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Courts in Conversation

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COURTS IN CONVERSATION

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INTRODUCTION

Ralph Waldo Emerson once suggested that we read not for instruction but for provocation.[1] By that standard, in *The Words That Made Us*, Akhil Reed Amar has written a characteristically great book.[2] This is not to deny that there is abundant instruction in its many pages: Amar offers a synoptic and yet still nuanced description of the great constitutional conversation that engulfed American political life in the eighty or so years around the founding. One of the chief values of the book, though, is that it will provoke a whole new set of additions to the constitutional conversation that it so ambitiously describes. The present symposium is a testament and a preview.

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1. *See* Ralph Waldo Emerson, *Divinity School Address*, *in* ESSAYS AND LECTURES 75, 79 (Joel Porte ed., 1983); HAROLD BLOOM, THE ANATOMY OF INFLUENCE: LITERATURE AS A WAY OF LIFE 10 (2011).

2. *See generally* AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760–1840 (2021).

My symposium essay will isolate and attend to one voice in the constitutional polyphony: the judiciary. A remarkable transformation takes place over the course of Amar's narrative. In the beginning, the institutional voice of the judiciary is scarcely audible. The courts' contributions to the constitutional conversation pale in comparison to the much more significant contributions of Presidents, cabinet officials, members of Congress, pamphleteers, litigators, and citizens. By the end of Amar's story, however, the Marshall Court has become a major voice in America's constitutional conversation. How did that happen? What accounts for this dramatic change in the relative volume of the judicial voice?

The passage from judicial inaudibility to judicial preeminence is a complex sociopolitical event that cannot be reduced to a single cause, and that is not my intention here. But this essay will suggest that a series of subtle, and now largely forgotten, institutional changes that occurred in the early decades of the Supreme Court's existence laid the groundwork for the dramatic growth in the Court's importance on the constitutional scene across that same period. And that growth, of course, has only continued: By the twenty-first century the Supreme Court "has by a very large margin the loudest institutional voice in constitutional debate."[3] These early institutional choices, then, though subtle, have powerfully defined the character of our constitutional conversation ever since.

After briefly discussing the judiciary in the colonial period, this essay begins with two interconnected developments between the Revolution and the ratification of the Constitution that bolstered the idea of judicial review: The appreciation, at least among elites, of the danger of unrestrained legislative power, and the advent of written constitutions with special democratic authority that could serve as sources of justiciable limits on government power. This essay then turns to the period after the Constitution went into effect and the federal judiciary materialized, when the early Supreme Court made a series of critical institutional choices to define and strengthen its voice. In particular, the Justices separated themselves from the executive branch, they tamped down on extracurricular partisan activities, they started to coalesce around unified "opinions of the Court," and they enlisted Congress to create an official reporter.

3. H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 126 n.24 (2008); *see* Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What* The Dialogue *(Still) Has to Teach Us*, 69 DUKE L.J. 1, 21–22 (2019) (noting that after the Civil War the Supreme Court "assume[d] an unchallengeable . . . interpretive role").

Blended together, these reforms enabled the Supreme Court to speak in a powerful and distinct institutional voice. On top of these reforms, Justice Joseph Story's appointment to a professorship at the fledgling Harvard Law School cemented a close connection between the courts and the intellectual study of law that continues to this day, further enhancing the Court's prestige and influence.[4] In all, these institutional reforms enabled the Court to achieve the preeminence it now enjoys in our constitutional conversation.[5]

I. BEFORE THE REVOLUTION

One of the first scenes described in *The Words That Made Us* unfolds in a courtroom, with a lawyer arguing a case before a panel of judges. But a reader must take care not to let the superficial familiarity of this scene obscure the profound differences between courts in the colonial period and today.

Before the revolution, the judiciary was a "much scorned and insignificant appendage of crown authority."[6] Colonial judges generally served at the pleasure of the king, lacking the tenure protection of their British counterparts.[7] And their responsibilities ranged far beyond the now recognizable adjudicatory functions of law declaration and dispute resolution; "[t]hey assessed taxes, granted licenses, oversaw poor relief, supervised road repair, set prices, upheld moral standards, and all in all monitored the localities over which they presided."[8] No wonder, then, that colonists regarded judges as yet more irksome avatars of central power, who needed to be kept in check by local juries.[9]

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4. *See infra* note 86 and accompanying text.

