MARSHALL AND THE CONSTITUTION

ADDRESS OF
HON. HOWARD B. LEE
Attorney General of West Virginia

DELIVERED BEFORE THE MERCER COUNTY BAR ASSOCIATION AT THE TWENTY-SIXTH ANNUAL MEETING

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BLUEFIELD, WEST VIRGINIA
December 27, 1929

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MR. PRESIDENT AND FELLOW MEMBERS OF THE BAR:

For the pleasure of this hour I am doubly grateful. I am privileged to renew the happy associations of former years, and also to speak to you on a subject of intense professional interest, namely, *Marshall and the Constitution.*

The task of relating the Constitution to the needs of our young and evolving democracy centered around the judicial career of Chief Justice John Marshall, the constructive architect of American Nationalism. Without precedent to guide, he blazed the trail toward constitutional government and ordered liberty, and, by his vision and courage, made the United States a virile nation rather than a feeble federation of jealous and warring states.

The climbing of the vines of tradition around the trellis of a great character usually obscures our vision of his personality and greatly diminishes our appreciation of his achievements. Not so with Marshall. His judicial interpretation of the Constitution brings into bold relief the profound legal learning, the broad statesmanship, the intense patriotism, and the sturdy character of this great American. He lived at a time when partisan feeling was extremely bitter; and although he, too, was strongly partisan, yet in his judicial capacity he never submitted his judgment to the party touchstone or gave to his party that which belonged to his country.

The full import of Marshall's's constitutional decisions can be grasped only when considered in relation to their historical background; the origin of the controversies involved; and their influence upon our national life. It is to a consideration of this aspect of a few such

decisions that I respectfully invite your attention. However, a comprehensive understanding of the subject demands a brief review of the struggle over the adoption of the Constitution; the history of the Supreme Court and the times immediately prior to Marshall's appointment.

In some of the states there was much violent opposition to the proposed Constitution. This was based largely upon the fear that the proposed Federal Government would control the states in respect to local legislation, especially in that relating to British debts, loyalist properties, and land grants and titles. Another subject of grave apprehension was the probable power given to the Federal Government to summon a state as a defendant and adjudicate its rights and liabilities. It was this latter possibility that led great patriots like Patrick Henry and George Mason of Virginia, Governor George Clinton of New York, and many others, to vigorously oppose the proposed plan. However, the existence of such power was disclaimed by the advocates of the Constitution, and its acceptance was due largely to the successful dissipation of such fears.

This bitter struggle divided the people into two schools of political thought. One school strongly opposed the Constitution lest it impair the supremacy of the states; the other school, discouraged by the weakness of the old Confederation, stood zealously for its adoption and the supremacy of the National Government. A few years later these same divergent views further divided the people into two political parties,—the Federalist and the Anti-Federalist. The former advocated a broad construction of the Constitution and the supremacy of the Federal Government over the states, its adherents being later known as the Whig and finally as the Republican party. The latter favored a strict construction of the Constitution and the supremacy of the States; it was later known as the Republican and at present as the

Democratic party; while the principle which effected this cleavage is historically known as State-Rights. The merits or demerits of these respective theories have no place in this discussion, except in so far as they are reflected in Marshall's constitutional decisions.

In February, 1789, Congress passed the Judiciary Act, and the Supreme Court was immediately organized with John Jay as the first Chief Justice. However, no business came before the Court for two years, when, notwithstanding the disclaimers of the advocates of the Constitution, the first suit entered was *Vanstophorst* v. *Maryland,* a suit brought by a firm of Dutch bankers as creditors against a state. This was followed by *Oswald* v. *New York, Indiana Company* v. *Virginia,* and *Chisholm* v. *Georgia,* 2 Dallas, 419; all being suits against these respective states as defendants. The last named case came before the Court for argument in August, 1792. The Court's jurisdiction was clear; section 2, Article III, of the Constitution expressly extended the Federal judicial power to controversies "between a state and citizens of another state". Georgia, however, refused to appear further than to file a written remonstrance denying the constitutional authority of the Court to adjudicate the liabilities of a sovereign state. The Court properly held that it had jurisdiction, upheld the right of a citizen of one state to maintain a suit against another state, rendered judgment for the plaintiff, and awarded a writ of inquiry of damages.

The country as a whole was violently agitated by this decision. The legislatures of several states passed resolutions urging upon Congress the necessity of submitting a constitutional amendment to prevent such suits. But Georgia's resentment took on more drastic form. Its legislature passed an act declaring that any Federal marshal or other person who executed any process of the Court in this case should *"suffer death by being hanged, without the benefit of clergy"*. In the mean-

while the writ of inquiry was never executed. Congress passed a Resolution which resulted in the adoption of the Eleventh Amendment, which provides that states may not be sued "by citizens of another state, or by citizens or subjects of any foreign state". This terminated the controversy and the first crisis was safely passed.

In 1795 Chief Justice Jay resigned and Washington appointed John Rutledge of South Carolina. Before notice of his appointment reached him, Rutledge made a violent speech in Charleston, attacking the Jay Treaty, in which he was reported to have said that Mr. Jay, who negotiated the Treaty, and the Senate, which ratified it, were "either fools or knaves, duped by British sophistry or bribed by British gold". In the midst of the storm caused by his speech, Rutledge arrived in Philadelphia, took the oath and assumed his seat. The Senate, however, when it convened in December following rejected Rutledge and the President appointed Oliver Ellsworth of Connecticut.

Just before Ellsworth took his seat, two cases of national importance were decided. In *Ware, Adm'r* v. *Hylton,* 3 Dallas, 191, the Court for the first time held a state statute unconstitutional; and in *Hylton* v. *United States,* 3 Dallas, 171, the Court for the first time passed upon the constitutionality of an Act of Congress. The principle announced in the first is worthy of notice. It involved a statute enacted by Virginia confiscating debts due British enemies. The plaintiff contended that this statute was in derogation of his rights under the Jay Treaty and, therefore, unconstitutional. In its opinion, the Court settled forever a fundamental doctrine of American law, namely, that a treaty between the United States and a foreign power, so far as compatible with the Constitution, supersedes all conflicting state laws.

