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978-0-521-76001-0 - Antecedents and Beginnings to 1801, Volume I

Julius Goebel

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## HISTORY OF THE SUPREME COURT OF THE UNITED STATES

*Antecedents and Beginnings to 1801* is the first of twelve volumes in the *Oliver Wendell Holmes Devise History of the Supreme Court of the United States*. In this first volume, Julius Goebel Jr. details the creation of a national judiciary in the United States under the Act of 1789 and traces the Supreme Court's development through its first decade of existence.

The book is organized into three parts. The first part describes the background of American constitutionalism. Goebel then goes on to depict the Constitutional Convention, the ensuing debate over ratification, and the framing of the Bill of Rights. In the final part of the book, he explains how early legislation affected the judiciary and the initial experience of the circuit courts and of the Supreme Court. These three parts are divided into seventeen chapters, together with a statistical analysis of the business of the Supreme Court from 1789 to 1801 and substantial notes on manuscript sources.

Julius Goebel Jr. (1892–1973) was George Welwood Murray Professor of Legal History, Columbia University School of Law. He was the author of numerous articles and books, including the classic *Felony and Misdemeanor: A Study in the History of English Criminal Procedure* (1937) and *A History of the School of Law* (1955). He co-authored *Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664–1776)* (1944) and *Cases and Other Materials on Domestic Relations* (1952) and edited *Cases and Materials on the Development of Legal Institutions* (1929). Until his death in 1973, he was editing what became the five volumes of *The Law Practice of Alexander Hamilton* (5 vols., 1964–80).

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# THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES

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VOLUME I

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Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,  
São Paulo, Delhi, Dubai, Tokyo

Cambridge University Press

32 Avenue of the Americas, New York, NY 10013-2473, USA

[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9780521760010](http://www.cambridge.org/9780521760010)

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An earlier version of this book was published by Macmillan Publishing  
Company in 1971

© The Permanent Committee of the Oliver Wendell Holmes Devise 1971  
First published by Cambridge University Press 2010

Printed in the United States of America

*A catalog record for this publication is available from the British Library.*

*Library of Congress Cataloging in Publication data*

Goebel, Julius, 1892–1973.

Antecedents and beginnings to 1801 / by Julius Goebel, Jr.

p. cm. – (The Oliver Wendell Holmes Devise History of the Supreme Court  
of the United States ; v.1)

Includes bibliographical references and index.

ISBN 978-0-521-76001-0 (hardback)

1. United States. Supreme Court – History. 2. Judicial power – United States –  
History. 3. Judicial review – United States – History. 4. Constitutional history –  
United States. I. United States. Permanent Committee for the Oliver Wendell  
Holmes Devise. II. Title. III. Series.

KF8742.A45H55 vol. 1 2009

347.73'2609–dc22 2009030764

ISBN 978-0-521-76001-0 Hardback

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Contents

|   |                |
|---|----------------|
| <i>Illustrations</i>  | <i>page</i> ix |
| <i>Foreword to the Cambridge Edition</i>                              | xiii           |
| <i>Foreword</i>   | xv             |
| <i>Editor’s Foreword</i>  | xix            |
| <i>Preface</i>  | xxi            |
| <i>Acknowledgments</i>  | xxvii          |
|   |                |
| I • THE PATH OF THE LAW — OLD WORLD TO NEW                            | I              |
| II • THE TRADITIONS OF JUDICIAL CONTROL OVER<br>LEGISLATION           | 50             |
| III • THE NEW STATES AND THE PRINCIPLE OF<br>CONSTITUTIONAL AUTHORITY | 96             |
| IV • THE CONTINENTAL CONGRESS AND NATIONAL<br>JUDICIAL AUTHORITY      | 143            |
| V • THE CONSTITUTIONAL CONVENTION AND THE<br>JUDICIARY                | 196            |
| VI • THE APPEAL TO THE PEOPLE AND THE<br>MOLDING OF OPINION           | 251            |
| VII • THE FRAMERS AS PROPAGANDISTS                                    | 292            |
| VIII • THE RAISING I: THE JUDICIAL BEFORE THE<br>STATES               | 324            |
| IX • THE RAISING II: THE JUDICIAL BEFORE THE<br>STATES                | 360            |

