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JOHN MARSHALL AND THE CONSTITUTION*

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AS MOST of you no doubt are aware, the present year has marked the two-hundredth anniversary of Chief Justice John Marshall's birth. Marshall was born on the 24th of September 1755, in what is now Fauquier County, Virginia. He died in Philadelphia, while still holding the office of Chief Justice of the United States, a few weeks less than eighty years later. One hundred and twenty years have thus elapsed since John Marshall completed the judicial labors for which he is so greatly celebrated. In that long interval, ten other Americans have held the office that Marshall held, and three preceded him in it. Our Chief Justices have included some very distinguished and able men; but, by universal consent, Marshall is recognized to stand pre-eminent—indeed, unrivalled—among them. The appellation, "the great Chief Justice," is still today, as it long has been, a completely unambiguous reference to John Marshall, and to no one else.

Now, I mean not to dissent from this universal view of Marshall's greatness; yet I do think that the true nature of his judicial career, particularly in the field of constitutional interpretation, has long been very generally misunderstood. According to the usual view, Marshall is conceived to have dominated his associates on the Supreme Court so completely that he was able to make the constitutional decisions of that tribunal express his own ideas and nothing else. His own ideas, it is further commonly assumed, were those of his own political party, the Federalists. So, the common view is that John Marshall was able to use, and did use, his domination of his court to read the old Federalist constitutional views into his court's decisions and thus to

* This is a reprint of a speech delivered by Professor Crosskey as one of a series of talks on Justices of the Supreme Court delivered by various experts at the University of Chicago Law School. All of the speeches will be published this fall in book form under the title "Mr. Justice."

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lay the foundations upon which our constitutional law ever since has rested; or—as some might wish to insist—the foundations upon which it rested until the notorious “Roosevelt court fight,” of some eighteen years ago.

For the general prevalence of this view of John Marshall's work in constitutional law, his biographer, Albert J. Beveridge, is undoubtedly, in considerable measure, responsible.¹ But such a view of Marshall's work antedated Beveridge's biography. The late Oliver Wendell Holmes, Jr., for one, took such a view of the subject fifteen years before the first of Beveridge's volumes appeared. The occasion was the centennial, in 1901, of Marshall's taking his seat as Chief Justice, upon the Supreme Court of the United States, and Holmes, as chief justice of Massachusetts, was answering a motion that the supreme court of that state adjourn in commemoration of the event. Holmes was not so gracious on this occasion as he usually was. He felt honest doubt about Marshall's greatness and rather inappropriately expressed it. He doubted, he said, “whether, after [Alexander] Hamilton and the Constitution itself, Marshall's work proved more than a strong intellect, a good style, personal ascendancy in his court, courage, justice and the convictions of his party.” Holmes conceded, however, that it had been a “fortunate” thing that the appointment of a chief justice, in 1801, had fallen to John Adams, instead of Thomas Jefferson, and so g[i]ve[n] it,” as he explained, “to a Federalist and loose constructionist to start the working of the Constitution. . . .”² Now, these remarks of Holmes plainly evince the same view of Marshall's work that I have already mentioned as the view commonly taken: Marshall dominated his court; he used his dominance to read Federalist party doctrines into the Constitution; and thus the basis of our constitutional law was laid. And along with these ideas, we have, in the case of Holmes, the further notion, which is also a common one, that the old Federalist constitutional views were based upon a “loose” construction of the Constitution.

Let me begin with this last idea. Is it true that the old Federalist constitutional views depended upon a loose construction of the Constitution? It most certainly is not. The Federalist views depended, first of all, upon a strict adherence to certain rules of documentary interpretation that were then quite generally accepted as proper. They depended, further, upon giving meaning to every single provision that the Constitution contains, and, also, upon giving significance to every difference in phraseology to be found in its various provisions. The Federalist views depended, in other words, upon a literal reading of the Constitution in all its parts; and in the few cases, if there were any such, where more than one meaning was possible, the ambiguity was to be

¹ Consult for example, 4 Beveridge, *The Life of John Marshall* 59–61 (1919).

² Holmes, *Collected Legal Papers*, 266, 268, 269 (1920). For a recent expression of this view of Marshall's work, consult Cahn, *John Marshall—Our ‘Greatest Dissenter,’* *The New York Times Magazine*, p. 14 (Aug. 21, 1955).

resolved, according to the Federalist views, by a strict adherence to the then accepted rule of choosing the meaning that best comported with the objects, or purposes, of the Constitution, which the Preamble states. In any ordinary use of words, the Federalist views depended, then, upon a rigorous, not a loose construction of the document.³

The views of their opponents—the Jeffersonians—were the views that really depended upon a loose construction. The Jeffersonian views called for disregarding certain parts of the Constitution completely. These parts—the parts that then were known as “the general phrases” of the document—were to be made absolutely meaningless. Other parts were to be twisted from their original meaning in a manner unfavorable to the national powers, and limitations were to be read into the document that it undeniably does not contain.⁴

Now, if these are the true facts about the Federalist and Jeffersonian views of the Constitution, how has the notion come to be accepted, in what is known as history, that the old Federalist views depended upon a loose construction of the document? In part, this is a result of the paucity and imperfection of the records of the Federalist period. The Senate of the United States, during its first five years, sat behind closed doors; no record at all of its debates for this period exists. In addition to this, there was no official reporting of the debates in either house of Congress during the early years. There was, it is true, some private reporting, some of which was afterwards republished in, and as, *The Annals of Congress*, in the 1830's; but these private reports from the formative period of our government are both imperfect and incomplete.⁵

As for the courts of justice of the period—particularly the Supreme Court—the cases in them did not bring up constitutional issues that went to the essence of the old Federalist views of the subject; and this remained true, in the main, during the first six or seven years of John Marshall's Chief Justiceship, when there was still a Federalist majority on the Court. The result of all

³ The old Federalist views of the Constitution are developed fully in Crosskey, *Politics and the Constitution in the History of the United States*, passim (1953). This publication is hereinafter cited as P. & C.

⁴ *Ibid.*

⁵ The *Annals of Congress* covering the early years of the Government were a reprint of Thomas Lloyd's contemporaneously published *Congressional Register*, a private report of debates in the House of Representatives. The most casual inspection of Lloyd's *Register* discloses that it was not a complete report of these debates, but a report of picked and chosen parts, and of picked and chosen speeches. The reporting is uneven. Some of it is very well done and seemingly complete, as, for example, the debates, on June 8, 1789, when James Madison proposed the initial amendments to the Constitution. Other debates—for example, those on these same amendments, on August 19, 1789—are omitted entirely. And still other parts of the reporting—for example, that on the same subject, two days earlier—are, on the basis of other and better surviving evidence, demonstrably inaccurate. In the instance mentioned, this other and better evidence consists of the official journals of the House and the Senate. Cf., P. & C. 702-3. Consult, also, note 36 *infra*.

these factors, taken together, was an imperfect and meager recording of the Federalist views; they became forgotten; and because the Jeffersonians, with their usual perversity, accused the Federalists of advocating a loose construction—the offense of which they themselves were guilty—and because, furthermore, the Jeffersonians won out politically, their charge has stuck in consequence of simple ignorance today as to what the old Federalist views were.

