

1923

# History of the Supreme Court in Resume

Robert Eugene Cushman

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

---

## Recommended Citation

Cushman, Robert Eugene, "History of the Supreme Court in Resume" (1923). *Minnesota Law Review*. 2190.  
<https://scholarship.law.umn.edu/mlr/2190>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

## THE HISTORY OF THE SUPREME COURT IN RESUMÉ

BY ROBERT EUGENE CUSHMAN\*

THE Supreme Court of the United States has by no means been neglected by historical writers. Its influence and its work have of necessity formed an important part of the substance of our political and constitutional history. The lives of its great men loom large in the annals of American biography. And yet of the Supreme Court as an institution, its origin, the development of its work, its personnel, its methods, the continuity and growth of its life as an organ of government, there has been no systematic or connected chronicle of permanent value. There has been plenty to read about Marshall or Taney, or about the *Dartmouth College case* or the *Dred Scott case*, but for the history of the Court as a court one has had to be content with Carson's saccharine eulogies of the Supreme Court justices<sup>1</sup> or with the sour-spirited economic determinism of Gustavus Myers.<sup>2</sup> Between these two poles there was nothing. The completion in 1919 of Mr. Beveridge's *Life of John Marshall* showed that a real history of the Supreme Court was not an impossible achievement; for that admirable work was not only a biography of Marshall but a history of the Court upon which for thirty-four years Marshall had sat. And now Mr. Charles Warren has presented to the historian, the lawyer, and the layman a systematic, scholarly, and readable account of the Supreme Court and its work from its origin in 1789 to the year 1918.<sup>3</sup>

Before proceeding to a consideration of the story which Mr. Warren has told, a word may be said of the way in which he has told it. To begin with, he has told it at considerable length; al-

---

\*Professor of Political Science, University of Minnesota.

<sup>1</sup>The History of the Supreme Court of the United States with Biographies of all the Chief and Associate Justices, by Hampton L. Carson. This was published in 1891 at the time of the centennial of the federal judiciary.

<sup>2</sup>History of the Supreme Court, by Gustavus Myers (1912). This was written from the socialistic point of view.

<sup>3</sup>The Supreme Court in United States History, by Charles Warren. Little, Brown, and Company, 1922. Mr. Warren is the author of *The History of the Harvard Law School* (three volumes, 1909), and *The History of the American Bar, Colonial and Federal, to 1860* (1911). He was assistant Attorney General of the United States from 1914 to 1918. He is now engaged in the practice of law in Washington, D. C.

though the three large volumes with their sixteen hundred pages have hardly proved sufficient for the purpose. The detailed narrative of the Court's history, term by term, is brought to a conclusion at the death of Chief Justice Waite in 1888. The thirty-year period succeeding is sketched in two final chapters which naturally do not aim to do more than mention some of the more conspicuous decisions and call attention to some of the recent tendencies in the development of judicial power and construction. It was inevitable that Mr. Warren should find his task growing more and more complicated as he reached the middle and later periods in the history of the Court. The cases become more numerous and more technical, the arguments of counsel and the opinions of the judges become briefer and more prosaic, and, the formative period of our constitutional development being largely passed, the decisions themselves seem less epoch-making than those which the Court rendered in the days of Marshall or Taney. To regret, therefore, that the necessary process of selection and compression has allowed but ten lines of comment upon cases which one would like to see discussed through ten pages is merely to regret that Mr. Warren did not write ten volumes instead of three.

The author's method has been that of the careful scholar and in somewhat lesser degree that of the man of letters. The book is the product of an appalling amount of careful and detailed research. No source of information apparently was too remote or too inaccessible to be consulted. Letters, manuscripts, memoirs, contemporary newspapers, have all been made to render up their secrets. By his consistent use of long quotations from these obscure sources, particularly the early newspapers, Mr. Warren has earned the gratitude of the historian, if not of the casual reader. And yet in spite of this stylistic liability, consciously incurred for a worthy purpose, he has written a book which is thoroughly readable and intensely interesting.

It is not the purpose of this paper to enter into an extended criticism of Mr. Warren's book. It would certainly not be difficult to expatiate at length upon the excellence of its substance and its craftsmanship; and whatever imperfections it has could, by sufficient avidity of effort, be exposed. The fact remains that it is a book of very great importance. The writer has accordingly set himself the task of introducing it to the readers of the MINNESOTA LAW REVIEW in sufficient detail to encourage those to read it who have the leisure, and to give those who do not enjoy that luxury at least some idea of its contents.

In order to do this it will be convenient to devote the first part of this paper to a very brief resumé of the Court's history in terms of the facts, conditions, and episodes upon which Mr. Warren's historical scholarship has shed new light or shed the light for the first time. This will be followed in the second part by a summary of certain broad conclusions respecting the influence, traditions, personnel, and general repute of the Court, gleaned from the author's portrayal of its entire history.

## I. A SYNOPSIS OF SUPREME COURT HISTORY

A. *The Pre-Marshall Period.* From the time of its first session in February, 1790, to the accession of Marshall in 1801, the Supreme Court remained a very modest and inconspicuous institution. It was obviously feeling its way. It lacked leadership; it lacked traditions; it lacked work. Three of its members left it to accept positions in the governments of their respective states.<sup>4</sup> Its most important decision, *Chisholm v. Georgia*,<sup>5</sup> was generally regarded as erroneous and was promptly overruled by constitutional amendment. And yet certain foundations were laid during this period, and certain events transpired, which deeply influenced the future development of the Court. Some of these merit brief comment.

In the first place, it was during this period that the Court established the important principle that judicial opinions would be expressed only in cases of actual litigation coming before the Court in the usual manner. As early as 1790 Hamilton had tried to persuade Jay to have the Supreme Court join with the executive and legislative branches of the government in protesting against certain resolutions adopted by the Virginia Legislature denouncing as invalid the proposed congressional legislation for the assumption of state debts. Jay refused to accept Hamilton's suggestion.<sup>6</sup> In 1792, however, the trustees of the National Sinking Fund, comprising Jay himself as Chief Justice, the vice-president, and three cabinet members, asked Jay for an opinion upon the construction of the law governing their duties, and Jay wrote an opinion.<sup>7</sup> In July, 1793, came Washington's famous letter to

<sup>4</sup>Robert H. Harrison was appointed and confirmed in 1789 but preferred to accept the chancellorship of Maryland. Warren, I, 42. John Rutledge resigned in 1791 to become chief justice of South Carolina. Warren, I, 56. Jay resigned in 1795 to become governor of New York. Warren I, 124. Cushing ran for the governorship of Massachusetts in 1794 but was not elected. Warren, I, 275.

<sup>5</sup>(1793) 2 Dall. (U.S.) 419, 1 L. Ed. 440.

<sup>6</sup>Warren, I, 52.

<sup>7</sup>Warren, I, 110, note 1.

the Court asking its opinion upon twenty-nine questions relating to international law, neutrality, and treaty construction. Jay, speaking for the Court, declined to consider the questions on the ground that such an extra-judicial function was not within the proper sphere of the Court's power.<sup>8</sup> Thus did good judgment save the Court from the colossal blunder of taking sides gratuitously in one of the bitter partisan controversies of the day. Six years later, when asked by two circuit court litigants to pass on the applicability of a state statute to an agreed statement of facts, the Court said it was unwilling to "take cognizance of any suit or controversy which was not brought before it by the regular process of law."<sup>9</sup> And yet the Court's idea of what constituted a moot case can hardly be called overstrict. In *Hylton v. United States*,<sup>10</sup> the carriage-tax case and the first case in which the Court passed squarely upon the validity of an act of Congress, it took jurisdiction of a controversy presented upon an agreed statement of facts which was false and known to be false (alleging that the defendant kept one hundred and twenty-five chariots for his personal use and not for hire!) and which was argued by counsel employed for both sides by the government.

It is worth noting in the second place, that during this period the stage was being set for the firm establishment of the Court's power of judicial review. The very first case on the docket, *West v. Barnes*, would doubtless have raised the question of the Court's power to invalidate a state statute had it not been dismissed on a technical ground.<sup>11</sup> The federal circuit courts, however, did not escape the issue; and Mr. Warren finds five cases in which state statutes were declared by those courts to be invalid as violating the United States constitution or treaties<sup>12</sup> before the

---

<sup>8</sup>Hamilton had protested against referring the question to the Court. Washington had decided to do so in deference to Jefferson's desires and Hamilton accordingly drafted the questions. Warren, I, 109.

<sup>9</sup>*Dewhurst v. Coulthard*, (1799) 3 Dall. (U.S.) 409, 1 L. Ed. 440. The question raised was whether the bankruptcy statute of Pennsylvania could operate to discharge a citizen of the state from obligations owed to a citizen of New York. This was one of the important questions which the Supreme Court passed on in *Sturgis v. Crowningshield*, (1819) 4 Wheat. (U.S.) 122, 4 L. Ed. 529.

<sup>10</sup>(1796) 3 Dall. (U.S.) 171, 1 L. Ed. 556. The case was decided by three of the six justices, Ellsworth, Wilson, and Cushing not participating. Warren I, 146-149.

<sup>11</sup>(1791) 2 Dall. (U.S.) 401, 1 L. Ed. 433. The case involved the application of the legal tender law of Rhode Island which had been invalidated by the Rhode Island supreme court in 1786 in the case of *Trevett v. Weeden*, 1 Thayer, *Cases on Constitutional Law* 73.

