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The Power Behind the Constitution: The Supreme Court.

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The Power Behind the Constitution: The Supreme Court

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ABSTRACT

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The framers of the Constitution designed a document to be the "Supreme Law of the Land" and within its pages a branch of government, a federal judiciary, never before envisioned. The Constitution, along with the Federal Judiciary Act of 1789, set the framework for building the strongest branch of government, the Supreme Court. Historical events and court decisions with few exceptions strengthened the power of the judiciary contributing to its authority. The Supreme Court Justices, by interpreting the Constitution and judging the legality of laws instituted by both state and federal legislatures, solidified its superior position in the government hierarchy. An examination of documents, case decisions, and the results of these decisions for the nation add credence to the assertion that of the three branches of government the strongest and most powerful was and is the Supreme Court.

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CHAPTER 1

INTRODUCTION

The citizens of the United States live in a country that has developed a unique set of laws by a government formed under a constitution written and adopted over two hundred years ago. Many Americans agree that for the most part they live in a good society; however, philosophers since Plato have sought to determine the nature and meaning of a "good society," a good state and a set of just laws.[1] Plato's political philosophy centered on the individual as the most important aspect of society, and he considered virtuous people as the core group of a political aristocracy that was a necessity for a competent ruling class. According to Plato, the ruling class required education and training.[2] Even the most astute observer of the process of policymaking, including laws and regulations, can not always distinguish which of the three branches of government in the United States is the most powerful.

The writers of the Constitution of the United States created a document that radically changed the Articles of Confederation, a document that had loosely united the colonies during most of the Revolutionary War. The "new" constitutional government was constructed with three branches of government; the executive branch consisting of a

[1] William S. Sahakian and Mabel Lewis Sahakian, *Ideas of Great Philosophers*, (New York: Barnes and Noble, Inc., 1966), 59.

[2] Plato, *The Republic*, trans. Desmond Lee (London: Penguin Books, 1955), 63.

President and Vice-President, the Congressional branch with a House of Representatives and a Senate, and a Federal Judiciary branch. The power and responsibilities of the legislative and executive branches were more clearly defined in the Constitution than were those of the judicial branch; yet the authors, many of whom were lawyers, perceived that a federal judiciary, a body to decide the power of federal law over state law, was extremely important. At the same time many, including Alexander Hamilton, professed publicly that it would be and perhaps should be the weakest branch of the government. In *Federalist* number 78, Hamilton wrote, "that the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution, because it will be least in a capacity to annoy or injure them."[3] Hamilton posited that because the legislature would have control of the purse and the executive the sword, the power of the judiciary would effectively be reduced. Hamilton, professing this belief, relied on the writings of Montesquieu, "Of the three powers above mentioned, the Judiciary is next to nothing."[4] Hamilton continued his argument stating individual oppression might come from the court on occasion but fear for the general liberty of the people was unnecessary from a federal judiciary separated from the other branches.[5] Hamilton further explained the judges would be required to consider and uphold the Constitution of the United States as the fundamental law of the nation and thus be expected to interpret laws made by the legislative branch with these criteria in mind.[6]

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[3] Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, with an introduction by Clinton Rossiter (New York: The New American Library, 1961), 465.

[4] Charles Montesquieu, *Spirit of Laws*, trans., Thomas Nugent (New York: Colonial Press, 1899), 186.

[5] Hamilton, 466.

[5] Hamilton, 467.

Also Hamilton wrote in number 78 *The Federalist Papers* that the Supreme Court would be an intermediate body between the people and the legislature in order, among other things, to keep the legislature within the limits of authority it was assigned by the Constitution. Hamilton perceived that establishing a federal Supreme Court was essential for the new republic in order for the principles of justice interpreted from the Constitution to be uniformly applied throughout the emerging nation.[7] In order to further understand the importance of a federal judiciary it is necessary to begin with a clearer understanding of the importance of law for the colonial mindset and how that mindset developed in the growth of power that has made the Supreme Court the most powerful branch of the government in the United States.

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[7] Stephen P. Powers and Stanley Rothman, *The Least Dangerous Branch?: Consequences of Judicial Activism* (Westport, Conn.: Praeger, 2002), 17.

CHAPTER 2

THE CREATION OF A NATIONAL CONSTITUTION

Once the colonists secured independence from England forming what would be a new nation the major concern of those who wielded power was how the new alliance would be organized to conduct the business of nationhood. All of the colonies had legislative bodies that had made local and colonial laws supposedly under the auspices of the English King and Parliament. The citizens of the colonies had an obsessive suspicion of any political power that operated from a distance, especially after the problems developed between England and the colonies had escalated into the Revolutionary conflict. The era of the American Revolution was a period of political paranoia.[1]

Many in the colonies sensed that a powerful central government would merely duplicate the principles of monarchy and the aristocracy they were attempting to separate themselves from.[2] A great many leaders, along with the average colonial citizen, were educated in the history of the British monarchy and English Constitutional law. The emergence of colonial voices in the legislatures of the colonies questioned the belief that a King ruled by Divine Right and that he had no equal within his realm. These voices culminated in the words which are a crucial part of the Declaration of Independence; "All men are created equal with unalienable rights including life, liberty, and the pursuit of happiness and that these rights must be protected by a government derived from the

[1] Lance Banning, "Republican Ideology and the Triumph of the Constitution, 1789-1793," *William and Mary Quarterly*, Third Series, Vol. 31, No. 2 (Apr., 1974), 171.

[2] Joseph J. Ellis *Founding Brothers: The Revolutionary Generation* (New York: Alfred A. Knopf, 2001), 7.

consent of the governed." Many of the grievances against England that were stated in the Declaration of Independence concerned the making and enforcing of laws, the administration of justice, and the powers of legislative bodies in the various colonies.

Once the colonies ratified the Declaration of Independence and war had commenced, the members of the Continental Congress began the job of writing a document in order to provide a legal framework for the Union of Free and Independent States. The document they proposed would be enforceable as the law of the new union. Even though John Dickinson had refused to sign the Declaration of Independence, he was appointed head of the committee to propose the new government. Dickinson proposed a strong central government, one having control over the western lands, having equal representation for the states, and having the power to levy taxes.[3] Members of the Continental Congress drastically changed the Articles before sending them to the states for ratification because of the fears presented by relinquishing local power to a strong central government. Under the Articles each state kept its sovereignty and the functions of the federal government were carefully specified and extremely limited. Despite these limitations on the power of a federal government, it took from November, 1777 until March, 1781 for the final ratification of the Articles of Confederation. The ratification took place only seven and one half months before the surrender of Lord Cornwallis and the British Army at Yorktown on October 19, 1781.[4]

Over the next several years state and federal leaders realized that the Articles of Confederation contained many defects. John Jay admitted that, "our federal government

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[3] *Articles of Confederation and Perpetual Union* 1777, http://www.barefootsworld.net/aoc1777.html accessed 8 December 2006. 1.

[4] *Articles,* 2.

has imperfections, which time and more experience will, I hope, effectually remedy."[5] In a letter to Edward Carrington, Thomas Jefferson wrote that "with all the imperfections of our present government, it is without comparison the best existing or that ever did exist."[6] Yet there were enough disorders in the states by the more democratic, radical elements to convince most conservative, wealthy state leaders that a stronger federal government was needed. These conservative-minded men were ready to give up a measure of state sovereignty to protect their property and wealth.

The navigation of interior waterways was by 1785 becoming a national problem and asserted itself with negotiations between Maryland and Virginia concerning the Potomac River. The plans for expanding use of the waterway for westward moment also involved Pennsylvania. George Washington, who was involved with the project, hosted a meeting of commissioners from Maryland and Virginia at Mount Vernon in March, 1785 and a compact was ratified and forwarded to the state's assemblies. Even though James Madison had not been present at the conference he led the fight for its adoption in the Virginia State Legislature. Madison was aware of the need for a larger conference with more states being represented and had discussed this possibility with Washington.[7]

After the adoption of the Mount Vernon resolution by Virginia, James Madison devised a plan calling for another convention, one that would have national consequences, in Annapolis. Not wanting to draw suspicion about nationalistic causes behind the call for a convention, Madison coyly attributed the proposal to John Tyler.

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[5] John Jay to Lord Landsdowne, 16 April, 1786. *Correspondence and Public Papers of John Jay,* Vol. 3, ed. H. P. Johnston (New York: G.P. Putnam's Sons, 1890-93), 188-190.

[6] Thomas Jefferson to Edward Carrington, 4 August, 1787. *Writings of Jefferson*, ed. Paul Leicester Ford (New York, G.P. Putnam's Sons, 1892-99), 423-425.

[7] Richard B. Morris, *Witnesses At the Creation: Hamilton, Madison, Jay, and the Constitution* (New York: Holt, Rinehart and Winston, 1985), 163.

The proposal was passed by the Virginia legislature, who then appointed commissioners to join delegates from other states in Annapolis, Maryland for the purpose of forming trade regulations promoting the general interests of all. While Madison indicated to intimate friends his bold objectives of changing the Articles of Confederation, he gave the outward appearance of one who thought they could be mended. Commissioners from only five of the thirteen states reached Annapolis for the conference and Maryland decided not to send delegates considering the meeting as transgressing the powers of Congress. James Madison arrived at Annapolis early and immediately sought the whereabouts of Alexander Hamilton, who did not arrive for three days. The two men had several private meetings about the upcoming conference, and each man sought out the other delegates for conversational meals where proposals and objectives for the genera meeting were discussed. When the meeting convened only twelve delegates representing five states were present, and they realized it would be useless to proceed. However, the convention unanimously adopted a proposal to be sent to Congress calling for a Convention to meet in May for the purpose of correcting defects in the Articles of Confederation, thus the Annapolis trade convention led directly to the call for a federal convention.[8] Congress referred the proposal to committee and after four months cautiously endorsed the proposal. Congress described the purpose for the convention as "for the sole and express purpose of revising the Articles of Confederation and reporting in Congress and the several legislatures such alterations and provisions therein."[9]

[8] Max Ferrand, "The Federal Constitution and the Defects of the Confederation," *The American Political Science Review,* Vol. 2, No. 4 (Nov., 1908), 533.

[9] Morris, 165-68.

Prior to the scheduled meeting in Philadelphia an insurrection in Massachusetts known as Shay's Rebellion illustrated both the economic problems the nation was facing and the growing disunity among the citizens of the various states. The insurgents, some two thousand farmers, conspired in an effort to close the Massachusetts state courts in order to stop sheriff's auctions and prevent farm foreclosures. Although the rebellion was brought under control rapidly, similar but less militant movements in other states symbolized for some how fragile the nation was under the Articles.[10] The convention had been convened to revise the Articles in order to make them adequate and to preserve the union between the states. Among the list of defects of the government under the Articles of Confederation compiled from writings of the delegates prior to the meeting are several concerned with judicial powers.[11] Under the Articles there was no separate federal judicial branch of government and the only judicial authority Congress possessed was the power to arbitrate disputes between states.[12]

The members of the Constitutional Convention included more than twenty men trained in the law with several being judges of the Supreme Court in their respective states and one, George Wythe, a professor of Law at the University of William and Mary in Virginia.[13] Because of their legal training, some of these men realized one of the main problems they faced was establishing adequate safeguards for private rights along with placing adequate power in the hands of a national government.[14] Most of these men were

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[10] Ron Chernow, *Alexander Hamilton* (New York: Penguin Books, 2004), 225.

[11] Ferrand, 536.

[12] "Articles," 4.

[13] "The Framers of the Constitution," http://usconstitution.net/constframe.html accessed 2 June, 2006, 1-8.

[14] Edward S. Corwin, *Essays on American Constitutional History*, eds. Alpheus R. Mason and Gerald Garvey (New York: Harper and Roe, 1964), 1.

educated in the democratic philosophy of Jean Jacques Rousseau. Rousseau favored a republican form of government ruled by laws afforded their power by a government of popular elected officials.[15] In most respects the framers of the Constitution were concerned with laws; especially how they would be made, judged, and enforced. The tone of the proceedings changed drastically once the delegates decided it was impossible to fix the Articles of Confederation and the only solution was to write a new document. The delegates decided to meet in secret committees behind locked and guarded doors because of the nature of their work and the fears they knew were present in the people. Because of the major influence Thomas Jefferson had on the writing of the Declaration of Independence it is of some importance to note that he was not present at the time of the Constitutional convention but in France where he was quite upset about the fact that everything was being done in secret and to a lesser extent so were John Jay, who remained in New York but lobbied the delegates at the convention when possible, and John Adams, in London.[16]

In correcting the defects in the Articles of Confederation by writing the new constitution the authors only "check upon state legislation" was the provision in Article VI that State Constitutions or laws shall not interfere with the "Supreme Law of the Land."[17] The idea of a "government of laws and not men," proposed by James Harrington in 1656 in *Commonwealth of Oceana* influenced the writers of the Constitution. Harrington explained that law "is a legal limit on government; it is the

[15] Sahakian, 73-74.
[16] Morris, 186-188.
[17] Ferrand, 540.

antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law."[18]

After many comprises the Committee of Style wrote the final draft of the Constitution, with the preamble and obligation of contract clauses being written by Gouverneur Morris of New York.[19] Even though the Articles of Confederation had been adequate to a small degree for the country during the Revolutionary War it had become unworkable for the group of states in order for them to grow and become a viable entity in the world. The struggle at the Constitutional Convention would be one over where the power of government should reside; with the individual states or with a strong, powerful central government. A large number of those who had observed the problems under the Articles of Confederation realized that if the fledgling nation was going to survive, it needed to unite with a strong federal government rather than align themselves as thirteen independent entities in a federation.[20]

Americans had grown accustomed to enjoying a wide array of liberties under the distant regulations of the English monarchs until the reign of George III. These liberties were tightly bound in the colonial laws and constitutions governing the various colonies. The Massachusetts Body of Liberties of 1641 influenced a large number of colonial governments because it guaranteed freedom of speech and petition at public meetings, the

[18] Jethro K. Lieberman, *The Enduring Constitution: A Bicentennial Perspective* (New York: Barnes and Nobles, Inc., 1966), 73-74.
[19] Lieberman, 13.
[20] Morris, 200.

right of counsel, trial by jury, and the same justice and law for every person.[21] After the French and Indian War, England restricted the colonial courts thus making some of the laws moot precipitating the colonists revolt. The writers of the Declaration of Independence attempted to make legal the revolt against the authority of English rule and law. The framers of the Constitution proposed a document making it the foundation around which a central power would control through laws produced by a legislative body, enforced by an executive body, and adjudicated by a Federal Judiciary whose purpose was to interpret the meaning of the Constitution, intended to be the "Supreme Law of the Land," enforceable by the courts. It became a symbol of national loyalty and evoked both emotional and intellectual support from Americans. It stood for liberty, equality before the law, and limited government and was considered a part of the American creed. The Constitution was designed as a supreme and binding law that both granted and limited powers and with the establishment of a federal court system would insure uniformity of judgments concerning federal laws.[22]

When the deliberations in Philadelphia were made public there arose a storm of protest and condemnations of the actions taken at the convention. Opposition was not limited to the judiciary article of the Constitution but extended to the whole document. Remembering how long it had taken to ratify the Articles of Confederation, the delegates had provided that once two-thirds of the state conventions had approved it would take

[21] Joyce Appleby, "The American Heritage: The Heirs and the Disinherited," *Journal of American History* (December, 1987), 808.

