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The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835

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This article is the third installment of an attempt to analyze and criticize the constitutional work of the Supreme Court in historical sequence, from the lawyer's point of view.¹

In the twelve years of its existence before the appointment of John Marshall as Chief Justice, the Supreme Court began to develop lasting principles of constitutional adjudication, but it decided few significant constitutional questions. In the first decade of Marshall's tenure, apart from *Marbury v. Madison*,² the Court's constitutional docket consisted almost entirely of relatively minor matters respecting the powers of the federal courts. Although im-

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¹ See Currie, *The Constitution in the Supreme Court: 1789-1801*, 48 U. CHI. L. REV. 819 (1981) [hereinafter cited as Currie, *Supreme Court, 1789-1801*]; Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646 (1982) [hereinafter cited as Currie, *Federal Courts, 1801-1835*]. These articles form the beginning of a study to be published in book form by The University of Chicago Press.

² 5 U.S. (1 Cranch) 137 (1803).

portant issues of federal jurisdiction confronted the Justices until Marshall's death in 1835, after 1810 the constitutional docket was dominated for the first time by cases raising important substantive issues respecting state and congressional powers: *Fletcher v. Peck*,³ *McCulloch v. Maryland*,⁴ *Gibbons v. Ogden*,⁵ *Brown v. Maryland*,⁶ *Trustees of Dartmouth College v. Woodward*,⁷ and many others. These decisions are the subject of the present article.

With the replacement of the old Federalists William Cushing and Samuel Chase by Gabriel Duvall and Joseph Story in 1811, the Court consisted of two Justices appointed by President Adams—Marshall and Bushrod Washington—and five appointed by Presidents Jefferson and Madison—William Johnson, Brockholst Livingston, Thomas Todd, Duvall, and Story. These seven men were to sit together until 1823.⁸ As on jurisdictional issues,⁹ they were to speak with remarkable unanimity on other constitutional questions, and usually through the medium of Marshall himself. Major differences of opinion first surfaced in *Ogden v. Saunders*¹⁰ in 1827; they became increasingly frequent as Marshall's earlier colleagues were supplanted by Smith Thompson, Robert Trimble, John McLean, and Henry Baldwin,¹¹ and at the end of the Marshall period three important constitutional cases had to be put off until the Taney period¹² because the illness of Duvall and Johnson prevented any decision from commanding a majority of the whole Court.¹³

³ 10 U.S. (6 Cranch) 87 (1810).

⁴ 17 U.S. (4 Wheat.) 316 (1819).

⁵ 22 U.S. (9 Wheat.) 1 (1824).

⁶ 25 U.S. (12 Wheat.) 419 (1827).

⁷ 17 U.S. (4 Wheat.) 518 (1819).

⁸ The terms of the Justices as well as their political party affiliations and the names of the Presidents who appointed them are given in G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* app. A, at A-1 to A-2 (10th ed. 1980). The terms of the Justices of the Marshall era are presented graphically in Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 649 n.26.

⁹ See generally Currie, *Federal Courts, 1801-1835*, *supra* note 1.

¹⁰ 25 U.S. (12 Wheat.) 213 (1827).

¹¹ For a chronology of the Justices, see sources cited *supra* note 8. James Wayne sat with Marshall during the Chief Justice's last term in 1835, see 34 U.S. (9 Pet.) v (1835), but the Court was shorthanded that year and decided no constitutional cases, see *infra* note 13.

¹² Appointed by President Jackson in 1836, Roger Taney remained Chief Justice until his death in 1864. See G. GUNTHER, *supra* note 8, app. A, at A-2.

¹³ *Briscoe v. Commonwealth's Bank*, 33 U.S. (8 Pet.) 118, 122 (1834) (also withholding judgment in *Mayor of New York v. Miln*) ("The practice of this court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in opinion, thus making the decision that of a majority of the whole court." *Id.*). Story and Charles Warren reported, without citation, that the

Many of the decisions of this period are household words. Written criticism of the opinion-writing techniques they reflect, however, is surprisingly rare; it is to that agreeable task that I now turn.

I. THE CONTRACT CLAUSE AND NATURAL LAW

The first set of substantive constitutional questions to command the serious attention of the Marshall Court, and the largest single group of cases presenting such questions during the entire Marshall period, were those under the clause of article I, section 10, forbidding the states to pass any "Law impairing the Obligation of Contracts."¹⁴ While various Justices had made earlier suggestions about the meaning of this clause as an aid in construing other constitutional provisions,¹⁵ the first case to confront the Court with the clause itself was *Fletcher v. Peck*¹⁶ in 1810.

A. *Fletcher v. Peck*

In 1795 the Georgia legislature evidently was bribed to enact a statute directing the Governor to convey most of what is now Alabama and Mississippi for less than two cents an acre. The next year a new legislature irately repealed the grant. Peck later acquired some of these so-called "Yazoo" lands and deeded them to Fletcher with covenants of good title. Fletcher sued in federal court for breach of covenant, arguing that the original sale was invalid or had been lawfully rescinded. The Supreme Court rejected

same was true of the *Charles River Bridge* case. *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 583-84 (1837) (Story, J., dissenting); 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 790 (rev. ed. 1926).

According to Marshall's biographer, "Thompson, McLean, and Baldwin thought the [*Briscoe*] and [*Miln*] laws Constitutional; Marshall, Story, Duval [sic] and Johnson believed them invalid." 4 A. BEVERIDGE, *LIFE OF JOHN MARSHALL* 583 (1919) (citing no authority). Marshall optimistically directed reargument at the 1835 Term "under the expectation that a larger number of the judges may then be present," *Briscoe*, 33 U.S. (8 Pet.) at 122, but Johnson died and Duvall resigned, see 34 U.S. (9 Pet.) v (1835). Though the former was replaced by James Wayne, the Court refused to decide the cases until the second vacancy was filled. 34 U.S. (9 Pet.) 85 (1835). The cases were finally decided in 1837. *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257 (1837); *New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837); *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

¹⁴ U.S. CONST. art. I, § 10, para. 1.

¹⁵ *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (separate opinion of Chase, J.) (construing the ex post facto clause of U.S. CONST. art. I, § 10, para. 1); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 465-66 (1793) (separate opinion of Wilson, J.) (interpreting U.S. CONST. art. III, § 2).

¹⁶ 10 U.S. (6 Cranch) 87 (1810).

both contentions.¹⁷

The interesting objection to the initial grant was that it was vitiated by the alleged bribery.¹⁸ Whether a court could ever set aside a law on this ground, Marshall wrote, "may well be doubted," and there would be "much difficulty" in administering any such rule: "Must it be direct corruption? or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority? or on what number of the members?"¹⁹ The question "how far the validity of a law depends upon the motives of its framers,"²⁰ as Marshall put it, was to be a pervasive one for the Court, transcending the bribery question and not susceptible to a simple answer.²¹ It seems clear in *Fletcher* that there was nothing in the *federal* Constitution to make bribery a basis for striking down state legislation. Although such a limit might conceivably have been implicit in the *Georgia* constitution, Marshall made no attempt to tie the argument to that document, and he already had said the conveyance satisfied the state constitution.²²

Marshall found it unnecessary to decide, however, whether bribery might invalidate the law; the state was not a party, and to decide "collaterally and incidentally" a "solemn question . . . respecting the corruption of the sovereign power of a state" would be "indecent, in the extreme."²³ The Court did not use the modern term "standing," but in effect it denied standing to assert the right

¹⁷ *Id.* at 134, 139. For the interesting background of the litigation, see 3 A. BEVERIDGE, *supra* note 13, at 546-602; G. HASKINS & H. JOHNSON, 2 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 336-53 (1981); 1 C. WARREN, *supra* note 13, at 392-99; and especially C. MAGRATH, YAZOO *passim* (1966).

¹⁸ *Fletcher*, 10 U.S. (6 Cranch) at 129.

¹⁹ *Id.* at 130. Justice Johnson in his separate opinion was even more emphatic, not only pointing to "insuperable difficulties" but terming the suggested inquiry an "absurdity" and concluding in circular fashion that legislative acts "must be considered pure . . . because there is no power that can declare them otherwise." *Id.* at 144.

²⁰ *Id.* at 130.

²¹ See, e.g., *Washington v. Davis*, 426 U.S. 229, 239-45 (1976) (equal protection violation requires a showing of racially discriminatory purpose); *United States v. Darby*, 312 U.S. 100, 114 (1941) (regulation of interstate commerce "not a forbidden invasion of state power merely because . . . its motive . . . is to restrict the use of articles of commerce within the states of destination"); see also *infra* notes 330-37 and accompanying text (discussing the "pretext" passage in *McCulloch v. Maryland*).

²² *Fletcher*, 10 U.S. (6 Cranch) at 128-29. He concluded, moreover, by holding that Georgia had owned the disputed lands despite their reservation for the use of the Indians in a royal proclamation of 1763. *Id.* at 139-43. Justice Johnson dissented from this conclusion. *Id.* at 145-47.

²³ *Id.* at 130-31. Elsewhere the Court suggested that bribery or fraud would be no basis for invalidating the claim of a later bona fide purchaser at common law, *id.* at 133-34, but this was not the expressed reason for refusing to determine whether the sale was invalid.

of a third party.²⁴ Possibly in so doing the Court was influenced by the fear that this was, as Justice Johnson suggested, "a mere feigned case."²⁵ Today the Court would dismiss a collusive suit for want of a case or controversy,²⁶ but collusion is hard to establish. The danger that it may pass undetected may support the prophylactic decision not to allow litigation of the rights of third parties, though that is not an inflexible rule today.²⁷

²⁴ Cf. *Warth v. Seldin*, 422 U.S. 490, 502 (1975) (taxpayers may not assert rights of victims of exclusionary zoning); *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (physician lacks standing to assert patient's due process claims). Indeed just the year before *Fletcher* the Court had refused to allow a litigant to argue the treaty rights of others. *Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 347 (1809). Nevertheless, *Fletcher* did decide on the merits that Georgia had no power to rescind the grant. *Fletcher*, 10 U.S. (6 Cranch) at 139; see *infra* notes 28-34 and accompanying text. Its reluctance to pass on the rights of the absent state was, without much explanation, confined to the bribery question.

²⁵ *Fletcher*, 10 U.S. (6 Cranch) at 147. John Quincy Adams, who had argued for Peck, reported that both Marshall and Livingston had privately expressed "the reluctance of the Court to decide the case at all, as it appeared manifestly made up for the purpose of getting the Court's judgment." 1 MEMOIRS OF JOHN QUINCY ADAMS 546 (C. Adams ed. 1874), quoted in 1 C. WARREN, *supra* note 13, at 395. Marshall reportedly said from the bench that the pleadings revealed "that at the time when the covenants were made the parties had notice of the acts covenanted against." 1 MEMOIRS OF JOHN QUINCY ADAMS, *supra*, at 547, quoted in C. MAGRATH, *supra*, note 17, at 66. If Cranch's report is anywhere near complete, Luther Martin's argument for *Fletcher* overlooked the two most important issues in the case. See 10 U.S. (6 Cranch) at 115, 124-25; C. MAGRATH, *supra* note 17, at 69 (explaining that Martin "was so drunk during its presentation that Marshall had the Court adjourn until the counsel regained his sobriety"). After the defendant lost in the Supreme Court on a technicality, *Fletcher*, 10 U.S. (6 Cranch) at 125-27, the plaintiff agreed to allow him to amend his pleadings, *id.* at 127, and the case was reconsidered. See also G. HASKINS & H. JOHNSON, *supra* note 17, at 344-45, adding that the amount in controversy originally stated in the complaint had been subsequently altered to conform with statutory minima, but arguing that the suit was not improper because such actions were and still are "an appropriate method of removing clouds on land titles."

With what has been variously characterized as naiveté, *id.* at 344, and as sarcasm, G. DUNNE, *JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT* 75 (1970), Justice Johnson consented to decide the case because of his confidence that "the respectable gentlemen . . . engaged for the parties . . . would never consent to impose a mere feigned case upon this court," *Fletcher*, 10 U.S. (6 Cranch) at 147-48. Marshall's opinion did not mention the problem at all. Beveridge praised the Court for reaching the merits because the times demanded that a message be sent to the states about their federal obligations. He also judged it improper for Johnson to shift responsibility to the attorneys: if not prepared to denounce the case "for what everybody believed it to be, and what it really was," he should have said nothing at all. 3 A. BEVERIDGE, *supra* note 13, at 592-93. Compare the Court's earlier willingness to entertain an apparently collusive controversy over the validity of the federal carriage tax in *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), discussed in Currie, *Supreme Court, 1789-1801*, *supra* note 1, at 853-54.

²⁶ See, e.g., *United States v. Johnson*, 319 U.S. 302, 305 (1943).

²⁷ See, e.g., *Barrows v. Jackson*, 346 U.S. 249, 257 (1953) (seller of home may assert buyer's right to freedom from racial discrimination). Professor Warren viewed the Court's refusal to pass on the bribery question as a significant victory for state rights despite the ultimate invalidation of the repealing act: had the Court ruled otherwise, "a wide door

At the constitutional level the more interesting issue was whether the legislature had power to revoke the grant after it had been made. On this question Marshall's opinion bristles with references suggesting unwritten limitations derived from natural law. He began by invoking "certain great principles of justice, whose authority is universally acknowledged,"²⁸ without relating them to any particular document. After adverting to the traditional equitable rights of bona fide purchasers,²⁹ he stated flatly that "when absolute rights have vested" under a statutory contract, "a repeal of the law cannot divest those rights."³⁰ He went on to say that "[i]t may well be doubted, whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation."³¹ This led him to add that the validity of the repeal "might well be doubted, were Georgia a single sovereign power."³² He concluded that it was the Court's unanimous opinion that "Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States," from revoking its grant.³³ Johnson, concurring specially with respect to the invalidity of the repeal, flatly renounced reliance on the Constitution: "I do it, on a general principle, on the reason and nature of things: a principle which will impose laws even on the Deity."³⁴

All of this is reminiscent of Justice Chase's famous dictum in *Calder v. Bull*³⁵ that "[t]here are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power."³⁶ Just what Chase

would have been opened for the attack upon State legislation in countless instances." 1 C. WARREN, *supra* note 13, at 397. See also G. HASKINS & H. JOHNSON, *supra* note 17, at 348, calling the decision on the bribery issue "an important and far-reaching limitation on the power of the judiciary insofar as the separation of powers was concerned" and relating it to an attempt by Marshall "to dissociate law and the Court from politics."

²⁸ *Fletcher*, 10 U.S. (6 Cranch) at 133.

²⁹ *Id.* at 133-35.

³⁰ *Id.* at 135. On the question whether there were any bona fide purchasers, see C. MAGRATH, *supra* note 17, at 16-19. The validity of the repeal was decided on demurrer, however, which assumed such purchasers existed.

³¹ 10 U.S. (6 Cranch) at 135.

³² *Id.* at 136.

³³ *Id.* at 139.

³⁴ *Id.* at 143.

³⁵ 3 U.S. (3 Dall.) 386 (1798).

³⁶ *Id.* at 388. See E. CORWIN, *LIBERTY AGAINST GOVERNMENT* 66 (1948), arguing that the notion of natural law limits on legislative power was embraced "at one time or other by all

meant by that has been disputed.³⁷ Similarly, it is not clear that Marshall meant in *Fletcher* to say the courts could set aside legislation that they found contrary to natural law. The statement that repeal cannot "devest" rights seems to be one of fact rather than of law, for it follows a declaration that legislatures "cannot undo" "an act . . . done" and is followed by the statement that "the act of annulling them, *if legitimate*, is rendered so by a power applicable to the case of every individual in the community."³⁸ For the suggestion that the repeal was of doubtful validity even apart from the federal Constitution, Marshall offered a positivistic explanation:

To the legislature, all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.

It is the peculiar province of the legislature, to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.³⁹

Thus he seems to have been suggesting not that the repeal offended natural law, but that it was not authorized by the grant of legislative power in the Georgia constitution.⁴⁰ Finally, even the ul-

of the leading judges and advocates of the initial period of our constitutional history, an era which closes about 1830."

³⁷ See Currie, *Supreme Court, 1789-1801*, *supra* note 1, at 872 & n.340, and the sources cited therein.

³⁸ 10 U.S. (6 Cranch) at 135 (emphasis added).

³⁹ *Id.* at 136. He had already analogized the legislature's action to a judgment setting aside a fraudulent conveyance and described it as "judging in its own case." *Id.* at 133. This was a sweeping enough suggestion; one of the grounds of decision in *Calder* had been based upon the recognition that in Connecticut, at least, the legislature *did* have authority to perform judicial functions. 3 U.S. (3 Dall.) at 395 (Paterson, J.), 398 (Iredell, J.), 400-01 (Cushing, J.). Marshall made no effort to distinguish the Georgia and Connecticut constitutions. Moreover, it is not clear that the revocation was any less legislative an act than the original grant; it was certainly as "general," and one wonders whether Marshall meant to outlaw all private bills. Yet Marshall put his finger on a limitation of potential significance for the federal Constitution as well: the separate grant of "judicial power" to the courts may imply that there are certain things Congress may not do under its "legislative powers" even though they otherwise constitute, for example, regulations of commerce. See also E. CORWIN, *JOHN MARSHALL AND THE CONSTITUTION* 148 (1919), arguing that a remark of Madison's at the Constitutional Convention indicated an intention to protect against special legislation by Congress.

⁴⁰ Despite a disclaimer of authority in *Calder* to pass on state law questions in reviewing state court decisions, 3 U.S. (3 Dall.) at 392, Chase may have been suggesting the same thing: "it is against all reason and justice, for a people to intrust a legislature with such powers; and therefore, it cannot be presumed that they have done it," *id.* at 388. See also 3

timate declaration of invalidity under "either" the Constitution or "general principles" need not reflect an alternative holding based on natural law. Not only might these "general principles" be those Marshall had suggested should be read into the state constitutional delegation of legislative power; this was also his statement of the "unanimous" opinion of the Court. The reference to "general principles" was necessary to make this statement true of Justice Johnson; it need not imply that other Justices agreed with him.⁴¹

In any event, one clear basis of the *Fletcher* decision, if not the sole basis,⁴² was that the repealing act violated the provision of article I, section 10, that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."⁴³ One problem with this conclusion was that Marshall had just suggested that the act in question was not "legislation," and one ground of decision in *Calder v. Bull* had been that the comparable reference in the same clause to ex post facto "Law[s]"⁴⁴ applied only to "legislative" acts.⁴⁵ The *Fletcher* opinion did not advert to this difficulty.

Marshall did, however, address two important arguments against the applicability of the contract clause. The first question, as he saw it, was whether a "grant" was a "contract."⁴⁶ He concluded that it was: Blackstone had said not all contracts were executory, and the grant "implies a contract" by the grantor "not to reassert" the right conveyed.⁴⁷ Moreover, "[i]t would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected."⁴⁸ Justice Johnson agreed that a grant was a contract but could not agree that it im-

J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1393-1394, at 268-69 (Boston 1833); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-1, at 428 (1978).

⁴¹ See G. DUNNE, *supra* note 25, at 75, terming this sentence evidence of "Marshall's skill in welding essentially divergent views into the 'unanimous opinion of the court'" in light of Johnson's opinion.

⁴² Both Professors Warren and Hale said flatly the repeal act was held unconstitutional on the basis of the contract clause. 1 C. WARREN, *supra* note 13, at 396; Hale, *The Supreme Court and The Contract Clause* (pt. 2), 57 HARV. L. REV. 621, 633-34 (1944). But see L. TRIBE, *supra* note 40, § 8-1, at 429 ("Marshall straddled the fence between pure natural law, implied limitations, and formal interpretation of explicit constitutional commands . . .").

⁴³ U.S. CONST. art. I, § 10, para. 1.

⁴⁴ *Id.*

⁴⁵ *Calder*, 3 U.S. (3 Dall.) at 395 (Paterson, J.), 398 (Iredell, J.), 400-01 (Cushing, J.).

⁴⁶ *Fletcher*, 10 U.S. (6 Cranch) at 136.

⁴⁷ *Id.* at 136-37. Counsel had so argued, *id.* at 123, and so had Hamilton in a legal opinion relating to the same grant 15 years before, see C. MAGRATH, *supra* note 17, at 22; Marshall did not cite Hamilton. For an effort to evaluate Marshall's conclusion in terms of common law and continental use of the terms "contract" and "obligation," see W. HUNTING, THE OBLIGATION OF CONTRACTS CLAUSE OF THE UNITED STATES CONSTITUTION 19-39 (1919).

⁴⁸ *Fletcher*, 10 U.S. (6 Cranch) at 137.

posed any continuing "obligation":⁴⁹ a conveyance "is most generally but the consummation of a contract, is *functus officio* the moment it is executed, and continues afterwards to be nothing more than the evidence that a certain act was done."⁵⁰

Johnson's position is tempting. One dispossessed by his grantor might be expected to sue for ejectment, not for breach of contract.⁵¹ In essence the repealing statute took property from its owners without compensation; Marshall himself had so characterized it in his discussion of limits derived from "the nature of society."⁵² Uncompensated takings were separately prohibited by the fifth amendment,⁵³ which applied only to the federal government, as the Court was soon to hold.⁵⁴ One might infer from this separate treatment that the Framers had embraced the traditional distinction between contract and property,⁵⁵ and that the repealing act in *Fletcher* had not impaired a contractual obligation.⁵⁶

Nevertheless Marshall's conclusion is not without plausibility. Though Marshall cited nothing for his crucial statement that a

⁴⁹ *Id.* at 144.

⁵⁰ *Id.* at 145. Johnson added that he feared the Court's interpretation might preclude the exercise of the power of eminent domain, *id.*, a plausible concern that the Court would later allay, see, e.g., *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 531-34 (1848). Johnson also expressed a more general fear that the decision might unduly interfere with the traditional and "beneficent" powers of the states to "affect[] existing contracts." *Fletcher*, 10 U.S. (6 Cranch) at 145. This concern seems essentially independent of the questions resolved in *Fletcher*; whether or not state grants were protected by the clause, later cases would confirm Johnson's lament, *id.*, that "where to draw the line, or how to define and limit the words, 'obligation of contracts,' will be found a subject of extreme difficulty." See *infra* notes 155-77 and accompanying text (discussing *Sturges v. Crowninshield*).

⁵¹ See Trickett, *Is a Grant a Contract?*, 54 AM. L. REV. 718, 729 (1920), arguing that when A conveys a horse to B "B has no right *in personam* against A, but only the right *in rem*, which is precisely the same as to A, as it is to any other human being." It is noteworthy in light of later decisions that Marshall did not ask whether Georgia law either recognized such a promise or characterized a grant as a contract. See *infra* notes 203-58 and accompanying text (discussing *Ogden v. Saunders*).

⁵² *Fletcher*, 10 U.S. (6 Cranch) at 135-36, quoted *supra* at text accompanying note 31.

⁵³ U.S. CONST. amend. V ("[n]or shall private property be taken for public use, without just compensation").

⁵⁴ *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), discussed *infra* notes 482-507 and accompanying text.

⁵⁵ See, e.g., 2 J. AUSTIN, LECTURES ON JURISPRUDENCE 1006 (3d ed. London 1869) (1st ed. London 1861-63) ("The confusion of *contract* and *conveyance*, by elliptical or improper expression, is one of the greatest obstacles in the way of the student" (emphasis in original)).

⁵⁶ See, e.g., J. SHIRLEY, THE DARTMOUTH COLLEGE CAUSES AND THE SUPREME COURT OF THE UNITED STATES 312-13, 404-10 (1895); Hutchinson, *Laus Impairing the Obligation of Contracts*, 1 S.L. REV. (n.s.) 401, 414-16 (1875), both criticizing this portion of the *Fletcher* decision. To Beveridge, however, the Court followed the Constitution's "plain command." 3 A. BEVERIDGE, *supra* note 13, at 594.

grantor implicitly promised not to retake the property, Coke had said long before that the ordinary words of conveyance implied a warranty of title,⁵⁷ and later commentators have affirmed that such a warranty barred a claim by the grantor himself.⁵⁸ That *Fletcher* makes *some* takings also contract impairments does not mean the taking clause has no independent field of operation; the same authorities tell us the normal warranty in a private deed does not protect against the wrongful act of a third party.⁵⁹ Moreover, Marshall buttressed his conclusion with a strong argument of improbability: the Framers were not fools, and it would make no sense to allow states to undermine the purpose of the clause by requiring restitution after a contract was performed.⁶⁰ This is a respectable means of argument if not carried too far;⁶¹ Marshall had used it most effectively before in *Marbury v. Madison*.⁶² But the application of this reasoning in *Fletcher* contrasts strikingly with the treatment of the same theme in *Hepburn v. Ellzey*,⁶³ where Marshall had conceded it was "extraordinary" that District of Columbia citizens appeared to be excluded from the diversity jurisdiction and yet refused to give a broad reading to the term "State" in article III,⁶⁴ calling the apparent absurdity "a subject for legislative, not for judicial consideration."⁶⁵

⁵⁷ E. COKE, FIRST PART OF THE INSTITUTES OF THE LAWEES OF ENGLAND; OR A COMMENTARY UPON LITTLETON § 733, at 384a (2d ed. London 1629) (1st ed. London 1628).

⁵⁸ See, e.g., S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 148 (1969); A. SIMPSON, AN INTRODUCTION TO THE HISTORY OF THE LAND LAW 118-19 (1969); H. TIFFANY, REAL PROPERTY § 681, at 705 (abr. ed. 1940).

⁵⁹ See, e.g., H. TIFFANY, *supra* note 58, § 681, at 705. See also R. POWELL, REAL PROPERTY ¶ 908 (abr. ed. 1968).

⁶⁰ *Fletcher*, 10 U.S. (6 Cranch) at 137, *quoted supra* text accompanying note 48. But see Trickett, *supra* note 51, at 729 ("[I]s it not as strange, that the property rights of a vendee were protected against a vendor, and the property rights of others not protected at all?").

⁶¹ It had been carried too far in the carriage-tax case of *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796). See Currie, *Supreme Court, 1789-1801*, *supra* note 1, at 856-57. Marshall might have made the result more literally plausible had he argued in addition that revocation effectively impaired the obligation of the previous contract to sell.

⁶² 5 U.S. (1 Cranch) 137 (1801). Marshall argued that to require courts to enforce unconstitutional laws "would be to overthrow, in fact, what was established in theory; . . . would seem, at first view, an absurdity too gross to be insisted on," *id.* at 177; and "would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits," *id.* at 178. See also Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 651-61. For a prominent later example, see *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 377 (1821), discussed in Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 687-94.

⁶³ 6 U.S. (2 Cranch) 445 (1805).

⁶⁴ U.S. CONST. art. III, § 2, para. 2.

⁶⁵ *Hepburn*, 6 U.S. (2 Cranch) at 453. See Currie, *Federal Courts, 1801-1835*, *supra*

Finally, the Court said, the clause applied to the state's own contracts as well as to private ones. The words of the Constitution drew no distinction between public and private obligations;⁶⁶ other provisions such as the *ex post facto* clause⁶⁷ clearly limited the activity of the state itself,⁶⁸ and the original provision of article III allowing states to be sued⁶⁹ implied that the state could not avoid liability by the simple act of legislatively repudiating its own contracts.⁷⁰ We might add that the purpose of protecting creditor expectations seems as applicable to public as to private contracts.

Later statutory cases were to invoke the maxim that provisions limiting preexisting powers should not be construed to include governments unless they specifically say so.⁷¹ Marshall himself was to suggest in *Sturges v. Crowninshield*⁷² that the Framers may have had certain types of private contracts particularly in

note 1, at 671-73.

⁶⁶ *Fletcher*, 10 U.S. (6 Cranch) at 137.

⁶⁷ U.S. CONST. art. I, § 10, para. 1.

⁶⁸ *Fletcher*, 10 U.S. (6 Cranch) at 138. The analogy is flawed. No one disputed that the contract clause limited state legislative action; the question went to the scope of that limitation. At one point Marshall came close to suggesting that the rescinding act violated the *ex post facto* clause itself: "This . . . act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased." *Id.* One leading student of the contract clause thought this passage showed Marshall "was uncertain as to precisely why the repeal act was invalid, although he was very sure that it was invalid." B. WRIGHT, *THE CONTRACT CLAUSE OF THE CONSTITUTION* 34 (1938). Because the legislature did not declare anything Peck had done a crime, application of the *ex post facto* clause in *Fletcher* would have been difficult to square with *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), which Marshall did not cite. See Currie, *Supreme Court, 1789-1801*, *supra* note 1, at 867-70. Moreover, the sentence following that passage suggests that he was merely using the *ex post facto* clause as the basis for another absurdity argument directed to the interpretation of the contract clause: "This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?" *Fletcher*, 10 U.S. (6 Cranch) at 139. See Hale, *supra* note 42, at 635 (Marshall "did not assert . . . that the rescinding act was in fact an *ex post facto* law, but only that it had the same effect and that therefore the contract clause should be construed to cover it.").

⁶⁹ That is, U.S. CONST. art. III, para. 1, as construed by the Court in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), before the adoption of the eleventh amendment. See Currie, *Supreme Court, 1789-1801*, *supra* note 1, at 831-39.

⁷⁰ *Fletcher*, 10 U.S. (6 Cranch) at 139. The argument could be turned around: if, as the adoption of the eleventh amendment suggests, the Court was wrong in holding article III made the states suable, see Currie, *Supreme Court, 1789-1801*, *supra* note 1, at 831-39, Marshall's own principle that for every right there is a remedy, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), implies that the state was not forbidden to impair its own obligations.

⁷¹ *E.g.*, *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 225 (1957) (anti-injunction provision of 28 U.S.C. § 2283 (1976)); *United States v. United Mine Workers*, 330 U.S. 258, 270 (1947) (Norris-LaGuardia Act, 29 U.S.C. §§ 101-110, 113-115 (1976)).

⁷² 17 U.S. (4 Wheat.) 122 (1819).

mind.⁷³ Moreover, in proposing adoption of the clause in the Constitutional Convention, Rufus King had advocated "in the words used in the Ordinance of Congs [sic] establishing new States, a prohibition on the States to interfere in *private* contracts";⁷⁴ the provision of the Northwest Ordinance from which he drew this clause was expressly limited to "private contracts."⁷⁵ On the other hand, the Convention ultimately used more general terms; it is unclear whether it meant to reject the Ordinance's limitation or to express the same idea in different words.⁷⁶

Thus, as in many of his jurisdictional opinions,⁷⁷ it is difficult to say whether Marshall was right or wrong in *Fletcher*; he managed without very much explanation and without referring to available authority⁷⁸ to resolve both doubtful issues in favor of an expansive meaning of the contract clause. This feat he accomplished in an apparently feigned case, largely on the basis of policy, notwithstanding his invocation of the already familiar shibbo-

⁷³ *Id.* at 204. See *infra* notes 155-202 and accompanying text.

⁷⁴ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 439 (rev. ed. M. Farrand 1937) (emphasis added) [hereinafter cited as CONVENTION RECORDS].

⁷⁵ Northwest Territory Ordinance and Act of 1787, art. II, ch. 8, § 1, 1 Stat. 51, 52 n.(a) (1789).