<sup>12</sup>(1796) 3 Dall. (U.S.) 199, 1 L. Ed. 568. The cases in the circuit courts were as follows: (1) a case in May, 1791, holding void a Connecticut statute as a violation of the treaty of peace; (2) a case in which

Supreme Court decided the famous case of *Ware v. Hylton* in 1796. It is very interesting that not one of the states whose legislation was at this time held void by an inferior federal court raised its voice in protest. Equally interesting is the fact that when in *Hayburn's Case*<sup>13</sup> a federal circuit court held an act of Congress unconstitutional and refused to enforce it, its action was greeted with enthusiastic approval by the Anti-Federalists, who later became such bitter opponents of judicial authority, but was viewed with grave concern by the Federalists, who feared the judiciary was becoming the ally of localism and strict construction.

One is impressed further by the fact that during the ten years under review the federal circuit courts, upon which, of course, the Supreme Court justices were sitting, rather overshadowed the Supreme Court. They were deciding more cases, exercising broader powers, and incidentally stirring up more bitter and widespread opposition to the federal judiciary than was the Supreme Court itself. It was out on the circuit that the justices delivered their sometimes indiscreet charges to grand juries, enforced the detested Alien and Sedition Acts, and assumed jurisdiction under the doubtful and certainly unpopular doctrine of the existence of a federal common law.<sup>14</sup> There is a touch of irony in the fact that it was the circuit court duty which they loathed and the constitutional propriety of which they doubted that won for the Supreme Court judges their unpopularity, and which, through the belated efforts of Congress to abolish it, made the Court itself the object of the bitter partisan hostility of Jefferson and his followers.<sup>15</sup>

---

Justice Iredell invalidated a Georgia statute upon similar grounds in 1792; (3) a similar decision by Justice Paterson in the circuit court in South Carolina in 1793; (4) *Alexander Champion and Thomas Dickason v. Silas Casey*, not published in the reports, (1792), invalidating a Rhode Island act as impairing the obligation of contracts; (5) *Van Horne's Lessee v. Dorrance*, (1795) 2 Dall. (U.S.) 304, 1 L. Ed. 391, in which Justice Paterson instructed a federal jury to consider a Pennsylvania statute void. This last case aroused some Federalist opposition.

In 1799 a statute of Vermont was invalidated as an impairment of the obligation of contracts. There were other cases in which similar issues were raised but the statutes were upheld. For all of the foregoing see Warren, I, 65-69, and footnotes.

<sup>13</sup>(1792) 2 Dall. (U.S.) 409, 1 L. Ed. 436. Warren, I, 70-81.

<sup>14</sup>In commenting on Chief Justice Ellsworth's decision in *United States v. Williams*, (1799) 2 Cranch, (U.S.) 82, note, 2 L. Ed. 214, Wharton, *State Trials*, 652, denying to American citizens the right of expatriation on the ground that no such right existed in common law, Mr. Warren says: "No decision by any federal judge had ever aroused so great and widespread resentment." Warren, I, 159-161.

<sup>15</sup>The federal Judiciary Act of 1801, one provision of which relieved the Supreme Court justices of circuit duty, precipitated Jefferson's attack

B. *The Rule of Marshall.* For a third of a century John Marshall's personality and broad judicial statesmanship dominated the Supreme Court. With telling blows he spiked down the foundation planks of our constitutional system. He fixed the Supreme Court in a position of dignity and authority; he established the doctrine of judicial review; he laid down the principles of nationalism and federal supremacy; he freed interstate commerce from the shackles of state monopoly; and he relentlessly defended the sanctity of contracts.<sup>16</sup> Space does not permit even a brief summary of Mr. Warren's valuable treatment of these matters. But a few interesting situations upon which he has shed new light may be singled out for comment.

We are given, in the first place, a somewhat new political setting for the case of *Marbury v. Madison*<sup>17</sup> and the doctrine of judicial review. Contemporary opinion seems to have been neither surprised nor disturbed to have the Court announce its power to invalidate an act of Congress. Until the acrimonious debates in Congress in 1801 upon the Judicial Repeal Act the Court's right to exercise that power seems not to have been challenged. The Republicans themselves had applauded the circuit judges for overriding a congressional act in the *Hayburn Case*<sup>18</sup> and had loudly abused the courts for not invalidating the hated Alien and Sedition Acts. In this connection Mr. Warren shows that the famous Kentucky and Virginia Resolutions of 1798 and 1799 asserting the states' authority to disregard acts of Congress which they deemed unconstitutional were not in reality denials of the power of judicial review, as has been sometimes asserted, but were merely declarations of the right of the states to act in such cases in the event that the courts had failed to do so. In short, Republican antipathy to the idea of judicial review seems to have originated from the concrete fear that the Court might declare unconstitutional the law repealing the obnoxious eleventh-hour Judiciary Act of 1801. Marshall's opinion in *Marbury v. Madison* infuriated Jefferson and his followers not because it established the judicial veto over legislation but because Marshall went out of his way to tell Jefferson that he had no legal right to withhold Marbury's commission. It was because the Court dared thus

---

on the judiciary. Warren, I, chap. IV: Beveridge, Life of John Marshall, III, Chap. I, II.

<sup>16</sup>For a summary of Marshall's work, see the writer's article, Marshall and the Constitution, 5 MINNESOTA LAW REVIEW 1.

<sup>17</sup>(1803) 1 Cranch (U.S.) 137, 2 L. Ed. 60.

<sup>18</sup>(1792) 2 Dall. (U.S.) 409, 1 L. Ed. 436.

to interfere with the executive that the Republican editors and politicians hurried to the attack; and practically the only criticism against the case on the basis of its doctrine of judicial review appeared in the columns of a federalist newspaper.<sup>19</sup> Mr. Warren sums this point up in a paragraph which may well be quoted:

"The fact is that the opposition to the judiciary during the early years of the nineteenth century, found in both the Republican and Federalist parties, was directed not so much at the *possession of the power* of the Court to pass upon the validity of the Acts of Congress, as at the *effect of its exercise* in supporting or invalidating some particular measure in which the particular political party was interested. So far from denying the existence of the power to pass upon the constitutionality of the detested Sedition Act or of the obnoxious United States Bank Charter, the Republicans in 1800 and in 1819 complained of the federal Court for its failure to declare these Acts to be unconstitutional; and prior to 1800 (as has been shown in a previous chapter) it was the Republicans (or Anti-Federalists) who had especially championed the right of the Court to protect the people and the states against the passage of unconstitutional laws by the legislatures. So, in the same manner, the Federalists in 1808 assailed the federal courts for failing to hold the hated Embargo Act unconstitutional. Unquestionably, if the Court had held either the Sedition Act, the Embargo, or the Bank Charter unconstitutional, the party opposing those laws would have warmly applauded its action, and would have been little concerned over the question of the existence of the power of the Court. This history of the years succeeding 1800 clearly shows that, with regard to this judicial function, the political parties divided not on lines of general theory of government, or of constitutional law, or of nationalism against localism, but on lines of political, social or economic interest."<sup>20</sup>

In connection with the case of *McCulloch v. Maryland*<sup>21</sup> and its setting it is worth noting that the doctrine of implied powers and liberal construction had been clearly enunciated by Marshall as early as 1804 in the case of *United States v. Fisher*.<sup>22</sup> Furthermore, in 1809 in *Bank of United States v. Deveaux*,<sup>23</sup> the question of the right of a state to tax a branch of the Bank of the United States had been involved. The Court dismissed the case for want of jurisdiction, holding that to give the federal courts jurisdiction

<sup>19</sup>Warren, I, 243-268. Mr. Warren calls attention to the fact that within six months of the decision in *Marbury v. Madison* the circuit court for the District of Columbia upon which Marshall sat invalidated an act of Congress in the case of *United States v. Benjamin More*. Although published widely this decision received no criticism. Warren, I, 255.

<sup>20</sup>Warren, I, 266-267.

<sup>21</sup>(1819) 4 Wheat. (U.S.) 316, 4 L. Ed. 579.

<sup>22</sup>(1805) 2 Cranch (U.S.) 358, 3 L. Ed. 304.

<sup>23</sup>(1809) 5 Cranch (U.S.) 61, 3 L. Ed. 38.



on the ground of diversity of citizenship it must be affirmatively shown that all stockholders of a corporation are citizens of a state other than that of the opposing party to a suit. This case had two important consequences: it kept corporation cases out of the federal courts for nearly forty years,<sup>24</sup> and it postponed the decision of the issue in *McCulloch v. Maryland*, respecting state authority, for nine years. Mr. Warren thinks that if the Court could have met this issue under the more auspicious circumstances of 1810 the whole course of our legal history might have been different.<sup>25</sup> The decision in *McCulloch v. Maryland* was, of course, received with a storm of protest by the Republicans. Interestingly enough, the point of bitterest attack seems to have been the doctrine of implied powers and the failure of the Court to invalidate the act chartering the bank, although there was at the same time plenty of protest against that portion of the decision invalidating the taxing act of Maryland, protest emanating particularly from the seven other states which had passed laws designed to exclude the bank or cripple its activities.<sup>26</sup> It must be kept in mind that this decision was rendered only a year before the enactment of the famous Missouri Compromise Act of 1820, and the slavery issue was already becoming acute. The southern leaders viewed with alarm the pronouncement of the broad doctrine of implied powers because they feared that it might serve as the constitutional basis for congressional interference with slavery.<sup>27</sup>

The slave states also viewed with bitter resentment the decision in *Gibbons v. Ogden*,<sup>28</sup> holding the New York steamboat monopoly an unconstitutional interference with interstate commerce. In most parts of the country the decision was received with great rejoicing, for, as Mr. Warren says, "It was the first

---

<sup>24</sup>This doctrine as to the citizenship of corporations was abandoned in *Louisville, etc., R. v. Letson*, (1844) 2 How. (U.S.) 497, 11 L. Ed. 353.

