

JOHN MARSHALL AND
THE CONSTITUTION;
A Chronicle Of The
Supreme Court

By
EDWARD S. CORWIN

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Chapter I

The Establishment Of The National Judiciary

The monarch of ancient times mingled the functions of priest and judge. It is therefore not altogether surprising that even today a judicial system should be stamped with a certain resemblance to an ecclesiastical hierarchy. If the Church of the Middle Ages was "an army encamped on the soil of Christendom, with its outposts everywhere, subject to the most efficient discipline, animated with a common purpose, every soldier panoplied with inviolability and armed with the tremendous weapons which slew the soul," the same words, slightly varied, may be applied to the Federal Judiciary created by the American Constitution. The Judiciary of the United States, though numerically not a large body, reaches through its process every part of the nation; its ascendancy is primarily a moral one; it is kept in conformity with final authority by the machinery of appeal; it is "animated with a common purpose"; its members are "panoplied" with what is practically a life tenure of their posts; and it is "armed

with the tremendous weapons" which slay legislation. And if the voice of the Church was the voice of God, so the voice of the Court is the voice of the American people as this is recorded in the Constitution.

The Hildebrand of American constitutionalism is John Marshall. The contest carried on by the greatest of the Chief Justices for the principles today associated with his name is very like that waged by the greatest of the Popes for the supremacy of the Papacy. Both fought with intellectual weapons. Both addressed their appeal to the minds and hearts of men. Both died before the triumph of their respective causes and amid circumstances of great discouragement. Both worked through and for great institutions which preceded them and which have survived them. And, as the achievements of Hildebrand cannot be justly appreciated without some knowledge of the ecclesiastical system which he did so much to develop, neither can the career of John Marshall be understood without some knowledge of the organization of the tribunal through which he wrought and whose power he did so much to exalt. The first chapter in the history of John Marshall and his influence upon the laws of the land must therefore inevitably deal with the historical conditions underlying the judicial system of which it is the capstone.

The vital defect of the system of government provided by the soon obsolete Articles of Confederation lay in the fact that it operated not upon

the individual citizens of the United States but upon the States in their corporate capacities. As a consequence the prescribed duties of any law passed by Congress in pursuance of powers derived from the Articles of Confederation could not be enforced. Theoretically, perhaps, Congress had the right to coerce the States to perform their duties; at any rate, a Congressional Committee headed by Madison so decided at the very moment (1781) when the Articles were going into effect. But practically such a course of coercion, requiring in the end the exercise of military power, was out of the question. Whence were to come the forces for military operations against recalcitrant States? From sister States which had themselves neglected their constitutional duties on various occasions? The history of the German Empire has demonstrated that the principle of state coercion is entirely feasible when a single powerful State dominates the rest of the confederation. But the Confederation of 1781 possessed no such giant member; it approximated a union of equals, and in theory it was entirely such.*

** By the Articles of Confederation Congress itself was made "the last resort of all disputes and differences...between two or more States concerning boundary, jurisdiction, or any other cause whatever." It was also authorized to appoint "courts for the trial of piracies and felonies committed on the high seas" and "for receiving and determining finally appeals in all cases of capture." But even before the Articles had gone into op-*

In the Federal Convention of 1787 the idea of state coercion required little discussion; for the members were soon convinced that it involved an impracticable, illogical, and unjust principle. The prevailing view was voiced by Oliver Ellsworth before the Connecticut ratifying convention: "We see how necessary for Union is a coercive principle. No man pretends to the contrary. . . The only question is, shall it be a coercion of law or a coercion of arms? There is no other possible alternative. Where will those who oppose a coercion of law come out? . . . A necessary consequence of their principles is a war of

eration, Congress had, as early as 1779, established a tribunal for such appeals, the old Court of Appeals in Cases of Capture. Thus at the very outset, and at a time when the doctrine of state sovereignty was dominant, the practice of appeals from state courts to a supreme national tribunal was employed, albeit within a restricted sphere. Yet it is less easy to admit that the Court of Appeals was, as has been contended by one distinguished authority. "not simply the predecessor but one of the origins of the Supreme Court of the United States." The Supreme Court is the creation of the Constitution itself; it is the final interpreter of the law in every field of national power; and its decrees are carried into effect by the force and authority of the Government of which it is one of the three coordinate branches. That earlier tribunal, the Court of Appeals in Cases of Capture, was, on the other hand, a purely legislative creation; its jurisdiction was confined to a single field, and that of importance only in time of war; and the enforcement of its decisions rested with the state governments.

the States one against the other. I am for coercion by law, that coercion which acts only upon delinquent individuals." If anything, these words somewhat exaggerate the immunity of the States from direct control by the National Government, for, as James Madison pointed out in the "Federalist," "in several cases . . . they [the States] must be viewed and proceeded against in their collective capacities." Yet Ellsworth stated correctly the controlling principle of the new government: it was to operate upon individuals through laws interpreted and enforced by its own courts.

