1-1956

John Marshall in Perspective

Dudley Warner Woodbridge
William & Mary Law School

JOHN MARSHALL IN PERSPECTIVE*

BY DUDLEY W. WOODBRIDGE
Dean, Marshall-Wythe School of Law, College of William and Mary

We are met this morning to pay homage to one of America's greatest Americans—a man whom we at William and Mary regard as our greatest alumnus—a man whom your great College honors with his name.

Born in Virginia two hundred years ago this September 24th, John Marshall served under George Washington, first as Lieutenant, and later as Captain. He saw and participated in the terrible suffering of the Continental troops at Valley Forge.

But John Marshall is not primarily honored and remembered today because he was a soldier or an athlete or a diplomat. "By their fruits shall you know them," or in Marshall's case by his acts—by his decisions on great questions of Constitutional Law—do we know him. He was aptly designated by his great colleague, Mr. Justice Story, as the "Expounder of the Constitution."

The Constitution of Soviet Russia like our own Constitution guarantees freedom of speech. Section 125 of the Soviet Constitution reads in part:

> In conformity with the interests of the toilers and to the end of strengthening the socialistic social order, citizens of the U.S.S.R. are guaranteed by law: (a) freedom of speech, (b) freedom of the press, (c) freedom of assembly meetings, and freedom of street parades and demonstrations.

While the Constitutions are substantially the same, there is a great difference, for the interpretation of a constitution is just as much a part of it as the language itself. To the Soviet mind freedom of expression simply does not include the right to criticize the Government. That is as much a

*An address delivered at Franklin and Marshall College, September 15, 1955 at exercises held by the College, in conjunction with the Lancaster Bar Association, to honor the memory of one of its founding namesakes.

rule with them as it is with us that freedom of speech does not give one the right falsely to cry out "Fire!" "Fire!" in a crowded theatre. In other words freedom of expression in Russia is freedom to praise or criticize what the ruling classes want praised or criticized.

That the same words mean vastly different things to different people is perfectly illustrated by the almost infinite number of interpretations of the Bible. Fortunately for us today, no one can force his interpretation of the Bible on others as the only true one. In the case of our Constitution there have been vast differences of opinion. But while our Government does not compel us to live by the Bible, we are compelled to live by our Constitution, and, therefore, it is of great importance that we have the best possible way of knowing what our Constitution means.

The Executive is bound by the Constitution and the Congress is bound by the Constitution just as much as are all the courts. It is then quite logical to reason that in executive matters the President is the one who determines what he can or cannot do under the Constitution, that in Legislative matters the Congress determines what laws it can constitutionally pass, and that in matters purely judicial the Supreme Court of the United States determines what can or cannot be done. The Constitution of the United States itself does not expressly cover this most important matter, but since each branch of the Government is on an equality with the other two branches how could one branch be superior to the others, and, in effect, exercise a veto over what the other co-ordinate branches wish to do?

The first and the most famous of Marshall's Constitutional Law Cases I wish to comment on this morning is the case of *Marbury v. Madison* in which the Supreme Court decided that it had the last word on what can be constitutionally done not only by the courts, but by the Congress, and by implication, the Executive.

One of the last acts of the Federalist administration of John Adams was the issuance of some commissions to

several persons, one of whom was Marbury, empowering them to be Justices of the Peace in the District of Columbia. Although these commissions had been duly signed and sealed they had not been actually delivered. The new Republican administration now headed by Thomas Jefferson declined to deliver the commissions. An Act of Congress then in force authorized the Supreme Court to "issue writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed or persons holding office, under authority of the United States." So Mr. Marbury applied to the Supreme Court of the United States for a writ of mandamus ordering the Secretary of State to deliver his commission to him.

Now whether Mr. Marbury was given his commission or not made little or no difference to the Country and probably little or no difference to himself. Whether the Supreme Court could give orders to the President and the Secretary of State acting pursuant to the orders of the President was a matter of some moment especially when the Court and the President were not seeing eye to eye on many matters. There was even some talk of impeachment if the Court issued the writ. And if the Court failed to issue the writ, it would seem to thereby decide by implication that it had no powers over the executive branch of the Government even though it was clearly acting illegally. Thus Chief Justice Marshall found himself in a dilemma—possibility of impeachment if he issued the writ; abject surrender if he did not issue the writ. His escape from the dilemma is one of the cleverest master strokes of judicial history.