<sup>25</sup>Had the Court sustained the jurisdiction of the circuit court and decided the important constitutional questions involved, the course of legal history would have been radically changed. *McCulloch v. Maryland* would have been anticipated by ten years; Congressional power to charter a bank would have been upheld: the long debates in Congress between 1810 and 1816 over this power would not have occurred; the charter of the old bank would probably have been renewed; the tremendous difficulties in the financing of the War of 1812 would have been obviated; the feelings of state jealousy over the denial of the state powers of taxation would have been less vigorous than they were ten years later, after a series of state laws had been set aside by the Court." Warren, I, 392.

<sup>26</sup>These states were Indiana, Illinois, Tennessee, Georgia, North Carolina, Kentucky, and Ohio. Warren, I, 505-506.

<sup>27</sup>Warren, II, 2.

<sup>28</sup>(1824) 9 Wheat. (U.S.) 1, 6 L. Ed. 23.

great 'trust' decision in this country, and quite naturally met with popular approval on this account."<sup>29</sup> But the South saw that the doctrines laid down placed in the hands of Congress control over foreign and interstate slave trade. Nor was this mere speculation. Eight months before, Mr. Justice Johnson in the circuit court had held unconstitutional a South Carolina statute forbidding the entrance into the state of free negroes on the ground that the statute impaired the freedom of commerce.<sup>30</sup> The state, violently protesting against outside interference, continued to enforce this law for over twenty-five years in open defiance of the court's decree.

C. *Taney and the Slavery Issue.* If the history of the Supreme Court were to be dramatized, practically every one north of the Mason and Dixon line would unhesitatingly select Chief Justice Taney for the rôle of villain. So inextricably has history linked his name with the *Dred Scott* case that all the rest of his twenty-eight years on the Bench counts for nothing. Mr. Warren does valuable service in making evident the high character of Taney's judicial service in general and by tracing the interesting history of the slavery issue in the courts.

No justice ever took a seat on the Supreme Court in the face of more bitter opposition than did Marshall's successor. In January, 1835, Jackson had nominated Taney, his secretary of the treasury, to the associate justiceship left vacant by the resignation of Mr. Justice Duval. The Senate by a close vote rejected the nomination. Nearly a year later, after Marshall's death, Jackson nominated Taney to the chief justiceship. A violent struggle ensued for over two and a half months, but Taney's appointment finally was confirmed. Deep was the gloom of the Whigs. Forgetting that the new chief justice had for years shared with Wirt the leadership of the brilliant bar of Maryland, they could see in the appointment only a political henchman receiving his reward; and they predicted the early reversal of the sound constitutional doctrines which Marshall had established.<sup>31</sup>

These gloomy prophesies were never realized. Marshall's work was not destroyed. Private rights were not endangered; and the principles of nationalism, if somewhat modified, were still

<sup>29</sup>Warren, II, 76. "For the one and only time in his career on the Supreme Bench Marshall had pronounced a 'popular' opinion. The press acclaimed him as the deliverer of the nation from the thralldom to monopoly." Beveridge, op. cit., IV, 445.

<sup>30</sup>Warren, II, 84.

<sup>31</sup>"Judge Story thinks the Supreme Court is gone, and I think so too" was Webster's comment. Warren, II, 284, and notes.

not reversed. Yet the attitude of the Court did change, as was more or less inevitable; and while those changes did not find favor in the eyes of Story and Kent, the more impartial student of history at the present time will hardly feel like asserting that they were changes to be deplored. Mr. Warren compares Taney's Court with that of Marshall in a paragraph so penetrating in its analysis and so admirable in its expression as to warrant its quotation in full:<sup>32</sup>

"There was, however, no real relaxation in the determination of the Court to uphold the National dignity and sovereignty, in any case where it was really attacked; and in fact, in the succeeding years, Chief Justice Taney went even further than Marshall had been willing to go in extending the jurisdiction of the federal courts in admiralty and corporation cases and in many other directions. If any real change in the course of the Court in cases affecting the National powers can be detected, between the thirty years after 1836 and the years prior, it may be said to amount only to this: that in doubtful cases, the Court possibly tended to give the benefit of the doubt to the state more than in Marshall's time, and even this statement cannot be made without qualification. But Taney differed from Marshall in one respect very fundamentally, and this difference was clearly shown in the decisions of the Court. Marshall's interests were largely in the constitutional aspects of the cases before him; Taney's were largely economic and social. Marshall was, as his latest biographer has said, 'the Supreme Conservative'; Taney was a Democrat in the broadest sense, in his beliefs and sympathies. Under Marshall, the 'leading doctrine of constitutional law during the first generation of our national history was the doctrine of vested rights.' Like his contemporary in England, Sir Robert Peel, he believed that 'the whole duty of government is to prevent crime and to preserve contracts.' Under Taney, however, there took place a rapid development of the doctrine of the police power, 'the right of the state legislature to take such action as it saw fit, in the furtherance of the security, morality and general welfare of the community, save only as it was prevented from exercising its discretion by very specific restrictions in the written constitution.' 'The object and end of all government,' Taney has said with great emphasis in the *Charles River Bridge case*, 'is to promote the happiness and prosperity of the community by which it is established and it can never be assumed that the government intended to diminish the power of accomplishing the end for which it was created. . . . We cannot deal thus with the rights reserved to the states, and by legal intendment and mere technical reasoning take away from them any portion of that power over their own internal police and improvement, which is so necessary to their well being and prosperity.' It was this change of emphasis from vested, individual property rights to the

---

<sup>32</sup>Warren, II, 307-310.

personal rights and welfare of the general community which characterized Chief Justice Taney's Court. And this change was but a recognition of the general change in the social and economic conditions and in the political atmosphere of that period, brought about by the adoption of universal manhood suffrage, by the revolution in methods of business and industry and in names of transportation, and by the expansion of the Nation and its activities. The period from 1830 to 1860 was an era of liberal legislation—the emancipation of married women, the abolition of imprisonment for debt, the treatment of bankruptcy as a misfortune and not a crime, prison reform, homestead laws, abolition of property and religious qualifications for the electorate, recognition of labor unions, liberalizing of rules of evidence, and criminal penalties. It was but natural that the courts amid such progressive conditions should acquire a new outlook responsive thereto. As has been well said, at the very moment when the election of Jackson meant the supremacy of the doctrine of strict construction, there arrived an era in the national life 'when the demand went forth for a large government programme: for the public construction of canals and railroads, for free schools, for laws regulating the professions, for anti-liquor legislation, for universal suffrage.' Taney came to the Bench with the view that the states must possess the sovereign and complete power to carry out this programme and to enact useful legislation for their respective populations. To Taney, the paramountcy of national power within the sphere of its competence was of equal but no greater importance than complete maintenance of the reserved sovereignty of the states. Neither must be unduly favored or promoted.<sup>33</sup>

The judicial history of the slavery controversy culminating in the *Dred Scott case*<sup>33</sup> can only be summarized briefly. It seems clear, in the first place, that the Supreme Court had early realized the explosive character of the slavery question and had wherever possible avoided it. Marshall himself in 1820 had discreetly side-stepped the question of the validity of a Virginia act forbidding the entrance of free negroes when that issue had arisen in the circuit court in the case of the *Brig Wilson*.<sup>34</sup> As he wrote to Story, with apparent relish:

"A case has been brought before me in which I might have considered its constitutionality, had I chosen to do so; but it was not absolutely necessary, and as I am not fond of butting against a wall in sport, I escaped on the construction of the act."<sup>35</sup>

As we have seen, however, Judge Johnson on the South Carolina circuit had been less fortunate.<sup>36</sup> In 1841 practically the same question, the power of a state to forbid the importation of slaves,

<sup>33</sup>*Dred Scott v. Sanford*, (1857) 19 How. (U.S.) 393, 15 L. Ed. 691.

<sup>34</sup>(1820) 1 Brock. (U.S.C.C.) 423, Fed. Cas. No. 17,846.

<sup>35</sup>Warren, II, 86.

<sup>36</sup>*Supra*, p. 283.

came before the Supreme Court in the case of *Groves v. Slaughter*,<sup>37</sup> but a majority of the Court avoided a decision of the constitutional issue by holding the clause of the state constitution in question not self-executing. Ten years later there was presented to the Court in the case of *Strader v. Graham*<sup>38</sup> the precise issue raised in the *Dred Scott case*: namely, whether slaves taken from a slave state to a free state and then back to a slave state remained slaves or had acquired their freedom. The Court held unanimously that the status of the slaves in question was governed exclusively by the laws of Kentucky, the state to which they had been returned, and that no federal jurisdiction arose. While there was some criticism of the Court's decisions on the Fugitive Slave Law, it is clear that prior to the *Dred Scott case* the Court had managed fairly well to keep from getting itself embroiled in the slavery controversy.

A second important element in the situation stands out. This is the development of a movement amongst certain of the political leaders to force the Supreme Court to decide, whether it wished to or not, the bitterly controverted question of the power of Congress over slavery in the territories. A provision designed to accomplish this formed part of the compromise program of 1850.<sup>39</sup> The result of this was most unfortunate. The conservative Whigs together with the northern and southern Democrats favored the idea of shifting onto the Court the responsibility of settling the slavery issue and loudly professed their willingness to abide by its decision. Even Lincoln was converted to this point of view.<sup>40</sup> The Free-soilers, on the other hand, apparently fearing the outcome, protested vigorously. Convinced, however, that a decision would ultimately be rendered on the question, they set about systematically to discredit the Court and thus to forestall the influence of any adverse pronouncement it might make. For nearly nine years the Court was the target of the most malignant vituperation; with the result that by the time the *Dred Scott case* was actu-

---

<sup>37</sup>(1841) 15 Pet. (U.S.) 449, 10 L. Ed. 800.

<sup>38</sup>(1851) 10 How. (U.S.) 13, L. Ed. 337.

