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## The Supreme Court Before John Marshall

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## ARTICLE

# THE SUPREME COURT BEFORE JOHN MARSHALL

SCOTT DOUGLAS GERBER\*

### INTRODUCTION

Approximately two decades ago, when I was new to the professoriate, I became fascinated with a simple question: Why do so many historians, law professors, and political scientists seem to think the United States Supreme Court began with John Marshall? The introduction to American Government textbooks I became familiar with in the 1990s left that impression. After I finished my Ph.D. dissertation on the Declaration of Independence's role in constitutional interpretation and revised it into my first book,<sup>1</sup> I turned my attention to trying to answer the question about Marshall's apotheosis.

I quickly decided that I would focus on what the Supreme Court did before Marshall joined it. More specifically, I wanted to put together an edited book on the justices who served on the Court prior to Marshall. Of course, to do that I needed scholars willing to contribute chapters to the book. Mark David Hall, a friend and classmate from graduate school, was the only contributor I knew before starting the book. Mark had written his Ph.D. dissertation—subsequently published as a book—on James Wilson's

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\* Professor of Law, Ohio Northern University; Associated Scholar, Brown University's Political Theory Project. This article updates the Introduction I wrote for *SERIAM: THE SUPREME COURT BEFORE JOHN MARSHALL* (Scott Douglas Gerber ed., 1998). I am grateful to NYU Press for permission to do so. The update maintains the book's original citation frequency and placement, which means there are somewhat fewer footnotes in the update than in a typical law journal article. I thank Cindy Klingler for administrative assistance in transcribing the Introduction into an editable format; Sean Burchett of the Supreme Court Historical Society for tracking down an old issue of the *Supreme Court Historical Society Quarterly* I needed; and Bill Casto, Mark David Hall, Steve Presser, and Jim Stoner for comments on the updated version of the piece. The article is my contribution to the symposium on "The Pre-*Marbury* Constitution" hosted by the *University of St. Thomas Law Journal* on November 14, 2016, and I dedicate it to the contributors to *Seriatim*: Sandra VanBurkleo, James Haw, Mark David Hall, Wythe Holt, Willis Whichard, Father Dan Degan, Steve Presser, Bill Casto, and Jim Stoner. *Seriatim* itself was dedicated to George Athan Billias, who remains a working historian and an inspiration as he approaches his 100th birthday.

1. See SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* (1995).

legal and political philosophy, so Mark was an obvious choice to write the Wilson chapter.<sup>2</sup> Mark also helped me identify the leading authorities on the other pre-Marshall Court justices. I contacted these scholars to ask if they would be willing to write a chapter about their particular justice. All agreed.<sup>3</sup> None of the prospective authors knew who I was when I requested this substantial commitment from them. Consequently, I credit my one-hundred percent success rate to a shared enthusiasm for the subject matter of the book. The result of everyone's hard work was *Seriatim: The Supreme Court Before John Marshall*, which was published in hardcover by NYU Press in 1998 and in paperback in 2000.<sup>4</sup> What follows is an overview of *Seriatim*, as well as an update on the reaction to the book and on the scholarship about the pre-Marshall Court that followed *Seriatim*'s publication.

## I. OVERVIEW OF *SERIATIM*

### A. *The Pre-Marshall Court in the American Mind*

Students of judicial institutions have come to appreciate that to understand any court we must understand its origins.<sup>5</sup> Nowhere is this more significant than in the case of the Supreme Court, because the origins of that institution are so closely identified with one justice—John Marshall. This holds true no matter what one thinks of Marshall. For those who hold Marshall in high esteem—and most scholars do exactly that—the study of the Court prior to 1801 makes more plain the stamp Marshall placed on the institution. For those who view Marshall less heroically—as do several contributors to *Seriatim*—studying the pre-Marshall Court reveals what the institution might have been like had Marshall not accepted the nomination to be chief justice.

Jumping ahead two centuries to the present, an examination of the Supreme Court before John Marshall reveals much of interest to students of the institution. Marshallphiles will note, for example, the absence of the institutional voice Marshall's leadership was able to provide—an institutional voice that has been absent for much of modern history as well.<sup>6</sup>

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2. See MARK DAVID HALL, *THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON, 1742–1798* (1997). Mark has since become one of the leading political theorists of the American Founding. See, e.g., MARK DAVID HALL, *ROGER SHERMAN AND THE CREATION OF THE AMERICAN REPUBLIC* (2013).

3. No living scholar had written anything of substance on William Cushing or Bushrod Washington. Jim Stoner volunteered to write the chapter about Justice Washington. I wrote the chapter about Cushing.

4. *SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL* (Scott Douglas Gerber ed., 1998).

5. See, e.g., Rogers M. Smith, *Political Jurisprudence, The "New Institutionalism," and the Future of Public Law*, 82 AM. POL. SCI. REV. 89 (1988).

6. See, e.g., Scott D. Gerber & Keeok Park, *The Quixotic Search for Consensus on the U.S. Supreme Court: A Cross-Judicial Empirical Analysis of the Rehnquist Court Justices*, 91 AM. POL. SCI. REV. 390 (1997) (featured in Richard Morin, *Those Disagreeable Supremes*, WASH. POST, July 15, 1997, at C5, col. 4).

Those who view Marshall less heroically will find in *Seriatim*, by contrast, that among other things, judicial review—the Court’s most important power in the American system of constitutional government—was understood by the early justices, was argued for by them, and was practiced by them.

The conventional wisdom is, of course, that the Supreme Court became an important institution only after Marshall’s arrival and the opinion rendered in *Marbury v. Madison* (1803). It is not exactly accurate to say that the pre-Marshall Court has been completely ignored by students of the judicial process, but most scholars on the subject stress the Court’s lack of significance. Bernard Schwartz, for instance, concludes in *A History of the Supreme Court* (1993) that “the outstanding aspect of the Court’s work during its first decade was its relative unimportance.”<sup>7</sup> Similarly, George Lee Haskins and Herbert A. Johnson comment in their 1981 volume of *The Oliver Wendell Holmes Devise History of the Supreme Court* that the Court was a

relatively feeble institution during the 1790s, too unimportant to interest the talents of two men who declined President Adams’ offer of the position of Chief Justice, it . . . acquired in . . . a few years’ time, and largely under the guiding hand of John Marshall, more power than even the framers of the Constitution may have anticipated.<sup>8</sup>

There is also the following observation by Robert G. McCloskey in *The American Supreme Court* (1960), arguably the most important book ever written about the Court:

It is hard for a student of judicial review to avoid feeling that American constitutional history from 1789 to 1801 was marking time. The great shadow of John Marshall, who became chief justice in the latter year, falls across our understanding of that first decade; and it has therefore the quality of a play’s opening moments with minor characters exchanging trivialities while they and the audience await the appearance of the star.<sup>9</sup>

There are countless other examples of the pre-Marshall Court being trivialized by law professors, historians, and political scientists.<sup>10</sup> Invariably, scholars point out that Robert H. Harrison never served as an associate justice after he was confirmed, and that William Cushing declined elevation from associate to chief justice. Similarly, Charles C. Pinckney, Edward Rut-

7. BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 33 (1993).

8. 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–1815*, at 7 (1981).

9. ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 30 (1960). Sanford Levinson has updated this classic tome several times over the years. Levinson includes *Seriatim* in the updated bibliographical essay. See ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 344 (Sanford Levinson rev. ed., 6th ed. 2016).

10. See, e.g., G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 7–34 (enlarged ed. 1988).

ledge, Alexander Hamilton, and Patrick Henry—significant statesmen in the 1790s—refused to be appointed to the Court, and several men who were appointed resigned to accept other positions. Most notable among the latter group, John Rutledge left the Court after two years to become chief justice of the South Carolina Court of Common Pleas; and John Jay, who spent part of his Supreme Court tenure serving as minister to Great Britain, resigned from the Court to become governor of New York, and later refused reappointment to the Court.

After noting the difficulty of staffing the early Supreme Court, scholars usually mention in passing a few cases, such as *Hayburn's Case* (1792), *Chisholm v. Georgia* (1793), *Ware v. Hylton* (1796), *Hylton v. United States* (1796), and *Calder v. Bull* (1798), and then hurry on to discuss related Marshall Court opinions. While some may hesitate for a moment to address *Chisholm v. Georgia*, those who do typically emphasize that this decision was overturned in 1798 by the Eleventh Amendment. Finally, many scholars cite the absence of a separate Supreme Court building as evidence that the early Court lacked prestige.<sup>11</sup>

There have been scholars, of course, who recognized that the early Court has been neglected. Edward S. Corwin, for one, in his 1919 book about John Marshall, wrote:

The pioneer work of the [pre-Marshall] Supreme Court in constitutional interpretation has, for all but special students, fallen into something like obscurity owing to the luster of Marshall's achievements and to his habit of deciding cases without much reference to precedent. But these early labors are by no means insignificant, especially since they pointed the way to some of Marshall's most striking decisions.<sup>12</sup>

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11. See, e.g., CARL BRENT SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* 98–101 (1943); FRED RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955*, at 3–72 (1955).

Several histories of the Supreme Court are less guilty of trivializing the pre-Marshall Court than are others, but even those works do not examine the contributions of the individual justices in any depth. See generally 1 JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES, ANTECEDENTS AND BEGINNINGS TO 1801* (1971); 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 31–168 (rev. ed. 1926); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 1–58 (1985). The increasingly popular encyclopedia-style biographical collections of the Supreme Court are too basic to be of much use to scholars. See, e.g., *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–1993* (Clare Cushman ed., 1993); *THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS* (Leon Friedman & Fred I. Israel eds., rev. ed., 5 vols., 1995); *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* (Melvin I. Urofsky ed., 1994).

