Seriatim

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Published by NYU Press

Gerber, Scott Douglas.
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Introduction

*The Supreme Court before John Marshall*

Scott Douglas Gerber

*The Pre-Marshall Court in the American Mind*

Students of judicial institutions in recent years have come to appreciate more than ever that to understand any court we must understand its origins.\(^1\) Nowhere is this more correct than in the case of the Supreme Court because the origins of that institution are so closely identified with one justice—John Marshall. This holds true no matter what one thinks of Marshall. For those who hold Marshall in high esteem—and most scholars today do exactly that—the study of the Court prior to 1801 makes more plain the stamp Marshall placed on the institution. For those who view Marshall less heroically—as do several contributors in this volume—studying the pre-Marshall Court reveals what the institution might have been like had Marshall not accepted the nomination to be chief justice.

Jumping ahead two centuries to the present—and some three hundred fifty pages to the end of this book—an examination of the Supreme Court before John Marshall reveals much of interest to students of the institution. Marshallphiles will note, for example, the absence of the institutional voice Marshall’s leadership was able to

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I thank Mark Hall for his contributions to this essay; Todd Ellinwood for his research assistance; and George Billias, Bill Casto, Chuck Hobson, Wythe Holt, Steve Presser, Jim Stoner, and Sandra VanBurkleo for their suggestions for making it better. An earlier version was presented at the 1996 meeting of the Northeastern Political Science Association. I thank the participants on the “Elements of Judicial Culture” panel—John Brigham, Nancy Kaspop, Jeffrey Morris, Suzanne Samuels, and Grier Stephenson—for their enthusiasm about this project.
provide—an institutional voice that has been absent for much of the twentieth century as well.² Those who view Marshall less heroically will find in these pages, by contrast, that, among other things, judicial review—the Court’s most important power in the American system of constitutional government—was understood by the early justices, was argued for by them, and was practiced by them.

The conventional wisdom is, of course, that the Supreme Court became an important institution only after Marshall’s arrival and the opinion rendered in *Marbury v. Madison* (1803). It is not exactly accurate to say that the pre-Marshall Court has been completely ignored by students of the judicial process, but most scholars on the subject stress the Court’s lack of significance. Bernard Schwartz, for instance, concludes in *A History of the Supreme Court* (1993) that “the outstanding aspect of the Court’s work during its first decade was its relative unimportance.”³ Similarly, George Lee Haskins and Herbert A. Johnson comment in their 1981 volume in the Holmes Devise History of the Supreme Court that the Court was a “relatively feeble institution during the 1790s, too unimportant to interest the talents of two men who declined President Adams’ offer of the position of Chief Justice, it . . . acquired in . . . a few years’ time, and largely under the guiding hand of John Marshall, more power than even the framers of the Constitution may have anticipated.”⁴ There is also the following observation by Robert G. McCloskey in *The American Supreme Court* (1960), arguably the most important book ever written about the Court:

> It is hard for a student of judicial review to avoid feeling that American constitutional history from 1789 to 1801 was marking time. The great shadow of John Marshall, who became Chief Justice in the latter year, falls across our understanding of that first decade; and it has therefore the quality of a play’s opening moments with minor characters exchanging trivialities while they and the audience await the appearance of the star.⁵

There are countless other examples of the pre-Marshall Court being trivialized by law professors, historians, and political scientists.⁶ Invariably, scholars point out that Robert H. Harrison never served as an associate justice after he was confirmed, and that William Cushing declined elevation from associate to chief justice. Similarly, Charles C. Pinckney, Edward Rutledge, Alexander Hamilton, and Patrick Henry—significant statesmen in the 1790s—refused to be appointed
to the Court, and several men who were appointed resigned to accept other positions. Most notable among the latter group, John Rutledge left the Court after two years to become chief justice of the South Carolina Court of Common Pleas, and John Jay, who spent part of his Supreme Court tenure serving as minister to Great Britain, resigned from the Court to become governor of New York, and later refused reappointment to the Court.