<sup>39</sup>In 1848 Senator Clayton introduced a bill for the admission of Oregon, one clause of which provided for appeals to the Supreme Court upon questions relating to the title to slaves, or to personal freedom arising on habeas corpus. The bill passed the Senate but not the House. Warren, II, 482-486. These same provisions, in substance, formed part of the Territorial Act of 1850 for Utah and New Mexico. See Report of Sen. Committee on Territories, Jan. 4, 1854. Senate Reports, No. 15, 33 Cong., I Sess. The text of these provisions is found in Allen Johnson's Readings in American Constitutional History (U.S.) 414.

<sup>40</sup>Warren, III, 52.

ally decided the Free-soil party had argued itself back into the old Jeffersonian-Jacksonian doctrine that a decision of the Supreme Court could not bind Congress in the exercise of its legislative authority.

The *Dred Scott* case itself need not be discussed at length. It was not, as has sometimes been alleged, framed by the slavery interests merely to get a decision on the slavery question. At the time of argument it attracted much less attention than the case of *Ableman v. Booth*,<sup>41</sup> which was also pending. It presented no new issue, for the facts were practically identical with those in *Strader v. Graham*,<sup>42</sup> decided in 1851. After the arguments in the *Dred Scott* case had been heard the judges agreed not to render an opinion upon the constitutionality of the Missouri Compromise Act of 1820, but to hold that, whatever the negro's status had been while residing in free territory, his present status was determined by the laws of Missouri; and since those laws held him a slave he could not sue in a federal court. Mr. Justice Nelson was designated to write the Court's opinion. Thus, again, the Court would avoid expressing itself squarely on the slavery issue. It was learned, however, that Justices McLean and Curtis were writing vigorous dissenting opinions in which they were discussing and upholding the Missouri Compromise Act. The majority, "forced up to this point by the two dissentients," apparently believing that a judicial decision on this vital question might settle it forever, determined finally to render an opinion covering the whole question of slavery in the territories. At this point a curious incident occurred. Mr. Justice Grier still felt that the Court should avoid the dangerous constitutional question. Accordingly Mr. Justice Catron wrote to Buchanan, the President-elect, telling him that the Court was going to pass on the validity of the Missouri Compromise Act and asking him to write to Grier urging upon him the necessity of settling the whole controversy by a clean-cut decision. This Buchanan did; and on February 23, 1857, Grier replied in a letter telling at length how the Court was to treat the case, and outlining what "you may safely say in your inaugural."<sup>43</sup> Thus is established, what was long denied,<sup>44</sup> that

<sup>41</sup>(1858) 21 How. (U.S.) 506, 16 L. Ed. 169.

<sup>42</sup>*Supra*, p. 286.

<sup>43</sup>Warren, III, 17, note.

<sup>44</sup>"But however Buchanan got his intelligence, his character and that of Taney are proof that the chief justice did not communicate the import of his decision to the president-elect." Rhodes, *History of the United States*, II, 269.

the new President had advance knowledge of the Court's decision, although it is equally clear that the character of the decision was in no way influenced by Buchanan's own views or political desires.

The actual decision in the *Dred Scott* case was far less important than what people thought about it and thought about the Court for rendering it. The case settled nothing, not even the rights of Dred Scott, who was freed three months later. But it cost the Court the confidence of the country. Not only had they blundered, but they had needlessly gone out of their way to blunder. As Professor Corwin has put it:

"The Dred Scott decision cannot be, with accuracy, written down as usurpation, but it can and must be written down as a gross abuse of trust by the body which rendered it. The results from that abuse of trust were, moreover, momentous. During neither the Civil War nor the period of reconstruction did the Supreme Court play anything like its due rôle of supervision, with the result that during the one period the military powers of the President underwent undue expansion, and during the other the legislative powers of Congress. The Court itself was conscious of its weakness, yet notwithstanding its prudent disposition to remain in the background, at no time since Jefferson's first administration has its independence been in greater jeopardy than in the decade between 1860 and 1870. Slow and laborious was its task of recuperating its shattered reputation."<sup>45</sup>

After the *Dred Scott* case the Republicans and Free-soilers were in no mood to view with complacency the patently sound decision of the Court in *Ableman v. Booth*.<sup>46</sup> The supreme court of Wisconsin invalidated the Fugitive Slave Law and sustained the right of the state to release violators of that law from the custody of the federal authorities.<sup>47</sup> Abolitionists could think only in terms of abolition. Consistency was thrown to the winds. As war broke upon the scene we find the state of Wisconsin belligerently hurling forth from her courts and legislature the same doctrines of nullification which had brought such wide-spread rebuke upon the head of South Carolina in 1833; while Chief Justice Taney, popularly regarded as the arch-apostle of the states rights philosophy, was thundering back in terms of a nationalism which Marshall himself never exceeded.

---

<sup>45</sup>"The Dred Scott Decision in the Light of Contemporary Legal Doctrine," 17 Amer. Hist. Rev. 52. Mr. Warren comments upon "the gross and willful perversion of a sentence in the Chief Justice's opinion" to the effect that "the negro has no right which the white man is bound to respect." This was not Taney's own view, but his description of the view generally prevalent during the eighteenth century. Warren, III, 25.

<sup>46</sup>Supra, p. 287.

<sup>47</sup>In re Booth, (1854) 3 Wis. 1.

D. *The War and Reconstruction.* Six weeks after the outbreak of hostilities in 1861, Chief Justice Taney, sitting in the circuit court, locked horns with President Lincoln in the famous *Merryman case*<sup>48</sup> over the right of the court to release on habeas corpus a prisoner in custody of the military authorities. The President ignored the court's action entirely, and Taney died three years later firmly believing, as Marshall had believed at his death nearly thirty years before, that the independent position of the judiciary was gone forever.<sup>49</sup> Other cases of interest rose during the war, but they are overshadowed in importance by the judicial history of Reconstruction. It may be noted that in 1863 the size of the Court was increased to ten. President Lincoln appointed five justices during his tenure of office and was able thus to reconstruct the Court.<sup>50</sup>

The decision in the case of *Ex parte Milligan*,<sup>51</sup> in 1866, marked the opening of a long battle between Congress and the Court in respect to Reconstruction. The Court unanimously vindicated Taney's position in the *Merryman case*, by holding that the president had no power to institute military trials in time of war in localities where the civil courts were open. A majority of the Court went on to say that Congress itself had no authority to establish military tribunals under such circumstances, an opinion from which four justices vigorously dissented.<sup>52</sup> This decision came too late to embarrass the conduct of the war, but it came just in time to serve notice upon Congress that its plans for Reconstruction through the establishment of military government in the South were in grave danger.<sup>53</sup> The reaction in Congress was

<sup>48</sup>*Ex parte Merryman*, (1861) Taney (U.S.C.C.) 246, Fed. Cas. No. 9, 487.

<sup>49</sup>Marshall's extreme pessimism during his last years is clearly brought out by Beveridge, op. cit. IV, Chap. X. Mr. Warren calls attention to two other cases in which the courts defied the military authorities. "Judge Treat of the United States district court in St. Louis issued a writ of habeas corpus in the case of Capt. Emmet Macdonald, who had been arrested and imprisoned by General Harvey, on charges of treason, and after lengthy arguments an order for Macdonald's discharge was issued and finally complied with by the Army." Warren, III, 91, note. See also *In re Kemp*, (1863) 16 Wis. 382, supporting Taney's views in the *Merryman case* and holding the president without power to suspend the writ of habeas corpus. Warren, III, 95, note.

<sup>50</sup>Lincoln's appointees, however, did not constitute a majority during Lincoln's own life.

<sup>51</sup>(1866) 4 Wall. (U.S.) 2, 18 L. Ed. 281.

<sup>52</sup>The majority consisted of Justices Field, Davis, Nelson, Grier and Clifford. Justices Miller, Swayne, Wayne, and Chief Justice Chase dissented on the question of congressional power.

<sup>53</sup>The justices had aroused the ire of the radical Republicans by refusing to sit in the circuit courts in the Southern states as long as they were governed by military authority. Chase's refusal to hold court in Virginia



prompt and furious; and the ruffled feelings of the Republican majority were by no means soothed by the two decisions rendered eight months later, *Cummings v. Missouri* and *Ex Parte Garland*,<sup>54</sup> holding the state and federal test oath provisions to be bills of attainder and ex post facto laws. Congressional attacks on the Court now appeared in all the various forms which the enemies of Marshall had devised forty years before.<sup>55</sup> The Court wisely avoided trouble by holding in *Mississippi v. Johnson* and in *Georgia v. Stanton*<sup>56</sup> that they could not enjoin the president or his secretary of war from enforcing the Reconstruction Acts. But when shortly thereafter it was clear that the constitutionality of those acts was to come before the Court in *McCardle's Case*,<sup>57</sup> the Republicans in Congress, in spite of Democratic taunts that they were afraid to trust the decision of a court of which President Lincoln's five appointees now constituted a majority,<sup>58</sup> passed an act taking away the Court's appellate jurisdiction in habeas corpus cases, even in cases pending, and thus snatched the constitutional issue from the very grasp of the Court.<sup>59</sup> That tribunal has never been subjected to more humiliating treatment than that which it received at the hands of the Republican leaders in the late sixties.

---

prevented the trial of Jefferson Davis for treason. Chase's theory seems to have been that Davis should be tried before a military tribunal; but he was obviously reluctant to sit in the case under any circumstances. Warren, III, 143. See also Salmon P. Chase, by Hart (Amer. Statesmen Series) 352-353.

<sup>54</sup>(1867) 4 Wall. (U.S.) 277, 18 L. Ed. 366, and (1867) 4 Wall. (U.S.) 333, 18 L. Ed. 356.

<sup>55</sup>Warren, III, 168-176.

<sup>56</sup>(1867) 4 Wall. (U.S.) 475, 18 L. Ed. 437, and (1867) 6 Wall. (U.S.) 50, 18 L. Ed. 721.

