THE RISE OF FEDERAL JUDICIAL SUPREMACY IN THE UNITED STATES.

PART I.

It is the object of this paper to touch but lightly on the several steps that have been taken to broaden the powers of the Supreme Court of the United States; to show how these steps have lead to the construction of a strong central government; to show how, in the construction of this strong central government, the judicial department has been made almost despotic in its independent supremacy, and finally to pay a brief tribute to the leading characters, who, despite opposition and without precedent to guide them, labored consistently to build up a governmental system remarkable for its peculiarity and its strength.

There is much to be said in explanation of the many new and often unpopular opinions which have become parts of our fundamental law, but space will not allow us to go beyond a passing delineation of the chief points in a few of the more important decisions.

In speaking of the jurists who took the leading part in building up the national system of jurisprudence, there are many thoughts and bits of history that press upon attention. We must, however, leave much of this untouched, and only present here and there a prominent figure clad in a few of his most strikingly intellectual robes and surrounded, perhaps, by those who occupied the foreground in the picture of his career.

The sessions of the National Court were, at the opening of the period to which reference is made, held for the first time in Washington, and to that new city came the flower of the Republic's bar. They proceeded to try such cases as *Marbury* v. *Madison*, an early example of strict construction; *United States* v. *Peters*, prohibiting State nullification of Federal decisions; The Georgia Claim, a case declaring grants of land

equivalent to a contract, the obligation of which must not be impaired; the prize case of *Rose* v. *Himely*, allowing the court to look into foreign proceedings, and annul such as are irregular; the "Nereide," where neutral goods on a belligerent armed ship were exempt from capture (a peculiar opinion reversed by the British rule); the Dartmouth College Case; the Trial of Aaron Burr; the case of *Sturges* v. *Crowninshield*, like the Dartmouth College Case, touching the obligation of contracts and annulling the Insolvent Act of New York; *McCulloch* v. *Maryland*, a powerful blow at State Sovereignty, and making a vast addition to the powers of the Federal Government; *Gibbons* v. *Ogden*, concerning State commerce; *Craig* v. *Missouri*, as to the emission of bills of credit; and the Cherokee Indian Case. At these few principles we will look only for a moment, remembering that many other cases were handled during this time, but none bearing so directly on the accumulating power of the central national system—hence not so directly within the scope of the present thought.

Of the three grand departments of the government of the United States, the one which is the most remarkable, both in its power and in the history of its personnel, is that department which is peculiar to our nation and which is the product of the world-famed American creative ability. The judicial branch of the American government has attracted the admiration of the legal world since the handing down of its first decisions. To-day it is the final authority, and hence the most autocratic of our several self-created rulers. Yet the great proportion of our people know little about it, and realize even less its wonderful importance as a factor in our pursuit of happiness. The commentators on American Government pronounce the various departments of the Federal government to be co-extensive, where the functions of the one end, those of the other begin, there being no overlapping and no conflict of authority. This thought is almost correct but for a few instances.

Doubtless, the framers of the Constitution, if they had any concerted intention, meant that the several parts of their creation should have their individual functions and powers

untrammeled by those enjoyed by the Government as a whole, and preserved from conflict with each other. Whether this object has been conserved, the careful student of history and government can best answer. And whether it was meant that one should dominate as a conservative final arbitrator between the governor and the governed, there is a division of opinion.

That there has been a conflict between the several heads of our sovereignty is unquestionable—That the judicial department has risen superior in the conflict; the conditions of to-day are the best evidence. But this is no assurance that there will not come a change. And in forming an opinion on such a possibility let us consider the reason for the present supremacy. The preservation of the purity, integrity, and power of the Federal Judiciary is absorbingly important. The first and foremost intelligence of the Infant Republic realized this and it is curious to note the striking inconsistency in the public mind of that day.

When the colonies were writhing under the iron heel of the oppresive central government of Great Britain, the politicians and statesmen rose in their wrath and denounced despotism, declaring that the voice of the people should be paramount in all pure governments. So sincere were the expressions of the oppressed that even when the causes of complaint were removed they precipitated war for the naked principle of political liberty. Who has ever questioned the colonial faith in government by the people? The land fairly shrieked at the suggestion of centralization. And from the snow-bound forest of Maine to the everglades of Georgia, the people clamored for popular government and local independence.

