

# John Marshall Was Not the First Chief Justice<sup>1</sup>

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I CHOSE this rather whimsical title, because, over the years that I worked on the early history of the Supreme Court, I got tired of hearing that John Marshall was the first chief justice. So I'm here to tell you not only that John Marshall was not the first chief justice, but that he was not the second or third either. John Jay, John Rutledge, and Oliver Ellsworth preceded Marshall, and Marshall never could have achieved prominence for the Supreme Court had it not been for the foundation laid by the justices in the decade before his ascension to the bench in February 1801.

The earliest justices appointed to the Court had a much more difficult job than those who followed, because the Constitution was merely a blueprint. It did not spell out how a functioning government was to be established. As Nathaniel Gorham, one of the delegates to the Constitutional Convention, stated, "The vagueness of the terms [of the Constitution] constitutes the propriety of them."<sup>2</sup> Many questions were left for future resolution. John Jay insightfully described his approach to achieving a workable government: "Wise and virtuous Men," he declared, "have thought and reasoned very differently respecting Government, but in this they have at Length very unanimously agreed. . . . That its Powers should be divided into three, distinct, independent Departments—the Executive legislative and judicial. But how to constitute and ballance them in such a Manner as best to guard against Abuse and Fluctuation, & preserve the Constitution from Encroachments, are

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<sup>1</sup>Read 8 November 2007 as part of the symposium "Putting the Constitution into Practice."

<sup>2</sup>Max Farrand, ed., *The Records of the Federal Convention of 1787*, 4 vols. (New Haven: Yale University Press, 1911), 2:217.

Points on which there continues to be a great Diversity of opinions, and on which we have all as yet much to learn.” Jay pointed out that the Constitution had taken care to provide the three branches with checks “one on the other,” in order to “keep each within its proper Limits,” but it would rest with the men who wielded these governmental powers to carry them out satisfactorily.<sup>3</sup>

The founders of the new American nation believed that the establishment of a national judiciary was one of their most important tasks. George Washington conveyed this message to the judges of the Supreme Court on the eve of their undertaking their first judicial duties. “I have always been persuaded that the stability and success of the National Government, and consequently the happiness of the People of the United States, would depend in a considerable degree on the Interpretation and Execution of its Laws,” Washington observed. “In my opinion, therefore, it is important that the Judiciary System should not only be independent in its operations, but as perfect as possible in its formation.”<sup>4</sup>

Article III of the Constitution, dealing with the judicial branch of government, is short. So it fell upon the first Congress that would come into being after the new system of government was approved to organize a judicial branch. The framers, recognizing the need for a national court to implement national interests in a system where powers were divided between a central government and the states, created in Article III the most novel institution of the American government, the Supreme Court. Having vested the judicial power in this Court and having spelled out its jurisdictional limits, the Constitution made only one further provision for the Supreme Court, although it was not explicit. By stating that the chief justice shall preside at presidential impeachment trials,<sup>5</sup> the position of chief justice was implicitly established. Article III also set out the tenure of federal judges and protection for their compensation. Congress, however, had to decide, in the first instance, whether lower courts were necessary. The number of justices and judges, where and when the courts would meet, and how much the judges would be paid, had to be provided for by statute.

While the clauses in Article III appear to be straightforward, they raised a number of questions. Was the full extent of jurisdiction granted in clause 1 mandatory or could Congress limit the jurisdiction of the federal courts within the guidelines contained in this clause? When a state

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<sup>3</sup>John Jay’s Charge to the Grand Jury of the Circuit Court for the District of New York, April 12, 1790, in *The Documentary History of the Supreme Court of the United States, 1789–1800* (hereafter *DHSC*), ed. Maeva Marcus, 8 vols. (New York: Columbia University Press, 2004), 2:26–27.

<sup>4</sup>George Washington to the Justices of the Supreme Court, April 3, 1790, in *DHSC*, 2:21.

