JOHN MARSHALL: HIS CONSTITUTIONAL DECISIONS*

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The subject of our discussion to-night was commissioned Chief Justice of the Supreme Court of the United States January 31, 1801, at the age of forty-five years.

Let us take a brief glance at some of the conditions prevailing at the time, to the end that we may better understand some of the obstacles which had to be overcome to finally impress upon the minds of our people the principle that the National Government was and of right must be supreme in its sphere.

In 1801 the population, including slaves, was in round numbers 5,400,000, and was spread out in rapidly lessening density, from the Atlantic to the Mississippi.

The colonies, deriving their governmental authority from separate crown charters, were independent of each other; and being physically isolated because of sparse population, the relatively great distances which separated one community from the other, the wretched roads, antiquated facilities for travel, and in some sections almost entire absence of means of communication, were developing distinct communities having their own manners, customs and idiom, jealous of their liberties and resentful of the

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real or imaginary encroachments of each upon the other. To
the crown charter we owe the birth and development of the con-
ception of the "sovereign and independent state."

This jealousy the colonies entertained for each other was the
progenitor of the fear and suspicion which many of the sovereign
states entertained not only toward each other but to that collective
entity, the United States of America.

No only these, but the primitive mode of life in the remote
settlements and in the wilderness beyond, had lowered the cul-
ture of many of our people almost to the plane of that of their
savage enemies; and the wild life of the pioneer, his immunity
from taxes, and the general isolation of his surroundings had
bred in many a pronounced antipathy to all restraint, and dis-
like of all governmental authority.

This mental situation was cultivated, nursed, accentuated and
made the most of by the demagogues and great editors of the
times; and they, being temporarily unable to control the National
Government, succeeded in subjugating the minds of the masses,
through inculcating what I believe history has demonstrated fal-
lacious, that the liberties of the people could only be safeguarded
against imaginary and conjured-up encroachment on the part of
the National Government, by the sovereign states, or rather by
those then in control of the sovereign states; whereas, in truth,
it was absolutely unthinkable on the part of the fathers to de-
prive any white man of his just rights or liberty as it was under-
stood in those days. Thus, instead of educating the masses to
the benefits of a unified system of government, its imaginary
disadvantages and dangers were harped upon until there arose
such a hatred, jealousy and suspicion of the National Govern-
ment as to threaten its very existence.

While liberty or freedom were still largely in the making (and
the people then were not nearly as free as we are to-day), there
was no real reason for such jealousy and suspicion. Francis
Corbin sounded the keynote in the debates in the Virginia Con-
vention upon the subject of the ratification of the Federal Con-
stitution, when he laid down the principle that the genius of our
institutions as exemplified by the Constitution was such that our
vast expanse of territory would be no obstacle to the new Gov-
ernment; in fact the Constitution and laws of the United States

"Corbin saw in the new Government not a consolidated but a rep-
resentative Federal Republic, which would place the remedy for public evils
could apply and be administered efficiently and successfully, not only from the Atlantic to the Mississippi, but throughout the North American continent, and more, throughout the entire Western Hemisphere.

It was because of the disrespect for law, the restiveness under all governmental restraint, and in many communities the insecurity of person and property, as well as the attempts of some of the states to enrich themselves at the expense of their neighbors and to secure unjust advantages otherwise, that impelled the fathers to the notion that our best hope for the future lay in a strong and somewhat centralized form of government rather than in the states which had been frequently weighed in the balance and found wanting; and it was the aim of the party then in power to fill the positions of trust by the best and ablest who could be induced to sacrifice private ease and comfort for the public service.

At the time Marshall became Chief Justice there were extant, as far as I can figure out, not to exceed seven or eight sets, aggregating about thirty volumes, of reports of the state and federal courts. The Federal statutes in general operation and the public statutes of the several states were very brief and meager and were embraced in single volumes ranging from 300 to 500 pages, and for size, compare favorably with Wisconsin Statutes of 1849.