CONTENTS

|  |     |
|--|-----|
| X • UNFINISHED BUSINESS—THE BILL OF RIGHTS                                     | 413 |
| XI • THE JUDICIARY ACT OF 1789   | 457 |
| XII • THE PROCESS ACTS   | 509 |
| XIII • THE CIRCUIT COURTS—ORGANIZATION, CIVIL AND APPELLATE JURISDICTION       | 552 |
| XIV • THE CIRCUIT COURTS—CRIMINAL JURISDICTION                                 | 608 |
| XV • THE SUPREME COURT—APPELLATE PRACTICE                                      | 662 |
| XVI • THE SUPREME COURT—POLITICAL AND CONSTITUTIONAL ISSUES I                  | 722 |
| XVII • THE SUPREME COURT—POLITICAL AND CONSTITUTIONAL ISSUES II                | 760 |
| APPENDIX: THE BUSINESS OF THE SUPREME COURT, 1789–1801, APPELLATE JURISDICTION | 795 |
| MANUSCRIPT SOURCES—ABBREVIATIONS OF LOCATIONS                                  | 814 |
| LOCATION OF MANUSCRIPT FEDERAL JUDICIAL RECORDS CONSULTED                      | 815 |
| MANUSCRIPTS OTHER THAN FEDERAL JUDICIAL RECORDS                                | 817 |
| CONTEMPORARY NEWSPAPERS AND PERIODICALS CITED                                  | 820 |
| SHORT TITLES AND ABBREVIATIONS   | 822 |
| A SELECT BIBLIOGRAPHY  | 824 |
| <i>Index</i>   | 841 |



---

*Illustrations*

F O L L O W I N G   P A G E   2 2 6

*Sir Edward Coke*  
*James Madison*  
*Alexander Hamilton*  
*Rufus King*  
*Caleb Strong*  
*Luther Martin*  
*Patrick Henry*  
*Richard Henry Lee*

F O L L O W I N G   P A G E   3 3 8

*The New York Merchants Exchange*  
*Back of the State House, Philadelphia*  
*Old City Hall, Philadelphia*  
*The Mayor’s Court Room (reconstructed)*

F O L L O W I N G   P A G E   4 8 2

*John Jay*  
*John Rutledge*  
*William Cushing*  
*James Wilson*

ILLUSTRATIONS

*John Blair*  
*James Iredell*  
*Thomas Johnson*  
*William Paterson*  
*Samuel Chase*  
*Oliver Ellsworth*  
*Bushrod Washington*  
*Alfred Moore*

F O L L O W I N G   P A G E   6 7 4

*Edmund Randolph*  
*William Bradford*  
*Charles Lee*  
*William Lewis*  
*William Rawle*  
*Jared Ingersoll*  
*Alexander J. Dallas*  
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*Edward Tilghman*  
*Peter S. Du Ponceau*  
*Samuel Dexter*  
*Jacob Read*

---

*Documents*

|  |     |
|--|-----|
| <i>Alexander Hamilton’s Brief No. 4, Rutgers v. Waddington</i>   | 135 |
| <i>Decree of the Standing Committee on Appeals in Palmer v. Hussey</i>                                 | 152 |
| <i>An Ordinance Ascertaining what Captures on Water shall be lawful (1781)</i>                         | 176 |
| <i>George Washington’s annotated copy, Report of the Committee of Detail of the Federal Convention</i> | 242 |
| <i>Melancton Smith’s “Minutes of Debates on the New Constitution”</i>                                  | 262 |
| <i>Senate print of the House’s Articles of Amendment</i>   | 445 |

DOCUMENTS

|  |     |
|--|-----|
| <i>Draft amendments to the Bill of Rights</i>  | 451 |
| <i>Manuscript draft, Senate Judiciary Bill</i>   | 464 |
| <i>Printed Senate Bill—An Act to Establish the Judicial Courts of the United States</i>                    | 469 |
| <i>Manuscript draft of an Act to regulate Processes in the Courts of the United States</i>                 | 513 |
| <i>Printed Senate Bill—An Act to regulate Processes in the Courts of the United States</i>                 | 516 |
| <i>Rule of the Supreme Court of the United States, August 8, 1792</i>                                      | 548 |
| <i>President George Washington’s letter on the eve of the first Circuits</i>                               | 555 |
| <i>Rules for the orderly conducting of business in the Circuit Court of Georgia in Cases at Common Law</i> | 576 |
| <i>Grand jury presentment, United States v. Joseph Ravara</i>  | 628 |
| <i>Grand jury presentment, United States v. James T. Callender</i>   | 642 |
| <i>Dorse of the indictment, United States v. John Fries</i>  | 657 |
| <i>First page Manuscript Minutes of the Supreme Court of the United States</i>                             | 664 |
| <i>Writ of error, Collet v. Collet</i>   | 668 |
| <i>Docket entries, Chisholm, Exr. of Farquhar v. the State of Georgia</i>                                  | 727 |

