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JOHN MARSHALL, MAGNIFICENT MUGWUMP

by

ARTHUR JOHN KEEFFE*

The tendency of all of us is to catalogue every one as either liberal or conservative. No truer song has ever been sung than the one Private Willis sings as the curtain rises for the second act of *Iolanthe*.¹ Following this passion for classification, there are those who classify John Marshall as the arch-conservative of all time.² But speaking personally, if one must do this, John Marshall should be called America's first and most magnificent "Mugwump".³ In this he does not differ from those Americans who vote every year for the best man, regardless of party label.

There are three periods of Marshall's life that put an indelible stamp on his character. First, Marshall grew up on the frontier, in the backwoods of Virginia, not on a prosperous plantation in the Tidewater. Although he was the eldest of fifteen children, his mother and father had time to instruct him, with occasional

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¹ I often think it's comical—

Fal, lal, la!

How Nature always does contrive—

That every boy and every gal

That's born into the world alive

Is either a little liberal

Or else a little Conservative!

—Private Willis at the opening of the second
act of Gilbert and Sullivan's *Iolanthe*.

² RODELL, *NINE MEN* (1955); and see the essay of Max Lerner in 20 *COL. L. REV.* 396 (1939), reprinted in Surrency, *John Marshall and the Campaign of History in THE MARSHALL READER* (Oceana 1955).

³ "Mugwump" is a phrase of Indian origin that came into our language in the famous campaign of 1884 between Blaine and Cleveland. Also that was the year of "Rum, Romanism and Rebellion". According to "A Dictionary of Americanisms on Historical Principles" (1951) a "Mugwump" was an independent Republican who voted for Cleveland in 1884 as a "mugwumpian Democrat". In the slang of the time he had his "mug" on one side of the fence and his "wump" on the other. "The Encyclopedia Americana" [Vol. 19, 548 (1955)] says of "Mugwump": The word belongs to the Algonquin dialect of the Indian language and is used by John Eliot in his translation of the Bible to translate the Hebrew word "Alluph", a leader. Eliot used it in the sense of a Big Chief, a term more comprehensible to the Indian mind than that which appears in the King James version . . . that means Duke. The word was spelled "mugqump" in the singular and "mugquompaog" in the plural. It appears many places throughout the Algonquin translation of the Old Testament.

help from the family's minister. His father was a member of the House of Burgesses which met in Colonial Williamsburg, and with George Washington was part of the block of backwoodsmen's votes that carried Henry's motions to protest the stamp tax over the opposition of the tidewater planter. There are those who might believe that living in backwoods Virginia in 1765 and having your father come home and regale you with the debates and the gossip at Williamsburg was education of a high order. It is a history course we could all wish to elect.

Secondly, at an early age John Marshall marched off with his father to fight with Washington.⁴ His biographer, Beveridge,⁵ declares that the winter at Valley Forge was a better education for Marshall than Oxford or Cambridge. We can believe it. The war was almost lost. The states and the weak Continental Congress would not give Washington supplies or troops. Jefferson, then a wealthy man, was at Monticello, busy being Governor of Virginia and framing laws for the reform of the state government and the protection of civil liberty. Jefferson, although warned by Washington, neglected even to turn out the Virginia militia to prevent Arnold's burning of Richmond. Valley Forge for Marshall was an advance seminar on the need America has for a strong central government.

Third, when Marshall was a member of the Virginia Legislature after the war, he became disgusted with the provincial attitude of the states. The votes which prevented the payment of British debts promised in the peace treaty, which defeated efforts to extradite criminals and made the day by day conduct of business so difficult, made Marshall believe he was back at Valley Forge. He took his Ph.D. in National Government at Richmond as a state legislator. Jefferson as a philosopher in far-off Paris could rejoice in Shay's Rebellion as evidence of American freedom but to Marshall it was anarchy that would make stable government impossible.⁶

These three periods of his life made a profound impression on Marshall. It made him feel that the rabble could not be trusted to establish in this country a stable, reliable national government. Remembering Valley Forge and the experience of the states under the Articles of Confederation, who can blame Marshall for feeling this way at that time?

