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A visitor to the Supreme Court in Washington today sees a building that is one of the most imposing and distinctive in the nation's capitol—a building that John Frank described as the "Marble Palace."[1] Upon entry to the building, the visitor encounters on the ground floor an area known as the Lower Great Hall. At one end is a formidable statue of Chief Justice John Marshall seated in his judicial robes and looking into the distance with an intent gaze. Throughout the ground floor public area are portraits and busts of former Justices. Each one appears serious and thoughtful. There is a solemnity to the atmosphere despite the presence of many visitors.

This mood of solemnity continues as one goes up one floor to the Great Hall itself, which is outside the courtroom. The ceiling is two stories high and situated against the side walls are busts of the Court's Chief Justices. The very dimensions of the Great Hall are imposing, contributing to the aura of great authority that is associated with the Court. Inside the courtroom, which one enters through two massive bronze doors, the effect is maintained. The ceilings are two stories high, as in the Great Hall, and large marble pillars run along the walls.

If one proceeds into the courtroom—which is open to the public—at a time when the Court is in session, one sees the Chief Justice and eight Associate Justices, black robed, sitting behind the long bench in nine individually sized black chairs. The courtroom itself adds to the atmosphere of dignity and authority; it is flanked on each

* Chief Justice of the United States. Chief Justice Rehnquist delivered this address at the third annual Robert B. Cole Lecture Series held at the University of Miami School of Law on Thursday, February 4, 1988.

1. John Frank used the phrase as the title of his book about the Supreme Court's role in American life. J. FRANK, MARBLE PALACE (1958).

side by thirty-foot high columns, and friezes around the top of the walls show great moments in the history of the law.

A few months after watching the oral argument of an important case, a visitor might see on the front page of his local newspaper a story saying that the Court had decided the case that he had heard argued. The story would describe the importance of the decision in terms of how it would affect the lives of the American people. Decisions such as *Brown v. Board of Education*,[2] *Miranda v. Arizona*,[3] and *United States v. Nixon*,[4] have dramatically altered aspects of public education, criminal law, and political history.

Viewing the Supreme Court of the United States as it now is, the established and respected head of the third branch of the federal government, housed in a handsome building and deciding cases of considerable national importance, one could easily believe that it has always been thus. That, however, would be a mistaken belief. The Supreme Court in the early days of its existence received almost no public recognition, for the simple reason that it did very little that would have warranted such recognition. When the federal government moved from Philadelphia to Washington in 1800, the responsible authorities neglected until the last minute to find any space—say nothing of a separate building—for the Supreme Court. And of course even the number of Justices on the Court has changed from time to time. It started with a total of six members, gradually increased until it had ten members at the time of the Civil War, was reduced to eight as a result of congressional politicking during Reconstruction, and then went to nine where it has remained for over a century. It is about the evolution of this important institution during the first hundred years of its existence that I am going discuss.

Let us travel back in time to New York City in 1789—the then capital of the United States during the first year of the new government under the recently adopted Constitution of the United States. Every school child knows, of course, that the first President of the United States was George Washington. But hardly any school children know—indeed, many lawyers do not know—the name of the first Chief Justice. Some might guess John Marshall, who was surely our most eminent Chief Justice, but he was actually third or fourth depending on how one counts.

The first Chief Justice was John Jay. When you learn something more about his years in office, you will understand why he is not

2. 347 U.S. 483 (1954).
3. 384 U.S. 436 (1966).
4. 418 U.S. 683 (1974).

widely remembered today for his service to the country in that capacity. The Court had almost no duties to perform for its first three years. Its first term lasted from February 1 to February 10, 1790, and the business consisted mainly of appointing a Clerk of the Court and admitting attorneys to practice. The second term lasted for two days in August 1790. The Court did not decide a single case during 1791 or 1792.

It is relatively easy to see how a man of Jay's political talents might have become restive in the position of Chief Justice and could come to describe the post as "intolerable."[5] Perhaps to ease the tedium of his enforced idleness, Jay conducted an unsuccessful campaign for the governorship of New York in 1792. One can only assume that President Washington agreed with Jay's assessment of his Supreme Court duties, for in 1794 he appointed Jay to be his envoy to England to negotiate what became known as the Jay Treaty—an achievement for which Jay has been long remembered. Jay never bothered to return to his post as Chief Justice. After negotiating the treaty with England, he resigned as Chief Justice in 1795 to serve as governor of New York, a position to which he had been elected *in absentia* while in England.