⁷⁶ See E. CORWIN, *supra* note 39, at 167-68, arguing on the basis of a general reference to the Philadelphia Debates that only private contracts were meant to be included, and B. WRIGHT, *supra* note 68, at 3-16, tracing the occasional references to the clause both at Philadelphia and in the state ratifying conventions. Wright reported that two Anti-Federalist assertions that the clause embraced public contracts "were denied by members of the Convention, and their denials were not challenged." *Id.* at 16; see *id.* at 15-16 (citing 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 474 (statement of Patrick Henry), 477-78 (Governor Randolph's reply that the clause had been included because of "frequent interferences of the state legislatures with private contracts") (2d ed. Philadelphia 1861) (1st ed. Washington, D.C. 1827-30); 4 J. ELLIOT, *supra*, at 190 (statement of James Galloway), 191 (W.R. Davie's answer that "[t]he clause refers merely to contracts between individuals")).

⁷⁷ See generally Currie, *Federal Courts, 1801-1835*, *supra* note 1.

⁷⁸ See G. DUNNE, *supra* note 25, at 75, terming *Fletcher* an example of "characteristic soldier's prose—terse, lucid, persuasive, and free of a single legal citation." To one leading student of the case, Marshall's opinion contained "little that was original." C. MAGRATH, *supra* note 17, at 82. Not only had Hamilton said it all before, see *supra* note 47, but both Justice Paterson on circuit, *Van Horne's Lessee v. Dorrance*, 28 F. Cas. 1012 (C.C.D. Pa. 1795) (No. 16,857), and the Supreme Court of Massachusetts, *Derby v. Blake*, decided in 1799 and belatedly reported at 226 Mass. 618 (1917), had reached similar conclusions. See also C. MAGRATH, *supra* note 17, at 52-53, 82-83. The same position had also been taken in congressional debates over compensation of the Yazoo claimants, see B. WRIGHT, *supra* note 68, at 23-24, and Justice Wilson had assumed in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 465 (1793), that the clause applied to public obligations. These earlier views may help to explain the fact that although some Republicans condemned the decision, it came as no surprise to the Bar. G. HASKINS & H. JOHNSON, *supra* note 17, at 348, 351; 1 C. WARREN, *supra* note 13, at 396.

leth that a law ought "seldom, if ever" to be held unconstitutional, "in a doubtful case."⁷⁹

B. *New Jersey v. Wilson*

In return for a surrender of other land claims, New Jersey had conveyed a tract in trust for the Delaware Indians pursuant to a statute providing that "the lands to be purchased for the Indians aforesaid, shall not hereafter be subject to any tax" and could not be conveyed.⁸⁰ Some years later, at the request of the Delawares, the legislature authorized the land to be sold. New Jersey proceeded to repeal the tax exemption and impose a tax on the purchasers; the Supreme Court in 1812 held without dissent that the state had impaired the obligation of contract.⁸¹

Marshall treated the case as an easy one: *Fletcher v. Peck* had settled that the contract clause included state contracts;⁸² there was consideration for the promise; the exemption was attached to the land, and the state had not demanded its surrender as the price of consent to the resale.⁸³ None of this was particularly surprising, though a later Court might have agreed with the state court that the exemption was personal⁸⁴ or had been extinguished with the restraint on alienation.⁸⁵ As in *Fletcher*, Marshall did not

⁷⁹ *Fletcher*, 10 U.S. (6 Cranch) at 128 (discussing the validity of the original grant under the Georgia constitution). The first Supreme Court appearance of this maxim seems to have been in Justice Chase's opinion in *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796), where it may have played some part in sustaining the challenged law. See Currie, *Supreme Court, 1789-1801*, *supra* note 1, at 855. For other early examples see *id.* at 866, 881.

It has been said that *Fletcher* was "the first case in which the Court had held a State law unconstitutional." 1 C. WARREN, *supra* note 13, at 392. Yet the Court had struck down a state law under the supremacy clause for conflict with a treaty as early as 1796, *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), and Justice Chase's opinion in that case explicitly endorsed federal judicial review of state legislation, *id.* at 236-37. See also Currie, *Supreme Court, 1789-1801*, *supra* note 1, at 863-64.

⁸⁰ *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164, 165 (1812) (quoting Act of Aug. 12, 1758 (colony of New Jersey)).

⁸¹ *Id.* at 166-67.

⁸² See *supra* notes 66-76 and accompanying text.

⁸³ *Wilson*, 11 U.S. (7 Cranch) at 166-67.

⁸⁴ *Cf.*, e.g., *Chesapeake & O. Ry. v. Miller*, 114 U.S. 176, 183-84 (1885) (so construing a promise of "no taxation upon the property of the said company" until its profits reached a certain level).

⁸⁵ *State v. Wilson*, 2 N.J.L. 282, 286-87 (Sup. Ct. 1807 term) (Rossell, J.), 291 (Pennington, J.), *rev'd*, 11 U.S. (7 Cranch) 164 (1812). See also *Given v. Wright*, 117 U.S. 648, 655 (1886), where taxation of land in the same tract was allowed on the basis of "long acquiescence" by the owners: "If the question [decided in *Wilson*] were a new one we might regard the reasoning of the New Jersey judges as entitled to a great deal of weight . . ."

stop to inquire whether his characterization of the transaction conformed to state law; in contrast to later Justices,⁸⁶ he seems to have thought the existence and interpretation of agreements for contract clause purposes entirely a matter of federal law. Nor did he suggest that it might be relevant that the tax exemption had been granted by the colonial government in the King's name in 1758,⁸⁷ long before the contract clause was adopted. As we shall see, however, such temporal questions posed interesting problems in the application of the clause.⁸⁸

What was most striking about *Wilson* was that no doubt was suggested as to the validity of the tax exemption in the first place. In *Fletcher*, while affirming that a legislature had authority to convey land,⁸⁹ Marshall had conceded that, "so far as respects general legislation," "one legislature cannot abridge the powers of" the next,⁹⁰ and Johnson had acknowledged that a sovereign could not part with its "right of jurisdiction."⁹¹

Neither Justice identified the source of this limit; perhaps they viewed it as implicit in the state constitution,⁹² or perhaps it was another manifestation of natural law.⁹³ Their suggestion was to be picked up by later Justices who would use it to hold that the state could not validly promise that future legislators would not outlaw a lottery.⁹⁴ A promise not to tax is hard to distinguish in this respect from a promise not to regulate, and an occasional Justice was to argue after Marshall was gone that tax exemptions were also invalid.⁹⁵ But neither Marshall nor Johnson seems to have

⁸⁶ See, e.g., *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938) (whether the state had bound itself by contract is a question "primarily of state law" which the Supreme Court should review only with deference "in order that the constitutional mandate may not become a dead letter"). See also *infra* notes 203-58 and accompanying text (discussing *Ogden v. Saunders*). For general discussion of the relation of state law to the contract clause see Hale, *The Supreme Court and the Contract Clause* (pt. 3), 57 HARV. L. REV. 852, 852-72 (1944).

⁸⁷ See *Wilson*, 11 U.S. (7 Cranch) at 165.

⁸⁸ See *infra* notes 125-54 and accompanying text (discussing *Trustees of Dartmouth College*); G. HASKINS & H. JOHNSON, *supra* note 6, at 599-600 (suggesting the problem).

⁸⁹ *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 132 (1810).

⁹⁰ *Id.* at 135.

⁹¹ *Id.* at 143 (Johnson, J., concurring).

⁹² See *Piqua Branch of State Bank v. Knoop*, 57 U.S. (16 How.) 369, 392-405 (1853 Term) (Catron, J., dissenting).

⁹³ See *Stone v. Mississippi*, 101 U.S. 814, 819-20 (1880).

⁹⁴ *Id.* at 821.

⁹⁵ E.g., *Piqua Branch of State Bank*, 57 U.S. (16 How.) at 404-05 (Catron, J., dissenting). Justice Catron asserted that the point had not been litigated in *New Jersey v. Wilson*. *Id.* at 401. In this he was partly right; while counsel had plainly contended in the state court that the legislature could not grant a perpetual exemption, *State v. Wilson*, 2 N.J.L. at 285,

thought *Wilson* was affected by their principle that sovereignty could not be surrendered, and the decision was to survive.⁹⁶

C. *Terrett v. Taylor*

The Episcopal Church had acquired land in Virginia before the Revolution. In 1776 the state legislature had confirmed the Church's title to the land; in 1784 it had incorporated the Church; in 1786 it had repealed the act of incorporation while reserving the Church's property rights.⁹⁷ In 1798, however, the legislature repealed the 1776 and 1784 statutes as "inconsistent with the principles of the constitution and of religious freedom,"⁹⁸ and in 1801 it asserted the right to all Church property.⁹⁹ The Supreme Court, in an 1815 opinion by Justice Story, held the property still belonged to the Church.¹⁰⁰

The Court gave straightforward reasons for this conclusion. The 1786 statute revoking the Church's charter had not purported to disturb its property rights, and the 1798 repeal of confirmatory statutes had left intact the Church's preexisting title.¹⁰¹ The 1801 statute had been passed after the land in question became a part of the District of Columbia "under the exclusive jurisdiction of congress."¹⁰² Therefore, "as to . . . property within that district, the right of Virginia to legislate no longer existed."¹⁰³ One is tempted to interpret this last passage as a questionable constitutionalization of Story's well-known views concerning the territorial limits of government power in general,¹⁰⁴ but with respect to the

the case was submitted in the Supreme Court "upon a statement of facts, without argument," 11 U.S. (7 Cranch) at 164. For later instances of the Court's wrestling with the tax exemption issue, see B. WRIGHT, *supra* note 68, at 73-75. See also Hale, *supra* note 42, at 654, who defends the Court: "[W]hen a state grants a tax exemption, it unquestionably surrenders . . . part of its sovereign power—the power to tax the exempted property. But to deny its power to grant the exemption by contract would be to take from it a sovereign power of perhaps greater moment."

⁹⁶ See B. WRIGHT, *supra* note 68, at 73-75; Hale, *supra* note 42, at 640-53.

⁹⁷ *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 44 (1815).

⁹⁸ Act of Jan. 24, 1799, ch. 246, 1 Va. Acts 388 (S. Pleasants Jr. & H. Pace 1803).

⁹⁹ *Terrett*, 13 U.S. (9 Cranch) at 48.

¹⁰⁰ *Id.* at 55. Justices Johnson and Todd did not participate. See *id.* at 45.

¹⁰¹ *Id.* at 51.

¹⁰² *Id.* at 52.

¹⁰³ *Id.*

¹⁰⁴ See J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 18, at 20 (2d ed. Boston 1841) (1st ed. Boston 1834). See also *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (holding that the fourteenth amendment's due process clause forbade application of Louisiana law to a contract made outside its borders); see generally R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS 403-519 (3d ed. 1981).

District of Columbia it was a paraphrase of the explicit terms of article I, section 8.¹⁰⁵

Story's gratuitous additional observations, however, are of special interest. The 1798 and 1801 statutes, he wrote, were ineffective to divest the Church of property for another reason:

That the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the state . . . we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine.¹⁰⁶

There it is again: the principles of "natural justice" seem to have been invoked, as perhaps they had been in *Calder* and in *Fletcher*, as a basis for disregarding acts of a state legislature.¹⁰⁷ This time Story was speaking for the whole Court. At most, however, his reliance on natural justice was an alternative holding; possibly he only meant to express his moral outrage along the way to his clear conclusion that the Virginia statutes offended "the constitution of the United States."¹⁰⁸

But why did the statutes offend the federal Constitution? Story referred to no specific provision; he gave no reasons; he cited none of those "decisions of most respectable judicial tribunals" to which he adverted. The provision most nearly applicable was the contract clause, which had just been read in *Fletcher v. Peck* to include grants of land by the state.¹⁰⁹ The difficulty was that in *Terrett* the Church's land had not been acquired from the state; it had been "purchased of a certain Daniel Jennings" in 1770.¹¹⁰ Thus the attempted confiscation seems to have been a garden variety taking of private property uncomplicated by the contractual

¹⁰⁵ U.S. CONST. art. I, § 8, cl. 17 (empowering Congress to "exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States").

¹⁰⁶ *Terrett*, 13 U.S. (9 Cranch) at 52.

¹⁰⁷ See *supra* notes 28-41 and accompanying text.

¹⁰⁸ *Terrett*, 13 U.S. (9 Cranch) at 52.

¹⁰⁹ See *supra* notes 42-70 and accompanying text. Chancellor Kent viewed this as the basis of *Terrett* as well. 1 J. KENT, COMMENTARIES ON AMERICAN LAW 415 (4th ed. New York 1840) (1st ed. New York 1826).

¹¹⁰ *Terrett*, 13 U.S. (9 Cranch) at 43.

implications of an original state grant. If Story was suggesting that *every* taking of property was an impairment of contract, he was significantly extending *Fletcher*, and he owed us an explanation.¹¹¹

To the extent that the Court relied upon the statutes incorporating the Church and confirming its title as contracts not to disturb the Church's property,¹¹² it was necessary to reject the argument that those statutes had been invalid at the outset under the religion clauses of the Virginia constitution;¹¹³ if the alleged contract was invalid, there was no obligation to impair. This reconstruction may explain the relevance of the apparently gratuitous remarks Story made about those clauses in the course of the *Ter-*

¹¹¹ One might argue that the expropriation impaired the *private* contracts by which the Church had obtained the property. In his treatise Story was later to say without explanation or authority that a state law "annulling conveyances between individuals, and declaring, that the grantors should stand seized of their former estates, . . . would be as repugnant to the constitution, as a state law discharging the vendors from the obligation of executing their contracts of sale." 3 J. STORY, *supra* note 40, § 1370, at 242. Cf. *supra* notes 42-70 and accompanying text (discussing Marshall's argument about public grants in *Fletcher*). It seems harder to infer a warranty against state action in a private deed than in a public one; at common law a warrantor was not responsible for the tortious act of a third party. See R. POWELL, *supra* note 59, ¶ 908; H. TIFFANY, *supra* note 58, § 681, at 705. Further, the state in *Terrett*, in contrast to the example given in Story's treatise, had not attempted to undo a private transaction by giving the Church's property back to its original owners.

¹¹² At one point in the opinion Story treated the 1776 act confirming the Church's interest as a "new grant" on the assumption that the Revolution had destroyed the Church's original title. *Terrett*, 13 U.S. (9 Cranch) at 50. Even on this assumption, however, it was not clear that this "grant" was a contract, since unlike that in *Fletcher*, there was nothing to indicate it had been made for consideration. Moreover, the crucial assumption that the Revolution had divested the Church was expressly repudiated on the same page of the opinion. *Id.* Nevertheless, Story expressly referred to the repeal of the confirming statute in his statement of unconstitutionality, *quoted supra* at text accompanying note 106; perhaps he viewed that law as a contract in which the state promised (for what consideration?) to respect the Church's interest.

Story added that the state had no power to deprive the Church of its property by repealing its corporate charter, *see Terrett*, 13 U.S. (9 Cranch) at 50, and he accompanied this pronouncement with a general discourse on the inviolability of corporate charters. Forfeiture of a franchise for "misuser" or "nonuser" would be all right, as the common law to that effect was "a tacit condition" in every charter; new governments might abolish "such exclusive privileges. . . as are inconsistent with the new government"; and there might be extensive powers to modify the charters of "public corporations which exist only for public purposes, such as counties, towns, cities, &c." *Id.* at 51-52 (emphasis in original). The implication seemed to be that otherwise the charter itself was protected, as the Court was soon to hold only after appropriate explanation. *See infra* notes 125-54 and accompanying text (discussing *Trustees of Dartmouth College*). But the conclusion in *Terrett* was only that a repeal of the charter could not operate to vest property in the state—a conclusion that was itself unnecessary since, as Story stressed, the statute revoking the charter had expressly declined to interfere with the Church's property rights. *See supra* note 101 and accompanying text.

¹¹³ Cf. *supra* note 98 and accompanying text (quoting the repealing statute, which cited the religion clauses as the reason for the repeal).

rett opinion.¹¹⁴ Direct Supreme Court encounters with the comparable provisions of the first amendment were far in the future;¹¹⁵ Story's observations are therefore of some significance for first amendment law despite the somewhat different wording of the state and federal provisions.¹¹⁶

The legislature had been mistaken, Story said, in thinking that either the existence of religious corporations or the grant of property for church purposes offended the guarantee of " 'free exercise' " or the declaration that " 'religion can be directed only by the reason and conviction, not by force and violence.' " ¹¹⁷ The legislature "could not create or continue a religious establishment which should have exclusive rights and prerogatives, or compel the citizens to worship under a stipulated form or discipline, or to pay taxes to those whose creed they could not conscientiously believe." ¹¹⁸ However,

the free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties, or by establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead.¹¹⁹

Modern establishment clause¹²⁰ doctrine has departed from the dicta endorsing state subsidies to all religions,¹²¹ but today it might well offend the free exercise clause¹²² to deny churches alone the benefits of the corporate form.¹²³

¹¹⁴ The statement in J. McCLELLAN, *JOSEPH STORY AND THE AMERICAN CONSTITUTION* 198 (1971), that "Story struck down the rescinding statute as violating the free exercise of religion and the rights of property guaranteed by the Virginia constitution and bill of rights" seems to be in error.

¹¹⁵ See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878).

¹¹⁶ Compare U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof") with VA. CONST. art. I, § 16 ("[t]hat religion . . . and the manner of discharging it, can be directed only by reason and conviction . . . and . . . all men are equally entitled to the free exercise of religion according to the dictates of conscience").

¹¹⁷ *Terrett*, 13 U.S. (9 Cranch) at 48-49 (quoting the Virginia Bill of Rights).

¹¹⁸ *Id.* at 49.

¹¹⁹ *Id.*

¹²⁰ U.S. CONST. amend. I. See *supra* note 116.

¹²¹ See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (striking down grants to church-related primary and secondary schools). But cf. *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (upholding tax exemptions for church property).

¹²² U.S. CONST. amend. I. See *supra* note 116.

¹²³ Cf. *McDaniel v. Paty*, 435 U.S. 618 (1978) (state may not exclude clergymen from legislature). See generally Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961).

Thus Story in his first constitutional opinion for the Court revealed some of Marshall's less attractive traits: unwillingness to confine himself to narrow grounds of decision, vague and conclusory resolution of important new constitutional questions,¹²⁴ failure to deal with the applicable precedents, and a strong suggestion of willingness to set aside legislation incompatible with his conception of "natural justice."

D. *Trustees of Dartmouth College v. Woodward*

Dartmouth College was established by royal charter in 1769. The charter appointed twelve trustees, gave them authority to govern the college, and empowered them to choose their successors. In 1816 the New Hampshire legislature passed a series of statutes increasing the number of trustees to twenty-one, authorizing the Governor to appoint the nine new members, and subjecting important decisions of the trustees to a new Board of Overseers largely chosen by the Governor. In an action by the old trustees to reclaim corporate books from an officer appointed under the new law, the state court upheld the statutory changes;¹²⁵ the Supreme Court in 1819 reversed.¹²⁶

¹²⁴ See B. WRIGHT, *supra* note 68, at 39 ("[E]ven the Marshall court was hesitant to call [the 1776 act] a contract. But if it was not a contract, where in the national Constitution does one find an applicable clause?"); see also G. HASKINS & H. JOHNSON, *supra* note 17, at 404 (stating that both *Fletcher* and *Terrett* were based on "the contract clause and the doctrine of vested property rights"). In *Town of Pawlet v. Clark*, 13 U.S. (9 Cranch) 292 (1815), which Story's treatise cites in the same breath with *Terrett*, 3 J. STORY, *supra* note 40, § 1385, at 258 & n.1, he was even more vague about the basis of his conclusion; the unexplained statement that a statute "could not afterwards be repealed" "so far as it granted the glebes to the towns," 13 U.S. (9 Cranch) at 336, followed a discussion of the inability of the Crown at common law to resell granted lands without the consent of their owner. *Id.* at 334. The Court and Story himself were later to suggest that *Terrett* had been based on the contract clause. See *Piqua Branch of State Bank v. Knoop*, 57 U.S. (16 How.) 369, 389 (1853 Term); 3 J. STORY, *supra* note 40, § 1358, at 258 & n.1.

¹²⁵ *Trustees of Dartmouth College v. Woodward*, 1 N.H. 111 (1817), *rev'd*, 17 U.S. (4 Wheat.) 518 (1819). This opinion is interesting for its rejection of the argument that the repeal offended the law-of-the-land clause of the state constitution, see N.H. CONST. pt. 1, art. XV, a first cousin of due process:

[H]ow a privilege can be protected from the operation of a law of the land, by a clause in the constitution declaring that it shall not be taken away, but by the law of the land, is not very easily understood. . . . It is evident, from all the commentaries upon it by English writers, that it was intended to limit the powers of the crown, and not of parliament.

1 N.H. at 129 (emphasis in original). Webster responded by quoting Blackstone's statement that "laws of the land" meant general legislation, not an act "to confiscate the goods of Titius" alone. 17 U.S. (4 Wheat.) at 580-81 (quoting 1 W. BLACKSTONE, COMMENTARIES *44).

¹²⁶ *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). For the

Though it evidently attracted little notice at the time outside New England,¹²⁷ this case later became a cause célèbre, and the Court made much of it. Marshall's opinion consumes thirty pages;¹²⁸ Washington and Story uncharacteristically felt obliged to add lengthy explanations of their own;¹²⁹ Duvall, who after eight years of silence may have lost the ability to express himself, unpardonably dissented without opinion.¹³⁰ Yet the arguments the Justices were at most pains to refute seem today to have bordered on the frivolous. Marshall directed the bulk of his ammunition¹³¹ against the lower court's suggestion that because Dartmouth had been established for the "public" purpose of education it was really a "public" corporation that could be abolished as readily as cities and towns;¹³² Washington and Story plowed the same ground

background of the case see 4 A. BEVERIDGE, *supra* note 13, at 220-81; 1 C. WARREN, *supra* note 13, at 475-92, and see generally the disorganized but detailed J. SHIRLEY, *supra* note 56, as to which Beveridge's cautionary evaluation rings true to at least the "harried reader," 4 A. BEVERIDGE, *supra* note 13, at 258 n.2. The legal arguments and other relevant materials have been collected by Timothy Farrar. T. FARRAR, REPORT OF THE CASE OF THE TRUSTEES OF DARTMOUTH COLLEGE AGAINST WILLIAM H. WOODWARD (Boston 1819).

¹²⁷ See 4 A. BEVERIDGE, *supra* note 13, at 237, 275-76.

¹²⁸ *Trustees of Dartmouth College*, 17 U.S. (4 Wheat.) at 624-54.

¹²⁹ See *id.* at 654 (Washington, J.), 666 (Story, J.). Livingston concurred "for the reasons stated by the Chief Justice, and Justices Washington and Story," *id.* at 666; Johnson concurred for the reasons stated by Marshall, *id.* (despite his dissent from the contract clause reasoning of *Fletcher*, see *supra* note 22 and accompanying text). Todd was absent the whole Term "on account of indisposition." 17 U.S. (4 Wheat.) at iii n.1. Todd has been reported as opposing the trustees when the case was first argued. See, e.g., 4 A. BEVERIDGE, *supra* note 13, at 225. This report evidently is based upon Webster's uncertain surmise. See 1 C. WARREN, *supra* note 13, at 480.

¹³⁰ See *Trustees of Dartmouth College*, 17 U.S. (4 Wheat.) at 713. Irving Dilliard rejects as "manifestly unfair" the allegation that Duvall was "probably the most insignificant of all Supreme Court judges." Dilliard, *Gabriel Duvall*, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, at 428 (H. Friedman & F. Israel eds. 1969) (quoting E. BATES, THE STORY OF THE SUPREME COURT 109 (1936)). Indeed, Dilliard affects to give Duvall extra points for declining to reveal his reasons, suggesting that by his "blunt entry" Duvall "showed what he thought of Webster's long oratorical plea before the bench and of Chief Justice Marshall's pioneering decision." *Id.* at 420. Dilliard does not suggest which Justice or Justices he thinks more insignificant than Duvall.

¹³¹ See *Trustees of Dartmouth College*, 17 U.S. (4 Wheat.) at 627-41.

¹³² *Trustees of Dartmouth College*, 1 N.H. at 132-34. Story had conceded in *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 52 (1815), that a legislature might have power to alter "public corporations which exist only for public purposes, such as counties, towns, cities, &c. . . . securing however, the property for the uses of those for whom, and at whose expense, it was originally purchased" (emphasis added). To suggest that the state's relationship with a private school was analogous to that with its own political subdivisions, however, seems little more than a play on the word "public." Among other things, as Washington said of a law creating a governmental body, "there is in reality but one party to it." *Trustees of Dartmouth College*, 17 U.S. (4 Wheat.) at 661.

To the interesting analogy of the marriage "contract," also employed by the court below, see *Trustees of Dartmouth College*, 1 N.H. at 132-33, both Marshall and Story re-

twice again,¹³³ the latter embellishing Marshall's first principles with extensive citation. For the rest, the opinions busied themselves largely with additional lightweight objections: that the trustees had no personal interest in the charter,¹³⁴ that the corporation did not exist until the charter was issued and hence could not be party to it,¹³⁵ and that state control did not significantly alter the charter.¹³⁶

The essence of the transaction, it seems, was an uncompensated taking. As Marshall said, the statutes appear to have transferred "[t]he whole power of governing the college" from the charter trustees "to the executive of New Hampshire";¹³⁷ they had turned a private school into a public one.¹³⁸ As an original matter one might have doubted that takings of property could be fitted into the contract clause.¹³⁹ The same objection, however, could have been made both in *Fletcher v. Peck*¹⁴⁰ and in *Terrett v. Taylor*.¹⁴¹ Moreover, by invalidating an expropriation of property that had not been acquired from the state, *Terrett* had seemed to ap-

sponded that divorce was no impairment but a remedy for breach; the latter strongly suggested that a unilateral divorce without fault would be unconstitutional, while the former reserved the question. *Trustees of Dartmouth College*, 17 U.S. (4 Wheat.) at 629 (Marshall, C.J.), 696-97 (Story, J.).

¹³³ 17 U.S. (4 Wheat.) at 659-62 (Washington, J.), 668-82, 693-95 (Story, J.).

¹³⁴ See *id.* at 641-50, 653-54 (Marshall, C.J.), 697-98 (Story, J.).

¹³⁵ See *id.* at 690-706 (Story, J.).

¹³⁶ See *id.* at 650-53 (Marshall, C.J.), 662-65 (Washington, J.), 707-12 (Story, J.), answering the arguments of John Holmes, *id.* at 604-05, and of William Wirt, *id.* at 613-14.

¹³⁷ *Id.* at 652.

¹³⁸ Webster repeatedly stressed in his argument for the trustees that they had been effectively deprived of their property, *id.* at 556, 558, 567, 573, 577-80, 587-88; Justice Washington said the same thing, *id.* at 664-65. The state court had protested that to invalidate the statutes in question would mean the state could not impose any new duties on existing corporations or "legislate at all, on the subject of corporations, without their consent." *Trustees of Dartmouth College*, 1 N.H. at 127. The Supreme Court was later to uphold public-utility regulation although it interfered with the freedom of the owners to manage their property. See, e.g., *Railroad Comm'n Cases*, 116 U.S. 307 (1886); *Munn v. Illinois*, 94 U.S. 113 (1867); cf. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83-84 (1980) (state may require shopping center to allow distribution of pamphlets). Yet even the modern decisions recognize that no formal assertion of government title is necessary to constitute a taking. E.g., *id.* at 82-83 (dictum); cf. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (government may not require that private marina be open to public without charge). Justice Washington recognized this point: "Would the difference have been greater in principle, if the law had appropriated the funds of the college to the making of turnpike roads . . . ?" *Trustees of Dartmouth College*, 17 U.S. (4 Wheat.) at 665.

¹³⁹ See generally Doe, *A New View of the Dartmouth College Case*, 6 HARV. L. REV. 161 (1892), in which a later New Hampshire Chief Justice contended that the vice of the state's action lay in transferring control of college property, not in repealing the charter.

¹⁴⁰ See *supra* notes 17-79 and accompanying text.

¹⁴¹ See *supra* notes 98-124 and accompanying text.

proach the position that every taking was an impairment of contract.¹⁴² In relying instead upon the charter as a contract, Marshall without discussion may have rejected this broad reading of *Terrett*, but because he did not cite that case, it is difficult to say what he thought it held. He did not cite *Fletcher* either, though its holding that a completed grant from the state was a contract resolved two of the most potent difficulties with his similar characterization of a corporate charter.¹⁴³

Yet there were significant differences between *Fletcher* and *Dartmouth College*, scarcely adverted to in the opinions, that seem to have prevented the result from being a foregone conclusion.¹⁴⁴ In the first place, despite Justice Washington's bare assertion,¹⁴⁵ it seems less obvious in the case of a charter than in that of a land transfer that the grant is implicitly irrevocable; to the modern reader a charter may look rather more like a temporary permit or license. Dartmouth's charter, however, seemed to preclude that inference, for it provided not only that the trustees should constitute the corporation "forever hereafter," but that their number

¹⁴² See *supra* notes 109-11 and accompanying text.

¹⁴³ Marshall's failure to cite *Fletcher* may help to explain why Washington and Story broke their silence, as both remedied the omission. See *Trustees of Dartmouth College*, 17 U.S. (4 Wheat.) at 656-57 (Washington, J.), 682-83 (Story, J.). Webster, who had unaccountably been permitted to devote the greater part of his long-winded argument to questions of state law he conceded were not before the Court, see *id.* at 557-88, had invoked not only *Fletcher* and *Terrett*, but *New Jersey v. Wilson* as well, *id.* at 590-91. Echoed by Washington, see *id.* at 663-64, he had particularly stressed Story's *Terrett* dicta implying that a corporate charter was a contract that normally could not be revoked, see *supra* note 112. Marshall ignored these too. In Marshall's defense it should be said that neither counsel nor the court below had denied that state grants could constitute contracts in appropriate cases. See *Trustees of Dartmouth College*, 1 N.H. at 132 (distinguishing *Fletcher* and *Wilson* as having involved "express contract[s]").

¹⁴⁴ Massachusetts Chief Justice Isaac Parker, writing to Webster after the argument, was unable to see how the college could lose, "considering the principles already adopted by the court." Letter from Isaac Parker to Daniel Webster (April 28, 1818), quoted in J. SHIRLEY, *supra* note 56, at 251. See also 4 A. BEVERIDGE, *supra* note 13, at 223 ("After . . . *Fletcher* . . . and . . . *Wilson*, nobody could have expected from John Marshall any other action than the one he took in the Dartmouth College case."); Hagan, *Fletcher vs. Peck*, 16 GEO. L.J. 1, 2-3 (1927) ("The Dartmouth College case simply applied the rule of *Fletcher vs. Peck* to a corporate charter."). Beveridge also reported, however, that Webster thought little of the contract clause argument and saw to the institution of related federal court actions in hopes of getting the state law questions to the Supreme Court. 4 A. BEVERIDGE, *supra* note 13, at 251-52. The "belief was general," he added, that review of the state court decision was "a feeble and forlorn hope." *Id.* at 238-39. Despite *Fletcher* and *Terrett*, Webster did not ask the Court to strike down the repeal on grounds of natural justice, presumably because those cases had originated in lower federal courts, and the Court's jurisdiction therefore had been broader.