It is true, of course, that, after the comparative poverty of his early youth, Marshall became a successful lawyer while he was serving in the legislature and

⁴ He was a Lieutenant in the Third Virginia regiment of which his father was a Major and fought at Iron Hill, Brandywine, Germantown, Monmouth and Stony Point. He wintered at Valley Forge. When Arnold invaded Virginia Marshall returned to service and fought to the close of the war. Mr. Justice Burton, *John Marshall—The Man*, 104 U. OF PA. L. REV. 3 (1955). See 1 BEVERIDGE, THE LIFE OF JOHN MARSHALL 69-147 (1919).

⁵ 1 BEVERIDGE, THE LIFE OF JOHN MARSHALL 108-147 (1919).

⁶ *Id.* at 200-400.

adopted in some measure the conservative views of his properous Richmond clients. Virginia then was larger and more important than New York or any other colony. Also, from his days in Fairfax County he counted Washington his greatest hero.

Something should be said of Marshall as a man. Beveridge would have us believe that Marshall was consistently unkempt and slovenly in his dress. Nevertheless, when he came to visit at Yorktown after the war, the Ambler girls looked forward to meeting him. Mary Ambler announced in advance that she intended to marry him. The other sisters took one look at this awkward frontiersman and left him to Mary, who married him as she had said she would.⁷ His genuine love for his wife was perhaps Marshall's finest trait. With it apparently went a very chivalrous attitude of respect and consideration for all women. It was after the death of his wife in 1831 that Marshall was said to have had his saddest days.⁸

His personality was so attractive that it accounts in large measure for the fact that Justice Burton can observe that some 23 of the 62 constitutional cases in which Marshall participated were unanimous.⁹ Living as the Justices did at one boarding house in Washington, there was ample time for them to talk over their cases. And as a conversationalist Marshall was the best. The "Marshall Court" was rightly named. Sitting from 1801 to 1835, Marshall served with some fifteen associate Justices of whom seven, Thompson, Livingston, Todd, Story, Duvall, Washington and Johnson were with him for many years—Johnson for thirty. Justice Burton tells us "there has been no other period of comparable continuity, none when continuity was so essential."¹⁰

Apparently, Marshall sat on 135 cases involving international law and wrote the Court's opinion in 80.¹¹ This indicates he was persuasive with his judicial brethren in controversies not only about domestic but also foreign law.

It must have been his homespun appearance and friendly manner that caused so many to love and admire John Marshall. Beveridge says that only Spencer

⁷ *Id.* at 108-147. As part of falling in love with Mary Ambler, Marshall walked to Philadelphia for a smallpox inoculation. He made 35 miles a day but arrived so disreputable looking that the tavern would not take him in. He suffered no ill effects and returned home to wed Mary.

⁸ 4 BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 518-595 (1919).

⁹ Mr. Justice Burton, *John Marshall—The Man*, 104 U. OF PA. L. REV. 3 (1955).

¹⁰ *Ibid.* During Marshall's days, the Supreme Court occupied a court room in the basement of the Capitol, quarters which in 1956 were used by the Joint Atomic Energy Committee. From 1860 to 1935 the Supreme Court sat in the little court room on the Senate floor of the Capitol opposite the Senate Disbursing Room. In this room there are busts of the Chief Justices, starting with John Jay and ending with William Howard Taft. Dean Acheson, at the American Law Institute banquet in Washington in May, 1956 spoke of how comfortable this old room was, contrasting its intimacy with the marble mausoleum that the Cass Gilberts, father and son, built for the Court atop Capitol Hill.

¹¹ Dumbauld, *John Marshall and the Law of Nations*, 104 U. OF PA. L. REV. 38 (1955).

Roane, the Judge of the Virginia Court of Appeals, and Thomas Jefferson hated Marshall personally.¹² This is the more remarkable in a period when public issues were so frequently made bitter personal ones. But Marshall at home did his own marketing and en route to his house talked to the humblest in Richmond. Once Bishop Meade of Richmond met Marshall astride his horse, holding on the pommel a jug of whiskey. The cork had come out and Marshall was using his thumb as a stopper.¹³

His sense of humor was acute. Once a young lawyer flattered him by saying the Chief Justice had "reached the acme of judicial distinction" and Marshall answered:

The acme of judicial distinction means the ability to look a lawyer straight in the eyes for two hours and not hear a damned word he says.¹⁴

Marshall once visited a club in Philadelphia where it was the rule that every member make a rhyme. Two or three Kentucky colonels were drinking bourbon at a table nearby. The word given Marshall was "paradox". His rhyme went this way:

In the Blue Grass Region
A paradox was born
The corn was full of kernels
And the colonels full of corn.¹⁵

While on circuit at Raleigh, Marshall would stay at a tavern kept by one Cooke, carry his own wood to his room and pitch quoits in the street with the public characters at the tavern.

