

# YEARBOOK 1987

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# YEARBOOK 1987

## Supreme Court Historical Society

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# *Justice Powell's Contributions to the Court*

by Byron R. White

Lewis Powell was the sixth new Justice to come to the Court after my arrival, and Justice Anthony Kennedy, who just filled the seat vacated by Justice Powell, is the eleventh. Whenever a new Justice is confirmed, the Court becomes a different instrument than it was. Judging is not a mechanical process but, among other things, an amalgam of ability, experience, and substantive views about the nature and role of government in general and the judicial function in particular. Justices are never carbon copies of each other and usually not even close to that description. Inevitably, a new Justice will decide some cases differently from his predecessor, and therefore the Court's product will be different than it would have been without the change in membership. This becomes readily apparent as the months after the new Justice arrives slip by, although it takes years really to determine his or her impact on the work of the Court. William O. Douglas told me soon after I came to the bench that it would be ten years before I had been "around the track" for the first time; only then would I have the feeling that most of the cases presented issues that I had judged before. Likewise, only after such a time can one assess with some confidence how a new Justice has influenced the Court. But it is certain that there will be a significant change, both in the sense that cases are not being decided as they would have been in the past and in the sense that there are departures from prior legal doctrine.

It thus goes without saying that Lewis Powell left his imprint on the Court. The scholarly journals will be full of the details of how and when this occurred. I shall just say in general that his impact is as plainly discernable, if not more so, than that of any of the Justices arriving since 1962. Justice Powell, who came directly from the practice, was a very intelligent, experienced and effective



Associate Justice Byron R. White (above) shared the bench with Associate Justice Powell from 1971 to 1987.

lawyer and Justice. He brought with him an immediate and present knowledge of the practice and could express very current views from the "real world" of the law about the role of the courts, the processes of governing, and the place of Constitutional restraints upon those processes. His views were more than a distant memory of what non-judicial life and thought is like. Judges perhaps can only speculate about the impact of their decisions; but those who have recently been in the trenches have considerably more to say on this subject. Lewis Powell said it in his characteristically quiet but extremely effective way, per-

haps more effectively than if he had come from ten or fifteen years of service as a federal or state judge.

Justice Powell's work on the Court again illustrated what history has time and again revealed — that prior judicial experience is not a prerequisite for outstanding performance on the Supreme Court. Felix Frankfurter's seminal treatment of the issue, 105 *University of Pennsylvania Law Review* 781 (1957), as well as the contributions of others, makes this very clear. Moreover, those who are nominated directly from the practice — in any one of its many manifestations — may well exert an influence different from those with years of service on the bench behind them. This is especially true if the nominee's experience, as Lewis Powell's was, is rich and varied.

Justice Powell is the perfect example of why Presidents not only should not confine their choice of Justices to those with judicial experience, but should instead affirmatively strive not to do so—to make sure that new arrivals on the Court include those fresh from the practice and hopefully more nearly reflecting the views of society, which, not in the short run by any

means, but over time, will have enormous influence on the way the law develops. This is not to disparage the value of judicial experience; those with it in many ways "hit the ground running" when they come here. They are not strangers to judging, and they normally arrive with mature and convincing views on important issues. But this does not gainsay the distinctive contributions that Lewis Powell made to the Court: distinctive in important part because he was fresh from the uncloistered, relatively unstructured, general practice of the law.

Of course, I do not mean to ignore Justice Powell's personal traits, for he was, and is, highly thought of by all of us, and for good reason. He was a very enjoyable colleague, one whom I sought to spend time with, whether at lunch, in the office, or elsewhere. I miss him for those reasons, but also for his views that were molded by a lifetime of experience in practice, dealing directly with those considerations that determine the quality of the country's existence. I'm sure he brought to us something that might have been lost had he been on the bench for years on end before he arrived here.

# ***Lewis F. Powell And The American Bar Association***

by Bernard G. Segal

In my initial draft of this article, I briefly summarized Justice Lewis F. Powell's more than 15 years on the Supreme Court as one of the most outstanding and highly regarded Justices in our nation's history. However, I then learned that Justice Byron R. White had agreed to submit an article on that subject for this issue of the *Yearbook*, and certainly no one is more qualified than he to do so. Accordingly, I proceed to my specific assignment.

Born in Suffolk and reared in Richmond, Virginia, after a brilliant scholastic record in college, where he won high honors, including election to Phi Beta Kappa, and at law school, graduating first in his class, Justice Powell earned his LL.M. degree at Harvard, promptly after which he embarked upon his career as a practicing lawyer.

His practice developed to be as extensive and diversified as it was efficient and effective. As a member of a leading law firm in Richmond, he represented a wide assortment of individuals and corporations, as well as civic and charitable groups. He excelled in many areas of practice having a very high reputation as a courtroom advocate at both trial and appellate levels. I had occasion, from time to time, to work with him directly, sometimes both of us representing a client in the same matter. Accordingly, I was able to observe at firsthand the excellence of his representations. I say without doubt that whether in court, or solving an intricate legal problem, he was as skilled a lawyer as I have known.

As ABA President (1964-65) and as President-Elect as well, he initiated highly significant programs and policies to fulfill the obligations of the legal profession to the community-at-large. He is conceded by everyone knowledgeable in ABA affairs and history as having



Bernard G. Segal

been one of the most effective, most dedicated, and most beloved Presidents and Presidents-Elect the Association has ever had. During the year that he was President, he placed the Association in a new position of leadership in terms of pragmatic institutional recognition of the vast social and technological changes that characterized the times, and in the adoption among others of highly significant programs and policies designed to improve the administration of criminal justice, to fulfill the obligations of lawyers to provide legal services to the needy members of our society, to reevaluate the ethical standards of the profes-

sion, and to enhance the general reputation of lawyers.

I now proceed to a statement of the outstanding projects Lewis Powell initiated during his term of office. The limitation of space however prevents my presenting as to each of these projects, the development in the years that followed. Perhaps on some future occasion, I will have the opportunity to update each project by giving its present status, in the achievement of which Powell continued to play a role even after his appointment to the Supreme Court.

The Criminal Justice Act of 1964, providing for compensated counsel in federal courts for indigent defendants charged with felonies or serious misdemeanors, having been enacted and gratifying progress having been made in a number of states, Justice Powell, as President of the Association, alerted the profession to the magnitude and urgency of the need for counsel in criminal cases; and he skillfully stimulated action by the organized Bar to meet that need. He also reminded the Bar that its responsibility was no less crucial in the civil justice field.

When the Economic Opportunity Act was enacted in 1964, authorizing community action programs designed to help the impoverished through legal services and other means in local communities across the country, there was considerable concern among some members of the profession as to whether the legislation, because it involved massive participation by the federal government in legal aid, would receive the support of the organized Bar. Most lawyers would have preferred local rather than federal solutions. However, under the leadership of Lewis Powell, who recognized that the complexities and demands of society required legal service assistance that was beyond the will or capacity of the profession, or even states and municipalities, to meet, the American Bar Association assumed the national leadership in persuading the organized Bar at all levels to embrace the OEO Legal Services Program then before the Congress. This not only helped rekindle the conscience of the Bar in a critical area in which it had certainly not distinguished itself; it provided the support the program needed to get off the ground. In a letter I received in 1970 from the eminent

Sargent Shriver, he referred to the magnificent leadership of Lewis Powell in the formulation and the effectuation of the national program. He praised, too, Powell's statesmanship in the identification and critical appraisal of its obvious problems and uncertainties. Shriver added that he had "come to believe that the Legal Services Program, small though it is, will rank in history with the great triumphs of Justice over Tyranny . . . (and) one of the brightest achievements in our nation's history."

In recognizing the need for broader and more efficient legal services for the poor, Powell did not overlook the mounting problems of other segments of the public in obtaining adequate legal services — the millions of persons who are not so impoverished as to be qualified for legal aid but who nevertheless require legal services and cannot afford to pay for them. And so, at his insistence the American Bar Association created still another agency, this time to ascertain the availability of legal services to all segments of society, the adequacy of existing methods and institutions for providing them, the need for group legal programs and their relation to the profession's ethical standards, and the most expeditious and effective way to provide such services to a greatly enlarged clientele. "But even as study progresses," Powell urged, "the organized bar at all levels must press ahead with every available means to improve existing methods. . . . It is axiomatic that those (the legal profession) who enjoy a monopoly position have higher duties and responsibilities. In discharging these, the ultimate test must be the public interest."

Recognizing the need for updating the Canons of Professional Ethics, including their observance and enforcement, Justice Powell appointed a new Special Committee on Evaluation of Ethical Standards to deal with that subject. In doing so, he directed the Committee's attention to three examples of the need: (1) wider discourse on fair trial and free press, lawyers being "a major source of news that may affect the fairness of trials;" (2) the representation of unpopular causes and the providing of aid even to the most unpopular defendants; and (3) the need to revise the Canons of Ethics to recognize the need for group legal services through lay organizations.

Reporting a growing dissatisfaction with



the discipline maintained by the legal profession, he courageously acknowledged that the dissatisfaction was justified and requested that the new canons lay down clear, peremptory rules relating directly to the duty of lawyers to their clients and the courts.

One of the most massive undertakings in the history of the Association undertaken during Lewis Powell's administration as President was the project to provide minimum standards for the administration of the criminal justice process—from prearrest and bail to sentencing, postconviction remedies and correctional treatment. Today, the historic Reports of the distinguished committee of judges, lawyers, and others initially appointed by Powell, provide innovative and effective standards to improve the criminal process. They were actively considered by legislatures, courts, and law enforcement authorities, and proved, as Lewis Powell predicted they would, to "help materially in improving the fairness, the certainty and swiftness of criminal justice."

In the area of race relations, the following paragraph from President Powell's Address at the Association's Annual Meeting is noteworthy:

One cannot think of crime in this country without special concern for the lawlessness related to racial unrest that casts a deep shadow across the American scene. This takes many forms. That which is most widely publicized is the criminal conduct of the small and defiant minority in the South—a

diminishing minority that still uses violence and intimidation to frustrate the legal rights of Negro citizens. This conduct is rightly condemned and deplored throughout our country. The full processes of our legal system must be used as effectively, and with as much determination, against racial lawlessness as against all other crime.

Evidence of the esteem in which Lewis Powell was held as a practicing lawyer by the bar of the country was the extremely rare occurrence of election as President of three leading national organizations of our profession—the American Bar Association, the American College of Trial Lawyers, and the American Bar Foundation.

Lewis Powell led these organizations with enormous compassion, creativity and endless energy. Anyone familiar with his record as ABA President could have predicted, as indeed I did 16 years ago in my statement to the Senate Judiciary Committee in support of his confirmation, that when he joined the Supreme Court only seven years after serving as ABA President, he would prove to be one of the truly great Justices of the Court. I said, in part:

... I have no doubt that as a Supreme Court Justice, law, as the will and wisdom of the people, is the client Lewis Powell will serve. ... [H]e will bring to his task extraordinary capacities, a wise and understanding heart, and a deep and abiding sense of justice. I predict that at the end of his term, Lewis Powell will have joined 'the enduring architects of the Federal structure within which our nation lives and moves and has its being.'

# Justice Powell and the Eighth Amendment: The Vindication of Proportionality

by George Clemon Freeman, Jr.<sup>1</sup>

One of the areas in which Justice Powell has had a major impact on current Supreme Court constitutional jurisprudence is the Eighth Amendment. That amendment provides that:

Excessive bail shall not be required, nor excessive fines imposed and cruel and unusual punishment inflicted.

Justice Powell's more important Eighth Amendment opinions fall into two categories—the capital punishment cases and the length of sentence cases. The capital punishment opinions include his joint opinion with Justices Stewart and Stevens in *Gregg v. Georgia*,<sup>2</sup> his later opinions for the Court in *Eddings v. Oklahoma*,<sup>3</sup> *Booth v. Maryland*,<sup>4</sup> and *McCleskey v. Kemp*,<sup>5</sup> and his dissent in *Burger v. Kemp*.<sup>6</sup> The non-capital, length of sentences, cases are his dissent in *Rummel v. Estelle*<sup>7</sup> and his opinion for the Court distinguishing *Rummel* three years later in *Solem v. Helm*.<sup>8</sup> In both lines of cases one of Justice Powell's principal contributions has been to help rescue and restore the concept of "proportionality" to its rightful place in enforcing the Eighth Amendment.

## The "Death Penalty" Opinions

*Gregg v. Georgia*<sup>9</sup> is unusual in that the plurality opinion, announcing the judgment, was written jointly by three Justices: Stewart, Powell and Stevens. The case is one of the most important decisions involving capital punishment and the Eighth Amendment in the past quarter century. It involved the validity of the statutory scheme for imposition of capital sentences that the Georgia legislature enacted in the wake of the Court's ruling in *Furman v. Georgia*,<sup>10</sup> which had held that Georgia's old



George Freeman, Jr. practiced law with Justice Powell in Richmond, Virginia from 1957 through 1971.

system was unconstitutional. In *Gregg*, the Court upheld Georgia's new capital sentencing system but was divided in the basic reasons for the result.

The Court was split three ways. Justices Brennan and Marshall adhered to their view that what is "cruel and unusual punishment" evolves with the times and that under that criterion the death penalty can no longer be justified in any circumstances.<sup>11</sup> Justices Stewart, Powell and Stevens likewise viewed the concept as an evolving one, but they concluded

that "the punishment of death does not invariably violate the Constitution."<sup>12</sup> They focused instead on the procedures by which capital punishment was imposed. While, in their view, the old Georgia system permitted unguided jurors to impose "the death sentence in a way that could only be called freakish,"<sup>13</sup> the new Georgia system provided significant guidance to the jury and the appellate review process added an additional safeguard against abuse.

The provision of appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury.<sup>14</sup>

Justice White, Chief Justice Burger and Justice Rehnquist concurred in the judgment in a separate opinion that avoided any discussion of evolving social standards and placed principal emphasis on the role of the Georgia Supreme Court in appellate review.

Indeed, if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside. Petitioner has wholly failed to establish . . . that the Georgia Supreme Court failed properly to perform its task in this case or that it is incapable of performing its task adequately in all cases; and this Court should not assume that it did not do so.<sup>15</sup>

The joint opinion of Justices Stewart, Powell and Stevens is of interest not only because of the seminal quality of *Gregg v. Georgia*, but also for the insight it affords into Powell's subsequent Eighth Amendment opinions. In particular, the heavy reliance upon *Weems*, *Trop* and *Robinson*,<sup>16</sup> clearly foreshadowed Powell's subsequent insistence that the Eighth Amendment's requirements of proportionality apply to all sentences, those in non-capital as well as capital cases.<sup>17</sup>

In *Eddings v. Oklahoma*, Powell, writing for the Court, set aside a death sentence imposed upon a defendant who was only sixteen years old, emotionally disturbed and mentally retarded at the time he committed the murder. The Court did so because the sentencing judge "did not evaluate the evidence in mitigation and find it wanting as a matter of fact" but "rather he found that *as a matter of law* he was

unable even to consider the evidence."<sup>18</sup> The Court reversed noting that "this sentence was imposed without 'the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases.'"<sup>19</sup> As in many of Powell's opinions in this field, the Court was closely divided. Four Justices, Chief Justice Burger and Justices White, Blackmun and Rehnquist, dissented.

In *Eddings*, Powell traced the recent history of the Court's evolving views on the constitutional parameters imposed on capital punishment:

As THE CHIEF JUSTICE explained, the rule in *Lockett* is the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual . . .

Beginning with *Furman*, the Court has attempted to provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused.<sup>20</sup>

Turning to the facts, Powell wrote:

We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in *Lockett*. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.<sup>21</sup>

Powell again showed special solicitude for juvenile offenders in his dissent in *Burger v. Kemp*.<sup>22</sup> There he emphasized the special problems presented where the defendant sentenced to death was age 17 and obviously mentally retarded:

Imposing the death penalty on an individual who is not yet legally an adult is unusual and raises special concern. At least, where a State permits the execution of a minor, great care must be taken to ensure that the minor truly deserves to be treated as an adult. A specific inquiry including "age, actual maturity, family environment, education, emotional and mental stability, and . . . prior record" is particularly relevant when a minor's criminal culpability is at issue.<sup>23</sup>

In *McCleskey v. Kemp*, Powell adhered to his belief that the appropriateness or inap-

propriateness of imposition of the death penalty should be objectively determined in light of facts directly related to the individual's character, conduct and the circumstances regarding his crime. In this case the jury found two aggravating circumstances justifying imposition of the death penalty and the defendant offered no mitigating evidence. The lower court, on the recommendation of the jury, imposed the death sentence. Subsequently, the defendant sought to have the sentence set aside in a petition for a writ of habeas corpus. His counsel presented a statistical study that purported "to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim, and to a lesser extent, the race of the defendant."<sup>24</sup> Speaking for himself, Chief Justice Rehnquist and Justices White, O'Connor and Scalia, Powell rejected arguments that imposition of the death penalty on McCleskey violated the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

Several comments on this opinion are in order. From the perspective of the Court and its continuing deep division over the constitutionality of the death penalty under the cruel and unusual punishment clause of the Eighth Amendment, the opinion is yet one more precedent in the controlling line of decisions following in the wake of *Furman v. Georgia*<sup>25</sup> and *Gregg v. Georgia*.<sup>26</sup> Thus, Powell's opinion reaffirmed for himself and four other justices that so long as Georgia in fact provides for procedures in the capital sentencing process that ensure the discretion unavoidably involved in sentencing is "controlled by clear and objective standards as to produce non-discriminatory application,"<sup>27</sup> the system itself is constitutional. Powell summarized this requirement as follows:

In sum, our decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty.

In this respect the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.<sup>28</sup>

Thus, Powell concluded that "[i]n light of our precedents under the Eighth Amendment, McCleskey cannot argue successfully that his sentence is 'disproportionate to the crime in the traditional sense.'"<sup>29</sup>

One of the more interesting parts of Powell's opinion in *McCleskey* is his treatment of the statistical study and its relationship to both the Eighth Amendment and Equal Protection arguments advanced by the defendant. Since the statistical study was used by the defendant as the basis for two alternative constitutional arguments, Powell chose to discuss the study's implications for each constitutional provision separately.

Addressing the Eighth Amendment argument that the imposition of the death penalty on McCleskey "is disproportionate to the sentences in other murder cases," Powell said that "absent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McCleskey cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty."<sup>30</sup> The Court's earlier opinion in *Gregg* favored such an argument because it recognized that "opportunities for discretionary leniency" would produce disparate results in individual application. But Powell rejected that extension of *Gregg*. So long as the sentencing procedures "focus discretion 'on the particularized nature of the crime and the particularized characteristics of the individual defendant,' . . . we lawfully may presume that McCleskey's death sentence was not 'wantonly and freakishly imposed,' . . . and thus the sentence is not disproportionate within any recognized meaning under the Eighth Amendment."<sup>31</sup>

Having disposed of the facial attack on the Georgia statute, Powell then proceeded to deal with the defendant's argument that "the Georgia system is arbitrary and capricious *in application*, and therefore his sentence is excessive, because racial considerations may influence capital sentencing decisions in Georgia."<sup>32</sup> Powell recognized that the statistical study was relevant but, in his view, it was





Associate Justice Lewis F. Powell, Jr.  
1971-1987

not constitutionally determinative for two reasons. The first was the inherent probative weakness of statistical evidence generally.

To evaluate McCleskey's challenge, we must examine exactly what the Baldus study may show. Even Professor Baldus does not contend that his statistics prove that race enters into any capital sentencing decisions or that race was a factor in McCleskey's particular case. Statistics at most may show only a likelihood that a particular factor entered into some decisions. There is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case. There are similar risks that other kinds of prejudice will influence other criminal trials. . . . The question "is at what point that risk becomes constitutionally unacceptable," . . . McCleskey asks us to accept the likelihood allegedly shown by the Baldus study as the constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions. This we decline to do. . . . Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process.<sup>33</sup>

Powell's second reason for rejecting the study was the lack of any limiting principle

should such studies generally become criteria for finding constitutionally impermissible discrimination against minority groups.

In *Boothe*, writing for the Court, Powell set aside a Maryland statute that permitted evidence of the impact of a murder on the family of the victim to be presented to a jury determining whether or not imposition of the death penalty was appropriate. He wrote that

[o]ne can understand the grief and anger of the family caused by the brutal murders in this case, and there is no doubt that jurors generally are aware of these feelings. But the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case [the sentence] on the relevant evidence concerning the crime and the defendant. As we have noted any decision to impose the death sentence must "be, and appear to be, based on reason rather than caprice or emotion. . . ." The admission of these emotionally-charged opinions as to what conclusions the jury should draw from the evidence is clearly inconsistent with the reasoned decision-making we require in capital cases.<sup>34</sup>

### The "Length of Sentences" Opinions

Powell's non-capital case "proportionality" opinions, his dissent in *Rummel v. Estelle*<sup>35</sup> and his opinion for the Court three years later in *Solem v. Helm*,<sup>36</sup> provide an example of how Powell ultimately persuaded a majority of his colleagues to come around to his view on a major constitutional issue. In this instance Justice Stewart, who concurred in *Rummel*, had left the Court and been replaced by Justice O'Connor who dissented in *Solem*. Thus the decisive vote in *Solem* came from Justice Blackmun who had been with the majority in *Rummel* but shifted to join Powell in *Solem*.

The issue in both *Rummel* and *Solem* was whether the Eighth Amendment imposes any limitations based on the principle of proportionality on the length of sentences legislatures may establish for non-capital offenses. Powell's careful research into the English law roots of the amendment provided the answer. He went back to Magna Carta and its provisions on amercements to find the origins of the concept of proportionality and traced its descent through the English Bill of Rights of 1689 to the Virginia Declaration of Rights, which was the immediate source of the language in the Eighth Amendment.

In light of this history, Powell could have rested his result on the concept of "original

intent." But he chose to take a more expansive approach. Evoking the "living Constitution,"<sup>37</sup> Powell tied the proportionality cases into the *Furman v. Georgia*<sup>38</sup> and *Gregg v. Georgia*<sup>39</sup> line of cases which had read limitations on death penalties into the Eighth Amendment to reflect changing social values. Powell stated in his *Rummel* dissent that "[t]he special relevance of *Furman* to this case lies in the general acceptance by Members of the Court of two basic principles. First, the Eighth Amendment prohibits grossly excessive punishment. Second, the scope of the Eighth Amendment is to be measured by 'evolving standards of decency.'"<sup>40</sup>

In his *Rummel* dissent, Powell also rebutted the argument that the Court's review of the scope of permissible punishment set by state legislatures is counter to the principles of separation of powers and federalism. He cited a line of Fourth Circuit cases imposing proportionality constraints on sentences imposed under state law as "impressive empirical evidence that the federal courts are capable of applying the Eighth Amendment to disproportionate noncapital sentences with a high degree of sensitivity to principles of federalism and state autonomy."<sup>41</sup>

Thus, once more we see the pragmatic Powell refusing to let abstract principles triumph over according justice to the individual standing before the Court:

The sentence imposed upon the petitioner would be viewed as grossly unjust to virtually every layman and lawyer. In my view, objective criteria clearly establish that a mandatory life sentence for defrauding persons of about \$230 crosses any rationally drawn line separating punishment that lawfully may be imposed from that which is proscribed by the Eighth Amendment.<sup>42</sup>

In *Solem*, for his new found majority, Powell answered the arguments that applying federal scrutiny to sentences to see if they are consistent with the concept of proportionality will allow the courts virtually unfettered discretion and deluge the courts with a flood of new cases. He reached back to *Weems v. United States*<sup>43</sup> and the few subsequent cases in that line, such as *Trop v. Dulles*<sup>44</sup> and *Robinson v. California*,<sup>45</sup> and to the death penalty cases to find objective factors by which proportionality may be determined:

In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective

criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for the commission of the same crime in other jurisdictions.<sup>46</sup>

Powell emphasized that application of such standards by courts is practical. "Application of the factors that we identify also assumes that courts are able to compare different sentences. . . . Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts."<sup>47</sup> Powell then proceeded to apply the criteria to the facts before him and concluded:

Applying objective criteria, we find that Helm has received the penultimate sentence for relatively minor criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State. We conclude that his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment.<sup>48</sup>

### A Final Observation

Justice Powell's contribution to current Eighth Amendment jurisprudence may have broader influence in the future in areas outside criminal sentencing. Commentators have already noted the relevance of the concept of proportionality to awards of punitive damages.<sup>49</sup> Its applicability to such damages was one of the issues recently before the Court in *Bankers Life and Casualty Company v. Crenshaw* but the Court did not reach the issue.<sup>50</sup> The Supreme Court of Georgia did, however, and, relying heavily on Powell's amendments analysis in *Solem*, held that the excessive fines provision of the Eighth Amendment and its Georgia Constitution equivalent barred all excessive monetary penalties including excessive punitive damages.<sup>51</sup> The proportionality concept has also been held applicable by lower federal courts to forfeitures under civil RICO.<sup>52</sup> Thus, the concept of proportionality, whether applied under the Eighth Amendment or under the broader concept of due process, may ultimately operate as an outer bound on the government's imposition of all civil penalties. Finally, this concept may be relevant to the application of strict, joint and several liability under statutes like the Superfund Act,<sup>53</sup> where, on the facts of a

particular case, the liability imposed is so disproportionate to the conduct or contribution of the particular defendant as to be punitive in effect.<sup>54</sup>

But whether or not these further extensions of the doctrine of proportionality are upheld by the Court, Justice Powell has already made

a major contribution by bringing new life to the almost moribund Eighth Amendment. Looking back into history to ascertain the evils that the founding fathers and their English forebears sought to avoid, Powell has made its protections relevant to contemporary society.

## Footnotes

<sup>1</sup> B. A. Vanderbilt 1950, LL.B. Yale 1956. Mr. Freeman clerked for Mr. Justice Black in the 1956 Term. Justice Powell practiced law with the author from 1957 to 1971 in Richmond, Virginia. This article is based on one section of an article by this author on "Justice Powell's Constitutional Opinions" which will appear in the Fall 1988 issue of the *Washington & Lee Law Review*.

<sup>2</sup> 428 U.S. 153 (1976).

<sup>3</sup> 455 U.S. 104 (1982).

<sup>4</sup> 482 U.S. \_\_\_, 107 S. Ct. 2529 (1987).

<sup>5</sup> 481 U.S. \_\_\_, 107 S. Ct. 1756 (1987).

<sup>6</sup> 483 U.S. \_\_\_, 107 S. Ct. 3114 (1987).

<sup>7</sup> 445 U.S. 263 (1980).

<sup>8</sup> 463 U.S. 277 (1983).

<sup>9</sup> 428 U.S. 153 (1976).

<sup>10</sup> 408 U.S. 238 (1972).

<sup>11</sup> 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); 428 U.S. 153, 231 (Marshall, J., dissenting).

<sup>12</sup> 428 U.S. at 169.

<sup>13</sup> *Id.* at 206.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 224.

<sup>16</sup> See *Id.* at 171-174 (discussing *Weems v. United States*, 217 U.S. 349 (1910); *Trop v. Dulles*, 356 U.S. 86 (1958) and *Robinson v. California*, 370 U.S. 660 (1962)). All these cases involved non-capital sentences or offenses.

<sup>17</sup> Justice Powell's subsequent non-capital sentences opinions in *Rummel v. Estelle*, 445 U.S. 263, 285 (1980) (Powell J. dissenting) and in *Solem v. Helm*, 463 U.S. 277 (1983) are discussed below.

<sup>18</sup> 455 U.S. at 113 (emphasis in original).

<sup>19</sup> *Id.* at 104 (quoting *Lockett v. Ohio*, 438 U.S. 586, 606 (1978)).

<sup>20</sup> *Id.* at 110-11.

<sup>21</sup> *Id.* at 113, 114 (1980) (emphasis in original).

<sup>22</sup> 483 U.S. \_\_\_, 107 S. Ct. 3114 (1987).

<sup>23</sup> *Id.* at 3140-41.

<sup>24</sup> 481 U.S. at \_\_\_, 107 S. Ct. at 1763.

<sup>25</sup> 408 U.S. 238 (1972).

<sup>26</sup> 428 U.S. 153 (1976).

<sup>27</sup> 481 U.S. at \_\_\_, 107 S. Ct. at 1772 (quoting *Gregg v. Georgia*, 428 U.S. 198 (1975)).

<sup>28</sup> *Id.* at 1774.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (emphasis in original).

<sup>31</sup> *Id.* 1775.

<sup>32</sup> *Id.* (emphasis in original).

<sup>33</sup> *Id.* at 1775-78 (emphasis in original). Powell's wariness of statistical studies is also evident in other contexts. See, e.g., *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 778 ("Quite apart from the language of the statute, our cases make clear that a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education."), 787 ("Our cases, however, have long since foreclosed the notion that mere statistical assurances will suffice to sail between the Scylla and Charybdis of 'effect' and 'entanglement' [in Establishment Clause, First Amendment cases].")

<sup>34</sup> 482 U.S. at \_\_\_, 107 S. Ct. at 2536.

<sup>35</sup> 445 U.S. 263, 285 (1980) (Powell, J., dissenting).

<sup>36</sup> 463 U.S. 277 (1983).

<sup>37</sup> 445 U.S. at 307.

<sup>38</sup> 408 U.S. 238 (1972).

<sup>39</sup> 463 U.S. 277 (1983).

<sup>40</sup> 445 U.S. at 291-92.

<sup>41</sup> *Id.* at 306.

<sup>42</sup> *Id.* at 307.

<sup>43</sup> 217 U.S. 349 (1910).

<sup>44</sup> 356 U.S. 86 (1958).

<sup>45</sup> 370 U.S. 660 (1962).

<sup>46</sup> 463 U.S. at 292.

<sup>47</sup> *Id.* at 294.

<sup>48</sup> *Id.* at 303.

<sup>49</sup> Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 141; Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand.L. Rev. 1233 (1987).

<sup>50</sup> \_\_ U.S. \_\_\_, 56 U.S. L.W. 4418 (U.S. May 17, 1988) (No. 85-1765, delivered May 16, 1988).

<sup>51</sup> *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 365 S.E. 2d 827 (March 17, 1988).

<sup>52</sup> *U.S. v. Bush*, 817 F.2d 1409 (9th Cir. 1987); *Hall v. City of Santa Barbara*, 813 F.2d 198 (9th Cir. 1987).

<sup>53</sup> Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.*

<sup>54</sup> See Jeffries, *supra*, n. 48; Freeman, *Inappropriate and Unconstitutional Retroactive Application of Superfund Liability*, 42 Bus. Law. 215 (1986); Massey, *supra*, n. 48.

# *Justice Powell And His Law Clerks*

by David Westin

Those of us who served as his clerks face many of the same difficulties in writing about Justice Powell that people must face in writing about their own parents. On the one hand, who knows better the "real person" behind the public persona? On the other, who can be trusted less to give an unbiased view? The Justice told us from the beginning that he and Mrs. Powell regard us as their own sons and daughters. Over the course of our time in the Powell chambers we indeed became part of the professional "Powell family" with all of the rights and responsibilities that entailed. We enjoyed the most intimate of professional relationships, observing the Justice closely as judge, supervisor, colleague, and friend. This relationship taught Powell clerks much about the man and how he filled the role of Supreme Court Justice. But it also colors anything that we say with the admiration and devotion that we feel for our professional father.

There are those, however, without the bias of a Powell clerk who have recognized the remarkable qualities that the Justice brought to the bench. An example comes out of the Solicitor General's Office, whose lawyers had the opportunity to appear before the Justice in hundreds of cases over his years on the Court, sometimes in victory and sometimes in defeat. I am told that in the middle of the Powell tenure a group of lawyers from the office speculated over which of the Justices they would choose if they were required to take just one to hear and decide all cases. The undisputed choice was Justice Powell.

What is it that has given Justice Powell such stature in the eyes of those who have not had the opportunity to work with him closely, as well as those of us who have? Surely part of the answer lies in the respect that lawyers have for



David Westin

a skilled legal craftsman. Whether or not one agrees with the outcome or the reasoning, a Powell opinion stands out for its clarity, structure, and essential honesty in dealing with the problems it addresses. The uniformly high quality of Justice Powell's opinions resulted in large part simply from the time and energy he put into them. It is difficult for those who did not see it for themselves to appreciate the extent to which the Justice devoted himself to the work of the Court. During my year with him, Justice Powell would spend six very full



days in chambers each week and would carry home substantial work each evening and every Saturday — work that he evidently had spent most of his “free” time dispatching, judging from what his briefcase held each morning when he came to work.

Justice Powell's long hours were certainly not the result of a lack of efficiency. His years leading a major law firm had made him extraordinarily able at focussing on the essence and delegating to his office staff, while never abrogating his ultimate responsibility. Rather, Justice Powell worked hard because he saw his position as a difficult one requiring much study, analysis, and reflection. He considered it his responsibility to understand all aspects of the issues put before him. The procedures he established within chambers illustrate this combination of efficiency and full and fair consideration. When Justice Powell was assigned a majority opinion to prepare, he would appoint one of us to work with him in preparing the first draft. In my own experience, this would lead to the exchange of several drafts back and forth, melding the law clerk's attempts to express the Justice's views with the infamous, lengthy “riders” that the Justice would invariably dictate for insertion and replacement. Once the Justice was satisfied with the draft, another clerk would perform a substantive review, including studying all authorities cited and, often, going back to first principles on the reasoning of the opinion itself. This regularly would lead to substantial revisions, to be worked out with the Justice and the clerk originally assigned to the opinion. The revised opinion would then be printed by the Print Shop in the basement of the Court as a “Chambers Draft” to be reviewed and discussed by the Justice with all of the clerks en masse. It was only after all clerks' suggestions had been considered that the opinion would be circulated to the other Justices for their consideration.

The same goal of ensuring full consideration of all points of view determined how Justice Powell approached decision-making. Time after time I watched as he made a conscious effort to keep his mind open right up to the point when the Conference would take a preliminary vote in a case. Occasionally this would prove difficult or impossible, as

there were some areas — for example, the public schools — where Justice Powell had done much work and thinking before coming to Court. But even after reaching a preliminary view in a case, Justice Powell was invariably eager to hear arguments against his position and to deal with such arguments fairly. In at least one case with which I was involved, I watched as he struggled with the arguments against him, concluded that they could not be disposed of honestly, and ultimately changed his initial view (leading to a change in the outcome of the case).

Justice Powell's legal rigor was central to his contribution to the Court and its decisions during his tenure. But taken alone it would tell of only half the man and of less than half of his contribution; in itself, it would not account for the respect he has commanded, such as from the young lawyers in the Solicitor General's Office.

What set Justice Powell apart was the way in which his profound regard for people guided his legal talent and discipline in the cases that came before him. We who served as Powell clerks felt this daily. Anyone who has met Justice Powell can attest to his graciousness and warmth. It is truly remarkable to see that this first impression is only expanded and deepened by working by his side over prolonged periods. As I have suggested, Justice Powell felt deeply the enormous responsibility of serving as a Supreme Court Justice. And the workload of the Court, particularly as the first of June deadline approaches for circulation of all majority opinions, is enormous. Yet the Justice was unfailingly kind, considerate, and understanding toward each of his law clerks. In addition to being a part of his nature, this concern over the interaction with and among his clerks and other staff was specifically intended. I recall that during my first interview with him I learned that in Justice Powell's eyes nearly all of the several dozen applicants he was considering were intellectually qualified to be his clerk; what he was searching for were the few individuals who would best fit personally with himself, with Sally Smith and his other long-time staff, and with one another. If my year is any sign, Justice Powell succeeded, for my three co-clerks are among my closest friends, as well as being among the lawyers whom I respect the most.

Justice Powell's regard for people went well beyond his chambers. Throughout the Court, wherever we would walk, he would know the names of the employees and would invariably have some ongoing discussion with them, whether about the security guard's duck hunting season or about the elevator operator's convalescing daughter.

The genius of Justice Powell, then, came in the way that he put together what might have appeared in others to be conflicting traits — remarkably high standards pursued under pressure and a sensitivity to the human side of life. For example, one might have expected someone who apparently demanded so much of himself to make some similar demands on his staff. I cannot remember a single instance, however, when Justice Powell ever demanded anything of us. Instead, he simply assumed that we would function at the very highest of our abilities and, as a result, received far more from us than more direct means could have extracted. Failing to meet the demands of an employer is one thing; disappointing a surrogate father is quite another.

The unusual combination of excellence and appreciation for people appears in Justice Powell's written legacy. I know that some have suggested that Justice Powell's great strength was also his great weakness — that a great and careful lawyer does not necessarily make a great and timeless jurist. I leave it to scholars and historians to pass on Justice Powell's place in history. History would sorely misjudge this great man, however, if it were thought that the weighing and balancing in his opinions resulted from only a fine lawyers' mind and its propensity to draw fine distinctions. To be sure, his rigor and intellectual honesty made it impossible for him to accept broad, simple rules where he saw that they could not be universally applied. But Justice Powell's approach to jurisprudence resulted from his sense of people and their institutions every bit as much as from his analytic care.

Justice Powell was suspicious of any me-

chanical or theoretical solution to what he viewed as the complex and subtle problems of humans. From his broad background in dealing with people — in the military, as a prominent commercial lawyer, as the head of a school board, as an advisor to Presidents — the Justice experienced first hand many of the situations and dilemmas confronting individuals at all levels of our society. In working on particular cases with him I learned of his experiences riding in police cars in the middle of the night in the inner city, sitting on the Richmond School Board during desegregation efforts, and helping a poor youth deal with the consequences of an abortion in the world before *Roe v. Wade*. Because Justice Powell was concerned with the individual people involved in such situations, he gained from these experiences a powerful sense of what could and could not be expected of humans and their institutions. Indeed, this very sense formed Justice Powell's views on what guidance and supervision the Supreme Court itself could and could not usefully give. For the Justice, it would have been wrong to set out abstract societal theories in Supreme Court opinions because it would have had the Court go beyond what it, as an institution created and populated by humans, could competently do.

First and foremost, Justice Powell saw people — whether law clerks, support staff, or litigants — as ends in themselves, rather than as mere means to achieve his own ends. He saw it his duty in each case to treat the individual parties before him with fairness and understanding. For those of us who watched him closely, the Justice epitomized the ideal of the competent and unbiased decisionmaker — something that would have made him just as great a judge if had sat on a local court hearing misdemeanors. Because he was called to serve on our highest Court, his wisdom born of rigor and humanity has illuminated the pressing issues of our day to the great benefit of all.

# *Obstacles To The Constitution*

by Warren E. Burger

Last September 17 marked the 200th anniversary of the signing of the first constitution of its kind in all history. The focus was on Philadelphia, but the whole nation watched—and much of the world. This organic law, defining and allocating the powers granted to the federal government, and dividing powers between the state and federal governments, reflected much more than the work of 55 delegates over a period of four months. It was an affirmation of ideas and ideals evolving over centuries, including concepts of the French thinkers, British, and of the Scottish Enlightenment.

The remarkable success of this charter of government controlled by the governed is suggested by the fact that in our time most Americans simply take it for granted. It is difficult even to imagine what our "America" would be like today if, during the last two centuries, it had been governed as the thirteen sovereign states functioned under the Articles of Confederation—that treaty of "firm friendship" explicitly preserving thirteen independent sovereign states. Perhaps the states of that America would resemble the states of Central and South America where the sharing of a common tradition, a common language—and largely a common religion—has not been enough to unite them in a federal union. Had we tried to continue under the loose, feeble Articles of Confederation of 1781 perhaps the area between Canada and Mexico would resemble the Central and South American states of today.

The creation and acceptance of a Constitution that unified the thirteen former colonies under a strong national government soon after the victory of Yorktown was far from inevitable. To appreciate what an extraordinary accomplishment the Constitution represents one must recall the historical, economic, and

political setting in which it was drafted.

Put most simply, in 1787 the thirteen former British colonies were not behaving like a nation, and of course they did not constitute a true nation. There was much that tended to unify Americans in the late eighteenth century; they had a common language and a common tradition; they or their immediate ancestors had come here seeking greater religious and political freedom and new opportunities; they had shared in the hardships of the long war for independence. But the common language, the common urge for freedom, and the shared war experiences were offset by regional and ideological conflicts, commercial rivalries, and widespread fear of a strong central government.

In 1787, the 13 states were made up of a collection of small farms and small communities—and plantations—stretching along the Atlantic coast from Canada to Spanish Florida. The largest city, Philadelphia, had only 40,000 people. Only one significant river, the Charles in Boston, had been bridged; others were crossed only by ferry—weather and floods permitting. Boston and Atlanta were weeks of travel apart; it took almost as long to get a letter to Atlanta from Boston as from London. Some settlers had crossed the Appalachians into the Western lands. Many early leaders questioned whether a federal republic could possibly extend over such a large area. How could representatives of the people stay in touch with their constituents so many miles, so many weeks apart?

Such manufacture as there was in the colonies was largely in New England, although even that region consisted for the most part of self-sufficient family farms. Much of the economic wealth of the South resided in large plantations that had become dependent on the evil institution of slavery. By 1787, the



tensions between the slave states and the abolitionist states had emerged and posed a great obstacle to uniting the states into a true nation.

Individual loyalty to the states was strong in the eighteenth century and, indeed, well into the nineteenth century. People tended to think of themselves as Virginians or New Yorkers first and Americans second. They regarded themselves as allies of people in other states. During the Revolutionary war, when New Jersey troops reporting for duty with General Washington at Valley Forge were asked to swear allegiance to the "United States," the soldiers at first declined, saying, "New Jersey is *our* country."

Quite aside from their loyalty to their own states, the American people in 1787 had a great and understandable fear of central governments as a result of their experience as colonists. They had fought a revolution to escape from a strong, unresponsive central government in distant London. Patrick Henry of Virginia was so opposed to the idea of a strong central government that he refused even to be a delegate to Philadelphia, saying he "smelt a rat." The "rat" he feared was born at Philadelphia, and he tried to kill it at the Virginia ratification convention in 1788.

These strong local interests defined the political map in America after British authority was cast off in 1776. The former colonies became, literally, separate, independent, sovereign states who joined in an alliance under the Articles of Confederation to conduct the war against England. But this was hardly more than a multilateral treaty — a "firm league of friendship" as the Articles recited. If George III and his ministers had not needed to keep their powder dry with a wary eye on France and Spain, that "firm league" might not have prevailed over a great world power.

Under this "alliance" of 1781-1789, the states sent representatives to the Continental or Confederation Congress, but that body's lack of powers caused despair to the leaders of the Revolution. For example, the Congress had no power to tax, relying instead on "contributions" from the states — Alexander Hamilton was "receiver of revenues" not collector of taxes. The states were not always prompt with their payments; in 1787, one state was in



Patrick Henry refused to serve as a delegate to the Constitutional Convention.

National Portrait Gallery

default of its "dues" for the previous five years. That Congress had become so ineffectual that many Members stopped attending — during a four month session beginning in October 1785, it had a quorum on only ten days.

Friction between the states was exacerbated by their exercise of sovereign powers to promote their differing and often conflicting interests. New York, for example, erected trade barriers and imposed duties on goods bound for Connecticut and New Jersey through New York harbors. This was profitable for New York, but it enraged its neighbors. When the Continental Congress failed to take any action against this practice, the New Jersey legislature voted to withhold its financial support from the Confederation. Other states with good ports — Pennsylvania, Massachusetts, and South Carolina — treated their less fortunate neighbors in much the same way that New York treated Connecticut and New Jersey.

Each state was also free to issue its own currency; in the mid-1780's, seven different state currencies were in circulation, along with foreign currency, and promissory notes issued by the Continental Congress. The states seemed almost to compete with each other to



see which could issue the most paper money; not surprisingly, much of the state-issued money was eventually worth next to nothing. The same was true of currency issued by the Continental Congress — “not worth a continental,” some said.

The weaknesses of the Confederation were acutely evident in the area of foreign relations. The Continental Congress could not force the states to abide by the treaties it made. People resisted repayment of debts owed to British creditors, as required by the Treaty of Paris, until, in 1796, the Supreme Court decided the only case ever argued by John Marshall in the Supreme Court — *Ware v. Hylton*, 3 Dallas 199 (1796). Several states entered treaties with Indians that conflicted with treaties made by the Continental Congress. We could not protect American shipping from the Barbary pirates — to whom we paid great sums in gold to ransom hostages. The charge for insuring goods on American ships in that day was double the rate for British and French ships. Our Navy could not protect freedom of the high seas.

States often had very different foreign policy interests. States whose western lands extended to the Mississippi River wanted a treaty with Spain that would permit Americans to use the river and the Gulf of Mexico for shipping agricultural and other products. States with no western lands, on the other hand, were not willing to risk a confrontation that might bring a Spanish Armada that would threaten trade with cities on the East Coast. In 1785, Massachusetts and New Hampshire restricted British trade in their ports in an effort to pressure the British to reopen trade with the West Indies. But Connecticut, seeking more trade for herself, promptly undercut the other states by announcing that British ships would be welcome in its ports.

Differences among the states on trade matters also led to political strife, said Madison, “Most of our political evils may be traced to our commercial ones.” Here Madison, Washington and Hamilton were of one mind.

The Continental Congress had little success resolving disputes between the states. In one case, involving the distribution of prize money resulting from the capture of a British ship, commissioners of the Continental Congress overturned a Pennsylvania court’s judgment,

but Pennsylvania’s officials simply ignored the decision. In another case, the Continental Congress successfully resolved a dispute over land claimed by Connecticut in part of what is now Pennsylvania — but not before Connecticut had sent settlers there, who ended up fighting with Pennsylvania troops.

Although the post-Revolution years revealed that the Articles of Confederation had many flaws, relatively few people thought that unifying the states under a strong central government was the best remedy. From 1781 to 1783 several men who would become important figures at the Philadelphia Convention — notably Madison, Pennsylvania’s Robert Morris and Hamilton — attempted without success to strengthen the Articles of Confederation by interpretation and amendment. Beginning in early 1785, however, several events helped people to recognize the disadvantages of the loose-knit alliance under the Articles.

The meeting we now call the Mount Vernon Conference of March 1785 was one of the first. Virginia and Maryland were quarreling over boundaries and the use of the Potomac River and Chesapeake Bay — the sort of dispute that had often led to war in other parts of the world.



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James Madison astutely observed that trade and commerce rivalries were generally the most divisive issues facing the delegates from the various states at the Constitutional Convention.

In an effort to resolve the conflict, both states appointed commissioners, but they could not agree. George Washington then invited them to Mount Vernon. Under the influence of his great prestige they were able — no doubt with some nudging — to resolve their differences. That meeting dramatized the need for a comprehensive political solution to the commercial and other rivalries that separated the states.

After the Mount Vernon meeting the Virginia legislature invited all the states to send representatives to a meeting at Annapolis, Maryland, to discuss interstate commercial issues. Only five states attended in September, 1786; those delegates adopted a resolution noting the grave crisis and the futility of considering commercial problems without also addressing the underlying political issues. The resolution was sent to all the states as well as to the Confederation Congress; the Congress proposed that the states send representatives to Philadelphia in May 1787 to discuss all matters necessary "to render the Constitution of the Federal Government adequate to the exigencies of the Union." They were calling themselves the "United States," but calling a thing by a name does not make it true. The Virginia legislature approved, and its legislature placed George Washington at the head of its delegation. Six other state legislatures followed suit in short order.

In 1786, an episode then occurred that made a tremendous impression on the states when some were uncertain whether to send delegates to Philadelphia. An uprising now known as Shays' Rebellion broke out in western Massachusetts. It began as a series of protests by indebted farmers who wanted paper money and more favorable foreclosure and bankruptcy laws. An armed band led by Daniel Shays — a former officer in the Revolution — defeated the state militia and forced some state courts to adjourn. Late in 1786 and early in 1787, Shays gathered a large force and attempted to seize the federal arsenal at Springfield, but he and his men were routed by Massachusetts troops. George Washington summarized the sentiments of many of his countrymen by expressing disgust that the states, having just won a difficult war, could scarcely keep order in peacetime.



George Washington used his considerable prestige in order to resolve a commercial dispute which threatened relations between Maryland and Virginia — one of many such conflicts over waterways which divided the various states.

Finally, on February 21, 1787, the Continental Congress, with some reluctance, officially invited the 13 states to send delegates to Philadelphia. Although Washington, Hamilton, Madison and others had urged calling a true constitutional convention, the Continental Congress — many of whose members shared Patrick Henry's fears — refused to comply fully. Its resolution was explicit: the convention was "for the *sole and express purpose of revising* the Articles of Confederation." There was no hint of drafting a wholly new Constitution. Patrick Henry's "rat" still worried many people.

The Convention was scheduled to begin on May 14, 1787, in Philadelphia, but even at that late date, it appeared that the meeting might not come to pass. Only two out-of-state delegates — Madison and Washington — had arrived by May 14. Rhode Island flatly refused to appoint any delegates, it would be many weeks before New Hampshire had enough money to send its representatives, and all five delegates initially selected by Maryland declined to serve. By May 25, however, enough delegates from other states were present to

form a quorum and the meeting began its official deliberations.

The beginning of the convention, however, was, of course, not the end of controversy. Regional and ideological conflicts shaped the views of many of the delegates and fueled heated debates on the Convention floor. But those who desired a strong central government took the initiative and soon it became clear to all the delegates that it was not enough simply to "revise" the Articles of Confederation; instead they drafted a wholly new constitution. Some did not agree; two of the three New York delegates walked out early, happily leaving Alexander Hamilton alone to speak for New York.

Many of the differences were of such magnitude that they threatened to deadlock the convention. For example, the delegates had a great deal of difficulty in agreeing on a means of apportioning representation for the legislature of the new national government. Finally, they reached the "Great Compromise": equal representation for each state in the Senate, and proportional representation in the House. They also forged a compromise on the divisive issue of slavery which, flawed as it was, resolved an impasse that threatened to abort the convention. Congress was given power to regulate interstate and foreign commerce — including the slave trade — but could not prohibit the importation of slaves for 20 years.

The anti-slavery voices were not silent and, while the delegates debated, the Continental Congress on July 13 enacted the Northwest Ordinance, precluding slavery in the new states to be formed in the Northwest Territory states. Tragically, it would take a bloody civil war finally to end the terrible evil of human slavery.

The Constitution's drafting, however, was just the first step. That a group of delegates

agreed on language in a document was one thing, but convincing the states to ratify the novel concepts embraced in the document was quite another. The legislatures of five states — Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut — ratified the Constitution within a few months; Rhode Island and North Carolina initially rejected it. The vote in a few key states was perilously close. Massachusetts affirmed by a vote of 187 to 168. The Virginia Ratification Convention took place over the course of three weeks with the great patriots Patrick Henry and George Mason strongly opposed. Even the support of George Washington, James Madison, Edmund Randolph, and young John Marshall secured ratification by a vote of only 89 to 79. Meanwhile, in New York, Alexander Hamilton, John Jay, and James Madison published a series of widely-read newspaper articles supporting the Constitution that were later collected as the "Federalist Papers." Even with these efforts, New York affirmed by only 30 to 27. New Hampshire became the ninth state to ratify, 57 for and 46 against. Rhode Island, the last hold-out, did not ratify the Constitution until 1790, by a vote of 34 to 32.

Looking back, we see that the charter for the new United States of 1789 was conceived, drafted, and ratified in the face of great regional and ideological conflicts and a pervasive, lingering fear of a strong national government. The Constitution, as a plan for government, is remarkable for many reasons. It has succeeded in securing freedoms, opportunities, and prosperity for millions of people; it has served as a blueprint for constitutional democracy for other people, and it has survived two centuries of change and strife. But perhaps the most remarkable thing about the Constitution — given the conditions of 1787 — is that we secured it at all.

# *The Relationship of Church and State: The Views of the Founding Fathers*

by Kenneth W. Starr

*Editor's Note: Judge Starr served as the Annual Speaker at the Society's Twelfth Annual Meeting held on May 18, 1987. This paper is the text of that speech.*

It is a great pleasure and high honor to be with you in this historic chamber as we come together in the Society for the first time during the Bicentennial celebration now underway under the leadership of our retired Chief Justice.

It seemed fitting and proper in this Bicentennial year to reflect on one of the recurring and most intriguing issues in our system of government — the relationship between religion and religious activities and the instruments of government. A relationship which we characterize by shorthand as the relationship between church and state.

To ruminate on so sweeping and yet so fundamental a topic is a hopelessly daunting

task, even to the foodhardy soul who would dare to wade into these difficult waters. And thus I will try to limit my observations in the main to the historical foundations of that relationship at the founding of the American republic, both at the Constitutional Convention in Philadelphia in 1787 and in the framing of the First Amendment to the United States Constitution by the First Congress of the United States in 1789.

I now ask you to travel back mentally to the Constitutional Convention in Philadelphia, with the delegates arriving in the wake of conferences at Mt. Vernon and Annapolis in prior years focusing on the foibles and inadequacies of government under the Articles of Confederation.

The Convention was to have begun on the 14th of May, exactly 200 years and four days ago. But things didn't go as planned. As the

Virginia Museum of Fine Arts



George Washington addresses the Constitutional Convention in this painting by Junius Brutus Stearns.



Journal of the Federal Convention recounts, "sundry deputies to the Federal Convention appeared; but a majority of the states not being represented, the members present adjourned, from day to day, until Friday, the 25th of the said month."

On that historic day, the Bicentennial of which we shall mark only one week hence, 29 delegates were in place from nine States. In addition to the three missing States, one of which, Rhode Island, was destined never to attend, Massachusetts and Georgia each boasted a modest single delegate. The ranks, in short, were thin.