It is a striking incident in American history that in this case John Marshall, representing Virginia, made

his first and only appearance before the Court as an attorney; and in arguing against the binding force of the Treaty over the state statute used the unhappy expression "those who wish to impair the sovereignty of Virginia", a phrase which was used so frequently in after years in attacking his own decisions.

The only case of national importance to come before Ellsworth as Chief Justice, was *Fairfax's Devisee* v. *Hunter,* 3 Dallas, 305, which involved the title to the Fairfax estate of 300,000 acres in Virginia. Because of the death of counsel for Hunter and the magnitude of the case, it was continued, and in some manner this explosive litigation disappeared from the docket for nearly twenty years. This was most fortunate, for there are grave doubts whether the infant Republic, at that time, could have survived the fury of the storm which resulted from its decision twenty years later.

Upon the resignation of Ellsworth, President Adams, on January 20, 1801, appointed his Secretary of State, John Marshall, as the fourth Chief Justice. Years afterwards, in speaking of the appointment, Adams said: "My gift of Chief Justice John Marshall to the people of the United States is the proudest act of my life. * * * There is no act of my life on which I reflect with greater pleasure. I have given to my country a Judge equal to a Holt, a Hale, or a Mansfield." Today, the correctness of this statement is universally recognized; but it was not always so. No man in our history was ever subjected to the scurrilous abuse that was for years heaped upon Marshall. No branch of the Government and no institution under the Constitution sustained a more continuous and unjustifiable attack or met with more vigorous opposition than did our Supreme Court under his leadership.

These attacks were directly attributable to the Court's exercise of two great powers, namely:—(1) The power to pass upon the constitutional validity of Acts of Con-

gress; and (2) The power to pass upon the constitutionality of state statutes. This opposition is more easily understood when we consider that neither power was conferred on the Court by the Constitution itself. The power to so pass upon Acts of Congress was established by the decisions of both the Circuit Courts and the Supreme Court as an implied and necessary power, and prior to 1802 its exercise excited no serious opposition. But in 1800, the Republicans elected Jefferson and a majority of both Houses of Congress, and in February, 1801, the outgoing Federalists enacted a new Circuit Court Act which reduced the number of Supreme Court Judges from six to five, relieved Judges of Circuit Court duty, and created six new Circuits with sixteen new Circuit Court Judges. President Adams immediately appointed Federalists to these positions.

A year later the Republican Congress repealed this Act, restored the Court to six members; abolished the new Judges; and created six Circuits, each to be presided over by a Supreme Court Judge. During the debate on this Bill the first assault was made against the authority of the Court to declare an Act of Congress unconstitutional. The Federalists argued that the provision of the Bill which deprived the new Judges of their offices was unconstitutional and the Court would so hold. The Representatives from several states denied that the Court possessed such authority, and declared that "Congress has the exclusive power to interpret the Constitution, * * * and the Judge who dares to question this authority of Congress will be hurled from his seat".

That these attacks upon the Court were unjustified is apparent when we consider that up to this time no Act of Congress had been held unconstitutional. In fact, the first such decision came twelve months later in *Marbury* v. *Madison,* and was not repeated until the famous *Dred Scott Case* decided fifty-four years later.

The most bitter assaults, however, against the Court,

respecting Congressional legislation, were not the result of its declaring Acts of Congress unconstitutional, but its failures so to do. Nor have such attacks been confined to any one party or section. The early Republicans assailed it because it failed to hold the Sedition Law, the Bank of the United States charter, and the Judiciary Act unconstitutional. The Democrats later attacked it for enouncing doctrines which would sustain the constitutionality of a bankruptcy law and a protective tariff, while the Federalists attacked it for refusing to hold the Embargo Act unconstitutional, and the later Republicans assailed it for sustaining the Fugitive Slave Act.

But by far the greatest opposition to the Court came from its exercise of the power to pass upon the constitutionality of state statutes, a power conferred by the Twenty-fifth Section of the Judiciary Act. This Section was considered by its framers as the essential pivot of the whole plan to escape the weakness of the old Confederation. Except for a few minor changes, it is still the law; and is probably the most important and satisfactory Act ever passed by Congress. Nevertheless, it constituted a decided impairment of state sovereignty, and for this reason, its enactment was vigorously opposed by the ultra State-Rights advocates as the entering wedge for Federal encroachment upon state authority. Beginning with *Chisholm* v. *Georgia,* decided in 1793, popular resentment against it continued to increase, and for seventy years it and the decisions of the Court under it were the storm center around which beat the tempest of State-Rights with an ever increasing fury, until its thunders were the roar of cannon; its lightnings the flash of battle.

Today we usually think of State-Rights as purely a Southern and Democratic doctrine, but the truth is it was as vigorous in Northern as in Southern states, and among Federalists and Whigs as among Republicans and

Democrats. And no state and no section of the Union has found any difficulty in adopting it whenever the interest of such state or section lay that way. In short, throughout our history, devotion to State-Rights and opposition to the Federal Courts, whether in the South or North, has been based, not upon dogmatic political theories and beliefs, but upon the particular economic or social legislation which the decisions of the Court happened to sustain or overthrow.

Of these two great powers so necessary for the enforcement of the supremacy of the Constitution, the power to pass upon the constitutionality of Congressional legislation was of lesser importance. Had the Court not possessed this power the Nation probably would have survived, but it would have ceased to be a Republic; the Bill of Rights and the reserved powers of the states guaranteed by the Constitution would have become unenforceable; the individual citizen would have possessed only such rights as Congress chose to grant him; and the lives, liberty and property of the minority would have become subject to the caprice of a majority in a centralized Congressional autocracy.

