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THE EARLY SUPREME COURT OF THE UNITED STATES IN PERSPECTIVE

On September 24, 1789, at the first session of the People of the United States in Congress assembled, after some opposition from South Carolina and Georgia which was vigorously fought by Massachusetts, New York and Virginia coupled with the powerful advocacy of Roger Sherman of Connecticut, there was finally passed the Judiciary Act providing for the establishment of the Supreme Court of the United States in accordance with Sections 1 and 2 of Article III of the Constitution of the United States theretofore adopted. This Act provided for a Chief Justice and five Associate Judges. The Act of July 13, 1866, provided for an additional Associate Justice; on April 10, 1869, Congress again raised the number of Associate Justices to eight, where it now remains, nine *en banc*.

Inextricably woven into the warp and woof of our national life the Supreme Court of the United States has through the years shaped the destinies of the American people by decisions, sometimes great, sometimes expedient, sometimes harmful—at times strongly usurping the functions of our legislative branch with "bench made law" and at others passing weakly upon a great issue in an attempt to evade a national debacle. How well or how ill its work has been done remains for the historian writing in the year 3000 A. D. to say. We are too close to the picture to see the effect of the chiaroscuro.

Even after the Supreme Court had been in operation for years, no less a patriot and statesman than Thomas Jefferson expressed at Paris a conviction that a grave mistake and vital error had been made by the founding Fathers in the

structure of the judicial department of our Government. He foresaw the judicial power, installed for life, "advancing with noiseless and steady pace to . . . the annihilation of constitutional state rights." How clairvoyant he was was rapidly borne out by events: the rulings of the Court became political and not judicial. The alien and sedition laws throttled the right of free speech and the Supreme Court of the United States remained supine as to the people and oligarchic in its views and decisions. With the coming of Jefferson into power, however, two Supreme Court Judges were impeached and one removed from office. Since that time the Court has won the general confidence of the people, albeit from time to time, its decisions running counter to general ideas and prejudices of large sections of our people have caused a renewal of agitation for a general change in our national judiciary system. However, human minds have never been able to erect a system of government which shall at all times be satisfactory to all men, and suffice it to say, that it is difficult to imagine, upon what rocky shoals we would have drifted had there been no *Dartmouth College* case on the security of corporate charters; had there been no *McCulloch v. Maryland* on the right of a State to tax a national agency; had there been no *Gibbons v. Ogden* on Interstate Commerce; or *Brown v. Maryland* and the *Passenger* cases on foreign commerce; if there were no *Craig v. Missouri* on State Bills of Credit; no *Charles River Bridge* case on State Powers over Corporations; or no *Slaughter-house* cases on the scope of the Fourteenth Amendment. We have seen great jurists—Jay, Marshall, Story, Taney, Chase —who shaped and planned the scope of the far-reaching Court. The bold and dominating Marshall, immediately on becoming Chief Justice, establishing in *Marbury v. Madison* that the Supreme Court held the power of declaring laws of Congress unconstitutional and affirming that there were

certain vested rights that no law could abolish. This was pretty close to a recognition of "the divine right of Kings." Considering the temper of the people after their war with England, Marshall was not wanting in courage in interpreting, supporting and developing the national concentration of power so odious to Jefferson. How the Court itself has treated this power,—whether inherent or usurped,—is reflected in its decisions. When necessity has later arisen, the Court has pointed to the precedent established by Marshall and has taken full cognizance of the extraordinary functions with which Marshall said the Court was vested. Whether the framers of the constitution at the convention in 1787 intended that the Supreme Court pass upon the constitutionality of the Acts of Congress is a moot point, the Constitution does not specifically so provide. The Supreme Court *itself* has so provided. It says it can and most of the American people, who think about it, have come to the conclusion that it can, and it does.

This does not imply that the Court has abused its power. As early as 1798, Judge Iredell took pains to call the attention of the people to the self-imposed limitation of authority that has hardened into a rule of conduct for the Court. Iredell said that as the authority to declare a statute void "is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case." In the long line of cases since every reasonable presumption has been given that statutes are valid and constitutional until the contrary is shown beyond, in the words of Judge Strong, "a rational doubt."

There has never been since Marshall and his chief coadjutor Story, any Chief Justice who has achieved or even paralleled the decisions of Marshall validating the Holland Company and Yazoo frauds, the decision for Livingston and Gilchrist against the Maryland Insurance Company pro-

mulgating for the first time the extraordinary and surprising doctrine that an insurance company ought to know that its assured will practice deception, except Story's decision in favor of Marshall in the *Fairfax* case and Story's historic decision when attacked by four Judges for having acted unconstitutionally in the *Fairfax* case, that he was the Judge of his own actions, and that after due deliberation, Story decided that Story had acted constitutionally.

Later came the *Dartmouth College* case with the decision that corporate charters and franchises are contracts becoming vested property rights and in no way subject to repeal. This momentous decision has become the world's most famous example of judge-made constitutional law. Swiftly following came the cases of *McCulloch v. Maryland, Gibbons v. Ogden* annulling the rights of a State to grant a monopoly, the decision in the "Antelope" case, by a terrific twisting of the law and facts legalizing the traffic of the slavers, the validation of the Arredondo claim, and then the claim of John Jacob Astor to the confiscated Morris lands and culminating with the validation of the enormous Mitchell claim to 1,200,000 acres in Florida.

On July 6, 1835, Marshall died at the age of eighty leaving as a heritage those precedents established by him which have become the organic principles of our law and government and by which the dead hand of Marshall still rules the decisions of our highest tribunal. President Jackson appointed Roger B. Taney as successor to Marshall.

Taney succeeded to the bench at the moment when the land frauds had become so fastened upon the nation that there was a general concerted plan for the spoliation of the national domain and for defrauding the Indians of the lands originally owned by them or reserved to them by the Federal Government. Without the connivance of the Supreme Court of the United States this wholesale seizing of public

lands was impossible. The State Courts continuously handed down decisions refusing to recognize the forged French land grants ante-dated but prepared and executed after the Louisiana Purchase and the spurious Spanish land grants which immediately sprang into being after the cession of Florida to the United States. But Marshall and Story had paved the way for Taney. To Taney the opinion of John Marshall was the voice of God. The land frauds continued and "westward the course of empire took its way."

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