Once Marshall drove over a sapling that became wedged between the wheel and the shaft. A negro servant of his friend Nathaniel Macon helped him. Marshall asked the boy to remember him to Macon. When he did so, Macon began to extol Marshall as the great Chief Justice. The lad answered:

Marse Nat, he may be de bigges' lawyer in de United States, but he ain't got sense enough to back a gig off a saplin.¹⁶

Quite aptly, Professor Frederick L. Bronner of Union College recently remarked that Marshall's catholic tastes, which included whist, backgammon, horse races

¹² 4 BEVERIDGE, *op. cit. supra* note 8, at 78.

¹³ *Id.* at 63.

¹⁴ *Id.* at 82-83.

¹⁵ *Id.* at 83.

¹⁶ *Id.* at 64-65. This story has special appeal to me. My mother opposed my entry to the Cornell Law School in much the same way. As a young man the Dean had lost a horse case for her. How could the law school be any good when the Dean caused her to have to pay for a horse so sick that he was found dead in the barn on the day of delivery? Another favorite Marshall story is the one about Court's custom of having a drink of wine on a rainy day. One sunny day Marshall asked Story to look out the window to see if he could catch a glimpse of rain. When Story reported none, Marshall overruled him on the ground that somewhere in the thirteen or more states over which the Court then had jurisdiction it must be raining. The present Attorney General of the United States in a recent piece recalls this familiar yarn. Brownell, *John Marshall, The Chief Justice*, 41 CORNELL L. Q. 93 (1955).

and "liberal purchases of wines and drinkables and fees to the Masons and the Jockie Club" must mean that "one doesn't have to be solemn, staid and serious to be a lawyer, a judge or a great man."¹⁷

Princeton, Harvard and the University of Pennsylvania gave Marshall honorary degrees.¹⁸ But except for six weeks at William and Mary, where he studied law under the great George Wythe,¹⁹ Marshall had no formal education.²⁰ He had hardly arrived at William and Mary when he was elected to Phi Beta Kappa, and even became a member of the Debating Team.²¹ Drinking was prohibited except for "beer, cider, toddy or spirits and water" when Marshall attended. Twelve years later the exception was changed to read "except in that moderation which becomes the prudent and industrious student."²²

It is quite appropriate that John Marshall's memory has been kept alive in a unique manner. When Marshall died on July 6, 1835, the Philadelphia bar collected about \$3,000, although the contributions were limited to \$10 each. Richmond lawyers gave the most. The Philadelphia lawyers so wisely invested the moneys that by 1884 it was \$20,000. Congress put up \$20,000 more and commissioned William Wetmore Story, the son of Mr. Justice Story, to make a statue of Marshall. Story's statue represents Marshall sitting in his robes and chair on the west lawn of the Capitol, facing the mall, that lovely strip of green grass that extends over fourteen long blocks to Washington's Monument. How fitting that Marshall should sit looking at this grand view up to the Monument for the Washington he adored!²³

The statue of Marshall was unveiled on May 10, 1884 with a speech by Chief Justice Morrison R. Waite of the Supreme Court of the United States and an oration by William Henry Rawle, Esq. of the Philadelphia bar. Dr. J. G. Armstrong of the Monumental Church of Richmond, Virginia, said the blessing, and Senator John Sherman of Ohio headed a joint Congressional Committee.²⁴ In 1901, one hundred years after Marshall ascended the bench, celebrations were held in his

¹⁷ 20 ALBANY L. REV. 4 (1956).

¹⁸ 4 BEVERIDGE, *op. cit. supra* note 8, at 89.

¹⁹ I BEVERIDGE, *op. cit. supra* note 5, at 154.

²⁰ *Id.* at 157-158.

²¹ *Id.* at 158-159.

²² *Id.* at 156, see footnote.