¹⁴⁵ *Trustees of Dartmouth College*, 17 U.S. (4 Wheat.) at 658 (Washington, J.).

should "‘hereafter and forever’" be "‘twelve and no more.’"¹⁴⁶ Yet the charter was a royal one antedating the contract clause, and the state court had persuasively held that the King could not have precluded the charter's legislative repeal.¹⁴⁷ If the extent of a contractual obligation is defined by the law in force at the time of its creation, as the Court was soon to hold over Marshall's partial objection,¹⁴⁸ then it could be argued strongly that there had no more been an obligation not to alter the college charter than there would have been if the document had expressly provided for its own repeal.¹⁴⁹

The second serious problem was consideration, which Story alone addressed in detail. Unlike a sale of land, the grant of a charter seems likely *prima facie* to be a one-sided transaction. Story's assertions to the contrary notwithstanding,¹⁵⁰ there seems to be little in the language of the college's charter to indicate the King had bargained for anything in return, be it the donation of private assets to the corporation or the implicit undertaking, confected by all three opinions,¹⁵¹ to administer the college according to its stated purposes. Story further argued, unnecessarily in light of his conclusion just stated, that no consideration was necessary, but in so do-

¹⁴⁶ *Id.* at 525 (quoting charter of Dartmouth College). But see J. SHIRLEY, *supra* note 56, at 433 (terming these expressions merely "formal").

¹⁴⁷ *Trustees of Dartmouth College*, 1 N.H. at 134.

¹⁴⁸ See *infra* notes 203-58 and accompanying text (discussing *Ogden v. Saunders*).

¹⁴⁹ See J. SHIRLEY, *supra* note 56, at 398; Hagan, *The Dartmouth College Case*, 19 GEO. L.J. 411, 420 (1931). Webster argued that the applicability of the clause to a pre-Revolution grant had already been decided. *Trustees of Dartmouth College*, 17 U.S. (4 Wheat.) at 591 (citing as authority *New Jersey v. Wilson*, where the point had not been addressed). He also contended (as a matter of state law, which should have been irrelevant) that the legislature had not inherited Parliament's power to annul charters, which he described as "sovereign" rather than "legislative." *Id.* at 558-61. See also Doe, *supra* note 139, at 213-16 (arguing that even after adoption of the contract clause New Hampshire's legislature lacked authority to promise not to exercise its regulatory power); cf. *supra* notes 80-96 and accompanying text (discussing *New Jersey v. Wilson*).

To be distinguished from the problem in *Trustees of Dartmouth College* is the Marshall decision in *Owings v. Speed*, 18 U.S. (5 Wheat.) 420 (1820), that the contract clause did not invalidate contractual impairments enacted before the Constitution took effect. Though the language of the clause clearly speaks only to future impairments ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .," U.S. CONST. art I, § 10, para. 1), it is not expressly limited to future contracts. Contrast U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" (emphasis added)). See also Currie, *Supreme Court, 1789-1801*, *supra* note 1, at 878-79 (discussing applicability of the *ex post facto* clause to statutes enacted before the Constitution).

¹⁵⁰ *Trustees of Dartmouth College*, 17 U.S. (4 Wheat.) at 685-87 (paraphrasing the charter's statement "‘considering the premises,’” *id.* at 524, as "in consideration of the premises in the introductory recitals," *id.* at 685 (emphasis added)).

¹⁵¹ See *id.* at 642 (Marshall, C.J.), 658-59 (Washington, J.), 688-90 (Story, J.).

ing he seems to have leapt from the undeniable premise that a gift is irrevocable to the dubious conclusion that it is for that reason a contract within the meaning of the Constitution.¹⁵²

The issues of consideration and duration thus seem to have been the principal stumbling blocks after *Fletcher* to the conclusion that corporate charters were protected by the contract clause; but Marshall basically ignored them, perhaps because counsel for the state had never clearly made the appropriate arguments.¹⁵³ Indeed, the court below, basing its decision on its characterization of the college as a "public" institution and on the pre-1789 charter date, had strongly hinted that the charter of a corporation for private profit could not be altered.¹⁵⁴ Thus, as in so many earlier cases, the Court in *Dartmouth College* settled important and difficult questions of constitutional law with hardly any discussion, and this time it simultaneously made mountains out of constitutional molehills.

E. *Sturges v. Crowninshield*

Sturges sued to collect on promissory notes; Crowninshield's defense was a discharge granted by a New York court under a state law, enacted after the notes had been given, "for the benefit of insolvent debtors and their creditors."¹⁵⁵ On questions certified by the federal circuit court, the Supreme Court in an 1819 Marshall opinion held the purported discharge unconstitutional.¹⁵⁶

The basis of the decision was once again the contract clause, and this time it seemed to fit like a glove. The notes were contracts between private parties; they had created obligations to pay specified sums of money; the discharge released the obligations and

¹⁵² [T]he constitution did intend to preserve all the obligatory force of contracts, which they have by the general principles of law. . . . [W]hen a contract has once passed, *bona fide*, into grant, neither the king nor any private person, who may be the grantor, can recal [sic] the grant of the property, although the conveyance may have been purely voluntary.

Id. at 683. For an argument that there was no consideration in *Dartmouth College* and that the contract clause did not forbid the rescission of a gift, see Thompson, *Abuses of Corporate Privileges*, 26 AM. L. REV. 169 (1892).

¹⁵³ See *Trustees of Dartmouth College*, 17 U.S. (4 Wheat.) at 600-15 (Messrs. Holmes and Wirt).

¹⁵⁴ See *Trustees of Dartmouth College*, 1 N.H. at 118-20 (discussing the matter evidently as one of state law).

¹⁵⁵ *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 122 (1819) (quoting Act of April 3, 1811, ch. 248, 1813 N.Y. Laws 468 (Southwick 1813)).

¹⁵⁶ *Id.* The court reached the same conclusion in *Farmers & Mechanics' Bank v. Smith*, 19 U.S. (6 Wheat.) 131 (1821), a case involving a Pennsylvania statute.

thus impaired them.¹⁵⁷ Perhaps, as Justice Livingston had said in upholding the New York law on circuit,¹⁵⁸ the Framers had been motivated in drafting the clause by laws authorizing the issuance of paper money, allowing the tender of worthless property, and extending the time for payment; but, as Marshall responded, they had employed more general terms in the Constitution.¹⁵⁹

[I]f, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.¹⁶⁰

Livingston had also concluded that it was too late to challenge state insolvency laws because they had been universally accepted since the adoption of the Constitution,¹⁶¹ and in this connection counsel¹⁶² properly invoked the opinion sustaining the circuit duties of the Justices in *Stuart v. Laird*.¹⁶³ Marshall replied that most of the insolvency laws cited merely released the debtor from prison, while the provision before him discharged the obligation itself.¹⁶⁴ Significantly, however, he elected not to base the validity of laws of the former description upon mere acquiescence. Misstating

¹⁵⁷ *Sturges*, 17 U.S. (4 Wheat.) at 197-98 (adding that the obligation was not impliedly limited to payment out of property in possession when the contract was made). Justice Washington had reached the same conclusion on circuit in *Golden v. Prince*, 10 F. Cas. 542 (C.C.D. Pa. 1814) (No. 5509); Marshall did not cite him.

¹⁵⁸ *Adams v. Storey*, 1 F. Cas. 141, 145-46 (C.C.D.N.Y. 1817) (No. 66) (praising insolvency laws as universal and just). Marshall did not advert to this decision.

¹⁵⁹ *Sturges*, 17 U.S. (4 Wheat.) at 204-05.

¹⁶⁰ *Id.* at 202-03. Marshall employed similar language in *Dartmouth College*, prefaced by the statement:

It is not enough to say, that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had the particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception.

Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) at 644. See *supra* notes 96-124 and accompanying text.

¹⁶¹ *Adams v. Storey*, 1 F. Cas. at 146-47.

¹⁶² *Sturges*, 17 U.S. (4 Wheat.) at 162, 165-66; see also *id.* at 165 (quoting the maxim "*communis error facit jus*").

¹⁶³ 5 U.S. (1 Cranch) 299, 309 (1803) ("[P]ractice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction."). See Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 661-65.

¹⁶⁴ *Sturges*, 17 U.S. (4 Wheat.) at 203.

the unambiguous argument of counsel, he declared practice *before* 1789 irrelevant¹⁶⁵ and relied on original intent: "To punish honest insolvency by imprisonment for life, and to make this a constitutional principle, would be an excess of inhumanity which will not readily be imputed to the illustrious patriots who framed our constitution, nor to the people who adopted it."¹⁶⁶ Moreover, imprisonment was "no part of the contract" but at most "a means of inducing [the debtor] to perform it," and "[w]ithout impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct."¹⁶⁷

The dictum endorsing retroactive laws releasing debtors from prison became an alternative holding in Justice Thompson's 1827 opinion in *Mason v. Haile*,¹⁶⁸ on the ground that they "act merely upon the remedy, and that in part only."¹⁶⁹ Marshall himself was later to come close to making the extraordinary concession in a desperate dissent that the state could abolish all remedies for pre-existing contracts.¹⁷⁰ Yet any sharp distinction between obligation and remedy was difficult to square with Marshall's insistence in *Marbury v. Madison*¹⁷¹ on the intimate relationship between rights and remedies,¹⁷² and, in striking down laws restricting the rights of landowners to recover against squatters in *Green v. Biddle*,¹⁷³ Jus-

¹⁶⁵ "If the long exercise of the power to emit bills of credit did not restrain the convention from prohibiting its future exercise, neither can it be said that the long exercise of the power to impair the obligation of contracts, should prevent a similar prohibition." *Id.*

¹⁶⁶ *Id.* at 200.

¹⁶⁷ *Id.* at 200-01.

¹⁶⁸ 25 U.S. (12 Wheat.) 370 (1827).

¹⁶⁹ *Id.* at 378 (citing *Sturges*). Justice Washington, dissenting, did not dispute the Court's reasoning as a general principle. He argued that the debtor's release from prison impaired the obligation and not merely the remedy because the contract in suit was a bond conditioned on his remaining in custody. *Id.* at 380-81 ("restraint of the person is the sole object of the contract" (emphasis in original)). Thompson responded that the statutory release satisfied the bond's condition that the prisoner remain until "lawfully discharged." *Id.* at 375, 377.

¹⁷⁰ *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 351 (1827) (Marshall, C.J., dissenting): [T]he constitution . . . prohibits the States from passing any law impairing the obligation of contracts; it does not enjoin them to enforce contracts. Should a State be sufficiently insane to shut up or abolish its Courts, and thereby withhold all remedy, would this annihilation of remedy annihilate the obligation also of contracts? We know it would not.

He appeared to take it back in the next breath, suggesting it would be unconstitutional "if a State shall not merely modify, or withhold a particular remedy, but shall apply it in such a manner as to extinguish the obligation, without performance." *Id.* at 352; see *infra* notes 215-37 and accompanying text.

¹⁷¹ 5 U.S. (1 Cranch) 137 (1803).

¹⁷² See *id.* at 163, 177-78; Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 651-61.

¹⁷³ 21 U.S. (8 Wheat.) 1 (1823).

tice Washington went to the opposite extreme: "If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner . . . is impaired" ¹⁷⁴

No one seriously contended, however, that the clause forbade changes in the minutiae of court procedure for enforcing existing agreements; the Court therefore was unable to avoid drawing lines to determine which remedial modifications had such a significant impact as to impair the obligation itself. ¹⁷⁵ Marshall's concession in *Sturges* that laws opening the debtors' prisons were valid may have been inescapable in light of practice, but his explanation that they went merely to the remedy suggested that remedial changes might embrace far more than procedural details. ¹⁷⁶ Later decisions would exploit this opening as an avenue for making substantial inroads upon the protection afforded by the clause. ¹⁷⁷

Before reaching the contract clause question in *Sturges*, the Court had unnecessarily resolved another issue of major importance. Sitting on circuit five years before, Justice Washington had held Congress's power to adopt "uniform Laws on the subject of Bankruptcies" ¹⁷⁸ exclusive because state laws "would be dissimilar

¹⁷⁴ *Id.* at 76. The case was decided twice. Story had put the point more modestly in reaching the same result in 1821, before the rehearing: "If those acts so change the nature and extent of existing remedies, as materially to impair the rights and interests of the owner, they are just as much a violation of the compact, as if they directly overturned his rights and interests." *Id.* at 17.

Green was significant also for its conclusion that a compact between Virginia and Kentucky was protected by the contract clause, *id.* at 92 (citing *Fletcher*); the contrary argument, Washington said, "was not much pressed," *id.* Counsel had argued that the clause was "intended merely for the protection of private rights," *id.* at 37, as it had been applied in all prior cases. Madison had described the sentence containing it as a "bulwark in favor of personal security and private rights." THE FEDERALIST No. 44, at 282 (J. Madison) (C. Roszter ed. 1961). As Marshall said in *Sturges*, however, the Framers had used broader words. See the argument in B. WRIGHT, *supra* note 68, at 46-47, 76, that it was "far-fetched" to hold a compact a contract but harmless because, as later cases were to hold, congressional approval made the compact a federal law entitled to precedence under the supremacy clause. Johnson concurred in *Green* based on the state constitution, not on the contract clause. *Green*, 2 U.S. (8 Wheat.) at 94-107 (Johnson, J., concurring).

¹⁷⁵ See, e.g., *Bronson v. Kinzie*, 42 U.S. (1 How.) 311 (1843); see also B. WRIGHT, *supra* note 68, at 107-18; Hale, *The Supreme Court and the Contract Clause* (pt. 1), 57 HARV. L. REV. 512, 534-37 (1944). Compare this issue with the question of the extent to which the application of state procedural rules in state court actions based on federal statutes is precluded because of their effect on substantive federal rights. E.g., *Dice v. Akron, C. & Y.R.R.*, 342 U.S. 359 (1952) (requiring jury to decide question of fraud in release of FELA claim).

¹⁷⁶ Marshall might have limited the impact of his concession had he picked up counsel's suggestion that imprisonment was a purely nominal remedy that did not significantly improve the chances of collection. *Sturges*, 17 U.S. (4 Wheat.) at 155.

¹⁷⁷ See, e.g., *Ewell v. Daggs*, 108 U.S. 143 (1883) (allowing retroactive repeal of a usury law).

¹⁷⁸ U.S. CONST. art. I, § 8, cl. 4.

and frequently contradictory.”¹⁷⁹ Hamilton had said the same of the similarly worded power to adopt “an uniform Rule of Naturalization,”¹⁸⁰ since otherwise “there could not be a UNIFORM RULE,”¹⁸¹ and in *Chirac v. Chirac*¹⁸² the Supreme Court itself had declared without explanation that the exclusivity of the naturalization power “ought not to be controverted.”¹⁸³ Moreover, counsel argued, the tenth amendment implied that all federal powers were exclusive, for it reserved to the states only those powers “‘not delegated to the United States by the Constitution.’”¹⁸⁴

Marshall was unimpressed. Express provisions such as that forbidding state treaties, he began, showed “the sense of the Convention to have been, that the mere grant of a power to Congress, did not imply a prohibition on the States to exercise the same power.”¹⁸⁵ Marshall conceded, however, as Hamilton had argued in *The Federalist*,¹⁸⁶ that such a grant was implicitly exclusive whenever its “terms” or its “nature” so required.¹⁸⁷ Although this was obvious enough in the case of government debts and the establishment of federal courts,¹⁸⁸ Marshall could easily have argued that concurrent bankruptcy powers were not so absurd as to overcome the presumption that when the Framers meant federal power to be exclusive they said so. Instead he took a narrower view based apparently on his familiar precept that the Framers had done nothing

¹⁷⁹ *Golden v. Prince*, 10 F. Cas. 542, 545 (C.C.D. Pa. 1814) (No. 5509). The suggestion that Story had reached the same conclusion in 1812, G. DUNNE, *supra* note 25, at 9 (citing *Babcock v. Weston*, 2 F. Cas. 306 (C.C.D.R.I. 1812) (No. 704)), seems erroneous; Story merely refused to respect a legislative stay pending final decision whether to grant a discharge and questioned a state’s power to bind an outsider suing in federal court. Despite the reporter’s interpolated citation in *Babcock* to decisions rendered as late as 1827, the original report shows the case was actually decided in 1812. See *Babcock v. Weston*, 1 Gall. 168 (C.C.D.R.I. 1812).

¹⁸⁰ U.S. CONST. art. I, § 8, cl. 4.

¹⁸¹ THE FEDERALIST No. 32, at 199 (A. Hamilton) (C. Rossiter ed. 1961) (emphasis in original).

¹⁸² 15 U.S. (2 Wheat.) 259 (1817).

¹⁸³ *Id.* at 269 (Marshall, C.J.).

¹⁸⁴ *Sturges*, 17 U.S. (4 Wheat.) at 124 (Mr. Daggett) (quoting U.S. CONST. amend. X).

¹⁸⁵ *Id.* at 193 (Marshall, C.J.).

¹⁸⁶ Cited by neither the Court nor counsel, Hamilton had argued for exclusivity when the Constitution “granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory and repugnant*.” THE FEDERALIST No. 32, at 198 (A. Hamilton) (C. Rossiter ed. 1961) (emphasis in original).

¹⁸⁷ *Sturges*, 17 U.S. (4 Wheat.) at 193.

¹⁸⁸ Counsel conceded the exclusivity of Congress’s powers in these areas and in the more controversial area of regulating commerce. *Id.* at 167-78 (Mr. Ogden). See *infra* notes 365-417 and accompanying text (discussing *Gibbons v. Ogden*). See also *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 49-50 (1825) (dictum) (states cannot directly regulate procedure of federal courts), discussed in *Currie, Federal Courts, 1801-1835*, *supra* note 1, at 713-16.

ing undesirable.¹⁸⁹ It was admitted, he said, that states might enact "insolvent" laws; the distinction between these and "bankrupt" laws was so indistinct that "much inconvenience would result" from holding the bankruptcy power exclusive.¹⁹⁰

That was all. Marshall could have demolished the tenth amendment contention by noting the incongruity of holding that a provision designed to protect state authority had actually impaired it.¹⁹¹ He could have countered Washington's textual argument by invoking counsel's analogy¹⁹² of the provision for "uniform" federal taxes,¹⁹³ which obviously was a limit only on Congress and not on the states. He also could have argued, with counsel and with Livingston's circuit opinion upholding the law involved in *Sturges*,¹⁹⁴ that the Court's recognition of the exclusivity of naturalization had been based solely on statute,¹⁹⁵ that Justices Wilson and Blair had upheld state naturalization in 1792 before the enactment of a prohibitory federal law,¹⁹⁶ and that the alleged exclusivity of the natu-

¹⁸⁹ See *supra* notes 60-65 and accompanying text (discussing *Fletcher v. Peck*).

¹⁹⁰ *Sturges*, 17 U.S. (4 Wheat.) at 194-96. In reaching this conclusion, Marshall incidentally proclaimed that the bankruptcy power would enable Congress to pass laws discharging only the person of the debtor, or operating at the debtor's instance, though both were said to be "insolvent" rather than "bankrupt" laws in contemporary parlance. *Id.* at 194. Livingston, in contrast, had doubted Congress had power to pass laws discharging anyone but "traders," and he had declared that "a bare inspection of the act," also involved in *Sturges*, "will leave no doubt in the mind of any one to which class it belongs." *Adams v. Storey*, 1 F. Cas. 141, 142 (C.C.D.N.Y. 1817) (No. 66).

¹⁹¹ See 1 ANNALS OF CONG. 449-50, 458-59, 790 (J. Gales ed. 1789); *infra* notes 292-364 and accompanying text (discussing *McCulloch v. Maryland*).

¹⁹² *Sturges*, 17 U.S. (4 Wheat.) at 174 (Mr. Ogden).

¹⁹³ U.S. CONST. art. I, § 8, cl. 1 (Congress's power "To Lay . . . Duties, Imposts and Excises" subject to limitation that they "be uniform throughout the United States").

¹⁹⁴ *Adams v. Storey*, 1 F. Cas. 141, 143-44 (C.C.D.N.Y. 1817) (No. 66).

¹⁹⁵ The act in force at the time of the state's attempted naturalization in *Chirac* provided that an alien could become a citizen "on the following conditions, and not otherwise." Act of Jan. 29, 1795, ch. 20, § 1, 1 Stat. 414, 414 (codified as amended in scattered sections of 8 U.S.C. (1976)); see *Sturges*, 17 U.S. (4 Wheat.) at 169-72 (Mr. Ogden). Marshall had said in *Chirac* that it was argued that the state law had been "virtually repealed by the constitution of the United States, and the act of naturalization passed by Congress." *Chirac v. Chirac*, 15 U.S. (2 Wheat.) at 269. Moreover, as Marshall noted, the exclusivity of federal authority had not been denied by counsel in *Chirac, id.*, and the entire passage was unnecessary to the result since the party asserting state power to confer citizenship prevailed on another ground.

¹⁹⁶ *Collet v. Collet*, 6 F. Cas. 105, 106-07 (C.C.D. Pa. 1792) (No. 3001) (Wilson and Blair, Circuit Justices; Peters, District Judge) (invoking the uniform-tax analogy), cited in *Adams v. Storey*, 1 F. Cas. at 141, 143. See also *United States v. Villato*, 28 F. Cas. 377 (C.C.D. Pa. 1797) (No. 16,622), where Justice Iredell suggested that "if the question had not previously occurred, [he] should be disposed to think, that the power of naturalization operated exclusively, as soon as it was exercised by congress," *id.* at 379 (dictum) (emphasis added).

ralization clause was based upon an argument, inapplicable to bankruptcy,¹⁹⁷ that the power to confer citizenship would enable one state to foist undesirables onto another by virtue of the privileges and immunities clause of article IV.¹⁹⁸ Not only were Marshall's arguments a good deal less than complete, but the narrow basis of his conclusion left the door open for his later dictum that the commerce power might be exclusive,¹⁹⁹ and thus to a whole raft of decisions striking down state laws on the ground that they encroached on congressional authority.

Perhaps most interesting is what *Sturges* tells us about the internal practices of the Marshall Court. As we have seen, Livingston had disagreed on circuit with the conclusion that the New York law offended the contract clause, and Washington had rejected the conclusion that the bankruptcy power was concurrent. Neither registered a dissent in *Sturges*, but there is extrinsic evidence that neither was persuaded to abandon his position.²⁰⁰ Moreover, later statements by Johnson have led observers to conclude that he agreed with Livingston.²⁰¹ Thus what the reports tell us was just another pronouncement of the Harmonious Seven turns out to have reflected the thinking of only three or four of their number, and we are left wondering on how many other occasions the Justices elected to suppress fundamental differences of view.²⁰²

¹⁹⁷ *Sturges*, 17 U.S. (4 Wheat.) at 148 (Mr. Hunter); *Adams v. Storey*, 1 F. Cas. at 143.

¹⁹⁸ See U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). This was Madison's argument, *THE FEDERALIST* No. 42, at 269-71 (J. Madison) (C. Rossiter ed. 1961), echoed by counsel in *Chirac*, 15 U.S. (2 Wheat.) at 264 (Mr. Harper), and by Chancellor Kent in his treatise, 1 J. KENT, *supra* note 109, at 424. This argument was to play a significant role in the *Dred Scott* decision, *Scott v. Sandford*, 60 U.S. (19 How.) 393, 405-07, 417-18, 422-23 (1857); its validity had been denied by Blair and Wilson in *Collet*: "[T]he state which communicates the infection must herself be first infected; and in this, as in all other cases . . . the principle of self-preservation will inculcate every reasonable precaution." 6 F. Cas. at 106-07.

¹⁹⁹ See *infra* notes 365-417 and accompanying text (discussing *Gibbons v. Ogden*).

²⁰⁰ See *infra* note 209 and accompanying text (discussing *Ogden v. Saunders*); 1 LIFE AND LETTERS OF JOSEPH STORY 326 (W. Story ed. 1851) ("All the Judges, except judge Livingston, concurred in this opinion").

²⁰¹ See, e.g., D. MORGAN, JUSTICE WILLIAM JOHNSON 117 n.33, 216 (1954) (citing *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827)). In *Ogden*, Justice Johnson denied the federal power was exclusive and said *Sturges* "partakes as much of a compromise, as of a legal adjudication." *Ogden*, 25 U.S. (12 Wheat.) at 272-73. He said the "minority" in that case had surrendered their position that retroactive laws were permissible rather than "risk the whole." *Id.* at 273. In addition, he described insolvency laws as just and said it was "no objection" to the "correctness" of his argument that it was said to be "as applicable to contracts prior to the law, as to those posterior to it" and thus inconsistent with *Sturges*: "I entertained this opinion then, and have seen no reason to doubt it since." *Id.* at 284.

²⁰² Washington also revealed in *Mason v. Haile*, 25 U.S. (12 Wheat.) at 370, that it had

F. *Ogden v. Saunders*

In *Sturges* the Court had held without recorded dissent that the contract clause prohibited the discharge of debts contracted before enactment of an insolvency law.²⁰³ Eight years later it held by a vote of four to three that a state was free to discharge obligations incurred to its own citizens after the law was passed.²⁰⁴

Ogden was the only constitutional case in thirty-five years in which Marshall signed a dissent, and he took Story and Duvall with him.²⁰⁵ Headless for the first time, the majority reverted to the pre-Marshall practice of seriatim opinions. Washington, who had never before broken publicly with the Chief,²⁰⁶ delivered a solid opinion²⁰⁷ whose becoming modesty²⁰⁸ contrasted sharply with Marshall's habitual certainty. In revealing that he had always thought the federal bankruptcy power exclusive,²⁰⁹ Washington also exhibited admirable self-restraint; for by respecting the precedential effect of what was really only a dictum in *Sturges*, he cast the deciding vote to uphold a law he believed invalid. The relatively independent Johnson was the most discursive,²¹⁰ pausing to tell us not only his views on issues already resolved in *Sturges*,²¹¹ but also that his predecessors had been wrong to limit the ex post facto clause to criminal matters.²¹² The newcomers Thompson²¹³ and Trimble,²¹⁴ whose disagreement with Marshall was an omen,

"never been my habit to deliver dissenting opinions in cases where it has been my misfortune to differ from those which have been pronounced by a majority of this Court," and that he did so in that case only out of "regard for my own consistency" in light of the perceived conflict between *Sturges* and the case before him. *Id.* at 379. Washington added that he had "prepared no written opinion" in *Mason*. *Id.* at 382. His saying so may suggest that by 1827 this had become a departure from the norm.

²⁰³ See *supra* notes 155-202 and accompanying text.

²⁰⁴ *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827). The case is discussed briefly in 1 C. WARREN, *supra* note 13, at 686-93, and in 4 A. BEVERIDGE, *supra* note 13, at 480-82.

²⁰⁵ *Ogden*, 25 U.S. (12 Wheat.) at 332.

²⁰⁶ In a letter to Jefferson, Johnson had said that Marshall and Washington were "commonly estimated as one judge." Letter from William Johnson to Thomas Jefferson (Dec. 10, 1822), quoted in D. MORGAN, *supra* note 201, at 182.

²⁰⁷ See *Ogden*, 25 U.S. (12 Wheat.) at 254.

²⁰⁸ "[M]y labors . . . have led me to the only conclusion by which I can stand with any degree of confidence; and yet, I should be disingenuous were I to declare . . . that I embrace it, without . . . a doubt of its correctness." *Id.* at 256.

²⁰⁹ *Id.* at 264.

²¹⁰ See *id.* at 271. For an earlier prominent difference of opinion between Johnson and Marshall, see *supra* notes 6-60 and accompanying text (discussing *Fletcher v. Peck*).

²¹¹ *Ogden*, 25 U.S. (12 Wheat.) at 272-81, 284; see *supra* note 201.

²¹² *Ogden*, 25 U.S. (12 Wheat.) at 286.

²¹³ *Id.* at 292. Thompson had replaced the deceased Livingston in 1823.

²¹⁴ *Id.* at 313. Trimble, whose opinion in *Ogden* was perhaps the most convincing, had

added important refinements to Washington's arguments at various points; but basically all four opinions said much the same things.

The Constitution protected not contracts as such, the majority observed, but only their "Obligation." The existence and extent of the obligation were determined by the law in force at the time of the agreement; that law was state law, and it included the insolvency provision. It was as if the contract itself had provided that insolvency would discharge the debt. It would be "something of a solecism," said Washington, to hold that the law creating an obligation impaired it at the same time.²¹⁵ The vice the Framers had meant to attack was retroactive legislation, which was "oppressive, unjust, and tyrannical";²¹⁶ there was nothing unjust about affording relief in accordance with rules accessible to the parties at the time of their agreement.²¹⁷

Through much of his dissenting opinion Marshall seemed to flirt with the idea that the Constitution protected agreements whether or not they were recognized by state law: "[I]ndividuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties."²¹⁸ The implication, supported by Webster's argument that the Framers' purpose had been not simply to protect vested rights but "to establish confidence, credit, and commerce,"²¹⁹ seemed to be that the contract clause guaranteed a freedom of contract resembling that which later Justices were to dis-

been appointed after Todd's death in 1826.

²¹⁵ *Id.* at 260 (Washington, J.).

²¹⁶ *Id.* at 266 (Washington, J.).

²¹⁷ *Id.* at 256-60, 266-67 (Washington, J.). See also *id.* at 283-85 (Johnson, J.), 297-303, 308-10 (Thompson, J.), 316-21, 324-27 (Trimble, J.). Webster had argued that the parties to a contract made before the insolvency law might equally have expected that such a law might be passed, *id.* at 245-46, but the ex post facto provision showed that at least in the criminal context the Framers had not found his equation convincing. Washington's policy argument also enabled him to explain why the Framers had, as he concluded, permitted prospective bankruptcy laws while forbidding those allowing tender other than in gold or silver: while the former merely afforded a person "by misfortunes . . . reduced to poverty" the chance "to become once more a useful member of society," the latter were "always unjust" because, "unsupported . . . by the plea of necessity," they relieved "the opulent debtor" as well. *Id.* at 269-70 (Washington, J.); see also *id.* at 288-89 (Johnson, J.).

²¹⁸ *Id.* at 346 (Marshall, C.J., dissenting).

²¹⁹ *Id.* at 247-48 (Mr. Webster); see also *id.* at 335-36 (Marshall, C.J., dissenting) (while the ex post facto clause is "in its very terms, confined to pre-existing cases," the contract clause "is expressed in more general terms . . . which comprehend, in their ordinary signification, cases which occur after, as well as those which occur before, the passage of the act.").

cover in the due process clause:²²⁰ a state impaired the obligation of contract not only when it destroyed a pre-existing contractual duty, but whenever it denied legal effect to the parties' intentions.²²¹

Although the words of the clause seem capable of bearing this interpretation,²²² and although no one provided direct evidence to refute Webster's assertions respecting the Framers' intentions,²²³ this aspect of Marshall's opinion proved to be nothing but a distraction, for he ended by abandoning it in the face of its insupportable consequences. As the majority pointed out, no one had ever doubted that the states could pass prospective statutes of frauds or of limitations, or outlaw usury or penalty clauses in future contracts.²²⁴ If the whole "power to pass prospective laws, affecting

²²⁰ *E.g.*, *Lochner v. New York*, 198 U.S. 45 (1905). See B. WRIGHT, *supra* note 68, at 50, 52; Isaacs, *John Marshall on Contracts: A Study in Early American Juristic Theory*, 7 VA. L. REV. 413, 426 (1921) (finding it ironic that "although Marshall was overruled in his attempt to find [liberty of contract] in the Constitution where it *was* written, a juristic tendency of a later day . . . succeeded in finding it in clauses where it had *not* been written" (emphasis in original)).

²²¹ If this was true, the case was not the same as if the parties had stipulated for discharge in the event of insolvency, for only in the latter instance would a discharge accomplish the intentions of the parties.