He decided three things: First, that Marbury was entitled to the commission. He lectured the President for failure to respect Marbury's vested rights telling him that America was a Government of laws and not of men. He then stated that mandamus was the proper remedy to compel the performance of public ministerial acts. He disclaimed any intention or any authority to control the discretion of

the executive. It seemed to follow from what he had said that he was going to grant the Writ of Mandamus, but instead he surprised his adversaries by deciding that the Act of Congress conferring original jurisdiction on the Supreme Court of the United States was in conflict with the Federal Constitution. That document (article III, Section 2) gives the Supreme Court original jurisdiction (1) in all cases affecting ambassadors, other Public Ministers and Consuls, and (2) in those cases where a State shall be a party. It then provides that in all other cases arising in the Federal Courts it shall have appellate jurisdiction. Since issuing writs of mandamus at the request of individuals does not affect Ambassadors, Public Ministers, or Consuls, nor involve any State, he held the Act of Congress null and void as being in conflict with the Constitution. In words that have rung down the centuries, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret the rule. If two laws conflict with each other, the courts must decide on the operation of each. So if the law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide the case, conformable to the law, disregarding the Constitution; or conformable to the Constitution, disregarding the law; the court must determine which of these conflicting laws governs the case; this is of the very essence of judicial duty. If then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

Please note that Marshall established the principle of judicial supremacy (a) without citing a single authority, (b) in a case of very little significance in and of itself, (c) deciding the case according to the wishes of the party then in power, (d) but lecturing them on the moral duties that

party had violated. As a result of all this, there was practically no objection from the Country as a whole to the doctrine of judicial supremacy laid down therein. Rather the court's opponents directed their fire at its criticism of the Republican administration.

One shudders to think as to what might have happened had the Court waited to establish the principle of judicial supremacy until some red-hot issue divided the Country, as say the Dred Scott Case, and the Court then for the first time asserted such a right. And let us not forget that there were many who took the view that each sovereign state had the right to determine for itself what acts of Congress were valid and what acts were not. It requires no imagination to see what intolerable confusion would have resulted had the Court not taken a firm stand at the opportune time. It is of interest to note that no other act of Congress was held invalid until the ill-fated Dred Scott Decision of 1857. During a period of 166 years the Supreme Court of the United States has disposed of more than 55,000 cases. In only 79 of these has it held that Acts of Congress were unconstitutional.

But the doctrine of Judicial supremacy still has its foes. In the February, 1955 issue of the *American Bar Association Journal* a lawyer and a former judge, Everett C. McKeage of San Francisco, writes of the Segregation Case (although he is personally opposed to segregation) (and you can imagine what he would have written if he was a strong believer in segregation), quote "Here again we have the example as stated by the late Chief Justice Stone of that Court when he critically said to his brother Justices, 'The only restraint we know is our own self-restraint.' . . . History teaches us that the Supreme Court of the United States, by its decisions, determines for itself its own authority and power in cases before it and amends the Federal Constitution by such decisions just as surely as though amended by the process and procedure provided for in the

Constitution. As Mr. Justice Holmes so aptly put it, that Court sits as a continuing constitutional convention. The Federal Constitution is whatever the Justices of that Court say it is. . . . No lawyer will deny that the Supreme Court, on many occasions, has overruled its former decisions on constitutional issues, just as in the instant case on segregation, thus making the meaning of the Constitution depend upon the individual views of its members. What was perfectly constitutional yesterday becomes heresy today just because nine judges (or even five, or three) say that it is. If this sort of thing is not a government of men, then I do not understand what that expression means. This is judicial omnipotence 'run wild'.

" . . . I say that these issues are far too important for a majority of nine judges to be the final authority on, it matters not how able, patriotic, and profound they may be. I stand with Thomas Jefferson, Andrew Jackson, Abraham Lincoln and Theodore Roosevelt on this vital subject." (End of quote)

But someone has to decide what law is supreme, Should it be the legislature which is most sensitive to the immediate popular prejudices? Should it be one man only, the President, or should it be by a majority of the Supreme Court which is at least one step removed from immediate popular passions, is disinterested, and has control of neither the public purse nor the military. Most people today (and I number myself among them) believe that our liberties, our rights, and our property are most secure if such a power is in the Courts where Chief Justice John Marshall put it in *Marbury v. Madison.*

Beveridge in his life of John Marshall says, "This principle (of Judicial Supremacy) is wholly and exclusively American. It is America's original contribution to the science of law. The assertion of it, under the conditions . . . was the deed of a great man."

Now permit me to turn from the political to the economic. In any society based on the division of labor the

interchange of products is its one most important economic necessity. Article I, Section 8 of the Federal Constitution reads in part:

> "The Congress shall have Power . . . To Regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes."