A Federal Judiciary was provided for in every Plan offered on the floor of the Federal Convention. There was also a fairly general agreement among the members on the question of "judicial independence." Indeed, most of the state constitutions already made the tenure of the principal judges dependent upon their good behavior, though in some cases judges were removable, as in England, upon the joint address of the two Houses of the Legislature. That the Federal judges should be similarly removable by the President upon the application of the Senate and House of Representatives was proposed late in the Convention by Dickinson of Delaware, but the suggestion received the vote of only one State. In the end it was all but unanimously agreed that the Federal judges should be removable only upon conviction following impeachment.

But, while the Convention was in accord on this matter, another question, that of the organization of

the new judiciary, evoked the sharpest disagreement among its members. All believed that there must be a national Supreme Court to impress upon the national statutes a construction that should be uniformly binding throughout the country; but they disagreed upon the question whether there should be inferior national courts. Rutledge of South Carolina wanted the state courts to be used as national courts of the first instance and argued that a right of appeal to the supreme national tribunal would be quite sufficient "to secure the national rights and uniformity of judgment." But Madison pointed out that such an arrangement would cause appeals to be multiplied most oppressively and that, furthermore, it would provide no remedy for improper verdicts resulting from local prejudices. A compromise was reached by leaving the question to the discretion of Congress. The champions of local liberties, however, both at Philadelphia and in the state conventions continued to the end to urge that Congress should utilize the state courts as national tribunals of the first instance. The significance of this plea should be emphasized because the time was to come when the same interest would argue that for the Supreme Court to take appeals from the state courts on any account was a humiliation to the latter and an utter disparagement of State Rights.

Even more important than the relation of the Supreme Court to the judicial systems of the States was the question of its relation to the Constitution as a governing instrument. Though the idea that

courts were entitled to pronounce on the constitutionality of legislative acts had received countenance in a few dicta in some of the States and perhaps in one or two decisions, this idea was still at best in 1787 but the germ of a possible institution. It is not surprising, therefore, that no such doctrine found place in the resolutions of the Virginia plan which came before the Convention. By the sixth resolution of this plan the national legislature was to have the power of negating all state laws which, in its opinion, contravened "the Articles of Union, or any treaty subsisting under the authority of the Union," and by the eighth resolution "a convenient number of the national judiciary" were to be associated with the Executive, "with authority to examine every act of the national legislature before it shall operate, and every act of a particular legislature before a negative thereon shall be final" and to impose a qualified veto in either case.

But, as discussion in the Convention proceeded, three principles obtained clearer and clearer recognition, if not from all its members, certainly from the great majority of them: first, that the Constitution is law, in the sense of being enforceable by courts; secondly, that it is supreme law, with which ordinary legislation must be in harmony to be valid; and thirdly—a principle deducible from the doctrine of the separation of powers—that, while the function of making new law belongs to the legislative branch of the Government, that of expounding the standing law, of which the Constitution would be part

and parcel, belongs to the Judiciary. The final disposition of the question of insuring the conformity of ordinary legislation to the Constitution turned to no small extent on the recognition of these three great principles.

The proposal to endow Congress with the power to negative state legislation having been rejected by the Convention, Luther Martin of Maryland moved that “the legislative acts of the United States made in virtue and in pursuance of the Articles of Union, and all treaties made or ratified under the authority of the United States, shall be the supreme law of the respective States, and the judiciaries of the several States shall be bound thereby in their decisions, anything in the respective laws of the individual States to the contrary notwithstanding.” The motion was agreed to without a dissenting voice and, with some slight changes, became Article VIII of the report of the Committee of Detail of the 7th of August, which in turn became “the linch-pin of the Constitution.”* Then, on the 27th of August, it was agreed that “the jurisdiction of the Supreme Court” should “extend to all cases arising under the laws passed by the Legislature of the United States,” whether, that is, such laws should be in pursuance of the Constitution or not. The foundation was thus laid for the Supreme Court to claim the right to review any state decision challenging on constitutional grounds the validity of any act of Congress. Presently this foundation was broad-

**Article VI, paragraph 2.*

ened by the substitution of the phrase “judicial power of the United States” for the phrase “jurisdiction of the Supreme Court,” and also by the insertion of the words “this Constitution” and “the” before the word “laws” in what ultimately became Article III of the Constitution. The implications of the phraseology of this part of the Constitution are therefore significant:

Section I. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office.