12. EDWARD S. CORWIN, *JOHN MARSHALL AND THE CONSTITUTION: A CHRONICLE OF THE SUPREME COURT 17–18* (1919). This insight is especially rare in books about Marshall, which tend to emphasize the inadequacy of the Court that preceded his. See, e.g., 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 120–121 (1919); LEONARD BAKER, *JOHN MARSHALL: A LIFE IN LAW* 363–364 (1974).

Unfortunately, Corwin failed in his long and distinguished career to fill this gap in the literature.

A few scholars have begun to challenge the idea that the Supreme Court became important only when John Marshall arrived. The multi-volume project documenting the activity of the early Court edited by Maeva Marcus and others, and Marcus's edited collection of essays on the Judiciary Act of 1789, have been of great assistance in this regard.<sup>13</sup> Also worth noting is William R. Casto's *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* (1995). Casto, who contributes an essay about Oliver Ellsworth to *Seriatim*, makes an important contribution with his book by presenting a compelling theory as to why the pre-Marshall Court is often viewed negatively. As Casto puts it:

Society in the late twentieth century—particularly political society—is usually viewed primarily in terms of conflicts of values and interests. . . . The abiding theme of the early Supreme Court, however, was precisely to the contrary. The Court sought to support the political branches of the new federal government, not to oppose them.<sup>14</sup>

According to Casto, “Though the justices occasionally resorted to constitutional interpretation, their primary objective was to bolster and consolidate the new federal government.”<sup>15</sup> The label of “mediocrity” attached to the pre-Marshall Court, he concludes, “is probably due to the direct conflict between the modern judicial paradigm of conflict and the early Court’s paradigm of support.”<sup>16</sup>

### B. *Insights from Biography*

Although a few scholars have begun to pay attention to the pre-Marshall Court,<sup>17</sup> much work remains to be done. One fruitful approach is to examine the contributions pre-Marshall Court justices made as individuals to American law and politics. After all, one does not need to subscribe to the psychological and sociological tenets of legal realism to recognize that any court, including the Supreme Court, is first and foremost composed of

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13. THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800 (Maeva Marcus et al. eds., 8 vols., 1985–2007) [hereinafter DOCUMENTARY HISTORY]; ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789 (Maeva Marcus ed., 1992). Five volumes of the *Documentary History* were in print at the time *Seriatim* was published. The *Documentary History* renders largely obsolete George Lankevich’s more limited collection. See 1 THE FEDERAL COURT, 1787–1801 (George J. Lankevich ed., 1986).

14. WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 247 (1995).

15. *Id.* at 213.

16. *Id.* at 249.

17. In addition to the work of Marcus and the previous and continuing efforts of the contributors to *Seriatim*, see STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES (1997). Other works will be discussed in Section II.B of this article.

individuals.<sup>18</sup> The biographical approach to the pre-Marshall Court is particularly appropriate, given that most of that Court's business took place while the justices were riding circuit. *Seriatim: The Supreme Court Before John Marshall* was designed with a multiple biographical methodology in mind.

The ten pre-Marshall Court justices (this number excludes the largely unknown Thomas Johnson and Alfred Moore) are worthy of study because of their impressive credentials and active involvement in America's founding. Of the ten, three signed the Declaration of Independence, six were members of the Federal Convention of 1787, and six were prominent members of their state ratifying conventions. Besides these credentials, seven served in the Continental Congress, eight had held prior judicial posts, and all served in state governments in some capacity. Two, Oliver Ellsworth and William Paterson, co-wrote the Judiciary Act of 1789, which helped shape the institution of the Court.

As the first president, George Washington had the unique opportunity to nominate an entire Supreme Court. He took this responsibility seriously, and regarded "the due administration of Justice as the strongest cement of good government." Consequently, he sought "the fittest characters to expound the laws and dispense justice."<sup>19</sup>

In his classic study of the political history of the appointment process, Henry J. Abraham identifies seven criteria employed by Washington to choose Supreme Court justices:

- (1) support and advocacy of the Constitution; (2) distinguished service in the Revolution; (3) active participation in the political life of state or nation; (4) prior judicial experience on lower tribunals; (5) either a "favorable reputation with his fellows" or personal ties with Washington himself; (6) geographic suitability; (7) love of country.<sup>20</sup>

The result was a number of impressive appointees. The nation's first Court was composed of John Jay of New York, John Rutledge of South Carolina, William Cushing of Massachusetts, James Wilson of Pennsylvania, John Blair of Virginia, and Robert H. Harrison of Maryland. The original six justices never met together as the Court, however. On his way to the inaugural session, Harrison fell ill; so ill, in fact, that he resigned his

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18. See J. W. Peltason, *Supreme Court Biography and the Study of Public Law*, in *ESSAYS ON THE AMERICAN CONSTITUTION: A COMMEMORATIVE VOLUME IN HONOR OF ALPHEUS T. MASON* 215–227 (Gottfried Dietze ed., 1964).

19. Letter from George Washington to John Rutledge, (Sept. 29, 1789), in 1 *DOCUMENTARY HISTORY*, *supra* note 13, at 20–21. President Washington wrote similar letters to all his nominees. See James R. Perry, *Supreme Court Appointments, 1789–1801: Criteria, Presidential Style, and the Press of Events*, 6 *J. EARLY REP.* 371, 374 (1986).

20. HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 71–72 (3rd ed. 1992). For a detailed discussion of Washington's and Adams's appointment processes, see Perry, *supra* note 19, at 380.

post without ever having sat on the Court. While Harrison's resignation is sometimes used as evidence to indicate that the early Court lacked prestige, it should be noted that his death, just two months after his resignation, indicates the severity of his illness. Harrison was replaced by James Iredell of North Carolina.

In 1791 the Supreme Court lost a second member, John Rutledge, who resigned to become chief justice of the South Carolina Court of Common Pleas. After South Carolinians Charles C. Pinckney and Edward Rutledge had both declined, Washington offered the position to Thomas Johnson of Maryland. Although Johnson accepted, he resigned within two years. William Paterson of New Jersey was then named to succeed Johnson.

Chief Justice John Jay was next to leave the Court, resigning in 1795 after being elected governor of New York. Washington's decision to replace Jay with John Rutledge—who had expressed a desire to return to the Supreme Court as chief justice—led to an embarrassing series of events. Rutledge's was a recess appointment, and during the recess he attacked the Jay Treaty with such vitriol that his confirmation by the Senate was unlikely at best. Indeed, the Federalist-controlled Senate considered Rutledge's assault on the treaty tantamount to treason and rejected his appointment by a vote of ten to fourteen. Washington turned to Patrick Henry to fill the center chair, but Henry declined the nomination. William Cushing was then nominated and confirmed as the nation's third chief justice. About a week later, Cushing, citing advanced age and ill health, resigned his promotion and returned to his position as the Court's senior associate justice. Finally, in 1796, Oliver Ellsworth of Connecticut became chief justice, a post he held for a full four years.

The year 1796 was also when John Blair's resignation from the Court became effective. Washington offered Blair's seat to Samuel Chase of Maryland, the converted Antifederalist, who accepted. Two years later, James Wilson died in office, becoming the first justice to do so. After John Marshall had declined an invitation to serve as an associate justice, Wilson's seat was filled by his former law student, Bushrod Washington of Virginia.

James Iredell died the following year and was replaced by Alfred Moore, a fellow North Carolinian. Moore served four years on the Court with little distinction. Finally, in 1800, in a letter sent from France where he was serving as a special envoy, Chief Justice Oliver Ellsworth resigned from the Court. John Adams quickly nominated John Jay, who was confirmed by the Senate. Jay refused to serve, however. The chief justiceship then fell to Adams's secretary of state, John Marshall of Virginia, who has since acquired the reputation as the "greatest" Supreme Court justice in American history.<sup>21</sup>

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21. See, e.g., ABRAHAM, *supra* note 20, at 81, 412–414.



The difficulty Washington, and to a lesser extent Adams, had in staffing the Supreme Court is stressed by those who dismiss the significance of the pre-Marshall Court. At a minimum, this perspective ignores the hardships faced by the early justices, such as illness and circuit riding.<sup>22</sup> More substantially, it overlooks the important contributions to American law and politics made by the early justices, both on circuit, where most of their judicial business was conducted, and before they arrived at the highest court in the land, where their respective efforts in the founding of the American regime were tremendous.

Scholars have long appreciated the value of studying individual Founders when trying to discern the character of the early American republic. The scores of volumes and papers projects on John Adams, Alexander Hamilton, Thomas Jefferson, James Madison, John Marshall, and George Washington, among others, testify to this fact. In a real sense, *Seriatim* picks up where Stephen B. Presser left off. Presser, who contributes an essay about Samuel Chase to *Seriatim*, demonstrated in his provocative book, *The Original Misunderstanding: The English, the Americans and the Dialectic of Federalist Jurisprudence* (1991), the value of examining the individual pre-Marshall Court justices—in Presser's case, Chase—for dispelling the myth of Marshall's apotheosis.<sup>23</sup> That said, the point of *Seriatim* is not that Marshall was not a force in American law and politics. There is, after all, a difference between revisionism and fiction. Rather, *Seriatim* is designed to put an end to the claim to unequivocal domination by Marshall on early American jurisprudence.