<sup>57</sup>*Ex parte McCardle*, (1868) 7 Wall. (U.S.) 506, 19 L. Ed. 264. The act of Feb. 5, 1867 provided for appeals from federal circuit courts to the Supreme Court in habeas corpus cases, in "all cases where any person may be restrained of his or her liberty, in violation of the constitution or of any treaty or law of the United States." The law had been enacted to aid in the enforcement of the Reconstruction Acts; it was seized upon in *McCardle's case* to contest the validity of those acts. Warren, III, 187.

<sup>58</sup>The death of Justices Catron and Wayne had reduced the membership of the Court to eight. The size of the Court had been fixed at seven by act of July 23, 1866 in order to prevent President Johnson from filling any vacancies thereon. Warren, III, 145.

<sup>59</sup>In the case of *Ex parte Yerger*, (1869) 8 Wall. (U.S.) 85, 19 L. Ed. 332, the Court held that it still had appellate jurisdiction in a habeas corpus proceeding under the provision of the federal Judiciary Act of 1789, and it looked as though the issue of the validity of the Reconstruction Acts would be passed upon. A bill was introduced in the Senate to deprive the Court of all appellate jurisdiction in cases arising from the Reconstruction Acts and another bill would have denied the Court the power to invalidate any act of Congress. The Yerger case was compromised and these bills never came to a vote. Warren, III, 213-219.

The Court's handling of the *Legal Tender Cases*, which now came on for argument, did not tend to strengthen its position in the public mind. In 1863 the question of the validity of the Legal Tender Acts had come before the Court in the case of *Roosevelt v. Meyer*,<sup>60</sup> but that case had been dismissed for want of jurisdiction. Had the question been decided at that time the acts would almost certainly have been held void by so large a majority of the Court that no attempt would have been made to have the question reopened. The issue arose again in *Hepburn v. Griswold*,<sup>61</sup> which was argued in 1867 and again in 1868. There were but eight judges on the bench at the time and the fear of an even division caused some delay in announcing the decision.<sup>62</sup> The Court finally lined up five to three against the validity of the statute; but the resignation of Mr. Justice Grier, who had been one of the majority, took place before the decision was made public, so the case was finally disposed of by a four-to-three division of the judges. On the day on which the *Hepburn Case* was decided President Grant nominated Bradley and Strong to vacancies on the Court;<sup>63</sup> and immediately a movement was set on foot to have the legal tender issue reopened for argument in cases still pending. By the aid of the two new justices a rehearing was forced over the protest of four justices; and in April, 1871, the Court by a five-to-four division, Bradley and Strong voting with the majority, reversed the decision in *Hepburn v. Griswold* and sustained the validity of the Legal Tender Acts.<sup>64</sup> The charge was made then and has been renewed many times since that President Grant had deliberately "packed" the Court by the appointment of two men whose views on the legal tender issue he had ascertained in advance. Mr. Warren rejects this view and points out that the decision to nominate Bradley and Strong had been reached before the president had any knowledge of how the case of *Hepburn v. Griswold* was to be decided. He feels that the fact that the two

---

<sup>60</sup>(1863) 1 Wall. (U.S.) 512, 17 L. Ed. 500.

<sup>61</sup>(1870) 8 Wall. (U.S.) 603, 19 L. Ed. 513.

<sup>62</sup>Mr. Warren calls attention to two unreported cases in 1870 in which statutes were upheld by an evenly divided Court. In the Test Oath Case, *Blair v. Thompson Ridgely*, the validity of a Missouri statute denying the right to vote to persons not taking an oath that they had not participated in rebellion, was sustained by a four-to-four decision. Another four-to-four decision upheld the constitutionality of an act of Congress "forbidding suits against the United States officers who took or destroyed property in the South as a war measure." Warren, III, 232, and note.

<sup>63</sup>The Court had been increased to nine by the act of April 10, 1869. Warren, III, 223.

<sup>64</sup>*Knox v. Lee*, (1871) 12 Wall. (U.S.) 457, 20 L. Ed. 287.

judges shared Grant's views on the question proves nothing; for in the existing state of public opinion on the question the president could hardly have found two Republicans of Supreme Court calibre who believed the legal tender legislation to be unconstitutional.<sup>65</sup> Among thoughtful people, however, the Court's blunt reversal of a decision not fifteen months old under the circumstances described was looked upon with grave concern. Whatever may have occurred actually, the whole situation had an ugly look. A most unfortunate precedent had been set. The Court has been criticized more bitterly on other occasions, but it has probably never come nearer deserving criticism than in this case.

In spite of its humiliation in the *McCardle case*,<sup>66</sup> the final victory on the constitutional issue of Reconstruction was to lie with the Court. There can be no doubt as to what the radical Republican group in Congress was trying to do. By the fourteenth and fifteenth amendments and by the various statutes passed for their enforcement the protection of civil rights was to be placed directly in the hands of the federal government. That this would have worked a complete and undesirable revolution in our federal system is certainly true; it seems no less true that such a revolution was what Congress desired. But by one decision after another the whole congressional program was emasculated. The process began in the *Slaughterhouse Cases*<sup>67</sup> in 1875, in which the Court held that the privileges and immunities of citizens of the United States which the fourteenth amendment had forbidden the states to abridge did not comprise civil rights generally but only such rights as owed their existence to the national government. It was practically completed in the *Civil Rights Cases*<sup>68</sup> in 1883, in which Congress was held to possess no power to protect the negro against racial discrimination practiced by individuals. Despite the aston-

---

<sup>65</sup>There could have been no doubt as to Strong's views as to the constitutionality of the Legal Tender Acts since the Pennsylvania supreme court, of which he was chief justice had upheld their validity in the case of *Shellenberger v. Brinton*, (1866) 52 Pa. St. 9. In fifteen states the supreme courts had upheld the validity of the Legal Tender Acts; while in two states adverse decisions had been rendered. The cases are cited in 2 Carson, *The History of the Supreme Court of the United States*, 450, note.

<sup>66</sup>*Supra*, p. 290.

<sup>67</sup>(1873) 16 Wall. (U.S.) 36, 21 L. Ed. 394. As is well known the Court expressed a view as to the scope of the equal protection of the law clause of the fourteenth amendment so narrow that it was later obliged to abandon it. The *Slaughter House Cases* would probably be decided the other way today upon the basis of due process of law.

<sup>68</sup>(109) U. S. 3, 27 L. Ed. 835, 3 S. C. R. 18. Other cases of interest in this connection are discussed in Warren, III, Chap. 34.

ishment and chagrin of the Reconstruction leaders these decisions had the salutary effect of eliminating the negro from national politics, of putting the responsibility for his protection primarily upon the states, and of restoring southern confidence in the Court and the federal government.

E. *Nationalism and the Growth of Judicial Power.* Even before the bitterness engendered by the war had wholly abated, the country had become engrossed as never before in industrial and commercial activity. The issues which came before the Court ceased in the main to have sectional or partisan implications, and came more and more to involve economic and social problems. Only a few of the more conspicuous lines of constitutional development during this later period can be mentioned.

In the first place, there occurred an enormous expansion of federal authority under the commerce clause of the constitution. Prior to 1860 only twenty-five cases involving the construction of this clause had come before the Court; now its docket was crowded with them. Not only did the Court support the extension of congressional authority over many matters only somewhat indirectly connected with the processes of interstate commerce itself, but it relentlessly blocked all efforts upon the part of the states to pass laws which would in any way interfere with or burden that commerce.

In the second place, there occurred under judicial sanction a marked increase in the sphere of the implied powers of Congress. Here may be noted the case of *Juillard v. Greeman*,<sup>69</sup> holding in substance that Congress could issue legal tender notes in time of peace, and suggesting that one basis for that power was the fact that it was enjoyed by other sovereign governments. Moreover, it was by boldly resorting to the doctrine of implication that Congress has been able to build up a genuine police power based on its delegated authority over commerce, taxation, and the post office.<sup>70</sup>

One of the most interesting phases of the Court's work during this period has been its supervision under the clauses of the fourteenth amendment of the social and economic legislation passed under the police power of the states. This supervision began only after a period of judicial uncertainty and experimentation as to what the fourteenth amendment really meant;<sup>71</sup> but now the valid-

<sup>69</sup>(1884) 110 U. S. 421, 28 L. Ed. 204, 4 S. C. R. 122.

<sup>70</sup>See the writer's *Studies in the Police Power of the National Government* 3 MINNESOTA LAW REVIEW, 289, 381, 452 and 4 MINNESOTA LAW REVIEW 247, 402.

<sup>71</sup>The trial and error method by which the Court developed its interpretation of the fourteenth amendment is exceedingly interesting. The

ity of practically every new exercise of the states' police power is tested sooner or later before the Supreme Court as to its possible denial of either due process of law or the equal protection of the law. In one or two cases of this sort the Court has held state statutes void upon grounds so narrow and legalistic in character as to merit criticism;<sup>72</sup> but the outstanding feature of the Court's decisions on the police power has been the broad liberality with which, in contrast to some of our popularly elected state courts, it has recognized that genuine social interests must be paramount over any conflicting interests of the individual. The Court will prevent legislative invasion of private rights which it regards as clearly arbitrary; but it has been willing to shift its definition of the term "arbitrary" to meeting the changing demands of modern social and economic problems.