After noting the difficulty of staffing the early Supreme Court, scholars usually mention in passing a few cases, such as *Hayburn's Case* (1792), *Chisholm v. Georgia* (1793), *Ware v. Hylton* (1796), *Hylton v. United States* (1796), and *Calder v. Bull* (1798), and then hurry on to discuss related Marshall Court opinions. While some may hesitate for a moment to address *Chisholm v. Georgia*, those who do typically emphasize that this decision was overturned in 1798 by the Eleventh Amendment. Finally, many scholars cite the absence of a separate Supreme Court building as evidence that the early Court lacked prestige.7

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

> The pioneer work of the [pre-Marshall] Supreme Court in constitutional interpretation has, for all but special students, fallen into something like obscurity owing to the luster of Marshall’s achievements and to his habit of deciding cases without much reference to precedent. But these early labors are by no means insignificant, especially since they pointed the way to some of Marshall’s most striking decisions.8

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

A few scholars have begun to challenge the idea that the Supreme Court became important only when John Marshall arrived. The multivolume ongoing project documenting the activity of the early Court edited by Maeva Marcus and others, and Marcus’s edited collection of essays on the Judiciary Act of 1789, have been of great assistance in this regard.9 Also worth noting is William R. Casto’s *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* (1995). Casto, who contributes an essay about Oliver Ellsworth in this volume, makes an important contribution with his book by presenting a compelling theory
as to why the pre-Marshall Court is often viewed negatively. As he puts it:

Society in the late twentieth century—particularly political society—is usually viewed primarily in terms of conflicts of values and interests. . . . The abiding theme of the early Supreme Court, however, was precisely to the contrary. The Court sought to support the political branches of the new federal government, not to oppose them.¹⁰

According to Casto, “Though the justices occasionally resorted to constitutional interpretation, their primary objective was to bolster and consolidate the new federal government.” The label of “mediocrity” attached to the pre-Marshall Court, he concludes, “is probably due to the direct conflict between the modern judicial paradigm of conflict and the early Court’s paradigm of support.”¹¹

*Insights from Biography*

Although a few scholars have begun to pay attention to the pre-Marshall Court,¹² much work remains to be done. One fruitful approach is to examine the contributions pre–Marshall Court justices made as *individuals* to American law and politics. After all, one does not need to subscribe to the psychological and sociological tenets of legal realism to recognize that any court, including the Supreme Court, is first and foremost composed of individuals.¹³ The biographical approach to the pre-Marshall Court is particularly appropriate, given that most of that Court’s business took place while the justices were riding circuit. *Seriatim: The Supreme Court before John Marshall* was designed with a multiple biographical methodology in mind.

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

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

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

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

The result was a number of impressive appointees. The nation’s first Court was composed of John Jay of New York, John Rutledge of South Carolina, William Cushing of Massachusetts, James Wilson of Pennsylvania, John Blair of Virginia, and Robert H. Harrison of Maryland. The original six justices never met together as the Court, however. On his way to the inaugural session, Harrison fell ill, so ill in fact that he resigned his post without ever having sat on the Court. While Harrison’s resignation is sometimes used as evidence to indicate that the early Court lacked prestige, it should be noted that his death two months later indicates the severity of his sickness. Harrison was replaced by James Iredell of North Carolina.

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

Chief Justice John Jay was next to leave the Court, resigning in 1795 after being elected governor of New York. Washington’s decision to replace Jay with John Rutledge—who had expressed a desire to return to the Supreme Court as chief justice—led to an embarrass-
ing series of events. Rutledge’s was a recess appointment, and during the recess he attacked the Jay Treaty with such vitriol that his confirmation by the Senate was unlikely at best. Indeed, the Federalist-controlled Senate considered Rutledge’s assault on the treaty tantamount to treason and rejected his appointment by a vote of 10 to 14. Washington turned to Patrick Henry to fill the center chair, but Henry declined the nomination. William Cushing was then nominated and confirmed as the nation’s third chief justice. About a week later, Cushing, citing advanced age and ill health, resigned his promotion and returned to his position as the Court’s senior associate justice. Finally, in 1796 Oliver Ellsworth of Connecticut became chief justice, a post he held for a full four years.

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

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

The difficulty Washington, and to a lesser extent Adams, had in staffing the Supreme Court is stressed by those who dismiss the significance of the pre-Marshall Court. At a minimum, this perspective ignores the hardships faced by the early justices, such as illness and circuit riding. More substantially, it overlooks the important contributions to American law and politics made by the early justices, both on circuit, where most of their judicial business was conducted, and before they arrived at the highest court in the land, where their respective efforts in the founding of the American regime were tremendous.
Scholars have long appreciated the value of studying individual Founders when trying to discern the character of the early American republic. The scores of volumes and papers projects on John Adams, Alexander Hamilton, Thomas Jefferson, James Madison, John Marshall, and George Washington, among others, all testify to this fact. In a real sense, *Seriatim* picks up where Stephen B. Presser left off. Presser, who contributes an essay about Samuel Chase to the present collection, demonstrated in his provocative book, *The Original Misunderstanding: The English, the Americans and the Dialectic of Federalist Jurisprudence* (1991), the value of examining the individual pre–Marshall Court justices—in Presser’s case, Chase—for dispelling the myth of Marshall’s apotheosis.18 This said, the point of *Seriatim* is not that Marshall was not a force in American law and politics. There is, after all, a difference between revisionism and fiction. Rather, *Seriatim* is designed to put an end to the claim to unequivocal domination by Marshall on early American jurisprudence.

