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The Constitution in the Supreme Court: 1789-1801

David P. Currie†

Histories of the Supreme Court and of the Constitution abound, as do legal analyses of constitutional decisions. The histories, however, tend to eschew legal criticism, while the analyses tend to be organized by subject matter. My aim is to provide a critical history, analyzing from the lawyer's standpoint the entire constitutional work of a particular period. My search is for methods of constitutional analysis, for techniques of opinion writing, for the quality of the performance of the Court and of its members.

This article covers the twelve years between the establishment of the Court in 1789 and the appointment of John Marshall as Chief Justice in 1801. The accomplishments of the Marshall period were so enormous that the modest record of his predecessors tends to be overlooked. Yet the first twelve years were a formative period during which the Justices established traditions of constitutional interpretation that were to influence the entire future course of decision.

† Harry N. Wyatt Professor of Law, University of Chicago. I should like to thank my colleagues Gerhard Casper, Frank Easterbrook, Henry Monaghan, Geoffrey Stone, and James B. White for their helpful comments.
The first Court consisted of six Justices,¹ and twelve men in all sat before Marshall. John Jay was the first Chief Justice. His associates were John Rutledge, William Cushing, James Wilson; John Blair, and James Iredell. Of the original appointees only Cushing remained in 1801. Jay was replaced by Oliver Ellsworth, his brethren by Thomas Johnson, Samuel Chase, Bushrod Washington, and Alfred Moore. Johnson in turn was replaced by William Paterson.²

Several of these Justices played no visible part in the decisions this article considers. Rutledge, although he did some circuit duty, resigned without ever sitting on the Supreme Court. When reappointed as Chief Justice in 1795, he served only until the next session of Congress, for he was not confirmed.³ Johnson departed before any significant opinions were written; Ellsworth sat in none of the cases that produced real opinions; Washington and Moore belong to the Marshall period. As far as the written word is concerned, we therefore are studying seven men: Jay, Cushing, Wilson, Blair, Iredell, Paterson, and Chase.

The Supreme Court published full-scale opinions construing the Constitution in only three cases before 1801. *Chisholm v. Georgia*⁴ held that a state could be sued in federal court without its consent; *Hylton v. United States*,⁵ that a federal tax on carriages was not a “direct” tax required to be apportioned among the states according to the census; *Calder v. Bull*,⁶ that a state legislature had not passed a forbidden ex post facto law when it set aside a judicial decree in a will contest.

These three controversies, however, do not exhaust the pre-Marshall Court’s encounters with matters constitutional. In *Ware v. Hylton*,⁷ the Court invalidated a state law under the supremacy

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¹ Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73 (current version in relevant part at 28 U.S.C. § 1 (1976)).
² See G. Gunther, Cases and Materials on Constitutional Law app. A, at A-1 to A-2 (10th ed. 1980). Five of the six vacancies in this short period were caused by resignations. This remarkably high turnover reflected the uncertain status of the new federal government and the arduous duty of riding circuit. Rutledge preferred to be Chief Justice of South Carolina, 1 C. Warren, The Supreme Court in United States History 56-57 (2d ed. 1926), and Johnson refused to remain, as Iredell called the Justices, a “travelling postboy.” Id. at 86.
⁴ 2 U.S. (2 Dall.) 419 (1793).
⁵ 3 U.S. (3 Dall.) 171 (1796).
⁶ 3 U.S. (3 Dall.) 386 (1798).
⁷ 3 U.S. (3 Dall.) 199 (1796).
clause because it contradicted a treaty. *Penhallow v. Doane’s Administrators*\(^8\) produced opinions on federal powers before 1789; *Cooper v. Telfair*,\(^9\) on questions under a state constitution. On at least nine other occasions, the Court faced questions with constitutional overtones respecting the powers of the federal courts. In *Hayburn’s Case*,\(^10\) the Court was asked to pass upon a statute subjecting certain circuit court decisions to revision by the Secretary of War; in *Chandler’s Case*\(^11\) and *United States v. Todd*,\(^12\) upon the authority of circuit judges to act extrajudicially as “commissioners” under the same statute; and in *La Vengeance*,\(^13\) upon the scope of the admiralty jurisdiction. In *Hollingsworth v. Virginia*,\(^14\) the Court held that the eleventh amendment limited pending as well as future suits against states, and resolved a major issue as to the process of constitutional amendment. In *Wiscart v. D’Auchy*,\(^15\) it respected a statutory limitation on its appellate jurisdiction, and in *Turner v. Bank of North America*,\(^16\) it enforced a congressional restriction on the diversity jurisdiction, despite arguments that both restrictions offended article III. In *Mossman v. Higginson*,\(^17\) it read restrictively a statute providing federal jurisdiction when an alien was a party so it could avoid finding the law unconstitutional. Finally, the Court invoked constitutional support in its refusal to honor an executive request for an advisory opinion in the so-called *Correspondence of the Justices*.\(^18\) Not all these matters were clearly disposed of on constitutional grounds, and in none did the

\(^{8}\) 3 U.S. (3 Dall.) 54 (1795).

\(^{9}\) 4 U.S. (4 Dall.) 14 (1800).

\(^{10}\) 2 U.S. (2 Dall.) 409 (1792).

\(^{11}\) The decision in *Chandler’s Case* was not published and is known only from a speech in Congress, 11 Annals of Cong. 903-04 (1802) (remarks of Rep. Dana), and from a discussion in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 171-72 (1803).

\(^{12}\) *Todd* also was unpublished. We know of the case from a report by Secretary of War Henry Knox to Congress (Feb. 21, 1794), reprinted in 1 Am. State Papers (Miscellaneous) No. 47, at 78 (W. Lowrie & W. Franklin eds., Wash., D.C. 1834), and from Chief Justice Roger Taney’s account in United States v. Ferreira, 54 U.S. (13 How.) 40, 52-53 (1851 Term) (Note by the Chief Justice, Inserted by Order of the Court). The entire record was published subsequently in Ritz, United States v. Yale Todd (U.S. 1794), 15 Wash. & Lee L. Rev. 220, 227-31 (1958).

\(^{13}\) 3 U.S. (3 Dall.) 297 (1796).

\(^{14}\) 3 U.S. (3 Dall.) 378 (1798).

\(^{15}\) 3 U.S. (3 Dall.) 321 (1796).

\(^{16}\) 4 U.S. (4 Dall.) 8 (1799).

\(^{17}\) 4 U.S. (4 Dall.) 12 (1800).

Court publish substantial opinions. But these facts are themselves of interest to the student of constitutional litigation. 19

I. FEDERAL JURISDICTION

Because jurisdiction is a threshold issue in every federal case, the Court would settle in its first forty years many of the fundamental issues surrounding the federal judicial power. A significant start was made in the years before Marshall.

A. Hayburn's Case

In 1792, Congress authorized pensions for disabled war veterans. The statute required applicants to file proofs with "the circuit court," which, if it found the applicant eligible, was to certify its finding to "the Secretary at War." 20 The Secretary in turn could place the name of the certified applicant on the pension list, or he could withhold the name and report the matter to Congress if he had "cause to suspect imposition or mistake." 21

William Hayburn filed for a pension under this statute, and the Circuit Court for the District of Pennsylvania refused to entertain his application. Although the judges apparently wrote no opinion, they took the unusual step of explaining their refusal in a letter to President George Washington. Two other circuits 22 also addressed their views to the President, though one 23 conceded that no application was pending before it. All three courts concluded that the statute was unconstitutional because it attempted to subject court decisions to revision by the Secretary of War. 24 Five Supreme Court Justices sitting on circuit 25 joined in these declarations of unwillingness to carry out an act of Congress they deemed

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19 A thorough understanding of the early development of constitutional doctrine must take account of the decisions of the Justices on circuit, but that is a project for another time.
20 Act of Mar. 23, 1792, ch. 11, § 2, 1 Stat. 243, 244 (repealed by Act of Feb. 28, 1793, ch. 17, § 1, 1 Stat. 324, 324).
21 Id. § 4, 1 Stat. at 244.
23 The Circuit Court for the District of North Carolina.
24 The three courts' letters are reprinted in Dallas's report of Hayburn's Case, 2 U.S. (2 Dal.) 409, 410-14 n.(a) (1792), and in 1 Am. State Papers (Miscellaneous), supra note 12, Nos. 30-32, at 49-53. For additional material on the case, see Farrand, The First Hayburn Case, 1792, 13 AM. HIST. REV. 281 (1908). See also 2 Annals of Cong. 556-57 (1792) (reporting Hayburn's memorial to Congress for relief following the circuit court's decision, and the appointment of a committee to inquire into Hayburn's allegations).
25 Jay, Cushing, Wilson, Blair, and Iredell.
unconstitutional—eleven years before *Marbury v. Madison.*

Attorney General Edmund Randolph then asked the Supreme Court for a writ of mandamus compelling the circuit court to pass upon Hayburn’s petition. An examination on the merits would have required the Court to decide whether the statute conferred either nonjudicial power on the courts or judicial power on the Secretary of War, and if so, whether negative implications should be drawn from the provision of article III stating that “the judicial Power . . . shall be vested in . . . Courts.” But the Court never reached these questions. The Attorney General, having neglected to secure Hayburn as his client, announced that he was acting “without an application from any particular person, but with a view to procure the execution of an act of congress.”

Evidently on its own motion, the Court “declared, that they entertained great doubt” as to the right of the Attorney General “to proceed ex officio.” The latter attempted to justify this manner of proceeding, “[b]ut the Court being divided in opinion on that question, the motion, made ex officio, was not allowed.” The Attorney General then entered an appearance as counsel for Hayburn, but the case later was mooted by the adoption of a new statute providing “in another way, for the relief of the pensioners.”

The Court seems to have taken for granted, as it since has held, that certain objections to subject matter jurisdiction properly may be raised by the Court on its own motion. Were it otherwise, jurisdictional limitations serving important institutional goals might be evaded by the agreement of parties with no incentive to enforce them. The point is not confined to constitutional limitations on jurisdiction, but it embraces them; it is an important

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26 5 U.S. (1 Cranch) 137 (1803).
27 U.S. Const. art. III, § 1. There was also the question whether there was, or needed to be under article III, a proper defendant. Cf. *Tutun v. United States,* 270 U.S. 568, 577 (1926) (holding naturalization petitions within the judicial power because the “United States is always a possible adverse party”); *Hart & Wechsler, supra* note 18, at 90 (notes on problem of proper parties).
28 2 U.S. (2 Dall.) at 408.
29 Id. at 409.
30 Id. at 409-10. *See* Act of Feb. 28, 1793, ch. 17, § 3, 1 Stat. 324, 324-25.
32 *Contrast* Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167-68 (1939) (stating that an objection to venue may be “lost by failure to assert it seasonably” because venue, unlike subject matter jurisdiction, only “relates to the convenience of litigants”).
part of the procedural framework for the enforcement of constitutional limitations. Alexander Dallas’s report, however, does not indicate that the Justices stopped to explain that they had the power or duty to raise such issues, or whence it was derived.

Nor does the report reveal the Justices’ reasons for concluding that the Attorney General lacked authority to proceed ex officio. Indeed, we must turn to the newspapers to find that the vote was 3-3,\(^4\) for Dallas reveals only that the Court was “divided.”\(^8\) Remembering the future, we can surmise that three Justices may have concluded that the Court could decide only “Cases” and “Controversies”—the terms employed in article III;\(^3\) that there was no case or controversy unless the applicant for relief himself was injured by the disputed action;\(^7\) and that the analogy of the Government’s acknowledged authority to prosecute crimes\(^8\) did not take the case outside this principle.\(^3\)

None of these conclusions is obvious, and it is by no means clear that the Justices meant to invoke what we now know as the constitutional dimension of the law of standing to sue. It is conceivable that they gave a narrow reading to section 35 of the Judiciary Act,\(^4\) which only authorized the Attorney General “to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned,”\(^4\) or to section 13,\(^4\) which gave the Supreme Court mandamus jurisdiction only “in cases war-

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\(^4\) See 1 C. Warren, supra note 2, at 77-78.

\(^5\) 2 U.S. (2 Dall.) at 409.

\(^6\) U.S. Const. art. III, § 2, para. 1.


\(^8\) Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92 (current version in relevant part at 28 U.S.C. § 518 (1976)).

\(^9\) See Hart & Wechsler, supra note 18, at 90, suggesting the analogies of the powers of English and state attorneys general “in relation to charities and in the enforcement of corporation laws.” Cf. 28 U.S.C. § 2403(a) (1976) and 29 U.S.C. § 216(c) (Supp. III 1979) (respectively authorizing the United States to intervene in private actions to defend the constitutionality of statutes and to sue for damages on behalf of workers injured by violations of the Fair Labor Standards Act). Consider also the vexing precedents as to the authority of states to sue to vindicate sovereign or citizen concerns. D. Currie, Federal Courts: Cases and Materials 75-77 (2d ed. 1975). Hart & Wechsler, supra note 18, at 90, calls attention to the problem that federal officials were on both sides of the Hayburn case.

\(^10\) Julius Goebel seemed to believe this was the basis of the decision. J. Goebel, 1 History of the Supreme Court of the United States 553 (1971). The scope of section 35 had been discussed by counsel, see 1 C. Warren, supra note 2, at 78.


\(^11\) See 1 C. Warren, supra note 2, at 81.
ranted by the principles and usages of law," which in turn might have required an interested plaintiff. Either of these positions would have raised the further question whether, if the Attorney General's application was a case or controversy within article III, Congress had the power to deprive the Court of jurisdiction over it under its constitutional authority to make "Exceptions" to the Court's appellate jurisdiction.

In short, the reported disposition of this first constitutional controversy in the Supreme Court was inconclusive. We know the Court left the validity of executive revision of court decisions for another day, but we cannot say whether the three Justices who voted for this result did so on constitutional grounds. It is tempting to criticize the Court for not explaining what it was doing, yet even today the Court usually does not write opinions when it is evenly divided and cannot resolve the questions presented. Moreover, we cannot be certain that the Justices did not reveal their reasons at the time, for there was no official reporter of decisions until 1816, and until 1834, no requirement that opinions be filed. Indeed, a later reporter of decisions who attempted to make a complete collection of early opinions concluded that until 1800, the written opinion was the exception, not the rule. What got reported in the earliest days was what Dallas for his own purposes could gather and elected to divulge.

B. Chandler's Case and United States v. Todd

The 1793 statute that mooted Hayburn's Case did not end litigation over the earlier pension law. Some of the judges, despite their conclusion that they could not certify pension claims in their

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43 Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 81 (current version in relevant part at 28 U.S.C. § 1651 (1976)).
44 U.S. Const. art. III, § 2, para. 2.
45 A modern court probably would have refused to reach the constitutional question in the absence of a more explicit statutory right to sue.
47 Id. at 62; Davis, Appendix to the Reports of the Decisions of the Supreme Court of the United States, 131 U.S. app. at xvi (1889).
48 Davis, supra note 47, at xv-xvi. In Calder v. Bull, 3 U.S. (3 Dall.) 386, 398 (1798), Justice Iredell observed that he had "not had an opportunity to reduce [his] opinion to writing."
49 See Dunne, supra note 46, at 62-63. Professor Goebel said that Dallas reported only about half the cases decided and reported them tardily: his fourth volume, containing Supreme Court cases decided in 1799 and 1800, appeared in 1807. J. Goebel, supra note 40, at 665.
judicial capacity, had been willing to do so "in the capacity of commissioners." The 1793 act preserved "rights founded upon legal adjudications" under the prior law and directed the Secretary and the Attorney General "to take such measures as may be necessary to obtain an adjudication of the Supreme Court of the United States, on the validity of any such rights claimed under the act aforesaid, by the determination of certain persons styling themselves commissioners."

Once again proceeding ex officio, the Attorney General first asked the Supreme Court for a writ of mandamus directing the Secretary to place on the pension list a certified claimant who had not been paid. As he reported, however, "two of the judges . . . expressed their disinclination," despite the new statute, "to hear a motion in behalf of a man who had not employed me for that purpose," and the motion prudently was withdrawn. Once again we cannot be sure the Justices' qualms were of constitutional dimension; the statutory reference to "such measures as may be necessary" may have meant finding a case that met preexisting jurisdictional requirements.

The standing problem was cured when a similar request was made by an attorney representing an unpaid certified claimant named John Chandler. Nevertheless the Court denied relief: "having considered the two acts of Congress" relating to pensions, it was "of opinion that a mandamus cannot issue to the Secretary of War for the purpose expressed." In Todd, the United States sued to recover money from a veteran already on the pension list, on the ground that the "commissioners" who had certified his claim had been without authority to pass upon the application. The Supreme Court held for the United States.

Thus Todd clearly established, and Chandler may have held, that the judges had lacked power to sit as commissioners. Like Hayburn, both Chandler and Todd can be justified on constitu-

50 See Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 n.(a).
52 Letter from Attorney General Edmund Randolph to Secretary of War Henry Knox (Aug. 9, 1793), reprinted in 1 Am. State Papers (Miscellaneous), supra note 12, No. 47, at 78; Ritz, supra note 12, at 225.
53 11 Annals of Cong. 904 (1802), quoted in Sherman, The Case of John Chandler v. The Secretary of War, 14 Yale L.J. 431, 435 (1905). The decision in Chandler's Case was not reported and is known only from other sources. See note 11 supra.
54 Like Chandler's Case, United States v. Todd was unreported and is known only from other sources. See note 12 supra.
tional grounds: arguably, article III forbids judges to do nonjudicial tasks; arguably, the processing of claims subject to executive revision was not judicial; and arguably, it made no difference that the judges formally had removed their robes.

It is improper to conclude, however, as occasional commentators have done, that the Supreme Court in Chandler or Todd held the 1792 pension statute unconstitutional. As in Hayburn, no opinion was published in either case; indeed, not even the judgments were published. We therefore do not know the Court's reasons for holding against Chandler and Todd, and in both cases there was a plausible statutory basis for decision. Because the statute required application to "the circuit court," it appeared, as the North Carolina circuit judges suggested in Hayburn, to authorize judges to act only as a court, not as commissioners.

