

DISCOVERING THE FOUNDERS' ATTITUDES TOWARD THE
UNITED STATES SUPREME COURT

A Senior Honors Thesis

by

TERESIA COLEMAN AVILA

Submitted to the Office of Honors Programs
& Academic Scholarships
Texas A&M University
In partial fulfillment of the requirements of the

UNIVERSITY UNDERGRADUATE
RESEARCH FELLOWS

April 2006

Majors: History and English

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ABSTRACT

Discovering the Founders' Attitudes Toward the United States

Supreme Court (April 2006)

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This research was meant to discover whether, amid accusations they have become the super branch, the judiciary envisioned by the Founders is mirrored today. Reviewing constitutional origins led to the discovery that the Founders acknowledged federalism (divided government) and popular sovereignty as fundamental principles, the judiciary was one of three branches established to protect these principles, and Founders insisted on a written constitution. Federalists and anti-Federalists differed widely on *how* to implement these principles but all held them to be foundational.

For over two centuries Americans have debated the proper interpretation of our compact. Questions persist regarding whether federalism consists of co-sovereign central and states governments or of sovereign central/weak subordinate governments. To discover the Founder's attitudes writings of three

periods were examined: 1) Marshall's *Marbury v. Madison* opinion; 2) debates surrounding opinions in *Martin v. Hunter's Lessee*, *McCulloch v. Maryland*, and *Cohens v. Virginia*; and 3) Andrew Jackson's 1832 bank veto. Researching historical documents, to define conflicting terms, was important because it allowed an understanding of how the *principles* these terms represent relate to the United States Supreme Court (USSC), and was essential for a knowledgeable, impartial comparison.

Major findings were that USSC rulings have largely defined the debate about *The Constitution*; that not even the extreme Federalist Alexander Hamilton believed the USSC was the sole and final arbiter of constitutional questions; and that today's judiciary fulfills the Founders' worst fears.

In conclusion, at recent confirmation hearings *stare decisis* (precedent) was touted by some elected officials as the guiding principal of judicial decisions. In most instances, they referred only to recent precedents set over the past 50-60 years, while ignoring centuries-old precedents established at our nation's founding. Implications are that unchecked, the judiciary will continue to discover "rights" lurking in the "shadows" of our Constitution. The judiciary is not solely to blame for this usurpation of *We the People's* sovereignty. Through ignorance and indifference an unelected judiciary has been allowed to dominate our constitutional system. If the court has become the Super Branch, *We the People* are largely to blame. Education and involvement are a sure cure.

To my father, G. B. Coleman, Sr. (SMSgt., U.S.A.F. Retired), who always encouraged me to read, taught me that books could open the world to me, and taught me the wonder of discovery. He taught me to learn about others and to accept them for who they are at heart. By his example, he taught me to love our country and our freedom, to remember never to take it for granted because of the precious price paid to gain it and retain it; that it is my responsibility to be vigilant to guard it, so that my grandchildren's grandchildren may also be born free.

You would have loved reading this, Daddy!

To my precious mother, Margaret Harvey Coleman, who taught me to love to read, and to laugh, and to be curious about others and life. I always know I will find you with a book or two or five at your side.

Thanks, Mom!

To my daughter, Lisa Marie Avila Ogden, who is the joy of my life, the daughter every mother dreams of, and the trailblazer in her mother's and her father's families' higher educational endeavors. Thank you and Michael for my wonderful grandson, Gabriel. Gig'Em, honey!

Lisa, you always light up my life!

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I will always remember Dr. Brooks reminding me that good historians do not choose research projects based on what they see wrong with the world

today, nor do they try to find only people or sources who agree with their views. While Dr. Brooks has been very generous with his time over the past year, he never sought to lead me to any conclusions or toward any bias. Rather, he taught me that good historians 1) allow people to speak for themselves within their own generation, 2) do not judge past actions or history from their current century but from the one being examined, and 3) make every effort to keep bias from their research.

I have learned a great deal about research during this past year. One week into writing my thesis I realized that my method of documenting the previous seven months' research was wholly inadequate for a project of this size. I also learned that I have some gaps in my knowledge and skills. Perhaps some would be distress or daunted by these discoveries, but I am excited because I know that I am a student at a vanguard university where those deficiencies can be quickly and thoroughly addressed. If one day I am considered to be a wordsmith, I will have to again acknowledge the contributions of both Dr. Brooks and Mrs. Raison for their parts in that craftsmanship.

Lastly, while I acknowledge Dr. Brooks' gracious mentorship and continually-challenging thoughts and guidance, my thesis conclusions are my own and should not be inferred to be his.

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Chapter 1

INTRODUCTION¹

“Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.”

Federalist No. 51

Today many people in our nation see a judiciary that is out of control, legislating from the bench. Across the spectrum – liberals and conservatives, Democrats, Republicans and Independents – people are beginning to call the United States Supreme Court (USSC) the Super Branch. The goal of this research was to discover the Founders’ attitudes towards the USSC and to discover whether or not today’s judiciary is the system the Founders envisioned when they ratified Article III of *The Constitution of the United States* (*The Constitution*²) and the *Bill of Rights*. In order to understand the Founders’ attitudes during the writing and ratification of *The Constitution*, the origins of the compact were examined. It was discovered that all the Founders came to agree upon two important principles: federalism, or divided government, and popular sovereignty.

¹ This thesis follows the style and format of *The Chicago Manual of Style*.

² NOTE: *The Constitution of the United States* is written *The Constitution* throughout the paper, including in quotations.

It is these very unique principles of liberty that appear to have made America the promised land of opportunity to people from all over the world. The numbers of people around the world who watched the recent (Spring 2006) Senate confirmation hearings, of the now Chief Justice John Roberts and Associate Justice Samuel Alito, demonstrate the important place on America's courts, their legitimate powers and their authority. USSC decisions impact the daily lives of every person living in America. One recent example is the USSC's June 23, 2005 ruling on "eminent domain" (*Kelo v. City of New London* [268 Conn. 1, 843 A. 2d 500, affirmed.]).³ This decision reversed over two hundred years of USSC *stare decisis* [court rulings set as precedent] by completely ignoring the beliefs and practices of America's colonists and citizens in the sixteenth, seventeenth, eighteenth, nineteenth and most of the twentieth centuries, regarding the sacredness of private property ownership.

Kelo v. City of New London gave local governments the right, under the Public Use Clause of the Fifth Amendment [last phrase], to take one individual's private property and give it to another individual or private company to use for purposes other than the general welfare of the entire community, such as roads and post offices. Many observers of the USSC were stunned by the Court's 5-4 ruling, which essentially allows the confiscation of private property by state and local governments that may then give that private property to another private entity. A number of state legislatures, apparently recognizing the ruling's

³ NOTE: The "Public Use Clause" of the Fifth Amendment [last phrase] – Appendix B.

disconnect with another of the founding principles – private property ownership, quickly passed legislation prohibiting confiscations within their own state. Unfortunately, many disinterested Americans do not even know that their private property has become fair game for any group of elected officials who might think that their citizens' private property can be put to "better" use by their neighbor.

Justice Thomas, in his dissenting opinion [which concurred with Justice Sandra Day O'Connor's minority opinion], blasted the decision, "This differential shift in phraseology enables the Court ... against all common sense ... [to] erase the Public Use Clause from our Constitution." He continued that this "decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning. In my view, the Public Use Clause, originally understood, is a meaningful limit on the government's eminent domain power."⁴ Which begs the question: Under what authority can the USSC, a creation of *The Constitution* itself, change the meaning or worse – as pointed out by one of its own members in this case – completely wipe out a portion of our founding compact?

Thomas' opinion demonstrates how every human being living in America today is impacted by the third branch of the federal government –

⁴ *Susette Kelo, et al., Petitioners v. City of New London, Connecticut, et. al.* (04-108) [268 Conn. 1, 843 A.2d 500, affirmed] 6/23/2005. Cornell Law School. 2/28/2006. <http://www.law.cornell.edu/supct/html/04-108.ZD1.html>

whether we know it or not, whether we care or not – as a result of the opinions the courts hand down. This recent controversial decision raises many questions about the scope and purview of the national judiciary including: Why did the Founders establish a central court system in the first place? What did they hope to achieve when they wrote, debated and approved Article III of *The Constitution* and the Fifth Amendment of the *Bill of Rights*? What did the Founders understand Article III to convey and established? What powers and authority were granted to the judiciary under this compact? These questions naturally lead to the major question: What were the Founders' attitudes about the judiciary in general and the USSC in particular?

Discovering the Founders' attitudes regarding the judiciary required an examination of the principle ideas of federalism, popular sovereignty, and the rights of mankind. It was also important to discover what the Founders meant when they wrote about terms such as the rule of law, judicial review, mixed government, separation of powers, and judicial supremacy (a relatively newer term, not often used by the Founders). A quick review of the ideas, documents and governments which preceded *The Constitution* was made; also examined was how the foundation for our new American form of government evolved. Principles upon which the vast majority of the Federalists and anti-Federalists agreed were examined. The Constitutional Convention debates and those at the various states' ratification conventions, especially regarding how the judiciary should function, were examined. To find answers to these questions the

Founders were allowed to speak for themselves, through their own writings.

Lastly, numerous secondary sources about the judiciary were reviewed, with the greater weight of fact and truth given to primary sources.

The Founders developed a completely new, unique form of government, taking ideas and parts of various republican-style governments and mixing them with a stronger central government. With few exceptions (Alexander Hamilton being a notable example), the Founders, both conservative and liberal, both Federalists and anti-Federalists, were determined to preserve the sovereignty of The People⁵ above that of all branches of the newly established government. Understanding this new form of government is essential to discovering what their attitudes were toward the judiciary. Additionally, in order to make a valid comparison between that era and today understanding the founding principles is vital.

Therefore, three periods of history, including specific opinions handed down by the USSC, were studied. The writings of some of the Founders were examined to determine, first, what they envisioned for this fledgling nation's judiciary, and second, whether or not their vision is still intact today. The three time periods studied are:

⁵ NOTE: The term "The People" [capitalized] is used to differentiate between the common usage of the term "the people," meaning the masses in general, and when the Founders were specifically referring to The People in their highest sovereign estate, such as in "We the People, in order to form a more perfect union..." The only exception will be within direct quotes, when it will be left as written.

1. John Marshall's opinion in *Marbury v. Madison*, 1 Cranch 137 (1803), in which he declared that Section 13 of the First Congress' Judiciary Act (1789) was unconstitutional; he explained that the USSC had the right of review over Congressional acts.
2. An eleven-year-long newspaper debate that raged between USSC Justice John Marshall, a staunch Federalist, and what some today (erroneously I believe) refer to as "states' righters," led by Marshall's most outspoken opponent, Judge Spencer Roane of the Virginia Court of Appeals [the highest court in Virginia]. These newspaper debates took place because of the opinions delivered by the USSC in *Martin v. Hunter's Lessee*, 1 Wheaton 304 (1816), *McCulloch v. Maryland*, 4 Wheaton 316 (1819), and *Cohens v. Virginia*, 6 Wheaton 264 (1821).
3. Andrew Jackson's 1832 presidential veto of Congress' bill to renew the charter of the Second Bank of the United States, and the constitutional reasons he gave for his veto, which included ignoring the opinion of the USSC in *McCulloch v. Maryland*.

Primary source documents, writings and USSC opinions from these three time periods, and the recent USSC ruling (*Kelo v. City of New London*) are the structure that led to the answer to "What were the Founders' attitudes toward the USSC?" The ultimate comparisons and contrasts clearly demonstrate the gaping chasm between what the Founders envisioned as the role of the USSC and how its functions today. Just as Thomas stated in his *Kelo v. City of New*

London opposition opinion, over the past 50-60 years the USSC has strayed far from what even the strongest Federalists, including Alexander Hamilton and John Marshall, believed to be the boundaries and authority of the courts. Lesser courts, following the USSC's lead, have also begun to ignore centuries of precedents and have usurped the authority of the executive and legislative branches of both the central and states governments.

Comparisons and contrasts will be addressed more extensively, along with *Kelo v. City of New London*, in the last chapter. First, the background, and the terms and ideas used by the Founders are reviewed, defined and explained in Chapter 2.

Chapter 2

BACKGROUND, AND TERMS AND IDEAS DEFINED

The spirit of encroachment tends to consolidate the powers of all the departments in one and thus to create, whatever the form of government, a real despotism. ... [B]ut let there be no change by usurpation [wrongful seizure of power]; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed.

George Washington⁶

Numerous ideas and documents served to mold and shape the thought processes of the citizens of this new nation in the late eighteenth century. Therefore, a clear understanding of *The Constitution* is impossible without a basic knowledge of the meaning of the words and ideas the Founders used in developing the foundational principles, especially regarding the judiciary. A passing knowledge of the judicial systems under which the colonies had existed up to the time of *The Declaration of Independence* [*The Declaration*] is also essential. Both individual and natural rights were reviewed in the context of the events

⁶ George Washington, *Address of George Washington, President of the United States, and Late Commander in Chief of the American Army, to the People of the United States, Preparatory to His Declination* (Baltimore: George and Henry S. Keatinge, 1796), 22. As reported in: David Barton. *Original Intent: The Courts, the Constitution, & Religion* (Aledo, TX: Wallbuilders, 2000), 272.

and documents that shaped the founding period and the judicial systems under which the colonies had existed up until *The Declaration*.

Wide Acceptance of the Ideas of Individual and Natural Rights

A review of the governments of England and each of the thirteen colonies shed light upon the actions of the colonists in the eighteenth century. Sir Winston Churchill, in his series, *A History of the English Speaking Peoples*,⁷ gave insight about the government in England and early colonial America, from an English point of view. Carl Becker, in his book *The Declaration of Independence*,⁸ wrote what many consider the classic and definitive work on this document and the period surrounding its passage. Both books explain the wide diversity of opinions among the colonists just prior to their declaring independence from English rule,⁹ in 1776. In his book, *A Constitutional History of the United States*,¹⁰ Forrest McDonald explains the evolution of American understanding of natural rights, from the time of the Mayflower Compact in the 1500s though the

⁷ Sir Winston S. Churchill, K.G. O.M. C.H. M.P. *A History of the English Speaking Peoples*, Vol. 2-4, (n.p., 1956; New York: Barnes & Noble, Inc., by arrangement with Dodd, Mead & Company, Inc., 1993).

⁸ Carl L. Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (New York: Alfred A. Knopf, Inc., 1942; New York: Vintage Books Edition, 1958).

⁹ *The Declaration of Independence*.

¹⁰ Forrest McDonald, *A Constitutional History of the United States* (Malabar, FL: Robert E. Krieger Publishing Company, 1982. Reprint Edition, 1986).

ratifying of *The Constitution* and into the 20th century, when the judiciary was busy developing case law.

For centuries the governments of the various colonies ran their own local, internal affairs with England, as a distant benevolent protector, directing their external affairs. This included setting up their own set of rules and systems to deal with those who chose not to abide by the colonial rules. With the fall of Oliver Cromwell and the ascent of King George III to the throne England looked to the prosperous colonies as a means to enrich their empty coffers. The colonists had developed their own local forms of governments and courts based upon the system they had known in England. England's new King and his Parliament, upon a closer inspection of these colonial innovations, became indignant because they believed the colonies owed England their allegiance and a debt for protecting them from the Indians, the French and the Spanish.

When England changed the way they dealt with the colonies it caused the colonists great unrest because the "natural rights of mankind," written about by John Locke and others, were already accepted as truth by most Americans. After centuries of controlling their own internal affairs, the colonists began to grumble when England started asserting greater control. England's actions persuaded many colonists that a distant government threatened personal liberty. Her steps to curtail their colonial governmental and judicial practices led to growing anger among the colonists.

By the time England passed the Sugar and the Stamp Acts in the mid-1760s, debates raged among the colonists regarding England's ill treatment of them as Englishmen, about taxation without representation, and about a closer federation between the colonies. These debates served as a tool for Americans to refine what they believed about "natural rights" and "popular sovereignty." Slowly, many colonists began to believe that America should be free of England's expanding and encroaching control of their internal affairs. When this belief reached full bloom it culminated with the signing of *The Declaration*.

In 1777, just months after independence was declared, the thirteen new states developed *The Articles of Confederation* [*The Articles*],¹¹ which loosely tied, or confederated, them together for their pending war with England. During the long and bloody war with Great Britain, the citizens discovered that *The Articles* were simply not adequate for the defense of the fledgling nation. George Washington, as General of all the armed forces, learned first hand the weaknesses of *The Articles*. He had lost thousands during the winter of 1777-1778, largely because of the weak central government's inability to raise funds and to ensure that each state paid their portions timely.

Many agreed with Washington that a new, more powerful central government was needed if America was to survive as a nation. W. Cleon Skousen's *The Making of America*¹² documents the chaos, fears and shortcomings

¹¹ *The Articles of Confederation*.

¹² W. Cleon Skousen, *The Making of America: The Substance and Meaning of the Constitution* (Washington DC: The National Center for Constitutional Studies, 1985).

of this period of time under *The Articles*. The increasing disorder and chaos within and among the states after the War, lead many to despair for our fledgling nation's continued liberty. England, France, Spain and the Indians stood poised on our borders, ready for our nation's collapse. Many of those who had played important roles on the national level thus far rapidly grew concerned at the growing restlessness and turmoil, prompting some to request that Congress call a constitutional convention. Delegates from the thirteen states were called together to strengthen *The Articles*.

The Constitutional Convention took on a different mission than had been originally intended, because many of the delegates realized that *The Articles* needed more than just a revision. Individual rights were now held to be among the citizens' most cherished liberties. They believed that both natural rights and popular sovereignty played a role in the foundation of our nation. But they also realized that those liberties could not long be protected in a nation that deteriorated into anarchy. Understanding what these delegates wrestled with in Philadelphia aided in determining whether the level of power exerted by the judiciary today is in accord with the Founders' views. Such excellent works as those by Morgan¹³ or McDonald,¹⁴ have not fully addressed the issue of judicial power and reach. Thus, especially as it pertains to the judiciary, examining

¹³ Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: W. W. Norton & Company, Inc.; Ontario: Penguin Books Canada Ltd., 1988).

¹⁴ McDonald, *Constitutional*.

what the Founders meant by federalism, or divided government, was also crucial.

The Pervading belief in Federalism and Popular Sovereignty

Seeing federalism through eighteenth century eyes helped in understanding *The Constitution* as it was established by the Founders. Federalism's most basic definition would be divided government. The Founders took strong measures to ensure that no branch of government consolidated too much power. As Madison explained in *Federalist No. 51*, because of "the compound republic of America, the power surrendered by the people is first divided between two distinct governments [central and states], and then the portion allotted to each [is] subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."¹⁵

These extra checks and balances – the double security Madison called it – were intended to protect the other basic belief held by the Founders – popular sovereignty. According to the Federalists, popular sovereignty is defined as "the fundamental republican principle of government according to the *equal*

¹⁵ Alexander Hamilton, James Madison, John Jay, *The Federalist Papers*, with an Introduction by Clinton Rossiter (New York: A Mentor Book: Penguin Books USA, Inc., 1961), 56.

voices of *the people* consenting to be governed.”¹⁶ Regarding the principle of popular sovereignty, Jefferson wrote a letter to John Taylor in 1816, stating that “The further the departure from direct and constant control by the citizens, the less has the government of the ingredient of republicanism ... The purest republican feature in the government of our own State [Virginia], is the House of Representatives.”¹⁷

Washington, Madison, Hamilton and other Federalists believed that the only way to protect the sovereignty of The People was to divide the power of government, but without the chaos of the weak central government the nation had experienced under *The Articles*. Anti-federalists, such as Patrick Henry, also believed in divided power but they were much more strongly opposed to a powerful central government. Jefferson would later write in his letter to Taylor, “If, then, the control of the people over the organs of their government be the measure of its republicanism, and I confess I know no other measure, it must be agreed that our governments have much less of republicanism than ought to have been expected; in other words, that the people have less regular control over their agents, than their rights and their interests require.”¹⁸

Research led to the discovery that no other principles were more widely accepted as essential to freedom by both sides of the debate as those of divided

¹⁶ *Ibid.*, 93.

