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From a weak tribual to a branch of government: The Supreme Court of the United States from 1789 to Marshall

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FROM A WEAK TRIBUAL TO A BRANCH OF GOVERNMENT

THE SUPREME COURT OF THE UNITED STATES FROM 1789 TO MARSHALL

An Abstract of a Thesis

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ABSTRACT

Each branch of the federal government has changed substantially since its creation in 1789. Today, the people directly elect both houses of Congress and citizens hold the President more accountable for his actions. The federal judiciary has grown as well. The third branch of government may have started as a fairly weak tribunal, but during the early national period it grew to an equal branch of government. The Justices redefined the judiciary by their own actions. They worked to amend the circuit riding requirements, adopted a new style of opinions, and asserted the authority of judicial review. Through primary evidence, this thesis will show that the actions of the Justices moved the Supreme Court forward, and not the cases brought to the Court, which some of the secondary literature suggests.

During the early years of the Supreme Court, each Justice had to attend two Circuit Courts as well as the Supreme Court. The traveling involved proved arduous and strained not only the Justices' professional lives, but also their personal lives. The issue of circuit riding also posed problems for the execution of justice. While sitting on the Supreme bench, Justices reviewed their own decisions from the Circuit Court. To ease the burdens from both these problems, the Justices sought relief through Congress. The Justices lobbied Congress and persuaded them to pass both the Circuit Court Act of 1792 and the Judiciary Act of 1793.

The adoption of a new opinion writing style enhanced the authority of the Supreme Court by giving it a unified voice. Chief Justice John Marshall understood the political climate of the early nineteenth century. He knew that if the Court wanted to

maintain authority they could no longer speak separately through seriatim opinions. The "opinion of the Court" allowed the Court to use a single voice, which gave a single message to the lower courts. This style of opinions also gave Marshall the opportunity to leave his mark on the history of the Court.

The establishment of judicial review secured for the Supreme Court a position as a branch of government. Judicial review gave the Court the final word on constitutional matters. The Court became the defender and protector of the United States Constitution. The Court gained this authority over the course of many years. Delegates debated the issue at the Constitutional Convention, framers urged its importance during ratification, and the Court itself created precedent. Finally, in 1803, the case of *Marbury v. Madison* cemented the Court's authority of judicial review.

Almost one hundred years later, in 1925, the Supreme Court reinforced its position as a branch of government. Under Chief Justice William Howard Taft, the Court urged Congress to pass the Judiciary Act of 1925. By this Act, the Supreme Court became a court of discretionary jurisdiction. This means that the Court gets to decide what a constitutional question is.

The Supreme Court of the twenty-first century has a much different appearance than the Court of the late eighteenth and early nineteenth centuries. From its marble home adjacent to the Capitol, the Justices interpret and declare the law of the land. The actions of the justices of the early national period brought the Supreme Court from a weak tribunal to a branch of government.

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Dedicated to my parents Mark and Sherrol Yurs

Thank you for all of your support and love

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CHAPTER I

INTRODUCTION

Adjacent to the United States Capitol stands the icon of American justice – the United States Supreme Court. Atop the building centered on the facade rests a banner declaring "Equal Justice Under Law." Inside, visitors are greeted with the Great Hall, which leads to a magnificent courtroom. From this room, nine justices interpret the United States Constitution and declare the law of the land. These depictions of prominence represent the United States Supreme Court of the twentieth century. However, does the same description fit the Court of the early national period? If not, what did the early Court look like and how did it become an equal branch of government?

The powers of each branch of government have varied throughout history. At different times in United States history, the executive and legislative branches have each tried to assert their authority over the other. The federal judiciary has also changed over time. However, the judiciary did not experience the same fluctuation as the other two branches. I argue in this thesis that the federal judiciary has moved steadily in the direction of becoming stronger through the actions of the justices themselves, which created precedents and statutes that further defined their role as an equal branch of government. The justices ushered in this new definition by changing the requirements of circuit riding, adopting new opinion writing practices, and the establishment of judicial review. A century later, the Supreme Court, under William Howard Taft, confirmed its authority as a branch of government through the Judiciary Act of 1925.

The United States Constitution establishes the building blocks for the United States government. Article III focuses on the judicial branch of government. Unlike Articles I and II, which set up the legislative and executive branches, Article III is short and ambiguous. The Founders gave the Court a general direction by laying out a few jurisdictional lines. They also called on Congress to create a federal court system, with a Supreme Court as its top tribunal.[1]

After the states ratified the Constitution, the first Congress met in 1789. On this occasion, the members of the Senate assembled a committee to organize the judiciary. Senators Oliver Ellsworth, William Paterson, and Caleb Strong made up the core of this committee and did most of the organizing.[2] The work of these men, along with their committee colleagues, produced the Judiciary Act of 1789.[3] With the passage of this act, the United States Supreme Court in its original form came into being.

The Supreme Court defined by the Judiciary Act of 1789 did not have the same appearance or stature that the Court today enjoys. The Judiciary Act of 1789 called for six total justices, one chief justice and five associate justices.[4] Today the Court consists of nine total justices. The size has expanded due to congressional enactments and

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[1]U.S. Constitution Article III.

[2]Julius Goebel, Jr., *Antecedents and Beginnings to 1801*, vol. 1 of *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States* (New York: The Macmillan Company, 1971), 458-459.

[3]Judiciary Act of 1789, S. 1, 1st Cong. (1789).

[4]Bernard Schwartz, *A History of the Supreme Court* (New York: Oxford University Press, 1993), 16.

custom. During the early years, the Court met in New York, Philadelphia, and later Washington D.C. Finally, in 1935, the Court moved into its current quarters.

Chapter II explains both the methodology and the historiography of the thesis. The section pertaining to methodology discusses how the research was conducted. The research began by reading the secondary literature to see what questions still remain. Then, the research moved into primary sources in search for the answers. The section on historiography lays out the arguments of earlier historians. This section also presents much of the primary material.

Chapter III explores the issue of the justices of the Supreme Court riding the Circuit Courts. The job description of the justices, under the Judiciary Act of 1789, illustrates one of the major differences between today's Court and the early Court. The Judiciary Act of 1789 required the justices to attend two circuit courts as well as hold two sessions of the Supreme Court of the United States annually. The justices of the first Supreme Court began to feel the hardships of travel, which caused some of the early justices to resign and take up other careers. John Jay, the first Chief Justice, identified the burden of travel as one of his reasons for resigning his post. Justice Thomas Johnson also applied the same reasoning. Johnson had only been a member of the Court for a year when he wrote "I cannot resolve . . . to spend six Months in the year of the few I may have left from my Family . . ."[5]

Why was the removal of the duty of riding the circuit important to the growth of the Supreme Court? There are two answers to this question. Of lesser importance, it

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[5]Schwartz, *History of the Supreme Court*, 19.

made the job more appealing. Justice James Iredell, a member of the early Court, took measures into his own hands. He supported the idea of the justices rotating the circuit assignments. When the issue came before the Supreme Court, the senior members argued only the federal legislature had the authority to create such a change. In disgust, Iredell, with the help of a relative in the United States Senate, wrote a piece of legislation which called for the rotation. This bill, the Circuit Court Act of 1792 became law on April 13, 1792.

A year later, in 1793, the Justices once again prompted legislative action. The Judiciary Act of 1793 lessened the burden of travel on the Justices from two circuits a year to only one. Before the Judiciary Act of 1793, justices resigned their positions because the work seemed unbearable. Before 1800, twelve different men served on the Supreme Court, including three Chief Justices. Also during that time, four members of the Court resigned from their positions. This pattern indicates that the Court membership was unstable. The Judiciary Act of 1793, along with other events in Court history, stabilized the Court's membership by making the job more appealing.

More importantly, the exemption of circuit riding also freed the justices from the ethical battle they faced when their own rulings came before the Supreme Court. During the early national period, most cases came to the Supreme Court through a "writ of error" from the Circuit Court. Justices then faced the decision of whether to recuse themselves, meaning to not participate, or hear the case again. Justice Iredell presented the ethical argument of William Blackstone. Blackstone believed that a judge cannot remain impartial in the area of his residence, which termed "prudent jealousy." The entire Court

followed the direction of Iredell in the remonstrance written to Congress. The justices as a whole did not believe they should correct the errors they made while serving as a Circuit Court judge once the case came before the Supreme Court.

Chapter IV focuses on the Supreme Court's opinion writing practices. Justices sought to strengthen the Court by changing the opinion writing practices. Courts speak differently than the other branches of government. When Congress or the President want to make a statement, they may use multiple media. Even in the late eighteenth and early nineteenth centuries this was the case. For instance, members of Congress or the President had the ability to make passionate speeches appealing to the emotions of the people. This avenue has never been open to the Supreme Court – or any other American courts. Courts must speak through their opinions and back up their statements using legal arguments and case precedents.

When the Supreme Court first began to hand down decisions, the justices delivered their opinions in a manner that would seem awkward and confusing to a modern audience. During the early years, 1789-1800, the Court issued its rulings in a "seriatim" fashion. This meant that each of the justices wrote his own opinion in each case. This model of seriatim opinions came from their English forefathers.[6] The King's Bench in England delivered its opinions using the seriatim form of opinion writing. Also, justices presented their opinions differently. Under this system, the least senior justice

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[6]George Lee Haskins and Herbert A. Johnson, *Foundations of Power: John Marshall, 1801-1815*, vol. 2 of *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States* (New York: MacMillian Publishing Co., Inc., 1981), 382.

presented his opinion first and the most senior issued his last.[7] When using the seriatim form of opinion writing, each case had the possibility of having six different opinions. This presented the difficulty of deciding which opinion held the most weight, thus rendering the voice of the Supreme Court weak and unreliable.

Chief Justice Marshall built upon Oliver Ellsworth's idea of "per curiam" decisions when he implemented opinions for the court into his Court's decision making process.[8] The difference between per curiam and opinion for the court is that the author is recognized for an opinion for the Court. Another is that Marshall changed the mode of deliverance. Previously, under the rule of seriatim opinions, justices gave their opinions in an inverse of seniority pattern, but under Marshall and the opinion of the court, the most senior justice in the majority wrote and delivered the decision. This practice enhanced the Court's authority by giving it a unified voice.

Along with affording the Court a single unified voice, the change in opinion writing practices also protected the Court from political opposition. Marshall understood the political climate of the late eighteenth and early nineteenth centuries. He recognized that the change in political leadership would directly affect the judiciary. Before the election of 1800, federalists such as George Washington and John Adams controlled both the presidency and congress. This federalist influence ensured that the members of the Supreme Court would generally favor the federalist agenda. The election of 1800 completely turned the tables. Thomas Jefferson defeated John Adams for the presidency,

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[7]Goebel, *Antecedents and Beginnings*, 751; More information can be found in Kermit Hall, *Oxford Companion to the Supreme Court* (New York: Oxford University Press, 1992), 608.

[8]Haskins and Johnson, *Foundations of Power*, 383.

and Jeffersonian Republicans flooded the halls of Congress. With a political majority in Congress, Jefferson could now fill vacant Court seats with his own ideological allies. Marshall sought to prevent a divided Court by changing the opinion writing practices. No longer could the minority's voice of opposition carry the same weight as the majority.

The decisions handed down by the Supreme Court using the new style of opinions provide evidence for the authority gained by the Court. Marshall used this new style to leave a stamp on the history of the Court. With the touch of a pen, Marshall and his associates defined the Court's jurisdiction, upheld national supremacy, and pronounced federal contract law. The Supreme Court defined both its original and appellate jurisdiction with *Marbury v. Madison* and *Martin v. Hunter's Lessee*. Marshall's Court asserted national supremacy through its decisions in *McCulloch v. Maryland* and *Gibbons v. Ogden*. Lastly, the Court defined the national contract law with its decisions in *Fletcher v. Peck* and *Dartmouth College v. Woodward*.

Chapter V studies the development of judicial review. The Supreme Court used its newly found voice to further define its role in government. The United States Supreme Court has not always been known as a court that answered questions of constitutionality of laws. The authority to answer such questions stems from the practice of judicial review. Although judicial review would not be fully established until the early nineteenth century, the Supreme Court built the foundation for such a doctrine much earlier.

Documents left by the framers of the Constitution suggest that the ground work for judicial review had been laid by the time of ratification. The founders revealed their

attitude toward judicial review in ratification speeches, the *Federalist* Papers, and other essays urging the ratification of the Constitution. The very documents that originally defined the Supreme Court, the United States Constitution and the Judiciary Act of 1789, allude to judicial review. The Court itself dealt with judicial review before *Marbury v. Madison*, when it heard cases dealing with state laws and their constitutionality. At least three such cases came before the Court before *Marbury*: *Ware v. Hylton*, *Hylton v. United States*, and *Calder v. Bull*.

Each of the above mentioned cases posed a constitutional question the Supreme Court. Both *Ware v. Hylton* and *Calder v. Bull* called the constitutionality of a state law into question. The case of *Hylton v. United States* asked the Court to decide the constitutionality of a federal statute. Although the Court did not declare an act of the federal congress unconstitutional, the fact that the questions came before the Court shows at least some of the founders and early justices believed the Court had the authority to answer such questions.

The formal establishment of judicial review, however, came as another product of the Marshall Court. The case of *Marbury v. Madison* allowed the Supreme Court to establish judicial review in 1803.[9] By declaring section 13 of the Judiciary Act of 1789 unconstitutional, Marshall defined an essential role of the Supreme Court. Marshall's opinion, along with its acceptance by the President and legislature, guaranteed the right of judicial review for the Supreme Court.

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[9]William H. Rehnquist, *The Supreme Court: Revised and Updated* (New York: Vintage Books, 2001), 27.

The epilogue, the final chapter, illustrates how Marshall and his contributions made a lasting impact on the judiciary. One hundred years after the death of the great Chief Justice John Marshall, the Supreme Court fully embraced the identity the early Court strived for with the passage of the Judiciary Act of 1925. In 1921, William Howard Taft became the Chief Justice of the United States. Taft admired John Marshall and his accomplishments. He once said that "[John Marshall] made this country. . . Marshall is certainly the greatest jurist America has ever produced, and Hamilton our greatest constructive statesman."[10] Taft prioritized judicial reform, which he tried to do as president, but failed.[11] With the goal of judicial reform in mind, Taft began to draft the Judiciary Act of 1925, which became known as the Judges' Bill.

The Judiciary Act of 1925 also serves as another example of the Justices taking charge and creating the changes which strengthen the Supreme Court. After becoming Chief Justice, Taft assembled a committee consisting of himself and four associate justices to write the legislation that became the Judges' Bill. Justices George Sutherland, Willis Van Devanter, James McReynolds, and William Day each sat with the Chief Justice on the committee. After they produced a document, Taft personally introduced the bill to the House of Representatives Judiciary Committee. The involvement of the justices did not end there. Taft and the Associate Justices working with him went to

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[10]Archie Butt to Clara, Washington, D.C., February 27, 1910, in *Taft and Roosevelt: The intimate Letters of Archie Butt Military Aide*, (Garden City, NY: Doubleday, Doran & Company, Inc., 1930), 293-294; Alpheus Thomas Mason, *William Howard Taft: Chief Justice* (New York: Simon and Schuster, 1965), 259-260.

[11]Merlo J. Pusey, "The "Judges' Bill" After Half a Century," *Supreme Court Historical Society Yearbook* (1976): 55.

Capitol Hill to lobby members of Congress. Taft even went further and actively corresponded with Senator Stanley of Kentucky, urging him to support the Judges' Bill.

Before 1925, the Supreme Court heard many cases due to a mandatory jurisdiction, especially cases dealing the constitutionality of statutes or cases with the potential for capital sentences.[12] These cases were appealed to the Supreme Court through a writ of error. A writ of error asked the Supreme Court to review the action taken by the lower court and correct any error of law that might exist. The Judiciary Act of 1925, the Judges' Bill, changed the protocol for appealing to the Supreme Court and gave the Supreme Court discretionary jurisdiction. This legislation made the writ of certiorari the main avenue to the Supreme Court. The discretionary jurisdiction gained by the Court through this Act gave the Court a new sense of authority – the right to decide, not only the answer to constitutional questions, but what a constitutional question is.

The Supreme Court of the early national period certainly did not appear or act the same as the Court today. Each of the subjects mentioned – circuit riding, opinion writing, judicial review, and later the Judges' Bill – show how the actions of the Justices created a stronger and more authoritative Court. In the following chapters, the federal judiciary will go from a weak tribunal to a branch of government.

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[12]Jonathan Sternberg, "Deciding Not to Decide: The Judiciary Act of 1925," *Journal of Supreme Court History*, vol. 33, no. 1 (2008): 5.

CHAPTER II

METHODOLOGY AND HISTORIOGRAPHY

The Supreme Court of the United States faced many challenges during its first fifty years of existence. The early Justices and other early judicial luminaries left many primary documents for historians to try and piece together the puzzle of the Court's development. Historians have utilized some of these sources producing a collection of secondary sources. Nevertheless, the secondary literature pertaining to the early Court years remains fairly small compared to other areas of the Court's history.