<sup>5</sup>U.S. Constitution, art. I, sec. 3.

was mentioned as a party, did it mean that the state could be a defendant as well as a plaintiff? When a case was brought into federal court under its diversity jurisdiction and the issue concerned matters ordinarily dealt with by state courts and state law, what law should the federal court apply? Was the enumeration of cases that would be within the Supreme Court's original jurisdiction meant to be the sum total of that jurisdiction or was it only a minimum that Congress could expand upon?

These questions had no easy answers, and the solutions to them were achieved both politically and judicially. The first Congress decided that it could regulate the jurisdiction of all federal courts, and in the Judiciary Act of 1789 it established with great particularity a limited jurisdiction for the district and circuit courts,<sup>6</sup> gave the Supreme Court the original jurisdiction provided for in the Constitution, and granted the Supreme Court appellate jurisdiction in cases from the federal circuit courts and from state courts where those courts' rulings had rejected federal claims.<sup>7</sup> The decision to grant federal courts a jurisdiction more restrictive than that allowed by the Constitution represented a recognition by the Congress that the people of the United States would not find a full-blown federal court system palatable at that time.

The justices of the Supreme Court, during the Court's first decade, apparently believed that Congress had the power to control the jurisdiction of the federal courts and acquiesced in whatever regulations Congress made. In 1799, the third chief justice, Oliver Ellsworth, who had been both a delegate to the Constitutional Convention and a principal drafter of the Judiciary Act of 1789, ruled that federal courts were without jurisdiction in the case before him, remarking that a federal court was a court "of limited jurisdiction and has cognizance, not of cases generally, but only of a few specially circumstanced."<sup>8</sup> In the same case, *Turner v. Bank of North America*, Associate Justice Samuel Chase made the point even more clearly: "The notion has frequently been entertained that the federal courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this court, we possess it, not otherwise; and if Congress has not given the power to us or to any other court, it still remains at the legislative disposal. Besides, Congress is not bound . . . to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the constitution might warrant."<sup>9</sup> In fact,

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<sup>6</sup>"An Act to establish the Judicial Courts of the United States" (24 September 1789), sections 9 and 11, *Stat.*, 1:76, 78–79 (hereafter Judiciary Act of 1789).

<sup>7</sup>Judiciary Act of 1789, sections 13 and 25, *Stat.*, 1:80, 85–87.

<sup>8</sup>*Turner v. Bank of North America*, 4 U.S. 8 (1799).

<sup>9</sup>*Ibid.*, 10.

Congress did not again broadly expand the jurisdiction of the federal courts until 1875, when lower federal courts were granted virtually all of the federal question jurisdiction set forth in Article III.<sup>10</sup>

When President George Washington took office in 1789, the institution of the Supreme Court was completely unformed. Washington did not know even the number of justices he would be required to appoint. Within a few months, however, the basic contours of the third branch began to emerge from the Senate committee. The Supreme Court would consist of a chief justice and five associate justices. It would convene at the capital, then New York and a year later Philadelphia, on the first Monday in February and the first Monday in August, to hold two annual sessions.<sup>11</sup> The president took special care with the appointment of the chief justice, choosing John Jay, a statesman with all the requisite experience, rather than James Wilson, who was a more renowned legal scholar. His choice of John Rutledge, who was rejected by the Senate, and then Oliver Ellsworth, reflected the same considerations.<sup>12</sup>

Congress created two levels of lower courts below the Supreme Court. For each of the states, the Judiciary Act created a federal district court that would have its own presiding judge who lived in the district and would exercise jurisdiction over admiralty and maritime causes and minor federal crimes. At a higher level would be circuit courts, which, unlike today's Circuit Courts of Appeal, were to be primarily courts of original jurisdiction—trial courts—for major federal crimes and civil cases of higher monetary value. Appeals from the district courts made up a minor portion of their dockets. Each state would have one circuit court, and the states were grouped into three circuits: the eastern, middle, and southern. The Judiciary Act provided that no judges would be appointed to the circuit courts. Instead, twice a year, two Supreme Court justices would attend the circuit court in each state, with the district judge from that state as the third member of the bench. The act set the number of justices at six, so that two could be assigned to each circuit in the spring and in the fall.<sup>13</sup>

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<sup>10</sup>“An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes” (3 March 1875), *Stat.*, 1:470.