The first order of business was the election of the President of the Convention. Two delegates were obvious candidates for that high honor, but only one nomination was offered. The logical choices were Benjamin Franklin, who did not appear at the Convention until the following Monday, and George Washington, who along with six other colleagues from Virginia was dutifully in attendance on the inaugural day. The dye was immediately cast when Franklin's colleague from Pennsylvania, the wealthy industrialist, Robert Morris, moved the nomination of General Washington. The Journal of the Convention states:

The nomination [of General Washington] came with particular grace from Pennsylvania, as Dr. Franklin alone could have been thought of as a competitor. The doctor was himself to have made the nomination of General Washington, but the state of the weather and of his health confined him to his house.

Franklin, then a mere 81 years of age, was at home suffering from the gout.

Washington, to no one's surprise, was unanimously elected. He was then conducted to the presiding chair by his nominator, Mr. Morris (who was coincidentally the General's host at his home in Philadelphia, situated a convenient block away from the State House) and John Rutledge of South Carolina. After the election of a Secretary, the appointment of a messenger and a door-keeper, and the appointment of a three-member committee on rules (George Wythe of Virginia, Thomas Jefferson's law teacher at William & Mary; Alexander Hamilton of New York; and Charles Pinckney of South Carolina), the Convention adjourned until 10 a.m. the fol-

lowing Monday, the 28th. The Convention at last was organized and under way.

The level of activity picked up on the second day of the Convention. Franklin and three colleagues from Pennsylvania took their seats; the future Chief Justice of the United States, Oliver Ellsworth of Connecticut, arrived as the first delegate from that State, and a solitary delegate from Maryland took his seat. The eminent Virginia lawyer, Mr. Whythe, reported from the rules committee on that body's work over the preceding weekend. Debate ensued and the rules, with two exceptions, were adopted.

But no sooner had the standing rules been agreed upon than the first sour note occurred, in the form of a letter from what the Journal describes as "sundry persons of the state of Rhode Island, addressed to the honorable the chairman of the General convention, was presented to General Washington by Mr. G. Morris." The letter was actually a word of cheer from a group of merchants and tradesmen who were appalled at the decision of their home State, known not so affectionately as *Rogue's Island*, to stay home. Rhode Island, to be blunt, was in social turmoil. The beleaguered merchants of Rhode Island urged the Convention to do its best — Rhode Island's business community was sending an S.O.S.

A final housekeeping matter had to be taken care of. Would the proceedings be public or not? A delegate from South Carolina, Pierce Butler, whose namesake would eventually sit on the Supreme Court, offered what might seem in the Bicentennial era to be a rather colorful motion, namely one against what the Journal refers to as "licentious publication of their proceedings." The motion was referred to the hardworking Rules Committee, and on the following day, which is of considerable significance to the final result of the Convention and to our more narrow focus this afternoon, that committee, through the tireless Mr. Wyeth, reported the three rules aimed at protecting the confidentiality of the proceedings.

With the rules finally in place on that day, Tuesday, the 29th of May, the time was right for the introduction of the first substantive set of proposals for the Convention's consideration. These were 15 resolutions advanced by Edmund Randolph, destined to be the Nation's first Attorney General in the Washington



National Portrait Gallery



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Both George Washington (left) and Benjamin Franklin (right) were considered likely candidates to preside over the Constitutional Convention. Probably influenced by considerations of Franklin's age and poor health, fellow Pennsylvanian Robert Morris moved Washington's nomination.

Administration. At the time, Randolph was an ever so young Governor of Virginia, at the ripe old age of 32, and though he was destined to enjoy high office in the first Administration, Randolph was also destined to be one of three delegates — along with George Mason of Virginia and Elbridge Gerry of Massachusetts — present at the Convention on its historic concluding day, September 17, 1787, who refused to sign the document. Ironically, Washington's future Cabinet officer objected to a single Executive, which he viewed with alarm as the "foetus of monarchy."

But back to May 29 and Governor Randolph's proposal, which had been crafted in the main by James Madison. This was, of course, the Virginia Plan, or the Large State Plan, calling for a radical revision of the structure of government under the Articles of Confederation. The Plan called for a bicameral legislature and an executive to be chosen by the legislature, but eligible to serve only a single term. Intriguingly, the executive and a "convenient number of the national

judiciary, were to compose a council of revision," with power to examine and invalidate every act of the legislature.

And here we must conclude our introduction to the Philadelphia Convention and turn our focus more specifically to that portion of the text of the Constitution that bears upon religion. The genesis of what is now Article Six, Clause Three, of the Constitution — our Oath of Office Clause — can be found in Randolph's fourteenth resolution. It was admirably brief. "Resolved, that the legislative, executive and judiciary powers within the several states ought to be bound by oath to support the articles of union."

This portion of the Virginia Plan was thus aimed at securing the loyalty of the States and state officials to the new national charter of government. This tack prompted no little discussion, both within and ultimately outside the convention. Madison's notes indicate that this resolution came on for debate two weeks later, on June 11, and prompted sharp opposition. Roger Sherman of Connecticut, destined

to author the Great Compromise between the Large and Small States, opposed this resolution as unnecessarily intruding into the States' jurisdiction.

Governor Randolph, on the other hand, vigorously defended the oath as necessary, to prevent the unbridled competition between state and national laws experienced under the Articles of Confederation. As officers of the several States were already under oath to their respective States, Randolph argued, to preserve a due impartiality they ought to be equally bound to the national government. Besides, Randolph continued, the national authority needs all the help we can give it.

Elbridge Gerry of Massachusetts was unmoved. He allowed his dislike for the oath clause. In his view, there was as much reason to require national officers to take an oath of fidelity to the States. The proposal proved deeply divisive. Six States voted in favor of it, 5 States voted no. The Solid South, led by Virginia, plus Pennsylvania and Massachusetts (notwithstanding Elbridge Gerry's opposition) carried the day.

Subsequently, as the Convention was nearing its final two weeks of work, a simple change was added to the Oath Clause. It was moved and seconded to add the words "or affirmation" after the word "oath." Unlike the closely divided question over whether to have any oath at all, this act of toleration passed overwhelmingly, with little debate, 8 to 1, with 2 States divided. The spirit of toleration, which is implicit in the command of the First Amendment, was plainly at work in the City of Brotherly Love. The Framers were quite willing to draft the basic charter of government so as to take religiously based scruples into account.

Then, Charles Pinckney of South Carolina moved to add to the Clause the following: "but no religious test shall ever be required as a qualification to any office or public trust under the authority of the United States." Roger Sherman, ever the doubter, thought the provision unnecessary. Others, including Gouverneur Morris and General Pinckney of South Carolina, expressed their approbation. Again, in contrast to the divisive question whether to have an oath at all, the motion carried overwhelmingly, with only North Carolina voting no and Maryland divided. (This, incidentally,

is the only time the word "ever" appears in the text of the Constitution.)

\* \* \* \*

Now, I think it would be quite wrong to draw from this record the sense that the members of the Constitutional Convention were hostile to religion. Far from it. Indeed, to the contrary, religious influences were widely viewed as important to the well-being of the body politic. The entire notion of a democratic society in the rather undemocratic age of the Enlightenment was grounded on the principle that the people were capable of public virtue. "We the people" were the opening words of the Constitution, not "we the mob." In the words of Edmund Burke, "[i]t is ordained in the eternal constitution of things that men of intemperate minds cannot be free. Their passions forge their fetters."

As ably chronicled in a forthcoming book by Richard Betterli and Gary Bryner, "the people" represented a value, an ideal, of a citizenry that displayed the great public virtues of self-restraint, obedience to law, and of honesty and morality in public dealings. Churches were seen as nurturing public virtue, much in the way the family taught and inculcated values of right and wrong, of decency and morality. In the vernacular of the modern day, churches represented vital intermediating institutions between the individual and the state. For every iconoclast like Thomas Paine, railing against organized religion, there were numerous more thoughtful, balanced observers who were friends of liberty but were also friends of the church.

This can be seen in the debate over the oath clause in the Constitution. One reason advanced against a specific religious test was that the oath itself vindicated society's interest in having decent, God-fearing individuals holding national office. Luther Martin, the high-living Attorney General of Maryland and one of its delegates to the Convention, wrote in 1788 that the clause was adopted by a great majority of the convention and without much debate. But he indicated that various members of the Convention were of the view that belief in God would provide security for good conduct of our rulers. Religious belief was thus seen even on the Convention floor as having what the professoriat would today call instrumentalist value.





Charles Pickney of South Carolina introduced a clause precluding religious tests as a qualification for public office.

This view — that the oath itself provided a sufficient test of virtue — was evident in Oliver Ellsworth's pro-Constitution essay in December 1787, where during the ratification process he stoutly defended the absence of a religious test to serve in office. The oath itself would suffice; any additional test would be tyrannical, the future Chief Justice maintained, and what is more, in the already pluralist United States, such a test would be absurd. Here are Ellsworth's words: "If [the religious test] were in favour of either congregationalists, presbyterians, episcopalians, baptists, or quakers, it would incapacitate more than three-fourths of American citizens for any publick office. There need [be] no argument to prove that the majority of our citizens would never submit to this indignity."

Ellsworth's opponents — the Anti-Federalists, were deeply alarmed, of course, not simply by virtue of the libertarian bent as evidenced in the Oath of Office Clause. Ironically, the Anti-Federalists, while championing religious qualification tests and the like, were fearful of the power of the central leviathan and the dim prospects — as they saw it — for

liberty in a federal system. The story of the demand within the several states for a Bill of Rights is well known and need not be dwelt upon in these reflections. Suffice it to say that several States urged inclusion of a Bill of Rights, and proposed specific language for Congress to consider. Virginia and North Carolina proposed identical provisions with respect to religion, which sounded the theme of natural rights and articulated both free exercise and non-establishment values. Similar proposals were advanced by New York and New Hampshire. With a typically New England economy of words, the proposal offered by New Hampshire provided: "Congress shall make no laws touching religion or to infringe the rights of conscience."

\* \* \* \*

Religion, in short, did not figure prominently in the deliberations at Philadelphia two hundred years ago, but it was of considerable prominence in the debates on ratification leading up to the proposal by the First Congress in 1789 for a Bill of Rights. And if the First Amendment enjoys, as is oftentimes said, a preferred place in our constitutional constellation, it should not go unnoticed that the Religion Clauses are further set apart; as the first of the first. It is only after the Establishment Clause and the Free Exercise Clause that the reader of the words of the First Amendment arrives at the other fundamental freedoms — of speech, of press, of assembly and of petitioning the Government for redress of grievances. The operative language, an economical sixteen words, is undoubtedly emblazoned in the memory of many here: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Curiously enough, while we know a good deal about the Constitutional Convention itself and the ratifying conventions that followed, the record is surprisingly sparse about the background of the Religion Clauses of the First Amendment. We know of course that Madison himself took the project in hand as a member of the First Congress which convened in 1789 and that he undertook the task armed with the proposals from several States.

As chronicled in Professor Michael Malbin's useful monograph, entitled *Religion and Politics*, Madison introduced two proposed



amendments pertaining to religion on June 7, 1789. The words are brief and bear repeating, with the first proposal the more germane:

The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed.

1 *Annals of Congress* 434 (June 8, 1789).

This proposal embodied the thrust of the Virginia and North Carolina formulations; and it bears noting that *freedom of conscience* was expressly protected in the Madisonian proposal, as it had been in the proposal advanced by New Hampshire, as well as by Virginia and North Carolina.

Madison's second proposal was more radical, in view of the Anti-Federalist stirrings about the position of the States vis-a-vis the new government. For Madison would have accomplished at the Founding, at least in part, what the Supreme Court was destined to hold 160 years later. Madison crafted his second proposal very simply: "No state shall violate the equal rights of conscience." The proposal, I

hasten to add, went on to protect the freedom of the press and the right to trial by jury in criminal cases; it was not devoted exclusively to religious freedom.

Nor should it go unnoticed from these two measures that Madison entertained a bifurcated notion as to governmental power to establish religion: under his two proposals Congress clearly could not establish a national religion, but the States, in contrast, *could* establish their own state religions, at least if they did not infringe upon "the equal rights of conscience."

This too, upon reflection, is unexceptional. For at that time 5 of the 13 States maintained establishments of religion, the last of which, Massachusetts, was not dissolved until 1833. The trend since the Revolution had been toward disestablishment, which was itself an indication of the vigor of variety of various religious groups. For at the time of the Revolution, 9 of the 13 colonies had established churches. Disestablishment occurred during the Revolution itself in the States of New York, Maryland and North Carolina. In Virginia, the largest and most powerful State, disestablishment occurred only one year before the convention. That effort, led of course by Jefferson and Madison, resulted in Madison's famous Memorial and Remonstrance, directed against a tax measure to assist teachers of the Christian religion. Here are the words of the Supreme Court in *Everson v. Board of Education*, authored in 1947 by Justice Black, as to the thrust of Madison's historic essay:

In it, [Madison] eloquently argued that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions.

330 U.S. 1, 12 (1947).

The Memorial and Remonstrance was founded on natural rights theory, which had provided, of course, the intellectual underpinning of the Declaration of Independence. It was emphatically not an anti-religion document, as the most cursory reading of it demonstrates. For, in Madisonian terms, that which is a right enjoyed by the individual against other members of civil society is a duty



Library of Congress

James Madison introduced two proposed amendments pertaining to religion in the First Congress.

owed to God. The duty to God, Madison stated, was "precedent both in order of time and degree of obligation, to the claims of Civil Society." As Madison put it in the majestic language of natural rights theory, "[b]efore any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe." Man's duty to God was of a higher order than man's duty to the State. And if this freedom of conscience was abused, Madison concluded, it was an offense against God, not against man. "To God, therefore," Madison wrote loftily, "not to men, must an account of it be rendered."

Lest this theory sound entirely wedded to Eighteenth Century thinking of less relevance to the current era, let me move forward for a fleeting moment to the 1980s, to an opinion authored by Justice Stevens, joined by Justices Brennan and Marshall. In *Hewitt v. Helms*, these contemporary Justices reembraced the Jeffersonian and Madisonian principle that liberty is a God-given right. "I had thought," Justice Stevens wrote, "it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights." 459 U.S. at 483. God, not the State, was the source of liberty; it was the high function of government to protect and preserve that liberty — principles that connected modern-day opinions of present Supreme Court Justices to the views that informed the Founding.

This, then, was the grand theme of the Memorial and Remonstrance. Madison was later to write that his Memorial had, in his words, "met with the approbation of the Baptists, the Presbyterians, the Quakers and the few Roman Catholics universally; of the Methodists in part; and even of not a few of the Sect formerly established by law." Quoted in *Everson*, 330 U.S. at 12 n.12. The Memorial, in short, was supported not so much by the local town atheist, if there were any in Virginia, but by much of the organized religious community.

*Religious pluralism, in short, was firmly rooted in American culture.* Not surprisingly as a result, much of the mood for disestablishment of churches came from the churches themselves, as suggested by Madison's letter. The Baptists, as they are to this day, were ardently opposed to governmental intrusion,

including by formal establishment, into matters ecclesiastical. It is thus no accident that Jefferson's famous letter in 1802, with its metaphor of a wall of separation, was written to the Danbury Baptists, in a State—Connecticut — which still maintained an established church at the time of Jefferson's writing.

But back to the First Congress. The two proposals advanced by Madison were referred to the Committee of the Whole on the same day. There, they sat idle for a month and a half. Finally, on July 21, 1789, the proposals were referred to a specially formed 11-member Select Committee, which included Madison. 1 *Annals of Congress* 665. Even that procedural tack was not without controversy. Congressman Thomas Tudor Tucker of South Carolina, a Bermuda-born physician trained at Edinburgh and who served as a surgeon during the Revolutionary War, rose in opposition. The subject was of too great importance to be spirited away to a Select Committee, Tucker complained; with Anti-Federalist tones of States' rights, Congressman Tucker—destined for appointment by Jefferson as treasurer of the United States—objected vehemently. "The States will expect," Mr. Tucker complained, "that their propositions would be fully brought before the House, and regularly and fully considered; if indeed then they are rejected, it may be some satisfaction to them, to know that their applications have been treated with respect." Better to postpone the matter for a month or even for a whole session.

Elbridge Gerry of Massachusetts seconded the objection. He taunted the Madison faction. "Shall we give the whole of the legislative power to select committees?" Here are Gerry's words, as recorded in the *Annals of Congress*: "Are gentlemen afraid to meet the public ear on this topic? Do they wish to shut the gallery doors." Let the House as a whole debate the issue. 1 *Annals* 663-64. But the objections by Tucker and Gerry were unavailing; the House was prepared to risk this symbolic affront to the States, sending the proposed Bill of Rights off to a Committee by a vote of 34-15.

As Professor Malbin has helpfully recounted, the Select Committee acted promptly — shades of George Wythe's Rules Committee at the Convention only two years before. The difference was that, unlike the Whythe Com-



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Both Elbridge Gerry of Massachusetts (left) and Thomas Sumter of South Carolina (right) felt Madison's proposed "religion" amendments were not being given adequate discussion by the full Congress.

mittee at the Convention, the Select Committee made only minor adjustments to the second proposal of Madison concerning the States. As to the first proposal, the Committee had taken a heavier editing pen. The longer Madisonian version (which we quoted earlier) was shortened to the following sentence:

No religion shall be established by law, nor shall the equal rights of conscience be infringed.

Now, notable among the changes is that the word "national" before the word "religion" had been dropped out. In addition, the Select Committee dropped the Madisonian clause, "the Civil Rights of none shall be abridged on account of religious belief or worship." There were, alas, no committee reports, so the reasons for the latter changes are enshrouded in mystery. But of greater interest is that *freedom of conscience* very much remained alive in the proposed language, thus foreshadowing what Justice Jackson was to call in the *Barnette* flag salute case, overruling the Supreme Court's decision just three years previously, a freedom of mind that all individuals enjoy. And it was this basic freedom that the Supreme Court reaffirmed two decades later, in the New Hampshire *Live Free or Die* case, *Wooley v. Maynard*, overturning Mr.

Maynard's 10-day jail sentence for covering over the State motto, "Live Free or Die," on his license plates.

The Select Committee's handiwork thus completed, the drama moved to the floor of the first Congress on August 15, 1789. While this may seem by modern standards lightning-like speed, the actual fact is that stalling tactics were underway. This was all part of an effort by Anti-Federalists to erode support for the new Constitution. One member of that First Congress wrote the following: "the Antis, viz, Gerry, Tucker, etc. appear determined to obstruct and embarrass the business as much as possible." (Times, it would appear, haven't changed much.)

And thus it was that even at the Founding, the First Congress was laboring under severe time constraints. Adjournment was nearing, and Madison was working assiduously to expedite debate and move the measures to passage. Resistance was stiff. Congressman Sumter of South Carolina, whose name was to adorn the fort in Charleston Harbor where the Civil War was destined to begin 75 years later, rose to his feet and complained of the haste with which proponents of the Amendments were trying to act. Full debate was needed. Here was Congressman Sumter's opinion,



uttered to Madison's undoubted chagrin:

It cannot be denied but that the present constitution is imperfect; we must, therefore, take time to improve it. If gentlemen are pressed for want of time, and are disposed to adjourn the session of Congress at a very early period, we had better drop the subject of amendments, and leave it until we have more leisure to consider and do the business effectually. \*\*\* The people have already complained that the adoption of the Constitution was done in too hasty a manner; what will they say to us if we press the amendments with so much haste?"

*Annals* at 745.

Madison took the offensive. This rather intellectual man in politics—who of course as Jefferson's Secretary of State would become fourteen years later the defendant in *Marbury v. Madison*, the case that established as a cornerstone of our constitutional edifice the principle of judicial review—had had quite enough. Here are Madison's words:

It is said that we are precipitating the business, and insinuated that we are not acting with candor. I appeal to the gentlemen who have heard the voice of their country, to those who have attended the debates of the State conventions, whether the amendments now proposed are not those most strenuously required by the opponents of the Constitution? It was wished that some security should be given for those great and essential rights which they have been taught to believe were in danger. \*\*\* Have not the people been told that the rights of conscience, the freedom of speech, the liberty of the press, and trial by jury, were in jeopardy? That they ought not to adopt the constitution until those important rights were secured to them?

*Annals* at 745. It was time to get on with the business at hand.

The debate did not go on indefinitely. The Religion Clauses were debated in the House for the most part on a single day, Saturday, August 15. That debate was memorialized in a modest two pages in the *Annals*, but it would be more than that devoted to any other single provision of the Bill of Rights. Indeed, considerably more attention was devoted to whether the people should be given the express right under the Constitution to give instructions to their representatives. This Burkean discussion over the nature of a representative democracy, especially as engaged by Madison, on the one hand, and Elbridge Gerry on the other, is a triumph of debate, with the touch of immortality rarely found in public discourse save for such treasures as the Lincoln-Douglas debates just 69 years later. But this too had to conclude.

The debate on what we now call the Religion Clauses concentrated on the establishment issue, bypassing the "rights of conscience" clause. The debate opened with an expression of concern about the Establishment Clause, articulated by a member from New York. Congressman Sylvester from the Empire State complained that as drafted the clause was susceptible to a construction different from that intended by the committee. (Here, then, was the familiar sight of a lawyer expressing fears about how language in a legal instrument might later be construed.) In Mr. Sylvester's view, the language might be thought to have a tendency to abolish religion altogether, a concern shared by another Member, Congressman Huntington. This would not do.

The Sylvester attack ends there; the Journal moves crisply on to a modest change suggested by one Congressman, Mr. Vining of Delaware, to put the "equal rights of conscience" provision before the establishment provision. Liberty was to be protected first and foremost. Elbridge Gerry, that astute politician who had served at Philadelphia but refused to sign the document, suggested a better version than that fashioned by the Select Committee. In Gerry's view, the amendment would read better if it were that no *religious doctrine* should be established by law. The tactics of delay were continuing.

At that juncture on that historic Saturday, Roger Sherman of Connecticut weighed in with the classic Federalist view that no protection at all was necessary. As Madison had argued previously, the national government was one of the delegated powers. Since Congress had not been delegated power by the Constitution to make religious establishments, the entire provision, Sherman argued, should be struck. It was totally unnecessary.

This recurring theme—the lack of need for such protections—was sounded in the ensuing debate on the remainder of the First Amendment—on freedom of speech, of press and assembly. This enumeration of rights ran a risk, some Congressmen warned. If there is freedom of speech, Congressman Sedgwick of Massachusetts argued, how could there not be freedom of assembly. Here are his words from 198 years ago:

If people freely converse together, they must assemble for that purpose; it is a self-evident unalienable right which the people possess; it is certainly a thing that never would be called in question; it is derogatory to the dignity of the House to descend to such minutiae.

This task of inclusion of rights to be protected had no obvious stopping point, Congressman Sedgwick argued. They might as well have declared, he retorted, that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper.

But Sedgwick's warnings proved unpersuasive. The Members were obviously moved by two considerations: first, and most importantly, the reality that several States had specifically enumerated such rights as meriting protection, and the Constitution had not been unanimously ratified; and second, that the rights articulated in the First Amendment were of especial importance. These were, in Elbridge Gerry's terms, "essential rights."

But I'm straying beyond the debate on the Religion Clauses themselves. The response to Roger Sherman's concerns—that the amendment was purporting to deny a power to Congress that Congress did not have in the first place—was set forth by two members, Mr. Carroll (of Maryland) and, not surprisingly, by Madison himself. Carroll emphasized the rights of conscience. These, Congressman Carroll emphasized, were by their nature of peculiar delicacy. They would not bear what he called the gentlest touch of the governmental hand. It was thus, again, the nature of the rights—freedom of conscience—that required singling out for express protection.

He then resorted to the ever present political reality. There was strong sentiment to the effect that these rights were not well secured under the present Constitution.

Madison came in on Carroll's heels. He began by setting forth his interpretation of what the Religion Clauses meant. The Madisonian view was majestic in its simplicity: "Congress should not establish a religion," Madison intoned, "and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." *The notion of compulsion* was at the heart of Madison's interpretation of the Religion Clauses. It is *compelled* religious

exercises, not religious exercises, that flew in the teeth of the First Amendment. It was just like the Fifth Amendment in this respect—there is no protection against self-incrimination, as is so loosely thought to be the case. Every lawbreaker is entirely at liberty to incriminate himself. The crucial distinction for constitutional purposes is that the individual is to be free from *compelled self-incrimination*.

Madison then went on to respond to Roger Sherman's charge that the Amendment was simply not needed in a government of limited, delegated powers. Whether these words were necessary or not, Madison opined, he would not say, but he repaired to the political reality of the times. These words were required, Madison observed, by some of the State Conventions, which were concerned about the breadth of the "necessary and proper clause" of the Constitution.

*The First Amendment was, as it were, an act of accommodation to the concerns of the American people, just as the modifications to the Oath Clause had been in Philadelphia two years earlier.* Madison would not stand on legal doctrine, sound though it might be, that in the very nature of things Congress had no power over religious affairs; these were basic and delicate rights, and the sensibilities of the people, even if not well grounded in law, should be accommodated. And thus it was that the value of accommodation, dominant at times in Religion Clause jurisprudence in the Twentieth Century, was the animating force in the crafting of the First Amendment itself.

Congressman Huntington stood as Madison took his seat. He agreed with the Madisonian reading of the clause, and felt strongly that the anti-establishment principle was sound. He observed that Rhode Island, a rather tumultuous place you will recall, had by charter provided that no religion could be established by law and that this was a blessed freedom. The Congressman's concern was thus not substantive, it was one of appearance. Let us protect ourselves against establishment, he said, but let us not while securing the rights of conscience patronize those who professed no religion at all.

Madison took the floor again. All these concerns, he felt, could be satisfied if the word "national" would be inserted in front of the

word "religion." This was not an anti-religion provision, after all, but to the contrary was a pro-religion clause. Religion would flourish where there was liberty. The sole concern was that one religious sect might obtain preeminence, or two sects combine together and establish a religion at the seat of government.

But the Madisonian effort to revive his original, proposed language, which certainly would have aided clarity in modern day interpretation of the Constitution, met with vigorous opposition. Nonetheless, that opposition was not on the specific merits of the Clause and its proper meaning. It was, rather, on the very basic, overriding issue of the nature of this new government. Was it a national government or something else, namely a federal government?

The ever-present Elbridge Gerry took up the cudgels on this fundamental point. The Anti-Federalists had taken umbrage at the notion that they opposed a federal government, Gerry complained. That was dead wrong. They were not at all opposed in principle. It was, in the opponents' view, the supporters of the Constitution who were favoring a *national* government. The real issue had been over ratification of the Constitution as it emerged from Philadelphia, without a bill of rights. Gerry then concluded on a colorful note: In light of this true distinction, he said, the competing factions should not have been called federalists and anti-federalists, but *rats* and *anti-rats*.

Madison, not given over to humor, threw in the towel. The *Annals* record that he thereupon withdrew his motion, but protesting all the way that the term, "national religion," by no means implied that the government was a national one, rather than a federal one.

The vote was then taken on the Religion Clauses — the vote was 31 in favor, and 20 against. Not, one might conclude, an overwhelming vote of confidence but nonetheless a comfortable margin. And the opposition, it bears repeating, was not one based on singling out religion for protection. *To the contrary, the opposition was grounded, first, on the fear that the language might be construed so as to give comfort and quarter to those who were irreligious, and second, on the lawyerly objection, pressed by Sherman, that the entire exercise was unnecessary in a government of limited and expressly*

*delegated powers.*

Thus, alas, ends the entirety of the recorded debate in the First Congress on the Religion Clauses. This is a sharp disappointment for historians, both professional and buff, and leaving not a few judges a bit wistful. The intriguing point is that as the recorded debates end, the Clause as passed by the House refers to the rights of conscience but not to the free exercise of religion.

But there is no mystery, thankfully, in this respect because we know, albeit without the benefit of debates and discussions that surely occurred, that a Congressman from Massachusetts, Fisher Ames, came forward on Thursday, August 20, with a revised proposal. It was, in the main, a proposed return to the version drafted by the Select Committee, but with a third provision added with respect to protecting the free exercise of religion. So as Ames proposed it, the rights of conscience *and* the free exercise of religion were protected.

What, then, was the relationship between



George Mason (above) had co-authored a guarantee of the free exercise of religion with James Madison which was included in the Virginia Declaration of Rights of 1776.



the "free exercise" and the "rights of conscience" clauses in the proposal? I must leave that intriguing issue ultimately to historians and scholars, but I will by your leave venture to offer an amateur, perhaps horseback opinion, a quick ruling from the bench as it were. And that is that the two were so intimately related that they were, in effect, substitutes one for another. What was the protection of the right of conscience but the protection of religion, at least at that time. Indeed, it would be quite wrong to view the Framers in the First Congress as somehow downplaying conscience and elevating religion, as some might tend to bifurcate the two in the contemporary age. The two—conscience and free exercise—were intimately linked. An act of conscience free of state compulsion was, in effect, the free exercise of religion. This view is at least partially buttressed by the Virginia Declaration of Rights of 1776, the pertinent clause of which was coauthored by a then 25-year old lawyer, James Madison, and George Mason, 59 at the time and dubbed by Jefferson as "the wisest man of his generation." It was from the 1776 Virginia Declaration that Madison drew so effectively in his Memorial and Remonstrance. And Article 16 of that historic Declaration stated in clear terms that all men enjoyed "equal title to the free exercise of Religion according to the dictates of conscience."

The two concepts—conscience and free exercise—were plainly linked in this historic statement of liberty, just as Madison implied in the great debate of August 15, 1789, when he referred to the Religion Clauses as protecting the rights of conscience. But in any event, it was Ames' version, with minor stylistic changes, that the House accepted on August 24 and sent to the Senate as the final proposed version.

Like the Constitutional Convention itself, the floor debates on the Senate were kept secret in the early days of the Republic. We have only records of the proposed amendments and motions. On September 9, the Senate passed a rather different Religion Clause proposal than that sent to it by the House. In contrast to the more general House version, the Senate measure stated:

Congress shall make no law establishing articles of

faith or a mode of worship, or prohibiting the free exercise of religion.

The bill then went to conference, and a distinguished conference committee it was. From the House came Madison, Sherman of Connecticut and Vining of Delaware; from the Senate came Ellsworth, Carroll (of Maryland) and Paterson of New Jersey, who was the principal architect at the Philadelphia Convention of the New Jersey (or Small State) Plan. In his character sketches of delegates to the Convention, William Pierce, a delegate from Georgia, described Paterson—at 34 only 3 years younger than Madison—as "one of those kind of Men whose powers break in upon you, and create wonder and astonishment." Paterson, as a Member of the First Congress, had now reached the ripe old age of 36.

It was from the hand of these six men, laboring outside the public eye, that the final language of the Religion Clause emerged, the sixteen words which we quoted earlier. That language was promptly accepted by the House on September 24, 1789 and by the Senate on the following day.

\* \* \* \*

What emerges from this return to the First Congress is the overriding concern at the Founding of securing the liberty of the people. This act—the crafting of the Bill of Rights in general and the Religion Clauses in particular—was ultimately an exercise in accommodation by virtue of the importance of the rights—an importance suggested by three tangible factors: first, that the Religion Clauses are first of the first, they are preeminent. Second, quite apart from the symbolic location of the Religion Clauses in the constitutional constellation, the First Congress quite obviously focused in its debates on *religious liberty* more than on the other freedoms enshrined in the Bill of Rights, no matter how dear those other freedoms might be; and third, that religion was universally seen as a positive good and that while securing religious liberty, the amendment should not give governmental aid and comfort to religious unbelief. And it was to this latter concern that Madison specifically responded by seeking incorporation of the concept of a national religion. Under this concept, the area of *verboden* activity would be

limited to the narrow ground of compulsion in matters of belief and of elevating a particular sect or combination of sects to governmentally mandated primacy in a society characterized by a healthy diversion of religious viewpoints and affiliations.

And thus the Amendments were proposed to the States, and were ultimately ratified effective December 15, 1791. The Religion Clauses were, of course, destined to be the source of considerable legal and constitutional debate as the Twentieth Century unfolded. But one clear message appears from the history of the First Congress. The First Congress — the body which debated and crafted the First Amendment as we still know it (in the precise language that stirs our hearts) — plainly, indisputably did not hold the notion now gaining currency that all religious references and observations would be eliminated from the official life of the Federal Government.

For on the very next day after approval of the proposed Bill of Rights, on Friday, September 25, the House turned to an appropriations bill and then considered a resolution to request President Washington to recommend a day of public thanksgiving and prayer, "to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God."

Now it did not go unnoticed that this recommendation had to do with religion. Our now-familiar friend from South Carolina, the Bermuda-born surgeon and future Treasurer, Congressman Tucker, complained that "this is a business with which Congress has nothing to do; it is a religious matter, and, as such, is proscribed to us." *Annals* at 915. But Mr. Tucker's opposition was, again, based entirely on his Anti-Federalist views of state power, versus the power of the new central government. Any such matter, this ardent Anti-Federalist maintained, lay within the province of the States.

But this States rights view garnered little support, and Roger Sherman, the architect of the Great Compromise in Philadelphia, mounted a spirited justification for the resolution based primarily on precedents in Holy Writ. Another Congressman, Mr. Boudinot, cited precedents from the practice of Congress under the Articles of Confederation. He expressed hope that the motion would meet with a ready acceptance. It did. Apparently with

little debate, and with only two Congressmen having been recorded as harboring misgivings about the resolution, the matter passed and the committee was appointed.

In addition to this action, as recounted in the Supreme Court's opinion in *Marsh v. Chambers* upholding the constitutionality of legislative chaplaincies, the House of Representatives and the Senate both elected chaplains in April and May 1789. Indeed, this past Law Day marked the Bicentennial of the day on which Madison's House of Representatives appointed its first chaplain, a practice that has continued for 200 years. Madison himself served on the Committee recommending the institution of a chaplaincy. And the two chaplains were, as of the early Fall of 1789, no longer volunteers but were paid by Congress. Madison himself, it bears noting, voted in favor of that measure.

Finally, that First Congress also repassed the Northwest Ordinance of 1787, a measure originally passed by the Congress under the Articles of Confederation. The Ordinance, among other things, set forth Congress' reasons for setting aside for education purposes federal lands in the territory northwest of the Ohio River. The first reason advanced by Congress was religion. In the words of our First Congress, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of learning shall forever be encouraged."

We will leave the remainder to historians and others. What has since transpired over the past two centuries since ratification of the Bill of Rights is in large measure a recurring theme in our decisional law in favor of the overarching value found in the Religion Clauses, that of religious liberty. It was the philosophy of natural rights — of liberty — which animated Jefferson and Madison and which so clearly informed the discussions and debates at the Convention and the First Congress.

True it is that the earliest cases involving the Religion Clauses were not so clearly oriented toward the libertarian theme of the First Amendment. But with the first case applying the First Amendment through the Fourteenth Amendment to the States, the 1940 case of *Cantwell v. Connecticut*, a dominant theme has been one of liberty — the protection of the free exercise right. And this theme has continued



into the most recent weeks of the October 1986 Term of the United States Supreme Court, as evidenced by the decision so recently in *Hobbie v. Unemployment Appeals Commission*, reaffirming the Court's earlier decisions in *Sherbert v. Verner* and *Thomas v. Review Board*, concerning the rights of religious believers to unemployment compensation.

The note of tension (about which so much has been said and written in recent years) has been sounded where the values enshrined in the Free Exercise Clause come under attack by invocation of the Establishment Clause, such as attacks on historic practices as chaplaincies, prayers at public events and the like, all of which are events the legality of which, upon reflection, will be seen to implicate values enshrined in the Free Exercise Clause. Who shall, after all, command a President or Senator not to invoke the Deity in a public pronouncement, implicating as those do both free speech and free exercise values.

That is to say, in closing, that the desire to erect an impenetrable wall of separation may ultimately come to be viewed, by virtue of such teachings as Justice Brennan's opinion for the Court in *Hobbie*, as constitutionally curious. In the modern day, it is useful to remember

that it is the evil of *compulsion* at which the Establishment Clause was aimed in a pluralist society. *The question for us as a Nation is whether in the name of tolerance and sensitivity, we are in danger of inadvertently entering an age of intolerance, thinking — strangely, oddly — that religion is like discrimination, something to be eliminated from public life, root and branch.*

It is, in this Bicentennial year, an appropriate time to reflect upon our commitment as a Nation to the principles of tolerance and understanding, as reflected at the Founding. It is a time for reflecting upon respect for the conscience of all our citizens. We must remember those who through the Constitution's protection have the inalienable right not to be compelled to participate in any religious observation or activity; we also must remember those who are mindful, in the words of Justice Stevens, that the source of liberty in civil society is their Creator. We must remember those who believe in the words of that great friend of religious liberty, James Madison, in his immortal Memorial and Remonstrance, that their ultimate allegiance is owed to the Governor of the Universe and the Universal Sovereign.

# Robbing the Poor to Aid the Rich: Roger B. Taney and the Bank of Maryland Swindle

by David Grimsted

## Prologue

In March 1836 Captain Thomas Williams wrote a letter to the *Baltimore Republican* that told much of his life story. A few years earlier prolonged illness caused Williams, then nearing sixty, to retire after forty-years labor at sea. When he retired, he deposited his lifetime savings of about \$5000 in the Bank of Maryland, judging that he and his wife could live on the five percent interest that the Bank offered. Williams thought that the prominence of the Bank's directors and its state charter would insure his money's safety. Almost exactly two years prior to the time Williams wrote his letter, the Bank of Maryland closed its doors and reduced him "in a moment . . . from competence to wretchedness and poverty." With only five dollars on hand, he had to sell his furniture while hoping for a speedy settlement of the Bank's accounts. Instead, the trustees who took charge of the bank's affairs delayed. Williams soon felt obliged to send "the decrepid widow" of an old sea-faring friend, whom he'd pledged to support, to the alms-house. Then he resorted to borrowing from friends, although "the honest pride of my life had been to live by the sweat of my brow, and . . . never be bent down by pecuniary obligation." When he wrote, Williams was beset by creditors, his wife was "literally in rags," and his house was empty and in danger of being forfeited for non-payment of taxes. "Something must be done to save us from despair," he begged, and concluded his appeal for help pathetically, "My former employers, all my neighbors and many others, will cheerfully testify that I have ever been an honest man and good citizen."<sup>1</sup>

Many honest men and women in the Jacksonian era, good citizens all, suffered hardships similar to those of the old Captain. Thomas Williams' letter gives human shape to a common enough reality in the "flush times"

of the mid-1830's. Williams was only one of thousands who lost a considerable part of their small savings in the Bank of Maryland collapse, and this incident was only one of thousands of similar failures that punctuated the era. Most losers in this process suffered less than Williams only because they pursued their just dues without the sea-dogged tenacity of the old Captain. By 1836 when Williams penned his lament, most of the original creditors of the Bank of Maryland had sold their credits for a fraction of their value to speculators who made probable profits of upwards of \$2,000,000, all of it taken from innocent lenders and depositors, most of them of modest means.<sup>2</sup> Captain Williams is a good "representative man" for the kind of person whom economic historians commonly neglect: the thousands of small investors whose funds somehow disappeared in the triumphant but bumpy "take-off" of American industrial capitalism.<sup>3</sup>

Captain Williams' misfortune was related to two of the thorniest and most important questions about the Jacksonian period: the nature and function of the power elite in that vociferously democratic society, and the motivation and influence of Andrew Jackson's attack on "the monster" second Bank of the United States. If the events behind Captain Williams' plight can only give shadow of answer to such large questions, the shadows reveal something about the shape of those structures themselves.

## I. Speculating

It's good to be shifty in a new country  
— William Tappan Thompson,  
— *The Adventures of Capt. Simon Suggs*

The story behind the Baltimore swindle began in the summer of 1831 when thirty-

eight-year-old Quaker banker, Evan Poultney, gained control of the old but largely inactive Bank of Maryland.<sup>4</sup> Poultney was a prototype of the era's small businessman with large plans, optimistic and sharply aware of new business opportunities. In the next few years he was to build his bank up quickly by offering favorable terms to small depositors and by using the connections of a well-placed group of supporters to get large governmental deposits, local, state, and national. With this group he was to engage in wide-scale speculations, one of them dependent on foreknowledge of the pet bank plans of Andrew Jackson's administration, that were to lead to the closing of his bank. While Poultney bore a full share of the responsibility for the speculations, he did not participate in the subsequent swindle which was to swallow both his and most small investors' savings. As a banker Poultney overreached himself, but ironically the economic tragedy for thousands owed less to his acquisitiveness than to his generous wish to hurt neither his speculating allies nor his unsuspecting depositors.

Poultney's purchase of the Bank of Maryland in 1831 created few ripples on the bustling Baltimore financial scene of these years, except for the people immediately involved. John B. Morris, a leading old-line Baltimore financial figure, perhaps felt some pique at being removed, somewhat unceremoniously, from the Presidency of the bank. Certainly Lydia Morris was not pleased by this turn of events, despite the fact that her husband made substantial profit from the sale of his stock. The presidency had been "a most agreeable post" and, she said "with regret," the position "gave an occupation to Mr. Morris."<sup>5</sup> Morris retained substantial real estate investments, but his ouster as president must have rankled. At least this is the kindest explanation of the crucial role he was to play when he was fully occupied three years hence in support of the swindle that was to destroy Evan Poultney and to cause Captain Williams' money to disappear.

The genially ambitious Poultney had no premonitions of disaster in 1831. One of a coterie of up-and-coming businessmen in these prosperous times, he had run for a number of years a successful "discount house," a banking establishment whose profits

derived from trading and transporting, at a slight margin, the notes issued by individual banks in all parts of the nation. Such bank notes were the country's primary currency, the real value of each depending on the solvency and the reputation of the issuing bank. Poultney's discount business created acute awareness of the profits to be made from being able to issue bank notes, which were in part a kind of loan from the public to the originating institution. So long as a bank's credit was good, it could basically print money for some of its purchases and loans. When Poultney bought controlling interest in the state-chartered Bank of Maryland, he purchased the financial opportunities that came with the legal right to print bank notes. The second Bank of the United States, with branches in all sections of the country, was the main monitor of banks' credit, though its watchdog role over this currency was being threatened by the developing political war between President Jackson and his opponent Henry Clay over its recharter.<sup>6</sup> All of this, of course, was somewhat distant background to the more immediate problem the new President of the Bank of Maryland faced. He needed to shake off the "inactive" status of his new business and gain sufficient deposits to allow him to issue bank notes safely on a wide-scale.

Poultney probably already had a plan in mind when he took over, a simple idea but one unusual in American banking circles and unprecedented in Baltimore at this time. Baltimore's banks were willing to act as caretaker for people's money, but were unwilling to pay for that privilege except in the case of large or long-term deposits. Poultney announced that his bank would offer 5% annual interest on all deposits, large or small, short or long-term. The plan was attractive to a number of people with small savings, like Captain Williams, because it seemingly offered some secure profit as well as protection.<sup>7</sup> It was doubtless unpopular with other bankers who must have lost deposits through Poultney's more generous terms, but Poultney was not to feel their wrath until some years later.

Money quickly came into the Bank of Maryland in quantity. Between Poultney's take-over in 1831 and the bank's first crisis in September of 1833, the bank's specie reserves increased five-fold, \$8,500 to \$45,000; its

deposits jumped almost twenty-fold, \$89,000 to \$1,720,000; and its note circulation nearly trebled, \$213,000 to \$620,000. The most publicly noticeable change, the increase in note circulation, caused worry about the bank's soundness among conservative bankers and businessmen; the Union Bank, Baltimore's strongest, put a limit on the amount of Bank of Maryland notes it would accept. Yet note issuance was hardly out of line with the increases in deposits and specie reserves that Poultney's new policies, and shortly his new secret co-owners, attracted.

Poultney's genial zest, popularity and reputation allowed him to attract a prominent Board of Directors for his new bank, as law required, but these were figureheads for his personal direction of the operation. This situation changed in the fall of 1832, however, as it was becoming increasingly clear that Andrew Jackson would win his second term with what he considered a mandate to kill the 'monster bank' of the United States. For several years national and local prosperity had been steady, in part because of the helpful financial guidance of the national bank, but its decreasing power suggested that even richer opportunities awaited innovative capitalists like Evan Poultney. The Bank of Maryland at this point began buying up its own stock at somewhat inflated rates. Within months, six men owned 900 of the 1000 shares of stock in the Bank of Maryland. The largest block, 400, belonged to Evan Poultney, but the majority were in the hands — 100 each — of five other men. Until the bank closed its doors about a year after this stock takeover, these six men were to control the main financial maneuverings of the Bank of Maryland.

Sometime after the Bank's collapse, first in the summer of 1834 and once again in the spring and summer of 1835, a vigorous public debate occurred about exactly who ran the bank during this year. Poultney said that the various activities were fully cooperative efforts by the six large shareholders until the first crisis developed in the late fall of 1833. The other five owners and their friends claimed they had played no more active role in the Bank's affairs than had the official directors.<sup>8</sup> All the evidence supports Poultney's position. A number of letters from the secret owners prove most active involvement. Nor is it

credible that they would pay for and own a controlling interest in a bank with whose affairs they were not involved. On top of this was the gross implausibility of the secret owners' "explanation" of why they owned the stock. Though they scarcely knew Poultney, said the five, they had agreed to become indebted for the Bank's stock at Poultney's request to protect the interest of Poultney's infant son should his father die. This was indeed a strange favor to do, especially since it involved tying up huge amounts of capital for someone who was a distant acquaintance. Nor is there any conceivable explanation of how having the majority holdings in the Bank in the hands of five comparative strangers wholly ignorant of its workings would "protect" any heir.

Clearly the interests of the secret five were not philanthropic as they later pretended, but calculatedly financial. Alexander Hamilton, son of the nation's first and greatest Secretary of the Treasury, reported that in Baltimore "it became very fashionable to laud Poultney for his great genius and abilities in banking." The secret owners perhaps did not think of Poultney "as a second Rothschild," but they decided a large degree of control and of ownership of his bank could prove very profitable to them, especially if kept secret.<sup>9</sup> The advantages to Poultney seemed equally great. Working with these men put him in contact with some of Maryland's ablest younger lawyers and businessmen, people of his own age, but better established politically, socially and financially. The offer must have seemed both attractive and flattering to the ambitious Poultney, who throughout his coming ordeal was to show tragic incapacity to be suspicious of those professing friendship to him.

None of Poultney's five cohorts ever showed any of his genial naivete. Yet they brought to their connection to the bank substantial abilities and position. Hugh McElderry and Evan T. Ellicott were wealthy and prominent young businessmen. Ellicott belonged to a leading industrial family; his father had founded a multi-faceted business establishment at Ellicott Mills, a center for wheat-growing and milling and iron-making. Ellicott was the much younger half-brother of Baltimore's leading banker, Thomas Ellicott, a family tie that was the source of deep animosity at the



moment, as members of Andrew Ellicott's first and second families legally battled over his estate.<sup>10</sup> McElderry was reputedly wealthy and served in a gentlemanly way on the boards of directors of several banks, although Thomas Ellicott had recently removed him, much to McElderry's embarrassment and anger, from a Directorship of the Union Bank. Seemingly McElderry was a Democrat; certainly he must have been friendly with Roger Taney, who had Andrew Jackson appoint McElderry one of the government directors to the Bank of the United States.<sup>11</sup>

The other three secret owners were attorneys. Reverdy Johnson and John Glenn were among the best known of Baltimore's young lawyers. The families of both men were respectably prominent, and by dint of their professional abilities and, in Johnson's case, social skills were well on their way already to a place in the Baltimore elite. Glenn, "preeminently a business lawyer," had gained some public reputation as a man of considerable ambition. Johnson shared this trait, but tempered it with greater subtlety. His brilliance at legal maneuvering won him a leading place at the bar, in lobbying work and in Maryland politics. Having served already in the Maryland legislature and as assistant Attorney General of the state, Johnson had ahead of him a career that was to make him a Whig United States Senator and Attorney General of the U.S., as well as Lincoln's chief political strategist in Maryland during the Civil War. An incredibly resourceful antagonist, Johnson destroyed almost all his personal papers (written in the first place in an almost undecipherable script), causing him to remain, as he doubtless wished, one of those shadowy "prominent men" who flourished in the nineteenth century.<sup>12</sup>

The fifth of these 100-share men was a less successful attorney. David Perine was never active at the bar, but made his living by managing trusts and property and through his fairly lucrative Clerkship of the Orphan's Court, seemingly his chief source of income prior to the swindle. From a fairly prominent family, Perine led a respectable life noted, as he made clear in his manuscript collections, more for his friendship with the notably successful than for his own achievements. His position among the owners seems to have



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All of the secret owners of the Bank of Maryland numbered themselves among Roger B. Taney's closest friends.

been one of secretary; he was the one who took minutes, wrote notes, copied documents, and carried messages.<sup>13</sup>

Though the secret owners shared many common ties, their most important link was that they were all among Roger B. Taney's closest friends. The ties with Ellicott and McElderry are least clear, though McElderry's appointment as a government Director to the Bank of the United States indicates Taney's personal favor. Johnson, Glenn and Perine were his closest contacts in Baltimore, people he supported and who supported him at all crucial junctures. That Johnson and Glenn were Whigs was part of the practical usefulness of the affiliation. Johnson could use his Whig ties to lobby effectively in Washington for Taney's appointment, all three men worked earlier for Perine's Clerkship and later Glenn's Judgeship, and Taney, whenever the Jacksonian paper in Baltimore became angry about the swindle, could be brought in to sanction his friends' positions or even to lobby for their interests in Annapolis. Ideological divisions such as they were — and they existed over slavery issue at least, with Taney approving that institution and Johnson cautiously hostile — faded in the face of such practical

considerations. The Perine Papers in the Maryland Historical Society are organized around the "lasting friendship" of the four men which long predated the secret club fraud. Taney, Johnson, and Glenn had served together as counsel for the Baltimore and Ohio Railroad. When Taney became Attorney General of Maryland, he appointed Johnson his chief assistant. When Taney went to Washington, Perine took charge of his local finances, even the hassles of renting his house.<sup>14</sup>

What is most important about this friendship was Taney's support of the secret owners at every juncture: in their early speculations, in the perpetration of the fraud, and in the long cover-up that ensued. His aid was essential at several key points and was always given, sometimes at considerable risk to himself. On Taney's prior information, the group speculated in bank stock; through his aid about \$500,000 of government funds were injected into the Bank of Maryland when the secret owners controlled it; through his maneuvers, the only leading banking figure fighting the swindle was removed from power; through his intervention, public and partisan sentiment against the swindlers was quieted; through his lies, the cover-up, at the time and since, was reinforced. Since even Taney's staunchest admirers picture him as hard-headed rather than generous, friendship seems a much less likely explanation of this conduct than a concealed financial interest in the plot. The serious political risks he took and the elaborate deceptions that he perpetrated make it highly probable that Taney was the seventh and most secret owner in the secret club that ran the bank between the fall of 1832 and the spring of 1834.

When Poultney first revealed the secret ownership in a pamphlet of the summer of 1834, he called the relationship a partnership. His former co-owners jumped on this term to show Poultney's dishonesty, arguing correctly that there had never been a legal partnership. Although Poultney had used the term in a colloquial rather than a legal sense, he was careful in subsequent writings to refer to the group as an association or club. Club seems as good a term as any. The Club will refer to Poultney and the five secret stock owners, Johnson, Glenn, Perine, McElderry, and Evan T. Ellicott. The Secret Club will refer to these

five hidden owners and to their dependable and indispensable ally, Taney, who first speculated and then manipulated the swindle after the bank closed in March, 1834.

The Secret Club members shared one final common trait. Between 1834 and 1836 they all bought, built, expanded or refurbished the mansions or estates that marked their secure entrance into the elite. Johnson and Glenn bought and remodeled mansions in downtown Baltimore in 1835. The same year Perine added 250 acres to his suburban estate and shortly began to build a "classical mansion" on it that burned in 1840. Hugh McElderry had just completed building a mansion in the summer of 1835. And Roger Taney, pressed with debts in 1834, bought his substantial home in Baltimore in 1835. To Baltimoreans angered at the swindle in the summer of 1835, many of these homes stood symbol of the status that had been bought at Captain Williams' and others' tragic expense. When several of the culprits left town to avoid tar and feathering, a mob attacked these homes, their profits made visible.

Taney was older and more prominent than the other Secret Club members, but his financial position was precarious, and his political-judicial future uncertain though highly promising in 1832. That all six had done well gave them confidence and reputation to do better, while the insecurities of their status attracted them to an opportunity like that of the Bank of Maryland which seemed tailor-made for quick profits with little risk in this heady stage of American capitalism. Accelerating growth cast doubt on the older economic verities and restraints, and these men, following what seemed newer and shorter paths to wealth, were at a stage in life that made them quite willing to treat "old-fashioned notions of banking" with "levity and badinage" in the pursuit of prompter happiness.<sup>15</sup>

Things briefly went well. The early Club dealings diverged little from the commonplace if somewhat speculative practices of most banks or businesses with good political connections, made devious only by the secrecy of the Club's ownership and control. The first problem, as the Club saw it, was increasing the capital they had to work with. Through Reverdy Johnson's lobbying efforts, the state of Maryland deposited over \$335,000 of its funds

in the Bank of Maryland, and David Perine, clerk of the Orphan's Court, directed most of that agency's lucrative accounts there. Reverdy Johnson and Hugh McElderry also lobbied a legislative charter for the General Insurance Company, of which Johnson became President and the four other secret owners directors. Taking its own stock as security, the Bank of Maryland lent Club members the money for their shares in the insurance company. These capitalists well understood the profitable, if dangerous, investment principle that came into active use in these years: buy on margin and use what you've "bought" to finance further speculation. Borrow to buy Bank of Maryland stock, and then borrow on it to buy General Insurance Corporation shares. If things went well, it could be the source of great wealth, but the indebtedness was perilously stacked if economic winds blew wrong.