For this project, I have chosen to employ more or less traditional methods of historical research. I began by reviewing the secondary sources to gain an understanding of the larger picture surrounding the early judiciary. The survey of the secondary literature generated questions which challenged the current historical claims. Then, I turned to the primary sources in search of answers to these questions. Throughout the project, I used many different kinds of primary sources such as, speeches, letters, opinions, legislation, and other legal documents. Preserved speeches delivered by the founders convey their feelings toward the judiciary. The Justices wrote to each other regularly and expressed their feelings to each other in this correspondence. Opinions written by the Justices show how the strength of the Court has grown. Legislation, such as the Circuit Court Act of 1792 and the Judiciary Act of 1793, shows how the Justices actively sought to strengthen the Court. The primary sources, coupled with the secondary

literature, have allowed me to present my argument on how the Court eventually became a co-equal branch of government.

The secondary literature pertaining to circuit riding offers a broad understanding of the issue, but to understand its deeper effects on the Court dipping into the primary sources is essential. The *Documentary History of the United States Supreme Court*, edited by Maeva Marcus, presents a wealth of primary sources. In these volumes, correspondence between justices, formal documents sent to Congress, and pieces of legislation show how the justices' actions further defined the role of the judiciary. Both Chief Justice John Jay and Associate Justice Thomas Johnson expressed strongly negative feelings toward circuit riding in their resignation letters. Those who remained on the bench privately praised the relief brought by the Judiciary Act of 1793 through personal letters, as Justice William Cushing did to Justice William Paterson. The remonstrance to Congress, sent by the justices, shows the unanimous disapproval of circuit riding. The legislation passed by Congress indicates that the Justices could collectively persuade the legislature.

Earlier historians have grappled with these same issues – circuit riding, opinion writing, and judicial review. However, historians have generally not shown the justices creating a stronger judiciary. Histories of the United States Supreme Court are often organized by the succession of Chief Justices. Bernard Schwartz, for example organized his *History of the Supreme Court* in this fashion. For each named Court, Schwartz used the cases to show how the Court changed through history, rather than focusing on the actions taken by the Justices. However, he also referred to some of the same issues

mentioned above. He wrote about the disgust the justices felt toward riding the circuit. However, Schwartz did not argue that the actions of the justices further defined their role in the United States government. Recent histories of the Supreme Court often show how the cases decided by the Court increased its strength.[1] But they pay little attention to the other aspects of the Court's history.

Another historian, Bruce Ackerman, argued the justices of the 1790s did not have any constitutional misgivings about circuit riding.[2] He painted the picture of a Supreme Court facing a new problem when circuit riding became an issue again during John Marshall's tenure as Chief Justice. The primary sources, discussed above, offer a much different interpretation of the Justices' views toward circuit riding. The resignation letters, remonstrance to Congress, and other documents show that the Justices did have major constitutional qualms about circuit riding.

Julius Goebel, on the other hand, went to the other extreme and produced a magnificent history of the early federal judiciary – volume one of the *Oliver Wendell Holmes Devise: Antecedents and Beginnings to 1801*. Throughout his work, Goebel gives detailed explanations of many different facets of the early Court. He discusses the creation of the Court, riding circuit, and early Court decisions. This book also offers several primary sources applicable for any study on the origins of the federal judiciary.

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[1]Bernard Schwartz, *A History of the Supreme Court* (New York: Oxford University Press, 1993).

[2]Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* (Cambridge, MA: The Belknap Press of Harvard University Press, 2005), 164.

Although Goebel wrote an extensive history of the early Court, his book acts more as an encyclopedia than a monograph.

Unlike circuit riding, the topic of opinion writing does not have a vast collection of primary sources. Interestingly, Marshall did not leave any primary sources explaining why the change of opinion writing practices took place. However, the opinions written by members of the Supreme Court show the difference between the two styles. The "opinion of the court" uses more direct language and the absence of other voices gives the decision more authority and stature. For example, Justice William Paterson ended his opinion for the Court for *Stuart v. Laird* with "Of Course, the question is at rest, and ought not now to be disturbed."[3]

The historical debate pertaining to the changing opinion writing styles remains fairly small. Albert Beveridge, the most thorough Marshall biographer, argues that Marshall changed the opinion writing practices all on his own. His four volume biography of Marshall offers a thorough background on Marshall, thus promoting a clear understanding of Marshall's political and judicial philosophies. He claims that Marshall's experiences in the Revolutionary War, especially at Valley Forge, planted in him the importance of a strong central government. [4] This belief in a strong federal government gave Marshall the passion that he needed to change the practices of the Supreme Court

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[3] *Stuart v. Laird*, 5 U. S. 299, 308.

[4] Albert J. Beveridge, *Frontiersman, Soldier Lawmaker 1755*-1788, vol. 1, *The Life of John Marshall* (Boston: Houghton Mifflin Company, 1916), 146-147; Leonard Baker, *John Marshall: A Life In Law* (New York: Macmillan Publishing Co., Inc, 1974), 46.

and make its voice stronger. Beveridge claims that Marshall changed the practice with the first case his Court decided – *Talbot v. Seeman*.[5]

Richard Ellis's *The Jeffersonian Crisis: Courts and Politics in the Young Republic*, also provides key information for the argument made in this section. Ellis puts the issues Marshall faced as Chief Justice in their historical context. He shows how Marshall would have understood these issues. This is evident in his discussion on how the cases of *Stuart v. Laird* and *Marbury v. Madison* worked together to achieve one goal. The same idea holds true in the case of opinion writing. Marshall knew the Court faced a real possibility of losing a political cohesiveness unless the change in opinion writing practices mitigated the negative effects of a politically divided Court.

George Haskins and Herbert Johnson wrote volume two of the *Oliver Wendell Holmes Devise: Foundations of Power: John Marshall 1801-1815*. Much like volume one, Haskins and Johnson's work reads like an encyclopedia. The authors show how the United States Supreme Court moved from issuing seriatim opinions to opinions of the court. They explain how during the Ellsworth years, the Court tried to issue opinions using "per curiam" decisions, but that an opinion with a single voice did not become the norm until the Marshall Court years.

Primary sources concerning judicial review show how justices used the foundations laid down by the founders and their own sense of authority to establish the right of the United States Supreme Court to answer constitutional questions. The primary

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[5] *Talbot v. Seeman*, 5 U. S. 1 (1801); Albert J. Beveridge, *Conflict and Construction 1800-1815*, vol. 3, of *The Life of John Marshall* (Boston: Houghton Mifflin Company, 1919), 16.

sources confirm that the idea of judicial review emerged much before Marshall, just as the secondary literature mentions. Framers of the Constitution argued for judicial review by giving speeches to ratification conventions, writing essays, and legislation. During ratification, Oliver Ellsworth wrote the "Letters of a Landholder,"[6] which he used as a medium to express his ideas toward judicial review. Alexander Hamilton's *Federalist 78*[7] also conveys the idea of judicial review. A case can be made that the Judiciary Act of 1789 harbors judicial review in section 25 of the document.

Judicial review has also prompted a great deal of debate amongst historians. Historians generally agree that the establishment of judicial review took place under Marshall's leadership of the Supreme Court. However, debate exists as to how the issue came to a head during the early nineteenth century. Some historians argue that judicial review developed as a brilliant response to the political culture, while others argue that earlier precedent gave Marshall the ability to confirm judicial review, and still other historians argue that the Supreme Court innately had the right of judicial review.

Albert Beveridge, in volume 3 of his biography of Marshall, argues that *Marbury v. Madison* needs to be put in its historical context. He argues that Marshall would have rather used judicial review to declare the 1802 Repeal Act unconstitutional, but used the cases of *Stuart v. Laird* and *Marbury v. Madison* to save the judiciary from an attack by the other branches. Beveridge also asserts that Marshall would have been familiar with

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[6]Paul Leicester Ford, *Essays on the Constitution of the United States, Published During its Discussion by the People 1787-1788* (Brooklyn, NY: Historical Printing Club, 1892), 159, 184.

[7]Alexander Hamilton, John Jay, and James Madison, *The Federalist*, Robert A. Ferguson, ed., (New York: Barnes and Noble Classics, 2006), 427-435.

works such as the *Federalist*, but that those documents alone did not support Marshall while deciding *Marbury*.[8] Richard Ellis in *The Jeffersonian Crisis* agrees with Beveridge, that a contemporary debate over judicial review took place prior to Marshall. Ellis argues that before Marshall issued his opinion in *Marbury* each of the three branches believed that it had the authority to interpret the Constitution for itself.

R. Kent Newmyer, in his book *John Marshall and the Heroic Age of the Supreme Court*, depicts judicial review as a process built upon earlier precedent. Although he does not mention the cases by name, Newmyer wrote how the Court had answered questions of constitutionality concerning state laws. He even mentions Alexander Hamilton's *Federalist 78* and how Marshall would have read and thoroughly digested Hamilton's views.[9] Newmyer claims that judicial review did not begin with John Marshall, but that Marshall had cleverly used the idea to keep the integrity of the Court intact without assaulting either of the other branches of government.

William E. Nelson also wrote about the origins of judicial review in his book *Marbury v. Madison: The Origins and Legacy of Judicial Review*. Nelson mentions that the framers debated judicial review during the convention and ratification period, however, does not go into detail about the sources available from that era. He also

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[8]Albert J. Beveridge, *Conflict and Construction*, 119 and 130.

[9] R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge: Louisiana State University Press, 2001), 171.

neglected to discuss the cases preceding *Marbury*. He brushes over the case of *Hylton v. United States*, and does not even mention *Ware v. Hylton* or *Calder v. Bull*.[10]

George Haskins and Herbert Johnson present the idea that judicial review had been an innate power given to the Supreme Court by the framers of the Constitution in their *Holmes Devise* volume. They agree with those who have argued that Marshall's opinion in *Marbury v. Madison* cemented the doctrine of judicial review. However, they also agree that judicial review had been understood legally before the time of Marshall. Haskins and Johnson date the premise of judicial review in colonial times. Also similar to Newmyer, Haskins and Johnson deploy *Federalist 78* and other evidence to support an early knowledge of judicial review. However, unlike Newmyer and Beveridge, Haskins and Johnson argue that judicial review can be found in the Constitution itself. They point out that Article III, Section 2 states that the authority of the federal courts "'shall extend to all Cases, in Law and Equity, arising under this Constitution, . . .' and, further, that the Supreme Court 'shall have appellate Jurisdiction, both as to Law and Fact, . . .'" [11] This statement seems to give the Court a broad authority.

The early Supreme Court decided cases that dealt with constitutionality of both state and federal laws before Marshall. The primary material also suggests that not all members of the federal judiciary fully accepted Marshall's declaration of judicial review authority. Judge Gibson, a Pennsylvania judge, sided, in an opinion he wrote, with the

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[10]William E. Nelson, *Marbury v. Madison: The Origins and Legacy of Judicial Review* (Lawrence, KS: University of Kansas Press, 2000), 2-3, 37.

[11] George Lee Haskins and Herbert A. Johnson, *Foundations of Power: John Marshall, 1801-1815*, vol. 2 of *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States* (New York: MacMillian Publishing Co., Inc., 1981), 186.

argument that each branch should interpret the Constitution on its own. However, the opposition from both the President and Congress to Marshall remained minimal as the Court gained the authority it sought.

Lastly, historians showed how the justices confirmed the Supreme Court's role as a branch of government developed during the early years, while further expanding the Court's authority with the Judiciary Act of 1925. Merlo Pusey, in his article "The 'Judges' Bill' After Half a Century," discusses how the Supreme Court further defined its role as an equal branch of government during the mid 1920s. Pusey gives the history behind the Judiciary Act of 1925. He explains how Chief Justice Taft made the passage of this piece of legislation a primary goal.[12]

H. W. Perry states in his book, *Deciding to Decide: Agenda Setting in the United States Supreme Court*, that once the Judiciary Act of 1925 became law, petitioning for a writ of certiorari, asking the Court to review the decision of the lower court, became the main avenue of reaching the Supreme Court. He then explains the guidelines for issuing a writ of certiorari. He describes how the justices used this criteria when the conference on which cases to accept. Along with certiorari guidelines, Perry explains the rule of four, meaning if four justices find a case "certworthy," the Court grants the writ. [13]

Edward A. Hartnett's article, "Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges' Bill," from the *Columbia Law Review* shows just how

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[12]Merlo J. Pusey, "The "Judges' Bill" After Half a Century," *Supreme Court Historical Society Yearbook* (1976): 55-61.

[13] H.W. Perry Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Cambridge: Harvard University Press, 1991), 33-34.

actively the Justices sought this jurisdictional change. Harnett emphasized the role Taft played in passing the Judges' Bill. He cites how Taft put together a committee to write the legislation which became the Judges' Bill. Hartnett also mentions Taft's involvement with the bill on Capitol Hill. For example, Taft introduced the bill to the House of Representatives Judiciary Committee, testified before Congress, as well as corresponded with Senator Albert Cummins and other members of Congress. Hartnett clearly shows how this bill became law because of the actions of Taft and his associate justices.[14]

Jonathan Sternberg's article, "Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court," also highlights the actions taken by the Justices to promote the change in jurisdiction. Much like Hartnett, Sternberg illustrates how forcefully the members of the Court acted. Sternberg also mentions how the switch to discretionary jurisdiction gave strength to the Court's silence. In other words, the Court made a statement by not taking a certain case. Before discretionary jurisdiction, the Court did not have this kind of influence.[15]

The Supreme Court of the eighteenth and early nineteenth centuries looked and acted much differently than the Court of the twentieth and twenty-first centuries. The actions of the Justices created precedents and statutes that further defined the Court's role as an equal branch of government. Each of the areas mentioned above, circuit riding,

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[14]Edward A. Hartnett, "Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges' Bill," *Columbia Law Review* 100, no. 7 (Nov. 2000): 1643-1738.

[15]Jonathan Sternberg, "Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court," *Journal of Supreme Court History*, 33, no. 1 (2008): 1-16.

opinion writing, judicial review, and the Judges' Bill gave the Court more authority and established the federal judiciary as an independent branch of government.

CHAPTER III

CIRCUIT RIDING

The ratification of the United States Constitution ushered in a new system of government. No longer did the thirteen states merely hang together by the threads of a confederation, but they now bonded to each other as one nation. Organized chiefly by the first three articles of the Constitution, a federal government began to take shape. The framers expressly laid out the functions and duties of the first two branches in the first two articles – the Legislative and Executive. However, Article III, which organized the judiciary, remained short and ambiguous. The founders charged the First Congress with the task of organizing the federal judiciary. Even after Congress created the Judiciary, questions still plagued the system. The issue of circuit riding offers one example of how the members of the Judiciary expanded and further defined its role as a branch of government.

Background

In March 1789, the First Congress gathered in New York City.[1] The United States Senate took the lead in the creation of a federal judiciary. On April 7, 1789, the Senate appointed and assigned a committee the task of establishing the judiciary.[2] The

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[1]Linda Grant De Pauw, *Senate Legislative Journal, Documentary History of the First Federal Congress, 1789-1791*, vol. 1 (Baltimore: The Johns Hopkins University Press, 1972), vii.

[2] Julius Goebel, Jr., *Antecedents and Beginnings to 1801: The Oliver Wendell Holmes Devise*, vol. 1 (New York: The Macmillan Company, 1971), 458.

committee consisted of ten men: Oliver Ellsworth of Connecticut, William Paterson of New Jersey, Caleb Strong of Massachusetts, Richard Henry Lee of Virginia, Richard Bassett of Delaware, William Few of Georgia, Paine Wingate of New Hampshire, Ralph Izard of South Carolina, and Charles Carroll of Maryland. Of these ten, Ellsworth, Paterson, and Strong made up the core of the committee.[3]

These three senators, Ellsworth, Paterson, and Strong, had compiled the most experience of the group. Each had served as a delegate to the 1787 Constitutional Convention and as delegates to their respective states' ratification conventions. Out of these three, Oliver Ellsworth became the principal author of the bill to organize the judiciary. Ellsworth attained leadership because of his strong personality and his ability to advocate, which he exhibited in his "Letters of a Landholder."[4]

On September 24, 1789, the Senate received word that George Washington had signed the "Act to establish the judicial Courts of the United States."[5] The Supreme Court established under the Judiciary Act of 1789 did not have the same appearance that the Court has today. The Judiciary Act of 1789 called for six total justices – one chief justice and five associate justices.[6] Also, the Judiciary Act of 1789 required the Supreme Court to hold two sessions a year in the nation's capitol.[7] The first of these sessions shall

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[3]Goebel, *Antecedents and Beginnings*, 458-459.

[4] Ibid., 459.

[5]De Pauw, *Documentary History First Congress*, 190.

[6] Judiciary Act of 1789, S. 1, 1st Cong. (1789).

