

JOHN MARSHALL, REVOLUTIONIST MALGRÉ LUI

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In the final chapter but one of his biography of Marshall, Beveridge characterizes the aging Marshall as "the Supreme Conservative." Yet when Marshall first emerged on the national scene it was as a revolutionist in the fullest sense, and 106 years after his death, it was Marshall's version of the Constitution which supplied the constitutional basis for the most profound revolution in the history of our constitutional law. In this paper I shall deal briefly with the intervening story—the story, to wit, of the evolution of the federal concept in the thinking of the Supreme Court. But first some personal facts about Marshall himself.¹

John Marshall was born September 24, 1755, on what was then the western frontier of the British province of Virginia. His father, Thomas Marshall, was a man of no pretensions to birth or learning, but of great energy of spirit and strong good sense. To him the Chief Justice was wont to attribute all his success in life, and it is evident that between father and son not only a powerful natural affection existed, but a remarkable congeniality.

With the outbreak of the Revolution, the two Marshalls set about training their frontier neighbors in the manual of arms. At about the time that his cousin, Thomas Jefferson, his elder by 12 years, was drafting the Declaration of Independence, young John was enlisting in the Continental line. First as lieutenant, later as captain, he fought at Brandywine, Germantown, Monmouth, and Stoney Point, and underwent with customary cheerfulness the rigors of Valley Forge.

Referring to this period many years later, he wrote: "I was confirmed in the habit of considering America as my country and Congress as my government." Another factor which contributed to his early nationalistic bent was the influence of the revered Washington.

His regiment's term of enlistment having run out, John, in 1780, attended, for about one month, a course of lectures on law by the famed Chancellor Wythe at the College of William and Mary—the only institutional education he ever received. His self-instruction in the

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1. See CORWIN, JOHN MARSHALL AND THE CONSTITUTION 25-52 (1919).

law had, however, begun some years earlier with his reading of the first American edition of Blackstone's *Commentaries* (1772), to which his father was a subscriber.

Marshall began legal practice in 1783 in the new state capital at Richmond and married the same year. His advancement, both professional and political, was rapid once it got under way. Meantime his political creed was taking shape. As a member of the Virginia Assembly, off and on from 1782, Marshall came to form a poor opinion of state legislatures. It seemed to him that generally they had an exaggerated conception of their own powers and that the selfish desires and narrow outlook of the farmer-debtor class usually controlled their proceedings. They refused to meet the obligations of their states under the Articles of Confederation, set at naught certain provisions of the Treaty of Peace, interfered freely with judicial decisions at the behest of litigating interests, put difficulties in the way of commerce among the sister states, voted cheap money laws, and played ducks and drakes generally with private contracts.

And for once his unloved and unloving cousin Jefferson agreed with him. In his *Notes on Virginia*, written in 1781, Jefferson assailed the Virginia Constitution of 1776 for having produced a concentration of power in the legislative assembly which answered to "precisely the definition of despotic government." Nor did it make any difference, he continued, that such powers were vested in a numerous body "chosen by ourselves"; "one hundred and seventy-three despots" were "as oppressive as one"; and "an *elective despotism* was not the government we fought for, but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others."²

The remedy for the shortsightedness and irresponsibility of the state legislatures was ultimately supplied by a second revolution, that which culminated in the adoption of the Constitution; and to this revolution, too, Marshall lent a helping hand in its later stages. It was owing mainly to Marshall that the Virginia legislature submitted the Constitution to the ratifying convention of that state without hampering instructions. On the floor of the convention itself, Marshall gave his greatest attention to the judiciary article as it appeared in the proposed Constitution, espousing the idea of judicial review. If, said he, Congress "make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Con-

2. 3 WRITINGS OF THOMAS JEFFERSON 223-24 (Ford ed. 1894).

stitution which they are to guard. They would not consider such a law as coming within their jurisdiction. They would declare it void.”³