¹⁷ Thomas Jefferson, Letter to John Taylor from Monticello May 28, 1816. (From *Revolution to Reconstruction: Presidents: Thomas Jefferson: Letters: The Test of Republicanism*. 3/1/2005). <http://odur.let.rug.nl/~usa/P/tj3/writings/brf/jefl45.htm>.

¹⁸ *Ibid.*

government (federalism) and popular sovereignty. Even with the discovery of these shared beliefs there still remained, however, a need to answer whether or not the views of the Founders regarding the judiciary are encompassed in our current judiciary. Understanding the importance the Founders placed on popular sovereignty and federalism was essential to comprehending their attitudes regarding judicial review, and to what many Americans today believe was always the norm — judicial supremacy.

The Creation of *The Constitution of the United States*

Reviewing the colonial roots of the American Revolution and the forces that had encouraged self-government and reviewing the differences between England's constitution and America's first constitution, *The Articles*, led to an understanding of why there was a need to change *The Articles* after the Revolutionary War.

Even with the increasing chaos in and among them, not all the states sent delegates to the 1787 Constitutional Convention (the Convention), in Philadelphia. Nevertheless, the majority of the delegates who did attend agreed that *The Articles* should be thrown out and a new Constitution constructed. Initially, they had to agree on a few basic ideas, the first of which was who would be the parties to the compact. Both Forrest McDonald¹⁹ and Edmund Morgan, in his book *Inventing the People: The Rise of Popular Sovereignty in*

¹⁹ McDonald, *Constitutional*.

England and America,²⁰ explain how the Founders had to develop new and unique ideas of governance and liberty, including determining who the parties to the compact were. Morgan in particular lays out how the idea of popular sovereignty came to be so important to America's Founders.

At the Convention the delegates did agree on the fundamental ideals that The People should have a direct say in how their government should work, they should have a republican form of government with representatives chosen by The People, and the government should not contain any form of "democratic monarchy."²¹ It was their differences concerning the form of government, the powers of the President, Congress, and the central judiciary, however, which lead to their greatest debates. The central government under *The Articles* was only authorized to deal with the various state legislatures. The government being proposed by Madison, Hamilton and others, was a drastic change because it granted power to the central government to directly impact and tax individual citizens (the power of the purse), to raise a standing army (the power of the sword) and to meddle in the various states' business.

During the Convention, delegates debated how power should be divided and controlled, always with the desire to protect the popular sovereignty of The People. It was agreed that the power of the American government would first be divided between the central and states' governments. Then these two separate governments would again be divided into three branches each, e.g., the

²⁰ Morgan, *Inventing*.

²¹ Ketcham, *Anti-Federalist*.

Legislature Branch, the Executive Branch, and the Judiciary Branch. Works such as Joseph Ellis' Pulitzer Prize winning book, *Founding Brothers: The Revolutionary Generation*,²² Adrienne Koch's, *Jefferson and Madison: the Great Collaboration*,²³ and Forrest McDonald's, *A Constitutional History of the United States*,²⁴ have been written about this period of history. They fully explain the measures taken to protect The People's sovereign power by dividing it, in order to prevent too much power accumulating in the hands of only a few.

The ideals (of life, liberty and the ability to pursue happiness in whatever vocation one might choose) were important to all the delegates. They agreed that *The Articles* were unable to bring the national stability that would protect those ideals. As Madison pointed out in *Federalist #10*,²⁵ "If the impulse and the opportunity be suffered to coincide, we know that neither moral nor religious motives can be relied on as an adequate control"²⁶ against governmental abuse, tyranny and anarchy. Madison realized that the only way to protect both the rights of individuals and the sovereignty of The People from an encroaching government and its officials was to divide its power.

²² Joseph J. Ellis, *Founding Brothers: The Revolutionary Generation* (New York: Alfred A. Knopf, 2001).

²³ Adrienne Koch, *Jefferson and Madison: the Great Collaboration* (New York: Alfred A. Knopf, 1950).

²⁴ McDonald, *Constitutional*.

²⁵ Hamilton, et. al, *Federalist*.

²⁶ Skousen, *Making*, 30.

Both the large states and small states were trying to establish their own view of federalism. These two factions agreed upon two compromises that worked to protect both groups and popular sovereignty at the same time. First, to protect the smaller states they adopted a bicameral (two house) Congress. The upper house, the Senate, would be “conformable to the federal principle [of states being equal] and necessary to secure the Small States against the large.”²⁷ Second, the “national principle”²⁸ [representation on the basis of number of people] would protect the large states from the small states.

Nevertheless, when such men as William Johnson of Connecticut spoke about the encroachment of the federal government upon the rights and authority of the states’ governments,²⁹ he voiced some of the very real concerns of those who supported co-ordinate rights and authority between the governments [central and states]. There was a fear that eventually the federal government would take a more powerful place in the lives of The People, weakening their sovereignty by rendering the states’ governments subordinate. This failure they believed would destroy the balance and protection that co-ordinate powers ensured.

After grueling months of debate and compromise, however, the compact was sent to The People of the states, who were to elect delegates appointed specifically to state constitutional conventions. As specified in the new

²⁷ Hamilton, 99.

²⁸ *Ibid.*

²⁹ Ketcham, *Anti-Federalist*, 86.

document, only nine states (rather than the full thirteen) were needed to ratify the new compact and establish a new and unique form of government.

The Ratification of *The Constitution*

Debates raged in newspapers, pamphlets, letters and speeches during the ratification process, between those who came to be known as federalists (who supported a stronger central government) and the anti-federalists (who opposed a stronger but distant central government like they had experienced under English control). Many, however, found the drastic change in *The Constitution's* style of government incompatible with their idea of liberty.

The federalists had quickly begun to inundate the public with essays, letters, pamphlets and leaflets that supported *The Constitution*. They explained how it gave the central government the power of the purse (taxation) whenever needed, the power of the sword (ability to call a standing army), and greater authority within the executive, legislative and judicial branches. This new compact provided for representation in a form that satisfied all the states. The large, highly populated states would have a lower body, the House of Representatives, where representation was based solely on a state's population. The smaller states, which refused to settle for anything less than the Principle of Equal Representation, were satisfied with each state having two senators in the upper house of Congress.

John Jay, Alexander Hamilton and James Madison published a large number of essays that have become known as The Federalist Papers. They were written to address arguments against ratification. For example, to address the unrest prevalent in some of the states after the Revolutionary War, Madison, in *Federalist #10*,³⁰ advocated that a central government was necessary to dispel factions. But he also recognized that removing the causes of faction – our ability to speak and act freely – would destroy liberty. “Liberty is to faction, what air is to fire, an aliment without which it instantly expires[.]”³¹ He therefore advocated a “means of controlling [faction’s] effects.”³² He argued that if the faction was made up of small groups or were contained in a small area the majority could vote against it. But if the faction was made up of a majority of the citizens, then *The Articles* had allowed the majority to “sacrifice to its ruling passion or interest, both the public good and the rights of other citizens.”³³ Madison argued that *The Constitution* provided a means to render a factious majority “unable to concert and carry into effect schemes of oppression.”³⁴ This served as a check against the government being unbalanced either toward individuals or toward large groups.

³⁰ Hamilton, et. al, *Federalist*, 77-84.

³¹ Kaminski, *Federalists*, 27.

³² *Ibid.*, 29. CHECK REFERENCE.

³³ *Ibid.*, 29.

³⁴ *Ibid.*, 30.

Madison wrote five Federalist Papers (numbers 47-51),³⁵ in an attempt to gather support for *The Constitution's* ratification, in which he discussed how *The Constitution* would protect The People's ideals of the separation of power (federalism). One of the strongest advocates of a powerful central government, Alexander Hamilton wrote six papers (numbers 78-83)³⁶ to explain how the judiciary was the weakest branch, to define court boundaries, and to explain the need to guarantee, among other things, a trial by jury. "The judicial authority of the federal judicatures," he wrote, "is declared by *The Constitution* to comprehend certain cases particularly specified. The expression of these cases marks the precise limits beyond which the federal courts cannot extend their jurisdiction, because the objects of their cognizance being enumerated, the specification would be nugatory if it did not exclude all ideas of more extensive authority."³⁷

Other *Federalist Papers* were written to address arguments put forth by a group that has become known as the anti-federalists (people who worked diligently to prevent ratification of *The Constitution*). Anti-federalists were opposed because they believed this new form of government undermined the freedoms won through the Revolutionary War. They advocated a true confederation, which meant strong state sovereignty, with limited power vested in a central government. They did not agree that a stronger union between the

³⁵ *Ibid.*, 300-325.

³⁶ *Ibid.*, 464-510.

³⁷ *Federalist*, 83.

various states was needed. They feared standing armies, because, as Brutus I stated in 1787, “they have always proved the destruction of liberty, and [a standing army] is abhorrent to the spirit of a free republic.”³⁸

Additionally, they disagreed on the greater powers given to the executive branch, believing that a strong President would lead America back into a monarchy, as stated in an essay by An Old Whig V, “... the office of the President of the United States ... is in reality to be a KING as much *a King as the King of Great Britain* [emphasis his], and a King too of the worst kind; ...”³⁹ This is understandable since there were murmurings of making George Washington king or president for life, both of which he adamantly opposed; he wrote in private correspondence that he would refuse such suggestions or offers.

The anti-federalists did not like the expanded authority afforded the new Congress either, especially with its ability to tax every citizen because, as Brutus I pointed out, “the authority to lay and collect taxes is the most important of any power that can be granted; ... it is the great mean of protection, security, and defence [sic], in a good government, and the great engine of oppression and tyranny in a bad one.”⁴⁰ Nor did they believe that the national judiciary should have the amount of power granted by *The Constitution*; again, because as pointed out by Brutus I, “The powers of these courts are very extensive; their jurisdiction comprehends all civil causes,... in the common course of things, these [central]

³⁸ Kaminski, 10.

³⁹ Skousen, *Making*, 86.

⁴⁰ Kaminski, 7.

courts will eclipse the dignity, and take away from the respectability, of the state courts.... they will swallow up all the powers of the courts in the respective states.”⁴¹

They also faulted *The Constitution* for not including what they considered essential – a *Bill of Rights* to protect individual liberty from encroachment by the central government. The Federalists felt a *Bill of Rights* was completely unnecessary because the divided branches were only granted narrow rights and because most of the states’ constitutions already contained a list of their rights. This one issue became a powerful rallying point for the anti-federalists and almost derailed *The Constitution’s* ratification. James Madison began to ponder the continued call for specific laws protecting the rights of citizens from the central government’s encroachment. He carried on detailed communications with Thomas Jefferson, who was Ambassador to France, who thought that these additional protections for The People would be beneficial.

The flurry of anti-Federalist letters, anonymous newspaper articles and pamphlets that were produced to address the Federalists’ arguments in support of ratification proved to be extremely helpful as they pointed out a number of flaws, especially the lack of a *Bill of Rights*. They also raised questions of who would be the final arbiter of issues such as the authority and boundaries between the central and state governments, and issues of property and commerce issues, and even who would decide the balance between the

⁴¹ Kaminski, 8.

authority of the three branches within both the federal and state governments. These undefined “grey areas” of *The Constitution* would be where the judiciary would begin to expand its authority.

Numerous scholarly works have been written concerning this time period and the events surrounding the creation of *The Constitution*, and about the formation of the judiciary itself. Questions regarding the Court’s expanded powers and activism, including the steady advance of judicial review into more areas of both central and state governments, were answered. However, regarding the issues of judicial review and judicial supremacy, few of these works allowed an abundance of the ideas and attitudes of the Founders to be clearly heard.

The Development of the Judiciary

The Founders believed there were enough checks and balances built into the new government that a vigilant citizenry would be able to remove from office those who attempted to usurp the authority of the original parties to the contract – The People. The delegates to the Convention in Philadelphia knew they did *not* want a court system like that in England, where the courts were an extension of and controlled by the monarchy. But they did want to ensure that trials would be by jury,⁴² which was not always the case in England. They also

⁴² *Federalist Papers*, 83. Also, Article III, Section paragraph 2. [See Appendix A]

wanted a written compact that was “set in stone” and not easily changed, contrary to the unwritten English constitution.

Because there were thirteen different versions of the judiciary, the delegates soon realized that the question of how to set up the central courts was too big and lengthy a battle to wage at the Convention. They realized that if not handled very carefully even one of the highly contested issues, such as slavery or the judiciary, could derail the process and guarantee *The Constitution* would never be ratified. The delegates feared such a failure would lead to more chaos and unrest, and possibly result in a civil war. Consequently, the First Congress was left to grapple with a number of major projects to ensure the smooth running of our nation’s government, including the formation of the judiciary.

While a Supreme Court and lesser courts (as created by the Legislature⁴³) was established by Article III of *The Constitution*, and addressed basic areas over which the courts had jurisdiction,⁴⁴ many questions were left unresolved. How the courts would be set up and run, and how much authority they would have and its reach were questions left mostly unanswered. Because these questions were left unanswered they would become one of the major points of contention with the anti-federalists. Ultimately, within less than thirty years, the judiciary would become the cause of great debates and discussion, and numerous Court opinions delivered in an attempt to define the judiciary’s role and authority.

⁴³ *The Constitution*, Article III, Section 1. [See Appendix A]

⁴⁴ *Ibid.*, Section 2, paragraph 1. [See Appendix A]

The First Congress (March 1789 – March 1791), according to McDonald, “enacted so much fundamental law that it almost amounted to a second constitutional convention.”⁴⁵ The laws established by the First Congress were in “four broad areas – 1) the *Bill of Rights*, 2) the acts creating the judicial system, 3) the executive department(s), and the financial system.”⁴⁶ Only the first two and *The Constitution* were reviewed for the purposes of discovering the Founders’ attitudes toward the USSC.

The *Bill of Rights* Deemed an Essential Key to Ratification

In *Federalist #84*, the Federalists challenged the anti-federalists’ demand for a bill of rights, explaining why they believed such a document was unnecessary. Originally, Madison also held this view; however, the ratification process caused him to realize that the promise of the addition of a bill of rights would cause *The Constitution* to gain a wider popularity more quickly. This promise was just the push to ratify needed by the fence-sitting, hesitant states. To his credit, almost immediately after ratification Madison set about to keep that promise.

Madison had been in constant correspondence with Thomas Jefferson, who was serving the nation in France and was unable to participate in the writing and ratification process. Jefferson, in his March 15, 1789 letter from

⁴⁵ McDonald, *Constitutional*, 36.

⁴⁶ *Ibid.*

Paris, acknowledges the reasons Madison mentioned, in his previous letter, that “a declaration of rights” might be beneficial. Jefferson tells Madison, “In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary.”⁴⁷ To encourage Madison in his endeavors Jefferson answered his numerous questions and delivered a final strong statement in support of the declaration of rights. Jefferson wrote, “There is a remarkable [sic] difference between the characters of the inconveniences which attend the want of [this declaration of rights]. The inconveniences of *The Declaration* are that it may cramp government in its useful exertions. But the evil of this is shortlived, moderate, & [sic] reparable. The inconveniencies of the want of a Declaration are permanent, afflicting & irreparable: they are in constant progression from bad to worse.” Finally, Jefferson wrote, “I am much pleased with the prospect that a declaration of rights will be added: and hope that it will not endanger the whole frame of the government, or any essential part of it.”⁴⁸

Madison reviewed all proposals coming out of the states’ ratifying conventions. He pared them down to nineteen (19) amendments, which he forwarded to the House of Representatives in May of 1789. When Madison addressed the House of Representatives, in June 1789, he had come to strongly

⁴⁷ Thomas Jefferson, 1789. Letter from Thomas Jefferson to James Madison, March 15. Transcript in the hand of Thomas Jefferson (First Federal Congress Project, Library of Congress, Washington D.C.).

⁴⁸ *Ibid.*

believe the *Bill of Rights* was a necessity for the states to be joined together in one national accord. Madison said:

I wish, among other reasons why something should be done, that those who have been friendly to the adoption of this constitution, may have the opportunity of proving to those who were opposed to it, that they were as sincerely devoted to liberty and a republican government, as those who charged them with wishing the adoption of this constitution in order to lay the foundation of an aristocracy or despotism. It will be a desirable thing to extinguish from the bosom of every member of the community any apprehensions, that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled. And if there are amendments desired, of such a nature as will not injure *The Constitution*, and they can be ingrafted [sic] so as to give satisfaction to the doubting part of our fellow citizens; the friends of the federal government will evince that spirit of deference and concession for which they have hitherto been distinguished. ... It cannot be a secret to the gentlemen in this house, that, notwithstanding the ratification of this system of government by eleven of the thirteen United States, ... there is a great number of our constituents who are dissatisfied with it; ... There is a great

body of the people falling under this description, ... there is a stronger motive than this [though] ... it is to provide those securities for liberty which are required by a part of the community. I allude in a particular manner to those two states who have not thought fit to throw themselves into the bosom of the confederacy: it is a desirable thing, on our part as well as theirs, that a re-union should take place as soon as possible. I have no doubt, if we proceed to take those steps which would be prudent and requisite at this juncture, that in a short time we should see that disposition prevailing in those states that are not come in, that we have seen prevailing [in] those states which are.

Madison's speech was very effective. With the additional urging of a number of prominent citizens such as Jefferson all the amendments were approved in August, 1791. They were forwarded to the Senate in September. The Senate specifically removed the amendment which stipulated that the amendments applied to the states as well as the central government. They in turn passed 12 amendments along to the states. By December 15, 1791, three-fourths of the states had passed ten amendments and the *Bill of Rights* was permanently appended to *The Constitution*. With the *Bill of Rights* and *The Constitution* as the foundation of their new form of government, the elected

representatives to the First Congress would grapple with many issues, including the development of a judicial system.

Creating a Working Judicial System

The only guidelines the First Congress had regarding the judiciary were set out in Article III of *The Constitution*. All thirteen states had their own version a judicial system. Attorney and Senator Oliver Ellsworth, of Connecticut,⁴⁹ was on the committee charged with developing the judiciary; he reportedly completed most of the work. Ellsworth, who would later become the third Chief Justice of the USSC [1796-1800],⁵⁰ found there were problems of three (3) types: “procedural, ideological and jurisdictional.”⁵¹ He believed Congress could not just rely upon Anglo-Saxon common law because there were already thirteen different versions of that common law at work in the United States.

To tackle the first issue of court procedures, Ellsworth mostly relied upon Connecticut’s version of the Anglo-Saxon common law. Second, to address the ideological issues, Ellsworth recognized there were two extremes in ideology in America: 1) nationalists, who believed in strong central government, that state governments were sub-ordinate to that central authority, and that the central government’s authority should “extend as far as *The Constitution* would

⁴⁹ McDonald, *Constitutional*, 38.