---

## *Foreword to the Cambridge Edition*

WHEN JUSTICE OLIVER WENDELL HOLMES died, he left his entire estate to the Congress of the United States, which, after a long lapse, established the Permanent Committee for the Oliver Wendell Holmes Devise. The Committee consists of five members, four appointed by the President of the United States and the fifth, the chair, by the Librarian of Congress. More than half a century ago the Committee decided that its principal purpose would be to commission a multi-volume history of the Supreme Court of the United States. The Holmes Devise History was originally envisioned as an eleven-volume series, concluding with a volume on the Hughes Court and ending in 1941. More recently, the Committee decided to extend the coverage of the series and commissioned new volumes, one on the Stone and Vinson Courts, and another on the Warren Court. It is possible that further volumes will be commissioned for subsequent Courts.

The Holmes Devise History has had a complicated history. A few of the initially commissioned volumes appeared fairly promptly, but many were long delayed. A few of the authors abandoned their volumes. Others passed away before they could complete their volumes, and new authors were appointed. As of 2009, two of the original volumes, as well as the recently commissioned volume on the Warren Court, have yet to appear, though we hope to see them within the next few years. The series was initially published by Macmillan, but after that firm ceased to do business, the Committee was fortunate enough to be able to contract with Cambridge University Press to publish the remaining volumes—and, remarkably, to put the earlier volumes back into print. The Committee is deeply grateful to Cambridge for undertaking this large and important publishing project.

The conception of the Holmes Devise History has also changed substantially over the years. Under its original Editor in Chief, Professor Paul Freund of Harvard Law School, the individual volumes were conceived of as nearly encyclopedic. Authors were expected to cover all of the most significant cases

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Julius Goebel

Frontmatter

[More information](#)

## FOREWORD TO THE CAMBRIDGE EDITION

decided by the Supreme Court of the United States, as well as to provide exhaustive biographical accounts of the Justices. After I became the Co-Editor with Paul Freund in 1978, however, authors were asked to take a more focused and analytical approach. More recent volumes are somewhat shorter and significantly more thematic, though I hope it is fair to say that each volume remains the major account of the Supreme Court during the period it covers.

I have been the Editor in Chief since 1990, and it gives me special pleasure to know that the entire series is now back in print and available to readers. The Holmes Devise project is one of the most ambitious in the history of American law, and I believe it is true to say of the Holmes Devise History that the whole is much more than the sum of its parts. While I cannot describe myself as a neutral party (I was, after all, a member of the Permanent Committee from 1974 until 1980), I also think it likely that Justice Holmes would have admired both the seriousness and comprehensiveness of the History of the United States Supreme Court, for it is much more than a handsome set for one's library shelves! I trust that it will prove useful to scholars, lawyers, and general readers for many years to come.

*Stanley N. Katz*

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Julius Goebel

Frontmatter

[More information](#)

---

## Foreword

WHEN OLIVER WENDELL HOLMES, JR., Associate Justice of the Supreme Court, died in March 1935 at the age of ninety-three, he left to the United States of America his residual estate, amounting to approximately \$263,000. Since such a bequest was unusual, there was no ready formula for utilizing this money. The subsequent deliberations among government leaders about a suitable disposition of the gift were interrupted by the onset of the Second World War, with the result that for many years the money remained in the Treasury, untouched and uninvested. Finally, in 1955, an act of Congress (P.L. 84-246) established the Oliver Wendell Holmes Devise Fund, consisting of the original bequest augmented by a one-time appropriation in lieu of interest. The act also created the Permanent Committee for the Oliver Wendell Holmes Devise to administer the fund. The Committee consists of four public members appointed by the President of the United States for an eight-year term and the Librarian of Congress as Chairman *ex officio*.

The principal project supported by the Holmes bequest, as stipulated in the enabling act, has been the preparation and publication of a history of the Supreme Court of the United States. The present volume is part of that series. Intended to fill a gap in American legal literature, the multivolume history has been planned to give a comprehensive and definitive survey of the development of the Court from the beginning of the nation to the present. Paul A. Freund, Carl M. Loeb University Professor, Harvard University, has served as editor in chief. The authors, of whom Julius Goebel, Jr., George Welwood Murray Professor Emeritus of Legal History, Columbia University School of Law, is one, have devoted many years to the research and writing.

The operation of the Permanent Committee has been dependent upon the services of the distinguished men who have contributed their time, their wisdom, and their practical assistance as members of the Committee. Their names appear below.