President Washington then named John Rutledge of South Carolina to be Jay's successor; he received an interim appointment, but the Senate refused to confirm him in that position, giving rise to lasting uncertainty as to how many Chief Justices this country has had.

President Washington then turned to Oliver Ellsworth of Connecticut, who became the next Chief Justice. Ellsworth served for five years, but like Jay, he too was beguiled by the President into accepting a diplomatic mission abroad while still serving as Chief Justice. He became ill while he was President Adams' special envoy to France, and resigned his judicial position in December 1800. President Adams, in the waning days of his administration, tendered the position to its first occupant, John Jay, who declined it politely but emphatically in this language:

> 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

5. 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 89 (1923).

returning to the bench under the present system . . . .[6]

One can scarcely blame Jay for his low estimate of the Chief Justiceship. The Supreme Court of the United States was then, as it is now, an appellate court, a court which hears appeals from the decisions of other courts, rather than a court of first instance, which hears witnesses and decides facts. But during the first decade of its existence, there just were not many cases appealed to it from other courts; during this time the Court decided a total of less than fifty cases—an average of about four cases per year—and the average length of its sessions in Washington was between three and four weeks. But if the Supreme Court's function was strictly appellate, the function of the Justices of the Court was not. During most of the year in which the Supreme Court was not sitting, they were "riding circuit" in the various geographic areas of the court to which they were assigned, sitting as trial judges in the lower federal courts in their circuit. This was something that they would continue to do for nearly a century, and it was one of the less attractive aspects of the job.

So insignificant was the Supreme Court during this period of time that when the federal government moved from Philadelphia, where it had been from 1790 until 1800, to the newly designated and newly constructed Capitol in Washington, facilities for the Court were wholly overlooked in the move. President John Adams had moved into the newly built "President's House," as the White House was then called, late in the year 1800. The north half of the Capitol building had been constructed atop what was then known as Jenkins Hill, a prominent elevation roughly in the center of the District. But it was not until January 20, 1801, that any notice was taken of the need to provide the Supreme Court with a place to conduct its term, scheduled to begin the following month. At this time the District Commissioners recommended to Congress, "[a]s no house has been provided for the judiciary of the United States, we hope the Supreme Court may be accommodated with a room in the Capitol to hold its sessions until further provisions shall be made, an arrangement, however, which we would not presume to make without the approbation of Congress."[7] Congress responded to this suggestion by designating a committee room on the first floor of the Capitol building as a "courtroom," and there the Court sat for seven years until more spacious

6. 4 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 285 (H. Johnston ed. 1970).

7. HOUSE OF REPRESENTATIVES COMMISSION TO SUPERVISE CONSTRUCTION OF BUILDING FOR OFFICES FOR CAPITOL, DOCUMENTARY HISTORY OF THE CONSTRUCTION AND DEVELOPMENT OF THE UNITED STATES CAPITOL BUILDING AND GROUNDS, H. R. REP. NO. 646, 58th Cong., 2d Sess. (1904), *quoted in* C. WARREN, *supra* note 5, at 170.

quarters were afforded it. In the words of Charles Warren, a leading student of the Court: "In this small and undignified chamber, only 24 feet wide, 30 feet long and 21 feet high, and rounded at the south end, the Chief Justice of the United States and his Associates sat for eight years."[8]

Thus, in 1800, eleven years after the establishment of the national government under the Constitution, the Supreme Court was at a "low ebb." It was a distinctly junior partner among the three branches of the national government, and its work as an appellate court attracted very little notice because the cases it decided were not of much moment. The Justices of the Court were appellate judges in Washington for only a few weeks of the year, and the rest of the time they were riding their circuits, trying cases in the federal circuit courts. No wonder John Jay said "no" when John Adams offered him a return engagement as Chief Justice!