[22] Sanford Levinson, *Constitutional Faith* (Princeton, N.J.: Princeton University Press, 1988), 47-52.

effect. No provision of the Constitution was subjected to more severe condemnation and subjected to greater fears and apprehension than the article on the judiciary. What a large number of people were troubled about was principally the relationship of the lower federal courts to existing state tribunals. Most gave little thought to the power the Supreme Court would have in declaring laws unconstitutional.[23]

[23] Leo Pfeffer, *This Honorable Court: A History of the United States Supreme Court* (Boston: Beacon Press, 1965), 26-27.

CHAPTER 3

THE FEDERALIST PAPERS AND RATIFICATION

In establishing American nationhood the first step had been the Declaration of Independence and the final declaration was the ratification of the Constitution of the United States. George Washington subscribed to the belief that the republic to be established by the Constitution created a government of laws that must be obeyed once the duly elected representatives had reached a decision.[1] Anticipating that many politicians would be anti-federalists, the signers of the Constitution provided for state ratification by popularly elected conventions and stipulated the Constitution would go into effect as soon as nine states ratified. Although Alexander Hamilton, an aristocrat and plutocrat, signed the Constitution, he did not have complete faith in the liberties it secured, and he favored rule by an elite made up of the rich.[2] Hamilton was present for only part of the Constitutional debates because with him was two anti-federalist delegates from New York who constantly overruled his opinions, hence he became frustrated and left the convention to return in July and for part of August.[3] When Hamilton returned to the convention the other two delegates had returned to New York to report to Governor George Clinton who was opposed to the new Constitution. Hamilton was the only

[1] Joseph J. Ellis, *Founding Brothers: The Revolutionary Generation* (New York: Vintage Books, 2002), 145.
[2] Richard Brookheiser, *Alexander Hamilton: American* (New York: The Free Press, 1999), 4.
[3] Brookheiser, 62.

delegate from New York to sign the document. He realized the importance of the ratification of the new Constitution for the nation and was aware of the opposition in New York backed by Clinton.[4]

Almost immediately, Alexander Hamilton began a campaign in New York to assure ratification of the Constitution. Hamilton persuaded and plotted and bullied his fellow New Yorkers to obtain a narrow margin in the convention aided immensely with the addition literary contributions he proposed. Hamilton conceived the idea of a series of twenty-five essays to be published and distributed in New York explaining the merits and meaning of the Constitution. He first asked Gouverneur Morris to be a contributor but Morris declined. His second choice was William Duer but Hamilton reconsidered and decided to commission John Jay and James Madison, who both accepted.[5] Jay, who had served as minister to Spain, was not among the delegation that framed the Constitution because Clinton did not appoint him, possible because as President of the Congress under the Articles of Confederation in 1779 Jay had espoused the cause of national supremacy. No doubt Hamilton knew of Jay's life of subterfuge having been the organizer and operator of a spy ring during the Revolutionary War. Jay had drafted the New York State Constitution which clearly reflected the constitutional ideas of John Adams, who helped write the Massachusetts state constitution and believed in a strong central government.[6] Madison and Hamilton had already plotted and led the fight for a vastly expanded national government with sovereign power over the states making Madison a good choice

[4] Brookheiser, 68.
[5] Brookheiser, 69.
[6] Morris, 71-74.

to aid in battling for ratification in both New York and his home state of Virginia.[7] The essay project when completed would contain a total of eighty-five essays, most being written by Hamilton. However, the authorship of the essays would remain anonymous with all scribers using the pseudonym Publius. The essays became known collectively as *The Federalist Papers.* These essays while only a part of the material used by Federalists in their quest to secure ratification of the constitution have become an integral part in legal interpretations of the meaning the founding fathers intended in the words of the document.[8]

While there were several areas of contention in the Constitution some needed to be explained and defended in more detail than others. The essays written by John Jay and James Madison, both lawyers, add insight into the arguments being debated about the organization of the government under the Constitution. Most realized once the Constitution was ratified it would become the "Supreme Law" of the land and the citizens would need to be educated about what it encompassed. The Constitution had been designed to create a government eliminating many of the problems apparent during the years under the Articles of Confederation. One shortfall, specifically the lack of a federal judiciary as part of a strong central government, had created both internal and external problems because there was no court in which to settle disputes between states or between states and a foreign government. Each state maintained its

[7] Ellis, 54.
[8] Morris, 78-80.

own court system and was unresponsive to the interests of another state. Treaties made by one or by Congress under the Articles of Confederation were often ignored in the courts of any other state.[9]

Furthermore, Alexander Hamilton, a prominent lawyer, acknowledged along with many others the importance of a strong judiciary although he realized a number of people feared such an overpowering national judiciary, believing it had the potential to dictate to the states. Hamilton and others perceived the need for a strong federal judiciary as an aid in the instruction and understanding of the new Constitution. Among the delegates at the convention had been thirty-four lawyers trained in English common law as expounded by seventeenth and eighteenth century jurists.[10] Given the abuses of the English monarch and Parliament, the framers of the constitution believed other institutions were more likely to aggrandize power than the courts.[11] In number 22 *The Federalist Papers*, Hamilton points out one of the defects of the Articles as a lack of a federal judiciary needed to expound and define the true meaning and operation of laws. He continued that treaties to have any force had to be considered the law of the land and their import had to be ascertained by judicial determinations submitted in the last resort to one "Supreme Tribunal."[12] The language Hamilton used in writing the *Federalist* number 78 was calculated to minimize suspicion and fears of a federal court,

[9] Morris, 162.
[10] Brookheiser, 170.
[11] Stephen P. Powers and Stanley Rothman, *The Least Dangerous Branch: Consequences of Judicial Activist* (Westport, Conn.: Praeger, 2002), 3.
[12] Hamilton, *Federalist*, 150.

although he held the belief that a strong and independent judiciary was necessary to maintain the integrity of the Constitution.[13] Hamilton believed the judiciary's complete independence was essential because the legislature could not be the constituted judge of its own powers without compromising the legality of laws. He visualized the courts as an intermediate body between the people and the legislatures in order to keep the legislature within bounds, and he denied this role placed the judiciary in a superior position to the legislatures.[14]

Additionally, John Jay, who had served two years on the Supreme Court of New York, was sensitive to the fears shared by many Anti-federalists of a large federal judiciary administering a body of federal common law and in the process undermining state court authority.[15] Jay also realized the necessity of a strong central government from his experience as President of Congress in 1779, when he took the position that the Articles of Confederation ratified by most states was a functioning body and stressed the supremacy of the judicial rulings of the Congress over those of the state courts. Jay drafted the resolution in 1787 on the supremacy of treaties and supported enlarging the power of Congress concerning powers of taxation and regulation of commerce.[16] In a 1786 letter to Thomas Jefferson, Jay wrote of his displeasure with having a legislative, an executive, and a judicial power vested in one body and

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[13] Morris, 46.
[14] Morris, 47.
[15] Morris, 50 Pfeffer, 37.
[16] Morris, 190.

concluded that these powers should be forever separated and distributed in such a way as to serve as checks and balances on each other.[17] In *Federalist* number 3, Jay argued concerning the necessity of treaties and continued by saying the framers demonstrated wisdom in placing the interpretation of treaties under the jurisdiction and judgment of the courts appointed by and responsible to one national government, however, in his final draft he omitted the phrase "national courts."[18] In Article III of the Constitution, the delegates side stepped the issue of courts, creating a Supreme Court and what other inferior courts the Congress might ordain and establish. Jay again argued the need for a strong central government instead of thirteen disunited states or several confederacies that might open the nation to invasion by outside forces and collapse. He completed his argument stating one nation would more ably provide a strong defense and reestablish public credit.[19] A continuing question which the authors of *The Federalist Papers* carefully avoided was which of the three branches of the national government might have the potential for becoming stronger than the others.

The third contributor to the essays was James Madison whose initial centralizing plan of government, with some important compromises, was the one finally adopted at the Constitutional Convention. Madison proposed that the national supremacy be extended to include a judiciary department with appeal to the national tribunal in all cases concerning foreigners or citizens of other states and an assumption

[17] Morris, 191.
[18] Jay, *Federalist*, 43-44.
[19] Morris, 51.
[20] Morris, 196.

by the national judiciary of all cases involving admiralty disputes.[20] During the convention procedures, Madison participated in many debates and kept the most careful records of what was said and done that are available. He contributed twenty-nine essays to *The Federalist Papers* and was a principal leader defending and supporting ratification of the Constitution in Virginia where the convention was evenly divided. After heated debates with Patrick Henry, the main Anti-federalist and adversary of a federal judiciary, the Virginia Convention followed Madison and unconditionally ratified the Constitution.[21] In *The Federalist* number 51, Madison wrote, "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[22]

Although *The Federalist Papers* were published in New York, the state did not ratify the Constitution until after it was considered in operation because nine states had accepted it. In other states various pamphlets and other propaganda was used by both those for ratification and those opposed. John Adams was a driving force for ratification in Massachusetts and federalist groups were lead by prominent individuals in other states. The thirteen states had agreed to a division of power relinquishing authority to a central power for common purposes.[23] Now would begin the task of

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[21] Morris, 238 and Ellis, 52.
[22] Madison, *Federalist,* 322.
[23] Corwin, 147.

setting up the government and strengthening its powers to consolidate the individual interests of the states in order to remain a viable entity and increase the respect and influence of the country around the world. The process naturally began with the election of the members of Congress and the election of a chief executive, George Washington.

CHAPTER 4

THE JUDICIARY ACT OF 1789 AND THE PRE-MARSHALL COURT

In writing the Constitution the framers merely authorized Congress to establish federal courts working below the level of a Supreme Court. The number of members in both federal courts and the Supreme Court was not set but left to the discretion of Congress to decide. The Constitution offered little guidance on how to structure the federal judiciary system. Article III of the Constitution concerned the judiciary and was the shortest but significant in that it was designed to insure a rule of law freed from political pressure by proposing life tenure for Supreme Court Justices.[24]

One of the main orders of business for the first Congress was to establish a federal judiciary with lesser courts. A Senate committee was appointed to write a proposal for the new court system. William Paterson, a delegate at the Constitutional Convention, and Oliver Ellsworth, later Chief Justice of the Supreme Court, were the main contributors to what would become the Judiciary Act of 1789. The Act was approved September 24, 1789, and established the judicial courts for the United States.[25]

The Act established a three-level court system with the top tier being the Supreme Court consisting of a Chief Justice and five Associate Justices with any four being a quorum and court sessions scheduled twice a year. The United States was divided into thirteen districts, one for each state, with each district court having original jurisdiction of

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[24] John E. Semonche, *Keeping the Faith: A Cultural History of the Supreme Court* (Lanham, Md.: Rowman & Littlefield Publishers, 1998), 25.

[25] Scott Douglas Gerber, ed. and intro., *Seriatim: The Supreme Court Before John Marshal* (New York: New York University Press, 1998), 18.

all suits that under the Constitution could be brought in federal courts, with the exception of those that could be brought directly to the Supreme Court. Each district would have one judge who should reside in the district for which he was appointed and hold session four times a year or more at the discretion of the judge. The districts were combined into three circuits; the eastern, the middle, and the southern circuit with each circuit to convene twice a year and have present any two Supreme Court justices and the district justice, a quorum being met by the presence of any two. Specific dates were set for each court session to convene. Oaths or affirmations required for clerks, judges, and justices were outlined in detail in the Judiciary Act.[26]

Another section of the Act provided for an attorney-general to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned and to give advice and opinion upon questions of law when required by the President or when requested by the heads of any of the departments.[27] The legislature shaped the courts with an understanding that the judiciary would help in charting the path of governmental policy.[28] The legal suits and actions that could be presented in each of the courts were spelled out clearly designating the legal jurisdiction of each court. The duties and responsibilities of marshals, deputies, and the attorney-general were explicit.
The superiority of federal powers over those of the states was defined. Ellsworth and Paterson resorted to obscure and legalistic jargon in section twenty-five of the Act to

[26] Pfeffer, 34.
[27] *The Judiciary Act of 1789,* http://www.constituions.org/uslaw/judiciary1789.htm accessed 5 February, 2008, 11.
[28] Robert McCloskey, *The American Supreme Court* (Chicago: University of Chicago Press, 1960), 17.

empower the Supreme Court with the power to declare unconstitutional any law enacted by Congress or state legislatures it perceived as outside the limits of the Constitution.[29] The first stage of becoming a nation was winning the war for independence, the second stage was creating a federal government supreme over all rivals within the sphere of power and the final stage would be the application of the weighty principals for the nation.[30]

With the passage of the Judiciary Act of 1789 the work of the Congress in establishing the federal courts was finished and the next step in establishing the courts would be up to George Washington and those he would nominate for the high court. Washington had the unique opportunity to select all the members of the federal judiciary. The responsibility of choosing the five associate justices and the chief justice, he took stoically because he believed that "the due administration of Justice was the strongest cement of a good government."[31] Washington relied on seven criteria in choosing his nominees for the court. First, they must support the Constitution and be an advocate for the Nation. They must have had distinguished service in the Revolution and be an active political participant in their state or the nation. Washington wanted each justice to have some judicial experience along with a favorable reputation with his fellows and wanted those he might have personal ties with. Appointees had to love their country and have some geographic suitability for the job.[32]

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[29] Pfeffer, 33.
[30] McCloskey, 67.
[31] Gerber, 5.
[32] Pfeffer, 38-39.

After careful deliberation George Washington selected John Jay as the first Chief Justice of the Supreme Court. The time Jay would spend on the bench coincided with a particular volatile phase of the revolutionary process, the period after formal adoption of a contested and some thought illegal Constitution and before the citizenship would be educated about the documents. Before taking office in 1789, Jay had argued that "due distribution" of power required cooperation between the executive and jurists in a similar fashion as New York's council of revision.[33] In order to strengthen the court and the nation Jay needed to interpret the vague language in the Constitution regarding the role the court possessed in governing the nation. The entire judiciary system lacked legitimacy because there was no immediate institutional antecedent for its existence. Some sections of the Judiciary Act and the Process Acts were being closely scrutinized by the legislature and every action the court took needed to be one that would increase its power and authority.[34]

John Jay came to the court with excellent credentials. He was admitted to the bar in New York in 1766 and served in both the First and Second Continental Congresses. Under the Articles of Confederation he served as President and helped draft the New York Constitution. He helped negotiate the Paris Peace Treaty ending the Revolutionary War. While not a delegate at the Philadelphia convention he was an active participant in the ratification process in New York. He was aware of the problems the nation had under the Articles of Confederation and supported the new government. He believed the

[33] Sandra Frances Van Burkleo, "Honor, Justice, and Interest: John Jay's Republican Politics and Statesmanship," *Seriatim*, 29.