[7] Ibid.

take place on the first Monday of February, followed by the second held on the first Monday of August.[8] This same section prescribes the seniority of the justices. The Act states that seniority shall be "according to the date of their commissions, or when the commissions of two or more of them bear date on the same day, according to their respective ages."[9] Lastly, the Judiciary Act of 1789 defined the Supreme Court Court's appellate jurisdiction. This gave the Court the authority to "re-examine" cases "and [reverse] or [affirm]" a previous ruling.[10]

Aside from the Supreme Court, the drafters of the Judiciary Act of 1789 created the Federal District and Circuit Courts. The Act states that the United Sates "shall be, and they hereby are, divided into thirteen districts. . ."[11] Each of these districts holds one court with one judge. The District Courts must hold four sessions each year. The Judiciary Act of 1789 gave the District Courts original jurisdiction in all cases in which the District Court has authority, "And the trial of issues in fact, in the district courts, in all cases except civil causes of admiralty and maritime jurisdiction, shall be by jury."[12]

The division of the District Courts into three areas created the Circuit Courts, named the Eastern, Middle, and Southern Circuits.[13] A Circuit Court then consisted of one District judge and two Supreme Court justices. The Judiciary Act of 1789 requires

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[8] Judiciary Act of 1789, S. 1, 1st Cong. (1789).

[9] Ibid.

[10] Ibid.

[11] Ibid.

[12] Ibid.

[13] Ibid.

that two sessions of the Circuit Court must take place in each district annually.[14] The Circuit Courts have original jurisdiction, much like the District Courts, but, in addition, Circuit Courts also have appellate jurisdiction of cases from the District Courts.[15]

The Burdens of Riding Circuit

Not long after the enactment of the Judiciary Act of 1789, the requirement of circuit riding became burdensome to the Supreme Court. The task of riding circuit caused a number of men nominated either to decline their appointments or resign their offices. Robert H. Harrison, appointed by George Washington to the first Supreme Court, declined the offer from the President. In a letter to Washington, Harrison confided that the "duties required by the [1789] Act for establishing the Judicial department, will be, from the limited number of Judges, considering the great extent of the States & and the frequency of the Courts, extremely difficult and burthensome to perform."[16] In another letter to President Washington, Harrison claimed the requirements of a "Judge of the Supreme Court would be extremely difficult & burthensome, even to a Man of the most active comprehensive mind; and vigorous frame."[17] Washington replaced Harrison with James Iredell, who quickly became another ardent opponent of circuit duties.

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[14]Judiciary Act of 1789, S. 1, 1st Cong. (1789).

[15]Ibid.

[16]Robert H. Harrison to George Washington, Annapolis, October 27, 1789, in *Appointments and Proceedings: Documentary History of the Supreme Court of the United States, 1789-1800*, vol. 1, ed. Maeva Marcus and James R. Perry (New York: Columbia University Press, 1985), 38.

[17]Ibid., 36.

In March of 1791, John Rutledge, one of the original members of the Supreme Court, resigned because his home state of South Carolina offered him the position of Chief Justice for the state's highest court.[18] To fill the seat opened by the resignation of Rutledge, President Washington appointed Thomas Johnson in July of the same year.[19] However, Johnson did not accept the President's nomination right away. The issue of riding the circuit played a determining role in Johnson's decision to accept.

After receiving his letter of nomination from the President, Thomas Johnson wrote back expressing his reservations. Although honored by his selection by Washington, Johnson did not feel as though he could ride the southern circuit. He wrote to Washington that if "the southern Circuit would fall to me . . . it would at my Time of Life and otherwise circumstanced as I am it would be an insurmountable Objection."[20] Johnson had also written Chief Justice John Jay regarding the same matter. Early that August, Washington wrote to Johnson telling him that he has spoken with the Chief Justice and the Associate Justices and that they "agreed upon that [Johnson] might be wholly exempted from performing this tour of duty . . ."[21] Washington went further to say that he hoped the next congressional session would reconsider the requirements of riding circuit for the justices of the Supreme Court.[22]

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[18]Ibid., John Rutledge to George Washington, Charleston, March 5, 1791, 23.

[19]Ibid., George Washington to Thomas Johnson, Philadelphia, July 14, 1791, 72.

[20]Ibid., Thomas Johnson to George Washington, Spurriers, Maryland, July 27, 1791, 173.

[21]Ibid., George Washington to Thomas Johnson, Philadelphia, August 7, 1791, 76.

[22]Ibid., George Washington to Thomas Johnson, Philadelphia, August 7, 1791, 76.

The United States Senate confirmed the nomination of Thomas Johnson on November 7, 1791. He took his seat on the nation's highest bench on August 6, 1792.[23] However, Johnson did not remain on the bench long. On January 16, 1793, Johnson wrote to President Washington to inform him of his decision to resign. He cited the duties of circuit riding as the determining factor for his decision.

> The Experience we have had of the little that has been or could be done under the present System though excessively fatiguing to the Judges would I thought have insured their Discharge from Circuit Duty . . . . I have not Self consequence enough to blame others for not thinking as I do as to wish Arrangements for my Accomodation[_] I have measured Things however and find the Office and the Man do not fit_ I cannot resolve to spend six Months in the Year of the few I may have left from my Family, on roads at Taverns chiefly and often in Situations where the most moderate Desires are disappointed. . .[24]

Johnson's comments on circuit riding show the stressful nature of the position: time away from family, hard travel, and bad conditions.

The duties of riding the circuit did not only strike those who left the Supreme Court as burdensome, but rather the whole Court held the same opinion. The amount of travel required of the justices created many logistical issues. Travel conditions sometimes made reaching a quorum on the Court difficult, as it did for the 1792 February term of the Supreme Court. William Cushing had trouble reaching the Court because of weather, and two other justices, Blair and Johnson, had not yet arrived either. Without these Justices in attendance, Justice Wilson had no choice but to adjourn daily.

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[23]Ibid., Confirmation by Senate, November 7, 1791; Record of Oaths, August 6, 1792, 77, 79.

[24]Ibid., Thomas Johnson to George Washington, Frederick, January 16, 1793, 80.

The Justices Taking Action

Among those who remained on the bench, Justice James Iredell became the most outspoken critic of circuit duties. Iredell corresponded with his brethren regularly on the topic, hoping he could spur the Court into action. In a lengthy letter to a number of his colleagues, Iredell stated his beliefs on the issue and argued on behalf of a remedy to ease some of the burden. Iredell mentioned two elements linked to riding circuits that he found most disagreeable. First, he lamented the conditions justices must work under. The arduous travel required by justices on the southern circuit not only threatened the justices' health, but also limited their ability to perform their duties as prescribed by law. He asked "Can any Man have a probable chance of going that distance twice a year, and attending a particular place punctually on particular days?"[25]

Iredell also believed circuit riding created problems for the execution of justice. If the circuits assigned the justices became permanent, he feared the integrity of the law might suffer. He advocated a concept popularized by William Blackstone, an English legal forefather, called "prudent jealousy." Prudent jealousy means "that no Man shall be a Judge of Assize in the County wherein he was born, or wherein he is resident."[26] In other words, a person who resides in the region where the judgment shall take place cannot retain the impartiality required of a judicial officer. Therefore, Justice Iredell

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[25]James Iredell to John Jay, William Cushing, and James Wilson, Philadelphia, February 11, 1791, in *The Justices on Circuit, 1790-1794: The Documentary History of the Supreme Court of the United States, 1789-1800*, vol. 2, ed. Maeva Marcus (New York: Columbia University Press, 1988), 132.

[26]James Iredell to John Jay, William Cushing, and James Wilson, Philadelphia, February 11, 1791, *The Justices on Circuit: Documentary History of the Supreme Court*, 133-134, 134n.

strongly supported the proposal from Justice John Blair that the justices rotate the circuit assignments.[27]

Iredell felt that the proposal of a rotation did not receive adequate attention from the members of the Supreme Court. He believed the Chief Justice did not fairly offer the question of rotation. Both Iredell and Blair claimed they did not understand that the Court had made a decision regarding the rotation of the circuits. Iredell expressed this confusion in his letter to Chief Justice Jay and Associate Justices Cushing and Wilson, while Blair confided his misunderstanding of the situation privately to Iredell.[28] Iredell also argued the fairness of presenting the question in the absence of Justice Rutledge. Iredell believed, if Rutledge had had the chance to vote, no majority would have been reached because the Justices would have been split equally.[29]

In his response, the Chief Justice began by sympathizing with Iredell and agreeing that "The Inconveniences [Iredell mentioned] are doubtless great and unequal . . ."[30] Then, Jay argued that only the legislature had the authority to create a remedy for these burdens. Justice Cushing, much like Jay, believed the legislature had the authority to solve the problems plaguing the Supreme Court. Cushing also argued against Iredell's

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[27]John Blair to John Jay, New York, August 5, 1790, *The Justices on Circuit: Documentary History of the Supreme Court,* 83-84.

[28]Ibid., James Iredell to John Jay, William Cushing, and James Wilson, Philadelphia, February 11, 1791, 133-134; Ibid., John Blair to James Iredell, Williamsburg, July 25, 1791, 196.

[29]Ibid., James Iredell to John Jay, William Cushing, and James Wilson, Philadelphia, February 11, 1791, 132.

[30]Ibid., John Jay to James Iredell, Philadelphia, February 12, 1791, 135.

use of prudent jealousy and countered that such a rotation would only cause "inconvenience to citizens by delay of causes . . ."[31]

Although the more senior justices on the Supreme Court, including Chief Justice Jay and the senior Associate Justice Cushing, disapproved of Iredell's proposal of rotating the circuits, Iredell did not abandon his plan. Samuel Johnston, Iredell's brother-in-law, sought to assist in the cause of reducing the stress created by the circuit courts. As a member the United States Senate, Johnston introduced a bill written by Iredell, which protected a justice from riding the same circuit twice in a row without his consent. Essentially, this piece of legislation called for the rotation of the circuits. This bill, the Circuit Court Act of 1792, became law on April 13, 1792.[32]

The legislative victory of the Circuit Court Act of 1792 allowed the members of the Supreme Court to seek some relief from the hardships imposed upon them by the Judiciary Act of 1789. However, this taste of liberation only encouraged the Justices to request more from the legislature. A record of the collective attitude of the Justices toward riding the circuits reached back at least as far as 1790. Collectively, the Justices wrote to President Washington expressing their concerns pertaining to the Judiciary Act of 1789. However, it is uncertain whether the President received this correspondence. In the letter, Jay argued that because the circuit courts remain inferior to the Supreme Court, the justices of the latter should not be officers of the former.[33] Two years later, the

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[31]Ibid., William Cushing to James Iredell, Philadelphia, February 13, 1791,137-138.

[32]Ibid., James Iredell to Thomas Johnson, Philadelphia, March 15, 1792, 248n.

[33]Justices of the Supreme Court to George Washington, New York, ca. September 13, 1790, *The Justices on Circuit: Documentary History of the Supreme Court*, 89-91.

Justices again took it upon themselves to create change and wrote to both President Washington and the Congress.

When the Justices wrote to the President in August of 1792 they laid out their feeling bluntly. They protested, "We really, Sir, find the burthens laid upon us so excessive that we cannot forbear representing them in strong explicit terms."[34] The Justices wrote to the President of the United States because they understood the influence Washington had among the other branches of government: "Your official connection with the Legislature and the consideration that applications from us to them, cannot be made in any manner so respectful to Government as through the President . . ."[35] This unified and unprecedented step, taken by a Court normally confined by self restraint, shows the fervent disapproval of circuit riding requirements felt by virtually every member of the High Court.

Equally unprecedented, the Justices also wrote a remonstrance to the Congress. The phrasing chosen by the Justices sheds even more light on the earnestness with which they pled for relief. They began by respectfully chastising Congress for not authorizing earlier any alterations of the Judiciary Act of 1789. They scolded the second branch, asserting "that the Act then passed was to be considered rather as introducing a temporary expedient, than a permanent System, and that it would be revised as soon as a period of

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[34]*The Justices on Circuit*, Justices of the Supreme Court to George Washington, Philadelphia, August 9, 1792, 288.

[35]Ibid., Justices of the Supreme Court to George Washington, Philadelphia, August 9, 1792, 288.

greater leisure should arrive."[36] After reminding Congress of the need to modify its earlier document, the Judiciary Act of 1789, the Justices proceeded to assist them in determining what changes needed to be made.

Without reservation, the Justices made their plea against the circuit duties prescribed in the 1789 Act. As Justice Iredell had argued earlier to no avail, the Justices declared to Congress that the circuits caused too much hardship due to travel conditions and impeded the flow of justice.

> That the task of holding twenty seven circuit Courts a year, in the different States . . . besides two sessions of the Supreme Court at Philadelphia, in the two most severe seasons of the year, is a task . . . too burthensome. . . . That the distinction made between the Supreme Court and its Judges, and appointing the same men finally to correct in once capacity, the errors which they themselves may have committed in another, is a distinction unfriendly to impartial justice . . .[37]

Consistent with the tone of the first half of the remonstrance, the Justices declined to use the contemporary letter etiquette and signed with a demand rather than as "humble and obedient servants."[38]

The bold action of the Supreme Court proved fruitful during the 1793 Congressional session. In the Spring of 1793, Congress passed the Judiciary Act of 1793 – often overlooked by historians. The Judiciary Act of 1793 attempted to ease the burdens of the Justices by reducing the number of circuits each Justice needed to attend

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[36]Justices of the Supreme Court to the Congress of the United States, Philadelphia, August 9, 1792, *The Justices on Circuit: Documentary History of the Supreme Court*, 289.

[37]Ibid., Justices of the Supreme Court to the Congress of the United States, Philadelphia, August 9, 1792, 289.

[38]Ibid., Justices of the Supreme Court to the Congress of the United States, Philadelphia, August 9, 1792, 289.

from two to one.[39] During the February term of the Supreme Court in 1794, the Justices wrote to Congress a second time. In this document, the Justices took the opportunity to thank the legislature for affording them some of the relief they sought. Appreciation for the congressional act also appears in the private correspondents of the Justices. William Cushing wrote to William Paterson, congratulating him on his appointment to the Supreme Court and assured him that "An Act, passed this week, eases of near half the difficulty."[40]

The Election of 1800

Issues surrounding the circuit courts remained fairly quiet for close to a decade. However, the political climate that followed the election of 1800 thrust the issue back into the national spotlight. The Federal Judiciary became caught in the crossfire of the political fight between John Adams and Thomas Jefferson. The Judiciary became the battleground for the greatest fight the young nation had experienced since independence.

After the election of 1800, John Adams understood what had happened and turned to the judiciary to ensure a federalist voice in the federal government. Even before the election of 1800, Adams wanted to expand the judiciary. However, the flood of Republican victories enhanced the importance of the expansion of the judiciary.[41] The politically savvy Adams understood that he could block Jeffersonian policy with a

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[39]Justices of the Supreme Court to the Congress of the United States, Philadelphia, February 18, 17, *The Justices on Circuit: Documentary History of the Supreme Court*, 443.

[40]Ibid., William Cushing to William Paterson, Philadelphia, March 5, 1793, 345.

[41] Kathryn Turner, "Federalist Policy and the Judiciary Act of 1801," *The William and Mary Quarterly*, Third Series, vol. 22, no. 1 (January 1965): 19.

Federalist-stacked judiciary. To reach this end, Adams pressed the lame duck Congress to pass the Judiciary Act of 1801.

Passed by the Senate on February 7, 1801, the Judiciary Act of 1801 became law six days later.[42] The main elements of the Act included: eliminating circuit duties for Supreme Court justices, creating six new circuit courts, and reducing the number of Supreme Court justices from six to five.[43] The elimination of circuit duties for Supreme Court justices and the creation of new circuit courts gave Adams sixteen new appointments. The reduction of the number of justices on the Supreme Court delayed any Republican nomination until the retirement of two sitting justices.[44]

Strong partisan feelings were associated with this bill from the outset. Pennsylvanian Senator, William Bingham pushed for the passage of the Judiciary Act of 1801, urging that "'the federal Party wish the appointments to be made under the present administration . . . the Importance of filling these Seats with federal characters, must be obvious.'"[45] After Congress passed the legislation, Gouverneur Morris wrote "because the Federalists 'are about to experience a heavy gale of adverse wind; can they be blamed for casting many anchors to hold their ship through the storm?'"[46] Aside from the partisan actions of the debate, the President appointed and the Senate confirmed John

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[42]Turner, "Federalist Policy and the Judiciary Act of 1801," 20-21.

[43] Richard Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (New York: Oxford University Press, 1971), 15.

[44]Ibid., 15.

[45]Turner, "Federalist Policy and the Judiciary Act of 1801," 19.

[46]Ellis, *The Jeffersonian Crisis*, 15.