President Adams then turned to his Secretary of State, John Marshall of Virginia, and nominated him to be Chief Justice. Marshall was born in Fauquier County, Virginia, in 1755. He had commanded a line company in the Revolutionary War and had fought in the battles of Brandywine, Germantown, and Monmouth before he had reached twenty-five years of age. He served under George Washington at Valley Forge, from whom he acquired a strong sense of nationalism and respect for discipline and authority. He would later say that his military experience confirmed in him the habit of "considering America as [his] country, and Congress as [his] government."[9] After the War, and after approximately six weeks of legal studies at William and Mary College, Marshall was admitted to the bar. He served in the Virginia Legislature, then in Congress. He was one of the three "XYZ" Commissioners sent to deal with Tallyrand and the French Directory in 1798, and upon his return John Marshall appointed him Secretary of State. From the portraits of John Marshall in existence today, it seems to me that the most striking characteristic of the man was his piercing dark eyes. In physical appearance he was tall, loose jointed, and often negligently dressed. William Wirt wrote of him: "[I]n his whole appearance, and demeanour; dress, attitudes, gestures; sitting, standing or walking; he is as far removed from the idolized graces of lord Chesterfield, as any other gentleman on earth."[10] And his long-time colleague on the Court, Joseph Story, said of him: "I love his laugh—it is too hearty for an intriguer; and

8. C. WARREN, *supra* note 5, at 171.

9. *See* W. REHNQUIST, THE SUPREME COURT 122 (1987).

10. W. WIRT, THE LETTERS OF THE BRITISH SPY 178 (R. Davis ed. 1970).

his good temper and unwearied patience are equally agreeable on the bench and in the study."[11]

Marshall would serve as Chief Justice for thirty-four years—the longest tenure in that office of any of its incumbents—and as a result of his labors he would be known ever after as "The Great Chief Justice." He authored the Court's opinion in the fountainhead case of *Marbury v. Madison*,[12] which established the proposition that the courts of the United States have the authority to declare an act of Congress unconstitutional. He spoke for the Court in the case of *Gibbons v. Ogden*,[13] expounding the scope of the authority that Congress was given under the Constitution to regulate commerce among the several states. He did the same in *McCulloch v. Maryland*,[14] holding that Congress had the authority to charter a bank under the "necessary and proper" clause of the Constitution. In the famous case of *Trustees of Dartmouth College v. Woodward*,[15] Marshall said for the Court that a colonial charter was a "contract" that the New Hampshire State Legislature could not impair without violating the Constitution.

Doctrinally, the contributions of the Marshall Court were of enormous importance to the subsequent development of the nation. It established the federal judiciary as full-fledged partner in the national government. It read broadly the authority of Congress to regulate commercial and economic matters, and read equally broadly the limitations that the Constitution placed on the state governments. At a time in our nation's history when the issue was genuinely in doubt, the Marshall Court laid the constitutional groundwork whereby the President and Congress over the years determined that it would be Alexander Hamilton's vision of the United States, and not Thomas Jefferson's, which would be fulfilled.

It is often a mistake to give too much credit to any particular Chief Justice for the decisions of the Court during the time that he presided. But it is no mistake to give such credit to John Marshall for the Court's decisions over the thirty-four years during which he presided. Until he became Chief Justice, the Court had delivered its opinions *seriatim*—meaning that each Justice delivered at least a short opinion in each case—in the English tradition. Marshall, in what his

11. JUNIOR LEAGUE OF WASHINGTON, THE CITY OF WASHINGTON 101 (T. Froncek ed. 1977).

12. 5 U.S. (1 Cranch) 137 (1803).

13. 22 U.S. (9 Wheat.) 1 (1824).

14. 17 U.S. (4 Wheat.) 316 (1819).

15. 17 U.S. (4 Wheat.) 518 (1819).

biographer described as "one of those acts of audacity,"[16] changed this tradition in the Supreme Court of the United States so that thereafter an opinion for the Court was delivered by only one of the Justices, and those in general agreement simply concurred without opinion. It is easy to see how this new practice greatly strengthened the authority of the Court's opinions. And since it was Marshall who usually spoke for the Court in important cases, this practice strengthened the authority of "his" opinions for the Court.