In 1799 Marshall made his once celebrated defense of President Adams' action in handing over to the British authorities, in conformity with the Jay Treaty, one Jonathon Robbins, who was allegedly a fugitive from justice. This was one speech on the floors of Congress which demonstrably made votes. Meantime, in 1797, Marshall had been one of the famous XYZ mission to France. He successively refused appointment as Associate Justice of the Supreme Court and as Secretary of War, but in 1800 accepted the post of Secretary of State. On January 22, 1801, while still holding that office, he was nominated to be Chief Justice and received the Senate's hesitant approval on January 27. The story of this crucial moment in his life and in the history of American constitutional law is related by Marshall in the *Autobiographical Sketch* which he prepared for Story in 1827:

“On the resignation of Chief Justice Ellsworth I recommended Judge Patteson [*sic*] as his successor. The President objected to him, and assigned as his ground of objection that the feelings of Judge Cushing would be wounded by passing him and selecting a junior member of the bench. I never heard him assign any other objection to Judge Patteson. . . . The President himself mentioned Mr. Jay, and he was nominated to the senate. When I waited on the President with Mr. Jay's letter declining the appointment he said thoughtfully ‘Who shall I nominate now?’ I replied that I could not tell, as I supposed that his objection to Judge Patteson remained. He said in a decided tone ‘I shall not nominate him.’ After a moments hesitation he said ‘I believe I must nominate you.’ I had never before heard myself named for the office and had not even thought of it. I was pleased as well as surprized, and bowed in silence. . . . I was unfeignedly gratified at the appointment, and have had much reason to be so.”⁴

Marshall's assumption of the Chief Justiceship marks the beginning of his career as the “Supreme Conservative.” Henceforth all his abilities would be directed to advancing through the Court the principles which underlay the Constitution, as he understood them, and these abilities were of a high order. Even Justice Holmes, while demurring to Senator Lodge's estimate of Marshall as “a nation-maker, a state-builder,” conceded him, a bit condescendingly to be sure, “a strong intellect, a good style, personal ascendancy in his court, courage, justice and the convictions of his party.”⁵ Two things Holmes

3. I BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 452 (1944).

4. MARSHALL, *AUTOBIOGRAPHICAL SKETCH* 29-30 (Adams ed. 1937).

5. LERNER, *THE MIND AND FAITH OF JUSTICE HOLMES* 384 (1943).

omitted: a profound conviction of calling and a singular ability, in the words of a contemporary, to "put his own ideas into the heads of others without their knowing it"—the residue, one may surmise, of his youthful experience as nurse-maid to a whole squadron of younger brothers and sisters.

The chief canons of Marshall's interpretation of the Constitution were the juristic weapons by which that interpretation became law of the land. For the purposes of this paper, they may be briefly summarized as follows:

1. The finality of the Court's interpretation of the law, and hence of the Constitution, which was the backbone of the doctrine of judicial review, as set forth particularly in *Marbury v. Madison*⁶ in relation to acts of Congress, and in *Cohens v. Virginia*⁷ in relation to state laws and constitutional provisions.

2. The popular origin of the Constitution, and its continuous vitality. The Constitution was "designed to endure for ages to come and hence to be adapted to the various crises of human affairs." The terms in which it grants power to the national government must, therefore, be liberally construed. The *locus classicus* of these doctrines is Marshall's decision in 1819 in *McCulloch v. Maryland*.⁸

3. The principle of national supremacy, which amounted to neither more nor less than a literal application of article VI, paragraph 2 of the Constitution: "This Constitution and the laws of the United States which shall be made in pursuance thereof and the treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." This language, Marshall held, ruled out *ab initio* any idea that the coexistence of the states and their powers imposed limits on national power. The *locus classicus* of this doctrine is the following passage from his great opinion in *Gibbons v. Ogden*,⁹ where the scope of Congress' power to regulate commerce afforded the immediate issue:

"We are now arrived at the inquiry—what is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are pre-

6. 5 U.S. (1 Cranch) 137 (1803).