Marshall as Oliver Ellsworth's replacement as Chief Justice just before the Judiciary Act passed. Executing the confirmation vote before the judiciary vote allowed Adams to keep a six member Supreme Court and put another loyal Federalist on the Court.[47]

The defenders of Adams claimed that his appointees deserved their positions. As Adams considered his appointments, he encouraged suggestions of suitable candidates for the judgeships. He wrote of the appointment process that it "would cost him 'much anxiety and dilligence [sic]'"[48] The men who Adams selected had impressive qualifications: all had established themselves either as lawyers or as judges. However, the appointments did not come without controversy. Each one of the nominations went to faithful Federalists. Adams had the reputation of "a strong party man" who "did not favor personally or otherwise, the appointment of persons who entertained anti-federalist principles."[49]

Opponents of Adams argued against, not only partisanship, but also nepotism. Some have argued that relatives received at least four of the appointments. Both Richard Bassett of Delaware and William McClung of Kentucky had "importuning relatives." The other two had direct relationships with either John Marshall or John Adams. James Marshall, the brother of John Marshall, received an appointment for District of Columbia

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[47]Turner, "Federalist Policy and the Judiciary Act of 1801," 19.

[48]George Lee Haskins and Herbert A. Johnson, *Foundations of Power: John Marshall, 1801-1815*, vol. 2, *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States* (New York: Macmillian Publishing Co., Inc., 1981), 130.

[49]Ibid., 129.

federal court. William Cranch, the nephew of the President, also received an appointment for the District of Columbia court.[50]

Lastly, many believed, especially Republicans, that some appointments violated Article I, Section 6 of the United States Constitution. That section forbade Adams from filling any of the new circuit court judgeships with sitting members of Congress because the courts had been created during their tenure of office. Nevertheless, the President found a way around the law. Adams filled the new vacancies by promoting sitting judges and then filled their seats with the members of Congress.

The votes cast during the election of 1800 did not produce a clear winner. Therefore, the House of Representatives decided the presidency. The Representatives had a choice between Thomas Jefferson and Aaron Burr – John Adams did not receive enough votes for consideration. The House of Representatives, still held by Federalists, chose Thomas Jefferson. The Federalists preferred Jefferson over Burr because they felt Jefferson was more politically moderate. Alexander Hamilton spoke on Jefferson's behalf, saying "To my mind a true estimate of Mr. Jefferson's character warrants the expectation of a temporizing rather than a violent system."[51] Other Federalists saw the decision as a choice between the lesser of two evils. John Marshall alleged that "The democrats are divided into speculative theorists & absolute terrorists. With the latter I am not disposed to class Mr. Jefferson."[52] Jefferson defended his own moderation when

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[50]Ibid., 131.

[51]Ellis, *The Jeffersonian Crisis*, 26.

[52]Ibid., 27.

he wrote "The greatest good we can do our country is to heal its party divisions & make them one people. . . . both sects are republican, entitled to the confidence of their fellow citizen."[53]

The Federalists hoped that Jefferson's moderation would extend to the judiciary when Jefferson took the oath of office on March 4, 1801.[54] In the early days of the Jefferson administration, it seemed as if Jefferson would keep his promises. Originally, he believed that the judges that had been appointed by his predecessor could not be removed. However, he also did not want the Federalists to have absolute control of the judiciary. To achieve this end, Jefferson ordered that all of the attorneys and marshals be removed from office and replaced with Republicans.[55] Not until William Marbury, Dennis Ramsay, Robert R. Hooe, and William Harper brought suit against the government for their commissions did Jefferson favor a total repeal of the Judiciary Act of 1801.[56]

Jefferson and the Republicans viewed the Supreme Court's decision to hear the case brought by Marbury and the others as a direct seizure of power. This fear of infringement united the Republicans in a movement to repeal the Judiciary Act of 1801. Senator Stevens Thomas Mason from Virginia exclaimed that the action by the Supreme Court "has excited a very general indignation and will secure the repeal of the Judiciary

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[53]Ellis, *Jeffersonian Crisis*, 27.

[54]R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge: Louisiana State University Press, 2001), 148.

[55]Ellis, *The Jeffersonian Crisis*, 33.

[56]Ibid., 43.

Law of the last session about the propriety of which some of our Republican Friends were hesitating." Jefferson also felt the need to express his displeasure when he wrote "that the Federalists 'have retired into the Judiciary as a strong-hold . . . and from that battery all the works of Republicanism are to beaten down and erased.'"[57]

Debate on the repeal act began in January of 1802. While discussing the legislation in the Senate, the Republicans expressed their fears of an overly powerful judiciary. Again, Virginia Senator Mason argued "that the Supreme Court judges, with only ten suits then on their docket, would have little to do to earn their salaries, and that for want of employment they might do mischief in areas in which they should not be engaged." During the debate, the Senate also discussed whether or not courts could be eradicated for the sole reason of eliminating judges. The answer to that question came on February 3, 1802 when the Senate passed the repeal bill.[58] Just one month later, on March 3, 1802 the House of Representatives voted to pass the Repeal Act.[59]

Republicans rejoiced in their victory over the Federalists. The March 5, 1802 edition of the *National Intelligencer* stated "Judges created for political purposes, and for the worst of purposes under a republican government, for the purpose of opposing the national will, from this day cease to exist."[60] James Blair wrote to a Republican ally

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[57]Ellis, *The Jeffersonian Crisis*, 44.

[58]Haskins and Johnson, *Foundations of Power*, 163-164.

[59]Ibid., 164.

[60]Ibid., 164.

"congratulating him on 'the happy termination of your labours . . . nothing can equal the applause and credit you univerally [sic] receive throughout this State by the People.'"[61]

The cheering of the Republicans, however, did not completely quiet the opposition. The Federalists made known their disgust with the Repeal Act. The *Washington Post* declared "that Jefferson had 'gratified his malice towards the judges . . . and laid the foundation of infinite mischief.'" The *Washington Post* went even further as it called for the judges to declare the new act unconstitutional.[62] Senator Plumer also expressed his unhappiness with the bill when he wrote that "The Judiciary that bulwark of our rights, is to be placed in a state of dependence; the tenure of the judges office . . . is to depend upon the whim & caprice of a theoretical President, & his servile minions."[63]

Aside from the partisan parts of the Repeal Act, how did it logistically change the federal judiciary? The new act restored the judiciary to what it had looked like shortly after the passage of the Judiciary Act of 1789. Once again the Supreme Court consisted of six members. The Repeal Act also restored the original District Courts and Circuit Courts. The restoration of the judiciary created under the 1789 Act furthermore forced the Justices to resume riding circuits.

Lastly, Jefferson delivered one more blow to the Federalists by signing the Judiciary Act of 1802. Jefferson feared the decisions scheduled to come from the

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[61]Haskins and Johnson, *Foundations of Power*, 164-165.

[62]Quoted in *The Washington Post*, Ibid., 165.

[63]Ibid., 166.

Supreme Court in its next term. He also realized that the Repeal Act did not take effect until July, which meant the Court would have to meet in June. The Judiciary Act of 1802 immediately restored the Court terms set under the Judiciary Act of 1789, but abolished the August term. This meant that the Supreme Court would have to wait until February of 1803 to convene.[64]

After the Repeal Act and the Judiciary Act of 1802, it looked as if the system of separation of powers might crumble. The Republican administration, due to fears of excessive judicial authority, silenced the Supreme Court by abolishing its August term.[65] In turn, members of the judiciary saw this action as a threat to their sovereignty as a branch of government. Members of the High Federalist faction, the party's right wing, approached the Supreme Court with a plan to negate the Repeal Act. These Federalists suggested that members of the Supreme Court refuse to ride the circuits. If the justices agreed, the circuit court judges appointed under the Judiciary Act of 1801 would hold the court sessions.[66]

The Justices needed to remain united for a plan such as this to succeed. Justice Samuel Chase advocated strongly that the Court proceed with the plan presented by the High Federalists. Chase adamantly argued against the constitutionality of the Repeal Act. In a letter to John Marshall, Chase laid out his reasoning as to why he questioned the constitutionality of the Repeal Act. He argued that, when the judges took their positions

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[64]Ellis, *The Jeffersonian Crisis*, 59.

[65]Newmyer, *John Marshall and the Heroic Age of the Supreme Court*, 153.

[66] Ellis, *The Jeffersonian Crisis*, 60.

under the Judiciary Act of 1801, they "immediately thereupon, eoinstante, such Judges become *constitutional judges*; and hold *their Offices*, and *Commissions* under the Constitution . . ."[67]

The decision as how the Supreme Court should act in this regard rested on the leadership of John Marshall. Like Chase, Marshall acknowledged that he had "some strong constitutional scruples"[68] in a letter to Associate Justice William Paterson. He expressed his views further in a letter to Justice William Cushing when he wrote "For myself I more than doubt the constitutionality of this measure & of performing circuit duty without a commission as a circuit Judge."[69] Marshall used this correspondence to poll his fellow brethren on their thoughts of the situation. In a reply to Marshall, Paterson wrote "I think with you, we must abide by the old practice."[70] Justice Cushing also sent a reply stating "we must"[71] hold the circuit court sessions. With a majority of the Court in support of riding the circuit, Marshall acted in accord with his colleagues and followed the old rule of law.

The decision to ride the circuit came with its share of consequences. Marshall understood that abiding by the Repeal Act would portray the Supreme Court as weak, but he also knew he had to pick his battles. Riding the circuit allowed Marshall to avoid a

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[67]Samuel Chase to John Marshall, Baltimore, April 24, 1802, in Haskins and Johnson, 173.

[68]John Marshall to William Paterson, Richmond, April 6, 1802, in *Marshall Writings*, ed. Charles F. Hobson (New York: The Library of America, 2010), 221.

[69]Ibid., John Marshall to William Cushing, Alexandria, April 19, 1802, 222.

[70]Haskins and Johnson, *Foundations of Power*, 177.

[71]Ibid., 177.

direct confrontation with the Republican administration. This could have been damaging to the judiciary. Marshall, knowing the cases before the Court, led the judiciary down a path that averted confrontation, but also asserted the strength of the judiciary. The Court used the case of *Stuart v. Laird* to achieve Marshall's goal.[72]

The 1803 case of *Stuart v. Laird* brought an important question before the Supreme Court. This case originated as nothing more than a property dispute between Hugh Stuart and John Laird. However, *Stuart v. Laird* also presented a key constitutional question. In December of 1801, the newly created Circuit Court in Virginia had ruled in favor of Laird, but the decision had to be validated the next term. By the time the next term came, Congress had repealed the Judiciary Act of 1801 with the Repeal Act of 1802. The Repeal Act made it so once again Supreme Court justices had to ride the circuits, which allowed Chief Justice John Marshall to hear the case at the circuit level.

After Marshall's Circuit Court decision, Hugh Stuart appealed to the Supreme Court on a writ of error. He argued the constitutionality of the Repeal Act of 1802 on the premise that the Constitution calls for judges to serve for a term of good behavior and therefore Congress did not have the authority to abolish formally established inferior courts. Due to his participation at the circuit level, Marshall recused himself from the case in the Supreme Court, and Justice William Paterson wrote and delivered the opinion of the Court.[73]

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[72]Newmyer, *John Marshall and the Heroic Age of the Supreme Court*, 154-157.

[73]*Stuart v. Laird*, 5 U. S. 299, 308.

In his opinion, Justice Paterson authoritatively declared the Supreme Court's decision. The Court affirmed the constitutionality of the Repeal Act of 1802. Justice Paterson wrote, "Congress has constitutional authority to establish from time to time such inferior tribunals as they may think proper; and to transfer a cause from one such tribunal to another. In this last particular, there are no words in the constitution to prohibit or restrain the exercise of legislative power."[74] The Court used a strict constructionist view of the Constitution. Justice Paterson sought to end the debate when he concluded his opinion with "Of Course, the question is at rest, and ought not now to be disturbed."[75]

Conclusion

The debate over riding the circuits gave the Justices the opportunity to assert the authority and to further define the role of the federal judiciary. The Justices themselves spearheaded the movement to end the practice of circuit riding. They sought refuge not only to ease the burdens of travel, but also to ensure the integrity of the judiciary. The Justices fought to end circuit requirements because they did not feel it was appropriate to correct their own errors. Without guidance from the Constitution, the Justices had to determine how to modify their positions.

The Justices of the Supreme Court further defined their role when asked to decide the constitutionality of riding the circuits. At this point in history, the Court had to walk a fine line. The tense political climate of the early nineteenth century did not allow for

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[74]*Stuart v. Laird*, 5 U. S. 299, 309.

[75]Ibid., 309.

any mistakes. Although the Court eventually upheld the constitutionality of riding the circuits, it asserted its authority by offering the last word on the subject.

CHAPTER IV

OPINION WRITING

Each year the President of the United States stands before both houses of Congress and delivers the state of the union address. Members of Congress meet with their constituents and hold press conferences. The Supreme Court, however, does not participate in the world of sound bites. The rhetoric open to other branches of government remains closed to the judiciary. Throughout its history, the Supreme Court issued its rulings through written opinions. Even though the Court has always used the written word to convey its ideas, it has changed its method of delivering the opinions. In 1800, John Marshall sought to change the Court's opinion writing practices. He directed the Court to issue "opinions of the Court" rather than in the traditional seriatim style. This move enhanced the Court's authority while diverting other possible problems.

Between the years 1789 and 1800, the Supreme Court issued its decisions using the seriatim model of opinion writing. The young Court inherited the practice from its English ancestors.[1] When using seriatim opinions, each justice writes an opinion in each case. In theory each opinion holds the same amount of weight. When delivering the opinions from the bench, the justice with the least amount of seniority offered his opinion first and the rest followed reverse seniority. Therefore, when the early Supreme Court rendered a decision, a case had the possibility of having six different opinions. Seriatim

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[1]George Lee Haskins and Herbert A. Johnson, *Foundations of Power: John Marshall, 1801-1815*, vol. 2 of *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States* (New York: MacMillian Publishing Co., Inc., 1981), 382.

opinions weakened the authority of the Supreme Court because the body did not speak with a unified voice. When he assumed the role of Chief Justice, John Marshall led the Court into a new era.

Article II, Section 2, gives the President of the United States the authority to nominate judges of the Supreme Court with the consent of the Senate.[2] The Federalist Party won the first two presidential elections – George Washington in 1789 and John Adams in 1796. At the same time, the Federalist Party controlled Congress as well. This created a friendly atmosphere for the President. As President, Washington and Adams could nominate those whom they felt would best serve their causes. Therefore, the members of the early Supreme Court all came from essentially the same political background. A number of the early justices played pivotal roles in the shaping of the federal government. William Paterson, John Rutledge, Jared Ingersoll, William Blount, and John Blair all signed the Constitution. Oliver Ellsworth, although not present to sign the document, worked tirelessly on behalf of the Constitution as a member of the Committee of Detail and then by authoring his *Letters of a Landholder.*

The political patronage of the early justices camouflaged the negative aspects of delivering the opinions seriatim. Although six men sat on the bench, generally six different philosophies did not. During much of the first decade of its existence, the Court spoke with a virtually unified voice. The second, third, and following opinions usually echoed the judgment of the first. However, the political climate of the nation soon changed. The election of 1800 ushered in a whole new government. The Republicans

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[2]U. S. Constitution, Article II, Section 2.

won both the White House and Congress. Jefferson's administration had a different philosophy than either Washington's or Adams's. Upon his inauguration, Thomas Jefferson had the authority to fill vacancies on the Supreme Court. Much like Washington and Adams, he also worked with an agreeable Congress. The issue of opinion writing came to the forefront because the Court could no longer rely on a strong political alliance.

John Marshall

On the frontier of Virginia, John Marshall was born on September 24, 1755.[3] Marshall's upbringing had a soundly positive impact on his life. Although he grew up far removed from any urban centers, Marshall obtained information from any source available. Unlike many frontier families, Marshall's parents, Thomas and Mary, supported education. They tried to offer their children, whom John was the eldest, every opportunity they could. Thomas Marshall became acquainted with Lord Fairfax, through whom he gained access to the land baron's library. This relationship between Lord Fairfax and Thomas Marshall provided John Marshall the opportunity to familiarize himself with literature and scholarship that would otherwise have been unavailable to him.

While engaging in his studies as a young boy, John Marshall fell in love with poetry. Marshall especially embraced the poetry of Alexander Pope. Pope's poetry spoke to the young Marshall, specifically his piece titled "Essay on Man." Marshall

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[3]Albert Beveridge, *The Life of John Marshall,* vol. 1(Boston: Houghton Mifflin Company, 1916), 7.

grasped the meaning of the poem – the need for, and the astuteness of, order.[4] Marshall once reminisced to his friend, and colleague, Justice Joseph Story, that he memorized many of Pope's moral works and had written in his own hand the words of "Essays on Man" by the age of twelve.[5] Marshall's admiration for Pope's poetry foreshadows the character Marshall assumed as an adult.[6]

John Marshall developed his character even further while serving in the Continental Army during the Revolutionary War. Throughout his life, Marshall enjoyed a strong relationship with his father. As a member of the House of Burgesses, Thomas Marshall heard, first hand, the passionate speeches delivered by Patrick Henry. On his trips home, Thomas relived the experience with his family. As John listened to his father he became filled with a patriotic spirit.[7] When the prospect of war became inevitable, both Thomas and John Marshall volunteered to fight for a cause for which they both felt strongly – liberty.[8]

During the winter of 1777-1778 John Marshall found himself with Washington's Army at Valley Forge. While at Valley Forge, Washington's Army experienced horrors surpassing even that of battle. The soldiers feared the harsh winter conditions much more than the British troops. Washington chose to camp at Valley Forge because he originally

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[4]Beveridge, *The Life of John Marshall,* vol. 1(Boston: Houghton Mifflin Company, 1916), 45.