Yet at the time of Marshall's appointment by President Adams, though he was recognized as one of the ablest members of the Federalist Party in Virginia, he was not regarded as among the very top flight of lawyers in the nation. How then did he achieve his mastery on the Court? It cannot be explained on grounds of political allegiance, since John Adams, who appointed him, was the last Federalist to be elected President of the United States. After him, for twenty-four years the Virginia dynasty of Republican Presidents held sway: Thomas Jefferson, James Madison, and James Monroe. These Presidents dearly wanted their appointees to the Court to challenge Marshall, with his federalist views of sweeping national power, but it simply did not work out that way. It is also tempting to explain Marshall's preeminence on the basis that he was, so to speak, present at the creation, but we know of course that he was not; both Jay and Ellsworth preceded him.

Surely one of Marshall's great abilities that contributed to his preeminence was his ability to explain clearly and forcefully why the Court reached the conclusions it did. Marshall had the power of clear, logical exposition, vouchsafed to none of his predecessors, and his opinions reflect it. They are a breath of fresh air, given that they were written at the time when English and American legal writing was often shrouded in fog.

Finally, there must have been a strong measure of the ability to persuade his colleagues in Marshall. He was not nearly as learned in the law as some of them, but perhaps his experience in dealing with his fellow human beings in such positions as commander of an artillery company during the winter at Valley Forge was a more than adequate substitute for book learning. The conviviality of the boarding house life to which he and his colleagues submitted themselves during the short time each year they were in Washington seems to have been made for someone who could capitalize on his abilities as a "team leader." Marshall did just that. Even in his own lifetime his accomplishments as Chief Justice made such a public impression that John

16. 3 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 16 (1919).

Adams in his retirement would say, "My gift of John Marshall to the people of the United States was the proudest act of my life."[17]

None of Marshall's colleagues during his thirty-four years of service on the Court achieved the enviable reputation that he did. Justice Gabriel Duvall of Maryland, for example, served for twenty-three years—from 1812 to 1835—during which time he authored a total of eighteen opinions—not quite one opinion per year. The only written record of his views on a question of constitutional law was his dissent in *Dartmouth College*, an early model of precision and brevity that I now quote to you in full: "Duvall, Justice, dissented."[18]

During the last days of John Marshall's tenure as Chief Justice, President Andrew Jackson cast about for a good Democrat to fill a vacancy on the Court from the Gulf Coast states. He hit upon his old friend William Smith, a native of Alabama and then seventy-four years old. Without getting in touch with the nominee, Jackson forwarded the nomination to the Senate, which promptly confirmed him—the Senate in those days apparently having a much different idea of its constitutional role of advising and consenting than it does now. But Smith upset the entire apple cart by declining the appointment, though he did graciously write a public letter explaining why he would decline, in his words, "A dignified office of light labors, and a permanent salary of $5,000."[19]

Upon John Marshall's death in 1835, Andrew Jackson appointed Roger B. Taney of Maryland to succeed him. Taney had been born in 1777 to a family of the southern Maryland tobacco-planting aristocracy, but since he was a younger son he realized he would have to fend for himself and make his own way in the world. He studied law in Annapolis and was admitted to the Maryland Bar at the age of twenty-two. He was active in Democratic politics in Maryland, and was a strong supporter of Andrew Jackson; when the latter reshuffled his cabinet in 1831, Taney was named Attorney General. He stood shoulder to shoulder with Jackson during the latter's fight with the Bank of the United States, and was ultimately named Secretary of the Treasury in order that he would accede to the President's orders to withdraw government funds from the Bank. Jackson nominated Taney as an Associate Justice in 1835, but opposition in the Senate prevented the nomination from ever coming to a vote. He fared better

17. C. WARREN, *supra* note 5, at 178.

18. *Trustees of Dartmouth College*, 17 U.S. (4 Wheat.) at 713 (Duvall, J., dissenting). For a discussion of the historical debate about the precise phraseology of Justice Duvall's monumental expostition on constitutional doctrine, see Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466, 470-71 n.33 (1983).

19. C. SWISHER, THE TANEY PERIOD 1836-64, at 65 (1974).

in December of that year when the Senate confirmed his nomination as Chief Justice by a vote of twenty-nine to fifteen.