The Court was not without its critics during this period, but in the year 1895 the attacks upon it became particularly virulent as a result of three decisions rendered that year. In the *Sugar Trust case*<sup>73</sup> the Court held that the corporations which were monopolizing the manufacture of sugar were not thereby engaged in interstate commerce, and hence were beyond the reach of the Sherman Act. This seemed to render the federal anti-trust legislation ineffective, and aroused resentment. In the *Income Tax cases*<sup>74</sup> the Court invalidated the Income Tax Law of 1894 a very popular statute. Hostility to the Court and its decision in this case was extreme. This was accentuated by the fact that in invalidating a statute which most people regarded as desirable the Court had to overrule its earlier decision sustaining the income tax passed during the Civil War, as well as by the further fact that this was a five-to-four decision in which Mr. Justice Shiras joined the majority after having changed his mind.<sup>75</sup> The decision was the target for

---

various phases of it are sketched in the writer's paper. *The Social and Economic Interpretation of the Fourteenth Amendment*, 20 Mich. L. Rev. 737.

<sup>72</sup>The most notable instance is the case of *Lochner v. New York*, (1905) 198 U. S. 45, 49 L. Ed. 937, 25 S. C. R. 539, 3 Ann. Cas. 1133, in which the New York ten-hour law for bakers was held void. See also *Coppage v. Kansas*, (1915) 236 U. S. 1, 59 L. Ed. 441, 35 S. C. R. 240 invalidating a Kansas statute penalizing the discharge of a workman because of membership in a labor union.

<sup>73</sup>*United States v. E. C. Knight Co.*, (1895) 156 U. S. 1, 39 L. Ed. 325, 15 S. C. R. 249.

<sup>74</sup>*Pollock v. Farmers' Loan & Trust Co.*, (1895) 158 U. S. 601, 39 L. Ed. 1108, 15 S. C. R. 912.

<sup>75</sup>The facts in regard to this are stated by Mr. Warren as follows: "At its first decision, April 8, 1895, the Court held a tax on real estate income unconstitutional, unless levied in the manner required for a direct tax; as to the other income, the Court was evenly divided, Judge Jackson being

partisan attack during the campaign of 1896, and the agitation against it culminated in the adoption of the sixteenth amendment in 1913. The *Debs case*<sup>76</sup> aroused the antagonism of organized labor by sustaining the right of the federal courts to issue injunctions in labor disputes for the protection of federal interests. At no time since 1895 has the Court been as unpopular with as many people as it was at the time of these decisions.

## II SUMMARIZING OBSERVATIONS.

A. *The Supreme Court and its Critics.* One of the illuminating facts which Mr. Warren brings out is that the Supreme Court has been the object of attack during almost its entire history. There have been one or two brief periods of respite; but in general it is safe to say that Senator La Follette and his friends in their recent onslaughts are merely preserving one of the Court's oldest traditions and are attempting to surround it with that same atmosphere of hostility in which it feels most at home and in which it has done its best work. There are certain facts about these criticisms and attacks on the Court which are worth noting.

One is impressed at the outset with the cosmopolitan character of the Court's critics. Every party which has ever been prominent in our political history, with the exception of the Whigs, has at some time or other strenuously attacked the Court's authority. That such opposition should be the meat and drink of the Jeffersonian Party as well as of their successors, the Jacksonian Democrats, was perhaps not wholly unnatural in view of the strong federalism of Marshall's Court; but the judicial enforcement of the Embargo Acts of 1807 and 1808 brought even the staunch New England Federalists to an attitude of open defiance of the Court's decisions.<sup>77</sup> On more than one occasion the southern Democrats set at naught the decrees of the Court; but their recalcitrant attitude was equalled and surpassed by the Free-soilers in their resistance to the Fugitive Slave Law decisions; while the Republican Party not only repudiated the Court's authority in the *Dred Scott case*,<sup>78</sup> to say nothing of the *Merryman case*,<sup>79</sup> but

---

absent owing to illness. A reargument being ordered, a second decision was made May 20, 1895, in which Judge Jackson (three months before his death) participated; but owing to the fact that Judge Shiras changed his mind after the first decision, the Court, by a vote of five to four, held the whole tax invalid." Warren, III, 421-422.

<sup>76</sup>In re *Debs*, (1895) 158 U. S. 564, 39 L. Ed. 1092, 15 S. C. R. 900.

<sup>77</sup>See Mr. Warren's summary of this situation quoted above, p. 281.

<sup>78</sup>*Supra*, p. 285, 287.

<sup>79</sup>*Supra*, p. 289.

was also guilty in *McCardle's Case*<sup>80</sup> of having directly interfered for partisan ends with the normal work of the Court. The Democratic Party loudly protested against the Income Tax decision of 1895;<sup>81</sup> and the Socialist and other radical parties of more recent origin have consistently opposed the exercise by the courts of the power of judicial review.<sup>82</sup>

Nor has opposition to the Supreme Court been confined to any one section of the country. North and South, East and West, have at various times defied its decrees. Not less than ten states<sup>83</sup> have openly denied its authority, in some instances successfully.<sup>84</sup> When the case of *Osborn v. The Bank of the United States*<sup>85</sup> came before the Court for argument in 1824, "seven states were formally in revolt against the national judiciary, and others were hostile;"<sup>86</sup> and as late as 1859 the legislature of Wisconsin adopted resolutions declaring that "this assumption of jurisdiction by the federal judiciary [in the case of *Ableman v. Booth*<sup>87</sup>] is an act of undelegated power, and therefore without authority, void, and of no force."<sup>88</sup>

It is interesting to note, furthermore, the variety of grounds upon which these violent attacks upon judicial authority have rested, and how little attention the critics of the Court have paid to the demands of logical consistency. The Jeffersonians, who came to regard the doctrine of *Marbury v. Madison* as anathema, violently assailed the Court for not invalidating the Alien and Sedition Acts and the act chartering the United States Bank. The Court was bitterly assailed for its decision in *Fletcher v. Peck*,<sup>89</sup> invali-

<sup>80</sup>Supra, p. 290.

<sup>81</sup>Supra, p. 294. See plank in Democratic Platform of 1896.

<sup>82</sup>Planks advocating the abolition of judicial review of acts of Congress are found in the Socialist platforms of 1908, 1912, 1916, and 1920.

<sup>83</sup>Georgia (1793, 1830-1832); Pennsylvania (1807-1809); Ohio (1819-1821, 1854-1856); Kentucky (1821-1825); Virginia (1821); South Carolina (1823, 1832); New York (1830); New Hampshire (1842-1845); California (1854); Wisconsin (1854-1859). The resistance in some cases was by the legislature of states and in some cases by the courts. Documents relating to most of these controversies are reprinted in Ames, *State Documents on Federal Relations*.

<sup>84</sup>This was notably true in the case of the resistance of Georgia to the decisions of the Court in the Cherokee Indian cases in 1830-1832. Warren, II, 193-194, 205, 228-229. The resistance of South Carolina to Mr. Justice Johnson's decision invalidating the state statute prohibiting the entrance of free negroes was continuous over a long period of time. Supra, p. 283.

<sup>85</sup>(1824) 9 Wheat. (U.S.) 738, 6 L. Ed. 204.

<sup>86</sup>Beveridge, op. cit. IV, 384.

<sup>87</sup>Supra, p. 287.

<sup>88</sup>Wis. Gen. Laws 1859, 247-8. See also Ames, *State Documents on Federal Relations* 303.

<sup>89</sup>(1810) 6 Cranch (U.S.) 87, 3 L. Ed. 162.

dating, as an impairment of the obligation of contracts, a state law repealing a grant of land; and yet these same critics loudly complained because the Court refused to invalidate the original granting act on the ground that it was passed by fraud and bribery. The northern states, which openly denied the binding authority of the decisions upholding the Fugitive Slave Law, were equally willing to deny the Court's power to invalidate the Missouri Compromise Act of 1820 in the *Dred Scott case*; while the southern states, which in like manner belligerently asserted that no federal court had jurisdiction to invalidate their laws against the importation of free negroes, would have rejoiced to have the Supreme Court invalidate the Personal Liberty Laws passed in ten northern states for the purpose of defeating the enforcement of the Fugitive Slave Law.<sup>90</sup> And so it has gone throughout the Court's entire history. It has been under fire most of the time, but the attacks which have been made on it have not been based upon any common doctrine of opposition to judicial power, carefully thought out and consistently adhered to. They have been rather the sporadic protests of parties, of sections, or of interests upon whose toes the Court has trod in some of its decisions, and whose temporary resentment has blazed into an opposition to judicial authority in general.

Nor have the Court's critics managed to agree upon what ought to be done to avert the alleged abuses of judicial power. It is interesting to compare the variety and character of the constructive proposals which have been made to curb that power. First, it has been urged at various times that the Court should be "packed" with judges known to hold certain approved views. The Jeffersonians seem to have brought about the impeachment of Chase in 1805 with the idea that the procedure could be used as a means of getting rid of the Federalists and filling the Court with Republicans.<sup>91</sup> Many Republicans loudly advocated the "packing" of the Court in order to bring about the reversal of the *Dred Scott case*.<sup>92</sup> For years it was believed that President Grant had resorted to this questionable device in order to secure the reversal of the first

---

<sup>90</sup>Such laws were passed in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Michigan, Wisconsin, Iowa, and Ohio. Warren III, 67, note. These laws which refused the assistance of state officials in the enforcement of the Fugitive Slave Law rested on Story's decision in *Prigg v. Pennsylvania*, (1842) 16 Pet. (U.S.) 539, 10 L. Ed. 1060, holding the power of Congress over fugitive slaves to be exclusive.

<sup>91</sup>This is made very clear in Beveridge, op. cit. III, Chap. IV dealing with the impeachment of Chase.

<sup>92</sup>Warren, III, 29-32.