The Supreme Court of the United States had been in existence about eleven years. Such decisions as were rendered will be found in Volumes 2 to 4, inclusive, of Dallas Reports, which likewise include the decisions of the Supreme Court of Pennsylvania, of intermediate Pennsylvania state courts; and the revolutionary court, as well as the circuit courts established under the Judiciary Act of 1789. Not to exceed forty-one matters, including final decisions, appearing to have been passed upon by the Supreme Court of the United States, are reported in these three volumes. Many of the reported decisions relate to practice. The bulk of them are admiralty cases, and several decisions involving the constitution, principally those relating to suits against our so-called "sovereign states."

in the hands that would feel them and not within the keeping of those who caused the disorder; he saw nothing in the extent of the country which would render the proposed Government oppressive. With larger vision system that might extend over all the western world, and indeed one which than most of his contemporaries he saw in the new Government a political could know no limitation of territory."

The great Chief Justice began his services February 4, 1801, but the court had no business apparently, and the first decision reported is that of *The Amelia*, an admiralty case, involving salvage, found in 1 Cranch. (5 U. S., page 1), which for the reasons above should be numbered 1 U. S., at the August, 1801 term.

The Chief Justice and his associates were still upon the uncharted seas of jurisprudence, having few, if any, precedents of value to guide them. The works of Kent, Parsons, Greenleaf, Story and other jurisconsults of American law, which have eased the labors of students, the profession and the courts, were of a succeeding generation, and were not then available to Marshall and his associates.

As reasons for the publication of the reports of that august tribunal, I quote at some length from the preface of the very learned and able reporter of 1 Cranch, as follows:

Much of that uncertainty of the law, which is so frequently, and perhaps so justly, the subject of complaint in this country, may be attributed to the want of American reports.

Many of the causes, which are the subject of litigation in our courts, arise upon circumstances peculiar to our situation and laws, and little information can be derived from English authorities, to lead to a correct decision.

Uniformity, in such cases, cannot be expected, where the judicial authority is shared among such a vast number of independent tribunals, unless the decisions of the various courts are made known to each other. Even in the same court, analogy of judgment cannot be maintained, if its adjudications are suffered to be forgotten. It is, therefore, much to be regretted, that so few of the gentlemen of the bar have been willing to undertake the task of reporting.

In a Government which is emphatically styled a Government of laws, the least possible range ought to be left for the discretion of the judge. Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps, nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge; he cannot decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public. The avenues to corruption are thus obstructed, and the sources of litigation closed.

To-day, I say, much of the uncertainty in the law is attributed to the existence of too many reported cases, which, because of their multiplicity, enable the diligent searcher to find authorities on both sides of nearly every complicated question of the common law. The vast number of independent tribunals existing in 1801 has multiplied at least tenfold, and it is impossible for any
lawyer or judge to keep track of the reported decisions which are published by thousands.

Such were some of the conditions when John Marshall assumed the duties of his office. The real danger which he and his associates had to guard against was not that the Union would destroy the states, but that the states would, as was the situation in the last years of the Confederation, destroy the Union. Nearly everyone seemed to be a constitutional lawyer and acted as if he knew more about it than the Supreme Court. Marshall's position in the earlier years was similar to that of an umpire at a baseball game where many of the spectators were dissatisfied with his decisions and were with difficulty being held within bounds. Every time a constitutional question was decided, a howl would be set up, the echoes of which we can still almost hear. Keeping in mind this setting, let us now briefly examine into his labors in behalf of Constitutional Government.

The reported opinions of the Chief Justice upon cases involving the construction and interpretation of the Constitution are, as near as I can ascertain, twenty-nine in number, of which twenty-six were delivered in the Supreme Court, and three in the circuit court of the United States for the circuit assigned to him, which included Virginia.

To do any of them justice would require an entire evening; and the best I can promise is to advert briefly to some of the principal decisions, stating the year of the decision, the provision of the Constitution involved and the points actually decided. Time will not permit comment upon the immense mass of judicial dicta embraced in the reasoning, which is received to-day as unquestioned authority with all the respect due the source whence it came.

*Marbury vs. Madison,* (1803), 1 Cranch 137, established the supremacy of the Constitution. It decides that an act of Congress repugnant to the Constitution is not law, and when the Constitution and an act of Congress are in conflict, the Constitution must govern the case to which both apply. This decision has its support not only in the reasoning of the Chief Justice, but in Par. 2 of Art. VI, which reads,

(2) This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the land; and the Judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.
When the people ordained that the Constitution, and the laws of the United States which shall be made in pursuance thereof shall be the Supreme Law of the land, one would think such mandate would receive unquestioned sanction. Such, however, was not the case; and the Supreme Court of the United States has been compelled throughout all time, and particularly during Marshall's incumbency, to vindicate the supremacy of the National Government and the liberties of the people against the assaults of state authority.