Taney was fifty-nine years old when he took his seat in the center chair of the Court. He would serve as Chief Justice for twenty-eight years. I think it is truly remarkable that during a period of more than sixty-three years—from 1801 until 1864—during which there were fifteen Presidents of the United States, there were only two Chief Justices: John Marshall and Roger Taney.

Taney in many ways was of a different stripe than Marshall. Marshall was disposed to see things from the point of view of a believer in a strong federal government, whereas Taney took more the point of view of one dedicated to "states' rights." Since most colleagues sent to join him on the bench by Presidents after Andrew Jackson shared this point of view, the Taney Court receded somewhat from the Marshall Court's broad constructions of the powers of the federal government and equally broad construction of federal constitutional limitations on state power. In the celebrated case of *Charles River Bridge v. Warren Bridge*,[20] decided shortly after Taney became Chief Justice, the Court receded from some of the broader implications of *Dartmouth College*, and held that one claiming rights under a charter from the state must be able to point to express language in the document granting such rights, rather than relying upon mere implication. In a case decided in 1851, called *Cooley v. Board of Wardens*,[21] the Taney Court qualified the broad implications of the Marshall Court's decision in *Gibbons v. Ogden*. *Cooley* involved a law enacted by the Pennsylvania Legislature requiring every ship bound to or from a foreign port to take on a pilot when approaching or departing from the Port of Philadelphia. An angry ship's master sued to recover the fee, claiming that voyages from Philadelphia to foreign countries obviously involved interstate commerce, and therefore, Pennsylvania might not impose such a regulation. The Supreme Court very sensibly decided that, although Congress may regulate any aspect of foreign commerce, when Congress had said nothing, the states might regulate some aspects of it.

By examining cases such as these, in which the Taney Court, without overruling any of the Marshall Court's great decisions, qualified the language in some of them, we see how the Court was causing constitutional doctrine to develop. The first case addressing the subject was obviously going to be of great importance, and its actual holding would be respected; but broad language or implications from

20. 36 U.S. (11 Pet.) 419 (1837).
21. 53 U.S. (12 How.) 299 (1851).

the holding would not necessarily find later Justices when a similar question arose again.

Taney and his Court ultimately came a cropper in the ill-fated *Dred Scott v. Sandford*[22] decision, which they handed down in 1857. Seeking, probably honestly though certainly benightedly, to "solve" the division in the nation over the extension of slavery, a majority of the Court waded unabashedly in the "political thicket" and succeeded only in diminishing the stature of the Court as a nonpartisan judicial institution. Chief Justice Taney was eighty years old at the time he delivered the Court's opinion in *Dred Scott*, and the outrage felt by antislavery critics of the opinion was tempered slightly by the feeling that Taney was not long for this world. But that thought, too, presented a problem; the President of the United States from 1857 until 1861 was James Buchanan, a Democrat and a "doughface"—the appellation given at that time to a northerner with Southern sympathies. Sober reflection caused the critics to think twice about wishing for Taney's immediate demise. Actually, the Chief Justice lived until the waning days of the Lincoln administration, prompting the acerbic Senator Ben Wade of Ohio, a diehard abolitionist, to say: "No man prayed harder than I did that Roger Taney would outlive the administration of James Buchanan but now I am afraid that I have overdone it."[23]

When Taney died in October 1864, at the age of eighty-eight, the bitterest hostilities of the Civil War were still in progress. So great was northern dislike for him that when in 1865 it was proposed in the Senate that funds be appropriated for a marble bust of him—just as funds had been appropriated for busts of all previous Chief Justices—Senator Charles Sumner of Massachusetts successfully opposed the measure, saying that "Taney will be hooted down the pages of history."[24] It was not until the death of his successor, Salmon P. Chase, eight years later, that Congress without objection appropriated funds for busts of both Taney and Chase to be placed in the Supreme Court chamber.

The very justified criticisms of Taney's opinion in *Dred Scott* tended to obscure some of his very solid opinions for the Court both before and after that one. Now that the dust of controversy has settled, a calmer and more balanced appraisal of Taney has been made. He had a first rate legal mind, and he was a clear, forceful writer. Like Marshall, he was not overly wrapped up in legal learning for its

22. 60 U.S. (19 How.) 393 (1857).

