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## President John Adams and Four Chief Justices: An Essay for James F. Simon

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R.B. BERNSTEIN

## President John Adams and Four Chief Justices: An Essay for James F. Simon

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## I. INTRODUCTION

Constitutional history is a human subject dealing with human creations—ideas, institutions, doctrines, customs, usages, and the enduring problems to which they respond. James F. Simon, a master of historical storytelling, has never forgotten that truth, and his readers are the luckier for it.

In a variation on Jim Simon’s trilogy examining the turbulent relationships between a President and a Chief Justice,<sup>1</sup> this article examines a complicated story of judicial appointments focusing on the problems that President John Adams faced in juggling as many as *four* Chief Justices in three months in 1800–1801, when the task of naming a new Chief Justice confronted him.<sup>2</sup> To complicate matters for him, his need to choose came at a time when the early Supreme Court of the United States lacked the authority and dignity that it enjoys today. This story also dramatizes the experimental nature of the American constitutional system, and politics under that system, in its first years. Consider, for example, the use of a sitting Chief Justice as leader of an American diplomatic mission, or the collision of partisan politics with the demands of administering a system of federal courts that most Americans viewed with suspicion and uncertainty.

By focusing on John Adams rather than on John Marshall—on the appointer rather than the appointee—this article differs from most accounts of Adams’s eventual choice of Marshall to become the nation’s fourth (fifth?) Chief Justice. Yet it is only when we study the appointment of Marshall to the Chief Justiceship by reference to President Adams’s struggle with the task of naming a new Chief Justice, by setting that struggle firmly within its historical and political contexts, that we can understand the ordeal that Adams faced and the solution that he found to it.

## II. SETTING AND CONTEXT

The setting in which Adams wrestled with this problem was Washington, D.C., the new permanent federal capital. Washington was far from being the august metropolis envisioned by its creators—it existed more in architectural drawings and planners’ hopes than in reality. Work on the Capitol building had barely begun; only that part of the building housing the original chamber of the House of Representatives

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1. See JAMES F. SIMON, *FDR AND CHIEF JUSTICE HUGHES: THE PRESIDENT, THE SUPREME COURT, AND THE EPIC BATTLE OVER THE NEW DEAL* (2012); JAMES F. SIMON, *LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT’S WAR POWERS* (2006); JAMES F. SIMON, *WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE THE UNITED STATES* (2002).
  2. I acknowledge my profound debt to the late Kathryn Turner Preyer (1925–2005), whose 1960 article, *The Appointment of Chief Justice Marshall*, was a pioneering exploration of this subject. See Kathryn Turner, *The Appointment of Chief Justice Marshall*, 17 WM. & MARY Q. 143 (1960), reprinted in BLACKSTONE IN AMERICA: SELECTED ESSAYS OF KATHRYN PREYER 39 (Mary Sarah Bilder, Maeva Marcus & R. Kent Newmyer eds., 2009) [hereinafter PREYER ESSAYS]. For a useful, distilled treatment of the Supreme Court Judiciary before Chief Justice Marshall’s appointment, see Natalie Wexler, *The Chief Justice from a Historical Perspective: In the Beginning: The First Three Chief Justices*, 154 U. PA. L. REV. 1373 (2006). See *id.* at 1379–96 for Wexler’s version of the events recounted here. See *infra*, text at notes 21–23 and 36–40, for an explanation of why I speak of “as many as” four Chief Justices.

was standing and in use. The Executive Mansion was large, cold, and drafty—First Lady Abigail Adams hung her laundry to dry in the cavernous East Room. Visitors from European nations viewed with derision the infant capital of a fragile federal republic, with its gargantuan public buildings and building sites speckling a wilderness, linked only by muddy footpaths instead of clean, dry, paved roads.<sup>3</sup> Though seemingly desolate, the capital was far from quiet. Politicians were wrangling bitterly over a host of issues, including, but by no means limited to, those thrown up by the elections of 1800 and the bitter, vituperative campaign that had preceded them.

In December 1800, President John Adams was sitting in the metaphorical eye of this political hurricane—a lame-duck and painfully self-conscious chief executive.<sup>4</sup> Having stood for a second term as candidate (with Charles C. Pinckney of South Carolina) of the Federalist partisan alliance, he had suffered a close but decisive defeat at the hands of the Republican ticket of Thomas Jefferson and Aaron Burr. The principal reason for his defeat was the shattering of the fragile bands holding together two contentious and mutually suspicious groups of Federalist politicians—moderate Federalists loyal to President Adams and more conservative Federalists supporting former Treasury Secretary Alexander Hamilton.<sup>5</sup> The resulting Republican victory left all the Federalists downcast, demoralized, and all too inclined to blame one another for their plight.

The only thing resolved by the presidential election of 1800 was that John Adams would be going home to Braintree, Massachusetts in March 1801. Who *would* become President was the subject of frantic and angry politicking both in the capital and throughout the United States. Under the original version of the Electoral College, the mechanism specified in the Constitution for choosing the President and the vice president every four years, electors cast two electoral votes apiece, except that they could not vote for two people from the same state. Although the party caucuses in Congress that selected the candidates had preferences for which should be President and which should be vice president, the Electoral College threw all the candidates into the same arena, vying for the same office. The candidate receiving the greatest number of electoral votes (so long as it was a majority of the votes cast) would become President, and the first runner-up would become vice president.<sup>6</sup>

The problem was that the Constitution's original method of choosing the President and vice president never made allowances for the development of loosely

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3. *See generally* KENNETH R. BOWLING, *THE CREATION OF WASHINGTON, D.C.: THE IDEA AND THE LOCATION OF THE NATION'S CAPITAL* (1991); KENNETH R. BOWLING, *CREATING THE FEDERAL CITY, 1774–1800: POTOMAC FEVER* (1988).

4. On Adams, see GILBERT CHINARD, *HONEST JOHN ADAMS* (1935); JOHN E. FERLING, *JOHN ADAMS: A LIFE* (1992); JAMES E. GRANT, *JOHN ADAMS, PARTY OF ONE* (2005); *JOHN ADAMS AND THE FOUNDING OF THE REPUBLIC* (Richard Alan Ryerson ed., 2001).

5. On this division, see MANNING J. DAUER, *THE ADAMS FEDERALISTS* (1968), and STEPHEN G. KURTZ, *THE PRESIDENCY OF JOHN ADAMS: THE COLLAPSE OF FEDERALISM 1796–1800* (Univ. Pa. Press rev. ed. 1957).

6. U.S. CONST. art. II, § 1, cl. 3, *superseded by* U.S. CONST. amend. XII.

organized partisan alliances operating on the national political stage.<sup>7</sup> In 1796, this arrangement had led to an embarrassing and uncomfortable result: the victor, John Adams, became President, and his chief rival, Thomas Jefferson, who trailed him by only three electoral votes, became vice president. In 1800, the contest was even more fraught, and the results were rife with the potential for political, even constitutional, crisis. Jefferson and Burr tied for first place, each receiving seventy-three electoral votes to Adams's sixty-five (and sixty-four votes cast for Pinckney). The Federalists also lost control of both Houses of Congress to the Republicans. And yet, despite their rout at the polls, the governmental calendar set forth in the Constitution and federal law kept the lame-duck House of Representatives, with a fractious and demoralized Federalist majority, in office until inauguration day, March 4, 1801, giving it the power and responsibility to decide who would become President. Although the balloting would not begin until February 1801, politicking over the electoral deadlock between Jefferson and Burr was already underway.<sup>8</sup>

Meanwhile, Adams sat in the Executive Mansion, alone and lonely, wrestling with a tangle of constitutional, political, administrative, diplomatic, and national security problems facing the nation in the closing months of his presidency. One such issue was the struggle by Congress to frame new legislation reworking the federal judiciary, responding to over a decade of lobbying by the Justices of the Supreme Court and to the changed political context created by the results of the 1800 elections—but many other unresolved problems confronted the federal government, leaving Adams with a desk piled high with correspondence to review and decisions to make.

### III. ADAMS AND CHIEF JUSTICE ELLSWORTH

Above all other matters, Adams was awaiting news from a diplomatic mission, led by Chief Justice Oliver Ellsworth, seeking an end to the nation's undeclared naval war with France—a war that had resulted from a series of diplomatic clashes dating from the earliest months of Adams's presidency, had generated domestic

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7. On the unsatisfactory original version of the electoral college, see R.B. Bernstein, *The Constitution as an Exploding Cigar and Other "Historian's Heresies" About a Constitutional Orthodoxy*, 55 N.Y.L. SCH. L. REV. 1073, 1088–89 & nn.67–72 (2010–2011).