Both cases presented an additional constitutional problem. Neither Chandler nor Todd sought review of a lower court decision; each was filed as an original action in the Supreme Court. If the statutory authorization of "measures . . . necessary to obtain an adjudication of the Supreme Court" purported to give the Court original jurisdiction, it was of doubtful constitutionality. Neither Chandler nor Todd was within those categories of cases

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55 Gordon Sherman so concluded as to Chandler, and Wilfred Ritz and John Bancroft Davis, a Supreme Court reporter, so concluded as to Todd. Sherman, supra note 53, at 437-38; Ritz, supra note 12, at 227; Davis, supra note 47, at cccxxiv. Deciding to the contrary as to Todd are J. Goreel, supra note 40, at 564 n.57, and Farrand, supra note 24, at 282-83 & n.4 (citing J. Thayer, Cases on Constitutional Law pt. 1, at 105 n.1 (1894)).

56 See notes 11 and 12 supra.

57 2 U.S. (2 Dall.) at 413 n.(a). In Chief Justice Taney's view, Todd had determined that the statute could not be construed to authorize the judges to act "out of court as commissioners." United States v. Ferreira, 54 U.S. (13 How.) 40, 53 (1851 Term) (Note of the Chief Justice, Inserted by Order of the Court). Modern theory tells us that the Justices should have chosen the statutory ground in preference to the constitutional. But this does not prove that that was what the Court in fact did.

In Chandler, the Court's cryptic reference to its consideration of "the two acts of Congress," 11 Annals of Cong. 904 (1802), lends credence to the conclusion that the Constitution was not the basis of decision in that case. Moreover, it is not even clear that the ground for decision in Chandler was that the judges lacked authority to act as commissioners: the decision rather may have been that mandamus was unavailable. Marshall was later at pains to argue, without proof, that Chandler had not decided that mandamus was unavailable against a Cabinet officer. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 171-72 (1803). But even if Marshall was right, Marbury itself would hold that mandamus lay only to enforce a plain ministerial duty, id. at 165-73, while the pension statute directed the Secretary to exercise judgment in determining which certified applicants to place on the pension list.

58 See Ritz, supra note 12, at 227-28; Sherman, supra note 53, at 435.


60 Whether it did is an open question.
over which article III specifies "the Supreme Court shall have original Jurisdiction," and Marbury v. Madison soon was to establish that Congress cannot confer original jurisdiction in other cases. The dismissal of Chandler may have been based on this ground. Chief Justice Roger Taney, on the other hand, thought that by entertaining Todd, the Court had held to the contrary. The failure of the Court to leave any significant traces of its reasoning makes it equally plausible to surmise that in both cases the Justices simply overlooked the problem.

We are left with two precedents that fail to reveal whether a constitutional question was decided and that were not even made available to the bar for such guidance as the unadorned results might afford. Chandler and Todd tell us nothing about the Constitution, but they say much about the early Court's attitude toward explanation and dissemination of its decisions. One cannot but wonder how many other possibly significant decisions may yet turn up in somebody's attic, and how many more may never be found. The chances may not be great, but Chandler and Todd are sobering admonitions for those who seek to know the complete history of constitutional adjudication.

C. The Correspondence of the Justices

In July 1793, Secretary of State Thomas Jefferson wrote to the Justices on behalf of President Washington seeking their advice on a number of legal questions arising from the ongoing hostilities between England and France: whether, for example, existing treaties gave France the right "to fit out originally in and from the ports of the United States vessels armed for war," and whether the neutrality laws permitted France to establish prize courts in this country. Jefferson prefaced the specific inquiries with the general question "whether the public may, with propriety, be availed of [the Justices'] advice on these questions?"
The Justices answered the prefatory question in the negative and refused to give the President advice:

We have considered the previous question... [regarding] the lines of separation drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been purposely as well as expressly united to the executive departments.67

This brief response has been an important precedent; with a few notable lapses,68 it generally has been understood ever since that the federal courts are not to give advisory opinions.69

Today we are likely to explain that this rule is derived from article III, which defines the "judicial Power" to include specified categories of "Cases" and "Controversies."70 This line of reasoning parallels the modern constitutional explanation of the Court's refusal to hear the Attorney General ex officio in Hayburn's Case.71 Both involve the same two less-than-obvious steps: that by permitting judges to decide cases and controversies, the Framers implicitly forbade them to do anything else, and that a request for an advisory opinion does not present a case or controversy.72

Today we might shore up these conclusions by reference to the debates in the constitutional convention. One of the reasons given for rejecting judicial participation in the proposed Council of Revi-

Jefferson's letter and several of the questions are reprinted in Hart & Wechsler, supra note 18, at 64-65.


68 See Hart & Wechsler, supra note 18, at 68-69 (citing, inter alia, extrajudicial opinions by Justice William Johnson on the constitutionality of federally financed internal improvements, see 1 C. Warren, supra note 2, at 596-97, and by Chief Justice Taney on the constitutionality of taxing judges' salaries).

69 See, e.g., Frankfurter, Note on Advisory Opinions, 37 Harv. L. Rev. 1002 (1924); Hart & Wechsler, supra note 18, at 66-70.

70 U.S. Const. art. III, § 2, para. 1.

71 See text and notes at notes 36-39 supra.

72 For the opinion that British judicial practice sanctioned advisory opinions, see 1 C. Haines, The Role of the Supreme Court in American Government and Politics 144 & n.110 (1944) (citing J. Thayer, Legal Essays 46-48 (1908)).
sion was the danger that the judges might prejudge issues that later could be litigated before them, a danger equally apparent if the judges gave advisory opinions. Moreover, when James Madison objected to jurisdiction over cases arising under the Constitution on the ground that courts should expound the law only in cases of a judicial nature, he recorded in his notes of the debates that it was "generally supposed" that the power given in article III would be so limited as a matter of construction. The official journal of the convention, however, was withheld from public scrutiny until 1819, and Madison's notes were unavailable until after his death in 1836. Thus the Justices were deprived of a valuable aid to construction during the critical, formative years of constitutional interpretation.

The Justices may have intended to suggest the case-or-controversy argument in their response to Jefferson with their one-word reference to decisions made "extrajudicially." If so, they fell far short of the kind of explanation we have come to expect of major constitutional opinions. Moreover, a negative inference from article III's reference to "judicial Power" is one of no fewer than six constitutional arguments discernible within the two cryptic sentences of the Justices' response quoted above. In addition to characterizing the request as "extrajudicial," the Justices mentioned general structural principles both of separation of powers and of checks and balances. To readers of Marbury v. Madison, the "last resort" clause of the Justices' reply suggests that the Supreme Court, here resorted to in the first instance, has original jurisdiction under article III only if a state or a foreign diplomat is a party. The "last resort" reference also suggests the fear that to render advice the President was free to ignore effectively would permit him to review the actions of the tribunal that article III designated as "supreme." Finally, the letter suggested that requests for judicial advice might be precluded by negative inference from article II, which empowers the President to "require the Opinion, in writing, of the principal

73 2 The Records of the Federal Convention of 1787, at 75 (rev. ed. M. Farrand 1937) [hereinafter cited as Convention Records] (remarks of Caleb Strong) (the judges "in exercising the function of expositors might be influenced by the part they had taken, in framing the laws"); id. at 79 (remarks of Nathaniel Gorham) (the judges "ought to carry into the exposition of the laws no prepossessions with regard to them").

74 Id. at 480.

75 See 1 id. at xi-xii, xv.
Officer in each of the executive Departments."

None of these six suggestions was spelled out in any detail, and the Justices stopped short of actually declaring that the Constitution forbids advisory opinions. "Separation" appears in a restatement of Jefferson's question, not in the answer. "Extrajudicially" seems to have been used for purposes of description rather than argument. Article II merely "seems" to limit the President to seeking executive advice. "Checks" and "last resort" were cited not as conclusive, but only as "considerations which afford strong arguments," and the argument they were said to support was against the "propriety," not the constitutionality, of advisory opinions.

Should we lament that once again the Court failed in its obligation to provide an adequate explanation for its decision? I think not. No one had attempted to require the Justices to give advisory opinions; it was therefore entirely appropriate for them to decline on policy grounds to do so, without reaching out to decide the constitutional question. The same considerations that made the Justices reluctant to give the President substantive advice support their decision under these circumstances not to give a definitive answer to the question of their constitutional power to advise.

D. Chisholm v. Georgia

Chisholm, a South Carolina citizen, brought an original action in assumpsit in the Supreme Court against the State of Georgia. The state argued there was no jurisdiction; the Court disagreed. This time there were opinions—real opinions—and this time a constitutional issue clearly was resolved. There was no opinion for the Court; each Justice delivered his own. Four Justices wrote for

76 U.S. Const. art. II, § 2, para. 1. See 2 Convention Records, supra note 73, at 80, reporting Rutledge’s argument that “[t]he Judges ought never to give their opinions on a law until it comes before them,” and that it was “unnecessary” for them to do so because “[t]he Executive could advise with the officers of State, as of war, finance, & c. and avail himself of their information and opinions.”

77 Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). The official report is silent as to the basis of the action. Charles Warren, relying on a newspaper account, described it as an action to recover on bonds given by debtors whose property the state had confiscated. 1 C. Warren, supra note 2, at 93 n.1. Later investigators have said it was an action for the price of goods furnished to the state. J. Goebel, supra note 40, at 726; C. Jacobs, The Eleventh Amendment and Sovereign Immunity 47 (1972).

78 This practice of seriatim opinions would persist until the appointment of Marshall, who put an abrupt end to it. The modern practice of writing one opinion speaking for the entire majority is likely to strike us as both tidier and more powerful; it is difficult to say what a case stands for if those deciding it failed to agree on a statement of reasons. See, e.g.,
the majority, and Iredell dissented alone. The majority opinions present interesting stylistic contrasts. Blair and Cushing were brief and to the point, relying chiefly on the words of the Constitution.\textsuperscript{79} Jay and Wilson wrote far longer and more pretentious opinions in which the constitutional language played a much smaller part; both have a very unfamiliar ring to the modern reader.

Jay's opinion is in three sections: "1st. In what sense, Georgia is a sovereign state. 2d. Whether suability is compatible with such sovereignty. 3d. Whether the constitution (to which Georgia is a party) authorizes such an action against her."\textsuperscript{80} He thus prefaced his discussion of what we would be inclined to view as the only issue with a largely abstract discussion of the nature of sovereignty, including a paragraph on "feudal principles."\textsuperscript{81} He proceeded to a general commentary on each clause defining the judicial power in article III,\textsuperscript{82} devoting two of his ten pages to the relevant language\textsuperscript{83} and concluding by patting the convention delegates on the back: "The extension of the judiciary power of the United States to [suits against a state by citizens of another state] appears to me to be wise, because it is honest, and because it is useful."\textsuperscript{84}

Wilson also divided his opinion into three parts, examining the question of suability "1st. By the principles of general jurisprudence. 2d. By the laws and practice of particular states and kingdoms. . . . 3d. And chiefly, . . . by the constitution of the United States . . . ."\textsuperscript{85} In the first section he declared, among other things, that "[m]an, fearfully and wonderfully made, is the workmanship of his all-perfect Creator: a state, useful and valuable as the contrivance is, is the inferior contrivance of man."\textsuperscript{86} In the next section we encounter Bracton, Isocrates, Frederick the Great, an

\textsuperscript{79} 2 U.S. (2 Dall.) at 450-53 (Blair, J.), 466-69 (Cushing, J).
\textsuperscript{80} Id. at 470.
\textsuperscript{81} Id. at 471-72.
\textsuperscript{82} Id. at 475-76.
\textsuperscript{83} Id. at 476-77.
\textsuperscript{84} Id. at 479.
\textsuperscript{85} Id. at 453.
\textsuperscript{86} Id. at 455.
allegedly pre-Norman book called the *Mirror of Justice*, a work by "the famous Hottoman" describing the traditions of "the Spaniards of Arragon," and a successful proceeding by the son of Columbus against King Ferdinand. Wilson's constitutional analysis begins with an "anecdote . . . concerning Louis XIV." It continues through references to "the People of Athens" to the unsurprising conclusion that the Constitution "could vest jurisdiction" over states if the Framers wanted it to, and dedicates to article III a single paragraph at the end of the opinion.

Today's observer is likely to dismiss the bulk of the Jay and Wilson opinions as persiflage. Perhaps they should be taken as evidence that at least two prominent Justices at that time believed "general jurisprudence," sound policy, and the experience of other nations were more immediately relevant to the interpretation of our written Constitution than we are likely to think they should be. The expansive notions of Wilson and Jay were not shared universally, however. Iredell insisted that it was not for the Court to consider questions of policy "unless the point in all other respects was very doubtful" and that unless the Constitution conferred the disputed authority, "ten thousand examples of similar powers would not warrant its assumption." Blair dismissed European precedents as "utterly destitute of any binding authority here."

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87 Id. at 459-61.
88 Id. at 461.
89 Id. at 463.
90 Id. at 464.
91 Id. at 466.
92 See, e.g., J. GOEBEL, supra note 40, at 731-33; C. JACOBS, supra note 77, at 51-52.
93 In Professor Goebel's view, Wilson's opinion shows him at his "fussiest," the "compulsive lecturer disposed to decorate his text with all the furbelows of learning, a great deal of which was dispensable"; Jay's was "considerably less than" a model of clarity and profundity, set "lamentable standards of American judicial historiography," and contained "digression" as well as "diversion." Clyde Jacobs, while terming the Wilson opinion "justly famed as a grandiloquent judicial exposition of general constitutional doctrines," adds that it was "rather weak in certain technical particulars" and, "as a state paper, . . . at least impolitic."
94 The Supreme Court's own clerk praised the Wilson and Jay opinions effusively while giving short shrift to Cushing and Blair: Wilson's argument was "elegant, learned," and Jay "delivered one of the most clear, profound, and elegant arguments perhaps ever given in a Court of Judicature." See 1 C. WARREN, supra note 2, at 95.
95 2 U.S. (2 Dall.) at 450.
96 Id. at 449.
97 Id. at 450. See also the letter of William Davie to Iredell, quoted in J. GOEBEL, supra note 40, at 731 n.30, commenting on Wilson's opinion: "[P]erhaps, notwithstanding the tawdry ornament and poetical imagery with which it is loaded and bedizened, it may still be
The basic arguments of the majority can be summarized as follows. Article III extends the judicial power to "Controversies ... between a State and Citizens of another State." The provision that the Supreme Court's jurisdiction shall be original in cases "in which a State shall be Party" confirms that it is immaterial whether the state be plaintiff or defendant, for "Party" embraces both. The inference is strengthened by the inclusion of controversies "between two or more States," for in such cases a state always must be defendant. Cushing and Jay added an argument concerning the purpose of the jurisdictional grant: jurisdiction was conferred to prevent interstate friction that could arise if a state were left to judge its own cause, and the danger of friction was as great when the state was defendant as when it was plaintiff. Jay invoked the preamble's goal to "establish justice" as a further aid to construction, arguing that it would be unjust if states could not be sued. Wilson echoed this policy argument under the rubric of "general jurisprudence." He also noted that governments were suable in other countries and added that state suability was implicit in the clause forbidding states to impair contracts, which otherwise would be a dead letter. Jay argued that article III was a "remedial" provision that should be liberally construed and that the old-world notion of state sovereignty underlying immunity from suit was incompatible with the concept of popular sovereignty expressed in the preamble.

These methods of constitutional interpretation are familiar to the modern reader. The words of the Constitution are parsed; inferences are drawn from the wording of other provisions; efforts are made to ascertain and achieve the purposes of the Framers; and arguments of policy and practice are advanced to establish that the conclusions we draw could have been intended. Taken by themselves, the arguments of the majority read very persuasively.

very 'profound.'"

97 2 U.S. (2 Dall.) at 450 (Blair, J.), 466 (Wilson, J.), 467 (Cushing, J.), 476 (Jay, C.J.).
98 Id. at 451 (Blair, J.), 477 (Jay, C.J.).
99 Id. at 451 (Blair, J.), 466 (Wilson, J.), 467 (Cushing, J.). Blair and Cushing made the same argument as to the provision for jurisdiction over controversies "between a State . . . and foreign States." The Court since has rejected the conclusion that a foreign state may sue an unconsenting state. Monaco v. Mississippi, 292 U.S. 313 (1934).
100 2 U.S. (2 Dall.) at 467-68 (Cushing, J.), 475-76 (Jay, C.J.).
101 Id. at 477.
102 Id. at 456, 458-61, 465.
103 Id. at 476.
104 Id. at 470-72.
The words of article III cover the case if given their ordinary meaning; the purpose imputed to the Framers, though not proved to be authentic, seems a plausible deduction; and the result satisfies today’s sense of good policy.