5. Others, of course, have noted the gradual ascendance of the Supreme Court's importance in constitutional debate in the early republic. But "[c]ommentators have largely ignored the *institutional* component of the Court's ascendance in favor of the doctrinal aspects of that development." Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1293 (1985) (emphasis added).

6. GORDON S. WOOD, POWER AND LIBERTY: CONSTITUTIONALISM IN THE AMERICAN REVOLUTION 126 (2021).

7. *See id.*; Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1104 (1976). For a survey of the early state judiciaries, see SCOTT DOUGLAS GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606–1787 (2011).

8. WOOD, *supra* note 6, at 127.

9. *See id.*

Thomas Hutchinson, who presides over Amar's early courtroom scene, exemplified the indistinct institutional identity of the judiciary in colonial America. Hutchinson inhabited all three "branches" of colonial government, with overlapping tenures. He served in the General Court (the legislative assembly) and in the Provincial Council (the upper house of the General Court).[10] While serving in the assembly, he was appointed to two judgeships, one on the probate court and one in the Court of Common Pleas.[11] Then, he served as Lieutenant Governor and Acting Governor of Massachusetts and accepted a post as Chief Justice of the Superior Court while still holding his other offices.[12] In short, the lines among the branches were considerably more porous in the colonial period than they are today, and, as a result, the voice of the judiciary did not have the same institutional distinctness.

Amar's account of *Paxton's Case* illustrates this point well.[13] When Hutchinson presided over *Paxton's Case* as Chief Justice, he was also Lieutenant Governor and a member of the elected council.[14] The court's rulings were reviewable by the Privy Council in England, an executive body that advised the King.[15] And, as a result, the ultimate significance of *Paxton's Case* for America's constitutional conversation was not the Superior Court's legal decision; rather, it was the speeches of the advocates, most notably James Otis, Jr. arguing against writs of assistance. The only reason we know what happened in the courtroom is that two eyewitnesses—Hutchinson himself and a young John Adams—personally memorialized the proceedings. Further, the court's actual ruling was largely an afterthought in the broader conversation: a unanimous (and presumably oral) decision issued immediately following re-

10. ANDREW STEPHEN WALMSLEY, THOMAS HUTCHINSON AND THE ORIGINS OF THE AMERICAN REVOLUTION 25–44 (1999).

11. *See id.*

12. *See id.* at 34–35; AMAR, *supra* note 2, at 11; GERBER, *supra* note 7, at 84–85.

13. *Paxton's Case* involved writs of assistance, that is, writs issued by colonial courts to local customs officers authorizing them to enter homes and other buildings, forcibly if necessary, to search for contraband. *See* AMAR, *supra* note 2, at 8, 34, 679–80. The case presented several technical issues, but the nub of the dispute was whether a customs officer needed some sort of individualized suspicion before conducting a search. *See id.*; *see also* Riley v. California, 573 U.S. 373, 403 (2014) (discussing writs of assistance); TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS 35–38 (1969).

14. *See* AMAR, *supra* note 2, at 14.

15. *See id.* at 19.

argument of the case that John Adams did not even deign to record.[16] In all, *Paxton's Case* bears the hallmarks of the colonial judiciary: indistinct institutional voice, unrecorded oral opinions, and the lack of an official reporter. It is no wonder that the court *qua* court did not speak prominently, even if a courtroom could serve as a theater for legal and political oratory.

II. TRANSITIONING TO ARTICLE III

Following the Revolution, many Americans still regarded judicial power warily, but that began to change over the 1780s. "Because judges had been so much identified with the hated magisterial power, many American Revolutionaries in 1776 sought not to strengthen the judiciary but to weaken it."[17] One can detect this distrust in the Articles of Confederation, which did not create a federal judicial system of any significance, and empowered Congress to oversee the resolution of interstate disputes through a kind of arbitral process.[18] But two intertwined developments of the 1780s altered the attitudes of many Americans toward the judiciary before the framing of the Constitution.