In United States vs. Fisher, et al., Assignees (1805), 2 Cranch 358, it was held that the power to make all laws necessary and proper to carry into execution the powers granted, confers on Congress the choice of means, and does not confine it to what is indispensably necessary; hence Congress could constitutionally give the United States a preference over the other creditors of a bankrupt, thus giving effect to Par. (18) of Section 8 of Article I, which reads:

Section 8. The Congress shall have power * * *

(18) To make all laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Among these powers is that conferred by Par. (4) "To establish . . . . uniform laws on the subject of Bankruptcies throughout the United States."

In Ex Parte Bollman and Swartwout (1807), 4 Cranch 75, the court defined the meaning and limitations of Section 3 of Article III, which reads:

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

This case decides:

To constitute treason war must be actually levied.

A conspiracy to subvert the Government by force is not treason.

If a body of men be actually assembled for the purpose of effecting by force a treasonable design, all who perform any part, however minute and however remote from the scene of action, and who are actually leagued in the general conspiracy, are traitors:
The mere enlistment of men, who are not assembled, is not a levying of war.

The clause "However remote from the scene of action," was, as explained to us at a previous gathering, very much limited in application, so as to effectually do away with the doctrine of constructive treason, so vigorously pressed by the disciples of liberty then in control of the National Government, and who were resisting the discharge of the petitioners from unlawful imprisonment.

In the *United States vs. Judge Peters* (1809), 5 Cranch 115, it was decided that an act of the state legislature cannot determine whether a court of the United States has jurisdiction, and the fact that a state has an interest in the subject matter of a suit between individuals, which it may choose to assert, does not oust the courts of the United States of jurisdiction.

In *Fletcher vs. Peck* (1810), 6 Cranch 87, that part of Section 10 of Article I of the Constitution which reads, "No state shall . . . . pass any . . . . law impairing the obligation of contracts," was up. The state of Georgia granted to certain parties an immense tract of land constituting practically an empire in itself. It was charged, and the evidence tended strongly to prove, that this grant was secured through flagrant, audacious and almost inconceivable corruption of the legislature and state officers. A succeeding legislature passed an act annulling the grant. The case did not originate in Georgia, but in the circuit court of the United States for the district of Massachusetts, and arose out of the alleged breach of warranty in Peck's deed to Fletcher, the grantor, Peck, having covenanted that the state of Georgia had good right to convey to Peck's predecessors in title, and Fletcher, the grantee, setting up that the subsequent act of the legislature annulling the grant, defeated Peck's title, and therefore constituted a breach of warranty under Peck's deed. The trial court rendered judgment against the plaintiff. The Supreme Court decided:

Contracts made by a state are within the Constitution of the United States.

When a law is a contract, a repeal of that law cannot take away rights vested under that contract. A grant implies a contract by the grantor not to reassert the title granted. So a grant made in pursuance of a contract is an executed contract, and its obligations cannot be impaired by a law of a state.
If a legislature make a grant of lands in fee simple, a subsequent legislature cannot take away the title of a *bona fide* purchaser for a valuable consideration from the first grantee, upon the ground that the grant to the latter was fraudulent.

Our court followed the above decision in holding that the legislature, being a co-ordinate branch of the government, its determination upon all matters within its unlimited discretion is final and conclusive.²

Nor will an act, writes Pinney, J., "be held void by reason of any supposed improper motives or unconstitutional intentions of the legislative body which enacted it. The respect which the court entertains for the legislative department of the Government, as well as grave reasons of public policy, alike forbid such an inquiry with a view of defeating the operation of any public legislative enactment." *Gerrymander Case*, 8t Wis. 440, 509.

In this connection, and at the expense of chronological order, we direct attention to the *Dartmouth College Case* (1819), 4 Wheaton 318, in which the same provision of the Constitution received consideration; and all being familiar with the facts, I will simply state the court's conclusions, as follows:

The charter granted by the British crown to the trustees of Dartmouth College, in New Hampshire in the year 1769, is a contract within the meaning of that clause of the constitution which declares that no state shall pass any law impairing the obligations of contracts. The charter was not dissolved by the revolution.