⁵⁰ The Supreme Court Historical Society, “History of the Court: Timelines of the Justices.” 20060505. http://supremecourthistory.org/02_history/subs_timeline/02_a.html

⁵¹ *Ibid.*

allow”⁵²; and 2) strict constructionists, who believed in coordinated sovereignty and in strict boundaries being placed around the central government. This second issue is where the vast majority of squabbles and compromises would take place during the First Congress. For the third issue of jurisdiction, Ellsworth proposed and Congress decided that everything outside the boundaries established by *The Constitution* belonged to The People, in their respective states, to decide. The First Congress believed *The Constitution* had placed strict boundaries upon the federal judiciary, and that state courts would have the wider judicial power. There were so many laws and procedures established by the First Congress that it has been called by many as a second Constitutional Convention.

By 1800, after a long and hard-fought election, the Republicans wrested control of both Houses away from the Federalists, and elected Thomas Jefferson president, who believed the Federalists in Congress had gone too far in granting the central government powers at the expense of The People’s sovereignty. The Federalists were afraid the Republicans would so weaken the central government that it would lead to chaos or civil war. They also feared losing all control of the central government so in early January of 1801, before the Republicans would take office in March, the Federalists changed the *Judicial Act* (1801), which changed the number of USSC justices, and they packed the lesser courts with Federalist judges. By 1802 the Republicans had changed the *Judicial*

⁵² *Ibid.*

Act (1802) back to the original. This time period, with all its challenges and squabbles, has been extensively addressed and explained in writings and correspondence by many of those who participated, such as George Washington,⁵³ Benjamin Franklin,⁵⁴ John Adams, Thomas Jefferson,⁵⁵ and many other Founders and numerous historians since.

Three specific time periods in history, from the late eighteen and early nineteenth centuries, were examined in light of this background knowledge, to discover the Founders attitudes toward the judiciary. Beside the opinion handed down by Chief Justice John Marshall in the case of *Marbury v. Madison*, in 1803, an examination of two other time periods was made: the eleven year debate between the USSC's Chief Justice John Marshall and his leading opponent, Chief Justice Spencer Roane of the Virginia Court of Appeals and Andrew Jackson's 1832 veto of the Second Bank of the United States.

⁵³ Jay A. Parry, Andrew M. Allison, and W. Cleon Skousen, *The Real George Washington: The True Story of America's Most Indispensable Man*, Vol. 3. The American Classic Series (Washington D.C.: The National Center for Constitutional Studies, 1991).

⁵⁴ Andrew J. Allison, W. Cleon Skousen and M. Richard Maxfield, *The Real Benjamin Franklin: The True Story of America's Greatest Diplomat*, Vol. 2, The American Classic Series (Washington D.C.: The National Center for Constitutional Studies, 1991).

⁵⁵ Andrew J. Allison, M. Richard Maxfield, K. DeLynn Cook and W. Cleon Skousen, *The Real Thomas Jefferson: The Real Story of America's Philosopher of Freedom*, Vol. 1, The American Classic Series (Washington D.C.: The National Center for Constitutional Studies, 1991).

Chapter 3

FEDERAL SOVEREIGNTY VERSUS COORDINATE SOVEREIGNTY: SEEN THROUGH JUDICIAL REVIEW:

*Marbury v. Madison*⁵⁶

*Martin v. Hunter's Lessee*⁵⁷

*McCulloch v. Maryland*⁵⁸

*Cohens v. Virginia*⁵⁹

There was a gulf between the two views of federalism among the various Founders. Three specific areas of judicial history were examined for clues to understanding the judicial system from both viewpoints, and to determine how the Court's authority has changed, expanded and evolved today. The first major case where the USSC wrote an opinion regarding who is or should be the arbiter of constitutional questions, was the controversial opinion handed down by the Marshall Court in *Marbury v. Madison*.⁶⁰

⁵⁶ 1 Cranch 137 (1803)

⁵⁷ 1 Wheaton 304 (1816)

⁵⁸ 4 Wheaton 316 (1819)

⁵⁹ 6 Wheaton 264 (1821)

⁶⁰ Note: The first actual case where the USSC made a ruling on a constitutional issue (Article I, Section 9, Clause 4) was in *Hylton v. the U.S.* in 1796, Congress' right to levying a tax on carriages.

Marbury v. Madison

1 Cranch 137 (1803)

The preservation of a free government requires not merely that the metes and bounds which separate each department of power be universally maintained but more especially that neither of them be suffered to overlap the great barrier which defends the rights of the people. The rulers who are guilty of such an encroachment exceed the commission from which they derive their authority and are tyrants. The people who submit to it are governed by laws made neither by themselves nor by an authority derived from them and are slaves.

James Madison

Chief Justice John Marshall's opinion in *Marbury v. Madison* is still being felt today, because Marshall used his opinion to lay out certain ground rules for judicial review, and expanded the purview of the courts. Today, even more than in its own day, the case is considered to be "ground-breaking." Almost every book written about the USSC, *The Constitution*, the judiciary or judicial review examines this case. Examples of the books addressing this case and judicial review are Kent Newmyer's, *The Supreme Court under Marshall and*

Taney,⁶¹ Forrest McDonald's, *States' Rights and the Union: Imperium in Imperio, 1776 - 1876*,⁶² and G. Edward White's volumes on the Marshall Court.⁶³ When the opinion was originally handed down there was a great deal of opinion expressed, both in favor and against. Among both liberals and conservatives, comments regarding this case vary as widely today as they did in 1803.

Marbury v. Madison was the result of the turmoil surrounding the extremely contentious election of 1800, when the Jeffersonian Republicans wrested control of both the executive and the legislative branches away from the Federalists. In 1801, in the waning days and hours of his defeated presidency, John Adams meant to ensure that the Republicans, who had taken control of the political branches of government, would be powerless to change the one branch that was not directly elected by The People, the judiciary. Just days before Jefferson took office, and with one of the USSC Justices retiring, the Federalist-controlled Congress changed the *Judiciary Act of 1789* (September 24, 1789, U. S. Statutes 1:73) to reduce the number of Supreme Court justices from six to five. Additionally, John Adams attempted to pack the lesser courts with Federalists,

⁶¹ R. Kent Newmyer, *The Supreme Court under Marshall and Taney*, eds. John Hope Franklin and A. S. Eisenstadt. The American History Series. (Wheeling, IL: Harlan Davidson, Inc., 1968).

⁶² Forrest McDonald, *States' Rights and the Union: Imperium in Imperio, 1776-1876* (Lawrence, KS: University Press of Kansas, 2000).

⁶³ G. Edward White with the aid of Gerald Gunther, *The Marshall Court and Cultural Change, 1815-35*, Vols. 3-4, The Oliver Wendell Holmes Devise: The History of the Supreme Court of the United States (New York: Macmillan Publishing Company; London: Collier Macmillan Publishers, 1988).

by making numerous last minute judicial appointments. Some of the certification papers were left on the desk of the Secretary of State. The ousted legislators assumed their actions would ensure that Jefferson would be unable to appoint a Republican to the highest court and any changes he and Congress might want to make would be thwarted.

Upon taking office in March 1801, the new Secretary of State, James Madison, discovered a number of the appointment certifications still on his desk. John Marshall, who had been holding dual positions (Secretary of State, in the executive branch, and Chief Justice of the USSC in the judicial branch) had failed to deliver them before he left the Secretary of State position.⁶⁴ Jefferson told Madison not to deliver the appointment certificates. Five appointees (William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper) sued to obtain their positions. The subsequent lawsuit clearly defined both the Federalists' and the Republicans' view of federalism. Marshall's opinion was the first volley in what is still an on-going debate regarding the USSC's power to review the acts of the president and Congress.

The USSC declared that Congress had overstepped its Constitutional boundaries when it enacted Section 13 of the *Judiciary Act of 1789*. Section 13

⁶⁴ It is interesting to note that Marshall was aware that his own actions were the cause of this case. He wrote to his brother, James, "I cannot help regretting [the situation] the more as I fear some blame may be imputed to me." John Marshall, *The Papers of John Marshall*, Charles Hobson, ed. (Chapel Hill: University of North Carolina Press, 1990), Vol. VI, p. 90, from a letter to James Madison on March 18, 1801. As quoted in Barton, *Original Intent*, p. 270.

granted the USSC the right to issue *writs of mandamus*,⁶⁵ and specifically stipulated what cases would be heard before the highest Court. Marshall found fault with Section 13 based on three things: 1) the “judicial powers clause” in Article III, Section 2; 2) the “supremacy clause” in Article VI; and 3) the “binding clause” also found in Article VI.

Importance to Judicial Review and Supremacy

The Jeffersonian Republicans gained control of both houses of Congress, and the presidency in the raucous election of 1800. The unexpected outcome demonstrated how many Americans were disillusioned with the Federalists, because of legislation such as the Alien and Seditions Acts that the Adams administration had forced upon the country. Surrounded by the increasingly hostile climate, and realizing he had no ability to force the president to follow any court rulings, Marshall found that Marbury had brought his suit to the wrong court, so his request for a *writ of mandamus* was denied. However, Marshall used this opportunity to chastise President Jefferson for withholding the appointments that had been made by Adams and approved by the previous Congress. According to one of Marshall’s biographers, this ruling “stressed the limits to executive powers but allowed the president discretion in the exercise of

⁶⁵ NOTE: a *writ of mandamus* is an order issued by a superior court commanding compliance by a public official or an inferior court.

his political powers.”⁶⁶ In actual fact, Jefferson believed Marshall to have stepped outside the Courts area of authority in instructing him, the president; he therefore ignored the ruling completely. While Jefferson would be the first president to ignore the Court’s rulings, he certainly would not be the last.

Marbury v. Madison appears to have been a springboard for the USSC to begin in earnest seeking a means to enlarge its scope of authority. By declaring Section 13 of the First Congress’ *Judicial Act of 1789* unconstitutional (a law duly debated and passed by both houses of Congress) the USSC declared that by this ruling it was preventing Congress from overreaching its Constitutional boundaries. The vast majority of Founders did not agree with the Court’s thinking. Apart from what *The Constitution* states specifically about the judiciary in Article III, it was left up to the duly elected representatives of The People, during the First Congress, to develop exactly how the judiciary would function, including what the courts would and would not be allowed to review and decide.

Even though a number of Founders spoke out against this ruling, especially those who strongly believed in coordinated sovereignty, Congress as a whole did nothing legally to countermand the idea that the USSC had the authority to review laws passed by Congress. Thus, the USSC gained a foothold in its march toward establishing judicial review as an accepted constitutional duty, and it moved closer to its current, widely-believed but unconstitutional

⁶⁶ Francis N. Sites, *John Marshall: Defender of the Constitution* (The Library of American Biography, New York: Longman, 1981), 133.

position of judicial supremacy. Over subsequent formative years in America's history, the USSC continued expanding their judicial authority. This led to a number of decisions that make up the second time period studied.

Soon, the USSC would expand its boundaries and powers through the decisions of three cases whose opinions sparked an eleven year debate between Chief Justice John Marshall of the USSC and Chief Justice Spencer Roane, of the Virginia Court of Appeals, and others, in newspapers in Virginia, New York, and Pennsylvania. These particular cases are important because in each case the Marshall Court began to develop the foundations of the American judicial system of case law and setting precedents that would stretch the borders of its authority. Heated discussions, between anonymous disputants, quickly followed the publication of each of these Court opinions.

Martin v. Hunter's Lessee

1 Wheaton 304 (1816)

In all good governments, the Legislative, the Executive, and Judiciary powers are confined within the limits of their respective departments. If therefore it should be found that the constitutional rights of our federal and local governments should on either side be infringed, or that either of the departments aforesaid should interfere with another, it will, if continued, essentially alter *The*

Constitution, and may in time, ... be productive of such convolutions [sic] as may shake the political ground upon which we now happily stand.

Samuel Adams

General Government can claim no powers which are not granted by *The Constitution*.

Martin v. Hunter's Lessee

Forrest McDonald, in his book *A Constitutional History of the United States*, explains at length how the beginning of an anonymous 11-year newspaper debate actually began with a case called *Fairfax's Devisee v. Hunter's Lessee*, 7 Wheaton 203 (1812). The debate was between an avowed Federalist, John Marshall, and men like Spencer Roane of Virginia who strongly advocated coordinated sovereignty (between the central and the states governments).

Virginia had confiscated the elderly Lord Fairfax's lands because he had sided with the British during the American Revolution. After the elder Fairfax's death, his nephew, Denny Martin, came from England to claim his inheritance. Martin, the new Lord Fairfax, found that Virginia had confiscated his uncle's lands because his loyalty to the King during the Revolutionary War. Fairfax's vast holdings, of more than 5.2 million acres, were some of Virginia's finest land,

so when they were confiscated and offered for sale the lands were quickly snatched up. For many years Martin's attorney, John Marshall,⁶⁷ disputed the Fairfax confiscation. This suit received a favorable ruling in the Virginia District Court of Winchester, but it was overturned on appeal in 1810 by the Virginia Court of Appeals. The new Lord Fairfax, determined not to lose his lands to the state, this time sued in federal court under Section 25 of the Judiciary Act of 1789. Along with his brother James, Marshall had purchased some of the Fairfax land; thus, "as an interested party,"⁶⁸ he was unable to sit on the bench for this opinion. With two other judges missing and one dissenting, Justice Story's ruling "was decided with less than a majority of the court,"⁶⁹ in Martin's favor.

Nevertheless Story's opinion, which was based on John Jay's Treaty of 1794, stated that since *The Constitution* mandated that national treaties have the force of law in every state, they "take precedence over state laws."⁷⁰ Story stated that the Virginia Court of Appeals had erred when it ruled against compliance with a US treaty. He ordered Virginia to comply by returning all of Fairfax's lands to him. Virginia judges, including Chief Justice Spencer Roane, who was one of the sharpest legal minds in the nation at that time, met for six days to decide what to do regarding the USSC's directive. With all the Virginia judges

⁶⁷ Haines, *The Role*, 340.

⁶⁸ McDonald, *Constitutional*, 100.

⁶⁹ Haines, *The Role*, 342.

⁷⁰ McDonald, *Constitutional*, 101.

in agreement, Roane reviewed three points⁷¹ handed down in *Hunter v. Martin*.⁷² The first question, according to Roane's opinion, was "whether the twenty-fifth section of the judicial act ... is justified by *The Constitution*."⁷³ Roane said this question, gave rise to two additional questions. First, did *The Constitution* give the USSC veto power over the rulings of the states' supreme courts, and second, if *The Constitution* did grant the USSC such veto power, then how much authority did it grant. In other words, could the USSC dictate what the states must do, or simply inform the states' courts that their ruling was unconstitutional. The second big issue the Virginia judges decided was whether this case "[came] within the actual provisions of that [25th] section."⁷⁴ Should it be determined that Section 25 of the Judiciary Act was legal under *The Constitution*, and, that it did give the USSC authority over state courts then the third question to be answered was whether the Virginia Court of Appeals (VCA) had the authority to negate [veto] either or both of the rulings by the USSC.

Roane pointed out that the decision made by the VCA had not been based upon Jay's Treaty. The VCA ruling did not look at "all these opinions," but took the "Constitution, which cannot err," as their guide and "occasionally, [they would] refer to the celebrated Report of the Virginia Legislature in the year

⁷¹ *Ibid.*, 328.

⁷² Spencer Roane, *Spencer Roane: Hunter vs. Martin; Judge Spencer Roane's Opinion* (The John P. Branch historical papers of Randolph-Macon College, Vol. 2:2, 1906).

⁷³ McDonald, *Constitutional*, 330.

⁷⁴ *Ibid.*

1799[.]”⁷⁵ The fact that other states, such as Maryland, had used the Report to develop their own constitutions demonstrated that the Report was found to be a “principle influence in producing ... the American republic.”⁷⁶

To understand the issues in this case Roane said it was necessary to remember that “the United States is not a sole and consolidated government.”⁷⁷ He was alluding to the very foundational ideals held by all Founders – divided government and popular sovereignty. America’s divided government had been created and established specifically to protect The People from power grabs by their elected officials, on both the federal and state levels. Sovereign states might enter into a union without “ceasing to be a perfect State; ... this [idea] has grown into a maxim ...”⁷⁸ so strong that Congress had passed the tenth amendment that provided that “the powers not delegated to the United States by *The Constitution*, nor prohibited by it to the States respectively, or to the people,”⁷⁹ remained with the state governments.

Roane further argued that Article III, Section 1 “relates solely and exclusively to the [federal] Courts of the United States[,]”⁸⁰ not to the courts of the various states. When *The Constitution* referred to state courts it specifically stated so, such as in the provision that all jury trials had to be held in the states

⁷⁵ *Ibid.*, 330.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, 331.

⁷⁸ *Ibid.*, 332.

⁷⁹ See Appendix B, Amendment X.

⁸⁰ McDonald, *Constitutional*, 332.

where the crime took place. The Sixth Amendment, Roane further pointed out, guaranteed a speedy jury trial to be held within the state and district where the crime was committed.⁸¹ *The Constitution* could not have been referring to the states' courts, because each of the states' constitutions already "exercised the power to say under what limitations and restrictions the jury trial shall prevail in their [respective] Courts."⁸² "One of the last [at that time] amendments⁸³ to *The Constitution*," Roane continued, specifically "declares that the judicial power of the United States shall not be construed to extend to suits brought against a State by citizens of another State, or of a foreign State, [it] is confined to the Federal Courts." Thus, it could not have referred to State courts because to have done so would have meant that The People would have been "left without any redress whatever, when aggrieved by a State!"⁸⁴

One of the apparent great failings of *The Articles of Confederation*, according to Roane, was that the central government had no power to act directly upon the citizens, but had to work through the States' governments. Consequently, "to remedy this evil an entirely new system was adopted, by which the general government acted directly upon the people." Only for the purpose of electing a President and Senators," are the governments of the several States and the central government commingled. "In every other instance

⁸¹ *Ibid.*, 335.

⁸² *Ibid.*, 336.

⁸³ Amendment XI, which was ratified in 1796 [see Appendix B]

⁸⁴ McDonald, 336.

the governments are entirely separate and distinct.”⁸⁵ Additionally, Roane noted that in every other part of *The Constitution* where judicial power and jurisdiction were discussed it referred to the “Federal Courts alone.”⁸⁶

Thus, Roane arrived at the answer to what was meant by Article III, Section 2, which states, “The judicial power shall *extend* [emphasis added by Roane] to all cases in law and equity arising under *The Constitution*, the laws of the United States, and treaties made, or which shall be made under their authority, etc.” He believed it was proper by “every rule of fairness” to attach the words “the United States,” from the first part to the second part, without causing harm to *The Constitution*. Roane admitted that the weakness of the judiciary under *The Articles of Confederation* led to a desire to *expand* the powers of the federal judiciary under *The Constitution*, but he denied that wording that gave jurisdiction to federal courts by taking it away from state courts. It was agreed that the constitution of one government did not control or dictate the constitution[s] of other government[s].⁸⁷

That valid point begs the question, “was that instrument (*The Constitution*) settling the jurisdiction of its own courts, or those of a different government?”⁸⁸ Roane disagreed with Justice Story’s notion that state courts should be considered *parts of the whole* of the Courts of the United States. Until

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, 339.

the USSC ruled the states' courts were governed by the Judicial Act, they had never been anything more than the "Courts of the several states!"⁸⁹ Ultimately, Roane ruled that "Article 25 of the *Judiciary Act of 1789* was unconstitutional"⁹⁰ insofar as it related to state courts. Thus, the VCA refused to comply with the directive as it found that the USSC had no jurisdiction over a purely state issue.