[34] Burkleo, 28.

country needed a strong government of decisive federal institutions and laws "ably administered" by a wise minority.[35] For a short while in 1789 Jay served simultaneously as Chief Justice and Secretary of State until Thomas Jefferson returned from France and accepted Washington's nomination. This dualism of jobs was acceptable at the time because of the needs and priorities of the nation.[36]

Other members of the first court appointed by Washington were John Rutledge, William Cushing, James Wilson, John Blair, and Robert H. Harrison. Justice Harrison resigned because of ill health before setting on the court. John Rutledge was a delegate to both the First and Second Continental Congresses. In 1776 he aided in the writing of the South Carolina Constitution and served as a delegate at the Constitutional Convention in 1787. He proposed a more restricted federal judiciary wanting only one Supreme Court and no lesser courts. He professed judges should never give their opinion on a law until it came before them.[37]

William Cushing was the third justice appointed by Washington in 1789. His judicial career spanned fifty years and he served in nine judicial positions. He did not attend the Constitutional Convention but was a major factor in the ratification process in Massachusetts. Cushing presided over most of the ratification sessions in Boston as the Chief Justice of Massachusetts. He made a series of grand jury charges that were designed to educate the public about the need for ratification of the new government. He

[35] Burkleo, 37.
[36] Burkleo, 45.
[37] James Haw, "John Rutledge: Distinction and Declension," *Seriatim,* 78.

would be a major participant in strengthening the power of the federal judiciary during his service on the bench.[38]

Another appointment Washington made was James Wilson, a signer of both the Declaration of Independence and the Constitution. Only James Madison exerted more influence over the Constitution than did James Wilson. At the convention he was a powerful voice for an independent judiciary. In law lectures Wilson expressed clear expectations for the right of the judiciary to review the legality of laws instituted under the Constitution. He believed the Supreme Court was in the position to check Congress because the justices were trained in the complex legal matters and were insulated from popular passions. He was a leading member of the ratification constituency in Pennsylvania.[39]

John Blair from Virginia rounded out the appointment on the first court. He was a delegate at the Constitutional convention and had served on the court in Virginia in 1779. Under the state constitution of Virginia, Blair defended judicial review as policy important to the separation of powers. At the time, the question of the power of judicial review was not controversial. At the Constitutional Convention Blair advocated a strong independent judiciary with life tenure for the justices. He backed the idea of a well

[38] Scott Douglas Gerber, "Deconstructing William Cushing," *Seriatim,* 87.
[39] Mark D. Hall, "James Wilson: Democratic Theorist and Supreme court Justice," *Seriatim,* 131.

articulated system of federal courts with admiralty jurisdiction, with power to judge cases between citizens of different states, and with states as the defendants.[40]

After the resignation of Robert Harrison, George Washington selected James Iredell from North Carolina to serve on the Supreme Court. He was not a delegate at the Constitutional Convention but supported the new Constitution and worked for ratification in North Carolina. North Carolina rejected the Constitution and remained independent until after the first election before finally ratifying the Constitution in November 1789. James Iredell at thirty-eight was one of the youngest judges to serve on the federal court. He supported the idea that the powers of the Assembly were limited and defined by the Constitution. To him the Constitution was the fundamental law, and unalterable by the legislature and for that reason an act must be voided that was inconsistent with it. Iredell believed it the responsibility of the judges to make sure every act of the Assembly they presumed to enforce was warranted by the Constitution and not usurped discretionary powers but only those assigned them by their constituted offices.[41]

The Judiciary Act of 1789 established the federal court system with specific guidelines including the establishment of districts with each state assigned one resident federal district judge to hear revenue and prize cases. A circuit was assigned to each Supreme Court Justice who was responsible for presiding over two courts a year in each state in his circuit. The act established the dates for Supreme Court sessions to

[40] Wythe Holt, "A Safe and Conscientious Judge: John Blair," *Seriatim,* 164.
[41] Willis P. Whichard, "James Iredell: Revolutionist, Constitutionalist, Jurist," *Seriatim,* 202.

commence and restricted jurisdiction to the court in cases where a state was the defendant.[42]

These men appointed by Washington and confirmed by the Senate serving as judges sitting on circuit court were how the American people became acquainted with the new institution of government and the federal judiciary. Through charges given to grand juries, the public came to understand the principles of the new Constitution and the government it established. The justices on these early courts each wrote and delivered orally their individual opinions on a case in what is considered Seriatim opinion writing. Over the first decade the jurisdiction and power of the court would be expanded and defined by judgments these justices made.[43]

An early incident between Congress and the Court helped to clarify the judiciary's role in the new governmental structure. In 1792 there was a continuing problem concerning pension claims by veterans of the Revolutionary War. The Secretary of War and his department were overloaded with claims and asked the Congress for help. In April the Congress told the federal justices that it would be their duty to hear and assess the viability of pension claims and to forward the results to the Secretary of War where they were subject to reversal. Justice John Blair riding circuit in Pennsylvania refused to hear the cases judging the order unconstitutional because the separation of powers forbade judges opinions from being subject to reversal by members of other branches of the government. Justice Blair concluded the act was radically inconsistent with the

[42] *Judiciary Act,* 10.
[43] Gerber, Intro. *Seriatim,* 16.

independence of judicial power--so strictly observed by the Constitution. Other justices followed his judgment and the Congress changed the procedure for assessing veteran claims.[44]

Standing firmly on its belief in the separation of powers, the Supreme Court refused a request by George Washington for advice on the neutrality laws in relation with supplying aid to France in a conflict with England. The justices concluded their power lay with making judgments on suits brought before them that concerned the treaty and not in interpreting the merits of a treaty. They accepted that if the congress approved a treaty then it was part of the law for all states and infractions could and should be judged by the federal court.[45]

The first full scale constitutional law decision the court decided was in a dispute originating over debts incurred during the Revolutionary War. In this case Chisholm, a resident of North Carolina, brought suit against the state of Georgia in the federal court. The judges referred to Article III, Part 2, and Section 2 of the Constitution that stated the Supreme Court had original jurisdiction in all cases where a state was one of the parties involved in the suit. The case presented a conflict between federal jurisdiction and state sovereignty. The court ruled in favor of Chisholm. The decision contributed to the power of the federal court to act as judges in cases involving non-residents suing a state constraining the actions of individual states, thus limiting the power of states. James Wilson concluded that a state could be sued and John Jay explained the Constitution gave express reference to federal jurisdiction in the case. John Blair concurred with the

[44] Holt, *Seriatim*,174, Pfiffer, 48.
[45] Pfiffer, 49.

Constitutional argument for hearing the case. James Iredell was the only justice to write a negative opinion of the action. The immediate consequences of the decision was Congress took action that lead to the enactment of the eleventh amendment, taking away jurisdiction from the court in such cases. It was the first instance in which a Supreme Court decision was superseded by a constitutional amendment.[46]

The Supreme Court during Washington's presidency evolved slowly and despite continuous changes of the judges, the court early established a primary place in the federal government. John Jay resigned from the position of Chief Justice in order to negotiate a treaty with Great Britain. President Washington appointed John Rutledge as Chief Justice. Rutledge had been on the court earlier and had resigned but gladly returned as Chief Justice. His tenure as Chief Justice was short lived because the Senate refused to confirm the appointment when it reconvened. Washington's final two appointments to the Supreme Court were Oliver Ellsworth, who was appointed Chief Justice, and Samuel Chase from Maryland. Ellsworth was a member of the original committee to write the Judiciary Act and the person chiefly responsible for crafting the act.[47] At the Connecticut ratification convention, Ellsworth explained that the judicial department would restrain both the Congress and the states from being able to destroy the Constitution.

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[46] Gerber, 108, and Kermit L. Hall, ed. *The Oxford Companion to The Supreme Court of the United State* (New York: Oxford University Press, 1992), 144.

[47] Justice Henry B. Brown, in 1911 at an American Bar Association meeting said the act was "probably the most important and the most satisfactory act ever passed by Congress."

During the first years of the court, the justices heard only a few cases, but some were of importance to the new nation and the establishment of the federal judiciary. In 1794 Congress enacted a law entitled, "An act to lay duties upon carriages for the conveyance of persons." The law assessed a tax on each carriage owned by an individual or business. The Constitution stated that Congress could not impose a law that was a direct tax but only a law that was an apportioned tax, meaning one accessed according to the population and the number of representatives from each state. Daniel Hylton viewed the carriage tax as a direct tax with the case being first heard in circuit court and then by Supreme Court Justices Samuel Chase, William Paterson, and James Iredell. The justices unanimously agreed that the carriage tax was an indirect tax therefore legal. Justice Chase in writing his decision interpreted the terms "tax" and "duty" in Article 1, Section 8, broadly, and concluded the carriage tax was an indirect tax. Justice Iredell argued that because the tax could not be apportioned if a state had no carriages then it was a direct tax "in the sense of the Constitution." In his seriatim opinion, Samuel Chase supported the judgment of the other justices. In the case of *Hylton v. United States,* the case before the Court was had Congress violated the Constitution and gone beyond its taxing and spending powers in implementing the tax. With their decision the Supreme Court upheld the taxing power of Congress and in this instance interpreted the meaning of the Constitution in a broad expansion of power.[48]

These early decisions of the Supreme Court not only strengthened the power of the central government and the Constitution but also established the court's own

[48] The Oyez Project, *Hylton v. United States*, 3 U.S. 171 (1796), http://www.oyez.org/cases/1792-1850/1796/1796_2/ accessed 28 December, 2007: Hall, 419.

authority. The case of *Chisholm v. Georgia,* concerning the possibility of a state being sued in federal court by a non-resident, brought to the front the question of states' rights. The court decided the non-resident had a right to bring a case in front of the federal court against the state of Georgia. Even the most ardent Federalist Congressmen could not fathom such power so soon. The Court had encroached too far on the authority of the states, and congress voted to overturn the decision through the only legal means available, a Constitutional Amendment ratified in 1798 preventing a private citizen from suing a state in federal court.[49]

Another national crisis concerning the authority and power of both the executive office and the Supreme Court occurred during the imposition and resistance to a federal mandated tax on whiskey. Alexander Hamilton, Secretary of the Treasury, in order to augment the national government's revenue from import duties recommended an excise tax on domestically produced whiskey. In March 1791, the Congress complied with the request and specified in the law that all trials concerning tax evasion were to be conducted in a federal court. The problem began in western Pennsylvania where anyone indicted for noncompliance was forced to travel three hundred miles to the federal court in Philadelphia. The accused then had to face a jury of unsympathetic easterners and in addition bear the heavy burden of the cost of the long journey and loss of wages plus court fines and penalties if found guilty. A United States Marshal was attacked by one hundred men while serving sixty delinquent taxpayers with summonses to appear in court

[49] Barbara Habenstreit, *Changing America and the Supreme Court* (New York: Julian Messner, 1974), 9.

in Philadelphia and soon more violence erupted. The chief revenue officer's house was burned by a crowd of five hundred after a shootout with federal soldiers assigned to protect him. Since Congress had closed its session after passing the new excise-enforcement law, the President, George Washington, had personal discretion to create the largest possible force to suppress what he perceived as a rebellious faction that might threaten the security of the nation. In order to invoke his powers under the Militia Act Washington needed the certification of a Supreme Court Justice acknowledging that law enforcement had truly failed in western Pennsylvania. Alexander Hamilton gathered documentation for presentation to Justice James Wilson, who made no independent investigation of the conditions in the west before he certified the call for troops.[50]

The legitimacy of calling out the militia against citizens was debated between the state of Pennsylvania and the Washington administration. Edmund Randolph, who as a delegate at the Constitutional Convention had argued for the creation of a strong national government with the power to put down insurrections, now urged Washington not only to delay action but to negotiate with the rebels. Randolph believed and rightfully so that Judge Wilson had irresponsibly approved the operation.[51] While some negotiations were attempted, in the end the militia was needed to suppress the resistance. Some of the cases stemming from the excise tax were heard in the federal district court but none were

[50] William Hogeland, *The Whiskey Rebellion: George Washington, Alexander Hamilton and the Frontier Rebels Who Challenged America's New Found Sovereignty* (New York: Scribner, 2006), 186.

[51] Hogeland, 189.

debated at the Supreme Court level. Justice Wilson by signing the order certifying the use of force in ordering up the militia strengthened the power of the federal government because it marked a milestone in determining limits on public opposition to federal policies, including those of the Supreme Court, the adjudicating part of the government.

By the end of George Washington's second term, the nation and the Supreme Court began to display signs of legitimacy to its citizens and the world. The powerful presence of the justices of the Supreme Court was a good educating force by explaining and interpreting the laws as set forth in the Constitution and those enacted by Congress. The pattern was set for judicial review of legislation that would become prominent during John Marshall's tenure as Chief Justice at the beginning of the nineteenth century. The power of the judiciary branch expanded in its first ten years of existence to a visible influence in the lives of the citizens of the United States by aiding in the consolidation of power in a central government and earning for itself the respect of confidence of the people.

CHAPTER 5

EXPANSION OF POWER: THE MARSHALL ERA

Before George Washington announced his retirement, a division of political views created dissension about the direction the federal government was to take and the rights and powers of the individual states. This division, stemming from the adoption of the Constitution, was between the Federalists, those who believed in a strong federal government, and the Anti-federalists, who supported less federal power and more sovereignty for the states. Adding to the discontent of the Anti-federalists was the negotiations and confirmation of the Jay Treaty designed to eliminate recurring problems with England left over from the Revolutionary War. It took Jay a year to negotiate a treaty that many citizens thought unsatisfactory and only with the prestige of Washington and the political skills of Hamilton was the treaty ratified after the entire debate and vote were held in secret. During the controversy, which could have had unfavorable consequences to the prestige of the Supreme Court, Jay was elected as governor of New York and resigned his position as Chief Justice.[1]

By the time of the presidential election of 1796, Washington appointed Senator Oliver Ellsworth of Connecticut, a principal author of the Judiciary Act, as Chief Justice of the Supreme Court. He also appointed Samuel Chase, chief judge of the Maryland general court, before the election of John Adams as president of the United States and Thomas Jefferson as vice-president.[2]

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[1] Pfeffer, 55.
[2] Pfeffer, 59.