However, without the power vested in the Court to determine whether state legislation conflicted with the Federal Constitution it is doubtful whether the Union could have been preserved. Through the judicial exercise of this power the Government developed into a Nation rather than into a Confederacy. It preserved the region of law over the sway of arbitrary state authority which would have inevitably resulted in anarchy and disunion. It also prevented the courts of the several states from impairing the authority of the Nation; made secure the obligations of contract; gave to every litigant whose rights depended upon Federal law a decision by Federal Courts; and established that uniformity of judicial construction throughout the country that has controlled,

directed and made possible our great economic, industrial, and social development as a Nation.

For these transcendent advantages we are undoubtedly indebted to the vision, statesmanship and courage of the Great Chief Justice. He was appointed in 1801 and served thirty-four years, during which time he judicially breathed into our Constitution that vitality which still makes it capable of meeting every test and satisfying every legitimate need. Moreover, his work on the Court was as voluminous as it was important. During his tenure the Court decided ninety-four cases in which no written opinions were filed, and handed down 1121 written opinions which fill thirty volumes of the Reports. Of these Marshall delivered the opinion in 519 or nearly one-half the cases. Of the sixty-six cases involving constitutional issues he delivered the opinion in thirty-six. Omitting the first, *Marbury* v. *Madison,* which involved the constitutionality of an Act of Congress, the others, for the most part, were simply a recurrence in various forms of the conflict for supremacy between the states and the Federal Government.

Prior to Marshall's appointment the Court had rendered only six decisions involving constitutional questions. But his coming marked the beginning of an era peculiar to our American system, namely, the development of constitutional law by judicial decision based upon a fundamental written Constitution. This development is still in progress and must continue as long as our system of government retains the essential features with which it was endowed.

Time will not admit of a discussion of each of Marshall's thirty-six constitutional decisions. Hence I have selected ten of these opinions that established fundamental principles, and have grouped them in five classes, arranged in their relation to each other rather than in their chronological order. In the first division is *Marbury* v. *Madison,* 1 Cranch, 152, decided in 1803. It is

historically important for two reasons; first, it is the only case wherein Marshall held an Act of Congress unconstitutional; and, second the breach it created between the Executive and Judicial branches of the Government had a profound effect upon the history of the country.

MARBURY v. MADISON

In the closing hours of his administration, President Adams appointed Marbury one of the justices of the peace for the District of Columbia. The appointment was confirmed, the commission issued, signed and sealed, but not delivered. Upon assuming office President Jefferson ordered it withheld. Marbury applied for and was awarded a Rule by the Court against Madison, Secretary of State, requiring him to show cause why a mandamus should not issue requiring him to deliver such commission.

The Constitution in its grant of original powers to the Court does not include the issuance of writs of mandamus. But the last sub-section of Section Thirteen of the Judiciary Act attempted to confer upon the Court the power to issue such writs, and upon this authority the Rule was awarded. President Jefferson and his friends deeply resented such action as an attempt by the Court to intermeddle with the prerogatives of the Executive. As a result of this bitterness Congress changed the time of holding the Terms of Court, which delayed a decision for two years.

Upon hearing, Marshall dismissed the Rule and enounced his first great constitutional principle, viz., that the Constitution is supreme and binding upon both Congress and the Court, and an Act of Congress repugnant thereto is void. He held further, that since the Constitution, in its grant of original powers to the Court, did not include the issuing of writs of mandamus that such part of the Judiciary Act which attempted to confer such jurisdiction upon the Court was unconstitutional. How-

ever, before reaching the jurisdictional issue, he asserted that a President could not authorize a Secretary of State to omit the performance of those duties enjoined by law; that a commission was only evidence of an appointment, and its delivery unnecessary to the validity thereof; that Marbury had been illegally deprived of his constitutional rights—a wrong which might be remedied in a proper court.

This *dictum* still further incensed the President and his friends, and the decision became the object of bitter assault both in and out of Congress,—not because the Court had exercised the power to declare an Act of Congress unconstitutional, but because it had enounced the doctrine that a mandamus might lie against a member of the Cabinet. But a decision gathers accretions with the years, and to lawyers of today, the keynote of the opinion lies in its fundamental doctrine that the Court had the power to determine the constitutionality of an Act of Congress,—a doctrine that for one hundred and twenty-five years has neither been abrogated nor successfully controverted.

Because of their conflicting political views, the relations between Marshall and his distinguished cousin, Thomas Jefferson, had been strained for years, and Marshall's opinion in this case completed the break. Henceforth, between them there was a malignant personal and political hatred which at times portended evil for the country.

Marshall had opposed the election of Jefferson because he sincerely believed him to be an unscrupulous demagogue and an advocate of principles antagonistic to orderly government. Later, he attributed to Jefferson's influence much of the popular hostility toward the Court. But in keeping with the dignity of his position, he never uttered an offensive word concerning his illustrious kinsman. "Even upon the death of Jefferson", says one historian, "no expression of sorrow or esteem or admiration or censure came from Marshall. He could

not be either hypocritical or vindictive; but he could be silent."

On the other hand, Jefferson with equal sincerity doubted the motives and patriotism of Marshall. He was convinced that Marshall was striving to exalt the National Government at the expense of the states, and to subvert the Constitution by elevating the Judiciary above the Executive and Legislative branches of the Government. In 1810 he wrote to President Madison referring to "the rancorous hatred which Marshall bears to the Government of his country" and to the "cunning and sophistry within which he is able to enshroud himself"; and to John Tyler he wrote that in the hands of Marshall "the law is nothing more than an ambiguous text, to be explained by his sophistry into a meaning that may subserve his personal malice".

However, the lapse of time has clearly demonstrated that each was mistaken in his estimate of the other. Both were intensely patriotic, each in his respective sphere contributing much to his country. The only explanation that can be offered for their mutual hatred and distrust is that Jefferson, not being a profound lawyer, was unable to comprehend the ultimate effect of Marshall's judicial conclusions; and Marshall, being an ultra-conservative, was likewise unable to appreciate Jefferson's efforts to ameliorate the condition of the common man.