8. For the best account of this traumatic election, see JOANNE B. FREEMAN, *AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC 199–261* (2001). See also SUSAN DUNN, *JEFFERSON'S SECOND REVOLUTION: THE ELECTION CRISIS OF 1800 AND THE TRIUMPH OF REPUBLICANISM* (2004); JOHN FERLING, *ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800* (2004); EDWARD J. LARSON, *A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA'S FIRST PRESIDENTIAL CAMPAIGN* (2007); PETER S. ONUF, *JEFFERSON'S EMPIRE: THE LANGUAGE OF AMERICAN NATIONHOOD 80–108* (2000); *THE REVOLUTION OF 1800: DEMOCRACY, RACE, AND THE NEW REPUBLIC* (James Horn, Jan Ellen Lewis & Peter S. Onuf eds., 2002); BERNARD A. WEISBERGER, *AMERICA AFIRE: JEFFERSON, ADAMS, AND THE REVOLUTIONARY ELECTION OF 1800* (2000). Older works include DANIEL SISSON, *THE AMERICAN REVOLUTION OF 1800* (1974); FRANK VAN DER LINDEN, *THE TURNING POINT: JEFFERSON'S BATTLE FOR THE PRESIDENCY* (Fulcrum Publ'g 2000) (1962). The latest addition to the literature as of this writing is JAMES ROGER SHARP, *THE DEADLOCKED ELECTION OF 1800: JEFFERSON, BURR, AND THE UNION IN THE BALANCE* (2010).

controversies that bedeviled Adams's administration, and ultimately had contributed to Adams's defeat in 1800.<sup>9</sup>

Though the choice of a sitting Chief Justice to conduct a diplomatic mission might cause modern Americans to raise their eyebrows, Adams had followed precedent in asking Ellsworth to lead this peace mission. In 1794, President George Washington had asked Chief Justice John Jay to negotiate a treaty with Great Britain, hoping that, as a veteran diplomat, Jay could resolve outstanding differences between the United States and its former mother country.<sup>10</sup> Jay's Treaty did ease tensions between the two nations, but at the cost of severe domestic political turbulence.

That two Chief Justices served on diplomatic missions in the 1790s reflected the conflicting perceptions of the Supreme Court in its early years; the Justices often were informal advisors to the executive branch, sometimes even accepting statutory executive responsibilities (such as deciding pension claims by Revolutionary War veterans) by designation of Congress.<sup>11</sup> These missions also reflected the Court's lack of pressing business, which in turn indicated that the Supreme Court as an institution and the Justices as individuals had at best uncertain stature in the public's eyes.<sup>12</sup>

In the middle of December, the good news for which Adams had been waiting finally arrived, though it came too late to save his Presidency: As reported in a letter dated October 16, 1800, and marked by Adams as received on December 15, Ellsworth and his colleagues had negotiated the Convention of 1800, which ended hostilities and resolved outstanding differences between France and the United States. In honor of this news, Adams renamed his home Peacefield; in 1815, he declared to the Massachusetts politician James Lloyd that his epitaph should read,

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9. See ALEXANDER DECONDE, *THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797–1801* (1966); MARIE-JEANNE ROSSIGNOL, *THE NATIONALIST FERMENT: THE ORIGIN OF U.S. FOREIGN POLICY 1789–1812* (Lillian A. Parrott trans., 2004); 4 *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789–1800*, at 245 (Maeva Marcus et al. eds., 1992) [hereinafter DHSC]; Wexler, *supra* note 2, at 1401–06.
  10. SAMUEL FLAGG BEMIS, *JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY* (Yale Univ. Press 1962) (1923); JERALD A. COMBS, *THE JAY TREATY: POLITICAL BATTLEGROUND OF THE FOUNDING FATHERS* (1970); TODD ESTES, *THE JAY TREATY DEBATE, PUBLIC OPINION, AND THE EVOLUTION OF EARLY AMERICAN POLITICAL CULTURE* (2006). On Jay's mission, see WALTER STAHR, *JOHN JAY: FOUNDING FATHER* 313–38 (2005); 1 DHSC, *supra* note 9, at 7; 4 DHSC, *supra* note 9, at 243–45 (discussing Jay's mission and its consequences); Wexler, *supra* note 2, at 1401–06.
  11. See, e.g., STEWART JAY, *MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES* (1997); Eric Sirvet & R.B. Bernstein, *John Jay, Judicial Independence, and Advising Coordinate Branches*, 21 J. SUP. CT. HIST. 23 (1996); Wexler, *supra* note 2, at 1396–1406. In *Hayburn's Case*, 2 U.S. 408 (1792), the Court confronted, but did not have to resolve, a conflict between circuit court decisions on a federal statute giving the judges of the circuit court the added responsibility of administering pension claims by Revolutionary War veterans. See JULIUS GOEBEL, JR., *ANTECEDENTS AND BEGINNINGS TO 1801*, in 1 *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 580–86 (Paul A. Freund ed., 1971).
  12. On the early Supreme Court, see generally DHSC, *supra* note 9; WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* (1995); *SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL* (Scott Douglas Gerber ed., 1998) [hereinafter *SERIATIM*]; Goebel, *supra* note 11; Wexler, *supra* note 2, *passim*.

“Here lies John Adams, who took upon himself the responsibility of the peace with France in the year 1800.”<sup>13</sup>

Ellsworth’s letter brought news not just of an old set of problems solved but also of a new problem to be solved. He informed Adams that, because of his fragile health (specifically, the excruciating ailment that he called “the gravel,” now recognized as kidney or bladder stones), he was resigning as Chief Justice, effective immediately:

Constantly afflicted with the gravel, and the gout in my kidneys, the unfortunate fruit of sufferings at sea, and by a winters journey through Spain, I am not in a condition to undertake a voyage to America at this late season of the year; nor if I were there, would I be able to discharge my official duties. I must therefore pray you, Sir, to accept this my resignation of the office of Chief Justice of the United States.<sup>14</sup>

In naming a new Chief Justice, Adams would choose a successor to a man who had been a moderately successful Chief Justice since his confirmation in 1796. As Adams considered the choices that Ellsworth’s resignation placed before him, he knew that the Supreme Court and its Chief Justice were of uncertain value and dignity in the new nation’s legal and political worlds. These problems plagued the Court when Ellsworth became Chief Justice, and they still were afflicting the Court when Adams received Ellsworth’s resignation.

In 1796, Ellsworth became Chief Justice because of his political eminence as a framer of the Constitution, as a leading Federalist senator from Connecticut, and as a designer of the federal court system created by the Judiciary Act of 1789.<sup>15</sup> Such an appointment, from our perspective, seems natural and easy. Yet it is largely forgotten that President Washington’s appointment of Ellsworth was his *third* attempt to fill the Chief Justiceship in the space of a year.

The Court’s and President Washington’s troubles began in the spring of 1795, when, on returning home after negotiating the Jay Treaty with Great Britain, Chief Justice John Jay discovered that he had been elected governor of New York—a post that he had sought in 1792 while presiding over the Court, and for which his friends

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13. GRANT, *supra* note 4, at 383 (quoting letter from John Adams to James Lloyd (Jan. 1815), in 10 CHARLES FRANCIS ADAMS, *THE WORKS OF JOHN ADAMS, ESQ., SECOND PRESIDENT OF THE UNITED STATES* 113 (1856)).

14. Letter from Oliver Ellsworth to John Adams (Oct. 16, 1800), in 1 DHSC, *supra* note 9, at 123. On the perennial question of whether the correct title is “Chief Justice of the United States” (which seems to have been standard since 1874, though used on occasion before 1874) or “Chief Justice of the United States Supreme Court” (which seems to have been standard from 1790 through 1874, although with variants cropping up), see 1 DHSC, *supra* note 9, at 173 n.6 and sources and authorities cited, including Josiah M. Daniel, III, “*Chief Justice of the United States: History and Historiography of the Title*,” 1983 SUP. CT. HIST. SOC. Y.B. 109–12. I am indebted to Josiah M. Daniel, III, for this reference.