23. C. SWISHER, *supra* note 19, at 969-70.

24. *Id.* (quoting Cong. Globe, 38th Cong., 2d Sess. 1012 (1865)).

own sake, and realized that constitutional law required vision and common sense as well as careful legal analysis. His willingness to find in the Constitution of the United States the necessary authority for states to solve their own problems was a welcome addition to the nationalist constitutional jurisprudence of the Marshall Court. His opinion in *Dred Scott* was a serious reflection on his judgment, but it should not be allowed to blot out the very constructive work otherwise done in a career that spanned twenty-eight years in his high office. Charles Evans Hughes, shortly after he himself had been appointed Chief Justice of the United States, observed at a ceremony dedicating a bust of Taney in Frederick, Maryland, in 1931: "[T]he arduous service nobly rendered by Roger Brooke Taney has received its fitting recognition. He bore his wounds with the fortitude of an invincible spirit. He was a great Chief Justice."[25]

In late 1864, Abraham Lincoln appointed his former Secretary of the Treasury, Salmon P. Chase, to succeed Taney as Chief Justice. Within a few months Lincoln himself was assassinated, and Vice President Andrew Johnson succeeded him in the Presidency. The Court now entered a period that could be described as one of "Babylonian captivity" to the radical Republicans in Congress. Lincoln would have needed all of his stature and prestige to accomplish his moderate program for restoring the Southern States to the Union in the face of those elements of his party in Congress who sought a far more draconian approach to Reconstruction. Andrew Johnson during his first months as President, seemed to be sympathetic to the radical Republicans' position, but as time went on it became clear that he was not. Ultimately, the President and Congress were so at loggerheads that the House of Representatives impeached Johnson, and the Senate subsequently acquitted him by a margin of only one vote. But the radical Republicans also viewed the Court with some hostility; after all, several of the Justices who had joined the *Dred Scott* majority opinion were still on the Court; the government had won the important decision in the *Prize Cases*[26] during the Civil War by a margin of only one vote in the Court. And in 1866, the Court, by a margin of five to four, declared in the landmark case of *Ex parte Milligan*[27] that civilians could not be tried before military tribunals as long as the civil courts were open. In 1867, the radical Republican majorities in both Houses of Congress enacted sweeping Reconstruction legislation that placed much of the South under military government. Many impartial

25. Hughes, *Roger Brooke Taney*, 17 A.B.A. J. 785, 790 (1931).
26. 67 U.S. (2 Black) 635 (1863).
27. 71 U.S. (4 Wall.) 2 (1866).

observers thought that these laws had major constitutional flaws in them.

Salmon P. Chase had been a leading spokesman for the antislavery cause in the North both as Governor of Ohio and as Senator from that state. He was then a capable Secretary of the Treasury for more than three years under President Lincoln. But he was not a great Chief Justice. He had been so bitten by the Presidential bug that even as Chief Justice he continued to maneuver in order that he might obtain the Presidential nomination of any party that would have him, both in 1868 and in 1872. He was also preoccupied with obtaining an increase in judicial salaries and with the prestige of his office—character traits that led him to do a foolish thing shortly after the Civil War.

The number of sitting Supreme Court Justices had peaked in March of 1863 with the appointment of Stephen J. Field as the tenth Justice of the Court. After the radical Republicans had had their falling out with Andrew Johnson, they became concerned about the possibility of his making appointments to the Supreme Court. In 1866, the House of Representatives passed a bill reducing the authorized number of Justices on the Court from ten to nine, with the blithe explanation that it was desirable to avoid tie votes that resulted from an even number. This bill was sent to the Senate, which had passed a quite different bill dealing with other aspects of federal jurisdiction.