**John Marshall’s Apotheosis**

Recently, I reviewed for the *Journal of American History* two new biographies of John Marshall. Both books, Charles F. Hobson’s *The Great Chief Justice: John Marshall and the Rule of Law* (1996) and Jean Edward Smith’s *John Marshall: Definer of a Nation* (1996),19 are welcome additions to scholarship and I say so in my joint review.20 Unfortunately, however, both books perpetuate the myth that Marshall is “The Father of the Court” and “The Jurist Who Started It All.” To make the point more directly, these two books were twice reviewed together prior to my joint review, and the quoted titles to these reviews demonstrate dramatically the impression the books leave on readers.21 Gordon S. Wood is the author of the review titled “The Father of the Court.”22 If one of the greatest living early American historians can default to clichés about the early Supreme Court, then clearly more work needs to be done on the origins of the Court.

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

Marshall’s greatness was recognized long before Beveridge. At his death in 1835 he had a reputation as a great statesman, if not always free from controversy. John Adams in 1825 wrote to Marshall that it was “the pride of my life that I have given to this nation a Chief Justice equal to Coke or Hale, Holt or Mansfield.” John Quincy Adams entered these words in his diary, a few days after Marshall died: “John Marshall . . . was one of the most eminent men that this country has ever produced.” Marshall’s colleague, Joseph Story, delivered a memorable eulogy of the chief justice that wonderfully captures the essence of Marshall’s greatness. Now, it is true that post–Civil War nationalism enhanced Marshall’s standing and that Beveridge wrote in that context—attempting to make Marshall into a symbolic hero of American nationalism, like Lincoln. Hope this helps.23

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

The process of glorification was launched with Allan Magruder’s worshipful biography in 1890; it gained momentum with the Marshall Day celebration of 1901 (the outcome of which was a three-volume collection of encomiums compiled by John F. Dillon); and it culminated with Albert Beveridge’s *The Life of John Marshall* (4 vols., 1916–1919) and Charles Warren’s *The Supreme Court in United States History* (2 vols., 1922). With prodigious documentation Beveridge unabashedly celebrated the victory of light (conservative nationalism) over darkness (Jeffersonian states’ rights agrarianism). And, by sheer force of emphasis and pervasive romanticism, his work raised Marshall above the Court, depicting him as the epic hero of American nationalism. Warren’s history was more scholarly, more bal-

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*It is difficult to deny that Marshall was a great politician. Only a great politician could do what Marshall did in *Marbury*: Announce that the Jefferson administration was wrong to withhold the judicial commissions in question and that courts could issue writs to compel public officials to do their prescribed duty—but that the Supreme Court had no power to issue such writs in the case at bar because the portion of the Judiciary Act of 1789 that gave the Court the power to do so was unconstitutional. In short, a showdown with the Jefferson administration was avoided, but Marshall still was able to “reaffirm” the Court’s power of judicial review.*
anced, and more generous in spreading the glory to include Marshall’s colleagues but showed the same preference for conservative nationalism.24

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

“Liberal” court critics since the early 1920s and 1930s had argued that the Supreme Court’s job was to accommodate the Constitution to the changing economic and social needs of the country. It seems more than coincidental that at about the time the courts were frustrating implementation of New Deal legislation, scholars began lavishly to praise John Marshall for his famous decisions. . . . Similarly, when liberal academics praised the Warren Court’s expansive interpretations of the Bill of Rights and the Fourteenth Amendment to protect the victims of educational, political, and economic discrimination, more volumes appeared apotheosizing Marshall.25

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

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

Scholars have appreciated for some time that Marbury v. Madison was not sewn from whole cloth.26* From Sir Edward Coke’s opinion in Dr. Bonham’s Case (1610), to James Otis’s speech against the Writs of Assistance (1761), to a series of pre-federal Constitution state-court cases,27 to Federalist no. 78, there exist a host of pre-Marbury precedents for judicial review. More to the point, the essays that constitute Seriatim reveal that virtually every member of the pre-Marshall Court played an important role in establishing the