In the second group is Marshall's great trilogy interpreting that part of section 10, Article I of the Constitution which forbids the states to "pass any * * * law impairing the obligation of contracts", commonly known as the "Impairment of the Obligation of Contract Clause". These are *Fletcher* v. *Peck,* 6 Cranch, 87, otherwise known as the *Yazoo Land Fraud Case,* decided in 1810; *New Jersey* v. *Wilson,* 7 Cranch, 164, decided two years later; and *Dartmouth College* v. *Woodward,* 4 Wheaton, 629, decided in 1819. We shall speak only of the first and third.

FLETCHER v. PECK

In *Fletcher* v. *Peck,* Marshall laid the second stone in the great structure of American Constitutional Law, and for the first time held a state statute unconstitutional. In 1795 the State of Georgia, by legislative act, granted to four land companies a tract of land in what is now Alabama and Mississippi, containing about 35,000,000 acres, for the sum of $500,000.00. The grant was obtained by fraud and the bribery of the legislature. These facts becoming known, the next legislature, 1796, passed an act revoking the sale, publicly burned the former act and expunged all evidence of its passage from the legislative records. In the meantime, one of the grantee companies had sold its tract to a New England company, which in turn had sold to investors in several states. The defendant Peck, of Boston, had sold a part of his purchase to the plaintiff, a resident of New Hampshire, who later brought suit in the Federal Court in Massachusetts for the recovery of his purchase money. Having lost in the lower court, Fletcher brought the case to the Supreme Court; Peck's defense being that Georgia's repeal act impaired the obligations of the contract created under the earlier statute and was therefore violative of the Federal Constitution.

With fine courage and deep vision Marshall declared the supremacy of the National Judiciary, plainly laid down the law of public contract, notified every state of its place in the American system, and announced the limitations placed upon each. He held the legislative grant to be a contract within the meaning of the Constitution, and enounced the doctrine, which he greatly amplified nine years later in the *Dartmouth College Case,* that faith once plighted whether in private contracts or public grants cannot be broken; that a state can neither pass a law impairing the obligations of a contract between private persons nor can it invalidate a contract made by itself. He also recognized the old English

maxim that "third persons without notice shall not be affected by the fraud of the original parties"; and, notwithstanding the fraud in originally obtaining these titles, they were nevertheless good when asserted by *bona fide* purchasers for a valuable consideration, without notice of such fraud. He held further, that the Court was without constitutional authority to enter upon an inquiry respecting the validity of a state statute because of the corruption of the sovereign authority of the state which enacted it.

The decision stunned the State-Rights leaders, aroused excited interest throughout the country and greatly increased the hostility toward the Court. The passing of the years, however, has demonstrated the soundness of this doctrine; for had the Court acceded to the contention that a state statute could be invalidated by a Federal Court because of fraud or bribery in its passage, it would have opened up a source of litigation that eventually would have destroyed all state sovereignty.

Like all of Marshall's constitutional expositions, this decision had both a political and economic significance. It not only tremendously strengthened the Federal judicial power, but immeasurably affected the whole course of our economic history by giving permanency to commercial transactions and inspiring business with that degree of confidence which has incalculably accelerated the development of our present gigantic commercial structure.

DARTMOUTH COLLEGE v. WOODWARD

But Marshall's greatest and most far-reaching decision on the subject of contracts was *Dartmouth College* v. *Woodward*. No judicial proceeding in this country ever involved more important consequences or more profoundly affected the industrial future of the Nation. More has been written about it than any other lawsuit; and yet at the time, outside of New Hampshire, it attracted little or no professional or public interest.

The historical side of the case furnishes an interesting chapter in church missionary work. The school out of which this college grew was founded at Lebanon, Connecticut, by Rev. Eleazer Wheelock for the purpose of educating and christianizing the Indians. Among his students was one Sampson Occom, an Indian youth who possessed remarkable powers of eloquence. Occom went to England to raise funds to carry on the work and succeeded in raising over $50,000.00; Lord Dartmouth, for whom the College was later named, being the largest contributor. To insure permanency, the Royal Governor of New Hampshire, in the name of His Majesty King George III, in 1769 issued to the institution a perpetual corporate charter in the name of Dartmouth College. This charter placed the management of the institution in the hands of a self-perpetuating body of twelve Trustees, with Lord Dartmouth at the head. The same year the College was moved to Hanover, New Hampshire, where it had received a grant of 44,000 acres of land.

It is said that nothing so disturbs the peace of a community as a row in a church, and it was such an episode in the church at Hanover that led to this celebrated litigation. Brother Samuel Haze had a misunderstanding with sister Rachel Murch, and, among other things, he told sister Murch that her "character was as black as hell". The good sister resented such unchristian remarks and a church trial resulted which eventually divided New Hampshire into two hostile religious camps. As an inevitable result the dispute soon involved the College. In 1816 the controversy had reached such proportions that it became a statewide political issue between the Republican and Federalist parties. The former won, electing the Governor and a majority of the legislature. An act was passed which repealed the Royal charter and made the College a state institution under the name of the Dartmouth University. Having lost in the state courts, the old Trustees sought relief in

the Supreme Court. The only issue was whether the Royal corporate charter was a contract within the meaning and protection of the Constitution. Marshall's affirmative answer, and his definition of a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law" are now so imbedded in our jurisprudence as to become, to all intents and purposes, a part of the Constitution itself.

The decision likewise had a far-reaching effect upon the economic and political history of the country. From an economic standpoint it formed an impregnable defense of vested rights against assaults by state courts and secured to corporations freedom from future legislative despotism and party violence. It came at a time when corporations were everywhere springing up in response to business needs and economic development, and the steadiness and permanency it gave to corporate securities gave confidence to investors and made possible the great industrial and commercial growth of America. From a political viewpoint the decision was of equal importance. Fisk, in his Historical and Literary Essays, says that this decision "went further, perhaps, than any other in our history towards limiting state sovereignty and extending the Federal jurisdiction". Moreover, it aligned on the side of Nationalism all those powerful economic forces which were then beginning to operate through corporate organizations.