Section II. 1. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects.

Such, then, is the verbal basis of the power of the courts, and particularly of the Supreme Court, to review the legislation of any State, with reference

to the Constitution, to acts of Congress, or to treaties of the United States. Nor can there be much doubt that the members of the Convention were also substantially agreed that the Supreme Court was endowed with the further right to pass upon the constitutionality of acts of Congress. The available evidence strictly contemporaneous with the framing and ratification of the Constitution shows us seventeen of the fifty-five members of the Convention asserting the existence of this prerogative in unmistakable terms and only three using language that can be construed to the contrary. More striking than that, however, is the fact that these seventeen names include fully three-fourths of the leaders of the Convention, four of the five members of the Committee of Detail which drafted the Constitution, and four of the five members of the Committee of Style which gave the Constitution its final form. And these were precisely the members who expressed themselves on all the interesting and vital subjects before the Convention, because they were its statesmen and articulate members.*

No part of the Constitution has realized the hopes of its framers more brilliantly than has Article III, where the judicial power of the United States

** The entries under the names of these members in the Index to Max Farrand's "Records of the Federal Convention" occupy fully thirty columns, as compared with fewer than half as many columns under the names of all remaining members.*

is defined and organized, and no part has shown itself to be more adaptable to the developing needs of a growing nation. Nor is the reason obscure: no part came from the hands of the framers in more fragmentary shape or left more to the discretion of Congress and the Court.

Congress is thus placed under constitutional obligation to establish one Supreme Court, but the size of that Court is for Congress itself to determine, as well as whether there shall be any inferior Federal Courts at all. What, it may be asked, is the significance of the word "shall" in Section II? Is it merely permissive or is it mandatory? And, in either event, when does a case arise under the Constitution or the laws of the United States? Here, too, are questions which are left for Congress in the first instance and for the Supreme Court in the last. Further, the Supreme Court is given "original jurisdiction" in certain specified cases and "appellate jurisdiction" in all others—subject, however, to "such exceptions and under such regulations as the Congress shall make." Finally, the whole question of the relation of the national courts to the state judiciaries, though it is elaborately discussed by Alexander Hamilton in the "Federalist," is left by the Constitution itself to the practically undirected wisdom of Congress, in the exercise of its power to pass "all laws which shall be necessary and proper for carrying into execution"* its own powers and those of

* *Article I, section VIII, 18.*

the other departments of the Government.

Almost the first official act of the Senate of the United States, after it had perfected its own organization, was the appointment of a committee "to bring in a bill for organizing the judiciary of the United States." This committee consisted of eight members, five of whom, including Oliver Ellsworth, its chairman, had been members of the Federal Convention. To Ellsworth is to be credited largely the authorship of the great Judiciary Act of September 24, 1789, the essential features of which still remain after 130 years in full force and effect.

This famous measure created a chief justiceship and five associate justiceships for the Supreme Court; fifteen District Courts, one for each State of the Union and for each of the two Territories, Kentucky and Ohio; and, to stand between these, three Circuit Courts consisting of two Supreme Court justices and the local district judge. The "cases" and "controversies" comprehended by the Act fall into three groups: first, those brought to enforce the national laws and treaties, original jurisdiction of which was assigned to the District Courts; secondly, controversies between citizens of different States;* lastly, cases brought originally under a state law and in a State Court but finally coming to involve some claim of right based on the National Constitution, laws, or treaties. For these

** Where the national jurisdiction was extended to these in the interest of providing an impartial tribunal, it was given to the Circuit Court.*

the twenty-fifth section of the Act provided that, where the decision of the highest State Court competent under the state law to pass upon the case was adverse to the claim thus set up, an appeal on the issue should lie to the Supreme Court. This twenty-fifth section received the hearty approval of the champions of State Rights, though later on it came to be to them an object of fiercest resentment. In the Senate, as in the Convention, the artillery of these gentlemen was trained upon the proposed inferior Federal Judiciary, which they pictured as a sort of Gargantua ready at any moment "to swallow up the state courts."