The situation I have just described has manifestly been favorable, likewise, to the rise of the misconception of John Marshall's work to which I have already alluded. But in the case of Marshall, there have been other factors at work, too. For one thing, Marshall persuaded his court to follow the practice of delivering court opinions, instead of individual opinions, in the cases decided; and in most of the cases, Marshall wrote and delivered the Court's opinions himself, especially in those involving constitutional issues. In consequence, it is usually assumed today that everything in these opinions represents Marshall's own views and, hence, Federalist views. Yet, if we remember that nearly all of Marshall's constitutional opinions were delivered for a Court with a hand-picked Jeffersonian majority upon it, it is certainly undeniable that such a view of the Marshall opinions is one inherently improbable.⁶

Such a view of the matter is, moreover, at variance with what Marshall himself described as the practice of his Court. Its practice, he indicated, in 1819, was what, he said, "[t]he course of every tribunal must necessarily be." "[T]he opinion which is to be delivered as the opinion of the court is," he said, "previously submitted to the consideration of all the judges; and, if any part of the reasoning be disapproved, it must be so modified as to receive the approbation of all, before it can be delivered as the opinion of all."⁷ I do not myself see how the facts could possibly have been otherwise than as Marshall stated them; or how it can be supposed, for a moment, that he did not, in many instances, have to compromise, or give up, his own and the Federalist views of the Constitution.

There are still other factors, moreover, that have contributed to the misconception of Marshall's work. One was his settled practice of not dissenting when he disagreed with the views of his Court. We have his own word for this. In *Bank of United States v. Dandridge*, in 1827, he said it had long been his "custom when [he] ha[d] the misfortune to differ from th[e] court, [to] acquiesce silently in its opinion. . . ."⁸ Justice Joseph Story, who usually

⁶ Most of these opinions postdate 1812, when the Jeffersonian Court majority was first achieved.

⁷ The quoted material is from an anonymous newspaper essay that Marshall wrote and had published in the *Philadelphia Union*, in the year mentioned in the text. Consult 4 Beveridge, *op. cit. supra* note 1 at 318–22.

⁸ 12 Wheat. (U.S.) 64, 90 (1827). The *Dandridge* case itself and *Ogden v. Saunders*, 12 Wheat. (U.S.) 213 (1827), appear to be the only cases in which Marshall departed from his practice of silent acquiescence.

agreed with Marshall's constitutional views, followed the same practice.⁹ And the associate of both, Justice William Johnson, said, in 1822, that "in some Instances," Marshall actually wrote and delivered the Court's opinion even "when [it was] contrary to his own Judgement and Vote." The Associate Justices were lazy, Johnson said; Marshall was willing to perform the labor of writing the opinions, and the Associates were content to let him do it.¹⁰

Now, surely, in the light of this last mentioned practice, it is perilous in the extreme to ascribe to John Marshall and, hence, to the old Federalists, who produced the Constitution, everything that his opinions contain. And we are likewise unwarranted in making such ascriptions merely on the basis of Marshall's silent acquiescence in various of the views of his Court. Why Marshall followed the practices I have just outlined, he never explained. But the fact is that the period of his Chief Justiceship was a period of constitutional decay. Time after time, Marshall was forced into compromise, or outright defeat, upon what it can easily be shown were his own views or, else, the old Federalist views of the Constitution, which, it is natural to suppose, he shared. It probably seemed to Marshall thoroughly unwise to underline such facts as these before the country and thus, perhaps, to encourage further attacks upon the Constitution, to the defense of which his life after 1801 was so largely devoted.

I have said that the period of John Marshall's Chief Justiceship was a period of constitutional decay. This was especially true, as respects the Supreme Court, during the twenty-three-year period after 1812, when most of the famous Marshall constitutional decisions were rendered. For, in 1812, the Jeffersonians at last obtained a dependable majority on the Court.¹¹ With the single exception of Joseph Story,¹² all the Justices appointed up to that time during Marshall's tenure, and nearly all of those appointed thereafter during his years on the Court, were hand-picked to vote against him on his own and the old Federalist views of the Constitution. To suppose, then, as is ordinarily done, that Marshall was able to get these men to agree with his

⁹ See Story's own statement to this effect in *Cary v. Curtis*, 3 How. (U.S.) 236, 252 (1845).

¹⁰ Morgan, *Mr. Justice William Johnson and the Constitution*, 57 Harv. L. Rev. 328, 333 (1944).

¹¹ There was an Anti-Federalist majority on the Court after 1807; but this was true only if the Anti-Jeffersonian Anti-Federalist, Samuel Chase, was counted. That the Jeffersonians did not trust Chase is shown by their attempt to remove him from office by impeachment, in 1805. Cf., also, Jefferson's attitude when the death of Justice William Cushing, in 1810, opened the way for another Jeffersonian appointment. "Old Cushing is dead," he wrote Albert Gallatin. "At length, then, we have a chance of getting a Republican majority in the Supreme Judiciary." 11 *The Works of Thomas Jefferson* 153 (Federal ed., 1904-5).

¹² Jefferson was opposed to President Madison's appointment of Joseph Story: he said Story was "unquestionably a tory." Consult 4 Beveridge, *op. cit. supra* note 1 at 106-10, esp. 109.

own and the Federalist views in case after case is certainly to suppose the improbable; and it easy to demonstrate, by a consideration of particular cases, that Marshall had no such astounding success with his Court.