This fundamental principle that a corporate charter is a contract, within the meaning and protection of the Constitution, still endures, but the opinion as a whole has been greatly modified by later decisions. In *Charles River Bridge* v. *Warren Bridge,* 11 Peters, 420, decided eighteen years later, it was held that while corporate charters are such contracts, they must be strictly construed in favor of the state; that nothing is to pass by implication; that in the absence of express words granting exclusive privilege no such grant can be inferred as against the state.

Such modification was fortunate. It came at a time when railroad transportation was fast developing. These railroads were paralleling and competing with previously chartered canals and turnpikes, and a contrary holding would have retarded the construction of our great railroad systems until the claims of these old canal and turnpike corporations were satisfied, and their consent obtained to a development which has inconceivably added to the wealth, prosperity, convenience and comfort of the Nation.

A further modification came in 1877 in the so-called *Granger Cases,* which held that state statutes fixing maximum rates for previously chartered railroads and grain elevator companies were not in conflict with either the "Impairment of the Obligation of Contract" or the "Due Process" clauses of the Constitution, because when property becomes clothed with a public interest the owner must submit to public control for the common good; that the police power is supreme in respect to the regulation of public corporations, and state legislation passed by virtue of such power is not repugnant to the Constitution.

But the decade beginning in 1880 witnessed a still more far-reaching modification of Marshall's doctrine of corporate contract. In *Stone* v. *Mississippi,* 101 U. S. 814, decided in 1880, followed four years later by *Butchers Union, etc., Co.* v. *Crescent City Co.,* 111 U. S., 746, the modern doctrine in this respect is thus stated: "The contracts protected by the Constitution are those that relate to property rights, not governmental"; that by virtue of that "well known but undefined power called the 'police power' * * * neither the legislature nor the people themselves can by any contract, divest themselves of the power to provide for the protection of the lives, health and property of the citizen, or the duty of preserving the peace, good order and morals of society".

In group three are *McCullough* v. *Maryland,* 4 Wheaton, 316, decided in 1819, and *Osborn* v. *The Bank,* 9

Wheaton, 795, decided five years later. In these cases Marshall held state laws of both Maryland and Ohio in conflict with the last paragraph of section 8, Article I, of the Constitution which empowers Congress "To make all laws which shall be necessary and proper for carrying into execution" the powers granted Congress by that instrument. This is commonly known as the "Necessary and Proper" clause of the Constitution, and under its authority Congress had chartered the Bank of the United States, the subject matter of both cases.

The decision in the former case came at a time when the question of a broad and narrow construction of the Constitution had sharply divided the people along political and party lines and involved a subject on which they were even more bitterly divided. For these reasons, no decision of the Court, except that in the *Dred Scott Case* ever raised such a storm of protest or brought the Union so near the brink of destruction.

McCULLOCH v. MARYLAND

With the probable exception of the Fugitive Slave Law no Act of Congress has ever met with such determined opposition as that chartering the Bank of the United States. It was first chartered in 1791 for a period of twenty years and was very successful. This led to the establishment of many state banks throughout the country and in a short time the rivalry between the two was extremely bitter. At the expiration of its charter Congress refused to recharter the national institution and it closed its doors. The state banks, however, were unable to meet the financial necessities of the country during and immediately after the War of 1812, and in 1816 Congress rechartered the Bank of the United States for another period of twenty years.

The state banks at once renewed the old warfare against the National institution and many states began a systematic attempt to destroy it. The constitutions

of both Indiana and Illinois prohibited it or any of its branches from doing business in those states. Kentucky imposed an annual tax of $60,000.00 on each branch, Tennessee $50,000.00, North Carolina $5,000.00, and Georgia a tax equal to 31¼% of its capital stock.

It was from Maryland, however, that the constitutionality of such legislation finally reached the Court. The Bank operated a branch in Baltimore, and a Maryland statute required all banks established within her borders, without state authority, to issue notes only of certain designated denominations and on paper stamped and taxed by the state; or, in lieu thereof, to pay to the state an annual tax of $15,000.00. A penalty of $500.00 was imposed for each violation,—a sum that in this case would have amounted to millions of dollars.

The suit was brought to recover a penalty from McCulloch, cashier of the Bank, for a violation of the statute. The Maryland courts upheld the law and McCulloch carried the case to the Supreme Court. On the record, the point in dispute was the constitutionality of the Act of Congress chartering the Bank, but the basic issue was whether the Federal or State Governments should be supreme.

Marshall's opinion in this case is his greatest judicial utterance and is second only to the Constitution itself. In it he rewrote the fundamental law of the Nation and made the Constitution a living thing, capable of keeping pace with the changing necessities of the American people. In exalted language, he held that it is for Congress alone to decide as to what laws are "necessary and proper" for carrying into execution the powers granted by the Constitution. "The power to tax", said he, "involves the power to destroy, and the power to destroy may defeat the power to create; and if a state is permitted to destroy the instrumentalities of the Government by taxation, then the declaration that the Constitution and laws made under it shall be the supreme law

of the land is an empty and unmeaning declaration. * * * The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

Again, many states were in a frenzy of revolt,—not because the Court had held an Act of Congress unconstitutional, but because of its failure so to do. Virginia's legislature adopted a resolution denouncing the decision as one "eminently calculated to undermine the pillars of the Constitution itself, and to sap the foundation and rights of State Governments". Pennsylvania, Indiana, Illinois, Tennessee and Kentucky supported Virginia with equal belligerency, while strange to say South Carolina joined New York and Massachusetts in supporting Marshall's opinion.

OSBORN v. THE BANK

Opposition to the Bank was extremely bitter in Ohio and only four days before *McCullough's Case* was argued, its legislature, in utter contempt of the National authority, passed an act directing her Auditor to asses an annual tax of $50,000.00 against each of the Bank's two branches doing business in the state. If payment of the tax was refused, the act further directed the Auditor "to enter the Banks, open the vaults, search the offices and seize all moneys, property and everything of value found on the premises or elsewhere".