At the close of the war for Independence, the leaders of the young sovereignty met to formulate a suitable government. They created, of course, a popular assembly. They provided, as expected, an executive, the choice of the people, but when they came to complete their task did they exhibit a real and substantial faith in their hard fought for principles of Democracy? The Supreme Court, a monument to the sagacity of those early patriots, is at the same time a glaring inconsistency. It illustrates even a lack of faith in popular

representatives, for far from being elected by the masses, it is filled by appointment of the indirectly elected executive, "by and with the advice and consent" of the still more indirectly elected Senate. Observe that this is the autocratic final dictator from which there is no appeal, and it is removed as far from popular sentiment as it was possible under our scheme of constitutional government. Those first patriots had cried out and fought for popular government, but when they proceeded to form one, the most perfect result of their labors, was, in effect, a despotism more absolute than the one under which they had so cruelly suffered.

The mind of man has never created a better scheme than the American Judiciary, yet it is remarkable that it should have sprung into existence despite such conflicting sentiments.

The executive of the United States, a more independent agent than many a so-called absolute monarch, is trammeled as well as the Congress by the Supreme Court, over whose decisions there is no higher supervision. In that court we have a despotism more absolute than is realized. Yet who feels the yoke, and who, if he does feel it, appreciates a sensation which is not a pleasure?

The absolute power of the despot is the most valuable and perfect characteristic of government, when vested in one worthy of the confidence. It is the frailty of human nature that renders it necessary that we divide the sovereignty among all in order to supplement the good qualities of the many and counteract the bad elements that might dominate in the individual.

A weak or corrupt incumbent of the bench would be almost beyond this remedy and the evil consequence might have wrecked our national career long ere this. The strength and supremacy of the Superior Court is as much due to the character of the judges who have ornamented the tribunal as to the constitutional provisions under which they have proceeded. The predominant feature of the Federal bench has been the purity and the industry of its judges. The legal ability of all of the members of the Supreme Court has been of a high order, that of Marshall marvelous, while Washington,

Ellsworth, Story and Curtis would have been leading powers among the first jurists of any land. Few have been commonplace, many have been celebrated in the field of statesmanship and diplomacy, and none have been questioned in their judgment save Taney, whose brilliant record, but for one decision, would have illuminated, to the eclipse of all, the annals of American law.

Jay, one of the first diplomatists of his time, a figure inseparable from the executive and legislative history of our National foundation, was great before he made great our judiciary.

Chase, a most creditable jurist during his short career, had, before assuming the judicial ermine, made world-famous the financial powers of his nation. Like Hamilton, he struck the dry rock of our national resources and an abundant stream of revenue gushed forth at a moment when the credit of the Union was suspended in the balance. To touch upon the record of many another, luminous with deeds of wisdom, brilliant with the sheen of silver oratory, and gorgeous in moral strength, would occupy too long. It is with the court at its zenith that we are to spend a moment—that court made immortal by Marshall.

The Supreme Court of the United States grew out of the unsettled condition of maritime jurisdiction. There is no doubt but that a national judiciary would have been demanded on other and even more pressing needs, but it so happened that the first call upon the colonies for some definite central judicial authority was made by those engaged in maritime capture. The early Congress established a Court of Appeals in cases of capture, and on this, the first central colonial institution, we find erected our great National Institution.

Its decisions were subsequently upheld by the United States Supreme Court. Besides the various important maritime cases decided in the first epoch of the judicial history of the country, there were two important questions settled, one that a state is amenable to the authority of the National Court and hence its sovereignty is subordinate to the National Sovereignty, and later it was decided that the National Tribunal had no jurisdiction in common law questions. Such matters belong

exclusively to the State Courts. This latter point was decided otherwise at first by Jay, C. J., but before the close of this period, Washington, J., had reversed the ruling bearing out the views of Judge Chase. The admirable decisions of the court under Oliver Ellsworth made the court famous and, too, there were numerous points of jurisdiction then established which have guided the legal course of procedure ever since.

Such is a very short statement of a few of the leading matters which had occupied the judicial attention of those who preceded Marshall and his court.

John Marshall was appointed Chief Justice of the United States by President John Adams and entered upon his duties in February, 1801. He had for the previous year succeeded Mr. Henry as Secretary of War, and immediately afterwards Colonel Pickering as Secretary of State, which latter office he had filled, during his one year of service, with distinguished ability.

When, on the resignation of Ollver Ellsworth, the President proceeded to select a successor, no one expected the choice would fall on so young a man. Judges Paterson and Cushing being foremost as the senior justices, had a prior claim, and the President had offered the honor to John Jay. On his declining to again preside, the next choice fell to Marshall, and this appointment was the wisest act of Adams' administration. Marshall found as his compeers, William Cushing, of Massachusetts; William Paterson, of New Jersey; Samuel Chase, of Maryland; Bushrod Washington, of Virginia, a nephew of George Washington; and Alfred Moore, of North Carolina, soon to be succeeded by William Johnson, of South Carolina.