The Club's second application of this principle occurred in this same spring. The Bank of Maryland bought, largely on credit, \$500,000 worth of Tennessee Bonds from the Union Bank of Tennessee; seemingly the Club intended to sell these quickly for cash to give them speculative capital while they slowly retired the debt to the Tennessee bank. This decision to invest in "stocks from the South" for some quick cash perhaps resulted from a failed speculation in the North. On March 19 Evan T. Ellicott wrote Poultney from New York City a letter that gave clear suggestion of the Club's speculative breeziness before troubles developed. "I have the satisfaction of announcing to the Club that the duplicates of the contract have been by mutual agreement *cancelled*. A good anthracite fire did the important service of annihilating this evidence of indiscretion and misapplied confidence," Ellicott explained. Little daunted, he added, "We may lose about as much as we ought to lose to make admonishment impressive," before urging that their speculations now look southward.<sup>16</sup>

In May of 1833 the Club launched a major new project. They decided to buy 6000 shares of the Union Bank of Maryland, for which they paid more than the going rate. This transaction made clear how Club management blurred lines between personal and corporate responsibility. In buying the Union Bank stock, John Glenn personally gave the Ten-



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President Andrew Jackson's desire to bring down the Bank of the United States initially figured prominently in the Bank of Maryland's owners' plans to build their fledgling institution into a major regional financial house.

nessee bonds, which the Bank of Maryland owned, to the Union Bank as security on a personal loan to him to buy the Union stock. Only months later was Glenn's debt transferred to Poultney and then to the Bank of Maryland. Such strategies make the transactions difficult to trace, but make amply clear Secret Club members' deep personal involvement in all the affairs of the Bank of Maryland.<sup>17</sup>

Only one reason for such a large stock purchase at inflated rates makes sense. The Club knew that the Union Bank was to be made a federal repository under the "pet" system which Andrew Jackson intended to institute, and concluded that the worth of the stock would rise quickly once this accession of government funds to its coffers became known.

The two people from whom Club members could have learned this inside information were two of the men most responsible for Jackson's special deposits system, Roger B. Taney, who suggested the policy to the President, and Union Bank president Thomas Ellicott, who devised it for Taney. Profits and politics were obviously converging here, and



an understanding of the coming manipulations about the Bank of Maryland require some filling in of the political history concerning Jackson's reelection in 1832 and its financial-political aftermath.

Jackson's first term had climaxed with a sharp political battle focused on the rechartering of the national bank. The opposition candidate, Henry Clay, sensing the need to embarrass Jackson politically if he were to have much chance against the popular president, worked with Nicholas Biddle, President of the United States Bank, to ask for early recharter, four years before the existing charter ran out. Biddle, who'd been trying to cajole Jackson into support for the Bank in some form with ambiguous results, calculated that his chances were better now than if he waited until Jackson's second term neared its end. Biddle believed it probable that the bank bill would pass, and Jackson would approve it rather than face the election saddled with having attacked what seemed a popular and effective institution. And Clay wanted early recharter because he felt a Jackson veto would provide the issue that would propel this secure friend of the Bank to the White House.

The Bank's friends could not have been more mistaken in their calculations. Taney correctly wrote Ellicott that the Biddle action had caused "what those opposed to it [BUS] could not have done. He has insured its certain and inevitable destruction." The obvious intention to embarrass him politically by early recharter brought out Jackson's immense combativeness. The Bank became the monster, and Jackson's resounding veto the prelude to resounding electoral victory. In many ways the Bank issue less injured Jackson than salvaged a kind of political integrity for his first administration which had been characterized up to that point by the tragedy of Indian removal and the farce of Peggy Eaton's social problems. There's no indication that the Bank issue fueled Jackson's success, but, because of it, his perhaps inevitable triumph became invested with a political point it would have otherwise lacked. Certainly for Jackson his election was a mandate to destroy the bank.<sup>18</sup>

This situation was less clear to others than to Jackson himself. The political ploy involved in early recharter gave his veto an aura of justice even to many sympathetic to the Bank, some

of whom expected that Jackson would change or replace it so that its primary functions regarding economic convenience and control would remain. There was hope for this policy even within Jackson's administration. Van Buren had not been enthusiastic about the veto, and remained dubious about, or at least aloof from, Jackson's subsequent policies.<sup>19</sup> But his primary concern — shaking as little as possible the boat that seemed to be carrying him to the Presidency — also made him hesitant to suggest any serious opposition to whatever Jackson came up with. Much less cautious was Louis McLane, Jackson's able and ambitious Secretary of the Treasury. McLane had told Biddle, prior to the early recharter attempt, that Jackson's reservations about the Bank were not such that would imperil its existence unless Biddle allowed it to become tied to politics. When Biddle neglected McLane's advice, the results were precisely those the Secretary of the Treasury predicted.<sup>20</sup>

Jackson's second presidential victory was immediately followed by McLane's first report as Secretary of the Treasury. It was the most comprehensive and integrated bit of financial planning since Alexander Hamilton's days, and as politically bold as Hamilton's various measures. McLane urged modified recharter of the Bank of the United States in a way that would continue its financial functions while putting them more fully in governmental rather than private hands.<sup>21</sup> It was a politically daring tack for McLane to take, who made clear that this position was his and not the President's. McLane understood Jackson well. He knew the President would appreciate the complex intelligence of the report and also the honesty of an opinion opposed to his general feelings but frankly and fairly expressed. Jackson admired the report, though he disagreed with the evaluation of the BUS. Possibly McLane's plan would have become administration strategy had not Roger B. Taney and Thomas Ellicott devised an alternative program that appealed much more to Jackson's desire "to strangle this hydra of corruption."

Taney and McLane were rivals within the administration for Jackson's favor, in much the same way John C. Calhoun and Van Buren had been in the first years of his presidency. While the earlier competition had centered on





Specie issue by the Bank of the United States (top) was not the sole currency in circulation during the early Nineteenth Century. As illustrated by the other two bank notes above, many financial institutions issued their own currency. The trading value of which was usually a reflection of public confidence in the institution.

becoming Jackson's presidential heir apparent, the Taney-McLane rivalry involved favoritism for appointment to the Supreme Court. Taney's strategy for Jackson's support was much less intricate than McLane's; it also proved more successful. He told Jackson at all

times precisely what Jackson most wanted to hear.

What Jackson most wanted to hear, Taney correctly concluded as soon as the effort for early recharter developed, was some means of directly counter-attacking the BUS. The veto

message was gratifying, but it left intact the Bank's position as government repository until 1836. Jackson wanted something done more quickly; he argued, and perhaps believed, that unless the Bank were crippled immediately it would "corrupt" the election of 1834.<sup>22</sup> Hardly a realistic fear, it was nonetheless a good barometer of Jackson's anxiety to move offensively. To gratify this desire Taney contacted an old Baltimore acquaintance, Thomas Ellicott, President of the Union Bank, Baltimore's strongest, to get suggestions. Perhaps piqued at his failure to be made President of the BUS years before, Ellicott had penned a pamphlet questioning the necessity or desirability of the national Bank. When Taney asked Ellicott's opinion, the latter replied so that Taney concluded, "The views of the subject taken by you are unanswerable." On February 20, 1832 Taney wrote Ellicott lamenting the way in which the national bank was given credit for sound currency when any bank — say, the Union Bank — whose notes were sound could do as well. Taney requested that Ellicott send him some copies of his pamphlets outlining this position, and suggested his hope that, if Congress demanded a national banking system, a series of "different independent Banks" would replace this "gigantic machine."<sup>23</sup>

Taney claimed to have carelessly misplaced Ellicott's letters in these years, though probably he destroyed them when the discrediting of Ellicott became necessary to the Club's financial plot. At any rate, the "Taney collection" in the Library of Congress are really the letters he sent to Ellicott, along with a few to Ellicott from Amos Kendall and a very few Ellicott letters on topics he considered major enough to require drafts. One of these drafts is the plan which Ellicott sent Taney once Jackson's reelection was assured. Though brief, it offers the fullest statement of the financial thought behind Jacksonian removal policy. Ellicott's theoretical position rested on Adam Smith's laissez-faire idealism: "Experience has proved where there exists no monopoly . . . the effect of competition will reduce prices to the very smallest measure of profit." The best system was one unencumbered by legal restraint and left open to the greatest degree of competition, for the power to regulate exchange inevitably suggested a monopoly somewhere which

"never fails to be abused by the people who enjoy it." Ellicott barely mentioned constitutional or states' rights objections to the bank; either these he considered unimportant, or he felt they properly fell into Taney's political-legal bailiwick.

Ellicott's plan foresaw the replacement of the BUS with one or more banks chartered in each state. These several designated banks would at once insure competition and reduce the total number of banks of issuance because each state would develop a vested interest in its designated federal repository which would curb wide-scale issue of charters to competing institutions. The federal government, as price of its favor, would require repositories to provide ample securities for government funds, and also regulate their emission of bank notes through Treasury Department directives to insure a stable and dependable currency. Ellicott's confidence that this system would naturally lead to the curtailment of the number of banks seems questionable, and time was to show how difficult the Jacksonians found imposing controls on the state banks of deposit. Still no document so coherently outlines a Jacksonian economic vision at the time when Jackson's determination to destroy Biddle's bank required and received some positive action. Clearly Ellicott appreciated the BUS' positive functions, and wished to replace them as well as the Bank itself, a reality clear later in the policies of Taney's replacement as Secretary of the Treasury, Levi Woodbury. Ellicott's argument also makes clear how a commitment to laissez-faire and commercial expansion was perfectly compatible with a desire for some banking and currency control.<sup>24</sup> The way Taney and Jackson implemented the plan, however, shows their immediate disinterest in its controlling features. When a trial balloon of the plan was sketched in the Jacksonian *Pennsylvanian* a month after Ellicott wrote it, it stressed the possible controls of the new system, but skirted the state monopoly and Treasury directive aspects which, rhetorically and practically, might have been politically disruptive but which were the heart of Ellicott's idea.<sup>25</sup> Taney later charged that Ellicott used the pet bank system to finance speculation and urged immediate withdrawal of all BUS funds, but no evidence exists supporting such charges.<sup>26</sup> Ellicott's

plan showed a concern for restraint that was not apparent in any of the early actions or arguments of Jackson, Kendall or Taney.

Whatever the Administration's interest in the long-range ideas Ellicott outlined, response was favorable to their immediate aspects. Ellicott wrote Taney summing up their discussions of the issue that now stretched over a year, "I know there is so little discrepancy in our views." Taney must have shown or revealed the Ellicott plan to his ally Kendall and probably to Jackson. Three weeks after Ellicott sent the proposal and one week before the public suggestion appeared in the *Pennsylvanian*, Taney wrote, "It is not intended at the present moment to enter upon the arrangements you speak of — and when the proper time arrives you may rely on it that I shall not forget what you mention."<sup>27</sup> The Bank issue was to be held in abeyance until Jackson handled the more pressing nullification crisis which South Carolina and John C. Calhoun fomented in these months.

By March 26, 1833 the proper time had come. Taney wrote Ellicott, "It will be well for you to come to Washington." On April 1 or 2 Ellicott visited Jackson and on April 6 he formally submitted a sketch for weakening the BUS by establishing other depositories for government funds, which seemingly became the basis for the pet bank system. On April 13 Ellicott wrote Kendall, who with Taney was the only member of the cabinet supportive of the scheme, soothing fears about note exchange if the deposits were removed.<sup>28</sup>

By early May Jackson had apparently fully accepted the plan. Taney claimed on the 5th that, since nothing was fully determined, what he had to say could wait until he saw Ellicott, but assured him, "I have nothing to say to you on that subject that you will not be pleased to know." In the same letter Taney mentioned that he'd asked the cashier at the Union Bank "to invest the money I have on deposit in Union Bank stocks — at whatever the market price." Obviously having sober second thoughts about what he'd done, Taney now piled on qualifications: it was not intended "for profit and resale," but as "a permanent investment" for his sisters and sister-in-law, while he'd welcome any other investment suggestions.<sup>29</sup> Perhaps Ellicott pointed out what Taney seemed on the brink of realizing:

the folly of his personally buying stock in a bank whose "pet" status seemed already secure, when the plan, much less the specifically favored banks, had not been publicly announced. Some dangers lurked in such self-evident use of privileged political knowledge to line the pockets even of sisters and sister-in-law.<sup>30</sup> The letters that followed took on a cryptic vagueness suggesting that what went on subsequently between the two men Taney judged safer to say than put in writing. The men had at least two conferences within the month, one in Baltimore and one in Washington, for "a free discussion of other matters" and to discuss things "before you go about the various matters we spoke of."<sup>31</sup>

It was at this point in mid-May that political action in Washington and financial action of the Bank of Maryland Club converged. While Ellicott and Taney talked of "other matters," which Taney hesitated to put to paper, the Bank of Maryland Club began negotiations to purchase 6000 shares of Union Bank stock at something above the market rate. There could only have been one reason for such action: the Club knew the Union Bank was to become a federal repository and concluded that its stock would rise in value once this became public knowledge. Taney ignored this transaction in all his subsequent complicated defenses of himself and the secret Club; Ellicott feigned surprise at this transaction in what seems the least honest part of his history of the Bank of Maryland swindle.<sup>32</sup> Both men must have known who was doing what and why at this point, despite later pretensions to innocence. Taney's "laundered" interest in the Club's speculations was obviously a safer way to profiteer than any sudden personal purchases, and Ellicott may have arranged the transaction partly out of his desire to enrich his son as well as to curry Taney's favor. Part of the men's discussions in these days must have involved that a third of the stock purchase was to go to Evan Poultney's discount house, Poultney, Ellicott and Co., now run by Evan's brother, Samuel, and William Ellicott, who was Thomas Ellicott's only son.

The money to purchase the stock the Union Bank loaned to John Glenn against the surety of the Tennessee Bonds Glenn personally deposited despite Bank of Maryland ownership. Glenn then distributed the shares to the



to the Bank of Maryland and Poultney, Ellicott and Co. to camouflage the purchase. So just before the pet banks were to be chosen, a large chunk of the stock in that bank most certain to be designated fell into the hands of Taney's friends, with a portion of it going to Ellicott's son's company.

Jackson chose Amos Kendall to locate suitable depositories and Taney ostentatiously avoided having anything to do formally with the selection of Baltimore's "pet." Taney later claimed that his Baltimore friends warned both him and Jackson about the shakiness of the Union Bank, but that Jackson personally chose it.<sup>33</sup> That Jackson should be supportive of the Bank of the man who laid the groundwork for his revenge against the BUS is not surprising. But that Taney's friends, who had just bought large blocks of stock in the Union Bank, were spreading reports hostile to it is not credible. Taney's argument that the Union Bank was unsound was proved untrue by all subsequent events, including Taney's determined effort to create a crisis of confidence in it the following year when such a policy suited the ends of the Secret Club. Perhaps some thought was given to making the upstart Bank of Maryland the bank of deposit. In August, 1834 the Whig *National Gazette* charged that Kendall had wanted to put government funds into Evan Poultney's "leaky canoe" and the Bank's letterbook showed much correspondence about getting deposits.<sup>34</sup> Yet by May there was probably no serious doubt of the selection of the Union Bank. In late July Kendall wrote Ellicott that he'd like to see him in Baltimore, and Taney informed Ellicott that he might find Kendall in the North if he'd left Baltimore before the banker returned. On August 10, Kendall's Baltimore investigation ended, Taney wrote Ellicott coyly that he would be glad to learn "that in Baltimore, arrangements that are likely to prove satisfactory have been offered by the banks in relation to the public deposits."<sup>35</sup> A week later the list of pet banks, including the Union, was made public.

Jackson's initiation of the special repositories system precipitated two crises. For Club members the trauma concerned the failure of Union Bank stock to rise and the resulting cash flow crisis which terminated their various loose speculations. While this local economic

trouble reached a head six weeks later, the national political crisis developed in early September around the removal plan. McLane gained appointment as Secretary of State and William J. Duane was made Secretary of the Treasury. Duane, whose credentials as a hard money advocate were clearer than anyone else's in the administration, had doubts about the political legality of the administration plan which lacked any Congressional seal of approval. He also recognized that the project as instituted was without mechanism for currency or bank control while undercutting those functions by the BUS. It would foster, he correctly claimed, speculation, not sound currency.<sup>36</sup> He also incorrectly argued cabinet officer's independence from presidential control regarding legally mandated orders. Jackson had no doubts about his own responsibility for controlling his administration or about the legality of any orders he mandated. On September 19 Taney told Ellicott not to come to Washington unless Duane refused Jackson's orders; two days later he asked Ellicott to be in the capitol the next day.<sup>37</sup> Duane had been fired, Jackson had designated Taney to replace him, and the new acting Secretary of the Treasury apparently wanted Ellicott on hand to offer procedural advice as the special deposits system began operation.

At the same time, the Club which ran the Bank of Maryland faced several problems. Though basically sound, the heavy investments in the General Insurance Company, Tennessee Bonds and Bank of Maryland and Union Bank stock had strained their liquid capital. The Union stock was worth only a bit less than had been paid for it, but the expectation was that it would rise as the pet bank system gained stability and acceptance. What was most desirable for Club members was that they resell the Tennessee Bonds, but this had not proved as easy as they had expected. Johnson wrote Nicholas Biddle begging both a loan, and that Bank of Maryland notes be accepted. When Biddle refused to be accommodating, the best solution seemed to be to hire Thomas Ellicott, who had some international as well as national reputation and excellent ties with England's wealthy Quakers, to go to Great Britain to peddle the bonds.<sup>38</sup> But the economic uncertainties of the new pet



system brought on a crisis too quickly for this strategem. Two days before Ellicott was to leave for London, Club members realized that their speculations and their reputations would be endangered unless the Bank of Maryland immediately gained some funds to avoid failure.

The one quick source of sufficient funds for their needs was the United States Treasury which was luckily under the control of their collaborator, Taney. Yet a direct federal loan to the Bank of Maryland threatened embarrassment to the acting Secretary; there was need to have some excuse if the transaction came to public attention. Protecting pet banks from sudden runs by the BUS seemed legitimate, and Taney sent drafts to all the pets, \$100,000 to Ellicott, with instructions that they be used only against a run. A request from a pet banker would justify sending additional funds — and place the onus on him if trouble brewed. David Perine and Johnson asked Ellicott to write a note to Taney requesting aid for Baltimore banks, and Johnson insisted that the Bank of Maryland not be specifically mentioned. Ellicott agreed, but made amply clear that the money was not needed at the Union Bank, so the letter proved of no use in the Secret Club's later deceptions. Hence it disappeared. Johnson, Perine and Glenn said later it begged money for the Union Bank; Taney said merely he'd misplaced it and had no memory of the gist of the note that supposedly triggered his \$200,000 federal contribution.<sup>39</sup>

Johnson and Perine travelled to Washington to talk to Taney, and on Thursday, October 3 wrote back to Thomas Ellicott and Evan Poultney that the acting Secretary had acted with his "usual kindness and despatch." These letters, saved by the recipients, are the crucial documents in the crisis. Printed during the controversy of the next years, Taney and Secret Club members never questioned their authenticity, though they insisted that what happened was very different from what these letters make apparent. Perine wrote to Ellicott with precise instructions about how the drafts Taney was sending with them were to be used. Two of them were to be cashed, and \$300,000 sent to the Bank of Maryland in the form of personal loans of \$75,000 each to Johnson, Glenn, Poultney, and Evan Ellicott. For this

money, Ellicott was to get ownership of a part of the Tennessee Bonds, which, Perine instructed, he should be prepared to send to Washington as collateral for the government funds. This letter makes clear Ellicott spoke honestly of these events. The whole procedure was concocted in Washington between Johnson, Perine and Taney, and then Ellicott was informed of it. Not only was Ellicott not asking for money, but was being asked to hand out to the Bank of Maryland more than he took in from the federal treasury, something he was readily able to do. And finally the drafts came with instruction not only that they be cashed right away, but that the Bonds be sent immediately to Taney, a provision explained only by Taney's central role in devising it.

Johnson wrote to Poultney as "Dear Evan," suggesting the unusual closeness of the Club. In the nineteenth century close acquaintances — even married couples — wrote each other formally as Dear Mr. \_\_\_\_\_, Dear Colonel \_\_\_\_\_ and even "Sir." "Dear Evan," wrote Johnson, "We have succeeded in our visit and will bring up tomorrow a draft for the Bank of the United States for \$200,000. Have the bonds ready to be sent to Ellicott. The secretary was prompt in the matter . . . He acted with his usual kindness and despatch out of no other motive than *friendship* for me." That Taney when he saw these letters never blamed the Secret Club makes clear that no one tricked him, but that he, Kendall and the Club all lied about Ellicott. Johnson's last clause is interesting. Presumably Johnson stressed personal friendship, hardly a very good reason for handing out \$200,000 in government funds, to convince Poultney that personal *interest* had no influence on this "prompt" and generous decision of the acting Secretary of the Treasury.<sup>40</sup>

Johnson's greed in large and small matters was to disprove his claim that he went to Washington for the Union Bank rather than the Bank of Maryland. He charged the latter institution for his visit, a fee that later appeared on its books.<sup>41</sup>

The peculiarities of the specific transaction also suggest Taney's active role in devising it. The money went immediately to the Bank of Maryland, but on the Union Bank's books it was officially recorded as personal loans of \$75,000 each to Johnson, Glenn, Evan T.

Ellicott, and Evan Poultney. Certainly the Club members, whose centrality in the Bank's affairs were secret, would have preferred not being personally named in the transaction should it ever come to public attention; Johnson, Glenn, and Evan Ellicott fought hard and successfully in the spring and summer of 1834 to get these personal loans changed to one drawn on the Bank of Maryland. Nor was there any advantage in this strategy to Thomas Ellicott whose bank's part in the transaction was fully protected by the purchase of the Tennessee Bonds. Only Taney could have wanted the loan in this form, for the good reason that, if the Bank of Maryland failed despite this financial transfusion, it would be less easy to trace in its books the sudden appearance of \$200,000 in government funds.<sup>42</sup> The two secret Club members not directly involved in this deal were those with closest ties to the administration: McElderry, who held a Jacksonian appointment, and Perine, who was Taney's financial errand boy in Baltimore.

The scheme Taney worked out with Johnson and Perine had a number of advantages: the government would hold the Tennessee Bonds as collateral insurance against any real loss; the Bank of Maryland would get enough cash to prevent or postpone its demise; the government "loan" to the Bank of Maryland would be indirect and veiled; secret Club members would have some time to extricate themselves and their money. Perhaps most important to Taney, Thomas Ellicott could be made scapegoat if the transaction drew public criticism.

The Taney-Ellicott letters in these days make clear that Taney was not only fully aware that the government money was going to the Bank of Maryland, but that he was as ready in October as he would be the next May to ruin the reputation of Ellicott, if that proved necessary, in the hard business of saving his own. Ellicott, following Perine's instructions, cashed two of the three \$100,000 drafts on Saturday, October 5, two days after Johnson and Perine rushed to Washington. On Monday Ellicott informed Taney of the transaction, "It seemed to me clear, and I was confirmed in the impression by persons in whose judgement I place much reliance, that this was your wish and intention by the

transmission of these drafts." This letter worried Taney not because the drafts had been used, but because Ellicott tied their use directly to the wishes of the acting Secretary and his friends. Taney's letter chided Ellicott's conduct, and said that the final draft should be used only "if made indispensable by the conduct of the Bank of the United States," in accord with the official instructions that he'd sent with the original draft. A longer letter of the same date, seemingly the one first sent, made clear however that Taney wanted the transaction completed: he trusted Ellicott to "take measures to enable you to relieve the present pressure in Baltimore" and not to allow "the \$200,000 you have received to be locked up in a manner that will give no advantage to the commerce of your city."<sup>43</sup> Taney's problem at this point was to express anger at the transaction, while ensuring that Ellicott went ahead with it.

The next day Ellicott wrote apologetically, explaining he'd acted on the verbal representations of Perine and Johnson when they handed him the two drafts. Taney, not pleased at this statement of fact, wrote a note to Johnson, who showed it to Ellicott, which seemingly chided Johnson and Perine for their misrepresentations. This letter was to suggest to Ellicott that Taney's will had really been distorted, but, as a letter in Johnson's possession, it could not be used to prove deception on their part and innocence on Ellicott's. The letter, of course, disappeared, and Johnson and Taney never remembered it, much less found it or a copy when these events became the subject of controversy. Its existence however is proved in Ellicott's next letter to Taney which mentions it, saying that both Johnson and Perine "feel most keenly the effect they have produced by their verbal statements to me," and explains how deeply entwined both men were with the insecure Bank of Maryland.<sup>44</sup>

The scenario that Taney, Perine and Johnson wanted to impose kept being frustrated by either the shrewdness or the naivete of Ellicott's responses. Seemingly he didn't know at this point that Taney was fully aware of how deeply involved Johnson and Perine were with the Bank of Maryland, but no "news," set down in writing about this transaction, could have pleased Taney less. It triggered his longest and harshest letter to Ellicott in which he

fumed that Perine, Johnson and the recipient — “there are no three men on whose honor or personal friendship I more firmly rely” — had acted “in a way to do me serious injury and injustice.” Here Taney again made clear that he knew the Union Bank was not in danger; Ellicott was “authorized to use the drafts to maintain the Bank of Maryland or any other Bank in Baltimore which was solvent” from attack by the United States Bank. The problem was, Taney lamented, that the money had been used to protect a speculation and not against a run. Aware obviously of the Bank of Maryland’s speculations, Taney’s greatest source of distress was evident: “and all this is managed in such a way to bring upon me the suspicion of having sanctioned it — and to make it difficult for me to vindicate myself from the unjust imputation.” All three friends would have acted differently “if the painful and mortifying situation in which it may place me had occurred to you.” Ellicott’s letters, like the alleged Johnson-Perine “deceptions,” had tied Taney to rather than extricated him from the plot.<sup>45</sup>

The next day, October 11, the acting Secretary wrote Ellicott a pacifying note. He repeated his instructions about not cashing the final draft, but expressed his entire confidence in Ellicott’s judgement, suggested that the Bank of Maryland, if a run occurred, should not have been left to its fate even if guilty of speculation, and praised Ellicott for his support of the Susquehanna Bridge and Bank Company, where a part of the government draft had gone. On October 12, Ellicott thanked Taney for his letter of the 11th because “the letter of the day before had given me the blues.”<sup>46</sup> The crisis, for the time being, was over.

All these letters, Taney’s, Ellicott’s, Perine and Johnson’s prove the claims of Ellicott and Poultny that Taney intended the government drafts to shore up the Bank of Maryland. Throughout these troubles, the financial strength of the Union Bank was clear. While it cashed government drafts for \$200,000, it actually sent \$300,000 in cash to the Bank of Maryland without any strain on its resources.<sup>47</sup> This makes more remarkable the key “event” in this crisis which Taney described in his manuscript history of it and which Kendall related in his *Autobiography*:

Both Jacksonians claimed that a haggard and furtive Thomas Ellicott rushed to Washington on the weekend of October 5 and 6, demanded and begged \$500,000 more, confessed in effect to corrupt speculations, and finally, in the face of their invincible rectitude, backed down and slunk back to Baltimore. Kendall, who claimed he just happened to be visiting Taney when Ellicott appeared, described the interview this way:

Mr. Taney told him he had sent for him for the purpose of ascertaining why he had used the transfer drafts confidentially placed in his hands, when the contingency upon which alone he was authorized to use them had not occurred. Mr. Ellicott made a stammering, incoherent statement about transactions in connection with a bank in Tennessee, and upon his conclusion Mr. Kendall said, ‘If I understand you, Mr. Ellicott, you have used those government funds to sustain a stock speculation.’ To this statement of the case Ellicott virtually assented . . . Under other circumstances the offender would have been at once exposed and denounced. But such a measure at that time would have put a powerful weapon into the hands of the enemy . . . such exposure would have been pointed out as proof that the entire movement had originated in similar motives, as had indeed been charged.

Kendall’s concern that exposure might have served as proof “that the entire movement had originated in similar motives” seems the one true statement in his account. Taney, with his love for invented self-sacrifice, says he turned down Ellicott’s half-million dollar request despite the fact that the Union Bank’s failure might have driven him from public life “with disgrace and contempt.” “Whatever might be the effect on myself personally, the path of duty was a plain one.”<sup>48</sup>

Yet Taney’s path of duty never led him to refer to this remarkable interview, in which Ellicott allegedly showed himself a desperate and semi-criminal man, in the daily letters of complaint, crimination, explanation, and reconciliation that flowed between Ellicott and Taney the next week. Within a few weeks Taney was writing Ellicott casually again, and in early November he privately authorized the banker to use the final \$100,000 draft if he wished. Two weeks after Ellicott “virtually assented” to having used government funds for stock speculation, Kendall asked him for advice on banking matters and signed the letter “your friend.”<sup>49</sup>



Taney and Kendall must have contrived their supportive fabrications of this interview together. Why they did so raises some questions about what their basic relation to the Bank War was. Emotion, time and human bias always distort one's perception and memory of events, but the literary invention of a non-existent incident suggests a determination to blame Ellicott and to misdirect attention from the financial history of the Bank of Maryland that's hard to explain in terms other than those of deep involvement with the Secret Club and the "historical lies" that these men fought to sanctify later. Kendall's invention in support of Taney, his later letters and his placing of post office funds in the Bank of Maryland conceivably grew from friendship for Taney.<sup>50</sup> Certainly Kendall's involvement with the Secret Club was much less direct than Taney's, but this imagined tale creates some suspicion of his being connected, as Taney almost certainly was, with the maneuverings and financial interest of the Secret Club.

Secret Club members took advantage of the federal treasury's help in easing this financial crisis to begin to extricate themselves from the more dangerous aspects of their ties to the Bank of Maryland. Poultney later reported that the agreement between them was burned, and Poultney agreed to buy the 500 shares of Bank of Maryland stock that the Secret Club members had owned. The stock purchase certainly took place at this time, and there seems no reason to doubt that what Evan T. Ellicott called, in another context, some "well placed anthracite" was used to end this arrangement.<sup>51</sup> Quite probably the extrication of the Secret Club from direct ties with the Bank of Maryland was part of the solution Johnson and Taney worked out when the \$200,000 drafts were sent to Baltimore.

The burning of the formal agreement did not end Secret Club connections to the Bank of Maryland, unfortunately for Evan Poultney, its new majority owner. The General Insurance Company continued to borrow, and Secret Club members Ellicott, McElderry, and especially Glenn continued to run branches set up in other states to facilitate circulation of Bank of Maryland notes.<sup>52</sup> Probably the seeds of the coming failure were sown, as the most thorough investigator of the Bank of Maryland later claimed, by Poultney's "imprudent liber-

ality" in assuming this indebtedness while letting the Secret Club retain access to its funds. Though directly responsible for the Bank of Maryland and of sanguinely speculative temperament, Poultney behaved toward both his secret partners and to the creditors of his bank with steady generosity and decency. He wanted to make quick money obviously, but he also showed concern that he not hurt others in doing so. It was his tragedy that his finer traits of generosity, trust, and concern were to be the sources of his helplessness when Johnson, Taney and others plotted his ruin, as well as that of hundreds of small investors. Naiveté was a fatal weakness given the willingness to be unscrupulously calculating of those who surrounded him. Because he was much less guilty than Taney and the Secret Club, Poultney, as one paper put it, "got off worse than anybody else."<sup>53</sup>

The ending of the October crisis did not end the problems of Roger B. Taney. When John H. B. Latrobe visited Washington in December, 1833, Taney was fuming about a public letter of Ellicott's defending him which he judged insufficiently strong, although he wrote Ellicott in praise of it. "As the remover of the Deposits," Latrobe concluded, Taney was "not on a bed of roses."<sup>54</sup> On the same day he talked to Latrobe, Taney asked Ellicott to come to Washington again, probably to consult on the Treasury report to Congress Taney was finishing.<sup>55</sup>

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## II. Swindling

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"Today may truly be called Black Monday," wrote John H. B. Latrobe in his diary of March 24:

The stoppage of the Bank of Maryland was announced in the papers of the morning. The great number of the customers that the Bank had, the immense amount of its notes in circulation, the large and numerous deposits that had been made in it, its great popularity heretofore, and the suddenness of its failure all conspired to produce a panic and consternation which for many a long day has not been equalled in Baltimore . . . People at the corners with long faces — crowds before the banks, all in consternation.<sup>58</sup>

For the whole Baltimore community, the Bank's failure was "felt with a heavy shock," partly because of its extensive bank notes and partly because it "held a large amount of money of widows and orphans, small dealers and thrifty persons, mechanics and others." Those others included Captain Thomas Wil-

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Evan Poultney published a card after closure assuring the public that the Bank of Maryland was basically solvent, but faced immediate problems that caused him to close its doors rather than take the risk of substantial real losses. He also pledged his personal estate to compensate for any creditor loss.<sup>60</sup> Poultney's was basically an honest statement, but one that was to be discredited as a result of decisions that the Secret Club had made a few weeks earlier.

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Taney and Kendall must have contrived their supportive fabrications of this interview together. Why they did so raises some questions about what their basic relation to the Bank War was. Emotion, time and human bias always distort one's perception and memory of events, but the literary invention of a non-existent incident suggests a determination to blame Ellicott and to misdirect attention from the financial history of the Bank of Maryland that's hard to explain in terms other than those of deep involvement with the Secret Club and the "historical lies" that these men fought to sanctify later. Kendall's invention in support of Taney, his later letters and his placing of post office funds in the Bank of Maryland conceivably grew from friendship for Taney.<sup>50</sup> Certainly Kendall's involvement with the Secret Club was much less direct than Taney's, but this imagined tale creates some suspicion of his being connected, as Taney almost certainly was, with the maneuverings and financial interest of the Secret Club.

Secret Club members took advantage of the federal treasury's help in easing this financial crisis to begin to extricate themselves from the more dangerous aspects of their ties to the Bank of Maryland. Poultney later reported that the agreement between them was burned, and Poultney agreed to buy the 500 shares of Bank of Maryland stock that the Secret Club members had owned. The stock purchase certainly took place at this time, and there seems no reason to doubt that what Evan T. Ellicott called, in another context, some "well placed anthracite" was used to end this arrangement.<sup>51</sup> Quite probably the extrication of the Secret Club from direct ties with the Bank of Maryland was part of the solution Johnson and Taney worked out when the \$200,000 drafts were sent to Baltimore.

The burning of the formal agreement did not end Secret Club connections to the Bank of Maryland, unfortunately for Evan Poultney, its new majority owner. The General Insurance Company continued to borrow, and Secret Club members Ellicott, McElderry, and especially Glenn continued to run branches set up in other states to facilitate circulation of Bank of Maryland notes.<sup>52</sup> Probably the seeds of the coming failure were sown, as the most thorough investigator of the Bank of Maryland later claimed, by Poultney's "imprudent liber-

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Denied access to their savings when the Bank of Maryland closed its doors, many depositors were unable to meet their financial obligations and saw their property auctioned off to satisfy creditors.

quicker economic comprehension than he was to in later months where careful accountants' reports never denied his support of the position that Bank of Maryland funds were radically deficient.

Probably the original intention of Secret Club supporters was simply to rake off some quick profits over the uncertainty and panic bound to follow the closing of a bank. The failure of the Bank of Maryland triggered a run on the Union Bank, because of rumored ties to the collapsed institution. John H. B. Latrobe found the Union Bank besieged by creditors on March 24, with even its directors helping count out silver. It stayed open until 4:00 to meet the rush and passed out \$20,000 to depositors while a huge crowd watched "having to their infinite sorrow no doubt no checks to present." Latrobe, himself a director of the Union Bank, knew it was safe; "all the other banks in the town were indebted to it." The next day the town was quieter. \$12,000 more was withdrawn from the Union Bank before its obvious ability and willingness to pay restored confidence in it.<sup>63</sup> The run on the Union Bank provided a comfortable political cover for Taney. Henry Clay demanded a Senate study of it and Taney's tie to it — and had to conclude that it was sound and that Taney had bought no stock in it for a number of years.<sup>64</sup> The wisdom of Taney's buying through the Secret Club rather than directly as he'd contemplated the previous May was never clearer.

On March 25 not only did the run on the

Union Bank end, but confidence grew that the Bank of Maryland would be able to pay its debts. This owed much to Poultney's card which asserted the Bank's basic solvency and pledged his personal estate to make up any deficit. The latter was an act of liberality suggesting Poultney's sincerity in not wanting to hurt anyone. At the same time, Thomas Ellicott, at Reverdy Johnson's request, agreed to become trustee for the Bank of Maryland — that is the person responsible for controlling and settling the Bank's affairs — if the presidents and cashiers of Baltimore's other banks so requested. When they did so, Ellicott became sole trustee and promised prompt settlement. The whole picture brightened sharply. Latrobe concluded that Poultney had been "unfortunate and injudicious, but is as honest a man as lives;" on his way home he called to shake hands with the ex-banker. And the son of a small Baltimore businessman travelling in Kentucky wrote his father to warn him of the Bank of Maryland's failure on the day it happened; three days later he suggested the Bank seemed to have money to pay its debts and, if his father had the chance, it would be a good investment to pick up Bank of Maryland notes at  $\frac{2}{3}$  their value.<sup>65</sup> Renewed hope sprang for Thomas Williams and thousands like him.

What was good news for most people was bad news to those few who owed large amounts of money to the Bank of Maryland. If there was confidence in the Bank and in a quick settlement, those who held credits on it



would not be willing to sell them at much of a discount. On the other hand, if it was believed that funds for payment were partial or would be slow coming, many would want or have to sell their credits at a fraction of their value. The money that Glenn and others in the Secret Club got at full value could then be paid back at only 50 or even 25 cents per dollar. Taney and Johnson consequently launched a campaign of pressure to discredit the Bank of Maryland's solvency and to insure long delay on any settlement.

The extraordinary tactics the Secret Club supporters were to employ can be explained only in terms of the huge profits attendant upon their success. There is no way of knowing how much particular individuals won or lost in this business, but the gross profits—every bit tied to losses by innocent depositors and note holders—can be roughly judged from the official audits that Joshua Atkinson later published of Bank of Maryland debts as of March, 1834, and September, 1836. When it closed its doors, the Bank of Maryland owed \$3,110,000; two and a half years later it still owed \$828,000. Thus in the interim about \$2,282,000 worth of credits had been retired. Using the highest rumored rate of exchange for the Bank's credits during most of this period, one-half, would suggest that smaller creditors and depositors in the Bank lost about \$1,141,000 which went into the pockets of the Bank's wealthy debtors and speculators. Of course, a part of the retired debt, especially that settled prior to the majority trustee's deceptive report in May, 1834, was handled at a fairer rate. Yet in April, 1834, before this report and the initiation of court cases that promised interminable delay, *Niles' Register* said credits were selling at 40 cents on the dollar, and the rates most often mentioned thereafter was 25 cents. In addition, of the \$828,000 debt outstanding in 1836, probably only about \$100,000 was still in the hands of the original holders. Given these figures almost \$1,500,000 were lost and won, if one uses the high 50% rate, and about \$2,200,000 if one uses the low 25% rate. If the figures are necessarily rough, they make clear enough the tremendous stakes in the plot Taney and Secret Club members launched in late March, 1834.<sup>66</sup>

In the summer of 1835 Poultney claimed that the five Secret Club members owed the

Bank of Maryland personally and corporately when it closed its doors about \$665,000, on which they must have made a profit of "at least \$300,000."<sup>67</sup> This seems a conservative estimate; Poultney was never allowed to examine or get information from the Bank's books after he became aware of the Secret Club plot, and he had no knowledge of some of their last minute maneuvers. The probable profits on those transactions of the General Insurance Company, just before the bank closed, suggest the scantiness of Poultney's estimate. While sending the Bank of Maryland soon-to-be valueless stock, its own and the Bank's, the Secret Club took in nearly \$398,000 in cash. Though this stock retained some value, the profits to the Secret Club and their supporters must have been over \$350,000 on these transactions alone. At the same time their General Insurance Company owed the Bank at its closing \$101,000; of this sum \$65,000 was never repaid, the largest outstanding bad debt at the final settlement of the Bank of Maryland.<sup>68</sup> If a convenient bankruptcy gave \$65,000 to the Secret Club and friends, the discount rate would have made their profits on the rest of the debt \$18,000 or \$27,000, for a total gain of between \$83,000 and \$92,000. Thus by forcing the Bank's closure and transferring good money for bad stock and "cheap" debts, these men put something just under \$450,000 in their hands through the General Insurance Company alone, almost all of it from third parties like Captain Williams.

The Secret Club members were flexible men. They had expected quick substantial profits from secret speculations, and had tried to capitalize on governmental foreknowledge and favor. Both efforts had failed, but they came to see how to turn this failure into much greater profits than they could have expected from success. When the Bank of Maryland closed its doors, Captain Williams' money was really there, as Poultney claimed, but the Secret Club had already devised the strategy that would rob the bank and put most of its funds into their pockets and those of people who cooperated with them.

If it was a profitable journey that the Secret Club embarked on in March, 1834, it was also a complicated and risky one which at times threatened disaster to them. Their first problem was in combatting the confidence and

prompt settlement that seemed likely in the few days Ellicott was sole trustee. Whatever his connivance at the profiteering involved with the purchase of Union Bank stock prior to its official designation as a pet, Ellicott would have nothing to do with the more vicious plan of March, 1834. As soon as they realized this, Taney and the Secret Club launched an attack to remove him first as single trustee of the Bank of Maryland, and then from his position of power and influence in Baltimore, the presidency of the Union Bank.

As early as March 29, a few days after Ellicott assumed the trust, a meeting of some Bank of Maryland creditors requested that two additional trustees be appointed to act with Ellicott. Probably Reverdy Johnson and friends quietly organized this "suggestion," playing upon the rumors of Ellicott's ties to the Bank of Maryland. Certainly Taney put maximum pressure on Ellicott to accept the new set up. A financial report that Ellicott submitted on the Union Bank during the run on it gave Taney "entire confidence" in its stability, but, on March 27, in conjunction with the pressure from the "creditors" meeting, Taney urged Ellicott to resign the trusteeship or to associate two others in it. He told Ellicott that Jackson also urged him to do this, and implied loss of favor for the Union Bank if this was not done.<sup>69</sup> There is no other evidence regarding Jackson's concern, but it seems likely, since Ellicott and Jackson were acquaintances, that Taney presented — and misrepresented — the situation in such a way to gain the president's assent to the Secret Club strategem.

Ellicott reluctantly succumbed to this pressure, in what he later saw as the greatest mistake of his life. Certainly it was a tragic decision for him, for Poultney and his relatives, and for the Bank's creditors, including Captain Williams. With the addition of Richard Gill and John B. Morris as trustees, legal control was assured to the Secret Club in their maneuvers. The majority trustees Morris and Gill, over Thomas Ellicott's protest, initiated a policy of delay, of circulating false reports suggesting gross deficiencies and frauds in the Bank of Maryland, and of instituting specious legal cases to justify prolonged non-settlement. They refused to heed careful and correct accountants' findings about the Bank, refused to resign although the

creditors repeatedly requested this, and refused all offers and demands for arbitration of claims to allow settlement. Appointed at the behest of the Secret Club, they at every point served the interests of that group and sacrificed those whose interests were entrusted to them.

The crucial issue over which Thomas Ellicott fought Morris and Gill (who had the support of the Secret Club and Taney) concerned how solvent the Bank of Maryland was when it closed its doors. Poultney insisted that the credits were there to cover all, or almost all, debts, but the majority trustees claimed huge deficits explainable only by fraud. The argument could be resolved only by auditing the bank's books, but Gill and Morris refused to have this done promptly, indicating that they did not believe in the stories they circulated or the court cases they initiated. Even clearer evidence of their deception comes from their refusal to acknowledge or consider the preliminary but accurate findings of the accountant whom they were finally forced to allow access to the books. Their only reaction to this clear indication that their policies were hostile to the interest of those they were allegedly serving was to bar the accountant's further access to the books. Every accounting told the same story: despite the cash flow crisis that the Secret Club had prodded, despite some bad loans mostly to Secret Club members and supporters, despite the loss of the value of its charter by long delay, the Bank of Maryland was solvent when it closed its doors. When the trust finally ended, not only were the outstanding debts paid at full value, but with a 10% dividend.<sup>70</sup> Captain Williams certainly deserved this good fortune; if he somehow managed to retain his credits, small payment it was for five years of suffering and uncertainty by an elderly man and the two elderly women dependent on him. Yet the typical and much more substantial beneficiary was John B. Morris whose deceptions as trustee allowed him to profit immensely as banker.

Once Taney and the Secret Club badgered Ellicott into accepting Gill and Morris as co-trustees, the stage was set for the legal farce that was the heart of the swindle. Over the next three years, individuals would fulminate against the plot, pamphlets would expose it, creditors would demand legal redress, part of



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Reverdy Johnson's appointment as counsel for the Bank of Maryland trustees greatly enhanced the Secret Club members' ability to profit from the Bank's crisis.

the press would briefly flagellate the schemers, rioters at one point would punish some of the chief perpetrators while much of the city looked on approvingly, but nothing impeded the swindle. Maryland's courts supported it at every stage, and Baltimore's elite shut their eyes to the truth — apparent in 1835 to rioting pavers and carpenters — when it became clear that the plotters would win and those few powerful men who were largely innocent would be destroyed.

The first actions of the new trustees made clear the triumph of the Secret Club. The legal advisors Ellicott had chosen to aid the trust, Judges Thomas B. Dorsey and Stevenson Archer, announced they could not serve and appointed as their replacements, John V. L. McMahon and the omnipresent Reverdy Johnson. Hence perhaps the leading figure in the Secret Club manipulations became the guiding legal hand for the majority trustees. In the statement of April 7 announcing the appointment of McMahon and Johnson, the trustees passed on their new counsels' first legal advice. In reply to an "inquiry" from the trustees, McMahon and Johnson told them that debtors must be allowed to retire their debts with any credits on the Bank of Mary-

land "without regard to the period at which such debtors may have become proprietors of such notes, certificates or accounts, or the value they may have paid for them."<sup>71</sup> Immediately, Johnson laid down the ground rules on which the swindle depended: debtors to the bank, mostly wealthy businesses and business men, could take advantage of any delay or indication of insufficiency of funds to buy at a fraction of their value creditors' holdings. Ellicott had wanted to have a quick accounting and setting up of a schedule of repayment to creditors so that profiteering from small holders' uncertainty or desperation would be minimal. Obviously other policies with other ends in view were instead to be initiated.

The one person with sufficient position and influence to hamper these plans was Thomas Ellicott, a fact that alone could explain the most bizarre aspect of this story. The relations between Ellicott and Taney *et al.* in the two months between late March and late May, 1834 are intricately puzzling. Yet they fit only one pattern: Taney was committed to the Club swindle, even to the point of plotting the public embarrassment of a major pet bank and the public disgrace and removal of the man who had devised the special deposits system which Taney had ridden into Jackson's favor. Ellicott was now a minority trustee, but, in that position and in his role as Baltimore's leading banker, he still could raise troubling questions about the Secret Club's new plans. For the plot to succeed, Ellicott's wings had to be clipped, and Taney systematically undertook that work.

Taney claimed in his 1839 manuscript history that in these months he slowly became aware — once again — of Ellicott's financial chicanery and his bank's unsoundness until it became necessary to remove him from the Union Bank presidency. Amos Kendall, his story once again synchronized with Taney's, also reported that Ellicott begged for more government funds, threatened to stop payment and tried to blackmail Taney.<sup>72</sup> These two kept no evidence of these contentions, Taney blandly explaining that the press of his duties caused him to misplace the evidence which proved the fraud of Ellicott and the frailty of his pet bank. Certainly this is odd behavior for a man who had determined to remove Ellicott from his post because of



financial misdoing. However Ellicott saved Taney's and Kendall's letters to him which make clear the falsity of the Taney-Kendall concoction. They show that Ellicott was laying out funds heavily at Taney's request in these months rather than asking for additional money, and that Taney was irritated, not by the unsoundness of the Union Bank, but by its unshakable soundness. The historian who has looked most closely at these events, Frank Gatell, has argued that Ellicott was losing his financial grasp in this period.<sup>73</sup> He was, but in no intellectual or practical sense. He simply was much too slow in coming to see that Taney, whom he still considered a friend, was determined to ruin him by casting doubt on the solvency of the government depository which Ellicott ran.

Right after the Bank of Maryland fell, despite the run on the Union, Ellicott asked for no additional funds and Taney feared not for its stability but for that of another pet, the shaky Planter's Bank of Mississippi, which he wanted Ellicott to pay promptly if the Bank of Maryland had any debts to it.<sup>74</sup> In April, Taney's letters vacillated between extreme if vague complaints against the condition of the Union Bank and contrition when Ellicott explained its real situation. On April 15 Taney wrote that Ellicott would be supported "if necessary," but that otherwise he shouldn't call on the government for funds. The same day Amos Kendall penned a note saying that Ellicott must prepare to "stand amidst ruin" and predicting imminent wide-spread bank failure in the area. On the 17th Taney sent up a \$200,000 draft from the Bank of Metropolis subject to immediate recall by the cashier there. On the 18th he wrote a particularly vehement letter attacking Ellicott and speculation, especially the Union Bank's purchase of railroad stock and Tennessee Bonds.<sup>75</sup> The latter charge is especially amusing since the Union Bank owned these bonds because Taney, Johnson and Perine had decided in October and again in February that their purchase by the Union Bank was the best conduit for government funds to the Bank of Maryland. Rather than being speculative, they were a perfectly sound but dormant purchase still held as collateral by the acting Secretary of the Treasury. On the 20th Taney denied any criticism of Ellicott in the letter of the 18th,

and on the 21st urged the banker to arrange specie loans with a Mr. Beale, a close friend of Taney's and Reverdy Johnson's, to save the banks in Frederick, Maryland. This last letter also shows that Ellicott, wisely it soon turned out, had become suspicious of the actions of the Bank of Metropolis and asked Taney to keep an eye on it. Taney was indignant at Ellicott's request, not because of any inherent unreasonableness in it, but because Ellicott had got wind of what was about to occur. On the 24th Taney was contrite that the Bank of Metropolis, the pet most directly tied to the Treasury, had suddenly drawn on the Union Bank for a huge amount. "It was contrary to my orders," Taney protested, "and I cannot understand the folly—the worse than folly—of such conduct."<sup>76</sup>

That this action was "worse than folly" seems clear enough, but it occurred, everything suggests, at Taney's orders. Taney wanted to embarrass the Union Bank, to have it not fail but experience a cash crisis that could be used to disgrace Ellicott publicly. And the failure of Taney's attempt attests the strong condition and the able management of Ellicott's bank. Amidst prophesies of total economic collapse, the Union Bank, at Taney's request, made large loans of specie to other banks, and still avoided trouble when another depository, contrary to Taney's promise, suddenly demanded a large cash draft. And throughout, no hint exists that Ellicott ever asked for additional government funds, in contrast to what Taney and Kendall both claimed.

What seems the only plausible scenario in April became even clearer in May: Taney was determined to ruin Ellicott. Throughout the first half of May Ellicott faced heavy drafts on his specie from both the government and private sources. On May 15 Taney replied to a letter in which Ellicott complained, in Taney's words, of a "constant drain of specie and evil passions at work" against him. "How much is desired?" Taney tartly asked, "How much have you left? What are your certain available means to meet the pressure?" Taney's demands for a precise accounting seemingly resulted precisely in that. Ellicott apparently went to see Taney, asked for no money, and marshalled data to make Taney acknowledge on May 19th "the wicked conspiracy to de-



stroy" the Union Bank; he said ingenuously that it was probably concocted to cast odium on both Ellicott and himself "for the part we took in the removal of the deposits." On the 23rd Taney asked that another large draft be sent to the Bank of Metropolis; and Ellicott replied that he no longer wished the Union Bank to be a pet. Ellicott cloaked his desire to escape in terms of dislike for talk about hard money within the administration, but probably he'd simply concluded the unprofitability of continuing a connection that for several months had taken more than it had given.<sup>77</sup>

At this point, Taney's tactics changed. He suggested that Ellicott should allow an inspection of his bank to restore confidence and to gain use of the Tennessee Bonds still locked in Treasury hands. To this carrot, Kendall added another: an official inspection alone could save Taney's mental equilibrium. "He is on all sides almost horrified out of his senses, and it is the duty of his friends to contribute all they are able to relieve him." If Taney were "horrified almost out of his senses" it could hardly have been over the solvency of the bank he had repeatedly investigated and found wholly sound, the last time about a week earlier. Taney's letter of May 27th made clear what he, Kendall and the Secret Club really had in mind. "Suppose I were to appoint an agent to examine under the contract." Taney suggested sweetly, "Reverdy Johnson, for example, on whom both of us have entire confidence."<sup>78</sup> Reverdy Johnson, the leading Club collaborator with Taney, was to be designated to make a report that could discredit Ellicott, no matter how flimsy its substance, — coincidentally just when trustees Morris and Gill were to make their opening public attack on the Bank of Maryland's situation. Fortunately for him, Ellicott had, by this time, considerably less than "entire confidence" in Johnson, and probably in Taney as well.

When Ellicott refused inspection, Taney appointed Reverdy Johnson and Charles Howard to inspect the bank anyway, though Ellicott was not told of this nor was any real inspecting done. They filed a hearsay report which Taney found insufficiently detailed, but which he later credited with showing him the shakiness of Ellicott's bank. His friendship with Johnson, Taney explained to Van Buren in 1836, grew from Johnson's help in saving

him "from the treachery of Ellicott." Meanwhile, Gill and Morris resorted to blackmail to accomplish what was the most immediate Secret Club objective at this point, to have their members' individual debts transferred to the Bank of Maryland for the Tennessee Bond deal. They threatened that charges might be levied against Ellicott for the \$42,500 commission he'd taken in October when his European trip to sell the Tennessee bonds was suddenly cancelled, and Gill broadly hinted that Ellicott's son William, of Poultney, Ellicott and Co., might be implicated in fraud.<sup>79</sup> When Ellicott preemptorily rejected these pressures to cooperate with the Secret Club, Taney began orchestrating his final attack on Ellicott.