*Marshall himself acknowledged as much. See Marbury v. Madison, 5 U.S. (1 Cr.) 137, 176 (1803). Moreover, President Jefferson, who came to resent Marbury, was not taken aback by the judicial-review aspects of the decision. (Jefferson believed that the Court, as well as the president and Congress, had the right to pass on the constitutionality of matters before it.) Rather, he resented Marshall’s obiter dictum that Marbury was entitled to his judicial commission.
Supreme Court’s power of judicial review—a power that is synonymous to this day with John Marshall’s most famous opinion. Indeed, many of the justices championed judicial review long before they were appointed to the Court. My essay on William Cushing, for example, suggests that even before independence was declared Cushing was charging grand juries in Massachusetts that courts had the authority to declare acts of Parliament unconstitutional, while Wythe Holt describes how John Blair participated in at least three early cases involving judicial review in Virginia. Furthermore, Willis Whichard points out that James Iredell articulated on several occasions before the Constitution went into effect perhaps the most sophisticated argument for judicial review offered during the Founding (an argument with which Marshall was almost certainly familiar). James Haw reveals that, despite fighting hard in the Federal Convention of 1787 to protect the power of state courts, John Rutledge both expected and supported federal judicial review, and William Casto demonstrates that Oliver Ellsworth endorsed the concept of judicial review at the Connecticut ratifying convention.

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

The justices who composed the Supreme Court before John Marshall did more than simply advocate judicial review, they practiced it. Barely a year had passed since the establishment of the federal courts when Chief Justice John Jay and Associate Justice William Cushing, on circuit, declared several states’ laws unconstitutional. There is also
Ware v. Hylton (1796), in which Justices Chase, Cushing, Paterson, and Wilson, sitting together as the Supreme Court, struck down a Virginia statute on the ground that it was inconsistent with a federal treaty and, hence, the supremacy clause of the Constitution. More- over, James Stoner points out in his essay about Bushrod Washington that Washington, who was accused in a widely repeated remark of being little more than a double for Marshall—an accusation that Stoner rejects—asserted in Cooper v. Telfair (1800) that the Court possessed the power of judicial review.

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

More examples of pre-Marbury incidents of judicial review could be discussed, but it should be clear by now that the pre–Marshall Court justices understood the concept of judicial review, that they argued for it, and that they practiced it. There is also abundant evidence that Marshall was both fully aware of and substantially influenced by these early precedents. Presser suggests, for example, that Marshall was in the audience when Samuel Chase delivered his jury charge in the Callender trial, and that Marshall later adopted some of Chase’s language in his Marbury opinion. Similarly, Whichard advises that Marshall’s opinion in Marbury drew upon Iredell’s well-known writings on judicial review. Finally, I surmise in my essay about Cushing that Cushing and/or Paterson probably made Marshall aware of the early Court’s precedents on judicial review.
An “Interdisciplinary Conversation”

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

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

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

Last, but it is to be hoped not least, the three political scientists also approach their justices in diverse ways. Although Mark Hall and James Stoner both utilize the method of political theory, Stoner’s Straussian orientation gives his essay a flavor different from that of Hall’s. My essay on Cushing is more disparate still: It employs deconstruction as a methodological approach.
In short, the contributors to *Seriatim* are engaged in an “interdisciplinary conversation” in the best sense of that phrase. Although none of the contributors (the editor included) are methodologists, let alone philosophers of science, we all share a commitment to both methodological self-consciousness and methodological pluralism. We value methodological self-consciousness because those who fail to pay attention to method are almost always in the grip of a prevailing methodology. (Here, we are paraphrasing John Maynard Keynes’s famous retort that those who dislike theory or claim to do without it are simply in the grip of an older theory.) We value methodological pluralism because a prevailing methodology might not be the “best” methodology, let alone the “perfect” methodology. A comparison between perhaps the two most diametrically opposed methodologies represented in *Seriatim* will illustrate why we take methodology so seriously.

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

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

Can students of the early American judiciary learn from deconstruction as well as from traditional history? from political theory as well as from doctrinal legal analysis? from psychology as well as from social, political, and economic considerations? from the melding of biography, political science, and intellectual history as well as from “unadulterated” biography? from a Straussian orientation as well as from a Marxist orientation? We hope the reader will grapple with
these questions. A brief preview of the essays that follow may provide some assistance in this regard. The essays, written by the leading authorities on the particular justices at issue, appear in the order of the justices’ respective appointments to the Supreme Court.