7. 19 U.S. (6 Wheat.) 264 (1821).

8. 17 U.S. (4 Wheat.) 316 (1819).

9. 22 U.S. (9 Wheat.) 1 (1824).

scribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.”¹⁰

Even, however, before Marshall had ascended the bench, the groundwork had been laid for a radically different conception of the union, viz. that of a union of sovereign states, whose reserved powers, recognized in amendment X, stood on a footing of equality with the delegated powers of the general government. The first adumbration of such a conception appears in *Federalist* #39, the author of which was James Madison, and it was further elaborated and extended in the Virginia and Kentucky Resolutions of 1798 and 1799. It is hardly surprising, therefore, that as Marshall proceeded to develop his nationalizing principles, “the sleeping spirit of Virginia, if indeed it may ever be said to sleep,” was aroused to protest.

Approaching Marshall’s opinion in *McCulloch v. Maryland* from the angle of his quasi-parental concern for “the balance between the States and the National Government,” Madison declared its central vice to be that it treated the powers of the latter as “sovereign powers,” a view which must inevitably “convert a limited into an unlimited government,” for, he continued, “in the great system of political economy, having for its general object the national welfare, everything is related immediately or remotely to every other thing; and, consequently, a power over any one thing, if not limited by some obvious and precise affinity, may amount to a power over every other.” “The very existence,” he urged, “of the local sovereignties” was “a control on the pleas for a constructive amplification of the powers of the General Government.”¹¹

10. *Id.* at 196-97. See also *id.* at 210-11.

11. 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 143-47 (1865). For a more elaborate statement of the same position, see Hugh Swinton Legaré’s review in 1829 of the first volume of Kent’s *Commentaries*. 2 WRITINGS OF HUGH SWINTON LEGARÉ 102, 123-33 (M. Legaré ed. 1845).

Two more drastic critics were friends of Jefferson and constantly stimulated by him. One of these was John Taylor of Caroline, who pronounced Marshall's doctrines to be utterly destructive of the division of powers between the two centers of government; the other was Spencer Roane, Chief Judge of the Virginia Court of Appeals, who denied that the national government derived any "constructive powers" from the supremacy clause.¹² The designated constitutional agencies for the application of this clause, he argued, were the state judiciaries—"the judges in every state," to wit. In combatting this heresy Marshall composed one of his most powerful opinions, that in *Cohens v. Virginia*.¹³

And many coarser voices joined in the hue and cry, and not without effect. Hardly any session of Congress convened after 1821, but witnessed some effort to curtail the powers of the Court, and the support accorded some of these in Congress reached sizeable proportions. Marshall became increasingly aware that he was fighting a losing fight.

"To men who think as you and I do," he wrote Story, toward the end of 1834, "the present is gloomy enough; and the future presents no cheering prospect. In the South . . . those who support the Executive do not support the Government. They sustain the personal power of the President, but labor incessantly to impair the legitimate powers of the Government. Those who oppose the rash and violent measures of the Executive . . . are generally the bitter enemies of Constitutional Government. Many of them are the avowed advocates of a league; and those who do not go the whole length, go a great part of the way. What can we hope for in such circumstances?"¹⁴

Marshall died July 5, 1835. A few months later Justice Henry Baldwin published his *View of the Constitution*, in which he paid tribute to his late Chief Justice's qualities as expounder of the Constitution. "No commentator," he wrote, "ever followed the text more faithfully, or ever made a commentary more accordant with its strict intention and language. . . . He never brought into action the powers of his mighty mind to find some meaning in plain words . . . above the comprehension of ordinary minds. . . . He knew the framers of the Constitution, who were his compatriots"; he was himself the historian of its framing, wherefore, as its expositor, "he knew its objects, its intentions." Yet in the face of these admissions, Baldwin

12. Taylor's and Roane's quarrel with Marshall may be traced sufficiently in the entries in the index to Beveridge's biography of Marshall. 4 BEVERIDGE, *op. cit. supra* note 3, at 657, 662.