[5]Ibid., 44-45.

[6]Ibid., 45.

[7]Ibid., 63-67.

[8]Ibid., 68.

believed the area had enough wood for construction and fuel and that the surrounding farmers would help feed his men. However, those Pennsylvania farmers sold their produce to the British rather than to the cold and starving men fighting for their freedom.

Somehow in the midst of all this misery, Marshall maintained a strong morale. As the captain of an artillery unit, Marshall tried to raise the spirits of his men. He entertained his men by running and jumping around in his stocking feet, which earned him the nickname silver heels because of the cloth his mother used to darn his socks. Even though Marshall endeavored to keep himself and his men in good spirits, the dire conditions left a lasting impact on the young man. The time he spent at Valley Forge implanted in him the importance of a strong central government.[9] Much like his reaction to Alexander Pope's poem "Essay on Man," Marshall yearned for a government that had the ability and the authority to ensure that nothing like Valley Forge could ever happen again.

After the Revolution, John Marshall went back home to Virginia, here he put his beliefs into practice. Marshall entered Virginia's General Assembly in 1782. His father used the reputation he built up while a member of the House of Burgesses in his own right to get his son elected. While a member of the General Assembly, Marshall became acquainted with many people such as James Madison, Patrick Henry, Richard Henry Lee, and Edmund Randolph.[10] Marshall once again found himself on the front lines with great men as his comrades.

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[9]Albert J. Beveridge, *Frontiersman, Soldier Lawmaker 1755*-1788, 146-147; Leonard Baker, *John Marshall: A Life In Law* (New York: Macmillan Publishing Co., Inc, 1974), 46.

[10]Beveridge, *John Marshall* vol. 1, 203.

After the ratification of the Constitution, Marshall continued his service to his home state of Virginia. In 1799, he won a seat in the United States House of Representatives. His tenure in the federal legislature did not last long. President Adams called upon his talents to serve as his Secretary of State. Marshall only held this cabinet position for a short time. However, he made a large impact. As Secretary of State, Marshall issued the commissions to the controversial appointments made during the closing hours of John Adams's administration. One of these commissions, William Marbury's, laid the foundation for another achievement of Marshall.

In 1800, Oliver Ellsworth resigned his position as the Chief Justice of the United States. He had been overseas in France and wrote to President Adams claiming that bad health kept him from making the voyage home, and that even if he could travel he would not be able to resume his duties as Chief Justice.[11] First, President Adams turned to John Jay to see if he would once again be the leader of the High Court. Jay declined the nomination. He felt that the problems that had caused him to resign earlier had not been fully answered and therefore would not be a part of the Court again.[12] The next candidate on Adams's list was John Marshall. Marshall gladly consented to the nomination to become the fourth Chief Justice of the United States on January 20, 1801. The United States Senate quickly confirmed Marshall,[13] and the Supreme Court entered a whole new era.

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[11]Maeva Marcus and James R. Perry, eds., *Appointments and Proceedings*, vol. 1 of *The Documentary History of the Supreme Court* (New York: Columbia University Press, 1985), 123.

[12]*Documentary History of the Supreme Court Vol. 1*, 146-147.

[13]Leonard Baker, *John Marshall: A Life In Law*, 353-355.

John Marshall served as Chief Justice from 1801-1835. During those thirty four years, he and his colleagues made changes to the Court that helped to further define its role as the third branch of government. The choice of John Marshall for Chief Justice of the United States came about only partly because of his excellence in the law. Marshall had also proven himself a strong nationalist and federalist. He had put into practice the philosophy he gleaned from Alexander Pope and the lessons learned during the frigid winter at Valley Forge. The time had come for Marshall to step outside of the shadows of his predecessors and place his own stamp on history.

When Marshall assumed the duties of Chief Justice, he entered a turbulent world. Marshall understood that, if the judiciary wanted to retain any authority, it needed to change with the times. With a non-federalist in the White House for the first time, the Court faced the possibility of becoming more divisive. Marshall displayed his comprehension of the situation in different ways. First, he designed the decisions in *Stuart v. Laird* and *Marbury v. Madison* to work in tandem. The Court's decision in each of these cases allowed the judiciary to assert its authority without directly confronting either of the other two branches of government.[14] Just as importantly, Marshall also changed the opinion writing practices of the Court. The switch from seriatim opinions to opinions of the Court gave Marshall's Court and the judiciary the voice it needed to enhance the authority of the federal judiciary.

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[14]Richard Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (New York: W.W. Norton & Company Inc., 1971), 67.

John Marshall began using opinions of the Court at the very onset of his tenure as Chief Justice.[15] Unfortunately, historians have not found any documents expressing why he instituted the change.[16] This leaves historians with the task of making their best argument based upon information gleaned from other sources. Marshall used the new style of opinions to leave a lasting mark on the federal judiciary – especially in the areas of jurisdiction, national supremacy, and contract law.

Jurisdiction

The jurisdiction of the Supreme Court, like many of the features of the judiciary, remained a source of contention even after the ratification of the Constitution and the implementation of the Judiciary Act of 1789. The Constitution vaguely outlines the Court's jurisdiction. Article III, Section 2, states "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original jurisdiction."[17] The language which follows gives the Court appellate jurisdiction in all other cases. The ambiguity of the Constitution coupled with the politics of the period forced the Court to answer these questions. The cases of *Marbury v. Madison* and *Martin v. Hunter's Lessee* define the Court's original and appellate jurisdiction respectively.

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[15]Beveridge, *Conflict and Construction 1800-1815: The Life of John Marshall* vol. 3 (New York: Houghton Mifflin Company, 1919), 16. Marshall used the opinion of the Court in the first decision his Court rendered – *Talbot v. Seeman*, 5 U. S. 1 (1801).

[16]Charles F. Hobson, ed., *Correspondence, Papers, and Selected Judicial Opinions November 1800-March 1807*, Vol. VI, *The Papers of John Marshall* (Chapel Hill: The University of North Carolina Press, 1990), 70.

[17]United States Constitution, Article III, Section 2.

Marbury v. Madison (1803)[18] dealt with more than just the issue of judicial review. Marshall, in his opinion, declared that the Supreme Court's original jurisdiction comes only from the United States Constitution and that Congress does not have the authority to change the original jurisdiction. The Chief Justice used this logic to say that the Court did not have the authority to issue a writ of mandamus on behalf of William Marbury. Marbury asked the Court to hear the case under the original jurisdiction given to the Court by the Judiciary Act of 1789.[19] However, Marshall stated that the Constitution prohibited the Court from taking Marbury's case under the guise of original jurisdiction.[20] Therefore, he used his opinion of court in *Marbury* to define the original jurisdiction of the Supreme Court.

Martin v. Hunter's Lessee (1816)[21], helped to further define the jurisdiction of the Supreme Court.[22] The case began as a land dispute that originated during the time of the American Revolution. A citizen of Virginia, Thomas Lord Fairfax, had left Denny Martin, an Englishman, a great deal of land upon his death. In 1793, Martin began to sell portions of the inherited land. At that point the State of Virginia stepped in using the confiscation acts to question the legality of Martin's ownership of the land. In 1810, the

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[18]This case will be discussed at length in Chapter V. *Marbury v. Madison*, 5 U. S. 137.

[19]*Marbury v. Madison*, 5 U. S. 137.

[20]Ibid., 180.

[21]*Martin v. Hunter's Lessee*, 14 U. S. 304.

[22]R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985), 106.

Virginia court of appeals sided with the State. That decision led to an appeal to the Supreme Court on a writ of error.[23]

R. Kent Newmyer, Joseph Story's biographer, believes that this case had an influence on the Supreme Court's appellate jurisdiction as momentous as *Marbury v. Madison* had on its original jurisdiction.[24] In this case, the Court had to decide on the constitutionality of section 25 of the Judiciary Act of 1789. Virginia argued against section 25 because it believed it to be unconstitutional. However, Justice Story did not agree. Story argued that "state courts decisions [should] be reviewable by the Supreme Court if there were to be such a thing as uniform federal law. Anything less would be a direct violation of the Constitution itself."[25] Justice Story argued against the state rightists and challenged them. "'The Constitution of the United States was ordained and established,' he declared, 'not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declared, by 'the people of the United States.'"'[26] Story affirmed the constitutionality of section 25 and thus, the Supreme Court's appellate jurisdiction, when he wrote that "the 25th section of the judiciary act . . . is supported by the letter and spirit of the constitution."[27]

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[23] R. Kent Newmyer, *Supreme Court Justice Joseph Story,* 106-107.

[24] Ibid., 106.

[25] Ibid., 108.

[26] Ibid., 109.

[27] *Martin v. Hunter's Lessee,* 14 U. S. 304, 351.

National Supremacy

John Marshall's nationalistic ideals compelled him to assert the supremacy of the federal law. When the Supreme Court faced questions which pitted state laws against federal laws, Marshall sided with the federal law. These decisions strengthened the judicial branch of the federal government. In these cases, Marshall assumed the authority on behalf of the federal judiciary to define the law of the land. The decisions in *McCulloch v. Maryland*[28] and *Gibbons v. Ogden*[29] offer two of the most famous examples of Marshall asserting national judicial supremacy.

The 1819 case, *McCulloch v. Maryland*, dealt with the establishment and the taxing of a national bank. The First Bank of the United States lost its charter in 1811. Renewing the bank's charter needed the cooperation of the Republicans, who, at first, opposed the idea. After the War of 1812, President James Madison understood the need for a national bank and asked Congress to establish such an institution. In 1816, the Second Bank of the United States received its charter. Maryland, however, wanted to limit the power of the new bank. Accordingly, Maryland's State Legislature passed a law that imposed a "'tax on all banks, or branches thereof, in the State of Maryland, not chartered by the legislature."[30] James McCulloch, the cashier at Baltimore branch of the Second Bank of the United States, disregarded the tax. For this, the State Legislature prosecuted him. McCulloch then appealed to the Supreme Court.

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[28] *McCulloch v. Maryland* 17 U. S. 316.

[29] *Gibbons v. Ogden*, 22 U. S. 1.

[30] *McCulloch v. Maryland* 17 U. S. 316.

Chief Justice John Marshall wrote the opinion of the court in this case. In his opinion, Marshall made two principal points. First, Marshall declared the Bank of the United States constitutional, which laid to rest an argument that dated back to the debates between Jefferson and Hamilton. Marshall justified this statement by stating that, since the Constitution did not expressly prohibit Congress from establishing a bank, Congress had the authority to do so under implied powers. Next, Marshall addressed the question of whether or not a state could tax a federal entity. Marshall argued that the supremacy clause of Article IV took priority over state laws, and, therefore, Maryland did not have the right to tax the national bank.[31]

Lastly, the Supreme Court helped shape the identity of the United States government in its decision of *Gibbons v. Ogden.* This case originated when the New York Legislature gave Robert R. Livingston and Robert Fulton control over steamboat navigation on all of New York's waters as well as other surrounding areas.[32] Thomas Gibbons challenged the monopoly in state courts under the federal Coasting Act of 1793. Gibbons believed that the federal law trumped New York's state law. The case came before the Supreme Court in 1824.

Chief Justice John Marshall also wrote the opinion for the court in this case. In his opinion Marshall again asserted that the United States Constitution and federal laws are superior to state law. Marshall wrote:

> The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner,

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[31]Ibid., 427.

[32] *Gibbons v. Ogden*, 22 U. S. 1, 1-3.

> connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies . . . [33]

Marshall made it quite clear that states have to obey and accept the supremacy and authority of the United States Congress.

Contract Law

Lastly, the Marshall Court left its mark on contract law in the United States. The cases of *Fletcher v. Peck* and *Dartmouth College v. Woodward* show how Marshall and his colleagues used their opinions to articulate the national contract law. These issues posed important questions for the young nation. An expanding nation ultimately had to face many questions concerning landownership and other property rights. Marshall used these cases as an opportunity to further the authority of the judiciary.

The case of *Fletcher v. Peck* originated in Georgia due to a question of land ownership. In 1795, Georgia sold 35 million acres of the Yazoo lands to four different companies for a total of 500,000 dollars.[34] However, in 1796 the Georgia Legislature passed a law that rescinded the previous sale because of unethical actions taken by the pervious legislature.[35] The purchasers of the land could not sue Georgia because of the Eleventh Amendment, which had been ratified due to an earlier case – *Chisholm v. Georgia.* The diversity of citizenship clause, which gives federal courts jurisdiction in

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[33]Ibid., 197.

[34] C. Peter Magrath, *Yazoo: Law and Politics in the New Republic, the Case of Fletcher v. Peck* (New York: W. W. Norton & Company Inc., 1966), 7.

[35] Ibid., 13.

cases between citizens of different states, allowed claimants to bring a case in federal Courts. In 1803, Robert Fletcher, of New Hampshire, brought action against John Peck, of Massachusetts. The original question before the federal court was whether Peck owned the land he sold to Fletcher.[36]

That original question in *Fletcher v. Peck* asked the federal court allowed Chief Justice Marshall to focus the case on the original sale of land from Georgia to the four companies in 1795. In his opinion of the court, Marshall explained how the 1795 sale was a contract and could not be repealed by the Georgia Legislature of 1796. Marshall argued that in 1795, when the sale took place, nothing in the Georgia Constitution expressly forbade the sale of the Yazoo lands. He also believed that the Court should not interfere in a state matter just because it disagrees with the motives of a legislature. Lastly, Marshall explained how the purchasers of the land did not participate in the corruption and, therefore, the 1796 repeal law infringed upon their property rights.[37] Marshall showed again how the Constitution, this time using the contract clause, is superior to state laws.

The origins of *Dartmouth College v. Woodward* date back to before the American Revolution. In 1769, Dr. Eleazar Wheelock, of the New Hampshire colony, received a grant to create what became Dartmouth College.[38] When the school first began, it had Christianizing Native Americans as a goal as well as generally educating all its students.

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[36]Ibid., 53.

[37]Ibid., 74-77.

[38] *Trustees of Dartmouth College v. Woodward*, 17 U. S. 518, 518-520.

As a private school, Dartmouth governed itself with authority vested in both a college president and a board of trustees. The college president had the ability to choose his successor. Eleazar Wheelock did so, choosing his son John as his successor. During the early nineteenth century, the school faced some difficult administrative issues. This led the Board of Trustees to seek the termination of the President of the college, John Wheelock.[39]

John Wheelock, knowing the precarious position of his job, sought help from the New Hampshire State Legislature. In 1816, the New Hampshire State Legislature revoked the charter of Dartmouth College and put the institution under the control of the State. The old trustees of the college refused to accept the Legislature's decision and continued to operate the college as they had in the past. Also, the old trustees brought a law suit against William Woodward. Woodward had previously served Dartmouth College as its secretary-treasurer. When he left, Woodward took Dartmouth's seal and records with him. The state court sided with the action of the State's legislature. After the state court issued its ruling, the old trustees appealed to the United States Supreme Court and hired the distinguished orator and statesman, Daniel Webster, to argue their case. Webster's argument, which lasted four hours, convinced the Supreme Court to rule in favor of the old trustees. The vote was five to one.

The opinion of the Supreme Court, written by Marshall, follows essentially the reasoning he enunciated in *Fletcher v. Peck.* Again, the Supreme Court addressed the contract clause of the United States Constitution. Near the beginning of his opinion,

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[39]Ibid., 539-544.

Marshall stated that "It can require no argument to prove, that the circumstances of this case constitute a contract."[40] By declaring the school's charter a contract, Marshall proposed the basis for his argument. He cited the United States Constitution to show that "'no State shall pass any . . . law impairing the obligation of contracts.'"[41] Marshall applied that quotation from the Constitution to show that the New Hampshire State Legislature did not have the right to interfere with Dartmouth College's charter and place it under the control of the State. The Chief Justice stated in his opinion thusly: "this is a contract, the obligation of which cannot be impaired, without violating the constitution of the United States. . ."[42]

Even though Chief Justice Marshall wrote the opinion of the Court, Justice Joseph Story's concurring opinion deserves equal attention. In his opinion, Story explained the difference between a public corporation and a private corporation and how that affects the authority of the State. Story used the example of a bank to show the difference. He wrote that "a bank created by the government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation. . . But a bank, whose stock is owned by private persons, is a private corporation, although it is erected by the government. . ."[43] Story applied this same reasoning to Dartmouth College, therefore declaring it a private corporation. This reasoning also brought Story back to

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[40]Ibid., 627.

[41]Ibid., 655.

[42]Ibid., 650.

[43]*Trustees of Dartmouth College v. Woodward* (1819), 17 U. S. 518, 669 (Story, J., concurring).