The first nominations for the Supreme Court were sent in by Washington two days after he had signed the Judiciary Act. As finally constituted, the original bench consisted of John Jay of New York as Chief Justice, and of John Rutledge of South Carolina, William Cushing of Massachusetts, John Blair of Virginia, James Wilson of Pennsylvania, and James Iredell of North Carolina as Associate Justices. All were known to be champions of the Constitution, three had been members of the Federal Convention, four had held high judicial offices in their home States, and all but Jay were on record as advocates of the principle of judicial review. Jay was one of the authors of the "Federalist", had achieved a great diplomatic reputation in the negotiations of 1782, and possessed the political backing of the powerful Livingston family of New York.

The Judiciary Act provided for two terms of court annually, one commencing the first Monday

of February, and the other on the first Monday of August. On February 2, 1790, the Court opened its doors for the first time in an upper room of the Exchange in New York City. Up to the February term of 1798 it had heard but five cases, and until the accession of Marshall it had decided but fifty-five. The justices were largely occupied in what one of them described as their "post-boy duties," that is, in riding their circuits. At first the justices rode in pairs and were assigned to particular circuits. As a result of this practice, the Southern justices were forced each year to make two trips of nearly two thousand miles each and, in order to hold court for two weeks, often passed two months on the road. In 1792, however, Congress changed the law to permit the different circuits to be taken in turn and by single justices, and in the meantime the Court had, in 1791, followed the rest of the Government to Philadelphia, a rather more central seat. Then, in 1802, the abolition of the August term eased the burdens of the justices still more. But of course they still had to put up with bad roads, bad inns, and bad judicial quarters or sometimes none at all.

Yet that the life of a Supreme Court justice was not altogether one of discomfort is shown by the following alluring account of the travels of Justice Cushing on circuit: "He traveled over the whole of the Union, holding courts in Virginia, the Carolinas, and Georgia. His traveling equipage was a four-

* *Flanders, "The Lives and Times of the Chief-Justices of the Supreme Court," vol. II, p. 38.*

wheeled phaeton, drawn by a pair of horses, which he drove. It was remarkable for its many ingenious arrangements (all of his contrivance) for carrying books, choice groceries, and other comforts. Mrs. Cushing always accompanied him, and generally read aloud while riding. His faithful servant Prince, a jet-black negro, whose parents had been slaves in the family and who loved his master with unbounded affection, followed."* Compared with that of a modern judge always confronted with a docket of eight or nine hundred cases in arrears, Justice Cushing's lot was perhaps not so unenviable.

The pioneer work of the Supreme Court in constitutional interpretation has, for all but special students, fallen into something like obscurity owing to the luster of Marshall's achievements and to his habit of deciding cases without much reference to precedent. But these early labors are by no means insignificant, especially since they pointed the way to some of Marshall's most striking decisions. In *Chisholm vs. Georgia*,* which was decided in 1793, the Court ruled, in the face of an assurance in the *Federalist* to the contrary, that an individual might sue a State; and though this decision was speedily disallowed by resentful debtor States by the adoption of the Eleventh Amendment, its underlying premise that, "as to the purposes of the Union, the States are not sovereign" remained untouched; and three years later the Court affirmed the supremacy of national treaties over conflicting

* 2 *Dallas*, 419.

state laws and so established a precedent which has never been disturbed.† Meantime the Supreme Court was advancing, though with notable caution, toward an assertion of the right to pass upon the constitutionality of acts of Congress. Thus in 1792, Congress ordered the judges while on circuit to pass upon pension claims, their determinations to be reviewable by the Secretary of the Treasury. In protests which they filed with the President, the judges stated the dilemma which confronted them: either the new duty was a judicial one or it was not; if the latter, they could not perform it, at least not in their capacity as judges; if the former, then their decisions were not properly reviewable by an executive officer. Washington promptly sent the protests to Congress, whereupon some extremists raised the cry of impeachment; but the majority hastened to amend the Act so as to meet the views of the judges.* Four years later, in the Carriage Tax case,± the only question argued before the Court was that of the validity of a congressional excise. Yet as late as 1800 we find Justice Samuel Chase of Maryland, who had succeeded Blair in 1795, expressing skepticism as to the right of the Court to disallow acts of Congress on the ground of their unconstitutionality, though at the same time admitting that the prevailing opinion among bench and bar supported the claim.

† *Ware vs. Hylton*, 3 *ib.*, 199.

* See 2 *Dallas*, 409.

± *Hylton vs. United States*, 3 *Dallas*, 171.