Let us begin with the old Federalist doctrine that the common law of England and the acts of Parliament in amendment of the common law, to the extent that these were in their nature applicable to American conditions, were "Laws of the United States," as well as laws of the separate states of the country. This doctrine is so discredited today that I have actually been accused by various modern legal scholars of being myself guilty of a lack of scholarship in believing that anybody ever believed such a thing. But the shoe is on the other foot. There is not a doubt that this was once a commonly held view.¹³

You may ask what was the constitutional and political importance of this old forgotten proposition. For one thing, it was important in interpreting one of the mandatory categories of the national judicial power in the third article of the Constitution; the category, that is, of "all Cases, in Law and Equity, arising under . . . the Laws of the United States." For, if the common law was one of "the Laws of the United States," the national judicial power would extend, it was thought, by virtue of this provision, to every case presenting any common law question as a question of national law.¹⁴ Because, however, of the fact that the original Judiciary Act, of 1789, had conferred upon the lower national courts, within this category, a criminal jurisdiction only, the question of the status of the common law as one of "the Laws of the United States" arose, in the early days of the government, chiefly in criminal cases.¹⁵

Concretely, what was at stake in these cases? Well, take one of them that arose in 1798. One Worrall had tried to bribe an official of the national government. Congress had never passed a statute forbidding such conduct or making it a crime. The question was: Could Worrall be punished?¹⁶ Again, there were various places in the United States—such as the sites of "Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings"—that were

¹³ The angriest of my accusers has been Professor Julius Goebel, of the Columbia law faculty. Consult his *Ex Parte Clío*, 54 Col. L. Rev. 450 (1954).

¹⁴ State criminal prosecutions at common law would not have been included. The common law applied in such cases, not as national law, but as state law; and the "Cases . . . in which a State shall be a Party," of Article III, included, by reason of the earlier enumeration in that article, only certain "Controversies," or civil suits. Cf. Judge Peters' opinion in *United States v. Worrall*, 2 Dall. (U.S.) 384 (1798).

¹⁵ As I have pointed out elsewhere, this view of the common law also underlay the rules of decision which, under section 34 of the first Judiciary Act, were followed in the national courts, in equity and admiralty cases. Consult P. & C. pp. 865-902. The only reported case in which this phase of the subject is taken up is Justice Story's circuit court case of *United States v. Coolidge*, 1 Gall. (U.S.) 488 (1813).

¹⁶ *United States v. Worrall*, 2 Dall. (U.S.) 384 (1798).

under the exclusive jurisdiction of the United States by the terms of the Constitution. Congress had never passed a statute forbidding, and making criminal, in such places, such acts as murder, robbery, rape, and the like. The question, then, was whether these and other unforbidden offenses could be committed in such places with impunity.¹⁷ The Federalist answer was a sensible and resounding "No." It was sufficient, they said, that these various acts were crimes at common law; for the common law, they held, was one of "the Laws of the United States."¹⁸ The Jeffersonians denied this and contended that the foregoing and other offenses could be committed without penalty, as against the United States, in the absence of acts of Congress of the kind I have already described.¹⁹

Why did the Jeffersonians take this seemingly foolish position? To understand their reasons, it is necessary to take into consideration another belief of the late eighteenth century, of which little is heard today. This was the belief, which the Jeffersonians apparently shared with the Federalists, that the legislature of every government, including Congress, had power to make rules of decision for its own courts of justice in all cases that its courts had power to decide. For, if the common law was one of "the Laws of the United States," and if, by consequence, the judicial power of the United States extended to all cases under the common law as national law, then because the common law itself extended to all subjects, the rule-making power that Congress would have would extend to all subjects, too. In other words, Congress would have, on this ground entirely separate from all others, the practical equivalent of a general national legislative authority. Now, Jeffersonism was a political revolt, chiefly southern in inspiration, against the sort of generally empowered national government for which the Constitution was intended to provide. The proposition that led to the consequence I have just stated had therefore to be denied; and it was denied; and its denial became one of the cardinal tenets of Jeffersonism.²⁰

A case involving the common-law criminal jurisdiction of the national courts was presented to the Supreme Court for decision shortly after the ini-

¹⁷ Consult the letter of District Judge Richard Peters, cited in *P. & C.*, p. 782.

¹⁸ Consult, for example, the answer of the Federalist Massachusetts legislature, of 1799, to the Virginia Resolutions, of the year before, printed in 4 *Elliot's Debates* 533, 536 (2d [24 cm.] ed., 1836). The Federalist view on this subject is recorded in many other places. For example, see the opinion of Judge Richard Peters in *United States v. Worrall*, 2 *Dall. (U.S.)* 384 (1798). And see *Henfield's Case*, discussed in *P. & C.*, ch. xx, § 3.

¹⁹ See James Madison's report to the Virginia House of Delegates, of 1799, on the Virginia Resolutions, of the year before, printed in 4 *Elliot*, op. cit. supra note 18 at 546, 561 et seq.

²⁰ James Madison, St. George Tucker, and Thomas Jefferson all pointed out, in their writings, the consequence stated in the text and insisted upon it as the chief reason for rejecting the doctrine under discussion. Their statements are cited at length in *P. & C.*, 560-61, 699, and 763-64. Consult, also, *ibid.* 630-33 and 669-74.

tial appearance of a Jeffersonian majority on that tribunal in 1812. This was the case of *United States v. Hudson and Goodwin*,²¹ which the Jeffersonians had nursed along for six long years, until they finally obtained their majority on the Court.²² Upon at last getting the case before the Court, the Attorney General, however, refused to argue it on behalf of the United States: it was simply too absurd for words. So, the Jeffersonian majority stepped forward and did what they were supposed to do: they ruled against the common-law criminal jurisdiction of the national courts and, hence, against the view that the common law was one of "the Laws of the United States."

From all that appears in the report of this case by William Cranch, the decision of the Court was unanimous. But, in actual fact, it was not unanimous. For this, we have the word of Joseph Story, one of the participating Justices. The determination had been made, Story said, by a bare majority of the Court of seven. This statement he made in a case on circuit in Massachusetts in the year immediately following.²³ He also said, at another time, that he had it on the "highest authority"—by which he apparently meant Chief Justice Marshall—that, in 1804, when the first Jeffersonian had been appointed to the Court, all the Justices previously on the Court were committed to the support of the common-law jurisdiction, except Samuel Chase,²⁴ who was not, I may add, a Federalist, as is usually supposed, but an Anti-Federalist who happened not to like Thomas Jefferson. Justice Story's own opposition to the Court's determination of the common-law point in 1812 appears from his circuit-court opinion of 1813, and there were two of the Justices of the Supreme Court, of 1812, who had been on the Court in 1804. These were John Marshall and Bushrod Washington. So, these two, with Joseph Story, made up the minority of three in the case of 1812. In this initial instance, then, Jeffersonism was triumphant; the ideas of John Marshall, and of the Federalist party from which he came, were completely repudiated.²⁵

Let us consider another of the old Federalist doctrines: the doctrine that, over and above and beyond its specifically enumerated powers, Congress possessed a general law-making authority for all the objects of the government that the Preamble of the Constitution states. Authority in the government, as distinct from its different departments and officers, was deemed by the Federalists to result from his plain statement of the government's purposes, or objects. The detail in the document related, in the main, to the divi-

²¹ 7 Cranch (U.S.) 32 (1812).