15. On Ellsworth, see WILLIAM R. CASTO, *OLIVER ELLSWORTH AND THE CREATION OF THE FEDERAL REPUBLIC* (1997); CASTO, *supra* note 12; and William R. Casto, *Oliver Ellsworth: “I Have Sought the Felicity and Glory of Your Administration,”* in *SERIATIM*, *supra* note 12, at 292–321. For documentation of Ellsworth’s appointment, see 1 DHSC, *supra* note 9, at 120–23. For a very old treatment that still has useful information, see 2 HENRY FLANDERS, *THE LIVES AND TIMES OF THE CHIEF JUSTICES OF THE SUPREME COURT OF THE UNITED STATES* 55–276 (T. & J.W. Johnson & Co. 1881) (1875).

had backed him without his knowledge in 1795.<sup>16</sup> On June 28, 1795, he resigned from the Supreme Court to accept his election. To succeed Jay, Washington first nominated John Rutledge of South Carolina, a distinguished but fiery politician who had been an important delegate to the Federal Convention and a leading advocate of the Constitution in South Carolina's 1788 ratifying convention. Rutledge also had served briefly as an Associate Justice of the Supreme Court from 1789 to 1791; although he had presided over circuit courts in the Southern circuit, he never joined his colleagues for sessions of the Supreme Court, and in 1791 he resigned to become Chief Justice of South Carolina's Court of Common Pleas and Sessions.<sup>17</sup>

Because Congress was in recess when Jay submitted his resignation, Washington gave Rutledge a recess appointment, confident that the Senate would confirm him when it reconvened later that year. Rutledge took office pursuant to that appointment on June 30, 1795. However, the abrasive Rutledge damaged his candidacy within three weeks of taking office by making a public speech in Charleston, South Carolina on July 16, 1795, against ratifying the Jay Treaty. News of Rutledge's address, and criticism of Rutledge for making it, soon spread through the nation's newspapers.<sup>18</sup> Rutledge's imprudent intervention into the ongoing political controversy over the Jay Treaty, combined with rumors about his mental instability, sank his nomination; after Washington submitted Rutledge's name to the Senate on December 10, 1795, the Senators rejected Rutledge on December 15 by a vote of fourteen to ten, the first time that the Senate had rejected a Supreme Court nominee. Before Rutledge received word of his rejection by the Senate, he had suffered a breakdown of his health while performing his circuit-riding duties; distraught at this evidence that he could no longer carry out his judicial duties, he attempted suicide by drowning at Camden, South Carolina, on his return journey to his home, and then made another attempt after returning home. These two attempts by Rutledge to take his own life confirmed the contemporary rumors that he was psychologically unfit to preside over the Court.

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16. See STAHR, *supra* note 10, at 334–35 (discussing his election in 1795), 339–64 (discussing his governorship). On Jay, see generally FRANK MONAGHAN, *JOHN JAY* (1937); RICHARD B. MORRIS, *JOHN JAY, THE NATION, AND THE COURT* (1967); STAHR, *supra* note 10, *passim*. For a more astringent perspective on Jay, see Sandra Frances VanBurkleo, "Honour, Justice, and Interest" *John Jay's Republican Politics and Statesmanship on the Federal Bench*, in SERIATIM, *supra* note 12, at 26–69. For a very old treatment that still has useful information, see FLANDERS, *supra* note 15, at 19. For documentation of Jay's appointment in 1789, see 1 DHSC, *supra* note 9, at 9. For discussion of Jay's appointment, see STAHR, *supra* note 10, at 271–73, and sources cited therein.

17. On Rutledge, see JAMES HAW, *JOHN & EDWARD RUTLEDGE OF SOUTH CAROLINA* (1997); James Haw, *John Rutledge: Distinction and Declension*, in SERIATIM, *supra* note 12, at 70–96. (There is also a semi-fictional study that is not recommended: RICHARD BARRY, *MR. RUTLEDGE OF SOUTH CAROLINA* (1942)). Also see the much older treatment in FLANDERS, *supra* note 15, at 431–645, and see the documentation of Rutledge's 1789 appointment in 1 DHSC, *supra* note 9, at 19–23.

18. For documentation of this controversial speech and reactions to it, see 1 DHSC, *supra* note 9, at 765–828; George S. McCowan, Jr., *Chief Justice Rutledge and the Jay Treaty*, 62 S.C. HIST. MAG. 10–23 (1961).

Still apparently unaware of his rejection by the Senate, he sent President Washington a resignation letter on December 28, 1795.<sup>19</sup>

Trying to put the Rutledge debacle behind him, Washington next turned his attention to the Court's senior Associate Justice, William Cushing of Massachusetts, who was renowned for his judicial experience and for his solid, reliable commitment to the Federalist cause.<sup>20</sup> Appointed by President Washington to the Court in 1789, Cushing was a learned and respected jurist who had presided over his state's highest court for over a decade and had played a key role in Massachusetts's ratification of the Constitution in 1788 and in the state's abolition of slavery.<sup>21</sup> When Washington submitted his name to the Senate, on January 26, 1796, Cushing won easy, swift, and unanimous confirmation that same day, and Washington executed his judicial commission as Chief Justice on January 27. Oddly enough, tradition has it that Washington never informed Cushing of his plan to name him as the nation's new Chief Justice, and that somehow Cushing never learned that the Senate had confirmed the nomination. Again according to tradition, the first news that Cushing had of his elevation came at a state dinner at the President's house on January 26, when Washington announced that the new Chief Justice would sit at his right at the dinner. Whether this tradition is true or false, after a few days of consideration, Cushing wrote to President Washington on February 2, 1796, declining his appointment as Chief Justice, returning his commission, and asking that he be allowed to remain as an Associate Justice, citing his frail health as his reason for declining his promotion. The records are unclear whether Cushing actually presided over the Court as Chief Justice pursuant to his appointment before declining the office; even had he presided over the Court at that time, he would have done so as senior Associate Justice because of the vacancy in the Chief Justiceship, as he had previously done while Chief Justice Jay was absent from the bench on his diplomatic mission to Britain. The Cushing incident, a puzzling byway in the history of the early Court, became yet another source of frustration for President Washington.<sup>22</sup>

19. See Haw, *supra* note 17, at 70–88; see also Wexler, *supra* note 2, at 1383–86.

20. On Cushing, see Ross E. Davies, *William Cushing, Chief Justice of the United States*, 37 U. Tol. L. Rev. 597 (2006); Scott Douglas Gerber, *Deconstructing William Cushing*, in *SERIATIM*, *supra* note 12, at 97–125 (citing—and severely criticizing—John D. Cushing, *A Revolutionary Conservative: The Public Life of William Cushing 1732–1810* (1960) (unpublished Ph.D. dissertation, Clark University), and correctly reporting it to be the only extended modern treatment of its subject); Wexler, *supra* note 2, at 1386–89. See also the much older treatment in FLANDERS, *supra* note 15, at 11–51. For documentation of Cushing's appointment, see 1 DHSC, *supra* note 9, at 28–30.

21. Gerber, *supra* note 20, at 115–17.

22. For documentation of Cushing's 1796 appointment to the Chief Justiceship, see 1 DHSC, *supra* note 9, at 101–04. In the most detailed and challenging analysis, Ross Davies stresses what in later times would be profound irregularities about Cushing's acceptance and then rejection of his appointment as Chief Justice accompanied by his decision to return to his duties as an Associate Justice. See Davies, *supra* note 20, *passim*. Neither DHSC nor Gerber addresses these issues. See *William Cushing: Appointment as Associate Justice in 1789*, in 1 DHSC, *supra* note 9, at 26, 27 n.19, 101–04; Gerber, *supra* note 20, at 98. For a distillation of the conventional wisdom that Cushing was acting Chief Justice while Jay was in England, that he continued in that role while the chief justiceship remained vacant, and that he thus did not actually act as Chief Justice under his appointment to that post in January 1796, see FLANDERS, *supra*

Thus, in naming Ellsworth Chief Justice, Washington was trying a *third* time to fill the vacancy left by Jay's resignation, and to put behind him and the nation the embarrassments of the Rutledge recess appointment and the short-lived Cushing appointment.

Ellsworth proved a sound choice to fill the vacant Chief Justiceship. As Chief Justice, he led his colleagues in consolidating the work of the Court under his predecessors,<sup>23</sup> and indeed Ellsworth seems to have been a key architect of the abandonment of the Court's original practice of seriatim written opinions in favor of one opinion for the Court—an achievement often attributed to John Marshall.<sup>24</sup> Under Ellsworth's stewardship, few cases of note came before the Justices—a circumstance, of course, over which neither Ellsworth nor his colleagues had any control. Four cases stand out, however, from the work of the Ellsworth Court, suggesting that the federal judiciary was indeed justifying its existence as a part of the federal constitutional system: *Hylton v. United States* (1796), in which the Justices upheld a federal tax on carriages, noting by implication that if they had found the statute invalid, they would have struck it down as unconstitutional;<sup>25</sup> *Hollingsworth v. Virginia* (1798), rejecting an attempt to invalidate the Eleventh Amendment because it had not been signed by President George Washington before being sent to the states (thereby confirming that a President has no required part to play in the Constitution's amending process);<sup>26</sup> *Calder v. Bull* (1798), holding that the constitutional ban on *ex post facto* laws applied only to criminal and not to civil statutes;<sup>27</sup> and *New York v. Connecticut* (1799), the first lawsuit between two states that the Court heard in its original jurisdiction.<sup>28</sup>

Adams's dealings with Ellsworth had been few but cordial. Ellsworth administered the constitutional oath of office to Adams at his inaugural on March 4, 1797; thus, Adams was the first President to be sworn in by a Chief Justice, and Ellsworth was

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note 15, at 46–48. Flanders also reports the story of Washington's announcement of Cushing's appointment at a state dinner. See also Wexler, *supra* note 2, at 1387 n.65 (citing GEORGE VAN SANTVOORD, SKETCHES OF THE LIVES AND JUDICIAL SERVICES OF THE CHIEF-JUSTICES OF THE UNITED STATES 245 n.\* (1854)). Also see Wexler's cogent and persuasive analysis in *id.*, at 1386–89, pointing out among other inconvenient facts that there is no evidence that Cushing was ever sworn in as Chief Justice.