Virginia's ruling again led Martin [the new Lord Fairfax] to appeal to the USSC; his new case was not based on ownership of the land but rather on the issue of the constitutionality of Article 25. While his new case (*Martin v. Hunter's Lessee*) was processing through the system Martin decided to go back to England. He sold the land to John and James Marshall, along with a few other Virginians. Either because Marshall did not want his name associated with the transaction, or because he didn't want to start the process over, which might "muddy" the waters of the purchase, the Marshalls kept the case moving through the court system under the Martin name. As one would expect, Story again sided with Martin (by now actually the Marshalls and the other buyers) but Story could not force Virginia's compliance.

Story believed that the need for uniform laws within the nation was ample reason for the USSC to gain jurisdiction over state courts. His opinion stated, "Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even *The Constitution* itself; if there were no revising authority to control these jarring and

⁸⁹ *Ibid.*, 340.

⁹⁰ *Ibid.*, 331.

discordant judgments, and harmonize them into uniformity, the laws, the treaties, and *The Constitution of the United States* would be different in different states and might, perhaps, never have precisely the same construction, obligation or efficacy in any two states.”⁹¹ While the USSC ruled in favor of the plaintiff, it had no authority or power to force the state of Virginia to comply, since the power of enforcement lies in the executive branch.

Importance to Judicial Review and Supremacy

Martin v. Hunters Lessee was a watershed case for both sides of the sovereignty issues. Spencer Roane believed that Article III of *The Constitution*, upon which Section 25 of the *Judiciary Act of 1789* was based, gave the USSC appellate jurisdiction on the “lesser [federal] courts,” but it did not give the USSC the right to review state court cases.⁹² Justice Story, writing on behalf of the Marshall Court ruled otherwise. He voiced Marshall’s opinion that the USSC was superior to all courts in the land regardless of what type of court it was (federal or civil). Because Marshall’s ruling remained *officially* unaddressed by the executive or legislative branches it further expanded the right of the USSC to review federal laws, the executive branch, *and* cases arising from

⁹¹ Margaret E. Horsnell, *Spencer Roane: Judicial Advocate of Jeffersonian Principles*, eds. Harold Hyman and Stuart Bruchey. *American Legal and Constitutional History: A Garland Series of Outstanding Dissertations* (New York & London: Garland Publishing, Inc., 1986), 134.

⁹² Horsnell, *Spencer Roane*,

constitutional issues within state courts. This appears to have not been according to what the Founders intended.

McCulloch v. Maryland

4 Wheaton 316, (1819)

The feud between Marshall and Roane – that is between the beliefs of how the central and states governments stood in regards to the other – would continue with the USSC opinion in *McCulloch v. Maryland*. The USSC again stepped in and issued an opinion that Roane (who until his death in 1822 remained one of the leading defenders of “coordinate sovereignty”),⁹³ considered to be outside the bounds of what was allowed by *The Constitution*. It was a case the Marshall Court used to further expand the authority of the USSC.

The case of *McCulloch v. Maryland*, often referred to as “the Bank Case,”⁹⁴ arose from an attempt by the state of Maryland to tax the federal Second Bank of the United States. Because the Baltimore branch cashier, James McCulloch, refused to pay a \$15,000 tax issued to it by the State of Maryland, the Marshall Court was able to address the issues that arose from this particular situation, to

⁹³ *Ibid.*

⁹⁴ Gerald Gunther, *John Marshall's Defense of McCulloch v. Maryland* (Stanford, CA: Stanford University Press. 1969), 3.

expound the Federalist ideal of a stronger central government and to further develop Federalist judicial aspirations, such as judicial supremacy. “Marshall ruled on two constitutional questions: 1) whether the act creating the national bank was constitutional, and if so, 2) whether the state act taxing the bank was constitutional.”⁹⁵ Closely following the words Hamilton gave to Washington, in his original document supporting the constitutionality of the First National Bank, Marshall ruled *yes* on question 1. He ruled *no* on question 2 because “the power to tax is the power to destroy”⁹⁶ and thus the states would be able to destroy the general government through taxation. Marshall stated that 1) the Bank was constitutionally incorporated and, thus, was a non-issue; and 2) the central government was supreme and the state governments were sub-ordinate; and 3) the inferior governments could not tax the superior government.

Before the ink had dried on *The Constitution*, there arose a division between those who wanted a coordinate form of government that divided power between the central and state governments, and those who wanted a central government that was superior to the states’ governments. These two views were espoused by the Federalists, who sought to expand and solidify the power of the central government, and the Republicans, who sought to preserve a narrow and literal interpretation of *The Constitution*. The distinct

⁹⁵ Forrest McDonald, *States’ Rights and the Union: Imperium in Imperio, 1776-1876* (Lawrence, KS: University Press of Kansas, 2000), 73.

⁹⁶ *Ibid.*, 74.

interpretations the two sides gave to what has become known as the *necessary and proper clause* underscored how far apart the two sides were.

The Federalists' view was that the framers intended that the central government's Legislative branch could do whatever was necessary, by whatever means necessary, to carry out its delegated powers and ensure that the work ran smoothly. Marshall's opinion in *McCulloch* explained in great detail that the specific meaning of the word *necessary* changed on occasions. Thus, he asked, "Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without the other?"⁹⁷ In world affairs and writing, he said, it simply denotes that a thing is "convenient, or useful, or essential to another."⁹⁸ Marshall further empowered the phrase "employ the means necessary" to mean "employing any means calculated to produce the end;"⁹⁹ and he refused to accept that the word *necessary* in *The Constitution* "controll[ed] the whole sentence."¹⁰⁰

John Marshall was not alone in his desire to solidify the strength and authority of the central government. His expansionist view was held by other influential people like Alexander Hamilton, who probably held the strongest expansionist views, and John Adams, who would use his term as president to

⁹⁷ Gunther, *Defense*, 33.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, 32.

fill the Courts with Federalist judges. George Washington, who despised parties as factious¹⁰¹ (he never called himself a Federalist), in fact warned his fellow citizens about the evils of party politics.¹⁰² He knew firsthand, perhaps more than others (from his experiences during the Revolutionary War), the hardship and loss of lives a weak central government could cost.

Marshall's *McCulloch* opinion, then, became the first volley in a renewed verbal sparring match between him and his views of supreme and subordinate governments and those who held the coordinate view of government. This other view – the Republican one – held that *The Constitution* should be literally interpreted. They held that that if *The Constitution* did not specifically grant a power to the central government then it remained with the states and The People. While Jefferson is generally considered the leader of those who held these views, in reality leadership on the coordinate sovereignty group resided in the Richmond Junto, led by Virginia Judge Spencer Roane. The group immediately took the offensive in response to the *McCulloch* opinion, through an extended debate in New England newspapers.

The first essay¹⁰³ on the *McCulloch* opinion appeared in the prominent Virginia newspaper, *The Richmond Enquirer*, whose editor, Thomas Ritchie, was part of the Richmond Junto and cousin to Roane. Gunther believes the essays

¹⁰¹ Fitzpatrick, John C. *George Washington Himself*. Indianapolis: Bobbs-Merrill Company, 1933. 34:251 (Letter to Timothy Pickering (7/27/1795)).

¹⁰² *Ibid.*, 35:224. "Farewell Address," (1796).

¹⁰³ Gunther, *Marshall's Defense*, 52-64.

under the pseudonym “Amphictyon” were written by Virginia Judge William Brockenbrough, while others believed they were written by Roane. Regardless of which Junta member wrote them, “Amphictyon” took apart Marshall’s opinion in the case by suggesting that the “states not only gave birth to *The Constitution*, but its life depends upon the existence of the state governments.”¹⁰⁴ He agrees¹⁰⁵ with Marshall¹⁰⁶ that *The Constitution* grants the central government limited powers and takes issue with Marshall’s finding of implied powers in the compact, by saying, “If the powers granted, be valid, it is solely because they are granted; and if the granted powers are valid, because granted, all other powers not granted, must not be valid,”¹⁰⁷ thus the Court was in error in finding *implied* powers. He also takes issue with Marshall’s judicial supremacy statement that the “judicial authority [of the USSC] is to be regarded as the sole expositor of *The Constitution*, in the last resort.”¹⁰⁸

In the *Enquirer*,¹⁰⁹ three days later, Amphictyon addressed specific ideas Marshall espoused in his *McCulloch* opinion. He especially faulted the rendering of the meaning of the phrase *necessary and proper*, and the one found in Section 8 of Article 1, the *general welfare*. Amphictyon points out that the Court’s rendering of these clauses illuminates why the anti-federalists opposed

¹⁰⁴ *Ibid.*, 56-7.

¹⁰⁵ *Ibid.*, 61, 64.

¹⁰⁶ *Ibid.*, 38.

¹⁰⁷ *Ibid.*, 61.

¹⁰⁸ *Ibid.*, 63.

¹⁰⁹ *Ibid.*, 64-77.

The Constitution from the beginning. He agreed with Marshall that the general government has limited powers, but he faulted Marshall's definition of each of those two clauses. Amphictyon prophesied, "So wide is the latitude given to the words 'general welfare,' ... and to the word 'necessary' ... that it will ... really become a government of almost unlimited powers."¹¹⁰ He addressed the examples used by Marshall to define *implied powers*: 1) the penal code: the right to penalize a criminal is both "natural and necessary,"¹¹¹ and 2) the postal system: that it would be impossible to have a postal system if the post could not be moved over roads, making this not an *implied* right, as Marshall stated, but an "indispensably necessary"¹¹² right embodied in the formation of a postal service, 3) power to punish mail fraud: this is necessary to applying justice, and 4) additionally, he took issue with Marshall's stating that the oath of office required by Congress was additional to that required by *The Constitution*, and unnecessary. Amphictyon not only noted that governments in Europe as well as America required oaths of office and deemed it indispensable because of man's nature and tendency toward corruption, but he likened Marshall's remark as having been made by a "youthful theorist, by some Utopian ... but proceeds with a very bad grace from the lips of the sage judges of the land."¹¹³

¹¹⁰ *Ibid.*, 65.

¹¹¹ *Ibid.*, 67.

¹¹² *Ibid.*, 68.

¹¹³ *Ibid.*, 69.

Marshall soon had his own response to Amphictyon's attack published anonymously in the Philadelphia *Union* newspaper from April 24-28, 1819, under the pseudonym of "A Friend to the Union." [Marshall's essays, under the pseudonyms of "A Friend of the Constitution," in response to Roane's "Hampden" essays, would not be discovered for another one hundred and fifty years.¹¹⁴] He alluded to the rise again of the anti-federalists' spirit in the attack on the Chief Justice and his opinion in *McCulloch*, and decried the fact that Marshall and the Court were being vilified because they sustained a bill that had been passed by Congress and signed into law by the President.¹¹⁵ Additionally, Marshall wrote that the attack implied that the unanimous decision of all six judges, four of whom were republicans, were really solely the Chief Justice's opinion and a rehashing of Alexander Hamilton's views.¹¹⁶

Marshall pointed out that the opening words of *The Constitution*, "We the People of the United States," could never be misunderstood to mean "We the states, &c,"¹¹⁷ and that even had the legislatures of each and every state been against the ratification of *The Constitution*, had The People in their ratifying Conventions approved it then it would have become the law of the land. He further reminded the readers that when the Constitutional Convention delegates presented the document to the states, it was merely a proposal and not the law

¹¹⁴ *Ibid.*, 2.

¹¹⁵ *Ibid.*, 79.

¹¹⁶ *Ibid.*, 81.

¹¹⁷ *Ibid.*, 85.

of the land until ratified by a majority of the States' ratifying conventions. Lastly, he took issue with Amphictyon's assertion that the states' legislatures can alter *The Constitution*; he reminded the readers that the state legislatures could only amend it after it had first been recommended to them, or they could, by two thirds, require Congress to call a convention of the people to propose amendments."¹¹⁸

Reminding Chief Justice Marshall of his reference to "the excessive jealousies" of the states against the central government, Roane (writing as Hampden in the *Richmond Enquirer* in June 1819) declared that the citizens of the various states were indeed jealous of the authority of the states. They clearly demonstrated that jealousy by quickly passing the Tenth Amendment, which stipulates that everything that is not clearly and specifically granted to the federal (central) government remained or was retained with The People or the states.¹¹⁹ Roane also took exception to Marshall's spin on both the rights claimed by Marshall's Court and his explanation of the words *necessary and proper*. While Marshall said the words meant that the central government may use any means at its disposal that they might reasonably believe to be necessary and proper, Roane reminded him that in the Virginia Report the issue of *necessary and proper* was addressed: "we are told by the *report* and by all the authorities, that 'it is incumbent on the general government to *prove* that *The*

¹¹⁸ *Ibid.*, 91.

¹¹⁹ See Appendix B.

Constitution grants the *particular* power.”¹²⁰ Roane accused the Marshall Court of rulings that appeared to “consider it [The People’s retention of these powers] as quite unimportant, so long as the great principles involving human liberty are not invaded, by which set of representatives of the people, the powers of government to be exercised.”¹²¹ However, *which* representatives exercise the governmental powers was extremely important because The People designed the balance of power just as they wished it and only The People should change that balance; the Court should not have set that delicate balance aside through its erroneous rulings. Most importantly, Roane took exception to the way Marshall repeatedly used misstated reality: “while being limited in its powers, [the central government] is supreme within the sphere” and that “the government, though limited in its powers, is supreme.” Roane emphatically attested that “[t]his word *supreme* does not sound well in a government which acts under a limited constitution. The *people* only are supreme. *The Constitution* is subordinate to them, and the departments of the government are subordinate to that constitution.”¹²² Marshall and Roane were clearly in complete agreement on the issue if Marshall simply meant that the “government is supreme *up to* the limits of *The Constitution*, and no further.”¹²³ Roane almost ridiculed the examples Marshall used to demonstrate the government’s power, especially

¹²⁰ Gunther, *Marshall’s Defense*, 128.

¹²¹ *Ibid.*

¹²² *Ibid.* 130.

¹²³ *Ibid.*, 131.

refuting Marshall's examples of why it was *necessary and proper* for the USSC to decide this case.

Roane was astounded the USSC was allowing a private corporation (through the establishment of the central bank) "by its *by laws* [Sec. 7], to repeal the laws of the several states ... a right only given to the *congress* itself, by *The Constitution*, and that only when acting under its provisions."¹²⁴ He then listed a number of evils these national bank branches bring into the states, thereby destroying their financial health. Roane's statements regarding the need for banks to control currency demonstrate that his disagreement with Marshall was not about banks. He was strongly against the corruption of the banks, but he was incensed that Marshall would use the *McCulloch* ruling for an "extra-judicial ... attempt to read into *The Constitution* his own theories concerning the nature of the union."¹²⁵

In his second essay of the 28th of April (1819), Marshall took issue with "Amphyction's [sic]" erroneous interpretation of the *McCulloch* opinion. He decided that the USSC believed that *The Constitution* should be liberally interpreted, rather than in a restricted manner. He denied that the Court implied or intended for *liberal* to mean "beyond the fair and usual import of the words. He further stated that "principle is not found in the opinion ..."¹²⁶ Marshall announced emphatically that the contest was between the "fair sense

¹²⁴ *Ibid.*, 136.

¹²⁵ Hosnell, *Spencer*, 147-8.

¹²⁶ Gunther, *Marshall's Defense*, 92.

of the words found in *The Constitution* and a restricted sense,"¹²⁷ and he charged that Amphyctyon and Hampden denounced the opinion not because it had attempted to give a fair sense to the words of the compact, but because it had not adopted a more restrictive view.

The differences between the two views (of Marshall and Roane) hinged on a few fundamental words. Thus the big issue, as far as the Virginia judges saw it, was not so much Marshall's interpretation of particular words as his expanding the Court's authority to review *all* cases; and the judges were against its ruling that the USSC was the sole and final arbiter of what is constitutional – the major issues were about authority, power and sovereignty. While the Judiciary Act of 1789, Section 25, granted limited judicial review to the courts, *The Constitution* did not specifically grant them this power. Some Founders believed judicial review could be found in the supremacy clause of Article VI; however, this clause did not state *who* the final arbiter was to be when there was a difference of view/opinion.

Importance to Judicial Review and Supremacy

In *McCulloch*, Marshall applied the same principle of implied powers to the legislative branch that he had applied to the executive branch in the *Marbury* case. One of his biographers, Francis Stites, wrote that the Marshall Court "would not allow Congress to 'adopt measures which are prohibited by *The*

¹²⁷ *Ibid.*, 93.

Constitution.”¹²⁸ This demonstrated the growing belief among the Court that they were to be the defender of *The Constitution*, even though, according to that compact, the president alone takes an oath to preserve, protect and defend *The Constitution* from all enemies, both foreign and domestic.

Even had Marshall not believed it was constitutional for Congress to grant a charter to a private corporation to set up a bank to do the nation’s banking, he realized that many Americans believed the Bank of the United States to be constitutional. However, while he was interested in the issue of the Bank, he was more interested in establishing that the federal government was sovereign over the states’ governments, and especially that the USSC was sovereign over the courts of the various states.¹²⁹

In his *McCulloch* ruling, Marshall liberally borrowed from Alexander Hamilton’s report to Washington regarding the constitutionality of the First Bank of America. He re-introduced Hamilton’s definition of the words *necessary* and *proper* to mean that the central government had the power to do whatever was necessary to fulfill its constitutional mandate to govern the nation and keep it secure.

As far as Roane and the others who believed in coordinated sovereignty were concerned, the *necessary and proper* clause related to the very specific and narrow issues allotted to the central government by *The Constitution*. The

¹²⁸ Francis N. Stites, *John Marshall: Defender of the Constitution* (The Library of American Biography, Oscar Handlin, Ed., New York: Longman, 1981), 133.

¹²⁹ Horsnell, *Spencer Roane*, 142.

Founders (as Hamilton first put forth and Marshall parroted in this case) had not intended for this clause to expand the central government's authority or boundaries, nor to allow the federal courts the right to encroach upon the very specifically retained rights (as stated in the Tenth Amendment and later the Eleventh Amendment) of the states and The People. Roane emphatically believed, and so stated, that the central government was not a party to the compact. The federal courts, which were created *by* the compact, could not have oversight of the governments of the several states and their citizens, who were parties to the compact. Roane quoted James Madison and the *Federalist Papers* to demonstrate that the *necessary and proper clause* was meant to restrict Congress' authority and power, not to grant them greater power. "[A] man must be a deplorable idiot who does not see that there is no difference' between an 'unlimited grant of power and a grant limited in its terms, but accompanied with unlimited means to carry it into execution.'" ¹³⁰

Marshall, just as emphatically declared, "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which *The Constitution* has declared." ¹³¹

¹³⁰ *Ibid.*, 152.

¹³¹ *McCulloch v. Maryland*, 6 Wheaton 264, 436. As reported by: Margaret Horsnell, *Spencer Roane*, 145.

The real and lasting significance of *McCulloch* was, therefore, not whether the Bank was constitutional but that Marshall used the case to assert judicial supremacy. He used the case to expand the authority of the central government by focusing on the “implied” powers he found lurking in the *necessary and proper clause*.¹³² And, he used the case to largely dismiss and ignore the 10th Amendment, which states, “The powers not delegated to the United States by *The Constitution*, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

The Virginia Court of Appeals’ (and the state of Virginia as a whole) refusal to recognize or to implement the ruling handed down by the USSC in *McCulloch*, essentially resulted in Virginia’s *de-facto* veto of the USSC’s ruling. The on-going verbal sparring match would heat up between Marshall and Roane, and between the two ideologies, during the *Cohens v. Virginia* case.