²² The background of the Hudson and Goodwin case is fully developed in P. & C. 766-84.

²³ *United States v. Coolidge*, 1 Gall. (U.S.) 488, 495 (1813).

²⁴ 1 Story, *Life and Letters of Joseph Story* 299 (1851).

²⁵ There are also a certain letter of Marshall's, from 1800, in the Library of Congress, and certain pronouncements of his in Aaron Burr's trial, in 1807, which corroborate the inference drawn above from Justice Story's statements. Consult P. & C. 1356, n. 45.

sion of this resulting governmental power between the different departments and officers. And the Federalists pointed out that the last of Congress' enumerated powers in the Legislative Article is not only a power "to make all Laws" which shall be "necessary and proper" to carry into execution Congress' own specifically enumerated powers, but a power, likewise, "to make all Laws" which shall be "necessary and proper" to carry into execution "all other Powers vested by the Constitution in the Government of the United States" or in any of its departments or officers. Now, mere inspection of the Constitution discloses that there are, in the document, no enumerated powers of *the Government*, as distinct from the enumerated powers of its different departments and officers. The "other Powers of the Government" branch of this final power of Congress is therefore meaningless, unless it is a reference to "Powers of the Government" that are not enumerated, such as those that resulted, under eighteenth-century views, from the preambular statement of the Government's general objects. This, the Federalists maintained, was what this clause had been intended to mean; and they also maintained—or, at any rate, some of them did—that the Common Defense and General Welfare Clause earlier in the same section had been intended as a separate and substantive grant of power to Congress to act for these two great purposes.²⁶

²⁶ Consult the materials cited in P. & C., 193-288 and 241-42. The views against which the opponents of the Federalists argued are often a good indication of what the Federalist views were in cases where the Federalists' views are imperfectly recorded. Compare Thomas Jefferson's and Edmund Randolph's opinions on the Bank, P. & C., 196-97, 206-16, and 248-49.

To the foregoing may be added an interesting statement made by James Madison when he introduced, in Congress, the initial amendments to the Constitution, on June 8, 1789. Madison was meeting the objection, which had been made by some of the writers in the ratification campaign, "that in the Federal Government [a bill of rights was] unnecessary, because the powers [were] enumerated, and it follow[ed] that all that [were] not granted by the Constitution [were] retained." This argument, Madison admitted, was "not entirely without foundation"; yet it was "not," he said, "conclusive to the extent which ha[d] been supposed." "It [was] true, *the powers of the General Government [were] circumscribed, they [were] directed to particular objects.*" But "within those limits," there was, he insisted, the same possibility of abuses such as a bill of rights would forbid, as there was in the case of the states, "because, in the Constitution of the United States there [was]," he said, "a clause granting to Congress the power to make all laws which sh[ould] be necessary and proper for carrying into execution *all the powers vested in the Government of the United States, or in any department or officer thereof.*" "[T]his enables them," he explained, meaning Congress, "to fulfil every purpose for which the Government was established." (Italics added.) And if there can be any doubt as to what Madison meant by the word "purpose," that doubt is allayed by his reference in the next succeeding paragraph to the "securing" of the people's "liberties" "to themselves and [their] posterity" as an "express purpose" for which the "new system" of government was "ordained and established." 1 Annals of Congress 438-39 (1789-90).

In other words, Madison was measuring "the powers of the Government" by the "objects" stated in the Preamble; and he was measuring "the powers of Congress," in their totality, by the fact that that body was expressly empowered to make "all" necessary and proper laws to carry into execution "all the powers vested in the Government." And, hence, his conclusion that Congress was empowered to "fulfil every purpose for which the

When the first Bank of the United States under the Constitution was formed in 1791, the doctrines supportive of the general national lawmaking authority of Congress were apparently the main reliance within Congress itself, in support of the constitutionality of the proposed bank. Edmund Randolph, as Attorney General, in one of the opinions he gave to President Washington, spoke of these views as "the doctrines of the friends of the bill."²⁷ In these circumstances, it is not surprising that these same doctrines were presented to the Supreme Court, in support of the second bank under the Constitution, when, in 1819, its constitutionality was questioned in the case of *McCulloch v. Maryland*.²⁸ The doctrines were presented by one of the great advocates of the time, William Pinkney, of Maryland. After hearing Pinkney's argument, Justice Joseph Story declared that "all the cobwebs of sophistry and metaphysics about State rights and State sovereignty [had been] brushed away [by Pinkney] with," what Story described as "a mighty besom." "[N]ever, in my whole life," said Story, "[have I] heard a greater speech; it was worth a journey from Salem [to Washington] to hear it. . . ."²⁹

What did Pinkney say? We do not know exactly. But we do know he spoke for three days.³⁰ So, what we have in Wheaton's Reports is only a meager outline. The part relating to the old Federalist doctrine of general power begins by pointing out that "all the objects of the government are national objects," and by insisting that "the means [for accomplishing these objects] are, and must be, [such as are] fitted to accomplish them." "These objects," said Pinkney, "are enumerated in the Constitution," whereupon he read the Preamble. "For the attainment of these vast objects," he then went on, "the government is armed with powers and faculties corresponding in magnitude." He next ran over the various Congressional powers enumerated in the Legislative Article, presenting the Common Defense and General Welfare Clause as a separate substantive grant; the commerce power, apparently, as comprehensive; and the "necessary and proper" clause with emphasis upon the fact that it extended to "all the powers of the Government." Then he concluded by castigating those who "doubted [that] a government invested with such immense powers ha[d] authority to erect a corporation within the sphere of

Government was established"; or, in other words, every "purpose," or "object," that the Preamble states.

The foregoing passages corroborate inferences I have elsewhere drawn, on the basis of evidence of other kinds, as to the nature of Madison's real views of the scope of the national powers, in 1789. See P. & C., 406-8 and 688-90. The passages I now cite I somehow overlooked on these earlier occasions.

²⁷ See P. & C., 193-205 and 211.

²⁸ 4 Wheat. (U.S.) 316 (1819).

²⁹ 1 Story, op. cit. supra note 4 at 324-25, cited in 4 Beveridge, op. cit. supra note 1 at 287.

³⁰ Ibid.

its general objects, and in order to accomplish some of those objects!"³¹ As may be perceived, the reliance in this part of Pinkney's argument was primarily upon the objects stated in the Preamble.