An act of the state legislature of New Hampshire altering the charter without the consent of the corporation, in a material respect, is an act impairing the obligation of the charter and is unconstitutional and void.

That a corporation is established for the purpose of general charity, or for education generally, does not, per se, make it a public corporation liable to the control of the legislature.

The effect of this decision was that the states promptly enacted constitutional provisions and laws reserving to the legislature power to amend, alter and revoke all corporate charters thereafter granted.

This decision was approved by our Supreme Court in a decision holding that the charter conferring upon the Milwaukee


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Gas Light Company the exclusive right to manufacture and sell gas in the City of Milwaukee without any limitation of time, is perpetual, and cannot be impaired by the grant of a subsequent franchise to another, but that under the Wisconsin Constitution (See Sec. 1 of Art. XI Const. Wis.) all acts relating to corporations may be altered or repealed by our legislature. *State vs. Milwaukee Gas Light Co.*, 29 Wis. 454, 462.

In *Sturges vs. Crowninshield* (1819), 4 Wheaton 122, Article I, Section 10, declaring that no state shall pass any law impairing the obligation of contracts, received further exhaustive consideration by the court in connection with the bankruptcy clause of the Constitution, Article I, Section 8, giving Congress power to "establish uniform laws on the subject of bankruptcies throughout the United States"; and the conclusion was reached that although the several states have authority to pass insolvent or even bankrupt laws in the absence of an act of Congress conflicting with such state laws, yet this power of the states is subject to the limitation of the federal Constitution that no state shall impair the obligation of contracts, and state laws cannot, therefore, discharge the debtor from subsisting contracts.

The authority of this case was very much shaken, if not entirely overruled, in *Odgen vs. Saunders* (1827), 12 Wheaton 213, at which time the so-called "complexion" of the court had been very much more changed. In this latter case the court decided:

An insolvent law of a state does not impair the obligation of future contracts between its citizens. But it cannot affect the rights of creditors who are citizens of other states.

To that part of the decision holding that a state bankruptcy law did not impair the obligation of contracts within the meaning of the federal Constitution, Marshall, Chief Justice, wrote a dissenting opinion in which Story and Duval, Justices, concurred. The proposition that a state bankruptcy or insolvency law cannot affect the rights of creditors who are citizens of other states and who do not participate in the state proceeding, received the unanimous sanction of the court. The decision of the majority of the court lays down the more humane rule and the rule that is more in accord with the public policy of the United States and of the several states, and has, it is believed, received the almost unanimous sanction of the profession and the public.

Our court has applied the doctrine of this case in its ruling that the mere enactment of the Federal Bankruptcy Act of 1898 did
not suspend the operation of state insolvency laws or prevent a
debtor from making a voluntary assignment under Ch. 80 Wis.
Stats., although such would constitute an act of bankruptcy under
the federal law. *Bender vs. McDonald*, 106 Wis. 332.

In *McCullough vs. Maryland* (1819), 4 Wheaton 316, regarded
by many as the greatest opinion of the Chief Justice, it was
decided:

The act incorporating the Bank of the United States is a law
made in pursuance of the Constitution.

A state law imposing a tax on the operations of the Bank of
the United States is unconstitutional.

No question is now raised as to this power. National Banks
chartered by act of Congress have been in existence upwards of
fifty years, and we now have the federal reserve system of banks
whose value and stabilizing power should be conceded by all.

In *Osborne vs. The Bank of the United States* (1824), 9
Wheaton 738, the State of Ohio passed a law levying a tax of
$50,000 on each office of discount and deposit established by said
bank in that state, and an official, although he knew that an
injunction had been allowed restraining the attempted collection
of the tax, proceeded by violence to the bank and took therefrom
$100,000 in specie and bank notes belonging to it, which money
afterwards came into the hands of the state treasurer, who was
made a defendant in the suit. The circuit court of the United
States entered a decree directing the defendants Osborne, the
auditor, and Sullivan, the state treasurer, to restore to the bank
said sum of $100,000 with interest on $19,830, the amount of
specie in the hands of Sullivan as treasurer. The defendants
appealed to the Supreme court of the United States under the
twenty-fifth section of the Judiciary Act.

The court reviewed its decision in *McCullough vs. Maryland*,
and held that the bank was a governmental agency, and being
such, was exempt from state taxation and state control; and
therefore that the act of the State of Ohio, “which is certainly,”
said the court, “much more objectionable than that of the State of
Maryland, is repugnant to a law of the United States made in
pursuance of the constitution and therefore void,” and no pro-
tection to the officers who executed it.