On May 28 and 29, Taney called Ellicott "one of my oldest and truest friends," expressed satisfaction with "the evidence of the strength of your bank," feigned surprise at another sudden draft by the Bank of Metropolis on the Union Bank, and once more urged inspection, this time by Johnson and Charles Howard, now operating with the Secret Club, and whom he'd instructed to investigate without mentioning it to his "friend." On these same days, Taney wrote to David Perine, announcing he'd suddenly learned Ellicott was dishonest and his bank unsound. The Secretary pretended to be amazed and confounded at "the cool, calculating duplicity with which he has been tormenting me for his own private gain — and with his efforts to sacrifice my honor to put money in his pocket." He concluded melodramatically, "He is decidedly the worst man I have ever known, and the deepest and most systematic hypocrite."<sup>80</sup>

Perine responded enthusiastically, of course, to the plan to destroy Ellicott. "You have served me in the time of trial. I have never forgotten it, and rest assured that I will stand by you in the time of danger."<sup>81</sup> Other Club members joined hands in the effort to remove Ellicott. Aiding their effort was Ellicott's overconfidence grown of arrogance and long use of power. The secure preeminence of his bank made the tall and austere Ellicott slow to take the movement to oust him seriously, just as he seems to have been hesitant during Taney's spring harassment to move from puzzled irritation toward positive action. He had successfully and carefully guided Baltimore's

leading bank for two decades, and it must have seemed unthinkable that he would be removed for no reason at all. Yet his success had bred a manner and a tight-fistedness that could irritate. John H. B. Latrobe, who liked Ellicott and did some lobbying for him in Annapolis, thought he was "not paid enough by half" for his efforts.<sup>82</sup> Over the years Ellicott's austere frugality probably created a group of people happy enough to see him go. His connection with the pet bank system also probably drove some wedge between him and many conservative bankers who might otherwise have been his natural allies.

Taney's announcement to Perine of the planned attack on Ellicott coincided with Gill and Morris' public report suggesting radical financial deficiencies in the Bank of Maryland that might require legal redress against Ellicott as well as Poultney. The only precise charge against Ellicott — probably leaked by Taney — was that he had refused to give out a list of all stockholders in 1831 while in 1833 he provided one to the government. Such complaints could be flimsy because of the practical foundation of the attack. The majority trustees — and hence Taney and the Club — controlled 4000 shares of Union Bank stock which became the basis of anti-Ellicott votes.

The campaign against Ellicott depended simply on creating a vague sense that something was wrong at the Union Bank, the kind of rumors the Secret Club showed a genius for initiating. Reverdy Johnson on May 29 — the same day Taney outlined his plan of attack to Perine and that Morris and Gill issued their report — wrote to Nicholas Biddle, allegedly on Ellicott's behalf, begging purchase of the Tennessee Bonds from "this choice pet." There is no evidence Ellicott ever used Johnson as his financial emissary; certainly by this time he had good reason to mistrust him. Nor does it seem probable that Ellicott would have appealed to his old rival, Biddle, even had there been pressing need for selling these bonds, as there was not. Johnson wrote not to sell the bonds (which the Treasury still held) but to lead the man who was still the nation's leading banker to conclude what Taney and the Secret Club wanted the influential to believe: that Ellicott's "speculations" had endangered the very survival of his bank and driven him to quixotic stratagems. When

Biddle unsurprisingly refused a loan and suggested that it might be a good thing if the Union Bank failed, Johnson let him know how Taney and the public had lost faith in Ellicott so that he would probably be shortly forced from his position.<sup>83</sup>

Taney, in his maneuvers, made it clear that government funds would remain in the Union Bank only if Ellicott were removed. He probably also offered the enticement of returning the Tennessee Bonds to influence the ouster, just as he'd tried to use them to seduce Ellicott into an inspection conducted by Reverdy Johnson. Obviously Taney's letters to Perine were intended to be shown to anyone who might be influenced by this opinion of Ellicott. This information Perine, Charles Howard, and Johnson circulated in rounding up anti-Ellicott sentiment, which in turn seemed to give substance to the rumors about the Bank's solvency.<sup>84</sup>

On June 13 a "reform" slate for the Union Bank was announced, and on June 16 the *Baltimore Gazette*, a paper that supported the Secret Club at each juncture, run by William Gwynn, who was a legal associate of Johnson and Taney for the Baltimore and Ohio railroad, applauded "a vigorous movement to effect a change in the administration of the Bank."<sup>85</sup> During the next month both sides juggled slates to try to secure control. By July it became clear that the election depended on 2000 proxy votes controlled by Poultney, Ellicott, and Co., which were contested on the grounds that the company had sold them to others specifically to circumvent the restriction that no one could vote more than 60 shares. On July 14 the Court of Appeals reversed the decision of the State Chancellor which had supported Poultney, Ellicott and Co.; on July 15 the reform ticket was elected, and the next day Hugh Evans replaced Thomas Ellicott as president. The first major action of the new board was to change the personal indebtedness of John Glenn, Reverdy Johnson, and Evan T. Ellicott to that of the Bank of Maryland. The acting Secretary of the Treasury at this point returned the Tennessee Bonds to the Bank's hands; later in the summer he protested his successor's removal of funds from the Union Bank.<sup>86</sup>

The removal of Ellicott from power was orchestrated with the majority trustees' first

public announcement of a policy that promised very delayed and very limited settlement for Bank of Maryland creditors. Over Ellicott's strenuous protest, Morris and Gill published at the end of May their brief pamphlet suggesting that the Bank of Maryland's assets would cover scarcely half its debts, and that legal prosecution of Evan Poultney, his relatives, and Thomas Ellicott might be necessary to collect some of the immense deficiency.<sup>87</sup>

Public controversy built quickly once Morris and Gill issued their initial report. Less than a week after the pamphlet appeared, City attorney Richard Gill convinced the Grand Jury, conveniently headed by Secret Club member Hugh McElderry, to issue criminal indictments against Evan Poultney and Poultney, Ellicott, and Co. At the same time Morris and Gill began civil recovery suits against Evan Poultney, his brothers and brother-in-law and Thomas Ellicott. Fully aware for the first time of the treachery of those he'd made such sacrifices to protect, Evan Poultney in early July published *A Brief Exposition of the Affairs of the Bank of Maryland* which made public for the first time Secret Club activities.<sup>88</sup> Poultney's mild and accurate description clearly worried the swindlers. Considering it too clever a production for Poultney, who had given substantial indication of naivete, they thought Ellicott wrote it. When Perine sent a copy to Taney, the latter assured his friend that they could expect only "dark insinuations" from the banker, because Ellicott was "too vulnerable and he knows it to provoke retaliation."<sup>89</sup> Taney was right. Ellicott would eventually expose vigorously the Secret Club swindle, but he would offer only "dark insinuations" about that bank's sudden purchase of Union Bank stock prior to its designation as a pet because he was as morally vulnerable on that issue as Taney and the Club.

While Ellicott's influence was neutralized in these months, the opposition to the Secret Club swindle found a new leader in the man representing the largest creditor of the Bank of Maryland. George M. Gibbs, President of the Union Bank of Tennessee, was in town trying to salvage the money his bank had tied up in the unpaid balance on the Tennessee Bonds. Gibbs had enjoined about \$100,000 in a Virginia branch bank, but the unpaid balance

was large, almost \$275,000. When the Morris-Gill report appeared, Gibbs was immediately suspicious of trickery, and tried with broad support from other creditors to enjoin the trustees from receiving credits for debts. A court order squelched this attempt to end profiteering.

Frustrated in his various efforts and furious, Gibbs in late July publicly declared that the Union Bank of Maryland had no right to sell the Tennessee Bonds. That bank promptly had him slapped in jail for libel and held there in lieu of an incredible \$500,000 bail.<sup>90</sup> The wheels of justice ground slowly in Maryland during this controversy, except when Taney, Johnson and the Secret Club clique, the leading members of the bar, wanted action. Perhaps most infuriating to Gibbs was the fact that Morris and Gill would not allow him to inspect the Bank of Maryland books. They toyed with his request until they knew he had to leave Baltimore — according to the terms of his release from jail — when they consented that he personally, but no representative of his, might inspect them. Because Gibbs was not a trained accountant, the concession was really meaningless. The cynicism of this offer triggered a meeting of Baltimore business men to disassociate themselves from such shoddy doings. Coming on the heels of Poultney's pamphlet and Gibbs' jailing, these businessmen were obviously angry at the majority Trustees and the new directors of the Union Bank, now clearly associated with the Club. They pledged to provide Gibbs' bail.<sup>91</sup>

In these days one also got the first batch of reflections in letters to the press of the broad injustices suggested in the affair. Perhaps most telling were the musings of "Honesty" in the *Baltimore Republican*:

The very bread has been taken from the mouths of the poor. The widow and orphan have lost their dower and their heritage — the laboring man has been deprived of the savings from the pittance of his weekly toil. By whom has this been done? By those who gave themselves forth as fathers to the fatherless, husbands to the widowed, and sure depositories of the garnered store that has come from the sweat of the poor man's brow; those whom the confidence of the community had honored with its trust, and who from that confidence discovered the means to bring desolation on the confiding. . . . Is elevated station, or wealth, or family, or influence, to chain the hands of retributive justice? Are our laws but weak spider's webs through which the large flies may break their way at pleasure? <sup>92</sup>



Even Honesty's melodramatic tone but little exaggerated the contours of this situation, which continued to provide a resounding "yes" to the rhetorical questions with which he closed.

In the meantime, the Secret Club and its supporters acted quickly to shutter the window that seemed to be opening on the truth. Johnson had been collecting material for the impending court cases, and Poultney's pamphlet caused him to gather everything he could to refute Poultney's contention that the Secret Club, later aligned with the majority Trustees, were instrumental in bringing on and perpetuating the Bank of Maryland difficulties. Johnson and John Glenn published this material in pamphlet form in early August, but the Club supporters probably used its materials to darken public understanding even before it appeared. Seemingly they were able to create enough pressures and uncertainties to fend off public hostility at this point. On July 29, just five days after their first meeting, Baltimore businessmen again convened, now to denounce economic chicanery in general, while saying they had no one in particular in mind and specifically denying support of Gibbs in his fight with the Union Bank.<sup>93</sup>

In their August pamphlet, Johnson and Glenn asserted the Secret Club's innocence of any connection with the Bank of Maryland except for a few little favors done out of kindness to Poultney. The authors did have one valid point which they labored a good deal: Poultney had called the Club arrangement a partnership, whereas a partnership had never been legally set up. Poultney seemingly used partnership in the commonplace rather than the legal sense, but it was a technical error which he corrected in his later pamphlet by calling the group an "Association" or a "Club." Aside from this issue, the Johnson-Glenn pamphlet depended on a standard debater's trick of obscuring a weak case by a plethora of information on unessential points. Letters from all Club members and from scores of others gave the pamphlet a superficial solidity compared to Poultney's affirmed nine-page statement. The Secret Club's crucial explanation of its members' relation to Poultney was incredible, but what was lacking in probability was compensated for in volume as they sang the refrain in unison.

Evan T. Ellicott's explanation repeated the main details of the general pattern. He — like Johnson and Glenn — had become a director of the Bank of Maryland when Poultney took it over in 1831 purely as a friend "not wishing to embarrass him." He and the other directors never had knowledge of how the bank ran, "confiding and unsuspecting as we were," but he agreed to the large stock transfer in his name because Poultney wanted it to protect his infant son. This "explanation" seems typical of the need to stress philanthropy even when it undercut all credibility in the story. Intelligent men might have bought blocks of stock in what they considered a promising enterprise without being active in its operation, but it makes no sense that they would make large financial commitments to aid the infant son of a casual acquaintance.

Ellicott also insisted that he had no knowledge of any Bank transactions, especially those involving Union Bank stock, or connections with any branches, contentions that a few letters he wrote Poultney would amply refute in the next round of pamphlets. "Some of our names were loaned in kindness and in confidence" reported the speculator, "but it was without any interest." Everyone in the Secret Club professed this same total indifference to profits, and willingness to endanger their own financial position by such stray and strange acts of generosity. Despite his total lack of knowledge of the Bank's operations, Evan Ellicott, like the other Club members, was now sure there was "an enormous deficiency," which money must have been stolen.<sup>94</sup>

Such personal testimonials of Club members' friendship for Poultney were interspersed with letters from other people, intended to refute minor parts of Poultney's account, but which in fact testified to Secret Club members' substantial involvement. They also dragooned friends and supporters into testimony corroborating their lack of financial calculation. For example, Taney's protégé, the Jacksonian Congressman from Baltimore, Benjamin Chew Howard, wrote a letter saying that it was he who had suggested that the General Insurance Company take nearly \$400,000 of cash out of the Bank of Maryland just before it closed.<sup>95</sup> So this huge transaction occurred out of no financial calculation but only because one minor share holder suddenly de-



cided it was a good idea. These men expected the world to believe that they were the most other-worldly of financial philosophers.

The evidence in the pamphlet could confuse if not convince an honest reader, and doubtless this was all Johnson and Glenn really wanted. The longer public judgment could be held in abeyance, the more securely powerful would be the Club members and the more insignificant those with a clear interest in exposing the fraud. In time, what Baltimore's leaders believed could gently merge with what they wished to believe: that the culprits were those citizens who had been removed from positions of power rather than those who advanced toward them. The furor of late July and early August quieted in part because Gibbs, who had provided leadership for the creditors, was forced out of town as the price for his being released from jail. There seemed nothing to do but await the accounting and the law cases.

Morris and Gill, who had crushed an audit order by Ellicott in April, showed remarkable determination to avoid one still. Through the fall of 1834 Poultney, Ellicott and Co. pressed for access to the Bank of Maryland books, but Gill and Morris coolly refused on the strange ground that Poultney, Ellicott and Company had not yet been audited. In December, legal threats from lawyer Nathaniel Williams forced them to agree to let Poultney, Ellicott and Company hire at that Company's expense an accountant to audit first the company's books and then the Bank's. While willing to pay Reverdy Johnson high legal fees, the majority trustees would pay nothing to understand the basic financial situation on which those cases depended. Morris and Gill also extorted a promise that the accountant would discuss no findings without their approval.

Poultney, Ellicott and Co. hired a respected English Quaker accountant, Francis Fowler, for the job. By January 19, 1835 he had compiled a report which revealed that there was no basis for the fraud charges against Poultney, Ellicott and Company. Gill and Morris were notably indifferent; they wrote the company that they could not consider such a brief report and that sometime when they were less busy they would talk to Fowler about it. When Gill and Morris refused to acknowledge the report, the third trustee, Thomas

Ellicott, sent it to Johnson and McMahon urging an immediate end to the suits and an immediate meeting of the trustees. Johnson replied that that wasn't practicable, because the majority trustees could not meet for awhile, being in distant Annapolis. In the meantime, Fowler had progressed far enough on the books of the Bank of Maryland to see that there was no foundation for the charges of fraud against Evan Poultney. On March 4 Fowler asked Morris and Gill if he might reveal his findings; on March 5 they ordered their attorney to interdict Fowler from further access to the books. Poultney, Ellicott and Co. published Fowler's findings about them in February and in March Fowler made known his conclusions about the Bank of Maryland.<sup>96</sup>

These reports revived public and creditor concern, as well they might. Unless Fowler were lying or wholly mistaken, his reports proved that the legal actions of those who controlled the trust were unwarranted and tended — and, if such evidence were neglected, must have been intended — to defeat the legitimate interests of the creditors. When the creditors organized to force an immediate opening of the Bank of Maryland books, Morris and Gill confirmed the more sinister interpretations of their actions by refusing, while giving no reason except the pending trials. When the courts refused the creditors' petition for access to the books, the creditors demanded that the trustees resign so that ones sympathetic to creditor interests could be appointed.<sup>97</sup> They delayed, stressing that the group did not prove that all its members were *bona fide* creditors and arguing their need of legal advice of counsel, in this case John V. L. McMahon and Roger B. Taney.

Johnson doubtless had Taney speak for him at this point because of the rising popular anger against Johnson whose role as Club member, a president of the soon-to-be-bankrupt General Insurance Company, as former legal counsel to Poultney, and as legal counsel to the Union Bank and to the majority trustees had raised some doubts about his judicial disinterestedness. There was also some advantage in having a prominent Jacksonian justify the majority trustees, especially as the Jacksonian *Republican* had been taking an increasingly pro-creditor tack. The MacMahon-

Taney opinion of May 2 was disingenuous; if the trustees resigned they would be still financially responsible. True so far as it went, the trustees could ask that the courts relieve them officially of their duties and appoint others in their stead — a perfectly common legal procedure. Taney, who had insisted that the trust be reconstituted to include Morris and Gill, now pretended such action a legal impossibility. Gill made clear he'd not resign; Morris piously announced that he'd like to give up the trust, but that the McMahon-Taney opinion revealed "the insurmountable barrier" to his doing so.<sup>98</sup>

During this spring of 1835, the majority trustees also turned a cold shoulder to a creditor plan, supported strongly by George Gibbs, to reopen the Bank of Maryland as the Phoenix Bank with a new charter from the legislature. By late May the only creditor hope was to go to court again, now to try to force the trustees to resign. This case dragged on through the summer and into August, with little happening except the Union Bank announcing, hardly surprisingly, that they favored retention of the majority trustees.<sup>99</sup> In this situation, stagnant but fraught with the frustration that greeted creditors wherever they turned legally, a second round of pamphlets appeared, which triggered a riot.

Poultney's second pamphlet was longer than the one of the previous summer. It reproduced some of the documents that reinforced the main outlines of his story — letters from John Glenn and Evan T. Ellicott, showing extremely active involvement in the bank, and those from Perine and Johnson proving that they well knew that Taney had sent the October drafts to aid the Bank of Maryland. Even more important it laid out publicly for the first time the contours of the Secret Club's profiteering through Gill and Morris' manipulation of the Trust. And Poultney showed roughly but accurately how Johnson, Glenn, McElderry, and Evan T. Ellicott secretly removed their and their friends' credits from the bank in the month and a half before it closed, knowing of and encouraging its demise, because they saw that a delayed settlement would allow them to reap hundreds of thousands of dollars without risking a cent.

Poultney also made clear the incredibility of

the Secret Club's protestation of philanthropy, especially the tales about helping an infant son and Poultney's wanting to give them shares of Bank of Maryland stock: "The gentlemen have endeavored to prove me a knave, and yet they here represent me to be an idiot." Perhaps most moving is Poultney's honest self-evaluation in this account. "In this business," he wrote, "I do not pretend to exonerate myself from imprudence — from downright folly." He insisted that the Club's early speculation, "however wild and visionary it may appear to many," involved no fraud and "only needed success to free it from the charge of even hazard." What Poultney most regretted was that not only he but thousands of others suffered so much because his generosity to the Club had permitted their profiteering. "Indeed, I have sufficient experience of their prudence and professional knowledge to teach me a lesson for the balance of my life."<sup>100</sup> The balance of Poultney's life was to consume less time than Morris and Gill were to require to audit the Bank of Maryland books. He died in 1837, bankrupt and broken less by financial follies than by those of friendship and trust.

The simplicity and clarity of Poultney's exposé following on the heels of the extraordinarily cynical response of Gill, Morris and Johnson to the audit, and of Taney, McMahon and the others to the creditors' desire to reconstitute the trust aroused a current of popular passion. To counteract this Glenn and Johnson quickly compiled a second pamphlet, *A Final Reply* which was longer and louder than their first effort, and more glaringly unconvincing if read closely. They took issue with several points, most of them minor or insignificant. How could the Club be "secret" as Poultney claimed when the stock transfers were on the books? they asked. The answer was simple. It was secret because the public had no knowledge that Glenn, Johnson, McElderry, Evan Ellicott, Perine and friends owned the majority interest in the bank and determined along with Poultney its major transactions. Much of the pamphlet was comprised of documents supposedly upholding their position, but several in fact attested strongly to the very active interest Secret Club members had taken in the Bank of Maryland. A letter from W. Atterbury who had been in charge of one branch, for example, said that on March 12,

two weeks before the Bank of Maryland failed, the General Insurance Company told him to send all funds that came in there.<sup>101</sup> This confirms Poultney's main argument that the Secret Club grabbed all the good credits in the days before the Bank closed so that they could profiteer on their debts afterward. Atterbury said that there had been articles between him and Glenn to run the agency, just as Glenn and Evan T. Ellicott were empowered in the Little Rock branch. Glenn and Ellicott held this power, Atterbury pretended, just in case of his sudden death. Keeping their hands on other people's money as some kind of strange life insurance policy was the Secret Club's favorite philanthropy. Atterbury's evidence really fits in with Poultney's claims, not those of the Club.

Other testimonials were false, either extorted from others or given because of the meshing of their own interests with those of the Club. Benjamin Chew Howard repeated his account of how the removal of General Insurance Company monies from the Bank in February and March was all his idea, and Taney testified that the October government drafts had been sent to aid the Union Bank. The Club members now testified not only to their total lack of real tie to the Bank of Maryland, but about their lack of debts to that Bank and/or their quick payment of them. They all had been maligned and cheated. Johnson, who never underdid his deceptions, claimed that not only did he have no personal debts to the bank — in contrast to what the books said — but the Bank really owed him \$32,865, for which he'd (trusting man that he was) asked for no receipt of deposit. Poultney had simply stolen his money.<sup>102</sup>

The Secret Club's greatest embarrassment was coming to be the General Insurance Company, which had been a main conduit of funds from the Bank of Maryland to their pockets. Its stock was almost at par they claimed; in fact, no one would buy it. Its only problems were the frauds perpetrated on it by Poultney; none were described. Its credit was excellent; in less than a year it would be bankrupt. If only all the Bank's debts were so well protected there would be no problem; when the books were closed the largest bad debt was that of the General Insurance Company.<sup>103</sup>

Johnson and Glenn held their tissue of testimonial and falsehood together with the rhetoric of moral melodrama, their perfect innocence contrasted with Poultney's black chicanery:

We have ceased to entertain any resentment towards Mr. Poultney. We regard him as a melancholy instance of the depth of the abyss into which humanity, when once it departs from perfect rectitude, is capable of falling. . . . He is below our enmity. . . . Hereafter we doubt not, if there is a moral monitor in every bosom, he will deeply grieve over the occurrences of the present day. He will weep in sack cloth and ashes over his betrayed friendships and violated assurances.<sup>104</sup>

Glenn and Johnson's *Final Reply* is puzzling less because so much of the information is false than because so little of the argument is credible. The basic goal is clear enough — to throw enough dust in the air to confuse things until the impending trials when, the authors promised, the huge deficits, the money stolen by Poultney and his relatives would be clear. Yet the psychology, the analysis, even the arithmetic is so clearly faulty that it hardly suggests the calculating intelligence that allowed the Secret Club to succeed. Yet it seems too Machievellian, even for Johnson or Taney, that they could have foreseen how helpful to them the reaction to the second pamphlet was to be.

In the collection of papers David Perine compiled to "prove" his and Taney's innocence in the Bank of Maryland swindle, he claimed the riots occurred in 1835 because the real culprits, Poultney and friends, wanted to destroy the "evidence" that had been collected to prove their guilt.<sup>105</sup> In fact, it was the publication of this evidence prior to the riot which seemingly capped the public conviction that the Secret Club members and their allies were unquestionably guilty as Poultney charged. A few days after it appeared, riots began which reached their climax on the night of August 6. The mob wished to tar and feather the Club members and the majority trustees, but as violence simmered these men left Baltimore. What they left behind was what the rioters believed to be the fruit of their manipulations: the houses or mansions that they had recently bought or built. In the *Final Reply*, Johnson had a friend testify that his attorney fees were enough to explain his ability to purchase a mansion within the past year.<sup>106</sup>



Whatever the specifics of finances, the Secret Club had become deeply involved in the expensive housing market. McElderry and Evan T. Ellicott were building mansions, Perine was building an estate and Glenn had moved to a larger home. And these buildings, symbols of the aspirations to new status and new security that had motivated the Secret Club, became the most fitting mob target. With the law so firmly on the side of the exploiters, there seemed little to be done to procure justice but to destroy those symbols of the profits most visible.

In the context of the riot, many other motivations became obvious, of course; more generalized social anger, a distaste for authority, a taste for the liquor found in many of the houses, euphoria with the sense of power suddenly and directly held. Yet there remained, in the general direction of the mob and in the limitations the rioters set on their activities, a central concern with redressing the moral balance. The Glenn, Johnson and Morris houses were the worst damaged; Perine, McElderry and Ellicott suffered less because there was some question about on whom the financial losses would fall. Stealing was sometimes stopped because the mob wanted to destroy, not obtain ill-gotten gains. Yet some mob members stole carefully things worth the amount they'd lost in the bank, and special enthusiasm was shown at the burning of Johnson and Glenn's law books, symbols of course of the mechanism through which the fraud was maintained. And, when some of the mob went to Evan Poultnery's, they not only did no damage but washed away the mud that had been tracked on his steps. One rioter said they wanted to do no harm to "honest men."<sup>107</sup>

The number of active rioters was never more than two or three hundred, but at times much of the city looked on with some approval or at least comprehension. One observer explained the situation to a friend in terms that suggest this general understanding: "The Bank of Maryland injured thousands. All who were connected with that institution at the time it failed have been considered by the people at large as enriched at their expense. The sufferers bore their loss with commendable fortitude until they supposed no lawful remedy would avail."<sup>108</sup>

A citizen's guard tried to prevent the riot on

Saturday night, but the mob was too large and too fluid to control. The deaths and injuries in these conflicts however turned the mob's attention to punishing those active in the guard once they finished sacking, unopposed, the homes of the major profiteers. And this expansion of mob scope along with growing embarrassment at the city's tolerance of riot created a reaction the following day. A large citizen's protective group was organized, and riotous activity vanished. Taney got Jackson to send federal troops to the scene but they weren't needed. The violence in fact was to serve the profiteers well in the long run. Public attention was deflected from the financial issues to the question of mob law, and the Secret Club members and their friends could, in this context, justly portray themselves as victims. Especially for the powerful who wished to believe them, the riot was a welcome, possibly even an essential, diversion.

The way sentiment played into Secret Club hands is made clear by one instance. L. W. P. Balch wrote a note of sympathy to Johnson after the riot, to which the latter replied, "In the midst of all my troubles, tears have never come from me until reading your most kind letter. There is something so touching in heartfelt sympathy I was overcome by it." Through his tears, however, Johnson suggested, "with diffidence" and confidence that his motives would be "duly appreciated," that Balch might write a letter to a local paper stressing Johnson's "reputation." Within the week, the *Baltimore Gazette* and several Whig papers were reprinting Balch's letter to the *Frederick Political Examiner*.<sup>109</sup> Johnson's importance in the Whig party and Taney's Democratic status allowed them to squelch any party press rumblings, and the banking friends of the Secret Club made the commercial press disinterested in the truth. In August 1835 the only paper to speak honestly about the Bank of Maryland manipulation was the *New York Evening Post*. The Administration had recently cut this paper from its patronage rolls when temporary editor William Leggett failed to show proper enthusiasm for anti-abolition mobs and actions. Unsusceptible to direct Jacksonian pressure and with stronger anti-riot credentials than any of the party journals, the *Post* alone insisted that "the mob was right in everything but their measures of redress and



retaliation."<sup>110</sup>

During September, action reverted to the courts. Early in the month Judge Stevenson Archer, who had suggested the appointment of Gill to the trust and of Johnson and MacMahon as its counsel, ruled that the creditors could not legally remove the trustees. Beside the obvious frustration, creditors suffered another significant loss in his decision. Upon its announcement, the Union Bank of Tennessee gave up the fight. Unable to gain a hearing outside of Maryland's courts, that Bank's administrators concluded that redress would be impossible within them. Hence they agreed to sell their remaining \$264,000 worth of credits for \$60,000 to W. H. Freeman, a banker with close ties to the Secret Club, whose Susquehanna Bridge and Bank Company had been bailed out in October, 1833, by Taney's indirect loan to the Bank of Maryland, only to fail in 1834. The Tennessee Bank sent the credits to Freeman through Reverdy Johnson and those two then transferred them to the Union Bank of Baltimore, Ellicott's old bank whose current officers had been put there by Taney and the Secret Club.<sup>111</sup> This bank still held them at the time of settlement in 1838, when they were redeemed at full value plus a 10 percent dividend, a tidy reward of some \$230,000 for that Bank's public faith in the Secret Club and the majority trustees, and testimony to their private surety that they were lying. The discount rate, in this case, under 25 percent suggests that the higher probable amount for the swindle, over \$2,000,000, is probably correct.

The creditors lost their most powerful supporter in this transaction and, without it, Johnson thought it safe to begin the court cases that were to provide those involved in the swindle with permanent camouflage. Johnson, of course, started with his strongest case, that involving the \$25,000 Thomas Ellicott was paid for agreeing to go to London to sell the Tennessee Bonds. The fee was high, and was dubious because the crisis situation of October, 1833, forced Perine, Johnson and Taney to work out other ways of getting quick money for the bonds. Ellicott in effect was paid for not going to London—or more probably for his extensive services in making possible Taney's indirect infusion of funds into the Bank of Maryland. In lieu of a contract

binding the Bank of Maryland to pay him, Ellicott's fee was doubtful and Ellicott himself had long suggested arbitration.<sup>112</sup> But Johnson was legally sure of this case, and thought he could wrap enough of the Secret Club's version of the scandal around his victory to disgrace his opponents and vindicate his friends. He trumpeted his intention to take a stenographer to the trial so the "truth" could at last be made public and William Gwynn's *Baltimore Gazette* agreed to print accounts of the trial, seemingly written by Johnson or one of his lackeys.<sup>113</sup>

All did not go well for the Secret Club, however. Ellicott was no mean opponent, and he hired lawyers from Washington, D.C. who were familiar with Maryland law but comparatively free from the pressures of its legal elite. And Francis Fowler, who had investigated the books extensively before the majority trustees barred further access, was unshakable in his testimony and integrity. Since the Secret Club supporters could not audit the books without supporting the case of those they prosecuted, Fowler's testimony was crucial. Hence Johnson resorted to his bottomless bag of stratagems to discredit Fowler. When one John Duer announced in the press that Fowler had threatened violence if Johnson took part in the Ellicott trial, Fowler made Duer admit that the accountant had only said in passing that Johnson's presence might trigger a disturbance. Duer also admitted that, after mentioning it to a friend, the friend told Johnson, who came around to get Duer to write it up in a way that proved misleading. In addition, during the trial, Johnson or some Secret Club supporter privately circulated a letter, real or forged, impugning Fowler's character. When Fowler got wind of it, he demanded in the press that "the concealed slanderer" print it so that he could expose its falsity.<sup>114</sup>

The trial ended in recovery of the money from Ellicott, which Johnson and crew could trumpet as justification for their conduct. Yet there was not the propaganda victory that had been expected. William Gwynn began publishing in the *Baltimore Gazette* the Secret Club version of the trial, but this differed so from the actual events that he had to apologize for the letters as the work of "a trusted friend" and publish future ones with elipses. On

October 14, the *Gazette* published a note from the *Harford* (Md.) *Republican* of a week earlier saying that the letters in the Baltimore papers about the trial "are not to be relied for either fact or impression." Since the *Gazette* was the only paper regularly publishing accounts, Gwynn must have been embarrassed by this opinion and even more so when, on October 17, he announced discontinuation of the series because of "the wish of the court."<sup>115</sup> The folly of publishing the trial record also became clear to the Secret Club; presumably the stenographic transcript was destroyed except for Johnson's long concluding argument. This David Perine kept in the papers the Secret Club compiled to prove historically the innocence of those actually guilty. This document reveals Johnson's basic problem: the most he could do to impugn Fowler's testimony was to point out, at least a dozen times, that the accountant was an Englishman.<sup>116</sup>

Johnson's stratagems, however, needed little factual support. To salvage something from the Ellicott trial, Johnson got the jury to sign a statement saying that nothing at the trial suggested guilt on the part of Johnson and his friends. Of course, they had not been on trial and no evidence could be directly offered against them, but the *Gazette*, ever faithful in its support of the clique, rejoiced at this "wonderful vindication."<sup>117</sup>

The weak criminal cases against Poultny and Poultny, Ellicott and Company resulted in quick acquittal. The fraud charge against Poultny revealed Reverdy Johnson's unscrupulousness in its fullest flower. As Evan Poultny's legal counsel when the Bank of Maryland closed, Johnson had told his client that there should be personal notes for \$400,000 on file on the Bank's books for the 400 shares of stock in it Poultny owned. Ill in bed at the time, Poultny signed the notes as Johnson suggested when David Perine brought them by his house. Someone predated these notes on the Bank's books so it superficially appeared that Poultny had personally abstracted \$400,000 just before closure. Since the notes themselves were dated sometime after the trust was set up and since no \$400,000 was removed in its last days, the charges clearly had no foundation. Johnson obviously gave the legal advice to the sick Poultny so he could later use the action he

insisted upon as "evidence" of criminal fraud to prosecute his client if that came to suit Secret Club ends.<sup>118</sup>

In May, 1836 Evan Poultny, who had been forced into bankruptcy, lacked funds to contest the civil cases against him, and Johnson trumpeted this as a great victory for the trustees, though of course not a cent was collected. In the case against Poultny, Ellicott and Co., the trustees won some \$34,000 — almost exactly the amount Fowler said they owed a year earlier and which the Company had offered to pay — but the bulk of the claim was denied. Johnson managed to get a new trial in this case and in 1837 Poultny, Ellicott and Co., now bankrupt, allowed Johnson another financially meaningless legal "vindication."

In the meantime the Secret Club and their supporters made one other profitable foray into public funds which triggered a last popular outburst, not riotous this time but equally angry and equally futile. In the spring of 1836 the riot victims asked the state legislature to compensate their losses. Knowing the state would never appropriate its own funds, Johnson, MacMahon, and Taney devised a bill whereby Baltimore would pay all costs. Johnson worked the Whig side, while Roger B. Taney went to Annapolis personally to corral Democratic support for his financial cronies (armed with a letter of support from his friend, Andrew Jackson.) Though all Baltimore Jacksonians refused to call on Taney, perhaps because Johnson made such public point of his reliance on the advice of his "friend and counsel" Taney, the plan worked.<sup>119</sup> The "country" legislators, happy enough to do a little favor that would cost only the city, passed the bill that compensated from Baltimore harbor funds all sufferers at full — and probably much exaggerated — value. Johnson received \$40,600; Glenn, \$37,300; John B. Morris, \$16,800; Evan T. Ellicott, \$4,800 and several thousand dollars in small amounts went to others.<sup>120</sup> Since no buildings were structurally injured in the riot, the awards seem grossly inflated in a period when one could buy a comfortable home for \$500 or \$600 dollars.

This was too much for many Baltimoreans. The Whig Baltimore *Patriot* condemned the bill, and the Democratic *Republican* lividly labelled it "a shameful infringement on the

rights of the people," something a good deal more vicious than any of the causes of the American Revolution. It proved, the *Republican* concluded, that "in this land of liberty, the power of wealth and influence controls those who make the laws." A few other papers joined in; the *Elkton Gazette* succinctly remarked that the indemnity bill was "robbing both Peter and Paul to pay Judas Iscariot."<sup>121</sup> Most important, the *Republican* published a series of letters by "Junius" on the riots and their financial sources that raised telling questions:

What let me ask is a mob? . . . I conceive a mob to be — a handful of villains, PLEBIANS or PATRI-CIANS, combined for the purpose of injuring the innocent by EVADING or VIOLATING the laws of the land. It will be seen that this definition, stripped of all technicalities and plain as it is, embraces the very essence of those evils which may commonly be supposed to be the result of a mob. . . . I will even venture so far as to say — an open violation of the laws of the land through the medium of physical force, is not as dangerous to liberty and property, as the more silent exercise of mental power, exerted for the purpose of making the laws themselves instruments of tyranny and oppression.<sup>122</sup>

The first Junius letter provided an able summary of the fraud, and was so popular that editor Samuel Harker had it republished as a broadside. It caused so much concern to the Secret Club supporters that Trustee and City Attorney Richard Gill had Harker and creditor leader Andrew Ruff arrested for publishing and circulating it, and tried to prevent William P. Preston's being admitted to the bar under the seemingly mistaken impression he was "Junius."<sup>123</sup> These extraordinary measures failed to silence Harker who published a variety of protests against the profiteering in these two months, including Captain Williams' story of his suffering. Nor was "Junius" silenced. He continued, passionately and intelligently, to tie the incident to broad evils "growing at the vitals of our society." A quotation from Thomas Otway's play *Venice Preserv'd* that introduced the final letter summarized Junius' attack on the injustices incident to the kind of capitalist manipulation represented in the Bank of Maryland affair:

The foundation of the common good is lost,  
Unholy cunning feeds upon the common weal  
And bad men fatten with the good man's labors.  
All that bear this, deserve ten-fold as much  
For natural justice bids us rise as one

And check the growth of these domestic spoilers  
That make us slaves, and tell us 'tis our charter.

Junius claimed that any decent government would feel more financial obligations to the sufferers from the bank failure than to the victims of the mob. When the indemnity bill passed, Junius urged civil disobedience against it. The legislature, he argued, had no more right to pass "a law compelling Captain Thomas Williams to put a portion of the remnant of his property into the hands of Reverdy Johnson than to compel the said Captain to take off his hat whenever he meets John Glenn." Perhaps by this time Captain Williams had no hat to take off.

Major public controversy was over. Not even the Bank settlement in 1839, which proved the truth of Poultney's contentions, nor the subsequent publication of Thomas Ellicott's able exposé of the swindle revived any widespread interest. Taney simply created his manuscript histories to deflect any future attention from the event, and Reverdy Johnson penned a final pamphlet. Now candidate for the United States Senate, Johnson seemingly felt compelled to "answer" Ellicott in print.<sup>124</sup> This document was once again mostly a compilation of testimonials to his perfect rectitude from fellow lawyers and judges. These allegedly proved the falsity of Ellicott's claims, as did the fact that Ellicott had not made his charges in the trial of late 1835. Just as Johnson's virtue was demonstrated in 1835 by a jury saying he was innocent of charges that had never been brought or weighed, he now "proved" his case by showing Ellicott had failed to mention during the trial questions which were not at issue in it. Seemingly this strange argument proved another "remarkable vindication," though Johnson's Whig supporters waited a few years to send him to Washington as their Senator.

### III. Speculating on the Swindling

Men under the influence of interest or passion do not always acknowledge even to themselves the motives upon which they really act. They sometimes persuade themselves that they are acting on a principle not inconsistent with their own self-respect, and sense of right, and shut their eyes to the one which in fact governs their conduct.

— Roger B. Taney



No single incident can unravel the complexities of political motivation or of the sources of power in a given society, but it may ravel the contours of prevalent interpretations. The story of Thomas Williams' fleeing offers some significant clues about both the chief political battle of the age, Jackson's bank war, and about the broader pattern of power and status in the era.

The "war" against the United States Bank that came to be the central issue of the politics of the 1830s had its clearest roots in Nicholas Biddle's decision to push for recharter before the election of 1832, which convinced Jackson that it was a "monster" determined to "destroy" him personally, and hence by definition an agent of political "corruption." Repeated investigations by hostile Congressional and administrative sources revealed great and potentially dangerous power, but no clear misuse of it. Yet such facts never shook Jackson's convictions. Perhaps the best example of Jackson's certainty that corruption existed came in his faith in Reuben Whitney, who provided the clearest testimony of BUS corruption but perjured himself so clumsily while doing so that Jackson, Kendall and Taney never dared give him an official position, though an anonymous letter attesting their support earned him the seemingly profitable post of *de facto* liaison between the government and the pet banks.<sup>125</sup> Whitney's note to Henry D. Gilpin, who in early 1833 was sent to investigate the BUS, makes clear Whitney's vision of the political and economic opportunities lying in confirming Jackson's conclusions: "I can only tell you that your situation is an enviable one. It would be the happiest day of my life to investigate the affairs of the bank." Another Whitney letter makes clear the ethics of this Jackson favorite in regard to the pet selections. When he wrote William David Lewis that his bank was to be named a Philadelphia pet, Whitney made clear he'd be pleased "if you can turn an honest penny to mutual advantage after you get this. . . . Burn this letter."<sup>126</sup>

Within the administration, Roger B. Taney and Amos Kendall were the only clear supporters of Whitney and of what became the Bank war. Certainly brighter than Whitney, both men must have seen as clearly as he that the route to Jackson's favor was through facilitat-

ing his convictions about the need to destroy the bank. Obviously Taney found in Thomas Ellicott a man who could provide a reasonably responsible plan for doing so, and both Taney and Kendall rode the special deposit plan to a central place in Jackson's affections, which made one man Chief Justice of the Supreme Court of the United States and the other Post Master General and the major political operative in the administration. Even after he left office, Jackson expressed his lasting gratitude to Taney for "the talented and energetic aid I received from you and Mr. Kindle."<sup>127</sup>

Long after these events, both Taney and Kendall wrote at length about their convictions in the bank controversy, and historians have largely taken these statements at face value. Along with skepticism about the total disinterestedness both men professed, there are three reasons for doubting Taney's later explanations. First, no evidence exists of Taney's reservations about the national bank prior to the movement for early recharter, which turned Jackson into an inveterate enemy of the institution. Second, all of Taney's writings at the time of the struggle seem a close parroting — in the personal letters to Jackson almost a parody, so fulsome is their flattery — of what Jackson wanted to hear. Bernard Swisher, who has most explored the sycophancy of these letters, absolves Taney on the grounds that he is not to be blamed for making use of Jackson's weakness for "judicious flattery."<sup>128</sup> This is, of course, true, but it seems significant that the flattery had nothing to do with instituting policy, since Jackson was unalterably committed to removal, but with currying personal favor. Third, Taney's relation with Baltimore's banks, especially the Secret Club's manipulation of the Bank of Maryland, suggests a willingness to use his position and knowledge to support financial speculation and corruption that far exceeded anything that has ever been tied to the BUS.

The deceptions of both Taney and Kendall about their relations with Thomas Ellicott certainly suggest men with a good deal to hide, specifically a relationship to the Bank of Maryland. The only reason to invent interviews with Ellicott that never occurred, and to pretend that the speculative unsoundness of his banking practices were the cause of his loss of favor must have grown from their mutual

desire to hide the United States Treasury's relation with the various speculations of the Secret Club who ran the Bank of Maryland for almost a year, and then made fortunes from its failure.

Taney's connection with the Secret Club members was intimate and his support of their stratagems essential. The Secret Club bought Union Bank stock because they knew it was to be designated a pet; Taney saw that \$200,000 of government money was deposited in the Bank of Maryland when it was necessary for the Secret Club's protection; he was instrumental in insisting that Ellicott give up control of the trust when the Secret Club hit on delay in settlement as the way to wealth; he worked to discredit Ellicott by precipitating a cash flow crisis in the spring of 1834 in the Union Bank; he managed to get Ellicott removed from power in Baltimore when that was necessary to the plotted fraud; and he publicly backed the majority trustees and worked to get riot indemnity for the Secret Club allies even though such actions posed some political danger to him. Though there is no direct evidence of his economic involvement in the schemes, such extreme support for the Secret Club speculations and fraud make a "laundered" financial interest by far the most probable explanation. Taney's biographers are favorable to the point of being uncritical, but none suggest any traits of naivete or humane generosity that would make likely his going to such lengths merely out of friendship.<sup>129</sup> In some ways the question of direct financial interest matters little. Taney's conscious support and cover up of the swindle make it clear that he felt no commitment to aiding "producers" against "speculators," indeed showed no compunction about abetting a fraud in which wealthy men made hundreds of thousands of dollars simply by concocting a clever scheme to bilk comparatively poor people.

Historians have long realized that the pet bank scheme had some obvious political motivations. Kendall clearly was enthusiastic about the political leverage that such patronage gave to the party.<sup>130</sup> John Pendleton Kennedy's diary gives some sense of how this operated in Baltimore. When Kennedy began moving into the anti-administration camp in December of 1833, Thomas Ellicott warned him that "I quarrel with my bread and butter,"

and David Perine chided him more harshly.<sup>131</sup> Such pressures were minor and to be expected in any system of government favoritism, but even they show more political "corruption" — that is support exacted directly for favors granted — than was revealed in all the investigations of the BUS.

Even Jackson's warmest enthusiasts have recognized that the special deposit plan increased rather than lessened questionable political influence; encouraged speculation rather than restraint; fostered loose credit rather than hard money. The relations of Taney, and less directly of Kendall, to the Bank of Maryland fraud suggests only that this may have been as much intent as chance result. Certainly there seems some significance in the fact that the one part of Ellicott's plan neglected was his desire to replace the controlling of note issue by the BUS with a substitute system. Probably such manipulations less motivated the action than were accepted as desirable side effects in a policy which was primarily intended to win Jackson's favor in relation to these men's political ambitions. If one keeps in mind how frequently the most extreme rhetoric of Taney or of Johnson and Glenn precisely inverted reality, Kendall's improbable description of Taney's reaction to becoming Secretary of the Treasury takes on significance: "But, said he, raising his hands to heaven, in doing so, I give up the most cherished object of my life. I am not a politician and have never sought political office. The summit of my ambition has been a seat on the bench of the United States Supreme Court and that desire I surrender in accepting the Treasury now."<sup>132</sup> Taney rode the special deposit system to Jackson's favor and to the Supreme Court with success; that he made considerable money, or at least helped his friends make considerable, on the way was probably a secondary consideration.

That Taney, the Secret Club, and their supporters labored to proclaim their innocence because of their guilt is to be expected. That powerful people at the time and historians since accepted their self-justifications seems more surprising. The Secret Club members obviously were shrewd. If they got rid of Thomas Ellicott, they sensed they could win; if they got rid of the last powerful creditor, the Union Bank of Tennessee, they sensed

they could get state compensation for their riot losses, even though the strategy was sure to trigger anger in Baltimore. But the question remains why the power elite in Baltimore who were not directly in the swindle remained oblivious to facts that were grasped accurately if roughly by rioting fireboys and laborers. Part of the explanation was that of a crude capitalism: the profits from the swindle for the time were immense and could be widely shared. Presumably John B. Morris's crucial support came from, or at least became tied to, his bank's speculating in the credits he as trustee disparaged. It would be surprising if some others who might have caused trouble were not let in on some of the profits being manufactured in the fraud. A cartoon, published at the height of the agitation in the summer of 1834, accurately suggested part of the elite's incentive to quietness: while the Club transported money out of the bank, a solid citizen, dressed in Taney's habitual black and looking rather like him, piously intoned "Judge not, that ye be not judged" while monkeys of avarice dangled money in front of him and the citizenry.<sup>133</sup>

Probably more influential was the power and the advantage that came from not crossing those who were Baltimore's best lawyers, who controlled its largest banks, who exerted influence most effectively in the city. They could arrange favors. John H. B. Latrobe worried briefly about the money he had deposited in the Bank of Maryland, but the cashier arranged that it be returned to him from some debt payment.<sup>134</sup> Latrobe did not profiteer, but he got his money back through extra-legal personal influence — while thousands of poorer folks like Captain Williams did not. And such favors, discreetly granted, prevented many from asking the questions the evidence should have raised, so long as Johnson, Taney and Morris provided some legal smokescreen to justify delaying judgment.

There were also threats, usually discreet but often clear enough. Johnson's letter to Benjamin Chew Howard during the Bel Air trial suggests this tactic: "it is now very important to my vindication in the case now trying here to have the benefit of your evidence, and I beg you to come up without delay . . . I had a summons issued for you on Sunday." Lawyer Nathaniel Williams, who at one point helped

Fowler get access to the Bank's books, also learned how Johnson begged tough. Williams was anxious to get home from the Bel Air trial, but Johnson insisted he stay; "I wish my clients thought my services and presence to be of as little importance as I know them to be." Alexander Hamilton reported that Glenn and especially Johnson threatened that anyone "who openly or secretly" questioned their position "render themselves liable to a suit, and might be mulcted into heavy damages."<sup>135</sup> The extraordinary legal actions against Gibbs in 1834 and against Harker and others in 1836 make clear such threats weren't empty.

Certainly Taney must have used the Administration's favor and patronage to get Harker's *Republican* back in line at times when it was most furious about the swindle. In the midst of printing the angriest and best newspaper exposés of the fraud, Harker inserted reports from an "Annapolis correspondent" favorable to the riot victims' indemnity claims. The dates of these letters, March 16 to 20, 1836 correspond with the days Taney was in Annapolis lobbying for his cohorts, and one assumes that only someone of influence in the party could have induced Harker to publish them at this time. Baltimoreans were right to be intimidated by such opponents. There was a calculating hardness about Taney and Glenn, and a sleekly gloved ruthlessness about Johnson, that made them most dangerous enemies.

For most of the elite such rewards or such intimidations were unneeded. Once Thomas Ellicott lost power, the Club knew that there was no powerful Marylander who would challenge them, and they could proceed, under the cover of pending court cases, in their fraud. Harker might yelp, minor politicians like Samuel Mass and Leon Dyer might attack, small businessmen like creditor Andrew Ruff and fledgling lawyers like William P. Preston might try to organize legal and popular protests,<sup>136</sup> but such folk didn't matter much. Pavers and carpenters might riot, but this action only gave the sanction of upholding law and order to the less noble business of ignoring fraud among one's peers. And so a man as intelligent as John Pendleton Kennedy concluded, after reading Johnson and Glenn's first *Reply*, that it fully refuted Poultney, that



"Quaker scoundrel." Likewise *Niles' Register* initially found Fowler's audit dubious, never mentioned it again, and mildly remarked in 1839, after the final settlement, that all would have been well had the original creditors held on to their deposits. And so John Latrobe accepted John B. Morris' specious explanation of why he couldn't open the Bank's books' in the spring of 1835, and failed to remember why Thomas Ellicott, whom he deeply admired, was drummed out of Baltimore. They, like others of their class, believed what they wanted to believe, what it would have been dangerous or troublesome for them not to accept, and what it was best to credit for communal, as well as personal, reputation and profit. No one wanted, as Kennedy put it, to "kill poor Baltimore with arrows feathered from its own wing." With the innocent already ruined and the guilty in power, *Niles'* refused to look at the second round of Poultney and Johnson-Glenn pamphlets: "Of this we are sure, the welfare of the city is not promoted by such things."<sup>137</sup> For the powerful in Baltimore, Johnson and Taney structured things so that a half-willed blindness to fraud became a form of civic duty.

The silence of Baltimore's elite on the fraud influenced but doesn't fully explain historians' failure to unearth it. Perhaps concern with larger national issues — the bank war, for example — has left local history to antiquarians who, until recently, usually were as concerned with communal reputation as were Taney and Johnson's contemporaries. Second, most of those who have touched on the issue most directly have been those writing biographies of Taney and Johnson which verge between friendly and hagiographic. Third, historians have tended to take at face value their easiest "respectable" source on a particular problem, and Taney's manuscript histories, written to deflect attention from Ellicott's account, have worked well. Historians of the age of Jackson of the Schlesinger school have followed Taney's manuscript's broad account of acts and motivation with little skepticism about its obviously self-serving quality, and Taney's analysts have accepted his account of his dealings with Ellicott (and the other sources in the carefully compiled Perine collection) without consideration of the major conflicts between it and the Taney letters Ellicott saved, now in the Library of Congress. It's telling that

the one accurate historical account of what happened financially, Alfred Bryan's in 1899, uses only economic data, not the rich manuscript-pamphlet sources, most of them intended to deceive.

Some lack of critical skepticism about sources, some tendency to see history from the viewpoint of those who win distorts even the one serious handling of this question, Frank Gatell's study of Taney and the Baltimore banks. Gatell passingly mentions some of the oddities in Taney's account, but this leads him to no exploration of them, in part because of a basic disinterest in the financial matters, apparent in such factual errors as having the wrong Poultney (Evan rather than Samuel) and the wrong Ellicott (Evan T. rather than William) running Poultney, Ellicott, and Company, or having Thomas Ellicott paid by his own bank (rather than the Bank of Maryland) for his London preparations to sell the Tennessee Bonds. Gatell lists the Secret Club members as speculators who embarrassed Taney, but fails to note that they were, before and after the event, Taney's closest associates whom he specifically absolved of all responsibility for trouble and whom he went to great lengths to aid. And though he sees Taney playing a "double game" in 1834 and Johnson "perhaps a triple," he pays so little heed to what Thomas Ellicott clearly described in his book that he pictures Ellicott's dispute with the other trustees as occurring "for murky reasons" which show only the banker's inability to get along with others.<sup>138</sup>

That historians as able as Carl Swisher and Gatell could be so misled by documents intended to deceive and by the tendency to accept the word of those who won suggests simply the dangers all historians run, the probable sweep of the errors committed by even those with the best intentions and abilities. History is a prisoner of documents, and this instance well suggests how these may chain — indeed may be intended to chain — as much as they champion understanding. While Taney claimed that he was so busy at the Treasury that he carelessly misplaced those letters proving Thomas Ellicott a desperate speculator and swindler, he carefully preserved a copy of his letter to a man who sent him, when acting Secretary of the Treasury, a gift of a box of cigars. He appreciated the kind

gift of a box of cigars. He appreciated the kind gesture, he wrote, but his "fastidiousness" demanded that he pay for the present. And that able chronicler of Jacksonian administrative practices, Leonard White, has used this letter, doubtless as intended, to prove high Jacksonian ethical standards.<sup>139</sup> For historians, like others, a good cigar may sometimes be, to misquote Freud, simply a smokescreen.