The Findings

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

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

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

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

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

Mark Hall explains in his essay on James Wilson that while many students of the early American republic know about Wilson’s extensive contributions to the framing and ratification of the Constitution, few are aware of the quality of his political thought. In fact, Hall argues that once Wilson’s political theory is understood, his contributions at the Constitutional Convention and on the Supreme Court fall readily into place.
Hall makes clear that central among Wilson’s political ideas was his belief that all individuals possess natural rights that must be protected by government. Contrary to many of his contemporaries, Wilson contended that thoroughly democratic institutions provide the best protection for both minority and majority rights. As a result, he supported the direct, popular election of representatives, senators, and executives. His democratic theory also informed his view of federalism, leading him to be a consistent nationalist. Yet Wilson did not hold a naive faith in the people, as indicated by his support for countermajoritarian checks such as judicial review. Hall attempts to reconcile Wilson’s support of these checks with his democratic theory, and ultimately concludes that Wilson was the foremost advocate among the Founders of a strong and democratic government that also protects minority rights.

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

Holt’s essay demonstrates that, as a member of the first Supreme Court, Blair cautiously but steadily in actions and opinions showed himself to be a staunch Federalist and a supporter of the mercantile-oriented, weak new central government, imperiled from within by agrarian and democratic dissent and from without by imperialistic European powers. He was, however, neither a profound writer nor a leader on the Court. But, Holt insists, the proper criterion by which to assess the Court’s opinions in the perilous 1790s is their political effectiveness in persuasively upholding the power, authority, and respect of the government while exciting no dismembering discontent; and the proper gauge of its members is their courage and consistency in supporting the new Constitution and its constituted government. On both of these measures, the amiable, safe, conscientious John Blair ranks at the top, Holt concludes, because his clear pronouncements empowering the government were phrased narrowly so as to provoke no animosity, even though he was the only southern justice consistently to support Federalist positions.
Willis Whichard explains that James Iredell came to America as a British official to be the comptroller of customs in Edenton, North Carolina. Iredell studied law under Samuel Johnston, a politically influential lawyer, and acquired the reputation of a superior lawyer. In his most significant case as counsel, Whichard reveals, Iredell advocated the concept of judicial review. He also championed it in a series of sophisticated letters and essays.

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

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

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

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

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

Was Samuel Chase, the only Supreme Court justice ever to be impeached, a partisan bully unfit to sit on the bench (as his Jeffersonian tormentors insisted), or was he unfairly attacked for seeking to maintain the rule of law when it was under partisan assault (as the defenders at his trial before the Senate maintained)? While most historians are prepared to concede Chase’s obvious brilliance, his hair-trigger temper and his obduracy led one recent historian—Seriatim’s own William Casto—flatly to declare that Chase’s appointment was “one of the most regrettable nominations in the Court’s history.”

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

*Readers will notice that Presser’s essay is structured differently than the others in the book. Because Seriatim essentially picks up where Presser left off with his earlier work on Chase, we thought readers might find it interesting to see why Presser did what he did there and what the reaction to his work has been.
William Casto approaches his essay on Oliver Ellsworth as an assault upon anachronistic preconceptions that many scholars have about the Founding generation. Specifically, Casto argues that there is a tendency to emphasize the secular aspects of political life in the early republic and to deemphasize the religious dimensions. Casto also insists that our late-twentieth-century preconceptions of the proper role of judges in political life has distorted our analyses of judicial conduct in the early American republic. The concept of separation of powers and the ideal of judicial aloofness from political controversy have changed substantially over the past twenty years, Casto maintains.  

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

Finally, in his essay on Bushrod Washington, James Stoner makes a powerful case for viewing Washington as a bridge between the pre-Marshall Court and the more famous Marshall Court. Consequently, Stoner explodes the myth that Washington and Marshall should be viewed, as William Johnson once charged, as “one Judge.”

Stoner argues that though Bushrod Washington lived in the shadow of two great men—his uncle George Washington and his friend of fifty years, John Marshall—he was an independent man who left his mark on federal justice and helped make possible the extraordinary unity of the Marshall Court. (This latter achievement is yet another for which Marshall receives undue credit.) Educated in law by George Wythe and James Wilson, distinguishing himself at an early age on the Richmond bar, Washington was appointed to the Court by John Adams in 1798. From the start, his jurisprudence is characterized by respect for legislative authority, a sense of exact justice, and a certain moderation. Stoner makes it clear that although Washington is largely overlooked today, he was a highly respected judge in his own day.
This, then, is what is chronicled in the essays that follow. Before readers are left to enjoy the essays, it might be useful for me to say a few words about why the collection is titled *Seriatim* (Latin for “severally” or “in series”).