The Bank obtained an injunction restraining Osborn, State Auditor, from collecting the tax; but because of some defect in service Osborn ignored it, issued his tax warrant and sent his assistant Harper to Chillicothe to collect the tax. Payment was refused; and Harper forcibly entered the Bank's vaults and seized specie and notes amounting to $120,475.00. Before reaching Columbus, however, an injunction was properly served on both

Osborn and Harper restraining them from delivering the money to the State Treasurer, which was likewise ignored and the money delivered. The Bank immediately instituted a suit for damages against the officers, and at the same time pressed its bill for an injunction.

Shortly after the decision in *McCulloch's Case,* Ohio's Legislature passed a resolution asserting that it had examined the arguments of the Chief Justice and "found them to be faulty", vigorously condemned the decision, and definitely challenged the National Government to make good Marshall's assertion in that case that the "power which created the Bank must have the power to preserve it". About a year later the Bank obtained a decree in the Circuit Court directing the money and notes to be returned to the Bank, with interest on the specie, and enjoining the collection of the tax. The State Treasurer refused to comply with the order, was arrested and committed to jail for contempt, the keys of the state treasury forcibly taken from him by the United States marshal, the vaults of the state treasury entered, and the money and notes seized and returned to the Bank. Thus did the Federal Government answer the challenge of Ohio's Legislature.

In the Supreme Court, the defendants revived the old State-Rights doctrine raised by Virginia eight years before in *Martin* v. *Hunter's Lessee,*—which denied the authority of the Court to pass upon the constitutionality of a state statute which had been upheld by the highest state court,—raised all the questions previously decided in *McCulloch's Case* and requested a review of that decision. They also asserted the further defense that the state officers, having no material or pecuniary interest in the controversy, were only "nominal parties" and therefore the suit was in reality against the state; and since the Eleventh Amendment forbids such suits, the Court was without jurisdiction.

Marshall reaffirmed *McCulloch* v. *Maryland,* again held

the Bank's charter constitutional and the state tax invalid, and proclaimed a new and far-reaching doctrine in constitutional law, namely, that while the Eleventh Amendment forbids suits against states, it affords no protection to a state officer who acts under an unconstitutional statute; that these officers acting under such a statute had committed a trespass for which they were liable, notwithstanding their positions.

While this fateful decision greatly broadened and strengthened the powers of the Court, it also furnished the basis for a renewal of Congressional attacks against it. But in the meantime, Marshall's opinion in the *"Steamboat Monopoly Case"*, decided less than three weeks before, soon became generally known and for the time dissipated all popular hostility against the Court.

In the fourth group are two of Marshall's most far-reaching constitutional decisions, *Gibbons* v. *Ogden*, 9 Wheaton, 1, commonly known as the *"Steamboat Monopoly Case"*, decided in 1814, and *Brown* v. *Maryland*, 12 Wheaton, 419, which followed four years later. Both relate to that part of section 8, Article I, of the Constitution which empowers Congress "To regulate commerce with foreign nations, and among the several states", commonly known as the "Commerce Clause". The first involved commerce among the states, while the second dealt wholly with commerce with foreign nations.

GIBBONS v. OGDEN

On August 17, 1807, an event occurred on the Hudson River which was to affect the destinies of the world—Robert Fulton navigated his first steamboat from New York to Albany. From this also grew one of the most important and far-reaching lawsuits in the history of American jurisprudence. In 1808 the New York Legislature granted to Fulton and Robert R. Livingston, who had financed Fulton's experiments, their heirs and assigns, the exclusive right to navigate steamboats within

the harbors and upon the rivers of the state for a period of thirty years. They were also authorized to license vessels not owned by them and to seize and forfeit to themselves any unlicensed vessel found navigating such waters. Similar rights had been granted by Louisiana and many other states.

Under a license from the monopoly, Ogden operated a steam ferryboat from New York to the New Jersey shore. Gibbons operated a line along the New Jersey coast under a Federal coasting license. By mutual arrangement they exchanged passengers on the New Jersey side. The monopoly secured an injunction against this practice on the ground that through such arrangement Gibbons in reality carried passengers direct from New York to New Jersey. In defiance of both Ogden and the Monopoly, Gibbons then started an opposition line direct from New York to New Jersey, and was enjoined. The case reached the Supreme Court on the ground that the New York grant contravened the "Commerce Clause" of the Constitution.

No legal proposition is more thoroughly understood today than the exclusive power of Congress to regulate "commerce among the several states". But at that time it was so uncertain that even so distinguished a lawyer as Wm. Wirt, of counsel for Gibbons, confined his argument to the proposition that the New York grant was in conflict with patent rights issued by the United States, a matter not touched upon by Marshall in his opinion. Daniel Webster, his associate, took the high ground that Congress alone had the exclusive constitutional authority to regulate commerce among the states in all its forms, on all navigable rivers, without restraint or interference by state legislatures. It is interesting to note how closely Marshall, in his opinion, followed Webster's reasoning.

This history making opinion is styled the "Emancipation Proclamation of American Commerce", and in

ability and statesmanship is second only to *McCulloch* v. *Maryland*. It broke the stranglehold of the steamboat monopoly; made the navigable waters of every state the common pass way of all citizens; announced the absolute power of Congress over interstate commerce, and did more to unite the American people into a Nation than any other single force in our history, save that of war.

This was the only popular opinion Marshall ever pronounced. In fact so popular did the Court now become that shortly afterward Senator Martin Van Buren, in a speech in the Senate, referred "to the general sentiment * * * of idolatry for the Supreme Court", and to Marshall as "that uncommon man * * * who is, in all human probability, the ablest Judge now sitting upon any judicial bench in the world". But it was only "the calm which precedes the storm", and within a few years the hatred for both Marshall and the Court showed itself with greater violence than ever.