And does the truth about the Bank of Maryland affair matter now? Not, one presumes, to Captain Williams and thousands like him whose losses and sufferings have turned to quiet dust as surely as have their predator's gains and triumphs. Not to John Glenn, Evan T. Ellicott, David Perine, Hugh McElderry, John B. Morris, and Richard Gill who turned profits from the fraud into comfortable respectability for the rest of their lives. Not to Evan Poultney and Thomas Ellicott whose grievances passed with them from the Baltimore scene. Not even to Reverdy Johnson

and Roger B. Taney whose financial chicanery was but a backwater of successful careers running toward substantial public and historical prominence, though these two carefully destroyed and, in Taney's case, created documents that "posterity" might not glimpse the truth.

Perhaps what happened matters only to those with a certain antiquarian interest in glimpsing human nature or, more modestly, the nature of politics, power, and finance in the good old days when American democracy and capitalism were abirthing. And for them, the moral of this particular story at least accords with John Pendleton Kennedy's sober second thoughts about the fraud: "This is a wicked world and the rogues have the majority."<sup>140</sup> Such was, of course, the elite view. Captain Thomas Williams and his fellow victims were, no doubt, the almost historically silent majority.

#### Endnotes

<sup>1</sup> Letter of Captain Thomas Williams, March 11, 1836 in *Baltimore Republican and Commercial Advertiser* (hereafter *Republican*) March 19, 1836. Williams later thanked several men for giving him \$65 which he promised to repay as soon as the Bank of Maryland settled its affairs. *Republican* March 21, 1836.

<sup>2</sup> According to a report by the trustees of the Bank of Maryland of Sept., 1836, Williams had a total of \$4,700 owed him; the Bank owed one Mary Williams \$600. John B. Morris and Richard Gill, *Report of Trustees of the Bank of Maryland upon the Situation of its Affairs Up to September 1, 1836* (Baltimore, 1836), 10. Williams is used here as representative of the victims of the swindle, although, if he somehow managed to hold onto his credits until late 1838, the failure might have cost him nothing save five years of suffering.

<sup>3</sup> There is general agreement among economic historians that the 1830s represented a kind of "take-off" stage of American capitalism, but in their concern for the broad economic pattern there has been little attention to the accumulative and ethical structure of business investment. Douglas C. North, *The Economic Growth of the United States, 1790-1860* (Englewood Cliffs, 1961); George Rogers Taylor, *The Transportation Revolution, 1815-1860*, (New York, 1966).

<sup>4</sup> The best general account of the Bank of Maryland's history is Thomas Ellicott, *Bank of Maryland Conspiracy as Developed in the Report to*

*the Creditors* (Philadelphia, 1839). Ellicott's version in a few places has a quality of special pleading, but is careful and accurate in what it asserts.

<sup>5</sup> Lydia Hollingsworth Morris to Rachel Tobin, January 30, 1832 in Hollingsworth Letters, MdHS.

<sup>6</sup> Bray Hammond, *Banks and Politics in the United States from the Revolution to the Civil War* (Princeton, 1957) most fully sketches the functions of the Bank of the United States in these years.

<sup>7</sup> Alfred C. Bryan, *The History of State Banking in Maryland* (Baltimore, 1899), 89-95, offers the only accurate historical outline of the financial aspects of the Bank of Maryland swindle. Bryan, and Gary L. Browne, *Baltimore and the Nation, 1789-1861* (Chapel Hill, 1980), 21-25, 71-79, describe Baltimore's earlier practices in banking.

<sup>8</sup> The basic situation Evan Poultney described in *A Brief Exposition of Matters Relating to the Bank of Maryland* (Baltimore, n.d.), a nine-page legally affirmed deposition, published (according to a notation in the David Perine papers, MdHS) on July 18, 1834. Almost precisely a year later, he published a fuller and more detailed account, *An Appeal to the Creditors of the Bank of Maryland and the Public Generally* (Baltimore, 1835). Reverdy Johnson and John Glenn published two pamphlets in reply to Poultney's which contain statements from all five secret Club members and much other material; *Reply to a Pamphlet Entitled "A Brief Exposition of Matters Relating to the Bank of Maryland," With an Examination Into Some of the*

*Causes of the Bankruptcy of that Institution* (Baltimore, 1834) and *A Final Reply to the Libels of Evan Poultney . . . , and a Further Examination of the Causes of the Failure of that Institution* (Baltimore, 1835). Secret owner David Perine published a similar if much shorter pamphlet, *To the Creditors of the Bank of Maryland* (Baltimore, 1834).

<sup>9</sup> Alexander Hamilton, "The Late Bank of Maryland," *Broadside*, dated September 4, 1839, MdHS.

<sup>10</sup> The data on those involved with the Club and the swindle is taken predominantly from the clipping and vertical files of the MdHS. Materials are scantiest on Evan T. Ellicott and McElderry for whom no personal papers exist.

<sup>11</sup> Jackson's official designation of McElderry as government director of the BUS are in the BUS Papers, Etting Collection, Historical Society of Pennsylvania, December 30, 1831 and January 3, 1833.

<sup>12</sup> The standard biography of Johnson offers a eulogistic chronology and excerpts from the sparse surviving Johnson writings. Bernard Steiner, *The Life of Reverdy Johnson* (Baltimore, 1914). The Glenn family papers, MdHS, suggest the social and civic significance of the family, after John Glenn established its fortune, but little that is personally or professionally telling about its founder.

<sup>13</sup> The David M. Perine collection in the Maryland Historical Society, organized stately to prove the life-long friendship of Perine, Taney, Johnson, and Glenn, was clearly intended to support the secret Club's version of the Bank of Maryland affair. Taney placed a few Ellicott letters here that might suggest, out of context, his version of what happened, his two 1839 manuscript accounts and letters to his son-in-law, John Mason Campbell, or to Perine. Evan T. Ellicott, Gill, and Taney all signed Perine's petition to obtain the Orphan's Court clerkship in 1825, Perine Papers.

<sup>14</sup> The Perine papers contain much evidence of the mutual support of these men, support probably enhanced because it cut across party lines. Carl Swisher discusses Taney's and Johnson's close ties to the Baltimore and Ohio Railroad, and Bernard Steiner chronicles their many shared legal struggles in the 1820s and 1830s. *Roger B. Taney* (New York 1935) 114-116; *Life of Roger B. Taney* (Baltimore, 1922), 89-98.

<sup>15</sup> Ellicott, *Conspiracy*, 5. Ellicott was reporting an interview with Perine and Johnson.

<sup>16</sup> Poultney had the Evan T. Ellicott letter published, after the first Johnson-Glenn *Reply*, to refute secret Club contentions of non-involvement; E. T. Ellicott answered that the letter was merely "jocose" and showed no real activity. *Baltimore Gazette*, August 6 and 7, 1834.

<sup>17</sup> Ellicott, *Conspiracy*, 6-7; Francis Fowler, *Broadside Statement on the Bank of Maryland* [March 1835] in the William P. Preston papers, MdHS. The subterfuge in these transactions, especially where they touch on the U.S. Treasury deposits and pet banks, makes clear the concern to mask the ties to Taney. In May, Hugh McElderry

tried to use his position as government director of the BUS to sell the Tennessee Bonds to Biddle, doubtless to finance the Union Bank stock purchase. McElderry to BUS, May 22, 1833, John Sargent Papers, HSPa.

<sup>18</sup> Taney to Ellicott, July 23, 1832, Taney Papers, LC. Two books suggest persuasively that Jackson was reelected not because of but despite his anti-bank position; Jean Alexander Wilburn, *Biddle's Bank: The Crucial Years* (New York, 1967); Robert Remini, *Andrew Jackson and the Bank War: A Study in the Growth of Presidential Power* (New York, 1967), 40-42.

<sup>19</sup> James C. Curtis, *The Fox at Bay: Martin Van Buren and the Presidency, 1837-41* (Lexington, 1970), 45-46, 65-66; Martin Van Buren to Andrew Jackson, July 29 and September 4, 1833, Jackson Papers, LC.

<sup>20</sup> Others passed on McLane's warnings to Biddle: Samuel Smith, December 7, 1831 and Thomas Cadwalader, December 21, 1831 to Nicholas Biddle, Biddle Papers, LC; Joel R. Poinsett to Dr. Joseph Johnson, January 25, 1832, Henry Gilpin Papers, HSPa.

<sup>21</sup> McLane's report was printed as *House Executive Document No. 3*, 22nd Congress, 1st Session. Jackson's respect for the report and reservations about the Bank sections, he made clear in a letter to Martin Van Buren, December 6, 1831, Jackson Papers, LC. McLane's skill in keeping presidential favor while on the losing side of most issues is shown in his letter to Henry Gilpin, December 11, 1833, Gilpin Papers, HSP. John A. Monroe, *Louis McLane: Federalist and Jacksonian* (New Brunswick, 1973) offers a rich account, especially of the McLane-Taney rivalry, 290-424.

<sup>22</sup> A telling account of Jackson's feelings, and Van Buren's reluctance, about removal is found in the notes that White House resident and Jackson's close friend, Major William Lewis kept at the time. Printed in James Parton, *The Life of Andrew Jackson* (New York 1860) III: 501-7. When Lewis argued gently against removal, Jackson insisted that the government funds would corruptly disappear and the elections of 1834 be corruptly bought unless he acted right away. These same issues were the heart of his final removal message to the cabinet, September 18, 1833, Jackson Papers, LC.

<sup>23</sup> Taney to Ellicott, December 12 and 23, 1831; January 25 and February 20, 1832. I've not been able to locate Ellicott's pamphlet, nor a letter in support of Jackson's veto he seemingly wrote also. Taney to Ellicott, July 23 and August 28, 1832, Taney Papers, LC.

<sup>24</sup> Someone dated Ellicott's draft of his plan in pencil November 5, 1833, but it must have been written and sent a year earlier. This misdating explains its neglect by historians. John McFaul, *The Politics of Jacksonian Finance* (Ithaca, 1972), 60-106, 143-77, describes the attempts and difficulties in instituting controls, though oddly suggests that any evidence of desire to control currency and banks refutes an "entrepreneurial" thesis.



<sup>25</sup> *Pennsylvanian*, December 6, 1833.

<sup>26</sup> Stuart Bruchey, ed. "Roger Brooke Taney's Account of his Relations With Thomas Ellicott in the Bank War," *Maryland Historical Magazine* 53 (1958): 68. The manuscript, deposited in the Perine Papers, MdHS, was intended as an answer to Ellicott's published account of the Bank of Maryland affair.

<sup>27</sup> Ellicott to Taney, November 5, 1832; Taney to Ellicott, November 28, 1832, Taney Papers, LC.

<sup>28</sup> Taney to Ellicott, March 25 and April 1, 1833; Ellicott to Jackson, April 6, 1833; Ellicott to Kendall, April 13, 1833, Taney Papers, LC.

<sup>29</sup> Taney to Ellicott, May 5, 1833, Taney Papers, LC.

<sup>30</sup> Frank B. Gatell, "Secretary Taney and Baltimore Pets: A Study in Banking and Politics," *Business History Review* 39 (1965): 217, chides Bray Hammond for suggesting a profiteering motive on Taney's part. Yet it's hard not to believe that Taney's sudden interest in Union Bank stock reflected a desire to speculate on his insider's knowledge.

<sup>31</sup> Taney to Ellicott, May 20 and 24, 1833, Taney Papers, LC.

<sup>32</sup> Ellicott, *Conspiracy*, 6-7. Browne implies that Ellicott's ties to Poultney meant that he was connected to the secret Club, but this seems precluded by his bitter feuds with Evan T. Ellicott and McElderry as well as the evidence from the period. *Baltimore in the Nation*, 122-125.

<sup>33</sup> Bruchey, "Taney's Account," *Maryland Historical Magazine*, 53: 69.

<sup>34</sup> *National Gazette* (Philadelphia), August 27, 1834; Frances Fowler, *Broadside on Bank of Maryland*, William P. Preston Papers, MdHS.

<sup>35</sup> Kendall to Ellicott, July 25 and August 3; Taney to Ellicott, July 24 and August 10, 1833, Taney Papers, LC.

<sup>36</sup> William I. Duane, *Narrative of Correspondence Concerning the Removal of the Deposits* (Philadelphia, 1838), 2-6. Duane was the only member of the administration to express concern about the evident speculative aspects of the plan. To Henry D. Gilpin, July 7, 1833, Gilpin Papers, HSPa.

<sup>37</sup> Taney to Ellicott, September 19 and 21, 1833, Taney Papers, LC.

<sup>38</sup> Reverdy Johnson to Nicholas Biddle, October 9, 1833, Biddle Papers, LC; Ellicott, *Conspiracy*, 11-12.

<sup>39</sup> Poultney, *Brief Exposition*, 6-7; Ellicott, *Conspiracy*, 14-18; Johnson and Glenn, *Reply*, 8-9, 51. Taney's public letter on July 25, 1834 strongly asserted his faith in "the truth, the honor, and the integrity" of Perine and Johnson and said they'd mentioned nothing about the Bank of Maryland in the October interview. In September he wrote Ellicott saying he had no recollection of the contents of the note, which he'd tossed away "as not worth preserving," though it elicited \$200,000 in drafts on the federal treasury. Printed in Ellicott, *Conspiracy*, 66-77.

<sup>40</sup> Poultney, *Appeal*, 41-42.

<sup>41</sup> Ellicott, *Conspiracy*, 11-12.

<sup>42</sup> According to Ellicott, Perine and Johnson remained unsure of the security of the Bank of Maryland and said, (for about a week), they might have to turn on Poultney, at which point Taney's letters become conciliatory rather than accusatory. Johnson prepared the specific procedural instructions regarding the Tennessee Bonds for the Union Bank Board of Directors, October 5, 1833, *Conspiracy*, 16-17, 70-71.

<sup>43</sup> Ellicott to Taney and Taney to Ellicott (twice), October 7, 1833, Taney Papers, LC.

<sup>44</sup> Ellicott to Taney, October 8 (twice) and October 10, 1833, Perine Papers, MdHS. That Taney kept these letters is interesting. What they say discredits Taney's story, but presumably the tone of confusion and apology was judged incriminating.

<sup>45</sup> Taney to Ellicott, October 10, 1833, Taney Papers, LC.

<sup>46</sup> Taney to Ellicott, October 11, 1833, Taney Papers, LC; Ellicott to Taney, October 12, 1833, Perine Papers, MdHS.

<sup>47</sup> Of the \$300,000 that went to the Bank of Maryland, \$50,000 was in turn loaned to W. H. Freeman's Susquehanna Bridge and Bank Company, and Ellicott loaned Freeman another \$25,000 during the crisis. Ellicott to Taney, October 8, 1833, Perine Papers, MdHS. Freeman was often to serve the secret Club in their subsequent financial and legal maneuverings. The criminal case against Poultney, Ellicott, and Co. involved his claim that he'd repaid the \$52,000 borrowed from the Bank of Maryland but it was not credited to him in the books and he had no receipt, an improbable claim exactly parallel to Johnson's later public story. *Case of Bank of Maryland versus Poultney, Ellicott, and Company* (Baltimore, 1837) 15-17.

<sup>48</sup> Amos Kendall, *Autobiography*, ed. by William Stickney (New York, 1949) 389-90; Bruchey, "Taney's Account," *Maryland Historical Magazine*, 58: 142-45. Here Taney admitted knowing the Bank of Maryland received the money, something proved by his letters to Ellicott which he'd denied in his 1834 public letters supporting the secret Club.

<sup>49</sup> Kendall to Ellicott, October 23, 1833; Taney to Ellicott, October 21 and 22 and November 5, 1833, Taney Papers, LC.

<sup>50</sup> The *Fredericktown* (Maryland) *Examiner*, June 25, 1834 reported that post masters in the area had been ordered for some time to deposit funds in the Bank of Maryland from which Postmaster General William Barry had borrowed money. Quoted in *National Gazette*, June 27, 1835. The Post Office was in September, 1836, still a creditor to the Bank of Maryland for \$22,695. Morris and Gill, *Report of the Trustees*, 1836, 5.

<sup>51</sup> Poultney, *Brief Exposition*, 6-7; Evan T. Ellicott to Evan Poultney, March 19, 1833 in Poultney, *Appeal*, 37.

<sup>52</sup> John Glenn controlled the branches in Little Rock, Louisville, Wheeling, Elktown and Cumberland; Evan T. Ellicott those in New York; and Poultney those in New Orleans and Virginia. Poultney, *Brief Exposition*, 7-8; *Appeal*, 20-35. The

latter contains letters showing Glenn's control of the branches.

<sup>53</sup> Fowler, *Broadside Statement; Harford* (Md) *Republican*, quoted in *Baltimore Republican*, July 4, 1836.

<sup>54</sup> Latrobe, "Diary," December 20, 1833, MdHS; Thomas Ellicott letter to *National Intelligencer*, December 12, 1833.

<sup>55</sup> Taney to Ellicott, December 13, and 20, 1833, LC.

<sup>56</sup> Benjamin French, "Diary," March 21, 1834, LC; Nicholas Biddle to John A. Stevens, February 22, 1833, Dreer Collection, HSPa. Parton, *Life of Andrew Jackson*, III: 537-61, offers an excellent resume of protests, public and private, in favor of recharter in these years.

<sup>57</sup> *Baltimore American*, March 27, 1834; Swisher, *Taney*, 268-69.

<sup>58</sup> Latrobe, "Diary," March 24, 1834, MdHS.

<sup>59</sup> *Baltimore American*, March 25, 1834; *Niles' Register*, 48 (August 15, 1835): 413; *National Gazette*, March 26, 1834; Eloise Baker to a friend, [April, 1834], Harwood Collection, MdHS.

<sup>60</sup> *Baltimore Gazette*, March 25, 1834.

<sup>61</sup> Poultney, *Appeal*, 19; Ellicott, *Conspiracy*, 36-37. The General Insurance Company "sold" — that is sent to it — \$200,000 of that Bank's stock for which it took cash from the branches while it collected \$197,943 that the Bank "owed" for its General Insurance Company stocks just prior to the Bank's closing.

<sup>62</sup> Roger B. Taney to Evan Poultney, February 14, 1835, Perine Papers, MdHS.

<sup>63</sup> Latrobe, "Diary," March 24, 1834, MdHS.

<sup>64</sup> *Congressional Globe*, April 3, 1834, 284-5.

<sup>65</sup> Latrobe, "Diary," April 2, 1834; Henry Baker to his father, March 25 and April 2, 1834, Baker Family Papers, MdHS.

<sup>66</sup> The report of the trustees of September 1836, which contains a summary of the official audit by Joshua Atkinson as of March 1834 and of 1836 is the most precise source of information from which to guess at profits. Morris and Gill, *Report of . . . 1836*, 9-16; *Niles' Register*, 46 (April 19, 1834), 118.

<sup>67</sup> Poultney, *Appeal*, 44-45.

<sup>68</sup> Ellicott, *Conspiracy*, 35, and Atkinson's audit, 84, 121-22.

<sup>69</sup> Ellicott, *Conspiracy*, 19-28; Taney to Ellicott, March 25, 27 and 30, Taney Papers, LC.

<sup>70</sup> The correspondence between Fowler, trustees and attorneys is printed in Morris and Gill, *Extracts*, 26-43. Fowler, *Broadside Statement; Niles' Register*, 54 (February 2, 1839), 189. Fowler's initial report was within \$7,600 of Atkinson's final one, and \$6,000 of this was an admitted Atkinson mistake. Thus the deficit was about \$20,000 at time of closure, less than Poultney, Ellicott, and Co. legitimately owed and were willing to pay immediately. Frances Fowler and Evan Poultney, *Testimony in the Case of the Bank of Maryland vs. Samuel Poultney and William T. Ellicott*. (Baltimore, 1840).

<sup>71</sup> *Baltimore Gazette*, April 8, 1835.

<sup>72</sup> Bruchey, "Taney's Account," *Maryland Histor-*

*ical Magazine*, 53: 71-73; Kendall, *Autobiography*, 390.

<sup>73</sup> Gatell, "Secretary Taney and the Pets," *Business History Review*, 39 (1965): 218-19.

<sup>74</sup> Taney to Ellicott, March 30, 1834, Taney Papers, LC.

<sup>75</sup> Kendall to Ellicott, April 15, 1834; Taney to Ellicott, April 15, 17, and 18, 1834, Taney Papers, LC.

<sup>76</sup> Taney to Ellicott, April 20, 21 and 24, 1834, Taney Papers, LC.

<sup>77</sup> Taney to Ellicott, May 15, 20, 21 and 23, 1834, Taney Papers, LC; Ellicott to Taney, May 22, 24, 1834, Perine Papers, MdHS.

<sup>78</sup> Taney to Ellicott, May 24, 25, 27 and 28, 1834; Kendall to Ellicott, May 28, 1834, Taney Papers, LC. Kendall said, unconvincingly, he wrote on impulse without Taney's knowledge.

<sup>79</sup> Roger Taney to Reverdy Johnson and Charles Howard, May 28, 1834; Johnson and Howard to Taney, and Taney to Johnson and Howard, June 20, 1834, Treasury Dept. Letters, National Archives; Roger Taney to Martin Van Buren, March 7, 1836, Van Buren Papers, LC; Ellicott, *Conspiracy*, 26-27.

<sup>80</sup> Taney to Ellicott, May 28 and 29, 1834, Taney Papers, LC; Taney to Perine, May 28, 29 and June 2, 1834, Perine Papers, MdHS.

<sup>81</sup> Perine to Taney, May 29, 1834, Perine Papers, MdHS.

<sup>82</sup> The best character sketch of Ellicott survives in the respectful reminiscences of John Latrobe in John E. Semmes, *John H. B. Latrobe and his Times* (Baltimore, 1917), 399-401. Ellicott's imperiousness is suggested in Latrobe's "Diary" February 15 and March 10, 1834, MdHS, and in John Pendleton Kennedy's "Diary," December 10, 11 and 21, 1833, Peabody Institute, Baltimore.

<sup>83</sup> *Baltimore Gazette*, June 13, 1834; Reverdy Johnson to Nicholas Biddle, May 29 and June 4, 1834; Biddle to Johnson, June 2, 1834, Biddle Papers, LC.

<sup>84</sup> Taney's letters to Perine, June 4, 5, and 7, 1834, MdHS, make clear the outlines of the attack. Taney's son-in-law, John Mason Campbell acted with Gill, Johnson, and Perine in these transactions.

<sup>85</sup> *Baltimore Gazette*, June 13 and 15, 1834; *Baltimore Republican*, June 14, 16 and 21, 1834.

<sup>86</sup> *Baltimore American*, July 8, 14, 15 and 16, 1834. The same stories were published in the *Gazette* and *Republican* as well, and the latter on July 9 printed Ellicott's announcement that, whatever the outcome of the vote, he would make public all the relations between the Union Bank and the Bank of Maryland.

<sup>87</sup> John B. Morris and Richard Gill, *Report* [May 28, 1834, Baltimore], 1-7.

<sup>88</sup> *Baltimore Gazette*, June 3, 1834. Poultney's *Exposition* was legally affirmed, so he could have been indicted for perjury had the secret Club not known his statement to be accurate.

<sup>89</sup> Taney to Perine, June 20 and July 10, 1834; Johnson and Glenn, *Final Reply*, 98.

<sup>90</sup> George Gibbs outlined the plot fairly accu-

ately in a long letter to the Directors of the Union Bank of Tennessee [July, 1834] in Jonathan Meredith Papers, LC. Letters from Robert Mickle (cashier of the Union Bank of Maryland), Hugh Evans (its new President), Sheriff Henry Sanderson and Gibbs recount the controversy in the *Baltimore Republican*, July 21, 23, 24 and 26, 1834.

<sup>91</sup> The letters between Gibbs and the majority trustees were published in Morris and Gill, *Extracts*, 50-54. The *Republican* of July 26, 1834 published the proceedings of the meeting of July 24.

<sup>92</sup> *Baltimore Republican*, July 25, 1834. See also the *Republican* of July 24 and the *Baltimore American*, July 25, 1834.

<sup>93</sup> *Baltimore Republican*, July 31, 1834.

<sup>94</sup> Evan T. Ellicott to Reverdy Johnson, July 26, 1834 in Johnson and Glenn, *Reply*, 41-44.

<sup>95</sup> Letter of Benjamin Chew Howard in *ibid.*, 30.

<sup>96</sup> Richard W. Gill to Samuel Poultny, October 4, 1834, J. Hall Pleasants Papers, MdHS; Thomas Ellicott letter, *Baltimore Republican*, April 1, 1835; Morris and Gill, *Extracts*, 26-42. The last reproduces the correspondence relating to Fowler's findings, with Fowler and Ellicott urging consideration, and Morris, Gill, Johnson and MacMahon refusing.

<sup>97</sup> *Baltimore Republican*, March 3, 1835. The William P. Preston Papers, MdHS, have several clippings and drafts of letters, some of them by Preston, on this spring's controversies and creditor schemes.

<sup>98</sup> The Taney-McMahon opinion and the trustees' responses were printed in the *Baltimore Gazette* and the *Republican* in early May, 1835.

<sup>99</sup> *Baltimore Gazette*, June 4, 1835.

<sup>100</sup> Poultny, *Appeal*, 3-7, 23-36, 48.

<sup>101</sup> Johnson and Glenn, *Final Reply*, 52-58.

<sup>102</sup> Johnson and Glenn, *Final Reply*, 108-9.

<sup>103</sup> Johnson and Glenn, *Final Reply*, 73, 87-94, 130.

<sup>104</sup> Johnson and Glenn, *Final Reply*, 4-5.

<sup>105</sup> "Memorandum" by Perine accompanying the mob handbills in the Perine Papers, MdHS.

<sup>106</sup> Johnson and Glenn, *Final Reply*, 124-25.

<sup>107</sup> T. J. Beach, *A Full and Authentic Account of the Rise and Progress of the Late Mob in the City of Baltimore . . .* (Baltimore, 1835); David Grimsted, "Rioting in its Jacksonian Setting" *American Historical Review*, 77 (April, 1972): 376-89.

<sup>108</sup> William Bartlett to Edward Stabler, August 12, 1835, *Maryland Historical Magazine*, 9 (June, 1914): 161.

<sup>109</sup> Johnson to Balch, August 17, 1835 in Steiner, *Life of Johnson*, 13-14; *Frederick Political Examiner* in *Baltimore Gazette*, August 24, and *National Gazette*, August 28, 1835.

<sup>110</sup> *New York Evening Post*, August 14, 1835.

<sup>111</sup> Bass to Jonathan Meredith, July 30, 1835; Meredith to A. Van Wyck, October 7, 1835; Van Wyck to Meredith, November 20, 1835 in Jonathan Meredith Papers, LC.

<sup>112</sup> Ellicott, *Conspiracy*, 7.

<sup>113</sup> *Baltimore Republican*, August 20, 1835; Bal-

timore *American*, August 21, 28, September 7, 9, 14, 17, 19, October 2, 1835; *Baltimore Gazette*, August 21, 1835.

<sup>114</sup> The Duer and Fowler statements and letters were published in the *Baltimore Gazette*, September 3, 4 and November 10, 1835.

<sup>115</sup> *Baltimore Gazette*, September 19, October 14 and 17, 1835.

<sup>116</sup> Stenographic transcript of Johnson's trial summation, Perine Papers, MdHS.

<sup>117</sup> Letter of the jury to Reverdy Johnson, December 15, 1835 in *Baltimore Gazette*, December 12, 1835; *Baltimore American*, December 18, 1835.

<sup>118</sup> Poultny, *Brief Exposition*, 3; Ellicott, *Conspiracy*, 25-26; Fowler, *Broadside Statement*.

<sup>119</sup> *Niles' Register*, 50 (June 25, 1836), 295 reported the amounts recovered in the trials to date: from Thomas Ellicott, \$28,100; from Poultny, Ellicott, and Co., \$34,400; and from Evan Poultny, \$400,000. *Niles'* must have known, but didn't mention, that the Poultny settlement was only *de jure* with no money really gained.

<sup>120</sup> Reverdy Johnson, *Memorial . . . to the Legislature of Maryland Praying Indemnity for the Destruction of his Property . . . by a Mob . . .* [Baltimore 1836]; John B. Morris, *Memorial to the Legislature of Maryland* (Baltimore, 1836); Roger B. Taney to John Mason Campbell, March 6, 1836, Howard Papers, MdHS.

<sup>121</sup> *Baltimore Republican*, March 25, April 2 and 6, 1835; *Baltimore Patriot*, March 27, 1836. The *Whig Chronicle* supported the bill very quietly, and the *Gazette* was, of course, enthusiastic for it.

<sup>122</sup> The lengthy "Junius" letters were published in the *Baltimore Republican* on February 4, 26, March 5, 17, 31, 1836.

<sup>123</sup> *Baltimore Republican*, February 11, 1836. The William P. Preston Papers, MdHS, contain drafts of several Preston proposals and letters attacking the secret Club or supporting the creditors at this time, but none are nearly so broad-gauged or well-written as the Junius letters.

<sup>124</sup> Reverdy Johnson, *Memorial . . . to the Legislature of Maryland* (Baltimore, 1840).

<sup>125</sup> John N. McFaul and Frank O. Gatell, "The Outcast Insider: Reuben M. Whitney and the Bank War," *Pennsylvania Magazine of History and Biography*, 91 (April, 1967), 115-44.

<sup>126</sup> Reuben Whitney to Henry D. Gilpin; January 27, 1833, Gilpin Papers; Whitney to William David Lewis, September 25, 1833, Lewis-Neilson Papers, HSPa.

<sup>127</sup> Jackson to Taney, April 14, 1838, Taney Papers, MdHS.

<sup>128</sup> Taney to Jackson, August 5, 1833 Jackson Papers, LC; Swisher, *Taney*, 228-230.

<sup>129</sup> Tyler, *Memoir of Taney*; Swisher, *Taney*; Lewis Walker, *Without Fear or Favor: a Biography of Chief Justice Roger Brooke Taney* (Boston, 1965).

<sup>130</sup> Frank Otto Gatell, "Spoils of the Bank War: Political Bias in the Selection of Pet Banks," *American Historical Review*, 70 (October, 1964) 35-58 offers the best survey of the general political-



economic considerations influencing selection of the pets.

<sup>131</sup> John Pendleton Kennedy, "Diary," December 10, 11 and 21, 1833, Peabody Library, Baltimore.

<sup>132</sup> Kendall, *Autobiography*, 386. Kendall noted, however, among the "political consequences" of removal, that "it made Mr. Taney Chief Justice of the Supreme Court" and himself Postmaster-General, 422.

<sup>133</sup> The cartoon, from the MdHS, is reproduced in Grimsted, "Rioting in its Jacksonian Setting," *American Historical Review*, 77: 381.

<sup>134</sup> John H. B. Latrobe, "Diary," March 24, 1834, MdHS.

<sup>135</sup> Reverdy Johnson to Benjamin Chew Howard, August 23, 1835, Howard Papers, MdHS.

<sup>136</sup> The William P. Preston Papers, MdHS, suggest Preston's legal and publicity efforts for the victims of the swindle.

<sup>137</sup> Kennedy, "Diary," August 7, 1834; March 24, 1835, Peabody Library, Baltimore; *Niles' Register*, 54 (February 2, 1839), 189; (July 26, 1834); Semmes, *Latrobe*, 401. In his novel *Quodlibet* (Philadelphia, 1840) Kennedy mixed the two sides of the Bank affair in his satire on Jacksonian policy, while his "Diary," January 27, 1835, greeted Taney's nomination to Chief Justice with dour enthusiasm: "With reference to Taney's power of doing mischief, it is probably best that he should be *pocketed*, as a billiard player would say, in the Supreme Court."

<sup>138</sup> Gatell, "Secretary Taney and the Baltimore Pets" *Business History Review*, 39 (1965), 207-23.

<sup>139</sup> Letter printed in Samuel Tyler, *Memory of Roger Brooke Taney LL.D.* (Baltimore, 1872), 239; Leonard White, *The Jacksonians* (New York, 1959), 201.

<sup>140</sup> Kennedy, "Diary," August 10, 1834, Peabody Library, Baltimore.

## Appendices

### CHARACTERS

#### *Speculator-Swindlers:*

Ellicott, Evan T. — businessman; Democrat; son of wealthy Quaker businessman and much younger half-brother of Thomas Ellicott, with whom he's locked in an intense legal contest over their father's will.

Glenn, John — attorney and businessman; Whig; Episcopalian; made a U.S. judge, 1844.

Johnson, Reverdy — attorney and politician; Whig; Episcopalian; Maryland assistant attorney-general under Taney, 1828; United States Senator, 1845-49, 1863-68; United States Attorney-General, 1849-51; Ambassador to Great Britain, 1868-69.

McElderry, Hugh — Businessman; Democrat; Episcopalian; government representative on the board of the Bank of the United States, 1831-35.

Perine, David — trust attorney; Democrat; Episcopalian; Roger Taney's financial aide in Baltimore.

Taney, Roger B. — attorney and politician; Democrat; Catholic; Maryland Attorney-General, 1828-30; United States Attorney-General, 1831-33; Secretary of the Treasury, 1833-36; Chief Justice of the Supreme Court, 1836-64.

#### *Trustee-Swindlers:*

Gill, Richard — attorney; Whig; Episcopalian; Baltimore City Attorney, 1834-1838.

Morris, John B. — banker and businessman; Episcopalian; president of Bank of Maryland, 1820-31; Mechanics Bank, 1834-44.

#### *Allies to the Swindlers:*

Evans, Hugh — banker; president, Union Bank, 1834-41.

Freeman, W.H. — banker and businessman; president, Susquehanna Bridge and Bank company, 1832-36.

Gwynn, William — attorney and editor; edits *Baltimore Gazette*, 1834-38.

Howard, Benjamin Chew — attorney and politician; Democrat; Episcopalian; United States congressman, 1835-38, 35-39; U.S. Supreme Court Recorder, 1843-62.

Howard, Charles — attorney-businessman; Episcopalian.

Kendall, Amos — editor, politician, and businessman; Democrat; Baptist; "Kitchen Cabinet," 1828-33; Postmaster-General, 1834-39.

McMahon, John V.R. — attorney; Whig; legal advisor to Bank of Maryland trust, 1834-38.

Mickle, Robert — cashier, Bank of Maryland, 1831-36; facilitates payment of Bank of Maryland debts to important people and Club favorites.

Niles, Hezekiah — editor of *Niles' Register*, 1811-37; avoids presenting any material suggesting swindle.

#### *Speculators Victimized by Swindle:*

Ellicott, William — businessman; Quaker; Democrat; with Poultney, Ellicott, and Co. until 1837; son of Thomas Ellicott.

Poultney, Evan — banker, Quaker; Democrat; President, Poultney, Ellicott, and Co. until 1831; Bank of Maryland, 1831-34.

Poultney, Samuel — businessman; Quaker; with Poultney, Ellicott, and Co. until 1837; brother of Evan Poultney.

#### *Other Victims*

Ellicott, Thomas — banker; Quaker; Democrat; President, Union Bank, 1814-34; trustee, Bank of Maryland, 1834-38.

Poultney, Philip — hardware store owner; Quaker; brother of Evan and Samuel Poultney.

Williams, Thomas — ship captain; invests life savings in Bank of Maryland on retirement in 1832.

*Public Opponents of Swindle:*

Fowler, Francis — accountant; English Quaker; publishes accurate resumé of Bank of Maryland finances in early 1835.

Gibbs, George — banker; Whig; President, Union Bank of Tennessee, largest loser in swindle; jailed and forced out of Baltimore, 1834.

Harker, Samuel — editor; Democrat; edits *Baltimore Republican*, 1830s, which publishes anti-swindle material at times.

"Junius," — anonymous author of the fullest attack on the swindle, published in Harker's *Republican*, 1836.

Mass, Samuel — cooper and politician; Democrat; President, Executive Council of Maryland, 1834;

leader of riot, 1835.

Preston, William P. — attorney and politician; Democrat; Catholic; arrested as suspected author of "Junius."

Ruff, Andrew — creditor leader in the struggle to have the Bank of Maryland books opened after the majority trustees removed.

*Observers:*

Latrobe, Benjamin — engineer and diarist; Democrat; Episcopalian.

Latrobe, John H.B. — attorney and diarist; Democrat; Episcopalian.

Kennedy, John Pendleton — author, businessman and diarist; Whig; Episcopalian.

Atkinson, Joshua — accountant; his official audit of 1838 confirms Fowler's findings against the Secret Club claims.

## CHRONOLOGY

*Financial Events*

May, 1831 — Evan Poultney gains control of the Bank of Md. and John B. Morris is removed as president of it.

May, 1832 — Secret Club formed to run Bank of Md.

Fall, 1832 — Secret Club buys up 900 of the 1000 Bank of Md. shares; it gains deposits from Baltimore Orphan's court, state of Maryland, and U.S. Post Office.

Jan., 1833 — Secret Club uses Bank of Md. funds to finance its newly chartered General Insurance Company.

May, 1833 — Secret Club uses Bank of Md. funds to buy 6000 shares in Union Bank of Md.; 2000 shares go to Poultney, Ellicott, and Co.

Oct., 1833 — Johnson and Perine ask Taney to save Bank of Md.; \$2,000,000 of federal deposits go to Union Bank, which sends \$300,000 to Bank of Md. in purchase of Tennessee bonds.

Nov., 1833 — agreement between secret owners and Poultney burnt.

Jan., 1834 — \$200,000 additional government deposits go to Bank of Md. as Union Bank purchases rest of Tennessee bonds.

Feb., March, 1834 — Secret Club members abstract their credits from the Bank of Md., while increasing their personal and corporate debts to it.

March 24, 1834 — Bank of Md. closes, and Ellicott quickly made sole trustee.

April, 1834 — Ellicott agrees to reconstitute the trust with Richard Gill and John B. Morris as co-trustees.

May 1834 — trustees Morris and Gill issue sketchy report suggesting huge Bank of Md. deficit and long legal delays.

July, 1834 — Ellicott ousted from Union Bank and replaced by Secret Club choice, Hugh Evans.

Dec., 1834 — Poultney, Ellicott and Co. gains permission for an accountant to examine Bank of Md. books.

March 1835 — Accountant Francis Fowler tells trustees books show no major deficit nor grounds for legal cases; trustees bar him from further access.

Spring, 1835 — creditors try to force opening of books and resignation of majority trustees legally; court rules against creditors and Morris and Gill refuse to resign.

Sept., 1835 — Union Bank of Tennessee sells its Bank of Maryland credits at less than a quarter of their value.

Summer, 1838 — settlement of Bank of Maryland affairs pays current creditors full value plus a 10% dividend; accountant's report supports Poultney's claims and Fowler's earlier findings.

*Political-Legal Events*

July, 1831 — bill to recharter Bank of U.S. introduced.

Feb., 1832 — Taney asks Ellicott to outline a substitute for the Bank of U.S.

July, 1832 Jackson vetoes bill to recharter Bank of U.S. with a message written largely by Kendall and Taney.

Fall, 1832 — Jackson reelected

April, 1833 — Ellicott explains his plan to Jackson in an interview Taney arranges.

Summer, 1833 — Kendall goes on tour to select pet banks for special deposits.

August, 1833 — Ellicott's Union Bank named Maryland pet.

Sept., 1833 — hard money Secretary of Treasury William Duane fired and Taney appointed to institute pet system.

Oct., 1833 — Taney issues drafts to pet banks in case of a run on them by the Bank of U.S.; sends extra \$200,000 with Johnson and Perine to Union Bank with verbal instructions it go to Bank of Md.

Jan., 1834 — Taney sends \$200,000 more to Bank of Md. through Union Bank.

Spring, 1834 — public meetings and petitions call for recharter of Bank of U.S. in some form.

Late March, 1834 — Taney, allegedly with Jackson's support, pushes Ellicott to resign sole trust.

April, May, 1834 — Taney connives to create a cash crisis in the Union Bank.

May, June, 1834 — Secret Club organizes effort to oust Ellicott from presidency of Union Bank.

July, 1834 — George Gibbs arrested for criticizing new policies of the Union Bank and required to leave Baltimore, Ellicott removed.

Aug., 1835 — rioters sack the homes of Glenn, Johnson and Morris and damage property of other swindlers.

Oct., 1835 — majority trustees recover \$25,000 from Ellicott in first legal case, but without the publicity victory they'd expected.

Nov., 1835 — E. and S. Poultney and William Ellicott are acquitted of criminal charges

March, 1836 — Taney goes to Annapolis to lobby successfully for riot indemnity for the swindlers; Johnson goes to D.C. to lobby successfully for Taney's confirmation as Chief Justice of the Supreme Court.

May, 1836 — Poultney, now bankrupt, doesn't contest second suit for damages.

Spring, 1837 — Poultney, Ellicott and Co., now bankrupt, doesn't contest second suit for damages

*Writings*

Late 1820s or early 1830s — Thomas Ellicott pamphlet on desirability of substituting new system for Bank of U.S.

July, 1834 — Poultney sworn deposition *A Brief Exposition of Matters Relating to the Bank of Maryland*.

Aug., 1834 — Johnson and Glenn pamphlet, *Reply to a Pamphlet Entitled . . .*; Perine pamphlet, *To the Creditors of the Bank of Maryland*.

March, 1835 — Fowler publishes broadside account of his findings

July, 1835 — Poultney pamphlet *An Appeal to the Creditors of the Bank of Maryland . . .*; Johnson and Glenn pamphlet *A Final Reply to the Libels of Evan Poultney . . .*

Early 1836 — Johnson and Morris publish pamphlets asking legislative indemnity for riot damage.

Feb., March, 1836 — "Junius" letters expose swindle in *Republican*.

Early 1839 — Ellicott book *Bank of Maryland Conspiracy . . .*

Later, 1839 — Taney composes his manuscript histories to absolve the Secret Club and refute Ellicott

1840 — Johnson publishes a memorial to absolve the Secret Club, refute Ellicott, and aid his quest for a U.S. Senate seat



# John Marshall's Selective Use of History in *Marbury v. Madison*

by Susan Low Bloch and Maeva Marcus

**EDITOR'S NOTE:** The following article is based substantially upon materials collected by the Documentary History Project of the Supreme Court of the United States, 1789-1800. The project is co-sponsored by the Supreme Court Historical Society and the Supreme Court of the United States and funded through the Supreme Court, the National Historical Publications and Records Commission and the generosity of various private donors.

This article, which first appeared in the *Wisconsin Law Review*, would not have been possible without the research conducted by the Documentary History Project's staff members: Maeva Marcus, James Buchanan, Christine Jordan, James Perry, Steven Tull.

## Wisconsin Law Review Editor's Note:

Professors Bloch and Marcus shed new light on a landmark case. They examine Chief Justice John Marshall's opinion in *Marbury v. Madison* and argue that Marshall misused precedent to support his controversial conclusions. In *Marbury*, the Court decided that the judiciary could issue a writ of mandamus to an executive official, but that Congress could not authorize the Supreme Court to issue such a writ in its original jurisdiction. The Court thereby asserted authority over both the executive and legislative branches, while avoiding a confrontation with President Jefferson. The authors maintain that the single, unnamed case Marshall relied on to support his first conclusion was in fact a composite of three unreported suits entertained by the Supreme Court during the decade preceding *Marbury*. Professors Bloch and Marcus then argue that Marshall, in his discussion of Congress's power to define the Court's original jurisdiction, ignored these same cases, and others,



Chief Justice John Marshall  
(1801-1835)

because they undermined his conclusion that the court lacked jurisdiction and were not easily distinguishable. The authors surmise that Marshall disregarded precedent in order to take advantage of the unique opportunity *Marbury* presented to establish the judiciary as an independent and equal branch of government without risking a confrontation with the executive.

## I. Introduction

*Marbury v. Madison*,<sup>1</sup> perhaps the most famous case in American constitutional history, is renowned for a variety of reasons but rarely for its selective use of precedent.<sup>2</sup> The first case in which the Supreme Court, speaking unanimously through Chief Justice John Marshall,<sup>3</sup> held an Act of Congress unconstitutional, declared judicial authority to order executive officials to perform specific statutory duties, and laid the foundation for the modern "political question" doctrine,<sup>4</sup> *Marbury* is considered a masterpiece of judicial statesmanship. Chief Justice Marshall is both praised and criticized for the clever selection and ordering of issues that enabled him to assert judicial power over both the legislative and executive branches, while simultaneously insulating these controversial assertions from confrontation and defiance.<sup>5</sup> As Professor McCloskey noted: "The decision is a masterpiece of indirection, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another."<sup>6</sup>

What is rarely noted about *Marbury*, though, is Marshall's striking use, or misuse, of history. Yet, recent research on Supreme Court precedents from the initial ten years of its existence suggests that the Chief Justice's clever craftsmanship went beyond skillfully selecting and ordering issues. Our analysis of these earlier cases suggests that Marshall took substantial liberties with these precedents.

The facts of *Marbury* are well-known. Federalist William Marbury had been selected to be a justice of the peace by outgoing Federalist President John Adams. Marbury's commission had been signed and sealed just hours before Adams left office but had not been delivered. The case arose when Marbury petitioned the Supreme Court to issue a writ of mandamus ordering the new Republican Secretary of State, James Madison, to deliver the commission to him.<sup>7</sup>

In deciding whether the Court could grant Marbury the relief he sought, Chief Justice Marshall confronted several difficult legal questions, two of which concern us here:

- (1) Could a writ of mandamus ever issue to the head of an executive department?
- (2) Could the Supreme Court issue such a

writ in the exercise of its original jurisdiction?

This was not the first time the Supreme Court had faced these inquiries. Similar issues had arisen in suits dealing with Congress's pension programs for wounded Revolutionary War veterans. Marshall knew of these cases and referred to them, but his use of them is remarkable. He discussed an unnamed case dealing with these pension programs, but it appears that he in fact merged several different proceedings to create this single case. Thus, the only American precedent the Chief Justice relied on in the entire *Marbury* opinion<sup>8</sup> apparently did not exist as he described it. Marshall employed this conflated case to support his first conclusion that a writ of mandamus could issue to order a cabinet official to do his duty, but disregarded the same proceedings when they conflicted with his second conclusion that the Supreme Court could not issue such a writ in the exercise of its original jurisdiction. This Article will examine this notably selective and arguably disingenuous use of history by the Chief Justice. As we will show, the initial misstatement of precedent may have been inadvertent; the convenient omission of the same precedent a few paragraphs later could not have been.

## II. The Invalid Pension Cases

Before we discuss the confusion in Chief Justice Marshall's treatment of precedent in *Marbury*, it is necessary to recount briefly the history of the disabled veterans cases. The story begins with Congress's passage, on March 23, 1792, of "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."<sup>9</sup> The act described the procedure by which a disabled veteran could obtain a pension from the United States. The applicant was required to appear before the Circuit Court of the United States for the district in which he resided<sup>10</sup> and prove that he had been wounded during the Revolutionary War in the service of the United States and had not deserted.<sup>11</sup> Upon receipt of such proof, the circuit court had to inquire into the nature and degree of the disability and recommend to the Secretary of War whether the applicant should be placed on the pension list and how much of



Maryland Historical Society



National Portrait Gallery

William Marbury (left) never received his commission as a justice of the peace, although it was duly signed by the outgoing Federalist President, John Adams, on his last day in office. His suit against President Jefferson's newly appointed Secretary of State, James Madison (right), who had refused to deliver the commission, touched off a political storm between the federalist-dominated Court and the newly elected Democratic-Republic President.

a pension he deserved. When the Secretary received all this information, he was to add the applicant's name to the pension list, provided he found no reason to suspect any "imposition or mistake." If he had such suspicions, the Secretary was empowered to withhold the applicant's name from the list and was required to report his decision to Congress at its next session.<sup>12</sup>

The judges of the circuit courts refused to proceed under the Invalid Pensions Act of 1792, claiming that the duties assigned to the courts were not of a judicial nature and, therefore, that the courts had no constitutional power to perform them.<sup>13</sup> As explained by the judges of the Circuit Court for the district of New York:

That, by the constitution of the United States, the Government thereof is divided into *three* distinct and independent branches; and that it is the duty of each to abstain from and to oppose encroachments on either.

That neither the *legislative* nor the *executive* branch can constitutionally assign to the *judicial* any duties but such as are properly judicial, and to be performed in a judicial manner.

That the duties assigned to the circuit courts by this act are not of that description, and that the act itself does not appear to contemplate them as such, inasmuch as it subjects the decisions of these courts made pursuant to those duties, first to the consideration and suspension of the Secretary of War, and then to the revision of the Legislature; whereas, by

the constitution, neither the Secretary of War, nor any other executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.<sup>14</sup>

The judges of the New York circuit court, John Jay, William Cushing, and James Duane, then declared that, in view of the benevolent purposes of the Act, they would agree to conduct the invalid pensions business as commissioners:

As, therefore, the business assigned to this court by the act is not judicial, nor directed to be performed judicially, the act can only be considered as appointing commissioners for the purposes mentioned in it by *official* instead of *personal* descriptions.

That the judges of this court regard themselves as being the commissioners designated by this act, and therefore as being at liberty to accept or to decline that office.<sup>15</sup>

These judges, as well as some others, then heard invalid pension claims as commissioners.<sup>16</sup>

The cases that formed the precedent referred to in *Marbury v. Madison* arose as a result of the judges' willingness to serve as commissioners under the 1792 Act. From April, 1792, until Congress passed a new invalid pension law in February, 1793,<sup>17</sup> the judges—acting as commissioners and not as a circuit court—processed the claims of Revolutionary War veterans in the manner pre-



scribed by the 1792 Act. Congress, in the course of that year, became convinced that the judges' doubts about the constitutionality of the Act were well-founded;<sup>18</sup> the new law replaced the circuit courts with district judges and reduced their role to merely hearing the evidence. Wishing to settle the question of the validity of pensions granted under the 1792 law, Congress also ordered the Secretary of War and the Attorney General to seek an adjudication from the Supreme Court of the United States of rights claimed under the Invalid Pensions Act of 1792.<sup>19</sup> As will be seen in Part III,<sup>20</sup> the various proceedings brought to determine the legitimacy of actions taken by the circuit judges as commissioners became the raw material from which Marshall fashioned his invalid pension case in *Marbury*.

Attorney General Edmund Randolph quickly responded to Congress's directive to seek a judgment from the Supreme Court. In August, 1793, the term of court after the 1793 Act to Regulate the Claims to Invalid Pensions became law,<sup>21</sup> Randolph moved the Court for a mandamus to the Secretary of War commanding him to put on the pension list of the United States an applicant whose claim had been approved by the judges acting as commissioners. Randolph did not appear as counsel for any particular applicant, and two of the five justices in court, Randolph reported in a letter to the Secretary of War, "expressed their disinclination to hear a motion in behalf of a man who had not employed me for that purpose, and I being unwilling to embarrass a great question with little intrusions, it seemed best to waive the motion until some of the invalids themselves should speak to counsel."<sup>22</sup> The Attorney General urged the Secretary of War to write to some of the invalid veterans whom the judges had certified as eligible for pensions to inform them of the way matters stood. Although there had been an invalid veteran in court when Randolph made his motion, the invalid had failed to identify himself to the Attorney General until after the Court had adjourned, too late for Randolph to appear as his counsel.<sup>23</sup>

At the February, 1794 term, the Supreme Court heard two cases dealing with invalid pensions, *Ex parte Chandler* and *United States v. Yale Todd*.<sup>24</sup> On February 5, William Edmund, counsel for John Chandler, moved for a

mandamus to the Secretary of War ordering him to put Chandler on the pension list of the United States in conformity with the recommendation of James Iredell and Richard Law, judges of the Circuit Court of the United States for the district of Connecticut sitting as commissioners. Chandler, a Revolutionary War veteran resident of Connecticut, had presented to the judges of the circuit court affidavits indicating that he had been disabled during the war. In addition, he produced depositions stating that he had resigned his commission in the Continental Army because of his infirmities.<sup>25</sup> The judges apparently had accepted the evidence Chandler submitted and certified his eligibility to be placed on the pension list, but Secretary of War Knox had not done so. The Supreme Court told Edmund that it would hear argument on his motion as soon as the case presently before it was concluded.<sup>26</sup>

Cryptic entries in the minutes of the Supreme Court give little information about the substance of the argument in *Chandler*. On February 7, the Court heard Edmund on "the subject of his motion made on the 5th instant."<sup>27</sup> Almost one week later, on February 13, the Court again heard "argument of counsel on the motion of Mr. Edmund for a mandamus to the Secretary of War."<sup>28</sup> The very next day the Court announced its decision: "The Court having taken into Consideration the motion of Mr. Edmund of the 5th instant, and having considered the two Acts of Congress relating to the same, are of opinion that a Mandamus cannot issue to the Secretary of War for the purposes expressed in the said motion."<sup>29</sup> Based on this brief entry in the minutes, no rationale for such a decision can be advanced with any certainty, although, as will be seen, several are plausible.<sup>30</sup>

The second invalid pension case on the Supreme Court's docket in February, 1794, *United States v. Yale Todd*, was brought specifically in response to Congress's directive to seek an adjudication of rights claimed under the Invalid Pensions Act of 1792. Because Randolph's motion for mandamus had failed in August, 1793, newly-appointed Attorney General William Bradford sought a new hearing before the Court.<sup>31</sup> The case is not reported and there is only one entry dealing with it in the minutes of the Supreme Court.<sup>32</sup> Our

knowledge of the case is greatly amplified, however, by the existence of a copy of the papers filed in the *Yale Todd* suit that Chief Justice Taney ordered appended to the report of *United States v. Ferreira* in 1852.<sup>33</sup> These papers note that on February 15, 1794, William Bradford, Attorney General of the United States, came before the Court<sup>34</sup> and informed it that on May 1, 1793, Yale Todd of North Haven, Connecticut was indebted to the United States in the sum of \$172.91 "for so much money had and received."<sup>35</sup> Todd had obtained this money as a result of the favorable action on his pension claim taken by the judges of the Circuit Court for the district of Connecticut and the Secretary of War in May, 1792. Bradford stated that Todd had promised to repay the United States but had not done so despite having been asked several times.<sup>36</sup> John Hallowell, attorney for the defendant, declared that his client had never agreed to repay the United States.<sup>37</sup> Presumably the theory underlying the suit was that Todd's pension had been improperly granted, because the judges, acting as commissioners, had no authority to grant a pension. The suit was a standard action on the case for money had and received, with a plea of non assumpsit.<sup>38</sup> In the final paragraph of the papers submitted in court the Attorney General and counsel for Todd agreed that

if this Court shall be of opinion that the said judges of said Circuit Court sitting as Commissioners and not as a Circuit Court had power & authority by virtue of Said Act so to order and adjudge of and Concerning the premises that then judgment shall be given for the defendant — Otherwise for the United States for one hundred & seventy two dollars & ninety one Cents damages and Six Cents Cost.<sup>39</sup>

A single entry in the minutes of the Supreme Court records the history and the decision in *United States v. Yale Todd*: "The Pleadings; and agreement of the Attorney General of the United States and the Attorney for the defendant being read and filed; and the Case argued the Court having also taken the same into Consideration are of opinion that Judgment be entered for the plaintiff in the above suit."<sup>40</sup> The Attorney General communicated the significance of this result to the Secretary of War in a letter dated the day that the decision came down.