Now, what did Chief Justice Marshall have to say about these old Federalist ideas in the Court's opinion? He said nothing about them; he ignored them completely, though there are one or two passages which suggest that he may originally have noticed them favorably before the opinion was seen by his judicial brethren.³² Instead of noticing the old Federalist ideas that Pinkney had urged, Marshall declared, early in the opinion, that "this government is acknowledged by all, to be one of enumerated powers." "The principle, that it can exercise only the powers granted to it, would seem too apparent," he said, "to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, [had] found it necessary to urge. . . ." "[T]hat principle," he flatly declared, "is now universally admitted."³³ Well—at least as we understand this principle today—William Pinkney did not admit it, and there were a good many other men who still did not admit it, at the time when Marshall wrote.³⁴ Yet all the Chief Justice could do for the old ideas Pinkney had urged was to add, in the opinion, that "the question respecting the extent of the powers actually granted," was, of course, "perpetually arising, and w[ould] probably continue to arise, so long as our system sh[ould] exist."³⁵ This, perhaps, could be taken as saving the question of the true interpretation of the Common Defense and General Welfare Clause and, also, of the "Powers of Government" branch of the "necessary and proper" clause, because each of these is, after all, among the enumerated—that is, the "actually granted"—powers of Congress.

I have said that, in 1791, the doctrine of general authority for all the purposes that the Preamble states was the main reliance, in Congress itself, in support of the constitutionality of the first Bank of the United States. This doctrine was not, however, the sole reliance of the friends of the bank bill in Congress. In addition, they relied upon the enumerated fiscal powers, especially in the light of the "necessary and proper" clause, as being themselves sufficient to warrant the proposed enactment. And there was reliance, also, upon Congress' power to regulate commerce as likewise sufficient in itself to warrant the intended act of incorporation.³⁶ In the opinion that Alexander

³¹ 4 Wheat. (U.S.) 316, 381-82 (1819).

³² See the second paragraph beginning on p. 406 of the opinion and the first paragraph beginning on p. 421 thereof.

³³ 4 Wheat. (U.S.) 316, 404 (1819).

³⁴ Consult the debates in Congress cited in P. & C., 234-35 and 240-42.

³⁵ *McCulloch v. Maryland*, 4 Wheat. (U.S.) 316, 404 (1819).

³⁶ Consult P. & C., 196-205. The only extant report of the debates in the House of Representatives (2 *Annals of Congress* 1894 [1790]) is very incomplete and imperfect. The inference of great incompleteness arises, in part from the disparity between the total vol-

Hamilton a little later gave to President Washington, the reliance was also upon the commerce power and the fiscal powers to support the act. The general authority of the government, Hamilton, unlike the men in Congress, did not discuss.³⁷

It has often been said that John Marshall's opinion in *McCulloch v. Maryland* is little more than a repetition of the opinion that Hamilton gave to President Washington in 1791. There are undoubtedly resemblances between these two opinions, as, indeed, there could hardly fail to be. But there are differences, also; and the differences indicate, I think, that John Marshall, in 1819, was already having trouble getting some of his Court to agree to another of the old Federalist views of the Constitution; the view, that is, that the commerce power of Congress is comprehensive.³⁸

Now, the mere fact that there was reliance upon the commerce power by Hamilton, and by the men in Congress, in support of the constitutionality of the Bank, is, in itself, a sure indication of how these old Federalists understood this particular Congressional power. For to be relevant to the subject and ground the conclusion that these men drew, the power had to be understood as complete. Had it, instead, been taken as subject to an interstate limitation, the conclusion they drew would not have followed; for the Bank, it must be remembered, was being incorporated to carry on its business not only in foreign and interstate commerce, but in intrastate commerce as well.³⁹

Examination of Hamilton's opinion will show that he developed his argument based on the commerce power, and relied upon it as sufficient to support

ume of the recorded debates, and the time known to have been consumed in them. Besides this, the recorded speeches, as well as the opinions later rendered to President Washington by Edmund Randolph and Thomas Jefferson, contain references to arguments not found in the recorded speeches. There are references, even, to whole speeches that are not recorded. And, finally, there is a want of fullness and logical coherence, in developing various doctrines in the recorded speeches, which indicates fragmentary and garbled reporting. A brief example will make clear what is meant. James Jackson, of Georgia, denying the adequacy of the commerce power, is recorded to have said: "The power to regulate trade is said to involve this [incorporating power] as a necessary means; but the powers consequent on this express power are specified, such as regulating light houses, ships, harbors, &c." 2 Annals of Congress 1917 (1834). There are, of course, no "specified" powers over "light houses, ships, [or] harbors" in the Constitution. What Jackson said, or meant, is thus completely obscure.

³⁷ 3 The Works of Alexander Hamilton 445-93 (Federal ed., 1904); cf., P. & C., 216-28.

³⁸ On this general subject, see P. & C., 17-292.

³⁹ I am aware that there are some passages in Hamilton's opinion on the Bank which, isolatedly considered, might be taken by a modern reader as evidence that he understood the commerce power as subject to an interstate limitation; but, as I have elsewhere shown, these passages arose out of certain peculiarities of eighteenth-century speech. See P. & C., 218-28. Consult also *The Federalist*, No. VI, and index thereof, where, under the general head of "Dissensions"—or "War"—"between the States," Hamilton listed and discussed Shays' Rebellion, an insurrection entirely internal to Massachusetts, and, likewise, the subject of intrastate tranquility generally.

his conclusion, quite as much as he did his argument based on Congress' fiscal powers. Chief Justice Marshall followed Hamilton, in *McCulloch v. Maryland*, to the extent of citing Congress' "power to regulate commerce" as amongst the powers that were relevant to the case;⁴⁰ but the Chief Justice went no further. In the actual discussion in the opinion, the reliance is wholly upon Congress' fiscal powers; and today, after more than a century's acceptance of the interstate theory of the commerce power, the very fact that Marshall cited this power as relevant in *McCulloch v. Maryland* is generally forgotten. The accepted doctrine is that Congress' power to incorporate national banks depends upon its fiscal powers alone.

Now, to have grounded the conclusion in *McCulloch v. Maryland*, not only upon the fiscal powers of Congress, but, alternatively, upon its commerce power, would have been to make the case a far, far broader precedent in favor of Congressional power than the case, as it was decided, actually was. For to have put the case upon this alternative ground would have been to recognize that Congress' power to regulate commerce was complete: that Congress could regulate all domestic as well as all foreign commerce. The situation in the *McCulloch* case was this: The Bank of the United States there involved was not the old Federalist bank incorporated in 1791; it was a newer bank created by a Jeffersonian Congress, and approved by the second Jeffersonian President, James Madison, in 1816. The Jeffersonian majority on Marshall's Court were apparently willing to uphold this act of their own party; but, equally apparently, they wished to do this on the narrowest possible ground. So, the decision was put on the fiscal powers only, and the relevancy of the commerce power was not developed in the case. Again, then, it can be seen, a doctrine that the old Federalists had considered relevant to Congress' incorporating a bank was excluded from the *McCulloch* case, rather than read into this famous Marshall opinion.