This decision also had its economic and political effect. On the economic side the opening of the Hudson River, New York harbor, and Long Island Sound, to free navigation made New York City the greatest commercial center in the country. It crushed similar monopolies in other states and opened our inland waterways to free and unrestricted commerce. The first railroad was built only five years later, and this decision removed the danger of like state grants to railroad monopolies, which would have prevented the growth of our present interstate railroad transportation systems, without which our great manufacturing enterprises and our own coal industry would have been impossible.

The ultimate political effect was equally important. It established the complete authority of the Nation over commerce, and greatly extended the powers of the National Government. The State-Rights advocates clearly saw and understood that this Nationalism as expounded by Marshall, if truly carried out, meant their inevitable

extinction. Southern leaders of the time freely predicted that this broad construction of the Constitution would some day be extended by Congress to include the right to legislate respecting slavery. History records how accurately this prophecy was fulfilled.

BROWN v. MARYLAND

Only three years after he had emancipated interstate commerce, Marshall was called upon to declare the supremacy of the National Government respecting commerce with foreign nations, and also to construe that provision of the Constitution which grants to Congress the exclusive power to collect duties and imposts.

Then as now states were seeking means of increasing their revenues by finding new subjects of taxation. To secure such revenue, a Maryland statute imposed a license tax of fifty dollars on all importers or wholesalers of imported goods. Failure to secure such license subjected the offender to a fine of one hundred dollars and the forfeiture of the amount of the tax.

Three Brown brothers in Baltimore, trading as Brown and Company, were indicted and convicted for having sold a package of foreign dry goods at wholesale without having first obtained such license. They brought the case before the Court on the grounds that such statute was in contravention of both the "Commerce Clause" of the Constitution and that clause which clothes Congress with the exclusive authority to levy and collect duties and imposts.

Just as in *Gibbons* v. *Ogden* he emancipated interstate commerce from the dominance of state governments, so in this case Marshall freed commerce with foreign nations from state interference. He held the statute repugnant to both provisions of the Constitution, declared the National control supreme over all commerce with foreign nations, and asserted the exclusive authority of

the Federal Government in the collection of duties and imposts.

In this case Roger Brooke Taney, who succeeded Marshall as Chief Justice, appeared as counsel for Maryland, and twenty years later in discussing the case, said: "I, at that time persuaded myself that I was right * * *. But further and more mature reflection has convinced me that the rule laid down by the Supreme Court is a just and safe one, and the best that could have been adopted for preserving the rights of the United States on the one hand, and of the states on the other, and preventing collision between them".

In group five are *Martin* v. *Hunter's Lessee,* 1 Wheaton, 304, decided in 1816, followed five years later by *Cohens* v. *Virginia,* 6 Wheaton, 264. The first settled conclusively the Court's jurisdiction in writs of error to state courts in civil cases, where Federal questions are involved; while the second established such jurisdiction in criminal cases. In neither case, however, is such jurisdiction conferred by the Constitution, but exists only by reason of the Twenty-fifth Section of the Judiciary Act. This section had been in effect twenty-four years and the Court had taken jurisdiction in sixteen such cases without serious opposition, when Virginia suddenly and violently challenged its constitutionality, denied the authority of the Court to take jurisdiction thereunder and pass upon the constitutionality of state statutes which had been upheld by the highest state courts. Today, this position seems highly absurd, but the support which Virginia then received from other states made it the rock upon which the young Republic narrowly averted disaster.

MARTIN v. HUNTER'S LESSEE

Martin v. *Hunter's Lessee* was the culmination of a series of suits involving the Lord Fairfax Estate in Virginia. It first came before the Court in 1791 in

Hunter's Lessee v. *Fairfax's Devisee,* 3 Dallas, 305, when it was continued and later dropped from the Court's docket. Some years later the litigation was revived in Virginia and in 1813 was again before the Court in *Fairfax's Devisee* v. *Hunter's Lessee,* 7 Cranch, 602. The state court was reversed, but refused to obey the mandate and it came before the Court on a second writ of error in *Martin* v. *Hunter's Lessee.*

Marshall had been interested in the controversy before his elevation to the Court and declined to sit. Both opinions were delivered by Justice Story, who came to the Court in 1811 at the age of thirty-two—the youngest man ever appointed to that bench. Story had been an ardent Republican and a firm believer in State-Rights, but his four years association with Marshall had given him a National vision equal to that of the Great Chief Justice himself. In fact, it is stated by some historians, that Story's second opinion is so characteristically Marshallesque as to indicate that the Chief Justice either dictated it or strongly influenced its preparation. Be that as it may, the principles therein stated were so far-reaching and so closely related to the prior and subsequent utterances of Marshall that we are impelled to make reference thereto.

Lord Fairfax was a Tory and in 1777 Virginia enacted a statute purporting to confiscate his entire estate of 300,000 acres, but never actually took possession of the property. In 1781 Lord Fairfax died in England his estate passing, by devise, to his nephew, Denny Martin. Hunter claimed title to 788 acres of this land through a grant from the state. Martin contested the validity of this grant on the ground that since the state had not executed its confiscatory statutes, his title was now protected by the terms of the Jay Treaty. The litigation involved the title to the whole estate.

In 1809 the Virginia Court sustained the claim of Hunter and completely demolished the Fairfax title. Martin

brought the case to the Supreme Court, and in 1813 Justice Story reversed the lower court and held that since Virginia had not taken possession of the property before the ratification of the Jay Treaty, it could not afterwards do so, as the Constitution and the laws and treaties thereunder took precedence over all conflicting state laws.

The wrath of Virginia was deeply aroused. For six days her Supreme Court solemnly deliberated whether to obey or defy the Court's mandate. It heard arguments from various members of the Bar, and then hurled its defiance at the Supreme Court of the United States by entering an order declining to obey such mandate, holding, that "under a sound construction of the Constitution, appellate jurisdiction of the Supreme Court of the United States does not extend to the Virginia Supreme Court, and so much of the Twenty-fifth Section of the Judiciary Act as extends such jurisdiction is unconstitutional".