13. See also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

14. CORWIN, *op. cit. supra* note 1, at 195.

rejects Marshall's theory of the origin of the Constitution and the corollary doctrine of liberal construction. "The history and spirit of the times," he wrote, "admonish us that new versions of the Constitution will be promulgated to meet the varying course of political events or aspirations of power."¹⁵

Baldwin's prophecy was speedily justified by the event. Within twenty-two months following Marshall's demise, the Court, having been enlarged by Congress from seven to nine Justices with the intention of watering down the still persisting Marshallian virus, received five new Justices and a new Chief Justice. Volume 11 of *Peters' Reports* reflects the juristic result of its transformation. Here occur three cases involving state laws, all of which, by Story's testimony, the late Chief Justice had stigmatized as unconstitutional. In 11 *Peters* all three are sustained. For present purposes the most significant of these cases was *New York v. Miln*,¹⁶ in which it was alleged that the state, in imposing certain requirements upon captains of vessels entering New York harbor with aliens aboard, had violated applicable congressional legislation. Speaking for the Court, Justice Barbour said:

"There is, then, no collision between the law in question, and the acts of congress just commented on. . . . But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive."¹⁷

Although Justice Wayne subsequently alleged that he had never assented to Barbour's "impregnable positions," and strongly hinted that they had been smuggled into the Court's opinion after it had

15. *Id.* at 225-26.

16. 36 U.S. (11 Pet.) 102 (1837).

17. *Id.* at 139.

been approved by the other Justices, there can be no doubt that by the time of the decision of the *License Cases*,¹⁸ ten years later, Barbour's dictum had, to all intents and purposes, become settled doctrine of the Court. What is more, Chief Justice Taney's opinion in these same cases projects on the basis of it a new conception of the Court's role in the Constitution, one which he later reiterates and enlarges in his opinion in *Ableman v. Booth*,¹⁹ decided in 1858. Here the Supreme Court, which Marshall had regarded as primarily an organ for the maintenance of national supremacy, is depicted as an arbiter standing outside of and above both the general government and the states, with power to settle "with the calmness and deliberation of judicial inquiry" all controversies as to their respective powers—controversies which "in other countries have been determined by the arbitrament of force."²⁰ Ironically enough, two years later, the Civil War broke.

We move now into a new cycle of American constitutional law. The Civil War had settled the most urgent and dangerous issue of the federal relationship. A new problem had meantime arisen—that of the relation of government, and especially of the national government, to private enterprise. The problem was formulated in the first instance in the terminology of the *laissez faire* conception of governmental function.

The bare facts of life, and especially the country's dependence upon the uncurbed energies of its pioneers for the conquest and appropriation of a vast wilderness, rendered American soil fertile ground for the *laissez faire* ideology. Thus President Van Buren, in his special message to Congress of September 4, 1837, wrote:

"All communities are apt to look to government for too much. Even in our own country, where its powers and duties are so strictly limited, we are prone to do so, especially at periods of sudden embarrassment and distress. But this ought not to be. The framers of our excellent Constitution and the people who approved it with calm and sagacious deliberation acted at the time on a sounder principle. They wisely judged that the less government interferes with private pursuits the better for the general prosperity. It is not its legitimate object to make men rich or to repair by direct grants of money or legislation in favor of particular pursuits losses not incurred in the public service. This would be substantially to use the property of some for the benefit of others. But its real duty—that duty the performance of which makes a good government the most precious of human blessings—is to enact and enforce a system of general laws commensurate

18. 46 U.S. (5 How.) 504 (1847).

19. 62 U.S. (21 How.) 506 (1858).