The first was a growing appreciation of the hazards of unchecked legislative power. "By the 1780s many Americans concluded that their popular state assemblies . . . had become the greatest threat to minority rights and individual liberties and the principal source of injustice in the society."[19] As a result, American leaders increasingly looked to the judiciary as a means of restraining popular legislatures.[20] The second development was the advent of written constitutions in the states, ratified by conventions with special democratic credentials.[21] This was a "watershed" in the

16. *See id.* at 20; *see also Paxton's Case*, *in* JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAYS, BETWEEN 1761 AND 1772, at 57, 414 n.2 (Boston, Little, Brown & Co. 1865).

17. *See* WOOD, *supra* note 6, at 128.

18. *See* ARTICLES OF CONFEDERATION of 1781, art. VIII.

19. *See* WOOD, *supra* note 6, at 129. Of course, not everyone shared this diagnosis at the time. *See* WOODY HOLTON, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION 21–123 (2007).

20. *See* WOOD, *supra* note 6, at 129; *see also* HOLTON, *supra* note 19, at 186–87.

21. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 306–43 (1969); RICHARD TUCK, THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY 181–283 (2015); David Singh Grewal &

history of constitutionalism because it inaugurated "a shift from viewing a constitution as simply a description of the fundamental political arrangements of the society to a conception that the constitution stood behind, or grounded and legitimated, those arrangements—and of course constrained them."[22] Further, the writtenness of a constitution made it more judicially tractable as a source of limits on legislative power. As future Justice James Iredell put it in a letter, an American-style constitution was not "a mere imaginary thing, about which ten thousand different opinions may be formed, but a written document to which all may have recourse, and to which, therefore, the judges cannot willfully blind themselves."[23] A written constitution made it more possible, if not inevitable, for a constitution to serve as a source of *justiciable* limits on legislative power.[24]

A new attitude toward judges is evident in the Federal Constitution, as compared to the Articles of Confederation. Most obviously, the Constitution created a Supreme Court staffed by judges with life tenure and salary protection.[25] It empowered Congress to create a system of inferior federal courts—which Congress did soon after convening for the first time. The Constitution extended the possible scope of federal jurisdiction to "all Cases" arising under the Constitution or federal law, subject to

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Jedediah Britton-Purdy, *The Original Theory of Constitutionalism*, 127 YALE L.J. 664, 677–81 (2018).

22. *See* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 769 (1988); *see also* MARTIN LOUGHLIN, AGAINST CONSTITUTIONALISM 2 (2022) ("Constitutionalism did not exist before the idea that the basic terms of the governing relationship could be defined in a foundational document."). Chief Justice Marshall referred to a "written constitution" as the "greatest improvement on political institutions" of the founding generation. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803); *see also* WOOD, *supra* note 21 at 259–69, 460–63. For some European forerunners to this development in America, *see* LINDA COLLEY, THE GUN, THE SHIP, AND THE PEN: WARFARE, CONSTITUTIONS, AND THE MAKING OF THE MODERN WORLD 112–13 (2021).

23. *See* GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 445 (2009) (internal quotation marks omitted) (quoting Letter from James Iredell to Richard Spaight (Aug. 26, 1787)).

24. *See id.* This is not necessarily to say that the content of a constitution was exhausted or fixed by its text for the founding generation, or that the function of judicial review was solely to enforce a written constitution according to its terms. *See* Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 L. & HIST. REV. 321, 342 (2021); *see also* KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA: LEGAL THOUGHT BEFORE MODERNISM 77 (2011) (describing "[d]ebates over the ontology of American constitutions").