### C. John Marshall's Apotheosis

Shortly before *Seriatim*'s publication I reviewed for the *Journal of American History* what at the time were two new biographies of John Marshall. Both books, Charles F. Hobson's *The Great Chief Justice: John Marshall and the Rule of Law* (1996) and Jean Edward Smith's *John Marshall: Definer of a Nation* (1996),<sup>24</sup> are welcome additions to scholarship and I said so in my joint review.<sup>25</sup> Unfortunately, both books perpetuate the myth that Marshall is "The Father of the Court" and "The Jurist Who Started It All." To make the point more directly, these two books were twice reviewed together prior to my joint review, and the quoted titles to these reviews dramatically demonstrate the impression the books leave on

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22. Numerous letters exist from different justices complaining about the onerous duty of circuit riding—especially in the Southern Circuit. See, e.g., 1 DOCUMENTARY HISTORY, *supra* note 13, at 731–732; 2 DOCUMENTARY HISTORY, *supra* note 13, at 126, 132, 288–290, 344; 3 DOCUMENTARY HISTORY, *supra* note 13, at 240.

23. See STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* (1991).

24. CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* (1996); JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* (1996).

25. Scott D. Gerber, Book Review, 84 J. AM. HIST. 658 (1997).

readers.<sup>26</sup> Gordon S. Wood is the author of the review entitled “The Father of the Court.”<sup>27</sup> If one of the greatest living early American historians can default to clichés about the early Supreme Court, then clearly more work needs to be done on the origins of the Court.

Given the supposition that John Marshall is unduly credited with almost everything significant to spring from the early Supreme Court, the question that must be asked is this: Why is Marshall glorified? The answer to this question is not as clear as one might think. Hobson, the longtime editor of *The Papers of John Marshall*, wrote the following response to a query from me in which I speculated that Marshall’s apotheosis was the handiwork of Albert J. Beveridge’s politically inspired biography of 1916–1919:

Marshall’s greatness was recognized long before Beveridge. At his death in 1835 he had a reputation as a great statesman, if not always free from controversy. John Adams in 1825 wrote to Marshall that it was “the pride of my life that I have given to this nation a Chief Justice equal to Coke or Hale, Holt or Mansfield.” John Quincy Adams entered these words in his diary, a few days after Marshall died: “John Marshall . . . was one of the most eminent men that this country has ever produced.” Marshall’s colleague, Joseph Story, delivered a memorable eulogy of the chief justice that wonderfully captures the essence of Marshall’s greatness. Now, it is true that post-Civil War nationalism enhanced Marshall’s standing and that Beveridge wrote in that context—attempting to make Marshall into a symbolic hero of Am[erican] nationalism, like Lincoln. Hope this helps.<sup>28</sup>

Help it does. There is, however, a difference between being a great *politician* and a great *judge*.<sup>29</sup> Other scholars offer a far more partisan-oriented account of Marshall’s deification than Hobson does. R. Kent Newmyer, the dean of judicial biographers, answers the question as follows:

The process of glorification was launched with Allan Magruder’s worshipful biography in 1890; it gained momentum with the Marshall Day celebration of 1901 (the outcome of which was a three-

26. See also HERBERT A. JOHNSON, *THE CHIEF JUSTICESHIP OF JOHN MARSHALL, 1801–1835* (1997).

27. Gordon S. Wood, *The Father of the Court*, *NEW REPUBLIC*, Feb. 17, 1997, at 38. See also Mark Miller, *The Jurist Who Started It All*, *WALL ST. J.*, Dec. 10, 1996, at A20.

28. E-mail from Charles F. Hobson to author (Sept. 29, 1995) (on file with author).

29. It is difficult to deny that Marshall was a great politician. Only a great politician could do what Marshall did in *Marbury*: announce that the Jefferson administration was wrong to withhold the judicial commissions in question and that courts could issue writs to compel public officials to do their prescribed duty—but that the Supreme Court had no power to issue such writs in the case at bar because the portion of the Judiciary Act of 1789 that gave the Court the power to do so was unconstitutional. In short, a showdown with the Jefferson administration was avoided, but Marshall still was able to “reaffirm” the Court’s power of judicial review.

volume collection of encomiums compiled by John F. Dillon); and it culminated with Albert Beveridge's *The Life of John Marshall* (4 vols., 1916–1919) and Charles Warren's *The Supreme Court in United States History* (2 vols., 1922). With prodigious documentation Beveridge unabashedly celebrated the victory of light (conservative nationalism) over darkness (Jeffersonian states' rights agrarianism). And, by sheer force of emphasis and pervasive romanticism, his work raised Marshall above the Court, depicting him as the epic hero of American nationalism. Warren's history (still one of the outstanding works on the Court) was more scholarly, more balanced, and more generous in spreading the glory to include Marshall's colleagues but showed the same preference for conservative nationalism.<sup>30</sup>

Finally, Presser emphasizes—in his typically provocative fashion—more recent events: The need for “liberal” academics to use Marshall's “supposed greatness” to “legitimize” the rash of post-1937 “liberal” Supreme Court decisions. Presser explains:

“Liberal” court critics since the early 1920s and 1930s had argued that the Supreme Court's job was to accommodate the Constitution to the changing economic and social needs of the country. It seems more than coincidental that at about the time the courts were frustrating implementation of New Deal legislation, scholars began lavishly to praise John Marshall for his famous decisions. . . . Similarly, when liberal academics praised the Warren Court's expansive interpretations of the Bill of Rights and the Fourteenth Amendment to protect the victims of educational, political, and economic discrimination, more volumes appeared apotheosizing Marshall.<sup>31</sup>

Whatever one's position regarding the pedigree of John Marshall's apotheosis, as far as the conventional wisdom is concerned, Marshall still casts a long shadow—an eclipse—across the history of the early Supreme Court. Nowhere is this more apparent than in the debate over the origins of judicial review in America.

#### D. *The “Myth” of Marbury v. Madison (1803)*

Scholars have appreciated for some time that *Marbury v. Madison* was not sewn from whole cloth.<sup>32</sup> From Sir Edward Coke's opinion in *Dr. Bon-*

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30. R. KENT NEWMYER, *THE SUPREME COURT UNDER MARSHALL AND TANEY* 20–21 (1968). See also Letter from William E. Leuchtenburg to author (Nov. 18, 1995) (on file with author) (“It is not my impression, though Chuck Hobson should know a good deal more, that Marshall had the reputation he does today in the 19th Century. He was seen then as considerably more of an embattled Federalist and a champion of certain interests.”).

31. PRESSER, *THE ORIGINAL MISUNDERSTANDING*, *supra* note 23, at 172.

32. See, e.g., Gordon S. Wood, *The Origins of Judicial Review*, 22 *SUFFOLK U. L. REV.* 1293 (1988) (arguing that the origins of judicial review are to be found in the colonial period). Marshall himself acknowledged as much. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

*ham's Case* (1610), to James Otis's speech against the Writs of Assistance (1761), to a series of pre-federal Constitution state-court cases,<sup>33</sup> to *Federalist* No. 78, there exist a lot of pre-*Marbury* precedents for judicial review. More to the point, the essays that constitute *Seriatim* reveal that virtually every member of the pre-Marshall Court played an important role in establishing the Supreme Court's power of judicial review—a power that is synonymous to this day with John Marshall's most famous opinion.<sup>34</sup> Indeed, many of the justices championed judicial review long before they were appointed to the Court. My essay on William Cushing, for example, suggests that even before independence was declared, Cushing was charging grand juries in Massachusetts that courts had the authority to declare acts of Parliament unconstitutional,<sup>35</sup> while Wythe Holt describes how John Blair participated in at least three early cases involving judicial review in Virginia.<sup>36</sup> Furthermore, Willis Whichard points out that James Iredell articulated on several occasions before the Constitution went into effect perhaps the most sophisticated argument for judicial review offered during the Founding<sup>37</sup> (an argument with which Marshall was almost certainly familiar).<sup>38</sup> James Haw reveals that, despite fighting hard in the Federal Convention of 1787 to protect the power of state courts, John Rutledge both expected and supported federal judicial review,<sup>39</sup> and William Casto demonstrates that Oli-

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Moreover, President Jefferson, who came to resent *Marbury*, was not taken aback by the judicial-review aspects of the decision. (Jefferson believed that the Court, as well as the president and Congress, had the right to pass on the constitutionality of matters before it.) Rather, he resented Marshall's obiter dictum that William Marbury was entitled to his judicial commission.

33. The state-court cases include Josiah Philips's Case (Va., 1778), *Holmes v. Walton* (N.Y., 1780), *Rutgers v. Waddington* (N.Y., 1784), *The Symbury Case* (Conn., 1785), *Trevett v. Weeden* (R.I., 1786), and *Bayard v. Singleton* (N.C., 1787). There is considerable debate in the scholarly community about the status of these early cases.

34. See, e.g., DAVID G. BARNUM, *THE SUPREME COURT AND AMERICAN DEMOCRACY* 3–9 (1993) (emphasizing *Marbury v. Madison*); JAMES Q. WILSON & JOHN J. DI IULIO, JR., *AMERICAN GOVERNMENT: INSTITUTIONS AND POLICIES* 420 (6th ed. 1995) (same). See also SMITH, JOHN MARSHALL, *supra* note 24, at 313. Of course, there have been specific studies of judicial review over the years, particularly by historians, that recognize that *Marbury* has been overemphasized. See, e.g., PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008); J. M. SOSIN, *THE ARISTOCRACY OF THE LONG ROBE: THE ORIGINS OF JUDICIAL REVIEW IN AMERICA* (1989); see generally SCOTT DOUGLAS GERBER, *A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606–1787* (2011). My point is that the conventional wisdom is still to the contrary—and that the role the pre-Marshall Court justices played in the origins of judicial review has been largely overlooked.