23. The best treatment of the Ellsworth Court is CASTO, *supra* note 12. See also SERIATIM, *supra* note 12; 3 DHSC, *supra* note 9 (dealing with the Justices on circuit 1795–1800); 5 DHSC, *supra* note 9 (discussing suits against states); 7 DHSC, *supra* note 9 (dealing with cases 1796–1797); 8 DHSC, *supra* note 9 (dealing with cases 1798–1800); Goebel, *supra* note 11.

24. For a valuable treatment of this point, see Wexler, *supra* note 2, at 1412–18 (discussing the tendency to award the credit for this innovation to Marshall instead of Ellsworth). A noteworthy example of the tendency to credit Marshall with inventing the opinion for the Court is George Lee Haskins & Herbert A. Johnson, *Foundations of Judicial Power: John Marshall, 1801–1815*, in 2 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 382–83 (Paul A. Freund ed., 1981).

25. *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796).

26. *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798).

27. *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

28. *New York v. Connecticut*, 4 U.S. 1 (1799).

the first Chief Justice to swear in a President. They had first met in the Senate in 1789, when Adams was the first vice president and Ellsworth was one of the first Senators from Connecticut. In the turbulent political strife of the late 1790s, in which the nation witnessed tense relations not only between the partisan alliances of the Federalists and the Republicans, but internal bickering between Adams Federalists loyal to the President and so-called High Federalists loyal to Alexander Hamilton, Ellsworth aligned himself with the Adams Federalists, and preferred to seek compromise and conciliation rather than engage in political brawling.<sup>29</sup>

In 1799, while Hamilton and his allies were engaged in preparing the United States for what they both feared and hoped would be an all-out war with France, Adams grew to distrust the motives and loyalties of his Cabinet—specifically Secretary of State Timothy Pickering and Secretary of War James McHenry, both of whom he suspected of being aligned with Hamilton rather than himself.<sup>30</sup> Having learned from the American minister resident at The Hague, William Vans Murray, that France was making confidential overtures to seek a peaceful resolution of the differences between the two nations and an end to the so-called “quasi-war,” Adams secretly authorized Murray to pursue this prospect for peace.<sup>31</sup> In February 1799, he named Murray as American minister plenipotentiary to France—and did so without prior consultation with his Cabinet. Angered Federalists in the Senate blocked Murray’s nomination, leading to a confrontation between the President and key Senators that degenerated into a shouting match. The only way to resolve the differences between the Federalist factions was to name a mission of three diplomats. Murray would be one. Adams wanted to name Ellsworth and Patrick Henry as the second and third members of the team, but Henry declined, and the fallback choice was Governor William Richardson Davie of North Carolina. Although Ellsworth was already apprehensive about the effects of a trans-Atlantic voyage and European travel on his health, he told President Adams to “disregard any supposed pains or perils that might attend me from a voige at one season more than another.”<sup>32</sup>

After months of difficult and frustrating negotiations, Ellsworth, Murray, and Davie concluded the Convention of 1800 (also known as the Treaty of Mortefontaine for the place where the diplomats signed it). This agreement ended hostilities between France and the United States and abrogated the Franco-American alliance of 1778, which had been vital to the success of the Revolution, but was now more of an

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29. Casto, *Oliver Ellsworth: “I Have Sought the Felicity and Glory of Your Administration,”* *supra* note 15, at 311.

30. On the strife between Adams and key members of his Cabinet, which culminated in Adams forcing Secretary of War James McHenry to resign and firing Secretary of State Timothy Pickering, see, e.g., FERLING, *supra* note 4, at 390–93. For Pickering’s perspective, see GERALD CLARFIELD, *TIMOTHY PICKERING AND THE AMERICAN REPUBLIC 180–218* (1980). On the continuing acrimony between Adams and Pickering, even after both of them had retired from active service in public life, see FREEMAN, *supra* note 8, at 113, 132, 137, 151–52, 156–57, 280, 316, 317 n.13, 324 n.102, 325 nn.116 & 118.

31. PETER P. HILL, *WILLIAM VANS MURRAY FEDERALIST DIPLOMAT: THE SHAPING OF PEACE WITH FRANCE 1797–1801* (1971).

32. Casto, *Oliver Ellsworth: “I Have Sought the Felicity and Glory of Your Administration,”* *supra* note 15, at 311 (quoting Oliver Ellsworth to John Adams on Sept. 26, 1799).

embarrassment than an advantage to both nations. It also provided that each nation would give the other “most favored nation” trading status (that is, that each nation would extend to the other the most favorable terms governing commercial exchanges granted to any other nation); provided for the return by each side to the other of public ships captured during the quasi-war; guaranteed free passage for all goods and passports; established more flexible arrangements in case of future hostilities between the two nations, including the renunciation of each nation’s authority to freeze assets owned by citizens of the other nation; recognized French fishing rights off the waters of Newfoundland and the Gulf of St. Lawrence; and required privateers of each nation to carry the equivalent of insurance to provide compensation for any unlawful future damage inflicted on the other nation’s shipping.<sup>33</sup>

Thus, it was with considerable satisfaction that Ellsworth wrote home to President Adams reporting the negotiation of this treaty, while also submitting his resignation on the grounds of illness. As he advised Adams, the state of his health prevented his quick return to the United States; he did not return to Connecticut until early 1801. Thereafter, he spent his time in retirement, with one brief stint as a member of the state’s Governor’s Council. He died in his home town of Windsor, on November 26, 1807.<sup>34</sup>

#### IV. PRESIDENT ADAMS AND CHIEF JUSTICE (?) CUSHING

The timing of Ellsworth’s resignation gave Adams an opportunity, while also posing three problems. By naming a new Chief Justice, Adams could shape the development of the Court and the constitutional system. First, however, the rancorous, divided Federalists in the Senate would have to confirm his nominee. Not only did many of the Federalist Senators blame Adams for their rout at the polls—they had long been split on almost every issue between those loyal to Hamilton and those loyal to Adams.<sup>35</sup> Second, as already noted, the federal judiciary was a constitutional orphan—lacking respect, denounced as partisan, and mocked as unnecessary. Would the Senate deem the need to fill the vacancy created by Ellsworth’s resignation important enough to act on with dispatch? Third, Adams only had a few weeks to choose a nominee, lest the task of filling the Chief Justiceship fall to the incoming Republican President (either Jefferson or Burr)—a prospect that

33. Convention Between the French Republic and the United States of America, U.S.-Fr., Sept. 30, 1800, 8 Stat. 178 (1778–1845). To view the text of the Convention of 1800, see 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA: DOCUMENTS 1–40, 1776–1818, at 457–87 (Hunter Miller ed., 1931) (including both French and English texts); 7 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776–1949: DENMARK–FRANCE 801–11 (Charles L. Bevans ed., 1971) (providing the English-language text only); *France—Convention of 1800: Text of the Treaty*, THE AVALON PROJECT, [http://avalon.law.yale.edu/19th\\_century/fr1800.asp](http://avalon.law.yale.edu/19th_century/fr1800.asp) (last visited Nov. 20, 2012) (providing the English-language text based on the Hunter Miller version). On the mission generally, see Stephen G. Kurtz, *The French Mission of 1799–1800: Concluding Chapter in the Statecraft of John Adams*, 80 POL. SCI. Q. 543 (1965).

34. Casto, *Oliver Ellsworth: “I Have Sought the Felicity and Glory of Your Administration,”* *supra* note 15, at 312–15; 2 FLANDERS, *supra* note 15, at 264–76.

35. DAUER, *supra* note 5, *passim*; KURTZ, *supra* note 5, *passim*.

both President Adams and the Senate's Federalist majority viewed with alarm, however much they might have disagreed on other matters.