25. *See* U.S. CONST. art. III.

congressional regulation.[26] It instructed state judges to disregard state laws in conflict with the Federal Constitution, and intimated that federal courts would have the power of judicial review too.[27] Alexander Hamilton spelled this out in *Federalist No. 78*, where he confirmed that the "courts of justice" would be "bulwarks of a limited Constitution against legislative encroachments."[28] The crucial theoretical move underlying that statement was made possible by the advent of written constitutions with special democratic legitimacy. An American legislature was no longer sovereign like a British Parliament; rather, the will of the sovereign people was expressed in a constitution that bound both legislatures and courts. Hence, for Hamilton, judicial review does not "by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both."[29]

III. FASHIONING A JUDICIAL VOICE IN THE EARLY REPUBLIC

The ratification of the Federal Constitution set the federal judiciary in motion. But it would take some time for it to assume recognizable shape. The first step in its emergence was for Congress to pass a law—the Judiciary Act of 1789—conjuring the lower federal judiciary into existence and organizing the Supreme Court.[30]

The story of the Judiciary Act has been told well before.[31] I will focus instead on what Robert Post has called the "material substrate of the Court's decisionmaking practices": the institutional choices made largely by the Justices themselves (though often in dialogue with the political branches) that defined the Court's voice and channeled that voice to the public.[32] These choices were not predetermined by Article III or the Judiciary Act. The first two choices had to do with distinguishing the judicial voice from other

26. *Id.*

27. *See* AMAR, *supra* note 2, at 493.

28. *See* THE FEDERALIST NO. 78, at 526 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

29. *See id.* at 525.

30. *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73.

31. *See, e.g.*, ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 175–213 (2010); ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789 (Maeva Marcus ed., 1992); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990).

32. Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1383 (2001).

constitutional actors; they involved *suppressing* certain forms of judicial speech in order to differentiate and strengthen the residuum. The second two changes had to do with the material reality of conveying a distinctive, strengthened judicial voice to those other actors and the public at large. A theme running through all of these changes is that an institution must sometimes renounce certain powers in order to increase its power as a whole.[33] *Relinquishing* the power to advise the executive branch, or to comment on partisan issues, or to write separate opinions, then, may actually have *enhanced* the power and legitimacy of the Supreme Court as an expositor of the Constitution.[34]

A. Splitting from the Executive

A first important change was for the Court to cleave itself from the Executive Branch. As I have already noted, in the colonial era, judges were often indistinguishable from other executive magistrates. John Adams, for instance, wrote in 1766 that the "first grand division of constitutional powers" was legislation and execution, and he placed the "administration of justice" in "the executive part of the constitution."[35] And one of the more striking features of the early Supreme Court to modern eyes is its closeness to the Executive Branch. As Amar points out, "the positions of chief executive and chief justice were kindred offices."[36] Early in his presidency, Washington asked Chief Justice Jay for a formal written opinion on what America's position should be in a dispute between Britain and Spain, which Jay obligingly provided.[37] Washington also sent Jay to negotiate the eponymous Jay Treaty with the British

33. *See* Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 64 (2016) ("[C]onstraints that reduce power when viewed in isolation may actually serve to expand power when viewed in a broader temporal or topical frame."); David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 573 (2013) ("[S]elf-binding mechanisms may . . . ultimately serve to enhance [power] by sustaining the institution's credibility and legitimacy.").

34. Ironically, the survival of an independent judiciary may itself be viewed a self-empowering and self-imposed constraint on the part of the *other* branches: "[A]n independent judiciary empowers [political] actors to a greater extent than it impedes their political agenda by enabling credible, and reciprocal, commitments." Levinson, *supra* note 33, at 66.

35. WOOD, *supra* note 6, at 127.

36. AMAR, *supra* note 2, at 470.

37. *See* WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 71–72 (1995).

while he was Chief Justice, and Adams made Chief Justice Oliver Ellsworth a special envoy to France.[38] The two candidates who finished behind Washington and Adams in the first presidential election—Jay and Rutledge—became the first two Chief Justices.[39] Jay and Rutledge also both served as state governors.[40] Marshall, at the beginning of his judicial tenure, was briefly Secretary of State and Chief Justice at the same time.[41]