You will note that it does not say that the States do not also have such a power, and the term "Commerce" is not defined. One of the chief reasons for the establishment of the Constitution was the necessity of regulating Commerce between the several states. Local tariffs and other discriminatory measures had given rise to sharp controversies during the period of the Articles of Confederation. The first important case to reach the United States Supreme Court on the subject of commerce among the several states was the case of *Gibbons* v. *Ogden,* some 35 years after the adoption of the Constitution.

The State of New York had granted Messieurs Fulton and Livingston a monopoly or exclusive right to operate steamboats in the navigable waters in the State of New York between the City of New York and points in the State of New Jersey. Ogden was an assignee of this right. Gibbons, in violation of Ogden's right, was operating two steamboats, and Ogden sought to enjoin him from so doing. The problem seems a simple one to us today, largely because of Marshall's reasoning in the final decision, but the most learned men in the law of New York, including her Chancellor Kent—the author of Kent's Commentaries, second only to Blackstone in the United States, held that the New York law was valid and that Gibbons had no right to operate the vessels within the State of New York, even though he had a federal license to engage in the coasting trade. It was urged by the proponents of the monopoly that the United States Constitution should be interpreted strictly, that "commerce" as used in the Constitution referred only to the interchange of goods and not to navigation, and that while

the State of New York could not levy a tariff on goods imported from New Jersey, it could require such goods to be carried on vessels owned and operated by citizens of the State of New York. The case was argued by some of the most prominent lawyers of the day. Daniel Webster, William Wirt, David B. Ogden, Thomas J. Oakley. You will note that the question involved was not to what extent Congress can regulate interstate commerce positively, but to what extent has the grant of the power to Congress taken that power from the states. Chief Justice John Marshall held that the term "commerce" includes more than the mere traffic in goods.

"Commerce," he said, "undoubtedly is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, *in all its branches,* and is regulated by prescribing rules for carrying on that intercourse." (Emphasis added)

He held that the people of every portion of every state have a right to engage in commerce in all its branches, that commerce included navigation; that such a right is a federal right, and that the power to regulate commerce given to the Congress "is complete in itself, may be exercised to its utmost extent, and acknowledged no limitations, other than are prescribed in the Constitution." He also laid down the principle that where there is a conflict or collision between a state statute and a federal statute, the federal statute must prevail so long as the federal statute does not violate the federal Constitution.

As to whether the Constitution should be strictly construed, John Marshall had this to say:

"This instrument (the Constitution) contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? . . . Nor is there one sentence in the Constitution . . . that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean, by a strict construction? If they contend only

against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which . . . would deny the government those powers which the words grant, as usually understood, impart, . . . for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, . . . then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded, as men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. . . . We know of no rule for construing the extent of such powers, other than is given by the language of the instrument, which confers them, taken in connection with the purposes for which they were conferred."

Unlike the case of *Marbury* v. *Madison,* the decision of *Gibbons* v. *Ogden* attracted a great deal of attention and there were immediate repercussions both favorable and unfavorable. These repercussions are still with us today.

Those who opposed the New York steamboat monopoly were jubilant. This was the first great "trust" decision in America. Those who feared that states would be deprived of their power over the commerce in slaves were alarmed, and Thomas Jefferson, then eighty-two years of age, was horrified. In a letter to William B. Giles (a year before Jefferson's death) he wrote:

"I see, as you do, and with the deepest affliction, the rapid strides with which the Federal branch of our government is advancing towards the usurpation of all the rights reserved to the States, and the consolidation in itself of all powers, foreign and domestic; and that, too, by construction which, if legitimate, leave no limits to their powers. . . . it is but too evident that the three ruling branches (of the federal government) are in combination to strip their colleagues, the State authorities, of the powers reserved by them, and to exercise themselves all functions foreign and domestic. Under the power to regulate commerce, they assume indefinitely that also over agriculture and manufacturers . . . "

Charles Warren in his History of the American Bar comments:

"But economic results of more far-reaching importance than the mere demolition of the (steamboat) monopoly were involved, which were not appreciated until later years. The opening of the Hudson River and Long Island Sound to the free passage of steamboats was the most potent factor in the building up of New York as a commercial center. The removal of danger of similar grants of railroad monopolies in other states promoted immensely the development of interstate communication by steam throughout the country. . . . In short Marshall's opinion was the emancipation proclamation of American Commerce."

This decision has made possible a national economy which is the admiration and envy of the World. But the precise limits of federal control over commerce have not yet been marked out. Decade after decade there has been an increasing federal control. As society becomes more and more complex and we become more and more interdependent, we must have more and more regulations. It certainly takes more rules to operate properly a railroad or an airport than it does a small private garage.

Now let us note some of the most important constitutional law decisions that have further developed and refined the doctrines laid down in *Gibbons* v. *Ogden*.