20. *Id.* at 520-21.

with, but not exceeding, the objects of its establishment, and to leave every citizen and every interest to reap under its benign protection the rewards of virtue, industry, and prudence.”²¹

But the theory of *laissez faire* which dominated the thinking of the American Bar Association, founded in 1878, and in due course that of the Supreme Court, was a highly pretentious, highly complex construction which, in effect, presented the American people overnight, as it were, with a new doctrine of Natural Law—one which thrust the maintenance of economic competition into the status of a preferred constitutional value.²² Of the distinguishable elements of the theory, the oldest was a benefaction from Adam Smith’s *Wealth of Nations*, which assumed a natural “economic order” whose intrinsic principles or “laws” automatically assure realization of the social welfare, provided their operation is not interfered with by judgments which are not based on the self-interest of the author thereof. This famous work appeared the same year as the Declaration of Independence, a coincidence which a president of the Association opined could only have had its origin in the mind of Deity itself. In 1857, John Stuart Mill’s *Political Economy* presented the world with a revised version of the *Wealth of Nations*, and was followed two years later by Darwin’s world-shattering *Origin of Species*. As elaborated particularly by Herbert Spencer and his American disciple, John Fiske, the evolutionary conception immensely reinforced the notion of governmental passivity. It was certainly reassuring to know that competition in the economic world was matched by “the struggle for existence” in the biological world, and that those who survived the latter struggle were invariably “the fittest,” since that went to show that those who were most successful in economic competition were likewise “the fittest.” Nor may mention be omitted of Sir Henry Maine’s *Ancient Law*, which appeared two years after the *Origin of Species*, for here the evolutionary process received, so to speak, a sort of jural sanctification. “The movement of progressive societies,” wrote Maine, “has hitherto been a movement from Status to Contract.” If hitherto, then why not henceforth? Freedom of contract, too, was a part of the divine plan.

To return to the American Bar Association—its original membership comprised avowedly the *élite* of the American bar. Organized in the wake of the decision in *Munn v. Illinois*,²³ which one of the members opined was a sign that the country was “gravitating toward

21. 3 MESSAGES AND PAPERS OF MARTIN VAN BUREN 344 (Richardson ed. 1897).

22. See TWISS, *LAWYERS AND THE CONSTITUTION* 63-200 (1942).

23. 94 U.S. 113 (1876).

barbarism," the Association soon became a sort of juristic sewing circle for mutual education in the gospel of *laissez faire*. Addresses and papers presented at the annual meetings iterated and reiterated the tenets of the new creed: government was essentially of private origin; the police power of the state was intended merely to implement the common law of nuisance; the right to fix prices was no part of any system of free government; "in the progress of society there is a natural tendency to freedom"; the trend of democracy is always away from regulation in the economic field; "the more advanced a nation becomes, the more will the liberty of the individual be developed."

What, however, did this signify practically? This question was answered by the president of the Association in 1892, in these words: "Can I be mistaken in claiming that Constitutional Law is the most important branch of American jurisprudence; and that the American Bar is and should be in a large degree that priestly tribe to whose hands are confided the support and defense of the Ark of the Covenant of our fathers . . . ?"²⁴

The problem remained, nevertheless, of how the tenets of *laissez faire* were to be translated into the accepted idiom of American constitutional law? This problem was met in part by Association papers, in part also by contemporary writings on constitutional law, such as, notably, Cooley's *Constitutional Limitations*, Tiedeman's *Treatise on the Limitations of the Police Power*, James Coolidge Carter's *Law, Its Origin, Growth and Function*, John Forrest Dillon's *The Laws and Jurisprudence of England and America*, among others.

And the final grist of all this grinding for the constitutional law of the period was, first, the doctrine of freedom of contract and, secondly, the doctrine that the regulation of production is exclusively reserved to the states both by the tenth amendment and by the principle of federal equilibrium. The doctrine of freedom of contract owes most to Tiedeman, who advanced the proposition that when a court was confronted with a statute restrictive of freedom of contract in the economic field, the principle that statutes are to be presumed constitutional was automatically repealed and the burden of proof was shifted to anyone who pleaded the statute.