In *Weston vs. The City of Charleston* (1829), 2 Peters 449,
the principle decided in *McCullough vs. Maryland* and *Osborne
vs. The Bank*, that “the states have no power by taxation or
otherwise to retard, impede, burden, or in any manner control the
operation of the constitutional laws enacted by Congress to carry
into execution the powers vested in the general Government, was
reaffirmed, and the court decided:

A tax on stock of the United States, held by an individual citizen of a
state, is a tax on the power to borrow money on the credit of the United
States, and cannot be levied by or under the authority of a state con-
sistently with the constitution.

And further, a judgment of the highest court of a state in a
proceeding for a prohibition, is a final judgment in a suit under
Section 25 of the Judiciary Act.

In this case the City of Charleston attempted to levy a tax
upon certain United States stocks now commonly known as
United States bonds, and the holder of such paper brought suit
in the state court to prohibit the collection of this tax as being
unconstitutional. The tax was sustained in the lower court, and
by the state Supreme Court, but was adjudged void on appeal, by
the Supreme Court of the United States.

Notwithstanding the foregoing, the Supreme Court of Nebraska
is reported to have sustained the validity of a state income tax on
interest derived from Liberty Bonds. The case was appealed to
the Supreme Court of the United States, but I have not heard
what, if any, disposition has been made of it.

The case of the Bank of the United States vs. the Planters
Bank of Georgia (1824), 9 Wheaton 904, was argued in connection
with Osborne vs. The Bank, and the court held that the fact that
the state of Georgia is one of the stockholders in the defendant
banking corporation did not prevent the corporation from being
sued in the courts of the United States, and that Article XI of the
amendments, which reads:

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

had no application.

In Loughborough vs. Blake (1820), 5 Wheaton 317, it was
contended that inasmuch as the territories and the District of
Columbia were not states, they could not, under the Constitution,
be made subject to the levy and payment of a direct tax imposed
by Congress. This contention was overruled, and it was decided:

Congress has authority to impose a direct tax on the District of Columbia
in proportion to the census directed to be taken by the Constitution.
The power of Congress to levy and collect taxes, duties, imposts and excises is co-extensive with the territory of the United States.

The power of Congress to exercise exclusive jurisdiction in all cases whatsoever within the District of Columbia, includes the power of taxing it.

In Owings vs. Speed (1820), 5 Wheaton 420, it was held that:

The present Constitution of the United States did not commence its operation until the first Wednesday in March, 1789 (March 4, 1789), and the provision in the Constitution that no state shall pass any law impairing the obligation of contracts does not extend to a state law enacted before that day, and operating upon rights of property vested before that time.

This case is important historically as fixing the date of the expiration of the old Government under the Articles of Confederation, which was fading away through sheer lack of cohesiveness, and the new Government under the Constitution, or, as stated in an act of Congress, "for commencing proceedings under the Constitution."

In Cohens vs. Virginia (1821), 6 Wheaton 264, the decision of Mr. Justice Story in Martin vs. Hunter's Lessee, 1 Wheaton 304, that under the Constitution and the Judiciary Act, the Supreme Court of the United States had the power to re-examine the judgment of a state court when that judgment decided against any right claimed or defense set up under the constitution, laws and treaties of the United States, was approved and followed; and it decided the further point that the appellate jurisdiction of the Supreme Court extended, notwithstanding the eleventh amendment, to all such cases, whoever may be the parties, and even if one of the parties is a state of the Union and the other a citizen of the same state. This decision sustained the revisory power of the Supreme Court over state court judgments, denying, what has come to be comprehensively styled, a "federal right," and that power is now in constant and undisputed exercise in the Supreme Court with the approval of the State Governments and people.

The statute granting this power and jurisdiction to the Supreme Court is the twenty-fifth section of the Judiciary Act (Act of September 24, 1789), which authorizes the Supreme Court of the United States to re-examine, by way of appeal or writ of error, the decisions of a state court, when the decision of such court is against some title, right or privilege set up and claimed by a party under the Constitution, laws and treaties of the United States, which provision is still in force without substantial change, and applies to and includes a case in which a state proceeds in its
own court by indictment, against one of its citizens, who attempts to defend under an act of Congress; and the Supreme Court of the United States, upon writ of error, will determine for itself whether or not the act of Congress constitutes a defense.