Chase and Washington were both men of the same vigorous and well trained legal talent as that of the Chief Justices. Paterson and Cushing were men of opposite careers, Cushing having been on the bench since the Revolution, as Chief Justice of Massachusetts, while Paterson had been a law maker, sitting in Congress and in Conventions, systematizing the State laws and filling the offices of Governor and Chancellor of New Jersey. They were unusual men. The same can hardly be

said of Moore or Johnson. Justice Moore was but a short time with the court and Johnson during his thirteen years of service did not rank in intellectual flexibility with his associates. His judgment was sound, but little varied, while his mind was not trained to versatility of method.

Such was the court, during the first stage of its existence, destined to be completely changed before the vigorous Marshall should yield up his thirty-four years of judicial trust to the adjudication of that only tribunal higher than his own, from which there is no appeal.

The Chief Justice was a tall slender man with black hair and small bright eyes, alert, yet calm and dignified of expression. His manners were unostentatious and modest, and although his thoughts were couched in precise and clear language, his conversation was hardly elegant, rather too genial and familiar to bear the impression of great repose. The unpretentious, straight-forward simplicity, coupled with the soundness and certainty of his thought, was what impressed immediately, and the accute and penetrating intellect was bound to dominate.

He was born in Virginia in 1755, and at a very early age showed signs of his coming ability. He was but eighteen when he entered the Revolutionary Army, as a lieutenant, and served until 1779, through the most vigorous campaigns. The next year he came to the bar of Virginia, but returned for another campaign with the army. Two years later he was in the Virginia Legislature. From the very beginning of his professional career he showed an unparalleled ability which drew him into the councils of the nation and the first place of administration long ere he had reached the noon-tide of manhood. When it was said that Mansfield himself did not furnish a standard by which to measure the capacity of Marshall, he was not paid too high a tribute nor did his prototype suffer from the remark. Mansfield was the pride of his country; Marshall was the wonder of his.

"One of the few the immortal names that was not born to die." And he who distinguished himself in keeping alive the memory of that name (as Napoleon said of his biographer) in so doing, if for nothing else, he must share his immortality.

So, too, shall we always think of Story as the admirer and constant helper of the mighty jurist.

The first serious question presented to this court was that involving the relation of the State in its Legislation to the Federal Constitution, and the authority of the Federal Judiciary to take cognizance in case of a conflict. This was a serious matter; it penetrated to the very base of our institutional existence, and while it is easy to see to-day that the state legislatures are bound to follow the National Constitution, and that it is the function of the organ interpreting the National Constitution to see that the legislatures so follow, still it was not so clear a century ago, and the decision in this case, *Marbury* v. *Madison*, was a corner-stone in our centralized nation of to-day. It had been decided that acts contrary to the Constitution were void, but what power was to sit upon the question was theretofore unsettled. In a subsequent question the court struck a decisive blow at the power of the National Legislative branch, and in pronouncing the fact that its powers were defined and limited, held that it was for the judiciary to interpret the definition and point out the limitations. Power not granted is denied. The Federal Government is one of delegated powers, and such as do not appear in the articles of delegation do not exist—this is the underlying thought. And the judicial branch proceeded to escape from the bonds by arrogating the power of pronouncing the metes and bounds of Federal jurisdiction, which were to trammel the other branches of government, but to which the court by this very act seemed to rise superior.

The states were next denied the right to share in this prerogative nor could they annul a Federal judicial act.

In the next step taken, while deciding a case under the denial of the right of a state to impair the obligation of a contract, a state was placed at the bar of the court on a par with an individual, and it was held that its grants were the same as an individual's contracts, and could not be repealed if so doing impaired the obligation of a contract. All this while there occupied the Presidential Chair that pattern of what we understand as Democracy—Thomas Jefferson.

Jefferson believed, and every true follower of him should believe, that the vital stream of our national life took its rise in the sovereignty of the individual states, and that the only sovereignty possessed by the Federal Government sprang from the shares delegated expressly, not impliedly, by the several states. He believed that in destroying the source of the stream you would dry up the mighty river of our nationality. With Adams and Marshall the rule was reversed. They believed that in curtailing the delegated sovereignty you would deplete the strength of the nationality and jeopardize the existence of the state. The well-being of the states depended on strong centralization, and in the conflict thus waged between court and administration, it is clear that the former has been victorious. Adams has won, but the influence of the profoundly intellectual Jefferson has steadied the national bark through many troubled waters and helped to check the federalistic precipitation of its course.

Thomas Kilby Smith.

(To be concluded.)