<sup>11</sup>Judiciary Act of 1789, sections 1 and 5, *Stat.*, 1:73, 75.

<sup>12</sup>For a discussion of Washington's appointments, see Maeva Marcus, “George Washington's Appointments to the Supreme Court,” *Journal of Supreme Court History* 24 (December 1999): 243.

<sup>13</sup>Judiciary Act of 1789, sections 1 and 4, *Stat.*, 1:73, 75. For a discussion on the origins of the Judiciary Act of 1789, see Maeva Marcus and Natalie Wexler, “The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?” in *Origins of the Federal Judiciary*, ed. Maeva Marcus, 13–39 (New York: Oxford University Press, 1992).

The new justices detested circuit riding. They were away from home for six months each year; they traveled on rough and rutted roads and trails or by water; they slept in public houses in crowded and uncomfortable conditions—Justice William Cushing once slept with twelve fellow lodgers in the room, and Justice James Iredell met with “a bed fellow of the wrong sort”<sup>14</sup>—and they paid for the privilege out of their own salaries. It is hardly surprising that the justices complained frequently to Congress, but to little avail. By not requiring a separate set of judges for the circuit courts, Congress limited the expense of the federal judiciary, about which many states had complained during the ratification process. But Congress claimed to have more positive reasons for the circuit-riding requirement: sending Supreme Court justices to all the states would be good for the new government and good for all the citizens. As Senator William Paterson (later Justice Paterson) noted, circuit courts would benefit the populace by carrying “Law to their Homes, Courts to their Doors.”<sup>15</sup>

As the year 1790 began, the justices embarked upon their business in a spirit of discovery: each action they took would be a test of the blueprint for governing outlined by the Constitution and the first Congress. Conscious of the significance of every decision they made, the justices invested much thought in even the smallest administrative detail, and in its first term administrative detail is all that the Supreme Court had to occupy its time. But by the next year, the justices issued their first opinions, and these reflected their belief that the Court’s rulings carried weight beyond the immediate question being considered.

The first case with which the Court dealt, *West v. Barnes*,<sup>16</sup> perfectly illustrates the justices’ concerns. They were faced with a dilemma: should they construe the procedural provisions of section 23 of the Judiciary Act<sup>17</sup> literally—producing inequitable results for litigants who lived in states distant from the nation’s capital—or should they effectively rewrite the statute to avoid this inequitable result? Although the justices realized that their decision would create problems for writ-seeking litigants who lived far from Philadelphia, they believed that correction could come only from the legislature that wrote section 23; Congress had to provide the remedy, not the Court. As Justice Iredell declared, “It is of infinite moment that Courts of Justice should keep within their

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<sup>14</sup>Diary of William Cushing, 20 November 1793, Philadelphia Almanac (1793), NH*i*, in *DHSC*, 2:433n. James Iredell to Hannah Iredell, 2 October 1791 (*ibid.*, 2:212).

<sup>15</sup>Notes of William Paterson, 23 June 1789, William Paterson Papers, Rutgers University, New Brunswick, New Jersey, in *DHSC*, 4:416.

<sup>16</sup>*West v. Barnes*, 2 U.S. 401(1791). For a discussion of the case, see *DHSC*, 6:7–26.