I have to report, that, in consequence of measures

taken "to obtain a decision of the Supreme Court of the United States upon the validity of the adjudications of certain persons styling themselves commissioners under the act of the 23d of March 1792," that court has this day determined (in the case of *Yale Todd*) that such adjudications are not valid.<sup>41</sup>

The Secretary of War then related this result to Congress in his report of February 21, 1794. The Secretary noted Attorney General Randolph's ineffective attempt to obtain an adjudication of the Supreme Court in August, 1793, and Attorney General Bradford's recent successful litigation in which the Court had decided that "the determinations of the commissioners were held to convey no legal rights to the invalids claiming under them."<sup>42</sup> As we will argue in part III, the fact that neither the Secretary of War nor the Attorney General discussed the *Chandler* case suggests that the government had had nothing to do with instituting Chandler's motion and did not consider it part of the government's efforts to settle the question of the invalid pensioners' legal rights under the 1792 Act.

### III. Marshall's Selective Use of Precedents in *Marbury*

When William Marbury petitioned the Supreme Court to issue a writ of mandamus ordering the Secretary of State to deliver Marbury's commission, Marshall divided his analysis into three questions:

- (1) Did Marbury have a right to the commission?
- (2) If he had a right and that right had been violated, did the laws of this country afford him a remedy?
- (3) If the laws did afford him a remedy, was the remedy a writ of mandamus directed to the Secretary of State from the Supreme Court?<sup>43</sup>

After answering the first two questions in the affirmative,<sup>44</sup> Marshall turned to the third. He subdivided this question into two parts: (a) Was a writ of mandamus directed to the Secretary of State the appropriate remedy? (b) Could the Supreme Court issue such a writ?<sup>45</sup> Marshall knew that the earlier proceedings involving the invalid pension acts were relevant to the first of these two inquiries and used them, but he discussed those proceedings imprecisely. More remarkably, when those same proceedings undermined his an-

swer to the second question, he ignored them.

#### *A. Marshall's Selective Scrambling of Precedent*

To support his view that a court could issue a writ of mandamus to a cabinet official, Marshall referred to an unnamed case. But there was no such case, at least not as he described it. Marshall stated the case as follows:

It must be well recollected that in 1792, an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him, by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional; but some of the judges thinking that the law might be executed by them in the character of commissioners, proceeded to act, and to report in that character.

This law being deemed unconstitutional at the circuits, was repealed, and a different system was established; but the question whether those persons who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list, was a legal question, properly determinable in the courts, although the act of placing such persons on the list was to be performed by the head of a department.

That this question might be properly settled, congress passed an act in February, 1793, making it the duty of the secretary of war, in conjunction with the attorney-general, to take such measures as might be necessary to obtain an adjudication of the supreme court of the United States on the validity of any such rights, claimed under the act aforesaid.

After the passage of this act, a *mandamus* was moved for, to be directed to the secretary at war, commanding him to place on the pension list, a person stating himself to be on the report of the judges.

There is, therefore, much reason to believe, that this mode of trying the legal right of the complainant was deemed by the head of a department, and by the highest law officer of the United States, the most proper which could be selected for the purpose.

When the subject was brought before the court, the decision was, not that a *mandamus* would not lie to the head of a department directing him to perform an act, enjoined by law, in the performance of which an individual had a vested interest; but that a *mandamus* ought not to issue in that case, the decision necessarily to be made if the report of the commissioners did not confer on the applicant a legal right.

The judgment, in that case, is understood to have decided the merits of all claims of that description; and the persons, on the report of the commissioners, found it necessary to pursue the mode prescribed by the law subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension list.

The doctrine therefore, now advanced, is by no means a novel one.<sup>46</sup>

Marshall appears to be describing a single case, but there is no one case that exactly fits

his description. As we will show, it is likely that the pension "case" Marshall had in mind was a composite of the three different pension proceedings set forth in Part II. The form of the action, the parties in the "case," and the motivation for the litigation — a mandamus motion brought by the United States Attorney General against the Secretary of War to carry out Congress's directive to obtain a Supreme Court adjudication of rights claimed under the 1792 Act — seemed to be derived from Attorney General Randolph's mandamus action pursuant to Congress's 1793 directive. The disposition of the "case" — denied because the commissioners' reports conferred no legal right — appears to be borrowed from Chandler's motion for a writ of mandamus. Finally, the legal consequence of the "case" — requiring all veterans recommended by commissioners' reports to start anew under the 1793 Act — seems to have come from the suit brought by Attorney General Bradford against Yale Todd.

Marshall's "case" involved a motion for a writ of mandamus from the Supreme Court to the Secretary of War. As related earlier, two such actions had been initiated. Attorney General Edmund Randolph brought one in August, 1793 and veteran John Chandler instituted one in February, 1794. It is not clear which, if either, of these Chief Justice Marshall had in mind.

One's first impression is that he was referring to Chandler's motion in 1794. Marshall said the mandamus was moved to direct the Secretary of War "to place on the pension list, a person stating himself to be on the report of the judges."<sup>47</sup> This sounds like a motion made by an identified person on his own behalf.<sup>48</sup> Randolph had made his motion as Attorney General of the United States, without being employed by any veteran, and in fact, apparently for that reason<sup>49</sup> had not been allowed by the Court to proceed with his motion. Marshall's wording suggests he was thinking not of Attorney General Randolph's motion but of Chandler's motion on his own behalf.

But the opinion also suggests that the "case" was brought to implement the 1793 congressional directive ordering the Attorney General and the Secretary of War to seek a Supreme Court adjudication on the validity of veterans' claims under the 1792 Invalid Pensions Act.



Again, two cases fit that description, but neither seems to be Chandler's motion. Attorney General Randolph's motion in 1793 was an effort to carry out Congress's directive. Randolph so characterized it in his letter to Secretary of War Knox on August 9, 1793:

In consequence of our arrangement I moved the Supreme Court of the United States on Tuesday last for a *mandamus* to be directed to you, as Secretary of War, commanding you to put on the pension list one of those who had been approved by the judges acting in the character of commissioners.<sup>50</sup>

Subsequently, Randolph's successor, Attorney General William Bradford, made another effort to carry out Congress's directive by bringing suit against Yale Todd in February 1794. But that was not a *mandamus* action. Chandler's motion, by contrast, does not appear to have been inspired or directed by the highest law officer of the United States.<sup>51</sup>

Marshall's characterization of the decision in the "case" suggests that he was reporting the result in *Chandler* but giving the rationale from *Yale Todd*. Marshall wrote:

[T]he decision was, not that a *mandamus* would not lie to the head of a department directing him to perform an act, enjoined by law, in the performance of which an individual had a vested interest; but that a *mandamus* ought not to issue in that case; the decision necessarily to be made if the report of the commissioners did not confer on the applicant a legal right.

The judgment, in that case, is understood to have decided the merits of all claims of that description; and the persons, on the report of the commissioners, found it necessary to pursue the mode prescribed by the law subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension list.<sup>52</sup>

Marshall was describing a case where the Court denied the writ not because it could not issue a writ of *mandamus* to a cabinet officer but because *mandamus* was inappropriate under the circumstances of the particular case. He obviously was not recounting the *mandamus* motion of Attorney General Randolph since that motion was never ruled on; indeed Randolph never even completed the motion. Marshall may have been describing the ruling in the *Chandler* case. The Court in *Chandler* said that "having considered the two Acts of Congress relating to [invalid pensions, it was] of opinion that a *Mandamus* cannot issue."<sup>53</sup> This statement is certainly consistent with a suggestion that the denial was specific to the



Attorney General Edmund Randolph carried the Invalid Pension case to the Supreme Court.

pension laws and was not a statement regarding the Court's authority to *mandamus* cabinet officers generally.

However, Marshall also suggested that a *mandamus* was inappropriate in the "case" he was discussing because the report of the commissioners conferred no legal right and that, after the Court's ruling, all persons recommended by commissioners' reports had to follow the newly revised procedures of the 1793 Act to get onto the pension list. This description may fit *Chandler* but not nearly as well as it fits *Yale Todd*. The Court may have denied Chandler the writ because, as Marshall suggested, the commissioners' report conferred no legal right. In fact, there are several theories under which the Court could have so concluded and which would have meant that all applicants in Chandler's position—recommended by the commissioners but not listed by the Secretary—would have to proceed anew under the revised procedures of the 1793 Act.<sup>54</sup> However, it is also possible that the Court denied Chandler's motion, not because the commissioners' reports generally conferred no legal right, but because there were reasons specific to Chandler justifying the Secretary's decision not to put Chandler's name on the

list.<sup>55</sup> Had Chandler's motion been denied for any of these reasons, one could not conclude that all veterans recommended by reports of commissioners would have to start anew under the 1793 Act.

In contrast to the uncertainty regarding the Court's rationale in *Chandler*, there is no question that in *Yale Todd* the court did conclude that the commissioners' report conferred no legal right. Attorney General Bradford so characterized the decision in his report to Secretary Knox immediately after the *Todd* decision: "The Court has this day determined that such adjudications of certain persons styling themselves commissioners . . . are not valid."<sup>56</sup> Similarly, in Knox's report to Congress he noted that the Court in *Yale Todd* had decided that "the determinations of the commissioners were held to convey no legal rights to the invalids claiming under them."<sup>57</sup> Thus, Marshall's characterization unambiguously describes the holding of *Yale Todd*. Again, however, that was not a mandamus action.

Marshall's description of the legal consequences of the "case," though again ambiguous, also suggests he was thinking of *Yale Todd*, not *Chandler*. Marshall wrote: "the judgment, in that case, is understood to have decided the merits of all claims of that description."<sup>58</sup> It is unclear to what claims he was referring. If Marshall meant only claims of veterans who were recommended by the commissioners' reports but who were not placed on the pension list by the Secretary of War, then, if one gives *Chandler* the broadest of all possible readings, the "case" Marshall describes may be *Chandler*. However, several factors suggest that Marshall's phrase "claims of that description" designated a larger class of claims — namely, all claims based on the 1792 Act including those of persons the Secretary of War had already placed on the pension list. The "case" Marshall had in mind was, he suggested, brought to carry out the 1793 congressional directive to the Attorney General to obtain a Supreme Court adjudication of the validity of rights claimed under the 1792 Act and Congress wanted a determination of the validity of all claims under that Act.<sup>59</sup> Moreover, Marshall indicated that after the judgment in the "case," it was necessary for all persons recommended by the commissioners' reports to start again with Congress's new

procedures.<sup>60</sup>

If Marshall had this larger class of claims in mind, then his characterization described the consequences of *Yale Todd*, not *Chandler*. The decision in *Chandler*, even read most broadly, settled, at most, the rights of veterans who had been recommended but never placed on the pension list. It is only *Yale Todd* that required all those recommended by commissioners' reports, including those already successfully placed on the pension list, to begin anew. Thus, Marshall's portrayal of both the reasoning and the consequences of the "case" seems to fit Attorney General Bradford's assumption action against *Yale Todd* better than it does *Chandler's* mandamus motion.

That Chief Justice Marshall's mandamus case may never have existed but is instead a composite of three different proceedings is interesting but not shocking. None of these three cases was reported. Getting information on cases was a far-cry from the modern day use of Lexis and Westlaw.<sup>61</sup> Marshall probably was relying on the argument of Marbury's counsel, discussions of the invalid pension cases in the congressional debates on the repeal of the Judiciary Act of 1801,<sup>62</sup> and the memories of the two Justices who had been on the bench in 1793 and 1794, William Cushing and William Paterson.<sup>63</sup> Marshall also may have been depending on his own recollection of these events, even though they had occurred nine or ten years earlier while he was engaged in private practice in Richmond, Virginia.<sup>64</sup>

Moreover, Marshall's scrambling did not seriously distort history; he could have made most of his points even with an accurate portrayal of the proceedings. Nonetheless, one cannot ignore the fact that Marshall apparently chose not to give his "case" a name, did not specifically mention the name "John Chandler" anywhere in the opinion, and portrayed a composite case that offered more effective precedent than an accurate depiction of the three proceedings would have provided.<sup>65</sup> Had Marshall focused on *Chandler's* motion accurately and not relied on convenient borrowings from Randolph's motion and the suit against *Yale Todd*, his argument would have been less forceful and less neat for several reasons. First, it would have been difficult to suggest that the head of an executive department and the country's highest legal officer



Library of Congress

Because Attorney General Randolph's motion for mandamus failed in August, 1793, his successor William Bradford (above) sought a new hearing before the Court.

were behind the suit.<sup>66</sup> Second, while Marshall could have contended that the Supreme Court denied the writ, not because mandamus could not be addressed to an executive official but because the commissioners' report conferred no legal right, Marshall would have had to acknowledge that the Court's statements were, in fact, ambiguous.<sup>67</sup> Finally, Marshall could not have suggested that the judgment decided the fate of all veterans recommended by the commissioners or that it settled all questions of rights under the 1792 Invalid Pensions Act.

By scrambling several proceedings, either knowingly or inadvertently, Marshall created useful precedent.<sup>68</sup> However, even more remarkable is the way he disregarded the same precedent only a few paragraphs later when it undermined his jurisdictional argument.

#### *B. Marshall's Convenient Omissions of Precedent*

Having concluded that mandamus was the appropriate remedy for *Marbury*, Marshall

turned to the question of the Supreme Court's power to grant such a remedy. Part of Marshall's genius in *Marbury*, as commentators have often noted, was his ability to assert power over the executive without providing an opportunity for anyone to object to or to defy the Court.<sup>69</sup> Marshall accomplished this by declaring that the Court had no jurisdiction in the case. He decided that section 13 of the Judiciary Act of 1789 gave the Supreme Court original jurisdiction to issue writs of mandamus to executive officials but that article III of the Constitution did not permit Congress to grant such authority to the Court. Thus, by simultaneously assuming and rejecting power, Marshall not only asserted authority over the executive, but over the legislature as well.<sup>70</sup>

As both admirers and detractors have observed, Marshall had to work hard to find this conflict between the Judiciary Act and the Constitution.<sup>71</sup> It would have been easy to interpret section 13 in such a way as to avoid having it confer original jurisdiction on the Court<sup>72</sup> or to read article III to permit Congress to move cases from the Supreme Court's appellate jurisdiction to its original jurisdiction.<sup>73</sup> In light of the fact that many of the drafters of section 13 were the same individuals who had participated in the Constitutional Convention, the existence of a conflict between the two documents was neither likely nor obvious.<sup>74</sup> Yet, Marshall carefully ignored that fact, notwithstanding his willingness to embrace the point on the occasions when it was more useful.<sup>75</sup>

But Marshall did more than ignore the fact that it was unlikely that the same men who had drafted article III in 1787 could unwittingly enact a conflicting jurisdictional statute only two years later. He also totally disregarded the fact that the pension "case" that he had just relied on in his mandamus discussion appeared to raise the same jurisdictional problem he faced in *Marbury*. Whichever mandamus action one considers, whether the one brought by Attorney General Randolph or the one brought by the veteran Chandler, it was an original motion in the Supreme Court seeking a writ of mandamus directed to an executive official. Marshall could not have been unaware that the jurisdictional posture seemed to be identical to the one in *Marbury*. His description of the pension case made the identity



obvious. He simply ignored the obvious.<sup>76</sup>

Marshall also ignored the fact that, in addition to the Randolph and Chandler motions to mandamus the Secretary of War, the Court had entertained another case in which it was asked to issue a writ of mandamus against an executive officer and the Court never questioned the constitutionality of such jurisdiction. In 1794, the Supreme Court in *United States v. Hopkins*,<sup>77</sup> considered a motion for a writ of mandamus to direct John Hopkins, Commissioner of Loans for the district of Virginia, to allow one Richard Smyth to subscribe to a loan authorized by Congress. After "argument and full consideration," the Court denied the motion because "the right claimed by the petitioner in the present case does not appear sufficiently clear to authorise the Court to issue the Mandamus moved for."<sup>78</sup> Jurisdiction apparently was never questioned.

Inadequate reporting of the early cases might explain Marshall's scrambling of precedents; it cannot, however, explain why he ignored the conflicts these cases appear to present. He clearly knew of the pension case (or cases) because he had just cited it (or them) only a few paragraphs earlier. He was also clearly aware of the existence of other mandamus motions in the Supreme Court that presented similar jurisdictional issues. In oral argument, Charles Lee, attorney for Marbury and former Attorney General of the United States,<sup>79</sup> cited both *Chandler* and *Hopkins* and noted that on these occasions, as well as on several others, the Court had entertained mandamus motions without questioning its jurisdiction.<sup>80</sup> Lee observed:

In none of these cases, nor in any other,<sup>81</sup> was the power of this court to issue a mandamus ever denied. Hence it appears there has been a legislative construction of the constitution upon this point, and a judicial practice under it, for the whole time since the formation of the government.<sup>82</sup>

Marshall, however, never mentioned any of these cases in his opinion.

Why did he make no attempt to distinguish them? It is not that distinctions were unavailable. Marshall could have tried to dismiss these precedents by noting that the jurisdictional issues in these cases were not argued and were decided at most *sub silentio*. He could have

asserted that the Court failed to discuss the jurisdictional issues in the prior mandamus cases because it was able to deny the motions for other reasons. When Marshall found himself in a comparable situation in *United States v. More*,<sup>83</sup> that is, confronted by precedent in which the Court had exercised jurisdiction where Marshall believed no jurisdiction existed, he distinguished the conflicting precedent. He states in *More*: "No question was made, in [the prior case], as to the jurisdiction. It passed *sub silentio*, and the Court does not consider itself as bound by that case."<sup>84</sup> He did not think the distinction too obvious to warrant mention.

Another potential distinction could have been to suggest that Chandler's motion was an attempt to invoke the appellate, not the original, jurisdiction of the Supreme Court. As Marshall noted in *Marbury*: "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause."<sup>85</sup> Thus, Marshall could have asserted that when Chandler petitioned the Supreme Court for a mandamus to the Secretary of War, he was not initiating a new judicial action but was continuing an action already begun by his earlier application to the circuit judges/commissioners.<sup>86</sup> Marshall, however, made no mention of this rationale at all. Perhaps Marshall and his colleagues did not believe the distinction accurate. After all, the circuit judges had carefully said they could not and would not act as judges. Perhaps Marshall believed that whatever the merits of the distinction for *Chandler*, it would not distinguish *Hopkins*, and distinguishing only *Chandler* would make the conflict with *Hopkins* more apparent.

Perhaps Marshall thought that citing or distinguishing precedent was simply unnecessary in this portion of the *Marbury* opinion. While this would be inconsistent with his citing of the pension case (or cases) earlier in the opinion and his treatment of conflicting precedent in *More*, and other cases,<sup>87</sup> it would not be surprising given his general disinclination to cite precedent<sup>88</sup> and his "celebrated absent-mindedness and disorderliness."<sup>89</sup> As Professor Currie noted, Marshall's "disdain for precedent in general was extraordinary

even when it squarely supported him."<sup>90</sup> For example, the question in *Marbury* as to whether the Court could examine the constitutionality of a statute and, if it found it inconsistent with the Constitution, refuse enforcement, was not an issue of first impression despite Marshall's indications to the contrary. Marshall could have found support for his conclusion in a number of earlier federal and state cases as well as in *The Federalist*.<sup>91</sup> Nonetheless, he cited no precedent, notwithstanding the fact that, as his biographer Albert Beveridge said: "No case ever was decided in which a judge needed so much the support of judicial precedents."<sup>92</sup> Similarly, in other major cases such as *Trustees of Dartmouth College v. Woodward*,<sup>93</sup> *McCulloch v. Maryland*,<sup>94</sup> *Hodgson v. Bowerbank*,<sup>95</sup> *Cohens v. Virginia*,<sup>96</sup> and *Wayman v. Southard*,<sup>97</sup> Marshall wrote as if he were confronting questions of first impression when in fact helpful precedent was available.

It is, of course, impossible to be certain why Marshall failed to use precedent more often, but in most of the instances we have examined it is possible to hypothesize plausible explanations. In several cases, he was probably unaware of or had forgotten the earlier precedents.<sup>98</sup> In others, he may have believed the precedent was poorly presented or not very helpful and preferred to start his own analysis fresh.<sup>99</sup> Whatever his reasons, in most of these cases, the neglected precedent supported Marshall's position. In those instances in which we found Marshall faced with precedent that undermined his position, he found ways to distinguish the cases.<sup>100</sup> *Marbury* stands alone as the only case we have found where Marshall ignored conflicting precedent he obviously knew about.

We believe the most likely reason Marshall ignored these precedents in *Marbury* was not that he thought the conflicts trivial or nonexistent but, on the contrary, that he believed they could not be dismissed or distinguished easily. The mandamus cases the Court entertained in the 1790's were not isolated examples that could be lightly dismissed as aberrations or unusual readings of section 13 or article III. Rather, as we will show, the Supreme Court decisions in the 1790's — the motions for extraordinary relief under section 13 of the Judiciary Act of 1789 as well as the *Yale Todd*

case—suggest that prior to *Marbury*, the Court not only never questioned the constitutionality of section 13, but also did not read article III as restrictively as Marshall did in *Marbury*. Moreover, the legislative history of the Judiciary Act of 1801 indicates that even John Marshall may not have read article III as restrictively as a congressman in 1800 as he did as a judge in 1803.

Throughout the 1790's, the Court adjudicated cases brought under section 13 without ever questioning the constitutionality of that section. In addition to the previously discussed mandamus cases brought against executive officials—*Chandler* and *Hopkins*<sup>101</sup>—the Court also entertained several petitions seeking writs of mandamus to be directed to a judge or court and never raised a concern about jurisdiction.<sup>102</sup> This lack of concern may be attributed to the fact that these cases, seeking to issue a mandamus to a judge or court, were within the appellate, and not the original, jurisdiction of the Supreme Court and therefore involved no enlargement of the Court's original jurisdiction.<sup>103</sup> What is significant, however, is not the lack of concern here, but the absence of any attempt to compare or contrast issuing a mandamus to an executive official with issuing one to a judge. This lack of discussion suggests that the constitutionality of the mandamus motions directed to executive officials was not questioned, and there was therefore no reason to distinguish those motions from the mandamus motions directed to judges.<sup>104</sup> As Marshall's biographer Albert Beveridge indicated, Marshall's suggestion that section 13 was unconstitutional was a "novel" idea:

The theory of the Chief Justice that Section 13 of the old Judiciary Law was unconstitutional was absolutely new, and it was as daring as it was novel. It was the only original idea that Marshall contributed to the entire controversy. Nobody ever had questioned the validity of that section of the statute which Marshall now challenged.<sup>105</sup>

We believe that the constitutionality of section 13 was not an issue in the 1790's because, prior to *Marbury*, the Court and Congress believed that article III permitted Congress to move cases from the Court's appellate jurisdiction to its original jurisdiction.<sup>106</sup> The Court's adjudication of the mandamus motions discussed above, its consideration of the *Yale Todd* case and the legislative

history of the Judiciary Act of 1801 all provide evidence that this was the general understanding.

In *Yale Todd*, the Court entertained the United States' suit notwithstanding the fact that it was exercising original jurisdiction over a case that clearly did not fall within the two categories of original jurisdiction specified by article III.<sup>107</sup> The case fell within the judicial power of the United States because the United States was a party, but it involved neither a state nor any ambassadors, public ministers, or consuls. Nonetheless, the Court, apparently without ever questioning its jurisdiction, adjudicated the case and awarded judgment for the United States. Thus, the Court appeared to be untroubled by the possibility of Congress's enlarging the Supreme Court's original jurisdiction to include cases that fell within the broad category of the judicial power of the United States. Indeed, Chief Justice Taney agreed with this reading of *Yale Todd*. As he said:

In the early days of the government, the right of congress to give original jurisdiction to the supreme court, in cases not enumerated in the constitution, was maintained by many jurists, and seems to have been entertained by the learned judges who decided Todd's case.<sup>108</sup>

Moreover, Congress, and even John Marshall himself as a congressman, seemed to maintain this interpretation of article III through at least 1800. In addition to enacting section 13 in 1789 and thereby enlarging the Court's original jurisdiction, Congress in an early draft of the Judiciary Act of 1801 contemplated another enlargement of the Court's original jurisdiction. This draft would have given the Supreme Court jurisdiction over suits in tort or contract against the United States by "any state, body politic or corporate, company, or person," without regard to whether such suits involved a state or ambassador, public minister, or consul.<sup>109</sup> This generous remedial provision ultimately was struck from the bill, but the legislative history nowhere suggests that any concern for constitutionality motivated the deletion.<sup>110</sup> It seems clear that whatever the reasons for the deletion, at least the House committee that drafted the bill—including John Marshall, who was a member of the committee and an apparent supporter of the bill<sup>111</sup>—did not doubt Congress's power to enlarge the Supreme

Court's original jurisdiction.

Thus, this relatively long-standing legislative interpretation of article III and the Court's acquiescence therein suggest why, if Marshall wanted to depart from this understanding, he had to do so by ignoring the prior conflicting mandamus cases. He could not dismiss them as isolated aberrations.<sup>112</sup> Neither could he contend that the Court in the 1790's was generally unconcerned with questions of jurisdiction.<sup>113</sup> Nor could he deny the force in counsel's argument that the First Congress's construction of the Constitution, accepted by the Court, was entitled to great weight.<sup>114</sup> As the following discussion indicates, Marshall frequently used that argument to great effect himself.

When Marshall confronted the question of the constitutionality of another provision of the Judiciary Act of 1789 in *Cohens v. Virginia*, he said:

Great weight has always been attached, and very rightly attached, to contemporaneous exposition. . . .

A contemporaneous exposition of the constitution, certainly of not less authority than that which has been just cited [having just cited and discussed *The Federalist*], is the Judiciary Act itself. We know that in the congress which passed that act were many eminent members of the convention which formed the constitution. Not a single individual, so far as is known, supposed that part of the act which gives the supreme court appellate jurisdiction over the judgments of the state courts in the cases therein specified, to be unauthorized by the constitution. . . .

This concurrence of statesmen, of legislators, and of judges, in the same construction of the constitution, may justly inspire some confidence in that construction.<sup>115</sup>

Marshall's brethren also frequently used this technique of constitutional interpretation.<sup>116</sup> In *Stuart v. Laird*,<sup>117</sup> decided only six days after *Marbury*, the Court upheld the constitutionality of the practice of having Supreme Court Justices sit on the circuit courts. The Court relied on the fact that the First Congress had imposed the duty in the Judiciary Act of 1789 and that the justices had complied continuously with the assignments. The Court observed:

[P]ractice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and



obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.<sup>118</sup>

Given that this history provided "an irresistible answer" and "fixed the construction" of the Constitution, one understands how it might have been hard for Marshall in *Marbury* to explain why the exact same history of legislative construction of article III and judicial acceptance of the constitutionality of section 13 did not provide an equally "irresistible answer." Ignoring the history was easier.

We have suggested why Marshall disregarded precedent in *Marbury*—he could not easily distinguish or dismiss the conflicting cases—but the question remains, why did Marshall knowingly depart from past cases and past Court practice? Perhaps the political situation in which the Court found itself led it to such a decision. We believe that Marshall wanted to make clear the Court's authority to review certain acts of the executive as well as of the legislature, but feared that ordering the executive to do something would risk a confrontation. He could achieve the dual assertion of power over the executive and the legislature without providing the executive an opportunity to defy the Court only by doing precisely what he did in *Marbury*: 1) assert the power to issue the writ of mandamus; 2) find that section 13 gave the Supreme Court that authority; 3) conclude that article III did not permit Congress to give the Court such authority; 4) hold that the Court therefore had to declare section 13 unenforceable; and 5) refuse the writ. The way to accomplish this persuasively was to ignore the conflicting precedent.

But the Chief Justice had the difficult task of convincing his colleagues on the bench to go along with such a result.<sup>119</sup> All his brethren had served on the Court in the 1790's, and two of them, William Cushing and William Paterson, had actually participated in the invalid pensions case decisions. Further, two colleagues, Paterson and Bushrod Washington, had advised the congressional committee that drafted the judiciary bill that would have enlarged the Supreme Court's original jurisdiction.<sup>120</sup> Moreover, Marshall himself had been a member of that committee and had supported the bill.<sup>121</sup> Thus, the Chief Justice

had to persuade his associates to reject what appears to have been a settled understanding and practice for more than a decade.

We have no evidence that proves how Marshall persuaded his colleagues, but it seems beyond dispute that politics played a significant part in the final outcome of *Marbury*. As soon as *Marbury* brought his case to court, the legal issues and their repercussions became the subject of much discussion, and interest remained high throughout the thirteen months that the suit was pending. The Justices had this long period to mull over the possible political consequences of their decision because shortly after *Marbury*'s motion was initiated in December, 1801, Congress changed the Supreme Court terms so that the Court did not meet again until February, 1803 when *Marbury* was finally decided.<sup>122</sup>

The connection between the Supreme Court's response to *Marbury*'s motion and the general political situation was lost on no one. When, on December 19, 1801, the Federalist Supreme Court ordered the Secretary of State to show cause why a mandamus should not issue to compel him to deliver *Marbury*'s commission, comments in the nation's capital focused on the political nature of that action. For the first time since the Constitution had been adopted, the three branches of government were not controlled by the same political party, and it was an open question whether a Federalist judiciary could survive with a Republican president and a Republican-dominated legislature. Since taking office, Republicans had been talking about a repeal of the Federalist-enacted Judiciary Act of 1801,<sup>123</sup> as well as the possible impeachment of the most extreme Federalist judges. Some observers saw the show-cause order as a political threat issued by the Court. A Washington correspondent of the *Salem Register* observed:

The mandamus, then, would in the first instance act as a check, and in any case tend to throw doubts among weak men and afford at least room for invective; again, if the Court should carry the assumed right of mandamus to Executive officers into practice, the precedent would not only perpetually enable the Supreme Court to controul [sic] the Executive but to perplex the Administration by similar litigations on the repeal of the law. . . .<sup>124</sup>

But Republicans viewed the Court's action



Associate Justices William Cushing (left) and William Paterson (right) had served on the Court when the invalid pension cases were considered and were essentially being called upon by Chief Justice Marshall to ignore the precedents set in those cases to arrive at the conclusion that the Court reached in *Marbury v. Madison*.

in a different light. A letter from an unidentified member of Congress printed in the *Philadelphia Aurora*, as well as other newspapers, noted that:

It is supposed that no further proceedings will be had; but that the true intention of the gentlemen is to stigmatize the executive, and give the opposition matter for abuse and vilification. The consequences of invading the Executive in this manner, are deemed here a high-handed exertion of Judiciary power. They may, perhaps, think that this will exalt the Judiciary character, but I believe they are mistaken.<sup>125</sup>

Senator John Breckenridge characterized the Supreme Court's issuance of the rule as "the most daring attack, which the annals of federalism have yet exhibited."<sup>126</sup> Senator Stevens Thomson Mason declared that "the conduct of the Judges on this occasion has excited a very general indignation and will secure the repeal of the judiciary law of the last session, about the propriety of which some of our republican friends were hesitating."<sup>127</sup> The fact that the Court put the case over to the next term suggests that it was well aware of the delicate legal and political situation in which it found itself.

In working out a solution to the problem, Marshall appears to have wanted to accomplish a number of goals, foremost among them

establishing a sphere in which the Supreme Court could remain supreme. During the year between the issuance of the show-cause order and the Court's decision in *Marbury*, the Federalists and the Court had suffered a tremendous defeat: Congress had voted, in February, 1802, to repeal the Judiciary Act of 1801 and return the judiciary, with minor changes, to the system created under the 1789 Act. The repeal annulled the broad grant to the federal courts of jurisdiction of all cases "arising under" the Constitution and laws of the United States and left the courts with the much more circumscribed jurisdiction specified in the 1789 Act. The repeal also eliminated the system of circuit courts set up by the 1801 Act, meaning Supreme Court Justices once again had to act as circuit judges.<sup>128</sup>

After Congress repealed the 1801 Act, Federalists placed their hopes in the judiciary.<sup>129</sup> They expected that the circuit judges appointed under the 1801 Act would legally oppose their removal from office — this never happened — and that the Supreme Court would declare the repeal unconstitutional. Before the Justices could determine officially as a court what their response to the repeal should be, they had to decide individually whether they would conduct the circuit courts

assigned to them.<sup>130</sup> After much correspondence among the Justices, Marshall and Chase acquiesced in the views of the other Justices and agreed to hold the fall circuit courts.<sup>131</sup> Republicans interpreted this decision as a great victory. Thus one can understand why the Chief Justice may have seen *Marbury* as an ideal opportunity for the Court to recover not only lost prestige but its proper place in the federal polity.

By purporting to separate law and politics in *Marbury* and clearly enunciating the doctrine of judicial review, Marshall sought to capture for the Court a special role in interpreting the Constitution. While appearing to remove the Court from participation in the realm of partisan politics, the Chief Justice defined an area, the "law," in which it was the duty of the Court to provide the guidelines under which the federal government would function. Although Marshall claimed to be eliminating political questions from review by the Court, in reality he assumed for the Court the critical power to determine which issues were political and which were law.<sup>132</sup> This was indeed a bold proposition, but, given the political context, he was able to proclaim it in *Marbury* only by denying to the Court jurisdiction in the case.

As we have shown, Marshall could not have achieved his goals in any other way. Thus, in *Marbury*, the Court turned its back on a decade of jurisprudence.<sup>133</sup> By prohibiting

Congress from enlarging the original jurisdiction of the Supreme Court, the Court said, in effect, that it could no longer entertain suits like those it had considered in the 1790's.<sup>134</sup> Yet, in the part of the opinion on this point, the Court ignored these suits. We can never know whether Marshall and his colleagues made a conscious decision to avoid mentioning conflicting precedent, but we can surmise that the persuasive Chief Justice convinced his associates that the new political situation demanded a new posture by the Court. A unified Federalist government no longer existed. The judicial branch remained the only hope of the Federalists to contain the perceived dangers of majoritarian democracy. The repeal of the Judiciary Act of 1801 had just returned the jurisdiction of the federal courts to the more restricted version contained in the 1789 Act. It may have seemed like a small price to pay for the Court to give up a congressionally-enlarged original jurisdiction in order to maintain its supremacy by exercising judicial review in the context of appellate jurisdiction. If Marshall could persuasively maintain the Court's supremacy only by disregarding the precedents of the 1790's, his brethren probably gave him their blessing. Thus, the Chief Justice and the Court were willing to take liberties with the historical record to reach a decision they thought was essential to the survival of constitutional government.

#### Footnotes

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<sup>1</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>2</sup> The case of *Marbury v. Madison* is studied in

virtually every constitutional law and federal courts course, as well as many administrative law classes. It is reprinted in most casebooks on constitutional law, federal jurisdiction, and administrative law and is discussed in numerous books and articles. See e.g., R. BERGER, *CONGRESS V. THE SUPREME COURT* (1969); 3 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 101-56 (1919); A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); W. CROSSKEY, 1 & 2 *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953); R. FAULKNER, *THE JURISPRUDENCE OF JOHN MARSHALL* 200-12 (1968); C. HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* (2d ed. 1959); G. HASKINS & H. JOHNSON, 2 *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* (1981); *JUDICIAL REVIEW AND THE SUPREME COURT*



SELECTED ESSAYS (L. Levy ed. 1967); C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1922); Bice, *An Essay Review of Congress v. The Supreme Court*, 44 S. CAL. L. REV. 499 (1971); Corwin, *Marbury v. Madison and the Doctrine of Judicial Review*, 12 MICH. L. REV. 538 (1914); Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646 (1982) [hereinafter cited as Currie II]; Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217 (1955); KELLY, HARBISON, & BELZ, THE AMERICAN CONSTITUTION 179-81 (6th ed. 1983); Mendelson, *Was Chief Justice Marshall an Activist?*, in SUPREME COURT ACTIVISM AND RESTRAINT (Halperin & Lamb eds. 1982); Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983); Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893 (1978); Strong, *Judicial Review: A Tri-Dimensional Concept of Administrative-Constitutional Law*, 69 W. VA. L. REV. 111 (1967); Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1; WECHSLER, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

<sup>3</sup> The lack of a recorded dissent, especially in the early years of the Marshall Court, did not necessarily mean a unanimous court. See, e.g., HASKINS & JOHNSON, *supra* note 2, at 385-88; D. MORGAN, JUSTICE WILLIAM JOHNSON: THE FIRST DISSENTER 168-69 (1954); Currie II, *supra* note 2, at 670 n. 158; Roper, *Judicial Unanimity and the Marshall Court—A Road to Reappraisal*, 9 AM. J. L. HIST. 118 (1965); White, *The Working Life of the Marshall Court, 1815-1835*, 70 VA. L. REV. 1, 34-38 (1984). According to the testimony of one of Marshall's colleagues, Justice Johnson, "in some instances" the Chief Justice delivered the opinions of the Court "even when contrary to his own Judgment and Vote." Quoted by W. CROSSKEY, 2 POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1080 (1953).

<sup>4</sup> 5 U.S. (1 Cranch) at 165-67, 169-71. See discussions in C. HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835, at 256 (1946); KELLY, HARBISON & BELZ, *supra* note 2, at 179-81; C. WRIGHT, THE LAW OF FEDERAL COURTS 74-81 (4th ed. 1983); Currie II, *supra* note 2, at 652; Van Alstyne, *supra* note 2, at 11-13.

<sup>5</sup> See 3 A. BEVERIDGE, *supra* note 2, at 126-27; Corwin, *supra* note 2, at 543; Currie II, *supra* note 2, at 661 ("We . . . see in *Marbury* the work of a masterful tactician."); Frankfurter, *supra* note 2, at 221; Nelson, *supra* note 2, at 894-95; KELLY, HARBISON, & BELZ, *supra* note 2, at 181.

<sup>6</sup> R. McCLOSKEY, THE AMERICAN SUPREME COURT 40 (1960).

<sup>7</sup> For a discussion of the political background of *Marbury v. Madison*, see 3 A. BEVERIDGE, *supra* note 2, at 105-11; R. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 43-45, 58, 64-68 (1971). Countless schol-

ars have debated whether politics, economic convictions, or neutral judicial principles motivated Marshall. See, e.g., R. BERGER, *supra* note 2, at 321-22; A. BICKEL, *supra* note 2, at 1-14, 23-28; T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 237-38 (7th ed. 1903); E. CORWIN, COURT OVER CONSTITUTION 98 (1938); 2 W. CROSSKEY, *supra* note 2, at 50-192; R. FAULKNER, *supra* note 2, at 200-12; HASKINS & JOHNSON, *supra* note 2, at 182-86; T. POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 12-23 (1956); J. THAYER, JOHN MARSHALL, reprinted in THAYER, HOLMES AND FRANKFURTER ON JOHN MARSHALL 58-59, 77-78, 84 (P. Kurland ed. 1967); C. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 163 (1890); I. C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 503-04 (1922); Frankfurter, *supra* note 2, at 219-21; Nelson, *supra* note 2, at 894-95.

<sup>8</sup> Marshall referred to only two cases in *Marbury*. One is the celebrated English opinion of *Rex v. Barker*, 3 Burr. 1265 (1762), in which Lord Mansfield established a very broad role for the mandamus remedy. The other is the pension case to be discussed in this Article.

<sup>9</sup> 1 STAT. 243 (1792) [hereinafter referred to as the "1792 Act" or the "Invalid Pensions Act of 1792" (pronounced "INvalid," not "inVALid")].

<sup>10</sup> In 1792, the circuit courts of the United States were composed of two Justices of the Supreme Court and the district judge of the state in which the circuit court met. Any two of these judges constituted a quorum. See section 4 of "An Act to establish the Judicial Courts of the United States" [hereinafter cited as the "Judiciary Act of 1789"], 1 STAT. 74-75 (1789).

<sup>11</sup> Act of March 23, 1792, §2, 1 STAT. 244 (1792).

<sup>12</sup> *Id.* §4.

<sup>13</sup> The judges made their sentiments known in letters addressed to the President of the United States who, pursuant to the judges' request, then communicated them to Congress. See letter from John Jay, William Cushing, and James Duane to George Washington (Apr. 10, 1792); letter from James Wilson, John Blair, and Richard Peters to George Washington (Apr. 18, 1792); and letter from James Iredell and John Sitgreaves to George Washington (June 8, 1792), 1 AMERICAN STATE PAPERS, MISCELLANEOUS 49-53 (Washington 1834). The only suit directly challenging the judges' determination arose in the Supreme Court of the United States after the Circuit Court for the district of Pennsylvania refused to consider the petition of William Hayburn to be placed on the pension list of the United States. See *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). Edmund Randolph, the Attorney General of the United States, acting as Hayburn's counsel, moved the Supreme Court for a writ of mandamus to the Circuit Court of Pennsylvania ordering it to hear Hayburn's petition. After argument, the Supreme Court postponed a decision until the case was made moot by the passage of a new law by Congress stipulating a different pro-

cedure for examining the Claims of Revolutionary War veterans. See "An Act to regulate Claims to Invalid Pensions," 1 STAT. 324 (1793). *Hayburn's Case* played no part in Chief Justice Marshall's opinion in *Marbury*.

<sup>14</sup> Extract of the minutes of the Circuit Court for the district of New York, 1 AMERICAN STATE PAPERS, MISCELLANEOUS, at 50 (Washington 1834) (emphasis in original). The letters from the other judges expressed similar views as to the unconstitutionality of the act. See letters cited *supra* note 13.

<sup>15</sup> Letters cited *supra* note 13 (emphasis in original).

<sup>16</sup> Some of them performed these duties notwithstanding grave doubts as to their authority to do so. See letter from James Iredell and John Sitgreaves to George Washington (June 8, 1792), 1 AMERICAN STATE PAPERS, MISCELLANEOUS, at 53 (Washington 1834). Before Iredell heard invalid pension claims he wrote a memorandum, possibly to assuage his own doubts, justifying his authority to act as a commissioner. See "Reasons for acting as a Commissioner on the Invalid Acts," (undated), CHARLES E. JOHNSON COLLECTION, North Carolina State Department of Archives and History.

Associate Justice James Wilson, however, refused to hear any claims as a judge or a commissioner. See letter from James Iredell to Hannah Iredell (Sept. 30, 1792) in G. McREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL (rep. ed. 1949) at 361 ("We have had a great deal of business to do here [Circuit Court for the district of Connecticut], particularly as I have reconciled myself to the propriety of doing the Invalid-business out of court. Judge Wilson altogether declines it.").

<sup>17</sup> "An Act to regulate the Claims to Invalid Pensions," 1 STAT. 324 (1793).

<sup>18</sup> See 3 ANNALS OF CONG. 556-557 (Apr. 13, 1792); General Advertiser (Philadelphia), Nov. 10, 1792 (report of Nov. 9, 1792 debate in House of Representatives); Independent Gazetteer (Philadelphia), Dec. 22, 1792 (report of Dec. 14, 1792 debate in House of Representatives). There were other causes for changes in the 1792 Act as well. See 3 ANNALS OF CONG. 733-34 (Dec. 3, 1792).

<sup>19</sup> "An Act to regulate the Claims to Invalid Pensions," §3, which provided:

That no person not on the pension list, before the twenty-third day of March, one thousand seven hundred and ninety-two, shall be entitled to a pension, who shall not have complied with the rules and regulations herein prescribed; saving however to all persons, all and singular their rights founded upon legal adjudications under the act, intitled [sic] "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:" [sic] But it shall be the duty of the Secretary of War, in conjunction with the Attorney General, to take such measures as may be necessary to obtain an adjudication of the Supreme Court of

the United States, on the validity of any such rights claimed under the act aforesaid, by the determination of certain persons styling themselves commissioners.

1 STAT. 324, 325 (1793).

<sup>20</sup> See *infra* notes 43-68 and accompanying text.

<sup>21</sup> This bill was reported on the floor of Congress one day before the February, 1793 term of court ended and passed several days later. 1 SEN. LEG. J. 476 (1793).

<sup>22</sup> Letter from Edmund Randolph to Henry Knox (Aug. 9, 1793), 1 AMERICAN STATE PAPERS, MISCELLANEOUS, at 78 (Washington 1834). No report of Randolph's motion for this mandamus appears in the minutes of the Supreme Court or in any other official records of the Court. See THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 169-474 (M. Marcus & J. Perry, eds. 1985) [hereinafter cited as Marcus & Perry].

<sup>23</sup> See letter from Edmund Randolph to Henry Knox (Aug. 9, 1793) *supra* note 22. Randolph apparently believed that a decision on his mandamus motion would have settled the question of the validity of rights granted to invalids under the 1792 Act. In his letter to Knox, Randolph stated: "The decision of one case would have involved every other." *Id.* However, a denial of the writ would have been much less informative than a grant. It is unlikely that a denial of the writ would have resolved the question of the validity of the rights of all claimants under the Act. See discussion at notes 54-55.

<sup>24</sup> These cases are not reported by Dallas in the U.S. Reports, but are recorded in the minutes and docket of the United States Supreme Court. See Marcus & Perry, *supra* note 22, at 222, 228. The earliest U.S. Reports (Volumes 1, 2, 3, and 4) were compiled by Alexander James Dallas, a private entrepreneur not officially appointed by the Court, and are denominated by his name. For a discussion of the deficiencies of the early Supreme Court reporting system, see Joyce, *The Rise of the Supreme Court Reporter*, 83 MICH. L. REV. 1291 (1985).

<sup>25</sup> See Depositions of Jonathan Prindle, Samuel Ferris, RG21, Federal Records Center (Waltham, MA).

<sup>26</sup> Minutes of the Supreme Court of the United States, in Marcus & Perry, *supra* note 22, at 222.

<sup>27</sup> *Id.*, at 223.

<sup>28</sup> *Id.*, at 226. On this occasion it is not clear who counsel was, nor whom he represented.

<sup>29</sup> *Id.*, at 226.

<sup>30</sup> See *infra* notes 54-55.

<sup>31</sup> William Bradford replaced Edmund Randolph as Attorney General after Randolph had been appointed Secretary of State. 1 SEN. EXEC. J. 147 (Jan. 27, 1794).

<sup>32</sup> See Marcus & Perry, *supra* note 22, at 228.

<sup>33</sup> 54 U.S. (13 How.) 40 (1851). The original papers filed in the *Yale Todd* suit no longer exist. They probably were destroyed in a fire in the late nineteenth century when many early Supreme

Court records were lost or damaged. Browning & Glenn, *The Supreme Court Collection at the National Archives*, 4 AM. J. L. HIST. 241-56 (1960).

<sup>34</sup> Although the final version of the Supreme Court minutes does not include any notice of an appearance before the Court on February 15, the original draft of the minutes contains the following entry: "The Court — on motion of Mr. Hillhouse adjourn until monday next at 11. to take into further consideration the case of the invalid pensioners of the Distr. of Connect." Hillhouse was one of Todd's attorneys. See Original Minutes of the Supreme Court, Feb. 15, 1794, in Marcus & Perry, *supra* note 22, at 379-80.

<sup>35</sup> See copy of papers submitted in *United States v. Todd* appended to file of *United States v. Ferreira*, RG 267, National Archives.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Minutes of the Supreme Court, Feb. 17, 1794, in Marcus & Perry, *supra* note 22, at 228.

<sup>41</sup> Letter from William Bradford to Henry Knox (Feb. 17, 1794), 1 AMERICAN STATE PAPERS, MISCELLANEOUS, at 78 (Washington 1834).

<sup>42</sup> Letter from Henry Knox to the Senate and House of Representatives of the United States (February 21, 1794), 1 AMERICAN STATE PAPERS, MISCELLANEOUS, at 78 (Washington 1834).

<sup>43</sup> 5 U.S. (1 Cranch) at 154.

<sup>44</sup> *Id.* at 162, 168.

<sup>45</sup> *Id.* at 168.

<sup>46</sup> 5 U.S. (1 Cranch) at 171-72.

<sup>47</sup> *Id.* at 172.

<sup>48</sup> It is therefore not surprising that the few scholars who have focused on the issue have assumed, as Professor Currie did, that the case Marshall was describing is Chandler's motion. Currie, *The Constitution in the Supreme Court: 1789-1801*, 48 CHI. L. REV. 819, 827 n.57 (1981) [hereinafter cited as Currie I]. Professor Currie also asserted that Chandler's case is known only from a speech in Congress and from a discussion in *Marbury v. Madison*. Currie I at 821 n.11. However, as discussed *supra* at note 23, the case is also recorded in the minutes of the Supreme Court. Professors Dionisopoulos and Peterson, in an article marred by inaccuracies both legal and historical, also asserted that Marshall must have been referring to the Chandler case. Dionisopoulos and Peterson, *Rediscovering the American Origins of Judicial Review: A Rebuttal to the Views Stated by Currie and Other Scholars*, 18 J. MAR. L. REV. 49, 73 n.174. In a much older article, Professor Coxe questioned whether Marshall had a real case in mind, but Coxe appeared to be totally unaware of the Chandler case. COXE, AN ESSAY ON JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION 14 (1893).

<sup>49</sup> See *supra* note 22 and accompanying text.

<sup>50</sup> 1 AMERICAN STATE PAPERS, MISCELLANEOUS, at 47 (Washington 1834).

<sup>51</sup> In theory, it is possible that Chandler had been urged by the Attorney General, either Randolph or Bradford, or by Secretary of War Knox to bring his motion, and thus Marshall could accurately suggest that Chandler's motion was brought to carry out Congress's 1793 directive to the Attorney General and Secretary of War. We do know that after Attorney General Randolph's unsuccessful motion for mandamus in August, 1793, Randolph discovered that a veteran had been in the courtroom. See *supra* note 23 and accompanying text. We also know that Randolph urged Secretary of War Knox to encourage veterans to seek judicial help. *Id.* We can speculate from this that Chandler might have been encouraged, by Randolph and/or by Knox, to bring his action. However, we have no real evidence that Randolph or Knox or Bradford did any of this. On the contrary, judging from the fact that Bradford was present in the Supreme Court on the days that Chandler's motion was argued and decided (see Marcus & Perry, *supra* note 22, at 379) but never mentions it in his case against Yale Todd or in his correspondence regarding the pension litigation (see letter from William Bradford to Knox, *supra* note 41), it seems likely that Chandler's motion was unrelated to the government's efforts to get a Supreme Court adjudication pursuant to Congress's 1793 directive.

Marshall's failure to cite the precedent by name, despite the fact that Marbury's counsel specifically mentioned Chandler during oral argument, suggests that Marshall may have known he was portraying more than simply the Chandler case.

<sup>52</sup> 5 U.S. (1 Cranch) at 172.

<sup>53</sup> See Marcus & Perry, *supra* notes 27-29 and accompanying text.

<sup>54</sup> Chandler might have had no legal right because the judges' report had no legal significance at all, either because the 1792 Act was unconstitutional or because the judges' self-characterization as commissioners had no legal effect. See Currie I, *supra* note 48, at 826-27; Sherman, *Case of John Chandler v. The Secretary of War*, 14 YALE L. J. 431, 437 (1905). Alternatively, the Court might have concluded that Chandler had no legal right because the judges' report was merely a recommendation and the Secretary of War had total, or at least unreviewable, discretion to decide whether to place a recommended applicant on the pension list. This reading of the Chandler ruling conforms to the initial circuit judges' concerns regarding the constitutionality of the 1792 Act; namely that the circuit court was not conferring a legal right and was only giving a recommendation. Under any of these theories, the Supreme Court's denial of Chandler's motion for a writ of mandamus would suggest that all applicants in Chandler's position would have to proceed under the 1793 Act to get onto the pension list.

<sup>55</sup> The Secretary might have refused to put Chandler's name on the pension list for several reasons. There is evidence that Chandler may have been unable to substantiate his claim that his



injuries were service-related. See letter from Henry Knox to House of Representatives (Dec. 14, 1792), 1 AMERICAN STATE PAPERS, CLAIMS, at 56-67 (Washington 1834); documents in Chandler's file, RG21, Federal Records Center (Waltham, MA). It is also possible that Chandler's entitlement was uncertain because he was a commissioned officer who apparently possessed a commutation certificate. MISC. REVOLUTIONARY WAR DOCS., National Archives. The entitlement of such officers under the 1792 and 1793 Acts was the subject of considerable debate and uncertainty. See letters in 1 AMERICAN STATE PAPERS, CLAIMS, 75, 78, 83-84, 129-134 (Washington 1834) (Ambiguity regarding the rights of commissioned officers who had received commutations of half-pay arose from the fact that while earlier pension acts had permitted officers to return their commutations and thereby qualify for pensions, the 1792 Act excluded from eligibility officers who had received commutations, with no mention of any option to return the money, and the 1793 Act repealed the references in the 1792 Act to officers who had received commutations.)