Justice Iredell found it unnecessary in his dissent to decide whether article III included suits against states, for he thought Congress had not conferred jurisdiction. The Court’s original jurisdiction, he argued, was not self-executing; legislation was necessary even to determine the number of Justices.\textsuperscript{105} Section 14 of the Judiciary Act authorized the Court to issue only those writs “agreeable to the principles and usages of law,”\textsuperscript{106} and traditional legal principles, which Iredell derived largely from an extensive and learned investigation of English law, did not permit governments to be sued.\textsuperscript{107} He added, without explaining why, that he thought this was just as well and that “nothing but express words, or an insurmountable implication (neither of which I consider, can be found in the case)” could justify holding suits against a state within article III.\textsuperscript{108}

Although the majority unpardonably failed to respond,\textsuperscript{109} Iredell was unconvincing. Article III is silent as to the number of Justices, but not as to the scope of original jurisdiction; legislation confirming the constitutional provision seems unnecessary. In any event, section 13 flatly provided that the Court should have original jurisdiction of suits “between a state and citizens of other states”;\textsuperscript{110} it should not have been necessary to seek an independent source of jurisdiction in section 14, which provided ancillary

\textsuperscript{105} Id. at 432.
\textsuperscript{106} Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82 (current version in relevant part at 28 U.S.C. § 1651 (1976)).
\textsuperscript{107} 2 U.S. (2 Dall.) at 433-49.
\textsuperscript{108} Id. at 449-50.
\textsuperscript{109} The Justices did not always write out their opinions in those days, see note 48 \textit{supra}, and Professor Goebel found evidence in two of the \textit{Chisholm} opinions that the Justices had not conferred about the case before announcing their opinions. J. \textit{GOEBEL, supra} note 40, at 728. Thus there might have been no opportunity to answer the Justice who spoke last. This does not explain the Justices’ failure to respond to Iredell, however, for he was the first to deliver his opinion.
\textsuperscript{110} Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80 (current version in relevant part at 28 U.S.C. § 1251(b) (Supp. III 1979)). Iredell dismissed section 13 by construing the provision making the Supreme Court’s jurisdiction “not exclusive” so as to limit it to cases over which state courts also had jurisdiction; more probably Congress meant only that state courts were not precluded from hearing such cases if they chose. The Court later accepted Iredell’s argument, however, in holding a state not suable by its own citizen in \textit{Hans v. Louisiana}, 134 U.S. 1, 18-19 (1890).
powers "necessary for the exercise of . . . jurisdiction[ ]" elsewhere conferred.\textsuperscript{111}

Yet Iredell's argument from history and tradition, unpersuasive as he used it to interpret section 14, is much more troublesome if redirected to the meaning of section 13 and of article III itself. In England, the theory of sovereignty was that the king could not be sued in contract cases without his consent. In the states, apparently no suit lay against the government. Was it likely that without specifically mentioning it, the convention meant to overthrow this established principle? An article III "Controversy" arguably means one cognizable according to judicial traditions,\textsuperscript{112} and if "Controversy" does not include advice to the executive, perhaps it does not include suits against unconsenting governments either.

This conclusion is supported by contemporaneous statements of several of the most prominent proponents of the Constitution. Madison and Marshall flatly told the Virginia ratifying convention that article III would not subject unwilling states to suits by individuals,\textsuperscript{113} and Alexander Hamilton said the same thing in The Federalist.\textsuperscript{114} Furthermore, the force of the majority's reliance on the plain constitutional language was weakened greatly by two Justices' admission that despite article III's inclusion of "Controversies to which the United States shall be a Party,"\textsuperscript{115} the United States might not be suable without its consent. Jay thought the case of the United States was different because a judgment against

\begin{footnotes}
\footnote{111}{Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82 (current version in relevant part at 28 U.S.C. § 1651 (1976)). Presumably Iredell was concerned that without section 14 there would be no method of serving execution or other process on the state. But the immunity objection is one of jurisdiction; section 14 seemed to authorize whatever writs would traditionally be appropriate on the assumption that the Court had cognizance of the case. Yet one must acknowledge the danger of misunderstanding the relationship between jurisdiction and the writs across a gulf of 200 years.}
\footnote{112}{See text and notes at notes 36-39, 70-72 supra.}
\footnote{113}{3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 533 (2d ed. Wash., D.C. 1836) (1st ed. Wash., D.C. 1827-30) [hereinafter cited as Elliot's Debates] ("It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring suit against a citizen, it must be brought before the federal court.") (Madison); id. at 555 (Marshall).}

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. . . . [T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith.}
\footnote{115}{U.S. Const. art. III, § 2, para. 1.}
\end{footnotes}
the general government would be unenforceable.116 Cushing thought the reason for jurisdiction was lacking because a suit against the United States presented no danger of interstate friction.117 Thus half the majority Justices did not shrink from finding less in the words of article III than met the eye. For them, at least, the language was not so clear that tradition and legislative history should have been immaterial.118

Since Chisholm, the Court has found many implicit immunities in the Constitution. The United States cannot be sued,119 and federal instrumentalities cannot be taxed or regulated,120 without congressional consent. Even today the facially plenary federal tax and commerce powers are thought to be limited in application to the states themselves.121 In addition, after the eleventh amendment reversed Chisholm itself by declaring that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State," the Court made up for the apparent carelessness of the amendment's draftsmen by construing other clauses of article III to respect the traditional sovereign immunity. Thus an unconsenting state also may not be sued by its own citi-
zen, or by a federal corporation, or by a foreign state, or in admiralty. Although it is true that the adoption of the eleventh amendment helped the Court reach these latter decisions, these decisions nevertheless support the conclusion that it would have been perfectly respectable if Chisholm had come out the other way.

This is not to say the decision was necessarily wrong. Madison, Marshall, and Hamilton notwithstanding, there was no unanimity among the Framers that immunity would exist. Edmund Randolph, who represented Chisholm in the Supreme Court, praised the proposed Constitution in the Virginia ratifying convention because in his view it made states subject to suit: “whatever the law of nations may say, . . . any doubt respecting the construction that a state may be plaintiff, and not defendant, is taken away by the words where a state shall be a party.” Moreover, Wilson’s survey of English law undercuts the accepted wisdom that the king could not be sued without his consent. Wilson asserted that the king was sued regularly through the mechanism of the petition of right. Iredell responded by quoting Blackstone that the petition was “a matter of grace” and not of “compulsion.” But Wilson contended that “the difference is only in the form, not in the thing.” Professor Louis Jaffe, writing much later, agreed with Wilson: “when it was necessary to sue the Crown eo nomine con-

122 Hans v. Louisiana, 134 U.S. 1, 15 (1890).
123 Smith v. Reeves, 178 U.S. 436, 446 (1900).
125 Ex parte New York, 256 U.S. 490, 497-98 (1921).
126 3 Elliot’s Debates, supra note 113, at 573 (emphasis in original). That the statements of Madison, Marshall, and Hamilton were controverted by prominent opponents of the Constitution, see, e.g., id. at 319, 475 (Patrick Henry), 526-27 (George Mason), is not very important, because the question ought to be what those who voted for the Constitution meant by it. See Schwegman Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951) (“The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors we look to when the meaning of the statutory words is in doubt.”). Cf. Local 1545, United Bhd. of Carpenters v. Vincent, 286 F.2d 127, 132 (2d Cir. 1960) (“[D]issenting opinions are not always a reliable guide to the meaning of the majority; often their predictions partake of Cassandra’s gloom more than of her accuracy.”). For fuller accounts of contemporary statements in and out of the ratifying conventions, see C. Jacobs, supra note 77, at 27-40; Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U. Pa. L. Rev. 515, 522-36 (1978).
127 2 U.S. (2 Dall.) at 460.
128 Id. at 442, 444 (quoting 1 W. Blackstone, Commentaries on the Laws of England 236 (Oxford 1765-69)).
129 Id. at 460.
sent apparently was given as of course."\textsuperscript{130} If Wilson and Jaffe were right, there was no meaningful tradition of sovereign immunity and thus no reason to strain the words of article III to respect it—and \textit{Chisholm} may have been right after all.

What remains interesting is the general failure of the \textit{Chisholm} opinions to come to grips with what we would think to be the real problem. Blair and Cushing confined themselves largely to the text of article III, without discussing either the tradition of immunity or the statements of the Framers, while Iredell made what we would consider the right argument in the wrong context.\textsuperscript{131} Nobody spoke, as Paterson later would,\textsuperscript{132} of the unwritten understandings of those who were at the Philadelphia convention, and the first citation of \textit{The Federalist} was still a few years away,\textsuperscript{133} although Jay was one of Hamilton’s fellow contributors to those essays. In the final analysis it was the discursive Jay and Wilson who made the most telling contributions for the majority: Jay argued that the tradition of immunity was based upon conditions not existent in America, and Wilson, that immunity was fictitious even in England and that the contract clause implied a judicial remedy.

Finally, Iredell in his dissent uttered a dictum that anticipated by ten years the decision in \textit{Marbury v. Madison}. Judicial organization and procedure, he declared, were within the control of Congress, with

\begin{quote}
but one limit; that is, “that they shall not exceed their authority.” If they do, I have no hesitation to say, that any act to that effect would be utterly void, because it would be inconsistent with the constitution, which is a fundamental law, paramount to all others, which we are not only bound to consult, but sworn to observe; and therefore, where there is an interference, being superior in obligation to the other, we must unquestionably obey that in preference.\textsuperscript{134}
\end{quote}

\textsuperscript{130} L. \textsc{Jaffe}, \textsc{Judicial Control of Administrative Action} 197 (student ed. 1965). \textit{See also} C. \textsc{Jacobs}, \textit{supra} note 77, at 6 (“The immunity doctrine by this time was largely a legal conception, which determined the forms of procedure in some cases but did not seriously impair the subject’s right to recovery in accordance with the substantive law.”).

\textsuperscript{131} \textit{See} text and notes at notes 105-112 \textit{supra}.

\textsuperscript{132} \textit{See} text and notes at notes 253, 260 \textit{infra}.

\textsuperscript{133} \textit{See} text and note at note 313 \textit{infra}.

\textsuperscript{134} 2 U.S. (2 Dall.) at 433.
E. Hollingsworth v. Virginia

The eleventh amendment, overruling Chisholm, was adopted in January 1798. One month later in Hollingsworth, the Supreme Court, without dissent and again without published opinion, dismissed all pending suits filed by citizens of one state against another state.

It had been argued, largely on the ground that retroactivity was disfavored, that the amendment did not apply to pending cases. The Court demurred, saying only that it applied to "any case, past or future." The amendment's text, though not unambiguous, is consistent with this conclusion: "The Judicial power . . . shall not be construed to extend to any suit . . . commenced or prosecuted" against one state by citizens of another. "Shall not be construed" speaks to future acts of construction, but such acts of construction could occur in pending suits. "Commenced" and "prosecuted" are indefinite as to time; the amendment does not say "to be commenced" or "which shall be commenced." Moreover, the argument that the amendment's policy applied equally to pending cases seems persuasive whether that policy was an abstract respect for sovereignty or the protection of state treasuries.

More interesting still is an issue of continuing significance that the Court also resolved without giving any reasons, so far as the report reveals. The eleventh amendment, it was argued, had not been constitutionally adopted, because it had not been submitted to the President for approval under the veto clause of article I.

135 See 1 C. Warren, supra note 2, at 101.
136 See 3 U.S. (3 Dall.) 378 (1798). It may be significant that the Court did not dismiss, but only continued, a pending suit against a state by a foreign state. See C. Jacobs, supra note 77, at 62-63. But if the Court thought such a suit was still maintainable, it eventually would change its mind. See Monaco v. Mississippi, 292 U.S. 313 (1934).
137 See 3 U.S. (3 Dall.) at 379-80 (argument of William Tilghman and William Rawle).
138 Id. at 382.
139 U.S. Const. amend. XI.
140 Moreover, future proceedings in pending suits are future exercises of the judicial power; they seem to be interdicted even if the amendment forbids only prospective action.
141 Marshall later would say that "prosecuted" referred to the continuing process of cases previously commenced. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 408-09 (1821).
142 See 3 U.S. (3 Dall.) at 381.
143 See C. Jacobs, supra note 77, at 67-74; 1 C. Warren, supra note 2, at 96-100. See also Ex parte McCordale, 74 U.S. (7 Wall.) 506, 514 (1869) (invoking what the Court termed the "general rule" that repeal of a jurisdictional provision requires dismissal of a pending appeal).
144 See 3 U.S. (3 Dall.) at 379 (argument of Tilghman and Rawle).
That provision applies not only to ordinary bills, but to "[e]very Order, Resolution, or Vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment)." Article V in turn provides for submission of a proposed constitutional amendment to the states "whenever two thirds of both Houses shall deem it necessary."

The language of the veto clause seems to include constitutional amendments. Moreover, counsel argued, there was no reason to think the President ought to be excluded from the amending process, as his "concurrence . . . is required in matters of infinitely less importance."

It is no answer that article V already requires the same two-thirds vote that would override a President's veto; as counsel argued, "the reasons assigned for his disapprobation might be so satisfactory as to reduce the majority below the constitutional proportion." Justice Chase's oral retort that "the negative of the president applies only to the ordinary cases of legislation" is surely incorrect if taken literally, because the veto clause on its face encompasses "[e]very Order, Resolution, or Vote" and extends the President's participation beyond "ordinary . . . legislation."

The feeling nevertheless lingers that the literal applicability of the veto clause to amendments is the result of careless drafting. Unlike the property and full faith clauses of article IV, article V does not simply confer additional substantive powers on Congress; it provides a separate procedure for the adoption of amendments, with the unique additional requirement of ratification by three-fourths of the states. Quite possibly this procedure was meant to be a self-contained whole, a substitute for the normal legislative process that included the President. This inference is strengthened by Madison's explanation, in offering to the convention the language found in the veto clause, that "if the negative of the President was confined to bills; it would be evaded by acts under the form and name of Resolutions, votes &c." Another important

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145 U.S. CONST. art. I, § 7, para. 3.
146 3 U.S. (3 Dall.) at 379.
148 3 U.S. (3 Dall.) at 381 n.(a).
149 U.S. CONST. art. IV, § 1 (full faith and credit); id. § 3, para. 2 (Congressional control over property belonging to the United States).
150 2 Convention Records, supra note 73, at 301. The amending power is discussed in The Federalist No. 43 (J. Madison) and the veto power in Nos. 51 (J. Madison) and 73 (A. Hamilton) without adverting to the question. Story gives only the holding of Hollingsworth, 3 J. Story, Commentaries on the Constitution § 1824, at 688 n.1 (Boston 1833), while
consideration, as the Court was told, was that the first ten amend-
ments had not been submitted to the President either. Not only
would the Court later defer to the construction adopted by other
branches in the first days of the Constitution, but in this in-
stance, rejection of the congressional reading would have upset set-
tled expectations by invalidating the Bill of Rights.

So far as the report shows, it did not occur to the Court to
suggest that the question of the President’s participation in the
amending process was a political one beyond judicial competence,
as the Court would say much later of some other issues of amend-
ment procedure. The Court simply decided, as Marshall’s Mar-
bury philosophy soon would suggest it should, whether the
amendment was law.

Finally, Hollingsworth may put to flight the conventional
wisdom that Marbury v. Madison was the first case in which the
Supreme Court held an act of Congress unconstitutional. Section
13 of the Judiciary Act, which Chisholm had read to authorize
suits by citizens of one state against other states, was still on the
books. In dismissing suits that fell within its provisions, the
Court treated that construction as no longer law because of the
supervening constitutional amendment. It is possible that the
Court merely overruled its earlier interpretation of section 13,
either to avoid the constitutional question, or in reliance on the
amendment’s command that the “Judicial power” be narrowly con-
strued. On the other hand, “Judicial power” is a constitutional
term, and the eleventh amendment was a constitutional, not a stat-
utory, amendment. It is thus possible that the Court in Hollings-
worth invalidated section 13 as applied and authoritatively con-
strued—without, so far as the record tells us, bothering to justify
either the power of judicial review or its conclusion with respect to
the statute in question.

In short, the Court may well have been right on the merits of

referring in another connection to Madison’s stated purpose. 2 id. at 355.

151 3 U.S. (3 Dall.) at 381.

152 See, e.g., Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803) (upholding the power of
Congress to impose circuit duties on Supreme Court Justices on the sole basis that the prac-
tice had existed since 1789).

153 Coleman v. Miller, 307 U.S. 433, 450, 454 (1939) (effect of a state’s previous rejection
and time for ratification).

154 5 U.S. (1 Cranch) at 177-78.

155 Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80 (current version in relevant part at
28 U.S.C. § 1251(b) (Supp. III 1979)).

156 Section 13 apparently was mentioned by neither Court nor counsel.
Hollingsworth. What is noteworthy is that once again either the Court did not offer an explanation of its conclusions, or Dallas did not report it.

F. La Vengeance

The United States sought forfeiture of a vessel seized for exporting contraband “from Sandy Hook, in the state of New Jersey . . . to . . . the island of St. Domingo.” The district court, sitting without a jury, held for the United States. The circuit court reversed on the merits. The United States appealed, arguing that the district court's decision was unreviewable by the circuit court and that the case should have been tried by jury. The relevant statutes allowed appeals of certain causes “of admiralty and maritime jurisdiction” and required a jury except in “civil causes of admiralty and maritime jurisdiction.” In the Government's view, the case was neither maritime nor civil. The Supreme Court in a single paragraph rejected both arguments: the case was maritime because “exportation is entirely a water transaction” and civil because as “a libel in rem,” it “does not, in any degree, touch the person of the offender.” Thus it was proper to try the case without a jury, and the circuit court had jurisdiction over the appeal.

There were three possible objections to the existence of admiralty jurisdiction. It was argued at one time or another that in England, the admiralty had no jurisdiction over acts “done part on land, and part on sea,” or over acts done wholly on water but within the body of a county, or over seizures for trade law violations, wherever they might occur. Behind all three propositions lay the argument that the Court should follow British precedents in construing the terms “admiralty” and “maritime.”

Did the Court in La Vengeance reject any of these propositions? Marshall thought it had: twelve years later he cited La Ven-
geance as having held that trade law violations were within the admiralty jurisdiction. Yet so far as the report of *La Vengeance* reveals, the contrary argument had not been made. Nor did the case hold that the admiralty jurisdiction encompassed actions done partly on land; it flatly said the exportation in question was “entirely a water transaction” because alleged “to have commenced at Sandy Hook; which, certainly, must have been upon the water.”

On the question whether Sandy Hook was within the body of a county, the Court seems to have been indifferent, but we have no way of knowing whether this was because it thought that British precedents did not govern, that waters within counties were within the British admiralty jurisdiction, or that Sandy Hook was not within a county. Indeed, counsel’s observation that local waters were excluded was so oblique that we cannot be confident the Court meant to address it at all.

All the Court safely can be said to have held is that the particular transaction took place entirely on the water, a narrow factual determination of no great significance. But the cryptic nature of the opinion made it relatively easy for later observers to argue that the decision stood for more important propositions as well.