The concept of freedom of contract is, of course, post-Marshall, being an offshoot of the substantive doctrine of due process of law, which first received important recognition in the jurisprudence of the Court in Chief Justice Taney's opinion in the *Dred Scott* case.²⁵ It

24. See CORWIN, *CONSTITUTIONAL REVOLUTION*, LTD. 87-88 (1941); TWISS, *op. cit. supra* note 22, at 174-200.

25. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857). For the antecedents of this dictum, see CORWIN, *LIBERTY AGAINST GOVERNMENT* 58-115 (1948).

reached its culmination in the October term of 1935 when the Court declared in effect that a minimum wage law was beyond the competence of either the states or the national government.²⁶ For our purpose we need give this concept no further attention. The other doctrine, however, that of an exclusive state power in the field of production, is immediately pertinent to the purpose of this paper.

The first important case in which this doctrine played a decisive role was the famed *Sugar Trust* case²⁷ of 1895, in which the Sherman Anti-Trust Act was put to sleep for twenty years so far as its main purpose, the repression of industrial combinations, was concerned. Early in his opinion, Chief Justice Fuller stated the fundamental rationale of the decision as follows:

“It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.”²⁸

In short, what was needed, the Court felt, was a hard and fast line between the two spheres of power, and in the following series of propositions it endeavored to lay down such a line: (1) production is always local, and under the exclusive domain of the states; (2) commerce among the states does not commence until goods “commence their final movement from their States of origin to that of their destination”; (3) the sale of a product is merely an incident of its production and, while capable of “bringing the operation of commerce into play,” affects it only incidentally; (4) such restraint as would reach commerce, as above defined, in consequence of combinations to control production “in all its forms,” would be “indirect, however inevitable and whatever its extent,” and as such beyond the purview of the statute.²⁹

26. See *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936). The late Charles Beard charged Marshall with a certain responsibility for the doctrine of freedom of contract on the score of his assigning such a transcendental value to the inviolability of contracts in his dissenting opinion in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 212, 331 (1827). This inviolability is derived from the proposition that “the right to contract is the attribute of a free agent. . . .” *Id.* at 350. *Ogden v. Saunders* is the one and only constitutional case in which Marshall appeared in the minority.

27. *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

28. *Id.* at 13.

29. *Id.* at 13-16.

In the *Sugar Trust* case nullification of the legislation involved assumed, therefore, the guise—or disguise—of statutory construction. A generation later, in the first *Child Labor* case,³⁰ the Court invalidated outright an act of Congress which banned from interstate commerce goods from factories in which child labor had been employed. Said Justice Day for a sharply divided Court:

“In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. *Lane County v. Oregon*, 7 Wall. 71, 76. The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government. *New York v. Miln*, 11 Pet. 102, 139. . . . To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States.”³¹

In short, the Court bases its decision on the tenth amendment, having first taken the precaution to amend the same by inserting the word “expressly” in front of the word “delegated.”

And in *Carter v. Carter Coal Co.*³² decided in 1935, the Court held void on like grounds an act of Congress intended to regulate hours of labor and wages in the bituminous coal mines of the country. Said Justice Sutherland for the Court:

“. . . [T]he conclusive answer [to defense of the act] is that the evils are all local evils over which the federal government has no legislative control. The relation of employer and employee is a local relation. At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character.”³³

30. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

31. *Id.* at 275-76.

32. 298 U.S. 238 (1936).

33. *Id.* at 308-09.