Marshall's main argument: that the State did not have the authority to interfere with the school's contract.

Conclusion

John Marshall's decision to change the opinion writing practices of the Supreme Court brought the Court into a new age. Marshall avoided the problems of a politically divided Court by changing the style of opinion writing. If he had allowed seriatim opinions to continue, the Court's authority would have remained weak and unreliable. The opinions of the Court not only allowed the Court to have a unified voice, but the practice also gave Marshall the ability to write many of the opinions himself Throughout his thirty four year tenure as Chief Justice, the Court issued over one thousand decisions. Marshall wrote 519 of the decisions himself.[44] He did not waste any opportunity to have an impact on the nation. Marshall surely left his mark on the Supreme Court and the nation as a whole.

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[44]Paul Johnson, *A History of the American People* (New York: Harper Collins Publishers, 1997), 237.

CHAPTER V

THE RISE OF JUDICIAL REVIEW

Whether via the bench housed in the dimly lit Old Senate Chamber, or in the elegant courtroom enjoyed by the Court today, the Supreme Court has offered the final say on constitutional matters. However, during the Nation's formative years the other branches often questioned the Court's assertion of judicial review. Historians have offered several different versions as to how judicial review became a focal point of the Court's authority. Some historians argue that judicial review came as a brilliant response to the political culture,[1] while others argue that earlier precedent gave Marshall the ability to confirm judicial review,[2] and, thirdly, some historians argue that the Supreme Court innately had the right of judicial review.[3] This chapter argues for a blend of these arguments: judicial review became part of the Supreme Court's authority gradually.

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[1]Richard Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (New York: W.W. Norton & Company Inc., 1971), 53-68; R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge: Louisiana State University Press, 2001), 154-155. Newmyer also discusses some of the earlier precedents for judicial review, *John Marshall and the Heroic Age of the Supreme Court*, 171.

[2]Julius Goebel, Jr., *Antecedents and Beginnings to 1801*, vol. 1 of *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States* (New York: The Macmillan Company, 1971), 704-705; Bernard Schwartz, *A History of the Supreme Court* (New York: Oxford University Press, 1993), 22-23.

[3]George Lee Haskins and Herbert A. Johnson, *Foundations of Power: John Marshall, 1801-1815*, vol. 2 of *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States* (New York: MacMillian Publishing Co., Inc., 1981), 186.

As most earlier historians have argued, the story of the rise of judicial review must be set in its historical context. Yet, the starting point of the story remains subject to debate by leading scholars. My "gradualism approach" shows that the rise of judicial review took place during the Constitutional Convention and during its ratification period, as well as through early actions taken by the Supreme Court before Marshall. Each of these segments of the early national period offers an interesting insight into the establishment of judicial review.

Constitutional Convention

After the colonists declared their independence and before the federal Constitution had been written, the Articles of Confederation governed the United States. The Articles lasted from 1781 to 1787. Under the Articles of Confederation, the federal government did not have much power. The majority of the power rested with the individual states. For example, the federal government did not have the authority to keep a standing army or to tax the people. The Articles of Confederation also lacked a federal judiciary. The Articles state that "The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other causes whatever. . ."[4] By 1786, it became clear that the Articles of Confederation needed revision, and so, in that spirit, Alexander Hamilton called for a convention to revise the Articles.

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[4]Articles of Confederation , Article, IX.

The convention that had been called by Hamilton took place in the summer of 1787 in Philadelphia. All of the states sent delegates, except Rhode Island. The original goal of the convention was to revise the Articles of Confederation, however, it soon became clear that nothing less than turning to the creation of a brand new government would suffice. A portion of the debate at what became known as the Constitutional Convention centered on the creation of a federal judiciary. The delegates discussed three plans for a federal government, each including a federal judiciary. They discussed at length the appointment of judges and established the jurisdiction of the federal judiciary.

One of the proposals for the new government, the "Virginia Plan," had been developed by James Madison and presented to the convention by Edmund Randolph.[5] Section nine of Madison's proposal called for a federal judiciary. The Virginia Plan called for the federal judiciary "to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature. . ."[6] Madison did not mention how the judges would be selected, but he did mention that they would serve for a term of good behavior, meaning as long as judges acted according to the law they would remain in office. Madison also called for a "fixed compensation for [the judges'] services."[7] Lastly, Madison laid out what he believed should be the jurisdiction of the federal judiciary. He gave the inferior courts original jurisdiction and reserved the appellate jurisdiction for the Supreme Court. Madison then termed the use of such jurisdictions:

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[5]James Madison, *Notes of the Debates in the Federal Convention of 1789*, ed. Adrinne Koch (New York: W. W. Norton & Company, Inc., 1966), 463.

[6]Ibid., 32.

[7]Ibid., 32.

> all piracies and felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collections of the national revenue; impeachments of any National officers, and questions which may involve the national peace and harmony.[8]

Madison also gave members of the federal judiciary the authority, along with the Executive, to inspect acts of the National Legislature.[9]

This section of the Virginia Plan demonstrates that the framers of the Constitution did not completely neglect the idea of judicial review. In his proposal, Madison hinted at the existence of the legal power of judicial review when he stated that the members of the federal judiciary, along with the executive, shall have the right to examine the acts of the legislature. Madison's plan called for a system of checks and balances, a system in which the federal judiciary would play a significant role.

William Paterson presented another proposal for a national government called the "New Jersey Plan." Like Madison, Paterson, in one section of his plan, he called for the creation of a federal judiciary.[10] However, Paterson's New Jersey Plan called for only one supreme tribunal. The New Jersey Plan also set forth a manner in which the judges were to be selected. Paterson believed that the authority of selecting the judges should rest with the Executive.[11] Paterson once again agreed with Madison. Paterson also thought the judges should hold their office for a term of good behavior and receive

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[8]Ibid., 32.

[9]Ibid., 32.

[10]Ibid., 120.

[11]Ibid, 120.

compensation for their services.[12] Under the New Jersey Plan, the federal judiciary has both original jurisdiction and appellate jurisdiction. It had original jurisdiction in cases dealing with "all impeachments of federal officers."[13] The appellate jurisdiction consisted of

> all cases touching the rights of Ambassadors, in all cases of captures from an enemy, in all cases of piracies and felonies on the high Seas, in all cases in which foreigners may be interested, in the construction of any treaty or treaties, or which may arise on any of the Acts for regulation of trade or the collection of the federal Revenue. . .[14]

Paterson also stipulated that no member of the judiciary may "be capable of receiving or holding any other office or appointment during the time of service, or for thereafter."[15] Lastly, Paterson gave the federal judiciary the authority "for the correction of errors, both in law and fact, in rendering judgment, to an appeal to the Judiciary of the United States."[16]

Much like Madison's plan, Paterson's plan also harbors ideas sympathetic to judicial review. However, Paterson's statement requires a bit more inference than Madison's. Paterson's statement, which conceded to the federal judiciary the authority "for the correction of errors, both in law and fact . . .," also suggests the idea of judicial review. Clearly both men, Madison and Paterson, wanted a judicial check on the legislature.

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[12]Ibid., 120.

[13]Ibid., 120.

[14]Ibid., 120.

[15]Ibid., 120.

[16]Ibid., 119.

Alexander Hamilton presented the third proposal for a national government at the 1787 convention, appropriately called the "Hamilton Plan." Hamilton also called for the creation of a federal judiciary in section seven of his plan. Under Hamilton's plan, "The supreme judicial authority of the United States to be vested in Judges to hold their office during good behaviour with adequate and permanent salaries."[17] However, he did not provide for the selection the judges. The Hamilton Plan also gave both original and appellate jurisdiction to the federal judiciary. Under this plan, the Supreme Court shall "have original jurisdiction in all causes of capture. . ."[18] Appellate jurisdiction is extended "in all causes in which the revenues of the General Government or the citizens of foreign nations are concerned."[19] Hamilton's plan, like the other two, called for the review of acts of Congress, but Hamilton prescribed this check differently than his convention colleagues.

Hamilton gave the check on the legislature solely to the executive. Of the three proposals, Hamilton's surely had the strongest central government. Three out of the four bodies established under his plan – Senate, Governour or Executive, and the Judiciary – held terms of good behavior. He also prescribed a review of state laws as to make sure state legislatures did not violate the laws stipulated by the federal Constitution. Again, this authority rested with the executives of each particular state.[20] Although Hamilton did

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[17]Ibid., 138-139.

[18]Ibid., 139.

[19]Ibid., 139.

[20]Ibid., 139.

not give the authority to review acts of Congress to the judiciary, he still understood the necessity of such a power.

The debate among the rest of the delegates during the Constitutional Convention reveals that those in attendance remained split on the issue of judicial review. Some of the delegates came out in favor of the Supreme Court receiving such an authority. Governor Morris expressed this opinion when he delivered his statement that "He could not agree that the Judiciary . . . should be bound to say that a direct violation of the Constitution was law . . . Encroachments of the popular branch of the Government ought to be guarded agst."[21] Others, such as Roger Sherman, disagreed with Morris and declared that "This was neither wise nor safe" and that "He disapproved of Judges meddling in politics or parties."[22] The convention never fully came to an agreement on the issue. When the final draft of the Constitution passed the convention, Article III barely gave an outline for the federal judiciary. Those at the convention may not have expressly given the judiciary the right of judicial review, but they did not expressly deny it either.

Ratification

The delegates may have gone home at the end of the Constitutional Convention, but the debate over judicial review continued long after the Philadelphia meeting. After the Convention approved the Constitution, it went to the states for ratification. This period, 1787-1788, of time saw the birth of what became a two party political system.

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[21]Madison, *Notes*, 463.

[22]Ibid., 464.

The country broke into two main factions: the Federalists, who supported ratification, and the Anti-Federalists, who opposed ratification. Alexander Hamilton left the 1787 Convention a fervent Federalist. He wanted to promote ratification to the nation and therefore, along with James Madison and John Jay, wrote the *Federalist Papers*.

These three men, Hamilton, Madison, and Jay, authored a total of 85 essays promoting the ratification of the Constitution. *Federalist 78*, written by Hamilton, expresses the Federalist attitude toward the judiciary. Hamilton broke the essay into three parts. Firstly, he briefly described the method of selecting judges. Secondly he defended the term of office given to judges of the United States. Lastly, he commented upon judicial authority.[23] Both sections two and three offer arguments implicitly supporting judicial review.

While expounding his second point, Hamilton alluded to the power of judicial review. Article III, Section One, of the Constitution states that all judges under the United States shall hold office for a term of good behaviour.[24] Hamilton argued that judges deserved such extensive terms because of the role they perform: "In a monarchy, [judicial terms of good behaviour] is an excellent barrier to the despotism of the prince: in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body."[25] He reinforced his position claiming that, to keep the judiciary

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[23]Alexander Hamilton, John Jay, and James Madison, *The Federalist*, Robert A. Ferguson, ed., (New York: Barnes and Noble Classics, 2006), 427-435.

[24]United States Constitution, Article III, Section 1.

[25]Alexander Hamilton, John Jay, and James Madison, *The Federalist*, Robert A. Ferguson, ed., (New York: Barnes and Noble Classics, 2006), 428.

separate from either the legislative or executive branches of government, judges needed the assurance of this tenure. Allying himself with the famed French legal philosopher Montesquieu, Hamilton asserted that, if judging does not remain independent, liberty cannot exist.[26] These words certainly suggest that the judiciary should have a check on both the legislature and executive.

Hamilton emphasized judicial review more clearly in the third part of the essay. He boldly declared that it is the duty of the judiciary "to declare all acts contrary to the manifest tenor of the constitution void."[27] After making such a claim, he entered into a lengthy discussion on the merits of giving the judiciary this authority. Hamilton insisted that the intentions of the Constitution must reign supreme.

> To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.[28]

Discrediting the criticism that the authority to declare acts of the legislature void would signify the dominance of the judiciary over the legislature, he asserted rather that it would preserve the superiority of the people.[29]

During the fight for ratification, Hamilton's voice was not alone on the issue of judicial review. A fellow Federalist and Constitutional Convention delegate, Oliver Ellsworth, expressed a compatible view on the role of the judiciary in the new republic.

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[26]Ibid., 429.

[27]Ibid., 429.

[28]Ibid., 430.

[29]Ibid., 430-431.

Born April 29, 1745, Ellsworth came from a comfortable family in Windsor Connecticut. In 1771, Ellsworth completed his legal studies and was accorded admittance to the Connecticut bar.[30] He quickly gained prominence in the legal profession. In 1773, he began public service as a deputy from Windsor to the Connecticut General Assembly. This first step into governmental work sparked a life long profession. By 1786, Ellsworth had served as justice of the peace for Hartford, delegate to Continetal Congress, member of Connecticut Supreme Court of Errors, and a member of the Superior Court of Connecticut. This service to Connecticut led to his appointment to the Constitutional Convention in 1787.[31]

As a delegate to the Constitutional Convention, Ellsworth strove for a federal government that had a separation of powers. Ellsworth wanted branches of the government to act on equal footing so that one could not gain more power than the other. The lack of a separation of powers fueled Ellsworth's main objection to the Articles of Confederation. Like Hamilton, Madison and Jay, the authors of the*Federalist Papers*, Ellsworth wrote his own series of essays urging ratification in his home state of Connecticut. In his "The Landholder V," Ellsworth described how a legislature alone cannot manage a whole nation. He wrote: "A legislative power, without a judicial and executive under their own control, is in the nature of things a nullity."[32] Again, in

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[30] Maeva Marcus and James R. Perry, eds., *Appointments and Proceedings: The Documentary History of the Supreme Court*, vol. 1 (New York: Columbia University Press, 1985), 115.

[31] Ibid, 117.

[32] Oliver Ellsworth, "Landholder V," in Paul Leicester Ford, ed., *Essays on the Constitution of the United States, Published During its Discussion by the People 1787-1788* (Brooklyn, NY: Historical Printing Club, 1892), 159.

"Landholder X," an essay in which Ellsworth vigorously rebuked the positions of Luther Martin during the convention, he agreed his colleague only in that he supported a judiciary with the authority to "[correct] all errors, both in law and fact."[33]

Ellsworth did not limit his contribution to the ratificiation effort to his "Landholder" series. He also became a delegate to Connecticut's ratification convention. Ellsworth cemented his understanding of judicial review when he rose to speak before the convention. He told the Connecticut ratification convention that "If the general legislature should at any time overlap their limits, the judicial department is a constitutional check. . . . if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges . . . will declare it to be so."[34] These words spoken by Ellsworth seem to parallel those written by Hamilton in *Federalist 78*.

By the time the states ratified the Constitution, a true consensus on the question of whether or not the Supreme Court had the authority of judicial review had not been reached. However, the lack of a consesus did not stop some from assuming that the Court had the authority. Before he even came to the Court, and before the ratification of the Constitution, Associate Justice James Iredell understood judicial review to be under the purview of a federal judiciary. In 1786, Iredell wrote a public letter explaining his position.

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[33]Ellsworth, "Landholder X," Ford, *Essays on the Constitution of the United States*, 184.

[34] Merrill Jensen, *Ratification of the Constitution by the States Delaware, New Jersey, Georgia, and Connecticut: The Documentary History of the Ratification of the Constitution*, vol. 3 (Madison, WI: State Historical Society of Wisconsin, 1978), 553.

> No check upon the public passions, it is in the greatest danger. The majority having the rule in their own hands, may take care of themselves; but in what condition are the minority, if the power of the other is without limit?[35]

Judicial review also found its way into the offical writings of Justice Iredell.

Iredell, again, referenced judicial review in a charge to the Georgia grand jury while acting as a circuit judge. He alleged that the framers had "established [the federal judiciary] as a great constitutional guard of the constitution itself . . . A restriction upon the legislative power, I believe, never existed until the establishment of the American governments."[36] Just as the framers had in their efforts to secure ratification, Iredell turned to the system of checks and balances and characterized the legislature as the branch most likely to become tyrannical.

Those who did not serve on the Supreme Court also weighed in on the debate. In a letter to Alexander Hamilton, William Bradford Jr. wrote that "they [the Supreme Court] have the power of paralyzing the measures of the government by declaring a law unconstitutional . . ."[37] This letter, written by a member of the Supreme Court bar, undeniably acknowledges that the Supreme Court has the authority of judicial review.

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[35]Stephen Breyer, *Making Our Democracy Work: A Judge's View* (New York: Alfred A. Knopf, 2010), 9.

[36]James Iredell's Charge to the Grand Jury of the Circuit Court for the District of Georgia, October 17, 1791, in *The Justices on Circuit, 1790-1794: Documentary History of the Supreme Court*, vol. 2, ed. Maeva Marcus (New York: Columbia UniversityPress, 1988), 218.

[37]William Bradford Jr. to Alexander Hamilton, Philadelphia, July 2, 1795, in *Appointments and Proceedings: Documentary History of the Supreme Court of the United States, 1789-1800*, vol. 1, ed. Maeva Marcus and James R. Perry (New York: Columbia University Press, 1985), 760.