Cambridge University Press

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Julius Goebel

Frontmatter

[More information](#)

## FOREWORD

In the early days of the Committee, Joseph P. Blickensderfer was Administrative Editor and Special Assistant to the Chairman. Dr. Blickensderfer contributed much imagination, enthusiasm, and hard work to plans for the publication of the history of the Supreme Court and later to preparations for the Holmes Devise lecture series also supported by the Committee. Following Dr. Blickensderfer's death in 1960, the late Lloyd Dunlap served as Administrative Editor for the years 1961–64. Since then the responsibility for the office of the Permanent Committee has been assigned to Mrs. Elizabeth E. Hamer, Assistant Librarian of Congress, who is assisted by Mrs. Jean Allaway as Administrative Officer for the Devise.

As Chairman *ex officio* of the Committee that has sponsored this work, I am happy to see the plans for the Oliver Wendell Holmes History of the Supreme Court come to fruition. This volume and its companions will form an appropriate tribute to the great Justice whose legacy has made possible their publication.

*L. Quincy Mumford*

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Frontmatter

[More information](#)

---

## *Editor's Foreword*

THE SUPREME COURT of the United States is on any count an extraordinary creation, remarkable in each of its major functions. It stands, in the first place, as the head of a system of federal courts, Circuit and District, separate from the courts of the states yet possessing jurisdiction in many cases concurrent with that of the state tribunals. The Court, moreover, is the supreme judicial arbiter of the constitutional order, exercising appellate authority for this purpose over both state and federal courts. And finally, the Court is vested with power in its original (as contrasted with its appellate) jurisdiction to resolve controversies between two or more states themselves. It is an awesome mission, reflecting the concern of the Framers and the members of the first Congress for maintaining the rule of law and the supremacy of the Constitution and laws passed pursuant to it, and manifesting a faith that, as a multiplicity of interests would diffuse the conflicts bound to persist in the Union, structured institutions and procedures for adjudication would domesticate them.

But remarkable as was the conception of the Supreme Court in the federation, it was not devoid of ancestry. Continuity with the past, as Justice Holmes reminded us, is not a duty, it is only a necessity. The flash of genius that produces a patentable invention does not dissolve the linkages of tradition and experience. The theme of the present volume is the lineage of the Court and its business in the first decade of its existence.

Professor Goebel has brought to this formidable task his immense learning in the formative eighteenth-century period of American law. Building on his resources of scholarship and insight he has traced the influences that shaped the federal judiciary—the traditional practices of the local courts in England and the procedures in the colonial and early state courts in America. These sometimes labyrinthine explorations, conducted with hard-won command of the terrain, provide a foundation for understanding the practice and process of the federal Circuit Courts, whose decisions were not only reviewable by the Supreme Court but were actually participated in by individual members of that Court. For circuit

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Frontmatter

[More information](#)

## EDITOR'S FOREWORD

riding was a major function of the Justices, as it was surely the most onerous branch of their duties, exposing them to “the dangers and miseries of overturned vehicles, runaway horses, rivers in full flood or icebound, and scruffy taverns.” Such was the heavy price of bringing the Justices literally to the people.

The other principal function of the Court, the maintenance of the constitutional order and the settlement of disputes between the states, likewise had its antecedents. The Privy Council in England, the Court of Appeals in prize cases under the Articles of Confederation, the commission for boundary disputes among the states, the state judicial systems themselves, all pass in review as prologue to the Constitutional Convention and Article Three, the ratifying conventions in the states, and the legislation of the first Congress giving structure to the federal judicial establishment.

The early years of the Court have come to be overshadowed by the towering figure of John Marshall. And yet the Justices who served during the twelve years before the fourth Chief Justice came to the bench were faced with issues of great moment, even with disputes over governmental powers under the Constitution, which they adjudicated with sagacity and no little learning. The reader of Professor Goebel's masterful account is not likely to forget that there were indeed brave men before Agamemnon.

*Paul A. Freund*

# Preface

WHEN THE SUPREME COURT of the United States held its first term, February 1790, in the city of New York there was no expectation that the establishment of federal judicial power would add a certain splendor to the development of American law. Indeed, in the very recent past the provisions for the judicial in the new Constitution had been under assault, nowhere more bitterly than in the state of New York. Some change of attitude had occurred only after Congress had effected a species of historical transfusion in the first statutes organizing the federal judiciary by drawing upon the laws and practices of the several states to vitalize the functioning of the new system. The force and effect of this can be appreciated only by taking into account the relative antiquity of native experience with law administration and its diversities. These were factors that were to make difficult the development of a federal jurisprudence; nevertheless their embracement promised a better chance of survival than if a scheme unrelated to extant realities had been contrived.