Cohens v. Virginia

6 Wheaton 264 (1821)

This case was the third of the cases used as the backbone of the Marshall/Roane newspaper debates that raged for eleven years. The rancor and enmity between Marshall and Roane reached its zenith during this case because

¹³² Article 1, Section 8, *The Constitution*.

Marshall used it as the sounding board for his growing belief in the supremacy of the federal courts over state courts.

Cohens v. Virginia is a case about two Cohen brothers who were authorized to sell lottery tickets in Washington D.C. for any necessary improvements in the newly incorporated District of Columbia (WDC). The brothers sold some of the lottery tickets in Virginia where gambling was illegal. Virginia authorities arrested and convicted them. With the approval of the state of Virginia's counsel, they appealed their conviction to the USSC. Virginia's state counsel recognized this case was another opportunity to test the reach of the USSC into state judicial and legislative matters.

When the USSC ruled in favor of the brothers, the state of Virginia was so concerned about the continuing implications of federal judicial interference in state matters that they impaneled a legislative committee to review and report on the USSC ruling. The Committee was swift with its strong report. "The committee is unwilling to believe, that the Congress of the United States, representing as they always should, the justice, the wisdom and the interests of the people,"¹³³ by allowing the incorporation of the new capitol city to authorize selling something that was illegal in the states, "in open defiance of the constituted authorities of the respective states; because, it is believed that such a delegation of authority is new and unheard of; supported by no experience;

¹³³ *Journal of the House of Delegates, Virginia*, 1820, pp. 102-104. As reported in: Charles G. Haines, *The Role of the Supreme Court in American Government and Politics: 1789-1835* (New York: Russell & Russell, 1960), 428.

justified by no analogy; without example of our ancestors, or root in *The Constitution*.”¹³⁴ The Committee defended the rights of the states by pointing out that as both the central and states’ governments had the ability to tax The People, there would naturally arise some disagreements in this area. However, “[i]f this occasional conflict of authority in the different governments of the Union may be justly regarded as a dangerous consequence of our federative system, the wise framers of *The Constitution* have prescribed no antidote against its possible and foreseen occurrence. It is highly probable they greatly preferred it to that fearful and absolute supremacy, which could alone invest one government with power to abrogate the rightful laws of another; and the exercise of which by the general government would directly affect the existence of the state governments, the balance of *The Constitution*, and the integrity of the Union.”¹³⁵

The historical author, Charles Haines, agreed with the Virginia Committee. In his book *The Role of the Supreme Court in American Government and Politics*, he pointed out that after delineating the scope of authority of the USSC in its appellate responsibilities the Committee fully believed that it was plainly evident that the framers of *The Constitution* intended for both the federal and the states’ legislators to have the same level of power – that the judiciary of both divisions of government would be separate but equal, with different spheres of influence.

¹³⁴ *Ibid.*

¹³⁵ Charles G. Haines, *The Role*, 429.

“[I]f either be independent of the other, whilst acting within its own sphere, both must be also independent of the other. And if the federal legislature cannot abrogate states laws, the federal judiciary cannot abrogate state judgments. The word, “supreme,” as descriptive of the federal tribunal, is relative, not absolute; and evidently implies that the supremacy bestowed upon the Supreme Court is *over the inferior* [federal] *courts*, to be *ordained and established* by Congress, and not *over the state courts*. This becomes more apparent from the apportionment of jurisdiction between the supreme and inferior courts, which immediately follows in the 2d clause in the 2d section of the same article, where it is declared that, ‘in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction.’ This clearly shows an intention to limit the jurisdiction of the Supreme Court to the specified cases in the preceding article. But, a limited jurisdiction, with absolute supremacy over the state tribunals would be no limitation at all: as the power of that supremacy would annihilate every means in the state governments to enforce the limitation, and make the extent of jurisdiction commensurate with the pleasure of the Supreme Court.¹³⁶

¹³⁶ *Journal of the House of Delegates, Virginia*, 1820, 102-104. As reported in: Charles G.

Haines explained that since the word *supreme*, as used by *The Constitution*, did not extend to the *inferior* courts then it was impossible for those *inferior* courts to be able to broaden their reach over the states' courts, simply because the word *supreme* is not applicable to the *inferior* courts. The *inferior* courts of *The Constitution* only have power on the basis of "the appellate jurisdiction of the Supreme Court (except in the few specified cases [as listed in Article III]), and the power of the inferior courts reaches not to the state courts."¹³⁷ This clearly demonstrates that "a reasonable conclusion" would be that the authority of the USSC does not extend over the state courts, according to Haines.

The Committee declared that Section 25 of the *Judiciary Act* had not changed the dynamics between the state and federal courts as laid down in Article III of *The Constitution*. By resolution, the Virginia Senate instructed the state's counsel to only discuss the issue of jurisdiction under Section 25 in the *Cohens v. Virginia* case before the USSC.

As far as Marshall was concerned, however, with this case he was able to write his opinion regarding which tribunal(s) would hold the supreme authority in all constitutional issues – the USSC or states' courts. Marshall pointed out there were two issues: 1) whether the act passed by Congress to allow the sell of lottery tickets was meant to allow sales in states where it was prohibited, and 2)

Haines, *The Role of the Supreme Court in American Government and Politics: 1789-1835* (New York: Russell & Russell, 1960), 429-30.

¹³⁷ *Ibid.*

whether or not the act of Congress was constitutional. Marshall allowed that since issue one was *no*, then issue number two was moot. However, he used this opinion to address Roane's allegations about state supreme courts being the highest court in issues solely between citizens and each specific state. According to McDonald, Marshall "demolished" Roane's compact doctrine and spelled out his view of divided sovereignty, which included the "supreme law clause of *The Constitution*, which bound 'the judges in every state' to place *The Constitution* above state constitutions and laws."¹³⁸ McDonald believes that Marshall made it clear that someone had to be the final arbiter, and with the supreme law clause, that meant that the USSC would be that arbiter.

The ruling in *Cohens v. Virginia* was largely based upon the Marshall Court's decision in *Martin v. Hunter's Lessee*¹³⁹ but the Court used the *Cohens'* case to enlarge even further the scope and authority of the USSC. The Marshall Court completely disagreed that *The Constitution* meant for the USSC to solely have jurisdiction on the few instances mentioned in Article III. In the ruling the USSC agreed with the plaintiff that their jurisdiction was not determined by the venue but by the "character of the cause."¹⁴⁰

Marshall disagreed with Virginia's claim that they (and, consequently, every other state) had the right to interpret *The Constitution* as it would lead to

¹³⁸ McDonald, *The Constitution*, 90.

¹³⁹ Charles G. Haines, *The Role of the Supreme Court in American Government and Politics: 1789-1835* (New York: Russell & Russell, 1960), 432.

¹⁴⁰ *Ibid.*

“mischievous consequences.”¹⁴¹ It appears Marshall was intentionally choosing to misunderstand Virginia’s point – neither Virginia’s legislators nor her highest court were attempting to interpret *The Constitution*, but to ensure that the boundaries between the federal and states’ tribunals would continue inviolate. Marshall clearly believed that the strength of the nation as a whole depended upon having one superior *supreme* tribunal.

McDonald’s modern assessment was that Marshall’s argument in the case completely destroyed Virginia’s point of view. But Spencer Roane, writing under the name of Algernon Sidney in the Richmond *Enquirer*, was quick put into words what many who were a party to the formation and ratification of *The Constitution* believed about the Marshall Court’s *Cohens* opinion. He faulted Marshall’s continued “assertion that if [the USSC’s] construction of *The Constitution* is not admitted, the state courts may ‘arrest the progress of the general governments, in its constitutional course.’”¹⁴² In reply to Marshall’s claim, Roane asserted that “that course [chosen by the federal legislature and judiciary] may be, as it often has been, *unconstitutional*, and subversive of the rights of the people; and if so ought not the state governments and judiciaries to intervene?”¹⁴³

¹⁴¹ *Ibid.*, 434.

¹⁴² Spencer Roane (writing as Algernon Sidney), *Virginia Opposition to Chief Justice Marshall* (The John P. Branch historical Papers of Randolph-Macon College, Vol. 2, Issue 2), 143.

¹⁴³ *Ibid.*

Roane further charged that the USSC justices continued to “indulge in groundless jealousy”¹⁴⁴ of both the states’ governments and supporters, while the states’ officials were actually defending their citizens from the encroachment of the central government into their lives. Roane reminded Marshall that citizens had already been deprived of *habeas corpus*, and locked up for exercising “their freedom of speech secured to them by *The Constitution*[,]” by federal actions. To Marshall’s assertion that the federal courts would protect the rights of all citizens Roane responded it was “belied by every page of our history. It is confronted by the glorious revolution of 1799 which was bottomed upon the great conviction of the people, that the federal government had abused – grossly abused – its powers.”¹⁴⁵

Roane made a crucial point when he questioned Marshall’s idea that while the states’ judiciaries cannot be trusted to keep the citizens’ best interests in mind, one was supposed to accept Marshall’s assertion that the USSC would always do so. Roane added that “[a] federal compact between two parties [federal and states’ governments] is a nonentity, if it is whatever one of those parties chooses to make it[;]” and Roane pointed out that Marshall himself, in the Constitutional Convention, “denied that, even in controversies between a state and citizens of *another* state, the states could be ‘dragged’ to the bar of the federal court. [Marshall] said that the express provision in the judicial article, in relation to this case, could not be expounded so as to make a sovereign state a

¹⁴⁴ *Ibid.*, 144.

¹⁴⁵ *Ibid.*

defendant, in the federal courts.”¹⁴⁶ Roane, referring to the *Marbury v. Madison* case, stated that he did not agree with the finding of the Marshall Court in that case, but that he was “entirely [in] accord with them in opinion that only what is directly pertinent, to the case in hand, is to be regarded as authority, and that everything else was to be rejected as extrajudicial. That concession, however, destroys several of the pillars, of the present opinion of the court, and will forever abolish almost all the volumes of Wheaton.”¹⁴⁷

In her biography of Roane, Margaret Horsnell, referring to numerous quotations from Albert J. Beveridge’s 1929 book, *John Marshall*, stated that “[f]rom 1801 to 1835, Marshall, with a blend of boldness and subtlety, selective logic and “home-made” law, slowly built up a series of decisions which embodied the Hamiltonian belief that the survival of the nation depended upon protecting property rights by the power of the state legislatures. ... It was absolutely essential to Marshall’s ultimate objective that the Supreme Court freely exercise the right to review state laws.”¹⁴⁸

Like the other cases, *Cohens* demonstrated clearly that while the supremacy clause of *The Constitution* states that the USSC is to judge on the constitutionality of specific issues there was a clear disagreement between judges and courts, then as now, regarding what those issues could and ought to

¹⁴⁶ *Ibid.*, 147.

¹⁴⁷ *Ibid.*, 152. Note: The “volumes of Wheaton” refers to the books where the Marshall Court opinions are recorded.

¹⁴⁸ Margaret E. Horsnell, *Spencer Roane: Judicial Advocate of Jeffersonian Principles* (New York & London: Garland Publishing, Inc., 1986), 35.

be. The Founders, however, when allowed to speak freely for themselves, have just as clearly said that the USSC and states courts were to have their own areas of review, their own authority, and were to be checked by other branches. It seems clear that the USSC has overstepped the will of the parties to *The Constitution*.

Importance to Judicial Review and Supremacy

As far as Roane and the others who believed in coordinated sovereignty were concerned, the issue of extreme importance in this case was the *necessary and proper* clause. This clause related to the very specific and narrow issues allotted to the central government by *The Constitution*, and was not intended by the Founders, as Hamilton first put forth and Marshall parroted in this case, to be expanded to give the central government nor the federal courts the right to encroach upon the very specifically retained rights (as stated in Amendment 10 and later Amendment 11) of the states and The People. Roane emphatically believed, and so stated, that the central government was not a party to the compact, thus the federal courts, which were created by the compact could not have oversight of the governments of the several states and their citizens, who were parties among themselves to the compact. The Founders' writings demonstrate that Roane's understanding of the division of powers aligned as Roane believed and that Marshall had stretched the *necessary and proper* clause far beyond what was intended by the Founding generation.

Chapter 4

ANDREW JACKSON'S ANSWER TO JUDICIAL SUPREMACY: 1832 VETO OF BANK RE-CHARTER

John Marshall has made his decision. Now let him enforce it!

Andrew Jackson ¹⁴⁹

Each public officer who takes an oath to support *The Constitution* swears that he will support it as he understands it, and not as it is understood by others....The opinion of the judges has not more authority over the Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive.¹⁵⁰

President Andrew Jackson's veto of the re-charter of the Second Bank of the United States was examined to observe how a president had handled the constitutionality of an issue on which he and the Court differed. Regarding the

¹⁴⁹ Note: This quote has been attributed to Andrew Jackson by a number of scholars, including Robert Bork, *The Tempting of America*, 28.

¹⁵⁰ Jackson's *Veto Message* of July 10, 1832.

Marbury v. Madison case and the judiciary, Thomas Jefferson wrote, “*The Constitution* intended that the three great branches of government should be coordinate, and independent of each other: As to acts therefore, which are to be done by either, it has given no control to another branch. ... It did not intend to give the judiciary ... control over the executive ... I have long wished for a proper occasion to have the gratuitous opinion in *Marbury v. Madison* brought before the public, and denounced as not law.”¹⁵¹ Jackson fulfilled Jefferson’s wish with his veto.

The words of numerous Federalists, anti-federalists, Republicans and interested citizens were examined in an attempt to determine who the Founders intended to have constitutional oversight, and whether that oversight rested in one branch alone or in more than one or all. It was discovered that in addition to judicial review both the legislative and executive branches were given constitutional authority and oversight powers. President Andrew Jackson’s veto of Congress’ bill to re-charter the Second Bank of the United States demonstrates how the checks and balances built into *The Constitution* were designed to work. Ideally, the veto (often referred to by the Founders as “the negative”) was to be used solely for the purposes of protecting the sovereignty

¹⁵¹ Albert Ellery Bergh, ed., *The Writings of Thomas Jefferson*, 20 vols. (Washington: Thomas Jefferson Memorial Association, 1907), 11:50. As quoted by W. Cleon Skousen, et al, *The Making of America: The Substance and Meaning of the Constitution* (Washington D.C.: National Center for Constitutional Studies, 1985), 213.

of The People, and to preserve *The Constitution* as delivered by the Founders, and ratified by the citizens of the states.

Background Surrounding Jackson's Veto

While there had been a few instances prior to 1832 of a president vetoing a bill none of them made quite the impact of Andrew Jackson's veto on July 10th. At issue was a rehashing of the banking questions that had arisen in President George Washington's term. At that time, the first Secretary of the Treasury, Alexander Hamilton, developed legislation to establish a federal financial system. Hamilton's most controversial issue in the system was the establishment of a national bank (which occurred on February 24, 1791).

Madison had spoken against the establishment of a bank when it was before the House of Representatives, by reminding the members that such a measure had been soundly defeated at the Constitutional Convention. Hamilton later wrote, "The proposal passed Congress over Madison's strenuous objection that the whole idea was unconstitutional, arguing that Congress had no power to create any such entity as a bank. Washington had followed the debates closely, and when the bill reached his desk he was in a quandary. He had never used the veto; he felt the veto was to be used only to protect *The Constitution*."¹⁵²

¹⁵² Skousen, *The Making*, 543.

Not being a lawyer, Washington requested that Hamilton, his Secretary of the Treasury; Thomas Jefferson, his Secretary of State; and Edmund Randolph, his Attorney General (all lawyers); provide him with their understanding of *The Constitution* on the matter of chartering the Bank. Jefferson and Randolph both said that it would be unconstitutional for the general government to allow private citizens to profit at the expense of the entire nation's citizens. Urged by Hamilton, Washington decided to sign the bill because he believed it was the best thing for the country at the time. While Washington had great respect for both Jefferson and Randolph, Hamilton had served as his aide during the Revolutionary War. (Both Hamilton's and Jefferson's opinions have become the standards by which the central-sovereignty Federalists and the coordinate-sovereignty Republicans have since been measured.)

In 1829, it was not apparent to anyone in the nation that upon becoming president Old Hickory [as the General had been dubbed by his soldiers and one of Jackson's favorite names]¹⁵³ would shake up the financial world in America by his veto. Prior to his presidency, Jackson had vacillated back and forth about banking and paper money. In 1818 he had sent a letter to President Monroe to keep some of the nation's funds on deposit in Nashville.¹⁵⁴ By 1821, he was

¹⁵³ James C. Curtis, *Andrew Jackson: and the Search for Vindication* (New York: Addison Wesley Longman, Inc., 1976), ix.

¹⁵⁴ *Ibid.*, 112.

referring to the Tennessee bank bill notes as “trash,”¹⁵⁵ and when his nephew, Andrew Jackson Donelson needed funds, Old Hickory wrote to him, “Dollars and cents are the legal tender of the United States ... paper money is not.”¹⁵⁶ Nevertheless, while for decades Jackson maintained close ties with those in banking, by the 1830s Jackson confided to one of his banking friends, John Coffee, that “I cannot sleep indebted.”¹⁵⁷

Some people believed the First Bank of the United States (the original national bank that Washington signed into law, at Hamilton’s urging and over Jefferson’s strong objections) had served a purpose while others opposed it. The first charter expired in 1811, and with it, all across the nation, came five years of runaway inflation. By 1816 people were again ready to accept a national bank, and the Second Bank of the United States came into being, with a charter for twenty years. With eighteen branches, the Second Bank was a very powerful force in the nation’s economy.

During the war of 1812 there had been a lot of paper money floating around and the Second Bank attempted to force the various states’ banks to begin using gold and silver specie once again. But “as a result of mismanagement and administrative incompetence, the Second Bank only accelerated the deflation that eventually resulted in the Panic of 1819.”¹⁵⁸

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*, 113.

¹⁵⁸ *Ibid.*, 115.

Jackson referred to the Second Bank of the United States as the “Monster on Chestnut Street,”¹⁵⁹ and he refused to state his opinions regarding the re-charter during the elections of 1828. By 1832, many of the Bank’s supporters believed that Old Hickory, because of his close ties with many people in the banking industry in a number of states, would approve its re-charter. They decided to attempt a re-charter four years before the old one was set to expire. No one suspected the depth of Jackson’s distrust of the Bank, especially two of its branches in Kentucky, which he believed had conspired to see that he was not elected to the presidency.

The president of the Second Bank was a forty-two year old man named Nicholas Biddle, who Jackson asked to look into the issue of the branch managers’ political actions. Apparently, Biddle did not realize just how important Jackson held the situation, so he expected the president would take his word that the two branch managers had not conspired against him. When Jackson made his first presidential state of the union speech, Biddle was completely unprepared to hear Jackson express his reservations about the constitutionality of the national bank. The rest of the nation and Congress were finally made aware of just how Old Hickory felt about the bank when he asked Congress to look for another solution to the nation’s financial stability, one that

¹⁵⁹ *Ibid.*, 114.

would be based on the full faith and “credit of the government and its revenues.”¹⁶⁰

With turmoil rife in his cabinet, in 1831, Jackson accepted the resignations of most of his cabinet members. His new cabinet members supported the re-charter of the Second Bank. With what he deemed a continuing assault by those supporting the re-charter, Old Hickory decided to break his promise and run for a second term as president, so that he could complete his promise to Martin Van Buren, ““The Bank, Mr. Van Buren, is trying to kill me, but I will kill it.””¹⁶¹

Veto: Jackson’s Answer to Judicial Supremacy

With his cabinet plotting behind his back, Jackson refused to believe John Randolph of Roanoke who told him to watch his back.¹⁶² Jackson had no idea that his Secretary of the Treasury McLane was plotting with Biddle to ensure the re-charter of the Second Bank. With his old nemesis, Senator Henry Clay, and Senator Daniel Webster strongly in support of the re-charter, by June of 1832 the Senate had passed the re-charter bill.