On its face this decision did not purport to resolve any constitutional questions: “civil” and “maritime” were statutory terms,

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165 The Betsey & Charlotte, 8 U.S. (4 Cranch) 443, 452 (1808).
166 Former Attorney General Lee, arguing against jurisdiction in The Betsey & Charlotte, *id.* at 446 n.(a), was asked if he could distinguish *La Vengeance*, which he also had argued. He said he could and added that in any event, “I know it was not so fully argued as it might have been; and some of the judges may recollect that it was rather a sudden decision.” Chase retorted: “I recollect, that the argument was no great thing, but the Court [sic] took time and considered the case well.” *Id.* (emphasis in original).
167 3 U.S. (3 Dall.) at 301. The Court also did not hold, as Marshall would hold in The Betsey & Charlotte, 8 U.S. (4 Cranch) 443, 452 (1808), that “[i]t is the place of seizure, and not the place of committing the offence, which decides the jurisdiction.” Though its language was loose, *La Vengeance* clearly involved the business of water transportation—a maritime offense, not just a maritime seizure. Much later, persuasively citing the purposes of the admiralty clause, the Court would hold that federal admiralty jurisdiction could not be invoked in a plane crash case where the only maritime link was that the plane had crashed upon navigable water. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 268 (1972).
168 *La Vengeance* would be cited in *Waring v. Clarke*, 46 U.S. (5 How.) 441, 458 (1847 Term), as an example of cases finding jurisdiction where a British court would not have. It should be clear that the Court in *La Vengeance* did not reveal that it did so consciously.
169 Attorney General Lee, arguing for the United States, had quoted Blackstone for the proposition that admiralty jurisdiction was limited to “causes arising wholly upon the sea, and not within the precincts of any county,” 3 U.S. (3 Dall.) at 300 (quoting 3 W. Blackstone, *Commentaries on the Laws of England* 106 (Oxford 1765-69)), but he apparently did not mention whether Sandy Hook lay within a county.
and the Government’s arguments were based on statute. Lurking in the background, however, were the constitutional provisions guaranteeing the right to a jury in “[t]he Trial of all Crimes,”170 “all criminal prosecutions,”171 and “Suits at common law.”172 The Court’s holding that the case was “civil” and “maritime” for statutory purposes could be argued as meaning it was neither a criminal prosecution173 nor a suit at common law174 for jury trial purposes under the Constitution.175 Moreover, the terms “admiralty” and “maritime,” which in La Vengeance determined the statutory jury right, also appear in the delineation of federal judicial power in article III. The decision that the case was maritime within the statute implied that it was also a case the federal courts could constitutionally entertain. Thus the Court let fly in a most cavalier way two conclusions that later might prove highly influential in the interpretation of the Constitution.176

G. Wiscart v. D’Auchy

The Circuit Court for the District of Virginia, sitting in equity, set aside a conveyance on the ground that it had been made to defraud creditors. On review the question arose whether the Supreme Court could reexamine the facts as well as the law.177 An unreported companion case, evidently in admiralty, presented the same issue.178 The question turned on the distinction between an

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170 U.S. CONST. art. III, § 2, para. 3.
171 Id. amend. VI.
172 Id. amend. VII.
173 Distinguishing criminal from noncriminal sanctions since has proved quite difficult for the Court. See, e.g., Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-84 (Goldberg, J.), 202-10 (Stewart, J., dissenting) (1963).
174 That maritime cases were not “suits at common law” was stated in Parsons v. Bedford, 28 U.S. (3 Pet.) 443, 446-47 (1830 Term) (dictum), and held in Waring v. Clarke, 46 U.S. (5 How.) 441, 459-60 (1847 Term).
175 Marshall would make this argument soon in The Betsey & Charlotte, 8 U.S. (4 Cranch) 443, 452 (1808), where he would maintain, though quite erroneously, that La Vengeance had held that the Constitution did not require jury trial under the circumstances.
176 See The Belfast, 74 U.S. (7 Wall.) 624, 638 (1869) (citing La Vengeance and other cases for the proposition that Congress “intended by the ninth section of the Judiciary Act to invest the District Courts” with the “entire power of the Constitution”); see also Waring v. Clarke, 46 U.S. (5 How.) 441, 458 (1847 Term) (citing La Vengeance and other cases for the constitutional proposition that “the admiralty jurisdiction . . . is not confined to the cases of admiralty jurisdiction in England when the constitution was adopted”).
177 3 U.S. (3 Dall.) 321, 322 (1796).
178 Ellsworth said the question had “been already argued in another cause.” Dallas “believe[d] the chief justice referred to the case of Pintado v. Bernard, an admiralty case, which was argued a few days before, during my absence from the court.” Id. at 324 & n.(a).
appeal and a writ of error, for as Ellsworth argued, facts could be reviewed only on appeal.\textsuperscript{179}

The statutory provisions were confusing. Section 21 of the Judiciary Act authorized the circuit courts to review district court decisions in "admiralty and maritime" cases by "appeal,"\textsuperscript{180} and section 22 authorized them to review "civil actions" by "writ of error."\textsuperscript{181} Section 22 further provided that circuit court decisions "in civil actions, and suits in equity," whether brought there originally or "by appeal," were reviewable in the Supreme Court "upon a like process."\textsuperscript{182}

Ellsworth said the statutory reference to civil and equity cases meant that all noncriminal judgments were to be reviewed in the Supreme Court by writ of error.\textsuperscript{183} Wilson thought otherwise. To him, the distinction between admiralty and civil cases for purposes of circuit court review demonstrated that admiralty cases were not civil within the provision for Supreme Court review.\textsuperscript{184} Thus Ellsworth concluded that Congress had forbidden the Supreme Court to review the facts in equity or maritime cases, and Wilson, that Congress had made no provision for Supreme Court review of maritime cases at all.

Both conclusions raise interesting constitutional questions. Article III extends the judicial power to cases like those considered in  \textit{Wiscart}. It places certain other cases within the Supreme Court's original jurisdiction. It also provides that "[i]n all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."\textsuperscript{185}

Wilson's thesis that Congress had made no provision for Supreme Court review raised the question whether the appellate jurisdiction was self-executing. Wilson thought it was: "an appeal is expressly sanctioned by the constitution; . . . and as there are not any words in the judicial act, restricting the power of proceeding

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\begin{itemize}
\item \textsuperscript{179} Id. at 327.
\item \textsuperscript{180} Judiciary Act of 1789, ch. 20, § 21, 1 Stat. 73, 83 (repealed by Circuit Courts of Appeals Act, ch. 517, § 4, 26 Stat. 826, 827 (1891)).
\item \textsuperscript{181} Id. § 22, 1 Stat. at 84 (repealed in relevant part by Circuit Courts of Appeals Act, ch. 517, § 4, 26 Stat. 826, 827 (1891)).
\item \textsuperscript{182} Id. (repealed in relevant part by Circuit Courts of Appeals Act, ch. 517, § 14, 26 Stat. 826, 829-30 (1891)).
\item \textsuperscript{183} 3 U.S. (3 Dall.) at 328.
\item \textsuperscript{184} Id. at 325-26.
\item \textsuperscript{185} U.S. Const. art. III, § 2, para. 2.
\end{itemize}
}
by appeal, it must be regarded as still permitted and approved." Ellsworth had no need to reach this question, for he found Congress had restricted the jurisdiction. Yet he disagreed with Wilson in dictum: "If congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction . . . ." Iredell had made the same argument as to the original jurisdiction in *Chisholm*.

The language of the Constitution is, as usual, ambiguous on this issue. If one focuses on the power to make "Exceptions," Wilson seems to have the better of the argument: the Court may review both fact and law until Congress otherwise provides. The "Regulations" clause, however, seems to support Ellsworth: the Court is authorized to exercise jurisdiction only under congressional regulations. Yet the latter is not the only possible reading; arguably, by analogy to the "Exceptions" provision, the clause means only that if there are "Regulations" the Court must obey them.

The Marshall Court would announce that the appellate jurisdiction was, as Wilson argued, self-executing: if Congress had established the Court without defining its jurisdiction, "in omitting to exercise the right of excepting from its constitutional powers, [Congress] would have necessarily left those powers undiminished." But Wilson's belated victory was Pyrrhic, for in the same opinion Marshall would declare that by providing for jurisdiction in some cases, Congress implicitly had forbidden review of all others. Thus, by a persuasive exercise in statutory construction, Marshall made it irrelevant that the appellate jurisdiction would have been self-executing in the face of congressional silence.

Ellsworth's conclusion that Congress had forbidden review of the facts, on the other hand, raised the question whether Congress had power thus to limit the Court's appellate jurisdiction. Article III seems to say it had: the Court has appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make." Ellsworth saw no difficulty: "if the rule [regarding jurisdiction] is provided, we cannot depart from it." Wilson appeared at

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186 3 U.S. (3 Dall.) at 325.
187 Id. at 327.
188 See text and note at note 105 supra.
190 Id. at 314. Not all this reasoning was necessary to the result, because the Court found Congress implicitly had contemplated Supreme Court review of the case before it.
191 3 U.S. (3 Dall.) at 327.
one point in his opinion to concede that this was true,192 but elsewhere he denied it: "Even, indeed, if a positive restriction existed by law, it would, in my judgment, be superseded by the superior authority of the constitutional provision."193

One might be tempted to dismiss Wilson's dictum as absurd on its face were it not that a host of later thinkers has agreed that the power to make exceptions to the Court's appellate jurisdiction is not so absolute as it appears. It has been argued that "Exceptions" may be made only as to issues of fact,194 may not contradict the apparent command of article III that all cases there listed be cognizable by some federal court,195 may not be used to deprive a litigant of a constitutional right,196 and may not "destroy the essential role of the Supreme Court in the constitutional plan."197

Some of these arguments may reflect wishful thinking, and probably none would have supported Wilson's unexplained conclusion in Wiscart. Yet contemplating later efforts in Congress to deprive the Supreme Court of jurisdiction to determine the constitutionality of important statutes,198 one may conclude there is more to the question than the plain words of the exceptions provision. If Marbury was right that the Framers provided for judicial review to keep legislatures within constitutional bounds,199 one reasonably may doubt that they meant to allow Congress to destroy that im-

192 "The legislature might, indeed, have made exceptions, and introduced regulations upon the subject . . . ." Id. at 326.
193 Id. at 325. Thus yet another Justice declared his readiness to ignore an act of Congress he deemed unconstitutional.
194 Merry, Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis, 47 MINN. L. REV. 53, 57-68 (1962).
198 E.g., H.R. 11926, 88th Cong., 2d Sess. (1964) (bill to deprive the Supreme Court of jurisdiction to determine the constitutionality of reapportionment of state legislatures). See also Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869) (statute depriving the Supreme Court of jurisdiction over certain habeas corpus appeals).
199 5 U.S. (1 Cranch) 137, 178 (1803).
important check by the simple expedient of removing jurisdiction.\textsuperscript{200}

The Court agreed with Ellsworth's conclusion that the facts could not be reviewed,\textsuperscript{201} and the case remains as authority for the power of Congress to eliminate review of facts in ordinary equity or admiralty cases in the Supreme Court. No doubt it would be asking too much to expect the Court to have anticipated that more drastic limitations on jurisdiction could raise more serious questions, and it was proper for the Court not to comment on future cases. By purporting to perceive no difficulty at all, however, the Court made it easier to cite \textit{Wiscart} as establishing that the power to make exceptions meant exactly what it said. In any case, the treatment of both constitutional issues in \textit{Wiscart} was cavalier in the extreme. Neither Ellsworth nor Wilson bothered to state his reasons, and their contrary conclusions crossed unacknowledged like ships passing in the night.

H. \textit{Turner v. Bank of North America}

Officers of the bank, Pennsylvanians, sued a North Carolina citizen on a promissory note that Biddle and Company had assigned to the bank. As to Biddle and Company, the record showed only "'that they used trade and merchandise in partnership together, at Philadelphia, or North Carolina.' "\textsuperscript{202} Section 11 of the Judiciary Act deprived the circuit courts of diversity jurisdiction over suits brought by the assignee of any chose in action "unless a suit might have been prosecuted in such court . . . if no assignment had been made,"\textsuperscript{203} because the citizenship of the assignor had not been established, the Court ordered the action dismissed.\textsuperscript{204}

Counsel for the bank argued that the assignee clause was unconstitutional: the controversy before the Court was between "citizens of different States" and thus within the article III "judicial

\textsuperscript{200} Indeed, one statute limiting the Supreme Court's appellate jurisdiction has been struck down as an attempt to defeat substantive rights. United States v. Klein, 80 U.S. (13 Wall.) 128, 144-48 (1872) (congressional attempt to deprive Southern claimants in the Court of Claims of rights restored by presidential pardon).

\textsuperscript{201} Paterson later revealed that he had agreed with Wilson; the vote was thus 4-2. \textit{See The Perseverance}, 3 U.S. (3 Dall.) 336, 337 (1797).

\textsuperscript{202} 4 U.S. (4 Dall.) 8, 8 (1799).


\textsuperscript{204} 4 U.S. (4 Dall.) at 10-11.
Power,"'205 and "congress can no more limit, than enlarge, the constitutional grant."'206 Ellsworth's one-page opinion for the Court, as reported, ignored the constitutional question. From the bench during argument, however, Ellsworth was incredulous: did counsel mean the courts could act without legislative sanction "in every case, to which the judicial power of the United States extends"?'207 Chase was more emphatic. First, he asserted, "the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to congress." Moreover, "congress is not bound . . . to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the constitution might warrant."'208 Thus it hardly can be contended that the Court was unaware of the argument that the assignee clause was unconstitutional. Rather, if the report is complete, the Court seems to have rejected the constitutional challenge as unworthy even of reply.

The question was important, however, and by no means free from doubt. Article III declares that the judicial power "shall be vested"'209 in the courts and "shall extend to" controversies "between citizens of different States,"'210 of which _Turner_ was one. This language looks mandatory. On the other hand, Congress is given power to make "Exceptions" to the Court's appellate jurisdiction,'211 and the convention records show that the constitutional reference to "such inferior Courts as the Congress may from time to time ordain and establish"'212 was meant to free Congress from the obligation to create any lower federal courts at all.'213 In addition, it would be unfortunate if Congress lacked authority to make such minor jurisdictional adjustments as the assignee clause and the jurisdictional amount to prevent imposition or overburden. None of this, however, conclusively refutes Justice Joseph Story's later position that the entire judicial power must be vested somewhere,'214 it establishes only that Congress has considerable leeway in determining where it shall be vested. Something might have

205 U.S. Const. art. III, § 2, para. 2.
206 4 U.S. (4 Dall.) at 9.
207 Id. at 10 n.1 (emphasis in original).
208 Id.
209 U.S. Const. art. III, § 1.
210 Id. § 2, para. 1.
211 Id. § 2, para. 2.
212 Id. § 1.
213 See _Hart & Wechsler, supra_ note 18, at 11-12.
been made of the fact that article III speaks of "all Cases" arising under federal law but only of "Controversies" between citizens of different states, and much might have been said of deference to the interpretation of the First Congress. What is significant is that the Court settled this important and difficult issue without preserving the least hint of its reasoning.

I. Mossman v. Higginson

Higginson was a British subject suing to foreclose a mortgage on property in Georgia. The citizenship of the defendants was not stated, and once more the Court ordered the suit dismissed: although section 11 of the Judiciary Act gave the circuit court jurisdiction "where . . . an alien is a party," the statute "must receive a construction, consistent with the constitution," and "the legislative power of conferring jurisdiction on the federal courts, is in this respect, confined to suits between citizens and foreigners."

Here the Court, in a one-paragraph unsigned opinion, for the first time expressly took liberties with a statute to avoid holding it unconstitutional. This has become familiar practice, praised by Professor Alexander Bickel as one of the "passive virtues" whereby the Court avoids ultimate confrontations with other branches. The theoretical excuse for its use seems to be a presumption that Congress does not mean to exceed its powers, but in fact Congress may view its authority more generously than the Court does. In Mossman one wonders whether the Court really thought the statute was meant to apply only if the other party was a state citizen; a holding of unconstitutionality might have been more candid. At the very least, the practice of construing statutes down to constitutional size called for explanation, especially because it approached in practical effect the not-yet-established power of judicial review.

That the case was not shown to be within article III is obvious: alienage is a basis for exercise of article III judicial power only if the controversy is "between a State, or the Citizens thereof, and

215 U.S. Const. art. III, § 2, para. 1 (emphasis added).
216 4 U.S. (4 Dall.) 12, 14 (1800).
218 4 U.S. (4 Dall.) at 14.
foreign States, Citizens or Subjects. The interesting problem, here resolved for the first time by the Supreme Court, was whether article III was the outer limit of federal judicial power. That it was had been assumed by counsel in Turner and by all the Justices in Chisholm, who seemed to think it necessary to demonstrate that the case before them came within article III. Several Justices on circuit in Hayburn had held that article III was the limit when they concluded that the courts could be given nothing but "judicial" power. Later cases would confirm that article III was the sole source of judicial power, and the point may seem obvious: Marshall soon would remind us that the federal government was one of enumerated powers, and the tenth amendment drives the point home by reserving to the states or to the people "[t]he powers not delegated to the United States by the Constitution."

But the tenth amendment alone does not establish that Congress lacks power to give the courts jurisdiction over suits between two aliens. Such a statute arguably is "necessary and proper" to Congress’s power to regulate foreign commerce, to the President’s authority to recognize foreign governments, or to some other federal foreign affairs function. The question that must be decided is whether article III’s enumeration implicitly limits Congress’s powers under the legislative grants of the Constitution. The inference that Congress’s powers are so limited is plausible, but it has not gone unquestioned; as recently as 1949, three Justices asserted that Congress could give article III courts jurisdiction over lawsuits involving District of Columbia citizens by virtue of its power "[t]o exercise exclusive Legislation" over the District. Thus, in Mossman, the Court resolved two debatable issues fundamental to constitutional litigation, apparently without giving any

220 U.S. Const. art. III, § 2, para. 1.
222 See text and notes at notes 77-134 supra.
223 See Hayburn's Case, 2 U.S. (2 Dall.) 409, 410-13 n.(a) (1792).
226 U.S. CONST. art. I, § 8, para. 18.
227 Id. art. I, § 8, para. 3.
reasons.