²³ William Wetmore Story was born February 12, 1819 and died October 7, 1895. He took an A.B. and an LL.B. at Harvard and he practiced law in Boston with Hillard, Sumner and George Ticknor Curtis. He was a poet, sculptor and musician. Also he was a Bankruptcy Commissioner and a Court Commissioner in the United States Courts in Massachusetts, Maine and Pennsylvania. See NATIONAL DICTIONARY OF BIOGRAPHY.

²⁴ I am indebted to Associate Justice Francis Bergan of the Appellate Division, Third Department of the Supreme Court of the State of New York, for the citation, 112 U.S. 744,

memory from coast to coast.²⁵ September, 1955 was the two-hundredth anniversary of his birth and once again, in memory of him, men and women gathered from coast to coast to speak about him.²⁶ It is a great and lasting tribute to John Marshall that the American people remember him in this way.

Marshall's personal qualities and his days in the backwoods when his father fought against the King at Williamsburg, his days in battle with Washington and during the long winter at Valley Forge,²⁷ and his days as a legislator, battling for the Constitution, a stable government and the keeping of our treaty obligations, unquestionably played a great part in what most scholars regard as his three greatest decisions, namely, *Marbury v. Madison*,²⁸ *McCullough v. Maryland*,²⁹ and *Gibbons v. Ogden*.³⁰

Marbury v. Madison was not really a decision. It was a lecture on morals to Jefferson, the great moralist, who needed it badly. William Marbury had been appointed a Justice of the Peace in Alexandria which was then part of the District of Columbia. Marshall had been Secretary of State under John Adams and one of the last acts of the Adams administration was to appoint a great number of Justices of the Peace, of whom Marbury was one. Marshall left the Commission of Marbury at his office, which Madison inherited as Secretary of State for Jefferson.³¹ Marbury sued directly in the Supreme Court for a writ of mandamus to be directed to Madison to give him his commission as Justice of the Peace.

which gives a description of this dedication. The statue is signed "W.W.Story, Roma, 1883." Justice Burton speaks feelingly of this Marshall statue in his article in the *Pennsylvania Law Review* [104 U. OF PA. L. REV. 3-8 (1955)] and in the little book that the University of Michigan published in 1937, "An Autobiographical Sketch by John Marshall", there is an interesting picture of it.

²⁵ Francis Miles Finch, then Dean of Cornell Law School, gave the principal address at Yale; Cornelius H. Hanford and Charles E. Sheppard gave addresses in Seattle, Washington; Judge Charles H. Simonton spoke in South Carolina before its legislature and highest court on February 4, 1901; Chief Justice John H. Shanck of the Ohio Supreme Court spoke at Columbus, Ohio; and Wayne Mac Veagh, Esq. spoke before the House of Representatives on behalf of the American Bar Association. The library of the Supreme Court of the United States has a collection of these speeches.

²⁶ In 1955 by far the most outstanding meeting was held at Harvard Law School on September 22, 23 and 24. One of many fine addresses at the Harvard meeting was by Mr. Justice Felix Frankfurter. See 69 HARV. L. REV. 217-238 (1955). The most extensive celebration for the Marshall Bi-Centennial year was at William and Mary in Williamsburg, Virginia. On September 25, 1954, busts of Marshall, Wythe and Blackstone by Felix W. deWeldon were unveiled there by the Chief Justice of the United States and the Lord Chief Justice of England. The addresses which were delivered at the ceremonies are collected in a small volume published by the Cornell University Press in 1956.

²⁷ Marshall seems to have been as popular in the Army as elsewhere. He was nicknamed "Silver Heels" because of the white yarn that his mother had knitted into the heels of the woolen stockings in which he won many foot races. Mr. Justice Burton, *op. cit. supra* note 9.

²⁸ 1 Cranch 137 (1803).

²⁹ 4 Wheat. 316 (1819).

Suing in this manner, directly in the Supreme Court in the first instance, *Marbury* acted in accordance with the 13th section of the Judiciary Act of 1789. In 1794 under the same section the Court had issued a writ of mandamus to Henry Knox, Washington's Secretary of War.³² The Constitution in Article III gives the Supreme Court the right to hear directly cases involving states and ambassadors. But Article III goes on to say that in other cases the Supreme Court shall sit only as an appellate court "with such Exceptions and under such Regulations as the Congress shall make".