Par. 3 of Sec. 8 of Article I provides:

The Congress shall have power ** to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

_Gibbons vs. Ogden_ (1824), 9 Wheaton 1, known as the great New York Steamboat Case, involved the respective powers of the states and nation over the all-important subject of commerce. The state of New York, by five different statutes enacted between 1798 and 1811, granted and confirmed to Livingston and Fulton, or one of them, and their assigns, the exclusive right of using steamboats upon all the navigable rivers, bays and waters within the limits and jurisdiction of the state of New York, for a specific term of years, and for each steamboat that could propel itself against the current of the Hudson River at a speed of not less than four miles an hour, they should be entitled to five years' extension of their grant, not to exceed thirty years. Stringent provisions were made to safeguard the monopoly thus granted, and the several enactments were sustained by the highest court of that state, in _Livingston vs. Van Ingen_ (1812), 9 Johnson 507, reversing the decision of the Court of Chancery denying the injunction, and overruling Chancellor Kent, who wrote the opinion of that court vindicating the exclusive control of Congress over navigation (9 Johns. 493); and the New York court of last resort absolutely enjoined defendants from operating a steamboat carrying passengers on the Hudson River from New York to Albany. Following the decision of _Livingston vs. Van Ingen_, the defendant Ogden was enjoined from running a steamboat between Elizabeth-town, New Jersey, and New York City, Chancellor Kent writing the opinion of the Court of Chancery, following the decision of _Livingston vs. Van Ingen_, which was affirmed by the highest court of New York (17 Johns. 488, 6 N. Y. Com. L. 442); and from there the case went to the Supreme Court of the United States. That court decided the following points:

The power to regulate commerce includes the power to regulate navigation and does not stop at the external boundary of a state. It does not comprehend that commerce which is completely internal.
The laws of New York which grant to Livingston and Fulton the exclusive right to navigate all the waters within the jurisdiction of that state, with boats moved by steam or fire, for a term of years, are inoperative as against the laws of the United States regulating the coasting trade, and cannot restrain vessels licensed to carry on the coasting trade under the laws of the United States, from navigating those waters in the prosecution of that trade.

Thus was the first decision of Chancellor Kent, which was clearly right, approved. The doctrine of the court is so universally recognized that discussion is unnecessary. In fact, the proposition that the power "does not comprehend that commerce which is completely internal" has received considerable shock in the recent decision of the Supreme court, wherein the power of the states to regulate and control intrastate commerce and transportation must give way to the power of Congress and of the Interstate Commerce Commission, in so far as such regulation differs with the provisions regulating interstate commerce.

In Brown vs. Maryland, (1827) 12 Wheaton 419, the commerce clause of the Constitution was again before the court for consideration. The state of Maryland passed an act requiring an importer of foreign merchandise to take out a license and pay a revenue license tax of $50 therefor, before he should be authorized to sell in the original package, the article imported. This act presented not only the question of the scope of the grant of power to Congress to regulate commerce, but also the extent of the prohibition against the states, contained in Paragraph 2 of Section 10 of Article I of the Constitution, which provides:

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws; and the net Produce of all Duties and Imposts laid by any State on Imports or Exports, shall be for the use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

The court decided such law to be in conflict with that provision of the Constitution of the United States, which prohibits a state from laying any imposts, etc.; and also with the clause which declares that Congress shall have power to regulate commerce.

It will be observed that the law prohibiting the importation and sale in the original package was adjudged void. It is quite
generally held that when the package is broken and the goods are used or offered for sale outside of the original packages, they became incorporated into the common mass or the general property of the state and are liable to such taxes as the state may impose upon other property.\(^3\)

In the case of *American Insurance Co. vs. Canter* (1828), 1 Peters 511: The solidarity and nationality of the Union under the Constitution were upheld; and although the Constitution is utterly silent as to the power of the Government to acquire territory, this case decided such power to be unquestioned. The chief justice wrote:

The Constitution confers absolutely on the Government of the Union the powers of making war and of making treaties; consequently that Government possesses the power of acquiring territory, either by conquest or treaty.

Hence upon the acquisition of Florida, it became an integral part of the Union, over which the Constitution *ex proprio vigore* extended.