35. Scott Douglas Gerber, *Deconstructing William Cushing*, in *SERIATIM*, *supra* note 4, at 114.

36. See Wythe Holt, *John Blair: "A Safe and Conscientious Judge,"* in *SERIATIM*, *supra* note 4, at 160–161.

37. See Willis P. Whichard, *James Iredell: Revolutionist, Constitutionalist, Jurist*, in *SERIATIM*, *supra* note 4, at 218.

38. See also William R. Casto, *James Iredell and the American Origins of Judicial Review*, 27 *CONN. L. REV.* 329 (1995).

39. See James Haw, *John Rutledge: Distinction and Declension*, in *SERIATIM*, *supra* note 4, at 78–79.

ver Ellsworth endorsed the concept of judicial review at the Connecticut ratifying convention.<sup>40</sup>

As sitting justices, the individuals who preceded John Marshall to the Supreme Court continued to advocate for judicial review. The best-known examples of this are William Paterson's jury charge in *Vanhorne's Lessee v. Dorrance* (1795)<sup>41</sup> and Samuel Chase's jury charge in the trial of James Callender in 1800. As Father Daniel Degnan's essay about Paterson and Presser's about Chase suggest, these jury charges helped to pave the way for public acceptance of judicial review.<sup>42</sup> Similarly, Mark David Hall demonstrates in his James Wilson essay that Wilson presented the case for judicial review in his famous law lectures of 1790–1792—lectures that influenced generations of American lawyers.<sup>43</sup> Students of the Court, moreover, are remiss if they fail to appreciate, as Father Degnan and Casto describe in their respective essays, that the Judiciary Act of 1789, which Paterson and Ellsworth co-wrote when they were serving in the Senate, authorized federal courts to review decisions from the states' highest courts if they involved certain federal questions.

The justices who composed the Supreme Court before John Marshall did more than simply advocate for judicial review; they practiced it. Barely a year had passed since the establishment of the federal courts when Chief Justice John Jay and Associate Justice William Cushing, on circuit, declared several states' laws unconstitutional. There is also *Ware v. Hylton* (1796), in which Justices Chase, Cushing, Paterson, and Wilson, sitting together as the Supreme Court,<sup>44</sup> struck down a Virginia statute on the ground that it violated a treaty and, hence, the supremacy clause of the Constitution.<sup>45</sup> Moreover, James Stoner points out in his essay about Bushrod Washington that Washington, who was accused in a widely repeated remark of being little more than a double for Marshall<sup>46</sup>—an accusation that Stoner

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40. William R. Casto, *Oliver Ellsworth: "I Have Sought the Felicity and Glory of Your Administration,"* in *SERIATIM*, *supra* note 4, at 298.

41. 2 U.S. (2 Dall.) 304 (Paterson, Circuit Justice 1795).

42. Daniel A. Degnan, *William Paterson: Small States' Nationalist*, in *SERIATIM*, *supra* note 4, at 241; Stephen B. Presser, *The Verdict on Samuel Chase and His "Apologist,"* in *SERIATIM*, *supra* note 4, at 264.

43. Mark David Hall, *James Wilson: Democratic Theorist and Supreme Court Justice*, in *SERIATIM*, *supra* note 4, at 131.

44. Iredell had been one of the judges in the lower circuit court that adjudicated the case. Consequently, he did not participate in the Supreme Court's decision. He did take the unusual step, however, of reading into the record his thoughts on the matter.

45. Ellsworth, who was not serving on the Supreme Court at the time *Ware* was decided, voiced his agreement with the decision in *Hamilton v. Eaton*, 11 F. Cas. 336, 340 (C.C.D.N.C. 1796) (No. 5,980).

46. James R. Stoner, Jr., *Heir Apparent: Bushrod Washington and Federal Justice in the Early Republic*, in *SERIATIM*, *supra* note 4, at 331–332.

rejects—asserted in *Cooper v. Telfair* (1800) that the Court possessed the power of judicial review.<sup>47</sup>

The pre-Marshall Court justices exercised judicial review over federal law as well. As Holt's and Hall's essays describe, the first clear occasion in which this occurred was *Hayburn's Case* (1792), wherein Justices James Wilson and John Blair, on circuit, declared the Invalid Pensioners Act of 1792 unconstitutional. The Court as a whole, in the then-unreported *United States v. Yale Todd* (1794), appears to have concurred with Wilson and Blair's position.<sup>48</sup> Perhaps most important, in *Hylton v. United States* (1796) the Court reviewed a congressional tax on carriages to determine whether the tax was constitutional. The Court concluded that it was, but the justices nevertheless recognized their power to declare otherwise. Indeed, Hall reports that when John Wickham, the counsel for the government, offered at the circuit level to address the issue of judicial review, Justice Wilson told him to sit down and be quiet because the issue had "come before each of the judges in their different circuits, and they all concurred in the opinion" that the Court could declare congressional statutes unconstitutional.<sup>49</sup>

More examples of pre-*Marbury* incidents of judicial review could be discussed,<sup>50</sup> but it should be clear by now that the pre-Marshall Court justices understood the concept of judicial review, that they argued for it, and that they practiced it. There is also abundant evidence that Marshall was both fully aware of, and substantially influenced by, these early precedents.

47. See also the seriatim opinions of Justices Chase, Paterson, and Cushing in *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 18–20 (1800), as well as *Pennhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54 (1795).

48. *Yale Todd* was cited in *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851). Maeva Marcus suggests, but does not conclude, that the Supreme Court ruled that *Yale Todd's* pension was invalid because the judges of the circuit courts wrongly interpreted the statute to allow them to act as commissioners and hear claims. See Maeva Marcus, *Judicial Review in the Early Republic*, in *LAUNCHING THE "EXTENDED REPUBLIC": THE FEDERALIST ERA* 25, 41 n.54 (Ronald L. Hoffman ed., 1996). Marcus, in an earlier essay written with Robert Teir, suggests, but again does not conclude, that the Supreme Court in *Yale Todd* declared the statute unconstitutional. See Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527, 531 n.25 (1988).

John Marshall himself—and in *Marbury v. Madison*, no less—made note of another unreported case, *Chandler v. Secretary of War* (1794), in which the Court appears to have invalidated an executive act. See *Marbury*, 5 U.S. (1 Cranch) at 172 (discussing the case). Susan Low Bloch and Marcus suggest, but once again do not conclude, that *Chandler* was decided on other than constitutional grounds. See Susan Low Bloch & Maeva Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 WIS. L. REV. 301, 315 n.54 (1986). But see Gordon E. Sherman, *The Case of John Chandler v. The Secretary of War*, 14 YALE L.J. 431, 437 (1905) (arguing that *Chandler* was decided on constitutional grounds). Bloch and Marcus maintain that Marshall manipulated precedents such as *Chandler* to get his desired political result in *Marbury*. See Bloch & Marcus, *supra*, at 301–337.

49. Scott Douglas Gerber, *Introduction: The Supreme Court before John Marshall*, in *SERIAM*, *supra* note 4, at 11.

50. See GERBER, *A DISTINCT JUDICIAL POWER*, *supra* note 34; Marcus, *Judicial Review in the Early Republic*, *supra* note 48, at 25–53.

Presser suggests, for example, that Marshall was in the audience when Samuel Chase delivered his jury charge in the *Callender* trial and that Marshall later adopted some of Chase's language in his *Marbury* opinion.<sup>51</sup> Similarly, Whichard advises that Marshall's opinion in *Marbury* drew upon Iredell's well-known writings on judicial review.<sup>52</sup> Finally, I surmise in my essay about Cushing that Cushing and/or Paterson probably made Marshall aware of the early Court's precedents on judicial review.<sup>53</sup>

### E. An "Interdisciplinary Conversation"

All of this said, *Seriatim* is important not only because it provides new information about the substantive contributions made to American law and politics by the pre-Marshall Court justices, but also because of what the collection says about the method of studying the early American republic. Law, history, and political science are all represented in the collection, and each of these separate disciplines is represented by a diversity of methodological (as well as ideological) viewpoints. By including essays from a variety of methodological perspectives, *Seriatim* aspires to move research on the American Founding in new directions.

The five law professors among the contributors consist of one, Wythe Holt (who also is trained in history), who emphasizes social, political, and economic events; a second, Willis Whichard, who utilizes the descriptive techniques of biography; a third, Father Daniel Degnan, who employs the doctrinal focus of traditional legal analysis; a fourth, Stephen Presser, who combines the melding of biography, political science, and intellectual history (in the tradition of J. G. A. Pocock) with the fervor of a polemicist; and a fifth, William Casto, who highlights the psychological aspects of individual legal and political behavior. Karl Llewellyn, who long ago urged academic lawyers to employ more social science methods, would be pleased.<sup>54</sup>

Two of the contributors teach primarily in history departments. The first, Sandra VanBurkleo, attempts to locate her subject within the context and languages of his particular historical moment. She identifies relationships between the subject and the prevailing intellectual currents, socioeconomic developments, and political climate of the time, much as Holt does from the legal academy (albeit without Holt's Marxist orientation). The second, James Haw, approaches his justice through the descriptive and narrative method of a "traditional" historian.

Last, but it is to be hoped not least, the three political scientists also approach their justices in diverse ways. Although Mark David Hall and

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51. Presser, *supra* note 42, at 264.

52. Whichard, *supra* note 37, at 202.

53. Gerber, *Deconstructing William Cushing*, *supra* note 35, at 114.

54. See Karl Llewellyn, *Legal Tradition and Social Science Method—A Realist's Critique*, in *ESSAYS ON RESEARCH IN THE SOCIAL SCIENCES* 89 (Leverett S. Lyon et al. eds., 1931; reprt., 1968).