II. LIMITATIONS ON CONGRESSIONAL AND STATE POWER

A. Hylton v. United States

Congress in 1794 laid a geographically uniform tax on carriages ranging from $1 to $10 according to the type of vehicle.\textsuperscript{230} The United States sued Hylton, as the owner of "one hundred and twenty-five chariots . . . for the defendant's own private use,"\textsuperscript{231} to collect the tax due. Hylton argued the tax was unconstitutional under article I, which provides that "direct Taxes shall be apportioned among the several States . . . according to their respective Numbers" and that "no Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."\textsuperscript{232} The Supreme Court in seriatim opinions unanimously upheld the tax, concluding that it was not "direct" and thus did not need to be apportioned.

That the Court was willing to decide this case was extraordinary, for the controversy bristled with procedural obstacles. The incredible stipulation that the plaintiff owned 125 private chariots was a transparent but clumsy effort to circumvent jurisdictional amount requirements: \textsuperscript{233} the parties had agreed that a judgment for the Government could be discharged by paying $16, the tax and penalty on a single chariot;\textsuperscript{234} and in any event, the statute respecting Supreme Court review required, if applicable, that the amount not equal but exceed $2000.\textsuperscript{235} Moreover, the court below,

\begin{itemize}
  \item \textsuperscript{230} Act of June 5, 1794, ch. 45, § 1, 1 Stat. 373, 373-74 (repealed by Act of May 28, 1796, ch. 37, § 1, 1 Stat. 478, 478).
  \item \textsuperscript{231} 3 U.S. (3 Dall.) 171, 171 (1796).
  \item \textsuperscript{232} U.S. Const. art. I, § 2, para 3; id. § 9, para. 4.
  \item \textsuperscript{233} Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84 (Supreme Court review of "final judgments and decrees in civil actions, and suits in equity in a circuit court, brought there by original process, or removed there from courts of the several States, or removed there by appeal from a district court where the matter in dispute exceeds the sum or value of two thousand dollars") (repealed in relevant part by the Circuit Courts of Appeals Act, ch. 517, § 14, 26 Stat. 826, 829-30 (1891)); id. § 11, 1 Stat. at 78 (circuit court jurisdiction over suits "where the matter in dispute exceeds . . . the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners") (repealed in the abolition of the circuit courts by the Judicial Code of 1911, ch. 231, § 289, 36 Stat. 1087, 1167). For the current version of the district courts' jurisdiction where the United States is plaintiff, see 28 U.S.C. § 1345 (1976).
  \item \textsuperscript{234} 3 U.S. (3 Dall.) at 172. See Act of June 5, 1794, ch. 45, §§ 1, 3, 1 Stat. 373, 373, 374 (repealed by Act of May 28, 1796, ch. 37, § 1, 1 Stat. 478, 478).
  \item \textsuperscript{235} See note 233 supra. Although the absence of a comma following the term "district court" suggests according to modern usage that the amount requirement may have applied
equally divided, had not decided the case. Ignoring the statutory procedure for a tie-breaking rehearing, the defendant had "confessed judgment" in an effort to reach the Supreme Court. Thus there was arguably no "final judgment[ ]," as the statute required for Supreme Court review. Indeed, because there was no lower court decision to review, it hardly could be said that the Court was exercising "appellate" jurisdiction at all, as article III soon was held to require in such cases. One also would expect a party to be precluded from appealing a judgment to which he had consented. Further, although the Court may not have known this, the Government paid the other side’s attorneys, destroying the adversary relationship the Court since has found necessary (and may have found necessary in Hayburn for a case or controversy under article III. Finally, only three Justices participated in the decision, and the statutory quorum was four. The Court apparently did not bat an eye; so far as the report reveals, each Justice went directly to the merits without mentioning any of the procedural problems apparent from the reporter’s summary. The contrast with Hayburn and the Correspondence, in which the Court went out of its way to avoid reaching difficult substantive questions, is striking.

Chase, Paterson, and Iredell wrote full opinions in Hylton. Wilson noted that he was not voting because he had sat below, but added that he remained of the unexplained opinion that the tax was valid. None of the Justices bothered to resolve what we would view as the threshold question whether the Court had power to declare an act of Congress unconstitutional. Chase adverted to the question, saying he did not need to reach it because he found

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237 3 U.S. (3 Dall.) at 172.
238 See note 233 supra.
239 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175 (1803).
240 Cf. Donovan v. Penn Shipping Co., 429 U.S. 648, 649-50 (1977) (no appeal from remittitur by party who had accepted it "under protest").
241 See 1 C. Warren, supra note 2, at 147; J. Goebel, supra note 40, at 779 & n.64.
242 See, e.g., Lord v. Veazie, 49 U.S. (6 How.) 251, 255 (1850 Term) (case must present "an actual controversy, and adverse interests," otherwise judgment is a "nullity").
243 See text and notes at notes 36-39 supra.
244 Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73 (current version in relevant part at 28 U.S.C. § 1 (1976)).
245 3 U.S. (3 Dall.) at 183-84.
the statute constitutional; the others said nothing about it at all. Thus the Court began to accustom the country to the fact of judicial review without proclaiming its power to exercise it. By the time Marbury claimed the power, its exercise was nothing new. Chase added, for the first time and without explanation, the important and now familiar reservation that if such power existed, he would "never exercise it, but in a very clear case." How seriously the Court takes this soothing message is unclear. Equally uncertain is its consistency with Marbury's conclusion that the judges are oath-bound to disregard a law that offends the Constitution. But ever since Chase's unelaborated dictum, it has been an accepted part of our tradition of constitutional adjudication. Thus, in these early days, were many important principles forever settled.

On the merits, the Justices' methods of interpretation in Hylton contrast sharply with those in Chisholm. In Chisholm, the Justices focused largely on the words of the Constitution, essentially ignoring a troublesome contrary tradition. In Hylton, the Justices relied mostly on unverified tradition and their own conception of sound policy, paying little heed to the Constitution's words.

All three opinions in Hylton hazarded the suggestion that only capitation and land taxes were direct, and for this unnecessarily broad conclusion (qualified in Paterson's opinion by additional possibilities) the decision was cited carelessly until 1895. The basis for this conclusion is elusive. Chase stated it without reasons, following and perhaps resulting from his discussion of policy. Iredell suggested that land taxes were direct because they could be apportioned fairly. Paterson referred to "theory and practice" without expounding the one or illustrating the other, and he added without citation that the provision had been inserted during the convention to allay Southern fears regarding taxes on land and

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246 Id. at 175.
247 Id.
248 5 U.S. (1 Cram) 137, 177-80 (1803). On this question see generally J. Thayer, supra note 72, at 16-33, applauding the doctrine of deference enunciated by Chase in Hylton and reporting earlier statements by others outside the Supreme Court to the same effect.
249 3 U.S. (3 Dall.) at 175 (Chase, J.), 177 (Paterson, J.), 183 (Iredell, J).
251 3 U.S. (3 Dall.) at 175.
252 Id. at 183.
slaves. But the opinions fall short of convincing the modern reader that contemporary understanding limited the term to land and poll taxes. That the Framers may have had land and poll taxes in mind does not prove that no others fall within the general term “direct”; even the Slaughter-House Cases conceded that the thirteenth amendment outlawed the enslavement of persons who were not black, despite its origin as a response to the enslavement of blacks.

Policy considerations dominated all three opinions. Apportioning a carriage tax according to population would be unfair, the Justices argued, for if carriages were distributed unevenly, an owner in a state with few carriages would bear a heavier burden. Paterson made no effort to relate this policy preference to the Constitution. On the contrary, he argued that the constitutional rule of apportionment was “radically wrong” and “ought not to be extended by construction”—hardly the statement of a judge who views his task as implementing the commands of the people.

Chase and Iredell were nominally more deferential, reasoning that by direct taxes the Framers must have meant those that could be apportioned to the census fairly. This is a prevalent approach to the construction of documents, and it is not without appeal: surely the Framers were reasonable people, and it should not be concluded lightly that they meant to do something foolish. This may be only a less candid way of saying that the judge’s preferences govern when the drafters’ intentions are undiscoverable.

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283 3 U.S. (3 Dall.) at 176-77.
284 83 U.S. (16 Wall.) 36, 72 (1873).
285 See 3 U.S. (3 Dall.) at 174 (Chase, J):
   For example: suppose, two states, equal in census, to pay $80,000 each, by a tax on carriages, of eight dollars on every carriage; and in one state, there are 100 carriages, and in the other 1000. The owners of carriages in one state, would pay ten times the tax of owners in the other.
See also id. at 179-80 (Paterson, J.), 181-83 (Iredell, J.).
286 Id. at 178.
   [W]here great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain . . . .
   . . . Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects.
Marshall added, however, that this was “a principle which must be applied with caution.” Id. at 390.
This result may be unavoidable, but it should not be a substitute, as it seems to have been in *Hylton*, for an honest attempt to give content to the constitutional text. The opinions should have begun by investigating what the word "direct" meant; on its face it does not begin to suggest taxes that may be apportioned fairly. Moreover, the Justices made no effort to show that carriages in fact were distributed unevenly per capita among the states, which was the crucial question under the test they adopted. Unlike fur coats and cotton fields, carriages do not seem prima facie to be a regional commodity. Nor did the Justices stop to consider, beyond Iredell's bare conclusion, whether the test of unequal distribution was consistent with their own admission that a land tax was direct, though a landowner in a state with few acres would bear an unequal burden. Furthermore, Paterson's history casts considerable doubt on the Justices' conclusion that a direct tax was one on a subject that was distributed uniformly. He asserted that the reason the South insisted on apportionment was that, having more than its share of land and slaves, it feared that a *uniform* levy per acre or per head would burden it unfairly. The inference to be drawn from this—that a direct tax is one on a subject that is *not* uniformly distributed—is the opposite of that drawn by the Justices.

Chase also argued that the carriage tax was not direct because it was a duty and thus subject to the distinct constitutional requirement of uniformity. This was a promising approach, for the constitutional categories seem mutually exclusive. But Chase dropped the ball. To justify his conclusion that the carriage tax was a duty, he told us only that the term in English usage included stamp taxes and tolls; he neglected to say why the carriage tax was more like these duties than it was like a land tax, which he conceded was direct. Indeed, one easily might draw the opposite conclusion: unlike his English examples, carriage and land taxes are both laid upon property.

Finally, Chase declared that the carriage tax was a tax on expenditure and thus was indirect. He did not add, as he should

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258 Paterson stated as a bare conclusion that "[i]n some states, there are many carriages, and in others, but few." 3 U.S. (3 Dall.) at 179.
259 Id. at 183.
260 Id. at 177.
261 Id. at 175.
262 U.S. CONST. art. I, § 8, para. 1 (providing that "all Duties, Imposts and Excises shall be uniform throughout the United States").
263 3 U.S. (3 Dall.) at 175.
have, that this was what the carriage tax had in common with tolls and stamp taxes, bringing it within the principle underlying the English term "duty." He did not explain, as he should have, that a land tax was distinguishable because it was laid not upon a consumptive expense but upon productive capital, and he did not rely upon the carefully contrived stipulation, anticipating this distinction, that Hylton's carriages were held "for the defendant's own private use, and not . . . to hire."\textsuperscript{284} He did not say, as he should have, in what sense a tax on expenditures was "indirect"; that is, he made no attempt to relate his test to the constitutional language.

It was Paterson who advanced the most persuasive argument. He, too, concluded that "[a]ll taxes on expenses or consumption are indirect taxes," but he explained why: "Indirect taxes are circuitous modes of reaching the revenue of individuals, who generally live according to their income."\textsuperscript{285} For this interpretation he quoted Adam Smith:

\begin{quote}
"[T]he state, not knowing how to tax directly and proportionably the revenue of its subjects, endeavors to tax it indirectly, by taxing their expense, which it is supposed, in most cases, will be nearly in proportion to their revenue. . . .

"Consumable commodities . . . may be taxed in two different ways; the consumer may either pay an annual sum, on account of his using or consuming goods of a certain kind, or the goods may be taxed, while they remain in the hands of the dealer . . . . [T]he coach-tax and plate-tax are examples of the former method of imposing; the greater part of the other duties of excise and customs of the latter."\textsuperscript{286}
\end{quote}

This at last is convincing. The Smith quotation at the same time gives an intelligible meaning to the term "direct," tells us specifically that a coach tax is not direct, and places the coach tax in the distinct category of "duties of excise," for which the Constitution prescribes not apportionment but uniformity.

What is left unclear is whether the Framers had Smith's definition in mind. The convention debates, which as noted were still unavailable, would have suggested that the Framers had no clear

\textsuperscript{284} Id. at 171.

\textsuperscript{285} Id. at 180.

\textsuperscript{286} Id. at 180-81 (quoting A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS bk. V, ch. II, pt. II, art. 4, at 482-83, 490-91 (London 1776)).
idea of what they meant by direct taxes. In addition, John Stuart Mill's later definition, as linguistically plausible as Smith's, would have cut the other way in *Hylton*. To Mill, an indirect tax was one whose ultimate burden was not borne by the person who initially paid it, and only a tax on carriages for hire can be passed on to the passengers. Today we would expect more exhaustive research, but Paterson stood alone in addressing the right question.

In sum, the Chase and Iredell opinions demonstrate a total unconcern for making sense of the constitutional text, a tendency to equate what is law with their own policy preferences, and an inclination to lay down flat rules that went beyond what was necessary to the decision. Paterson was even more blatant in following his own preference, but in other respects his opinion is markedly

\[\text{267 See text and note at note 75 supra. What little the debates reveal about direct taxes tends to support the *Hylton* decision. An initial proposal to apportion all taxes by the census was objected to on the ground that it might cause "embarrassments" and was restricted to "direct" taxes, 1 CONVENTION RECORDS, supra note 73, at 592, lending support to the Chase-Iredell position that the Framers thought of direct taxes as those susceptible of fair apportionment. Gouverneur Morris and Madison—despite the latter's argument in Congress that the carriage tax was direct, 4 ANNALS OF CONG. 730 (1794)—spoke of taxes on consumption as indirect, 1 CONVENTION RECORDS, supra note 73, at 592 (Morris); 2 id. at 277 (Madison), thus supporting the Chase-Paterson conclusion as to taxes on expenditures. When "Mr. [Rufus] King asked what was the precise meaning of direct taxation?", however, "No one answd [sic]." 2 id. at 350 (emphasis in original). Fisher Ames would admit in the House debate over the carriage tax that it was not easy to define direct taxes; he thought this tax permissible for the cryptic reason that it "falls not on the possession, but the use." 4 ANNALS OF CONG. 730 (1794).

We fairly may conclude that the Framers could have been more informative in their terminology; their inattention to detail seems explicable, however, on the ground that the apportionment scheme was in large part a method of bringing the North and South closer together on the question whether slaves should be included in the basis of representation. For the South would be less insistent on including the slaves, and the North less insistent on excluding them, if their inclusion would cause the South to bear a heavier share of federal taxes. See 2 CONVENTION RECORDS, supra note 73, at 106. It is not clear that anyone at the Convention thought apportionment of any kind of taxes was desirable for its own sake.

\[\text{268 J.S. MILL, PRINCIPLES OF POLITICAL ECONOMY bk. V, ch. III, § 1, at 367 (London 1848) ("Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another . . . .")}.

\[\text{269 In Canada, the British North America Act permits the provinces to impose only "direct" taxes, 30 & 31 Vict., c. 3, § 92(2) (1867) (reprinted at CAN. REV. STAT. app. II, No. 5, § 92(2) (1970)), and Canadian courts have adopted Mill's definition. See P. Hogg, CONSTITUTIONAL LAW OF CANADA 402 (1977) (citing Bank of Toronto v. Lambe, 12 App. Cas. 575 (1887), and quoting Mill's definition, supra note 268). See also Whitney, The Income Tax and the Constitution, 20 HARv. L. REV. 280, 282-83 (1907). Cf. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 306 (Oxford 1765-69) (describing customs duties without using the term "direct" as "a tax immediately paid by the merchant, although ultimately by the consumer").}
superior. He was the most reluctant to jump to the unnecessary conclusion that only land or capitation taxes might be direct. He alone attempted to relate convention history to show what direct taxes the Framers had in mind and what purpose they had in requiring apportionment. Most importantly, he alone gave us in the Smith quotation both evidence of contemporary usage and an intelligible interpretation of the constitutional language. Yet although the various strands of Paterson's opinion—policy, history, and Smith's terminology—converge to support the constitutionality of the carriage tax, his position is internally contradictory in theory, and the contradiction would haunt the Court in the most important modern controversy surrounding the apportionment clauses.\(^{270}\) In the first place, Paterson failed to recognize that his view of history contradicted his policy that only taxes on evenly distributed subjects should be apportioned. More importantly, both his history and the intimations that only land and poll taxes were direct suggested that income taxes need not be apportioned. Under Smith's definition, however, a tax on income is precisely what is meant by a direct tax.

B. \textit{Ware v. Hylton}

The administrator of a British subject sued in federal court to recover on a bond. The debtor had paid the money to the Commonwealth of Virginia in 1780 under a statute making such payment a defense to a claim by an alien enemy. The 1783 Treaty of Peace, however, provided that “creditors . . . shall meet with no lawful impediment to the recovery . . . of all bona fide debts heretofore contracted.”\(^{271}\) The circuit court held the treaty did not resuscitate debts that previously had been discharged; the Supreme Court reversed.\(^{272}\)

Chase, Paterson, Wilson, and Cushing wrote opinions. Iredell, who did not vote, published the contrary opinion he had delivered in the trial court. Paterson, Wilson, and Cushing issued forgettable opinions confined almost entirely to the interpretation of the treaty. Chase and Iredell, whose discussions of Virginia's initial power of confiscation sparkled with learned references to such au-

\(^{270}\) See \textit{Pollock v. Farmers' Loan \\& Trust Co.}, 157 U.S. 429 (1895) (income tax).