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

When John Marshall was appointed chief justice in 1801, he put an end to the practice of seriatim opinion writing. Chief Justice Marshall did so because he believed that the Supreme Court’s “power and prestige” would be enhanced if it spoke with a “single voice.” To that end, Marshall established the practice of a single “opinion of the Court”—almost always signed, at least in the early days of his chief justiceship, by Marshall himself—that would reflect the views of the Court as an institution and be recorded and reported to the public. As with any collaborative product, however, this new practice meant that differences among the justices were adjusted internally and, consequently, hidden from public view. Although this was plainly Marshall’s intention, the end of seriatim opinion writing meant that the contributions of individual justices were difficult, if not impossible, to discern. This, we suspect, goes a long way toward explaining why Marshall has come to eclipse in the conventional wisdom the other justices of the early Supreme Court. And this, we believe, is unfortunate.

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

NOTES


11. Ibid., 247, 213.

12. In addition to the work of Marcus and the previous and continuing efforts of the contributors to the present volume, see also Stewart Jay, *Most Humble Servants: The Advisory Role of Early Judges* (New Haven: Yale University Press, 1997).


16. See, for example, Abraham, *Justices and Presidents*, 81, 412–14.

17. Numerous letters exist from different justices complaining about the onerous duty of circuit riding—especially in the Southern Circuit. See, for example, Marcus, *Documentary History*, vol. 1, 731–32; vol. 2, 126, 132, 288–90, 344; vol. 3, 240.

18. See Stephen B. Presser, *The Original Misunderstanding: The English, the


24. R. Kent Newmyer, The Supreme Court under Marshall and Taney (Arlington Heights, Ill.: Harlan Davidson, 1968), 20–21. See also letter from William E. Leuchtenburg to Scott D. Gerber, 18 November 1995 (“It is not my impression, though Chuck Hobson should know a good deal more, that Marshall had the reputation he does today in the 19th Century. He was seen then as considerably more of an embattled Federalist and a champion of certain interests.”) (letter in my possession).


27. The state-court cases are Josiah Philips’s Case (Va., 1778), Holmes v. Walton (N.Y., 1780), Commonwealth v. Caton (Va., 1782), Rutgers v. Waddington (N.Y., 1784), The Symsbury Case (Conn., 1785), Trevett v. Weeden (R.I., 1786), and Bayard v. Singleton (N.C., 1787). There is considerable debate in the scholarly community about the status of these early cases.

28. See, for example, David G. Barnum, The Supreme Court and American Democracy (New York: St. Martin’s Press, 1993), 3–9 (emphasizing Marbury v. Madison); James Q. Wilson and John J. DiIulio, Jr., American Government: Institutions and Policies, 6th ed. (Lexington, Mass.: D. C. Heath, 1995), 420 (same). See also Smith, John Marshall, chapter 13. Of course, there have been specific studies of judicial review over the years, particularly by historians, that recognize that Marbury has been overemphasized. See, for example, J. M. Sosin, The Aristocracy of the Long Robe: The Origins of Judicial Review in America (Westport, Conn.: Greenwood Press, 1989). My point is simply that the conventional wisdom is still to the contrary—and that the role the pre–Marshall Court justices played in the origins of judicial review has been largely overlooked.

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

31. Ellsworth, who was not serving on the Supreme Court at the time *Ware* was decided, voiced his agreement with the decision in *Hamilton v. Eaton*, 11 F. Cas. 336, 340 (C.C.D.N.C. 1796).

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


34. For more, see Marcus, “Judicial Review in the Early Republic,” 25–53.


36. This phrase was coined by historian Peter S. Onuf in a refreshing essay


39. Here, readers will be reminded of the thesis of Casto’s superb tome, *The Supreme Court in the Early Republic*.


41. Haskins and Johnson make an interesting case for the possibility that the opinion of the Court was delivered, but not necessarily written, by the senior justice who participated in the case. Given that Marshall was both chief justice and rarely absent, this tended to be Marshall. See Haskins and Johnson, *Foundations of Power*, 382–87 (discussing this subject, as well as the more general subject of the transition from seriatim opinion writing to institutional opinion writing). Casto maintains that Marshall merely solidified a custom—using institutional rather than seriatim opinions—that Ellsworth initiated during his chief justiceship. See Casto, *The Supreme Court in the Early Republic*, 110–11.