In Thomas Jefferson’s first catalogue of his library (1783), the laws of the American states other than his own were classified as “Foreign Laws.” This insular outlook was shared by lawyers in other jurisdictions; it derived from the fact that as colonies each had had an identity impressed upon it by the circumstances of its founding that was to develop into a jealous particularism. In the most venerable of the continental colonies basic ideas about the judicial structure and the procedures, original and appellate, had become settled long before the Crown instituted an effective watch and ward over colonial enactments and saw to it that as respects the judicial there should be the least impairment of the *status quo*.

In any jurisdiction reached by royal mandates, acts of assemblies were subjected to tests of law and policy, all conceived to be ingredients of the imperial constitution. Disallowance awaited transgression. The colonials had no stomach for such control, but they became so far conditioned to the notion that legislation must consist with certain standards that this became part of the total

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Frontmatter

[More information](#)

## PREFACE

experience that shaped the doctrine of constitutional supremacy. This was to be embodied in many of the first state constitutions.

Two incidents of royal policy contributed to the perpetuation of local diversities. One was the prohibition upon legislative erection of new courts except for small causes, a policy that served to perpetuate the existing structure of colonial courts. The second and less effective policy was the subjection of acts meddling with procedure to the test of conformity with the common law. For one reason or another a variety of legislative experiments escaped the axe, and consequently some new departures from the English canon were to survive. The novelties for which the bar and the judges alone were responsible never suffered systematic scrutiny, for the Crown never formally imposed upon the judiciary as it did upon the legislatures the standard of common law conformity. This was a dispensation favorable to the Americanization of what the colonials appropriated from the stores of the common law—a process highly selective, depending, as one might expect, upon local political traditions and the accidents of juristic controversy. There was never, as some myth-makers would have us believe, a wholesale reception.

Colonial judiciaries were, however, not utterly immune from surveillance, for their judgments or decrees were in principle subject to review on appeal to King in Council. This was in practice a more or less latent possibility, for the appellate jurisdiction was so regulated that in relation to the quantum of American judicial business, only the most resolute and affluent litigant was likely to pursue this remedy. Nevertheless, determinations of great constitutional import were made on appeal that affected some of the most politically vocal colonies. To the very end such appeals remained a contingency of which counsel on this side of the water were well advised to be aware.

When royal government came to an end, judicial power in its plenitude devolved upon the new states, and encompassed matter such as the chancery jurisdiction, hitherto a preserve of the Crown, and the admiralty jurisdiction, once a flower in what Francis Bacon called the “garland of prerogatives” that had become the subject of parliamentary regulation. The so-called reception provisions of state constitutions and statutes assured the continuing vigor of the common law as practiced or as a fundamental source of reference. It was from this aggregate, conserved by intense local pride, that surrenders were to be sought in the national interest.

At the outset, the national interest was the successful prosecution of the war and then the recognition of independence. It was in connection with the former that the Continental Congress, the *de facto* organ of the rebel colonies, assumed appellate jurisdiction (1775) in cases of prize adjudicated in state courts—a first exercise of “federal” judicial authority. There were to be instances of state resistance to this assertion of jurisdiction and the fact that the instrument that was to convert the *de facto* confederation into one *de jure* empowered the Congress to establish a Court of Appeals in cases of captures did not subdue the recalcitrants. It was all of four years before all the states ratified the

PREFACE

Articles of Confederation. Yet, even after this occurred, the appellate jurisdiction was challenged and an attempt was made in Congress (1784) to have vacated all sentences.

The belated attack on the appellate jurisdiction in cases of captures at sea was one of the accumulating events that convinced the leading advocates of union of what they called the “imbecility” of the Confederation. Indeed, the coming of peace made manifest that the Americans’ hitherto perilous situation had been in Edmund Randolph’s words “the cement of our union.” The details of disintegration and the steps taken to bring this to a halt are familiar history. Ironically enough, it was the states acting independently that furnished the impetus for constitutional reform.

A federal judiciary was not, in eighteenth-century parlance, the most “interesting” problem facing the delegates to the Constitutional Convention of 1787. Although everyone was aware of the fact that the nation’s foreign affairs were suffering from the shortcomings of state administration of justice, ideas regarding a federal establishment were long amorphous. There was never any doubt about a Supreme Court, but the inferior courts were a real bone of contention. Perhaps even more than the scope and heads of federal jurisdiction, the problem of making the judicial an independent branch of government fully coordinate with the other branches was to engage the Convention. This was not quickly done, for the image of the English judge whose participation in government was not confined to judicial duties haunted the delegates who sought to have Supreme Court Justices share in the veto power. Even after agreement seemed to have been reached that their role with respect to enactments should be confined to the review of statutes for repugnancy to the supreme law, there was a last-ditch effort to make a privy councillor of the Chief Justice.