The Court may have reviewed the merits of Chandler's claim and denied the motion on one of these narrower grounds. First, the Court says it examined the two Acts of Congress and from that determined no writ should issue, arguably suggesting that the Court was troubled by the aforementioned uncertainty regarding the entitlement of commissioned officers who possessed commutations. Second, the fact that Attorney General Bradford went forward with the *Yale Todd* case the day after Chandler's motion was denied and never mentioned it suggests, although not conclusively, that he did not find the denial of Chandler's motion very significant. In theory, the Attorney General could have believed that Chandler decided the claims of veterans recommended but not placed on the list and that he still wanted to test the legality of the claims of the class of veterans who actually got onto the list. However, existing evidence lends no support to such a theory. Neither Bradford nor the Court ever mentioned the *Chandler* case. Moreover, the correspondence exchanged among Knox, Bradford, and members of Congress after the February, 1794 litigation never mentioned the Chandler motion. See *infra* text following note 57.

<sup>56</sup> See *supra* note 41 and accompanying text. That is also how Chief Justice Taney characterized the result in *Yale Todd*. See *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52-3 (1851). As suggested earlier in the discussion of Chandler's motion, see *supra* note 54, there are at least two theories which could support a finding of no legal right. *Yale Todd* may have had no right to the pension money because the 1792 Act was unconstitutional. W. J. Ritz seems to hold this view. See Ritz, *United States v. Yale Todd*, 15 WASH. & LEE L. REV. 220 (1958). Alternatively, *Todd* may have had no right because, as a matter of statutory construction, the judges were not authorized by Congress to sit as commissioners and thus their actions were *coram non iudice*. See J. GOEBEL,

1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 564-65, n.57 (1971); *United States v. Ferreira*, 54 U.S. (13 How.) at 53 (In Chief Justice Taney's view, *Yale Todd* had determined that the statute could not be construed to authorize the judges to act out of court as commissioners).

Applying the *Yale Todd* decision to the claims based upon recommendations of the district judge of Maine gives us some idea of the contemporary interpretation of *Yale Todd* and suggests that Congress and Bradford adopted the statutory rationale. According to the Judiciary Act of 1789, the district judge of Maine could exercise all the powers of a circuit judge. The Invalid Pensions Act of 1792 required circuit judges to hear the claims of wounded veterans, so the district judge in Maine performed this duty. But he seems to have undertaken it as a judge; he never declared that he was acting as a commissioner. The Secretary of War, in sending his lists to Congress, distinguished those claims processed by the judges acting as commissioners and those handled by the district judge of Maine. See 1 AMERICAN STATE PAPERS, CLAIMS, *supra* note 55, at 67. Thus if the Court had held the entire Invalid Pensions Act of 1792 unconstitutional, claims based on the Maine judge's report would have little legal significance. If, however, the Court had merely held that the commissioners had no authority, claims based on the Maine judge's recommendation might still have validity.

Both the Attorney General and Congress appear to have adopted the latter view. In a letter to the Secretary of War, Attorney General Bradford wrote: "The adjudication of the Supreme Court in last February term respecting the claims of certain invalids does not comprehend or in any degree affect such claims as are founded on the adjudications of the Judge of the district of Maine, 'who appears to have conformed himself to the act of 23 MAR. 1792.'" See letter from William Bradford to Secretary of War (June 2, 1794), JOHN W. WALLACE COLLECTION, VOL. III, Pennsylvania Historical Society. Congress, responding to the *Yale Todd* decision, directed the Secretary of War to send to district judges lists of the invalid pensioners returned by the judges acting as commissioners with the order that these invalids not be placed on the pension list and that this information be published in newspapers in the judges' districts. The names of invalids whose claims had been adjudicated by the district judge of Maine do not appear on these lists, leading to the conclusion that they remained on the pension list of the United States. See, e.g., Dunlap and Claypoole's American Daily Advertiser (Philadelphia), July 21, 1794.

<sup>57</sup> See *supra* note 41.

<sup>58</sup> 5 U.S. (1 Cranch) at 172.

<sup>59</sup> 5 U.S. (1 Cranch) at 171-72. Congress had explicitly preserved "to all persons, all and singular their rights founded upon legal adjudications under the [1792] act," and directed the Attorney General to obtain an adjudication on "the validity of any such rights claimed under the [1792] act aforesaid,

by the determination of certain persons styling themselves commissioners." 1793 Act §3. *See supra* note 19.

<sup>60</sup> 5 U.S. (1 Cranch) at 172.

<sup>61</sup> *See supra* note 24.

<sup>62</sup> 11 ANNALS OF CONG. 903-05 (1802).

<sup>63</sup> Cushing, however, was not present for the argument or the decision in *Marbury*. *See Minutes of the Supreme Court*, Feb. 10, 11, & 24, 1803, National Archives.

<sup>64</sup> *See* 2 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 77-121 (1916).

<sup>65</sup> As noted *supra* note 51, Marshall's failure to mention the Chandler motion by name suggests he may have known he was describing more than just the *Chandler* case.

<sup>66</sup> *See supra* note 51.

<sup>67</sup> *See supra* notes 54-55 and accompanying text.

<sup>68</sup> It is interesting that there was another mandamus case that Marshall could have used without alterations. *See United States v. Hopkins*, discussed *infra* note 77 and accompanying text.

<sup>69</sup> *See* 3 A. BEVERIDGE, *supra* note 2, at 126-27; R. McCLOSKEY, *supra* note 6, at 40-44; Corwin, *supra* note 2, at 540-43; Currie II, *supra* note 2, at 661 ("We . . . see in *Marbury* the work of a masterful tactician. . ."); Frankfurter, *supra* note 2, at 221; Nelson, *supra* note 2, at 894-95; Van Alstyne, *supra* note 2, at 30-33.

<sup>70</sup> The President and the public paid less attention to the Court's assertion of power over the legislature; the principal concern and, in fact, outcry, focused on the Court's asserted power over the executive. *See* C. WARREN, *supra* note 2, at 243-55. The outcry was based in part on the assertion of power and in part on the fact that it was unnecessary in view of the Court's ultimate holding of no jurisdiction. Both the claim that the judiciary could issue a writ of mandamus to the executive and the finding that *Marbury* had a right to the commission arguably constituted advisory opinions which the Justices only eight years earlier had suggested were inappropriate and perhaps unconstitutional. *See* letter from John Jay *et al.* to George Washington (Aug. 8, 1793) (responding to letter to Justices from Secretary of State Jefferson (July 18, 1793)), reprinted in P. BATOR, P. MISHKIN, D. SHAPIRO and H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 64-66 (1973); J. THAYER, *supra* note 7, at 62-63.

President Jefferson was outraged by Marshall's opinion. Writing four years after *Marbury*, Jefferson noted that he had "long wished for a proper occasion to have the gratuitous opinion in *Marbury v. Madison* brought before the public and denounced as not law." C. WARREN, *supra* note 2, at 244, citing JEFFERSON, 10 WORKS OF THOMAS JEFFERSON (A. G. LIPSCOMB ed. 1903) (letter from Thomas Jefferson to George Hay (June 2, 1807)). According to Charles Warren, Jefferson was still angry years later when he wrote several letters complaining about *Marbury*:

[T]he practice of Judge Marshall in travelling out

of his case to prescribe what the law would be in a moot case not before the Court "[was] very irregular and very censurable," and that in the *Marbury* Case "the Court determined at once that, being an original process, they had no cognizance of it; and therefore, the question before them was ended. But the Chief Justice went on to lay down what the law would be, had they jurisdiction of the case, to wit: that they should command the delivery. The object was clearly to instruct any other Court having the jurisdiction what they should do if *Marbury* should apply to them. Besides the impropriety of this gratuitous interference, could anything exceed the perversion of the law? . . . Yet this case of *Marbury v. Madison* is continually cited by Bench and Bar as if it were settled law, without any animadversion on its being merely an *obiter* dissertation of the Chief Justice."

C. WARREN, *supra* note 2, at 244-45, citing JEFFERSON, 10 WORKS OF THOMAS JEFFERSON (A. G. LIPSCOMB ed. 1903) (letters of Jefferson to William Johnson (June 12, 1823) and to William Jarvis (Sept. 28, 1820)).

Republican newspapers were equally outraged. The Virginia Argus published a series of letters signed by Littleton and addressed to Chief Justice Marshall:

To decide upon the merits of a cause without jurisdiction to entertain it, I affirm to be contrary to all law, precedent and principle. . . . Could it accord with impartiality, policy, justice or dignity to reverse the principle, and encourage a litigation by prejudging a member of the Government on a question that the very act of adjudication advised the applicant to bring before you in your appellate character?

Republished in the Aurora (Philadelphia), Apr. 23, 26, 30, May 2, 3, 1803; Republican Watchtower (New York) May 19, 25, June 25, 1803; *see generally*; C. WARREN, *supra* note 2, at 250-53.

Not surprisingly, Federalist newspapers were not troubled by Marshall's selection and ordering of the issues. *See* C. WARREN, *supra* note 2, at 245-48. For more modern defenses of Marshall's ordering of issues, *see* 3 A. BEVERIDGE, *supra* note 2, at 133-42; HASKINS & JOHNSON, *supra* note 2, at 193; Nelson, *supra* note 2, at 900; Van Alstyne, *supra* note 2 at 6-14.

<sup>71</sup> *See supra* note 69.

<sup>72</sup> Section 13, in relevant part, provided:

The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specifically provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States. 1 STAT. 81 (1789) (emphasis added). It would have been easy to read §13 in such a way as to avoid any

constitutional question. As Professor Currie noted, Justice Marshall neglected to quote all of §13 in his opinion; read in context, §13 "strongly suggests that mandamus against officers was to be issued only in appellate form or ancillary to the exercise of jurisdiction independently existing." Currie II, *supra* note 2, at 653. Such an interpretation would have presented no difficulties under article III. Moreover, this interpretation accorded with the traditional use of mandamus. As Professor Corwin observed:

[I]n Common Law practices, in the light of which §13 was framed, the writ of mandamus was not, ordinarily at least, an instrument of obtaining jurisdiction by a court, even upon appeal, but like the writs of habeas corpus and injunction, was a remedy available from a court in the exercise of its standing jurisdiction.

Corwin, *supra* note 2, at 541 (emphasis in original). Further, construing statutes to avoid constitutional difficulties was not an unusual technique of statutory construction at that time. See, e.g., *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800) [discussed *infra* note 95]; see generally HASKINS & JOHNSON, *supra* note 2, at 199; Nelson, *supra* note 2, at 942-47; Van Alstyne, *supra* note 2, at 15.

<sup>73</sup> Article III provides that the Supreme Court shall have "original jurisdiction" in "cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." U.S. CONST. art. III, §2, cl. 2. Article III further provides that, in all other cases within the judicial power of the United States, the Court is to have "appellate Jurisdiction, both as to Law and Fact, with such exceptions . . . as the Congress shall make." *Id.* Marbury's action did not fit within the appellate jurisdiction of the Supreme Court because it did not seek to "revise . . . and correct . . . the proceedings in a cause already instituted. . . ." 5 U.S. (1 Cranch) at 175. Instead he was seeking to "create that cause," *id.*, and thus was seeking to invoke the original jurisdiction of the Court. But his action did not fit within the two categories article III specified for original jurisdiction. If §13 gave the Supreme Court original jurisdiction in this case, and Marshall had just held that it did, it could only be constitutional if the Constitution permitted Congress to add to the two specified categories of original jurisdiction. Marshall concluded that Congress could not. As he stated: "If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance." 5 U.S. (1 Cranch) at 174.

But, as other commentators have noted, this conclusion was hardly inevitable. The framers could have intended that the two specified categories were to be minimum definitions of the Court's original jurisdiction, with Congress empowered to enlarge but not to restrict it. Alternatively, the framers

might have intended their designation to be the presumed initial distribution with Congress authorized to modify it, if and when it chose. See Corwin II, *supra* note 2, at 540-43; HASKINS & JOHNSON, *supra* note 2, at 199; Currie II, *supra* note 2, at 654; Van Alstyne, *supra* note 2, at 31. Marshall's reading of article III left the Court more vulnerable to congressional checks on the Court's jurisdiction than he may have realized or intended. See Currie II, *supra* note 2, at 660-61; Van Alstyne, *supra* note 2, at 32-33. Indeed, Marshall retreated from some of his broader statements soon after *Marbury*. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 398-402 (1821).

<sup>74</sup> The group of men who served both in the Constitutional Convention and then in Congress during the enactment of the Judiciary Act of 1789 was not unimpressive. It included Oliver Ellsworth, an influential member of the Constitutional Convention, one of the drafters of the Judiciary Act, and Marshall's predecessor as Chief Justice of the Supreme Court; William Paterson, member of the Convention, member of the Senate committee that reported the Judiciary Act of 1789, and associate Justice on the Supreme Court with Marshall; Senators William S. Johnson, Robert Morris, William Few, George Read, and Representatives James Madison, Abraham Baldwin, and Roger Sherman, all of whom participated in the Constitutional Convention and supported the Judiciary Act in Congress. As Beveridge observed, there were at least "twelve men, many of them highly learned in the law, makers of the Constitution, draftsmen or advocates and supporters of the Ellsworth Judiciary Act of 1789, not one of whom had ever dreamed that an important section of that law was unconstitutional." 3 A. BEVERIDGE, *supra* note 2, at 129. See also DOUGHERTY, POWER OF THE FEDERAL JUDICIARY OVER LEGISLATION 82 (1912). As will be discussed *infra* text accompanying notes 114-18, interpretations adopted by the First Congress were generally accorded substantial deference. See e.g., *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 351-52 (1816) (Story, J.) (upholding the constitutionality of another section of the Judiciary Act of 1789, §25, which gave the Supreme Court appellate jurisdiction of state court judgments).

It is an historical fact, that at the time when the Judiciary Act was submitted to the deliberations of the first congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is an historical fact, that the supreme court of the United States has, from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important States in the Union, and that no state tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the supreme



court, until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence of enlightened state courts, and these judicial decisions of the supreme court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts.

See also, *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 395 (1798) (Chase, J.); *id.* at 399 (Iredell, J.); *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 173-75 (1796) (Chase, J.).

<sup>75</sup> See *infra* notes 113-17 and accompanying text.

<sup>76</sup> The case of *United States v. Yale Todd* also raised troubling jurisdictional questions. See *infra* notes 102-03 and accompanying text.

<sup>77</sup> *United States v. Hopkins* was unreported but is described in both the Supreme Court docket and minutes. See Marcus & Perry, *supra* note 22, at 494, 226-28.

<sup>78</sup> Marcus & Perry, *supra* note 22, at 226-28.

<sup>79</sup> It seems fitting that Lee argued on behalf of Marbury. Lee had been appointed one of the new circuit court judges under the Judiciary Act of 1801, the other last minute effort by the outgoing Federalist Party to enlarge and fill the judiciary before Republican President Jefferson was sworn in. Lee declined the appointment, however, and returned to private practice. 1 SEN. EXEC. J. 385 (Feb. 25, 1801).

<sup>80</sup> 5 U.S. (1 Cranch) at 148-49.

<sup>81</sup> There were several other mandamus and prohibition cases before 1803. See *infra* notes 101-04 and accompanying text.

<sup>82</sup> 5 U.S. (1 Cranch) at 149.

<sup>83</sup> 7 U.S. (3 Cranch) 159 (1805).

<sup>84</sup> *Id.* at 172. In *More*, Marshall questioned, *sua sponte*, whether the Supreme Court had appellate jurisdiction over criminal cases from the circuit court of the District of Columbia. 7 U.S. (3 Cranch) at 172. The Court concluded that, notwithstanding contrary precedent in *United States v. Simms*, 5 U.S. (1 Cranch) 252 (1803), the Court had no jurisdiction. 7 U.S. (3 Cranch) at 173. On the other hand, when Marshall found favorable precedent, he would rely on it even if the relevant issue had not been argued or explicitly adjudicated. See e.g., *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), where Marshall held that the Court had appellate jurisdiction to issue a writ of habeas corpus to an inferior court, citing two cases in which the Court had issued a writ of habeas corpus under similar circumstances but had not explicitly considered the jurisdictional issue. *Id.* at 100-01. Justice Johnson, dissenting, pointed out this defect in Marshall's precedents and cited Marshall's own statement in *More*. *Id.* at 104.

<sup>85</sup> 5 U.S. (1 Cranch) at 175.

<sup>86</sup> See, e.g., *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807).

<sup>87</sup> See *infra* note 100.

<sup>88</sup> Currie II, *supra* note 2, at 656, 661; Currie, *The Constitution in the Supreme Court: State and Con-*

*gressional Powers, 1801-1835*, 49 U. CHI. L. REV. 887, 972 (1982) [hereinafter cited as Currie III]. See also, JOHN MARSHALL: COMPLETE CONSTITUTIONAL DECISIONS iv-v (J. Dillon ed. 1903) ("Many of the greatest and most luminous of his constitutional opinions contain scarcely a reference to adjudged cases or to the authority of precedents. . .").

<sup>89</sup> White, *The Working Life of the Marshall Court, 1815-1835*, 70 VA. L. REV. 1, 18 (1984), Marshall is not noted to have been a great historian. On the contrary, as Professor Klinkhamer observed, Marshall has been "charged with plagiarism and historical inaccuracy of the most serious kind in his capacity as the historian or biographer of George Washington. . . ." Klinkhamer, *John Marshall's Use of History*, 6 CATH. U. L. REV. 78 (1956). See also Foran, *John Marshall as a Historian*, AMER. HIST. REV. XLIII 51 (Oct. 1937); J. THAYER, *supra* note 7, at 41-43. Even Marshall was not happy with his biography of Washington. According to Beveridge, Marshall said: "It is one of [my] most desirable objects . . . to publish a corrected edition. . . I would not on any terms . . . consent that one other set of the first edition . . . be published." 3 A. BEVERIDGE, *supra* note 2, at 272. Contrast Charles Beard's comments on Marshall as an "authority, whose knowledge of the period and whose powers of judgment and exposition will hardly be denied by the most critical;" "A historian of great acumen," whose "masterly" *Life of George Washington* is a "great" work. C. BEARD, *ECONOMIC ORIGINS OF JEFFERSONIAN DEMOCRACY* 1, 109, 159, 237 ff., 242 (1915); C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION* 296 ff. (1936).

<sup>90</sup> Currie II, *supra* note 88, at 972.

<sup>91</sup> As several scholars have observed, the Supreme Court itself had previously reviewed the constitutionality of federal statutes, but had found them valid. See e.g., *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796) (an unapportioned tax on carriages not a "direct" tax and therefore not unconstitutional; *Van Horne's Lessee v. Dorrance*, Pa. Cir. reported in 2 U.S. (2 Dall.) 304 (1795); *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792); see generally A. MASON, *THE SUPREME COURT: PALLADIUM OF FREEDOM* 73-76 (1962); Currie II, *supra* note 2, at 655; Van Alstyne, *supra* note 2, at 44. Moreover, there were numerous instances where state courts had held state statutes void under state constitutions, both before 1789 as well as before 1803. See J. GOEBEL, *supra* note 56, at 50-95; HASKINS & JOHNSON, *supra* note 2, at 190. Finally, Marshall could have found support in numbers 78 and 81 of the *Federalist*. *THE FEDERALIST* 489-96, 505-14 (B. Wright ed. 1966). See generally 3 A. BEVERIDGE, *supra* note 2, Appendix C; Van Alstyne, *supra* note 2, at 38-39; C. WARREN, *supra* note 2, at 262.

<sup>92</sup> 3 A. BEVERIDGE, *supra* note 2, at 119.

<sup>93</sup> In *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), Marshall failed to cite *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), notwithstanding its potential usefulness in establishing that a state charter could be a contract. His

colleagues, Justices Washington and Story, wrote unexpectedly long separate concurrences that Professor Currie suggests might have been prompted by Marshall's failure to cite *Fletcher*. Currie III, *supra* note 88, at 908 n.143.

<sup>94</sup> In the landmark case of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Marshall explored the incidental powers conferred on Congress by the "necessary and proper clause." He wrote as if the question were one of first impression and never mentioned his own earlier opinion in *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1804), where the Court had already rejected the contention that the clause required indispensable necessity.

<sup>95</sup> In *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809), the question was whether federal courts had jurisdiction whenever one party was an alien, as the jurisdictional statute seemed to indicate, or only when the other party was a state or citizen of a state, as article III seemed to require. Marshall held that the statute could not extend the jurisdiction beyond article III, and therefore that the failure to allege that one party was a citizen of a state was fatal. 9 U.S. (5 Cranch) at 304. Marshall nowhere mentioned the same holding eight years earlier in *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800). Scholars disagree as to whether *Hodgson* held the jurisdictional statute to be unconstitutional, see HART & WECHSLER, *supra* note 70, at 417 and C. WRIGHT, *supra* note 4, at 93 & n.10, or whether Marshall simply construed the jurisdictional provision narrowly to avoid the constitutional issue, see Mahoney, *A Historical Note on Hodgson v. Bowerbank*, 49 U. CHI. L. REV. 725 (1982). *Mossman* was clearly a statutory construction case. See *id.*, at 734-35.

<sup>96</sup> In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), Marshall established the constitutionality of §25 of the First Judiciary Act without noting until the last paragraph that the Court, only five years earlier in an elaborate opinion by Justice Story, had already upheld its constitutionality. Only after his own long dissertation that essentially retraced Justice Story's reasoning did Marshall indicate that further discussion was unnecessary "because the subject was fully discussed and exhausted in the case of *Martin v. Hunter's Lessee* [14 U.S. (1 Wheat.) 304, 323-52 (1816)]." 19 U.S. (6 Wheat.) at 432.

<sup>97</sup> In *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825) Marshall asserted that "Congress may certainly delegate to others, powers which the legislative may rightfully exercise itself," without citing the arguably helpful precedent of *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813).

<sup>98</sup> Thus, Marshall's failure to cite *Mossman* in *Hodgson v. Bowerbank*, *supra* note 95, may have been because he was unaware of *Mossman*, not having been on the Court when it was decided. Accord Currie II, *supra* note 2, at 680. Another possible reason Marshall may have cited no precedent in *Hodgson* is that *Hodgson* is simply a one line opinion on a relatively easy point. As Professor

Currie suggested, Marshall may have omitted a reference to *Mossman* because the legal point in *Hodgson* was obvious and "Marshall's resolution extemporaneous." *Id.* Marshall's failure to cite *Fisher* in *McCulloch* is harder to attribute to lack of awareness since Marshall wrote *Fisher*. However, it may be that no one mentioned *Fisher* and that even Marshall had forgotten it. Accord Currie III, *supra* note 88, at 931.

<sup>99</sup> Marshall had recused himself in *Martin v. Hunter's Lessee*, when the Court first upheld the constitutionality of §25 of the Judiciary Act of 1789. *Cohens v. Virginia* gave Marshall his first opportunity to address the constitutionality of §25, and he may have been eager to propound his own analysis without being constrained by Story's opinion in *Martin v. Hunter's Lessee*. Marshall may have failed to cite *Fletcher* in the *Dartmouth College* case because the state in the *Dartmouth College* case did not argue that charters could never be contracts. See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 600-15 (1819); *Trustees of Dartmouth College v. Woodward*, 1 N.H. 111, 132 (1817); see also Currie III, *supra* note 80, at 908 n. 143.

<sup>100</sup> In addition to the *More* case discussed *supra*, see also *Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) 110 (1828), in which Marshall distinguished *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) and *United States v. Peters*, 9 U.S. (5 Cranch) 115, 139-41 (1809) (eleventh amendment jurisdictional issue). Similarly, in *Bank of the United States v. Planter's Bank of Georgia*, 22 U.S. (9 Wheat.) 904 (1824), and *Osborn*, 22 U.S. (9 Wheat.) at 817-18 (1824), Marshall distinguished *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809), on the question of the power of the Bank of the United States to sue and be sued. The distinctions did not always convince Justice Johnson who dissented in both instances; however, at least Chief Justice Marshall attempted to find distinctions and did not simply ignore prior conflicting cases.

<sup>101</sup> See *supra* notes 25-30 and 77-78 and accompanying text.

<sup>102</sup> One of these petitions to mandamus a lower court also involved the pension acts. In 1792, Attorney General Randolph tried to get the Supreme Court to order the circuit court for the district of Pennsylvania to hear veterans' petitions. The Court questioned the Attorney General's authority to make such a motion *ex officio*, and he was not allowed to proceed. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). Undeterred, Randolph got a veteran, William Hayburn, to hire him as private counsel and on behalf of Hayburn, Mr. Randolph moved for a writ of mandamus to direct the circuit court to hear Hayburn's petition. *Id.* The Court, however, never ruled on the motion, apparently because Congress was about to modify the Pension Act. *Id.* at 409-10. See *supra* note 13. In another mandamus action, *United States v. Lawrence*, 3 U.S. (3 Dall.) 42 (1795), Attorney General Bradford sought to get the Supreme Court to issue a writ of mandamus ordering District Judge Lawrence to

issue an arrest warrant against Captain Barre, accused by the French of being a deserter. The Court denied the writ because "the district judge was acting in a judicial capacity, when he determined that the evidence was not sufficient to authorize his issuing a warrant for apprehending Captain Barre; and, whatever might be the difference of sentiment entertained by this court, we have no power to compel a judge to decide according to the dictates of any judgment but his own." 3 U.S. (3 Dall.) at 53. The Court appears never to have questioned its jurisdiction. In *Fitzbonne & Allard v. Judge of the District Court for the District of New York*, an unreported case, the plaintiffs sought a writ of mandamus from the Supreme Court directing the district court to proceed to judgment in a naturalization proceeding. The Supreme Court granted a motion to show cause on August 12, 1800. See Marcus & Perry, *supra* note 22, at 328. Thereafter, there are no further entries on this matter in the Supreme Court. Accord J. GOEBEL, *supra* note 56, at 785 n.77.

<sup>103</sup> As was suggested in *Marbury*, and confirmed in later cases, it is constitutional for the Supreme Court to issue writs of mandamus to inferior courts to protect its appellate jurisdiction. See 5 U.S. (1 Cranch) at 175; see also *Ex Parte United States*, 287 U.S. 241 (1932) (a case virtually identical to *United States v. Lawrence*, *supra* note 102, in which the Court issued the writ, holding that the mere possibility that the case might ultimately come to the Court for review meant that the case was within its appellate jurisdiction).

<sup>104</sup> In addition to the six mandamus actions — Randolph's motion (*supra* notes 21-25 and accompanying text), *Chandler* (*supra* notes 25-30 and accompanying text), *Hopkins* (*supra* notes 77-78 and accompanying text), *Hayburn* (*supra* note 102, *Lawrence* (*supra* note 102), *Fitzbonne and Allard* (*supra* note 102) — there were also three petitions in the Supreme Court for writs of prohibition, the other extraordinary writ authorized by §13 of the Judiciary Act of 1789. See *United States v. Peters*, 3 U.S. (3 Dall.) 121 (1795); *United States v. Judge of District Court of United States for District of Virginia*, unreported, cited in Marcus & Perry, *supra* note 22, at 272; *United States v. Bache*, unreported case, described in *id.* at 309. All three writs were to be directed to inferior courts. The Supreme Court granted the requested writs in the first two cases, see 3 U.S. (3 Dall.) at 129-32; the third case was abated in 1799 when the respondent died. See Docket of the Supreme Court, in *id.* at 522. In none of the cases did jurisdiction appear to be an issue.

<sup>105</sup> 3 A. BEVERIDGE, *supra* note 2, at 128.

<sup>106</sup> Professor Currie claimed that Marshall's contention that the original jurisdiction of the Supreme Court could not be expanded was not a new theory, citing the Supreme Court Justices' 1790 letter to President Washington objecting to circuit duty and Justice Chase's 1802 letter to Marshall claiming that the repeal of the Judiciary Act of 1801 was unconstitutional. Currie II, *supra* note 2, at 655 n.58. (The

Justices' letter to George Washington and Washington's original request for their views on the judiciary generally are reprinted in 3 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES*, 436-38 (Boston 1858). No proof exists that the Justices' letter was ever sent. Justice Chase's 1802 letter is reprinted in HASKINS & JOHNSON, *supra* note 2, at 172-77 n.182). We disagree. The Justices' 1790 letter, while pertinent, does not appear to address the question of whether Congress can enlarge the Supreme Court's original jurisdiction. The Justices argued that article III gives the Supreme Court "original jurisdiction in only two cases, but in all the others vests it with appellate jurisdiction" because, the Justices said, the framers believed it inappropriate for the "ultimate appellate jurisdiction" to be combined with original jurisdiction. From this premise, they argued that it was unconstitutional to make Supreme Court Justices exercise original jurisdiction in cases that might later be heard as appellate cases in the Supreme Court. *Id.* Without regard to the persuasiveness of their argument, it does not address the question of whether Congress can move a matter from the Supreme Court's appellate jurisdiction to its original jurisdiction, especially if the Supreme Court continues to be the ultimate judicial authority in the matter and will not be called upon to review its own decision at a later time. The Justices' 1790 letter was concerned with the impropriety of having members of the Supreme Court review, on appeal, their own decisions or decisions of their colleagues sitting as trial judges. Nothing of the sort is involved in Congress's moving cases from appellate to original jurisdiction and we can gain no insight into the Justices' view of that question from their 1790 letter.

Justice Chase's 1802 letter to Chief Justice Marshall argued that repeal of the Judiciary Act of 1801 and the consequent reimposition of the Justices' circuit riding duties was unconstitutional. As one step in a complicated argument, Chase asserted that Congress could not move cases from the Supreme Court's appellate jurisdiction to its original jurisdiction. His view was premised on his belief, never accepted by the Supreme Court, that Congress was constitutionally required to establish inferior courts and vest them with original jurisdiction of all matters not assigned by the Constitution to the Supreme Court's original jurisdiction. Thus, according to Chase, enlarging the Supreme Court's original jurisdiction would entail diminishing the original jurisdiction of the inferior courts and would mean that "the citizen would be deprived of the benefit of a hearing in the inferior Tribunals." HASKINS & JOHNSON, *supra* note 2, at 173 n.182. Justice Chase concluded that Congress could not constitutionally require Supreme Court Justices to sit on Circuit Courts because they might have to hear and decide, as original matters, cases that article III had defined to be in the Supreme Court's, as well as the individual Justice's, appellate jurisdiction. *Id.* at 176. Without regard to the persuasiveness of Chase's convoluted logic, it was given in 1802 —



after *Marbury* was first instituted and shortly before it was decided — and thus does not undermine our opinion that the prevailing view of article III in the 1790's was that the Supreme Court's original jurisdiction could be enlarged. See also, Nelson, *supra* note 2, at 941 (distinguishing question of constitutionality of riding circuit from question in *Marbury*).

<sup>107</sup> See *supra* note 73. In fact, *Yale Todd* presented another potentially troubling jurisdictional question. The statutory basis for Supreme Court jurisdiction of the case was not obvious. Nothing in the Judiciary Act of 1789 seemed to fit. The most likely statutory candidate was Congress's 1793 directive to the Attorney General and Secretary of War to seek an adjudication from the Supreme Court. See *supra* note 19. That would be an oblique, but not necessarily ineffective, way to define jurisdiction and, in fact, the Supreme Court later read the 1793 Act to provide such jurisdiction. See *Florida v. Georgia*, 58 U.S. (17 How.) 478 (1854).

<sup>108</sup> *United States v. Ferreira*, 54 U.S. (13 How.) 40, 53 (1851).

<sup>109</sup> "A Bill to Provide for the Better Establishment and Regulation of the Courts of the United States," 6th Cong., 1st Sess., introduced Mar. 11, 1800, CONGRESSIONAL COLLECTION, Rare Book Room, Library of Congress. Section 5 provided in its entirety:

And be it further enacted, that where any state, body politic or corporate, company, or person, shall have any demand against the United States, for or on account of any debt, contract, or damages whatsoever; or shall claim the right of soil in, of, or to any land held or possessed by the United States; it shall be lawful for such state, body politic or corporate, company, or persons, to file a petition in the Supreme Court of the United States, setting forth, fully and particularly the matter and grounds of such demand or claim, and praying redress; and also to serve the attorney general of the United States with a copy of such petition; whose duty it shall be thereupon, to appear in the said court, on the part of the United States and defend such demand or claim and that the said court shall be, and hereby is, authorized and empowered to hear such petition, and to inquire into the matter and grounds thereof, and to decree therein, according, to the rules and principles received and practiced in courts of equity; which decree, so rendered, shall be, to all intents and purposes, binding on the United States, the faith of which is hereby pledged to stand to and perform the same.

<sup>110</sup> Mr. Gallatin apparently moved to strike the provision on March 25, 1800, after which a "lengthy debate then ensued." 10 ANNALS OF CONG. 645 (1800). The provision was struck on March 26. *Id.* No debate or vote was recorded. Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 WM. AND MARY Q. 3, 11-13 (1965).

<sup>111</sup> *Haskins & Johnson*, *supra* note 2, at 124; Turner, *supra* note 110, at 12 n.48. Marshall de-

fended the bill on the floor of the House. 10 ANNALS OF CONG. 646 (1800).

<sup>112</sup> Indeed, it is interesting that Marshall did not try to use the earlier mandamus cases to strengthen his argument. Arguably, he could have cited them to show not only that the Court had apparently not issued any writs of mandamus in the past, but also that considering the merits first was an acceptable mode of analysis. His failure to do so tends to confirm our belief that Marshall knew they could not fairly be cited to support his jurisdictional argument and that ignoring them was the better approach.

<sup>113</sup> As Professor Currie noted, issues of federal jurisdiction constituted a significant portion of the Court's docket during this period. See Currie I, *supra* note 47, at 822-53; Currie II, *supra* note 2, at 650. Thus, for example, the Court confronted and decided questions regarding Congress's power to limit the Court's appellate jurisdiction in *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 321 (1796) and to restrict diversity jurisdiction in *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8 (1799). Similarly, in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 450-51 (1793), the Court held that article III's provision for jurisdiction over a "controversy between a State and citizen of another State" included those in which the state was the defendant. In addition, when Attorney General Randolph tried on two separate occasions to petition the Court for a writ of mandamus in the pension cases, the Court, *sua sponte*, questioned his authority to make such a motion and ultimately refused to allow him to proceed. See *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); letter from Edmund Randolph to Henry Knox (Aug. 9, 1793), printed in 1 AMERICAN STATE PAPERS, MISCELLANEOUS, at 78 (Washington 1834). Finally, in *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800), the Court strained to read a jurisdictional statute narrowly to avoid a broader reading that was more likely to have violated article III, a technique of statutory construction Marshall failed to use in *Marbury*.

<sup>114</sup> 5 U.S. (1 Cranch) at 148-49; see *supra* note 82.

<sup>115</sup> 19 U.S. (6 Wheat.) 264, 418, 420-21 (1821). Marshall also relied on the early interpretation of Congress coupled with judicial acquiescence in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Regarding Congress's power to create a bank, Marshall noted that Congress had done so as early as 1791 and said:

The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation. . . . An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property had been advanced, ought not to be lightly disregarded. 17 U.S. (4 Wheat.) at 401.

<sup>116</sup> See, e.g., *Martin v. Hunter's Lessee* discussed *supra* note 74.

<sup>117</sup> 5 U.S. (1 Cranch) 299 (1803).

<sup>118</sup> 5 U.S. (1 Cranch) at 309 (emphasis added.) The Justices upheld the constitutionality of the practice of riding circuit, notwithstanding its burdensomeness, their intense hatred for the practice, and their prior opinion that it was unconstitutional. See draft letter from John Jay *et al.* to President Washington reprinted in 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 436-38. See also text accompanying note 106.

The opinion in *Laird* was delivered by Justice Paterson. According to Cranch's Report, Marshall "having tried the cause in the court below, declined giving an opinion." 5 U.S. (1 Cranch) at 308. The Court's decision affirmed the judgment of the court below, which had been rendered on the technical insufficiency in form of the defendant's plea. C. WARREN, *supra* note 2, at 273 n.1.

<sup>119</sup> Unanimity was important to the Chief Justice. See White, *supra* note 3, at 34-38.

<sup>120</sup> Letter from Samuel Sewall to William Cushing (Feb. 25, 1800), WILLIAM CUSHING PAPERS, Mass. Historical Society; see also *supra* note 74 and accompanying text.

<sup>121</sup> See *supra* note 106 and accompanying text.

<sup>122</sup> Section 1, 2 STAT. 156 (1802). Congress, in this April, 1802 Judiciary Act that followed the repeal of the Judiciary Act of 1801, see *infra* note 128, revised the Supreme Court's term to insure that the Court would not have the opportunity to rule on the constitutionality of the Repeal Act before the Justices, as individuals, had to decide whether to acquiesce in the repeal by riding circuit. See HASKINS & JOHNSON, *supra* note 2, at 167-68.

<sup>123</sup> The Judiciary Act of 1801 had significantly extended federal jurisdiction and enlarged the federal judiciary. It established an entirely new set of circuit courts staffed with its own judges (and filled with appointments by outgoing President Adams). Supreme Court Justices were no longer required to ride circuit. 2 STAT. 89 (1801).

<sup>124</sup> Salem Register, Jan. 28, 1802, as quoted in C. WARREN, *supra* note 2, at 205.

<sup>125</sup> Aurora, Dec. 30, 1801.

<sup>126</sup> Letter from Breckinridge to James Monroe (Dec. 24, 1801) JAMES MONROE PAPERS (microfilm series 1, reel 2) Library of Congress.

<sup>127</sup> Letter from Mason to James Monroe (Dec. 21, 1801), JAMES MONROE PAPERS (microfilm series 1,

reel 2), Library of Congress.

<sup>128</sup> See Judiciary Act of 1801, 2 STAT. 89 (1801); JUDICIARY ACT OF 1802, 2 STAT. 156 (1802); see also *supra* note 123.

<sup>129</sup> See letter from Abner Mott to John Rutledge (Feb. 20, 1802), JOHN RUTLEDGE PAPERS, Southern Hist. Coll., Univ. of N.C.; letter from Roger Griswold to ? (Feb. 26, 1802), WILLIAM GRISWOLD LANE MEM. COLL., Yale Univ.

<sup>130</sup> As explained *supra* note 122, an 1802 act postponed a meeting of the Court until February, 1803, but the repeal act went into effect in July 1802 and the Justices were required to conduct the fall circuits.

<sup>131</sup> The story of how the Supreme Court Justices made their decision on whether to acquiesce in the repeal and to ride circuit is long and interesting but is not germane to this Article. For a complete account, see HASKINS & JOHNSON, *supra* note 2, at 168-81.

<sup>132</sup> See HASKINS & JOHNSON, *supra* note 2, at 406; Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution* (Book Review), 96 HARV. L. REV. 355, 359 (1982); Nelson, *supra* note 2, at 932-42; see also *Goldwater v. Carter*, 444 U.S. 996 (1979); *Powell v. McCormack*, 395 U.S. 486 (1969); *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>133</sup> Arguably, the Court's decision to ignore the past rather than distinguish it was vindicated by the contemporary reaction to the decision. As Charles Warren noted, see *supra* note 70, the focus of attention was principally on the Court's assertion of power over the executive and the fact that the assertion was unnecessary given the Court's holding of no jurisdiction. Little attention was directed to the Court's decision that it had no jurisdiction, and there was no apparent recognition of any inconsistency with prior practice and understanding. Thus, one can contend that, by ignoring any potential conflict with precedent and not trying to distinguish prior practice, the Court avoided scrutiny of that part of its opinion. On the other hand, it is certainly plausible that no matter how the Court had structured its jurisdictional argument and no matter how openly it had acknowledged prior cases, the focus of attention would have remained on the Court's asserted power to examine the lawfulness of executive action.

<sup>134</sup> See *supra* notes 102-04 and accompanying text.

# The Judicial Bookshelf

by D. Grier Stephenson, Jr.<sup>1</sup>

Few students of the Supreme Court and the Constitution read very far before encountering *McCulloch v. Maryland*.<sup>2</sup> In this decision, the Court held that Congress could charter a national bank even without express authorization in the Constitution and that the states could not tax it. The ruling formally recognized both a deep reservoir of legislative power within the Constitution and a subordinate place for the states in the federal system. Moreover, the Supreme Court, as expounder of the Constitution, would correspondingly have a narrow but nonetheless essential role, protecting national interests from improper inroads by the states. Yet as important as the ruling was in cementing the foundations of national supremacy, Chief Justice Marshall's opinion of the Court was vigorously criticized in some quarters at the time. Marshall even felt compelled to resort to the newspapers in anonymously written defenses of his position.<sup>3</sup>

Nearly a decade later the controversy over *McCulloch* had not subsided. In a review of Kent's *Commentaries*, Hugh Swinton Legaré, later Attorney General and Secretary of State in President Tyler's administration, declared that the decision of 1819 "gave the government an unbounded discretion in the choice of 'means' to effect its constitutional objects. . . . [T]here is no end to the consequences that may and will be deduced from the doctrine in *McCulloch's* case," he declared.

The amount of it really is, that the enumeration of powers in the constitution was a vain attempt to confine what is necessarily illimitable—that such an instrument never can ascertain its objects with any sort of precision—that it can, at most, hint a vague purpose and sketch a sweeping outline, which is to be filled up at discretion—in short, that it is not the plan of a government formed and settled, and circumscribed from the first, . . . but a mere nucleus around which a government is to be formed, according to the circumstances of the times, and the

opinions of mankind. Such a principle being once established, no man can pretend to anticipate what shape the constitution of the United States . . . is destined to take.<sup>4</sup>

For Legaré, the Supreme Court had renounced a responsibility. "We venture to predict that no act of the federal government . . . will ever be pronounced unconstitutional in that court, for the simple reason that the principle of *McCulloch's* case covers the whole ground of political sovereignty, and consecrates usurpation in advance." In the short run, Legaré was right. From 1803 until the unusual circumstances of the *Dred Scott* case in 1857, the Supreme Court refrained from declaring any act of Congress unconstitutional. Still, the real significance of Legaré's assessment went further than dissatisfaction with the holding in the bank case. Legaré explicitly accepted the Court's role as guardian of the Constitution, expecting the Court to protect state interests against inroads by Congress. Legaré's critique, therefore, was no attack on judicial review, but a pointed reprimand. The Court had read national powers so broadly as to make its future exercise against Congress highly unlikely. *McCulloch* threatened state prerogatives.

Skirmishes over *McCulloch* of course did not conclude the debate. The political heirs of Marshall and Legaré continue the dialogue on the nature of constitutional limitations and the role of the Supreme Court in giving them meaning. The subject guarantees that the Supreme Court will not soon suffer from inattention in political and legal literature, as recent volumes attest.

## The Justices

John Marshall's leadership in decisions such as *McCulloch* during some 34 years as



head of the Supreme Court earned him the acclamation of "the great Chief Justice." Leadership is the subject of Robert J. Steamer's *Chief Justice*.<sup>5</sup> He observes correctly that in a few instances "the presidential choice of a chief justice has been the president's most enduring contribution to the nation's political culture."<sup>6</sup> This is certainly true with President John Adams' appointment of Marshall in the waning days of his administration in 1801. It is probably true with respect to President Hoover's nomination of Charles Evans Hughes in 1930, President Grant's choice of Morrison Remick Waite in 1874, and President Harding's selection of William Howard Taft in 1921. It may even be true of President Eisenhower's naming of Earl Warren in 1953. Surely few of Eisenhower's decisions and policies have had a more lasting impact on the nation.

Rather than undertaking a chronological study of the chief justices from Jay through Burger, Steamer has instead adopted a comparative approach, examining chiefs in the various ways in which leadership has manifested itself. Coverage is uneven, as one would expect. Jay, Rutledge, and Ellsworth, the first three chief justices, served for very short periods (Rutledge for only six months), and with a relative scarcity of cases, the opportunity for measurable impact was small. Moreover, attention given to Chief Justice Burger is less than to, say, Warren or Fuller because Steamer completed his writing prior to Burger's retirement in 1986 — before the record for the fifteenth Chief Justice had fully run its course.

Part of the context of judicial leadership is the change the office has experienced since 1789, especially in arenas outside the Supreme Court. This makes comparisons more difficult. Public expectations for a Warren Burger were vastly different from those for a John Marshall or a Roger Taney. Aside from working one's influence on public policy through cases decided by the Court (the internal dimension of leadership), today's Chief Justice confronts demands outside the Court that are far removed from those of the nineteenth century. The external dimension of the chief justiceship now requires the occupant to preside over the Judicial Conference of the United States and to supervise the Adminis-

trative Office of the United States Courts as well as to handle other administrative chores, to lobby for legislation to improve the administration of justice, to defend the judiciary from political assaults from without, to communicate with the organized bar and law schools on matters of common interest, and to fulfill a ceremonial component in the public's eye. All of these, says Steamer, require "an uneven amalgam of managerial dexterity, social adroitness, and intellectual powers," and, one should add, political acumen.<sup>7</sup>

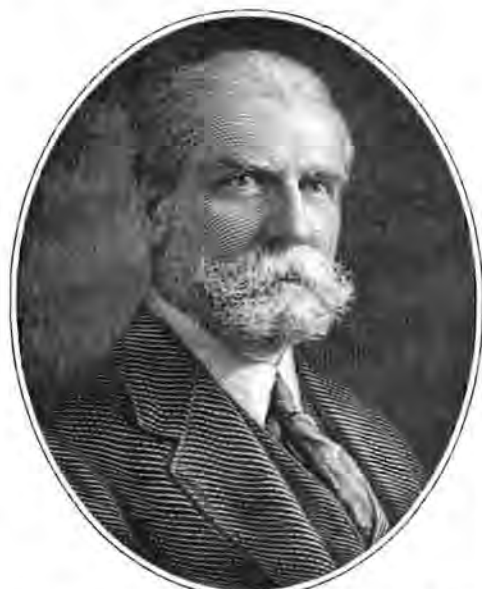
Steamer attempts to answer a series of questions: What has been a particular chief's impact on constitutional development? What are the qualities which have made some chief justices great leaders? Why has prior political success or legal accomplishment not prevented mediocrity in the office? What connection appears between judicial statesmanship and legal craftsmanship? From answers to these and related questions, Steamer generates not a quantitative measure of leadership but a characterization of those who excelled and why. Noting Charles Evans Hughes' observation that "the ways in which the Court does its work give [the chief justice] a special opportunity for leadership," Steamer attempts to provide a look at how fifteen chiefs have used that "special opportunity."

Additionally, judicial greatness requires that "the incumbent be a judge whose views of the Constitution and of the law must be thoughtfully formulated and expounded in a written opinion. . . ." The Chief must be able "to carry his intellectual weight" in order to build and to maintain respect with colleagues and with the Court's constituencies in the legal profession, the academy, and the public at large. Potentially, in the right hands the office of Chief Justice in power, prestige and authority can be, and sometimes has been, "second only to the presidency."

Steamer's conclusions confirm widely held impressions. There are few surprises. In overall performance, the nation has been well served by holders of an office the Constitution mentions but does not describe. Excepting John Rutledge who hardly had a chance, Steamer believes that "all have left a personal imprint on the Court's work and in greater or less degree on American constitutional development." Marshall, Hughes, and Warren re-



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According to Robert Steamer's *Chief Justice*, some of the success enjoyed by Chief Justices John Marshall (left) and Charles Evans Hughes (right) was attributable to both men's political acumen.

ceive the highest ratings, yet the author is quick to add that they necessarily had neither "the most imaginative minds" nor were they necessarily "the most deft managers." Especially for Marshall and Hughes, they succeeded because they were "very skillful politicians" in the internal and external dimensions of judicial life.<sup>9</sup>

During the years of his incumbency Warren never faced a president bent on limiting institutional power as did Marshall with Jefferson or Hughes with Roosevelt. Nor were the Warren Court's decisions ever without considerable support throughout the country. The buckshot approach taken by Congress [in Warren's years], while harassing and not to be discounted, was never as formidable a political threat as the big cannon aimed by President Roosevelt.<sup>10</sup>

Contributing to leadership is the combination of personalities on the bench at a particular time. While the chief's character and demeanor are surely factors, so are the character, demeanor, and attitudes of each of the associate justices. Insights into seventeen present and former justices appear in *The Supreme Court and Its Justices*,<sup>11</sup> a collection of essays on the Supreme Court and its members. Edited by Jesse H. Choper, the volume reprints twenty-six articles from the *ABA Journal*, including eleven by, and twelve about, individual justices. In a few instances, an essay about one justice is authored by another, as in

the case of Chief Justice Warren's "Chief Justice Marshall: Expounder of the Constitution."

Choper has divided the volume into seven sections, six of which contain two or more essays: (1) Establishment of the Power of Judicial Review, (2) Portraits of Past Justices, (3) Qualities, Characteristics and Activities of Past Justices, (4) The Court as a Center of Controversy, (5) Internal Operation of the Court, (6) Appointment of New Justices, and (7) Lawyering Before the Court. While most of the essays are recent in origin, several are not. "Roger Brooke Taney: A Great Chief Justice" by Charles Evans Hughes appeared originally in 1931 and contributed to the restoration of Chief Justice Taney's reputation in scholarly circles. Harry C. Shriver's "Oliver Wendell Holmes: The Lawyer" was first published in 1938 and is one of two essays in the book on the Olympian. Robert H. Jackson assessed "The Judicial Career of Chief Justice Charles Evans Hughes" while he was Attorney General, just before his own appointment to the Court following Harlan Stone's move to the center chair in 1941. And Justice Harold H. Burton's classic "*Marbury v. Madison*: The Cornerstone of Constitutional Law" was featured in a 1950 issue of the *Journal*.

Among the most recent entries are two by Justice Lewis F. Powell, Jr., who retired from

the Supreme Court in June 1987, after fifteen and a half years of service. "Myths and Misconceptions About the Supreme Court" and "What Really Goes on at the Supreme Court" are instructive not only about the Court but about Justice Powell as well. Implicit in each is deep institutional loyalty and affection, a hope for public appreciation of the nature of the Court's work, and a belief in civility and collegiality if the Justices are to do their work well. "If I seem partisan on behalf of the Court, it is because I am," says Powell.<sup>12</sup>

Myths Justice Powell debunks include "long 'vacations,'" "the mysteriously light workload" (where he takes issue with the late Justice Douglas' contention that the Court is "vastly underworked"), "law clerks' influence," the impropriety of five-four decisions (where he notes that the kinds of issues the Court faces guarantee a large number of such splits each term), and the prevalence of "discords" and "blocs." Journalists who interpret the Court's work to the public fail "to understand that judges, like lawyers, may disagree strongly without personal rancor or ill will. The fact is that a genuine cordiality exists among the justices. . . . [U]se of the word *bloc* reflects a serious misconception of the way the Court functions and suggests some invidious degree of collaboration in the decisional process."<sup>13</sup>

Written after publication of *The Brethren*,<sup>14</sup> his second essay argues that "the extent of our secrecy is greatly exaggerated."<sup>15</sup> Engaging in what Holmes once called "the elucidation of the obvious," Powell reminds readers that secrecy for deliberations is essential. "The integrity of judicial decision making would be impaired seriously if we had to reach our judgments in the atmosphere of an ongoing town meeting." Similarly, Justice Powell defends the Court against charges in the media that the institution has become "rudderless." The absence of a dominant "judicial or ideological philosophy" is a sign of strength, he writes. It is evidence that "justices recognize no obligation to reflect the views of the president who appointed them," an indication of "a long tradition at the Court of independent decision making."<sup>16</sup>

Enhancing the value of these and other selections is their accessibility. So often essays of similar merit from across the years remain

scattered among dozens of dusty bound periodicals on library shelves or wound on reels of microfilm. And in many libraries they are unavailable in any medium. Students of the Court can be pleased that so many contributions have been given new life in a new form.

### The Court At Work

Because the Supreme Court is a collegial body, understanding interactions among the Justices and between the Court and the larger political system is therefore essential to understanding the institution. This is the objective of David M. O'Brien in *Storm Center*.<sup>17</sup> Exploring judicial tempest and calm alike, O'Brien has written one of the most useful and most thoroughly researched volumes on the Court to appear in a long time. For example, he examined the private papers of 55 justices (including the papers of Justice Brennan and the late Justice Douglas), over half the number of all who have ever served on the High Court. Moreover, he had correspondence or discussions with former Chief Justice Burger as well as Chief Justice Rehnquist and Justices Brennan, O'Connor, Powell, Stevens, Blackmun, Marshall, and White, as well as the late Justice Stewart.

Because the Supreme Court's role in American government is at once both anti-democratic and counter-majoritarian, O'Brien agrees with Chief Justice Edward White that its power rests "solely upon the approval of a free people."<sup>18</sup> The operation of the Court accordingly becomes a topic worthy of study beyond reasons of scholastic curiosity. How the Court decides cases — the institutional dynamics that are at work — may well affect public attitudes toward the Court and therefore the way its decisions are received.

*Storm Center* flashes a caution light on how the Court performs its tasks. Looking at the Burger Court, O'Brien believes that it became "increasingly bureaucratic in response to growing caseloads." The result has been, O'Brien finds, a Court now functioning "more like a legislative body," with a decision typically being more like an event than a process. The danger is that such trends "in turn lead to less certainty, stability, and predictability in the law."<sup>19</sup>



By "bureaucratization" O'Brien presumably means the addition of staff at the Court, including clerks for individual Justices, hired for specific duties because of their expertise, who operate in a hierarchy of authority. More work is therefore done by persons other than the Justices themselves, casting a shadow over Justice Brandeis' observation that "the reason the public thinks so much of the Justices of the Supreme Court is that they are almost the only people in Washington who do their own work."<sup>20</sup> Evidence for a shift toward legislative-like behavior is a decrease in collegiality and socializing among the Justices necessitated by an increased caseload and a marked increase in the number of highly politicized cases the Court now chooses to hear.