James Stoner both utilize the method of political theory, Stoner's Straussian orientation gives his essay a flavor different from that of Hall's. My essay on Cushing is more disparate still: it employs deconstruction as a methodological approach.<sup>55</sup>

In short, the contributors to *Seriatim* are engaged in an "interdisciplinary conversation" in the best sense of that phrase.<sup>56</sup> Although none of the contributors (the editor included) are methodologists, let alone philosophers of science, we all share a commitment to both methodological self-consciousness and methodological pluralism. We value methodological self-consciousness because those who fail to pay attention to method are almost always in the grip of a prevailing methodology. (Here, we are paraphrasing John Maynard Keynes's famous retort that those who dislike theory or claim to do without it are simply in the grip of an older theory.) We value methodological pluralism because a prevailing methodology might not be the "best" methodology, let alone the "perfect" methodology. A comparison between perhaps the two most diametrically opposed methodologies represented in *Seriatim* will illustrate why we take methodology so seriously.

In his chapter on John Rutledge, James Haw employs the methodology of a "traditional" historian, writing descriptive, narrative history in relatively narrow terms.<sup>57</sup> More than anything else it is, in the words of Arthur M. Schlesinger, Sr., "the business of the historian to find, collect, classify, and appraise data relating to the past."<sup>58</sup> Haw's essay on Rutledge, with its painstaking attention to archival materials and myriad new discoveries about this controversial member of the pre-Marshall Court, is a testament to the continuing vitality and relevance of good "old-fashioned" history.

By contrast, my chapter on William Cushing employs one of the most popular—and controversial—methodologies of the postmodern age; "namely," deconstruction.<sup>59</sup> Where Haw seeks to provide "new" information about John Rutledge's contributions to American law and politics, I attempt to reverse and resituate the "existing" conceptual priorities upon which the various orderings and evaluations of William Cushing and, consequently, of John Marshall, thrive.

Can students of the early American judiciary learn from deconstruction as well as from traditional history? from political theory as well as from doctrinal legal analysis? from psychology as well as from social, political, and economic considerations? from the melding of biography, political sci-

55. I now teach in a law school.

56. This phrase was coined by historian Peter S. Onuf in a refreshing essay criticizing his fellow historians of the American Founding for attempting to defend history against "alien disciplines." See Peter S. Onuf, *Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective*, 46 WM. & MARY Q. 341 (1989).

57. See Haw, *John Rutledge*, *supra* note 39, at 70–96.

58. Arthur M. Schlesinger, *History: Mistress and Handmaid*, in LYON, *ESSAYS ON RESEARCH IN THE SOCIAL SCIENCES*, *supra* note 54, at 139.

59. See Gerber, *Deconstructing William Cushing*, *supra* note 35, at 97–125.



ence, and intellectual history as well as from “unadulterated” biography? from a Straussian orientation as well as from a Marxist orientation? We hope the reader will grapple with these questions. A brief summary of the essays that constitute *Seriatim* may provide some assistance in this regard. The essays appear in the order of the justices’ respective appointments to the Supreme Court.

#### F. *The Findings*

Sandra VanBurkleo explores in her essay relationships between John Jay’s intellectual “system”—that is, his systematic political and economic philosophies—and his conception of the Supreme Court’s role in government.<sup>60</sup> Unlike some of *Seriatim*’s contributors, she challenges the notion that Jay’s jurisprudence (and, for that matter, his bench) can best be understood by tightening the links between Jay and Marshall—that is, by rendering the federal judicial experience more continuous and homogenous. That approach, she contends, is unacceptably Whiggish. Jay has to be understood on his own terms as both a product and an architect of the early phases of the American Revolution. First and foremost a diplomat, Jay had in mind a federal judiciary quite unlike the system refashioned and consolidated by John Marshall after 1801. To draw straight lines between past and present, to rub out strange and abandoned practices, VanBurkleo thinks, is to impoverish the present by eliminating an important part of the republic’s past. Thus, she introduces a certain amount of distance between Jay and Marshall: Jay was extremely important—but not as a harbinger of Marshall. Rather, his now mostly archaic vision of federal practice offers ripe opportunities for comparative study and cultural-historical enrichment.

James Haw describes John Rutledge’s distinguished career.<sup>61</sup> He was a lawyer, colonial and state legislator, member of the Continental Congress, governor of South Carolina during most of the War of Independence, chancellor and later chief justice of South Carolina, delegate to the Federal Convention of 1787, and associate justice of the Supreme Court of the United States. Haw discusses how at the Constitutional Convention Rutledge advocated a mixed republic in which gentlemen would govern in the public interest, and sought to safeguard the interests of South Carolina. But, Haw suggests, Rutledge was willing to compromise repeatedly to achieve a more effective central government. Rutledge’s most important contributions, Haw believes, were chairing the Committee of Detail, and helping to secure the enumeration of congressional powers, the necessary and proper clause, and safeguards for the deep South on the slave trade and taxation of exports.

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60. See Sandra Frances VanBurkleo, “Honour, Justice, and Interest”: John Jay’s Republican Politics and Statesmanship on the Federal Bench, in *SERIATIM*, *supra* note 4, at 26–69.

61. See Haw, *supra* note 39, at 70–96.

Haw characterizes Rutledge's judicial philosophy as being quite conservative. Rutledge believed that judges should follow established legal constructions unless the legislature clearly changed them. Occasionally, however, he allowed equitable or political considerations to influence his rulings. His service on the federal bench was too brief to permit any major contribution there, Haw concludes. From 1792 through 1795, his deep mental depression produced erratic behavior that, combined with his outspoken opposition to the Jay Treaty, led the Senate to reject Rutledge's nomination as chief justice in 1795. Consequently, more than any of the justices chronicled in *Seriatim*, the vast majority of Rutledge's contributions to American law and politics occurred independent of his Supreme Court service.

My essay on William Cushing endeavors to disrupt the conventional wisdom that Cushing is but a footnote in the text of American history.<sup>62</sup> Instead of viewing Cushing as the Dan Quayle of the early American republic—in other words, as an intellectual lightweight who rose to power through family and political connections—I argue that Cushing contributed much to American law and politics (perhaps as much as John Marshall).

My deconstruction of William Cushing reveals that he played a leading role in Massachusetts in, among other things, abolishing slavery and securing ratification of the federal Constitution. Cushing also had a great deal to do with the development of judicial review in America and, most importantly, with establishing the “textualist” approach to legal interpretation—an approach for which, like judicial review itself, John Marshall has been given undue credit over the years.

Mark David Hall explains in his essay on James Wilson that while many students of the early American republic know about Wilson's extensive contributions to the framing and ratification of the Constitution, few are aware of the quality of his political thought.<sup>63</sup> In fact, Hall argues that once Wilson's political theory is understood, his contributions at the Constitutional Convention and on the Supreme Court fall readily into place.

Hall makes clear that central among Wilson's political ideas was his belief that all individuals possess natural rights that must be protected by government. Contrary to many of his contemporaries, Wilson contended that thoroughly democratic institutions provide the best protection for both minority and majority rights. As a result, he supported the direct, popular election of representatives, senators, and executives. His democratic theory also informed his view of federalism, leading him to be a consistent nationalist. Yet Wilson did not hold a naive faith in the people, as indicated by his support for countermajoritarian checks such as judicial review. Hall attempts to reconcile Wilson's support of these checks with his democratic

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62. See Gerber, *Deconstructing William Cushing*, *supra* note 35, at 97–125.

63. See Hall, *supra* note 43, at 126–154.

theory, and ultimately concludes that Wilson was the foremost advocate among the Founders of a strong and democratic government that also protects minority rights.

Wythe Holt characterizes John Blair as a wealthy, well-connected, and influential merchant, planter, legislator, and lawyer from the powerful Tidewater aristocracy who was an important leader of second rank when Virginia joined most of the colonies in the drive for independence.<sup>64</sup> Blair won repute serving on Virginia's highest courts and, as a member of the Constitutional Convention and Virginia's ratification convention, he silently aided the formation of a new government for the new nation.

Holt's essay demonstrates that, as a member of the first Supreme Court, Blair cautiously but steadily in actions and opinions showed himself to be a staunch Federalist and a supporter of the mercantile-oriented, weak new central government, imperiled from within by agrarian and democratic dissent and from without by imperialistic European powers. He was, however, neither a profound writer nor a leader on the Court. But, Holt insists, the proper criterion by which to assess the Court's opinions in the perilous 1790s is their political effectiveness in persuasively upholding the power, authority, and respect of the government while exciting no dismembering discontent; and the proper gauge of its members is their courage and consistency in supporting the new Constitution and its constituted government. On both of these measures, the amiable, safe, and conscientious John Blair ranks at the top, Holt concludes, because his clear pronouncements empowering the government were phrased narrowly so as to provoke no animosity, even though he was the only southern justice consistently to support Federalist positions.

Willis Whichard explains that James Iredell came to America as a British official to be the comptroller of customs in Edenton, North Carolina.<sup>65</sup> Iredell studied law under Samuel Johnston, a politically influential lawyer, and acquired the reputation of a superior lawyer. In his most significant case as counsel, Whichard reveals, Iredell advocated the concept of judicial review. He also championed it in a series of sophisticated letters and essays.

Whichard demonstrates how Iredell became a leading essayist for the American cause in the Revolution and a bellwether for the Federalist forces in the effort to ratify the federal Constitution. Iredell answered George Mason's objections, led other literary efforts, and served as floor leader for the Federalist forces at the initial North Carolina ratification convention. When that convention failed to approve the Constitution, Iredell continued his endeavors until a second convention ratified the document. President Washington rewarded Iredell's efforts by appointing him to the Supreme Court. Whichard suggests that the grasp of constitutional questions Iredell dis-

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64. See Holt, *supra* note 36, at 155–197.