The decision that the adoption of the new frame of government should be the act not of the Continental Congress, but of the people for whom the Convention purported to speak, was to precipitate prolonged and searching inquiry into the expedience and soundness of the proposed instrument of union. As might be expected of a litigious populace quick to appeal and one widely conversant with the operations of courts, the inquest into the judicial was at once intelligent and prejudiced, critical and immensely informative. It has in the past been but little regarded for its impact, yet it led to the formulation of the Bill of Rights; it profoundly influenced the provisions of the first Judiciary Act. Both must be accounted to be the prime achievements of the first session of the first Congress. Both owed their strength to the fact that they were retrospective—the Bill of Rights because it put beyond controversy the quiet possession of rights of which the colonials believed that they then had been deprived and had fought a war to secure; the Judiciary Act because it was constructed in so many of its parts from long-seated law and usage.

One thing the ratification discussions had made clear was the need for some sort of *modus vivendi* between state and eventual federal judicial establishments. In exercise of the constitutional authority to ordain and establish courts inferior

PREFACE

to the Supreme Court, the Judiciary Act provided for District and Circuit Courts; significantly, however, it also provided for the exercise of concurrent jurisdiction by state courts in certain species of actions. The safeguard against a possible centrifugal effect was the lodgment in the Supreme Court of a power of review of judgments in the highest state courts for alleged repugnancy to the laws, treaties or Constitution of the United States. There were also sops to Cerberus in the shape of monetary limitations: the direction that the laws of the states be the source of reference for decisions in trial at common law, and that jury service be governed so far as practical by state laws. A final yielding to state pride was the later rejection by the Senate of a proffered scheme of uniform federal procedure and the passage of a Process Act making mandatory state forms.

A problem to which only opponents of the Constitution had given tongue was the difficulty if not impossibility of administering justice over a territory, which miserable means of communication made vaster than in fact it was. In combination with the clamor over the probable expense of a federal system, it became evident that some form of judicial visitation such as prevailed in England and in some states was desirable. The scheme devised was to associate the District judge with two, later one, of the Justices of the Supreme Court to hold and keep the Circuit Court in each district within a designated circuit. This was an inimitable idea, but it imposed an intolerable travel burden upon the visiting Justices. They were, furthermore, the least pampered of any government servants. No clerks were allotted them, no allowance for travel. The Judiciary and the Process Acts between them required that they acquire a command of state law, and as in every instance this was a memory jurisprudence, they had to put their trust in the attendant District judge. In centers like Boston, New York, and Philadelphia, where the bar possessed a high level of competence, the ardors of advocacy invited conflicts of memory difficult for a Justice reared in a different legal culture to resolve and consequently tended to induce judicial reliance on English book law. The business of the Circuit Courts was one of steady growth that exacted a heavy toll on a Justice's energies. It was here that the power of review of state and federal legislation was first exercised; here that the defects of the statutory regulation of admiralty appeal were first laid bare. It was from the Circuit Courts that the bulk of the causes to come before the Supreme Court on error came, and although the practice developed that a Justice who sat on a case at Circuit refrained from participating in the Supreme Court decision thereon, it is difficult not to believe that in conference he might supplement the record.

The criminal jurisdiction of the Circuit Courts was insulated by the fact that the Congress did not see fit to provide for error—not even in prosecutions for misdemeanor long permitted in English law. Criminal procedure was left by Congress so far at large that in this area the Circuit Courts were free within the limits of the Bill of Rights to effect a reception of common law practices. The list of crimes against the United States was an attenuated one, and but for the

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978-0-521-76001-0 - Antecedents and Beginnings to 1801, Volume I

Julius Goebel

Frontmatter

[More information](#)

## PREFACE

addition of the Sedition Act in 1798, the administration of the criminal law was a matter neither of public solicitude nor of great public interest. It was a partisan wrath over the enforcement of this new act that was to bring on a calculated wave of criticism against the Circuit Courts and eventually to raise the issue of a federal common law, to lead to an attempted disherison of judicial review and to become a ponderable factor in the later assault upon the federal judicial.

Because the Justices moved about the country, the press of the 1790s reflects a widespread interest in their doings on circuit, but the public was illy informed of their work in the Supreme Court. Indeed, it was not until 1798 that the first reports of decisions from a professional hand became available, to be followed in 1799 by a second volume. These publications were a boon to the bar at large, for at long last there were at hand rulings of the Court on appellate practice; certain fundamentals were settled during the first decade of the Court's existence and this portion of the business that came before it must be accounted one of its major achievements. Procedure, after all, is something savored only by the connoisseur and is devoid of the spice that a dash of politics can lend a litigated cause. With such the text of the Constitution proved redolent.