²²² Each side attempted, without much success, to derive support from the relation of the clause to other arguably similar provisions. See, *e.g.*, *Ogden*, 25 U.S. (12 Wheat.) at 265-66 (Washington, J.) (noting that a single clause proscribed both contractual impairments and the retroactive ex post facto laws and bills of attainder, while prospective bans on coinage, bills of credit, and legal tender were lumped together elsewhere); *id.* at 335-36 (Marshall, C.J., dissenting) (observing that the retrospective ex post facto and bill of attainder provisions were both applicable only to criminal matters, while the other civil prohibitions all had prospective force). Justice Washington maintained that the text had been "so maturely considered" that the placement of each clause gave an important clue to its meaning. *Id.* at 268. Yet the document of which he was speaking contains two distinct requirements that direct taxes be apportioned and places the power to govern the District of Columbia and the territories in entirely separate articles.

²²³ The Convention debates, still unavailable at the time, are less than conclusive. Rufus King had moved "to add, in the words used in the Ordinance of Congs [sic] establishing new States, a prohibition on the states to interfere in private contracts." 2 CONVENTION RECORDS, *supra* note 74, at 439. To Mason's objection that "[t]his is carrying the restraint too far," *id.* at 440, Wilson replied that "retrospective interferences only are to be prohibited," *id.* (emphasis in original). But the Northwest Ordinance provision that King had proposed to copy, and that Wilson was discussing, expressly referred to "private contracts or engagements . . . previously formed." Northwest Territory Ordinance and Act of 1787, art. II, ch. 8, § 1, 1 Stat. 51, 52 n.(a) (1789) (emphasis added). As with the question of public contracts, see *supra* notes 66-76 and accompanying text (discussing *Fletcher v. Peck*), we do not know whether the Convention later dropped the explicit limitation because it was undesirable or because it was understood. Justice Chase had used the assumed retrospection of the contract clause to show that the ex post facto provision must be limited to criminal matters to avoid redundancy. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798), discussed in Currie, *Supreme Court, 1789-1801*, *supra* note 1, at 868-69. Nobody cited Chase in *Ogden*.

²²⁴ *Ogden*, 25 U.S. (12 Wheat.) at 257, 259, 261 (Washington, J.), 286-87 (Johnson, J.),

contracts, was denied to the states," said Washington, "it is most wonderful, that not one voice was raised against the provision . . . by the jealous advocates of state rights,"²²⁵—especially because, as Thompson added, Congress did not seem to have been given power to do it either.²²⁶

Unwilling, as in the case of debtor's prison,²²⁷ to overthrow so much accepted practice, Marshall conceded the majority's basic premise: acknowledging state power "to regulate contracts" and "to prohibit such as may be deemed mischievous,"²²⁸ he attempted instead to distinguish the Court's analogies. Statutes of limitations, he urged, extinguished merely the remedy and not the right; even *Sturges* had recognized that the law of remedies was subject to modification.²²⁹ The Court had already held, however, that the remedial label was no talisman permitting indirect destruction of the obligation;²³⁰ both Washington and Trimble pointed out that Marshall himself had expressly denied in *Sturges* that statutes of limitation could be applied retroactively.²³¹ Moreover, some of the Court's examples could not fairly be characterized as remedial. Marshall had another explanation for them: usury laws and statutes of frauds "precede the obligation of the contract" and "declare the contract to be void in the beginning"; an "obligation must exist before it can be impaired,"²³² but a discharge in bankruptcy

299 (Thompson, J.), 326 (Trimble, J.).

²²⁵ *Id.* at 268 (Washington, J.); see also *id.* at 258 (Washington, J.), 305 (Thompson, J.).

²²⁶ See *id.* at 308 (Thompson, J.). Counsel had made this point as well. *Id.* at 236-37. We do not know exactly who made the argument; although Wheaton reported at length his and his colleague Webster's arguments against the law, *id.* at 214-26, 237-54, he impartially reduced the combined arguments of his seven distinguished adversaries to an amalgam of ten pages without individual attribution, see *id.* at 227. Unlike Thompson, Professor Crosskey, who believed the commerce clause gave Congress general authority over contract law, see *infra* note 377, found it not at all absurd to think the states had been ousted from the field entirely; in his view, *Ogden v. Saunders* was wrongly decided, 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 359 (1953).

²²⁷ See *supra* notes 165-67 and accompanying text.

²²⁸ *Ogden*, 25 U.S. (12 Wheat.) at 347 (Marshall, C.J., dissenting).

²²⁹ *Id.* at 348-54 (Marshall, C.J., dissenting). It was in this connection that he was to make the sweeping suggestion that the Constitution did not require the states "to enforce contracts." *Id.* at 351; see *supra* notes 155-77 and accompanying text (discussing *Sturges v. Crowninshield*). Washington argued that a bankruptcy discharge was equally "remedial" in that, like a time limitation, it must be pleaded and could be defeated by a subsequent promise unsupported by consideration. *Ogden*, 25 U.S. (12 Wheat.) at 262-63 (Washington, J.); see also *id.* at 287 (Johnson, J.).

²³⁰ See *supra* notes 173-74 and accompanying text (discussing *Green v. Biddle*).

²³¹ *Ogden*, 25 U.S. (12 Wheat.) at 262 (Washington, J.) (citing *Sturges*, 17 U.S. (4 Wheat.) at 207), 326-27 (Trimble, J.).

²³² *Id.* at 348 (Marshall, C.J., dissenting).

"defeat[s] a contract once obligatory."²³³ As Trimble argued, however, "a power competent to declare a contract shall have no obligation, must necessarily be competent to declare it shall have only a conditional or qualified obligation";²³⁴ the law effectively made continued solvency a condition of the original obligation, and the discharge therefore took nothing from the creditor.²³⁵

At this point Marshall was on the ropes, but he came up with a startling analogy of his own that must give pause to those who share my sense that the majority was right. If the clause merely protected existing expectations, said Marshall, the state could make it inapplicable to all future agreements by enacting that agreements "should be discharged as the legislature might prescribe."²³⁶ Principled grounds for distinguishing the prospective bankruptcy law are not easy to find; and thus the contending Justices seem to have demonstrated that either to uphold the law or not to uphold it would lead to consequences so absurd that they could not have been intended.²³⁷

²³³ *Id.* See also *id.* at 337 (Marshall, C.J., dissenting) (arguing that an insolvency law had "no effect whatever" on a contract "until an insolvency should take place, and a certificate of discharge be granted").

²³⁴ *Id.* at 323 (Trimble, J.).

²³⁵ *Id.* at 323-24 (Trimble, J.); see also *id.* at 308 (Thompson, J.). Compare Hale, *supra* note 175, at 521-22, 528-31 (criticizing Marshall's efforts) with 4 A. BEVERIDGE, *supra* note 13, at 481 (terming the *Ogden* dissent one of Marshall's "most powerful" opinions).

²³⁶ *Ogden*, 25 U.S. (12 Wheat.) at 339 (Marshall, C.J., dissenting); see also *id.* at 338 (less shocking argument that if the bankruptcy law determined the obligation of contracts made after its enactment, it could not be repealed as applied to them). Washington conceded this latter point. *Id.* at 260-61 (Washington, J.).

²³⁷ Marshall commendably conceded that the question had been settled neither by *Sturges* nor by its companion case of *McMillan v. McNeill*, 17 U.S. (4 Wheat.) 209 (1819), despite the statement in the latter case that it was immaterial that the law had been "passed before the debt was contracted," *id.* at 213. In *McMillan* the contract had been "made in a different state, by persons residing in that state, and consequently without any view to" the insolvency law in question. *Ogden*, 25 U.S. (12 Wheat.) at 333 (Marshall, C.J., dissenting). Thus the application of the law in *McMillan* had had retrospective effect after all; the case fell within the purpose of protecting vested rights even though it was hard to say the state had "passed" a law impairing the obligation of contracts. *Cf.* *Owings v. Speed*, 18 U.S. (5 Wheat.) 420 (1820) (holding the clause inapplicable to an impairment occurring before 1789). In any event, *McMillan* affords support for the argument that retroactive application of the law of even an interested state may be unconstitutional, despite the Court's later holding to the contrary in *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964). See B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 625-26 (1963) (arguing that it was "just as unreasonable, and just as much an impairment of the obligation of contracts, to apply the law for the protection of the new resident with an out-of-state contract as to apply it for the protection of an old resident with a contract antedating the statute"). But see Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress*, 1964 SUP. CT. REV. 89, 93-94 (taking it back).

Washington and Thompson argued with some force that the issue in *Ogden* was at least

Having furnished the one-vote margin for upholding the state's power to provide for the discharge of future debts owing to its own residents,²³⁸ Justice Johnson wrote a mysterious cadenza in which he cast the decisive vote *against* applying the law even prospectively against a creditor from another state.²³⁹ It seems certain that this opinion was not based upon the contract clause; to determine what it *was* based on is appreciably more difficult.

Johnson devoted a good deal of attention to demonstrating that American courts rejected the British conflict-of-laws principle that a discharge by the place of contracting was binding on foreign creditors,²⁴⁰ but he had declared at the outset that the question was whether the discharge had been valid when rendered.²⁴¹ Because the Court had made clear much earlier that state authority was not limited²⁴² by what Johnson kept referring to as "international" law,²⁴³ it seemed incumbent on him to suggest that there was something in the Constitution to impose on New York the Court's conclusions as to the proper choice of law. Later passages seemed to suggest he saw deficiencies of notice²⁴⁴ and possibly of personal jurisdiction over an out-of-state creditor,²⁴⁵ as well as interference with federal court judgments that Johnson did not say

doubtful, and, therefore, in light of the Court's many previous statements about doubtful cases, the statute ought to be upheld. *Ogden*, 25 U.S. (12 Wheat.) at 270 (Washington, J.), 294 (Thompson, J.). Thompson further suggested that, since the words did not forbid it, the Court should do what sound policy required. *Id.* at 310 (Thompson, J.). Marshall ventured a general approach to constitutional interpretation:

To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers;—is to repeat what has been already said more at large, and is all that can be necessary.

Id. at 332 (Marshall, C.J., dissenting).

²³⁸ This holding disposed of a number of cases argued together with *Ogden*. See 25 U.S. (12 Wheat.) at 357.

²³⁹ *Id.* at 358 (Johnson, J.) (disposing of *Ogden* itself); see *id.* at 213-14.

²⁴⁰ *Id.* at 359-66 (Johnson, J.).

²⁴¹ *Id.* at 358. Johnson expressly declined to consider whether a valid discharge could be disregarded in another forum: "The question . . . steers clear of that provision in the constitution which purports to give validity in every state to the records, judicial proceedings, and so forth, of each state." *Id.*

²⁴² *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 299 (1796) (Chase, J.), discussed in Currie, *Supreme Court, 1789-1801*, *supra* note 1, at 860-61.

²⁴³ *E.g.*, *Ogden*, 25 U.S. (12 Wheat.) at 359 (Johnson, J.) ("The question is one partly international, partly constitutional.").

²⁴⁴ *Id.* at 365-66 (Johnson, J.).

²⁴⁵ *Id.* at 366 (Johnson, J.) ("on what principles can a citizen of another State be forced into the Courts of a State").

existed.²⁴⁶ Yet the due process clause, on which we would rely for notice and personal jurisdiction today,²⁴⁷ apparently applied at the time only to federal action.²⁴⁸ The further possibility that in these allusions Johnson was anticipating the natural law notions later pronounced in *Pennoyer v. Neff*²⁴⁹ seems to yield on closer reading to the conclusion that notice problems merely illustrated that there was "good reason" for limiting state power over foreign creditors.²⁵⁰

Johnson's one concrete constitutional reference was to "the provision . . . which gives the power to the general government to establish tribunals of its own in every State, in order that the citizens of other states or sovereignties might therein prosecute their rights under the jurisdiction of the United States."²⁵¹ The purpose of this clause, he thought, was "to confine the States, in the exercise of their judicial sovereignty, to cases between their own citizens" to prevent "jealousy, irritation, and national complaint or retaliation."²⁵² Johnson seems to have been suggesting, in other words, that article III gave the federal courts *exclusive* jurisdiction of diversity cases.²⁵³ This remarkable and unsupported suggestion was contrary to the explicit assurances of *The Federalist*,²⁵⁴ to thirty-eight years of uninterrupted practice based upon the laws enacted by the First Congress,²⁵⁵ and to Justice Washington's conclusion in *Houston v. Moore*²⁵⁶ that the constitutional grant of federal-question jurisdiction was not exclusive.²⁵⁷ So far as I am aware it has never surfaced in any other context since.²⁵⁸

²⁴⁶ *Id.* at 367 (Johnson, J.).

²⁴⁷ See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (notice); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (jurisdiction).

²⁴⁸ See *infra* notes 524-51 and accompanying text (discussing *Barron v. Mayor of Baltimore*).

²⁴⁹ 95 U.S. 714 (1878).

²⁵⁰ *Ogden*, 25 U.S. (12 Wheat.) at 365 (Johnson, J.).

²⁵¹ *Id.* at 359 (Johnson, J.) (referring to U.S. CONST. art. III, § 1).

²⁵² *Id.* (Johnson, J.).

²⁵³ See also *id.* at 368-69 (Johnson, J.) (describing the discharge as contrary to "the judicial powers granted to the United States"); Hale, *supra* note 175, at 524 (Johnson's reasoning may imply that the discharge was limited by "the constitutional grant of federal judicial power").

²⁵⁴ THE FEDERALIST NO. 82 (A. Hamilton).

²⁵⁵ Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (current version in relevant part at 28 U.S.C. § 1332 (1976)) (diversity jurisdiction "concurrent with the courts of the several States").

²⁵⁶ 18 U.S. (5 Wheat.) 1 (1820), discussed in Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 702-05.

²⁵⁷ 18 U.S. (5 Wheat.) at 32 (Washington, J.).

²⁵⁸ One would have thought Johnson spoke only for himself; for although he said he

G. Later Cases

Ogden v. Saunders represents a watershed in contract clause litigation, for it finally set a limit to expansive construction of the clause. Before *Ogden*, the Court had only once rejected a contract clause claim, holding the clause inapplicable to a law passed before the Constitution took effect.²⁵⁹ Meanwhile the Court not only had invoked the clause to invalidate retroactive bankruptcy laws²⁶⁰ and changes in the law of remedies that seriously obstructed contractual obligations,²⁶¹ but had stretched it to cover land grants,²⁶² corporate charters,²⁶³ and interstate compacts.²⁶⁴ The contract clause remained a potent limitation throughout the nineteenth century,²⁶⁵ but *Ogden* established the important principle that it did not apply to prospective laws, and other decisions beginning the same year increasingly upheld even retroactive legislation respecting contracts.²⁶⁶

One method of upholding such legislation was to take advantage of the *Sturges* dicta allowing "remedial" changes that did not go to the essence of the obligation; on this ground the Court allowed relief for imprisoned debtors in *Mason v. Haile*.²⁶⁷ A second method was narrow construction of the contract: the Kentucky-

had been "instructed by the majority finally to dispose of this cause," *Ogden*, 25 U.S. (12 Wheat.) at 358 (Johnson, J.), Marshall and the others agreeing with Johnson's result had already given ample grounds for their vote, and Johnson did not say they agreed with his reasons. Story later said, however, in an opinion for the Court, that Johnson had spoken for all four of them. *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 635, 643 (1832); see also *id.* at 348 (Marshall's response to counsel). The holding of Johnson's coda to *Ogden* was reaffirmed in *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223 (1864); although the Court reported Johnson's reasoning, it added:

Insolvent laws of one State cannot discharge the contracts of citizens of other States, because they have no extra-territorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceeding, has no jurisdiction in the case.

Id. at 234.

²⁵⁹ *Owings v. Speed*, 18 U.S. (5 Wheat.) 420 (1820); see *supra* note 149.

²⁶⁰ *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819); see *supra* notes 155-202 and accompanying text.

²⁶¹ *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823); see *supra* notes 173-75 and accompanying text.

²⁶² *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); see *supra* notes 17-79 and accompanying text.

²⁶³ *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); see *supra* notes 125-54 and accompanying text.

²⁶⁴ *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823); see *supra* notes 173-75 and accompanying text.

²⁶⁵ See B. WRIGHT, *supra* note 68, at 91-93.

²⁶⁶ See *infra* notes 267-78 and accompanying text.

²⁶⁷ 25 U.S. (12 Wheat.) 370 (1827); see *supra* notes 168-69 and accompanying text.

Virginia compact that had been held impaired by anti-squatter legislation in *Green v. Biddle*²⁶⁸ was held in *Hawkins v. Barney's Lessee*²⁶⁹ unimpaired by such "reasonable" regulation of the land titles it protected as the enactment of a new seven-year statute of limitation; a state land grant was held in *Jackson v. Lamphire*²⁷⁰ not to imply a promise that the state would not enact a statute imposing a limit on the time during which persons might challenge recorded decisions respecting land titles; and, despite *McCulloch v. Maryland*'s famous aphorism about the power to tax and the power to destroy,²⁷¹ a state bank charter was held not to imply an immunity from state taxation in *Providence Bank v. Billings*.²⁷² Marshall relied in the latter case on the common practice of taxing corporations,²⁷³ noted that the bank's argument would also exempt land granted by the state from taxation,²⁷⁴ and laid down the general principle that because of the "vital importance" of the taxing power "its abandonment ought not to be presumed."²⁷⁵ Finally, in *Satterlee v. Matthewson*²⁷⁶ and in *Watson v. Mercer*,²⁷⁷ the Court relied on the language of the contract clause itself in holding that it did not forbid laws retroactively *creating* contracts, though the purpose of the clause might apply; only "impair[ment]" of contractual obligations was prohibited.²⁷⁸

Justice Johnson's separate opinion in *Satterlee* warrants brief attention. Finding unrelated grounds upon which to concur, he protested that, although

[t]o give efficacy to a void contract, is not . . . violating a con-

²⁶⁸ 21 U.S. (8 Wheat.) 1 (1823); see *supra* notes 173-75 and accompanying text.

²⁶⁹ 30 U.S. (5 Pet.) 457, 465-66 (1831) (Johnson, J.).

²⁷⁰ 28 U.S. (3 Pet.) 280, 290 (1830) (Baldwin, J.).

²⁷¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819); see *infra* notes 273-78 and accompanying text.

²⁷² 29 U.S. (4 Pet.) 514, 563-64 (1830) (Marshall, C.J.), distinguishing *McCulloch* on the ground that it had relied on the supremacy clause and the absence of state power over the creatures of Congress. The contract clause, however, gives state charters the same priority over later state laws that the supremacy clause gives federal charters over state law.

²⁷³ *Id.* at 561.

²⁷⁴ *Id.* at 562.

²⁷⁵ *Id.* at 561.

²⁷⁶ 27 U.S. (2 Pet.) 380 (1829) (Washington, J.).

²⁷⁷ 33 U.S. (8 Pet.) 88 (1834) (Story, J.).

²⁷⁸ See *Satterlee*, 27 U.S. (2 Pet.) at 413 (Washington, J.) ("it surely cannot be contended, that to create a contract, or to destroy or impair one, mean the same thing"). But see *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), holding it an impairment of contract to *increase* the obligations of an employer under a pension plan: "[I]n any bilateral contract the diminution of duties on one side effectively increases the duties on the other." *Id.* at 245 n.16. See also Hale, *supra* note 175, at 515-17 & n.24.

tract, . . . it is doing infinitely worse; it is advancing to the very extreme of that class of arbitrary and despotic acts, which bear upon individual rights and liabilities, and against . . . which the Constitution most clearly intended to interpose a protection.²⁷⁹

He appended a lengthy note that concluded with a reference to the principle of "the equity of a statute," suggesting that the contract clause might apply because the retroactive creation of a contract, while "out of the letter" of the clause, was "within the same mischief" it was designed to prevent.²⁸⁰ Despite the freewheeling natural law views he had expressed in *Fletcher v. Peck*,²⁸¹ however, Johnson acknowledged he had "serious doubt" whether the "equity of a statute" idea could be applied to the Constitution.²⁸² Instead he rested his case on the ex post facto clause, attacking "that unhappy idea, that the phrase 'ex post facto,' in the Constitution of the United States was confined to criminal cases exclusively,"²⁸³ and arguing that *Calder v. Bull* had not, as commonly supposed, so decided.²⁸⁴ Because the opening quotation from his opinion suggests he had decided to strike down the law before he discovered the clause of the Constitution upon which he could pin the result,²⁸⁵ this retreat from earlier natural law pronouncements may indicate that he had acquired not modesty but dissimulation.

Washington, writing for the majority, did not respond directly to the ex post facto argument; he said, however, that the Constitution did not forbid the divesting of vested rights as such.²⁸⁶ Wash-

²⁷⁹ *Satterlee*, 27 U.S. (2 Pet.) at 414-15 (Johnson, J.).

²⁸⁰ *Id.* at 687 app. No. 1 (original ed. Philadelphia 1829).

²⁸¹ 10 U.S. (6 Cranch) 87, 143-48 (1810) (Johnson, J., concurring); see *supra* note 34 and accompanying text. Arguing that *Fletcher* was Johnson's "one notable appeal . . . to natural law," Professor Morgan pointed to Johnson's earlier acknowledgment that "[t]here are certain eternal principles of justice which never ought to be dispensed with, and which courts . . . never can dispense with but when compelled by positive statute," D. MORGAN, *supra* note 201, at 211 & n.25 (quoting *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 486 (1813) (Johnson, J., dissenting)), and to Johnson's later statement that he had once given "too much weight to natural law and the suggestions of reason and justice in a case which ought to be disposed of upon the principles of political and positive law, and the law of nations," *id.* at 227 (quoting *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 258 (1830) (Johnson, J., dissenting)).

²⁸² 27 U.S. (2 Pet.) at 687 app. No. 1 (original ed. Philadelphia 1829).

²⁸³ *Satterlee*, 27 U.S. (2 Pet.) at 416 (Johnson, J.) (quoting U.S. CONST. art. I, § 10, cl. 1).

²⁸⁴ *Id.* at 681, 682 app. No. 1 (original ed. Philadelphia 1829). See Currie, *Supreme Court, 1789-1801*, *supra* note 1, at 866-71 (discussing *Calder*).

²⁸⁵ See *supra* text accompanying note 279.

²⁸⁶ *Satterlee*, 27 U.S. (2 Pet.) at 413 (Washington, J.).

ington added that nothing in *Fletcher* was to the contrary. After quoting one of Marshall's more florid natural law passages, Washington emphasized that *Fletcher* had reviewed a federal rather than a state court decision; he seems to have read Marshall as talking about the state constitution.²⁸⁷ Thus by 1829 the Justices seem to have become more reluctant than in the early days of contract clause litigation to look outside the Constitution for limits on state power.²⁸⁸ The new attitude is reflected in *Watson v. Mercer*,²⁸⁹ where, in upholding retroactive validation of a conveyance against both ex post facto and contract clause objections, Story was to repeat, despite *Terrett v. Taylor*,²⁹⁰ that "the mere fact that it divests antecedent rights of property" did not bring a statute into conflict with the federal Constitution.²⁹¹

In short, after leaping to give the contract clause a debatably broad reading in *Fletcher v. Peck* and the next few cases, the Court, largely with Marshall's acquiescence, declined to undertake further extensions of its underlying principle beyond the ordinary meaning of particular contracts or of the clause itself.

II. CONGRESSIONAL AUTHORITY AND IMPLICIT LIMITATIONS ON STATE POWER

A. *McCulloch v. Maryland*

Maryland imposed a tax of one to two percent on the issuance of notes by banks established "without authority from the state."²⁹² The Bank of the United States, chartered by Act of Congress and owned in part by the United States,²⁹³ issued notes without paying the tax. The state court penalized the Bank's cash-

²⁸⁷ *Id.* at 413-14.

²⁸⁸ Later in the same Term, however, Story was to say without pointing to anything in the Constitution that New Hampshire could not authorize an executrix to sell land in Rhode Island because "[t]he legislative and judicial authority of New Hampshire were bounded by the territory of the state." *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 655 (1829).

²⁸⁹ 33 U.S. (8 Pet.) 88 (1834).

²⁹⁰ 13 U.S. (9 Cranch) 43 (1815); see *supra* notes 77-95 and accompanying text.

²⁹¹ 33 U.S. (8 Pet.) at 110-11. Johnson, nearing the end of his time, was absent. *Id.* at iii. Story did not mention his contrary, unsuccessful efforts in *Satterlee* but relied on supporting precedent. See *id.* at 110-11. See also 3 J. STORY, *supra* note 40, § 1392, at 266-68 (reaffirming that the Constitution did not invalidate all retroactive legislation).

²⁹² *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 321 (1819) (quoting Act of Feb. 11, 1818, ch. 156, § 1, 1 Md. Laws 679, 679 (Dorsey 1840)). The obligation could be discharged by an annual payment of \$15,000. Act of Feb. 11, 1818, ch. 156, § 1, 1 Md. Laws 679, 679 (Dorsey 1840).

²⁹³ See Act of Apr. 10, 1816, ch. 44, § 1, 3 Stat. 266, 266 (expired by its terms in 1836), providing that 20% of the shares should belong to the United States.

ier; the Supreme Court in the famous 1819 Marshall opinion unanimously reversed.²⁹⁴

Since *McCulloch* claimed federal incorporation as his defense, Congress's authority to establish the Bank was in issue, and the Court sustained it. As in *Martin v. Hunter's Lessee*,²⁹⁵ practice was invoked to illustrate contemporary understanding: "The principle now contested was introduced at a very early period of our history, has been recognised by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation";²⁹⁶ Congress had created a similar bank as early as 1791.²⁹⁷ Thus the issue could "scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded."²⁹⁸ As in *Martin*, however, and in contrast to *Stuart v. Laird*,²⁹⁹ practice was not asserted to be conclusive. Even long acquiescence, Marshall acknowledged, would not justify "a bold and daring usurpation," but "a doubtful question . . . in the decision of which the great principles of liberty are not concerned, . . . if not put at rest by the practice of the government, ought to receive a considerable impression from that practice."³⁰⁰ He went on to find constitutional support for the Bank as an original matter.

Marshall began his discussion by conceding that the federal government was one of "enumerated powers," which could "exercise only the powers granted to it."³⁰¹ The tenth amendment, reserving to the states "[t]he powers not delegated to the United States by the Constitution,"³⁰² simply confirmed this conclusion in order to "quiet[] the excessive jealousies which had been excited";³⁰³ it did not, unlike the provision in the Articles of Confed-

²⁹⁴ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The case is set in context by 4 A. BEVERIDGE, *supra* note 13, at 282-339, and by 1 C. WARREN, *supra* note 13, at 499-500.

²⁹⁵ 14 U.S. (1 Wheat.) 304, 351-52 (1816); see Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 681-87.

²⁹⁶ *McCulloch*, 17 U.S. (4 Wheat.) at 401.

²⁹⁷ Act of Feb. 25, 1791, ch. 10, 1 Stat. 191 (expired by its terms in 1811).

²⁹⁸ *McCulloch*, 17 U.S. (4 Wheat.) at 401.

²⁹⁹ 5 U.S. (1 Cranch) 299, 308 (1803), discussed in Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 661-65.

³⁰⁰ *McCulloch*, 17 U.S. (4 Wheat.) at 401.

³⁰¹ *Id.* at 405.

³⁰² U.S. CONST. amend. X.

³⁰³ *McCulloch*, 17 U.S. (4 Wheat.) at 406.

eration reserving powers not "expressly" given Congress,³⁰⁴ preclude finding that Congress had "incidental or implied powers."³⁰⁵ To avoid prolixity, the Constitution contained only "its great outlines" and designated only "its important objects."³⁰⁶ It was "not denied, that the powers given to the government imply the ordinary means of execution."³⁰⁷ A federal corporation was permissible, therefore, if it was an "essential," "appropriate," "direct" means of carrying out powers explicitly given to Congress.³⁰⁸

This view of incidental powers Marshall found confirmed by the authorization to make "all laws which shall be necessary and proper, for carrying into execution" powers elsewhere granted the United States.³⁰⁹ This clause was not a limitation on the power that would otherwise have existed, but a grant; a sufficient motive for its inclusion was "to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble."³¹⁰ Nor was the clause itself limited to "those single means, without which the end would be entirely unattainable";³¹¹ "necessary" was a term admitting "of all degrees of comparison," in contrast to the prohibition of state import duties not "*absolutely necessary*" for executing inspection laws.³¹² In summary: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and

³⁰⁴ ARTICLES OF CONFEDERATION art. 2.

³⁰⁵ *McCulloch*, 17 U.S. (4 Wheat.) at 406. See also 1 ANNALS OF CONG. 790 (J. Gales ed. 1789) (Madison, opposing a motion to add the word "expressly" to what became the tenth amendment, argued "there must necessarily be admitted powers by implication, unless the constitution descended to recount every minutia").

³⁰⁶ *McCulloch*, 17 U.S. (4 Wheat.) at 407. It was in this context that Marshall uttered that greatly admired and essentially vacuous bon mot: "we must never forget that it is a constitution we are expounding." *Id.* (emphasis in original). See Kurland, *Curia Regis: Some Comments on the Divine Right of Kings and Courts to Say What the Law Is*, 23 ARIZ. L. REV. 582, 591 (1981), arguing that whenever an opinion quotes this passage "you can be sure that the court will be throwing the constitutional text, its history, and its structure to the winds in reaching its conclusion." One might have thought, as a later Justice has written, that "precisely because 'it is a constitution we are expounding,' we ought not to take liberties with it." National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 647 (1949) (Frankfurter, J., dissenting) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819)) (first emphasis added, second emphasis in original).

³⁰⁷ *McCulloch*, 17 U.S. (4 Wheat.) at 409.

³⁰⁸ *Id.* at 409-11.

³⁰⁹ *Id.* at 411-12 (quoting U.S. CONST. art. I, § 8, cl. 18).

³¹⁰ *Id.* at 420-21.

³¹¹ *Id.* at 414.

³¹² *Id.* (quoting U.S. CONST. art. I, § 10, para. 2) (emphasis in original).

spirit of the constitution, are constitutional."³¹³

In all of this I find Marshall at his most persuasive. The natural inference of incidental powers was confirmed in *The Federalist*;³¹⁴ the necessary and proper clause removes any doubt; a requirement of indispensable necessity would have been so confining that it could hardly have been intended. Marshall's examples of unquestioned laws inconsistent with that strict reading were compelling: surely if Congress may establish courts and executive departments it may punish perjury and prescribe oaths of office; surely the power to tax to pay the debts includes the power to transport money from place to place.³¹⁵ Marshall's final statement regarding the extent of incidental powers is remarkably careful and hard to improve upon in the light of a century and a half of experience.

What is surprising is that Marshall treated all this as an open question. The issue had arisen fourteen years before in *United States v. Fisher*,³¹⁶ where the Court had upheld Congress's power to give claims of the United States priority in the distribution of insolvent estates. Marshall had disposed of the issue in two quick paragraphs. There too he had acknowledged that the federal government had limited powers.³¹⁷ There too he had rejected the argument that indispensable necessity was required: "Where various systems might be adopted for that purpose, it might be said, with respect to each, that it was not necessary, because the end might be obtained by other means."³¹⁸ It followed that Congress "must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution."³¹⁹ Because "the government is to pay the debt of the Union," it has "a right to make remittances, by bills or otherwise, and to take those precautions which will render the transaction safe."³²⁰

It was typical of Marshall not to cite even his own opinions although they squarely supported him; witness the omission of any

³¹³ *Id.* at 421.

³¹⁴ THE FEDERALIST No. 33 (A. Hamilton); *id.* No. 44 (J. Madison).