One way to avoid a confirmation battle would be to promote a sitting Associate Justice to preside over the Court. If Adams were to choose a sitting Justice to take Ellsworth's place, Cushing, the Court's senior Justice, had the inside track—even though, as noted above, Cushing had turned down appointment to the Chief Justiceship in 1796 and none of the reasons that he had cited for doing so had changed in the ensuing four years. As 1800 faded into 1801, Cushing still suffered from all the debilities that he had cited to President Washington to explain his refusal of the Chief Justiceship: he was elderly (at sixty-eight, three years older than Adams himself) and of frail and failing health. Although Adams was aware that many Federalists expected him to name Cushing to succeed Ellsworth, the President doubted whether the elderly, fragile jurist could stand the stress of leading the Court or whether, after a few years, he would die or resign, leaving a vacancy to be filled by a Republican President.<sup>36</sup>

The Associate Justice next in seniority, William Paterson of New Jersey, was another often-mentioned candidate for the Chief Justiceship. Like Ellsworth, Paterson had been a framer of the Constitution and of the Judiciary Act of 1789 (as one of New Jersey's first Senators); in addition, he had been his state's attorney general and was a respected jurist who was engaged in revising New Jersey's laws while serving on the Court.<sup>37</sup> Many Federalists favored Paterson over Cushing, including many in the Senate (who knew and respected Paterson as a former colleague)—but Adams worried that, were he to bypass Cushing to nominate Paterson, he would offend Cushing.<sup>38</sup>

No other sitting Associate Justice seemed a likely candidate for promotion to Chief Justice, which simplified the conundrum somewhat. Yet, as Adams realized, naming a sitting Justice such as Cushing or Paterson to succeed Ellsworth would create more problems regarding judicial appointments. Promoting a sitting Justice would require the appointment of a new Associate Justice to fill the resulting vacancy. Would the Senate be able or willing to confirm two appointments to the Court in the short time before its session ended? Indeed, would Adams be able to find a candidate for the new vacancy on the Court should he name Cushing or Paterson Chief Justice? And if by choosing Paterson he so offended Cushing that Cushing resigned from the Court, Adams would have two vacancies to fill besides the Chief Justiceship.

While Adams pondered his options, Thomas Boylston Adams, his youngest son and a newly-minted lawyer, wrote to him from Philadelphia to convey a message

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36. Turner, *supra* note 2, at 150–51, reprinted in PREYER ESSAYS, *supra* note 2, at 46–47.

37. On Paterson, see JOHN E. O'CONNOR, WILLIAM PATERSON, LAWYER AND STATESMAN 1745–1806 (1979); Daniel E. Degnan, S.J., *William Paterson: Small States' Nationalist*, in *SERIATIM*, *supra* note 12, at 231–59; R.B. Bernstein, *William Paterson: Conservative Revolutionary in an Age of Crisis*, GARDEN STATE LEGACY (Dec. 2011), [http://gardenstatelegacy.com/files/William\\_Paterson\\_A\\_Conservative\\_Revolutionary\\_in\\_an\\_Age\\_of\\_Crisis\\_Bernstein\\_GSL14.pdf](http://gardenstatelegacy.com/files/William_Paterson_A_Conservative_Revolutionary_in_an_Age_of_Crisis_Bernstein_GSL14.pdf). See also the documentation of Paterson's appointment in 1 DHSC, *supra* note 9, at 87–93.

38. Turner, *supra* note 2, at 151 n.36, reprinted in PREYER ESSAYS, *supra* note 2, at 46 & n.36.

from Jared Ingersoll, the U.S. Attorney for the District of Pennsylvania. Ingersoll was a distinguished Federalist who had been a quiet delegate to the Federal Convention of 1787, and was a recognized leader of the bar of the nation's largest city. Shaken by the electoral rout of 1800, Ingersoll wanted to resign his office rather than await removal by the incoming Republican administration. Adams told his son to ask Ingersoll to delay his resignation until at least March 3, 1801 (Adams's last day in office), while also instructing Thomas to sound out Ingersoll about his availability for another appointment. Adams then awaited word whether Ingersoll would be willing to join the Court as its newest Associate Justice, meaning that he would have a candidate on hand to fill the vacancy created by promoting Cushing or Paterson. Father and son exchanged letters for weeks thereafter, with the President pressing his son for an answer and Thomas reporting with frustration that Ingersoll was unwilling to commit himself.<sup>39</sup>

#### V. PRESIDENT ADAMS AND THE ONCE (AND FUTURE?) CHIEF JUSTICE JAY

Adams therefore proceeded on two tracks in the winter of 1800–1801. While monitoring Thomas Boylston Adams's struggle to extract a definite answer from Ingersoll, he also looked outside the Court to find a plausible candidate for Chief Justice, a course of action that would not require finding a second nominee to the Court. Adams wanted not only a distinguished jurist, but a man who could unite the fractious Federalists in the Senate behind his appointment. Adams therefore decided to bring back to national politics a man who had worked with him to negotiate the Treaty of Paris of 1783 that ended the American Revolution, a man who had been the first Chief Justice of the United States and also had served as governor of New York, and a man who could bring together the various factions of the Federalists in his support: John Jay. Gifted with diplomatic skill, legal ability, and political stature, Jay was fifty-five, ten years younger than Adams, and thus was likely to serve for longer than Cushing could. And, with the second term of his governorship drawing to a close, he might well be available to accept a well-paying, distinguished federal post that he would be able to hold for the rest of his life.

Adams also knew, however, that there was no guarantee that Jay would accept reappointment to the Court. Jay's years of service under the Articles of Confederation and the Constitution had left him weary and frustrated. From 1784 through 1789, Jay had served as Secretary for Foreign Affairs, having succeeded his fellow New Yorker Robert R. Livingston. At that time, Jay had set as a condition of accepting the post that Congress must return the seat of government to New York City, his home town. Before this appointment, Jay had spent the early 1780s on diplomatic missions in Spain and France; now he wanted to be close to his wife, Sarah Livingston

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39. Turner, *supra* note 2, at 147–49, reprinted in PREYER ESSAYS, *supra* note 2, at 43–45. Once Adams named Marshall to the Chief Justiceship, there was no longer the prospect of a further vacancy on the Supreme Court, and Adams turned his attention instead to wooing Ingersoll as a candidate for one of the new federal circuit court judgeships. Ingersoll ultimately declined. See Robert J. Lukens, Note, *Jared Ingersoll's Rejection of Appointment as One of the Midnight Judges of 1801: Foolhardy or Farsighted?*, 70 TEMP. L. REV. 189 (1997).

Jay, and his children, in his home town of New York City—and Congress was so desperate for a reliable Secretary of Foreign Affairs that it accepted his demand. Jay found the Secretaryship vexing, especially when, in 1786, he had sought congressional authorization to negotiate a commercial treaty with Spain by making a tactical concession of American rights to gain access to the lower Mississippi River and the port of New Orleans, then under Spanish control. Suspicious of his motives and scenting bias on Jay's part in favor of the commercial northeastern states, the delegates from the five Southern states made clear that they would block any attempt to ratify any treaty that Jay negotiated on his proposed terms. This debacle confirmed Jay's sour view of the Confederation and his commitment to national constitutional reform, a position that he held throughout 1787 and 1788, during the framing and adoption of the Constitution. Indeed, it was Jay's shrewd, diplomatic efforts at the New York ratifying convention in 1788, at least as much as the oratorical pyrotechnics of his colleague Alexander Hamilton, that helped secure New York's ratification of the Constitution.<sup>40</sup> Moreover, Jay's *Address to the People of the State of New-York* proved far more popular and effective as a pro-Constitution pamphlet than the two stout volumes of essays known as *The Federalist*.

In 1789, President Washington offered Jay his choice of positions in the new government. Rather than take the office of Secretary of State, the institutional successor to the Secretaryship for Foreign Affairs, Jay accepted appointment as the first Chief Justice of the United States. Again, however, Jay found his new post more vexing than gratifying.

In 1795, after nearly six years as Chief Justice, Jay left the High Court, feeling bitterness about his time there, and for good reason. As the first Justices of the new Supreme Court, Jay and his colleagues were victims of widespread suspicion of efforts to create an independent federal judiciary. The need to allay these suspicions strongly influenced the creators of the Judiciary Act of 1789. The framers of the 1789 Act created a system of lower federal courts dividing the nation into three judicial circuits. Justices would ride from state to state, holding circuit courts in their assigned circuits, sitting in each state's circuit court with each state's federal district judge. This system of circuit-riding would give the Justices something to do while waiting for the new federal judicial system to generate an appellate workload for the Supreme Court.<sup>41</sup> These trial courts were the workhorses of the federal judicial system, becoming the principal means by which the federal government had direct contact with the American people.<sup>42</sup>

40. RICHARD B. MORRIS, *John Jay and the Adoption of the Federal Constitution in New York: A New Reading of Persons and Events*, 63 N.Y. HIST. 133 (1982).

41. See Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753 (2003), for a valuable history of circuit-riding. See *id.* at 1756–61 for a discussion of justifications for the 1789 statute on circuit-riding. See 2 DHSC, *supra* note 9 (dealing with the Justices on circuit between 1790 and 1794); 3 DHSC, *supra* note 9 (dealing with the Justices on circuit between 1789 and 1800); 4 DHSC, *supra* note 9 (dealing with efforts between 1789 and 1801 to organize and reorganize the federal judiciary).

42. Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127 (1967), reprinted in RALPH LERNER, *THE THINKING REVOLUTIONARY: PRINCIPLE AND PRACTICE IN THE NEW REPUBLIC* 91 (1987).