The 13th section of the Judiciary Act of 1789 made an "exception" for writs of mandamus and habeas corpus. The ultimate decision of Marshall was that it was unconstitutional for the Congress to make this exception even though the Constitution clearly authorizes the Congress so to do.³³ Thus the explanation for *Marbury*

³⁰ 9 Wheat 1 (1824).

³¹ 3 BEVERIDGE, THE LIFE OF JOHN MARSHALL 101-156 (1919).

³² CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1008-1048 (1953). See especially subdivision 6 which discusses *Chandler v. Knox* and another such case. Both are unreported but were mentioned in the argument and in the opinion in *Marbury v. Madison*. Marshall said: "If Congress remains at liberty (under Article III) of the Constitution to give [the supreme] court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution under Articles III is form without substance." And Marshall went on to say: "Affirmative words [the supreme court shall have original jurisdiction] are often, in their operation, negative of other objects than those affirmed; [for instance, that Article III meant that in only the cases specifically mentioned could the Court have original jurisdiction] and [in the provision foregoing], a negative or exclusive sense must be given [its affirmative words], or they have no operation at all." Crosskey comments that "the ordinary eighteenth-century rule" was as Marshall stated with respect to a negative "outside their affirmative scope", but he says this "was not the situation with respect to the provision of Article III [that Marshall] quoted," "For the provision would manifestly still have secured to the Court its original jurisdiction as therein provided, whether that jurisdiction could be added to or not." Quite rightly, it seems to me Crosskey contends that Article III contemplated that the Congress would diminish or increase the appellate jurisdiction of the supreme court within the classes of cases to which the affirmative grant with its negative implication gave the Court power to hear. Therefore, "the only legitimate question in *Marbury v. Madison* was whether Congress had made such an exception, by section 13, in a constitutional manner." As Crosskey says, the answer was clearly in the affirmative as a matter of law. "For adding, to the Court's original jurisdiction, cases such as the *Marbury* case—which otherwise would have been within its constitutionally conferred appellate jurisdiction—was undeniably one way of making exceptions from the latter jurisdiction; and way, moreover, that complied fully with the condition, to which Congress's excepting power is properly subject by the [affirmative and negative] terms of Article III.

³³ Crosskey suggests this. *Id.* at 1041. The research of Crosskey as to the use of the limited affirmative in the eighteenth century [1 Crosskey, Politics and the Constitution in the History of the United States 486-487] and his analysis of Marshall's reasoning [2 CROSSKEY *op. cit. supra* note 32 at 1041-1042] convinces me that *Marbury v. Madison* was technically decided extra-legally. As Crosskey says, the nub of the decision legally was whether the exception clause in Article III should have been read this way: "In all cases affecting Ambassadors, other public Ministers and Counsuls, and those to which a State shall be a party, the Supreme Court shall have original jurisdiction, [and that] in all the other

v. Madison lies in the history of the time. The law was clear that the statute was constitutional.³⁴

Professional detractors of Marshall contend that he wanted to destroy Congress and protect the rich. Far from it. Jefferson, like Roosevelt in our time, was out to destroy the Supreme Court, to impeach Marshall and appoint Spencer Roane of Virginia in Marshall's post. There is conclusive historical evidence that Jefferson wanted to get rid of the Federalist judges who had been jailing newspaper editors who dared to write articles derogatory of John Adams. In this we can sympathize with Jefferson. No one should go to jail for writing an honest criticism of John Adams or Eisenhower or any other American President. But neither should federal judges be thrown out of office when a new President and political party come into power.³⁵

If Marshall had decided *Marbury v. Madison* as he legally should have, Jefferson would have had the ammunition he wanted to impeach not only Marshall but every other Federalist judge. If Marshall had decided that Marbury was improperly appointed, the Federalist party and Marshall himself would have become a laughing stock. Marshall's actual decision allowed him to say that Marbury had a legal and moral right to his commission, that in denying him a commission Madison and Jefferson were violating the laws of the land, but that unfortunately the Supreme Court could not interfere because the statute the Congress had passed, permitting Marbury to sue in the Supreme Court in the first instance, was unconstitutional.