At this point Chief Justice Chase proceeded to put his big toe into the legislative pond and got it severely stubbed. Chase's efforts appear to have been motivated not so much from partisanship as from greed. In private correspondence with members of the House and Senate he urged that Congress raise the Justices' salaries to a level commensurate with those of the Nation's highest ranking military officers. In those days—unlike now—that would have meant a tripling of the salaries of the Justices. He also wanted "his" title changed from merely Chief Justice of the Supreme Court of the United States to the grander title of Chief Justice of the United States. Chase was also a veteran politician, and apparently there were in those days, just as there are now, what are known as "budgetary constraints." Chase suggested that one way to lessen the fiscal impact of the increased salaries that he proposed would be to reduce the number of Justices from ten to seven. It is interesting to note that Chase made all of these suggestions unilaterally, without any consultation with his colleagues.

A Senate Judiciary Committee picked up Chase's idea of eliminating three of the ten seats on the Court, gave him his much desired new title, but totally ignored his plea for salary increases. The Senate

bill was agreed to by the House and signed by President Johnson in July 1866, and for the next three years no vacancies were filled even though two Justices—John Catron of Tennessee and James Wayne of Georgia—had died during Andrew Johnson's Presidency. Only when Ulysses S. Grant became President in 1869 did Congress once again authorize two additional Justices for a total of nine.

During this same period of time when Congress was tinkering with the membership in the Court in order to deny Andrew Johnson any appointments to that body, it was also tinkering with the jurisdiction of the Court to prevent its deciding on the constitutionality of Reconstruction legislation. In *Ex parte McCardle*,[28] William H. McCardle, the editor of a newspaper in Vicksburg, Mississippi, had been vituperative in his criticism of the acts of the Reconstruction government in the South, and in Mississippi in particular. The commanding general of the military district embracing Mississippi ordered McCardle arrested and fined in November, 1867; he was to be held for trial before a military commission on charges that his editorials incited insurrection, disorder, and violence, and that they "impeded reconstruction." The federal judge in Jackson, Mississippi, ruled against McCardle and McCardle took an appeal to the Supreme Court under a statute providing for such an appeal. In January 1868, the Court granted a motion to advance the case on its calendar and heard arguments for four days in March of that year. It is some indication of how significant the Court thought the case was that counsel for each side was allowed six hours, rather than the normal two hours, to present its argument. The lawyers for McCardle contended that Congress could not simply turn the State of Mississippi into a military district in time of peace; relying on the Court's decision in *Ex parte Milligan* two years earlier, they said that Congress could not deprive a civilian of his right to jury trial as long as the civil court sat and did business. The government contended that Congress' efforts to deal with Reconstruction represented a political decision and thus could not be challenged in the courts. At the close of these arguments the case was submitted for decision, but the Court apparently passed over the case at its next conference because of legislation that was then rapidly making its way through Congress.

This legislation was designed to repeal the law giving the Supreme Court the authority to hear appeals from the circuit courts in habeas corpus cases—specifically designed to prevent the Court from rendering a decision in the *McCardle* case, which it had already heard argued. Congress passed this law over President Johnson's veto

28. 74 U.S. (7 Wall.) 506 (1868).

in late March 1868, and of course thereby presented a brand new question to the Court: Could Congress divest the Supreme Court of jurisdiction over a case that had already been argued and submitted for decision?

When the Court adjourned a few days after the enactment of this law without having decided the case, McCardle's lawyers feared the worst. Jeremiah Black, in a letter to Howell Cobb, a Georgia colleague in the Buchanan cabinet, expressed his outrage at what he viewed as the Court's "knuckling under": "The Court stood still to be ravished and did not even hallo while the thing was getting done."[29] The *Louisville Courier Journal* editorialized that the Court had not "possessed half the nerve that belongs to many a justice of the peace."[30]

The ultimate disposition of the *McCardle* case by the Supreme Court was anticlimactic; in March 1869, it decided unanimously that Congress did not violate article III of the Constitution by taking away the Court's jurisdiction to decide the case.

I think it is fair to say that at this point the Court reached a nadir in its prestige and authority, which had begun to decline with the decision in *Dred Scott* a decade before. The sort of legislative supremacy which James Madison warned of in the *Federalist Papers* was abroad in the land; the President had been impeached by Congress and was saved from conviction by a margin of only one vote in the Senate; the Court had had both its membership and its jurisdiction altered in such a way as to suit the purposes of the dominant party in Congress. A part of that tinkering had been encouraged by the Chief Justice himself.