*Legal Tender* decision;<sup>93</sup> and there is no question but that Congress juggled the size of the Court in 1866 and 1867 in order to prevent President Johnson from filling vacancies on it with men who would oppose its views.<sup>94</sup> A second proposal has been made that the twenty-fifth section of the Federal Judiciary Act should be repealed, thus taking from the Supreme Court the right to pass upon the question of constitutionality of state statutes.<sup>95</sup> Sometimes this proposal has been accompanied by the suggestion that the Senate should be the court of final authority in all cases involving the validity of state laws.<sup>96</sup> In the third place, it has been urged that the power of judicial review be abolished entirely, either leaving Congress and the President the sole judges of their constitutional powers, or making the Senate the court of last resort.<sup>97</sup> A multitude of schemes have been worked out to require either that the Supreme Court must agree unanimously in order to invalidate a state or federal statute, or else that a certain extraordinary majority of the judges should concur in such a decision.<sup>98</sup> Finally, it has occasionally been suggested that the Supreme Court should be made elective for short terms, or appointive for short terms, in order to make it reflect more accurately the public opinion of the day.<sup>99</sup> None of the proposals has ever been enacted into law, and with the exception of the unfortunate lapse in connection with *McCardle's Case*<sup>100</sup> Congress has possessed self-re-

---

<sup>93</sup>Supra, p. 291.

<sup>94</sup>See footnote 58, supra.

<sup>95</sup>This proposal was not infrequently made during Marshall's struggles with the various states. Bills to accomplish it were introduced into Congress in 1822 as a protest against the decisions in *Cohens v. Virginia*, (1821) 6 Wheat. (U.S.) 264, 5 L. Ed. 257, and *Green v. Biddle*, (1823) 8 Wheat. (U.S.) 1, 5 L. Ed. 547, (first decided in 1821 and reargued); similar bills were introduced in 1831 during the controversy with Georgia respecting the Cherokee lands; the same attempt was made in 1858 during the congressional discussion of the *Dred Scott* case and the *Booth* case.

<sup>96</sup>In 1821 Senator Johnson of Kentucky introduced a resolution for a constitutional amendment providing that in all cases in which a state is a party, "and in all controversies in which a state may desire to become a party in consequence of having the constitution or laws of such state questioned, the Senate of the United States shall have appellate jurisdiction." Warren, II, 117.

<sup>97</sup>Supra, p. 296. See the recent proposal of Senator LaFollette and his friends.

<sup>98</sup>This problem is somewhat extensively discussed in an article by the writer, *Constitutional Decisions by a Bare Majority of the Court*, 19 Mich. L. Rev. 771.

<sup>99</sup>Jefferson favored the appointment of the justices for a six-year term, and suggested that they be eligible for reappointment if approved by both houses of Congress. Warren, II, 116. The Socialist and Farmer-Labor Parties advocate an elective Court.

<sup>100</sup>Supra, p. 290.

straint enough to refrain from interfering with the exercise of the Court's authority.

B. *The Supreme Court and Politics.* The Supreme Court has very frequently had to deal with cases which have had definitely partisan implications. Persons who have been disappointed by its decisions have sometimes cast reflections upon its impartiality and have charged it with allowing the political views of its members to color its administration of justice. In a certain broad sense there was justice in Jefferson's complaint in 1801 that "the Federalists have retired into the judiciary as a stronghold...and from that battery all the works of republicanism are to be beaten down and erased."<sup>101</sup> For as long as the fundamental theories of government continued to form the basis of alignments between political parties it was of course inevitable that the Court should line up on one side or the other on those questions. And certainly Marshall had no compunctions about taking sides.<sup>102</sup>

But apart from this more general aspect of the case, the history of the Court is one long refutation of the charge that its decisions have been rendered for partisan ends or that its judges have been actuated in their judicial work by motives of political gratitude or political ambition. There have been men on the bench who have been politically ambitious, but those ambitions have not colored the performance of their judicial functions. This salutary tradition has developed in the face of the fact that more than one President has made his appointments to the Court in the hope and expectation that his own political views would be reflected in its decisions. Jefferson admittedly did this and urged Madison to do likewise;<sup>103</sup> but the small success he achieved in molding the political complexion of the Court is reflected in his gloomy comment on the occasion of Story's appointment in 1810, that "it will be difficult to find a character of firmness enough to preserve his independence on the same bench with Marshall,"<sup>104</sup>—a comment

<sup>101</sup>Beveridge, op. cit. III, 21.

<sup>102</sup>It is interesting speculation to consider what the constitutional development of the country might have been had Jefferson been able to appoint Spencer Roane, the ardent states' right advocate, to the chief justiceship of the Supreme Court in 1801 as he had hoped to do. No two men held more widely divergent views upon constitutional problems than Marshall and Roane.

<sup>103</sup>Jefferson, for instance, wrote Madison in 1810, "another circumstance of congratulation is the death of Cushing...which gives an opportunity of closing the reformation [the Republican victory of 1800] by a successor of unquestionable republican principles." Beveridge, op. cit. IV, 109.

<sup>104</sup>Beveridge, op. cit. IV, 59.

inspired no doubt by the independent attitude assumed by Mr. Justice Johnson upon Jefferson's embargo policy.<sup>105</sup> It seems likely that Jackson made his six Supreme Court appointments with a careful eye to the political views of the new justices as well as to their fitness; and yet the whole bench decided against him in the matter of the Spanish land claims.<sup>106</sup> Lincoln showed his freedom from narrow partisan bias in appointing Mr. Justice Field, a Democrat, to the Court as well as by giving the chief justiceship to Chase, who very obviously wanted to replace Lincoln as leader of his party. And yet in making the latter appointment Lincoln frankly wrote to a friend that he was influenced by the necessity of having a chief justice "who will sustain what has been done in regard to emancipation and the legal tender."<sup>107</sup> It was Chase, however, who helped invalidate the Legal Tender Acts, which as secretary of the treasury, he had urged Congress to pass,<sup>107a</sup> and it was Mr. Justice Davis, appointed by Lincoln and one of his closest personal friends, who wrote the opinion of the Court in the *Milligan case*.<sup>108</sup> It is needless to multiply examples of this sort of judicial independence. Mr. Warren has analyzed the leading decisions upon which a partisan alignment of judges would have been possible, and finds Republican and Democratic justices indiscriminately joined to make up the majorities and minorities.

"In fact," declares Mr. Warren, "nothing is more striking in the history of the Court than the manner in which the hopes of those who expected a judge to follow the political views of the president who appointed him have been disappointed."<sup>109</sup>

*C. The Personnel of the Court.* The present and former members of the Supreme Court do not constitute a very numerous body of men. Mr. Justice Sanford is the seventy-third justice to take his seat upon the Bench.<sup>110</sup> Twenty-six of these men have

---

<sup>105</sup>In 1808 Mr. Justice Johnson issued a mandamus compelling the collector of the port of Charlestown to clear a vessel which was being held under the authority of instructions issued by Jefferson for the enforcement of the Embargo Act of 1808. Jefferson's order was held illegal and void. Mr. Warren says: "The episode forms one of the most striking illustrations of judicial independence in American History." Warren, I, 324, et, seq.

<sup>106</sup>Warren, II, 241-245.

<sup>107</sup>Lincoln added to this statement the comment: "We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore, we must take a man whose opinions are known." Warren, III, 123.

<sup>107a</sup>He had, however, assumed this position very reluctantly.

<sup>108</sup>Supra, p. 289.

<sup>109</sup>Warren, I, 22.

<sup>110</sup>This figure is reached by counting Rutledge but once. He served for two brief periods, first as associate justice, and later as chief justice.

served twenty years or more,<sup>111</sup> and eight have served thirty years or more.<sup>112</sup> After the initial manning of the Court by Washington it has so far fallen to the lot of only three Presidents, Jackson, Lincoln, and Taft, to appoint a majority of the justices,<sup>113</sup> although Presidents Grant, Cleveland, Harrison, and Harding (to date) have each appointed four. The change in the Court's personnel has been greater in recent years than during the period prior to the Civil War, probably due to the fact that the later appointments have gone to much older men.<sup>114</sup>

Various considerations have entered into the selection of Supreme Court justices. There has always been a sectional influence arising out of the fact that prior to 1869 the justices were generally expected to be chosen from the part of the country in which they did their circuit court duty, one justice being assigned to each circuit. Even after they were relieved of duty in the circuit courts the tradition of a sectional distribution of members of the Court has persisted, as is evidenced by some of the recent appointments of President Harding.<sup>115</sup> Such a policy limits the range of choice and may prevent the selection of the men best fitted for the office. It is but natural that personal friendships and political affiliations should have actuated many appointments to the Court. Some men have been selected upon these grounds who were at the time of their elevation to the bench by no means conspicuous for their learning or judicial experience. Furthermore, it must not be forgotten that nominations to the Court must be ratified by the Senate, and the president has on many occasions been obliged to sacrifice his own desires with reference to the

<sup>111</sup>These justices were Cushing, Washington, Marshall, Johnson, Story, Duval, Thompson, McLean, Wayne, Taney, Catron, Nelson, Grier, Clifford, Swayne, Miller, Field, Bradley, Harlan, Gray, Fuller, Brewer, White, McKenna, Holmes, Day.

<sup>112</sup>These are Justices Washington, Marshall, Johnson, Story, McLean, Wayne, Field, Harlan.

<sup>113</sup>Jackson appointed Justices McLean, Baldwin, Wayne, Taney, Barbour and Catron; Lincoln appointed Justices Swayne, Miller, Davis, Field, and Chase; Taft appointed Justices Lurton, Hughes, Van Devanter, Lamar, Pitney and elevated Mr. Justice White to the chief-justiceship.

<sup>114</sup>See the interesting article, *The Ages of the Justice* by Walton H. Hamilton, *The New Republic*, Oct. 11, 1922. Mr. Hamilton states that the average age of all the justices appointed during the first forty years of the Court's history was forty-seven. No man over sixty was appointed until 1870. In 1921, just before adjournment the average age of the members of the Court was sixty-nine.