The Chief Justice's citation of the commerce power suggests, nevertheless, that its relevancy may have been developed and relied upon in some earlier version of the opinion. Whether this actually happened or not, the citation certainly seems to indicate that Marshall, himself, like Hamilton and other Federalists in 1791, considered the commerce power to be relevant; and, for reasons I have already assigned, this means that he must have regarded it as a complete power over the subject: a power to regulate all domestic as well as all foreign commerce. This surmise is borne out by what Marshall had to say about this power, two years later, in *Cohens v. Virginia*. It was in the famous passage that begins: "[T]he United States form, for many, and for most important purposes, a single nation. . . ." "In war," Marshall went on, "we are one people. In making peace, we are one people." And then, finally, he declared that, "in all commercial regulations, we are one and the same

⁴⁰ 4 Wheat. (U.S.) 316, 406 (1819).

people." "[F]or all these purposes, [America's] government," he said, "is complete; to all these objects, it is competent."⁴¹

Now, I do not see how it is possible to read these statements from the *Cohens* case as other than a plain recognition by Chief Justice Marshall that the power of Congress to regulate commerce was a complete power: that it extended to all domestic as well as all foreign commerce. The language Marshall used is totally irreconcilable with the view that he thought the power one to regulate foreign and interstate commerce only. How Marshall was able to get these statements approved by his judicial brethren in the *Cohens* case, I do not know; but the statements are there, and their meaning seems plain. So, we may take it that John Marshall, in 1821, took the same view of the national commerce power that Alexander Hamilton and other Federalists had taken in the early 1790's.

This view, I might add, was also the view taken by the majority of the men in Congress, in the 1820's.⁴² It seems, however, not to have been the view of the Jeffersonian majority on Marshall's Court. For, when the famous New York steamboat monopoly case of *Gibbons v. Ogden* was decided in 1824, Marshall receded from the position he had taken, three years earlier, in *Cohens v. Virginia*. In the *Gibbons* case, Marshall no longer maintained that the United States were a single nation as to "all commercial regulations." Instead, though referring to the language of the Constitution as "comprehensive," he declared that the power it gave might, nevertheless, "very properly be restricted to that commerce which concerns more States than one." Once again, then, we have a failure, on John Marshall's part, to read into one of his Court's decisions what it is clear was his own and an old Federalist view of the Constitution.⁴³

But although that fact is certain, it is a mistake to suppose, as is frequently done, that, in the *Gibbons* case, Marshall interpreted the commerce power in the meager dimensions in which that power existed during the major part of our subsequent history. In other words, it is a mistake to suppose that John Marshall, in the *Gibbons* case, interpreted Congress' internal power over commerce as a power to regulate interstate commerce only. The Chief Justice said that the power was being restricted to "that commerce which concerns more States than one"; and what he meant by these words, his opinion makes abundantly clear. He meant by them all commerce of a domestic kind that was of interest, or importance, to more than a single state; and he meant this, whether the particular commerce was interstate or not. Marshall said, moreover, that, with respect to all such commerce, Congress' power was "plenary"—"as absolut[e]," he declared, "as [a commerce power] would

⁴¹ 6 Wheat. (U.S.) 264, 412-14 (1821).

⁴² Consult the debates in Congress cited in P. & C., 240-50.

⁴³ 9 Wheat. (U.S.) 1, 194 (1824).

be in a single government. . . ." And whenever Congress acted under this great power, any conflicting state law must yield, whether the law in question was one for the regulation of a state's own purely domestic commerce or one for the regulation of its system of internal police.⁴⁴

That *Gibbons v. Ogden* was not contemporaneously understood as adopting the interstate theory of the commerce power is shown, moreover, by what happened in the following year, in the state of New York. The interstate theory was not then entirely unknown. It had been thought up, somewhat earlier, by lawyers for the New York steamboat monopoly and had been applied by the highest court of the state, in 1812, to uphold the monopoly as between citizens of the state, in respect to traffic between the New York cities of New York and Albany. This was in the case of *Livingston v. Van Ingen*, a case which, because the defendants were bought off by the successful plaintiffs, was not appealed to the Supreme Court of the United States.⁴⁵ *Gibbons v. Ogden*, though not actually adopting the interstate theory, had involved steamboat movements only between New York and New Jersey. The decision, then, left technically open the question whether the New York monopoly law was still good with respect to movements such as had been involved in the *Van Ingen* case; that is, with respect to movements wholly within the state. A case was accordingly begun in the New York courts, a few weeks after the *Gibbons* decision, to settle this question. Under the title of *North River Steamboat Company v. Livingston*, the case was carried to the highest court of the state, in 1825. The New York court thereupon overruled the interstate doctrine of its earlier decision and, on the authority of the *Gibbons* case, brought the New York steamboat monopoly completely to an end, both in intrastate and interstate commerce.⁴⁶

Now, it is needless to say that the New York court would never have taken such action had it understood the Supreme Court's decision of the preceding year as one adopting the interstate theory of the commerce power.⁴⁷ But if the interstate theory did not originate in *Gibbons v. Ogden*, you may well ask how, and when, the theory did originate. The answer is that the theory was read into John Marshall's decision in the *Gibbons* case by his Jacksonian successor, Roger Brooke Taney. Marshall's doctrine of plenary national supremacy, which he had announced so clearly in the *Gibbons* case, was overturned, within two years of his death, by the Jacksonian Court. This occurred

⁴⁴ 9 Wheat. (U.S.) 1, 197, 209-10 (1824). Consult the discussion of this case in P. & C., 250-92.

⁴⁵ 9 Johns. (N.Y.) 507 (1812). Consult P. & C., 231-34.

⁴⁶ 1 Hopk. (N.Y. Ch.) 151 (1824); S.C. 3 Cow. (N.Y.) 711 (1825); consult the discussion in P. & C., 268-80.

⁴⁷ For further evidence that *Gibbons v. Ogden* was not contemporaneously understood as adopting the interstate theory of the national power, see P. & C., 280-87.

in *New York v. Miln*, in 1837, when it was indicated by the Court that the whole field of internal police was free of the national supremacy.⁴⁸ Ten years later, Chief Justice Taney blew this unwarranted concept up to include the regulation of all intrastate commerce. He did this in his oft-quoted definition of the states' police powers, in the *License Cases*, of 1847.