\(^{271}\) Treaty of Peace, Sept. 3, 1783, United States-Great Britain, art. IV, 8 Stat. 80, 82, T. S. No. 104.

\(^{272}\) 3 U.S. (3 Dall.) 199 (1796).
authorities as Vattel and Bynkershoek,273 addressed several interesting constitutional questions as well.

First, both Chase and Iredell agreed that it was immaterial whether Virginia's confiscation offended the law of nations: if it did, that was a matter for international sanctions, but the courts were bound by Virginia law.274 Second, Chase rejected the argument that the exclusive war power was in Congress as early as 1777 and that Virginia therefore had lacked power to confiscate debts.275 Wilson's cursory opinion seems to have adopted this argument.276 But to Chase the powers of Congress vis-à-vis the states before the Articles of Confederation were based more on custom than on ascertainable grants. He concluded that the only "safe rule" was that all the powers actually exercised by congress, before that period, were rightfully exercised, on the presumption not to be controverted, that they were so authorized by the people they represented, by an express or implied grant; and that all the powers exercised by the state conventions or state legislatures were also rightfully exercised, on the same presumption of authority from the people.277

Because Congress never had tried to confiscate British debts but states had, Chase found Virginia had acted within its power.278 Wilson protested that this meant Virginia "must be equally empowered to pass a similar law, in any future war,"279 but in fact,

273 Id. at 225-27, 230 (Chase, J.), 263 (Iredell, J.).
274 Id. at 229 (Chase, J.), 265-66 (Iredell, J.). Iredell anticipated here the arguments he soon would turn against Chase in Calder v. Bull, 3 U.S. (3 Dall.) 386, 398-99 (1798); see text and notes at notes 343-344 infra, and he took the occasion to show that he embraced judicial review of both federal and state statutes:

The power of the legislatures is limited; of the state legislatures, by their own state constitutions and that of the United States; of the legislature of the Union, by the constitution of the Union. Beyond these limitations, I have no doubt, their acts are void, because they are not warranted by the authority given. But within them, I think they are in all cases obligatory in the country subject to their own immediate jurisdiction, because, in such cases, the legislatures only exercise a discretion expressly confided to them by the constitution of their country. . . .
3 U.S. (3 Dall.) at 286. In all of this Iredell spoke for himself alone, while Chase's observations about the law of nations were unnecessary in light of his conclusion that the treaty overrode state law.
276 3 U.S. (3 Dall.) at 231-33. This, too, was unnecessary in light of Chase's conclusion that the treaty overrode state law. See also id. at 219-20 (argument of counsel for Ware).
277 Id. at 281.
278 Id. at 232.
279 Id. at 233.
270 Id. at 281.
that question would depend, as Ware did not, on the interpretation of the war provisions of the Constitution of 1789. Moreover, Chase’s abnegation of the power to review pre-Articles of Confederation statutes ostensibly was attributable to the lack of any firm basis for determining what the authority of Congress then had been; he had not been so deferential to the fact of congressional action in the carriage tax case. In any event, the war powers argument in Ware was a harbinger of many future arguments, some to be successful, that a grant of power to the federal government implicitly excluded concurrent state action.

More important for the future was the Court’s conclusion that Congress had authority in 1783 to rescind by treaty the state confiscation. Cushing and Paterson merely stated this conclusion, and Wilson and Iredell apparently assumed it. Chase gave reasons. The 1778 Articles of Confederation, he said, gave Congress “the sole and exclusive right and power of determining on peace or war, . . . and of entering into treaties and alliances”.

This grant has no restriction, nor is there any limitation on the power in any part of the confederation. A right to make peace, necessarily includes the power of determining on what terms peace shall be made. A power to make treaties must, of necessity, imply a power to decide the terms on which they shall be made . . . .

Considering the narrow legislative powers granted to Congress by the Articles, this sweeping statement is remarkable. Counsel in discussing “the power of the commissioners” who negotiated the treaty had argued that “congress never was considered as a legislative body, except in relation to those subjects expressly assigned to the federal jurisdiction; and could, at no time, nor in any manner, repeal the laws of the several states, or sacrifice the rights of individuals.” Chase’s sweeping statement rejected both contentions, and in so doing established that Congress could do by treaty what it might lack power to do by legislation and that it could disturb

280 See text and notes at notes 249-263 supra.
281 See, e.g., Chirac v. Chirac, 15 U.S. (2 Wheat.) 259, 269 (1817) (“That the power of naturalization is exclusively in Congress does not seem to be, and certainly ought not to be, controverted . . . .”).
282 3 U.S. (3 Dall.) at 282 (Cushing, J.), 249 (Paterson, J.).
283 ARTICLES OF CONFEDERATION art. 9, § 1.
284 3 U.S. (3 Dall.) at 236.
285 Id. at 216 (argument of counsel for Hylton).
vested rights retroactively. The latter conclusion may be qualified under the 1789 Constitution by the taking clause of the fifth amendment, but the former was as applicable to the new Constitution as to the old. As in Hylton v. United States, however, Chase went out of his way to say that because he found the treaty valid, he did not have to decide whether he had the power to hold treaties void; in any event, he said he would "never exercise it, but in a very clear case indeed." The most important constitutional holding of Ware v. Hylton was that the federal courts had the power to determine the constitutionality of state laws. This crucial point, so painstakingly established with respect to federal laws a few years later in Marbury v. Madison, passed almost unnoticed. Cushing, Wilson, and Paterson voted to strike down the state law without adverting to the question, and the report does not reveal that it was the subject of argument. Iredell, who thought the treaty initially only an unenforceable promise that the states would repeal inconsistent laws, agreed that in 1789 it became under article VI the supreme law of the land, putting the case "upon the same footing, as if every act constituting an impediment to a creditor's recovery had been expressly repealed." Chase also relied on the supremacy clause:

A treaty cannot be the supreme law of the land . . . if any act of a state legislature can stand in its way . . . . Laws of any of the states, contrary to a treaty, shall be disregarded . . . . It is the declared duty of the state judges to determine any constitution or laws of any state, contrary to that treaty . . . , null and void. National or federal judges are bound by duty and oath to the same conduct.

As the critics later were to complain of Marbury, the fact that the Constitution restricts legislative powers does not prove that the courts have authority to determine whether the limits have

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286 In his unconcern for federalism in the exercise of the treaty power, id. at 235-37, Chase anticipated Missouri v. Holland, 252 U.S. 416, 432-35 (1920), where the Court upheld a migratory bird treaty and implementing statute against a claim that both invaded powers reserved to the states under the tenth amendment. On vested rights, he said simply with a citation to Vattel that "the sacrificing [of] public or private property, to obtain peace, cannot be the cases in which a treaty would be void." 3 U.S. (3 Dall.) at 236.

287 3 U.S. (3 Dall.) at 237.

288 Id. at 272, 277.

289 Id. at 277. See U.S. Const. art. VI, para. 2.

290 3 U.S. (3 Dall.) at 236-37.
been exceeded.\textsuperscript{291} But in the case of state laws, article VI does just that. Not only is federal law (including the Constitution and treaties) declared to be supreme, suggesting it is to be applied by courts in preference to conflicting laws that are not supreme, but “the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”\textsuperscript{292} As Chase said, state court judges are expressly directed to review the consistency of state law with federal.\textsuperscript{293} Chase also seems correct that the reference to state judges was inserted not to distinguish them from, but to assimilate them to, federal judges: it would make no sense to require federal judges alone to enforce unconstitutional state laws, and the mere declaration of supremacy might not have sufficed to override the impression that a state court owed primary loyalty to its own sovereign.\textsuperscript{294}

Only Chase and Iredell made anything of the fact that the treaty in question had been concluded before the Constitution was adopted. The former said simply that the supremacy clause was “retrospective,”\textsuperscript{295} the latter, that it “extends to subsisting as well as to future treaties.”\textsuperscript{296} The constitutional language supports them, giving supremacy to “all Treaties made, or which shall be made, under the Authority of the United States.”\textsuperscript{297} This language looks both forward and backward, in contrast to the purely prospective language of the accompanying clause, “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof.”\textsuperscript{298} This contrast, and the nearly silent holding of the Court that pre-1789 treaties were supreme, are important considerations against the half-hearted argument for judicial review of congressional acts that Marshall later was to extract from the supremacy clause.\textsuperscript{299}

\textsuperscript{292} U.S. Const. art. VI, para. 2.
\textsuperscript{293} 3 U.S. (3 Dall.) at 237.
\textsuperscript{294} Accord, 2 W. Crosskey, supra note 195, at 988. It is even arguable that the reference to judges “in every State” (according to Crosskey, a prior draft had said “of the several States”) embraces federal judges; Crosskey thought the change was meant to include local as well as state judges. \textit{Id}.
\textsuperscript{295} 3 U.S. (3 Dall.) at 237.
\textsuperscript{296} \textit{Id.} at 277.
\textsuperscript{297} U.S. Const. art. VI, para. 2 (emphasis added).
\textsuperscript{298} \textit{Id.} (emphasis added).
\textsuperscript{299} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803). For criticism of Marshall’s argument, see 2 W. Crosskey, supra note 195, at 990-99.
Finally, it was argued in *Ware* that the treaty had been broken by England and was no longer in force.\textsuperscript{300} The argument was ignored by the Supreme Court but deserved a reply. Iredell had rejected it below on the ground that it was for Congress under the war powers, or the President and Senate under the treaty power, to determine whether to declare a treaty abrogated by breach, because under the law of nations, a broken treaty was not void but voidable.\textsuperscript{301} Perhaps this can be characterized as an interpretation of international law, of no moment to the student of the Constitution. But perhaps Iredell meant to resolve a question of the constitutional separation of powers, to say in modern terms that the questions of treaty breach and its consequences are committed to other branches of government and are not within the "judicial Power" of article III. In this light, Iredell's disposition, and to a lesser extent the Court's silence, may be seen as early forerunners of the political question doctrine.

In sum, although the *Ware* opinions are concerned largely with the transitory nonconstitutional issue of the meaning of a particular treaty, those of Chase and Iredell are also gold mines of interesting constitutional problems. Once more we find inadequate discussion of important issues: there was no opinion of the Court, Iredell wrote only for the circuit court, and most of the Justices had nothing meaningful to say. But in *Ware*, the Court for the first time struck down a state law under the supremacy clause, establishing for all time its power of judicial review of state laws. At the same time, it established that pre-1789 treaties came within the supremacy clause and that the courts would not inquire whether a treaty had been broken, and it rendered an extremely broad interpretation of the Confederation treaty power that seemed equally applicable to the Constitution. The opinions also contain insights, though not holdings, concerning the exclusivity of congressional powers and whether legislative power is limited by international law. Yet all of this ferment was byplay to the Court and thus was considered poorly, for the Justices evidently viewed the constitutional issues as too easy to merit serious discussion. Thus once more were important constitutional questions settled in a most off-hand manner.

\textsuperscript{300} 3 U.S. (3 Dall.) at 202 (defendant's plea in bar in the circuit court).

\textsuperscript{301} Id. at 258-61.
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C. Calder v. Bull

The Connecticut legislature ordered a new trial in a will contest, setting aside a judicial decree. Reviewing subsequent state court proceedings, the Supreme Court without dissent held that the legislature's action was not an "ex post facto Law" forbidden the states by article I, section 10.302

Again the Court exercised the power of judicial review, but only Iredell took the trouble to affirm the existence of that power. As in his opinion on circuit in Ware, he did so in words that drew no distinction between state and federal laws:

If any act of congress, or of the legislature of a state, violates those constitutional provisions, it is unquestionably void . . . . If they transgress the boundaries of [their constitutionally delegated] authority, . . . they violate a fundamental law, which must be our guide whenever we are called upon, as judges, to determine the validity of a legislative act.303

Thus Iredell disposed in the same breath of the question already settled on the basis of the supremacy clause in Ware v. Hylton and the much harder question still to be determined in Marbury. Once more the Justices managed without actually so holding to imbed deeper the idea that they could review acts of Congress. Chase stated for the third time his dogma that he would not exercise the power to strike down legislation "but in a very clear case,"304 and this time Iredell said it, too, giving as his reason only that the power "is of a delicate and awful nature."305

Chase refused, however, to decide whether the legislature's action was contrary to the constitution of Connecticut: "I am fully satisfied, that this court has no jurisdiction to determine that any law of any state legislature, contrary to the constitution of such state, is void."306 This statement was unexceptionable in the context of Calder itself, for the case was on writ of error from a state court; under section 25 of the Judiciary Act, the Supreme Court had jurisdiction to review state courts only if federal rights had been denied and then only to review matters that "immediately

302 U.S. CONST. art. I, § 10, para. 1; 3 U.S. (3 Dall.) 386, 392 (Chase, J.), 397 (Paterson, J.), 400 (Iredell & Cushing, JJ.) (1798).
303 3 U.S. (3 Dall.) at 399. Chase explicitly left open the issue of judicial review of acts of Congress. Id. at 392.
304 Id. at 395.
305 Id. at 399.
306 Id. at 392.
respect[ed]" the federal question.\footnote{307} Chase's statement might be thought to mean the Court never could decide state constitutional questions, but that would have been erroneous. There was no limitation to issues of federal law in the provisions authorizing the circuit courts to hear diversity cases or the Supreme Court to review them,\footnote{308} and section 34 expressly directed federal courts in common law circumstances to apply state law.\footnote{309} Indeed, in Ware \textit{v. Hylton}, a diversity case, Chase himself had passed upon the question whether the law of nations limited Virginia's power of confiscation,\footnote{310} and the Court soon would decide state constitutional questions in Cooper \textit{v. Telfair}.\footnote{311} Chase's remark therefore should be confined to cases coming from state courts.

On the merits of the ex post facto objection, opinions were written by Cushing, Iredell, Paterson and Chase. Chase, as junior Justice, delivered the first and most extensive opinion, as he had in the carriage tax and treaty cases. The words "ex post facto law," he said, were "technical, they had been in use long before the revolution, and had acquired an appropriate meaning, by legislators, lawyers and authors."\footnote{312} Looking to Blackstone, to state constitutions, and for what may have been the first time to "the author of the \textit{Federalist}," whom he praised for "his extensive and accurate knowledge of the true principles of government," Chase concluded that according to settled usage, ex post facto laws were those that retroactively "create or aggravate the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction."\footnote{313} He added that this narrow construction was confirmed by other clauses of the Constitution, for if the term "ex post facto" had included retroactive \textit{civil} laws, it would have been unnecessary to forbid the states to impair contracts or the United

\footnote{307} Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87 (current version at 28 U.S.C. § 1257 (1976)).

\footnote{308} Id. § 11, 1 Stat. at 78 (circuit court diversity jurisdiction) (repealed in the abolition of the circuit courts by the Judicial Code of 1911, ch. 231, § 289, 36 Stat. 1087, 1167); id. § 22, 1 Stat. at 84 (Supreme Court review) (repealed by the Circuit Courts of Appeals Act, ch. 517, § 14, 26 Stat. 826, 829-30 (1891)). For the current version of the district courts' diversity jurisdiction, see 28 U.S.C. § 1332 (1976); for the current version of the Supreme Court's power to review decisions by the courts of appeals, see 28 U.S.C. § 1254 (1976).

\footnote{309} Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (current version at 28 U.S.C. § 1652 (1976)).

\footnote{310} See text and note at note 274 supra.

\footnote{311} See text and notes at notes 376-396 infra.

\footnote{312} 3 U.S. (3 Dall.) at 391.

\footnote{313} Id. at 391-92.
States to take property without compensation. Paterson reached the same conclusion for much the same reasons. Iredell agreed that the prohibition applied only to criminal cases, but his assigned reason was naked policy: retroactive civil laws such as takings for public use were often justifiable; retroactive criminal sanctions were not.

The techniques of constitutional interpretation employed by Chase and Paterson were straightforward and familiar to today's reader. Their conclusion that the term "ex post facto law" traditionally referred only to criminal matters, however, has been disputed vigorously. Chase did not bother to quote either Blackstone or The Federalist, on which he relied. Paterson did quote Blackstone, but both sources have been argued by critics to have used criminal punishments as no more than an example and not as an exclusive definition of ex post facto legislation. Two of the state constitutions referred to by Chase and Paterson did not use the term "ex post facto" at all; two more used it without instructive amplification; and innumerable contemporary statements have been cited to show that the term commonly was used to refer to civil as well as to criminal matters.

The critics have succeeded in demonstrating that the issue was not so one-sided as Chase and Paterson contended, but not, I think, that the decision was clearly wrong. The Maryland and North Carolina Constitutions provided "[t]hat retrospective laws,

314 Id. at 390, 394. See U.S. Const. art. I, § 10, para. 1 (contracts clause); id. amend. V (compensation clause). In so doing, Chase implied without giving reasons that the contract clause was retrospective only, an assumption Marshall later would dispute respectfully. See Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 332-58 (1827) (dissenting opinion). Chase made the same argument about the provision that the states not "make any Thing but gold and silver Coin a Tender in Payment of Debts," U.S. Const. art. I, § 10, para. 1; 3 U.S. (3 Dall.) at 390, but Justice Washington later would concede in Ogden that the legal tender clause applied to subsequent as well as preexisting debts. 25 U.S. (12 Wheat.) at 269.