In this context, it makes sense that two of the most important constitutional (and institutional) decisions made by the Justices in the Court's early years had the specific function of separating the judicial department from the Executive Branch. In *Hayburn's Case*, several Justices riding circuit (sitting alongside district judges) refused to be treated as "executive-branch bureaucrats rather than as officials of a separate, distinct, and co-equal branch."[42] Their core objection to the statutory scheme in question was that it invested the Secretary of War with the power to revise a judicial judgment, which threatened to subordinate the judicial voice to the Executive. The next year, when President Washington, through his Secretary of State Thomas Jefferson, asked the Justices for their opinion on a series of questions arising out of European hostilities, the Justices declined, suggesting that the President had no power to compel them to render an advisory opinion.[43] This correspondence served as a precedent that the Court "should not—as an exercise of institutional discretion—issue advisory opinions."[44] In both of these early episodes, the courts refused to be mere adjutants to the executive branch. That, in turn, would allow the Court to delineate more sharply its distinct function of adjudicating cases and construing the law as a separate institution.[45]

B. Extracurricular Partisanship

The second change was the tamping down of partisan activities by judges. In the eighteenth century, convening a criminal court was

38. *See* AMAR, *supra* note 2, at 381.
39. *See id.* at 471.
40. *See id.*
41. *See id.* at 482.
42. *Id.* at 336.
43. *See* CASTO, *supra* note 37, at 79.
44. *Id.*
45. *See* G. Edward White, *The Working Life of the Marshall Court, 1815–1835*, 70 VA. L. REV. 1, 48 & n.173 (1984).

a public occasion, and judges would use their addresses to the grand jury to discuss salient political issues.[46] These addresses were frequently published in newspapers.[47] Early federal judges—including Justices riding circuit—took up this custom, and, as a result, inserted themselves into various partisan affrays.[48] No one went further in this direction than Justice Samuel Chase, who not only stumped for Adams' reelection while still on the bench, but made partisan "harangues" during Sedition Act prosecutions.[49] After Jefferson's election as President, Chase made a particularly vituperative charge to a Baltimore grand jury, in which he inveighed against universal suffrage.[50] That last excess led to Chase's impeachment. Though he was acquitted, Marshall "redirected his colleagues' sermonizing into opinions of the Court."[51]

This is not to say that the Marshall Court excused itself from "politics," broadly understood.[52] Republican political theory informed the Marshall Court's approach to questions of constitutional law.[53] The constitutionality of the national bank and Maryland's attempt to tax it, for instance, were deeply "political" questions.[54] But the banishment of *partisanship*—or at least overt partisanship in judicial utterances and opinions—gave the Supreme Court a different kind of authority in discussing constitutional questions.[55] It allowed the courts to ground their authority in

46. *See* CASTO, *supra* note 37, at 127; *see also* George L. Haskins, *Law Versus Politics in the Early Years of the Marshall Court*, 130 U. PA. L. REV. 1, 3–4 (1981).

47. *See* CASTO, *supra* note 37, at 127.

48. *See id.* at 127–29; *see also* AMAR, *supra* note 2, at 550.

49. *See* AMAR, *supra* note 2, at 550–51.

50. *See id.*

51. *Id.*; WOOD, *supra* note 23, at 438. This tradition has only strengthened. When Justice Ginsburg commented on Donald Trump's presidential campaign, she earned bipartisan rebuke, and ultimately called her comments "ill advised." *See* Michael D. Shear, *Ruth Bader Ginsburg Expresses Regret for Criticizing Donald Trump*, N.Y. TIMES (July 14, 2016), https://www.nytimes.com/2016/07/15/us/politics/ruth-bader-ginsburg-donald-trump.html [https://perma.cc/X3W3-SF4U].

52. *See* Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CAL. L. REV. 1473, 1501–03 (2007).

53. *See* White, *supra* note 45, at 48–49.

54. *Cf.* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 97, 257 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2000) (1835).

55. *See* White, *supra* note 45, at 48–49, 48 n.173.

professionalism and legal reason.[56] This move was all the more significant in light of the well-known *rise* of partisanship during the Adams and Jefferson presidencies in the political culture more generally,[57] which undercut some of Congress's capacity to speak authoritatively on constitutional questions.[58] In that broader environment, a court could credibly claim to bring a unique kind of competence—or at least something different—to the constitutional conversation.