Over the next twenty years the Court slowly regained its dimmed luster. Chase died in 1873, and was succeeded as Chief Justice by Morrison R. Waite of Ohio. Waite was a capable and industrious, if not a great, Chief Justice. One of his great virtues was that, unlike Chase and several of the Associate Justices, he was not seeking the Presidential nomination of any party. Only slightly less assiduous than the efforts of Chief Justice Chase toward securing the Presidential nomination were the efforts of two of the Associate Justices—David Davis and Stephen J. Field. And Justice Samuel F. Miller was at least "mentioned" as a Presidential candidate in one of the quadrennial years. Morrison Waite felt that it would sully the office he

29. C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88 PART ONE, at 478 (1971) (quoting 2 ANN. REP. AM. HIST. ASSN. FOR 1911, at 694 (1913)).

30. C. FAIRMAN, *supra* note 29, at 479.

held to aspire to any other one, and this firm determination on his part helped to restore the prestige of the Court.

The Chief Justices of the post-Civil War era did not achieve the stature of Marshall or Taney, and perhaps for that reason several of the Associate Justices made major contributions during this period of time. Samuel F. Miller of Iowa and Stephen J. Field of California, both appointed by Lincoln, and Joseph Bradley, appointed by President Ulysses S. Grant, each served for more than twenty years and made notable contributions to the jurisprudence of the Court. Indeed, Field set a record for longevity of service that was not surpassed until Justice William O. Douglas, with whom I had the honor of serving for a short time, retired in late 1975. Justice Field's record for longevity was attained against the express wishes of his colleagues, who several years before he retired had reached the conclusion that age had taken its toll on him and it would be best for all concerned if he were to step down.

The staple of the Waite Court's business—the kind of cases that engaged most of its time day in and day out—was cases involving essentially common law questions that were only in federal court because of the diversity of citizenship of the parties. At this time any losing litigant, either in a civil case in the lower federal courts or in the supreme court of a state, could have his case heard and decided in the Supreme Court of the United States. In this respect the Court's jurisdiction was quite different than what it is now. But even during Chief Justice Waite's tenure, harbingers of the future were present. The Waite Court decided a number of important cases interpreting the meaning of the Civil War amendments to the Constitution of the United States. It decided, for example, that the fourteenth amendment prohibited racial discrimination in the selection of grand jurors in state courts. It also decided that these amendments forbade only discrimination by the government and not discrimination by private individuals. The Waite Court was also called upon to deal with the public law aspects of the tremendous expansion of the railroads in this country during the Civil War. The Court gave great latitude to the states to regulate railroads along with other businesses when the regulations did not affect interstate commerce, but when state regulation made its effects felt beyond the boundaries of the state, the Supreme Court said "no."

In March 1888, Morrison R. Waite died after a short illness. His death occurred just one hundred years ago next month, and just ninety-nine years after John Jay was appointed the first Chief Justice by George Washington. The Court was at precisely the midpoint

between the beginning of the federal government in 1789 and the present day. It had just about completed the first hundred years of its existence. Grover Cleveland appointed Melville W. Fuller of Illinois to succeed Waite as Chief Justice, and Fuller would lead the Court for twenty-two years in the second century of its existence. Much in the way of dramatic change in the kind of cases that it decided lay before the Court, just as much in the way of dramatic change lay ahead of the nation—a nation still predominantly isolationist in its outlook toward other countries, and predominantly *laissez-faire* in its attitude toward government regulation of business. But the institution of which Fuller took charge in 1888 was a far different one than had existed in 1800 when John Jay refused Adams' tender of the office of Chief Justice. The Court was now a full partner in the tripartite division of powers within the federal government, and its authority as the final expositor of the meaning of the Constitution of the United States was fully established. Under Marshall it had read broadly the constitutional grants of authority to the national government; under Taney it had made sure that neither the Constitution nor the national government would eclipse the power of the states to solve their problems; after the Civil War it had given a common sense interpretation to the Civil War amendments to the Constitution. Time would show that it would be equal to the tasks which lay ahead of it in the second century of its existence.