315 Id. at 399-400.

316 Id. at 396.

317 See Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 681-87 app. No. 1 (1829 Term) (Johnson, J., concurring, Note on the Exposition of the Phrase, "Ex Post Facto," in the Constitution of the United States) (original ed. Phila. 1829); 1 W. Crosskey, supra note 195, at 324-51; Field, Ex Post Facto in the Constitution, 20 Mich. L. Rev. 315 (1922). Among the statements cited are an explicit one by Iredell in the North Carolina ratifying convention and an opinion on circuit in which Paterson seems to have assumed that the clause had civil application. See 1 W. Crosskey, supra note 195, at 337-38, 341-42. Crosskey concluded that the Justices in Calder were attempting to clear the way for a retroactive federal bankruptcy law, which had been argued to be forbidden by the corresponding ex post facto clause of article I, section 9, paragraph 3. Id. at 346-49.
punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore, no ex post facto law ought to be made. Hamilton in The Federalist supported the federal prohibition on the ground that "[t]he creation of crimes after the commission of the fact" was a "favorite and most formidable instrument[ ] of tyranny." Blackstone, after condemning Caligula for "ensnar[ing] the people" by giving inadequate notice of the law, had said there was "still a more unreasonable method than this, which is called making of laws, ex post facto; when after an action is committed, the legislator then for the first time declares it to have been a crime." One reading these references might fairly conclude, though the inference is not inescapable, that their authors thought the term applied only to criminal punishments.

What this split of opinion seems to indicate is that, as in the case of direct taxes, there was no clear answer to what the Framers meant by ex post facto laws. Yet two of the Justices told us only part of the story in an effort to persuade us that they modestly were following tradition, while the third, Iredell, told us the clause meant what he wanted it to mean without first showing that it had no established definition.

Later decisions basically have adhered to the conclusion that the ex post facto clauses apply only to retroactive punishment, but the practice of seriatim opinions and the peculiar wording of the Paterson and Iredell opinions make it difficult to say that this

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319 MD. DECLARATION OF RIGHTS OF 1776 § 15 (current version at Md. Const. declaration of rights, art. 17); N.C. DECLARATION OF RIGHTS OF 1776 § 24 (current version at N.C. Const. art. I, § 16), quoted in 3 U.S. (3 Dall.) at 397. Crosskey argued that in these constitutions the "enacting part . . . went beyond the evil recited in its preamble." 1 W. CROSSKEY, supra note 195, at 345. This is a plausible but hardly a necessary conclusion.

320 The Federalist No. 84, supra note 114, at 511-12 (A. Hamilton). Johnson and Crosskey, in dismissing a passage in The Federalist that merely had condemned ex post facto laws without saying what they were, were referring to Madison's No. 44. Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 685 app. No. 1 (1829 Term) (Johnson, J., concurring, Note on the Exposition of the Phrase, "Ex Post Facto," in the Constitution of the United States) (original ed. Phila. 1829); 1 W. CROSSKEY, supra note 195, at 329.

321 1 W. BLACKSTONE, supra note 269, at 46 (emphasis in original).

322 The convention record itself contains conflicting evidence. Madison asked a question indicating that he thought ex post facto referred to civil as well as criminal matters, 2 Convention Records, supra note 73, at 440, and George Mason moved to strike the phrase because it might be held to reach civil cases. Id. at 617. John Dickinson, on the other hand, "mentioned to the House that on examining Blackstone's Commentaries, he found that the terms 'ex post facto' related to criminal cases only." Id. at 448.

was the holding of the Court in *Calder*. Paterson discussed the criminal issue only after declaring that "we may, in the present instance, consider the legislature of the state as having acted in their customary judicial capacity. If so, there is an end of the question." He then proceeded to "consider the resolution . . . as the exercise of a legislative and not a judicial authority," "[f]or the sake of ascertaining the meaning" of the constitutional term. Iredell was even more emphatic in resting his conclusion on the judicial ground. Like the House of Lords, he argued, the Connecticut legislature had judicial as well as legislative power: the power "to superintend the courts of justice . . . is judicial in nature; and whenever it is exercised, as in the present instance, it is an exercise of judicial, not of legislative, authority." He then went on to discuss, hypothetically, the criminal issue. Cushing, the only other Justice to participate, wrote only one substantive sentence: "If the act is a judicial act, it is not touched by the federal constitution: and if it is a legislative act, it is maintained and justified by the ancient and uniform practice of the state of Connecticut."

Thus it was possible thirty years later for Justice William Johnson to maintain with some plausibility that *Calder* had held only that the resolution was judicial: three Justices had so declared, and only Chase had limited the clause to criminal matters, for what Paterson and Iredell had said on that point was dictum. It might be more accurate to call their comments on the criminal issue an alternative basis for their conclusion. In any event, *Calder* illustrates the uncertainty that can arise when each Justice writes separately and half of them gratuitously give two independent reasons for their decisions.

None of the three Justices who concluded that the challenged action was judicial said why that was relevant to the constitutional question. The answer seems to be that the Constitution forbids only an "ex post facto Law," and that judicial action is not

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324 3 U.S. (3 Dall.) at 395 (emphasis added).
325 Id. at 396.
326 Id. at 398.
327 Id. at 400-01. Cushing's second point left something to be desired, for Chase argued with some force that the whole point of the ex post facto clause was to outlaw previously accepted practice. Id. at 389.
329 See note 78 supra.
"Law."\textsuperscript{330} It is hard to believe the Framers meant to outlaw the ordinary process of appellate review; they created an appellate federal court, and arguably, it was of no concern to them how the states allocated governmental powers among their branches.\textsuperscript{331} But there are reservations: if judicial action is not a law, a state might impose through a novel interpretation of the common law the same unfair punishment of the unsuspecting actor that the Justices thought the clause was designed to prevent.\textsuperscript{332} Moreover, the separation of state powers was not a wholly improbable concern of the Framers: one common explanation for the prohibition of bills of attainder, which applies to the states as well as to Congress, is the unsuitability of legislatures to conduct criminal trials.\textsuperscript{333} In any case, plausible though the Justices’ conclusion may have been, it deserved a fuller examination.

Interesting and important as the discussion of the ex post facto clause was, the most noteworthy aspect of the Calder opinions was the controversy between Chase and Iredell over the place of natural law in constitutional litigation. Chase’s opinion started harmlessly enough by paraphrasing the tenth amendment: “It appears to me a self-evident proposition, that the several state legislatures retain all the powers of legislation, delegated to them by the state constitutions; which are not expressly taken away by the constitution of the United States.”\textsuperscript{334} He then asserted that the “sole inquiry” was whether the action of the Connecticut legislature offended the ex post facto clause of the Federal Constitution.\textsuperscript{335} In the next paragraph, however, he stated:

\begin{itemize}
\item \textsuperscript{330} See Frank v. Mangum, 237 U.S. 309, 344 (1915); L. Tribe, supra note 323, at 477-78.
\item \textsuperscript{331} Article IV, section 4 of the Constitution, which guarantees each state “a Republican Form of Government,” apparently was not invoked in Calder. It was touted in the convention as a safeguard against monarchy, 1 Convention Records, supra note 73, at 206 (remarks of George Mason and Edmund Randolph), and has since been held nonjusticiable, Pacific States Tel. Co. v. Oregon, 223 U.S. 118, 133, 151 (1912).
\item \textsuperscript{332} Recently such efforts have been struck down under the fourteenth amendment’s due process clause, Bouie v. City of Columbia, 378 U.S. 353-54 (1964), but until after the Civil War the Federal Constitution guaranteed due process only at the hands of the federal government. See Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 249 (1843 Term) (holding the fifth amendment’s just compensation clause inapplicable to the states). In other contexts the term “laws” has come to include judicial decisions. Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972) (jurisdiction of cases arising under the laws of the United States); Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) (state laws as rules of decision in the federal courts).
\item \textsuperscript{333} See, e.g., United States v. Brown, 381 U.S. 437, 442-46 (1965); T. Cooley, Constitutional Limitations 260-61 (1868); L. Tribe, supra note 323, at 491-92.
\item \textsuperscript{334} 3 U.S. (3 Dall.) at 387.
\item \textsuperscript{335} Id.
\end{itemize}
There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power . . . . An act of the legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a right-ful exercise of legislative authority.336

He gave as examples "a law that makes a man a judge in his own cause; or a law that takes property from A. and gives it to B."337

Did Chase mean to contradict himself and to assert power to strike down any law offending his sense of natural justice? John Hart Ely thinks not. If Chase had been of that view, Professor Ely argues, he would not have sustained the act before him, for he also declared that laws impairing rights vested under existing rules were unjust. To Ely, the "great first principles" Chase had in mind were those of the Federal Constitution.338 Yet Chase cannot have meant that a law "that takes property from A. and gives it to B." offended the Federal Constitution, for he concluded that the ex post facto clause applied only to criminal cases. Moreover, Ely's interpretation does not account for the paragraph Chase devoted to demonstrating that the original decree had given Calder no vested right.339 This paragraph is irrelevant to the ex post facto issue, and it seems to refute Ely's conclusion that Chase found the action of the Connecticut legislature offensive. It suggests that the reason Chase upheld the legislature's action was that it impaired no vested right and therefore was consistent with natural justice.340

336 Id. at 388.
337 Id.
340 Elsewhere in his opinion, Chase argued that "[t]o maintain that our federal, or state legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments." Id. at 388-89. The reference to the federal legislature shows that Chase was not speaking only of actions unrestrained by state constitutions; he seems to have been arguing that Congress, too, was subject to limits not found in any written document.

Other passages of the opinion suggest a third possible interpretation that would contradict Chase's conclusion that the Court lacked power to determine the compatibility of state laws with state constitutions. The reason the legislature could not give A's property to B, Chase declared, was that "it is against all reason and justice, for a people to intrust a legis-lature with such powers, and therefore, it cannot be presumed that they have done it." Id. at 388. The next sentence attributed the "prohibition" of such laws to "[t]he genius, the nature and the spirit of our state governments." Id.
Iredell thought Chase was asserting the authority to measure laws against his own ideas of justice, and he protested vigorously. Despite the views of “some speculative jurists,” Iredell argued, the Court could not pronounce state or federal legislation void “merely because it is, in their judgment, contrary to the principles of natural justice.” For one thing, “[t]he ideas of natural justice are regulated by no fixed standard” and would be a license for judges to set aside any law with which they disagreed. Moreover, English judges could not disregard legislation on the basis of natural justice, and Americans had dealt with the problem of oppressive laws by adopting constitutions “to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries.” The power of appointed judges to annul legislation on grounds of policy was thus not only undemocratic and contrary to the English legal tradition we had inherited; it was fundamentally inconsistent with the concept of a written constitution. Iredell might have added the powerful language of the tenth amendment, which Chase himself had paraphrased: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

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341 Id. at 398-99.
342 Id. at 399.
343 Id. at 398-99.
344 In other words, the adoption of a written constitution indicating the extent to which the courts were meant to interfere with legislative judgments had rendered the assertions of natural law in the Declaration of Independence and in other revolutionary writings obsolete. It had not, however, extinguished such assertions. Ellsworth, who did not sit in Calder, argued in the convention that it was unnecessary to prohibit ex post facto laws because "there was no lawyer, no civilian who would not say that ex post facto laws were void of themselves," and several others agreed with him. 2 CONVENTION RECORDS, supra note 73, at 376, 378-79. Obviously there was more to be said on the question than the countervailing assertions of Chase and Iredell, but the absence of a more complete discussion was understandable, for even Chase thought Calder was an inappropriate case for invoking natural law. For an examination of natural law ideas from Cicero to Coke to James Otis, see E. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955).
345 3 U.S. (3 Dall.) at 387 (Chase, J.). A passage at the end of Paterson's opinion seems to suggest he shared Iredell's view that judges were limited by the Constitution:

I had an ardent desire to have extended the [ex post facto] provision in the constitution to retrospective laws in general. . . . [T]hey neither accord with sound legislation, nor the fundamental principles of the social compact. But on full consideration, I am convinced, that ex post facto laws must be limited in the manner already expressed . . .

Id. at 397. Crosskey construes this passage, however, to refer to a prior opinion Paterson held on circuit as to the meaning of the Constitution, not to his efforts at the convention, which he had left before the issue was discussed. 1 W. CROSSKEY, supra note 195, at 346.
The Chase-Iredell exchange was the opening salvo in a running battle that never has simmered down completely. Chase’s assertive position, trumpeted in a case in which in his own view it had no application, was elevated by Marshall in 1810 to what may have been an alternative holding in *Fletcher v. Peck.* It was embraced in separate opinions by Marshall’s colleague William Johnson and was advanced as the Court’s basis for striking down a state law in a famous opinion by Justice Samuel Miller after the Civil War. More frequently the Court formally has renounced natural law. In practice, however, some of the Court’s more recent decisions under such rubrics as “substantive due process” raise the question whether it is paying lip service to Iredell for the sake of appearances while effectively following Chase—a course of action that arguably compounds usurpation with deception.

Neither Chase, Marshall, Johnson, nor Miller invoked in support of this expansive view of judicial power the ninth amendment’s provision that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Overwhelmingly ignored for most of its history, this amendment recently has been exhumed by commentators and has begun to appear modestly in Court opinions. It is far from obvious that it empowers judges to announce additional constitutional rights; it may establish merely that the Constitution does not preclude recognition of rights that are not of constitutional dimension. Whatever its meaning, a sufficient explanation for the failure of early Justices to invoke the amendment in cases

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346 See, e.g., J. Ely, supra note 338; Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703 (1975).
347 10 U.S. (6 Cranch) 87, 139 (1810 Term).
348 E.g., id. at 143.
349 Loan Ass’n v. City of Topeka, 87 U.S. (20 Wall.) 655, 662-63 (1874).
352 E.g., J. Ely, supra note 338, at 34-41.
353 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579 n.15 (1980) (Burger, C.J., announcing the judgment of the Court); Griswold v. Connecticut, 381 U.S. 479, 486-99 (1965) (Goldberg, J., concurring). Both opinions, however, fall short of saying that the ninth amendment creates constitutional rights. Chief Justice Burger noted only that the amendment “served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others,” 448 U.S. at 579 n.15, and Justice Goldberg cautioned that the ninth amendment does not leave judges “at large to decide cases in light of their personal and private notions,” 381 U.S. at 493, or give them “unrestricted personal discretion,” id. at 494 n.7.
like *Calder* is the historically and structurally plausible inference, made law by the Marshall Court, that the Bill of Rights limited only federal and not state powers.\(^{354}\)

In sum, the import of *Calder* was rendered obscure by the readiness of Paterson and Iredell to resolve two issues when one would have sufficed. Moreover, not all the opinions gave adequate explanations for their conclusions, and serious doubts have been raised as to the Justices' view of tradition. But the Paterson and Chase opinions are excellent examples of the weight that tradition and contemporary understanding can be given in interpreting the Constitution. If the same tools had been employed in *Chisholm*, that case might have come out the other way.

**III. STATE CONSTITUTIONS AND CONGRESSIONAL POWER BEFORE 1789**

The pre-Marshall Court's approach to constitutional adjudication may be illuminated further by its encounters with constitutions other than the present federal one. I already have discussed the Justices' treatment in *Calder* and *Ware v. Hylton* of federal jurisdiction over state constitutional questions, of the relationship between state law and the law of nations, of the powers of the pre-Articles of Confederation Congress, and of the treaty power under the Articles.\(^ {555}\) Two other early cases presented the Court with similar constitutional problems.

**A. *Penhallow v. Doane's Administrators***

In 1775 the Continental Congress passed a resolution calling on the colonies to establish prize courts for the condemnation of captured vessels employed to suppress the Revolution, providing that "in all cases, an appeal shall be allowed to the congress, or such person or persons as they shall appoint for the trial of appeals."\(^ {356}\) In 1777 a New Hampshire court condemned a captured vessel; in 1778 an appeal to Congress was filed; in 1780 Congress established a "Court of Appeals in cases of capture"; in 1783 that court reversed the state court decree. After the adoption of the new Constitution, a federal district court awarded damages for failure to respect the decision of the Court of Appeals. The Supreme


\(^{355}\) See text and notes at notes 274-301, 306-311 supra.

\(^{356}\) 1 J. Cong. 242 (1775) (Folwell's Press ed. Phila. 1800).
Court essentially affirmed.\textsuperscript{387} The overriding constitutional question was the authority of Congress to establish a tribunal to review the state court decree. All four participating Justices said this issue had been settled by the decision of the Court of Appeals and could not be reopened collaterally.\textsuperscript{388} Yet all four added comments on the merits of the question as well.

The Articles of Confederation expressly gave Congress the power of "establishing courts for receiving and determining finally appeals in all cases of captures."\textsuperscript{389} Because Congress was not empowered to establish trial courts for capture cases, it was obvious that review of state court decisions was intended. The Court lost no sleep over the question, later so hotly disputed,\textsuperscript{390} whether the tribunals of one sovereign could review those of another. Paterson, after paraphrasing the Articles, declared that the Court of Appeals had been "constitutionally established,"\textsuperscript{391} and Blair said the authority of the court under the Confederation was "confessed."\textsuperscript{392} The difficulty was that the Articles had not been ratified until 1781, after the entry of the state court's decree and establishment of the Court of Appeals. Consequently it was argued that the jurisdiction of the Court of Appeals over the Penhallow case depended on Congress's power to provide for review of state capture cases prior to the Articles of Confederation. Iredell and Cushing, while commenting on Congress's pre-1781 authority, found it unnecessary to resolve the issue because it had been determined by the

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\textsuperscript{387} 3 U.S. (3 Dall.) 54, 60-62 (1795). The Court also upheld the authority of the district court to entertain the action based on the earlier decree, reaffirming its decision in The Betsey, 3 U.S. (3 Dall.) 6 (1794), that prize cases were "civil causes of admiralty and maritime jurisdiction" within section 9 of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, 77 (current version in relevant part at 28 U.S.C. § 1333 (1976)). Appellees' counsel in The Betsey had conceded that prize cases were "Cases of admiralty and maritime Jurisdiction" within article III, section 2, paragraph 1 of the Constitution, but had argued that they were not "civil causes" under the statute. 3 U.S. (3 Dall.) at 7. In Penhallow, 3 U.S. (3 Dall.) at 97, Iredell explained that the statutory and constitutional references to maritime as well as admiralty cases eliminated the British distinction between courts of prize and of instance.