As a few of his own party members in the House began to desert his position, Jackson realized he was in a full-blown battle. He believed it was for the nation’s well-being. Many of his opponents hoped that he would use his

¹⁶⁰ *Ibid.*, 120.

¹⁶¹ *Ibid.*, 111.

¹⁶² *Ibid.*, 127.

presidential veto the kill the bill, as they believed it would demonstrate to the nation “the growing threat of executive usurpation.”¹⁶³ When the House passed the re-charter in July 1832, Jackson decided not to heed the counsel he was given to write a mild veto if he decided upon the negation course. Instead, he chose to oppose the bill with a vengeance. Jackson realized that the Bank issue would have to play a prominent role in the presidential election.

Although ruled by Marshall’s Court as constitutional, the issue of Congress’ granting a private corporation the right to set up a national bank was re-visited by Jackson. The Bank’s supporters erroneously believed that Jackson would support the re-chartering of the Second Bank of the United States. In his veto, however, Jackson stated that he had “read the Court’s opinion” and he disagreed with it. He then listed the things he believed were not only detrimental to the economy of individual states, but to the union as well. Further, he laid out how the branches of government were set up to serve as checks upon each other and how one branch could not have more or greater authority than the other. Consequently, as President, he said he had a duty to veto any legislation that he believed was unconstitutional.¹⁶⁴

Jackson’s statements as to why he was vetoing the bill shed light on how the executive branch, at least, viewed the separation of powers and the checks and balances written into *The Constitution*. Because he was so vocally opposed

¹⁶³ *Ibid.*, 128.

¹⁶⁴ NOTE: Of course, had Congress not agreed with him, they could have checked the president’s power by overriding his veto, which they chose not to do.

to judicial review, surely Jackson would have been aware that Thomas Jefferson, before, during and long after his retirement from public office was a repeated and vocal opponent to many of the decisions handed down by his distant cousin's court.

During his presidency Jefferson had responded to an inquiry from Abigail Adams, former president John Adam's wife, regarding the judiciary,

"You seem to think it devolved on the judges to decide on the validity of the sedition law, but nothing in *The Constitution* has given them a right to decide for the executive, more than to the executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them. ... That instrument [*The Constitution*] meant that its coordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action, but for the legislature and executive also in their spheres, would make the judiciary a despotic branch."¹⁶⁵

Later Jefferson became even more explicit regarding the judiciary and Marshall's opinion in *Marbury v. Madison*. He wrote, "*The Constitution* intended that the three great branches of government should be coordinate, and independent of each other: As to acts therefore, which are to be done by either, it

¹⁶⁵ Bergh, *Jefferson*, quoted by Skousen, *Making* 573.

has given no control to another branch. ... It did not intend to give the judiciary ... control over the executive ... I have long wished for a proper occasion to have the gratuitous opinion in *Marbury v. Madison* brought before the public, and denounced as not law.”¹⁶⁶ Jefferson’s wish was finally fulfilled by Jackson’s veto.

According to McDonald,¹⁶⁷ the policies of Jefferson and Jackson strengthened, rather than weakened the USSC, because it left constitutional issues to the states, which meant that the only one overseeing their actions would be the USSC, rather than the executive or legislative branches. Curtis, one of Jackson’s biographers, however, believes that Jackson’s veto was both arrogant and a “tacit admission of weakness, of failure to manipulate committees and marshal votes.” He wrote, “In issuing this veto and making himself equal to two-thirds of Congress, Jackson did not strengthen the presidency...To him, the veto was a defensive weapon.”¹⁶⁸

Ultimately, Jackson would change the entire face of the Court. While he was in office, five of the seven justices died, including Marshall. In 1837, the Court was increased from seven to nine justices, which allowed Jackson to appoint Roger Brooke Taney as Chief Justice. Taney would serve longer than

¹⁶⁶ *Ibid*, 213.

¹⁶⁷ McDonald, *Constitutional*, 74.

¹⁶⁸ Curtis, *Andrew Jackson*, 131.

any other justice besides Marshall. With the two additions, the Court was filled with seven justices who strongly supported states rights.¹⁶⁹

Importance to Judicial Review and Supremacy

Jackson, too, had read *Marbury v. Madison*, and did not accept Marshall's opinion (that the USSC was the branch to decide constitutional issues) to be sound or constitutional. Like Jefferson before him, Jackson believed that *The Constitution* granted each branch powers to check and bring balance to the actions of the others. In his veto, he set out exactly why he was vetoing this bill as unconstitutional. This point is essential in understanding that even into Jackson's administration it was believed that the other branches were intended to provide a check upon one another's powers. Jackson's veto demonstrated how the executive branch could and did check the judiciary, which, in turn demonstrated that the USSC, at least to this point was not believed to have judicial supremacy. Other presidents (outside the scope of this research) would later use their veto power to check the legislative branch and Lincoln would check the judiciary by simply ignoring the USSC's ruling in the *Dred Scott* case.

¹⁶⁹ *Ibid.*, 83. NOTE: Unfortunately, Taney's Court would go on to be remembered as the most notorious in the history of the nation, with its *Dred Scott v. Sandford* slavery decision.

Chapter 5

FINDINGS AND CONCLUSIONS

If the public are bound to yield obedience to laws to which they cannot give their approbation, they are slaves to those who make such laws and enforce them. Samuel Adams¹⁷⁰

Whenever the people become dissatisfied with its operation, they have only to will its abrogation or modification and let their voice be heard through the legitimate channel, and it will be done. But until they wish it, let no branch of the government, and least of all the Judiciary, undertake to interfere with it.

Commonwealth v. Kneeland (1838)

What is worrisome is that so many of the Court's increased number of declarations of unconstitutionality are not even plausibly related to the actual Constitution. This means that we are increasingly governed not by law or elected representatives but by an unelected, unrepresentative, unaccountable committee of lawyers applying no will but their own.

Judge Robert H. Bork¹⁷¹

¹⁷⁰ Boston Gazette, January 20, 1772, Samuel Adams writing as "Candidus." Quoted in Barton, *Original Intent*, 259.

The journey to discovering what the Founders thought about the USSC and whether today's Court mirrors their ideal has uncovered many things and answered many questions. At the outset it was determined that a full knowledge of the forces at play in America that led up to the colonists declaring their independence from England was necessary to completely comprehend the Founders' attitudes toward the USSC. That knowledge led to an understanding of the widely accepted ideas of individual and natural rights.

A complete understanding of society in the colonies from the time of their founding, including how they handled legal matters, and the salutary neglect of England that allowed the colonists to generally determine their own course, colony by colony, brought an understanding of why rebellion began to arise in the hearts of the colonists. When the monarchy was again established in England, King George and his parliament began to put stricter controls and harsher taxes upon them. By this time, however, the colonists were fully entrenched in the political ideas of John Locke and others, and had embraced the twin concepts of individual liberties and the right to own private property. The colonists had developed their own internal governmental systems, including judicial systems and laws based on the *Magna Carta* and the English common law.

¹⁷¹ Robert H. Bork. *The Tempting of America: The Political Seduction of the Law* (New York: The Free Press, 1990), 130.

The colonists strongly believed it was wrong for rulers to tax their citizens without representation, which was not happening with England and her new monarch. These beliefs mixed with England's increasing pressures led to the colonies writing one of America's most precious documents, *The Declaration of Independence (The Declaration)*. This *Declaration* led immediately to a war with England and the development of a loose confederation between the new States (which the colonies had been renamed in *The Declaration*), which was drawn up in *The Articles of Confederation (The Articles)*.

During the long and costly war (in time, money, property and lives), the weaknesses of the Confederation soon became apparent. America almost lost the war because the central government had no way to enforce the payment of taxes, which had an extremely adverse affect on the citizen-soldiers who were dying of starvation and freezing in the winters, because of lack of supplies.

After winning the war (in equal parts because of the valor and endurance of American soldiers and England's weariness of the fighting) Americans settled down for a new, independent freedom. This newfound freedom quickly began to point out even more weaknesses in *The Articles*, and caused many to despair of the survival of this fledgling nation. Internal strife was increasing and all the States were beginning to neglect and ignore *The Articles*. America was surrounded on all sides by nations that were ready and willing to take over as soon as our failure was determined, including France, Spain, England Mexico and the Indians.

These internal problems led to the Constitutional Convention, where *The Articles* were completely rejected and a new compact was designed by the delegates. Everyone was not enthused with this new document; nevertheless, our new form of government was memorialized in our nation's second most precious document – *The Constitution of the United States*. The events and writings surrounding the development and ratification of this compact were extensively studied to determine the Founders original intent and their original meanings of terms. Those meanings and terms were then examined to determine if they hold the same meanings today.

With the necessary background research completed it was possible to determine how the judiciary was developed and evolved from England and their common law, through the colonial time, then to the period under *The Articles* and up to *The Constitution*. Because there were thirteen versions of the English common law (one per State) in the United States, the delegates to the Constitutional Convention knew that the full development of Article III, detailing the judiciary of the federal government, would be too long and arduous, so they left most of its development to the First Congress. The First Congress had a group of legislators in committee (mostly lawyers), led by Senator Oliver Ellsworth of Connecticut, draw up a bill detailing how the judicial system would work. This document and the bill authorizing it became known as the *Judiciary Act of 1789*.

Because of the amount of materials available on the judiciary and the founding of our nation in general, the scope of this research was limited to *three* specific time periods. These periods were studied through the lens of four court cases and the rulings handed down by the Marshall Court of the USSC, and Andrew Jackson's presidential veto of the Second Bank of the United States, in 1832. The cases were specifically chosen because they addressed the issues of sovereignty and divided government, and generated a great deal of controversy in their own time. The controversy left a large body of primary source materials from the Founders to research, and because, especially regarding the court cases, today they are still viewed as groundbreaking – in some cases even more so than in their own day.

Preliminary Questions Answered

The research for this project allowed the questions posed in Chapter 1 to be answered. Those questions were:

- 1. Why did the Founders establish a central court system in the first place?**

The colonists were used to handling their own legal affairs. Each colony had already developed their own houses of government and their own judicial systems, based on the English common law. Of course, that common law held a little different flavor, depending upon the state, but they all agreed that the courts should be free from the control, but not oversight, of

the executive and legislative branches. They had witnessed first hand the problems of the English courts, which were simply an arm of the monarchy and Parliament. They also agreed that a jury trial was essential to preserve individual freedoms. Previous to the Revolutionary War, the English had handled all external colonial affairs and each colony had ordered its own local affairs. Under the new form of government, the Founders established the USSC to handle very specific cases (which are listed in Article III and, as demonstrated by their own words, the Founders wanted the States to handle their own legal affairs. Continual, verbally-fought battles between the federal and coordinate sovereignty judicial camps continue to rage to this day.

2. What did they hope to achieve when they wrote, debated and approved Article III of *The Constitution* and the Fifth Amendment of the *Bill of Rights*?

The Founders wrote Article III of *The Constitution* to establish the federal judiciary as a separate and co-equal branch of the federal government. They listed the areas over which the federal courts would have oversight. Even in their day, however, questions began to arise regarding the boundaries between the federal and states' tribunals' authority, so Congress ratified Amendment XI in 1795. This amendment was to further clarify, along with the Tenth Amendment, the boundaries of the federal judiciary, and was an effort to ensure the USSC would not decide to encroach upon the states' areas.

Amendment X of the *Bill of Rights* states: "The powers not delegated to the United States by *The Constitution*, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Amendment XI, which was meant to serve as further clarification of the judicial areas that were solely in the purview of the states' courts, says: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state." Amendment V, as well as VI through VIII, was developed to ensure that the federal courts would not be able to decide these cases, nor to interfere with the states in enforcing them.

When the original proposed amendments were sent by the House of Representatives to the Senate for approval, the Senate expressly removed the amendment that would bind the states as well as the federal government by the *Bill of Rights*. Some of the justices of the USSC thought they had a better way, though, and by their rulings over the centuries have bound the states by the same amendments. These USSC actions have had the effect of broadening their own area of authority and has allowed them to pass judgments that *The Constitution* clearly never intended them to have any say over, e.g., prayer in schools, crosses on public property, obscenity laws, community standards, all of which are having a homogenizing affect on American society.

3. What did the Founders understand Article III to convey and establish?

The Founders intended Article III to delineate the areas of authority of the federal courts. The Founders, though, knowing there were thirteen versions of the English common law, were unwilling to discuss Article III too much or to be too specific as to how the judiciary would function on a daily basis, because they believed the fight would be long and arduous and might very well scuttle the constitutional ratification process. Again, when Congress became aware that there were questions as to which tribunal would handle issues concerning individual states and their citizens, they passed Amendment XI.

4. What powers and authority were granted to the judiciary under this compact?

Section 2 of Article III, contains three sub-sections, which cover the authority of the federal judiciary. Section 2.1 explains that the USSC has authority over all cases which arise under *The Constitution*, laws of the nation as a whole, treaties, admiralty and maritime cases, controversies between a number of states, or of which the United States is a party, and between states and citizens. (However, this last section was modified by Amendment XI, as explained in items numbered 2 and 3.) Section 2.2 covers the authority of the USSC regarding “ambassadors and other public ministers and consuls, and those in which a state shall be a party, the supreme court [sic] shall have original jurisdiction. In all other cases before-mentioned, the supreme court [sic] shall have appellate

jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.”¹⁷² Section 2.3 ensures that “all trials for crimes, except in cases of impeachment, shall be by jury,”¹⁷³ in the state where the crime was committed, and if not committed in any state then Congress may decide where the case will be held.

5. What were the Founders’ attitudes toward the judiciary in general and the USSC in particular?

As demonstrated in the previous chapters, the vast majority of Founders believed in federalism (divided government) and popular sovereignty, even if they had differing ideas of what those ideals would “look” like in the fledgling nation. In order to preserve both those principles it was agreed that courts were necessary. As was demonstrated during the ratification process, the anti-federalists were against the powers granted to the USSC in Article III because they feared there would be little power to restrain the Court from usurping the authority of the states’ courts or the authority of *We the People*. Since there was thirteen versions of the English common law, the delegates to the Constitutional Convention feared that to write more might lead to full-blown discussions regarding the federal judiciary, which in turn might have led to a failure to ratify *The Constitution*. Consequently, how the judiciary would be built was left up to the First Congress.

¹⁷² See Appendix A.

¹⁷³ *Ibid.*

Unfortunately, the First Congress had so many other things to do and develop, that a committee was appointed to design the federal court system. Nevertheless, research has shown that the Founders, both Federalists and anti-federalists, attempted to design a federal court system that would be independent from the politics of the executive and legislative branches, that it would be a check on those two branches, while those two branches would be a check on it. The Founders – all of them – intended there to be a definite and strong boundary between the reach of the federal tribunal and those of the various states. It never intended the USSC to interfere with the citizens and their states, and how they chose for their own state to operate.

The Senate, whose members were originally elected by the legislatures of each state as a check against encroachment of federal powers into states matters, never intended that the *Bill of Rights* would apply to the states, but solely to check the powers of the three federal branches. The election of Senators was changed to be by popular vote rather than by the various state legislatures; the USSC ruled that the *Bill of Rights* pertained not only to the federal but to the state governments; and the USSC removed other roadblocks, all of which paved an expressway for the USSC to begin its assault upon the rights of individuals and the states. An all out assault upon communally-accepted mores within each state began in earnest, allowing the USSC to become the Super Branch – dictating every area of American life. It no longer appears to be a deterrent if a case does not come before the USSC, regarding an issue upon which they wish

to rule. Like John Marshall, they use any and every case to pronounce dictates which clearly are outside the bounds of their authority and are contrary to the words found in *The Constitution*.

Findings and Analysis

It is evident that today the USSC depends more upon their own Court's rulings from the past 50 – 60 years than on our founding documents and the *stare decisis* of two hundred years of USSC cases. Often the opinions handed down today do not even attempt to address *The Constitution* or the *Bill of Rights*, which were originally designed to insure that the citizens would be guaranteed freedom from the national government's intrusion into their everyday lives. The rights of the citizens within their respective states were further guaranteed by their state's constitution.

Another discovery was that the Court has clearly begun to hand down decisions which are according to the beliefs of a few elite, as opposed to the vast majority of Americans. Judge Robert Bork pointed out that "for the past half century, whenever the Court has departed from the original understanding of *The Constitution's* principles, it has invariably legislated [sic] an item on the modern liberal agenda, never an item on the conservative agenda." Bork continues, "The pace of judicial revision of *The Constitution* has accelerated over the Court's history, as has the exertion of judicial power, revisionist or not. The Court struck down no federal statutes between *Marbury* in 1803 and *Dred Scott*

in 1857, a period of fifty years.”¹⁷⁴ Also, “The adoption of the due process clause of the fourteenth amendment soon provided ... a temptation of judicial constitution-making the Justices could not resist.”¹⁷⁵

Having discovered just how far the USSC has strayed from our Constitution it is difficult not to allow Judge Bork, with his scathing indictments against the judiciary, to speak, “We observe therefore, the increasing importance of the one counter-majoritarian institution in the American democracy. ... *What is worrisome is that so many of the Court’s increased number of declarations of unconstitutionality are not even plausibly related to the actual Constitution. This means that we are increasingly governed not by law or elected representatives but by an unelected, unrepresentative, unaccountable committee of lawyers applying no will but their own.*”¹⁷⁶ [emphasis mine]

A majority of Americans, within their state and local communities, have agreed that certain behavior is unlawful. Consequently they have passed constitutional amendments and laws making those actions illegal. Justices have unconstitutionally handed down opinions allowing some of those rights, in complete disregard of the wishes of We The People, and the laws we have chosen within our own communities. What the Justices, over time, have accomplished with their rulings is to develop a “[g]eneral right of freedom – a

¹⁷⁴ Robert H. Bork. *The Tempting of America: The Political Seduction of the Law* (New York: The Free Press, 1990), 130.

¹⁷⁵ *Ibid.*, 93.

¹⁷⁶ *Ibid.*, 135.

constitutional right to be free of regulation by law,” which Justice Bork explains is “a manifest impossibility. Such a right would posit a state of nature, and its laws would be that of the jungle.”¹⁷⁷

Another judge, Charles Haines, from the turn of the twentieth century, wrote “There are heavy costs for the legal system, heavy costs for our liberty to govern ourselves, when the Court decides it is the instrument of the general will and the keeper of the national conscience. Then there is no law; there are only the moral imperatives and self-righteousness of the hour.”¹⁷⁸ “At the center of the philosophy of original understanding, therefore, must stand some idea of when the judge is bound by prior decisions and when he is not.”¹⁷⁹

Haines demonstrated that all through the centuries of our nation, not all judges have agreed with the Court’s expansion of powers. For example, in the early 1930s, Haines pointed out that when the Court was urged by companies to “interpret the new amendments [13th, 14th and 15th] to *The Constitution* so as to nationalize individual liberty and place within the reach of the federal courts the entire realm of security to person and protection of property,” the Court refused to do so.¹⁸⁰

In fact, before the mid-1900s the Court always interpreted those amendments to be specifically for the protection of the Negro race. This is born

¹⁷⁷ *Ibid.*, 99.