65. See Whichard, *supra* note 37, at 198–230.

played in promoting ratification was the foremost reason for the appointment.

Whichard maintains that Iredell's most significant opinion was his dissent in *Chisholm v. Georgia*. In that case Iredell took the position that a citizen of one state could not sue another state. The Eleventh Amendment incorporated Iredell's position into the Constitution. Iredell spent most of his Court years traveling the circuits. He led efforts to terminate or reduce the travel but, Whichard reveals, those efforts were largely to no avail. His work on circuit undermined his health, and he died after a near-decade of service.

Father Daniel Degnan reminds us that William Paterson was a member of the Constitutional Convention and author of the New Jersey, or small-states, plan.<sup>66</sup> Despite his advocacy of the rights of the smaller states, however, Paterson proved to be a consistent nationalist. As a member of the first Senate, Paterson was a principal coauthor, with Oliver Ellsworth, of the Judiciary Act of 1789. The first nine sections of the act, establishing the federal district and circuit courts, were in Paterson's handwriting.

Paterson served on the Supreme Court from 1793 to 1806 where, Father Degnan argues, his work was a continuation of his work in the convention and the Senate. For Paterson, prize capture on the high seas evoked the plenary power of the national government in foreign affairs. The national power to tax, he believed, was not to be narrowly constrained. State laws were to be tested by the new Constitution, as were state court decisions on the issue. Congress had the power to abolish federal courts (as well as to establish them), although judges would lose their positions. Practical contemporary construction was dispositive.

Perhaps most interesting, Father Degnan suggests, is that Paterson issued in a circuit court case one of the most striking early statements of the doctrine of judicial review: "What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. . . . [E]very act of the Legislature, repugnant to the Constitution, is absolutely void."<sup>67</sup> To Paterson, Father Degnan concludes, these principles formed a straight line from the Constitutional Convention and the first Senate through the foundations laid by the early Supreme Court.

Was Samuel Chase, the only Supreme Court justice ever to be impeached, a partisan bully unfit to sit on the bench (as his Jeffersonian tormentors insisted), or was he unfairly attacked for seeking to maintain the rule of law when it was under partisan assault (as the defenders at his trial before the Senate maintained)?<sup>68</sup> While most historians are prepared to con-

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66. See Degnan, *supra* note 42, at 231–259.

67. *Id.* at 243.

68. See Presser, *supra* note 42, at 260–291.

cede Chase's obvious brilliance, his hair-trigger temper and his obduracy led one recent historian—*Seriatim*'s own William Casto—flatly to declare that Chase's appointment was "one of the most regrettable nominations in the Court's history."<sup>69</sup>

In 1991 Stephen Presser published his book *The Original Misunderstanding*, a summation of fifteen years of work, to argue that Chase should be regarded as one of the greatest of the early Supreme Court justices, and someone who articulated a vision of constitutional law more in keeping with the Framers' original understanding than did John Marshall. Presser's book intrigued historians and academic lawyers, who had quite different responses to his thesis and to Samuel Chase. In his essay in *Seriatim*, Presser revisits Chase's contributions to American law and politics, responds to his critics, and explores some of the tensions facing scholars who write legal history.<sup>70</sup>

William Casto approaches his essay on Oliver Ellsworth as an assault upon anachronistic preconceptions that many scholars have about the Founding generation.<sup>71</sup> Specifically, Casto argues that there is a tendency to emphasize the secular aspects of political life in the early republic and to deemphasize the religious dimensions. Casto also insists that our modern-day preconceptions of the proper role of judges in political life has distorted our analysis of judicial conduct in the early American republic. The concept of separation of powers and the ideal of judicial aloofness from political controversy have changed substantially over the past several decades, Casto maintains.

Casto uses Ellsworth as an archetype to illustrate two points. First, Ellsworth was a thoroughgoing religionist who viewed his public and private activities through the lens of Calvinism. The point is not that Ellsworth's religion caused him to act in different ways—although Casto suspects that it did. Instead, Casto believes that Calvinism was the organizing philosophy of Ellsworth's life and that he and others like him cannot be understood if his faith is marginalized. Second, with respect to his judicial conduct in the early republic, Chief Justice Ellsworth is depicted as one who was deeply involved in the national politics of the late 1790s. Casto believes that Ellsworth viewed himself not so much as a judge but, rather, as an active participant in public life who happened to be a judge.

Finally, in his essay on Bushrod Washington, James Stoner makes a powerful case for viewing Washington as a bridge between the pre-Mar-

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69. Gerber, *Introduction*, *supra* note 49, at 18 (quoting Casto).

70. Readers will notice that Presser's essay is structured differently than the others in the book. Because *Seriatim* essentially picks up where Presser left off with his earlier work on Chase, we thought readers might find it interesting to see why Presser did what he did there and what the reaction to his work has been.

71. Casto, *Oliver Ellsworth*, *supra* note 40, at 292–321.

shall Court and the more famous Marshall Court.<sup>72</sup> Consequently, Stoner explodes the myth that Washington and Marshall should be viewed, as William Johnson once charged, as “one Judge.”<sup>73</sup>

Stoner argues that, though Bushrod Washington lived in the shadow of two great men—his uncle George Washington and his friend of fifty years, John Marshall—he was an independent man who left his mark on federal justice and helped make possible the extraordinary unity of the Marshall Court. (This latter achievement is yet another for which Marshall receives undue credit.) Educated in law by George Wythe and James Wilson, and distinguishing himself at an early age on the Richmond bar, Washington was appointed to the Court by John Adams in 1798. From the start, his jurisprudence was characterized by respect for legislative authority, a sense of exact justice, and a certain moderation. Stoner makes it clear that although Washington is largely overlooked today, he was a highly respected judge in his own day.

### G. *A Word Is Worth a Thousand Pictures*

This, then, is what is chronicled in *Seriatim*. Before I describe the reaction to the book and the scholarship on the pre-Marshall Court that has followed the book’s publication, it might be useful for me to say a few words about why the collection is titled *Seriatim* (Latin for “severally” or “in series”).

As judicial process scholars probably know, the practice in English appellate courts is for all of the participating judges to write, and deliver orally, individual opinions explaining their views on a case. This process is known as “seriatim” opinion writing. (The seriatim custom originated in the jury-charge practice of the common-law courts.) Seriatim opinion writing was also the practice used in early American appellate courts—the U.S. Supreme Court included—before, that is, John Marshall became chief justice.

When John Marshall was appointed chief justice in 1801, he put an end to the practice of seriatim opinion writing. Chief Justice Marshall did so because he believed that the Supreme Court’s “power and prestige” would be enhanced if it spoke with a “single voice.”<sup>74</sup> To that end, Marshall established the practice of a single “opinion of the Court”—almost always signed, at least in the early days of his chief justiceship, by Marshall himself<sup>75</sup>—that would reflect the views of the Court as an institution and be

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72. Stoner, *supra* note 46, at 322–350.

73. *Id.* at 332 (quoting William Johnson).

74. HENRY J. ABRAHAM, *THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE* 199 (6th ed. 1993).

75. Haskins and Johnson make an interesting case for the possibility that the opinion of the Court was delivered, but not necessarily written, by the senior justice who participated in the case. Given that Marshall was both chief justice and rarely absent, this tended to be Marshall. *See*

recorded and reported to the public. As with any collaborative product, however, this new practice meant that differences among the justices were adjusted internally and, consequently, hidden from public view. Although this was plainly Marshall's intention, the end of seriatim opinion writing meant that the contributions of individual justices were difficult, if not impossible, to discern. This, we suspect, goes a long way toward explaining why Marshall has come to eclipse in the conventional wisdom the other justices of the early Supreme Court. And this, we believe, is unfortunate.

In short, the collection is titled *Seriatim* for three reasons: (1) because the justices who composed the Supreme Court before John Marshall functioned, for the most part, and spoke, almost always, as individuals; (2) because we aspire to dispel the myth that the early Court became significant only when Marshall arrived; and (3) because we hope to suggest something of the drama in which the pre-Marshall Court justices performed their important duties. To make the point even more directly, a good book title captures the essence of what the author endeavors to accomplish. The title *Seriatim* does that for us.

## II. THE REACTION TO *SERIATIM* AND THE SCHOLARSHIP THAT HAS FOLLOWED *SERIATIM*'S PUBLICATION

### A. *The Reaction to Seriatim*

As far as I know, *Seriatim* was reviewed approximately a dozen times, which is a lot for an edited book. It was also included in the *National Law Journal*'s "summer reading" list in July 1999, which was particularly unusual, especially given that the latest John Grisham legal thriller also was on the list.<sup>76</sup> We never thought *Seriatim* would be a beach book.

All but three of the reviews praised *Seriatim*, which was unusual too, although gratifying. The first lukewarm review, that of Nova Southeastern University Law School professor John Sanchez for *Legal Studies Forum*, insisted that, "In my view, the book, while worthwhile, falls short of its avowed goal to 'destroy' the claim to unequivocal domination by John Marshall on early American jurisprudence."<sup>77</sup> The second, that by University of Washington School of Law professor Stewart Jay for the *William and Mary Quarterly*, opined, "Overall, the book fails to bolster substantially the reputation of the pre-Marshall Court, and for some readers it actually may have

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HASKINS & JOHNSON, *supra* note 8, at 382–387 (discussing this subject, as well as the more general subject of the transition from seriatim opinion writing to institutional opinion writing). Casto maintains that Marshall merely solidified a custom—using institutional rather than seriatim opinions—that Ellsworth initiated during his chief justiceship. See CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC*, *supra* note 14, at 110–111.