³¹⁵ *McCulloch*, 17 U.S. (4 Wheat.) at 409, 416-17.

³¹⁶ 6 U.S. (2 Cranch) 358 (1805).

³¹⁷ *Id.* at 396.

³¹⁸ *Id.* See also Marshall's second "Friend of the Union" letter, The Philadelphia Union, April 28, 1819, reprinted in G. GUNTHER, JOHN MARSHALL'S DEFENSE OF *McCulloch v. Maryland* 95 (1969), giving illustrations including the raising of armies: "A bounty . . . is unconstitutional, because the power may be executed by a draft; and a draft is unconstitutional, because the power may be executed by a bounty."

³¹⁹ *Fisher*, 6 U.S. (2 Cranch) at 396.

³²⁰ *Id.* See U.S. CONST. art. I, § 8, cl. 1.

reference to *Fletcher* in *Dartmouth College*.³²¹ In *Dartmouth* two of his brethren stepped in to remind the public that the question was not new;³²² in *McCulloch* they stood by while he threw away his trump card. So far as the report reveals, counsel had not invoked *Fisher*, and maybe nobody remembered it. That decision had not raised much dust in 1805;³²³ that was a long time before *McCulloch*, and the indexing of cases was not what it is today.³²⁴

In fact the *Fisher* test is subject to serious criticism. Marshall's rejection of a straw man had led him unjustifiably to the opposite extreme: that Congress has some latitude in the choice of means need not mean it may employ any "which are in fact conducive to the exercise of a power granted by the constitution."³²⁵ Virtually anything Congress might want to do could meet that criterion; among other things, it would authorize whatever might bring the government additional money to pay its debts or to support armies. It was on this basis that Congress not long ago was permitted to escheat the estates of veterans who die without heirs;³²⁶ the same argument would seem to support escheat of everyone else's property, or the operation of any enterprise for profit.³²⁷ Not only is such a lax standard difficult to square with the language authorizing laws that are both "necessary and proper,"³²⁸ but more fundamentally, it contradicts *Fisher's* simultaneous acknowledgement of the basic principle that the subjects of federal legislation are limited.

³²¹ See *supra* note 143 and accompanying text.

³²² *Id.*

³²³ See 1 C. WARREN, *supra* note 13, at 503-04. It had, however, provoked one congressman to propose a constitutional amendment limiting Congress to the passage of laws bearing a "rational connection with and immediate relation to the powers enumerated." *Id.* at 502.

³²⁴ See Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 680 & n.221.

³²⁵ *Fisher*, 6 U.S. (2 Cranch) at 396.

³²⁶ *United States v. Oregon*, 366 U.S. 643, 645-47 (1961).

³²⁷ See also Jefferson's famous argument:

Congress are authorized to defend the nation. Ships are necessary for defence; copper is necessary for ships; mines necessary for copper; a company necessary to work the mines; and who can doubt this reasoning who has ever played at "This is the House that Jack Built"? Under such a process of filiation of necessities the sweeping clause makes clean work.

Letter from Thomas Jefferson to Edward Livingston (April 30, 1800), reprinted in 9 THE WORKS OF THOMAS JEFFERSON 132-33 (P. Ford ed. 1905).

³²⁸ In *McCulloch* Marshall argued that the effect of adding the word "proper" was if anything "to qualify" the "strict and rigorous meaning" that might otherwise have been suggested by "necessary," 17 U.S. (4 Wheat.) at 418-19, but the use of "and" rather than "or" seems to imply, as counsel had argued, that it is not enough that a law be merely "proper," *id.* at 367 (Mr. Jones).

In this critical respect, despite superficial similarities, the *McCulloch* formulation is a vast improvement upon *Fisher*.³²⁹ The means chosen must be "plainly" adapted to the end, not merely conducive to it; tenuous connections to granted powers will not pass muster. It must in addition be "appropriate," which implies some supervision of the reasonableness of the means. It must not, Marshall added in a later paragraph, be a mere "pretext . . . for the accomplishment of objects not entrusted to the government."³³⁰ Finally, and most important, it must consist with the "spirit" as well as the letter of the constitution. In light of earlier statements in his opinion, the implication seems unmistakable: incidental authority must not be so broadly construed as to subvert the basic principle that Congress has limited powers.

Though much sweat is often shed over general principles, as it was in *McCulloch*, it is not news that they seldom decide actual cases,³³¹ and Marshall's formula for determining the necessity and propriety of incidental legislation left even more than every standard must to the judgment of those who were to apply it. Marshall's effort succeeded, nevertheless, in setting a mood in which the problem should be approached, and it seems to me he set one that precisely captured the constitutional spirit. While respecting the limited nature of federal power, he managed to avoid a construction that would have crippled the ability of Congress to carry out the purposes for which it had been established.

Marshall was far weaker, however, in applying his exemplary criteria to the case before him. He mentioned in passing various enumerated powers to which the creation of a bank might be inci-

³²⁹ Although Marshall had dropped less guarded references to means that were "convenient," *id.* at 413, "conducive," or "appropriate," *id.* at 415, elsewhere in *McCulloch*, the famous passage, *supra* text accompanying note 313, was the summation of his argument.

³³⁰ 17 U.S. (4 Wheat.) at 423. This is an interesting contrast to Marshall's refusal to investigate the motive for the Yazoo land grant in *Fletcher*. See *supra* notes 18-27 and accompanying text. The "pretext" concept has since had a checkered career. Compare *United States v. Kahriger*, 345 U.S. 22, 28-32 (1953) (rejecting pretext argument), *overruled in other respects*, *Marchetti v. United States*, 390 U.S. 39, 54 (1968) and *United States v. Darby*, 312 U.S. 100, 114 (1941) (same) with *United States v. Butler*, 297 U.S. 1 (1936) (congressional power denied as pretext).

³³¹ See, e.g., *Associated Indus. v. Department of Labor*, 487 F.2d 342, 349-50 (2d Cir. 1973) (doubting whether it made any practical difference whether regulations of the Occupational Safety and Health Administration were reviewed under the "arbitrary and capricious" standard or the "substantial evidence" rule). See also *Industrial Union Dep't v. Hodgson*, 499 F.2d 467, 473 (D.C. Cir. 1974) ("rigorousness" of court's review of Occupational Safety and Health Administration regulation would not be affected by applying a combined standard of substantial evidence and rationality); Currie, *OSHA*, 1976 AM. B. FOUND. RESEARCH J. 1107, 1127 n.112.

dental: "to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies."³³² What is striking is that he made no serious effort to demonstrate how the bank was necessary and proper, or even conducive, to any one of them. Indeed all he said on this score was that the bank's utility in "fiscal operations" of the government was "not now a subject of controversy."³³³ Hamilton had done somewhat better in his defense of the first Bank of the United States: it would facilitate tax collection and commerce by creating a medium of payment or exchange and by increasing the money supply; it was a "usual, and in sudden emergencies, an essential instrument, in the obtaining of loans to government."³³⁴ Even this proved only that some of the Bank's functions were, in *Fisher's* terms, "conducive to the exercise of . . . power[s]" given to Congress; it did not seem to establish that even these functions were consistent with the federative spirit of the Constitution or to justify the Bank as a whole.³³⁵

I do not mean to suggest that Marshall was wrong to uphold either the Bank in *McCulloch* or the government priority in *Fisher*. I do suggest that to reach those conclusions on the basis of the test stated in *McCulloch* would have required a careful examination of the powers actually granted the Bank, of their relationship to the explicit powers of Congress, and of the degree to which they undermined the principle of limited federal powers. In short, Marshall devoted most of his effort to demolishing the straw man of indispensable necessity and slid over the real question of the

³³² *McCulloch*, 17 U.S. (4 Wheat.) at 407. See U.S. CONST. art. I, § 8. Hamilton in his well-known defense of the first national bank had also relied on article IV's authority to "make all needful Rules and Regulations respecting the . . . Property belonging to the United States," U.S. CONST. art. IV, § 3, para. 2, i.e., its money. 1 THE WORKS OF ALEXANDER HAMILTON 138 (New York 1810), quoted in 3 J. STORY, *supra* note 40, § 1261, at 137 n.4.

³³³ *McCulloch*, 17 U.S. (4 Wheat.) at 422. See also 3 J. STORY, *supra* note 40, § 1261, at 135 (concluding that to reveal why the Bank was a useful and appropriate governmental institution "would be a waste of time").

³³⁴ See 1 THE WORKS OF ALEXANDER HAMILTON, *supra* note 332, at 138-41. Some of Hamilton's arguments were repeated by counsel. *McCulloch*, 17 U.S. (4 Wheat.) at 388-90 (Mr. Pinkney).

³³⁵ See *McCulloch*, 17 U.S. (4 Wheat.) at 334-37 (Mr. Hopkinson) (arguing that the Bank's branches served merely a profit-making function and could not be sustained). But see 3 J. STORY, *supra* note 40, § 1264, at 146-47, implying that anything that made the Bank more effective was permissible: "All the powers given to the bank are to give efficacy to its functions of trade and business." For details concerning the Bank's functions and its utility in carrying out congressional powers, see B. HAMMOND, BANKS AND POLITICS IN AMERICA 251-85 (1957); W. SMITH, ECONOMIC ASPECTS OF THE SECOND BANK OF UNITED STATES 99-230 (1953).

propriety of the Bank itself.³³⁶ Moreover, in so doing he seems to have undermined the exemplary test he had just laid down. His cavalier application of the test to the case before him, reinforced by his explicit refusal to examine the "degree of . . . necessity" of any law "really calculated to effect any of the objects entrusted to the government,"³³⁷ seemed to mean that the limits he had laid down should not be taken seriously.

Having upheld the existence of the Bank, the Court went on to hold Maryland could not tax it. The policy basis for this conclusion was plainly stated in the famous aphorism that "the power to tax involves the power to destroy";³³⁸ to allow the states to tax or to regulate the activities of the federal government would make it "dependent on the States."³³⁹ As to the legal basis of his conclusion Marshall was a good deal more obscure. It is not even clear whether he meant to find tax immunity in the Constitution itself or in the Bank's statutory charter.³⁴⁰ He phrased the question as a constitutional one, asserted that the relevant principle "pervades the constitution," and said a power to destroy the Bank was incompatible with Congress's "power" to create it.³⁴¹ However, the "principle" to which he referred was federal supremacy; he expressly invoked the supremacy clause,³⁴² which merely subordinates state law in the event it conflicts with other federal provisions; and at several points he adverted to the invalidity of state

³³⁶ It was, however, the abstract test Marshall laid down that attracted the most vehement criticism. See G. GUNTHER, *supra* note 318, at 18-19.

³³⁷ *McCulloch*, 17 U.S. (4 Wheat.) at 423.

³³⁸ *Id.* at 431.

³³⁹ *Id.* at 432; see *id.* ("They may tax the mail; they may tax the mint; . . . they may tax judicial process . . .").

³⁴⁰ The distinction may be important, for although Congress may repeal any immunity it has created, there have been decisions against the power of Congress to confer on states powers withdrawn from them by the Constitution. See, e.g., *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 317 (1851). More recent commerce clause cases tend to be less exacting. E.g., *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 421-27 (1946). Cf. *Clark v. Barnard*, 108 U.S. 436, 447 (1883) (allowing a state to waive the immunity from federal suit afforded by the eleventh amendment).

³⁴¹ *McCulloch*, 17 U.S. (4 Wheat.) at 425-26. Here he paraphrased Pinkney's argument for the Bank. See *id.* at 391 (Mr. Pinkney). Pinkney had also said both that the power to tax was the power "to repeal the law, by which the bank was created," *id.* at 394 (Mr. Pinkney), and that, like the immunity of a foreign vessel from judicial process, *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), the Bank's immunity arose "out of general considerations" "independent of the letter of the constitution, or of any other written law," *McCulloch*, 17 U.S. (4 Wheat.) at 395 (Mr. Pinkney). Marshall expressly declined to hold the federal tax power exclusive, *id.* at 424; obviously the Framers had not meant to deprive the states of all revenue. See also THE FEDERALIST No. 32 (A. Hamilton).

³⁴² U.S. CONST. art. VI, para. 2.

action incompatible with federal "laws."³⁴³ In fact, a few years later, in *Osborn v. Bank of the United States*,³⁴⁴ he would decide a similar case squarely on the ground of conflict with the Bank's federal charter.³⁴⁵

Whether based upon Constitution or statute, the Bank's immunity was implicit only. The charter law was silent on the question. While a confiscatory tax or one that placed the Bank at a fatal competitive disadvantage would have contradicted the statute by destroying what Congress had created,³⁴⁶ Marshall expressly declined to investigate whether the Maryland tax was confiscatory,³⁴⁷ and he did not rely on its discriminatory nature. Moreover, a few years later, despite an argument invoking *McCulloch*, Marshall was to hold that a state bank charter did not imply immunity from state taxation—though the power to tax was the power to destroy a state corporation no less than a federal one.³⁴⁸

To the extent that Marshall relied on the Constitution itself, the argument was once again that the Framers were reasonable people who could not have meant to place federal operations at the mercy of state laws.³⁴⁹ But a similar argument for implicit immunity had been made in *Chisholm v. Georgia*,³⁵⁰ and the Court had rejected it largely on the ground that the words of the Constitution

³⁴³ *McCulloch*, 17 U.S. (4 Wheat.) at 425-27; see also *id.* at 436: "[T]he States have no power . . . to retard . . . the operations of the constitutional laws enacted by Congress." Webster had said that the "only inquiry" was whether the state law "be consistent with the free operation of the law establishing the bank, and the full enjoyment of the privileges conferred by it." *Id.* at 327.

³⁴⁴ 22 U.S. (9 Wheat.) 738 (1824).

³⁴⁵ *Id.* at 865-68. See Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 695-701. Justice Stone was later to say that *McCulloch* itself had been based on the charter. Helvering v. Gerhardt, 304 U.S. 405, 411 (1938).

³⁴⁶ See 1 C. WARREN, *supra* note 13, at 505 (giving examples of state legislation actually outlawing the Bank).

³⁴⁷ We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give.

McCulloch, 17 U.S. (4 Wheat.) at 430. See the celebrated riposte of Justice Holmes, in arguing to sustain a state sales tax on sales to the United States: in the days of *McCulloch* "it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. . . . The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 233 (1928) (Holmes, J., dissenting).

³⁴⁸ *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 560 (1830); see *supra* notes 338-43 and accompanying text.

³⁴⁹ Cf. *supra* notes 60-65 and accompanying text (discussing *Fletcher v. Peck*).

³⁵⁰ 2 U.S. (2 Dall.) 419 (1793); see Currie, *Supreme Court, 1789-1801*, *supra* note 1, at 831-39.

did not except suits against states;³⁵¹ Marshall made no attempt to distinguish *Chisholm*. More basically, *McCulloch*'s argument positing absurd consequences did not hold up on its merits. As another Justice Marshall has pointed out, no implicit immunity is necessary to protect federal operations;³⁵² Congress can immunize them at any time by statute under the necessary and proper clause.³⁵³

In interesting dicta, Marshall attempted to limit the scope of *McCulloch*'s immunity decision. First, he denied that *state* banks would be free of *federal* taxation; although a state tax upon federal operations would fall largely upon outsiders with no voice in determining state policy, the representation of the states in Congress would prevent abuse of a federal power to tax them.³⁵⁴ The enumeration of federal powers emphasized by Marshall elsewhere in the opinion,³⁵⁵ however, demonstrates that the Framers were not content as a general matter to rely solely on political safeguards to protect the interests of the states. Indeed, Marshall's principal argument for implicit immunity seems far stronger in the converse case than in *McCulloch* itself: unlike the United States, the states cannot protect themselves by enacting an immunity statute; the supremacy clause is a one-way street.³⁵⁶ It was not too long after

³⁵¹ *Chisholm*, 2 U.S. (2 Dall.) at 450-51 (Blair, J.), 466 (Wilson, J.), 467 (Cushing, J.), 476-77 (Jay, C.J.).

³⁵² *First Agricultural Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 352 (1968) (Marshall, J., dissenting) ("Congress could provide . . . statutory immunity from state taxation for the federal instrumentalities it may establish."). The majority in that case illustrated his principle by finding national banks immune from the state tax in question under 12 U.S.C. § 548 (1976). *First Agricultural Nat'l Bank*, 392 U.S. at 345.

³⁵³ In *McCulloch* Marshall essentially ignored counsel's strenuous argument that, if the government itself was immune from state taxes, the Bank was not because it was basically a private operation carried on for profit. See *McCulloch*, 17 U.S. (4 Wheat.) at 340-41 (Mr. Hopkinson); Plous & Baker, *McCulloch v. Maryland: Right Principle, Wrong Case*, 9 STAN. L. REV. 710, 720-23 (1957). In *Bank of the United States v. Planters' Bank*, 22 U.S. (9 Wheat.) 904, 906 (1824), Marshall was to insist that a suit against a corporation chartered and partly owned by a state was not a suit against the state barred by the eleventh amendment. See Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 700. A parity of reasoning would suggest that a tax on the Bank was not a tax on the United States. Cf. *National League of Cities v. Usery*, 426 U.S. 833, 854 n.18 (1976) (acknowledging that Congress could regulate state-owned railroads because they were "not in an area that the States have regarded as integral parts of their governmental activities"); *New York v. United States*, 326 U.S. 572, 582-83 (1946) (allowing a federal tax on the state's sale of mineral water while assuming that other state functions were immune).

³⁵⁴ *McCulloch*, 17 U.S. (4 Wheat.) at 428, 435. See *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 547-48 (1869) (upholding a federal tax on the issuance of state bank notes). For an excellent explication of other examples of the same principle of political safeguards, see J. ELY, *DEMOCRACY AND DISTRUST* 82-87 (1980).

³⁵⁵ See *supra* notes 332-33 and accompanying text.

³⁵⁶ See Powell, *The Waning of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 633, 652-64 (1945).

McCulloch that the states were held immune from federal taxes as well.³⁵⁷

Marshall's second reservation was that the opinion did not preclude nondiscriminatory taxes on "real property of the bank" or on "the interest which the citizens of Maryland may hold in this institution."³⁵⁸ This too derives support from his discussion of political checks, though not tied to it in the opinion; that the state cannot overburden federal activities without doing the same to those of its own citizens furnishes some degree of protection. If this was the reason for Marshall's concession concerning property and stock taxes, it should have permitted a nondiscriminatory tax on the issuance of banknotes as well; yet in the body of his opinion Marshall nowhere relied on the fact that the Maryland tax was discriminatory.³⁵⁹ A property tax might be consistent with the notion, elsewhere found in the opinion, that the Constitution did not "deprive the States of any resources which they originally possessed,"³⁶⁰ because the land had not been created by Congress. But shares of bank stock had been; like the notes taxed in *McCulloch* itself, they were "means employed by the government . . . for the execution of its powers."³⁶¹ Marshall nowhere explained why stock was not also governed by his earlier injunction that the state could not tax such means at all.³⁶² In fact, the concessions for property and stock did not sit well with the rest of the opinion; Marshall himself was to ignore them in *Weston v. City Council*,³⁶³ where,

³⁵⁷ *Collector v. Day*, 78 U.S. (11 Wall.) 113, 126-27 (1871), *overruled in part*, *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 486 (1939) (holding salaries of government officials subject to income taxation).

³⁵⁸ *McCulloch*, 17 U.S. (4 Wheat.) at 436.

³⁵⁹ Moreover, his distinction of the property and stock cases was simply that the case before him concerned "a tax on the operations of the bank," *id.* at 436; and elsewhere he had flatly limited the state to taxing "every thing which exists by its own authority, or is introduced by its permission," finding "a total failure of this original power to tax the means employed by the government of the Union, for the execution of its powers," *id.* at 429-30. A nondiscriminatory tax on banknotes would be inconsistent with these passages.

For discussion of the nondiscrimination dictum in *McCulloch* and its application to a tax on occupiers of government property in *United States v. County of Fresno*, 429 U.S. 452 (1977), see Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?*, 75 MICH. L. REV. 1426, 1434-41, 1446-54 (1977) (praising *Fresno* but concluding for "cogent policy reasons" that "the *McCulloch* dictum concerning nondiscriminatory taxes on federal property may be best left unexhumed," *id.* at 1454 (emphasis added)).

³⁶⁰ *McCulloch*, 17 U.S. (4 Wheat.) at 436.

³⁶¹ *Id.* at 430.

³⁶² *Id.*

³⁶³ 27 U.S. (2 Pet.) 449, 468-69 (1829).

over a pointed Johnson dissent,³⁶⁴ he struck down a tax on the holders of federal securities without discussing whether it was discriminatory.

B. *Gibbons v. Ogden*

Ogden, owner of a steamboat monopoly granted by New York, obtained a state court injunction restraining Gibbons from operating steamboats across the Hudson River between New York and New Jersey.³⁶⁵ Gibbons's boats, however, were licensed and enrolled under federal statute;³⁶⁶ the Supreme Court in 1824 held the federal license gave Gibbons a right to operate his boats notwithstanding the state law.³⁶⁷

The threshold question was whether Congress had power to license vessels traveling between two states. The answer seems easy today: interstate navigation was "Commerce . . . among the several states,"³⁶⁸ for commerce necessarily involved not only the exchange of goods but all "commercial intercourse."³⁶⁹ Congress

³⁶⁴ *Id.* at 472-73. Johnson argued that the tax was not discriminatory and therefore was valid. *Id.* Justice Thompson also dissented. *Id.* at 473. The tax applied to all interest-bearing obligations except bank stock and those of the state itself. *Id.* at 449-50. See T. POWELL, *VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION* 92 (1956), suggesting that the tax was "to some extent" discriminatory "because it did not apply to all property."

³⁶⁵ *Ogden v. Gibbons*, 4 Johns. Ch. 150 (N.Y. Chan. 1819), *aff'd*, 17 Johns. 488 (N.Y. 1820), *rev'd*, 22 U.S. (9 Wheat.) 1 (1824). New Jersey and Connecticut had enacted retaliatory legislation against the New York monopoly. See 4 A. BEVERIDGE, *supra* note 13, at 404.

³⁶⁶ Act of Feb. 18, 1793, ch. 8, 1 Stat. 305 (codified as amended in part at 46 U.S.C. §§ 251-252 (1976)).

³⁶⁷ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). See generally M. BAXTER, *THE STEAMBOAT MONOPOLY* (1972) (providing useful and interesting background of the case); 4 A. BEVERIDGE, *supra* note 13, at 397-460 (recounting the litigation and Chief Justice Marshall's construction of the commerce clause). For the interesting observation that repeal of the increasingly unpopular monopoly by the state legislature was hindered by arguments based on the contract clause, see Mendelson, *New Light on Fletcher v. Peck and Gibbons v. Ogden*, 58 YALE L.J. 567 (1949). See also 28 NILES WEEKLY REGISTER 147 (1825), reporting the voyage of a new steamboat gratefully christened the "'Chief Justice Marshal' [sic]."

³⁶⁸ U.S. CONST. art. I, § 8, cl. 3.

³⁶⁹ *Gibbons*, 22 U.S. (9 Wheat.) at 189-90. Counsel had conceded that the transportation of goods was closely enough connected with their exchange to be considered a part of commerce. *Id.* at 76-77 (Mr. Oakley), 89-90 (Mr. Emmet). What Marshall did not clearly reveal in this connection was that the vessels in question were used for transporting passengers. See 4 Johns. Ch. at 152. Later Justices were to assert, as counsel had argued in *Gibbons*, that the distinction was important. See, e.g., *Edwards v. California*, 314 U.S. 160, 182 (1941) (Jackson, J., concurring) ("the migrations of a human being . . . do not fit easily into my notions as to what is commerce"); *Passenger Cases*, 48 U.S. (7 How.) 283, 473-74, 493 (1849) (Taney, C.J., dissenting). Marshall had already said on circuit that the commerce power authorized Congress to outlaw the importation of persons, *The Wilson v. United States*, 30 F. Cas. 239, 243 (C.C.D. Va. 1820) (No. 17,846), while holding that the case before him did not come within the law, *id.* at 244-45. As Beveridge said, the fact that counsel did

had enacted navigation laws at its very first session.³⁷⁰ Moreover, the constitutional provisions forbidding Congress to prefer one state's ports over another's or to require ships bound for one port to clear at another³⁷¹ would have been unnecessary if navigation had not been included.³⁷² Marshall stressed that there was no reason to give the Constitution an unnaturally narrow construction:³⁷³ the Framers "must be understood . . . to have intended what they have said . . . [;] [w]e know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred."³⁷⁴

At the same time Marshall emphasized that federal power extended only to commerce "with foreign Nations, and among the

not invoke this precedent seems to say much about the dissemination of opinions at the time. 4 A. BEVERIDGE, *supra* note 13, at 427-29. For a documented argument that the Framers had a narrow view of what Congress could do under the interstate commerce clause but that navigation acts were specifically contemplated, see Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 451-59, 478-80 (1941).

³⁷⁰ *Gibbons*, 22 U.S. (9 Wheat.) at 190. See, e.g., Act of Sept. 1, 1789, ch. 11, 1 Stat. 55, amended by Act of Dec. 31, 1792, ch. 1, 1 Stat. 287 (codified as amended at 46 U.S.C. § 11 (1976)).

³⁷¹ U.S. CONST. art. I, § 9, cl. 6.

³⁷² *Gibbons*, 22 U.S. (9 Wheat.) at 191. But see T. POWELL, *supra* note 364, at 52 ("Marshall . . . does not note that there is another maxim for interpretation, namely, *ex majore cautela*—out of an abundance of caution. . . . Obviously, . . . sometimes one [maxim] is appropriate and at other times the other.").

Justice Johnson, arguing that "[s]hip-building, the carrying trade, and propagation of seamen, are such vital agents of commercial prosperity, that the nation which could not legislate over these subjects, would not possess power to regulate commerce," *Gibbons*, 22 U.S. (9 Wheat.) at 230 (Johnson, J., concurring), added a similar inference from the 20-year moratorium in the same section on federal statutes prohibiting "[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit," *id.* at 230 (referring to U.S. CONST. art. I, § 9, cl. 1). As Marshall had said on circuit, *The Wilson v. United States*, 30 F. Cas. 239, 243 (C.C.D. Va. 1820) (No. 17,846), this inference was equally relevant to the question, adumbrated *supra* note 369, whether "Commerce" included the transportation of persons, and Johnson expressly referred in *Gibbons* to "the transportation of both men and their goods." See *Gibbons*, 22 U.S. (9 Wheat.) at 230-31 (Johnson, J., concurring).

³⁷³ *Gibbons*, 22 U.S. (9 Wheat.) at 187-89.

³⁷⁴ *Id.* at 188-89. St. George Tucker had argued that federal powers should be strictly construed because "[o]therwise the gradual and sometimes imperceptible usurpations of power, will end in the total disregard of all its intended limitations." St. G. Tucker, 1 *Appendix to Blackstone's Commentaries* 153, in 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (St. G. Tucker ed. 1803) [hereinafter cited as Tucker's Appendix to Blackstone]. It is well that Tucker's profession was law and not medicine; deliberate undernourishment is a costly safeguard against accidental overeating.

several States, and with the Indian Tribes";³⁷⁵ "the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description."³⁷⁶ Commerce "among" the states thus was limited to that "commerce which concerns more states than one. . . . The completely internal commerce of a state, then, may be considered as reserved for the state itself."³⁷⁷ It bears emphasizing that in *Gibbons*, as in *McCulloch v. Maryland*,³⁷⁸ the great exponent of national power expressly acknowledged significant limitations on the reach of federal legislation;³⁷⁹ it was Mar-

³⁷⁵ U.S. CONST. art. I, § 8, cl. 3. See *Gibbons*, 22 U.S. (9 Wheat.) at 193.

³⁷⁶ *Gibbons*, 22 U.S. (9 Wheat.) at 194-95.

³⁷⁷ *Id.* Professor Crosskey devoted much of his professional life to attacking the traditional understanding that Congress's power was limited to "interstate" commerce. "Commerce," he urged, was not restricted to interchange; "States" meant the people of the States, not territorial units; and "among," as illustrated by such phrases as "marriage among the Indian tribes," did not mean from one community to another. See 1 W. CROSSKEY, *supra* note 226, at 50-83. See also B. POTTER, *THE TALE OF PETER RABBIT* 25 (1972) (1st ed. 1903) ("He lost one of his shoes among the cabbages and the other shoe amongst the potatoes."). Crosskey concluded that Congress was meant to have power to regulate all gainful activity within the United States, 1 W. CROSSKEY, *supra* note 226, at 83, that it was therefore not absurd after all to read the contract clause as depriving the states of all power to legislate with respect to contract, *id.* at 288-92, and that construing the ex post facto clause to include civil legislation would therefore not have made the contract clause redundant, *id.* at 324-51. Thus Crosskey disagreed not only with the limitations the Court found in the commerce clause but with *Ogden v. Saunders* and *Calder v. Bull* as well. *Id.* at 348-51. See *supra* notes 222-26 and accompanying text; Currie, *Supreme Court, 1789-1801*, *supra* note 1, at 866-73.

Crosskey's work, after a barrage of devastating reviews, has been profoundly ignored. See, e.g., Brown, Book Review, 67 HARV. L. REV. 1439 (1954), pointing out among other things that Crosskey's arguments were almost entirely "lexicographical," *id.* at 1442, and eschewed any real effort to reconcile his conclusions with the "larger political and institutional forces which must have had some part in shaping the new government," *id.* at 1441. Brown gives numerous examples of eighteenth-century usage contradicting Crosskey, *id.* at 1446-55 ("a league among twelve Grecian cities," *id.* at 1450 (quoting 1 *THE WORKS OF JAMES WILSON* 247 (R. McCloskey ed. 1967)); "hostility among nations," *id.* at 1450 (quoting *THE FEDERALIST* No. 6, at 54 (A. Hamilton) (C. Rossiter ed. 1961))). In addition, leading Federalists such as Washington and Marshall had praised *The Federalist*, which, as virtually everyone else had, acknowledged that Congress was to have limited powers, *id.* at 1443-46. For the view taken in *The Federalist*, see, for example, *THE FEDERALIST* No. 42, at 235 (J. Madison) (C. Rossiter ed. 1961) (speaking of commerce "between State and State").

³⁷⁸ See *supra* notes 301-31 and accompanying text.