<sup>17</sup>Judiciary Act of 1789, section 23, *Stat.*, 1:85.

proper bounds, and *construe*, not *amend*, acts of Legislation.”<sup>18</sup> He fully expected Congress to change the law immediately. When it did not, he continued all cases in his circuit where section 23 was implicated and sent a letter to President Washington explaining his action and requesting the president to urge Congress to act.<sup>19</sup> Eventually, Congress did make different provisions for writs of error.<sup>20</sup>

The eighteenth-century Republic was so different from the country we know in the twenty-first century that it is hard to imagine all the decisions the three branches of government had to make in order to turn themselves into functioning institutions. For example, the justices had to determine whether to engage in extrajudicial activities, whether to give advisory opinions, and whether to make a political issue of their doubts about sitting on circuit deciding matters of original jurisdiction that were not within the jurisdiction described in the Constitution. But by far the most important question answered by the justices in the first decade was whether they would perform the function of judicial review. Judicial review is the practice by which federal judges, where necessary to decide cases brought before them, determine whether federal and state legislation and the actions of federal and state executive officers and courts conflict with the United States Constitution. The words “judicial review” are not explicitly mentioned in the Constitution, and this has cast doubt on the legitimacy of the practice. But from the very beginning of the Republic, federal judges assumed that they had this power. Congress, in the first decade, acted as if there were no doubt that the courts could exercise judicial review.<sup>21</sup> In a charge to a grand jury while on circuit—the first ever given under the new Judiciary Act—John Jay put his finger on what would become throughout the history of the Supreme Court the subject of recurrent controversy: “A judicial Controul, general & final, was indispensable. The Manner of establishing it, with Powers neither too extensive, nor too limited; rendering it properly independent, and yet properly amenable, involved Questions of no little Intricacy.”<sup>22</sup>

In the first decade after the Constitution was ratified, federal judges exercised their power of judicial review with regard to both state and

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<sup>18</sup> *Federal Gazette*, 2–3 August 1791, in *DHSC*, 6:22.

<sup>19</sup> James Iredell to George Washington, 23 February 1792, in *DHSC*, 2:240–41.

<sup>20</sup> “An Act for regulating Processes in the Courts of the United States, and providing Compensations for the Officers of the said Courts, and for Jurors and Witnesses” (8 May 1792), section 9, *Stat.*, 1:278.

<sup>21</sup> Maeva Marcus, “Judicial Review in the Early Republic,” in *Launching the “Extended Republic”*: *The Federalist Era*, ed. Ronald Hoffman and Peter J. Albert, 25–53 (Charlottesville: University Press of Virginia, 1996).

<sup>22</sup> John Jay’s Charge to the Grand Jury of the Circuit Court for the District of New York, April 12, 1790, in *DHSC*, 2:27.

national legislation on a number of occasions, sometimes finding a conflict but more frequently upholding the actions of the legislatures. The political branches of government accepted the Court's role; in fact, when for the first time the Supreme Court justices on circuit in Pennsylvania found an act of Congress<sup>23</sup> unconstitutional in *Hayburn's Case*,<sup>24</sup> Congress enacted a new law to meet the judges' objections at its next session.<sup>25</sup> In 1796, exercising the power of judicial review, the Court, in *Ware v. Hylton*<sup>26</sup> and *Hylton v. United States*,<sup>27</sup> determined two major issues. *Ware* concerned the right of British creditors to recover pre-revolutionary war debts owed to them by Americans, as required by the Definitive Treaty of Peace of 1783, and its resolution depended on establishing the supremacy of federal treaties over state laws. When the Court held in favor of the British creditors, this point of law was settled.

Having exercised judicial review to void a state statute, the Supreme Court, at the same term, passed on the constitutionality of a federal statute, the Carriage Tax Act of 1794.<sup>28</sup> Before enacting the legislation, Congress had debated the constitutional validity of such a tax, discussing whether it was a "direct tax" (and therefore unconstitutional because not properly apportioned according to the population of each state) or a lawful "indirect tax." Opponents and proponents of the statute sought to bring it before the Court for an authoritative decision on these questions.