The political aspect of *Marbury v. Madison* is evident from two other facts. If the only trouble were the lack of jurisdiction of the Supreme Court to hear Marbury on a direct application, why did not Marbury start all over in the Circuit Court and, if he lost, appeal from the Circuit to the Supreme Court? And the so-called sixteen mid-night judges who were duly appointed by John Adams under the Judiciary Act of 1801 and entitled under Article III of the Constitution to "hold their offices during good behavior",³⁶ were unconstitutionally deprived of

cases [enumerated in Article III] it shall have appellate jurisdiction, both as to law and fact, *with such exceptions*, and under such regulations as the Congress shall make." Or should it be read the way Marshall read it? My vote is for Crosskey and in accordance with the two prior decisions of the Court.

³⁴ See the comments of the late Thomas Reed Powell at the William and Mary Law School on the Anniversary of *Marbury v. Madison*. See 2 WILLIAM AND MARY L. REV. at page 24 (1955).

³⁵ 3 BEVERIDGE, THE LIFE OF JOHN MARSHALL 100-222 (1919). See also 2 CROSSKEY *op. cit. supra* note 32 at 1008-1048.

³⁶ 1 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 611 (1953).

their jobs by Jefferson when the Judiciary Act of 1801 was repealed. To his dying day Marshall believed that Jefferson acted unconstitutionally in refusing to allow these judges to serve. Yet no mandamus suit was ever brought by any of these sixteen judges to force Madison and Jefferson to allow them to serve! Like the decision in *Marbury v. Madison*, the failure of both Marbury and the sixteen midnight judges to apply to a Circuit Court for a writ of mandamus means that it was politically inexpedient to do so, because it might have given Jefferson added ammunition with which to press for the removal of Marshall and the other Federalist judges on the Supreme and Circuit Courts.

Not only is it clear that *Marbury v. Madison* was incorrectly decided on the law, but it is questionable whether Marshall ever intended that the power should be exercised against the Congress as we have seen the Supreme Court do in our generation. It was not until the Dred Scott Case in 1857 that the Supreme Court ever again declared a law of the Congress unconstitutional. And the wording of the Supremacy Clause of Constitution in Article VI leads one to believe that with respect to acts of Congress and treaties the Supreme Court may lack the same power that it has to declare state laws unconstitutional. If a law be passed by the Congress pursuant to an enumerated power, and that law does not expressly violate another provision of the Constitution, generally speaking the Supreme Court no longer declares it unconstitutional. Nor should it. It is the power to declare laws of states unconstitutional that is so essential for the preservation of a strong central government.

That power Marshall asserted in *McCulloch v. Maryland*, perhaps his greatest opinion. There Marshall declared that the national government is "a government of the people"—that it "emanates from them" and "Its powers are granted by them, and are to be exercised directly on them, and for their benefit." Webster paraphrased this language of Marshall in his reply to Hayne, and Lincoln at Gettysburg paraphrased both.³⁷ In retrospect one wonders why Marshall ever decided either *Marbury v. Madison* or *McCulloch v. Maryland*.

Marshall's position in *Marbury v. Madison*, where he had himself mislaid Marbury's commission, would disqualify present-day judges. Decision of the appeal in the Alcoa anti-trust case was delayed a long time because so many former Attorneys General were on the Court that it could not muster a quorum to decide the case. Finally the Congress passed a special law creating a court to hear the appeal.³⁸

³⁷ 4 BEVERIDGE, *op. cit. supra* note 8 at 282-339.

³⁸ *U. S. v. Aluminum Co. of America*, 91 F. Supp. 333 (1950).

McCulloch v. Maryland could have been limited to a decision that a tax levied only on a national bank was discriminatory. Both cases could have been ducked by Marshall's saying (as, to one's great vexation, the Supreme Court occasionally does today) that the constitutional questions need not be answered as not being directly presented or as involving political questions. Well it is for this country that Marshall leaped to decide these constitutional questions when he did and in the way he did. And we can rejoice that he did not employ any of the modern techniques by which today a constitutional decision is frequently evaded.³⁹

A third decision of Marshall must be mentioned, *Gibbons v. Ogden*. That case determined the scope of the Commerce Clause of the Constitution. It gives the Congress the power:

To regulate *Commerce with* foreign nations and *among* the several States, and *with* the Indian Tribes.

The case involved the right of New York to give a monopoly to Fulton to operate steam boats on the rivers of New York. The trip involved was one from Elizabeth, New Jersey to Albany, New York. Gibbons had a federal license to operate his boats in the coastal trade, so the question was directly presented as to which law, state or federal, was supreme.