The Supreme Court's first encounter with what developed into a politically explosive cause arose in *Chisholm, Exr. of Farquhar v. the State of Georgia* where it undertook to exercise original jurisdiction in an action against a state by a citizen of another state. The majority of the Justices decided that the meaning of the clause in Article III was plain, which, indeed, it was, although this answer had been evaded throughout the ratification debates. Judgment was duly entered for the plaintiff. Because similar suits against states were already on the docket, the repercussions were profound, and there ensued in the states a resurgence of the pretensions to sovereignty that had bedevilled the formulation and ratification of the Constitution. The contested jurisdiction was expunged by the eventual ratification of the Eleventh Amendment; until this happened, the Court, nevertheless, abided by its precedent.

Among the woes from which the old Confederation government suffered had been the disposition of the new states not to discharge their debts—as if this were a perquisite of newly found sovereignty—and, of even greater embarrassment, to impede the performance of treaty obligations. The so-called diversity jurisdiction conferred upon the federal judicial had been contrived among other reasons to provide a forum where British creditors could pursue their claims without impediment as covenanted in the treaty of peace. Suits for collection, nevertheless, remained obstructed by earlier state statutes allowing discharge of debts paid into state treasuries. Once more the sovereignty argument was paraded in the debt case of *Ware v. Hylton* where it was determined that such acts had been voided by the treaty of peace—the first great affirmation of the supremacy of treaties over state law. The fact that at the same term the Court held constitutional the federal carriage duties—a form of taxation volubly opposed by states' rights advocates—did nothing to smother a growing belief that the federal judiciary was a “foreign” jurisdiction.

PREFACE

What the Supreme Court contributed toward defining the grant of maritime and admiralty jurisdiction was achieved likewise in an atmosphere of political tension, the result of emotions aroused by the wars growing out of the French Revolution. The basic problem of the Court was to establish judicially the obligations inherent in the national policy of neutrality in relation to competing claims of treaty rights, and to resolve conflicting views of the law of nations. This was an awesome task in the face of the sharp divisions of public opinion that swiftly developed into party programs, and the accusations of malfeasance emanating from one of the belligerent powers.

The Supreme Bench remained steadfast in its adherence to the conception that it was a court of justice independent of and coordinate with other branches of government, which it declined to advise and upon which it would not trespass. Neither was it disposed to enlarge its powers beyond what the Constitution seemed explicitly to authorize. In no particular was this more plainly manifested than in the reserve it displayed when urged to exercise supervisory powers over the federal judiciary. The outlook of the Justices was national—it could hardly be otherwise, for the experience of nearly all of them reached back to the pre-Revolutionary troubles through the travails of the Confederation and the founding of the Constitution. They gave the Court a tone that was to persist into another era.

Except as research has dictated some deviations, this volume has followed in the main the specifications of the plan submitted by the Permanent Committee for the Oliver Wendell Holmes Devise. It reflects necessarily the writer's long engagement with problems of the transplantation of law and his belief that even those matters professionally least beguiling to lay people are part and parcel of intellectual history. Consequently, the provenance of ideas and the use to which such were put has seemed to us more worthy of investigation than what may be called the "outward and visible" aspects of the judiciary such as how it was housed or the apparel of judges. About these matters others have written. It has been sought, further, to deal with our evidence at first hand without regard to anachronous assumptions or sentiments. The difficulty of estimating men and events in terms of their own times is close to insuperable. Yet in anything concerning the administration of the law, it is the virtue of the relevant sources within a given span of years that these are susceptible of assessment in the context of the period. A decade and more spent with the muniments of eighteenth-century law practice has emboldened us to make the attempt.

JULIUS GOEBEL, JR.



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## *Acknowledgments*

UPON THE COMPLETION of a work of research a final and pleasurable duty is the tender of thanks to the many who have given aid and comfort. This writer is particularly indebted to the members of the Permanent Committee for the Oliver Wendell Holmes Devise and to its administrative officers—the late Dr. Joseph P. Blickensderfer, the late Mr. Lloyd A. Dunlap, Mrs. Elizabeth E. Hamer and Mrs. Jean D. Allaway—for many favors. Dean William C. Warren of Columbia University School of Law arranged that our undertaking be designated a University project, a benefit that has facilitated our work in many ways. The staffs of the Columbia University libraries and of all the federal repositories—The Manuscript Division of the Library of Congress, the National Archives, and the various Federal Record Centers—have all gone out of their way to assist our researches. This has also been our happy experience at the various state and city repositories—the Connecticut State Library, the Massachusetts Archives, the New York State Library, the Boston Public Library, the New York Public Library, Astor, Lenox and Tilden Foundations and the Division of Old Records in the Office of the New York County Clerk.