76. See *Surfing the Books: Summer Reading: Even if they Aren't, July and August Feel as if they Should be for Lazing and Reading*, NAT'L L.J. (New York), July 5, 1999, at A14–A15.

77. John Sanchez, Book Review, 24 LEGAL STUD. F. 203, 203 (2000). Sanchez specializes in employment law.

the opposite effect.”<sup>78</sup> The third, written for *Continuity* by K. R. Constantine Gutzman, a history professor at Western Connecticut State University, maintained that, “While most of the chapters in this volume are quite nicely done, they serve mainly to demonstrate that the Federalist presidents, George Washington and John Adams, appointed uniformly able, accomplished Federalists to the high court; they do not dispel the impression that the pre-Marshall Court’s work was relatively insignificant.”<sup>79</sup>

Fortunately for us, every other reviewer emphatically disagreed. For example, Amy C. Kunstling proclaimed the following in a review for the *North Carolina Historical Review*:

Most law students’ first-year constitutional law class begins with a discussion of Chief Justice John Marshall’s opinion in *Marbury v. Madison*, in which the United States Supreme Court famously stated “It is emphatically the province and duty of the judicial department to say what the law is.” By beginning constitutional law with the study of *Marbury*, students are left with two impressions: first, that the pre-Marshall Supreme Court’s contributions were negligible and unworthy of study; and second, that *Marbury* was the first time a federal court had recognized the concept of judicial review. *Seriatim: The Supreme Court before John Marshall*, however, convincingly refutes these misimpressions.<sup>80</sup>

Two periodicals affiliated with the Supreme Court reviewed the book. The review in *The Supreme Court Historical Society Quarterly* called *Seriatim* a “wonderful new book [that] challenges the idea that the Court did nothing of importance prior to Marshall’s appointment. . . . [I]t seems destined to become a staple source for the Court’s first decade.”<sup>81</sup> The *Journal of Supreme Court History* said *Seriatim* was “well researched and generally lively” and that “[w]hat sets *Seriatim* apart is not the importance its contributors claim for the early Court but the evidence they amass to support that claim.”<sup>82</sup>

The review for the American Judges Association’s *Court Review*, albeit of the paperback edition, also commended *Seriatim*:

Gerber’s point in putting together the book appears to have been two-fold: first, in his own words, “to dispel the myth that the early Court became significant only when Marshall arrived,” and second, to provide a good, three-dimensional portrait of each of the justices included. The book succeeds on both fronts, including

78. Stewart Jay, Book Review, 57 WM. & MARY Q. 235, 236 (2000). Jay did say that “[t]hese essays offer succinct yet informative biographies of jurists whose contributions to American law have been neglected until relatively recently.” *Id.* at 235.

79. K. R. Constantine Gutzman, Book Review, 29 CONTINUITY 89, 89 (2001).

80. Amy C. Kunstling, Book Review, 76 N.C. HIST. REV. 460, 460 (1999).

81. James B. O’Hara, *New Literature on the Court*, 19 SUP. CT. HIST. SOC. Q., no. 3, 1998, at 5, 7, 13.

82. D. Grier Stephenson, Jr., *Judicial Bookshelf*, 25 J. SUP. CT. HIST. 112, 118, 120 (2000).



a spirited presentation of the ways in which these justices—well before *Marbury v. Madison*—practiced and championed judicial review. Originally issued in a more-expensive hardbound version, this paperback edition is well worth its purchase price.<sup>83</sup>

*Seriatim* was likewise well received by two political scientists who reviewed it. R. J. Steamer concluded for *Choice* that “[t]his creative and imaginative analysis of America’s first national jurists is recommended for all students of Supreme Court history,”<sup>84</sup> while Tinsley Yarbrough wrote in the *Law and Politics Book Review* that “[t]his absorbing collection of essays . . . goes far toward filling a void in the literature on the early justices of the world’s most significant tribunal.”<sup>85</sup>

Historian R. B. Bernstein was equally kind in *H-Net Reviews*:

These valuable contributions to historical scholarship illuminate an unjustly neglected era of the history of the federal judiciary. They also force historians and legal scholars to reconsider how they have studied the history of the federal courts, and they also demand that general historians include the history of the federal courts as a key thread of the political and constitutional history of the early American Republic.<sup>86</sup>

Daniel L. Dreisbach concluded likewise in the *Journal of the Early Republic*: “The book effectively challenges the claim that the Court did little of significance before Marshall. Under an untested frame of government, guided by a vague constitutional mandate, and supported by colonial antecedents and a controversial Judiciary Act, the pre-Marshall justices helped shape the nation’s high court.”<sup>87</sup>

University of Chicago Law School professor David P. Currie wrote in a review for the *American Historical Review* that *Seriatim* “does something that has not been done before, and it is something worth doing.”<sup>88</sup> He continued:

The book’s title is both clever and descriptive. Not only did the justices of the time deliver their opinions *seriatim*, which is to say separately, but the book presents the justices themselves *seriatim*, affording us not so much another analysis of the decisions of the early Court (for which there is no crying need) as a better understanding of the individuals who made up that tribunal and of whom our knowledge has been limited. . . . [E]ven one who has

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83. The Resource Page: New Books: Scott Douglas Gerber (Ed.), *Seriatim: The Supreme Court before John Marshall*, New York Univ. Press, 2000, 37 CT. REV. 52, 52 (2001).

84. R. J. Steamer, Book Review, 37 CHOICE, no. 2, Oct. 1999, <http://choicereviews.org/review/10.5860/CHOICE.37-1219>.

85. Tinsley Yarbrough, Book Review, 9 L. & POL. BK. REV. 186, 186–187 (1999).

86. R. B. Bernstein, Book Review, H-NET, Dec. 1999, <https://networks.h-net.org/node/16794/reviews/16915/bernstein-casto-oliver-ellsworth-and-creation-federal-republic-and>.

87. Daniel L. Dreisbach, Book Review, 20 J. EARLY REP. 143, 144 (2000).

88. David P. Currie, Book Review, 105 AM. HIST. REV. 1301, 1301 (2000).

studie[d] the work of the early Supreme Court can learn a good deal about the individual justices from this book, and thus a lot about the Court they composed. . . . [I] found them all interesting and informative; the serious student of the Court's history cannot afford to ignore them.<sup>89</sup>

Almost certainly the most gratifying review was penned by Herbert A. Johnson of the University of South Carolina School of Law for the *American Journal of Legal History*.<sup>90</sup> Johnson, who had coauthored a Holmes Devise book about the Marshall Court,<sup>91</sup> opened his review with the following decree:

While many essay collections may deserve the bibliographic graveyard to which they are assigned, it would be a crime against scholarship if this group of biographical sketches suffered a similar fate. The distinguished contributors provide us with a convenient interpretative guide to the lives, jurisprudence, and decision-making of those jurists who pre-dated Chief Justice Marshall's tenure on the bench of the U.S. Supreme Court. Good judicial biography is an essential building block of constitutional history, and as such this book represents a significant contribution to our knowledge of the early Supreme Court. It challenges us to take the Jay and Ellsworth Courts seriously, and brings their achievements out of the shadow cast by the subsequent era of John Marshall. Throughout the volume the authors prove that the early Court needs to be studied on its own terms and not retrospectively by invidious comparisons to the Marshall Court.<sup>92</sup>

### B. *Scholarship That Has Followed Seriatim's Publication*

More important than the heart-warming praise for *Seriatim*, Johnson observed that "we are at the 'end of the beginning,' and certainly not finished, with this scholarly project."<sup>93</sup> I agree. I mentioned in the Preface to *Seriatim* that the book was "exploratory in nature and, it is hoped, will provoke scholars to research the early Court more carefully than they have in the past."<sup>94</sup> I am pleased to report that progress has been made.

A number of scholars cited *Seriatim* when discussing the judicial opinion-writing process, although many of them were focused on modern rather than historical practices.<sup>95</sup> However, some fine work has been done on the

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89. *Id.* at 1301–1302.

90. Herbert A. Johnson, Book Review, 46 AM. J. LEGAL HIST. 346, 346 (2004).

91. See HASKINS & JOHNSON, *supra* note 8.

92. Johnson, *supra* note 90, at 346–347.

93. *Id.* at 347.

94. Scott Douglas Gerber, *Preface to SERIATIM*, *supra* note 4, at ix, x.

95. See, e.g., M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 304 (2007); Adam S. Hochschild, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 WASH. U. J.L. & POL'Y 261, 263 (2000); Justin Marceau, *Plurality Decisions: Upward-Flowing Precedent and*

early Court since *Seriatim*'s publication, including about the individual justices who preceded Marshall.