³⁷⁹ In defining "to regulate" as "to prescribe the rule by which commerce is to be governed," *Gibbons*, 22 U.S. (9 Wheat.) at 196, Marshall suggested a second limitation that seemed to cast doubt on whether the commerce clause supported expenditures for navigation aids or for internal improvements. President Monroe's interpretation had been narrower still, limiting Congress to outlawing state imposts on commerce. See 2 J. RICHARDSON, *MESSAGES AND PAPERS OF THE PRESIDENTS* 140, 161-62 (1900). See also Abel, *supra* note 369, at 465-81, arguing that Congress was not meant to have the general affirmative regulatory power that the words seem to convey.

shall's successors who were to expand the commerce power to cover virtually everything.³⁸⁰

More questionable was Marshall's conclusion that the federal licenses were intended to give Gibbons an indefeasible right to navigate the Hudson River. He seemed to think it self-evident: "The word 'license,' means permission or authority; and a license to do any particular thing, is a permission or authority to do that thing"³⁸¹ It was immaterial that the particular waters in question were not mentioned in the licenses; it was enough that they authorized the boats to engage in "the coasting trade."³⁸² Yet other licenses or permits have been construed merely as indicating the absence of federal objection to the proposed activity, not as affirmative authorizations.³⁸³ The state court had plausibly held,³⁸⁴ and Justice Johnson agreed,³⁸⁵ that the licenses in *Gibbons*

³⁸⁰ See, e.g., *Wickard v. Filburn*, 317 U.S. 11 (1942) (upholding federal regulation of growing wheat for on-farm consumption). Marshall did not clearly say, however, as later Justices would argue, that Congress's power was strictly limited to interstate commerce. See *Passenger Cases*, 48 U.S. (7 How.) 283, 400 (1849) (opinion of McLean, J.). Note the reference, quoted *supra* in text accompanying note 377, to commerce that "concerns" more than one state, the similar mention of that "which does not extend to or affect other states," *Gibbons*, 22 U.S. (9 Wheat.) at 194 (emphasis added), and the later statement in arguing against concurrent state power that "[i]f congress license vessels to sail from one port to another, in the same state, the act is supposed to be, necessarily, incidental to the power expressly granted to congress, and implies no claim of a direct power to regulate the purely internal commerce of a state," *id.* at 204. See F. FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 41-42, 60-61 (1937); T. POWELL, *supra* note 364, at 50 ("Commerce . . . 'which concerns more states than one' . . . is a much more expansive conception than 'interstate commerce'" (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 194)). After *Gibbons*, the New York court in a split decision held the federal license authorized intrastate as well as interstate navigation, and upheld its constitutionality in reliance on *Gibbons*, pointing out that the licensing statute, first enacted in 1789, see *supra* note 370 and accompanying text, contained regulations expressly applicable to intrastate voyages. *North River Steamboat Co. v. Livingston*, 3 Cow. 713 (N.Y. 1825). Beveridge misstates both the trial court's decision in this case and the effect of the affirmance. See 4 A. BEVERIDGE, *supra* note 13, at 447-50.

³⁸¹ *Gibbons*, 22 U.S. (9 Wheat.) at 213.

³⁸² *Id.* at 214 (quoting the language of the license).

³⁸³ E.g., *Organized Village of Kake v. Egan*, 369 U.S. 60, 62-64 (1962) (federal permits to anchor fish traps in National Forest land and to obstruct navigable waters with them do not prevent state from forbidding their use); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446-48 (1960) (local smoke abatement code enforceable against federally licensed boiler).

³⁸⁴ *Ogden v. Gibbons*, 17 Johns. at 509 ("[T]he only design of the federal government in regard to the enrolling and licensing of vessels, was to establish a criterion of *national character*, with a view to enforce the laws which impose *discriminating duties* on *American vessels*, and those of foreign countries." (emphasis in original)).

³⁸⁵ *Gibbons*, 22 U.S. (9 Wheat.) at 232 (Johnson, J., concurring) ("[I]t is to confer on her American privileges, as contradistinguished from foreign; and to preserve the government from fraud by foreigners, in surreptitiously intruding themselves into the American

were merely a means of enforcing a discrimination against foreign vessels;³⁸⁶ Marshall himself was to hold a few years later, quite without explanation, that an identical license did not prevent a state from obstructing the passage of the licensee by authorizing the damming of a navigable stream.³⁸⁷

More important than the holding that the New York monopoly contravened a federal statute were Marshall's dicta suggesting that in the absence of statute it might have offended the commerce clause itself. "It has been contended," said Marshall,

that, as the word "to regulate" implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. . . . There is great force in this argument, and the court is not satisfied that it has been refuted.³⁸⁸

Justice Johnson went further: rejecting the argument based upon the licenses,³⁸⁹ he based his concurrence on the ground that the federal commerce power was exclusive.³⁹⁰

commercial marine, as well as frauds upon the revenue, in the trade coastwise, that this whole system is projected.").

³⁸⁶ From the outset foreign vessels had been subjected to grossly discriminatory duties. See, e.g., Act of July 20, 1790, ch. 30, 1 Stat. 135 (codified as amended at 46 U.S.C. § 121 (1976)). Section 6 of the statute involved in *Gibbons* provided for payment of the higher foreign duties by ships not enrolled or licensed. Act of Feb. 18, 1793, ch. 8, § 6, 1 Stat. 305, 307-08 (codified as amended at 46 U.S.C. § 318 (1976)). In 1817 foreign ships were excluded from the coasting trade entirely. Act of March 1, 1817, ch. 31, 3 Stat. 351, *repealed in part* by Act of June 28, 1864, ch. 170, 13 Stat. 201, *remainder repealed* by Act of Mar. 3, 1933, ch. 202, 47 Stat. 1428.

Chancellor Kent, who had given the license a narrow reading in the state trial court, *Ogden v. Gibbons*, 4 Johns Ch. at 156-59, stuck to his guns after the Supreme Court's decision:

The great objects and policy of the coasting act were, to exclude foreign vessels from commerce between the states, in order to cherish the growth of our marine, and to provide that the coasting trade should be conducted with security to the revenue. The register and enrolment of the vessel were to ascertain the national character; and the license was only evidence that the vessel had complied with the requisites of the law, and was qualified for the coasting trade under American privileges.

1 J. KENT, *supra* note 109, at 435. For approving views of Kent's conclusion, see, for example, F. FRANKFURTER, *supra* note 380, at 15-16; T. POWELL, *supra* note 364, at 53, 142; Campbell, *Chancellor Kent, Chief Justice Marshall and the Steamboat Cases*, 25 SYRACUSE L. REV. 497, 525-28 (1974).

³⁸⁷ *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829); see *infra* notes 410-17 and accompanying text. See also *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 275-77 (1977), casting aspersions on Marshall's interpretation in *Gibbons* and recasting the license's effect as a (still questionable) prohibition of discriminatory treatment.

³⁸⁸ *Gibbons*, 22 U.S. (9 Wheat.) at 209 (Marshall, C.J.).

³⁸⁹ *Id.* at 231-33 (Johnson, J., concurring).

³⁹⁰ *Id.* at 226-29 (Johnson, J., concurring).

This was the beginning of incessant litigation over the extent to which state legislation is precluded by the commerce clause.³⁹¹ The wording of the clause suggests no limitation on the states; it merely grants Congress the authority to "regulate Commerce."³⁹² This language contrasts vividly with Congress's power of "exclusive Legislation" over the District of Columbia³⁹³ and with the various provisions of article I, section 10, expressly forbidding states to invade such federal preserves as the making of treaties or the coining of money.³⁹⁴ Moreover, though Marshall did not say so, *Gibbons* was not the first case confronting the Court with a question of the exclusivity of a grant of federal power. Four years earlier the Court had allowed a state to punish failure to respond to a call-up of the

The power of a sovereign state over commerce . . . amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom, necessarily implies the power to determine what shall remain unrestrained, it follows, that the power must be exclusive . . .

Id. at 227. But no one denied that Congress had *power* to insist that commerce be free; the argument was that the states retained concurrent authority until Congress insisted. Johnson on circuit had already held the commerce power exclusive in striking down a South Carolina law imprisoning and in many cases enslaving black seamen arriving in South Carolina ports, *Elkison v. Deliesseline*, 8 F. Cas. 493 (C.C.D.S.C. 1823) (No. 4366), partly in evident reliance on the unpromising text, *id.* at 495 ("the words of the grant sweep away the whole subject, and leave nothing for the states to act upon"), and partly because exclusivity was desirable, *id.* ("If this law were enforced . . . retaliation would follow; and the commerce of this city . . . might be fatally injured."). Johnson also found the black-sailor law contrary to federal law and a treaty, and added that the powers to fix the value of foreign coins and to set standards of weights and measures were also exclusive. *Id.*

William Rawle, writing shortly after *Gibbons*, quoted at length from Marshall's opinion, W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 82-84 (2d ed. Philadelphia 1829) (1st ed. Philadelphia 1825), and argued that the risk of varying and obstructive state regulations, "mutual rivalries, and other obvious inconveniences" meant that only Congress could regulate foreign commerce or commerce "between the different states," *id.* at 82. More significantly, the Virginia Republican St. George Tucker had reached the same conclusion without explanation as early as 1803. 1 Tucker's Appendix to Blackstone, *supra* note 374, at 180. Story disingenuously professed that *Gibbons* had settled the question. 2 J. STORY, *supra* note 40, §§ 1067-1068, at 12-13. Professor Corwin agreed that the Framers had meant the commerce power to be exclusive, E. CORWIN, *supra* note 36, at 142, but gave no reasons for the conclusion. See also Abel, *supra* note 369, at 484-94 (arguing for the same conclusion largely on the basis of scattered hints in the federal and state conventions). But see F. FRANKFURTER, *supra* note 380, at 12-13 ("[t]he conception that the mere grant of the commerce power to congress dislodged state power finds no expression" in either state or federal conventions); 2 J. THAYER, CASES ON CONSTITUTIONAL LAW 2190-91 (1895) (arguing the commerce power was not exclusive).

³⁹¹ For one recent example see *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (invalidating an Iowa law limiting the length of trucks).

³⁹² U.S. CONST. art. I, § 8, cl. 3.

³⁹³ *Id.* § 8, cl. 17. See *supra* notes 101-05 and accompanying text (discussing *Terrett v. Taylor*).

³⁹⁴ U.S. CONST. art. I, § 10, para. 1 ("No State shall enter into any Treaty, Alliance, Confederation; . . . coin money" (emphasis added)).

federal militia, despite the argument that both federal legislative and judicial powers were exclusive.³⁹⁵ In 1819 Marshall himself had written for the Court in holding the federal bankruptcy power not exclusive;³⁹⁶ the unexplained contrary suggestion respecting naturalization in an earlier case could easily have been based upon a preemptive federal statute.³⁹⁷ Chief Justice Taney was later to argue with great plausibility,³⁹⁸ as had Chancellor Kent and his brethren in an earlier New York case,³⁹⁹ that the commerce clause did not limit the states.⁴⁰⁰ What is most significant for present pur-

³⁹⁵ *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820), discussed in Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 702-05.

³⁹⁶ *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819); see *supra* notes 155-202 and accompanying text. Both *Sturges* and *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820), had been urged on the Court in *Gibbons* by counsel as decisive. *Gibbons*, 22 U.S. (9 Wheat.) at 35 (Mr. Oakley), 86 (Mr. Emmet).

³⁹⁷ See *supra* notes 194-95 and accompanying text (discussing *Chirac v. Chirac*). Later cases also have held the federal patent and copyright powers not to be exclusive. *E.g.*, *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974); *Goldstein v. California*, 412 U.S. 546 (1973). The New York court had held the patent power not exclusive in *Livingston v. Van Ingen*, 9 Johns. 507 (N.Y. 1812), which also involved the steamboat monopoly. The question was litigated but not decided in *Gibbons*. See *Gibbons*, 22 U.S. (9 Wheat.) at 221. As he had in *McCulloch*, see *supra* note 341, Marshall conceded that the federal tax power was not exclusive, but he distinguished the taxing power from the commerce power, *Gibbons*, 22 U.S. (9 Wheat.) at 198-200. See also *id.* at 199 ("In imposing taxes for state purposes, [the states] are not doing what congress is empowered to do," for Congress may tax only "to pay the debts, and provide for the common defence and general welfare of the United States.").

³⁹⁸ *License Cases*, 46 U.S. (5 How.) 504, 579 (1847) (Taney, C.J., concurring).

³⁹⁹ *Livingston v. Van Ingen*, 9 Johns. 507 (N.Y. 1812). See especially the argument of Judge (later Justice) Thompson that federal powers were impliedly exclusive only if, as with borrowing on federal credit and establishing federal courts, *id.* at 565-66, they "did not antecedently form a part of state sovereignty," *id.* at 565, or their objects "from their nature, are beyond the reach and control of the state governments," *id.* Though appointed to the Supreme Court in 1823, Thompson did not arrive in time to participate in *Gibbons v. Ogden*. See 22 U.S. (9 Wheat.) at iii. For his later views on the commerce clause, see *infra* notes 425-30 and accompanying text (discussing *Brown v. Maryland*).

⁴⁰⁰ The Court seems right in its subsequent conclusion that one purpose of the commerce clause was to prevent untenable state obstructions to the free flow of goods. See *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 534 (1949) (citing 3 CONVENTION RECORDS, *supra* note 74, at 547 (Madison's explanation)); THE FEDERALIST No. 22, at 144-45 (A. Hamilton) (C. Rossiter ed. 1961):

The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.

See also 2 J. STORY, *supra* note 40, § 1066, at 11. But see Kitch, *Regulation and the American Common Market*, in REGULATION, FEDERALISM AND INTERSTATE COMMERCE 11-19 (A. Tarlock ed. 1981), arguing that the Framers' perceptions of substantial state interference lacked support in either theory or practice. In any event, the Constitution on its face suggests that the means of national control the Framers selected was to authorize Congress, not

poses, however, is Marshall's willingness once again to reach out and make one-sided suggestions about an issue that he conceded he did not have to resolve.

Both Marshall and Johnson took pains to emphasize that the states were not without all power to *impede* interstate or foreign commerce. Article I itself recognized, for example, that states might pass laws requiring inspection of goods to be exported,⁴⁰¹ but these, Marshall insisted, were not regulations of commerce. Their object was

to improve the quality of articles produced by the labor of a country They act upon the subject, before it becomes an article of foreign commerce, or of commerce among the states They form a portion of that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to the general government⁴⁰²

Similarly, state "quarantine and health laws," explicitly recognized by Congress,⁴⁰³ "are considered as flowing from the acknowledged power of a state, to provide for the health of its citizens."⁴⁰⁴ Johnson was of the same opinion:

The same bale of goods, the same cask of provisions, or the same ship, that may be the subject of commercial regulation, may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated, are no more intended as regulations on commerce, than the laws which per-

the Court, to keep open the channels of trade. *See* U.S. CONST. art I, § 8, cl. 3.

Justice Johnson declared in his concurrence that the entire panoply of state commercial regulations "dropped lifeless from their statute books" when the Constitution was adopted, implying a general agreement that federal power was exclusive. *Gibbons*, 22 U.S. (9 Wheat.) at 226 (Johnson, J., concurring). *Accord* B. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 52 (1942). Others, however, have disputed Johnson's version of the facts. *See, e.g.,* F. FRANKFURTER, *supra* note 380, at 51 ("From the beginning of the Union, the states had woven a network of regulatory measures over foreign and interstate commerce."). Counsel in *Gibbons* cited these past state practices to the Court. *Gibbons*, 22 U.S. (9 Wheat.) at 63-64 (Mr. Oakley), 97 n.(a) (Mr. Emmet). Marshall attempted to distinguish some of them as police power regulations rather than regulations of commerce, *see infra* notes 401-04 and accompanying text, but he said nothing about counsel's examples relating to trade with the Indians, *Gibbons*, 22 U.S. (9 Wheat.) at 82-83 (Mr. Oakley), or regulation of stagecoach fares, *id.* at 97 n.(a)(2) (Mr. Emmet).

⁴⁰¹ U.S. CONST. art. I, § 10, para. 2. ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws").

⁴⁰² *Gibbons*, 22 U.S. (9 Wheat.) at 203 (Marshall, C.J.).

⁴⁰³ Act of May 27, 1796, ch. 31, 1 Stat. 474, *repealed by* Act of Feb. 25, 1799, ch. 12, § 8, 1 Stat. 619, 621 (codified as amended at 42 U.S.C. §§ 88-91, 97, 112 (1976)).

⁴⁰⁴ *Gibbons*, 22 U.S. (9 Wheat.) at 205 (Marshall, C.J.).

mit their importation, are intended to inoculate the community with disease.⁴⁰⁵

The reader may well find the resulting "exclusivity" of congressional authority in the sphere of commerce a peculiar one. If the purpose of the Framers was to create a self-executing safeguard against state interference with commerce, one might expect them to have done so without regard to the name of the power the state purported to exercise.⁴⁰⁶ Fifty years later the Court was to recognize that the federal interest that had led to Marshall's suggestion of exclusivity was threatened equally by state action under the police-power label⁴⁰⁷ and to reject, at least for the time being,⁴⁰⁸ the *Gibbons* distinction.⁴⁰⁹

Five years after *Gibbons*, in *Willson v. Black Bird Creek Marsh Co.*,⁴¹⁰ Marshall wrote for a unanimous Court in upholding a state law that authorized construction of a dam obstructing a small navigable creek. Stressing that Congress had passed no law affecting the question, Marshall concluded that the state law could not, "under all the circumstances of the case, be considered as re-

⁴⁰⁵ *Id.* at 235 (Johnson, J., concurring).

⁴⁰⁶ *Cf.* License Cases, 46 U.S. (5 How.) 504, 583 (1847) (Taney, C.J., separate opinion) (objecting that if the states are "absolutely prohibited . . . from making any regulations of foreign commerce . . . such regulations are null and void, whatever may have been the motive of the State"); F. FRANKFURTER, *supra* note 380, at 52-53 (concluding that "Taney's analysis destroys the illusive simplicity of Marshall's concession of a 'police' power to the states" (footnote omitted)); T. POWELL, *supra* note 364, at 51 (characterizing Marshall's distinction as an "exercise in verbalisms"), 150 (suggesting that Marshall's police-power exceptions were so sweeping that it hardly mattered whether the states could "regulate commerce").

⁴⁰⁷ *Henderson v. Mayor of New York*, 92 U.S. 259, 271-72 (1876) ("Nothing is gained in the argument by calling it the police power. . . . [W]henver the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall . . .").

⁴⁰⁸ Although a later Court was to note that over the years the Court had "consistently . . . rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce . . . while generally supporting their right to impose even burdensome regulations in the interest of local health and safety," *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 535 (1949), the Court already had stopped viewing the matter as one of simple labeling. In fact, the Court has struck down health and safety regulations whose burden on commerce it has found unjustified. *See, e.g., Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945).

⁴⁰⁹ Like Marshall's concession respecting the imprisonment of debtors in *Sturges*, *see supra* notes 164-77 and accompanying text, the distinction drawn in *Gibbons* seems an afterthought employed to avoid the many examples that seemed to contradict his theory. *See* F. FRANKFURTER, *supra* note 380, at 27 (Marshall's "doctrine of a completely exclusive commerce power could not be rigorously applied without changing the whole political character of the states").

⁴¹⁰ 27 U.S. (2 Pet.) 245 (1829).

pugnant to the power to regulate commerce in its dormant state."⁴¹¹ That Congress had passed no relevant law was not clear after *Gibbons*, for Willson had a federal license to engage in the coasting trade.⁴¹² Counsel had argued with some force that if, under *Gibbons*, "Delaware has no right to restrain particular vessels from using her navigable streams, she cannot stop the navigation of those streams" altogether.⁴¹³

The more interesting question was why, after *Gibbons*, the dam did not offend the commerce clause itself. Some of Marshall's contemporaries thought he meant to retract the feelers of exclusivity he had put out in *Gibbons*.⁴¹⁴ More likely, since Johnson did not dissent, the key lay in Marshall's statement that the "value of the property on [the creek's] banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved."⁴¹⁵ "Measures calculated to produce these objects," he added in an evident reference to his discussion of inspection and quarantine laws in *Gibbons*,⁴¹⁶ were allowable—"provided," he added ambiguously, "they do not come into collision with the powers of the general government."⁴¹⁷ The important point is that he made no real effort to explain, though this was the first case in which he had to face the issue of the preemptive effect of the commerce clause itself; he left us to wonder what was the basis of the decision.⁴¹⁸

⁴¹¹ *Id.* at 252.

⁴¹² *Id.* at 246, 248 (Mr. Coxe). See *supra* note 387.

⁴¹³ *Willson*, 27 U.S. (2 Pet.) at 249 (Mr. Coxe). Marshall did not answer this contention in his opinion. Frankfurter read *Willson* as holding that the license conveyed no right to navigate unimportant small streams. F. FRANKFURTER, *supra* note 380, at 20-21. Taney thought *Willson* meant the license gave a right to navigate only those streams which were not obstructed. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 585-87 (1852) (Taney, C.J., dissenting).

⁴¹⁴ See *New York v. Miln*, 36 U.S. (11 Pet.) 102, 149-50 (1837) (Thompson, J., concurring). Thompson had participated in *Willson*. See also F. FRANKFURTER, *supra* note 380, at 28 (suggesting that *Willson* was a retreat from Marshall's earlier conception of an exclusive commerce power).

⁴¹⁵ *Willson*, 27 U.S. (2 Pet.) at 251.

⁴¹⁶ See *supra* notes 403-04 and accompanying text.

⁴¹⁷ *Willson*, 27 U.S. (2 Pet.) at 251. Story explained *Willson* as holding that the state's authority to act under "other powers, beside that of regulating commerce," was not destroyed by the commerce clause. 2 J. STORY, *supra* note 40, § 1069, at 517. See also F. FRANKFURTER, *supra* note 380, at 29 n.37 (citing Story with approval).

⁴¹⁸ Justice Frankfurter put the point somewhat less critically: Marshall "did little more than decide, stating hardly any doctrine but hinting enough to foreshadow, certainly in direction, the vitally important accommodation between national and state needs formulated more than 20 years later in *Cooley v. Board of Wardens*, 12 How. 299, 319 (1851)." Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 223 (1955).

C. *Brown v. Maryland*

Brown had imported goods from abroad and sold them in the original package. Maryland convicted him for selling them without paying a fifty dollar license tax for the privilege of selling imported goods. In 1827 the Supreme Court reversed.⁴¹⁹

Much of the opinion was devoted to showing that Maryland's law offended the provision of article I, section 10, forbidding a state, without congressional consent, "to lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws."⁴²⁰ "[I]mports," said Marshall, invoking the "lexicons" and "usage," are "things imported"; a "'duty on imports' then, is not merely a duty on the act of importation, but is a duty on the thing imported."⁴²¹ Whatever the purpose of the clause, a tax on the sale of imported goods would undermine it as effectively as a tax on the act of importation; for "[n]o goods would be imported if none could be sold."⁴²² Thus an import remained an import, immune from state taxation, "while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported."⁴²³ Finally, a tax on the business of selling imported goods was in effect a tax on the goods themselves: "It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself"⁴²⁴

All of this sounds very plausible. Surely the Framers had not meant to allow the free entry of goods to be sabotaged by nominally distinguishable taxes levied after importation. The trouble was, as pointed out by Justice Thompson's dissent, that Marshall's reasoning proved too much: a tax on a later resale of the goods at retail

would equally increase the burden, and enhance the expense of the article [I]t will necessarily affect the importation. So that nothing short of a total exemption from State charges or taxes, under all circumstances, will answer the supposed object of the constitution. And to push the principle to such lengths, would be a restriction upon State authority, not war-

⁴¹⁹ *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827). See 4 A. BEVERIDGE, *supra* note 13, at 454-60; 1 C. WARREN, *supra* note 13, at 693-96.

⁴²⁰ U.S. CONST. art. I, § 10, para. 2.

⁴²¹ *Brown*, 25 U.S. (12 Wheat.) at 437-38 (quoting U.S. CONST. art. I, § 10, para. 2).

⁴²² *Id.* at 439.

⁴²³ *Id.* at 442.

⁴²⁴ *Id.* at 444.

ranted by the constitution.⁴²⁵

Thompson therefore would have restricted the prohibition to "foreign duties, and not to taxes imposed by the States, after the imports became articles of internal trade, and for domestic use and consumption."⁴²⁶

Marshall conceded that "there must be a point of time when the prohibition ceases."⁴²⁷ He then stated:

when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition⁴²⁸

The arbitrariness of the line drawn is evident;⁴²⁹ it can be derived neither from the words nor from the purpose of the import-export clause. Nevertheless, neither alternative seemed palatable: on the one hand it seems unlikely the Framers meant to give imported goods a perpetual tax exemption, and on the other Marshall seems right that Thompson's narrow interpretation would drain the clause of all meaning.

To the extent the clause was meant to protect citizens of inland states from tolls exacted by states through which their goods were imported,⁴³⁰ the tax in *Brown* was arguably all right, for there was no suggestion that *Brown* had sold the goods for transport to another state. But the language of the clause forbids imposts and duties on *all* imports, whether or not destined for other states. To

⁴²⁵ *Id.* at 455 (Thompson, J., dissenting).

⁴²⁶ *Id.* at 456 (Thompson, J., dissenting).

⁴²⁷ *Id.* at 441.

⁴²⁸ *Id.* at 441-42.

⁴²⁹ See T. POWELL, *supra* note 364, at 181 ("So far as I know, the removal of one pasteboard box from the wooden shipping case ends the immunity of other pasteboard boxes still left in the traveling container."); Trickett, *The Original Package Ineptitude*, 6 COLUM. L. REV. 161 (1906).

⁴³⁰ See THE FEDERALIST NO. 42, at 267 (J. Madison) (C. Rossiter ed. 1961) (arguing that "[a] very material object" of the federal commerce power "was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter"); *id.* No. 44, at 283 (J. Madison) ("The restraint on the power of the States over imports and exports is enforced by all the arguments which prove the necessity of submitting the regulation of trade to the federal councils."); see also Marshall's statement in *Brown*, 25 U.S. (12 Wheat.) at 440 ("The great importing states would thus levy a tax on the non-importing states").

the extent this language reflects a policy "to maintain unimpaired our commercial connexions [sic] with foreign nations, or to confer this source of revenue on the government of the Union,"⁴³¹ the Maryland tax seems particularly offensive, because it placed imports at a disadvantage—it did not apply to sellers of local products. At a minimum, as the Court was to say with the hindsight of 150 more years, the import-export clause "prohibits state taxation based on the foreign origin of the imported goods"⁴³²—regardless, I should have thought, of whether they are singled out for taxation at the wholesale or the retail stage or in the hands of the ultimate consumer.⁴³³ From this perspective, the original-package distinction not only was unnecessary as a means of keeping the clause from overly infringing the reserved powers of the states, but it also left the clause incapable of achieving its purposes and subjected it to patent evasion. Although the validity of a nondiscriminatory property tax on imported goods may not be as easy a question as the Court recently made it,⁴³⁴ that is another reason why Marshall

⁴³¹ *Brown*, 25 U.S. (12 Wheat.) at 439. See also *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976):

The Framers of the Constitution thus sought to alleviate three main concerns by committing sole power to lay imposts and duties on imports in the Federal Government, with no concurrent state power: the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically.

Id. at 285-86 (footnote omitted).

⁴³² *Michelin*, 423 U.S. at 287.

⁴³³ See 1 W. CROSSKEY, *supra* note 226, at 296-97 (arguing that while "Imposts" were understood as restricted to "customs duties," which were "duties collected . . . at the time and place of importation or exportation," "Duties" included "excises" and "all state taxes . . . save property taxes only" (emphases in original)). Crosskey buttressed these conclusions with the persuasive example of Connecticut's 1790 repeal of a discriminatory excise on the retail sale of imported goods after arguments that it offended the import-export clause. *Id.* at 306-11.

⁴³⁴ See *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). As the Court acknowledged in *Michelin Tire Corp.*, a nondiscriminatory tax on goods imported for shipment to another state at least arguably offends the avowed purpose of preventing coastal states from levying tolls on their inland neighbors, *id.* at 290; and there is a semantic difficulty in holding that nondiscriminatory property taxes are "Duties on Imports" only when applied to goods to be exported after arrival, see Hellerstein, *Michelin Tire Corp. v. Wages: Enhanced State Power to Tax Imports*, 1976 Sup. Ct. Rev. 99, 115-17. Furthermore, as Hellerstein also points out, it is not entirely clear that nondiscriminatory taxes even on those goods consumed in the importing state are consistent with the assumed purposes of freedom of for-

would have done better to avoid deciding *Brown* on a basis that seemed to embrace it. It would have sufficed to hold that the state could not levy taxes that applied only to imported goods.

Typically, Marshall was not content to rest the invalidity of Maryland's license requirement on the import-export clause alone; he went on to add, unnecessarily, that it was unconstitutional on a second ground.⁴³⁵ The commerce clause empowered Congress to authorize importation; since "[s]ale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part," Congress may also "authorize the importer to sell."⁴³⁶ The tariff act, which "offers the privilege" of importation "for sale at a fixed price," implicitly conveyed also the right to sell, without which the right to import was of no value.⁴³⁷ Marshall concluded accordingly:

Any penalty inflicted on the importer for selling the article in his character of importer, must be in opposition to the act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to congress to regulate commerce⁴³⁸

Thus the case was governed by precedent:⁴³⁹ *McCulloch v. Maryland*.

McCulloch v. Maryland?! As the dissent shouted,⁴⁴⁰ *McCulloch* was not a commerce clause case; it had held a state could not tax the operations of the federal government.⁴⁴¹ One might have

sign commerce and of protecting federal revenue. See *id.* at 108-09. On the other hand, it is not clear that the Framers meant to give foreign goods a competitive advantage or to free those dealing in them from bearing the cost of state services such as police and fire protection. See *Michelin*, 423 U.S. at 287; Early & Weitzman, *A Century of Dissent: The Immunity of Goods Imported for Resale from Nondiscriminatory State Personal Property Taxes*, 7 Sw. U.L. Rev. 247, 247, 252 (1975).

⁴³⁵ See T. POWELL, *supra* note 364, at 182 ("[I]t was an adventure in supererogation to wield the club of the commerce clause for a second lethal blow after the import clause had successfully committed legicide").

⁴³⁶ *Brown*, 25 U.S. (12 Wheat.) at 447. This was an interesting step beyond *Gibbons*, where Congress had been held to have power to regulate interstate movement. As Thompson observed in his *Brown* dissent, the resale of goods after importation was a wholly intra-state transaction if viewed in isolation. *Id.* at 453 (Thompson, J., dissenting). *Gibbons*, of course, had refused to view the New York and New Jersey portions of a single journey as separate transactions. *Gibbons*, 22 U.S. (9 Wheat.) at 195-96.

⁴³⁷ *Brown*, 25 U.S. (12 Wheat.) at 447.

⁴³⁸ *Id.* at 448.

⁴³⁹ *Id.* at 449.

⁴⁴⁰ *Id.* at 457-58 (Thompson, J., dissenting).

⁴⁴¹ See *supra* notes 292-364 and accompanying text.

thought the proper starting point was *Gibbons v. Ogden*, in which Marshall had hinted but not decided that the commerce power was exclusive.⁴⁴² But one then would have encountered Marshall's explicit concession in *Gibbons* that this arguable exclusivity did not preclude the states from *affecting* commerce by the exercise of distinct reserved powers.⁴⁴³ Indeed, in rejecting the argument that the import-export clause itself implied that, apart from its strictures, the states were free to regulate commerce, *Gibbons* had as much as said that the commerce clause did not preclude state taxation: "This prohibition . . . is an exception from the acknowledged power of the states to levy taxes, not from the questionable power to regulate commerce";⁴⁴⁴ it and the limitation of state tonnage duties⁴⁴⁵ "presuppose the existence of that which they restrain, not of that which they do not purport to restrain."⁴⁴⁶ *McCulloch*'s precept that the power to tax involved the power to destroy thus could not be applied to the commerce clause itself without undermining the basis of the *Gibbons* opinion.

What *Brown* had in common with *McCulloch* was that Congress had exercised its legislative power, in the one case by chartering a national bank, in the other by imposing a tariff. In both decisions Marshall obscured the basis of his holding by declaring alternately that the state law offended federal "law" and that it conflicted with congressional "power."⁴⁴⁷ In *Brown*, at least, the inference seems strong that it was the federal statute that Marshall found decisive.⁴⁴⁸ For, as recounted above, he went into some de-

⁴⁴² See *supra* notes 388-418 and accompanying text.

⁴⁴³ See *supra* notes 401-04 and accompanying text.