One day after its decision in the British debts case, the Supreme Court held the Carriage Tax Act constitutional. Persuaded by the argument of Alexander Hamilton, who was recruited to present the government's case before the Court, the justices upheld the carriage tax as an indirect tax. But all the justices acknowledged that they were engaged in an exercise of judicial review, weighing the congressional statute against the Constitution. They knew they had the power to overturn the act, if necessary. While there were critics of the substantive decision in *Hylton*, the Court's power of judicial review was not questioned.

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<sup>23</sup> "An Act to provide for the settlement of the Claims of Widows and Orphans barred by the limitations heretofore established, and to regulate the Claims to Invalid Pensions" (23 March 1792), *Stat.*, 1:243.

<sup>24</sup> *Hayburn's Case*, 2 U.S. 409 (1792). For a full discussion of the case, see *DHSC*, 6:33–46.

<sup>25</sup> "An Act to regulate the Claims to Invalid Pensions" (28 February 1793), *Stat.*, 1:324.

<sup>26</sup> *Ware v. Hylton*, 3 U.S. 199 (1796). For a full discussion of the case, see *DHSC*, 1:203–22.

<sup>27</sup> *Hylton v. United States*, 3 U.S. 171 (1796). For a full discussion of the case, see *DHSC*, 1:358–69.

<sup>28</sup> "An Act laying duties upon Carriages for the conveyance of Persons" (5 June 1794), *Stat.*, 1:373.

Of course during the initial ten years of the American government the executive, legislative, and judicial branches were controlled by the same political party, the Federalists. As time went on, however, more causes of political disagreement appeared. After the passage of the Alien and Sedition Acts in 1798,<sup>29</sup> judicial review became a focal point of partisan debate when the justices on circuit refused to permit juries to consider the constitutionality of that legislation. The Kentucky and Virginia Resolutions of 1798 and 1799, which specifically claimed that the Alien and Sedition Acts were unconstitutional, asserted that each state should itself judge of the constitutional validity of congressional statutes. Other states failed to support the resolutions, and several state legislatures repudiated this theory of nullification.<sup>30</sup> The end result was to leave the power of judicial review with the federal courts, where it belonged under the Constitution.

But by the end of 1801, the nation had undergone a major political realignment. The Republicans had taken over the executive and legislative branches of the national government; only the judiciary remained as a stronghold of the Federalists. Now, for the first time, the justices were thrown into the middle of partisan political wars, with judicial review becoming a contested issue. And their leader was the man named in the title to my talk, John Marshall, the newest member of the bench. It is he who gets the glory for establishing the power of judicial review in the famous case of *Marbury v. Madison* (1803).<sup>31</sup> While it is true that the Court's opinion in *Marbury* was the first written justification of that power and that the Supreme Court, for the first time, overturned a congressional statute, the previous decade of jurisprudence gave the Marshall Court the necessary experience with which to deal with that momentous question. The 1790s had established the Supreme Court as an institution that could not be ignored, an institution worth defending.

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<sup>29</sup>The following four acts are collectively referred to as The Alien and Sedition Acts (1798):

“An Act supplementary to and to amend the act, entitled ‘An act to establish an uniform rule of naturalization; and to repeal the act heretofore passed on that subject’” (18 June 1798), *Stat.*, 1:566.

“An Act Concerning Aliens” (25 June 1798), *Stat.*, 1:570.

“An Act Respecting Alien Enemies” (6 July 1798), *Stat.*, 1:577.

“An Act in addition to the act, entitled ‘An act for the punishment of certain crimes against the United States’” (14 July 1798), *Stat.*, 1:596.

<sup>30</sup>Merrill Peterson, “Virginia and Kentucky Resolutions,” in *Encyclopedia of the American Constitution*, ed. Leonard Levy, 6 vols. (New York: MacMillan Reference, 2000), 4:1974–75.

<sup>31</sup>*Marbury v. Madison*, 5 U.S. 137 (1803).