Within a month after taking the oath of office, John Adams faced a possible dilemma with France. The French looked upon Jay's Treaty as the forming of an Anglo-American alliance and treated the United States with hostility and its representatives with disdain, believing there were surely secret portions of the treaty. The French Directory were threatening reprisals against American shipping interests and Adams, hoping to continue Washington's policy of avoiding actual involvement in the war between England and France, decided to send a three-man delegation to France. Along with Elbridge Gerry, a Republican proponent, Adams appointed two staunch Federalists, Charles Pinckney and John Marshall, a lawyer from Virginia. The delegation was treated with open contempt by the brokers for the French foreign minister, Talleyrand. During the meetings in France suggestions for the desire of money changing hands ended with Marshall sending an account of the French diplomatic tactics, along with the names of the extortionate intermediaries, known as X, Y, and Z, back to President Adams who reported it to Congress.[3]

Rumors began to spread more rapidly of a possible French invasion and the fear of enemy spies being present frightened many citizens. After a warning by President Adams of the dangers of foreign influence and the need to exterminate them, the Congress in 1798 passed a series of four laws collectively called the Alien and Sedition Acts. The Sedition Act made it illegal for anyone to speak or to write any false, scandalous, or malicious remarks against the president or the Congress. The Republican minority in Congress argued to no avail that the laws violated the First Amendment

[3] Pfiffer, 61.

which assured freedom of speech and freedom of the press. The act was condemned in many states and the legislatures of Virginia and Kentucky adopted resolutions declaring the law unconstitutional and as sovereign states they had the right to declare it unconstitutional. In Virginia there was talk of secession. What enraged the people was the part the judiciary particularly the Supreme Court Justices played in the enforcement of the act. While the Supreme Court never had the occasion to judge the constitutional merits of the act, many of the individual justices riding circuits vigorously enforced the act; the worst offender was Justice Samuel Chase.[4]

Following the elections of 1800 and the pending take over of elected Republican officials, including Thomas Jefferson as President, the Federalist Congress took steps to secure influence in the judiciary. When James Iredell resigned from the Supreme Court Adams appointed Bushrod Washington, a relative of George Washington, who was confirmed by the Senate. When Chief Justice Oliver Ellsworth resigned, only a month before Jefferson was to take office, Adams asked Jay to return to the court. Jay declined the offer partly because he had resigned in 1795 due to the onerous duties of riding circuit as part of the justices responsibilities under the Judiciary Act. Adams then turned to John Marshall, the Secretary of State, who had served him well in France and was a person who he respected and knew to be on the side of the Federalists. John Marshall's nomination was rapidly confirmed by the Senate that also passed an act expanding the Federal judiciary by adding twenty-three new judges and doubling the number of circuit

[4] Pfeffer, 64-65, and Brookhiser, 138.

courts, while cutting the number of Supreme Court Justices to five. The judges nominated by Adams were good choices and were confirmed with little opposition from the Republicans in the Senate.[5]

In addition to expanding the federal judiciary, the Congress on February 27 gave Adams the authority to create as many justices of the peace for the new District of Columbia as he saw fit. He quickly submitted for confirmation the names of forty-two justices and the Senate pushed through the necessary confirmations. On his last night in office, Adams signed the commissions and sent them to the State Department, where Secretary Marshall was to affix the great Seal before dispatching the appointments. At the time Marshall had not resigned his position as Secretary of State even though he had been sworn in as the Chief Justice of the Supreme Court. While most of the commissions reached the appointees, those of the new District of Columbia justices of the peace went astray. As a result of trivial slip-up, a fundamental principle of the Constitution, one that would affect the lives of millions of future Americans, would forever be established. The mistake of Secretary of State John Marshall would lead to Chief Justice John Marshall's first, and in the opinion of some historians the greatest decision, of his thirty-four years on the bench.[6]

Along with the election of Thomas Jefferson as President the Republicans won control of the House of Representatives and the Senate. Jefferson experienced few problems getting any initiatives or laws passed through the Congress, but the judiciary

[5] David McCullough, *John Adams* (New York: Simon & Schuster, 2001), 138 and Pfeffer, 69.
[6] John A. Garraty, "The Case of the Missing Commissions," *Quarrels That Have Shaped the Constitution,* ed. John A. Garraty (New York: Harper & Row, 1964), 3.

presented a more difficult problem. He considered proposing a constitutional amendment that would change the principle of life tenure for the justices. Jefferson succeeded in eliminating the second tier of the judicial system; the federal attorneys and marshals, thus giving Republicans full control of the access to the courts. Then he had the Judiciary Act of 1801 repealed placing the principle of lifetime appointments in jeopardy. In order to insure time to enact the repeal, the Republican Congress postponed the next session of the Supreme Court for a year. It was evident that Jefferson wished to revoke judicial appointment amendable to party politics.[7]

Some of the justices deposed by Jefferson's actions petitioned Congress for "relief," but were rejected. The Supreme Court had to meet in the office of the Clerk of the Senate because no one had designed a place for the court to meet. At every opportunity Marshall struck against the power and authority of the new President, his cousin. However, there were few occasions for him to do so. On one occasion Marshall refused to allow a Presidential message to be read into the record, stating that it would violate the principle of separation of powers by bringing the President into the court. In another action Marshall ruled Jefferson's action in a boat seizure incident was illegal. Marshall was ready to declare the Judicial Repeal Act unconstitutional, but none of the deposed circuit court judges brought a case to court. Marshall attempted to persuade his associates that it was unconstitutional for Supreme Court Justices to ride circuit as they must do again since the lower courts had been abolished by Jefferson. Although agreeing

[7] Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to George Bush* (Cambridge, Mass.: The Belknap Press of Harvard University, 1993), 73-74.

with his reasoning the other justices would not support him because they felt the years of having ridden the circuit lent sanction to the old law. Frustrated, Marshall waited for any opportunity to judge the actions of Jefferson.[8]

When in December 1801 the case of *Marbury v. Madison* came before the court; chief Justice Marshall had the chance to confront the judicial actions of President Jefferson. William Marbury was one of the justices of the peace for the District of Columbia whose commission Jefferson had held up. Marbury was petitioning the court to issue an order, a writ of mandamus, requiring Secretary of State James Madison to deliver his commission. Marshall assumed jurisdiction for the Supreme Court to hear the case and issued an order for Madison to show cause at the next term of the court why such a writ should not be drawn up. Marshall considered this his opportunity to assert the authority of the Court over the executive branch of government. In a bid to secure more time, Madison convinced the Congress to suspend the summer session of the Court and make the next session convene in February, 1803. Perhaps, Marshall because of his prior involvement in the case should have disqualified himself but he chose not to and no objections were raised.[9]

When the court convened on February 9, Justices Bushrod Washington and Samuel Chase in addition to Marshall were on the bench. The case proceeded even though the administration boycotted the hearings. Knowing he had control over Congress, President Jefferson waited for Marshall to act. If Marshall overreached the

[8] Garraty, 7.
[9] Garraty, 9.

powers of the Court, he could be impeached and if he backed down the prestige of the Court would be reduced.[10]

Marshall realized issuing the writ would produce little because he knew it would be ignored by Madison who would be backed by Jefferson. It would be a futile act to issue the writ and might instigate impeachment proceedings against Marshall. Marshall engineered a solution to the dilemma and although it was based on questionable legal logic it convinced the associate justices to agree to it. The issue as Marshall perceived it was a conflict between the Court and the President and the problem was how to check the President without hurting the Court. The solution Marshall suggested was to state emphatically the justice of the plaintiff's case and to condemn the actions of the Executive but to deny that the Court had the power to provide judgment in the case. Marshall said the justices were entitled to their commissions and that Madison by withholding them was in violation of the law. He said the court could not issue the writ because the provision in the Judiciary Act of 1789 authorizing the court to do so was unconstitutional. In other words, Congress had no legal right to give the power to the Court. Marshall claimed the writ of Mandamus could only be issued in cases that came to it on appeal from a lower court and this case had originated in the Supreme Court. Further he emphasized that the Constitution was the "Supreme Law of the Land" and that it was the duty of the judicial department to say what the law was and then the Supreme Court must overturn any law that violates the Constitution thus making the law void. The court could not issue the writ of mandamus because the Act of 1789 ceased to exist.

[10] Garraty, 11.

While Jefferson was angry at the criticisms aimed at him, he accepted the principles of the decision but claimed the executive as well as the judiciary could decide questions of constitutionality. Although it was not the first time the power of judicial review, not discussed in the Constitution, had been used, Marshall's decision increased the power and integrity of the Supreme Court to render judgment on the constitutionality of a law and effectively limited executive powers.[11]

Inadvertently the attempted impeachment of Justice Samuel Chase also strengthened the court. There is no doubt that Chase's conduct as a judge was improper, but his insolence and errors in judgment did not fit the criteria of "high crimes and misdemeanors" to be removed from office. There were thirty-four Senators at the time, but although the Republicans had enough for the necessary two-thirds to impeach, there were not enough who believed that Chase's conduct constituted high crimes or misdemeanors. The Senate failed to find Chase guilty; therefore, he remained on the bench until his death in 1811. The immediate consequence of the decision restored confidence to Marshall who continued to make the Supreme Court a major instrument in shaping the political, economic, and social patterns of the nation.[12]

In 1804 Jeffersonian congressmen met in caucus and nominated Jefferson for president and George Clinton for vice president. No one at the caucus wanted Aaron Burr. So for over a year Burr was a somewhat bitter lame duck vice president. During this time it is possible that he was engaged in both business and political activities that

[11] Garraty, 12-13 and Pfeffer, 81-83.
[12] Pfeffer, 87-88.

could be considered quite questionable. Burr traveled west and south into the new territories that were part of the Louisiana Purchase. His activities resulted in him being charged and tried for treason in Mississippi where he was acquitted. James Wilkinson, the governor of the Louisiana Territory, provided President Jefferson with some dispatches as proof of a conspiracy headed by Burr to invade Spanish territory and set up a new nation. Jefferson issued a proclamation in November 1806 for Burr's arrest. Initially on April 1, Chief Justice Marshall concluded the prosecution had failed to present enough evidence for treason but scheduled the trial of Aaron Burr on the charges of high misdemeanors leaving it open for the prosecution to gather witnesses to produce evidence on the treason charges. President Jefferson may have lost his objectivity with regard to the Burr case, but his desire to win was obvious because his administration spent nearly $100,000 and over fifty blank pardons in an attempt to convict Burr. The prosecution conceded that Burr was not present at the supposed conspiracy meeting but they argued that his previous involvement with members of the group implied his support of the conspiracy. Marshall's opinion was the prosecution had not presented sufficient evidence under the definition of treason in the Constitution to convict Burr. Jefferson was furious and contemplated suggesting a Constitutional Amendment limiting the powers of the judiciary. Marshall judged the case by the evidence and the constitutional meaning of treason, further increasing the prestige of the court.[13] Marshall's strict reading of the Constitution and firm position of evidence put the American law of treason beyond

[13] Nancy Isenberg, *Fallen Founder: The Life of Aaron Burr* (New York: Viking, 2007), 169-170.

the easy grasp of political expediency, as the Framers of the Constitution had intended.[14]

During the next thirty-four years Marshall dominated the court and rendered more than a thousand decisions, finding himself in the minority only eight times, despite the fact that most of the Federalist justices were replaced by Jefferson and his republican successors. Some of the decision of the court strengthened the national government at the expense of the states and others supported the position of the country's property interests. In the 1810 case *Fletcher v. Peck,* the court threw out a Georgia law that rescinded large land grants. The premise in the case was a contract, once agreed upon, could not be summarily broken. Another case in 1819 involved the clash of federal and state authority and would have long lasting consequences. The controversy involved the charter of Dartmouth College located in New Hampshire.[15]

Initially Dartmouth's royal charter provided that its board of trustees would be self-perpetuating. The legislature of New Hampshire passed a law to permit the state to appoint trustees: thus the college was changed from a private to a public college. The Supreme Court of New Hampshire upheld the state's right to alter the charter and change the status of the college. Alumnus, Daniel Webster represented his college when the case, the *Trustees of Dartmouth College v. Woodward,* was heard on appeal by the Supreme Court. Webster argued based on the interpretation of the full meaning of the clause in the Constitution prohibiting states from impairing the obligations of contracts. Present in the court room were a large number of representatives from other colleges

[14] R. Kent Newmyer, *The Supreme Court Under Marshall and Taney* (New York: Thomas Y. Crowell Company, 1968), 34.

[15] Pfeffer, 98-99.

whose independence would also be in question if the court decided in favor of New Hampshire. Webster cited the case of *Fletcher v. Peck* involving land grants where the verdict of the court had been that a grant was the same as a contract. Further Webster argued that the Dartmouth charter was a grant or contract of corporate powers and privileges as much as a grant of land. After other attorneys presented their arguments, Marshall announced that some of the justices could not make up their minds; therefore, the case was continued until the next term, postponing the decision for a year. During the year both sides sought support and lobbied the justices. When the court reconvened in February 1819, Marshall read his magisterial opinion. Marshall adjudicated that a grant of corporate powers was indeed a contract within the meaning of the Constitution; therefore, a state legislature did not have the power to void it. The case enhanced the prestige of both John Marshall and the Supreme Court because it illustrated the power and authority of the federal court over state courts. The charter rights of Dartmouth and all private colleges were confirmed by the decision.[16]

Although the Dartmouth College case was important, it did not eliminate the problems of state versus federal powers. Another hotly contested issue arose from the efforts of Maryland and Ohio to drive a federal corporation, the Bank of the United States, out of their territory. The federal bank was chartered by Congress in 1816 as part of the American mercantile system whose job it was to aid the government in fiscal operations and provide a national system of credit and a uniform national currency. However instead of restraining state banks, under the Bank's first president it competed

[16] Richard N. Current, "The Dartmouth College Case," Garraty, 28-29.

against them in speculation and extension of credit.[17] Maryland passed legislation imposing a tax on all banks not chartered by the state including the Baltimore branch of the Bank of the United States. Because the bank refused to comply with the Maryland order, the teller at the federal bank, James E. McCulloch, was arrested and charged. The Baltimore County Court judged the case in favor of the state and on appeal the judgment was affirmed by the Maryland Court of Appeals thence by writ of error it went to the United States Supreme Court. Both parties in the case, *McCulloch v. Maryland,* agreed upon the facts of the case. The only question to be decided was whether the federal law chartering the Bank and the state law taxing it were in conflict and if so which was constitutional and override the other.[18]

When the case opened in late February the Bank of the United States was represented by Daniel Webster, a former Federalist Congressman who three years before had opposed the bill chartering the bank, by William Pinkney of Baltimore, and by Attorney General William Wirt. Maryland was represented by Joseph Hopkinson from Philadelphia, Walter Jones from Washington, and Luther Martin, who had actively opposed the Constitution at the convention in 1787. Martin had opposed ratification of the Constitution in Maryland because of the feared subjection to federal authority now being argued.[19] Marshall, speaking for the unanimous Court, began by saying the Court was only doing what it had to do and turned to Maryland's assertion of sovereignty and

[17] Newmyer, 40.
[18] Bray Hammond, "The Bank Cases," Garraty, 31.
[19] Robert G. McCloskey, *The American Supreme Court* (Chicago: University of Chicago Press, 1960), 46.

expounded the principal of national sovereignty which is supreme over state sovereignty. Further Marshall said the incorporation of the Bank was constitutionally sound under the provision of enumerated powers that gave Congress the power to pass laws necessary and proper. Marshall found the tax imposed by Maryland unconstitutional.[20] The decision was upsetting to Thomas Jefferson and other orthodox Republicans because of the seven justices only two were Federalist, the others having been appointed by Jefferson or Madison, both of whom opposed the Bank chartering recommendation of Alexander Hamilton.[21]

Another important decision, perhaps the only popular one that Marshall rendered, was again one that would increase the powers of the federal government over those of the states. The case centered on a fight between rival steamboat operators in New York Harbor and concerned the single question of whether or not Congress had the power to regulate interstate as well as foreign commerce. Both the claimant and the defense in the case, *Gibbons v. Ogden,* were represented by eminent counsel because at the time the controversy over nationalism and states' rights was in the forefront making the case already famous. Once the arguments were heard it took almost a month before Marshall delivered the Court's opinion. For the first time the Court had a chance to clarify the meaning of the commerce clause and in a legal point of view the opinion Marshall wrote was one his soundest. Only Justice William Johnson dissented. Marshall stated under the Commerce Clause of the Constitution the monopoly statutes of the State of New York

[20] Newmyer, 43-45.
[21] Mc Mloskey, 50.

were invalid because the Federal Coasting License Act of 1793 superseded in authority the state law dealing with the same subject. In short, Congress had the power to regulate navigation within the limits of every state if such navigation was connected with foreign or interstate trade. Marshall's decision, which has been called "the emancipation proclamation of American commerce," was far-reaching in scope and became more important to the country as time went on in the development of the railroad, the telegraph, the telephone, and the oil and gas pipe lines; as they moved across state borders and depended on protection under *Gibbons v. Ogden.*[22]

While other cases were decided in Marshall's thirty-four years as Chief Justice that strengthened the authority and prestige of the Supreme Court and the nation, one arising during the presidential term of Andrew Jackson appears, at least on the surface, to weaken the position of the Court. Jackson, elected in 1828, was a critic of the federal judiciary, and his election in part seemed a popular questioning of the power and position of the judiciary. While Americans revered the Constitution and to some degree the nationalism of Marshall, Jackson perceived that the Marshall position was a threat to the sovereignty of the individual states. In the campaign for president Marshall had sided with Henry Clay and John Quincy Adams, thus Jackson was displeased personally with Marshall and not just the judiciary.[23]

[22] George Dangerfield, "The Steamboat Case," Garraty, 49, 58-61; Newmyer, 50-51: Felix Frankfurter, *The Commerce Clause: Under Marshall, Taney, and Waite* (Chapel Hill: The University of North Carolina Press, 1937), 22-26.