In *Craig vs. Missouri* (1830), 4 Peters 411, that part of Section 10 of Article I which provides that “no states shall . . . . emit bills of credit,” was before the court, and it was held that:

Certificates issued by the state of Missouri, in sums not exceeding $10, nor less than fifty cents, receivable in payment of all state, county, and town dues, etc., the faith and funds of the state being pledged for their redemption, were “bills of credit,” the emission of which was prohibited by the clause above quoted; and:

A promissory note given to the state in exchange for such certificates is void.

In *Providence Bank vs. Billings* (1830), 4 Peters 514, the court held that a law of the state of Rhode Island, imposing a tax upon the capital stock of a bank chartered by that state, does not impair the obligation of the contract arising from its charter, which contains no stipulation on the subject of taxation, a decision which appears to be manifestly correct.

In *Cherokee Nation vs. The State of Georgia* (1831), 5 Peters I, the court held an Indian tribe or nation, within the United States, is not a foreign state within the meaning of the second

section of the third article of the Constitution, and cannot sue in the United States courts. This decision arose out of what many think were acts of flagrant injustice on the part of the state of Georgia in depriving the Cherokee Nation of its lands and practically expelling the Indians from that state.

In *Worcester vs. The State of Georgia* (1832), 6 Peters 515, the court held:

The law of Georgia which subjected to punishment all white persons residing within the limits of the Cherokee Nation and authorized their arrest within those limits, and their forcible removal therefrom, and their trial in the courts of the state, was repugnant to the Constitution, treaties and laws of the United States, and so, void; and a judgment against the plaintiff in error, a missionary among the Indians, under color of that law, was reversed by the court under the twenty-fifth section of the Judiciary Act, and the release of Worcester from confinement, ordered. This was the case where the state of Georgia disregarded the opinion and mandate of the Supreme Court, and the executive arm of the Government under President Jackson refused to compel its observance.

In *Barron vs. The City of Baltimore*, (1833), 7 Peters 243, it was decided that the provision of the Fifth Amendment of the Constitution, declaring that private property shall not be taken for public use without just compensation, is a limitation only on the power of the United States; it is not applicable to the legislation of the several states. In fact, this decision established the principle that the provisions of the first ten amendments have to do with matters of national rather than of state concern, and are not applicable to the states.

We quote from the opinion:

In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to state Governments. This court cannot so apply them.

This, I believe, covers all the decisions of the Supreme Court of the United States of practical value to-day, involving questions of constitutional construction and application, in which the Chief Justice wrote either a prevailing or a dissenting opinion. In fact, the Chief Justice wrote the prevailing opinion in all the cases except the case of *Ogden vs. Saunders*, which practically
overruled the decision in *Sturges vs. Crowninshield*, and decided that a state insolvent law does not impair the obligation of future contracts between its citizens.

The case of *United States vs. Aaron Burr* (1807), 4 Cranch (Appendix) 470, tried in the Virginia Circuit, was ably reviewed at a previous session and needs no further comment.

In the case of the *Brig Wilson vs. The United States* (1820), 1 Brockenbrough, 423, the Chief Justice on the circuit sustained the validity of an act of Congress restraining the importation of any negro, mulatto or person of color into the United States, but held that this did not apply to crews of vessels trading in the harbors of the nation.

In *United States vs. Maurice* (1823), 2 Brockenbrough, 86, the Chief Justice decided that the power of appointment of officers of the United States whose election is not provided for by the Constitution or laws of the United States, lies with the president, which power, it is believed, has never since been questioned.

The decisions upon constitutional questions constituted only a small part of the labor of the court between February 4, 1801, and July 6, 1835, from 1 Cranch (5 U. S.) to 9 Peters (34 U. S.) 762, through twenty-nine volumes of reports. During this period many questions of constitutional law and construction were decided in which the Chief Justice participated, but did not write the opinion of the court.

The question arises: How was it that John Marshall continued to dominate the court, if that expression be proper, in view of the fact that very strong, forceful, learned and able men of the opposite political faith were appointed as justices for the express purpose of undermining Marshall's influence and views in the construction and interpretation of the Constitution?