Riding circuit, however, was onerous and sometimes potentially life-threatening. Justice James Iredell, who was repeatedly assigned to the Southern Circuit, complained that the assignment required him to travel 1500 miles twice a year over bad roads on horseback. Iredell died suddenly in Edenton, North Carolina, on October 20, 1799, at the age of forty-nine; later scholars have attributed his demise to the toll that circuit-riding exacted on him.<sup>43</sup> So, too, while riding circuit in the winter of 1800, Justice Samuel Chase fell off his horse and nearly drowned as he tried to ford the Susquehanna River.<sup>44</sup> Jay and his colleagues made repeated attempts to lobby Congress and President Washington for judicial reform, but Congress seemed indifferent to the Court's plight—a circumstance that infuriated the Justices and left Jay, in particular, with few illusions about how little value anyone put on the federal judiciary.<sup>45</sup>

Jay and his brethren suffered from more than the burdens of circuit-riding. In 1798, the ratification of the Eleventh Amendment to the Constitution represented an extraordinary rebuke to the Court. This amendment overturned perhaps the Jay Court's most important case interpreting the Constitution—*Chisholm v. Georgia* (1793), which, by a vote of four to one, upheld the right of a citizen of one state to sue another state in federal court without that state's consent.<sup>46</sup> The issue raised by *Chisholm* might seem a technical matter of jurisdiction, but at the time it threatened to create a tidal-wave of litigation against the states in federal courts on a variety of grounds. The most threatening such ground was the prospect that former Loyalists, now refugees in Canada or Great Britain, might sue states to recover lands confiscated from them during the Revolution—lands that states had resold to enable more of their citizens to own land and thereby to qualify for voting and holding office, as well as to ease the demand for land. The threat that such lawsuits might destabilize the states' new economic, social, and political orders was so terrifying that such leading Federalists as Alexander Hamilton had pledged during the ratification controversy of 1787–1788 that the federal courts never would hear such cases. As Justice James Iredell maintained in lonely, agitated dissent, *Chisholm* gave the lie to those assurances. Within weeks of receiving news of the Court's decision in *Chisholm*,

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43. On Iredell's travails, see Glick, *supra* note 41, at 1766 n.82, and sources cited therein; Dale Yurs, *The Early Supreme Court and the Challenges of Circuit-Riding*, 36 J. SUP. CT. HIST. 181 (2011). See *id.*, at 184–86, 187, for much of the discussion on Iredell's travels. For documentation of Iredell's appointment, see 1 DHSC, *supra* note 9, at 60, 64–65, 68.

44. Letter from Samuel Chase to Hannah Chase (Feb. 4, 1800), in 1 DHSC, *supra* note 9, at 888–89. For documentation of Chase's appointment, see *id.* at 110–14; JAMES HAW ET AL., *STORY PATRIOT: THE LIFE OF SAMUEL CHASE* (1980); STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS, AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* (1991).

45. On the Justices' efforts to secure either reform or abolition of circuit-riding, see Glick, *supra* note 41, at 1763–72, 1774–82; Wythe Holt, "The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects": *The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793*, 36 BUFF. L. REV. 301–40 (1987); Wexler, *supra* note 2, at 1410–12, and sources cited therein. For a discussion of an attempted radical reworking of the federal judiciary that failed, see Wythe Holt, "Federal Courts as the Asylum to Federal Interests": *Randolph's Report, the Benson Amendment, and the "Original Understanding" of the Federal Judiciary*, 36 BUFF. L. REV. 341 (1987).

46. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 493 (1793).

four states petitioned Congress to adopt such an amendment, and Congress lost no time in acting on their demands. Although it is unclear when the states ratified the amendment, Secretary of State Timothy Pickering declared it ratified in 1798. The Eleventh Amendment not only overturned the Court's decision in *Chisholm*, but did so by declaring that the Constitution should not and could never be interpreted in the way that Jay and all his colleagues, with the exception of Iredell, had read it: as an insult of epic proportions.<sup>47</sup>

Nothing could be done to ease the pain of the rebuff to the Court embodied by the Eleventh Amendment, but Adams hoped that pending legislation reshaping the federal judiciary by abolishing circuit-riding might persuade Jay to accept reappointment as Chief Justice. What became the Judiciary Act of 1801 was the focus of heated debate in both houses of Congress; this statute would create new federal circuit courts to handle appeals from the specialized district courts and to deal with their own caseloads, leaving the Justices free to manage the Supreme Court's appellate caseload and the few categories of cases that they could hear in the Court's original jurisdiction. The bitterness of the debate raised worries about whether Congress would pass the measure and send it to President Adams for his signature before his term expired.<sup>48</sup>

Meanwhile, on December 18, 1800, with wary hope, Adams sent Jay's name to the Senate, which swiftly confirmed him the next day.<sup>49</sup> Adams immediately sent word to Jay of his appointment in a heartfelt letter assuring Jay that in the present turbulent times, "nothing will cheer the hopes of the best men so much, as your acceptance of this appointment. You have now a great opportunity to render a most signal service to your Country. I therefore pray you most earnestly to consider of it seriously & accept it."<sup>50</sup> Adams also waxed eloquent in praise of Jay's talents and abilities, hoping perhaps that such compliments would move Jay to return to the Court:

I had no permission from you to take this step but it appeared to me that providence had thrown in my way an opportunity not only of marking to the publick the spot where in my opinion the greatest mass of worth remained collected in one individual but of furnishing my Country with the best security its inhabitants afforded against the increasing dissolution of morals.<sup>51</sup>

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47. On *Chisholm v. Georgia* and how the Eleventh Amendment overruled it, see RICHARD B. BERNSTEIN, *AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT?* 48–70 (1993); CLYDE F. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 1–74 (1972); DAVID E. KYVIG, *EXPLICIT & AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION 1776–1995*, at 112–14, 124–25 (1996); JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* 21–22 (1987).

48. See Turner, *supra* note 2, at 149–50, reprinted in PREYER ESSAYS, *supra* note 2, at 45–46. On this pivotal statute, see also Kathryn Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 WM. & MARY Q. 3 (1965), reprinted in PREYER ESSAYS, *supra* note 2, at 10–38.

49. For documentation, see 1 DHSC, *supra* note 9, at 144–45.

50. Letter from John Adams to John Jay (Dec. 19, 1800), in 1 DHSC, *supra* note 9, at 145–46.

51. *Id.*

As he admitted in his letter, however, Adams had never asked Jay whether he would accept reappointment as Chief Justice. Adams's critics cite this oversight as an example of his habit of making appointments and other decisions impulsively<sup>52</sup>—and yet this was precisely the course of action that Washington had followed in January 1796 in naming Cushing as Chief Justice. Over the next two weeks, Adams pondered what Jay would do; in the meantime, he continued to seek potential candidates to fill a new vacancy on the Court should Jay decline and Adams have to return to his previous plan of naming Cushing or Paterson to the Chief Justiceship. Another consideration weighing on Adams was the fractious congressional debate over the Judiciary Act of 1801; its fate might determine whether Adams would have to appoint a sitting Justice to the Chief Justiceship or look outside the Court if Jay said no.<sup>53</sup>

On January 2, 1801, Jay wrote to Adams refusing his appointment; Adams received the letter about two weeks later.<sup>54</sup> Jay balanced between expressing warm feelings for his old colleague and venting his dislike for how badly the nation was treating its new court system. Calm, decisive, and icy-cold in his assessment of the post offered to him, Jay made clear that he had no faith in efforts at judicial reform—the argument that Adams had hoped might bring Jay around to accepting reappointment to the Court. Jay reminded Adams that the Judiciary Act of 1789, which created circuit-riding, was shaped more by “certain Prejudices and Sensibilities, than . . . the great and obvious Principles of sound Policy.”<sup>55</sup> He added that ten years of hopes for reform “have not been realized; nor have we hitherto seen convincing Indications of a Disposition in Congress to realize them.”<sup>56</sup> Jay did not mention, among the many slights that the judiciary received at congressional hands, the adoption of the Eleventh Amendment, but he did not have to do so. Both men recognized the amendment as a stinging blow to the Court.

Jay ended his letter with a blunt summation of his reasons for refusing his appointment; his statement deserves extended quotation:

I left the Bench perfectly convinced that under a System so defective it would not obtain the Energy, weight, and Dignity which are essential to its affording due support to the national Government; nor acquire the public Confidence and Respect which, as the last Resort of the Justice of the nation, it should possess. Hence I am induced to doubt both the Propriety and the Expediency of my returning to the Bench under the present System; especially as it would

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52. See, e.g., CLARE CUSHMAN, COURTWATCHERS: EYEWITNESS ACCOUNTS IN SUPREME COURT HISTORY 10 (2011); Turner, *supra* note 2, at 144, reprinted in PREYER ESSAYS, *supra* note 2, at 40. See also the examples cited *infra* note 66.