[23] Richard B. Longaker, "Andrew Jackson and the Judiciary," *Political Science Quarterly,* Vol.71, No.3, (Sep., 1956), 348, accessed JSTOR 22, October, 2008.

During George Washington's administration, the government entered into a treaty with the "Cherokee Nation" of Indians in Georgia giving them ownership of their land and providing them substantial autonomy. After gold was discovered on the land Georgia desired it and enacted legislation abrogating all the Indians' laws and dividing up their lands. The Cherokees appealed to President Jackson, who had little sympathy for the cause of any Indians. They then applied to the Supreme Court for an injunction to stop Georgia from enforcing the statutes. While the federal case was pending, Corn Tassel, a Cherokee, was convicted in a state court of murdering another Indian. Tassel applied to the Supreme Court for a writ of habeas corpus on the ground that because of the earlier treaty the Cherokees could not be tried in a state court because they were entitled to their own courts. Marshall issued the writ but the legislature said the federal court had no right interfering with the state court. The state hung Corn Tassel five days later. When the injunction suit came before the Court for hearing Georgia refused to appear. In 1831 Marshall ruled the court had no jurisdiction of the case because the Cherokees had sued as a foreign nation and they were not such but rather a "domestic dependent nation," similar to a ward of the state.[24]

Meanwhile, Georgia passed a statute requiring all white persons in Indian Territory to obtain a license and take an oath of allegiance to the state. Two missionaries refused to take the oath and were arrested and sentenced to four years imprisonment. They appealed to the Supreme Court in the case of *Worcester v. Georgia* and Marshall

[24] Pfeffer, 118-119.

ruled the law unconstitutional on the ground the Georgia had no jurisdiction over the Indians who were exclusively under the jurisdiction of the federal government.[25] President Jackson reportedly said, "John Marshall has made his decision; now let him enforce it," when he ignored the court's decision. The seeming defiance of Jackson can be explained by examining some other factors associated with his decision to do nothing. He was in the midst of the battle over the existence of the Bank of the United States and over nullification issues with South Carolina. In order to enforce the Court's decision, Jackson realized that it would take a large military force against Georgia and it would still be impossible to coerce Georgia to comply and the sympathies of the country would have been on the side of Georgia and he had a re-election campaign to consider. Jackson viewed the Indian problem as a temporary one and the nullification issue as a national crisis in which he would need the aid of Georgia to settle.[26]

The nullification issue, however, did not reach the Supreme Court. President Jackson's actions in the case do illustrate the respect he held for the federal judiciary. He believed in the supremacy of the national law and if South Carolina objected to the Tariff Acts of 1828 and 1832 the proper recourse was either a Constitutional Amendment or the courts. He believed the South Carolina nullifications law threatened to destroy the supremacy of the national law and that it was the duty of the President, Congress, and the Supreme Court to defend the law.[27]

[25] Pfeffer, 120.
[26] Longaker, 360.
[27] Longaker, 362.

Many decisions made by the Marshall court threatened to explode into legislative changes that would possible cripple the court because of growing fears in the south and the west over questions of states' rights, but Jackson did not support changes to the federal judiciary. The few attempts tapered off after the death of Marshall and the influx of Jackson appointees to the Supreme Court including Roger B. Taney as Chief Justice, a man who would preside over the Court for almost thirty years in which time the Court would face major struggles and controversies.

CHAPTER 6

THE TANEY COURT---CIVIL WAR---RECONSTRUCTION

Despite the attempts by the Supreme Court to protect the rights of the Cherokees in Georgia they would be manipulated and forcibly removed to reservations in the West. In order to justify these actions, President Jackson and the federal government would sign treaties with the Cherokees that included provisions for the exchange of their land in Georgia for those in West. Unfortunately the process of dispossessing the Indians was an acceptable arrangement by the vast majority of Americans at the time, while the legality of such actions was questioned by only a few and the enforcement of law was made impossible both by the people and President Jackson.[1]

Outside the courtroom, the foundations of economic nationalism that Marshall championed were slowly disintegrating because of nullification problems, threats of secession, and Jackson's states' rights and his war on the Bank. Marshall was concerned with the new conditions of the nation and despairingly wondered if the constitution could last.[2] Marshal because of his age and ill-health grew despondent about the accession of Jackson and what alterations the growth of the democratic spirit had made upon federalism.[3]

[1] Pfeffer, 118: Newmyer, 87.
[2] Newmyer, 88.
[3] Percival E. Jackson, *Dissent In The Supreme Court: A Chronology* (Norman, Oklahoma: The University of Oklahoma Press, 1969), 40.

Before Marshall's death in 1835, President Jackson had already appointed three Democrats to the Supreme Court. He appointed Roger Taney to replace Marshall and made one other appointment the same year and two appointments in 1837 giving the Democrats an easy majority on the Court. Taney, a Southerner and Roman Catholic, was a states' righter dedicated to the Union and although he had been a slaveholder, he regretted the institution of slavery and had manumitted his slaves. Taney, a lawyer and politician, was also an aristocrat with a democratic political philosophy serving in the Jackson administration as Attorney General and Secretary of the Treasury, where he revealed an anti-monopolistic, state mercantilist, democratic bias that he brought to the Court.[4]

The historical changes that brought the Jacksonians to power in 1828 also required a Court able to bring the law into accord with the political and economic currents in order to preserve constitutional union by making it relevant for the time. While the Taney Court inherited a substantial body of decisional law it had to adjust the old law without appearing to abandon it in order to maintain its own prestige and the continued authority of the law. The Taney Court faced problems created because of the rapid expansion of the country both geographically and economically.[5]

While one of Marshall's major objectives, safeguarding property rights, was at the time important to the economic growth of the new nation, some of his decisions now threatened to slow up progress by hindering the development of new enterprises needed

[4] Newmyer, 94.
[5] Pfeffer, 121.

for the massive expansion of the West. Marshall's broad interpretations of the Constitution were altered by the first constitutional law opinion concerning impairment-of-contract provisions written by Chief Justice Taney. The alteration of opinions occurred in the case, *Charles River Bridge v. Warren River Bridge,* which was first argued in 1831. No decision was handed down because there was no clear majority on the Court and Marshall was concerned about issuing decisions that invalidated a state law without a majority concurring. The Court directed counsel to reargue the case, but the inability to obtain a majority and changes on the Court caused further postponements until it was six years before it was presented to the Taney Court for a decision.[6]

The facts of the Charles River case raised crucial issues and the Court's decision would modify doctrines inherited from the Marshall Court. The Massachusetts legislature had in 1785 chartered the Charles River Bridge Company to build a bridge connecting Boston and Cambridge over the Charles River. They granted the company the right to collect tolls for forty years and later changed it to seventy years. While the toll rights were still in place, the legislature chartered the Warren Bridge Company giving it the authority to build an adjacent toll-free bridge. The legal question was did the imprecise wording of the old charter implicitly give the Charles River Bridge Company a monopoly that the new bridge encroached upon, thus violating the contract clause of the Constitution? Major political, economic, and intellectual issues that divided the Whigs and the Jacksonians hinged on the Court's decision. The counsel for the Charles

[6] Pfeffer, 123.

River Bridge Company, Daniel Webster, argued that the Dartmouth College decision meant that the charter the company had been granted was a contract whose obligations could not constitutionally be impaired. Since the company had been given the opportunity to make money by operating the bridge if, another bridge was allowed the company would lose money and the contract would be worthless, and to permit this to happen would destroy the security of all property and all rights derived under it.[7] The lawyer for the new bridge argued it was serving public needs produced by new circumstances and suggested that new modes of transportation like the railroads would have a problem if every dilapidated turnpike and canal company could continue behind an implied monopoly.[8]

The Chief Justice spoke for the majority and used Anglo-American law and Jacksonian politics and economics against the doctrine of implied contracts. Taney declared it was a rule of common law known in every case without exception and supported by fifty years of American usage and practice that any ambiguity in the terms of a contract acts against the company and in favor of the public. While the rights of private property must be guarded, Taney continued the rights of the community must be observed. Implied monopolies he said hindered equality of opportunity and economic progress. He concluded the charter for the new bridge was constitutional.[9]

In addition to expressing opposition to monopolies and refusing to allow then to be created by judicial interpretation of a legislative grant not specifically doing so, Taney

[7] Pfeffer, 124.
[8] Newmyer, 95-96.
[9] Newmyer, 97.

spelled out a concept known as police power. Under this power, government could adversely affect private rights and interests that would normally be protected. Taney altered the prime purpose of government making it no longer the protector of private property and the promoter of profit-making but rather the promoter of the welfare of the community. The Court's decision in favor of the free bridge over the private bridge became one of the constitutional foundations for social welfare legislation in the twentieth century. Taney believed his decision was necessary for economic expansion and progress.[10]

Extended over from the Marshall Court was another case, *City of New York v. Miln,* that concerned a New York statute requiring the master of every vessel entering the port of New York City from an outside port to turn over to the mayor the name, previous residence, age, and occupation of every passenger. The development of the West required manpower that was being supplied by immigrants from Europe who often had spent their money on passage, and a substantial number were destitute and stranded in the city. The law had been passed in an effort to regulate and control the financial burden on the state of New York. The master of a ship, Miln, refused to comply; therefore, he was charged and convicted with a penalty specified for noncompliance. When it was argued in front of the Marshall Court, he had indicated his opinion that the law was unconstitutional. The argument of the Taney Court given by Justice Barbour upheld the statute saying the state not only had the right, but the duty, to provide for the general welfare by any means necessary. This police power, Barbour contended, was never turned over to the federal

[10] Pfeffer, 125.

government and therefore the authority of the state is complete, unqualified, and exclusive. The Marshall Court understood the police power narrowly, referring to the power of the states to preserve order within their borders. Under Taney the idea was broadened to include the power to provide for the welfare of the community and accorded a high constitutional status. It assumed the interests of the community were superior to the rights of individuals.[11]

Another example of the shift away from Marshall's nationalist outlook is the decision in the case *Briscoe v. Bank of the Commonwealth of Kentucky* concerning banking and the issuance of "bills of credit." Article 1, Section 10 of the Constitution prohibited states from using "bills of credit," but the meaning of "bills of credit" had remained unclear. The Marshall Court in the case *Craig v. Missouri* had found the state interest-bearing loan certificates were invalid because the Constitution prohibited them. However, the Taney Court upheld the issuance of circulating notes by a state-chartered bank, narrowly defining a "bill of credit" as a note issued by the state, on the faith of the state and designed to circulate like money. Since the bank redeemed the notes and not the state they were not "bills of credit" for constitutional purposes. The Court's decision supporting state banking, deferred to economic realities, broadening economic opportunity, and indulged a preference for state over national mercantilism. By this time President Jackson had made sure that state banks constituted the main source of national

[11] Pfeffer, 127.

currency and credit by closing the Nicholas Biddle Bank. The reversal from the Marshall decision upset Justice Story, a Marshall supporter, and he dissented in the case.[12]

In a large part thanks to the Marshall Court, the most effective constitutional instrument for separating power between the states and the national government was the commerce clause of the Constitution; however, the Taney Court interpreted it differently than had Marshall. Unlike Marshall, who believed the commerce clause operated to impose restrictions upon state authority that was the Court's duty to define and enforce, Taney professed that the mere grant of commerce power did not limit state power and the Court's duty was to interfere only if a state statute if it conflicted with an act of Congress or the Constitution. Taney did not find in the commerce clause an implied prohibition against state taxation discriminating against foreign or interstate commerce because the limits of state power were not expressly stated in the Constitution.

Further Taney while not denying the transporting of people was part of commerce also professed that the "intercourse of persons passing from one state to another" was not necessarily within the boundary of interstate commerce.[13] Neither Southern nor Northern states were likely to tolerate interpretations of the commerce clause that would limit their prerogatives. The South because of slavery and the North because of an interest in

[12] Henry F. Graff, "The Charles River Bridge Case," Garraty, 76; Hall, 91; Newmyer, 100.

[13] Felix Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* (Chapel Hill: The University of North Carolina Press, 1937), 58-65

[14] Newmyer, 102.