"[T]he police power of a State," said Chief Justice Taney, is "the power of sovereignty, the power to govern men and things within the limits of [a state's] dominion." And, then, in specific reference to the subject of commerce, he added that "[e]very State [might] regulate its own internal traffic, according to its own judgment," and "free," he declared, "from any controlling power on the part of the general government." He was "not aware," he added, "that these principles ha[d] ever been questioned."⁴⁹ One might suppose from this statement that Chief Justice Taney had never read *Gibbons v. Ogden*; but his own memories went back to the founding of the Government, and we may feel quite sure he knew exactly what he was about. His statements, at any rate, constitute, I believe, the earliest evidence of adherence to the interstate theory of the commerce power to be found in the Supreme Court's reports. The theory was not actually applied against Congress until 1869.⁵⁰

One more matter, and I shall have done. This one other matter is the intended place of the Supreme Court of the United States in the country's juridical system, and what happened to the Court's intended position in that system during John Marshall's tenure of office. The original intention was that the Court should be the general juridical head of the country, with a supreme appellate jurisdiction over all other courts, state and national, with respect to all kinds of law. A contemporary, Judge Charles Huston, of Pennsylvania, said, in 1836, that this view of the Court's position had been "a general opinion among lawyers and judges" when the Government first was formed.⁵¹ There is abundant evidence to show that Judge Huston was correct; and among the lawyers adhering to this view in the early years was John Marshall, then a practitioner in Virginia.⁵²

As is well known, Marshall, along with his brother, James, and his brother-in-law, Rawleigh Colston, agreed, in 1793, to purchase the huge Fairfax estate in Virginia, from its English owner, Denny Martin Fairfax. The difficulty was that the three would-be purchasers lacked the necessary funds, and Fairfax, who was then sixty-eight years old and had been trying vainly for ten years to get something out of his Virginian inheritance, wanted to be paid the

⁴⁸ 11 Pet. (U.S.) 102, 138 (1837).

⁴⁹ 5 How. (U.S.) 504, 574, 582 (1847).

⁵⁰ *United States v. DeWitt*, 9 Wall. (U.S.) 41 (1869).

⁵¹ *Barnes v. Irvine*, 5 Watts (Pa.) 557, 558 (1836).

⁵² On this general subject, consult P. & C., chaps. xviii-xxi and xxiii-xxvi.

money. This necessitated borrowing by the Marshall group; and this, in turn, necessitated settling the title to the estate in question. What John Marshall did, as Fairfax's lawyer, to settle this title, along with the nature of the questions that the title involved, demonstrates beyond any question what view Marshall took, in the middle 1790's, of the Supreme Court's intended powers and position, in the country's juridical system.

The title to the Fairfax estate depended upon the favorable settlement of a number of different legal questions. Some of these were questions of common law; some others were questions of Virginia state statutory law; and some were questions under treaties of the United States. The important point is that *all* these points had to be settled favorably to Fairfax to clear up the title. For this purpose, accordingly, John Marshall, in 1795, began an action in ejectment in the United States circuit court, in Virginia, with respect to a plot of some 700 acres of the Fairfax estate; and this case was carried to the Supreme Court of the United States, in the following year, for final decision *to settle the title to the whole*.

Now, it is elementary law that the decision in an action of ejectment did not, as a judgment, settle the title even to the land to which the action related, and still less, of course, did it settle the title, as a judgment, to land which was not the subject of the action, at all. There was, then, only one way in which the Supreme Court's decision of the case appealed to it in 1796 could have settled the title, either to the 700 acres to which the action related, or to all the remainder of the huge Fairfax estate: the Supreme Court's decision could have settled that title only as a supreme and binding judicial precedent upon all the points of law, state, common, and national, upon which the title depended. And the Court's decision, as such a precedent, could have settled the title, only if it was binding on all courts, state and national alike, with respect to every question of law that the title involved. The particular case was never decided, but eventually dismissed because of a partial compromise, entered into, in 1796-97, between the state of Virginia and the Fairfax claimants. It is nevertheless clear, from John Marshall's behavior in bringing the action and pressing the appeal, that, in the middle 1790's, he believed the Supreme Court of the United States to be the highest court in the country on questions of all kinds of law.⁵³

This inference as to Marshall's opinion upon this subject is confirmed by his later behavior, as Chief Justice, in deciding the case of *Huidekoper's Lessee v. Douglass*, in 1805, in the Supreme Court of the United States.⁵⁴ The *Huidekoper* case was another action of ejectment brought to settle the title to certain lands by getting a supreme legal precedent upon the point of

⁵³ On this general subject, see P. & C., ch. xxiv, §§ 3 and 4. The case referred to in the text is dealt with at pp. 789-93.

⁵⁴ 3 Cranch (U.S.) 1 (1805).

law on which the title depended. The title to the lands, which lay in Pennsylvania, depended upon the meaning of an act of the Pennsylvania legislature of the 3rd of April 1792. The Pennsylvania state courts had twice interpreted this statute unfavorably to the claim of the plaintiff in the *Huidekoper* case, before that action had even been started. Marshall and his Court nevertheless decided the same point in favor of the plaintiff in the case in question. Now, it is important to understand that Marshall and his Court could not possibly have been ignorant of the purpose of the *Huidekoper* litigation, for the use of ejectment actions to settle land titles in the manner I have described was a common practice among lawyers of the period.⁵⁵ Marshall and his Court must, then, have thought that they had power to settle the title in the case before them by settling the meaning of the Pennsylvania statute upon which the title depended. Any other view would make their disregard of the Pennsylvania precedents frivolous in an extreme degree.⁵⁶

The Court of 1805 still had, to be sure, a majority of Federalists upon it. So, the question remains of what happened to this old Federalist doctrine of the Court's general juridical supremacy after the Supreme Court fell under Jeffersonian domination in 1812. The answer is that the doctrine at first fared surprisingly well. Thus, in 1813, in another case carried to the Supreme Court to settle the Fairfax title, the Court—minus Chief Justice Marshall of course—decided all the points involved in the title, whether of common law, state law, or national law, in exactly the way John Marshall had hoped the Court would do in the case of 1796.⁵⁷ This later case, moreover, was appealed to the Supreme Court from the state courts, not the national courts, of Virginia; and when the Virginia state court, in 1815, attacked the Supreme Court's decision as unconstitutional, that body, upon a second appeal to it, in 1816, vindicated its earlier action, and, consequently, its claim to the general juridical headship of the country, completely.

This was in the famous case of *Martin v. Hunter's Lessee*, Justice Joseph Story speaking for the Court.⁵⁸ That case, I am aware, is today usually taken as a claim of judicial supremacy merely as to so-called "federal questions"; that is, as to questions of the meaning of the Constitution, statutes, and treaties, of the United States. The case, in fact, was much more than this, as, I am confident, any lawyer will agree who will take the trouble to read the case in context with the earlier phases of the *Fairfax* litigation; that is,

⁵⁵ Cf. the statement of Chief Justice Oliver Ellsworth, in *Sims v. Irvine*, 3 Dall. (U.S.) 425 (1799), another ejectment action intended to settle a land title under state law, that "the case ha[d] been brought here"—that is, to the Supreme Court of the United States—"to settle the title."