Many answers have been given to this question by those who have written and spoken in praise of this great jurist, but it seems to me that none of them have fairly met the precise point. The reason to which I attribute Marshall's success in holding the court in line for more than thirty years, when the political complexion was against him, is that when he became Chief Justice of the United States, he forgot that he ever was a politician, and made it his policy to serve the entire nation, regardless of the wishes of those who were influential in securing his position. In other words, he was Chief Justice of the Supreme Court of the United States, or as sometimes termed, the Chief Justice of the
United States. When he assumed that office, he became the servant of all. Many public officials seem to entertain the notion that their primary duty is to those to whom they owe their election or appointment, and forget that their duty is equally to those who either were not instrumental in that behalf or who actually opposed the same.

Marshall was truly one of "the great Virginians." History says there was but one greater than he. He secured the adherence of his political opponents to his views, because they were finally convinced of their soundness, and of his sincerity of purpose.

"Judges," wrote a great English philosopher, "ought to be more learned than witty, more reverend than plausible, and more advised than confident.

"A judge ought to prepare his way to a just sentence, as God useth to prepare His way, by raising the valleys and taking down the hills; so when there appeareth on either side a high hand, violent prosecution, cunning advantages taken, combination, power, great counsel, then is the virtue of a judge seen to make inequality equal; that he may paint his judgment as upon even ground.

"Patience and gravity of hearing is an essential part of justice; and an over speaking judge is no well-tuned cymbal. It is no grace to judge first to find that which he might have heard in due time from the bar; or to show quickness of conceit in cutting off evidence or counsel too short or to prevent information by questions though pertinent.

"It is a strange thing to see that the boldness of defense should prevail with judges; whereas they should imitate God, in Whose seat they sit, who represseth the presumptuous and giveth grace to the modest; but it is more strange, that judges should have noted favorites, which cannot but cause multiplication of fees, and suspicion of by-ways."

Judge Marshall embodied and put in practice the highest ethics and best principles of judicature. In those early days the court had abundant time to listen to argument, to consider the briefs of counsel and to decide the cases brought before it. While Marshall wrote some twenty-five of the prevailing opinions of the court, I feel that some credit must be given to the bar of his time, who presented the cases, and to his associates upon the bench. He had the benefit of perhaps the ablest and most brilliant array of lawyers who appeared in any court during all time, and most of his associates upon the bench were able and patriotic men, who imitated the Chief Justice, in that they became servants of the entire nation rather than of the influence which may have made their respective appointments. It must further be kept in mind that during those early years the migration from
Great Britain and the countries of northern Europe greatly predominated, and that the character of the race which produced the fathers had not thus far become impaired through admixture with inferior breeds, as is the present tendency, due to the tremendous and almost unlimited immigration previous to the great war, to this country.

His career and services upon the bench were such as finally disarmed the hatred and malignity of his bitterest political opponents, and endeared him to the entire nation. The court was raised from a tribunal of trifling influence to one whose decisions commanded universal respect, sanction and support. Perhaps the greatest tribute Marshall received was from the editor of a Richmond paper, who during his entire term violently criticized the decisions of the Supreme Court upon all constitutional questions making for the integrity and sovereignty of the Union as against the disintegrating influences of the respective states. “There was,” wrote this editor, “about him so little of the ‘insolence of office’ and so much of the benignity of the man that his presence always produced the most delightful impressions.”

Those of our profession who have or feel that they have attained some importance on the bench or at the bar may well study the life, the character and the habits of this kindly disposed man, and profit by the example he has set. Here was one at least who was not obsessed by his own importance. The great curse of the federal courts, and in fact, of some of the state courts of that time, and I regret to say in some rare instances even of the present, is the arbitrary and censorious attitude some judges assume in their dealings with members of the bar and with litigants who come before their courts. This, when persisted in to the extent of impairing the efficiency and usefulness of the court or of the bar, should constitute sufficient ground for impeachment, and I feel the Senate erred when it failed to sustain the impeachment of Mr. Justice Chase.

The most typical modern example of what I conceive Judge Marshall to have been was exemplified in Judge Seaman, for many years district judge for the Eastern District of Wisconsin, and finally one of the judges of the Circuit Court of Appeals of the United States for the Seventh Judicial Circuit. He, like Marshall, deemed himself a servant of the nation and of those who appeared before him, and exemplified in practice all that a good judge should be.
Therefore it is that Marshall and his works should be our inspiration; the "cloud by day and the pillar of fire by night" which led the nation out of the wilderness of imminent disintegration into the realm of unity, stability and permanency.