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reform legislation including anti-slavery laws needed limited use of the commerce clause and federal intervention.[14]

In the first years of the American republic, slavery was not a serious national problem because provisions to stop the import of slaves after twenty years was included in the Constitution along with a protection for slave owners against the emancipation of runaway slaves in non-slave states. The industrial revolution changed the nature of the country in many ways including views of the slavery issue. The admission of new states into the Union created discussions and laws affecting the spread of slavery westward. The slavery issue was bound to come before the court because it was basic to the political and economic life of the nation.[15]

The first significant case the Taney Court decided that dealt directly with the slavery issue was *Groves v. Slaughter* in 1841. The overexpansion of the slave trade and the draining of capital placed Mississippi in financial trouble; thus a constitutional amendment was adopted prohibiting the further importation of slaves as merchandise into Mississippi but did not enact legislation enforcing the prohibition. A purchaser defaulted on payment for imported slaves, and the seller argued the state prohibition was void because it conflicted with federal commerce power. A Court majority of four were able to evade the issue of whether slaves were persons or articles of commerce in holding that the Mississippi constitutional provision was ineffectual in the absence of statutory supplement. Although concurring with the decision, both Chief Justice Taney and Associate Justice Baldwin insisted that state control over slavery and African-Americans

[15] Newmyer, 120.

was exclusive of federal power. These conclusions illustrate the growing discord over the slavery question in the nation.[16]

Another slavery case decided by the court in 1841 was *United States v. The Schooner Amistad*, involving a Spanish owned vessel engaged in the slave trade. The slaves mutinied and took over the vessel which ended up in Hartford, Connecticut. Acting through the Spanish embassy, the traders demanded the return of the slaves under an existing treaty. The district judge ruled the slaves should be shipped back to Africa and the decision was appealed to the Supreme Court where former President John Quincy Adams defended the Africans. The decision avoided the constitutional question presented by the Connecticut law abolishing slavery but rather said the treaty with Spain was not applicable because the Africans were not pirates or robbers in which case they would have been returned to Spain. Since Spain had abolished slavery they were not merchandise and therefore their kidnapping in Africa was unlawful, thus they were entitled to their freedom in Connecticut. In making their decision the justices not only interpreted American laws but also took it on themselves to interpret Spanish law and the wording and meaning of the treaty between the United States and Spain, thus clearly extending their authority.[17]

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[16] Jackson, 54; Hall, 354; Pfeffer, 142.
[17] Pfeffer, 145; Newmyer, 124.

A year later, another case, *Prigg v. Pennsylvania*, forced the Court to face the problem of the fugitive slave law. Edward Prigg, a professional slave-catcher, had been sent to Pennsylvania to recover an alleged slave, Margaret Morgan. Prigg applied for removal certificates under the Federal Fugitive Slave Law of 1793 and Pennsylvania's 1826 personal liberty law, but they were denied. Without authorization, Prigg took Morgan and her children, including one conceived and born in Pennsylvania, back to Maryland. Pennsylvania indicted Prigg for kidnapping under the 1826 state law and after negotiations he was returned to Pennsylvania to stand trial where he was found guilty. The case then went to the Supreme Court so that it might define the power of states to legislate concerning the return of fugitive slaves since Prigg believed the Pennsylvania law was unconstitutional. While all the justices agreed the law was unconstitutional their reasons for the decision were different. Justice Story, speaking for the Court, held that the federal Fugitive Slave Law of 1793 was constitutional and that the Pennsylvania law was unconstitutional because it added conditions to the return process and that as long as no breach of peace was involved a slave owner or his agent could recapture and return a slave to its rightful place. Story concluded his opinion by saying that all state judges and other officials ought to enforce the federal law but the national government could not force them to do so because it had not power to require state officials to act. Taney concurred but objected to the assertion that northern states could withdraw their support of the law and leave enforcement strictly to the federal government.[18]

[18] Paul Finkelman, "Sorting Out *Prigg v. Pennsylvania*," *Rutgers Law Journal* 24 (1993), 605-665, Accessed JSTOR 10 November, 2008; Pfeffer, 146-147; Hall, 669.

The case, *Dred Scott v. John F. A. Sandford,* decided by the Court in 1857, stands as one of the most important cases heard concerning American constitutional law and it provided a basis for far-reaching interpretations of due process and played a major role in precipitating the Civil War.[19] The case, more commonly known as the *Dred Scott Case,* had been in the courts for eleven years before reaching the Supreme Court. Dr. John Emerson, a physician attached to the United States Army stationed in the slave state of Missouri, purchased a slave, Dred Scott, in 1833. In 1834 Emerson was transferred to the free state of Illinois and then to the Wisconsin Territory, where slavery was forbidden by the Missouri Compromise of 1820, and in each case he took Scott with him. Emerson returned to Missouri with Scott and his wife and two children in 1838. In 1842, Dr. Emerson was ordered to Florida where the Seminole War was being fought and left the slaves behind with his wife. Shortly after returning, in 1843, Dr. Emerson died and the slaves continued to work for Mrs. Emerson, who occasionally hired them out to others. In 1846 Scott sued Mrs. Emerson in the Missouri courts on the ground that his residence in a free state and in a free territory had emancipated him. The Missouri Supreme Court ruled that his return to Missouri reestablished his slave status even if suspended during his absence.[20]

The case went to the Supreme Court by a writ of error and was first argued in February 1856 with the final decision not reached until March 6, 1857. In nine separate opinions, two dissenting, covering 234 pages, the justices attempted to solve judicially a problem that political institutions had not been able to decide. Chief Justice Taney first

[19] Hall, 759.
[20] Pfeffer, 150.

established the Court's technical right and duty to consider all aspects of the case and then turned to the question of citizenship for the first time in the Court's history. Taney declared although blacks could be citizens of a given state, they were not citizens of the United States; therefore, the Court had no jurisdiction in the case. Secondly, Taney judged that Scott was still a slave because he had never been freed in the first place because Congress exceeded its authority when it forbade or abolished slavery in the territories because no such power could be inferred from the Constitution. Furthermore, Taney declared slaves were property protected by the Constitution and the Missouri Compromise was invalid. The chaos of the separate opinions and the Court's uncertainty about the legal questions before it obscure how much of the opinion was law. Six judges denied that Congress had the power to prohibit slavery in the territories but only three of them thought the question was fairly before the Court. Taney's opinion on the question of African-American citizenship had the support of only three justices, but the only thing that was clear was Scott remained a slave and therefore was not a citizen and that the Court had no jurisdiction.[21]

When the Court's decision was announced, the northern press denounced the decision and condemned the Court, as did members of the clergy. With the Court's intrusion into the slavery issue, many were sure that any compromise over slavery was impossible. The decision damaged the machinery of political compromise as much as it undermined the prestige of the Court. The Republican Party was forced to denounce the Court, thereby strengthening abolitionists' sentiment with the party and the Democratic Party depended on the acceptance of popular sovereignty by factions in its ranks. The

[21] Newmyer, 136; Hall, 760; Bruce Catton, "The Dred Scott Case," Garraty, 88-89.

decision would affect the Presidential election of 1860 and it would take the Civil War and two amendments, the thirteenth and fourteenth, to overturn it.[22]

The election of 1860 resulted in a decisive majority in the Electoral College for Abraham Lincoln. In December South Carolina seceded from the Union and was soon followed by six other southern states. President Buchanan, in office until March 4, 1861, was cautious and ineffective stating the states had no right to secede but added that the federal government had no right to use force against secession. He urged compromise but took no action to preserve the Union. In his Inaugural Address, Lincoln pledged not to interfere with slavery in the states where it existed and he promised to enforce federal regulation, including the Fugitive Slave Law. He labeled secession as illegal and pledged to preserve, protect, and defend the Constitution. The Civil War began when federal troops at Fort Sumter, South Carolina were bombarded by Southern guns.

After the war broke out, Chief Justice Taney came into a direct clash with President Lincoln, who had authorized the suspension of habeas corpus; a person's right to have a judge determine the legality of his imprisonment under certain circumstances. Lincoln authorized the military to arrest and indefinitely detain anyone suspected of aiding the rebels. Maryland did not secede from the Union, but as a border state it had many people sympathetic to the southern cause. In May of 1861, John Merryman, a citizen of Baltimore was arrested and imprisoned without trial or formal charges. Taney issued a writ of habeas corpus directing the fort's commander, General Cadwalader, to bring Merryman to the Baltimore federal court. The general refused on the grounds that

[22] Newmyer, 138; Hall, 761; Jackson, 63.

Lincoln had suspended the right to habeas corpus. Taney attempted to have Cadwalader arrested but failed. Taney filed an opinion, *Ex* parte *Merryman,* in which he held that under the Constitution, Congress alone, and not the President, had the power to suspend the right of habeas corpus. One reason for the Revolutionary War, Taney stated was the abuse by the English King in suspending the right of Habeas Corpus. Lincoln's Attorney-General advised him that Taney was wrong and that the President had the right to suspend habeas corpus; therefore, Lincoln continued the action going so far as to issue and arrest warrant for Taney. However, no marshal could be found to arrest the eighty-four year old judge.[23]

During the remaining three years of his life, Taney waged his own private war against the Union. He dissented in the Prize cases that held (by a five to four vote) that Lincoln had the constitutional power to impose a blockade on the South. Although the cases were not before the Court, Taney wrote a number of opinions to have ready including one that would have declared the conscription act unconstitutional. Another dealt with the Emancipation Proclamation and the Legal Tender Act Taney would have declared unconstitutional. However, the Legal Tender Act did come before the Court in 1863, but Taney was too ill to attend the Court session and the other justices decided that the Court had no jurisdiction. Chief Justice Roger Taney died in 1864. The injury done throughout his tenure as Chief Justice to the integrity of the Supreme Court and its relationship to the other branches of government would take many years to repair.[24]

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[23] Allan Nevins, "The Case of the Copperhead Conspirator," Garraty, 90-91; Pfeffer, 159; Michael Genovese, *The Power of the American Presidency* (NewYork: Oxford University Press, 2001), 8.

[24] Pfeffer, 162-163.

By 1864, President Lincoln had already appointed four justices to the Supreme Court. Lincoln appointed Salmon P. Chase, who had no previous judicial experience and had not practiced law for fifteen years, as Chief Justice. Lincoln chose Chase because he wanted to make sure that the emancipation and legal tender measures would be upheld by the Court, and he also wanted to end Chase's presidential aspirations. Lincoln believed the Legal Tender Act, authorized by Chase when he was Secretary of the Treasury, was secure with his court appointee.[25] Lincoln knew that Chase was still a powerful leader of the radical wing of the Republican Party and hoped the appointment would consolidate the party. Chase as Secretary of the Treasury had faced the daunting task of financing the war efforts and maintaining the nation's solvency.[26]

During the Civil War Lincoln authorized the creation of military commissions to try persons accused of aiding the enemy, violating the rules of war or engaging in other disloyal activities. In late 1864, United States army officials in Indiana arrested Lambkin Milligan and several other prominent antiwar Democrats. They were charged with conspiracy to seize munitions at federal arsenals and to free Confederate prisoners held in several northern prison camps. At the time Indiana was not in the area of military operations and the defendants could have been tried in a federal court for treason, but army officials elected to try the defendants by military commission because they doubted the reliability of Indiana courts and juries. The military tribunal found Milligan and two

[25] Pfeffer, 182.

[26] Jethro K. Lieberman, *The Enduring Constitution: A Bicentennial Perspective* (New York: West Publishing Company, 1987), 92.

other defendants guilty and sentenced them to death by hanging. Milligan challenged the conviction in the United States Circuit Court in Indiana and the disagreement of two judges sent the case to the Supreme Court. Even though the Court announced its decision in April 1866, the opinions were not released until December. All nine justices agreed that the military court did not have jurisdiction and that Milligan and the others must be released. The grounds for the decision, however, were quite different. Justice Davis, writing for the Court, stated that the Constitution was not suspended in time of emergency or war; therefore, the military trial of civilians violated the Constitution. Chase agreed that Milligan should be released but rested his decision on the Habeas Corpus Act of 1863 guaranteeing trial of civilians in civil courts but argued that Congress could enact legislation to try civilians in a military court. With growing violence in the South against African-Americans many believed that the military courts were essential to the safety of former slaves. President Johnson would use the decision to reduce military authority in occupied states.[27]

During Reconstruction the Court handed down two other controversial decisions. In *Cummings v. Missouri* the Court held a Missouri statute invalid that barred any person not first taken an oath that he had not supported or favored the Confederacy from voting, holding office, teaching, preaching, or practicing law. The Court invalidated a federal statute requiring a similar oath of any attorney seeking to practice in a federal court in the

[27] Hall, 550; Pfeffer, 172-173.

case *Ex parte Garland.* The grounds for both were they were retroactively imposed punishments on something that was not punishable when committed. [28]

The case of *Texas v. White* addressed the questions of secession, Reconstruction, and the nature of the Union. The presidentially reconstructed government of Texas filed suit to recover state-owned securities sold by the state's Confederate government. The defendants argued that Texas had seceded from the Union and had not yet been restored; therefore, it could not sue in federal court. Chief Justice Chase in a majority opinion stated that Texas and all other states that had seceded had no legal right to do so; therefore, they had been and still were a part of the Union and their citizens were still citizens of the United States. Congress had recognized the provisional government of Texas; therefore, they were entitled to sue in federal court. Chase ruled that the states' Confederate government had been illegal; its acts in support of the rebellion were null and void. He concluded that the state was entitled to recover the securities. The decision further endorsed the position that the Union was perpetual and that Reconstruction was a political problem within the scope of congressional power.[29]

In 1866 the Fourteenth Amendment was proposed in Congress and ratified by the States in 1868. The amendment made all people born within the nation citizens of both the United States and the state where they were born. It further prohibited states from depriving anyone of due process of law or equal protection under the law and reduced the

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[28] Pfeffer, 174.

[28] Hall, 869; Harold M. Hyman, *The Reconstruction Justice of Salmon P. Chase,* (Lawrence, Kansas: University Press of Kansas, 1997), 72-74.

representation of any state that deprived a part of its male population the right to vote. The first major interpretation of the Fourteenth Amendment by the Supreme Court came in the *Slaughterhouse Cases*, in which the Court held that the basic civil rights and liberties of citizens remained under the control of state law. The Court limited the privileges of citizens referred to in the amendment to protection on the high seas and the right to travel to and from the nation's capital. The decision in the *Slaughterhouse Cases* drastically reduced the protection against state violations of fundamental guarantees of liberty.[30]

On the death of Chief Justice Salmon Chase in 1873, President Grant at first looked among his unscrupulous political cronies for someone to nominate before he decided on Morrison Remick Waite, who had successfully arbitrated an award of $15 million in damages for America at the Geneva Arbitration Tribunal.[31] Waite had never argued a case before the Supreme Court when he was appointed to the position of Chief Justice. Waite's decision in 1879 in the *Sinking-Fund Cases* was nationalistic in that it allowed Congress to amend corporate charters in the public interest. In another case, *Minor v. Happersett*, the held that denying votes to women was not a violation of the Fourteenth Amendment because suffrage was not a right of "citizenship." Two opinions, *United States v. Cruikshank* and *United States v. Reese,* Waite wrote narrowed national protection of the newly freed slaves. In the case *Munn v. Illinois* the argument concerned the Fourteenth Amendment's "Due Process Clause," intended to bar any state from

[30] Pfeffer, 80 and Hall, 309-310.
[31] Hall, 906.

depriving persons of property without the process of law and the commerce power of the Congress. The case stemmed from Illinois legislation setting the rates that grain elevator operators in Illinois could charge their grain producing customers, providing they did business in an Illinois city with a population larger than 100,000. The law only applied to Chicago where farmers were upset about the elevator operators fixing rates and gouging farmers. The operators argued the Illinois statute was an unconstitutional infringement on their rights as guaranteed under the Fourteenth Amendment. Chief Justice Waite for the majority upheld the Illinois law, arguing it was within the limits of the police power of the state of Illinois. Justice Field dissented and argued against legislative price fixing.[32]

On the death of Chief Justice Waite in 1888, President Grover Cleveland in the hopes of bettering the Democrats' changes in the November election decided to appoint someone from Illinois to the Supreme Court. The man he chose, Melville Weston Fuller, was a well respected lawyer who had appeared regularly before the Supreme Court. In 1896 Fuller would preside over a case, *Plessy v. Ferguson,* which involved the Thirteenth and Fourteenth Amendments and would change the interpretation of the Fourteenth for the next five decades.[33] The dispute arose as a test case to challenge a statute that was an example of the Jim Crow laws then being passed in the South as whites sought to increase their control of state governments. The Louisiana statute (1890) required railroads to provide "equal but separate accommodations for the white and colored races" and barred persons from occupying rail cars other those assigned to their race. Writing

[32] Hall, 566, 906; Jackson, 85.
[33] Hall, 637.

for the Court Justice Henry Billings Brown rejected both of Plessy's arguments stating that the Thirteenth Amendment applied only to actions whose purpose was to reintroduce slavery and that the law did not violate the Fourteenth Amendment requirement that all citizens be afforded equal protection under the law. Brown postulated that laws requiring separation of the races did not suggest that one race was inferior only if one race chose to perceive the laws that way. Brown said that for the Court to mandate that the races be mixed would be futile in the face of strong public sentiment as manifested by statutes requiring separation of the races in educational facilities. Justice John Marshall Harlan was the lone dissenter in the case holding that the law was in clear conflict with both Amendments stating, "The arbitrary separation of citizens, on the basis of race, is a badge of servitude inconsistent with the civil freedom and equality before the law established in the Constitution." The Court's decision in the Plessy case would stand for over fifty years allowing segregation in every sphere of public life and would require another Supreme Court decision to overturn the decision.[34]

The Supreme Court case of *Pollack v. Farmers' Loan & Trust Co.* concerned the federal income tax law of 1894. The Court's decision was given by Chief Justice Fuller stating that the law was unconstitutional because it was not apportioned among the states according to their populations making it a direct tax. The Court had decided in a five to four vote after having to rehear the original issue. The Court's decision would stand until the ratification of the Sixteenth Amendment in 1913 providing for a federal income tax.[35]

[34] C. Vann Woodward, "The Case of the Louisiana Traveler," Gerraty, 155-157; Hall 637-638; Pfeffer, 139-140.