At all the historical societies and other private collections mentioned in the list of manuscripts, the writer and his assistants have received innumerable courtesies, in particular from Mr. John D. Cushing, Librarian of the Massachusetts Historical Society. Requests to quote from manuscript sources have been uniformly granted and we are happy to express our gratitude for these permissions to the following:

The Beverly Historical Society, Beverly, Massachusetts, for an excerpt from a letter of Nathan Dane.

The William L. Clements Library, University of Michigan, Ann Arbor, Michigan, for the use of Robert R. Livingston's notes on the Constitution and the Anthony Wayne Papers.

The College of William and Mary in Virginia for matter from the Monroe Papers and the Tucker-Coleman Collection in the Earl Gregg Swem Library.

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Julius Goebel

Frontmatter

[More information](#)

## ACKNOWLEDGMENTS

Columbia University for items in the Jay Papers.

The Maryland Historical Society for a quotation from Samuel Chase's Charge Book.

The Massachusetts Historical Society for quotations from the Cushing, Knox, Pickering, R. T. Paine, and miscellaneous manuscripts.

The Newport Historical Society, Newport, Rhode Island, for quotations from letters in the Loan Office Letter Book and Custom House Letter Book.

The New York Historical Society for quotations from the Bancker Papers, the James Duane Papers, the Richard Harison Papers, the Rufus King Papers, the Lamb Papers, the Livingston Papers, the McKesson Papers, and the Joseph Reed Papers.

The New York Public Library, Astor, Lenox and Tilden Foundations, for quotations from Gilbert Livingston's notes on the New York Convention.

The Historical Society of Pennsylvania for quotations from the Peter Du Ponceau Letterbooks and his Form Book, the Richard Peters Papers, the Shippen Papers, and the William Rawle Papers.

Mr. Thomas Pinckney, Mrs. Langbourne M. Williams, and Mrs. M. M. Pinckney for liberty to consult the Pinckney Family Papers.

The Library of the University of Virginia for quotations from letters of Chase and others in the Lee Family Papers.

Yale University Library for quotations from the notes of Sir William Lee in the Osborn Collection.

Acknowledgments for permission to reproduce portraits appear with the illustrations themselves. The writer is most grateful to Miss Helen Sanger of the Frick Art Reference Library for her assistance in the process of selection.

For the examination of the widely dispersed federal judicial records the writer has had the help of a succession of former students. He is especially indebted to Mr. Robert L. Crawford, to Mr. Gerald Mac D. Shea, to Mr. Hugh C. Humphreys, now of the New York bar, and to Mr. Donald J. McLachlan, now of the Illinois bar, for his analysis and reports on the Revolutionary War Prize Appeals and the Supreme Court Appellate Case Papers. Mr. McLachlan also prepared the statistical tables of Supreme Court appellate practice.

A great deal is owed to friends and former colleagues. The late Mr. David J. Mays of the Virginia bar drew our attention to various useful items, and Mr. Harold L. Russell, Jr., of the Georgia bar pursued inquiries into the survival of early rules of court in that state. On all difficult points of practice, United States District Judge Jack B. Weinstein has given constant expert counsel; Professor Joseph Henry Smith of Columbia Law School has helped to solve difficult questions of admiralty appeals. Professor Gerald Gunther, now of Stanford University Law School, read and made many affirmative suggestions for the betterment of Chapter V. For advice on diverse historical problems the writer is indebted to two distinguished historians, Professor Harold C. Syrett, editor of *The Papers of Alexander Hamilton*, and Professor Emeritus Dorothy Burne Goebel. Miss Winnifred Bowers and Miss Betty J. Thomas, associate

Cambridge University Press

978-0-521-76001-0 - Antecedents and Beginnings to 1801, Volume I

Julius Goebel

Frontmatter

[More information](#)

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## ACKNOWLEDGMENTS

editors of *The Law Practice of Alexander Hamilton*, have given invaluable editorial aid in the preparation of the manuscript. Finally, the writer's thanks are due to our editor Ray A. Roberts of The Macmillan Company, to Professor Herbert Wechsler of the Columbia Law School and to our editor-in-chief Professor Paul A. Freund for their great interest and encouragement.

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Julius Goebel

Frontmatter

[More information](#)

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