The press of time in turn leads to the filing of more dissents and concurrences, a task made easier with the advent of word processing. Differences among the Justices become fixed rather than compromised. In the years of the Burger Court at least, O'Brien found a reinforcing of "ideological and personal differences."<sup>21</sup> By contrast, until the end of Chief Justice Hughes' time on the Court, the difference between the number of opinions for the Court (majority opinions) and the total number of opinions (including majority and separate opinions) was very small. During Chief Justice Warren's tenure, however, the latter figure became more than twice the former figure, meaning that individual dissenting and concurring opinions now substantially outnumber majority opinions. Opinions are also longer on average than they were fifty years ago, a significant development since there are now so many more opinions. The trend, which O'Brien terms "legislative," is for Justices to "stake out" rather than to compromise positions. One recalls the situation which generally prevailed prior to Chief Justice Marshall's appointment when Justices routinely filed *seriatim* opinions, making "the Court's" position more difficult to ascertain.

Partly responsible for this phenomenon are the kinds of cases the Court hears today: major questions of constitutional and statutory interpretation. "These are areas in which the justices are most likely to disagree and to be least inclined to compromise."<sup>22</sup> In Frankfurter's words, "constitutional law . . . is not at

all a science, but applied politics. . . ."<sup>23</sup> Moreover, greater workloads leave less time for resolving differences. "There is less of this than one would like," admits Justice Powell, "primarily because of our heavy case load and the logistical difficulties of talking individually to eight other justices."<sup>24</sup> O'Brien believes that Justices may be "less willing to withdraw concurring or dissenting opinions because of the time their clerks devoted to them."<sup>25</sup> Finally, the more individualized stands that are taken publicly, the more Justices feel constrained from compromising their views in the future for fear of seeming inconsistent.

*Storm Center* also portrays the Court at work in the context of deciding particular cases. Especially instructive are the accounts of decision making in *United States v. Nixon* and *Griswold v. Connecticut*. Readers learn more than has been made available in any other source.<sup>26</sup> In the Connecticut birth control case, for example, an early draft of Justice Douglas' majority opinion rested on a First Amendment right of associational privacy, as in *N.A.A.C.P. v. Alabama*.<sup>27</sup> In a three-page memorandum to Douglas, Justice Brennan suggested instead the penumbral approach the published opinion of the Court contains. For Brennan, the change in grounding "would be most attractive to me because it would require less departure from the specific guarantees and because I think there is a better chance it will command a Court."<sup>28</sup>

Despite such examples of collegiality, O'Brien believes that the recent trends he has highlighted are "likely to continue regardless of future appointments and attempts to curb the Court." Both the nature of the Court's docket and its internal procedures have combined to give "the Supreme Court a new, more difficult role to play in American political life."<sup>29</sup>

If O'Brien's book presents a "macro" view of the Court, Bernard Schwartz in *Swann's Way*<sup>30</sup> provides a "micro" look at one of the Burger Court's most far-reaching decisions: *Swann v. Charlotte-Mecklenburg Board of Education*.<sup>31</sup> This was the first decision by the Supreme Court explicitly approving busing as a remedy for racial segregation in urban areas. While its focus was southern, it was nonetheless a precursor of decisions affecting other



David O'Brien's *Storm Center* includes many inside glances of the Supreme Court at work. Among these is an instance in which Justice William Brennan (left) prevailed upon Justice William O. Douglas (right) to change the foundation upon which he based the Court's majority opinion in *Griswold v. Connecticut*.

parts of the nation. Throughout his account, Schwartz offers ample corroboration of Justice Clark's observation that "differences of opinion must be expected on legal questions as on other subjects. . . . The history of progress is filled with many pages of disagreement. Why, therefore, . . . expect 'the most influential men . . . on the bench . . . trained in different philosophy and matured in a different climate' to have the same thoughts and views? They don't and they won't."<sup>32</sup>

Schwartz presents what is probably the most detailed account in the literature of the Supreme Court's decision-making process in a single case. To accomplish this task he drew from several manuscript collections, interviews with several present and former Justices, as well as customary primary and secondary sources. When *Swann's Way* appeared in 1986, five Justices (Brennan, White, Marshall, Blackmun, and Burger) who participated in *Swann* were still on the Court. (Chief Justice Burger retired at the end of the term in 1986, and Justices Powell and Rehnquist were not

named to the Court until eight months after *Swann* came down. Justice Stevens did not join the Court until after Justice Douglas' retirement in 1975.) Questions regarding propriety naturally arise when memoranda prepared in confidence reach the public's eye while Justices concerned are still sitting. The same question applies in some places to O'Brien's *Storm Center*.

Fifteen years, however, separate the decision in the case and publication of Schwartz's book. Less time than that had elapsed when Alpheus Mason's ground-breaking biography of Chief Justice Stone appeared in 1956, just eleven years after Stone's death.<sup>33</sup> Moreover, several members of the Stone Court were therefore still sitting when heretofore secret details of judicial deliberations saw the light of day. And parts of the Stone biography had already been published as articles in law reviews. Controversial in some quarters at the time, intervening decades have accustomed almost all scholars and Court publicists to the acceptability of Mason's timing. Certainly when the cases have

been long decided, the materials made available by the Justices themselves or their estates, and full documentation provided by the author, the public gains and the Court benefits from scholarly scrutiny.<sup>34</sup>

In *Swann*, each member of the Court recognized the case's importance. Not only was the question raised a significant one, but the Court had its own record of unanimity in school segregation cases to protect. Moreover, Warren Burger was in one of his first terms as Chief Justice, with the need to establish leadership on the bench. Finally, all were aware of the much-publicized promises of the Nixon administration, growing out of the presidential campaign of 1968, to restrict the effects of *Brown v. Board of Education*<sup>35</sup> and its progeny.

Schwartz's account demonstrates the lengths to which a new chief justice might go to retain the appearance of leadership. According to Schwartz, Burger's views on the case were not shared by a majority of the Justices. Burger was inclined to curtail the broad prohibiting order issued by United States District Judge McMillan in Charlotte. Justice Black as well believed the remedy went beyond what the Constitution required. This division resulted in a judicial tug-of-war. Through six drafts the majority pulled Burger toward their understanding of the case, while several members of the Court became sensitized to his objections. Justice Black went so far as to prepare a draft dissent which he circulated, perhaps as a bargaining ploy, within days of the day *Swann* was actually announced. Schwartz explains how Black's position placed Burger in the middle between a more restrictive position and that of Justices like Brennan who wanted a resounding affirmation of the steps Judge McMillan had taken in the case. "Even Brennan could conclude," Schwartz says, "that the Burger draft joined by all was still preferable, with all its imperfections, to a further refining process that would produce the sharp Black dissent."<sup>36</sup> The opinion thus brought the Court together in a statement which perfectly reflected no Justice's views.

After the decision had been announced, Fifth Circuit Appeals Judge Griffin Bell confessed to a reporter, "It's almost as if there were two sets of views laid side by side."<sup>37</sup> Schwartz shows how this came about.

The blending of dissent and agreement which Schwartz observed in *Swann* is the subject of Sheldon Goldman and Charles Lamb's *Judicial Conflict and Consensus*,<sup>38</sup> a volume of twelve original essays on appellate court decision-making in the United States. Four concern the United States Supreme Court, four the United States Courts of Appeals, and four the state supreme courts. Focus is on judicial *behavior*, not the reasoning put forth in the opinions themselves.

The editors' reasons for commissioning the studies include, first, increased "understanding of American collegial courts as legal policy-making institutions." Second, because appellate courts have substantial power in American government, "examination of conflict on courts may tell us about a variety of ways in which that power is or can be exercised." Third, students of the judicial process will learn more about the internal operations of courts. This suggests a fourth reason: enhancing one's knowledge of "the individual attitudes and values of judges." Consideration of the concept of "judicial role" is offered as a fifth basis, with the sixth being an improved ability "to draw inferences about the exercise of leadership on courts."<sup>39</sup>

Sidney Ulmer's "Exploring the Dissent Patterns of the Chief Justices: John Marshall to Warren Burger,"<sup>40</sup> the second essay in the collection, is of particular interest. Noting the obvious incentives for a chief justice not to dissent, Ulmer first surveys the number of dissenting votes cast by individual chief justices as recorded in the *Reports*. Despite the essay's title, complete comparative data in the study include the Warren Court, but not the Burger Court since the research had been completed well before Chief Justice Burger's retirement. Since the dissent rates vary sharply by chief justice, Ulmer then attempts to account for the differences. Overall, the percentage of nonunanimous cases ranged from a low of 7 percent in the Marshall Court to a high of 75 percent in the Vinson Court. The rate for the Warren Court was 69 percent. Moreover, with only two exceptions, each succeeding court has shown a higher percentage of 5-4 cases (or their equivalent) than its predecessor. This fact, Ulmer notes, is consistent with the proposition that cases decided by



the Supreme Court have become more complex and that disunity has increased as the Justices have gained a greater say in selecting cases for review.

Within the pool of all cases decided (from a low of 704 during the Stone years to a high of 4866 in the Fuller years), the chief's dissent percentage ranged from a low of less than 1 (Marshall) to a high of 13 (Stone). Warren's and Vinson's were slightly over 12 percent each. Furthermore, the mean rate of dissent for chief justices prior to Stone was only 1.9 percent.<sup>41</sup> To account for these variations, Ulmer statistically tests several hypotheses. He discovers that the dissent rate among chief justices does not decrease for chiefs appointed in their later years or who serve for a longer time. It is not explained by prior experience as a legislator or a judge. Nor is it a function of congressional pressure on the Court. It does correlate in most instances if one considers both complexity of cases and turnover on the Court. Ulmer equates "complexity" with the dissent rate in cases in which the chief justice did not dissent. His "turnover index" results from combining the average number of appointing presidents per Court with the average number of appointments per Court.

Ulmer is careful not to draw firm conclusions on the basis of his study. His dissent-predicting model for chief justices, he cautions, "is strictly exploratory." Indeed, when tested against Chief Justice Burger's dissents between 1969 and 1980, the model greatly under-predicted the former chief's dissents. Perhaps "complexity of cases and turnover are having a greater impact on Burger than on earlier chiefs. The correct explanation, however, can be found only after additional research."<sup>42</sup> Even with respect to earlier chiefs, it is entirely possible that other considerations, not tested in the Ulmer study, could account for the varying dissent rates observed.

Complexity of litigation in the Supreme Court underlies the analysis and recommendations in *Redefining the Supreme Court's Role* by Samuel Estreicher and John Sexton.<sup>43</sup> Both authors are former clerks at the Court, Estreicher having served with Justice Powell in 1977 and Sexton with Chief Justice Burger in 1980. Partly because of this experience, both became concerned with the Court's workload,

which many recognize as a problem. "There is a limit to human endurance," Justice Brennan has said, and the present number of cases argued and decided "taxes that endurance to its limits."<sup>44</sup>

Identifying a problem, however, is not the same as finding or agreeing on a solution. Proposals to "do something" about the expanding docket began in earnest early in Chief Justice Burger's tenure, with recommendations for a National Court of Appeals. This institution would review the Supreme Court docket, referring only the most important cases to the justices and disposing of the rest itself.<sup>45</sup> A commission headed by Nebraska Senator Roman L. Hruska recommended creation of an intermediate court to decide about 150 cases a year referred to it either by the Supreme Court or existing courts of appeals.<sup>46</sup> In the 1980s discussion turned to establishment of an Intercircuit Tribunal (ICT) that would occupy a position just below the Supreme Court, deciding only cases referred to it by that body, especially those involving conflicts among the circuits.<sup>47</sup>

Estreicher and Sexton believe that adding a new court will only marginally increase the number of cases in which nationally binding law can be rendered. Instead, what is needed is a redefined role for the Supreme Court, one that does not call for the Court to be a "supreme court of errors." If the Court is seen as the strategic leader of the federal lawmaking process and not as a super court of appeals, the justices can meet the expectations placed upon them. Otherwise there will be "the inevitable, paralyzing frustration that must seize them if they take seriously their obligation to satisfy the current level of expectations" of universal availability.<sup>48</sup>

Accordingly, the Court's "principal objectives in selecting cases for plenary consideration should be to establish clearly and definitively the contours of national legal doctrine once the issues have fully 'percolated' in the lower courts, to settle fundamental interbranch and state-federal conflicts, and to encourage the state and federal appellate courts to engage in thoughtful decision-making, mindful of their own responsibility in the national lawmaking process."<sup>49</sup> Their findings, based on the 1982 term, show (1) that

nearly one-fourth of the cases in which the Court granted review "had no legitimate claim on the Court's time and resources;" (2) that only 48 percent of the cases heard by the Court in 1982 *had* to be heard, meaning that "over half of the Court's docket was discretionary;" and (3) that "less than 1 percent of the cases denied review . . . were cases that should have been heard by the Court. . . ."

Under a regimen of a newly defined role, the Court's docket would be divided into three categories: the priority docket, the discretionary docket, and the "improvident grant segment." The first would include "intolerable" intercourt conflicts, conflict with Supreme Court precedent where a lower court has "disregarded authoritative Supreme Court precedent squarely on point," resolution of "profound vertical federalism disputes," resolution of interbranch disputes, and resolution of interstate disputes. The discretionary docket would include cases where a state court sustained state action in the face of a federal constitutional or statutory challenge, other considerations of "vertical federalism" where federal courts have invalidated "nonstatutory state action on federal constitutional or statutory grounds (excluding federal habeas)," a "significant interference with federal executive responsibility," occasional interventions to correct "egregious error in order to ensure responsible actions by lower courts," resolution of national emergencies, and "vehicles for advances in the development of federal law." The third category of cases in which the Court would not intervene include most intercourt conflicts between only two courts, most issues of "nonconstitutional law" in the absence of one of the other criteria, issues of state law, and most situations where a state court has invalidated state action on federal grounds.<sup>51</sup>

These of course are not precise or clearly defined categories. The authors, however, have outlined an imaginative solution of the workload problem in terms of altered role, rather than more institutions or ever enlarging bureaucracies. Their recommendations even call for a change in the way the Court decides cases. Once the proper ones have been chosen, the Court would routinely call upon expert help, rather than relying mainly on the talents of counsel involved in the litigation.<sup>52</sup> The objec-

tive is a way in which the Justices can employ their scarce resources to perform essential functions.

### The Work Of The Court

As the number of volumes surveyed in the article attests, the Supreme Court is a much-studied institution. Yet, in almost any book about the Court and its Justices, it is commonplace to find comparatively little on the pre-Marshall period. Even the first volume of the Holmes Devise *History*<sup>53</sup> reserves only three chapters to the Supreme Court. This relative inattention is due to the smaller number of cases, rapid turnover in personnel, and an unformed institutional identity. After 1800 the Court faced a docket that had increased in both volume and significance, enjoyed more stable membership, and had a developing identity.

A major step toward rectifying much of this pre- versus post-1800 imbalance has occurred with publication in two parts of the first volume of *The Documentary History of the Supreme Court of the United States, 1789-1800*, edited principally by Maeva Marcus and James R. Perry, as assisted in this monumental project by seven associate, assistant, and illustrations editors. Sponsored by the Supreme Court Historical Society and the United States Supreme Court, the project will eventually encompass seven volumes, providing the first record of all cases heard by the Supreme Court between 1790 and 1800. In addition, the series will contain documents relating to the justices and the business of the Court, plus a compilation of official records, private papers, and other primary sources.

To date, searches by the editors have turned up over 18,000 documents. If volume one is an accurate predictor of what is to come, the series will more than fulfill the editors' promise that the set "will constitute a collection of materials that no individual scholar could hope to duplicate."<sup>54</sup> Indeed, the value of this collection is two fold: some materials are being published for the first time, and for the first time so many valuable sources are together in one place.

Volume one serves as an introduction and resource for the installments to come, but

standing alone, it is of major value. There are, for example, 156 pages of documents and other materials relating to the appointment of each justice during the Court's first decade. This section is followed by nearly 400 pages of minutes, drafts of court proceedings, and docket headnotes. Notes on bar admissions conclude Part One.

Part Two consists of what the editors call "Commentaries." These are some 560 items, including letters, newspaper articles, diary and journal entries, and similar things relating to the appointment of justices and clerks and to the work of the Court. One finds, for example, ample material relating to John Rutledge's appointment as Chief Justice on July 1, 1795 and his subsequent rejection by the Senate on December 15. It seems safe to say that no other single publication contains so many items relating to this series of events.

The *South Carolina State-Gazette* account of Rutledge's speech in Charleston against the Jay Treaty during the month of his nomination appears in full, with the editors' notations on versions that were reprinted in at least twelve other newspapers up and down the coast before the middle of August as well as references to the speech published in several more.<sup>55</sup> The press may have been no less a force in American politics in Rutledge's day than in our own, but given the horseback and sailing-ship pace of the news, nationwide impact was almost always delayed.

Also present is Secretary of State Edmund Randolph's letter of July 25 to President Washington, containing Henry De Saussure's report that Rutledge was "believed in Charleston to be deranged in his mind." This is followed by Randolph's plainly exasperated letter to Washington on July 29:

The newspapers present all the intelligence, which has reached me, relative to the treaty. Dunlap's of yesterday morning conveys the proceedings of Charleston. The conduct of the intended Chief Justice is so extraordinary, that Mr. Wolcott and Col. Pickering conceive it to be a proof of the imputation of insanity. By calculating dates, it would seem to have taken place, after my letter, tendering the office to him was received; tho' he has not acknowledged it.<sup>56</sup>

Rutledge's letter of resignation as Chief, written December 28, 1795, offered mainly his declining health as reason:



Bureau of Engraving and Printing

Among the many important contributions of Volume One of *The Documentary History of the Supreme Court of the United States, 1789-1800* is an extensive collection of documents relating to the appointment and subsequent rejection by the Senate of Chief Justice John Rutledge (above).

I set out, tho' in ill Health . . . for Raleigh, in No. Carolina, but was so indisposed on the Road, as to be incapable of reaching it & as ultimately obliged to return to this Place, convinced by Experience, that it requires a Constitution less broken than mine, to discharge with Punctuality & Satisfaction, the Duties of so important an Office.<sup>57</sup>

Rutledge was neither the first nor the last justice to reel from the onerous pressures occasioned by the travel which duty on circuit entailed. Since the Senate did not reject Rutledge until December 15, it seems entirely possible that Rutledge wrote this letter before he knew the outcome of the vote.

While the fruits of the first volume of *The Documentary History* were not available to David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789-1888*<sup>58</sup> stands as a substantial scholarly achievement. His book, however, is neither a history of the Court nor a straight legal analysis of all its decisions. Rather, Currie has attempted "to provide a critical history, analyzing from a lawyer's standpoint the entire constitutional work of the Court's first hundred years."<sup>59</sup> The product is an evaluation of the Court in terms of the method of inter-



pretation and the style of opinion writing displayed in each of the Court's decisions on constitutional issues. The author therefore omits discussion of the broader political and social contexts, but recognizes their importance obliquely through references in the footnotes.<sup>60</sup>

Currie's evaluation of judicial performance rests on the Constitution itself — a kind of constitutional objectivism. It is "a law binding the judges no less than the other officials whose actions the court undertakes to review." Accordingly, "judges have no more right to invent limitations not found in the Constitution than to disregard those put there by the Framers. In short, when a judge swears to uphold the Constitution, he promises obedience to a set of rules laid down by someone else."<sup>61</sup>

Not surprisingly, Currie is usually more impressed by right reason than correct results. Thus, Harlan's dissent in the Civil Rights Cases<sup>62</sup> is regarded as "a substantial effort by any standard but one in which he seems to have let his heart run away with his head."<sup>63</sup> But Currie's judgments are tempered by understanding. "Especially from the smug advantage of a century or two of hindsight, it is easier to find fault than to write a good opinion. . . . Add that the opinions were often prepared by overburdened generalists in as little as a few days, in a time of inferior research tools and an immature tradition of judicial exposition, under the pressure of carrying colleagues with varying views; and it is perhaps inspiring that the Justices did so well."<sup>64</sup>

Because of the reference already made in this survey to the pre-Marshall years, Currie's findings for that decade are of some interest. In terms of published opinions, the Court's decisions were explained by only seven justices: Jay, Cushing, Wilson, Blair, Iredell, Paterson, and Chase.<sup>65</sup> While there were only three constitutional cases resolved by full-scale opinions (*Chisholm v. Georgia*, *Hylton v. United States*, and *Calder v. Bull*<sup>66</sup>) an additional twelve cases such as *Ware v. Hylton*<sup>67</sup> had constitutional overtones.

These decisions, Currie concludes, established two lasting principles of construction: that "doubtful cases were to be resolved in favor of constitutionality" and that "statutes

were to be construed if possible in a manner consistent with the Constitution."<sup>68</sup> Moreover, basic tools of constitutional interpretation in use before 1801 are still employed today. "The first Justices looked to the text of the governing constitutional provision, to inferences that could be drawn from other provisions to contemporary usage, to the intentions or purposes of the Framers, and to their own conceptions of sound policy."<sup>69</sup> Words seemed decisive in *Chisholm*, legal tradition in *Calder*, and policy in *Hylton v. United States*. Then as now, opinions were flawed.

In *Chisholm*, the Justices paid insufficient heed to tradition and to the statements of the Framers. In *Hylton*, they relied too heavily on policy before making a serious effort to explain the text. In *Calder*, they failed to explain why judicial action was not forbidden by the ex post facto clause, to acknowledge usage contrary to that which they invoked, and to make clear precisely on which ground they relied.<sup>70</sup>

Perhaps the most surprising conclusion arising from Currie's analysis is "the enormous latitude the Constitution has left to judicial judgment." That was illustrated by the first decade's work. Already appearing were symptoms of free-wheeling judicial discretion. In Currie's view, Paterson and Iredell were the most impressive in their constitutional jurisprudence. Chase could be "thorough and persuasive" but wandered into issues not presented and seemed to be "no respecter of the written Constitution." While Wilson exhibited "erudition," his opinions also "seemed pretentious and disorganized." Jay was "long-winded and off the point," while Blair and Cushing added little. "[N]ot a time of giant Justices or of great decisions," Currie nonetheless finds the Court under Jay, Rutledge, and Ellsworth anything but uninteresting and insignificant. It set "a pattern of constitutional adjudication that was to endure."<sup>71</sup>

Just as Currie's volume purposefully overlooked the political and social contexts of litigation to focus on the reasoning the Justices employed, John A. Garraty's *Quarrels That Have Shaped the Constitution*<sup>72</sup> is a collection of studies that highlights the origins and development of constitutional cases in their political milieu. Originally published in 1962, the book has been reissued with five new essays, for a total now of twenty. Don E. Fehrenbacher's on

"The Dred Scott Case" replaces Bruce Catton's. Appearing for the first time are articles on *Near v. Minnesota*<sup>73</sup> ("The Case of the Miscreant Purveyor of Scandal" by Paul L. Murphy), *Gideon v. Wainwright*<sup>74</sup> ("The Case of the Florida Drifter" by Anthony Lewis), *Roe v. Wade*<sup>75</sup> ("The Abortion Case" by Rosalind Rosenberg), and *West Coast Hotel Co. v. Parrish*<sup>76</sup> ("The Case of the Wenatchee Chambermaid" by William E. Leuchtenburg).

Garraty's title sums up the nature of American constitutional interpretation. It is a process of resolving "quarrels" which appear in the guise of cases, posing questions to be answered by judges. Constitutional principle is frequently the by-product of the pursuit of personal gain, as people seek to retain or recover something they believe (or hope) is rightfully theirs. Decisions that emerge from cases continue to shape the document by which all the nation lives.

So, as William E. Leuchtenburg explains, it was Elsie Parrish (the "Wenatchee Chambermaid") who initiated the litigation in which the Supreme Court in 1937 upheld, five votes to four, the Washington State minimum wage law. The decision helped to launch a constitutional revolution in favor of expanded governmental regulation of the economy and helped to dampen another: President Franklin Roosevelt's "court-packing" plan.<sup>77</sup> The landmark decision of *Adkins v. Children's Hospital*<sup>78</sup> was overruled, and with it the very recent holding in *Morehead v. New York ex rel. Tipaldo*.<sup>79</sup>

In 1937, Court-watchers expected the Washington statute to fall. On June 1, 1936, *Morehead* had invalidated a New York minimum wage law, with Justices Sutherland, Butler, Van Devanter, McReynolds, and Roberts in the majority, and with Justices Brandeis, Cardozo, and Stone and Chief Justice Hughes in dissent. Now in *West Coast Hotel*, announced on March 29, 1937, Roberts voted to sustain a nearly identical statute. Intervening was the unveiling on February 5 of President Roosevelt's statutory assault on the Court.

To defend Roberts against accusations that the President's plan drove him to the other side of the economic regulation question, Justice Frankfurter published in 1955 a memorandum which Roberts had given him a decade earlier outlining the sequence of events with

respect to his votes in *Morehead* and *West Coast Hotel*.<sup>80</sup> In an explanation to which Leuchtenburg only briefly alludes,<sup>81</sup> Roberts recounted that he had favored granting review in *Morehead* only if the Justices were prepared to overrule *Adkins*. Since only three preferred that route (Hughes wanted only to distinguish that case from *Adkins* since the state of New York had not challenged the older case directly), he went along with the Sutherland wing of the Court in striking down law. By contrast, *West Coast Hotel* squarely presented the opportunity of interring *Adkins*. "Thus, for the first time," Roberts maintained, "I was confronted with the necessity of facing the soundness of the *Adkins* case."<sup>82</sup> And at conference on December 19, Roberts voted to uphold the law. The Court was evenly divided at that point because of Justice Stone's absence due to illness. When he returned in February, Stone also cast his vote to uphold the law. Roberts' position had therefore been made clear well before announcement of the court-packing plan.<sup>83</sup>

While the Roberts memorandum explains the timing of his vote in the second case relative to the impending executive-judicial confrontation, the record is clear that Roberts could have made the difference on the fate of the New York statute in 1936. Perhaps Roberts was simply unsettled in his own thinking regarding the enormity of the constitutional issues which were at stake. He had voted with the majority in upholding the moratorium law in *Home Building & Loan Association v. Blaisdell*, and had authored the ground-breaking majority opinion on minimum milk prices in *Nebbia v. New York*. Yet, he spoke for the Court in *United States v. Butler*, striking down the Agricultural Adjustment Act, and was part of the majority in the Carter Coal case invalidating the Bituminous Coal Conservation Act in 1936.<sup>84</sup>

Because of the outcome of this constitutional "quarrel," Elsie Parrish finally received her back pay of \$216.19. Interviewed some thirty-five years later, writes Leuchtenburg, "she indicated . . . that she had accomplished something of historic significance — less for herself than for the thousands of women . . . who needed to know that, however belatedly, they could summon the law to their side."<sup>85</sup>

While the Garraty volume enlivens a series

of constitutional disputes spanning 170 years, *A "Scottsboro" Case in Mississippi* by Richard C. Cortner<sup>86</sup> is a detailed account of the events and personalities involved in a single case: *Brown v. Mississippi*.<sup>87</sup> *Brown* was the Supreme Court's first decision invalidating a state conviction because of the use at trial of coerced confessions.

Indeed, as late as the 1920s, the Due Process Clause of the Fourteenth Amendment had not been held to impose significant restrictions on the states in the administration of their criminal laws. In terms of the Court's subsequent and gradual assumption of supervisory powers over state criminal justice, therefore, *Brown* is a companion to *Powell v. Alabama*,<sup>88</sup> the Scottsboro case where the Court four years earlier had overturned convictions because of inadequate counsel.

The connection between *Powell* and *Brown* goes beyond their similar settings in adjacent states during the 1930s with poor black males on trial for their lives. Cortner shows how the Court in the latter case could have used the former decision as a basis for reversing the Mississippi convictions, because counsel at trial was inadequate.<sup>89</sup> That would have served the defendants just as well, but *Brown* would have had no measurable influence on constitutional law. By focusing on the introduction of coerced confessions at trial, however, the Court expanded the scope of its review of state proceedings by attributing more procedural content to the Fourteenth Amendment. The results have been far-reaching. Interrogations and counsel have been troublesome issues for the justices in nearly every succeeding term.

Throughout Cortner provides an engaging account which captures the drama and humanity of the case, all the while he effectively shows how *Brown* became one of those "quarrels that shaped the Constitution." There was the murder of Raymond Stuart, a Kemper County, Mississippi, planter. Ed Brown, Henry Shields, and Yank Ellington were black sharecroppers who were arrested, indicted, tried for murder, and sentenced to be hanged, all within a week of Stuart's death. The District Attorney was John Stennis, later United States Senator. Key to the direction the case took after the trial were the efforts by local attorneys John A. Clark and Earl Leroy Brewer at substantial emotional and financial

costs to themselves. Clark, a state senator, took the appeal to the Supreme Court of Mississippi, but then suffered a mental and physical collapse as well as the loss of a political future in his home state. Brewer was a former governor of Mississippi who conducted the *Brown* appeal to the United States Supreme Court. Without persistence by first Clark and then Brewer, with shoestring funding (total contributions were \$1925) from local people and from groups such as the Commission on Interracial Cooperation and National Association for the Advancement of Colored People, the case of the Kemper County trio doubtless would have ended very differently.

Particularly influential in the appeal was the opinion by dissenting Justice William Anderson of the Mississippi Supreme Court which highlighted graphically the gruesome details of the "interrogation." The state court majority had upheld the convictions not because they approved of the methods the police employed but because counsel did not object to the use of the confessions until after they had been introduced at trial. To this Anderson responded: "The court had staring it in the face this incompetent testimony without which there could be no conviction. Must the lives . . . be taken by law because their counsel failed to bring to the attention of the court this incompetent evidence? Are they without remedy?"<sup>90</sup>

According to Chief Justice Hughes for a unanimous Supreme Court, they were not. "[T]he freedom of the State in establishing its policy is the freedom of constitutional government. . . . Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand."<sup>91</sup> As it happened, *Brown* came down on February 17, the same day the Court announced its decision in *Ashwander v. TVA*.<sup>92</sup> Understandably, much press attention focused on the latter which upheld the validity of the Tennessee Valley Authority. Commented one news magazine, "Even the deepest-eyed Liberal hardly gave a hoot that day about *Brown et al. v. State of Mississippi* — three Negroes convicted of murder, whose statements, claimed to have been made when they were brutally whipped by deputy sheriffs, were admitted in evidence. . . ."<sup>93</sup>



Afterwards, District Attorney Stennis insisted on a retrial. Eventually a plea bargain was arranged whereby the Kemper County trio could please *nolo contendere* to manslaughter. With time already spent in jail, sentences ran seven and a half years for Brown, two and one-half for Shields, and six months for Ellington. The three were persuaded that a retrial might again result in a death sentence. "On 28 November 1936, . . . the hard-fought battle on their behalf came, rather unsatisfactorily, to an end."<sup>94</sup>

Rather than mold a book around a single case, Francis Graham Lee in *Wall of Controversy* has chosen a single issue: the church-state constitutional conflict.<sup>95</sup> Combining his own observations with a judicious selection of documents, Lee has compiled a valuable and concise resource for anyone interested in this continuing issue. The body of the book contains excerpts from the opinions of nine Justices, the earliest being Justice Frankfurter's dissent in the second flag-salute case<sup>96</sup> and Justice Black's majority opinion in *Everson v. Board of Education*.<sup>97</sup> Most recent are the opinions of the Court in *Mueller v. Allen* and *Lynch v. Donnelly*, written by Justice Rehnquist and Chief Justice Burger respectively.<sup>98</sup> Altogether, excerpted opinions come from thirteen cases.

Lee's chief concern is the Court's difficulty in resolving disputes under the First Amendment's religion clauses. He believes that an inability to remove conflicts from the political agenda — or worse still, an exacerbation of political conflict — is a sign of failure. Because the church-state controversy is largely a constitutional controversy, the Court bears much of the responsibility, he concludes, for the issue's continuing presence in the crucible of conflict. He notes by contrast that political dissent and obscenity, while not entirely in remission as issues, are no longer the burning questions they were in the 1950s and 1960s.<sup>99</sup>

According to Lee, the core of the problem is the Court's failure to enunciate clear and convincing principles in the church-state arena which would end the debate. By lack of clarity, he presumably means an absence of predictability. With the Establishment Clause, for instance, it is difficult to know in advance whether particular forms of state aid to sectarian schools will be judged constitutionally

acceptable. Yet the problem of clarity does not arise because all the justices keep changing their minds. The record demonstrates consistency among most members of the Court. For instance, into 1986 before Chief Justice Burger's retirement, three were reluctant to approve almost any form of aid, and three found most forms of aid to be constitutionally unobjectionable. It was the thinking of the middle group of Justices that effectively determined the outcome in individual cases, with two or more sometimes leaning one way and sometimes another. The result was a crazy-quilt pattern of decisions which the public must have considered muddled, or at best unclear.

The church-state conflict is also compounded by the evolving nature of the questions that arise. Interactions between government and religion are hardly fixed or static, a fact made immeasurably more complex once the Supreme Court applied the religion clauses to the states through the Fourteenth Amendment in the 1940s. One year finds questions of bus transportation and loans of textbooks on the docket, while another year finds tax deductions for school expenses and "shared time" arrangements up for decision. Moreover, church and state interact in literally hundreds of ways, since religious bodies are part of society and since citizens have religious as well as political interests. Consistent application of "clear" principles might not be entirely persuasive, therefore, given the conflicting views that exist throughout the population. At present, what consensus there is might best be described as "uncertain."<sup>100</sup>

Were he given five votes on the Court, Lee would cast them in favor of the "Livermore principle." New Hampshire's Judge Samuel Livermore was a member of the First Congress that proposed the First Amendment and the rest of the Bill of Rights to the states. His wording for the religion clauses stipulated that "Congress shall make no laws touching religion or to infringe the rights of Conscience." The House adopted Livermore's motion, and Lee believes it "to be as good a representation as Madison's of the feeling in that chamber. . . ."<sup>101</sup>

What would the Livermore principle require today? According to Lee, "religion and the state must be absolutely separate. . . .

[G]overnment . . . should eschew any action that benefits religion or any laws that injure religion." Banned would be all aid to sectarian schools, books as well as buses. Also highly suspect would be any laws regulating religious institutions. Lee believes the best contemporary statement of the Livermore principle is found in Justice Brennan's "sadly neglected standard" from his concurring opinion in *Abington School District v. Schempp*:

Neither can Government give, either directly or indirectly, any aid, money, services, or support to any religion or any religious organization nor can Government impose, directly or indirectly any burden, tax, or regulation on any religion, religious organization, or individual in the practice of his/her religion, unless such burden is required by a compelling state interest that can be achieved by no other means.<sup>102</sup>

The church-state controversy remains unsettled, of course. But Lee's volume is evidence that the task of resolving it—removing it from the political agenda—requires more than the Court can do alone. Of course the justices sit partly as teachers in American society, a role that has been evident ever since early justices extolled the virtues of constitutional government as they traveled on circuit. But the Court can teach only so much and lead only so far. Also needed is sufficient consensus among opinion leaders across the land. That has yet to take shape. Constitutional decision making in the church-state arena is hampered by divided opinion among the people at large. It is probably enough to expect the Court to be a consensus contributor, and too much to ask that the Court be the consensus builder. As Attorney General Robert Jackson perceptively observed before his own appointment to the Court,

However well the Court and its bar may discharge their tasks, the destiny of this Court is inseparably linked to the fate of our democratic system of representative government. Judicial functions, as we have evolved them, can be discharged only in that kind of society which is willing to submit its conflicts to adjudication and to subordinate power to reason. The future of the Court may depend more upon the competence of the executive and legislative branches . . . to solve their problems adequately and in time than upon the merit which is its own. There seems no likelihood that the tensions and conflicts of our society are to decrease. . . . I see no reason to doubt that the problems of the next half century will test the wisdom and courage of this Court as severely as any half century of its existence.<sup>103</sup>

Few should therefore be amazed when the Court's responses on church-state questions reflect the conflicting answers voiced by the nation itself.

### Judicial Review

Progress toward Lee's goal of clearer and more persuasive opinions interpreting the religion clauses involves exercise of the power of judicial review. This authority of courts in the context of cases to refuse to apply laws judges find in conflict with the Constitution today distinguishes American courts from those of most nations in the world. And distinguishing American courts from *every* other system is the significance of questions those cases involve.

This development is the subject of *The Rise of Modern Judicial Review* by Christopher Wolfe.<sup>104</sup> "Modern" is the key word in the title, for Wolfe's survey of thinking about judicial review from the *Federalist* to the last years of the Burger Court forms the basis of his conclusion that the "very nature of judicial review has changed."<sup>105</sup> This transformation in turn creates a need to explore both the origins of judicial power and a consideration of the alternatives to judicial review as it is currently practiced. Wolfe is very much a believer in "truth in judging": Americans should be fully aware of what their judges do.

Wolfe divides the history of judicial review into three stages: the "traditional" era of constitutional interpretation (1789-1890), the "transitional" era (1890-1937), and the "modern" era (1937-present). The first

was characterized by its assumption that the Constitution was both intelligible—it had a real or true meaning that could be known if one read it properly—and substantive—it established principles that were definite and clear enough to be enforced as legal rules, rather than merely proclaiming vague generalities.<sup>106</sup>

The second era transformed judicial review into a device to defend property by reading certain natural rights into constitutional passages most susceptible to interpretation. The magnitude of this change was obscured at the time by several factors. First, expanded constitutional protection was justified as a plausible construction of the Commerce Clause and the Fifth and Fourteenth Amendments. Second, the founders themselves had placed high value

on property, making it easy to fasten a "laissez-faire" economic theory onto the Constitution, especially in view of the increased scope of government regulation of business after the Civil War. Third, legal realism which arose around the turn of the twentieth century argued that all judging was inherently legislative. That is, deciding cases entailed judges writing values into law. Taken together, American judges in the transition era could argue that they were doing nothing more than judges from an earlier day had done. Even opponents of the Court's new use of judicial review accepted the idea that the Constitution embodied protection for property rights, says Wolfe. They argued instead that the Constitution merely had to be adapted to new conditions. This attitude cut the words in the document loose from their foundations, resulting in an accordion-like text — one which could eventually take on almost any meaning.

Spanning the division between the transitional and modern eras, Robert H. Jackson described this process.

During its early days [the Court] had the aid of counsel who expounded the Constitution from intimate and personal experience in its making. . . . The passing of John Marshall marked the passing of that phase of the Court's experience. Thereafter the Constitution became less a living and contemporary thing — more and more a tradition. The work of the Court became less an exposition of its text and . . . more largely a study of what later men had said about it. The Constitution was less resorted to for deciding cases, and cases were more resorted to for deciding about the Constitution.<sup>107</sup>

The modern era has reflected "the victory of a distinctly modern understanding of judicial power as fundamentally legislative in character."<sup>108</sup> As Jackson said, "This was the inevitable consequence of accumulating a body of judicial experience and opinion which the legal profession would regard as precedents."<sup>109</sup> Scholars transposed an understanding of the common law judge at work into the realm of constitutional interpretation, with "the nearly total victory within the legal profession of the view that judges — including Supreme Court justices exercising the power of judicial review — are inevitably legislators."<sup>110</sup> This applied as much to a Jerome Frank as it did to a Felix Frankfurter. With this understanding of the role of judges in the political system firmly implanted, resurgence

of judicial activism after 1937 "seems to have been virtually inevitable." Driving this evolution in the third stage as in the second has been "dissatisfaction with the Constitution — either because its prescriptions are wrong, or more often, because they do not go far enough. . . ."<sup>111</sup>

So in evaluating the Warren Court's interpretation of the religion clauses, for example, Wolfe notes the same confusion Lee and others have found.

The inability of the Court to provide an interpretation that harmonized the two religion clauses was the result of its desire to expand the meaning of each beyond its original intent. Its willingness to tolerate the contradictions that arose . . . was simply another manifestation of its subordination of constitutional intent to what it thought were the best constitutional policies. Better that we have incoherent constitutional interpretation, it seemed to say, than that we have interpretation that tolerates public support for religion or fails to protect religious minorities sufficiently.<sup>112</sup>

But recall that Lee's solution to the present confusion in interpretation of the religion clauses was also a recourse to "intent." Lee's understanding of that intent, however, would produce strong separationist decisions identical to those Wolfe believes depart from intent.

"Theories of judicial review," writes Wolfe, "either confine judges to exercising judgment, or they encourage them to exercise will."<sup>113</sup> The former was dominant in the "traditional" stage, the latter in the "modern." A return to judicial review in its earliest form involves more than a rejection of deeply ensconced ways of thinking. It raises a more fundamental question: "is the Constitution itself an adequate basis for modern government?"<sup>114</sup> Judicial review properly considered, believes Wolfe, exposes one's deepest thinking on the nation's needs. If the Constitution without judicial re-making does not do the things we want, then a judiciary on the modern model may be institutionally desirable. Yet Wolfe prefers that an explicit and knowing choice be made.

Are the demonstrated and potential benefits of modern judicial review outweighed by its demonstrated and potential harms? Is a legislative form of judicial review, on the whole, an improvement over the founders' attempt to provide for both majority rule and minority rights, or is it indeed too "precarious" a security?<sup>115</sup>



There may be too many with an interest in keeping the Constitution the way it has become for a reappraisal to occur that would satisfy Wolfe, even if the Court soon begins a fourth stage of judicial review. But studies like his and the others surveyed here stimulate healthy debate about the Court's evolving place in American government and help to determine what that place will be. What was

true in the time of Hugh Swinton Legaré remains true today. The history of the nation lies in the cases the Court decides. Values clash in the courtroom as they do in the electoral arena. Controversy surrounding judicial decisions fairly reflects the American people's strong attachment to, yet suspicion of, the judiciary's role in the democratic experiment.

## Footnotes

<sup>1</sup> The volumes surveyed in this article are listed alphabetically by author below.

CHOPER, JESSE H., ed., *The Supreme Court and Its Justices* (Chicago: American Bar Association, 1987). Pp. 269.

CORTNER, RICHARD C., *A "Scottsboro" Case in Mississippi: The Supreme Court and Brown v. Mississippi* (Jackson: University Press of Mississippi, 1986). Pp. xiv, 174.

CURRIE, DAVID P., *The Constitution in the Supreme Court: The First Hundred Years 1789-1888* (Chicago: University of Chicago Press, 1985). Pp. xiii, 504.

ESTREICHER, SAMUEL, and JOHN SEXTON, *Redefining the Supreme Court's Role: A Theory of Managing the Federal Judicial Process* (New Haven, Conn.: Yale University Press, 1986). Pp. x, 201.

GARRATY, JOHN A., *Quarrels That Have Shaped the Constitution*, rev. ed. (New York: Harper & Row, 1987). Pp. viii, 391.

GOLDMAN, SHELDON, and CHARLES M. LAMB, eds., *Judicial Conflict and Consensus: Behavioral Studies of American Appellate Courts* (Lexington: University Press of Kentucky, 1986). Pp. ix, 305.

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MARCUS, MAEVA, and JAMES R. PERRY, eds., *The Documentary History of the Supreme Court of the United States, 1789-1800*, vol. 1 (in 2 parts) (New York: Columbia University Press, 1985). Pp. lxxii, 999.

O'BRIEN, DAVID M., *Storm Center: The Supreme Court in American Politics* (New York: W. W. Norton, 1986). Pp. 384.

SCHWARTZ, BERNARD, *Swann's Way: The School Busing Case and the Supreme Court* (New York: Oxford University Press, 1986). Pp. 245.

STEAMER, ROBERT J., *Chief Justice: Leadership and the Supreme Court* (Columbia: University of South Carolina Press, 1986). Pp. xiv, 321.

WOLFE, CHRISTOPHER, *The Rise of Modern Judicial Review: From Constitutional Interpretation to*

*Judge-Made Law* (New York: Basic Books, 1986). Pp. x, 392.

<sup>2</sup> 17 U.S. (4 Wheaton) 316 (1819).

<sup>3</sup> G. Gunther, *John Marshall's Defense of McCulloch v. Maryland* (1969).

<sup>4</sup> 2 H. Legaré, *Writings* 130 (1845).

<sup>5</sup> *Supra* n. 1.

<sup>6</sup> *Id.*, 293.

<sup>7</sup> *Id.*, xi.

<sup>8</sup> *Id.*, 301.

<sup>9</sup> *Id.*, 296.

<sup>10</sup> *Id.*, 298.

<sup>11</sup> *Supra* n. 1.

<sup>12</sup> *Id.*, 213.

<sup>13</sup> *Id.*, 207.

<sup>14</sup> B. Woodward and S. Armstrong, *The Brethren* (New York: Simon and Schuster, 1979). The book purported to reveal the inside scoop on the Court from 1969 to 1976. Controversial in its sources of information and absence of documentation, the volume was otherwise unremarkable in its findings.

<sup>15</sup> Choper, *supra* n. 1, 209.

<sup>16</sup> *Id.*, 210-213.

<sup>17</sup> *Supra* n. 1.

<sup>18</sup> *Id.*, 15.

<sup>19</sup> *Id.*, 14.

<sup>20</sup> Quoted in C. Wyzanski, Jr., *Whereas - A Judge's Premises* 61 (1944).

<sup>21</sup> O'Brien, *supra* n. 1, 231.

<sup>22</sup> *Id.*, 274.

<sup>23</sup> "The Zeitgeist and the Judiciary," in A. MacLeish and E. Prichard, Jr., eds., *Law and Politics*, p. 6 (1939).

<sup>24</sup> Choper, *supra* n. 1, 210.

<sup>25</sup> O'Brien, *supra* n. 1, 275.

<sup>26</sup> 418 U.S. 683 (1974); 381 U.S. 479 (1965). From O'Brien's perspective, *Nixon* and *Griswold* are presumably atypical in that both reflect considerable cooperation as well as give-and-take in the course of writing opinions, although *Griswold* is typical in that several separate opinions accompanied the opinion of the Court.

<sup>27</sup> 357 U.S. 449 (1958).

<sup>28</sup> O'Brien, *supra* n. 1, 257, quoting from the Brennan Papers in the Library of Congress.

<sup>29</sup> *Id.*, 42-43.

<sup>30</sup> *Supra* n. 1.

<sup>31</sup> 402 U.S. 1 (1971).

<sup>32</sup> Tom C. Clark, "Internal Operation of the United States Supreme Court," 43 *American Judicature Society Journal* 51 (1959). Justice Clark was quoting in part E. Smyth Gambrell.

<sup>33</sup> A. Mason, *Harlan Fiske Stone: Pillar of the Law* (1956).

<sup>34</sup> In Justice Frankfurter's words, "That the Supreme Court should not be amenable to the forces of publicity to which the Executive and the Congress are subjected is essential to the effective functioning of the Court. But the passage of time may enervate the reasons for this restriction, particularly if disclosure rests not on tittle-tattle or self-serving declarations." Frankfurter, "Mr. Justice Roberts," 104 *University of Pennsylvania Law Review* 311, 313-314 (1955). It is therefore unsettling to see a citation as authority on a point to *The Brethren* in a scholarly work, because most information in *The Brethren* is itself undocumented. Schwartz, *supra* n. 1, 203. See the comment on *The Brethren* in n. 14, *supra*.

<sup>35</sup> 347 U.S. 483 (1954).

<sup>36</sup> Schwartz, *supra* n. 1, 179. Appendix "A" contains Chief Justice Burger's first draft of his *Swann* opinion, and Appendix "B" contains the final draft as published in the *United States Reports*.

<sup>37</sup> *Newsweek*, May 3, 1971, p. 27.

<sup>38</sup> *Supra* n. 1.

<sup>39</sup> *Id.*, 2-5.

<sup>40</sup> *Id.*, 50-67.

<sup>41</sup> *Id.*, 62, 64.

<sup>42</sup> *Supra* n. 1. The book is based on a 1253-page study the authors published as "A Managerial Theory of the Supreme Court's Responsibilities," 59 *New York University Law Review* 681 (1984).

<sup>43</sup> Brennan, "Some Thoughts on the Supreme Court's Workload," 66 *Judicature* 230, 231 (1983).

<sup>44</sup> *Report of the Study Group on the Caseload of the Supreme Court* (1972).

<sup>45</sup> *Structure and Internal Procedures: Recommendations for Change* (1975).

<sup>46</sup> Burger, "Annual Report on the State of the Judiciary," 69 *A.B.A. Journal* 42 (1983); Burger, "The Time is Now for an Intercircuit Panel," 71 *A.B.A. Journal* 86 (April 1985).

<sup>47</sup> Estreicher and Sexton, *supra* n. 1, 130.

<sup>48</sup> Estreicher and Sexton, *supra* n. 1, 4-5.

<sup>49</sup> *Id.*, 6.

<sup>50</sup> *Id.*, 52-65.

<sup>51</sup> *Id.*, 128-136.

<sup>52</sup> J. Goebel, *Antecedents and Beginnings to 1801* (New York: Macmillan, 1971).

<sup>53</sup> Marcus and Perry, eds., *supra* n. 1, xliii.

<sup>54</sup> *Id.*, 765-770.

<sup>55</sup> *Id.*, 772-773.

<sup>56</sup> *Id.*, 100.

<sup>57</sup> Currie, *supra* n. 1. Several chapters appeared as law review articles between 1981 and 1984.

<sup>58</sup> *Id.*, xi.

<sup>59</sup> E.g., *id.*, 209, n. 51, in discussing the Charles

River Bridge case, 36 U.S. (11 Peters) 240 (1837).

<sup>60</sup> Currie, *supra* n. 1, xii.

<sup>61</sup> 109 U.S. 3 (1883).

<sup>62</sup> Currie, *supra* n. 1, 451.

<sup>63</sup> *Id.*, 455.

<sup>64</sup> Currie notes that the others played "no visible part" in the decisions he considered. As Associate Justice and as Chief Justice, Rutledge did only circuit duty. Johnson wrote no significant opinions, and Ellsworth was not a participant in the major decisions. Currie assigns Washington and Moore to the Marshall period for study. Currie does not include the Justices' circuit work as part of his analysis.

<sup>65</sup> 2 U.S. (2 Dallas) 419 (1793), 3 U.S. (3 Dallas) 171 (1796), and 3 U.S. (3 Dallas) 386 (1798).

<sup>66</sup> 3 U.S. (3 Dallas) 199 (1796).

<sup>67</sup> Currie, *supra* n. 1, 55.

<sup>68</sup> *Id.*, 56.

<sup>69</sup> *Id.*, 57.

<sup>70</sup> *Id.*, 56, 58.

<sup>71</sup> Garraty, *supra* n. 1.

<sup>72</sup> 283 U.S. 697 (1931).

<sup>73</sup> 372 U.S. 335 (1963).

<sup>74</sup> 410 U.S. 113 (1973).

<sup>75</sup> 300 U.S. 379 (1937).

<sup>76</sup> *West Coast Hotel* of course dealt with state power. Further evidence of a judicial turnaround came on April 12, 1937, when the Court upheld sweeping congressional power under the National Labor Relations Act by the narrowest of margins, in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>77</sup> 261 U.S. 525 (1923).

<sup>78</sup> 298 U.S. 587 (1936).

<sup>79</sup> Frankfurter, *supra* n. 1, 34.

<sup>80</sup> Garraty, *supra* n. 1, 282.

<sup>81</sup> Frankfurter, *supra* n. 1, 34, 315.

<sup>82</sup> The evidence for a politically-based "switch" is more compelling in the Jones & Laughlin case. The constitutionality of the National Labor Relations Act was argued on February 10-11, 1937, with a five-to-four decision forthcoming on April 12.

<sup>83</sup> 290 U.S. 398 (1934), 291 U.S. 502 (1934), 297 U.S. 1 (1936), 298 U.S. 238 (1936).

<sup>84</sup> Garraty, *supra* n. 1, 284.

<sup>85</sup> Cortner, *supra* n. 1.

<sup>86</sup> 297 U.S. 278 (1936). Cortner is the author of other books on individual cases: *The Apportionment Cases* (1970); *The Arizona Train Limit Case* (1970); *The Jones & Laughlin Case* (1970). A more general study by Cortner is *The Supreme Court and the Second Bill of Rights* (1981).

<sup>87</sup> 287 U.S. 56 (1932).

<sup>88</sup> Cortner, *supra* n. 1, 132.

<sup>89</sup> *Brown v. State*, 173 Miss. 542, 561-562 (1935) (dissenting opinion).

<sup>90</sup> 297 U.S. at 287.

<sup>91</sup> 297 U.S. 288 (1936).

<sup>92</sup> *Time*, February 24, 1936, p. 6.

<sup>93</sup> Cortner, *supra* n. 1, 153.

<sup>94</sup> Lee, *supra* n. 1.

<sup>96</sup> *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

<sup>97</sup> 330 U.S. 1 (1947).

<sup>98</sup> 463 U.S. 388 (1983); 52 U.S.L.W. 4317 (1984).

<sup>99</sup> Lee, *supra* n. 1, 4-5.

<sup>100</sup> Stephenson, "Religion and the Constitution: An Uncertain Consensus," 86 *South Atlantic Quarterly* 95 (1987).

<sup>101</sup> Lee, *supra* n. 1, 117-118.

<sup>102</sup> 374 U.S. 203 (1963) (concurring opinion), quoted in Lee, *supra* n. 1, 119.

<sup>103</sup> Jackson, "Address," Appendix XV, 84 L.ed. 1428, 1429 (1940).

<sup>104</sup> Wolfe, *supra* n. 1.

<sup>105</sup> *Id.*, ix.

<sup>106</sup> *Id.*, 3.

<sup>107</sup> Jackson, *supra* n. 103, 1428-1429.

<sup>108</sup> Wolfe, *supra* n. 1, 6.

<sup>109</sup> Jackson, *supra* n. 103, 1429.

<sup>110</sup> Wolfe, *supra* n. 1, 7.

<sup>111</sup> *Id.*, 205.

<sup>112</sup> *Id.*, 286.

<sup>113</sup> *Id.*, 352.

<sup>114</sup> *Id.*, 354.

<sup>115</sup> *Id.*, 356.



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