¹⁷⁸ Charles G. Haines, *The American Doctrine of Judicial Supremacy* (New York: The Macmillan Company, 1914), 132.

¹⁷⁹ *Ibid.*, 155.

¹⁸⁰ *Ibid.*, 295.

out by any number of opinions, but just one will suffice to demonstrate the Courts opinions: “No one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.’ In fact, it was emphatically denied that it was the intention of these amendments to change the main features of the federal system.”¹⁸¹

Another judge, Justice Bradley, said, “It is always a delicate thing for the courts to make an issue with the legislative department of the government, and they should never do so if it is possible to avoid it. By the decision now made we declare, in effect, that the judiciary, and not the legislature, is the final arbiter in the regulations of fares and freights of railroads and the charges of other public accommodations. It is an assumption of authority on the part of the judiciary which, it seems to me, with all the due deference to the judgments of my brethren, it has no right to make.”¹⁸² The Court ruled that if the citizens were unhappy with their legislators’ abuses in office their remedy was at the polls not in the courtroom.¹⁸³

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Ibid.*, 297.

Until the early 1900s USSC Justices most often believed in the theory of natural law and wrote so in their briefs. “Justice Clifford wrote on one occasion, that ‘courts cannot nullify an act of the state legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie *The Constitution*, where neither the terms nor the implications of the instrument disclose any such restriction. Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both *The Constitution* and the people, and convert the government into a judicial despotism.’”¹⁸⁴

Still another judge, Circuit Court Justice Paterson, has questioned the validity of what the Courts are doing. He wrote, “What is a constitution? It is a form of government delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. *The Constitution* is certain and fixed; it contains the permanent will of the people and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. ... In short, gentlemen, *The Constitution* is the sun of the political system, around which all legislative, executive, and judicial bodies must revolve.”¹⁸⁵

Even our first progressive judge, Chief Justice Marshall in *Marbury v. Madison* wrote, “*The Constitution* is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative

¹⁸⁴ *Ibid.*, 299.

¹⁸⁵ *Ibid.*, 41.

acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to *The Constitution* is not law; if the latter part is true, then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature repugnant to *The Constitution* is void.”¹⁸⁶

Demonstrably, Marshall himself would be astounded at the situation in America’s judiciary today. While many have labeled him a revisionist, and that label can be applied, he honestly believed he was setting a true course for the nation, one of stability and one which was ever mindful of our system of divided government. He explicitly stated in the *Marbury* case that if the legislature could change *The Constitution* without amending, it would be unnecessary to even have a written Constitution. It logically follows that if the judiciary has the ability to make *The Constitution* “say” something that any ordinary citizen can see is not in the wording then the rulings are invalid and unconstitutional.

No power of any of the branches was believed to be, nor accepted by the Founders as being, superior to one another. They emphatically believed that all three branches were to be servants of The People, and The People could change

¹⁸⁶ 1 Cranch, 177.

or alter them as they pleased, as long as they followed the proper process to do so. Just as the USSC was never intended to be the superior branch, deciding all constitutional questions, neither was the power of the legislative and executive branches meant to be superior over *The Constitution*. Only The People, who were parties to the compact, were and should be superior to the document they ratified and to the branches that compact developed.

In late nineteenth century the Dean of Harvard Law School, Christopher Columbus Langdell (1826-1906), who fully embraced Charles Darwin's theory of evolution, decided to apply this theory to the law. Thus, he decided, "since man evolved, then his laws must also evolve; and judges should guide both the evolution of law and *The Constitution*."¹⁸⁷ Dean Langdell developed the study of case law, which effectively moved our Courts away from relying principally on *The Constitution*. Court opinions began to receive more emphasis than our nation's founding compact. This led to the current belief held by many in America that the law as opined by judges is the "Law," and thus, the law is what the Courts say it is.

All of the Founders of our nation, men and women alike, conservative and liberals, Federalists and Anti-Federalists would have all taken up arms against this turn of events. This situation is exactly what many Founders anticipated, though, as clearly expressed in 1819 (September 6th), by Thomas Jefferson in a letter to Chief Justice Spencer Roane, of the Virginia Court of

¹⁸⁷ David Barton. *Original Intent: The Courts, The Constitution, & Religion* (Aledo, Texas: Wallbuilders Press, 1996), 228.

Appeals, explaining how he saw in many of the Marshall Court opinions the seeds of usurpation. Jefferson referred to what he called “the revolution of 1800,” when the “suffrage of the people” had “declared its will by dismissing functionaries of one principle [the ideals of the Federalists] and elect[ed] those of another [Jeffersonian Republicans], in the two branches, executive and legislative.” He went on to lament that “[o]ver the judiciary department, *The Constitution* had deprived them [*We the People*] of their control” and thus the Courts had already become, Jefferson continued, “[a] reprobated system.”¹⁸⁸ Referring in particular to a Marshall judicial opinion that “the judiciary is the last resort in relation to the other departments of the government,” Jefferson wrote that if that opinion was truly the case then the “constitution [sic] ... is a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please.”¹⁸⁹

This ability to mold the law seems to be the purpose of Langdell’s switch to the Socratic form of study of the law, and the fulfillment of that purpose can certainly be observed in the judiciary today. Case law is full of rulings where the Courts have completely rewritten *The Constitution*. The case mentioned in Chapter 1, regarding the USSC’s 5-4 case of eminent domain (*Kelo v. City of New London*) is just one case in point. The ruling flies in the face of what any

¹⁸⁸ Thomas Jefferson, Letter to Spencer Roane of Sept. 6, 1819. The Founders’ Constitution website. (01/03/2005).

http://press-pubs.uchicago.edu/founders/print_documents/a1_i_18s16.html

¹⁸⁹ *Ibid.*

ordinary, common person would understand to be the meaning regarding their property rights as protected by *The Constitution*. Even Justice Joseph Story, one who walked lock-step with his Chief Justice John Marshall, as far as constitutional views of judicial powers are concerned, wrote in his book *Commentaries on the Constitution of the United States*, that “Upon subjects of government it has always appeared to me, that metaphysical refinements are out of place. A constitution of government is addressed to the common sense of The People; and never was designed for trials of logical skill, or visionary speculations.”¹⁹⁰

As a republic, a government based on the rule of law, the one thing that makes a republic strong is that it recognizes that the Law is blind, not in the sense that it ignores common sense, but in the sense that the rulings of *The Constitution* are made regardless of the race, color, creed, gender, whatever, of the parties, but not blind to *The Constitution* itself. If the citizens of a republic begin to believe that the Law is no longer being impartial or being applied in a just and fair manner, then lawlessness begins to creep into the system. Those who believe in the law decide to enforce their own brand of “the Law,” while those who would break any and all laws, have no fear that the law will hold them accountable for their crimes. They have learned from their experience(s)

¹⁹⁰ Joseph Story. *Commentaries on the Constitution of the United States*, Vol. VI (Carolina Academic Press, 1987) (1833). As quoted by: Robert H. Bork. *The Tempting of America: The Political Seduction of the Law* (New York: The Free Press, 1990), 5.

with the Courts that it is all considered a game and if you know how to play the game, and have the funds to pay for a competent attorney, you can be fairly sure that you will not be held accountable for the crime.

There is no power above them, to control any of their decisions.

There is no authority that can remove them, and they cannot be controlled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.

Robert Yates ("Brutus"), Anti-Federalist Papers XV, 20 March 1788.

Over the past two centuries the debate has continued between those who support a strong central government and those who believe that states should be co-equal in authority. However, I found that while the Founders differed, sometimes greatly, on *how* to implement these principles, all of them – Federalists and anti-Federalists – held federalism and popular sovereignty to be rock-solid foundational principles. None of the Founders, including the extreme Federalist, Alexander Hamilton, nor even John Marshall, believed that the USSC was the sole and final arbiter of what was constitutional. The current judiciary is nothing like the Founders imagined. It is, in fact, the fulfillment of their worst fears.

Along with the expansion of the reach and authority of the third branch, *We the People* have lost our supremacy. The vast majority of usurpation has come in the past 50-60 years. Although we heard a great deal about *stare decisis* (following precedent) during the recent confirmation hearings, the fact is that over the past 50 years, with increasing frequency, the Courts have ignored centuries-old precedents. However, there are those who desire to allow both *The Constitution* and its prevailing original meanings, as held by the Founders, to rule. In the example of *Kelo v. New London*, Justice Thomas, in his dissenting opinion stated, “If the Public Use Clause served no function other than to state that the government may take property through its eminent domain power – for public or private uses – then it would be surplusage [sic].”¹⁹¹

To support his opinion Thomas then quotes *Marbury v. Madison*, 1 Cranch 137, 174 (1803), “It cannot be presumed that any clause in *The Constitution* is intended to be without effect.” Thomas found that “the consequences of today’s decision are not difficult to predict, and promise to be harmful. ... the losses [of private property] will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful.”

Thomas goes on to quote Justice O’Connor’s dissenting opinion, that this ruling “encourages ‘those citizens with disproportionate influence and power in

¹⁹¹ *Susette Kelo, et al., Petitioners v. City of New London, Connecticut, et. al.* (04-108) [268 Conn. 1, 843 A. 2d 500, affirmed] 2005/06/23. Cornell Law School, pg 3. 2006/02/28. <http://www.law.cornell.edu/supct/html/04-108.ZD1.html>

the political process, including large corporations and development firms' to victimize the weak."¹⁹² After pointing out that since 1949 the vast majority of those displaced by eminent domain "takings" are blacks and poor whites, Thomas' most scathing denouncement is that "the Court [in this ruling] relies almost exclusively on this Court's prior cases to derive today's far-reaching, and dangerous, result. ... When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of *The Constitution's* original meaning."¹⁹³

This demonstrates how the current USSC justices (excepting the newest members, Roberts and Alito, as their records have yet to be determined), if it suits their revisionist views of constitutional law feel little compunction to follow the *stare decisis* of centuries of USSC precedents. Nor is there any guarantee that with these newest members, Roberts and Alito, who are presumed to be conservative in their philosophical views of judicial revisionism, will not begin to feel the heady power of being able to legislate from the bench.

Seeing something in society they think needs to be changed and feeling that society and her elected officials are not moving to correct these perceived wrongs quickly enough has, in the past, been quite enough to nudge a judge, who declares himself or herself to believe in a strict constructionist view, to take up the activists' mantra.

¹⁹² *Ibid.*, 12.

¹⁹³ *Ibid.*, 13.

Conclusions Based on Findings

The current judiciary is nothing like the Founders imagined. It is, in fact, the fulfillment of their worst fears. Along with the expansion of their reach and authority, *We the People* have lost our supremacy. The vast majority of usurpation has come in the past 50-60 years. Although we heard a great deal about *stare decisis* (following precedent) during the recent confirmation hearings (spring 2006), the fact is that over the past 50 years, with increasing frequency, the Courts have ignored centuries-old precedents.

However, not all of the blame for this situation can be placed at the feet of the judiciary. Ignorant of our founding principles, *We the People*, through our elected representatives, have allowed this aberration to develop – the non-elected judiciary ruling over the elected executive and legislative branches. *We the People* have abdicated our own superior place as designers and creators of, and sole parties to, the document which established these three branches. Today it is the creation – this Super Branch, and its entire offspring – that, often illogically and erratically, rules over the creators.

Often USSC Justices are disingenuous because they point to opinions such as that of the Marshall court in *Marbury v. Madison* and *McCulloch v. Maryland* and state that from our nation's earliest history judicial review has been widely accepted, while completely ignoring some of Marshall's words in those documents which clearly state his abhorrence of the very idea of the USSC and the judiciary in general becoming a super branch. What Marshall was

concerned with was our nation returning to the chaos and growing lawlessness under *The Articles of Confederation*.

There is little doubt that if one researches Marshall's writings, both personal and from the bench, without difficulty it may be discovered that he was not so much interested in building himself a judicial throne as he was to ensure that the foundational principles of federalism and popular sovereignty were preserved. He also recognized that some group or person would, of necessity, have to be the final say on any number of issues. For the most part, he believed that any constitutional questions that came into the realm of the USSC were their legitimate area of constitutional decision making. However, Marshall was emphatic that other constitutional issues were rightly and correctly decided by the executive and/or the legislative branches.

As an example, in the *Kelso* case the current [pre-Roberts and Alito] justices have strayed far from what Madison expressed in *Federalist* #45:

"The powers delegated by the proposed Constitution to the federal government are few and defined. Those who are to remain in the State governments are numerous and definite. The former will be exercised principally on external objects, as war, peace, negotiations, and foreign commerce; with which last the power [sic] of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and

properties of the people, and the internal order, improvement, and prosperity of the State.”¹⁹⁴

To ensure that these lofty ideals became fact, Madison went about putting together the *Bill of Rights*, the tenth of which states, “The powers not delegated to the United States by *The Constitution*, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”¹⁹⁵

Implications for Citizens

Not all of the blame for our current situation, however, can be placed at the feet of the judiciary. Ignorant of our founding principles, *We the People*, through our equally ignorant elected representatives, have allowed this aberration to develop – the non-elected judiciary ruling over the elected executive and legislative branches. *We the People* have abdicated our own superior place as designers and creators of, and sole parties to, the document that established these three branches. Today, it is the creation – this Super Branch, and its entire offspring – that, often illogically and erratically, rule over the creators. Judge Bork has summed up why Americans should be vigilant of their sovereignty. “Legislation is far more likely to reflect majority sentiment while judicial activism is likely to represent an elite minority’s sentiment.”¹⁹⁶

¹⁹⁴ Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: Mentor Books, 1961), No. 45.

¹⁹⁵ See Appendix B.

¹⁹⁶ *Ibid.*, 17.

Bork, too, has discovered that the rulings coming out of the USSC and numerous subordinate courts are counter to the wishes of the vast majority of Americans. He states emphatically, "The values a revisionist judge enforces do not, of course, come from the law. If they did, he would not be revising."¹⁹⁷

Judges serve a wonderful purpose but if they do not do the will of The People, then The People have remedies with their elected officials. But before people will become courageous enough to stand against an increasingly powerful super branch, it will first be necessary that the citizenry become educated about their own governmental process. Exercises in the importance of civic participation and responsibility are vital to ensure that not just the minority of involved citizens is heard, but the will of *all* The People. That takes a strong commitment on the part of all Americans.

Historically, only a small number of citizens ever are willing or able to participate in their nation's government on a federal level. It is on the local and state levels where greater participation by the ordinary citizen is necessary and can make a difference. Otherwise, very soon, we will not recognize our nation because it will be nothing like the Founders and the citizens who fought for our freedoms, left to us.

¹⁹⁷ *Ibid.*, 16.

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APPENDIX A

The Constitution of the United States

Preamble

We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Article I

Section 1 - Legislative powers; in whom vested

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2 - House of Representatives, how and by whom chosen Qualifications of a Representative. Representatives and direct taxes, how apportioned. Enumeration. Vacancies to be filled. Power of choosing officers, and of impeachment.

1. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the elector in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

2. No person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a Citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3. *Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.*(The previous sentence was superseded by [Amendment XIV](#)). The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one

Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4. When vacancies happen in the representation from any State, the Executive Authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment.

Section 3 - Senators, how and by whom chosen. How classified. State Executive, when to make temporary appointments, in case, etc.

Qualifications of a Senator. President of the Senate, his right to vote.

President pro tem., and other officers of the Senate, how chosen. Power to try impeachments. When President is tried, Chief Justice to preside.

Sentence.

1. The Senate of the United States shall be composed of two Senators from each State, *(chosen by the Legislature thereof,)* (The preceding five words were superseded by [Amendment XVII](#)) for six years; and each Senator shall have one vote.

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the Legislature of any State, the Executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies. (The words in italics were superseded by [Amendment XVII](#))

3. No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a Citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

4. The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their other officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the office of the President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the

United States is tried, the Chief Justice shall preside: and no person shall be convicted without the concurrence of two-thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgement and punishment, according to law.

Section 4 - Times, etc., of holding elections, how prescribed. One session in each year.

1. The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

2. The Congress shall assemble at least once in every year, and such meeting shall *be on the first Monday in December*, (The words in italics were superseded by [Amendment XX](#)) unless they by law appoint a different day.

Section 5 - Membership, Quorum, Adjournments, Rules, Power to punish or expel. Journal. Time of adjournments, how limited, etc.

1. Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

3. Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgement require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one-fifth of those present, be entered on the journal.

4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

Section 6 - Compensation, Privileges, Disqualification in certain cases.

1. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

2. No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have increased during such time; and no person holding any office under the United States, shall be a member of either House during his continuance in office.

Section 7 - House to originate all revenue bills. Veto. Bill may be passed by two-thirds of each House, notwithstanding, etc. Bill, not returned in ten days to become a law. Provisions as to orders, concurrent resolutions, etc.

1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

2. Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the president of the United States; if he approve, he shall sign it, but if not, he shall return it, with his

objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration, two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be re-passed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Section 8 - Powers of Congress

The Congress shall have the power

1. To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States:
2. To borrow money on the credit of the United States:
3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes:
4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States:
5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures:
6. To provide for the punishment of counterfeiting the securities and current coin of the United States:
7. To establish post-offices and post-roads:
8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries:

9. To constitute tribunals inferior to the supreme court:
10. To define and punish piracies and felonies committed on the high seas, and offences against the law of nations:
11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water:
12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years:
13. To provide and maintain a navy:
14. To make rules for the government and regulation of the land and naval forces:
15. To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions:
16. To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress:

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings: And,

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

Section 9 - Provision as to migration or importation of certain persons. Habeas Corpus , Bills of attainder, etc. Taxes, how apportioned. No export duty. No commercial preference. Money, how drawn from Treasury, etc. No titular nobility. Officers not to receive presents, etc.

1. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808, but a tax or duty may be imposed on such importations, not exceeding 10 dollars for each person.

2. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

3. No bill of attainder or ex post facto law shall be passed.

4. No capitation, or other direct tax shall be laid unless in proportion to the census or enumeration herein before directed to be taken. (Modified by [Amendement XVI](#))

5. No tax or duty shall be laid on articles exported from any state.

6. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from one state, be obliged to enter, clear, or pay duties in another.

7. No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

8. No title of nobility shall be granted by the United States: And no person holding any office or profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

Section 10 - States prohibited from the exercise of certain powers.

1. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post

facto law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

3. No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in a war, unless actually invaded, or in such imminent danger as will not admit of delay.

Article II

Section 1- President: his term of office. Electors of President; number and how appointed. Electors to vote on same day. Qualification of President. On whom his duties devolve in case of his removal, death, etc. President's compensation. His oath of office.

1. The Executive power shall be vested in a President of the United States of America. He shall hold office during the term of four years, and together with the Vice President, chosen for the same term, be elected as follows:

2. Each State shall appoint, in such manner as the Legislature may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector. *The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for each; which list they shall sign and certify, and transmit sealed to the seat of Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain*

two or more who have equal votes, the Senate shall choose from them by ballot the Vice President. (The clause in italics was superseded by [Amendment XII](#))

3. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

4. No person except a natural born Citizen, or a Citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

5. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected. (This clause has been modified by [Amendment XX](#) and [Amendment XXV](#))

6. The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he

shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

7. Before he enter on the execution of his office, he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of the President of the United States, and will to the best of my ability, preserve, protect and defend *The Constitution* of the United States."