[35] Hall, 654.

Throughout the nineteenth century the Supreme Court was involved in controversial issues of constitutional meaning that directed the development of the nation and the authority of the Supreme Court. The first Supreme Court Justices had the job of educating the public to the meaning of the "Supreme Law of the Land," and justices throughout the century interpreted the Constitution in different ways depending upon the needs of the nations and its citizens as the nation developed from an agrarian based nation to an industrial nation. While the Supreme Court had far differing outlooks for the nation as time progressed, it changed the focus of laws affecting everyone throughout the century.

CHAPTER 7

THE SUPREME COURT IN THE TWENTIETH CENTURY

At the beginning of the twentieth century the United States had returned to economic prosperity both internally and by expanding foreign markets around the world. The closing of the American frontier was considered as complete and the nation was already turning to a new kind of expansionism; the gaining of territories after the Spanish American War carried the nation into a period of stark imperialism and colonialism. The expansion of industrial empires in the form of trusts and monopolies continued to expand, as did labor unions and other social reforms groups, spreading into the first decades of the twentieth century. The United States experienced a tremendous influx of immigrants from southern and eastern Europe changing the structure of urban living. Before the end of the century the United States would participate in two world wars along with other military conflicts. Legislation and court decisions from the nineteenth century would be both strengthened and totally altered as the changing nation experienced events that would need a Supreme Court capable of interpreting the Constitution for a changing citizenship, nation, and world. In the twentieth century the Supreme Court would continually reflect the needs of a changing nation while maintaining its position as the strongest branch of the government. As Alexis de Tocqueville said in the nineteenth century the Supreme Court was given a higher standard than any other tribunal and that

no other nation ever constituted so powerful a judiciary as the Americans and that at some point every law that is slightly controversial will at some point be heard by the Supreme Court.[36]

While the Sherman Anti-Trust Law, declaring monopolies and trusts illegal, had been passed by Congress in 1890, it would not be until after the turn of the century when many cases concerning trusts would be brought before the courts. The Supreme Court in 1895 had taken the position that the federal government only held authority when the act could be enforced in respect to interstate commerce, not when a manufacturing process is done locally for then it is under the authority of state legislatures. The decision reflected a narrow reading of the commerce clause and the interpretation of what products might be involved and severely limited control over the growing monopolies and trusts.[37]

As a result of the Court's decision in 1895, industrialists continued to consolidate money and power in the formation of more monopolies and trusts; such as, the Standard Oil Company, the Copper Trust, the Smelters' Trust, the National Sugar Refining Company, and the United States Steel Corporation with a capital of more than a billion dollars.[38] Before the election of Theodore Roosevelt as President, the Department of Justice did little to enforce the anti-trust laws taking the position that the act was aimed at unreasonable restraints on trade and against monopolies that were against the public interest. Roosevelt was adamant in controlling the spread of monopolies and worked tirelessly in his attempts to destroy them.

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[36] Alexis de Tocqueville, *Democracy In America,* trans. Henry Reeve (New York), 30-32.
[37] Pfeffer, 229.
[38] Pfeffer, 230.

The case of *Northern Securities v. United States*, involved the formation of a holding company to merge control of the Northern Pacific and Great Northern Railroads created by J.P. Morgan and James J. Hill. Roosevelt instructed the Department of Justice to bring a suit to dissolve the merger on the ground it was in violation of the Sherman Act because the combination would restrain trade. The federal circuit court in Minnesota issued an injunction and the company appealed to the Supreme Court. In addition to the obvious question concerning the legality of the monopoly the question arose whether the statute was to be applied to stock ownership. In a 5 to 4 decision the Court upheld the injunction pronounced that the formation of the holding company was an unreasonable restraint on trade therefore making it illegal. The dissenters in the case agreed that the restraint was reasonable and that congressional control over commerce could not embrace stock ownership.[39]

The government moved against the Standard Oil Company and American Tobacco Company in 1910. While the Court was in full agreement to dissolve the Standard Oil Company, they were divided on the appropriate approach to understanding the statute. Chief Justice Edward White speaking for the Court applied "the rule of reason" as set forth in common law and statutory construction to define restraints of trade and monopoly, concluding that a common-law standard of reasonableness should be used to identify the actions that the act prohibited. The wording used by White, in the opinion of several of the Justices, was a linguistic slight of hand because the definition of reason

[39] Hall, 600 and Pfeffer, 238 and Skowronek, 2227-238.

itself remains ambiguous.[40] Although concurring in the decision, Justice John Marshall Harlan accused the court of having usurped the Constitutional functions of the legislative branch of the government and accused the Court of acting outside the limits of the Constitution.[41] The Supreme Court in accepting the concept of the rule of reason adopted a similar distinction as the one used by President Roosevelt in separating "good" and "bad" trusts. In the words of former Chief Justice John Marshall the Court also retained for itself, the right "to say what the law is."[42] The Court upheld the dissolution of the American Tobacco Company later in the same year. The debate over anti-trust policies continued throughout the presidential campaign of 1912, leading to the Clayton Antitrust Act and the Federal Trade Commission Act.[43]

The progressive movement that dominated in Roosevelt's administration witnessed the enactment of laws in many states hoping to ease the burdens of the working class, including working conditions and the number of hours. The nation was adjusting to the rapid growth of industry and to the enormous need for labor. It was inevitably that the Supreme Court would have to interpret the Constitution that was drafted in a pre-industrial age to fit the new economic developments. In 1903, Oregon passed a law setting a maximum of ten hours work a day for women employed in factories and laundries. A foreman of a laundry in Portland, Oregon required Mrs. Elmer Gotcher, a

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[40] Walter Pratt. *The Supreme Court Under Douglas White: 1910-1921.* (Columbia, South Carolina: University of South Carolina Press, 1999), 39; Hall 818-19.

[6] Pratt, 40.

[7] Pratt, 43.

[8]Hall, 819.

laundress, to work more than ten hours in one day. He was charged, convicted, and fined ten dollars in a local court. After appeals at the lower court level had the same result the case, *Muller v. Oregon,* went to the Supreme in 1908. With the permission of the Oregon's state attorney, the National Consumers' League hired Louis D. Brandeis, who later would be appointed to the Supreme Court, to defend the law. In previous cases the Court had upheld the power of the states to guard the health, safety, and welfare of its citizens through the police power assigned each state. Brandeis employed an innovative strategy that involved the use of data collected supporting the assertion that long hours had a detrimental effect on women. He included at least fifteen pages of excerpts from other state and foreign laws to support the belief that long hours endangered women's health. The new system Brandeis used is called *Ex facto jus oritur* meaning out of the facts springs the law. Before this the constitutionality of such statutes limiting working hours had been argued on their legal merits alone. The amount of economical and sociological material that Brandeis used in his presentation became known as the "Brandeis brief." The Court's decision, while upholding the legality of the law, also stated that working long hours took a toll on women and because healthy mothers produce healthy offspring, the health of women becomes an object of public interest and care and since they were inferior to men, they warranted state protection.[44]

In 1917, the Court heard another case, this time without Brandeis, concerning the same Oregon statute with the Court deciding the same way. The tactics of Brandeis did

[44] Alphaeus Thomas Mason, "The Case of the Overworked Laundress," Garraty, 177; Hall, 364; Pfeffer, 243.

not convince the Court in 1923 when it considered a District of Columbia law designed to regulate the minimum wage for women. In this case, Justice Sutherland spoke for the majority of six found that the freedom of contract clause had been violated by restraint. Sutherland considered the brief of facts, similar to Brandeis', presented by Professor Frankfurter wholly irrelevant to the case.[45] While the Supreme Court heard other cases, there is no clear conclusion from a consensus of the results. The Congress eventually passed legislation controlling wages and working conditions for workers.

During the first decade of the twentieth century large number of immigrants from southern and Eastern Europe entered the United States as the need for labor continued to grow. A clause in the law stated that entry could be denied to anyone likely to become a public charge because of the burden impoverished immigrants were becoming to many cities on the east coast of the United States. A man, one of a group of twenty Russian immigrants entering the United States, was denied entry. The reason given for the denial was that the man was going to Portland, Oregon and the entry official deemed it impossible for the man to find work there. The law was meant to excluded paupers and professional beggars. The Supreme Court rendered a decision stating that the man could not be denied entry simple because he was going to a particular location when in fact he was being admitted to the nation, making it an arbitrary distinction that could not be applied.[46] The United States by the 1920s began to restrict immigrations into the United States and during World War II most Japanese American citizens were placed in

[45] Mason, 185, 187.
[46] Pratt, 144.

interment camps. While the legality of these actions was not questioned, the Supreme Court has not been called on to rule on the Constitutionality of these actions.[47]

Responding to public pressure over events in Cuba, President McKinley in 1898 led the United States into war with Spain. The Spanish-American War marked the emergence of the United States as a world power with colonial possessions in the Caribbean and the Pacific. Even though the government had vowed the sole purpose of the war was to liberate the oppressed Cubans, Puerto Ricans, and later the Filipinos from their Spanish tyrants it did not end that way. Neither the Declaration of Independence nor the Constitution with its provisions for citizenship and franchise contained any guidelines for a colonial power. It was fine for Cuba, Puerto Rico, and the Philippines to become part of the United States, but they produced great quantities of sugar and the Constitution forbids any tariff on goods shipped from part of the United States to another, this would mean that Cuban and Puerto Rican sugar must be admitted duty free, which would upset the sugar trusts. The Constitution guarantees freedom of speech and trial by jury and forbids cruel and unusual punishment. The Supreme Court would have to answer the questions concerning the rights of the citizens in the annexed territories in relationship to the rights guaranteed by the Constitution.[48]

The *Insular Cases* are a group of fourteen decisions that involve the application of the Constitution and the Bill of Rights to overseas territories gained in the treaty ending the Spanish-American War. Basically, the Supreme Court decided on three questions of

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[47] Roger Daniels, *Coming to America: A History of Immigration and Ethnicity in American Life* (Princeton, N.J.: Perennial, 1991), 303-305.

.[13] Pfeffer, 231-232.

constitutional law: whether the national government had the power to acquire territories by treaties; whether certain statutes applied to the territories; and whether the Bill of Rights applied automatically to any territory upon acquisition. In *De Lima v. Bidwell* the Court confirmed that the nation had the power to acquire territory, pointing for support to the history of acquisitions. In deciding about the placement of duties on goods shipped from Puerto Rico to the United States, the Court relied on the wording of the Dingley Tariff Act of 1897, which imposed tariffs on "all articles imported from a foreign country." Once Puerto Rico was ceded to the United States it was no longer a foreign country; therefore, it did not necessarily apply to Puerto Rico. The Court decided there were two categories of insular possessions; incorporated and unincorporated. Incorporated territories, like Alaska before statehood, are deemed part of the United States for almost all purposes except Congressional representation and Presidential elections unincorporated territories, like Puerto Rico, had fewer rights, and Congress could enact tariff laws on their exports. In *Dorr v. United States*, the decision concerned the Fifth Amendment guarantee of criminal prosecution of felonies by a grand jury and the Sixth a trial by jury. The Court decided that a Filipino charged with a felony was not entitled to a trial by jury unless the Congress enacted a special law extending that right to them.[49]

The case *Truax v. Reich* in 1915 declared unconstitutional an Arizona law requiring employers to hire not less than eighty percent of their workers from among American citizens. The Court's opinion written by Justice Hughes said that the equal

[49] Pfeffer, 233-34; Hall, 434.

protection clause of the Fourteenth Amendment applied to all persons and not merely citizens, and it did not permit a state to deny to lawful inhabitants the right to earn a living merely because they were not citizens.[50]

As an obvious subterfuge to evade the Fourteenth and Fifteenth Amendments some southern election laws had provisions exempting from the states' literacy requirements for voters persons who either themselves or were direct lineal descendants of persons who could vote on January 1, 1866, a date when Negroes were not eligible to vote. These provisions in the election laws were called "grandfather clauses." In the case of *Guinn v. United States* the Supreme Court declared the law unconstitutional.[51]

Franklin D. Roosevelt took office as President at the depth of the depression and to meet the emergency he called a special session of Congress. When the Congress adjourned it had enacted more important pieces of legislation and instituted more new policies than any previous legislature in American history. The Congress enacted the Emergency Banking Law that confirmed the President's action in closing all the banks in the country and gave him further emergency power to control foreign exchange, good currency movements, and banking in general. The Congress authorized the creation of the Federal Emergency Relief Administration, the Home Owners Loan Corporation, The Tennessee Valley Authority, and adopted The National Recovery Act, the Civilian Conservation Corps, and The Emergency Farm Mortgage Act.[52]

[50] Pfeffer, 252.
[51] Pfeffer, 253.
[52] Pfeffer, 295.