⁴⁴⁴ *Gibbons*, 22 U.S. (9 Wheat.) at 201-02.

⁴⁴⁵ U.S. CONST. art. I, § 10, para. 3 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage . . .").

⁴⁴⁶ *Gibbons*, 22 U.S. (9 Wheat.) at 203. See THE FEDERALIST No. 32, at 199 (A. Hamilton) (C. Rossiter ed. 1961) (arguing that the import-export clause "implies . . . that as to all other taxes, the authority of the States remains undiminished"); 1 W. CROSSKEY, *supra* note 226, at 320 (adding that powers to tax and to regulate had been considered distinct since colonial days).

⁴⁴⁷ See, e.g., *supra* notes 420-24, 427-28, 437-39, and accompanying text (discussing *Brown v. Maryland*); cf. *supra* notes 340-43 and accompanying text (discussing *McCulloch v. Maryland*).

⁴⁴⁸ See Sholley, *The Negative Implications of the Commerce Clause*, 3 U. CHI. L. REV. 556, 572 (1936) (adding, however, that dicta in *Brown* suggest that Marshall meant to recede from the distinction between regulation and taxation he had drawn in *Gibbons*). But see 1 W. CROSSKEY, *supra* note 226, at 311 (concluding *Brown* "rested solely on the Imports and Exports Clause"); T. POWELL, *supra* note 364, at 54, 181-82 (acknowledging the "uncertainty" of the opinion); B. WRIGHT, *supra* note 400, at 54 (concluding that "the dormant commerce power" was "insufficient" for Marshall in *Brown* "as in the *Gibbons* case").

Both Beveridge and Story seemed to think the decision was based on the commerce

tail to show that the tariff act gave the importer a right to sell,⁴⁴⁹ as he had held the steamboat license in *Gibbons* gave a right to navigate the Hudson.⁴⁵⁰ That *McCulloch* was invoked in *Brown* adds strength to the conclusion that the immunity of the Bank also had been inferred from the statute.

As in *Gibbons* and *McCulloch*, the argument for a statutory immunity in *Brown* is weak; the tariff act seems rather a revenue measure than an affirmative grant of the privilege of importing the goods, let alone that of selling them.⁴⁵¹ And of course the fictitious statutory right, like the immunity under the import-export clause, had to be limited arbitrarily so that the states could exclude unhealthful products and tax the retailer.⁴⁵² In the last analysis, however, it does seem that the Court in *Brown* was taking liberties only with a statute and not with the commerce clause itself.⁴⁵³

D. *Worcester v. Georgia*

After the Cherokees' effort to enjoin the enforcement of Georgia laws regulating reservation affairs had failed on the ground that the tribe was not a "foreign State" entitled to sue under article III,⁴⁵⁴ the state prosecuted and convicted Worcester for living on Cherokee land without a license. The Supreme Court reversed in 1832 in a famous Marshall opinion.⁴⁵⁵

clause itself. See 4 A. BEVERIDGE, *supra* note 13, at 457; 2 J. STORY, *supra* note 40, §§ 1068-1069, at 515-17. See also F. FRANKFURTER, *supra* note 380, at 50 & n.6 (concluding that although both *Gibbons* and *Brown* "rest on a finding of conflict between Congressional and state statutes . . . Marshall intended these opinions to develop a doctrine of limitations upon state authority implied from the commerce clause").

⁴⁴⁹ See *supra* notes 436-39 and accompanying text.

⁴⁵⁰ See *supra* notes 381-82 and accompanying text.

⁴⁵¹ See F. FRANKFURTER, *supra* note 380, at 20 (terming *Brown*'s statutory construction "esoteric"); T. POWELL, *supra* note 364, at 54 (describing it as "imaginative"), at 182 (calling it "as questionable as Marshall's invocation of the Coasting License in *Gibbons v. Ogden*" (footnote omitted)).

⁴⁵² See *Brown*, 25 U.S. (12 Wheat.) at 443-44.

⁴⁵³ Marshall added quite gratuitously "that we suppose the principles laid down in this case, to apply equally to importations from a sister state." *Id.* at 449. Since the tariff statute did not apply to interstate shipments and the decision seems not to have been based on the commerce clause itself, this passage seems to mean the Court thought the imports clause applied to goods coming from the other states. The Supreme Court later denied this application in *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1869). Crosskey and Powell, however, argued that Marshall was right. See 1 W. CROSSKEY, *supra* note 226, at 297-301, 315; T. POWELL, *supra* note 364, at 281. But see F. FRANKFURTER, *supra* note 380, at 37 (disagreeing with Crosskey and Powell).

⁴⁵⁴ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), discussed in Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 719-22.

⁴⁵⁵ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). See 4 A. BEVERIDGE, *supra* note

Some later decisions determining the limits of state power over Indian affairs have spoken mystically about the inherent sovereignty of the Indian nations, as if that extra-constitutional thesis somehow limited state authority.⁴⁵⁶ Though it is possible to pluck statements from *Worcester* that, separated from their context, appear to look in that direction,⁴⁵⁷ Marshall explicitly rejected such a conclusion: "If the objection to [Georgia's] . . . legislation . . . was confined to its extra-territorial operation, the objection, though complete, so far as respected mere right, would give this court no power over the subject."⁴⁵⁸ Instead, he flatly held the state law "in direct hostility with treaties [that] . . . recognise the pre-existing power of the [Cherokee] nation to govern itself"⁴⁵⁹ and with "acts of congress"⁴⁶⁰ that "manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive,"⁴⁶¹ both of which he had earlier discussed in considerable detail.

Georgia had denied the power of the federal government to bind it by an Indian treaty.⁴⁶² Although the state did not appear in

13, at 539-51 (reporting that "the mandate" in *Worcester* "was never obeyed," *id.* at 551); 2 C. WARREN, *supra* note 13, at 189-239 (pointing to serious procedural obstacles to the coercive enforcement of a Supreme Court mandate in a state criminal case and noting that after Jackson's stern reaction to South Carolina's Ordinance of Nullification, Worcester and his fellow defendants were pardoned by the Governor of Georgia). Warren also doubted that President Jackson ever said "John Marshall has made his decision, now let him enforce it." *Id.* at 219 (footnote omitted).

⁴⁵⁶ See, e.g., *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973) (adding that "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption"). That "inherent . . . sovereignty" remains a basis for upholding the governmental authority of Indian tribes was dramatically confirmed in *United States v. Wheeler*, 435 U.S. 313, 332 (1978), which concluded for this reason that the double jeopardy clause did not bar successive prosecutions by a tribe and by the United States; but Justice Rehnquist affirmed for the Court in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 481 n.17 (1976), that Indian immunities from state law derive from the supremacy clause alone, i.e., from conflicts between state law and federal statutes and treaties. See also F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 117 (1942) (noting the basis of the federal government's authority over Indian affairs rests in statutes and treaties).

⁴⁵⁷ *E.g.*, *Worcester*, 31 U.S. (6 Pet.) at 559 ("The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights from time immemorial . . ."), 561 ("The Cherokee nation, then, is a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force . . .").

⁴⁵⁸ *Id.* at 561.

⁴⁵⁹ *Id.* at 561-62.

⁴⁶⁰ *Id.* at 562.

⁴⁶¹ *Id.* at 557.

⁴⁶² See 2 C. WARREN, *supra* note 13, at 190.

the Supreme Court, Marshall unambiguously posed the question⁴⁶³ and rejected Georgia's answer: "The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties."⁴⁶⁴

This important constitutional question need not have been reached, since Marshall had found the state laws contrary to statutes as well as to treaties,⁴⁶⁵ and since Congress had explicit authority "[t]o regulate Commerce . . . with the Indian Tribes."⁴⁶⁶ Out of the blue, however, and wholly without amplification, Marshall added that Georgia's actions "interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the Union."⁴⁶⁷ Justice McLean's long-winded concurrence⁴⁶⁸ expressly and unnecessarily⁴⁶⁹ jumped to the essentially unexplained conclusion that Congress's power over Indian commerce was exclusive;⁴⁷⁰ possibly that is what Marshall had in mind as well, though

⁴⁶³ *Worcester*, 31 U.S. (6 Pet.) at 541, 557-58.

⁴⁶⁴ *Id.* at 559. It was in this context that Marshall declared that Indian nations were "distinct, independent, political communities." *Id.*

⁴⁶⁵ *Id.* at 561-62.

⁴⁶⁶ U.S. CONST. art. I, § 8, cl. 3.

⁴⁶⁷ *Worcester*, 31 U.S. (6 Pet.) at 561.

⁴⁶⁸ *Id.* at 563-96 (McLean, J., concurring). McLean had been appointed by President Jackson in 1829. The *Worcester* opinion contains a rather complete statement of McLean's judicial philosophy, including his favorable opinions of such chestnuts as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). Since Georgia had denied the Supreme Court's authority to review its criminal convictions, see 2 C. WARREN, *supra* note 13, at 213-14, the latter observation was not entirely out of place, see Currie, *Federal Courts, 1801-1835*, *supra* note 1 at 687-94 (discussing *Cohens*). Marshall may have been alluding to this situation when he wrote that the statute gave the Court both the "power" and the "duty" to decide the case: "This duty, however unpleasant, cannot be avoided." *Worcester*, 31 U.S. (6 Pet.) at 541.

Justice Baldwin dissented on procedural grounds, *id.* at 596 (Baldwin, J., dissenting), saying that his opinion on the merits was the same one he had expressed in the *Cherokee Nation* case, 30 U.S. (5 Pet.) at 31-50, where he had concluded that Georgia had full sovereignty over the Cherokee territory. Baldwin's conclusions are summarily reported, for the interesting reason that (as late as 1832) his opinion "was not delivered to the reporter." *Worcester*, 31 U.S. (6 Pet.) at 596.

⁴⁶⁹ McLean, like Marshall, found the Georgia laws contrary to treaty and federal statute. *Worcester*, 31 U.S. (6 Pet.) at 578-79.

⁴⁷⁰ *Id.* at 580-81. The reason given was simply that this power was "enumerated in the same section" with Congress's authority "to regulate commerce with foreign nations, to coin money, to establish post-offices, and to declare war" and "belongs to the same class of powers." *Id.* Coinage and war are easily distinguishable, because the Constitution expressly limits state power in these fields, U.S. CONST. art. I, § 10, paras. 1, 3, and the Court never had

his well-documented conclusions regarding the statutes and treaties were quite ample to dispose of the case. If Marshall meant to reach still another important and avoidable constitutional question, to resolve a difficult issue without discussion, and to give three grounds where one would have sufficed, it would not be for the first time. If, more charitably, we read the exclusivity remark as an aside and the reference to interference with "the relations established" as relying on the statutes and treaties, then, despite its well-known hints, the Court seems never to have invalidated a state law on the basis of the unimplemented commerce clause during Marshall's tenure, and it would be a long time before his successors did so.⁴⁷¹

E. Other Cases

The limits of federal power, apart from those of the judiciary, were not often litigated in the days of Marshall. *McCulloch* and *Gibbons* were of course the great cases; in upholding the Bank⁴⁷² and the power to license steamboats,⁴⁷³ Marshall gave a liberal but restrained direction to the interpretation of grants of congressional authority. In the same tradition, *United States v. Fisher*⁴⁷⁴ upheld priority for government claims against an insolvent estate; *Loughborough v. Blake*⁴⁷⁵ held that direct taxes could be extended to the

held either the postal power or that over foreign commerce to be exclusive. The difficulties posed by an implied exclusion of state authority over interstate commerce are considered *supra* notes 388-417 and accompanying text (discussing *Gibbons v. Ogden*); they seem equally applicable to Indian commerce. Justice Story, citing *Worcester*, described the Indian-commerce power as exclusive, 2 J. STORY, *supra* note 40, §§ 1094-1095, at 540-42; Rawle had reached the same conclusion before *Worcester*, evidently on the basis of *Gibbons*, W. RAWLE, *supra* note 390, at 82, 84. For recent statements casting doubt on this notion without ruling out negative effects on state law entirely, see *Washington v. Confederated Tribes*, 447 U.S. 125, 150-62 (1980), and cases cited; *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 481 n.17 (1976).

⁴⁷¹ The first unequivocal example seems to have been *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232 (1873). See also *Southern S.S. Co. v. Portwardens*, 73 U.S. (6 Wall.) 31 (1867) (alternative holding).

⁴⁷² See *supra* notes 292-364 and accompanying text (discussing *McCulloch v. Maryland*).

⁴⁷³ See *supra* notes 365-418 and accompanying text (discussing *Gibbons v. Ogden*).

⁴⁷⁴ 6 U.S. (2 Cranch) 358 (1805); see *supra* notes 316-28 and accompanying text.

⁴⁷⁵ 18 U.S. (5 Wheat.) 317 (1820). The power "to lay and collect taxes, duties, imposts and excises," said Marshall, was "without limitation as to place." *Id.* at 318 (quoting U.S. CONST. art. I, § 8, cl. 1). The requirement that direct taxes be "apportioned among the several States . . . according to their respective Numbers," U.S. CONST. art. I, § 2, para. 3, was meant "to furnish a standard by which taxes are to be apportioned, not to exempt from their operation any part of our country," *Loughborough*, 18 U.S. (5 Wheat.) at 320. The further requirement of apportionment "in Proportion to the Census or Enumeration" of the

District of Columbia; and *Martin v. Mott*⁴⁷⁶ declared that congressional power "to provide for calling forth the militia, to . . . repel invasions" supported a statute empowering the President to do so when, in the Court's words, there was "imminent danger of invasion."⁴⁷⁷

The relationship between Congress and the other federal branches was inconclusively touched upon in three cases. *The Cargo of the Brig Aurora v. United States*⁴⁷⁸ and *Wayman v. Southard*⁴⁷⁹ conclusorily upheld statutes giving authority to the President and to the courts, respectively, over objections that they delegated legislative power. *The Flying Fish*⁴⁸⁰ enforced a statute that the Court read to limit the President's right to seize vessels operated in violation of an embargo, despite Marshall's concession

states' respective populations, U.S. CONST. art. I, § 9, cl. 4, neither forbade nor required inclusion of the District of Columbia, *Loughborough*, 18 U.S. (5 Wheat.) at 321-22. The contrary implication derived from the well-known American aversion to taxation without representation was untenable, for it would deprive Congress of all power to tax residents of the District, contrary to the requirement that duties, imposts, and excises be "uniform throughout the United States," U.S. CONST. art. I, § 8, cl. 1, which admittedly "not only allows, but enjoins the government to extend the ordinary revenue system to this district," *Loughborough*, 18 U.S. (5 Wheat.) at 325. This last dictum may seem debatable, but the holding itself seems convincing.

More questionable seems Marshall's additional conclusion, apparently unnecessary to the decision, that if the District was included in a direct tax its share would have to be proportional to its own population, *id.* at 321-22, 325, because the census by which such a tax must be apportioned is the one "herein before directed to be taken," U.S. CONST. art. I, § 9, cl. 4. Marshall correctly had emphasized that the latter clause need not include the District at all: "The census referred to is admitted to be a census exhibiting the numbers of the respective States." *Loughborough*, 18 U.S. (5 Wheat.) at 321.

Marshall's resolution has much to commend it in policy, for it extended the Framers' ideas of tax equity to a case for which, as was generally true of the territories and the District of Columbia, they had failed adequately to provide. Cf. Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 666-67 (discussing *United States v. More*, 7 U.S. (3 Cranch) 159 (1805); *Hepburn v. Ellzey*, 6 U.S. (2 Cranch) 445 (1805); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828)). For the Court's first encounter with the direct tax provisions see Currie, *Supreme Court, 1789-1801*, *supra* note 1, at 853-60 (discussing *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796)).

⁴⁷⁶ 25 U.S. (12 Wheat.) 19 (1827).

⁴⁷⁷ *Id.* at 28-29 (Story, J.) (quoting U.S. CONST. art. I, § 8, cl. 15). Story stated that "[o]ne of the best means to repel invasion is to provide the requisite force for action, before the invader himself has reached the soil." *Id.* at 29. The point had not been contested. Story added that the statute gave the President unreviewable discretion to determine whether there was an imminent danger, *id.* at 29-32; the latter passage was to be used to support the conclusion in *Luther v. Borden*, 48 U.S. (7 How.) 1, 44-45 (1849), denying judicial authority to determine which was the legitimate government of Rhode Island.

⁴⁷⁸ 11 U.S. (7 Cranch) 382 (1813); see Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 715-16.

⁴⁷⁹ 23 U.S. (10 Wheat.) 1 (1825); see Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 713-16.

⁴⁸⁰ 6 U.S. (2 Cranch) 170 (1804).

that the President might have had power to make such seizures in the absence of the statute under his constitutional duty to "take care that the laws be faithfully executed."⁴⁸¹

What most of these decisions save *McCulloch* and *Gibbons* have in common is a lack of serious attention to the constitutional issue. *Fisher* leapt to a broad interpretation of the necessary and proper clause simply because it rejected the straw man of indispensable necessity; *Wayman* and *The Cargo of the Brig Aurora* were purely conclusory, and *The Flying Fish* did not advert to any question of Congress's power to limit the methods by which the President executes the laws.

Of greater interest is Justice Johnson's opinion for a unanimous Court in *Anderson v. Dunn*,⁴⁸² upholding the implicit power of the House of Representatives to punish nonmembers for contempt. He began with a ringing endorsement of *McCulloch*'s principle of incidental powers:

Had the faculties of man been competent to the framing of a system of government which would have left nothing to implication, it cannot be doubted, that the effort would have been made by the framers of the constitution. But what is the fact? There is not in the whole of that admirable instrument, a grant of power which does not draw after it others, not expressed, but vital to their exercise⁴⁸³

The principal basis for inferring a legislative contempt power was necessity:

[I]f there is one maxim which necessarily rides over all others, in the practical application of government, it is, that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them⁴⁸⁴ That a deliberate assembly . . . should not possess the power to suppress rudeness, or repel insult is a supposition too wild to be suggested.⁴⁸⁵

Johnson invoked analogy as well: it was on the same principle that the courts were "universally acknowledged" to have inherent contempt power, though Congress had expressly confirmed that au-

⁴⁸¹ *Id.* at 177 (quoting U.S. CONST. art. II, § 3).

⁴⁸² 19 U.S. (6 Wheat.) 204 (1821). For a brief explanation of the facts see D. MORGAN, *supra* note 201, at 119.

⁴⁸³ *Anderson*, 19 U.S. (6 Wheat.) at 225-26.

⁴⁸⁴ *Id.* at 226.

⁴⁸⁵ *Id.* at 228-29.

thority by statute out of "abundant caution."⁴⁸⁶ The existence of an explicit provision enabling each House to "punish its Members for disorderly Behaviour,"⁴⁸⁷ Johnson concluded, did not negate the power to punish others: no one thought the express authority to punish piracy meant that Congress could not create other criminal offenses, and "the exercise of the powers given over their own members, was of such a delicate nature, that a constitutional provision became necessary to assert or communicate it."⁴⁸⁸ Arguments based upon the constitutional jury provisions and upon article III's vesting of the "judicial Power" in the courts⁴⁸⁹ were simply ignored.⁴⁹⁰

This was a remarkable performance in which Jefferson's first appointee, who was to acquire a reputation as dissenter and upholder of state rights,⁴⁹¹ proved himself the spittin' image of John Marshall.⁴⁹² What the Constitution ought to provide, it provides—even though, as with the tax immunity in *McCulloch*,⁴⁹³ Congress's authority under the necessary and proper clause seems to render the necessity argument hollow. It is noteworthy that Johnson elected to announce a broad principle of inherent powers rather than more modestly to find contempt authority in the provi-

⁴⁸⁶ *Id.* at 227-28. Marshall had proclaimed an inherent judicial contempt power in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807). See Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 688-70. So had Johnson himself in the course of denying that federal courts had implicit authority to punish common law crimes. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). Johnson cited neither Marshall nor himself; indeed, he cited nothing in the entire *Anderson* opinion.

⁴⁸⁷ U.S. CONST. art. I, § 5, para. 2.

⁴⁸⁸ *Anderson*, 19 U.S. (6 Wheat.) at 233.

⁴⁸⁹ See *id.* at 214, 218 (Mr. Hall). See also 1 Tucker's Appendix to Blackstone, *supra* note 374, at 200 (criticizing an earlier exercise by the House of the power to punish nonmembers on these grounds as well as for want of a grand jury and of due process, and arguing that the enumerated powers of each House, like those of Congress itself, were a barrier to the discovery of unlisted powers).

⁴⁹⁰ For an approving view of *Anderson*, see 1 J. KENT, *supra* note 109, at 235-36 & 236 n.a., invoking not only "the principle of self-preservation," *id.* at 236, but also the practice of Parliament, *id.* at 235, which had been noted by counsel in *Anderson*, 19 U.S. (6 Wheat.) at 219-20, but not relied on in the opinion. *Anderson* was distinguished in *Kilbourn v. Thompson*, 103 U.S. 168 (1881) (casting aspersions on the Parliamentary analogy while holding a particular contempt citation beyond the House's power). But see Potts, *Power of Legislative Bodies to Punish for Contempt* (pts. 1 & 2), 74 U. PA. L. REV. 691, 780 (1926) (criticizing *Kilbourn's* approach and endorsing *Anderson*). The Court relied on *Anderson* in *McGrain v. Daugherty*, 273 U.S. 135, 160-78 (1927), in upholding the implicit investigatory power of the Senate.

⁴⁹¹ See generally D. MORGAN, *supra* note 201.

⁴⁹² See *id.* at 120, speaking of *Anderson*: "William Johnson had turned his back on strict construction."

⁴⁹³ See *supra* notes 349-53 and accompanying text.

sion empowering each House to "determine the Rules of its Proceedings."⁴⁹⁴ It is also notable that Johnson undertook in best Marshall fashion to lay down obiter limitations on the implicit power determined much as a legislature would have determined them: imprisonment was the only permissible sanction, because it was "the least possible power adequate to the end proposed";⁴⁹⁵ even imprisonment "must terminate with . . . adjournment," since when it adjourns "the legislative body ceases to exist."⁴⁹⁶ "[N]either analogy nor precedent would support the assertion of such powers in any other than a legislative or judicial body" since it would never "be necessary to the executive, or any other department, to hold a public deliberative assembly."⁴⁹⁷

III. BILLS OF CREDIT AND THE BILL OF RIGHTS

A. *Craig v. Missouri*

Two more great cases remain for consideration; both came near the end of Marshall's service, and in both, as usual, he wrote the opinion. The first ranks with *McCulloch* as one of the early landmarks in defining what Kenneth Dam has called our "fiscal constitution";⁴⁹⁸ it involved the important but now forgotten clause of article I, section 10, forbidding the states to "emit Bills of Credit."⁴⁹⁹

Missouri had issued to Craig, in return for a promissory note, a certificate in the amount of \$199.99 plus interest. The state had agreed to accept such certificates in payment of taxes and debts, had announced its intention of paying its officers' salaries with them, and had pledged for their redemption the proceeds of state operations in the salt market, all debts owing to the state, and the faith of the state itself. The state sued Craig to collect on his promissory note and prevailed in state court. In 1830 the Supreme Court reversed, holding that the note had been issued for an illegal consideration: the certificate was a prohibited bill of credit.⁵⁰⁰

Craig is another typical Marshall opinion, devoted primarily

⁴⁹⁴ U.S. CONST. art. I, § 5, para. 2.

⁴⁹⁵ *Anderson*, 19 U.S. (6 Wheat.) at 230-31.

⁴⁹⁶ *Id.* at 231.

⁴⁹⁷ *Id.* at 233-34. Examples of greater punishments by Parliament were brushed aside as merely "historical facts, not . . . precedents for imitation." *Id.* at 231.

⁴⁹⁸ Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271 (1977).

⁴⁹⁹ U.S. CONST. art. I, § 10, para. 1. In the indexes to at least two modern treatises, the clause is not listed at all. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 967 (1978); L. TRIBE, *supra* note 40, at 1176 (1978).

⁵⁰⁰ *Craig v. Missouri*, 29 U.S. (4 Pet.) 410, 437 (1830).

to the dissection of a red herring. Counsel had argued that the certificates were not bills of credit because they were not legal tender.⁵⁰¹ Marshall spent some time giving historical examples of bills of credit issued before 1789 that were *not* legal tender but “were productive of the same effects.”⁵⁰² Though he referred to particular issues of bills, he recited no evidence to prove his conclusory assertions as to their effects; and he had already disposed of the legal-tender argument by showing that it would render the bill-of-credit clause superfluous in light of the independent provision forbidding states to “make anything but gold or silver a legal tender.”⁵⁰³

Establishing that bills of credit are forbidden even if not legal tender does not tell us what a bill of credit is; to answer that question Marshall resorted again to history. “The term has acquired an appropriate meaning”; there was a “sense in which the terms have been always understood.”⁵⁰⁴ Before 1789

the attempt to supply the want of the precious metals by a paper medium was made to a considerable extent; and the bills emitted for this purpose have been frequently denominated bills of credit. . . . Such a medium has been always liable to considerable fluctuation. Its value is continually changing; and these changes, often great and sudden, expose individuals to immense loss, are the sources of ruinous speculations, and destroy all confidence between man and man.⁵⁰⁵

Thus the prohibition was directed toward paper money; “it must comprehend the emission of any paper medium, by a state government, for the purpose of common circulation.”⁵⁰⁶ The small denominations of the bills in question, he concluded, “fitted them for the purpose of ordinary circulation; and their reception in payment of taxes, and debts to the government and to corporations, and of salaries and fees, would give them currency.”⁵⁰⁷

All this sounds, as Marshall usually did, very plausible.⁵⁰⁸ One

⁵⁰¹ *Id.* at 421-22 (Mr. Benton) (“Free to refuse them, the citizen may protect himself from loss by their depreciation, by rejecting them.”).

⁵⁰² *Id.* at 435 (Marshall, C.J.); *see id.* at 434-36.

⁵⁰³ *Id.* at 433-34. *See* U.S. CONST. art. I, § 10, para. 1.

⁵⁰⁴ 29 U.S. (4 Pet.) at 432. *Cf.* *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-94 (1798), employing a similar argument in construing the *ex post facto* clause. *See* Currie, *Supreme Court, 1789-1801*, *supra* note 1, at 867-69.

⁵⁰⁵ *Craig*, 29 U.S. (4 Pet.) at 432.

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.* at 433.

⁵⁰⁸ *See* E. CORWIN, *supra* note 39, at 92, declaring without elaboration that the certifi-

notices at once, however, that as usual his history was stated as a simple conclusion with virtually no reference to supporting materials.⁵⁰⁹ We have essentially only his word for it either that paper money was commonly known as a bill of credit or that its evils were the "mischief" the clause was designed to prevent.⁵¹⁰ Moreover, although rejection of tender as an essential ingredient makes attractive his conclusion that these certificates shared the relevant attributes of paper money, his concession that the state could issue an instrument promising "to pay money at a future day for services actually received, or for money borrowed"⁵¹¹ raises serious questions as to whether he drew the line at the right place. Surely, as he admitted, the state was not forbidden to issue promissory notes when it borrowed money. The hard problem in the case was to define the difference between such a note and the forbidden bill, and Marshall made no real effort to wrestle with it.

The difficulty was highlighted by the interesting dissent of Justice Johnson,⁵¹² which demonstrates the respect that he held for Marshall, despite occasional disagreement, after many years of joint labor. Entirely missing is the strident tone of today's dissents, which characterize the majority as a band of unprincipled brigands; Johnson's is a measured, statesmanlike opinion. He agreed with Marshall that history furnished the guide to the meaning of the constitutional terms: since the terms were "vague and general, and, at the present day, almost dismissed from our language," it was "only by resorting to the nomenclature of the day of the constitution, that we can hope to get at the idea which the framers of the constitution attached to it."⁵¹³ He agreed that "'bill of credit'" meant "paper money" and that it was not limited to legal tender.⁵¹⁴ But he also agreed with Marshall that the clause did not

cates in *Craig* were plainly unconstitutional.

⁵⁰⁹ He did cite "Hutchinson's History of Massachusetts, vol. 1, p. 402," for his examples of early issues of bills of credit. *Craig*, 29 U.S. (4 Pet.) at 434.

⁵¹⁰ THE FEDERALIST No. 44 (J. Madison), which counsel had cited, *Craig*, 29 U.S. (4 Pet.) at 418-19, not only had confirmed that the bill-of-credit provision was aimed at "the pestilent effects of paper money," THE FEDERALIST No. 44, at 281 (J. Madison) (C. Rossiter ed. 1961), but was the evident source of Marshall's reference to "confidence between man and man," *Craig*, 29 U.S. (4 Pet.) at 432. St. George Tucker had equated bills of credit with "paper money" and had explained the clause as directed against its "depreciation." 1 Tucker's Appendix to Blackstone, *supra* note 374, at 312. Marshall cited neither.

⁵¹¹ *Craig*, 29 U.S. (4 Pet.) at 431-32.

⁵¹² *Id.* at 438-44 (Johnson, J., dissenting).

⁵¹³ *Id.* at 442.

⁵¹⁴ *Id.* Johnson added that the certificates in question were made "tender" for salaries of state officials, which might imply their invalidity under the legal tender clause, but he dropped the suggestion and voted to uphold them. *Id.* Counsel had argued that the require-

forbid the state to borrow, and he thought that was what the state had done in *Craig*.⁵¹⁵ it had given its certificates in exchange for private notes, which could then be discounted to produce cash for state expenditures.⁵¹⁶ He added that the fact the certificates bore interest "disqualifies them for the uses and purposes of a circulating medium" by giving them a variable value, and that the state had promised not to pay certificate holders but to receive the certificates in satisfaction of taxes; "the objection to a mere paper medium is, that its value depends upon mere national faith," while the certificate holder "has a better dependence" in that he may tender it for paying his taxes.⁵¹⁷

This is not the place to determine whether Johnson was right in any of these distinctions; what is important for present purposes is that Marshall loftily ignored them all.⁵¹⁸ Thompson also dissented, arguing that there was a difference "between a bill drawn on a fund . . . constituted or pledged for . . . payment," as he said was the case in *Craig*, and one "resting merely upon the credit of the drawer."⁵¹⁹ He added that the decision appeared to outlaw all notes issued by state-chartered banks, since "the states cannot certainly do that indirectly which they cannot do directly";⁵²⁰ Marshall ignored him too. Finally, the newcomer McLean added a wordy dissent in which he seemed to suggest, contrary to Johnson, that the state was essentially *lending* money to the certificate holders,⁵²¹ but he agreed with Johnson that the certificates were

ment that the bills be accepted by state officers was "not before the court," *id.* at 422 (Mr. Benton), and Thompson in dissent agreed, *id.* at 446-47.

⁵¹⁵ Counsel had so argued. *Id.* at 421 (Mr. Benton).

⁵¹⁶ *Id.* at 443-44 (Johnson, J., dissenting) (terming the transaction an "amphibious" one and affording what seems to be a rather rare example of the application of Justice Chase's familiar maxim that a law is to be upheld if it is not clearly unconstitutional).

⁵¹⁷ *Id.* at 444.

⁵¹⁸ Marshall of course spoke first, and, in a day in which not all opinions were written out in advance, *see supra* note 202, there may have been less opportunity than there is today to respond to dissent; yet it is hard to believe Johnson had not revealed his views in the course of deliberation before decision.

⁵¹⁹ *Craig*, 29 U.S. (4 Pet.) at 447 (Thompson, J., dissenting). *See also id.* at 448 ("when a fund is pledged, or ample provision made for the redemption of a bill or voucher, . . . there is but little danger of a depreciation or loss").