Early Supreme Court Cases

The Supreme Court took even stronger steps toward obtaining the authority of judicial review through its own decisions. The Court itself dealt with judicial review before *Marbury v. Madison*, when it heard cases dealing with state laws and their constitutionality as well as acts of the federal congress. At least three cases had come before the Court before *Marbury*: *Ware v. Hylton*, *Hylton v. United States*, and *Calder v. Bull*.[38]

In 1796, the case *Ware v. Hylton* asked the Supreme Court to decide the constitutionality of a state law. This case dealt with a Virginia law that had been passed in 1777. The law forgave debts owed to British subjects.[39] Even though the law existed, an instance occurred where a British creditor sued for the collection a debt owed by an American citizen that had been due before the American Revolution. Looking to get out of his commitment, the debtor sought refuge by trying to invoke the 1777 Virginia law.[40]

During the May term of 1793, the Circuit Court for Virginia heard the case of *Ware v. Hylton*; and the court's decision was rendered a month later. Chief Justice Jay and Associate Justice Iredell had first heard the case as circuit court judges. Their respective opinions show different perspectives on the case. The circuit court did not

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[38]Julius Goebel, Jr., *Antecedents and Beginnings to 1801*, 704-705; Schwartz, *A History of the Supreme Court*, 22-23.

[39] Bernard Schwartz, *A History of the Supreme Court* (New York: Oxford University Press, 1993), 22.

[40]Ibid., 22.

decide the case unanimously. Justice Iredell and Judge Griffin held one position, while Jay stood alone.

The opinion delivered by Jay asserted that the Virginia law, passed in 1777, no longer remained valid. Jay argued that Article IV of the Treaty of Pairs had restored the plaintiff's right to seek payment from the debtor. The decision went on to say that the money paid to the State, which the debtor paid in concurrence with the Virginia statute, did not substitute payment to the plaintiff after the ratification of the peace treaty. Therefore, Jay sided with the plaintiff.[41]

The other two judges of the circuit, however, did not agree. Justice Iredell took the liberty of explaining his position in a lengthy opinion. He agreed with the plaintiff that the debt had not been forfeited, that England had violated the terms of the treaty, and that the government had annulled the debt. However, Iredell sided with the defendant on the fact that the defendant paid the debt to the State under the authority of Virginia statute. Iredell claimed he could not, in good faith, force the defendant to pay the debt again. This judgment did not claim that the plaintiff did not have the right to the debt owed to him, but only that the plaintiff was "not entitled to it from the present Defendant."[42]

After the Circuit Court of Virginia handed down its decision, John Ware filed a writ of error. He and his lawyer claimed that the Circuit Court erred in its decision on

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[41]John Jay, Circuit Court Opinion in *Ware, Cases 1796-1797: The Documentary History of the Supreme Court of the United States 1789-1800*, vol. 7, ed. Maeva Marcus (New York: Columbia University Press, 2003), 310.

[42]James Iredell, Circuit Court Opinion in *Ware, Cases 1796-1797*, 292.

behalf of the defendant, Daniel Hylton. "When by the Law of the Land the said Judgment ought to have been given for the said plaintiff against the said defendants,"[43] argued Ware. The Supreme Court heard the case during its 1796 term.

When it handed down its decision in 1796, the Supreme Court of the United States still issued its opinions seriatim. As the seriatim manner prescribed, the justices issued their written opinions in reverse seniority. Justice Samuel Chase offered his opinion first – it eventually became the most well known opinion in the case. Justice Chase believed the pre-constitution Virginia law was unconstitutional. The justification for that claim came from Justice Chase when he wrote in his opinion that:

> A treaty cannot be the supreme law of the land if any act of a state Legislature can stand in its way...It is the declared will of the people of the United States that every treaty made, by the authority of the United States, shall be superior to the constitution and laws of any individual state; and their will alone is to decide.[44]

Using the supremacy clause found in Article VI of the Constitution, Justice Chase declared the Virginia law void.

The other justices who participated in the case, Justices William Cushing, James Wilson, and William Paterson, concurred with the judgment of Justice Chase. Justice Iredell did not participate in the case due to his involvement in the case at the circuit level, and Chief Justice Jay did not participate because he had resigned from his position as Chief Justice before the Court heard the case in 1796. Justice Cushing, in his opinion,

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[43]Ibid., Assignment of Error, June 6-July 10, 1794, 315.

[44]Schwartz, *A History of the Supreme Court*, 22.

argued that the treaty nullified *ab inito*, from the beginning, all laws of impediments.[45] Justice Paterson, along the same lines, declared that the treaty repealed the Virginia statute and voided any payments into the Virginia State Treasury.[46] Justice Wilson contended that the federal legislature controlled the terms of both war and peace.[47]

Also in 1796, the Supreme Court heard the case of *Hylton v. United States*; it also concerned judicial review. This case differs from *Ware v. Hylton* in its relation to judicial review because it concerns an act of the Congress and not of a state legislature. The issue emerged when Congress passed a direct tax with "An Act laying Duties Upon Carriages for the Conveyances of Persons."[48] The new law took effect in September of 1794 and placed a duty of one dollar on every two-wheeled carriage and ten dollars on each coach. Daniel Hylton, who served as the defendant in *Ware v. Hylton*, doubted the constitutionality of such a law. Therefore, after the law took effect, he refused to pay the tax.[49] This act of civil disobedience set the stage for the Supreme Court to weigh in on the question of constitutionality of a federal act of Congress.

The case came before the Circuit Court of Virginia in 1795, and Hylton's lawyer made the argument that Congress went beyond its constitutional authority by creating the carriage tax. The defense argued that the carriage tax was a direct tax and the

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[45]Julius Goebel Jr., *Antecedents and Beginnings*, 753; *Hylton v. United States*, 3 U.S. 171, 184 (Cushing, J.).

[46]*Hylton v. United States*, 3 U.S. 171.

[47]Goebel, *Antecedents and Beginnings*, 753.

[48]Ibid., 778.

[49]Ibid., 778-779.

Constitution required that all direct taxes "shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . ."[50] Nevertheless, the judges of the Circuit Court of Virginia rejected their argument and found in favor of the plaintiff, the United States.[51] However, the judgment of the Circuit Court did not bar the defendant from seeking a writ of error.

In June of 1795, Hylton secured the writ of error. The writ ordered the Supreme Court to hear the case and correct any errors found in the judgment of the Circuit Court. The Supreme Court heard oral argument in March of 1796. The new Chief Justice, Oliver Ellsworth, did not participate in the decision because of he had been absent during oral argument. Associate Justice William Cushing, also absent during oral argument, refused to participate in the decision. Justice Wilson abstained from voting due to his participation in the case at the circuit level.

As in *Ware v. Hylton*, the Supreme Court issued opinions seriatim. Justices Chase, Paterson, and Iredell each delivered an opinion. The participating justices voted unanimously to uphold the ruling of the Circuit Court and therefore the constitutionality of the statute in question. Each of the justices, beginning with Chase, declared that the carriage tax did not fall under the definition of a direct tax. Justice Paterson stated that, since carriages fall under consumption, a tax on carriages must be indirect. Justice Iredell agreed with Paterson, but justified the carriage tax as indirect on the basis that it cannot

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[50]U.S. Constitution, Article I, Section 2.

[51]Judgment of the Circuit Court, *Cases 1796-1797*, 436.

be apportioned.[52] These opinions offer the first utterances of the Court deciding the constitutionality of an act by the federal congress.

In 1798, The Supreme Court heard a third case that presented a constitutional question. The case of *Calder v. Bull* came to the Supreme Court out of the state of Connecticut. This case originated as a dispute over a will. The Connecticut legislature disregarded a ruling from the probate court, which declined to record the will in question. The petitioner, John Calder, filed suit because he felt the state legislature violated the United States Constitution's prohibition on ex post facto laws.[53] Each level of the Connecticut judicial system ruled in favor of the state legislature. The case reached the Supreme Court of the United States on a writ of error from the Connecticut State Court of Errors.[54]

Again, the Supreme Court issued its ruling seriatim. Although the decision was unanimous, Justices Chase, Paterson, Iredell, and Cushing each wrote separate opinions in the case. Justice Chase justified his opinion that the Connecticut State legislature did not violate the Constitution by asserting that the ex post facto clause only refers to criminal law. Justice Paterson agreed with Chase and added that he believed that to be the intent of the framers. Justices Iredell and Cushing came to the same conclusion, but offered different reasoning. Justice Iredell argued that the act passed by the Connecticut legislature was judicial rather than legislative, therefore not under the ex post facto

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[52]William Tilghman's Notes on the Justices' Opinions, *Cases 1796-1797*, 500.

[53]U.S. Constitution, Article I, Section 9.

[54]Goebel, *Antecedents and Beginnings*, 782.

regulation. Justice Cushing agreed with Iredell.[55] Here, again, the justices evaluated the constitutionality of a law.

The explicit establishment of judicial review came as another product of the Marshall Court, the famous decision of *Marbury v. Madison* (1803).[56] The case materialized due to the tumultuous transfer of power, from the Federalists to the Republicans, after Thomas Jefferson took office on March 4, 1801. President Adams singed and a Federalist Congress passed the Judiciary Act of 1801 during the latter days of Adams' administration. The passage of this act allowed Adams to nominate sixteen new judges.[57] These judges became known as the "Midnight Judges."

The nomination of William Marbury as the justice of the peace for the District of Columbia occurred during the time of the Midnight Judges. However, the Secretary of State did not issue Marbury his commission. After Thomas Jefferson took over the Presidency, he ordered his new Secretary of State, James Madison, to ignore the commission.[58] Marbury still felt entitled to the commission, the change in administration notwithstanding. Looking for a solution to his problem, Marbury turned to the Supreme Court. He filed for the Supreme Court to issue a writ of mandamus – an order from the Court to an official to do a specific task that is required by law.[59]

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[55]Ibid., 783-784.

[56]William H. Rehnquist, *The Supreme Court: Revised and Updated* (New York: Vintage Books, 2001), 27.

[57]Richard Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (New York: Oxford University Press, 1971),15.

[58]William H. Rehnquist, *The Supreme Court: Revised and Updated* (New York: Vintage Books, 2001), 27.

The Supreme Court began hearing *Marbury v. Madison* in December of 1801.[60] However, it did not get to finish its adjudication of the case until February of 1803.[61] The handing down of this opinion did more than just resolve this case; it also created a new doctrine. Chief Justice John Marshall wrote the famous opinion for the court, and all of his colleagues concurred with the opinion. While writing this opinion, Marshall answered more than just the question of whether William Marbury was entitled to his commission. It also defined the Supreme Court's jurisdiction and provided, in effect, a declaration of independence for the nation's highest Court.

Chief Justice John Marshall broke his opinion of the Court in *Marbury v. Madison* into four different questions. First Marshall asked if Marbury had a legal right to the position of justice of the peace for the District of Columbia, and to the commission.[62] Marshall answered that Marbury did have a legal right to the position. Marshall found that an appointment became valid after the President signs the commission of the office.[63] So, at this point in Marshall's opinion, Marbury appeared to have a right to his commission from President Adams.

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[59]Kermit Hall, *The Oxford Companion to the Supreme Court of the United States* 2nd edition (New York: Oxford University Press, 2005), 603-604.

[60]Ellis, *The Jeffersonian Crisis*, 43.

[61]The court proceedings were interrupted because of debate over the Judiciary Act of 1801. President Jefferson and his Republican congress feared political impact of the new system that had been hastily passed through at the end of President Adams' term, so they repealed the Judiciary Act of 1801 and passed the Judiciary Act of 1802, which reinstated the old judicial system, but also delayed the meeting of the Supreme Court from December of 1801 to February 1803. For further reading look at William H. Rehnquist, *The Supreme Court*, or George Haskins and Herbert A. Johnson, *Foundations of Power: John Marshall 1801-1815*.

[62]*Marbury v. Madison*, 5 U. S. 137, 154 (1803).

[63]Ibid., 155.

Next Marshall raised the question of whether the law gave Marbury a remedy.[64] Again, Marshall answered the question affirmatively. He wrote in his opinion that "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[65] This means that there should legally be a way for Marbury to receive his commission.

The third question of Marshall's opinion asked if a writ of mandamus was the proper remedy in this case.[66] Once more, Marshal answered the question positively. He looked back and applied an old English case where a writ of mandamus had been used to direct an English official to perform a certain task.[67] Jefferson and the Republicans feared the answer to this question because they worried that Marshall might assume more authority and begin to direct other branches of government. Marshall, however, feared that outcome as well and, thus, tried to steer the Court from taking cases that were political in nature.

The fourth, and final, question present in Marshall's opinion asked if the Supreme Court had the authority to issue a writ of mandamus in this case.[68] It is in this section of Marshall's opinion that judicial review was clearly enunciated. Even though Marshall believed that Marbury had a right to his commission, and that a writ of mandamus could

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[64]Ibid., 154.

[65]Ibid., 163.

[66]Ibid., 154.

[67]Ibid., 163.

[68]Ibid., 154.

be used to secure the commission, he believed that the Supreme Court did not have the authority to issue such a writ in this case. Marshall came to this conclusion because of the jurisdictional boundaries specified by Article III of the Constitution.

Article III of the Constitution gives the Supreme Court both original jurisdiction,[69] a court allowed to hear a case in the first instance, and appellate jurisdiction,[70] a court with the authority to review decisions from lower courts. When Marbury first brought his case to the Supreme Court, he filed the case under the Court's original jurisdiction. This procedure was correct under Section 13 of the Judiciary Act of 1789. That section gave the Supreme Court the authority "to issue writs of Mandamus in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."[71] It appeared on first reading that Marbury had the right to file his case with the Supreme Court via original jurisdiction case because the Secretary of State, James Madison, was a "person holding office" that was "under the authority of the United States."[72] However, Marshall felt that Section 13 of the Judiciary Act of 1789 violated the jurisdiction that had been laid out by the Constitution. He believed that the Constitution should take priority and Article III of the Constitution states that "the Supreme Court shall have original jurisdiction in all cases

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[69]Original Jurisdiction: The jurisdiction granted a court to try a case in the first instance, make findings of fact, and render a usually appealable decision. *Merriam-Webster's Dictionary of Law*, s. v. "Original Jurisdiction."

[70]Appellate Jurisdiction: The jurisdiction granted to particular courts to hear appeals of the decisions of lower tribunals and to reverse, affirm, or modify those decisions. *Merriam-Webster's Dictionary of Law*, s. v. "Appellate Jurisdiction."

[71]Judiciary Act of 1789, S. 1, 1st Cong. (1789).

[72]Rehnquist, *The Supreme* Court, 30-31.

affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction."[73] Therefore, Congress did not have the authority to statutorily change, including adding to, the Supreme Court's original jurisdiction. In his opinion for the court, Marshall declared Section 13 of the Judiciary Act of 1789 unconstitutional. Marbury may never have received his commission as a result of this case, but Marshall established judicial review for the Supreme Court of the United States.

Conclusion

Thus, *Marbury v. Madison* is unquestionably the final elocution of the power of judicial review; however, its antecedents cannot be ignored. As we have seen, clear evidence exists that shows the origins of judicial review existed as early as the Constitutional Convention. The idea lingered in uncertainty throughout the first decade of the Court's history. With its decision in *Marbury*, the Supreme Court fully embraced judicial review and, as a consequence the Court assumed its place as an equal branch of government.

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[73]Ibid., 31.

EPILOGUE

THE JUDGES' BILL

In 1925, almost one hundred years after the death of the great Chief Justice John Marshall, the Supreme Court completed its fabrication of the identity the early Court strived for with the passage of the Judiciary Act of 1925. In 1921, William Howard Taft became the Chief Justice of the United States. Taft admired John Marshall and his accomplishments. He once said that "[John Marshall] made this country. . . Marshall is certainly the greatest jurist America has ever produced, and Hamilton our greatest constructive statesman."[1] Taft prioritized judicial reform, which he tried to do as president, but failed.[2] With the goal of judicial reform in mind, Taft began to draft the Judiciary Act of 1925. This became known as the Judges' Bill.

Taft hoped to strengthen and reform the federal judiciary by redefining the jurisdiction of the Supreme Court of the United States. Throughout the history of the Court, cases have reached the supreme bench using different avenues. Currently, counsel petition for a writ of certiorari,[3] asking the Court to call up the records of a lower court to review its decision, to present their case to the Supreme Court, however, this is only a

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[1]Archie Butt to Clara, Washington, D.C., February 27, 1910, in *Taft and Roosevelt: The Intimate Letters of Archie Butt Military Aide*, (Garden City, NY: Doubleday, Doran & Company, Inc., 1930), 293-294; Alpheus Thomas Mason, *William Howard Taft: Chief Justice* (New York: Simon and Schuster, 1965), 259-260.

[2]Merlo J. Pusey, "The "Judges' Bill" After Half a Century," *Supreme Court Historical Society Yearbook* (1976): 55.