<sup>115</sup>At present the geographical representation on the Court is as follows: Chief Justice Taft (Connecticut), McKenna (California), Holmes (Massachusetts), Van Devanter (Wyoming), McReynolds (Tennessee), Brandeis (Massachusetts), Sutherland (Utah), Butler (Minnesota), Sanford (Tennessee).

choice of a new justice in order to secure senatorial approval. Although in recent years the president's nominations have with few exceptions been ratified without much protest, this has by no means been the rule throughout the history of the Court. There are twenty cases in which men have been formally named as justices and have failed to receive the approval of the Senate,<sup>116</sup> the last instance of such rejection occurring in 1894. And finally the range of choice of members of the Court has been further narrowed, especially in earlier times, by the unwillingness of some of the outstanding leaders of the bar to accept positions upon it. The list of those who have been offered justiceships and have declined them for various reasons includes such names as those of Patrick Henry, John Quincy Adams, Clay, Seargant, Binney.<sup>117</sup>

In view of what has been said of the efforts to use the appointments to the Supreme Court for partisan purposes and in view of the fact that the considerations which have governed those appointments have not infrequently resulted in the selection of men of not much more than average legal ability, how can we account for the fact that the Court has to such an astonishing degree avoided partisanship or political bias and has at the same time been able to bring to the solution of our great constitutional problems a broad-minded statesmanship of the highest order? The answer is not to be found alone in the genius of the great leaders like Marshall or Story, nor in the lofty traditions which the Court has developed in large measure. The answer is to be found in the

<sup>116</sup>These cases, with the date of nomination and the name of the President making it in parenthesis, are as follows: John Rutledge (1795, Washington), rejected, 10 to 14; Alexander Wolcott (1811, Madison), rejected, 9 to 24; John J. Crittenden, (1828, J. Q. Adams), Senate, 23 to 17, refuses to act; Roger B. Taney (1835, nominated as associate justice by Jackson), indefinite postponement by vote of 24 to 21; John C. Spencer (1844, Tyler), rejected 21 to 26; Reuben H. Walworth, and Edward King (1844, Tyler), nomination laid on table; John M. Read (1845, Tyler), Senate adjourns without action; George W. Woodward (1845, Polk), rejected 20 to 29; Edward A. Bradford (1852, Fillmore), Senate fails to act before adjournment; George E. Badger and William C. Micou (1853, Fillmore), Senate refuses to act; Jeremiah S. Black (1861, Lincoln) rejected 25 to 26; Henry Stanberg (1866, Johnson), Senate votes to reduce size of Court to seven to prevent appointments by Johnson; Ebenezer R. Hoar (1869, Grant), rejected 24 to 33; George H. Williams (1873, nominated chief justice by Grant), nomination withdrawn to avoid rejection; Caleb Cushing (1874, nominated chief justice by Grant), nomination withdrawn to avoid rejection; Stanley Matthews, (1881, Hayes), not acted upon (appointed by Garfield and confirmed in 1881); William B. Hornblower (1893, Cleveland), rejected 24 to 30, through "senatorial courtesy" as a result of the struggle between Cleveland and Senator Hill of New York; Wheeler H. Peckham (1894, Cleveland), rejected 32 to 41 for same reasons as Hornblower.

<sup>117</sup>Appointments were also tendered to Levi Lincoln, Martin Van Buren, Buchanan, and Conkling.

fact that the holding of high judicial office seems to generate in the man who holds it, no matter who or what he is, a sense of responsibility, a desire to dispense justice, and an ambition to contribute to the beneficent development of the law, which places him above partisanship or favoritism and which endows him with a mental energy and ability of which he may not have dreamed himself capable.

*D. Supreme Court Mores.* Attention may be called in closing to the way in which certain customs or traditions have been evolved with respect to the work of the Supreme Court and the activities of its members which have solidified into a sort of customs code of official ethics. In some instances this has come about as the result of popular criticism and the demand of public opinion; in other cases it has been due merely to a recognition upon the part of the Court of what is suitable and proper.

In the first place it looked at the outset as though it might become customary to seek appointments to the Court by direct application. Washington appointed two justices in response to their own requests,<sup>118</sup> and refused a third.<sup>119</sup> Fortunately, this undignified procedure was soon abandoned and it is safe to say that at present a man desirous of securing a seat on the Supreme Court could do nothing more calculated to injure his prospects than to make any efforts in his own behalf.

In the second place we recognize at present an unwritten law forbidding a justice of the Supreme Court from engaging in political activity of any sort, to say nothing of holding political office. Even the decorous and punctilious behavior of Mr. Hughes at the time of his nomination to the presidency in 1916 did not fail to elicit charges that he had violated the proprieties by allowing his name to be considered while still on the Bench.<sup>120</sup> And yet during the early period no such tradition seemed to exist. Both Jay and Marshall for brief periods held at the same time the offices of secretary of state and the chief justiceship of the United States;<sup>121</sup> and Jay, as we have seen, served also as one of the

---

<sup>118</sup>James Wilson and John Rutledge. Rutledge offered himself to Washington to succeed Jay as chief justice in 1795. Warren, I, 33, 127.

<sup>119</sup>Thomas McKean, chief justice of Pennsylvania, asked for an appointment in 1789. Warren, I, 40-41.

<sup>120</sup>Cf. the statement by Chief Justice Waite in 1875 refusing to allow his name to be considered as a possible presidential candidate. Warren, III, 285-286.

<sup>121</sup>Jay had been secretary for foreign affairs under the Confederation, and continued to act in that capacity until Jefferson's return from France in the spring of 1790. Washington offered Jay his choice of offices under

trustees of the national sinking fund.<sup>122</sup> Both Jay and Ellsworth while on the Bench were sent on diplomatic missions to foreign countries.<sup>123</sup> Both Jay and Cushing ran for the governorships of their respective states without resigning their judicial positions.<sup>124</sup> Both Bushrod Washington and Chase electioneered vigorously in the presidential campaign of 1800.<sup>125</sup> Mr. Justice McLean was either actively or passively a candidate for the presidency in practically every campaign after his appointment by Jackson in 1829, and openly denied that such a course was in any sense improper.<sup>126</sup> Mr. Justice Davis, without resigning from the Court, accepted the presidential nomination of the Labor Reform Party in 1872; and when elected to the United States Senate in January, 1877, continued on the Bench until March 4, of that year.<sup>127</sup> But increasing resentment has been called forth by each successive instance of such political activity on the part of Supreme Court justices.

Nor did the members of the Court in the earlier period observe the salutary custom of refraining from unofficial expressions on public questions. The abuses which arose out of the early charges to grand juries in the circuit courts are matters of common knowledge.<sup>128</sup> In 1808 Mr. Justice Johnson issued to the press a long reply to those who had criticized his decision in the case of *Ex parte Gilchrist*.<sup>129</sup> Marshall was so aroused by the bitter attacks upon the Court for its decision in *McCulloch v. Maryland* that he published under the nom de guerre "A Friend of the Union" a series of articles defending his position.<sup>130</sup> On several occasions Mr. Justice McLean expressed himself publicly upon the slavery issue, and was particularly criticized for giving his views on the power of Congress over slavery in the territories in 1848, at a time

---

the new government and Jay chose the chief justiceship. Pellet, John Jay (Amer. Statesmen's Series) 235-236. Marshall held both offices during the last four weeks of Adams' administration. Beveridge, op. cit. II, 558.

<sup>122</sup>Supra, p. 277.

<sup>123</sup>Jay was sent to England in 1794 to negotiate the treaty which bears his name. Ellsworth had been appointed envoy to France in 1799 and never resumed his duties on the Court. For contemporary criticism of the dual appointments, see Warren, I, 167.

<sup>124</sup>Warren, I, 76, 275.

<sup>125</sup>Bushrod Washington had electioneered for Charles C. Pinkney. Warren, I, 275. Chase had worked for Adams. Warren, I, 156.

<sup>126</sup>Warren, II, 543-544, and note.

<sup>127</sup>Warren, III, 287, and note.

<sup>128</sup>For accounts of this interesting practice see Warren, I, 59, 60-61, 165-167.

<sup>129</sup>Supra, note 105. Johnson's reply is commented on, Warren, I, 334.

<sup>130</sup>Beveridge, op. cit. IV, 318-323.

when it was generally understood that that question would ultimately come before the Court for decision.<sup>131</sup>

Finally, the Court now exercises every precaution to prevent the escape of any advance information as to its decisions. A "leak" as to a Supreme Court decision would be regarded as a most unfortunate and reprehensible occurrence. But Story seems to have discussed the outcome of pending cases rather freely in his private correspondence; and other justices of his time and even of later times did the same.<sup>132</sup> The correspondence between Buchanan and Justices Catron and Grier with respect to the *Dred Scott* case probably did not constitute any very serious deviation from what the traditions of the Court at that time would have sanctioned.<sup>133</sup> Chief Justice Chase told Boutwell, Grant's secretary of the treasury, two weeks in advance, how the case of *Hepburn v. Griswold* was to be decided.<sup>134</sup> Since that time, however, there seems to be no conspicuous instance of a breach of the rule of strict secrecy respecting pending decisions.

These customs and traditions are perhaps not intrinsically of vital importance. An occasional breach of one or more of them would probably not interfere with the impartial administration of justice. They do, however, help the Court to keep itself above suspicion. They protect its reputation in the eyes of the country. And therein lies their value and their importance; for, all things considered, the measure of confidence which people have in the disinterestedness and integrity of the Supreme Court, is hardly of less moment than the actual impartiality and efficiency with which it does its work.

---

<sup>131</sup>Warren, II, 544-546.

<sup>132</sup>One is impressed by the freedom with which Story expressed himself on any and every question which interested him, a freedom which would now be regarded as indiscreet and improper. "Life and Letters of Joseph Story" by William Story, *passim*.

<sup>133</sup>Supra, p. 287.

<sup>134</sup>Warren, III, 239, note.