In brief, the distinction between direct and indirect effects is not one of degree but one of kind; and its maintenance is essential to the maintenance of the federal system itself.³⁴

Thanks to the Great Depression—André Siegfried has recently pronounced it “probably the most important event in the history of the United States since the War of Independence”—this entire system of constitutional interpretation touching the federal relationship is today in ruins. It began to topple in *NLRB v. Jones & Laughlin Steel Corp.*,³⁵ in which the Wagner Labor Act was sustained. This was in 1937, while the “Old Court” was still sitting. In 1941, in *United States v. Darby*,³⁶ the “New Court” completed the job of demolition. The act of Congress involved was the Fair Labor Standards Act of 1938, which not only bans interstate commerce in goods produced under substandard conditions, but makes their production a penal offense against the United States if they are “intended” for interstate or foreign commerce. Here Chief Justice Stone, speaking for the unanimous Court, goes straight back to Marshall’s definition of Congress’ power over interstate commerce in *Gibbons v. Ogden* and to his construction of the “necessary and proper” clause in *McCulloch v. Maryland*. The former is held to sustain the power exercised in the Fair Labor Standards Act by way of prohibiting commerce; the latter is held to support the prohibition by the act of the manufacture of goods for interstate commerce except in conformity with the standards imposed by the act as to wages and hours. As to the tenth amendment, it was dismissed “as a truism that all is retained which has not been surrendered.” Its addition to the Constitution altered the latter in nowise.³⁷

Summing up the effects of the *Darby* case, the late Justice Roberts said in his *Holmes Lectures* for 1951: “Of course, the effect of sustaining the Act was to place the whole matter of wages and hours of persons employed throughout the United States, with slight exceptions, under a single federal regulatory scheme and in this way completely to supersede state exercise of the police power in this field.”³⁸

All in all, it is not extravagant to say that the Supreme Court has rarely, if ever, rendered a more revolutionary decision, whether

34. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548 (1935). The spokesman for the Court in *Schechter* was Chief Justice Hughes, as he was two years later in *Jones & Laughlin Steel Corp.* In PUSEY, CHARLES EVANS HUGHES (1951), the author endeavors to show that his hero’s route from the one position to the other proceeded in a perfectly straight line without any backtracking. The demonstration is far from conclusive. See Corwin, Book Review, 46 AM. POL. SCI. REV. 1167, 1171-72 (1952).

35. 301 U.S. 1 (1937).

36. 312 U.S. 100 (1941).

37. See *id.* at 113-15, 118, 123-24.

38. ROBERTS, THE COURT AND THE CONSTITUTION 56 (1951).

it be judged for its advance over contemporary constitutional doctrine, or for its immediate legislative consequences, or for its implications for future national policy. And in the end it is Marshall's two great opinions which supply its underlying ideology. The great Chief Justice, embodied, or embalmed, in pronouncements still vital, speaks again, becomes once more the Revolutionist. Can it be supposed that if he had been present in person he would have consented willingly to be thus conscripted in the service of the New Deal? Self-exhumation of the illustrious dead is an accepted literary convention, and I claim the right to invoke it on this occasion. If the right be granted, then the answer to the above question must undoubtedly be "No." For supporting testimony I turn once more to Beveridge, for his account of the strenuous and successful fight which Marshall, with the cooperation of his critic Madison, made in the Virginia constitutional convention of 1829 against manhood suffrage and in support of the oligarchic county court system. As Beveridge phrases the matter:

"On every issue over which the factions of this convention fought, Marshall was reactionary and employed all his skill to defeat, whenever possible, the plans and purposes of the radicals. In pursuing this course he brought to bear the power of his now immense reputation for wisdom and justice. Perhaps no other phase of his life displays more strikingly his intense conservatism."³⁹

"The American Nation," Beveridge adds, "was his dream; and to the realization of it he consecrated his life."⁴⁰ At no time, on the other hand, did he contemplate the desirability, or even the feasibility, in a free state, of greatly altering by political action the existing relations of the component elements of society. Liberty, the spacious liberty of an expanding nation, not social equality, was the lode-star of his political philosophy.

39. 4 BEVERIDGE, *op. cit. supra* note 3, at 488.

40. *Id.* at 472.