⁵²⁰ *Id.* at 449. This passage sheds interesting light on the modern question of the degree to which ostensibly private action is subject to constitutional provisions applicable in terms only to states. *See, e.g.,* *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

⁵²¹ *Id.* at 456-57 (McLean, J., dissenting). McLean stated the object was "to furnish the citizens of Missouri with the means of paying to the state the taxes which it imposed, and other debts due to it," at a time when bank failures had destroyed the value of existing currency. *Id.* Thus, he argued that Missouri was trying to alleviate the very dangers the clause was designed to prevent. This was a clever argument but rather disingenuous, for he

not bills of credit because they contained only a promise of acceptance in satisfaction of taxes, not a promise to pay.⁵²²

All this ferment suggests that *Craig* was a pretty difficult case; Marshall sailed right over the top of it without acknowledging any of the difficult problems.⁵²³

B. *Barron v. Mayor of Baltimore*

Our final case was one of enormous significance. Barron argued that the city had taken his property without compensation by destroying the navigability of a stream and rendering his wharf unusable. Marshall's brief 1833 opinion declined to review the state court's denial of relief, holding despite the apparently all-embracing terminology of the fifth amendment provision ("nor shall private property be taken for public use, without just compensation")⁵²⁴ that it did not apply to the states.⁵²⁵

Marshall began by suggesting that the answer was inherent in the very nature of the document: "The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states."⁵²⁶ This did not get him very far, for it proved too much: the entire tenth section of article I was explicitly devoted to limitations on state power. In attempting to explain these away he came perilously close to misrepresentation, suggesting that they "generally restrain state legislation on subjects intrusted to the general government, or in which the people of all the states feel an interest."⁵²⁷ Neither the prohibition of ex post facto laws and bills

had earlier said the same was true of early issues of paper money that the clause was designed to preclude. *Id.* at 452.

⁵²² *Id.* at 457-58 (McLean, J., dissenting). McLean also concluded that the Court's decision that the certificates were invalid did not justify a reversal of the state court's judgment: whether a contract was void because its consideration was illegal was a matter of state law. *Id.* at 459-63. For Justice Story's belated response that most of the allegedly distinguishing features pointed out by the dissenters had been shared by bills of credit issued before 1789, see 3 J. STORY, *supra* note 40, §§ 1362-1365, at 232-37 & 235 n.2.

⁵²³ *Craig* was reaffirmed without dissent in *Byrne v. Missouri*, 33 U.S. (8 Pet.) 40 (1834), shortly before Marshall's death. But one of the first acts of the Court after his departure was to uphold state bank notes on the basis of narrow distinctions of *Craig*, *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257 (1837), leading Story in dissent to complain that that case had been overruled, *id.* at 328-50 (Story, J., dissenting). Marshall's cavalier treatment of the real issues in *Craig* made the task of overruling much easier.

⁵²⁴ U.S. CONST. amend. V.

⁵²⁵ *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833). There were no dissents.

⁵²⁶ *Id.* at 247.

⁵²⁷ *Id.* at 249 (instancing coinage, letters of marque and reprisal, and international and

of attainder nor the contract clause as it had been construed⁵²⁸—neither of which he bothered mentioning in this connection⁵²⁹—fit Marshall's description any better than did the taking clause itself.

Somewhat more appealing was his argument that when the Framers had meant to limit state power they had specifically said so: despite its general language, the provision in article I, section 9, that "no bill of attainder or ex post facto law shall be passed"⁵³⁰ could not apply to the states because section 10 expressly provided that "[n]o State shall . . . pass any Bill of Attainder, [or] ex post facto Law."⁵³¹ That the original document did not limit states without mentioning them, however, does not prove the same was true of the amendments, which contained no separate provisions naming states; indeed the contrast between the taking clause and the first⁵³² and seventh amendments,⁵³³ which spoke expressly of "Congress" and of "any Court of the United States," arguably suggested that when the amendments limited only federal departments they said so expressly.⁵³⁴ But, as Marshall noted in passing,⁵³⁵ although article I, section 9, similarly limited the powers of "Congress" over the "Migration or Importation of . . . Persons,"⁵³⁶ that phraseology does not seem to rebut the inference that the more general provisions of that section apply only to the federal government. Though far from conclusive, the contrast between sections 9 and 10 helped to confirm Marshall's initial presumption

interstate treaties, the last of which "can scarcely fail to interfere with the general purpose and intent of the constitution").

⁵²⁸ See *supra* notes 203-58 and accompanying text (discussing *Ogden v. Saunders*); *supra* notes 226, 377 (discussing Professor Crosskey's dissenting view).

⁵²⁹ "It would be tedious to recapitulate the several limitations on the powers of the states which are contained in this section." *Barron*, 32 U.S. (7 Pet.) at 249.

⁵³⁰ *Id.* at 248 (quoting U.S. CONST. art. I, § 9, cl. 3).

⁵³¹ U.S. CONST. art. I, § 10, para. 1.

⁵³² *Id.* amend. I ("Congress shall make no Law respecting an Establishment of Religion . . .").

⁵³³ *Id.* amend. VII ("no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law").

⁵³⁴ See W. RAWLE, *supra* note 390, at 124 (the first amendment "expressly refers to the powers of congress alone, but some of those which follow are to be more generally construed, and considered as applying to the state legislatures as well as that of the Union"), 127 (discussing the fourth amendment and stating "[h]ere again we find the general terms which prohibit all violations of these personal rights, and of course extend both to the state and the United States" (emphasis in original)). See also 2 W. CROSSKEY, *supra* note 226, at 1057-58 (arguing that because most of the amendments were to apply to the states, those that were to bind only the federal government were explicitly so limited).

⁵³⁵ *Barron*, 32 U.S. (7 Pet.) at 248.

⁵³⁶ U.S. CONST. art. I, § 9, cl. 1.

that "limitations on power, if expressed in general terms, are naturally . . . applicable [only] to the government created by the instrument."⁵³⁷

Marshall put his best argument last, and it was based on history: the amendments had been adopted in response to a demand for "security against the apprehended encroachments of the general government—not against those of the local governments."⁵³⁸ Typically, this crucial conclusion was essentially unsubstantiated. Marshall did refer generally to the recommendations of the various state ratifying conventions without quoting them,⁵³⁹ and there is support in them for his position.⁵⁴⁰ Moreover, it was clear that as originally proposed the amendments would have limited only federal action; for though none was expressly so restricted, they were offered as additions to article I, section 9, together with a separate provision that "[n]o State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases," which was to go with other limitations on state power in section 10.⁵⁴¹ The vagaries that befell this proposal during its odyssey through Congress obscured both its terminology and its structure with respect to the *Barron* question. Yet the most significant change—the decision to append the amendments at the end of the Constitution rather than inserting them more comprehensively in article I—was plainly motivated by purely formal or technical considerations quite divorced from the breadth of their application.⁵⁴²

⁵³⁷ *Barron*, 32 U.S. (7 Pet.) at 247.

⁵³⁸ *Id.* at 250.

⁵³⁹ *Id.*

⁵⁴⁰ New Hampshire and Massachusetts, for example, had both asked for amendments to "more effectually guard against an undue administration of the federal Government"; some of their specific proposals spoke of "Congress," while others were phrased in general terms. 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 93-96, 141-44 (U.S. Dep't of State comp. 1894). The Virginia proposals, cited by Professor Crosskey as asking for limitations on the states as well, were similar in phrasing but substituted for the preliminary references to the "federal Government" an unilluminating desire for provisions "'asserting and securing from encroachment the essential and unalienable Rights of the People.'" 2 W. CROSSKEY, *supra* note 226, at 1061; *see id.* at 1061-64. Crosskey did not cite the New Hampshire or Massachusetts recommendations, leading one respected reviewer to the conclusion that "Mr. Crosskey suppressed this important evidence." Fairman, *The Supreme Court and the Constitutional Limitations on State Governmental Authority*, 21 U. CHI. L. REV. 40, 51 (1953) (emphasis in original).

⁵⁴¹ 1 ANNALS OF CONG. 451-52 (J. Gales ed. 1789). Professor Crosskey conceded as much. 2 W. CROSSKEY, *supra* note 193, at 1066-67.

⁵⁴² In the House of Representatives Sherman argued that "to interweave our propositions into the work itself" would be "destructive of the whole fabric" and would go beyond the amending authority given by article V because it would "establish a new constitution." 1 ANNALS OF CONG. 734-35 (J. Gales ed. 1789). Clymer added that separate amendments

If either the addition of language making clear that certain of the new provisions did not apply to the states or the elimination of the only provision expressly naming them was meant to have the paradoxical effect of expanding the reach of other provisions whose language was not altered, one would expect to find some evidence of that intention. Professor Fairman has shown, however, that the subsequent actions of numerous members of the Congress in proposing the amendments were inconsistent with the notion that the Bill of Rights was applicable to the states.⁵⁴³ Indeed the Senate attached to the proposal a preamble that seemed rather to confirm that its purpose was to limit federal power.⁵⁴⁴ In addition, despite two equivocal hints by Justice Johnson,⁵⁴⁵ a flat statement in an

would preserve the original text as "a monument to justify those who made it." *Id.* at 737. On the other side, Madison argued sensibly that discrete amendments would make the document harder to understand. *Id.* at 735. Gerry saw no advantage save "to give every one the trouble of erasing out of his copy of the constitution certain words and sentences, and inserting others." *Id.* at 738. A variety of speakers lamented the investment of so much time in what Gerry termed "matters of little consequence." *Id.* See *id.* at 735-44.

⁵⁴³ For example, several of them participated actively in state constitutional conventions after 1791 in which, without apparent objection, grand jury provisions were drafted that did not measure up to those in the fifth amendment. See generally Fairman, *supra* note 540. Professor Crosskey, who believed that *Barron* was "without any warrant at all," mentioned none of these episodes and came up with no counterexamples of his own. 2 W. CROSSKEY, *supra* note 226, at 1067.

⁵⁴⁴ The preamble recited that the amendments were proposed because "[t]he Conventions of a number of the States [had] at the time of their adopting the Constitution expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added" and in hopes that "extending the ground of public confidence in the government [would] best insure the beneficent ends of its institution." 1 Stat. 97 (1789) (the preamble never became part of the Constitution). Crosskey argued that "*its Powers*" might mean state as well as federal powers, since the Constitution "was, in fact, a scheme of '*Government*' through state '*Powers*' as well as national '*Powers*,'" and since state authority had been limited by the original instrument. 2 W. CROSSKEY, *supra* note 226, at 1065 (emphasis in original) (quoting 1 Stat. 97).

⁵⁴⁵ See *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 242-44 (1819), discussed in Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 707-09, where Johnson for the Court held that a federal statute incorporating Maryland law did so only to the extent the state law was valid and proceeded to measure it, "as a law of Maryland," against the seventh amendment; *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820), where Johnson argued in a concurrence that the states had concurrent power to punish the failure to report when the militia was called into federal service:

I cannot imagine a reason why the States may not also, if they feel themselves injured by the same offence, assert their right of inflicting punishment also. In cases affecting life or member, there is an express restraint upon the exercise of the punishing power. But it is a restriction which operates equally upon both governments; and according to a very familiar principle of construction, this exception would seem to establish the existence of the general right.

Id. at 34. For a possibly too skeptical dismissal of these passages, see Fairman, *supra* note 540, at 76-77. Johnson acceded to *Barron*, without naming it, in his opinion for the Court in *Livingston v. Moore*, 32 U.S. (7 Pet.) 469, 551-52 (1833), applying its reasoning to the re-

1829 treatise,⁵⁴⁶ and an "inclination" in one New York decision,⁵⁴⁷ the result Marshall reached in *Barron* was supported by a respectable body of previous state-court authority⁵⁴⁸—which characteristically was not noted in Marshall's opinion.⁵⁴⁹

Thus Marshall's last great opinion brings us full circle to the strengths and weaknesses of his first one. As in *Marbury v. Madison*,⁵⁵⁰ his instincts seem as usual to have led him to a sound result, and as in *Marbury* he began with an overstatement from

quirement of a civil jury, U.S. CONST. amend. VII, and due process, *id.* amend. V: "As to the amendments of the constitution of the United States, they must be put out of the case; since it is now settled, that those amendments do not extend to the states" Morgan said that Johnson was absent from the "session of the Court" in which *Barron* was decided, D. MORGAN, *supra* note 201, at 135 n.33, but he misstated the date of *Barron* as 1832, and in fact *Livingston* and *Barron* were decided during the same Term. Later cases applying the *Barron* principle to additional Bill of Rights provisions include *Smith v. Maryland*, 59 U.S. (18 How.) 71, 76 (1855) (search and seizure) and *Permoli v. New Orleans*, 44 U.S. (3 How.) 589 (1845) (freedom of religion); *Barron* itself was reaffirmed in *Withers v. Buckley*, 61 U.S. (20 How.) 84, 90 (1858). Today it is understood to be the fourteenth amendment that makes much of the Bill of Rights applicable to the states. See *Duncan v. Louisiana*, 391 U.S. 145, 147-49 (1968).

⁵⁴⁶ W. RAWLE, *supra* note 390, at 124, quoted *supra* note 534.

⁵⁴⁷ *People v. Goodwin*, 18 Johns. 187, 201 (N.Y. 1820), where Chief Justice Spencer "inclined" to the view that, because of its "unrestricted . . . terms," the double jeopardy clause applied to the states, but found it unnecessary to resolve the question because the same principles governed under New York law. Although Professor Fairman argued that Spencer spoke for himself alone, Fairman, *supra* note 540, at 74, the opinion not only is titled that of the court but adds that the other judges "entirely concur," 18 Johns. at 200, 207. But see *infra* note 548 (later New York decisions rejecting Spencer's inclination in *Goodwin*).

⁵⁴⁸ *Maurin v. Martinez*, 5 Mart. 432, 436 (La. 1818) (civil jury); *Renthorp v. Bourg*, 4 Mart. 97, 131-32 (La. 1816) (taking); *Livingston v. Mayor of New York*, 8 Wend. 85, 100-01 (N.Y. 1831) (opinion of Chancellor Walworth; not mentioned in parallel opinion of Senator Sherman) (due process, taking, and civil jury); *Jackson v. Wood*, 2 Cow. 819, 820-21 (N.Y. 1824) (grand jury and criminal jury); *Murphy v. People*, 2 Cow. 815, 818 (N.Y. 1824) (grand jury and criminal jury). See also *id.* at 818 (reporter's note that although the other members of the court did not discuss the case they "agreed clearly"); *Huntington v. Bishop*, 5 Vt. 186, 193-94 (1832) (terming it "very doubtful" that the civil jury requirement of the seventh amendment applied to the states). Professor Crosskey cited none of these cases.

⁵⁴⁹ It also seems significant that in neither *Fletcher v. Peck*, *supra* notes 17-79 and accompanying text, nor *Trustees of Dartmouth College*, *supra* notes 125-54 and accompanying text, where the Court performed considerable surgical feats to prove that a taking of property was an impairment of contract, did it occur to the eminent attorneys to suggest the applicability of the fifth amendment. Furthermore, for what it is worth, the Constitution of the short-lived Confederate States of America, drafted after *Barron* and displaying a remarkable likeness to that of the United States, inserted the first eight amendments unambiguously in article I, section 9, with other limitations applicable (by contrast with section 10) only to the central government. CONFEDERATE STATES OF AMERICA CONST., art. I, §§ 9-10, reprinted in *THE STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA* 15-17 (J. Mathews ed. 1864).

⁵⁵⁰ 5 U.S. (1 Cranch) 137 (1803). See Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 651-61.

the nature of the Constitution and disdained serious explication of supporting materials.⁵⁵¹

CONCLUSION

We all knew beforehand that Marshall's time was a time of great decisions; to see them all together makes quite an impression.⁵⁵² Substantively the cases tend to confirm the popular view that the Court under Marshall construed federal powers generously and put teeth into constitutional limits on the states. The Court may have pushed beyond the Framers in attempting to make the contract clause cover certain takings of private property, in finding an implicit immunity of federal instrumentalities from taxation, in circumventing the apparent purpose of the eleventh amendment, and in suggesting, without holding, that the commerce clause implicitly limited state power. Nevertheless, it is difficult to say with any certainty that the Marshall Court was ever clearly wrong. Nor was the Court unfailingly nationalistic. In its later years it held back from pushing the logic of the contract clause to extreme conclusions; it resolved a debatable issue against the exclusivity of the federal bankruptcy power; its interpretations of the diversity and admiralty clauses were quite modest; and in

⁵⁵¹ The Annals of Congress were not published until 1834; their title page reveals simply that they were "compiled from authentic materials." 1 ANNALS OF CONG. (J. Gales ed. 1789).

To be mentioned for the sake of completeness are *Hampton v. McConnell*, 16 U.S. (3 Wheat.) 234 (1818), and *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813). These decisions held that the 1790 statute requiring "every court within the United States" to give to records and judicial proceedings "such faith and credit as they have . . . in the court of the state from whence [they] . . . are . . . taken," Act of May 26, 1790, ch. 11, 1 Stat. 122, 122, amended by Act of Mar. 27, 1804, ch. 56, §§ 1, 2, 2 Stat. 298, 298-99 (current version at 28 U.S.C. § 1738 (1976)), gave judgments the same effect as in the state rendering them. Because the statutory terms "faith and credit" parrot those of U.S. CONST. art. IV, § 1, these decisions are of relevance in construing the Constitution itself; there are scholars who endorse Justice Johnson's dissenting view in *Mills* that "faith and credit" referred only to admissibility in evidence, 11 U.S. (7 Cranch) at 485-87; see, e.g., Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses* (pt. 1), 14 CREIGHTON L. REV. 499, 566-67 (1980). Yet as a constitutional question the issue seems unimportant, since article IV expressly authorizes Congress to prescribe not only "the Manner in which such Acts, Records, and Proceedings shall be proved," but also the "Effect thereof." U.S. CONST. art. IV, § 1; see Cook, *The Powers of Congress under the Full Faith and Credit Clause*, 28 YALE L.J. 421 (1919). The opinions in *Hampton* and *Mills* are brief and conclusory.

⁵⁵² This Conclusion concerns the Marshall era generally; it refers to cases that have been discussed in this article, in my earlier article on the Marshall Court (Currie, *Federal Courts, 1801-1835*, *supra* note 1), or in both. Further citation and cross-references will be dispensed with, therefore, except in the few instances where the reference would be unclear otherwise or where the case has not been cited in full elsewhere in this article.

both *McCulloch* and in *Gibbons*, the two great decisions sustaining federal legislative power, Marshall emphasized the limited nature of Congress's authority. On the whole the Marshall Court seems to have steered a statesmanlike course between the competing centrifugal and centripetal forces; at Marshall's death it could still be said, as in 1789, that the federal government was neither feeble nor of unlimited powers.

When we attempt to analyze the work of individual Justices, the most striking fact is that most of Marshall's brethren were nearly invisible. The old Federalists appointed before Marshall (Cushing, Paterson, Chase, and Moore) spoke a total of three paragraphs in constitutional cases after he was appointed.⁵⁵³ Todd, Livingston, and Duvall passed through without writing a single constitutional opinion, though together they sat for a total of sixty years. Washington wrote a handful of opinions in thirty years, nearly all of them about the contract clause and only two of them for the Court.⁵⁵⁴ Trimble wrote once, for himself alone, to uphold the prospective bankruptcy law.⁵⁵⁵ Thompson, another relative latecomer, dissented from several decisions striking down state laws⁵⁵⁶ and joined the majority, also on behalf of state rights, in the one case in which Marshall openly dissented;⁵⁵⁷ yet he also dissented from the denial of jurisdiction in the first Cherokee case.⁵⁵⁸ McLean, appointed in 1829, showed signs of independence and strength in two important separate opinions, vigorously nationalist in arguing for exclusive powers concerning Indians but lenient toward the states on bills of credit.⁵⁵⁹ Baldwin, appointed in 1830, took the opposite position from McLean on both these issues. Both Justices belonged essentially to the Taney period, as did Wayne, who participated in none of the constitutional decisions under Marshall.

⁵⁵³ See Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 662 (discussing *Stuart v. Laird*).

⁵⁵⁴ See *supra* notes 169, 173-74, 203-37, 276-87, and accompanying text (discussing *Mason v. Haile*, *Green v. Biddle*, *Ogden v. Saunders*, and *Satterlee v. Mathewson*); Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 702-05 (discussing *Houston v. Moore*).

⁵⁵⁵ See *supra* notes 213-37 and accompanying text (discussing *Ogden v. Saunders*).

⁵⁵⁶ See *supra* notes 363-64, 419-53, 519-20, and accompanying text (discussing *Weston v. City Council*, *Brown v. Maryland*, and *Craig v. Missouri*). Thompson also wrote for the Court in upholding a state law opening debtors' prisons in *Mason v. Haile*. See *supra* notes 168-69 and accompanying text.

⁵⁵⁷ See *supra* notes 203-58 and accompanying text (discussing *Ogden v. Saunders*).

⁵⁵⁸ See Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 719-22 (discussing *Cherokee Nation v. Georgia*).

⁵⁵⁹ See *supra* notes 468-70, 521-22, and accompanying text (discussing *Worcester v. Georgia* and *Craig v. Missouri*).

Of Marshall's fifteen colleagues only Story and Johnson wrote enough to demonstrate much in the way of individual style, and even they were minor figures. Story could write a more lawyerlike opinion than Marshall could, as his opinions in *Martin v. Hunter's Lessee* and in *Trustees of Dartmouth College* showed, with more concern for precedent and for the purposes underlying the Constitution. *Terrett v. Taylor* and *The Thomas Jefferson*,⁵⁶⁰ however, showed him equally capable of resolving critical issues by bald fiat and equally susceptible to the siren song of natural law. With the possible exception of *Houston v. Moore*, where Marshall's vote was not disclosed, Story seems to have disagreed only once with his Chief Justice in a constitutional case: he would have upheld jurisdiction in *Cherokee Nation*.⁵⁶¹

Johnson was more interesting than Story because he was more independent, differing with Marshall more often than any of his colleagues,⁵⁶² though often only with respect to the reasons supporting the decision. Sometimes Johnson was less willing than the majority to extend federal judicial power: he voted against a broad view of the arising-under jurisdiction in *Osborn v. Bank of the United States*, in favor of state sovereign immunity in *Bank of the United States v. Planters' Bank*, against original habeas corpus jurisdiction in *Ex parte Bollman*, and he wrote separately in *Martin v. Hunter's Lessee* to say the state court could not be ordered to obey the Supreme Court's mandate. Moreover, sometimes he was less vigorous than Marshall in enforcing limitations on the states: he voted to uphold prospective bankruptcy laws in *Ogden*, taxation of federal securities in *Weston*, and the loan certificates in *Craig v. Missouri*.

Far more remarkable than these divergences, however, were the wide area of Johnson's agreement with Marshall and the respectful manner in which he usually couched his occasional dissentient views, as exemplified by *Craig*. Indeed, when it came to the protection of vested rights from state action he was more interventionist than Marshall, resting his concurrence in *Fletcher* squarely on natural law and fighting a futile rearguard action in *Satterlee*.

⁵⁶⁰ 23 U.S. (10 Wheat.) 428 (1825); see Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 709-13.

⁵⁶¹ Story's 1833 treatise is largely a compendium of Marshall opinions and of excerpts from *The Federalist*. See generally J. STORY, *supra* note 40. But see J. McCLELLAN, *supra* note 114, at 307, arguing that Story was the "pillar of the Marshall Court" and that Marshall was "so unsure of himself that he must constantly exploit the mind of Mr. Justice Story."

⁵⁶² See D. MORGAN, *supra* note 201, at 178-79, 188.

He alone argued in *Ogden v. Saunders* that the diversity jurisdiction was exclusive, and it was he, not Marshall, who wanted to rest *Gibbons v. Ogden* on the exclusivity of the federal commerce power. Johnson could be as conclusory as Marshall (*The Aurora*), as inattentive to detail (*Bank of Columbia v. Okely*), as confused as any other Justice (*Ogden v. Saunders*); at times he could point out serious flaws in Marshall's reasoning (*Craig, Planters' Bank*). In general his opinions do not come across as high on the scale of legal craftsmanship; he seems to have been led less by his head than by his heart.⁵⁶³

This brings us to the man at center stage, who impressed thirty-four years of constitutional decision with his own personality as no one else has ever come close to doing. In later years the cognoscenti have rightly come to think of Chief Justices as essentially one voice among nine. But from 1801 to 1835 the Supreme Court was the Marshall Court; this utter domination is perhaps the greatest tribute to the force of John Marshall.

And his opinions? The sample is extensive and varied. Often, like his predecessors, he would toss off a constitutional issue in a single conclusory paragraph or less, as with the original jurisdiction in *Ex parte Bollman*, the complete-diversity rule in *Strawbridge v. Curtiss*,⁵⁶⁴ the delegation issue in *Wayman v. Southard*, the exclusivity of the naturalization power in *Chirac*, and the legality of damming a navigable stream in *Willson*. At the opposite extreme he would write at great length on issues that seemed frivolous, as in *Dartmouth College*, or that were foreclosed by precedent, as in *Cohens v. Virginia*.

His disdain for precedent in general was extraordinary, even when it squarely supported him; neither *McCulloch*, nor *Cohens*, nor *Dartmouth*, nor *Hodgson v. Bowerbank*,⁵⁶⁵ nor even *Marbury v. Madison* was, as Marshall led us to believe, essentially a case of first impression. In contrast, there were early cases such as *Bollman* and *The Charming Betsy*⁵⁶⁶ in which he gave excessive weight

⁵⁶³ For a fascinating account of the temporal variations in Johnson's pattern of expressing his own opinions, see *id.* at 168-89. Morgan attributed the marked increase in separate opinions after 1823 to a letter from Johnson's old mentor Thomas Jefferson urging that every judge "prove by his reasoning that he had read the papers, that he has considered the case, and that in the application of the law to it, he uses his own judgment." *Id.* at 183 (quoting letter from Thomas Jefferson to William Johnson (Mar. 4, 1823)).

⁵⁶⁴ 7 U.S. (3 Cranch) 267 (1806); see Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 674-75.

⁵⁶⁵ 9 U.S. (5 Cranch) 303 (1809); see Currie, *Federal Courts, 1801-1835*, *supra* note 1, at 679-80.

⁵⁶⁶ *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). See Currie,

to precedents in which the issue had not been argued—a position he seems to have soon outgrown.

In contrast to his predecessors, who had construed a statute narrowly to avoid holding it unconstitutional,⁵⁶⁷ Marshall went out of his way in *Marbury* to create a conflict by statutory interpretation. Similarly, although in *Cohens* he felt impelled in retracting some careless dicta to inveigh against the dangers of obiter comments, he seldom missed the opportunity to rest a decision on two or three grounds when one would have sufficed, as in *Planters' Bank*, or to pick the more difficult ground for decision, as on the question of the state as a party in *Cohens*, or to pass on issues not necessarily presented, like the merits in *Marbury*, the exclusivity of the commerce clause in *Gibbons*, and the possible extra-constitutional limitations in *Fletcher v. Peck*.

Sometimes Marshall was highly literal in his reliance on the constitutional text, as in denying diversity jurisdiction for the District of Columbia in the face of powerful arguments respecting the Framers' purposes; at other times, like Jay and Wilson in the earlier *Chisholm* case, he reduced the applicable text to an afterthought, most prominently in *Marbury v. Madison*. He succeeded in *Marbury* in persuading us not so much that judicial review could be found in the Constitution, but that it ought to have been put there; time and again he seems to have been writing a brief for a conclusion reached independently of the Constitution. Repeatedly he ran oblivious over obvious difficulties raised by dissenting opinions, as in the bill-of-credit case and on the sovereign immunity question in *Planters' Bank*. At other times he endorsed unsatisfying distinctions that would prove troublesome to his successors in order to explain away embarrassing precedents: witness the concessions for state health laws in *Gibbons*, for state taxation of bank stock in *McCulloch*, for retail taxes in *Brown*, and for remedial laws affecting contracts in *Sturges*. In *McCulloch*, *Brown*, and *Worcester* he failed to identify clearly just what it was that state law conflicted with: the Constitution itself, a statute, or treaty. When he relied on history he tended to state it on his own authority without supporting citations. He had a strong tendency, as seen in *McCulloch*, *Fisher*, and *Craig*, to devote his energies to straw men and to shortchange the difficult issue. In short, though Mar-

Federal Courts, 1801-1835, *supra* note 1, at 668-70 (discussing *Ex parte Bollman*).

⁵⁶⁷ See *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800); *Currie, Supreme Court, 1789-1801*, *supra* note 1, at 851-52.

shall has been generally admired,⁵⁶⁸ it is difficult to find a single Marshall opinion that puts together the relevant legal arguments in a convincing way.

Andrew McLaughlin once wrote that if Marshall had been a better lawyer, he would not have been so great a judge.⁵⁶⁹ Just what this means I am not certain; if the suggestion is that the law is of marginal relevance to judges, I would have to dissent on the basis of the supremacy clause. In any event, while it is always risky to judge the past by modern standards, it seems to me Marshall would have lost nothing in his eminence as a judge if he had refrained from such blatant overstatements as that written constitutions necessarily contemplate judicial review, strengthened *Cohens* and *Dartmouth* by invoking precedent, avoided reaching out for issues that did not need to be decided, as in *Gibbons*,⁵⁷⁰ or told his audience in *McCulloch* whether the state tax offended the statute or the Constitution.

Marshall was a strong man with a fascinating style, a strong sense of where he was going, and wonderfully sound instincts in the building of a constitution. Whatever his technical shortcomings, one who reads many of Marshall's opinions seems likely to find merit in Thayer's verdict that Marshall was "one of the greatest, noblest and most engaging characters in American history."⁵⁷¹ Marshall's time was one of those in which it would be exciting to

⁵⁶⁸ See, e.g., J. THAYER, JOHN MARSHALL 57 (1901) (calling Marshall "preeminent" in the constitutional field: "first, with no one second"); Esterline, *Acts of Congress Declared Unconstitutional*, 38 AM. L. REV. 21, 41 (1904):

[I]f at this hour the world were called upon to close and render up its account to the Creator . . . and the United States of America were reached on the roll, and its inhabitants from the beginning were signaled to nominate one personage as their loftiest illustration of man who was created in His image, how well, oh, how well, they could stand unanimously agreed in awarding the glory, and sending up . . . the revered, magisterial and immortal name — John Marshall!

Justice Frankfurter echoed Holmes's view that Marshall was the "'one alone' to be chosen 'if American law were to be represented by a single figure,'" Frankfurter, *supra* note 418, at 217 (quoting O.W. HOLMES, *John Marshall*, in COLLECTED LEGAL PAPERS 270 (1920)).

⁵⁶⁹ A. McLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 300 (1935) (adding that "his duties called for the talent and insight of a statesman capable of looking beyond the confines of legal learning"). See also E. CORWIN, *supra* note 39, at 42 (1919), arguing that Marshall's unstudious habits contributed to his achievement: "he made more use of his brain than of his bookshelf."

⁵⁷⁰ But see Frankfurter, *supra* note 418, at 221 ("To slight these phases of his opinion as dicta, though such they were on a technical view, is to disregard significant aspects of his labors and the way in which constitutional law develops.") But cf. Frankfurter, *Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924) (discussing the dangers of advisory opinions).

⁵⁷¹ J. THAYER, *supra* note 568, at 157.

have lived; and Marshall was one of those people it would be nice to have been.