C. Opinions of the Court

A third change, and in my view the most critical, was the development of the practice of the "opinion[] of the Court."[59] Although Marshall is usually credited with establishing the practice, it actually began to take hold during Chief Justice Ellsworth's tenure.[60] Before Ellsworth, the Court often delivered its opinions seriatim, meaning that each Justice would state his reasoning separately.[61] When Ellsworth became Chief Justice, "a clear pattern emerged in which he would personally deliver short opinions of the Court, infrequently supplemented by dissenting or concurring opinions."[62] Based on Alexander Dallas's reports, the Court delivered

56. *See* WOOD, *supra* note 23, at 453–54 (noting that, after 1800, judges "shed their traditional broad and ill-defined political and magisterial roles" and "increasingly saw themselves as professional jurists").

57. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2319–22 (2006) (describing the rise of political parties).

58. *See, e.g.*, David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2382 (2021).

59. *See* CASTO, *supra* note 37, at 111.

60. While not strictly true, the common attribution to Marshall likely reflects the fact that Marshall was the first to use the institution to deliver substantial and well-crafted opinions on major constitutional questions. I, for one, could not name off the top of my head an opinion of the Court written by Chief Justice Ellsworth, but any 1L could probably rattle off several Marshall opinions.

61. The practice of seriatim opinions was a textual representation of another way that the Court was far more decentralized than today. It is easy for observers of today's Court, ensconced in marble in the capital, to forget that riding circuit was a vital part of a Justice's job in the early republic. The Court's early caseload was light—in the first four years, it had only twelve filings. *See* CASTO, *supra* note 37, at 54–55. In those early years, "the Justices performed virtually all of their official duties while they were serving as trial judges in the circuit courts . . . ." *Id.* at 55. For more on the importance of circuit riding, see AMAR, *supra* note 2, at 332–34.

62. *See* CASTO, *supra* note 37, at 111.

seriatim opinions only once when Ellsworth was in the majority.[63] Ellsworth seems to have first adopted this practice from his time on the Connecticut Superior Court in the 1780s.[64] And it "became entrenched during Chief Justice Marshall's tenure."[65] Marshall strengthened the practice by fostering social and professional camaraderie among the Justices, who for many years of the Marshall Court lived together at the same boardinghouse while in Washington.[66]

The practice of the "opinion of the Court" worked differently in Marshall's time than in ours.[67] A draft opinion was not circulated in advance of publication for other Justices to review and formally join. And Justices were not compelled to record their votes on whether they concurred in the opinion, concurred in the result, or dissented. As a result, "an 'opinion of the Court' [was] a highly individualized product that certainly cannot be considered a concerted effort of a unified court."[68] It "merely reflected one justice's effort to advance a formal justification for a majority decision made orally and informally."[69]

That said, a single opinion, purporting to speak for the Court as an institution, was more publicly and politically impressive than a hodgepodge of seriatim opinions. As James Bradley Thayer shrewdly remarked in his biography of Marshall, the majority opinion "seemed, all of a sudden, to give to the judicial department a unity like that of the executive."[70] In other words, having cleaved itself from the executive institutionally, the Supreme Court could now speak in a unified fashion—like the executive. And its unified

63. *See id.*

64. *See id.* at 110. In 1784, Connecticut had passed a law requiring the judges of the Supreme Court of Errors and the Superior Court "to give in writing the reasons of their decisions upon points of law, and lodge them with their respective clerks, with a view, as the statute expressly declares, that the cases might be *fully reported*." *See* Joyce, *supra* note 5, at 1297–98 (quoting An Act Establishing the Wages of the Judges of the Superior Court, 3 State Rec. May Sess. 1784 at 9).

65. *See* CASTO, *supra* note 37, at 111.

66. *See* AMAR, *supra* note 2, at 547; White, *supra* note 45, at 5–6, 34–35; *see also* ALAN TAYLOR, AMERICAN REPUBLICS: A CONTINENTAL HISTORY OF THE UNITED STATES, 1783–1850, at 54 (2021).

67. *See* Henry Paul Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 12 (1979) (noting the modern "assumption that 'opinions of the Court' have a collective character, that is, that they represent the shared view, in all points of significance, of those who join in the opinion").