It was then 1824. Marshall had been on the bench for twenty-three years, and not one Federalist remained there with him. To carry his court and write the opinion Marshall had to make some concessions, and this explains why the opinion in *Gibbons v. Ogden* is in parts fuzzy and confusing. From prior opinions we know Marshall believed that the Commerce Clause empowered the Congress to regulate intrastate⁴⁰ or domestic commerce. Probably to carry his court, Marshall in *Gibbons v. Ogden* had to say that the Commerce Clause did not apply to commerce that "is completely internal". But he adds at once that it does not apply to Commerce,

which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States.

When we analyze closely what Marshall says in *Gibbons v. Ogden*, we see that he asserts for the Congress the power to regulate domestic or *intrastate* commerce.

³⁹ The "ducking" rules are infinite. See *Massachusetts v. Mellon*, 262 U. S. 447 (1923); *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947). The author of the fallacious principle that no constitutional point should be faced by the Supreme Court until the pistol is at its head, neglected to practice what he preached in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). See Keeffe, *Weary Erie*, 34 CORNELL L.Q. 494 (1949). As Roscoe Pound has pointed out, procedural rules of this type are a source of the greatest danger. See also Keeffe, Brooks and Greer, 86 or 1100, 32 CORNELL L.Q. 253 (1946), and Keeffe, *A National Ministry of Justice*, 40 A.B.A.J. 951 (1954).

⁴⁰ Note that the Constitution does not use the word "interstate". It says "commerce". And it does not say "*Commerce between the States*". It says "commerce among the several States".

How can there be any internal commerce in any state of any kind that "does not extend to or affect other States"? This was the interpretation of *Gibbons v. Ogden* when it was decided. New York, in a second steamboat case, declared that Congress could regulate intra-state commerce.⁴¹ The case concerned a boat plying between Albany, New York and New York City, so that unlike *Gibbons v. Ogden* an intra-state trip was before the court.⁴²

As soon as Marshall died in 1835 and Taney came to the Court, the states rights advocates took over. Then was born the alleged distinction between *intra* and *interstate* commerce. From then until that famous chicken was killed in Brooklyn and the NRA and the blue eagle of Iron Pants Johnson died with it, laws of the Congress were declared unconstitutional from time to time as regulating *intra-state* commerce.⁴³ In our day we have lived to see *Gibbons v. Ogden* rise from the grave to become law again.

In the *Laughlin Steel* case,⁴⁴ and in many others, we have been told that any intra-state commerce that affects interstate commerce can be regulated by the Congress. Marshall's double-talk in *Gibbons v. Ogden* has once again become the law of the land. Even prize fights and theatrical exhibitions can be regulated. For some strange reason only major-league baseball remains intra-state commerce. Once in a while there is some other flash-back, but by and large the distinction between inter and intra-state commerce has been obliterated.⁴⁵

We all remember the anxious days of the thirties when Roosevelt was pressing his court-packing bill and the Court was under attack by him, even as it had been by Jefferson in the early eighteen hundreds or as it is today by the South. It was indeed paradoxical that Roosevelt, the great admirer of Jefferson, should win his nationalistic victory for the new-deal laws that today regulate American business, domestic as well as interstate, by the use of Marshall's opinion in *Gibbons v. Ogden*.⁴⁶

⁴¹ *The North River Steam Boat Company v. John R. Livingston*, 3 Cow. 711 (N.Y. 1825.)

⁴² Crosskey devotes Parts 1 and 2 of Volume I of his work to the Commerce Clause.

⁴³ It was not until after Marshall's death that his great decision in the *Gibbons* case was repudiated by his Court.

⁴⁴ See *NLRB v. Jones and Laughlin Steel Corporation*, 301 U.S. 1 (1937). Today all "commerce" except baseball seems to be subject to regulation by the federal government.

⁴⁵ 4 BEVERIDGE, *op. cit. supra* note 8 at 397-460.