To this order Martin obtained a second writ of error, and it was in this proceeding that Story delivered his great constitutional decision, concurred in by four of his Republican associates. The opinion is not only the equal of Marshall's greatest nationalistic utterances, but has ever since formed the keystone of the arch of Federal judicial power. He held that the Constitution, and the laws and treaties compatible therewith, are supreme and supersede all conflicting state laws; that the Constitution gave to Congress the right to confer appellate jurisdiction upon the Supreme Court in all cases arising under the Constitution, laws and treaties of the United States, even when arising in state courts; that such jurisdiction was dependent on the nature of the case and not on the particular court in which the case was pending. However, to avoid further embarrassment the mandate was now directed to the lower court in Shenandoah County, which entered the proper judgment.

In view of the resentment of Virginia over the *Fairfax Cases,* it was unfortunate that the Court's jurisdiction in writs of error to state courts in state criminal cases should have likewise arisen in Virginia. But such was the case, and five years later Virginia was again infuriated by *Cohens* v. *Virginia,* which settled conclusively the Court's jurisdiction in writs of error to state courts in criminal cases, where Federal statutes are involved.

Congress had previously authorized the City of Washington to institute lotteries and conduct drawings. The defendants, P. J. and M. J. Cohen, were indicted, convicted and fined one hundred dollars for selling such lottery tickets in Virginia, in violation of a state statute. A Federal statute being involved, the case was carried to the Supreme Court. The wrath of Virginia which had somewhat cooled since the *Fairfax Case,* now flamed anew at what she styled this unwarranted invasion of her rights as a sovereign state. Its legislature by resolution instructed counsel for the state "to answer to the question of jurisdiction alone, and if this be decided against them that they make no further appearance".

Pursuant to their instructions counsel for Virginia moved to dismiss the writ on two grounds, namely:— (1) That the Court had no constitutional jurisdiction of a writ of error to a state court in a state criminal prosecution; and (2) That Congress had no power to authorize the sale of such lottery tickets in a state whose laws prohibited such sale. It was upon this motion that the main arguments were made and Marshall's historic decision rendered. On the record, there was nothing in the case but a conflict of jurisdiction, nor was the interest in the case due to the prominence of the peddlers of these lottery tickets. Its true significance lies deeper;—it was another judicial conflict for supremacy between the states and Federal Government.

A true perspective of the case and Marshall's historic

opinion is impossible without an understanding of the great political crisis which preceded it. The attempt in 1819 to admit Missouri as a state, the bitter debates in Congress between the anti-slavery and pro-slavery advocates, and the "Compromise" in 1821 which finally admitted it as a state, had greatly agitated the people. Threats of secession by southern leaders had been boldly made both in and out of Congress. Such threats had even been hinted at in the argument of this case by counsel representing Virginia. The time was ripe for Marshall's great opinion, which, in the last analysis, was an address to the American people. In fact so opportunely did the case reach the Court that it was charged at the time that it had been purposely arranged to enable Marshall to deliver his epochal opinion. When we consider the insignificance of the subject matter, the amount involved, and the legal talent engaged, we are led to conclude that the charge was true. However, if it were true, it was fully justified by the results; if not true, its presentation to the Court at that particular time was most providential, for it gave to Marshall the opportunity to again proclaim the supremacy of the Nation, and the necessity for National unity.

The Court having decided the jurisdictional question against Virginia, her counsel in accordance with their instructions declined to appear further. In the meantime, Daniel Webster, who represented New York in a similar case then pending, gratuitously appeared on behalf of Virginia and won the case on the merits.

Marshall's opinion on the jurisdictional issue is one of America's greatest state papers. There is no dodging, no hedging, no equivocation, no attempt to compromise a great issue that could not be compromised. On the contrary, there is the broadest and bravest declaration of National supremacy over the states in all cases involving the Constitution, laws, and treaties of the Nation. In language exalted in its patriotism he replied

to the southern threats of secession, just as he rebuked the same spirit in Pennsylvania and New England ten years earlier in *United States* v. *Peters,* 5 Cranch, 135.

To Virginia's contention that the Constitution has "provided no tribunal for the final construction of itself * * * and, therefore, this power may be exercised by every state in the Union * * *", Marshall answered that the people themselves established the Constitution because experience had taught them the necessity of a closer and firmer union, and "this government would disappoint their hopes unless invested with a large part of the sovereignty which formerly belonged to the states"; that these "ample powers" were given to the Government for reasons explained by the Constitution itself: "In order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare"; and this Constitution so established by the people leaves no doubt as to its supremacy, for it plainly states that it, and the laws and treaties made under it "shall be the supreme law of the land, and the judges in every state shall be bound thereby; anything in the Constitution or laws of any state to the contrary notwithstanding, * * *".

The wrath of Virginia over the issuance of the writ of error was now goaded to a fury by the decision on the motion; nor did the fact that she won the case on the merits abate such bitterness. Marshall was not only excoriated by the press and in public address, but his Republican associates, who had been appointed by Jefferson, were denounced as apostates to the faith which they had previously championed.

This bitterness against Marshall, except for a brief period following the *"Steamboat Monopoly Case"*, continued with varying degrees of intensity until his death, July 6, 1835. But that silent, never resting element called time has written history's verdict, and the place of Marshall is now secure. The mists and fogs of party

spirit have broken away and the name and fame of this great "Expounder of the Constitution" are now cherished, irrespective of section or party, as the common heritage of all. He did not make the Constitution, but by his judicial interpretation he saved it from destruction, and made it a practical instrument, adapted to the needs of a progressive people—a Nation far more extensive than its founders ever dreamed. It is probable that questions of conflicting authority between the states and the Federal Government will never cease to rise, but the number of such inquiries will continue to grow fewer and their scope less critical, because Marshall traced the boundary lines and set up the landmarks to be followed by those who were to come after him.