After holding for scores of years that insurance was not commerce (Contracts of insurance "are not commodities to be shipped or forwarded from one State to another, and then put up for sale") the Supreme Court reversed itself in 1941. In other words insurance is just as much commerce as is navigation. But baseball. Ah! There is another question. Baseball is a game.

In *Wilson* v. *New* decided in 1917 it was held that Congress could fix the standards of hours and wages on the Nation's Railroads as a means of preventing a threatened general strike.

In the so-called Lottery cases decided in 1903, it was held that Congress in the exercise of its power to regulate

interstate commerce, might prohibit the transportation of articles, such as lottery tickets, which have only a moral relationship to commerce, i.e., articles which can not injure other goods in transit but can only accomplish their baneful effect within the state into which they are transported. Certainly the moral aspects of commerce are just as much the concern of the whole country as are its financial aspects.

And now come the Child Labor Cases. In 1916 Congress prohibited the transportation in interstate commerce of the products of any mine, quarry, mill, cannery, or factory, in which within thirty days prior to its removal therefrom children under the age of 14 had been permitted to work. By a five to four decision the Act of Congress was declared invalid because it was not intended as a regulation of interstate commerce but as a regulation of child labor—a matter for each state to determine for itself. This decision was over-ruled in *United States* v. *Darby* in 1944. Said the Court:

> "The motive and purpose of the present regulation is plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in distribution of goods produced under sub-standard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows."

The same principle is applicable to goods produced by convict labor. In *Kentucky Whip and Collar Co.* v. *Illinois Central Railway Co.* decided in 1937, a congressional act making it unlawful knowingly to transport in interstate commerce goods made by convict labor into any State where the goods are intended to be received, sold, or used in violation of its laws was upheld as a valid regulation of interstate commerce.

And the same for farming. Congress, in the exercise of the power to regulate interstate commerce, may limit the production of crops and impose fines for production in excess of quotas.

And Congress under its commerce powers may even regulate intrastate freight rates where they affect interstate rates.

In the *Morgan* case it was held that a Virginia statute segregating bus passengers according to race in interstate trips was void because it was a burden on interstate commerce to compel "any passenger to change his or her seat as it may be necessary or proper" to preserve the status of segregation on the trip. "It seems clear to us," said the majority of the court, "that seating arrangements for the different races in interstate motor travel require a single uniform rule to promote and protect national travel."

Just one more case on commerce, and then I am through pointing out the superstructure that has been built on *Gibbons* v. *Ogden.*

Were you, or your parents, broke and out of work in 1939? Suppose the answer is "yes." Suppose you wanted to start life anew in that fairy land of sunshine and opportunity known as California. Thousands of people tried that very thing. As a result staggering problems of health, decency, and finance resulted. California, in desperation, passed its "Anti-Oakie Law" by which it attempted to keep indigent persons out of the State.

Held this cannot constitutionally be done. It is an interference with interstate commerce. In the words of Mr. Justice Cardozo, (and it was the philosophy of John Marshall) "(The Constitution) was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in unison and not division."

So under the Commerce Power Congress has been able to legislate against monopoly; control to a considerable extent the business of insurance and navigation, and the occupation of mining; manufacturing; and agriculture; and regulate to a considerable degree even our morals and our local economies.

I do not join with those who think that this is all bad. Some things affect the national economy as a whole—far more now than in 1789—and when they do, planning on a national scale is just as essential for the best interests of all as are zoning laws on a local scale for the planning of a city.

John Marshall had courage of the highest order. He had physical courage as evidenced by his valor and his fortitude as a soldier. He had moral courage as evidenced by his conduct of the trial of Aaron Burr for treason. As Chief Justice his stature was so great that nine people out of ten, perhaps, take it for granted that he was the first Chief Justice when in reality he was the fourth—preceded by John Jay, who thought so ill of the Court that he resigned to become governor of New York, John Rutledge who thought so little of the Court that he had once resigned as an associate justice to serve as Chief Justice of the Supreme Court of South Carolina, and by Oliver Ellsworth.

It was Marshall, more than any other one man, who placed the judiciary on an actual equality with the legislature and the President; who made it possible for us to have liberty under law even as against the Congress and the Chief Executive; and who formulated the policies that have resulted in a strong national economy without which we could never have become a first class world power.

In the perspective of time we now see clearly that John Marshall was no fleeting comet that flashes across the heavens, he was no satellite or planet that shines only in the reflected light of far greater forces, but a fixed star of the first magnitude whose atomic light reaches us today as undiminished as at the time of his death some one hundred twenty years ago.

It is a fine thing for the American Bar, and for you of Franklin and Marshall College, to be associated with the name of such a man, but it is still a finer thing to be guided and inspired by his example and his light!