Not surprisingly, two contributors to *Seriatim* published terrific additional work on the pre-Marshall Court justices. Wythe Holt penned an insightful article in 1999 about John Rutledge for the *Journal of Southern Legal History* in which Holt demonstrates "not only that John Rutledge was one of the most important of our forgotten founders, but also that he is perhaps the most forgotten of our important founders."<sup>96</sup> A decade later William Casto contributed a superb article about James Iredell to a *Vanderbilt Law Review* symposium about judicial reputation.<sup>97</sup> Casto concludes that article, which was an updated version of a piece he published in the *Connecticut Law Review* in 1995,<sup>98</sup> with these words:

To a degree, the measure of a Justice's greatness is not in the person, but in the eyes of the beholder. We do not see the greatness of Iredell's analysis because his theory does not comport with the twenty-first-century practice of judicial review. Nevertheless, he offered the most comprehensive analysis and justification of judicial review ever penned by a Supreme Court Justice. Moreover, some of his insights are timeless. In particular, his insight regarding the impact of the majority rule upon those in the minority is as powerful today as it was over two centuries ago.<sup>99</sup>

A handful of articles and one handbook addressed the pre-Marshall Court as an institution.<sup>100</sup> As did the articles about individual justices, the scholarship about the early Court as an institution tends to cite *Seriatim* as a starting point. Natalie Wexler, an associate editor of *The Documentary History of the Supreme Court of the United States, 1789–1800*, opens her 2006 article in the *University of Pennsylvania Law Review* entitled "In The Be-

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*Acoustic Separation*, 45 CONN. L. REV. 933, 945 (2012); Peter J. McCormick, "Was it Something I Said?": *Losing the Majority on the Modern Supreme Court of Canada, 1984–2011*, 50 OSGOODE HALL L.J. 93, 98 (2012); Melvin I. Urofsky, *Mr. Justice Brandeis and the Art of Judicial Dissent*, 39 PEPP. L. REV. 919, 919 (2012). The most surprising citation was in a 2016 amicus curiae brief from the governor's office in Texas. Brief for Governor Greg Abbott, et al. as Amici Curiae Supporting Petitioners, *Pidgeon v. Turner*, (No. 15–0688), 2016 WL 7638350, at \*1, \*8–9 (Tex. June 30, 2017) (decision not yet released for publication).

96. Wythe Holt, *How a Founder Becomes Forgotten: Chief Justice John Rutledge, Slavery, and the Jay Treaty*, 7 J.S. LEGAL HIST. 5, 6 (1999).

97. William R. Casto, *There Were Great Men Before Agamemnon*, 62 VAND. L. REV. 371 (2009). Marshall was Casto's Agamemnon. *Id.* at 372.

98. See Casto, *James Iredell and the American Origins of Judicial Review*, *supra* note 38.

99. Casto, *There Were Great Men Before Agamemnon*, *supra* note 97, at 398. Law professor and *Green Bag* editor-in-chief Ross E. Davies honored Iredell with the first of the "Supreme Court Sluggers" cards issued for a pre-Marshall Court justice. See Ross E. Davies, *Supreme Court Sluggers: James Iredell*, 4 J.L. (3 J. LEGAL METRICS) 169 (2014).

100. See also Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753 (2003) (describing the history of circuit riding that includes a section on the pre-Marshall Court justices).

ginning: The First Three Chief Justices” with a *Seriatim*-like announcement:

It comes as a surprise to many—including a number of lawyers and law students—to learn that John Marshall was not in fact the country’s first Chief Justice, but rather its fourth (or, according to some recent scholarship, its fifth). Before there was Marshall, there were John Jay, John Rutledge (briefly), *possibly* William Cushing (even more briefly), and Oliver Ellsworth. While legal historians may be familiar with these nonhousehold names, all too often when these men, and the Court over which they presided from 1789 to 1800, do receive mention, it is only to be dismissed as inferior to what immediately followed. As Robert McCloskey aptly put it in *The American Supreme Court*, “[t]he great shadow of John Marshall . . . falls across our understanding of that first decade; and it has therefore the quality of a play’s opening moments with minor characters exchanging trivialities while they and the audience await the appearance of the star.” In the last ten years, scholars have begun to focus more attention on the pre-Marshall Court, but a certain derogatory attitude persists. One recent popular history of the Supreme Court, for example, describes the early Justices as “a thoroughly undistinguished lot.”<sup>101</sup>

Wexler then devotes the remainder of her lengthy article to describing the chief justice’s role from 1789 until Marshall’s arrival in 1801. R. B. Bernstein tells a related story in a 2012/13 essay about the difficulty President Adams had in filling the chief justice’s seat prior to appointing Marshall.<sup>102</sup>

Casto contributed yet another fine article with his 2002 piece in the *Ohio Northern University Law Review* about what he denotes as “the early Supreme Court justices’ most significant decision”: the August 8, 1793, letter from the justices declining to provide President George Washington with an advisory opinion about the first serious foreign affairs crisis under the Constitution.<sup>103</sup> A similarly outstanding focused contribution to the scholarship about the Supreme Court before John Marshall is political scientist Charles Anthony Smith’s 2008 article in the *Law & Society Review* in which Smith demonstrates that “a significant rationale for the jurisdiction and design of the Court was to establish a credible commitment to uphold trade agreements and resolve trade disputes with other nations.”<sup>104</sup> Smith

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101. Natalie Wexler, *In The Beginning: The First Three Chief Justices*, 154 U. PA. L. REV. 1373, 1373–1374 (2006) (citing *SERIATIM*, *supra* note 4, among other works).

102. R. B. Bernstein, *President John Adams and Four Chief Justices: An Essay for James F. Simon*, 57 N.Y.L. SCH. L. REV. 441, 441–442 (2012).

103. William R. Casto, *The Early Supreme Court Justices’ Most Significant Decision*, 29 OHIO N. U. L. REV. 173, 173 (2002).

104. Charles Anthony Smith, *Credible Commitments and the Early American Supreme Court*, 42 LAW & SOC’Y REV. 75, 77 (2008).

insists: “With Casto (1995) and Gerber (1998), I reject the conventional wisdom about the irrelevance of the early Court.”<sup>105</sup>

The final volumes of *The Documentary History of the Supreme Court of the United States, 1789–1800*, were completed in 2007, including volume 8, the concluding volume, about decisions issued by the pre-Marshall Court.<sup>106</sup> Canadian law professor Matthew P. Harrington published a handbook for ABC-CLIO in 2008 that included, among other items, biographies of the pre-Marshall Court justices and A–Z entries on other significant people of the day (e.g., George Washington), important laws and constitutional provisions (e.g., the Judiciary Act of 1789 and Article III), and concepts (e.g., judicial review).<sup>107</sup>

Finally, but perhaps most significantly for modern students of the Supreme Court, *Seriatim* was mentioned in subsequent scholarship about judicial review. Mary Sarah Bilder, a 2016 recipient of the Bancroft Prize for her book about James Madison,<sup>108</sup> authored a 2006 article in the *Yale Law Journal* that argues that “judicial review arose from a longstanding English corporate practice under which a corporation’s ordinances were reviewed for repugnancy to the laws of England.”<sup>109</sup> Her thesis, she notes, builds on the previous work of other scholars, including the contributors to *Seriatim*, “who have demonstrated significant post-Revolutionary comfort with the practice of judicial review.”<sup>110</sup> Stephen Presser, a contributor to *Seriatim*, picks up from where he left off in both *Seriatim* and his prior work about Samuel Chase, and insists in a 2002 symposium in the *William and Mary Law Review* about the legacy of Marshall, that Marshall’s brand of judicial review—“an instrumentalist, positivist, centralizing, judicial supremacist strand, one less concerned with principle and precedent, and more con-

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105. *Id.* See also James W. Ely Jr., *The Court that John Marshall Inherited*, LIBRARY OF LIBERTY & LAW (2013) (book review), <http://www.libertylawsite.org/book-review/the-court-that-john-marshall-inherited/> (“The history of the Supreme Court before the appointment of John Marshall in 1801 has long received scant attention from scholars. The unspoken assumption was that little of importance occurred during the Court’s first decade and that Marshall established the Court as a major institution. This dismissive attitude has been increasingly challenged. [See Scott Douglas Gerber, ed. *Seriatim: The Supreme Court before John Marshall* (1998)]. William R. Casto has contributed significantly to a reevaluation of the early Supreme Court in this readable and important study.”).

106. See 8 DOCUMENTARY HISTORY, *supra* note 13. A master’s degree thesis on the pre-Marshall Court likewise was completed in 2007. Brook Carl Poston, *George’s Court: Examining the Role of the Supreme Court Justices as Statesmen in the 1790’s* (2007) (unpublished M.A. thesis, University of Missouri-Kansas City) (on file with ProQuest online database).

107. MATTHEW P. HARRINGTON, JAY AND ELLSWORTH, THE FIRST COURTS: JUSTICES, RULINGS, AND LEGACY (2008).

108. MARY SARAH BILDER, MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015).

109. Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 504 (2006).

110. *Id.* at 507. Bilder’s citation to *Seriatim* led the editors of the Yale Law Journal to ask me to write a response to Bilder’s article. I praised it. See Scott D. Gerber, *The Political Theory of an Independent Judiciary*, 116 YALE L.J. POCKET PART 223 (2007).

cerned with expedience”—is at least partially responsible for the moral relativism that has damaged modern America.<sup>111</sup> Chase, in contrast, Presser declares, represented another strand of judicial review, “one based in natural-law ideas running all the way back to Aristotle and Cicero, and forward through Aquinas and Burke,” and one that “saw law as a conservative force, and one embodying the moral principles and perhaps even the divine dictates of eternal forces.”<sup>112</sup>

I, too, have continued to explore the origins of judicial review. In fact, my 2011 Oxford University Press book, *A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606–1787*, articulates a new theory about the origins of judicial review: one that emphasizes the connection between judicial review and the rise of judicial independence.<sup>113</sup>

#### CONCLUSION

*Seriatim* was one of the best experiences of my academic career. Not only did it result in a number of lifelong friendships with some of the leading legal and political historians of early America in the academy today, but the book was positively reviewed and it has sparked other scholars to author additional interesting work about the Supreme Court before John Marshall. More work remains to be done, but I am proud to say that *Seriatim* has left its mark.

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111. Stephen B. Presser, *Some Alarming Aspects of the Legacies of Judicial Review and of John Marshall*, 43 WM. & MARY L. REV. 1495, 1510 (2002).

112. *Id.* at 1511.

113. GERBER, A DISTINCT JUDICIAL POWER, *supra* note 34.