[3]Certiorari: An extraordinary writ used by a superior court to call up the records of a particular case from an inferior judicial body. *Merriam-Webster's Dictionary of Law*, s. v. "Certiorari."

recent pathway to the Court. For over a century, a mandatory jurisdiction of a writ of error plagued the Court. The Judiciary Act of 1789 established and defined the writ of error for the Supreme Court.

Writ of Error

Section 25 of the Judiciary Act of 1789 outlines the Supreme Court's appellate jurisdiction. This part of the legislation states that contested issues under the control of the federal government such as treaties, statues, or commissions, may come before the Supreme Court through a writ of error.[4] This section of the Judiciary Act of 1789 established a mandatory jurisdiction. It took over a century to realize the hardships of such a jurisdiction and the positive impact its removal could have on the Court's authority.

The case *Proprietors of Charles River Bridge v. Warren Bridge Proprietors* came to the Supreme Court through a writ of error in 1837. By this time, Roger Brooke Taney, a loyal Jacksonian Democrat, had replaced John Marshall as Chief Justice of the United States. The Supreme Court was no longer being led by an ardent Federalist. This change in leadership not only affected the outcome of the case, but it also left only Joseph Story to take up Marshall's voice.

The origins of the case date back to 1785, when the Massachusetts Legislature granted some Charlestown businessmen a charter to build a bridge over the Charles River and, thus, effectively replace the old ferry. In return, the proprietors received a forty-year

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[4]Judiciary Act of 1789, S. 1, 1st Cong. (1789).

guarantee of tolls.[5] After the State saw how much the bridge enhanced travel, it extended the guarantee another thirty years, which meant the proprietors of the Charles River Bridge could receive tolls for a total of seventy years. However, in 1828 the Massachusetts Legislature granted the Warren Bridge Corporation a charter to build another bridge over the Charles River. The proprietors of this second bridge had the right to collect the same amount in toll, but only for six years. After the sixth year, the State turned the bridge into a free passageway.[6]

In 1830, the proprietors of the Charles River Bridge went to the Supreme Court of Massachusetts – hoping to get an injunction against the Warren Bridge. However, the state's Supreme Judicial Court did not grant the injunction "because of the proprietors' ambiguous claims to exclusive rights."[7] Following the decision from the high court of Massachusetts, the plaintiffs appealed to the United States Supreme Court.

The Supreme Court first began hearing the oral argument for the case in 1831, while Chief Justice Marshall still presided over the Court. Originally, the Court had been divided on this case and, therefore, did not issue a ruling. The Supreme Court heard another argument after Chief Justice Taney had been confirmed and issued its ruling in 1837.[8] The opinions in this case show a stark difference between Roger Taney and Joseph Story. Taney wrote the opinion of the Court and Story wrote a strong dissent.

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[5] Stanley I. Kutler, *Privilege and Creative Destruction: The Charles River Bridge Case* (New York: The Norton Library W. W. Norton and Company, Inc., 1971), 1.

[6] Kutler, *Privilege and Creative Destruction*, 2.

[7] Ibid., 3.

[8] Ibid., 3.

In his book, *Privilege and Creative Destruction: The Charles River Bridge Case*, Stanley Kutler illustrates how Chief Justice Taney "reduced the plaintiff's argument to two basic propositions."[9] The first of these propositions held that the plaintiff believed that the rights from the 1650 ferry grant to Harvard shifted to the Charles River Bridge. Taney disagreed with this claim and declared that "Whatever exclusive privileges attached to the ferry followed the fate of the ferry."[10] Taney argued that if the rights had belonged to the ferry and the ferry no longer existed – neither did the rights.

The second proposition Taney saw in the plaintiff's argument held that the actions of the Massachusetts Legislature in 1785 and 1792 "'necessary implied'" the exclusive rights of the Charles River Bridge. Again, Taney disagreed with the argument. He did not believe that anything could be proven by implication. He argued that the plaintiffs "must show that the State had entered into a contract with them . . . not to establish a free bridge. . . . Such, and such only, are the principles upon which the plaintiffs . . . can claim relief."[11] Due to these arguments, the Court ruled in favor of the Warren Bridge Proprietors.

The decision by the Court infuriated Justice Story, who fought to get a decision for this case in 1831. He exclaimed that he felt "humiliated, as [he thought] everyone [there was], by the Act which ha[d] now been confirmed."[12] Story's heated dissent went

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[9]Ibid., 87.

[10] Ibid., 87.

[11]*Proprietors of Charles River Bridge v. Warren Bridge Proprietors*, 36 U. S. 420, 540.

[12]Kutler, *Privilege and Creative Destruction*, 95-96.

directly to the argument made by Taney. The chief disagreement rested in how to interpret charters. Taney believed they should be interpreted conservatively, and Story argued they should be interpreted liberally. Story believed that "If the courts and judges were not at liberty to presume and imply meanings of charters, there would be, he said, an end to the case."[13]

Justice Story also looked back to precedents in his dissenting opinion. In particular, Story cited the 1810 case of *Fletcher v. Peck.* In this case, Marshall declared that a legislature cannot rescind its own grant. Story believed that the action of the State legislature to create the Warren Bridge essentially nullified the charter of the Charles River Bridge.[14] In other words, Story alleged that the State of Massachusetts rescinded its own grant and therefore the proprietors of the Charles River Bridge had a right to the injunction.

This case ended with three different opinions: Chief Justice Taney's opinion of the Court, Justice Story's dissenting opinion, and Justice John McLean's concurring opinion. The three types of opinions suggests that the Justices did not all agree. No justice joined Taney on his opinion of the Court. Justice Henry Baldwin joined Story's dissent. The majority of the Court, Justices Philip Barbour, Smith Thompson, and James Wayne, joined Justice McLean's concurring opinion, which stated that the Court did not

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[13]Ibid., 97.

[14]Ibid., 99.

have jurisdiction in the case.[15] This type of vote begs the questions of whether or not the Justices would have granted certiorari had the Court any discretionary jurisdiction.

The Judges' Bill

As the nation matured the docket of the Supreme Court began to grow. States' rights cases as well as industrialization led to an increase of cases on the Court's docket. The Judiciary Act of 1891 and the creation of the Courts of Appeals helped to bear some of the burden. The 1891 Act created nine new federal appellate courts. These courts assumed the appellate jurisdiction of the original Circuit Courts. Along with the creation of the new appellate courts, Congress abolished the circuit riding requirement for the Justices of the Supreme Court.[16]

The Judiciary Act of 1891 also granted the Court some discretionary jurisdiction, but did not relieve the Court of much of its mandatory jurisdiction.[17] Under the Judiciary Act of 1891, the Supreme Court could decide to review decisions of the Courts of Appeal. However, cases from the highest state courts maintained their right to appeal to the Supreme Court. The Judiciary Act of 1891 signaled the beginning of a transition from a Supreme Court with mandatory jurisdiction to a Court with discretionary jurisdiction.[18]

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[15]*Proprietors of Charles River Bridge v. Warren Bridge Proprietors*, 36 U. S. 420, 583 (McLean, J., Concurring).

[16]Kermit Hall, *The Oxford Companion To The Supreme Court of the United States* (New York: Oxford University Press, 1992), 548-549. "Judiciary Act of 1891"

[17]Jonathan Sternberg, "Deciding Not to Decide: The Judiciary Act of 1925," *Journal of Supreme Court History*, 33, no. 1(2008): 5.

[18]Hall, *The Oxford Companion To The Supreme Court of the United States*, 548.

Before 1925, many cases had a right to appeal to the Supreme Court, especially cases dealing the constitutionality of statute or cases where capital sentences occurred.[19] These cases were appealed to the Supreme Court through a writ of error – as was the case in *Proprietors of Charles River Bridge v. Warren Bridge Proprietors*. In a writ of error, the Court was "limited…to reviewing…questions of law in the appeals brought before it, rather than questions of fact."[20] The Judiciary Act of 1925, the Judges' Bill, changed the protocol for appealing to the Supreme Court.

In October of 1921, Chief Justice Taft assembled a committee of justices to work on a draft of the Judges' Bill.[21] The committee consisted of Justices Willis Van Devanter, William Day, James McReynolds, and George Sutherland.[22] Through this piece of legislation, the Justices hoped to clear the Supreme Court's docket of cases that they did not feel had constitutional importance. Chief Justice Taft wrote to Senator Augustus Stanley of Kentucky, speaking of the Judiciary Act of 1925, "the truth is that there is no other way by which the docket in our Court can be reduced so that we can manage it. We are now a year and three months behind."[23] To achieve this goal, the "bill

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[19]Sternberg, "Deciding Not to Decide," 5.

[20]Ibid., 4.

[21]Ibid., 9.

[22]Pusey, "The "Judges' Bill" After Half a Century," 56.

[23]Ibid., 57.

propos[ed] to enlarge the field in which certiorari is to take the place of obligatory jurisdiction."[24]

Taft and the committee of justices worked tirelessly for the passage of the Judges' Bill. Taft went so far as to personally introduce the bill for the first time to the House Judiciary Committee in 1922.[25] Justices lobbying for congressional support became a fairly regular occurrence. Chief Justice Taft, along with associate Justices Van Devanter, McReynolds, and Sutherland, had the most interaction with Congress.[26] This type of interaction between justices and members of congress is normally a rare occurrence, which further stresses the importance the Justices placed on this piece of legislation.

Once the Judiciary Act of 1925 became law, petitioning for a writ of certiorari became the main avenue of reaching the Supreme Court. Even though certiorari is a form of discretionary jurisdiction, there are guidelines that help the Court decide if a case is certworthy. The guidelines can be found in Rule 10 and H.W. Perry Jr. lays out Rule 10 in his book *Deciding to Decide: Agenda Setting in the United States Supreme Court*. The guidelines consist of:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

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[24]Ibid., 56.

[25]Sternberg, "Deciding Not to Decide," 9.

[26]Ibid., 12.

> (b)When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a United States court of appeals.
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decision of this Court...[27]

The Justices vote on whether or not to grant certiorari, and if four justices want to hear a case certiorari is granted. This is known as the rule of four.[28] At this point, the United States Supreme Court became a court primarily of discretionary jurisdiction.

The Impact on the Court

The Judiciary Act of 1925 helped to define and strengthen the Supreme Court as an equal branch of government. Once certiorari became the main avenue for cases to reach the Supreme Court, the Justices gained the authority to declare which cases had constitutional importance. The 1960s case of *Gideon v. Wainwright* shows how certiorari gave the Justices this new authority. This case focused on the Sixth Amendment right to an attorney in a jury trial. The Sixth Amendment states that "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense."[29]

In 1942, the Supreme Court handed down its decision in *Betts v. Brady*. *Betts v. Brady* had set the precedent on issue of an accused person's right to an attorney. Betts, a Maryland man, faced charges of robbery. At the time of arraignment, Betts informed the

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[27]H.W. Perry Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Cambridge: Harvard University Press, 1991), 33-34.

[28]William H. Rehnquist, *The Supreme Court: Revised and Updated* (New York: Vintage Books, 2001), 12.

[29]U.S. Constitution, Amendment VI.

judge of his financial situation. He asked the court to appoint an attorney to represent him because he could not afford one.[30] The judge denied Betts's request stating that the courts of Carroll County Maryland only supplied counsel in cases of murder or rape.[31] Upon appeal, Judge Carroll T. Bond upheld the decision to deny a state sponsored attorney because Betts "was a man forty-three years old, of ordinary intelligence and ability to take care of his own interests on the trail of that narrow issue."[32] Justice Owen Roberts wrote the opinion of the Court for the six to three majority.

Justice Roberts argued that the Maryland Courts did not violate Betts's Sixth Amendment right or the Due Process clause of the Fourteenth Amendment. He declared that the "Sixth Amendment of the national Constitution applies only to trials in federal courts."[33] The opinion went further to say that the Fourteenth Amendment does not extend the rights of the first ten, specifically for this case the Sixth, to the states except in "certain circumstances."[34] Roberts stipulated that the question of state sponsored representation shall be left to the individual state legislatures. He did not want the Court's opinion to "straightjacket"[35] the states.

Three justices dissented from the *Betts* majority – Justices Hugo Black, William O. Douglas, and Frank Murphy. Justice Black wrote the dissenting opinion and the

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[30]*Betts v. Brady* 316 U. S. 455, 457.

[31]Ibid., 457.

[32]Ibid., 472.

[33]Ibid., 461.

[34]Ibid., 461-462.

[35]Ibid., 472.

others concurred. Black countered Justice Roberts's assertion that the Fourteenth Amendment does not extend the Sixth Amendment rights to state courts. He pointed out that if this case had come before the Supreme Court from a federal bench, the Court would have had to reverse the lower court's decision rather than affirm.[36] He also showed how precedents from both state and federal courts have extended Sixth Amendment rights regardless of intelligence or financial standing.[37]

In 1953, the Supreme Court entered a new phase as the governor of California, Earl Warren, became the Chief Justice of the United States. Before his years on the Court, Earl Warren worked to secure the right to counsel in California as Governor and Attorney General. After becoming Chief Justice, Warren sought to revisit the issue of *Betts v. Brady* and the Sixth Amendment.[38] In 1962, the Supreme Court received a petition for a writ of certiorari on behalf of Clarence Gideon. Gideon faced similar charges as Betts and was also denied counsel. Warren urged his colleagues to grant Clarence Gideon's petition for certiorari. In 1963, the Supreme Court heard oral argument and once again faced the constitutional question posed in *Betts v. Brady*.

Much like Betts, Gideon faced minor felony charges of breaking and entering a poolroom in a Florida State court.[39] Gideon also requested the appointment of counsel due to his financial situation. The judge denied his request, stating that Florida law only

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[36]*Betts v. Brady* 316 U. S. 455, 474-475 (Black, J. dissenting).

[37]*Betts v. Brady* 316 U. S. 455, 475-477 (Black, J. dissenting).

[38]Jack Harrison Pollack, *Earl Warren: The Judge Who Changed America* (Englewood Cliffs: Prentice-Hall, Inc., 1979), 217.

[39]*Gideon v. Wainwright* 372 U. S. 335, 336.

allows for state appointed counsel when facing capital charges.[40] Just as Betts, Gideon represented himself during the trial and did the best he could. However, the jury found him guilty and sentenced him to five years in prison. Gideon sought redress from the Florida State Supreme by asking for a writ of habeas corpus. Florida's State Supreme Court denied the remedy.[41] This time, however, the Supreme Court ruled in favor of the petitioner – Clarence Gideon.

Justice Black wrote for the unanimous Court. Much of Black's dissenting opinion in *Betts v. Brady* now became law. When the Court agreed to hear oral argument, it required the counsel, on both sides, to argue the merits of the Court's decision in *Betts v. Brady*.[42] The prevailing argument called for the reversal of the *Betts* decision. Black then declared that the Sixth Amendment must be applied to the states to protect the Due Process present in the Fourteenth Amendment. He went further to state that the Court got it wrong when it decided *Betts*. As he stated in his 1942 dissent, the Court ignored earlier precedent.[43] Black ended his opinion with the statement "Twenty-two States, as friends of the Court, argue that *Betts* was 'an anachronism when handed down,' and that it should now be overruled. We agree."[44]

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[40]Ibid., 337.

[41]Ibid., 337.

[42]Ibid., 338.

[43]Ibid., 341-343.

[44]Ibid., 345.

The significance of *Gideon* is not that it overturned a previous precedent, but that the Justices decided that the case had constitutional importance and had the final say on the constitutional issue. In *Gideon*, the Justices decided a constitutional question existed. In its decision, the Court went from being divided on the issue of Sixth Amendment rights to speaking with a unanimous voice. When reflecting on the decision, Earl Warren said "It interpreted the Constitution to say exactly what it said."[45] Not until after the Judiciary Act of 1925, did the Justices have the right or the authority to decide if a case had constitutional importance or have the final say on constitutional questions.

Conclusion

The year 1925 marked another pivotal moment in the history of the Supreme Court of the United States. Once again it took matters into its own hands and explored new ways of enhancing its authority on constitutional matters. The Court, under Chief Justice William Howard Taft, achieved the identity sought by those of the early national period. Under John Marshall, the Court assumed the authority to answer constitutional questions with its decision in *Marbury v. Madison*. The passage of the Judiciary Act of 1925, the Judges' Bill, gave the Supreme Court discretionary jurisdiction through the writ of certiorari. This new jurisdiction extended the authority of the Supreme Court from answering constitutional questions, to also deciding what constitutes a constitutional question is.

The actions the justices of the early national period created precedents and statures that further defined the Judiciary's role as an equal branch of government. The

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[45]Pollack, *Earl Warren*, 218.

justices changed the circuit riding requirements, adopted new opinion writing practices, and established judicial review. Each of these steps strengthened the authority of the Supreme Court. The amended circuit riding requirements created an atmosphere friendlier to justice. The new style of opinions gave the Court a strong unified voice. Lastly, the establishment of judicial review put the Court on equal footing with the other branches of government. Each of these achievements helped strengthen the Court from a relatively weak tribunal to the Court today, which interprets the highest law in the land.

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