68. White, *supra* note 45, at 39.

69. *Id.*

70. JAMES BRADLEY THAYER, JOHN MARSHALL 54–55 (1901).

voice could stand out more as partisanship increasingly fragmented discourse in the political branches on constitutional questions.

Over the long run, it would be hard to overstate the importance of the practice of majority opinions for giving the Court a prominent institutional voice:

> Majority opinions have played a subtle but significant role in establishing the Supreme Court's hegemony over the Constitution's interpretation. A contrary tradition of seriatim opinions would have splintered many of the Court's opinions into the relatively isolated and more or less different views of the various Justices. In contrast, a single majority opinion makes it easier for the Court to speak with a single authoritative voice.[71]

The development of this institutional practice played a key role in amplifying the Supreme Court's voice in America's constitutional conversation.[72]

D. Official Reports

A fourth and final change is the hiring of the first official Supreme Court reporter. It is one thing to produce an opinion of the Court; it is quite another to publish and disseminate it in an authoritative fashion. As John Langbein has advised, "we need to remind ourselves that the written opinion was a novelty in the later eighteenth century."[73] In England, decisions were announced orally (think *Paxton's Case*), and then summarized and compiled by law reporters—individuals with substantial discretion over what to

71. CASTO, *supra* note 37, at 111.

72. This amplification may have had the result over the long run of making *judicial* forms of argumentation more important in debates about constitutional questions. *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) (describing the "modalities" of constitutional argument); David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 744–45 (2021) (noting that theorists have tended to rely on Supreme Court opinions in identifying the modalities of constitutional argument). Constitutional law is a social practice that may change over time. *See* Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEX. L. REV. 1869, 1919 (1994) ("Change is built into the system because the forms of argument take their life from the general society."). It stands to reason that a mutable social practice will be shaped by the most important institutional players that engage in it. The increasing prominence (and ultimate dominance) of the Supreme Court in constitutional discourse, then, may very well have contributed to the "professionaliz[ation]" and legalization of the modern modalities of constitutional argument. *See* Pozen & Samaha, *supra*, at 786.

73. John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 571–72 (1993).

include in their reports.[74] A number of American states had informal reporters of this sort. Alexander Dallas became the first Supreme Court reporter basically by happenstance, because he was preparing reports for Pennsylvania when the Supreme Court began to sit there.[75] The early unofficial reports of the Supreme Court's decisions left much to be desired. They were plagued by "delay, expense, omission and inaccuracy."[76] At one point, eight years elapsed between the Supreme Court's term and Dallas's publication of the reports. The Court's next reporter, William Cranch (whose name readers may recognize from citations to *Marbury v. Madison*), was not much better.[77]

In 1804, the legislatures of Massachusetts and New York (possibly at Chancellor Kent's urging) for the first time designated *official* reporters and arranged for them to be paid a stipend.[78] By 1817, this practice finally made its way to the Supreme Court, when, instigated by Marshall and Story, Congress created a salaried official reporter for the Supreme Court. Chief Justice Marshall himself recognized the promise of official reporting for enhancing the institutional position of the Supreme Court, writing in a letter to a member of the Senate Judiciary Committee:

> That the cases determined in the Supreme Court should be reported with accuracy and promptness, is essential to correctness and uniformity of decision in all the courts of the United States. It is also to be recollected that from the same tribunal the public receive that exposition of the constitution, laws, and treaties of the United States as applicable to the cases of individuals which must ultimately prevail. It is obviously important that a knowledge of this exposition be attainable by all.[79]

An official reporter would enable the Court to control lower courts more effectively and disseminate its constitutional "exposition[s]" to the people.[80]

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74. *See id.* at 572, 576–77.

75. *See id.* at 573; Joyce, *supra* note 5, at 1295–96.

76. Joyce, *supra* note 5, at 1301, 1312. The unofficial reports were also changed when incorporated in subsequent editions of the U.S. Reports. *See* Jane Manners, *Executive Power and the Rule of Law in the Marshall Court: A Rereading of* Little v. Barreme *and* Murray v. Schooner Charming Betsy, 89 FORDHAM L. REV. 1941, 1953 n.58 (2021).