⁴⁶ See notes 26 and 44. Cf. POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 42, 43, 82, 151 (1956). It is surprising to observe Powell saying, "Taney's mind seems to me markedly neater than that of Marshall, and his arguments are less open to refutation. Marshall was more intricate, more philosophical, cleverer at turning sharp

There are decisions of Marshall which this writer laments. *Barron v. Baltimore* is without a doubt his worst mistake, holding as it did that the Bill of Rights applies only to the national government and not to the states.⁴⁷ Probably Marshall's name played its part in the destruction of the Privileges and Immunities clause of the 14th Amendment by the Supreme Court in the *Slaughter-House* cases.⁴⁸ But *Strawbridge v. Curtis* appears equally mistaken, holding as it does that an action cannot be one between citizens of different states if there happens to be just one party defendant of the same citizenship as one party plaintiff. Practically this has led to hours of unnecessary litigation and endangered every suit in a federal court based on diversity where more than two parties are involved.⁴⁹ Probably Marshall's decision in *Hepburn*⁵⁰ can be partly blamed for the low state of civil liberty possessed by those poor people condemned to live in the District of Columbia.

But we would have to be very provincial indeed not to recognize that the great soldier, lawyer and statesman who decided *Marbury v. Madison*, *McCulloch v. Maryland* and *Gibbons v. Ogden* made this country a nation, and that his judicial errors elsewhere, if any, are trivial in comparison. Professor Beveridge may believe if he wishes that Marshall was a "Supreme Conservative",⁵¹ but one must remember that Beveridge was writing about Marshall as an old man⁵² when he used that label. It was Marshall as a young man and a Federalist who voted in Congress against the Alien and Seditions laws,⁵³ and who testified so honestly on the impeachment trial of Mr. Justice Samuel Chase of the United States Supreme Court,⁵⁴ and who braved Jefferson's wrath to do justice to Aaron Burr.⁵⁵

corners, and his elocution is more sonorous than Taney's . . . gifts which doubtless are literary virtues but not necessarily judicial ones. Marshall was a nation builder, which Taney was not. As a creative statesman Marshall built superstructures on the foundation laid by the Fathers, but Taney in my view kept loser to that foundation than did Marshall, with always the tragic exception of his Dred Scott enormity, as to the absence of national power to forbid slavery in the territories." See POWELL at Page 43.

⁴⁷ 7 Pet. 243 (1833).

⁴⁸ For a brilliant attack on the soundness of this decision, see 2 CROSSKEY *op. cit. supra* note 32, at 1083-1158. For the case itself, see 16 Wall. 36 (1873).

⁴⁹ 3 Cranch 267 (1806). See Keffe and Cotter, *Service of Process in Suits Against Directors: A Barrier to Justice*, 27 CORNELL L.Q. 74 (1941), and Keffe, 29 *Distinct Dam-nations of the Federal Practice and a National Ministry of Justice*, 7 VAND. L. REV. 636, 654-655 (1954).

⁵⁰ See Keffe and Dykes, *The 1940 Amendment To The Diversity Of Citizenship Clause*, 21 TUL. L. REV. 171 (1946), and Rathvon, Jr. and Keffe, *Washingtonians and Roumanians*, 27 NEB. L. REV. 375 (1948). See also *National Mutual Insurance Company v. Tidewater Transfer Company*, 337 U. S. 582 (1948), and see Note, 35 CORNELL L.Q. 198 (1949). The *Hepburn* case is *Dundas v. Ellzey*, 2 Cranch 445 (1805).

⁵¹ 4 BEVERIDGE, *op. cit. supra* note 8 at 461-517.

⁵² *Id.* at 67.

⁵³ 2 BEVERIDGE, *THE LIFE OF JOHN MARSHALL*, 432-484 (1919).

⁵⁴ 3 BEVERIDGE, *op. cit. supra* note 31 at 157-222.

⁵⁵ *Id.* at 274-342, 343-397. Recently Mr. Justice Burton has reviewed the trial of Burr and reached the same conclusions as Beveridge. Mr. Justice Burton, *Justice The Guardian of Liberty; John Marshall at the Trial of Aaron Burr*, 37 A.B.A.J. 735 (1951). If one half of what either Beveridge or Burton say is true (and I assume all they say is true), then the greatest blow that Jefferson ever struck against civil liberty was the unjustified trial of Aaron Burr.

Believing stubbornly as I do in the presumption of innocence, I am convinced that John Marshall, either in the morning or the evening of his days, would have risen to his country's needs in our thirties and would have voted with Charles Evans Hughes and Owen Roberts in the *Laughlin Steel* case. To me, Marshall was first and last a magnificent Mugwump.