The oil industry was suffering from overproduction and wasteful competition and the oil prices had collapsed during the depression. The individual states were unable to raise prices by controlling production so some state governors asked Congress for help. The National Industrial Recovery Act authorized codes of fair competition, and one was adopted for the oil industry that fixed production quotas for various states, but left it up to each state to allocate the quotas among its own producers. Another section of the act authorized Roosevelt to prohibit the movement in interstate commerce any oil produced in excess of the quotas and impose a fine on guilty parties. The case, *Panama Refining Co. v. Ryan*, was presented to the Supreme Court in 1934 and decided in 1935; it would be the first setback for the New Deal Programs. The Court held the later provision unconstitutional because the Congress could not delegate to the President the undefined and unlimited power to create a crime by Presidential Proclamation that "hot oil" should not be transported across state line. Shortly after this decision, the Court in another case declared unconstitutional on the same grounds another provision of the NRA, concerning industry codes of fair competition. The following year legislation regulating prices and labor relations in the bituminous coal industry was ruled unconstitutional on the same grounds. The *Panama and Schechter* decisions have never been overruled.[53]

Congress adopted the Railroad Retirement Act in 1934, providing a pension for the retirement of railroad employees. It was to be done by a compulsory insurance whereby contributions of the railroads and their employees were pooled to provide an

[53] William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal* (New York: Harper & Row, 1963), 231; Hall, 619; Pfeffer, 296-97.

annuity to all employees, varying according to the length of service. The Supreme Court threw out the entire act because it was beyond the power of Congress to set up a compulsory pension system for the railroads. This did not constitute the regulation of commerce the Court proclaimed. Justice Roberts in giving the opinion said the act was disguised as a measure to regulate railroad transportation, its provisions are really and essentially related solely to the social welfare of the worker a field not for Congress.[54]

After his overwhelming reelection in 1936, Roosevelt believed that he had to do something about the Supreme Court to make it more amenable to the New Deal legislation. At first, Roosevelt thought of a constitutional amendment adding justices but decided it was impractical. Not only would an amendment require two-thirds vote of both houses, but three-quarters of the states would have to approve it. Roosevelt was worried that moneyed interests might buy up enough state legislatures to prevent passage, plus it could take years. Roosevelt considered a Congressional action that would require two-thirds or seven-ninths vote of the Court to declare an act of Congress or of the states to be unconstitutional but realized the Court would declare such an act unconstitutional.[55]

Most likely some of the Supreme Court Justices would have liked to retire from the bench, but the Economy Act of 1933 cut the amount of money they would receive at retirement from $20,000 a year to $10,000 making it financially impossible for them to resign. The two oldest of the four conservatives, Justices Van Devanter and Sutherland,

[54] Leuchtenburg, 144; Pfeffer , 300.
[55] Ted Morgan, *FDR: A Biography* (New York: Simon and Schuster, 1985), 469.

could not afford to retire. A bill had been introduced in 1936 to provide the justices with retirement with full salary for life, and once it was passed the problem would solve itself. Roosevelt had not thought it through and was determined to bulldoze the court into submission.[56]

On February 5, 1937, Roosevelt sent to Congress a proposal for reorganization of the judiciary. It was not unusual to change the number of judges, it had been done in past, Roosevelt message said. The message was clothed in concern for the judicial work load. In the past year, Roosevelt continued the court had declined to grant review in 695 out of 803 cases. The tone was gratuitously wounding, in that it equated the age of the justices with incompetence, saying some are unable to perceive their own infirmities. To revitalize the Court Roosevelt recommended that when a federal judge who had served at least ten years waited more than six months past his seventieth birthday to resign, the President might add a new judge to the bench. He could appoint as many as six new justices to the Supreme Court. Roosevelt had told none of the Congressional leaders ahead of time about the pending proposal for changes to the Supreme Court and that would prove to be a major mistake.[57]

In attempting to alter the Supreme Court, Roosevelt had attacked one of the symbols that many believed the nation needed and the public and Congress would react. Roosevelt had violated his own method of making sure he had support before continuing with a program. Most of the legal profession was against the plan.

[56] Morgan, 470.
[57] Leuchtenburg, 233; Morgan, 471.

Congressmen were deluged with letters expressing intense anxiety over the fate of the Court. Men who had feared to oppose his economic policies because they anticipated popular disapproval now had the perfect justification for breaking with the President and going with the people. Many liberals were disquieted by the Court plan and Roosevelt's language that suggested he not only wanted to reform the Court but to humiliate it.[58]

The Senate Judiciary Committee opened hearings on the court reorganization bill. Senator Wheeler from Montana wanted to give the justices every opportunity to defend themselves against the accusations against them; therefore, he had secretly contacted Chief Justice Hughes on the advice of Brandeis. Hughes wrote a letters for Wheeler to read to the Judiciary Committee. Before reading the letter Wheeler told the committee members that he a statement from a man who knows more about the Court than the President of the United States, than the Attorney-General, than I do or any member of this committee. The letter explained in detail that the court was fully abreast of its work, destroying the president's main argument. More judges the letter said would only make for inefficiency and delay. It was a shocking departure for a chief justice to give an opinion on a bill affecting the court and it had a tremendous impact on the committee members. [59]

On March 29 the Supreme Court upheld the minimum wage law of the state of Washington in a 5 to 4 decision. On the same day it approved an act on farm mortgages, which it had previously struck down, and the collective bargaining provisions of the

[58] Leuchtenburg, 234-235; Morgan, 472.
[59] Morgan, 473.

Railway Labor Act. Two weeks later the Court upheld the Wagner Act. There were a host of similar decisions. The Court recognized that America had graduated from the era of unrestrained and government-encouraged capitalist expansion and was becoming a modified welfare state, and no matter how much the Justices did not like the development, even by invoking the Constitution they could not stop it. By summer of 1937 there was no longer a need for the judiciary reorganization bill and it was permanently shelved by the Senate. Within two and half years Roosevelt named five appointees to the nine-man Supreme Court.[60]

In 1944 Roosevelt was nominated for an unprecedented fourth term as president and won the election, but three months after his inauguration he suffered a massive stoke and died. Harry S. Truman succeeded him as President. During his two terms in office Truman experienced problems with the conservative coalition in Congress and many of his Fair Deal proposals were defeated.

At the height of the Korean War, on April 5, 1952, the Steelworkers' Union gave notice of a nationwide strike. Three days later, President Truman issued an executive order instructing Secretary of Commerce Charles Sawyer to seize and operate the nation's steel mills. Secretary Sawyer directed the companies' president to operate the facilities in compliance with government regulations. Truman took the view that his action was valid under the powers invested in him as president and commander in chief. The purpose of the Taft-Hartley Act was to allow the parties to arrive at a settlement and

[60] Pfeffer, 321; Leuchtenburg, 238; Morgan, 476-477.

to permit Congress to get involved if collective bargaining was unsuccessful. In a series of rapid lower court rulings the case, *Youngstown Sheet & Tube Co. v. Sawyer*, reached the Supreme Court in May 1952. The fact that Congress in considering the Taft-Hartley Act had specifically rejected a seizure provision in the act could only be interpreted as a prohibition against executive seizure. The Court's decision rejected the argument that the President had inherent constitutional authority to issue an executive order seizing private steel mills. The Court ruled that Truman had overstepped his authority by assuming powers delegated to the legislative branch and not the executive branch.[61]

Since the decision in 1896 that held that state-imposed racial segregation in public facilities was not unreasonable and therefore did not violate the Equal Protection Clause of the Fourteenth Amendment, many states had instituted the policy of segregation. Beginning in the mid-1930s groups had brought suits at the state and then the federal level challenging, on constitutional ground, the legal grounds for segregation of the races. In 1950 the Court in two cases invalidated segregation in graduate and law schools, noting the inequality of facilities. In 1952, a landmark case, *Brown v. Board of Education,* was first argued in front of the Supreme Court. On May 17, 1954, the nation anxiously waited to hear the Court's decision. Chief Justice Earl Warren gave the decision for the Court declaring that segregation by race in public school was unconstitutional. Warren said the changing prominence and social role that public schools had assumed in the twentieth century could not be done by segregating races. He

[61] Maeva Marcus, *Truman and the Steel Seizure Case* (New York: Columbia University Press, 1977), 127; David P. Currie, *The Constitution in the Supreme Court, The Second Century, 1888-1986* (Chicago: The University of Chicago Press,1990), 365-370.

continued that education was the most important function of the state and local government and where the state provided schools they must be made available to all on equal terms.[62] Warren then addressed what constituted "equal terms," and the formulation he used yielded the conclusion that separate facilities are inherently unequal.[63] The unanimous declaration of the Supreme Court that racial segregation violated the spirit and the letter of the Constitution was transmitted around the world being translated into thirty-four languages. The prestige of the Supreme Court, as well as the nation, increased tremendously with the Court's decision; but not because of Congressional legislation, nor from executive initiative but from the authority of the court to declare a law or parts thereof at a state level as unconstitutional. The Supreme Court had made law without making legislation. However, the decision revealed the deep nature of race hostility in the United States that would be dealt with for many more years. The Supreme Court established its essential role in determining the ultimate meaning of freedom in the United States.[64]

During his tenure in office, President Richard M. Nixon made unprecedented public pronouncements criticizing the Supreme Court and systematically took step to alter past decisions of the Court. He sent directives to the federal bureaucracy to ignore certain rules pursuant to the enforcement of federal court rulings. He sent a recommendation to Congress suggesting that the jurisdiction of the federal court should

[62] John Howard, *The Shifting Wind: The Supreme Court and Civil Rights from Reconstruction to Brown* (Albany: State University of New York Press, 1999), 326-327.
[63] Howard, 328.
[64] Howard, 330.

be restricted so they could not render decisions on some issues. The actions and suggestion of President Nixon while not ignored were not enacted.[65]

During the twentieth century the Supreme Court made rulings of cases that concerned education, civil rights, individual rights, and the constitutionality of many state and federal laws. One concerned the rights of an individual to be provided legal counsel when questioned or charged with a crime, but different rulings and legislation altered the original court decision several times during the century. A woman's right to have an abortion was decided in *Roe v. Wade*, but on a number of occasions has been reargued in front of the Court but without changes.

[65] Theodore L. Becker and Malcolm M. Feeley, ed. *The Impact of Supreme Court Decisions: Emperical Studies* (New York: Oxford University Press, 1973), 6.

CHAPTER 8

CONCLUSION

The framers of the Constitution of the United States created a document so ambiguous as to allow the interpretation of its meanings to be flexible enough for the problems associated with a growing and expanding nation. They made this document the "Supreme Law of the Land." They created an independent branch of government whose sole duty is to interpret whether or not a state or federal law falls within the limits of the Constitution. The Supreme Court is the conscience of the Constitution. Thomas Hobbes, the great essayist, wrote, "It is not wisdom, but authority that makes a law."[66] The Supreme Court has the authority to say what law according to the Constitution is because from their earliest roots Americans possessed a strong respect for law and justice and placed their trust in the integrity of the court to protect their individual liberties from usurpation by the other branches of government in who they have little faith.

Alexis de Tocqueville recognized that the United States had constituted and then made legal a powerful judiciary to act as guardian of the rights of the people. This powerful judiciary, the Supreme Court, protected the people and the Constitution from illegal acts originating in both the executive and legislative branches of the government at state and federal levels. Tocqueville noted there was hardly a "political question in the United States which did not sooner or later turn into a judicial one." Political issues, although sometimes controversial, that the court has decided include executive orders, presidential directives, and one presidential election. But while these decisions have on

[66] Hobbes, 12.

occasion produced criticism of the court from many directions, in the end the position and especially the authority of the court to make those decisions remain unchanged. Court critics have not been able to diminish the power and authority of court nor even with some questionable decisions has the court's integrity been permanently damaged in the eyes of Americans, who still blame individual justices for bad decisions and not the court system. One reason that the court receives major respect today from the general public is because they are rarely seen on the political circuits because they are not elected either directly or indirectly by the people but appointed by the president and confirmed by the Senate. Unlike politicians who must belittle opponents and in the process espouse in their propaganda, lies, and half-truths, justices are viewed as superior because they are outside of this part of the political sphere. The organizational integrity of the Court has not been touched.[67]

While Presidents appoint Supreme Court Justices who they believe will follow their philosophy, once on the court justices have surprised the presidents who appointed them. Many individuals before being appointed to the court hold other high offices to which they must at least publicly profess to follow the political policies of the president, otherwise they lose their jobs. Once appointed to the Supreme Court they have a lifetime job unless an impeachable crime is committed. No Supreme Court Justice has ever been removed from office by the impeachment process. In the final analysis the Supreme Court is composed of men and women who take with them to the court their experiences,

[67] Pffeffer, 18.

prejudices, and at times political beliefs. The Court is held in high regard by the public and generally by the elected branches that interact with the institution. Part of that respect stems from the fact that the public traditionally believes that the Court largely acts in a disinterested fashion, weighing the facts and paying attention to the Constitution and precedents. The public expects the Supreme Court to protect their rights as citizens against infringement from unjust laws and this expectation of the court illustrates the acknowledgement of the people concerning the power of the court.[68]

While Alexander Hamilton professed to believe that the Supreme Court would be the weakest branch of the government, his private conversations with like-minded people expressed the belief that it would indeed be powerful because it would be the final power over the interpretation of law in the Constitution. Hamilton and others of his generation realized the tremendous need for a powerful judiciary to constrain the ambitions of political powers while protecting the rights and liberties of individual citizens while at the same time they recognized potential fears because of abuses the colonists suffered at the hands of the English monarchy. The Supreme Court is the most powerful branch of the Government because of the respect and authority given it by the Constitution, the Federal Judiciary Act of 1789, and the people of the United States of America. It is the only branch of government that can act alone to interpret the Constitution and laws legislated by the federal or state legislatures. Specific decisions of the Court have been nullified by amendments to the Constitution. On rare occasions the jurisdiction of the court has been

[68] Richard L. Pacelle, Jr. *The Role of the Supreme Court In American Politics: The Least Dangerous Branch?* (Boulder, Colorado: Westview, 2002), 157.

temporarily curtailed and once with an amendment that permanently withdrew from the court the power to hear and decide suits against any state that does not wish to be sued. These were comparatively minor and peripheral restrictions on the Court's power because instead of suing the state, its governor or other state official who acts unconstitutionally is sued. The organizational integrity of the court has not been diminished by any act of Congress or by any constitutional amendment. No member of the Court has ever been removed from it other than death, voluntary resignation, or retirement.

When the Court ruled that Truman's seizure of the steel mills was unconstitutional, he turned the mills back to their officers and directors. In 1954, the Court crippled the Congressional campaign against domestic Communism and subversion, Congress protested, but accepted the limitations placed on it. When the Court in 1954 handed down a decision against the South's social system of racial segregation they protested loud and long, but resigned themselves to desegregation, delaying as long as possible to implement the decision. When the Court told Nixon he had to turn over tapes to an independent investigation, he complied. As Hamilton said, the President as commander-in-chief is afforded enormous power to affect his will and Congress is the only agency of the federal government that can levy taxes, thus they have control of the purse strings. The states control their own revenues and maintain strong police forces.[69] The Supreme Court has none of these instruments of power and yet it

[69] Pfeffer, 17-18.

prevails over the others because in the final analysis the integrity, authority, and respect for the Court comes from the Constitution and the people. The framers could only hope in their wildest dreams to have established such a strong branch of government; one that is above both the executive and the legislative branches.

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