53. See Turner, *supra* note 2, at 158–60, reprinted in PREYER ESSAYS, *supra* note 2, at 53–55.

54. See 4 JOHN JAY, THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY §§ 284–85 (Henry P. Johnson ed., Da Capo Press, reprint 1971) (1890–1893) [hereinafter PAPERS OF JOHN JAY], reprinted in 1 DHSC, *supra* note 9, at 146–47.

55. 1 DHSC, *supra* note 9, at 146; 4 PAPERS OF JOHN JAY, *supra* note 54, at 285.

56. 1 DHSC, *supra* note 9, at 146; 4 PAPERS OF JOHN JAY, *supra* note 54, at 285.

give some Countenance to the neglect and indifference with which the opinions and Remonstrances of the Judges on this important Subject have been treated.<sup>57</sup>

Perhaps realizing that he had been uncharacteristically undiplomatic, Jay concluded his letter by acknowledging his sense of public obligation; at the same time, he concluded, he could not overlook that “the state of my health removes every doubt, it being clearly and decidedly incompetent to the fatigues incident to the office.”<sup>58</sup> Even in reference to an ostensibly private reason for refusing reappointment, the New Yorker could not forbear pointing out the taxing effects of being Chief Justice (including the ordeal of circuit-riding).

Even while awaiting Jay’s reply to news of his reappointment to the Chief Justiceship, Adams half-expected him to decline, but he had confided in nobody, not even his wife and closest political advisor, Abigail Adams, how likely it was that Jay would refuse reappointment or what Adams might do in that case.<sup>59</sup> The historical record offers conflicting evidence of Adams’s thinking as he awaited Jay’s response. There are some indications that he actually was returning to the previous option of naming a sitting member of the Court to succeed Ellsworth and then naming a new Justice to fill that vacancy, or accepting the idea floated in Congress, then in the midst of drafting the Judiciary Act of 1801, that it would be wise to shrink the Court’s membership to five, relieving Adams of the burden of making two appointments to the Court—as well as leaving no vacancy for his successor to fill. All the while, Adams was working side-by-side with Secretary of State John Marshall—and taking Marshall’s measure.

## VI. PRESIDENT ADAMS AND CHIEF JUSTICE MARSHALL

As of January 1801, John Marshall had served as John Adams’s Secretary of State for a little less than a year, but he had already won the President’s confidence and liking. Marshall was born in Virginia in 1755 and, at the age of twenty, commanded a unit of Virginia militia during the opening months of the Revolution. Starting his military career as a lieutenant in a local regiment known as the Culpeper Minutemen, he enlisted in the Continental Army and became first a lieutenant and then a captain of the Eleventh Virginia Continental Regiment. Serving under George Washington at Valley Forge, the young Marshall swiftly formed a deep admiration for his fellow Virginian. After the war’s end, Marshall studied for the Virginia bar, including six months of lectures by George Wythe at the College of William and Mary. In 1780, Marshall received his law license, bearing the signature of Virginia’s governor, Thomas Jefferson—a notable historical irony, in light of events some thirty years later that would pit Marshall, then Chief Justice, against President Jefferson.<sup>60</sup>

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57. 1 DHSC, *supra* note 9, at 147; 4 PAPERS OF JOHN JAY, *supra* note 54, at 285.

58. 1 DHSC, *supra* note 9, at 147; 4 PAPERS OF JOHN JAY, *supra* note 54, at 285–86.

59. See Turner, *supra* note 2, at 146, 149, reprinted in PREYER ESSAYS, *supra* note 2, at 42, 44–45.

60. DAVID ROBARGE, A CHIEF JUSTICE’S PROGRESS: JOHN MARSHALL FROM REVOLUTIONARY VIRGINIA TO THE SUPREME COURT 55 (2000). This and the following five paragraphs of this article are based on this fine but neglected monograph. For authoritative studies of Marshall’s life, see the dated but still useful

Launching himself as an attorney, Marshall soon had a wide-ranging and varied law practice. Like most other attorneys of his time, he focused on such issues as property disputes, controversies over land titles, and will and estate contests. In 1788, his strong support for reforming the general government led him to join the Federalists in backing the proposed Constitution. Elected as a Federalist delegate from Henrico County to Virginia's ratifying convention in Richmond, he joined forces with such leading Federalists as James Madison and George Wythe, speaking with particular effectiveness in defense of the Constitution's Article III, which authorized an independent federal court system headed by "one Supreme Court."<sup>61</sup>

Following the Constitution's ratification, and despite the praise he received for his efforts in the Virginia ratification contest, Marshall navigated increasingly troubled political waters. Most Virginia politicians opposed the fiscal policies proposed and advocated by Washington's Secretary of the Treasury, Alexander Hamilton; thus, Marshall became more and more prominent among the slowly dwindling band of Virginia's Federalists—even though, in 1791, he chose to retire from public life to practice law, speculate in western lands, and care for his ailing wife.

From 1791 to 1797, however, despite his intentions, Marshall found himself shuttling once more between private and public life. The demands of his growing law practice clashed with his political sympathies, for he often represented Virginia debtors seeking to evade the claims of American and British creditors, or to defend Virginia statutes easing debtors' burdens in the face of the Constitution and national treaties. In 1796, he argued his only case as an attorney before the U.S. Supreme Court—*Ware v. Hylton*, which he lost decisively.<sup>62</sup> In that case, Marshall sought to defend a Virginia statute authorizing confiscation by the state of debts owed to British subjects. Despite his efforts, which won admiration for his eloquence and his masterly legal analysis of the questions presented, the Supreme Court struck down the statute on which he and his client relied, holding that it violated the ban on such statutes by the Treaty of Paris of 1783, and thus the Constitution's Supremacy Clause.

In the late 1790s, Marshall was returning to prominence as a Southern Federalist, emerging as second only to Washington himself in Virginia. Indeed, as the Federalists increasingly became a regional rather than a national political force (with its center of gravity in New England), Marshall's standing helped vault him into national prominence. Nonetheless, in 1795 he turned down Washington's offer to name him Attorney General of the United States; in 1796, he again turned down another bid by Washington to bring him into the administration, this time as American minister to France; and in 1798, he declined appointment to the Supreme Court (to succeed James Wilson, who had undergone a spectacular self-destruct under the twin pressures of financial ruin and failing health). Instead, Marshall recommended that

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ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* (1916); see also CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* (1996); R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* (2001); and JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* (1996).

61. For a valuable discussion, see ROBARGE, *supra* note 60, at 106–12, and sources cited therein.

62. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

President John Adams name his good friend Bushrod Washington, who was the former President's nephew—a recommendation that Adams followed.<sup>63</sup> (Later, Justice Washington would repay the favor by asking Marshall to write the authorized biography of George Washington.<sup>64</sup>)

In 1797, however, he did accept a federal appointment from President Adams. When he was named, with Charles C. Pinckney and Elbridge Gerry, to undertake a special diplomatic mission to ease tensions between the United States and France, the appointment launched a vital episode in his life—cementing his national reputation, bolstering his status as a Federalist, and, above all, commending him to the attention of President Adams, a man not given to undue fondness for Virginians. Marshall and his colleagues had barely arrived in France before they confronted three French diplomats, who demanded bribes for themselves and other officials as the price of negotiations. When the Americans indignantly refused, the mission failed. Marshall returned home with the diplomats' report documenting the French demand for bribes, which President Adams then released with shrewd timing and spectacular political effect. The Americans' defense of their national honor against French insults in the so-called XYZ Affair made Marshall a national hero. Following his return to America, Marshall continued to rise within the Federalists' fractious ranks, esteemed by both High Federalists and Adams Federalists, yet unswerving in his support for President Adams. Following the President's purge of High Federalists from his Cabinet in 1800, he first named Marshall Secretary of War and then Secretary of State. Thus, when Adams had to deal with the conundrum of whom to name to the Chief Justiceship of the United States, he had Marshall by his side.

In an autobiographical sketch written over twenty years later at the request of his friend and colleague Justice Joseph Story, Marshall recalled what happened when Adams received Jay's letter refusing reappointment to the Court.<sup>65</sup> On reading the letter, Adams declared to Marshall, "Mr. Jay has declined his appointment." Then he asked, "Whom shall I nominate now?" Marshall suggested Paterson, aware that most Federalist Senators leaned toward the New Jerseyan, but Adams dismissed the idea "in a decided tone." Adams then looked at Marshall and said, "I believe that I must nominate you." A surprised but gratified Marshall accepted Adams's decision to name him the nation's highest ranking judge.

Adams's choice of Marshall might look like one of those impulsive acts so often denounced by Adams's critics,<sup>66</sup> but further examination of his choice makes clear

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63. On Bushrod Washington, see James R. Stoner, Jr., *Heir Apparent: Bushrod Washington and Federal Justice in the Early Republic*, in *SERIATIM*, *supra* note 12, at 322–49.