\textsuperscript{388} Id. at 85 (Paterson, J.), 95-96 (Iredell, J.), 113 (Blair, J.), 116-17 (Cushing, J.). This conclusion is of interest in light of the later understanding, prevalent until recently, that subject matter jurisdiction always could be examined in a suit on a sister-state judgment despite the full faith and credit clause. See Durfee v. Duke, 375 U.S. 106, 112 (1963); Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 469 (1874), and cases cited therein.

\textsuperscript{389} Articles of Confederation art. 9, § 1.

\textsuperscript{390} See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

\textsuperscript{391} 3 U.S. (3 Dall.) at 85.

\textsuperscript{392} Id. at 113.
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Court of Appeals. Paterson and Blair upheld the pre-Articles of Confederation power on the merits. Paterson, like Chase in the later Ware v. Hylton, sought the authority of Congress in the "powers they exercised": "in congress were vested, because by congress were exercised, with the approbation of the people, the rights and powers of war and peace," and the disposition of captured vessels was "incidental thereto. Though Blair warned that "usurpation can give no right and sought to find authority in the states' written instructions to their delegates, he essentially agreed.

It had been argued that any powers Congress might have had were merely "recommendatory" and that New Hampshire was thus free to disregard them. Congress had rejected this contention in 1779, approving a committee declaration that "no act of any one state can or ought to destroy the right of appeals to Congress." Paterson found this decision binding on New Hampshire and termed its reasoning "cogent and conclusive." Blair was even more explicit: "those acts of New Hampshire which restrain the jurisdiction of congress, being contrary to the legitimate powers of congress, can have no binding force."

The impact of Penhallow on later decisions was muted by the Justices' reliance upon res judicata and by the fact that the sources of authority they construed differed sharply from those of the present Constitution. Nevertheless the case is of significant interest. First, the jurisdiction it sustained was to become an important precedent for upholding Supreme Court review of state court judgments under the new Constitution. Second, Paterson and Blair gave the idea of judicial review a boost by asserting, without bene-

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363 Id. at 89-97 (Iredell, J.), 117 (Cushing, J).
364 See text and notes at notes 276-280 supra.
365 3 U.S. (3 Dall.) at 80.
366 Id. at 109.
367 Congress's actions, Blair wrote, had afforded "an opportunity to their constituents to express their disapprobation, if they conceived congress to have usurped power, or, by their co-operation, to confirm the construction of congress; which would be as legitimate a source of authority, as if it had been given at first." He found in response to these actions "not the least symptom of discontent among all the confederated states, or the whole people of America." Id. at 111.
368 Id. at 71 (argument of counsel for Penhallow).
370 3 U.S. (3 Dall.) at 82.
371 Id. at 113.
fit of an explicit supremacy clause, the power to disregard state laws contradicting a congressional resolution. The same two Justices also foreshadowed _McCulloch v. Maryland_ in their sweeping deduction of the power to provide for capture appeals from the congressional authority to make war. Finally, Paterson's gratuitous remark that "the states, individually, were not known nor recognised as sovereign, by foreign nations" was to be echoed nearly 150 years later in support of an expansive view of federal authority over foreign affairs.

B. _Cooper v. Telfair_

This case was a diversity action on a debt. The defense was a 1782 Georgia statute attainting the plaintiff for adherence to the British and confiscating his property. Rejecting arguments that the attainder offended Georgia constitutional provisions declaring "trial by jury . . . inviolate" and legislative and judicial powers "separate and distinct," the Court in 1800 unanimously affirmed the circuit court's decision for the defendant.

Once again there was discussion of the propriety of judicial review. The parties conceded it, and Cushing declared "that this court has the same power, that a court of the state of Georgia would possess, to declare the law void." Chase noted quite unnecessarily that he concurred in the "general sentiment" that "the supreme court can declare an act of congress to be unconstitutional and therefore, invalid." But he added a curious qualification: "whether the power, under the existing constitution, can be employed to invalidate laws previously enacted, is a very different question, turning upon very different principles." Chase did not resolve this question because he found the challenged law consistent with the Georgia Constitution.

What the adoption of the 1789 Constitution has to do with the

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373 17 U.S. (4 Wheat.) 316 (1819).
374 3 U.S. (3 Dall.) at 81.
376 4 U.S. (4 Dall.) 14, 16 (1800) (assignments of error); see GA. CONST. OF 1777, art. LXI (jury trial); id. art. I (separation of powers).
377 4 U.S. (4 Dall.) at 15.
378 Id. at 16, 17.
379 Id. at 16, 17.
380 Id. at 19.
381 Id.
power to review state laws for consistency with state constitutions is not clear. Whether the Georgia Constitution is judicially enforceable is a question of Georgia law. But Chase’s doubt as to the power to invalidate pre-1789 laws suggests a distinct issue not raised by the parties or considered in the opinions: why did not the Georgia law violate the federal ban on ex post facto laws, impairment of contracts, and bills of attainder? The answer must be that those prohibitions are prospective only, as their language suggests: “No State shall . . . pass” those forbidden laws. The Court later would confirm that the contract clause did not apply to laws passed before the effective date of the Constitution.\(^{383}\)

One should not conclude too hastily, however, that the Constitution grandfathers all preexisting laws. The fourteenth amendment expressly forbids any state either to “make or [to] enforce” certain kinds of laws, and a state probably can be said to “deprive” a person of property or to “deny” equal protection at the time it enforces a preexisting law.\(^{384}\) Other clauses of article I are more ambiguous in this respect: no state shall “make any Thing but gold and silver Coin a Tender”\(^{385}\) or “lay any Imposts or Duties on Imports or Exports.”\(^{386}\) These transitional issues are of no present significance, but the Framers seem not to have given them much attention.

On the merits, all four Justices seem to have concluded in Cooper that the state jury trial provision, read in conjunction with a separate requirement that criminal trials take place “in the county where the crime was committed,”\(^{387}\) was inapplicable because the offense was not shown to have occurred in Georgia.\(^{388}\) Indeed, three of them seem to have taken the venue provision to imply that the punishment of offenses was a proper legislative function under Georgia’s separation of powers: the power to punish must reside somewhere, and it did not reside in the courts.\(^{389}\) Neither conclusion was obvious. As with legislative appeals in

\(^{381}\) U.S. Const. art. I, § 10, para. 1.

\(^{382}\) Owings v. Speed, 18 U.S. (5 Wheat.) 420 (1820).

\(^{383}\) U.S. Const. amend. XIV, § 1.

\(^{384}\) Id. art. I, § 10, para. 1.

\(^{385}\) Id. para. 2.

\(^{386}\) Ga. Const. of 1777, art. XXXIX.

\(^{387}\) 4 U.S. (4 Dall.) at 18 (Washington and Chase, JJ.), 19 (Paterson, J.), 20 (Cushing, J.).

\(^{388}\) Id. (Washington, Paterson, and Cushing, JJ.).
Calder v. Bull, a little history might have shown a tradition of legislative punishments, but the question would have remained whether Georgia’s separation of powers provision was meant to preserve or to alter that tradition.

Chase’s opinion is the most interesting. After declaring the jury trial provision inapplicable, he added that the result would have been the same if the offense had been shown to have occurred in Georgia:

The general principles contained in the constitution are not to be regarded as rules to fetter and control; but as matter merely declaratory and directory: for, even in the constitution itself, we may trace repeated departures from the theoretical doctrine, that the legislative, executive, and judicial powers, should be kept separate and distinct.

Was the aggressive advocate of judicial power to strike down laws that offended “natural justice” here rejecting the principle of ordinary judicial review? Was he consistent in so doing, on the theory that judges can ignore constitutions as well as laws if they disagree with them? Because he endorsed judicial review in the next paragraph, I think his point was more modest: not everything in a constitution was to be regarded as “merely declaratory and directory,” but only “general principles” such as Georgia’s separation of powers provision, which was undercut elsewhere in the document. This was not a necessary conclusion either, however, for the provision was phrased in mandatory terms and the “departures” might have been exceptions to an enforceable rule. Moreover, Chase’s thesis hardly explains why the jury provision would not apply to an offense committed within the state. That provision looks neither general nor declaratory in the sense of his opinion.

The particular Georgia issues resolved in Cooper are of no importance today. For us the case represents one more exercise of the increasingly familiar power of judicial review, explicitly endorsed as to federal statutes for the first time by Chase, and a recognition that despite Chase’s careless statement in Calder, the Court can determine state constitutional questions in cases coming from lower federal courts. Cooper is noteworthy also for Chase’s distinc-

390 See text and notes at notes 323-327 supra.
391 4 U.S. (4 Dall.) at 19.
392 See text and notes at notes 336-337 supra.
393 See text and notes at notes 306-311 supra.
tion between laws enacted before and after 1789 for purposes of judicial review and for his willingness to find some constitutional provisions unenforceable judicially. This approach suggests an exception to judicial review of undefinable scope, reminiscent of the later notion of political questions. It is also interesting that Chase, who in *Calder* had declared unnecessarily that a law giving A's property to B would be void because contrary to "natural justice," did not bother to explain why the same was not true of a naked bill of attainder. Perhaps he thought traitors were different, or maybe he was bluffing in *Calder v. Bull*. Finally, in *Cooper*, two more Justices—Washington and Paterson—echoed Chase's now familiar litany that laws would not be struck down except in clear cases. The *Cooper* opinions suggest that the Justices took this admonition quite seriously: it seems to me they identified possible interpretations of the Georgia Constitution that would uphold the bill of attainder and then resolved the ambiguities in favor of constitutionality.

**Conclusion**

If one looks solely at the specific holdings of the Supreme Court before 1801, the achievements were modest. The *Chisholm* holding that states could be sued was overruled immediately by the eleventh amendment. *Hylton*'s narrow interpretation of the direct tax provisions was of more lasting significance, affording Congress a broad latitude for taxation for a hundred years. *Calder* gave a narrow reading to the ex post facto limitation, but the basis of the holding was unclear. *Ware* held that a particular treaty revived debts previously extinguished. *Mossman* held that an alien could not sue unless the defendant was a citizen of a state. In *Hollingsworth*, the Court without discussion excluded the President from the amending process.

The importance of this period lies in the extent to which the Court established an enduring framework for constitutional adjudication. The practice of seriatim opinions, which weakened the force of the decisions, soon would be abandoned, but other aspects

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395 See text and notes at notes 336-337 supra.


397 See A. McLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 300-01 (1935).
of the pre-Marshall Court's practice remained. Judicial review of state legislation was established in *Ware*, in which the Court struck down a state law contradicting a treaty. Judicial review of federal legislation was practiced in fact in *Hylton*, in which the law was upheld. More than one Justice went on record in dictum declaring the power to exist, and a federal statute may have been struck down in *Hollingsworth v. Virginia*.

Moreover, two lasting principles of construction were established before 1801: doubtful cases were to be resolved in favor of constitutionality, and statutes were to be construed if possible in a manner consistent with the Constitution. There were intimations of the political question doctrine in the suggestions in *Ware* and *Cooper* that some issues, even of constitutional dimension, might be nonjusticiable. The informal *Correspondence* settled once and for all that the Court would decide legal questions only in the context of ordinary litigation. There were hints in *Ware* and in *Penhallow* of a coming tendency to construe federal grants of power extensively. In *Calder*, Iredell and Chase began the debate over the power of judges to disregard laws not infringing particular constitutional provisions.

Furthermore, the basic tools of constitutional interpretation employed before 1801 are still in use today. The first Justices looked to the text of the governing constitutional provision, to inferences that could be drawn from other provisions, to contemporary usage, to the intentions or purposes of the Framers, and to their own conceptions of sound policy. The relative weight given to these various interpretive aids was, as it has remained, variable. The words were stressed in *Chisholm*, legal tradition in *Calder*, and policy in *Hylton*.

It is striking how difficult it is to say, even after nearly 200 years of opportunity for reflection, whether the Court was right or wrong in its early constitutional decisions. There seems to be no clear answer to the question whether the Framers meant to allow states to be sued, or to outlaw retroactive civil legislation, or to require apportionment of taxes on carriages. Perhaps this should not be surprising. No legislator can foresee and answer all questions that may arise, and the Framers consciously and properly limited themselves to the statement of a few general principles. In any event, the small sample of decisions before 1801 dramatically illustrates the enormous latitude the Constitution has left to judicial judgment.

The Court's response to the Constitution's ambiguity is also
interesting. Time and again the Justices pretended to find the answer in the language or history of the Constitution when the Framers apparently either had differed as to the meaning of the words (as in *Chisholm* and *Calder*) or had had no firm idea of what they were trying to say (as in *Hylton*). The Swiss Civil Code of 1907 takes the opposite tack, instructing the judge in the absence of authority to decide “according to the rules which he would establish if he were to assume the part of a legislator.” Perhaps there is a middle road. I would not vote as a legislator to institute sovereign immunity, and I do not think the Framers gave a clear answer to the immunity question, but I have difficulty believing that in the climate of 1789, they would have wanted to make states suable. Finally, there is another alternative: the Court might have taken Chase’s deferential expressions seriously and upheld the challenged provisions in all three cases on the ground that they were not clearly unconstitutional. In any event, the *Chisholm* Court would not be the last to take refuge in the fiction that the Framers had answered a question that the judges actually may have resolved in a legislative manner.

The same decisions contain both the foregoing tendency to cloak the exercise of real judgment in the trappings of deference and the contrasting suggestions of judicial freedom from authority we would be likely to view as binding. In *Hylton*, all three Justices leapt with what may appear unseemly haste to a discussion of the undesirability of apportioning carriage taxes, and Paterson made no effort to disguise the influence of his policy preference. The eclectic use of foreign precedents and general jurisprudence in Wilson’s and Jay’s *Chisholm* opinions suggests the kind of “pluralism of legal sources” that has been said to have been prevalent prior to the French Revolution, a kind of universality of legal principles transcending the commands of the particular sovereign. Most of

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398 *Schweizerisches Zivilgesetzbuch*, Code civil suisse, Codice civile svizzero art. 1, para. 2 (codified at Systematische Sammlung des Bundesrechts ch. 210, art. 1, para. 2), quoted favorably in B. Cardozo, *The Nature of the Judicial Process* 140 (1921). Cardozo adds that even in such a case the judge is not “wholly free . . . in pursuit of his own ideal of beauty or of goodness . . . . He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to ‘the primordial necessity of order in the social life.’ Wide enough in all conscience is the field of discretion that remains.” *Id.* at 141 (footnote omitted) (translating and quoting 2 F. Gény, *Méthode d’Interpretation et Sources en Droit privé positiv* 303 (2d ed. 1919)).

399 Coing, *The Roman Law as Ius Commune on the Continent*, 89 Law Q. Rev. 505, 513 (1973) (“Pluralism of legal sources also means that a judge who has to decide a specific case, has to look for rules not only in the orders of the sovereign, but can apply rules which he
all, there is Chase's bold assertion in *Calder* of the power to disregard statutes contrary to "first principles." 400

The symptoms of free-wheeling judicial discretion varied from Justice to Justice. Iredell and Blair protested Wilson's eclecticism in *Chisholm*, and Iredell flatly disagreed with Chase about natural justice. Most of the Justices spoke most of the time as if they conceived of their job as the important but limited one of attempting to understand and enforce the written Constitution. Most interesting of all, however, was the assertion of both fictitious deference and judicial license in one and the same opinion: Chase in his remarkable *Calder* pronouncement seemed to go out of his way to declare the right to nullify any legislation with which he disagreed, while in the same breath he pretended that in determining the meaning of the ambiguous ex post facto clause he exercised no independent judgment whatsoever.

Although it is not easy to say that any of the Court's earliest constitutional decisions was clearly wrong, it does appear to today's reader that too many important issues were decided without adequate consideration. That the President could not veto constitutional amendments comes down to us as a bare conclusion. That Congress could make exceptions to the diversity jurisdiction was not even stated in the reports. Long and learned opinions in *Chisholm*, *Ware*, and *Penhallow* refute the inference that eighteenth-century judges were not expected to explain what they were doing. 401 Yet the Justices did not feel the need to assure dissemination of their reasons for every constitutional decision.

Even the full opinions, moreover, often were flawed in their reasoning. In *Chisholm*, the Justices paid insufficient heed to tradition and to the statements of the Framers. In *Hylton*, they relied too heavily on policy before making a serious effort to explain the text. In *Calder*, they failed to explain why judicial action was not forbidden by the ex post facto clause, to acknowledge usage contrary to that which they invoked, and to make clear precisely on which ground they relied.

As far as the individual Justices are concerned, I find Paterson

finds in any book of authority, whether this has been expressly recognized by the sovereign or not."

400 3 U.S. (3 Dall.) at 388. See text and note at note 336 *supra*.

401 See J. Dawson, *The Oracles of the Law* xii (1968) ("We now take this duty for granted but in its present form it came relatively late, not only to English legal tradition but still more in systems like the French and German that have derived continuous inspiration from Roman law.").
and Iredell the most impressive. In *Calder*, Paterson, like Chase, made effective—if selective—use of contemporary understanding. In *Hylton*, Paterson relied in part on his own policy preferences, but he alone attempted to interpret the constitutional language in light of current usage and the purposes of the Framers. Iredell receives favorable marks for his attention to history in *Chisholm* and for his opposition to limitless judicial nullification in *Calder*. Chase could be thorough and persuasive, as in *Ware*, but he was unable to restrain himself from commenting on issues not presented, and his natural justice thesis showed him to be no respecter of the written Constitution. Wilson displayed erudition in *Chisholm* but seemed pretentious and disorganized, hiding the majority's best points in a pile of verbiage. Jay's only opinion, also in *Chisholm*, seems longwinded and off the point. Blair and Cushing wrote pedestrian opinions that added little.

It was not a time of giant Justices or of great decisions. Yet in its first twelve years the Supreme Court set a pattern of constitutional adjudication that was to endure.