⁵⁶ For a full consideration of the *Huidekoper* case, see P. & C., ch. xxiii, § 4.

⁵⁷ *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch (U.S.) 603 (1813). See P. & C., ch. xxiv, § 3.

⁵⁸ 1 Wheat. (U.S.) 304 (1816). Consult P. & C., ch. xxiv, § 4.

in context with the two opinions in the Virginia court and the earlier Supreme Court decision, of 1813, which the *Martin* opinion was written to vindicate.⁵⁹ The case, in view of the land title it was intended to settle and the earlier decision it was meant to vindicate, was necessarily a claim of judicial supremacy over the Virginia court as to questions of all kinds of law whatsoever.

The principles of the *Martin* case were a second time affirmed in *Cohens v. Virginia*, in 1821.⁶⁰ The Virginia court, nevertheless, never acknowledged these principles, though it did contrive to avoid a clash with the Supreme Court on any of the involved points of law; and the Marshalls kept their lands. A somewhat similar policy was followed with respect to the *Huidekoper* decision by the Supreme Court of Pennsylvania. Then, in the middle 1820's, the Supreme Court of the United States began to weaken; and in a series of decisions culminating in *Wheaton v. Peters*, in 1834,⁶¹ the Supreme Court abdicated its supremacy over the state courts completely, with respect to all questions of state law and common law. At the time, indeed, it seemed as if the Court were abdicating its right, even, of independent decision with respect to all such questions. So, John Marshall, at the very close of his career, was obliged to witness, once more, an extensive denial, by his Court, of principles in which, we have seen, he firmly believed, and which, furthermore, he must have known were the views of the Federalist founders of the Government.

It would be possible to add to the foregoing instances; but enough has been said, I hope, to convince you that the usual view of John Marshall's career is hardly tenable. John Marshall did not carry on a continual frontal assault, uniformly successful, upon the subversive principles of Jeffersonism. Instead, he fought a long and stubborn rearguard action to defend the Constitution against those principles. And it was, on the whole, a losing fight. Time after time, during his long career, Marshall was forced into compromise or defeat; and the result was a pretty complete transformation of the Constitution by the date of his death.

No one, it may be added, was more aware of what was going on than John Marshall. As his biographer has shown from the letters of his closing years, Marshall died almost in despair of the future of the Union. He was convinced that the South—and his own state of Virginia, in particular—were

⁵⁹ That is, in order: *Hunter v. Fairfax's Devisee*, 1 Muf. (Va.) 218 (1810); *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch (U.S.) 603 (1813); *Hunter v. Martin*, 4 Muf. (Va.) 1 (1815); and *Martin v. Hunter's Lessee*, 1 Wheat. (U.S.) 304 (1816). Consult P. & C., ch. xxiv, §§ 3 and 4.

⁶⁰ 6 Wheat. (U.S.) 264 (1821).

⁶¹ The important members of the series were: *Jackson ex dem. St. John v. Chew*, 12 Wheat. (U.S.) 153 (1827); *Green v. Neal's Lessee* 6 Pet. (U.S.) 291 (1832); and *Wheaton v. Peters*, 8 Pet. (U.S.) 591 (1834). For a full discussion, consult P. & C., ch. xxv.

determined to convert the Union into a loose confederation.⁶² And that he was not far wrong is shown by the action I have already noted of the southern-dominated Taney court that came into power upon Marshall's death, in 1835. Its initial action in substituting the principle of the inviolability of the states' police powers, for Marshall's principle of plenary national supremacy, was greeted, by one of the nationalists of the time, as a return to the principles of the Articles of Confederation.⁶³ Such, there can be no doubt, it truly was, especially after the concept of state police power was blown up to include the regulation of all intrastate commerce, as it was in the *License Cases*, of 1847.⁶⁴

These two principles—the interstate theory of Congress' power over commerce and the inviolability of the police powers of the states—were certainly basic to our constitutional law until times very recent; and these principles derived, not from the decisions of John Marshall, but from unjustified glosses upon his decisions by Roger Brooke Taney and the Jacksonian Court that came into power upon Marshall's death. So far, moreover, as our constitutional law actually has been based on Marshall's decisions, it has involved much more of Jeffersonism than of Federalism; much more of the views of Marshall's associates on the Court than of Marshall's own ideas. And the fragments of Federalism that did survive in the Marshall decisions represented, in the main, no more than what Marshall's associates felt compelled to agree to, in order to reach results that they desired to reach on other grounds. In saying these things, I do not mean to imply that John Marshall had no victories at all, for this would not be true; but I do mean to say that, on the great fundamental theses of Federalism—the theses that went to the very character of the government—the theses that I have here reviewed—John Marshall was defeated, either by his own Court or by the Taney Court that succeeded him.

Does this conclusion, then, impugn Marshall's claim to greatness? I can only say that, so far as I am concerned, I do not think it does. A man may be great in tragedy as well as triumph, in defeat as well as victory. And since there was, it seems to me, much more of tragedy and defeat, than of triumph and victory, in John Marshall's career as defender of the Constitution, we must, I think, revise our estimate of the nature of his career to see him as he truly was. His greatness, clearly, was not that of triumphant victory. It was a greatness that consisted in devoting half a lifetime to a cause in which he profoundly believed; in faithful service to that cause in the face

⁶² 4 Beveridge, *op. cit. supra* note 1, ch. x; esp. pp. 575-78.

⁶³ 46 *The North American Review*, 126, 154 (1838). The commentator was said to be Henry Wheaton.

⁶⁴ *New York v. Miln*, 11 Pet. (U.S.) 102 (1837); *License Cases*, 5 How. (U.S.) 504 (1847).

of overwhelming odds; in unflagging courage in the face of those odds, and in the face of constantly recurring defeats. There can be no doubt, moreover, that John Marshall, in spite of the conditions in which he worked, accomplished much in the way of minimizing damage; that it was, indeed, a "fortunate" thing, as Oliver Wendell Holmes observed, in 1901, that it fell to Marshall, and not an appointee of Thomas Jefferson, to serve, in the critical early years of the nineteenth century, as Chief Justice of the United States. This circumstance, I think, probably saved the Union.

So, although I take a very different view of Marshall's work than is usually taken, he still remains to me "the great Chief Justice." There is not one of his predecessors, not one of those who succeeded him, that I should think, for a moment, of nominating in his place.