64. FREEMAN, *supra* note 8, at 62–104. The original edition is JOHN MARSHALL, *THE LIFE OF GEORGE WASHINGTON* (Philadelphia, C.P. Wayne, 1804–1807) (five vols.). A modern reprint of an 1838 one-volume abridgment is JOHN MARSHALL, *THE LIFE OF GEORGE WASHINGTON: SPECIAL EDITION FOR SCHOOLS* (Robert Faulkner & Paul Carriss eds., 2000) (1838).

65. See JOHN MARSHALL, *AN AUTOBIOGRAPHICAL SKETCH* (John Stokes Adams ed., 1937); 1 DHSC, *supra* note 9, at 928. For the documentation of Marshall's appointment, see 1 DHSC, *supra* note 9, at 152–55.

66. Even the otherwise admiring John Patrick Diggins criticizes Adams for his erratic impulsiveness. JOHN PATRICK DIGGINS, *JOHN ADAMS* 10 (2004). Alexander Hamilton denounced Adams's tendency to

that he knew what he was doing, and that he chose well. Adams saw in Marshall a man only forty-five years old, healthy and vigorous, unlike Ellsworth or Cushing, and thus someone who would serve for a significant period as Chief Justice. Adams also knew that Marshall was a skilled lawyer and veteran diplomat, like Jay—qualities that a new Chief Justice could draw on in winning his colleagues' loyalty and support. Adams also valued Marshall's popularity, rooted in his part in the XYZ Affair that had ignited the quasi-war with France. Finally, as a man who had endured much from subordinates and political allies whose loyalties were questionable, Adams knew that Marshall was a Federalist loyal to him rather than to the High Federalists.<sup>67</sup>

The Senate received news of Adams's nomination of Marshall with consternation. Adams's choice left many Senate Federalists angry and shaken; most of them had backed Paterson and had assured him of their support. (Other Senators, disconcerted by Marshall's relative youth, even expressed the private opinion that Adams should name himself Chief Justice.<sup>68</sup>) At first, some Senators who were enthusiasts for Paterson debated with one another the chances of forcing the President to their point of view by delaying or even rejecting Marshall's nomination. But finally the Senators realized that they could not reject Marshall without risking an even more offensive appointment from Adams or risking that the new President, probably Thomas Jefferson, would choose the next Chief Justice. In addition, the pressure to complete the task of recasting the federal judiciary by enacting the Judiciary Act of 1801 made such a battle with the President pointless and destructive.<sup>69</sup> So, despite their grumbling, they confirmed Marshall. Thus it was John Marshall who swore in his distant cousin, Thomas Jefferson, as President of the United States. And, ultimately John Marshall proved to be John Adams's most enduring legacy as President.

## VII. CONCLUSION

This story of President John Adams's dealings with four Chief Justices is tangled and complex. It is a story, by turns, of the use of Justices as diplomats; of the politics of judicial selection; of the need for institutional reform; of the effects on laws of partisan strife; of the competing demands of public and private realms in a leading politician's struggle to chart his own course; and ultimately of the roundabout and at times impulsive ways that Presidents establish their legacies and Supreme Court Justices get the chance to achieve greatness.

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decide issues on "Impulse and Caprice." FERLING, *supra* note 4, at 397; KURTZ, *supra* note 5, at 100. See also sources cited in note 52, *supra*.

67. In addition to the sources cited in note 60, *supra*, see for excellent treatments of Marshall as Chief Justice, HERBERT A. JOHNSON, *THE CHIEF JUSTICESHIP OF JOHN MARSHALL 1801-1835* (1998); Haskins & Johnson, *supra* note 24; G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835*, in 3-4 *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES* (Cambridge Univ. Press 2010) (1988).

68. Turner, *supra* note 2, at 158, *reprinted in* PREYER ESSAYS, *supra* note 2, at 53-54.

69. Turner, *supra* note 2, at 160-62, *reprinted in* PREYER ESSAYS, *supra* note 2, at 55-57.

Consider, for example, a few counterfactual situations<sup>70</sup>: What might have happened had Thomas Boylston Adams been able to give his father timely assurance that Jared Ingersoll *would* accept appointment as an Associate Justice? Such assurance might have led Adams to promote Cushing—or, had Cushing declined, Paterson—to Chief Justice. Cushing as Chief Justice would have been a place-filling appointment, given that the stresses of being Chief Justice might have sapped Cushing's strength so that he would have died even earlier than September 13, 1810 (the date of his actual death). Such a scenario would have given the eventual Republican President, Thomas Jefferson, the chance to appoint a new Chief Justice—perhaps William Johnson or Spencer Roane (often named as a candidate should Jefferson have the chance to name a Chief Justice). Cushing also might have declined Adams's offer, repeating his conduct from 1796, in which case Adams might have turned to Paterson, a choice in line with the expectations and hopes of most Federalist Senators. Paterson, however, died on September 9, 1806, so he also would have been a place-holding appointment, again giving Jefferson the chance to name a Chief Justice to his liking.

In any event, had Adams promoted either Cushing or Paterson to the Chief Justiceship and then named Ingersoll to fill the vacancy left by that promotion, we might not have had the landmark Marshall Court decisions that form the spine of any standard course in constitutional law. Nor might we have had Associate Justice Joseph Story, whom President James Madison appointed to the Court in 1812 to succeed Cushing after two previous nominees (Levi Lincoln, Jefferson's Attorney General, and the diplomat and former Massachusetts Senator John Quincy Adams) had declined the appointment, and a third (Alexander Wolcott) had been rejected by the Senate.<sup>71</sup> In turn, not having been named to the Court, it is not clear whether Story would have become the Dane Professor of Law at the Harvard Law School, nor whether he would have reshaped American law with the remarkable series of treatises on commercial and constitutional law growing out of his lectures at Harvard.

And what would American constitutional law, not to mention the Supreme Court, have become under the leadership of Cushing or Paterson, and then of Johnson or Roane? Would it have set out to vindicate and define federal power to regulate interstate commerce, or to defend national supremacy over the states, as the Court did under Chief Justice Marshall's leadership? Further, in a question indicating the frequent mingling of law and politics in the early Republic, would another Chief Justice have engaged in Marshall's effort to separate law and politics and thereby to

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70. For an intriguing exploration of the value of counterfactual history, see *VIRTUAL HISTORY: ALTERNATIVES AND COUNTERFACTUALS* (Niall Ferguson ed., 1999); see also R.B. Bernstein, *Review of Ferguson, Niall ed., Virtual History: Alternatives and Counterfactuals*, H-NET (Jan. 2000), <http://www.h-net.org/reviews/showrev.php?id=3721>.

71. See R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 70–71 (G. Edward White ed., 1985); Morgan D. Dowd, *Justice Joseph Story and the Politics of Appointment*, 9 AM. J. LEGAL HIST. 265–85 (1965).

protect the Court and the federal bench from the vicissitudes of political change?<sup>72</sup> By contrast, had Marshall *not* been named to the Court, would he have been able to rekindle and redirect the energies of the demoralized Federalists and prevent them from dwindling into a purely sectional faction? Would the Federalists have found new inspiration and energy under the political leadership that Marshall could have offered them, perhaps even backing him for the presidency against Jefferson in 1804 or Madison in 1808 or 1812?

These counterfactual questions offer new confirmation of the truth of the oft-quoted comment by Oliver Wendell Holmes, Jr., when, in 1901, as chief justice of the Massachusetts Supreme Judicial Court, he spoke at a court ceremony marking the centennial of Marshall's appointment as Chief Justice:

A great man represents a great ganglion in the nerves of society, or, to vary the figure, a strategic point in the campaign of history, and part of his greatness consists in his being *there*. I can no more separate John Marshall from the fortunate circumstance that the appointment of Chief Justice fell to John Adams, instead of to Jefferson a month later, and so gave it to a Federalist and loose constructionist to start the workings of the Constitution, than I can separate the black line through which he sent his electric fire at Fort Wagner from Colonel Shaw.<sup>73</sup>

Thomas Boylston Adams's failure, despite his best efforts to nail down Jared Ingersoll's candidacy for a seat on the Court, John Jay's decision to forgo another bruising stint of public service, and John Adams's willingness to seize on John Marshall's availability all suggest that we must heed the lessons that Jim Simon teaches in his work on constitutional history. We must acknowledge—and be grateful for—the influence of the contingent and the unforeseen on the Supreme Court's long and tortuous path from institutional irrelevance to judicial pre-eminence.

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72. For this view of Marshall, see WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* *passim* (2000); William E. Nelson, *The Eighteenth-Century Background of John Marshall's Jurisprudence*, 76 MICH. L. REV. 893 (1978).

73. Oliver Wendell Holmes, Jr., *Remarks of the Chief Justice of the Massachusetts Supreme Judicial Court (Feb. 4, 1901)*, in 178 MASSACHUSETTS REPORTS: CASES ARGUED AND DETERMINED IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, FEBRUARY 1901–MAY 1901, at 624–28 (1902).