77. *See* Joyce, *supra* note 5, at 1306–12.

78. *See* Langbein, *supra* note 73, at 573–74.

79. Joyce, *supra* note 5, at 1346–47.

80. *See id.* This goal was all the more important as the Court made clear that its appellate jurisdiction covered state, as well as federal, courts. *See generally* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

Henry Wheaton, an associate of Justice Story's, was appointed the first official reporter of the Supreme Court. After Wheaton's appointment, the country had "complete, meticulous and timely reports unlike any that had gone before."[81] The quality of reports was still somewhat uneven for a time; Wheaton's successor, Peters, did not share his talents.[82] But the country had taken a major step in the direction of Marshall's vision: The Supreme Court could communicate its constitutional vision with reasonable "accuracy and promptness."[83] Wheaton's very first term as reporter witnessed one of the Marshall Court's great constitutional decisions, *Martin v. Hunter's Lessee*. Many of the other great monuments of the Marshall Court—including *McCulloch*, *Dartmouth College*, *Gibbons*, and *Osborn*—also appeared for the first time in Wheaton's reports.[84] In short, "the development of a dynamic official reporter system" was an important ingredient of "the Supreme Court's ascendance to power under John Marshall."[85]

CONCLUSION

The judicial opinion is a complex institutional practice that reflects and may even give rise to notions of the Supreme Court's function in the legal system and the nature of constitutional law. In Robert Post's words, "[t]he response of Justices to a changing

81. *See* Joyce, *supra* note 5, at 1388. The Reporter's Act was actually passed by Congress a year after Wheaton's appointment. *See id.*

82. *See id.* at 1361.

83. *See* Joyce, *supra* note 5, at 1347.

84. *See generally* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Osborn v. Bank of U.S., 22 U.S. (9 Wheat.) 738 (1824).

85. Joyce, *supra* note 5, at 1293. A final development is less institutional and more sociological, but bears mention nonetheless. In 1828, Justice Story accepted a post as Dane Professor at Harvard Law School. AMAR, *supra* note 2, at 564. Story, like his friend Chancellor Kent, was thus an "artist[] who worked in three media—the published judicial opinion, juristic writing, and legal education." Langbein, *supra* note 73, at 571. And he interconnected those media. Story's presence at Harvard, as well as the Commentaries he produced, not only helped to make the study of law a substantial field of intellectual endeavor in the United States, but he also made the Court a focal point of that study. In his own words, the "[t]wo great sources" for his treatise were the Federalist Papers and Marshall's judicial opinions. AMAR, *supra* note 2, at 567. The Supreme Court opinion remains to this day the backbone of legal education. These sociological connections between the bench and the academy, like the institutional changes already described, increased the Court's prominence in our legal culture.

institutional environment, or to evolving notions of law or of judicial authority, will be mediated by their conception of the nature and functions of Supreme Court opinions."[86] With that in mind, I have looked to the Supreme Court's early institutional practices to answer the puzzle with which I began: How did the judiciary, and the Supreme Court in particular, grow into such a prominent and meaningful participant in America's constitutional conversation over the period canvassed by Amar?

The foundation for this growth was put in place between the Revolution and the Federal Constitution, as states ratified written constitutions with special democratic authority that could be susceptible to judicial interpretation, and even invest judicial interpretation with that special authority. Then, after the Federal Constitution went into effect, the early Supreme Court Justices made a set of critical institutional changes that both strengthened the judicial voice and made it distinct from the other branches. The Justices separated themselves from the President and his cabinet, they suppressed overt partisanship, and they started to speak through unified and elaborately reasoned "opinions of the Court" that were disseminated in official reports. These changes remain the backbone of the Court's institutional identity.

Amar rightly observes that the Marshall Court "helped create and solidify an *institutionalized* constitutional culture."[87] The aim of this essay has been to give more specificity to that claim by charting the early and now obscure institutional choices that made it possible for the Court to vociferate as it does today.

86. *See* Post, *supra* note 32, at 1289.
87. *See* AMAR, *supra* note 2, at 562 (emphasis added).