Section 2 - President to be Commander-in-Chief. He may require opinions of cabinet officers, etc., may pardon. Treaty-making power. Nomination of certain officers. When President may fill vacancies.

1. The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint

ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have the power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session.

Section 3 - President shall communicate to Congress. He may convene and adjourn Congress, in case of disagreement, etc. Shall receive ambassadors, execute laws, and commission officers.

He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he may receive ambassadors, and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Section 4 - All civil offices forfeited for certain crimes.

The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

Article III

Section 1 - Judicial powers. Tenure. Compensation.

The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

Section 2 - Judicial power; to what cases it extends. Original jurisdiction of Supreme Court Appellate. Trial by Jury, etc. Trial,

1. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies

between two or more states, between a state and Citizens of another state, between Citizens of different states, between Citizens of the same state, claiming lands under grants of different states, and between a state, or the Citizens thereof, and foreign states, Citizens or subjects. (This section modified by [Amendment XI](#))

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before-mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Section 3 - Treason defined. Proof of. Punishment of.

1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

Article IV

Section 1 - Each State to give credit to the public acts, etc. of every other State.

Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Section 2 - Privileges of Citizens of each State. Fugitives from Justice to be delivered up. Persons held to service having escaped, to be delivered up.

1. The Citizens of each state shall be entitled to all privileges and immunities of Citizens in the several states.

2. A person charged in any state with treason, felony, or other crime, who shall flee justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

3. No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom *such service or labour may be due*. (This clause superseded by [Amendment XIII](#))

Section 3 - Admission of new States. Power of Congress over territory and other property.

1. New states may be admitted by the Congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states, without the consent of the legislatures of the states concerned, as well as of the Congress.

2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

Section 4 - Republican form of government guaranteed. Each State to be protected.

The United States shall guarantee to every state in this union, a republican form of government, and shall protect each of them against invasion; and on

application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

Article V

Constitution: how amended; proviso.

The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress:

Provided, that no amendment which may be made prior to the year 1808, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

Article VI

Certain debts, etc. declared valid, Supremacy of Constitution, treaties, and laws of the United States, Oath to support Constitution, by whom taken. No religious test.

1. All debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution, as under the confederation.
2. This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in *The Constitution* or laws of any state to the contrary notwithstanding.
3. The senators and representatives before-mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

Article VII

What ratification shall establish Constitution.

The ratification of the conventions of nine states, shall be sufficient for the establishment of this constitution between the states so ratifying the same.

<http://www.yale.edu/lawweb/avalon/amend1.htm> (Downloaded: 3/20/2006)

The Copyright Issue and the use of Avalon Project Documents

“If you wish to use Avalon Documents on your website or in your classroom for any educational or non-commercial purpose we have no objection and indeed encourage you to do so. All we ask is that you please [e-mail](#) us and let us know. We get a kick out of knowing the documents are being used.” William C. Fray (William.fray@yale.edu) [Email sent on April 3, 2006]

APPENDIX B

The Bill of Rights & Amendments XI - XXVII

I - Freedom of Speech, Press, Religion and Petition

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

II - Right to keep and bear arms

A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

III - Conditions for quarters of soldiers

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

IV - Right of search and seizure regulated

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation,

and particularly describing the place to be searched, and the persons or things to be seized.

V - Provisions concerning prosecution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

VI - Right to a speedy trial, witnesses, etc.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

VII - Right to a trial by jury

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

VIII - Excessive bail, cruel punishment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

IX - Rule of construction of Constitution

The enumeration in *The Constitution*, of certain rights, shall not be construed to deny or disparage others retained by the people.

X - Rights of the States under Constitution

The powers not delegated to the United States by *The Constitution*, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendments XI - XXVII

XI - Judicial Powers Construed

Passed by Congress March 4, 1794. Ratified February 7, 1795.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.

XII - Manner of Choosing a President and Vice-President

This Amendment altered [Article 2 Section 1 Part 2](#)

Passed by Congress December 9, 1803. Ratified July 27, 1804.

1. The Electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate; the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; - The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole

number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. *And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President.* (The words in italics were superseded by [Amendment XX](#))

3. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such numbers be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

XIII - Slavery Abolished

Passed by Congress January 31, 1865. Ratified December 6, 1865.

1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
2. Congress shall have power to enforce this article by appropriate legislation.

XIV - Citizen rights not to be abridged

Passed by Congress June 13, 1866. Ratified July 9, 1868

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws.
2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of Electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis

of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support *The Constitution of the United States*, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

XV - Race no bar to voting rights

Passed by Congress February 26, 1869. Ratified February 3, 1870.

1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
2. The Congress shall have the power to enforce this article by appropriate legislation.

XVI - Income taxes authorized

Passed by Congress July 2, 1909. Ratified February 3, 1913.

The Congress shall have power to lay and collect taxes on incomes, from whatever sources derived, without apportionment among the several States, and without regard to any census or enumeration.

XVII - U.S. Senators to be elected by direct popular vote

Passed by Congress May 13, 1912. Ratified April 8, 1913.

1. The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures.

2. When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the Legislature of any State may empower the Executive thereof to make temporary appointments until the people fill the vacancies by election as the Legislature may direct.

3. This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of *The Constitution*.

XVIII - Liquor Prohibition

Passed by Congress December 18, 1917. Ratified January 16, 1919.

[Altered by Amendment XXI](#)

1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

3. This article shall be inoperative unless it shall have been ratified as an amendment to *The Constitution* by the Legislatures of the several States, as

provided in *The Constitution*, within seven years from the date of the submission hereof to the States by the Congress.

XIX - Giving nationwide suffrage to women

Passed by Congress June 4, 1919. Ratified August 18, 1920.

1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.
2. Congress shall have power to enforce this article by appropriate legislation.

XX - Terms of the President and Vice-President

This Amendment altered [Article 1 Section 4 Part 2](#) and [Article 2 Section 1 Part 5](#)

Passed by Congress March 2, 1932. Ratified January 23, 1933

1. The terms of the President and the Vice-President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3rd day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.
2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3rd day of January, unless they shall by law appoint a different day.

3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice-President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice-President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice-President shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice-President shall have qualified.

4. The Congress may by law provide for the case of the death of any of the persons from whom the House of representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice-President whenever the right of choice shall have devolved upon them.

5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article (October 1933).

6. This article shall be inoperative unless it shall have been ratified as an amendment to *The Constitution* by the Legislatures of three-fourths of the several States within seven years from the date of its submission.

XXI - Repeal of Amendment XVIII

Passed by Congress February 20, 1933. Ratified December 5, 1933.

1. The [Eighteenth](#) article of amendment to *The Constitution* of the United States is hereby repealed.
2. The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.
3. This article shall be inoperative unless it shall have been ratified as an amendment to *The Constitution* by conventions in the several States, as provided in *The Constitution*, within seven years from the date of the submission hereof to the States by the Congress.

XXII - Limiting presidential terms of office

Passed by Congress March 21, 1947. Ratified February 27, 1951.

1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once.

2. But this Article shall not apply to any person holding the office of President when this Article was proposed by Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

3. This article shall be inoperative unless it shall have been ratified as an amendment to *The Constitution* by the Legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

XXIII - Presidential vote for the District of Columbia

Passed by Congress June 16, 1960. Ratified March 29, 1961.

1. The District constituting the seat of Government of the United States shall appoint in such manner as Congress may direct:

2. A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

3. The Congress shall have power to enforce this article by appropriate legislation.

XXIV - Barring poll tax in federal elections

This Amendment altered [Article 1 Section 2 Part 3](#)

Passed by Congress August 27, 1962. Ratified January 23, 1964.

1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or any other tax.

2. Congress shall have power to enforce this article by appropriate legislation.

XXV - Presidential disability and succession

This Amendment altered [Article 2 Section 1 Part 5](#)

Passed by Congress July 6, 1965. Ratified February 10, 1967.

1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take the office upon confirmation by a majority vote of both houses of Congress

3. Whenever the President transmits to the President Pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmits to the President Pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

5. Thereafter, when the President transmits to the President Pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmits within four days to the President Pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is

unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

XXVI - Lowering the voting age to 18 years

This Amendment altered [Article 1 Section 9 Part 4](#)

Passed by Congress March 23, 1971. Ratified June 30, 1971.

The right of citizens of the United States, who are 18 years of age or older, to vote shall not be denied or abridged by the United States or any state on account of age.

The Congress shall have power to enforce this article by appropriate legislation.

XXVII - Congressional Pay

This Amendment altered [Article 1 Section 3 Part 1](#) and [Article 1 Section 3 Part 2](#)

Passed by Congress September 25, 1789. Ratified May 7, 1992.

No law, varying the compensation for services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

<http://www.yale.edu/lawweb/avalon/amend1.htm>

(Downloaded : 03/20/2006, with website's permission.)

APPENDIX C

Glossary of Terms

Common Law: The collection of principles and rules, particularly from unwritten English law, that derive their authority from long-standing usage and custom or from courts recognizing and enforcing those customs.¹⁹⁸

Compact Theory: A theory first put forth by Thomas Jefferson and James Madison in their Kentucky and Virginia Resolutions (respectively) as responses to John Adams' and the Federalists' Alien and Sedition Acts. This theory supposed that the states were parties to the compact (*The Constitution*) and, therefore, could not be subordinate to the federal government, which was created when *The Constitution* was ratified.¹⁹⁹

Coordinated Sovereignty: This is what most Jeffersonian Republicans believed was established by *The Constitution*. While many modern historians refer to men, such as Spencer Roane, as "states' righters" the term does not

¹⁹⁸ David M. O'Brien, *Storm Center: The Supreme Court in American Politics*. (New York: W. W. Norton & Company, Inc., 1990), 413.

¹⁹⁹ *Ibid.*, 412.

really correctly portray their beliefs in both a co-equal strong central and strong states' governments, where each government is divided into legislative, executive and judicial branches to protect the sovereignty of the people, and where each branch and each branches divisions have clearly defined areas of oversight and boundaries, which are set out in *The Constitution*.

Dissenting Opinion: An opinion by a justice that disagrees with the result reached by the Court in a case.²⁰⁰

Doctrine of Separation of Powers: The principle that holds that power can be divided between different branches in order to limit the scope of that power and to prevent power from resting in one branch alone; it achieves balance.

Federalism: Divided government which protects the sovereignty of the people.

Judicial review: The power to review and strike down any legislation or other government action that is inconsistent with federal or state constitutions. The Supreme Courts reviews government actions only under the Constitution of the United States.²⁰¹

²⁰⁰ *Ibid.*

Judicial supremacy: The idea that the courts have final and sole decision as to whether or not something is constitutional.

Mixed government: American government is mixed because the smaller states' rights are protected by each state having equal representation in the Senate, while the rights of the larger states are protected by having representation in the House of Representatives based on population.

Original jurisdiction: The jurisdiction of a court of first instance, or trial court. The Supreme Court has original jurisdiction under Article III of *The Constitution*.

Popular sovereignty: The belief that all power derives from the people; that the authority to govern was given by the people to the triune branches in order to have peace and safety in society; that all power still rests in those who signed the compact, and that if anyone tried to take sovereignty from the people they are a usurper.

Self-Government: Through a gradual process Americans come to accept the belief that liberty meant self-government.

²⁰¹ *Ibid.*, 413.

Stare decisis: Latin term meaning “Let the decision stand.” The principle of adherence to settle cases, the doctrine that principles of law established in earlier cases should be accepted as authoritative in similar subsequent cases.

Writ: An order commanding someone to perform or not perform acts specified in the order.

Writ of Mandamus: “We Command”; an order issued from a superior court directing a lower court or other government authority to perform a particular act.

Teresa Coleman Avila

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Citizenship: USA

Place of Birth: Fort Worth, Texas

Bilingual: Spanish

Widely traveled: 41 states and 10 countries; lived in Spain 4 years, with a Japanese family for 10 days, with Romanians for 9 days, and with Cuban nationals for 6 days.

Education

- **Texas A&M University**, College Station, Texas.
Majors: History/English (GPRs: History, 3.75; English, 3.82)
2005-2006 TAMU Undergraduate Research Fellow
Vice President, Class of 2006, Class Councils
 - **Blinn College**, Bryan, Texas.
Major: History (GPA: 3.83)
A.A., pending (6 hours short; will graduate May, 2006 with honors)
 - **Hardin-Simmons University**, Abilene, Texas
-

Research Interests

- Early American History to Civil War era
 - Lost Tribes of Israel to 100 AD
 - Individuals who have impacted and changed their "world"
-

Special Awards

- **TAMU Summer Undergraduate Research Fellowship Fund Scholarship** (2005) – financed research trip to the Library of Congress.

Honors and Awards

- **Texas A&M University**, College Station, Texas.
Texas A&M University Honors Program
Vice President, Class of 2006
Golden Key International Honor Society, 2006
“Bridge to Aggieland” Scholarship, 2004-2005
Colgate “Take Me Away to College” Scholarship, 2004-2005, 2nd Place
- **Blinn College**, Bryan, Texas.
President’s Scholar, 2003-2004
Blinn College Honors Program
President Emeritus James H. Atkinson Scholarship, 2003-2004
Nancy Sheppard Atkinson Memorial Scholarship, 2003-2004
Blinn’s Nominee: Jack Kent Cooke Foundation Scholarship, 2004-2005
Phi Theta Kappa Honor Society
Who’s Who in American Junior Colleges, 2003-2004
Collegiate All-American Scholar, 2003-2004
- **Hardin-Simmons University**, Abilene, Texas
Freshman Class Secretary

Publications

- **Texas A&M University Research Fellow’s Thesis:** “Discovering the Founders’ Attitudes Toward the United States Supreme Court”
- **Chapbook, “American Smorgasbord”** Short stories for Dr. Charles Taylor’s Creative Writing Class (ENGL235)

Employment

- **Texas A&M University Transportation Services**, Student Bus Driver: drive regular routes around the nation's largest land mass campus; also private charters all over state.
- **Odyssey Academy**, Galveston, Texas: handled all accounting details for charter school, including accounts payable and receivable and payroll, until the accounting documentation functions were migrated to Region IV Education Service Center (ESC), healthcare benefits, workmen's compensation, grants reporting, national school meal program, student and financial state accounting requirements; served as Advisor to the Student Government; served as liaison between administration and Board of Directors, governmental and educational agencies including the IRS, Texas Education Agency, Region IV ESC; supervised staff of two.
- **Shriners Burns Hospital**, Galveston, Texas: handled myriad complex details for one of the world's leading burn surgeons, including daily schedule, budget, staff needs, and smooth running of the medical staff office; developed complex agendas and, often on short notice, complex national and international travel arrangements; developed complex itineraries, arranged travel and accommodations for visiting physicians, professors, scientists, government and private officials wishing to meet with the Chief of Staff (COS); served as liaison for the COS with the Board of Trustees, governmental agencies, and other medical dignitaries from around the world; ensured staff maintained complete confidentiality of patient data; ensured articles, periodicals, book chapters, journal reviews, and lecture abstracts were submitted in a timely, complete manner; worked with controller and his staff to monitor the clinical medical staff budget, developed justifications for new staffing needs, as well as non-research capital equipment needs; attended monthly department head meetings and held monthly staff meetings;

interviewed, hired, counseled, and supervised and evaluated the job performances of four staff.

- **Ramona Holcombe & Associates**, Santa Ana, California: developed structural groundwork for a non-profit foundation, which was to have provided matching funds to Christian schools, to develop American heritage, music, sports and language programs, as well as to provide pay increases to teachers and fee grants to students of single parents.
- **HDV (high definition vision)**, Rancho Santa Fe, California: assisted owners in myriad details of setting up new company expected to go worldwide with non-cable, interactive television and films.
- **University Medical Center of Southern Nevada**, Las Vegas: assisted chief operating and financial officers in ensuring the complex operation of the hospital's numerous administrative divisions functioned smoothly; areas included finance, payroll, accounting, cost reimbursement, volunteer services, patient services, ambulatory clinics, support services, procurement, rehabilitation services, pharmaceutical services, radiology and pathology; worked closely with numerous national, state, county and local government and political leaders; was advisor for UMC's Junior Pre-Med Program (the nation's oldest pre-med Boy Scout Post); member of UMC's Patients/Employees Team for Service (PETS), which chose the employees of the month and year; coordinated rewriting of division policies and procedures, job descriptions and appraisals; served as designated Disaster/Emergency Secretary; coordinated two hospital-wide one-day clerical workshops; taught four of the twelve sessions.
- **Henderson (Nevada) Police Department**: Dispatcher; dispatched police, fire and emergency medical services.
- **National Association of Broadcasters**, Convention, Las Vegas, Nevada; Interpreter: Spanish

- **Tabernacle School (K-7):** Principal of one-room school; interviewed, hired, trained and supervised teachers; ordered study materials; set up weekly reward trips and annual school reward trips; counseled and disciplined students, met with parents; handled all financial matters for school, e.g., billing, receipts, payments, and accounting; ensured students maintained a minimum of 80% or higher on all studies; held weekly chapel services.

Selected Invited Talks and Mission Trips

- **Keynote Speaker:** Elko County (NV) Convention, 1992
- **Keynote Speaker:** Echoes Women's Retreat, Mt. Charleston, NV: 1999, 2000, 2001, 2003, 2004
- **Political Televised Debate** for Secretary of State (Reno, Nevada), 1996
- **Keynote Speaker:** Victorville (California) Assembly of God, July 4, 1995
"Religious Freedom in America and Cuba"
- **Keynote Speaker:** Women of Virtue Conference, Central Christian Church, 1996, 1997
- **Goodwill Trip:** Yokohama Exotic Showcase Festival, 1988
- **Mission Trip:** Church Youth Group, Romania, 1993
- **Mission Trip:** Church Youth Group, Montego Bay and Ocho Rios, Jamaica, 1995
- **Interpreter:** Annual National Church Meeting, Ciego de Avila, Cuba, 1995

Community Involvement

- **Stand America Foundation, Inc.,** (non-profit organization), Las Vegas, Nevada; Founder and President, 1998 to present
(http://sos.state.nv.us/corp_nme.asp)
- **El Shaddai Ministries, Inc.,** (non-profit organization), Las Vegas, Nevada; Trustee, 1988 to present (http://sos.state.nv.us/corp_nme.asp)

- **Mo'Manna Ministries, Inc.**, (non-profit organization), San Marcos, California; Board Secretary/Trustee, 1998 to present (www.momanna.org)
- **Echoes of Faith Ministries, Inc.** (non-profit organization), Las Vegas, Nevada; Trustee (installed January 2006)
- **Citizens' University**, College Station, Texas; Class of 2004
- **Minister**, Echoes of Faith Church, Las Vegas, Nevada; Ordained: 1997
- **Minister**, Echoes Community Church, Indian Springs, Nevada; Licensed: 1995; Ordained: 1997
- **Member, Nevada delegation to major national political conventions:** 1988, 1992
- **Major Party Secretary**, State of Nevada
- **Major Party Secretary**, Clark County, Nevada
- **3rd Party Candidate, Secretary of State**, Nevada
- **3rd Party Chairman, Secretary**, State of Nevada
- **3rd Party Chairman, Secretary**, Clark County, Nevada
- **President, Secretary, and Seminar Chairman**, Oasis Chapter, Professional Secretaries International (now Int'l Assoc. of Administrative Professionals-IAAP)
- **Advisor - Junior Pre-Med Organization Boy Scout Post** (oldest pre-med post in the U.S.), University Medical Center, Las Vegas, Nevada; 1996 and 1997