# JOHN MARSHALL AND THE COMMERCE CLAUSE OF THE CONSTITUTION*

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No provision of the United States Constitution has been more vitally involved in the development of our national economic life and in the transitions through which our constitutional system has passed than has the commerce clause in article I. In the third paragraph of section 8 of that article, it is provided:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

It would be difficult to envisage a more vivid panorama of the course of our economic and constitutional development than that revealed in the succession of controversies arising out of its application to novel problems of commercial intercourse and economic activity. Yet so frequently, and in such varying contexts, has the commerce clause been construed by the courts that attention is drawn to the scope of activities to which it has been applied and diverted, perhaps, from the broad purposes for which it was originally designed and which it serves, and will continue to serve, in the ever-increasing complexities of modern economic life. Because those broad purposes were first enunciated in the Supreme Court by John Marshall, and because his classic exposition thereof has had so enduring an influence, the commerce clause, in certain aspects of its application, is a particularly appropriate subject for presentation in connection with the celebration of the two hundredth anniversary of his birth.

Of the forty-four cases that Marshall decided during his term on the Court, three of importance involved the commerce clause.[1] Of these three cases the first, and by far the most significant, was *Gibbons*

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1. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827); Willson v. Black-bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829).

*v. Ogden,* which ranks in importance with *Marbury v. Madison,*[2] *McCulloch v. Maryland,*[3] and *Cohens v. Virginia.*[4] *Gibbons v. Ogden,* otherwise known as the "Steamboat Case," was decided in the year 1824. The background of that case was the grant to Livingston and Fulton of an exclusive privilege to operate steamboats on the waters of the state of New York during a fixed number of years. Ogden was the assignee of that privilege. Gibbons operated a steamboat between a New Jersey port and New York, and he held a federal coasting license for his vessel under the act of Congress providing for the licensing of coastal vessels.[5] Ogden applied for and obtained an injunction against Gibbons in the New York courts,[6] and the case eventually came up on error to the Supreme Court. The question before the Court was whether the commerce clause invalidated the act of a state purporting to grant an exclusive right to navigate the waters of that state. The case was a critical one because several states—New Jersey, Connecticut, and Ohio—had passed retaliatory statutes excluding from their waters any vessel licensed under the Fulton-Livingston monopoly.[7] But the case presented a political aspect also in that it brought into sharp focus the contest between the upholders of states-rights and the believers in a strong federal government.[8]

Two important legal points were involved in *Gibbons v. Ogden.* The first was the meaning of the term "commerce" as used in the commerce clause, specifically whether it included "navigation." Although it was contended by counsel for Ogden that "commerce" meant merely "buying and selling," [9] Marshall held that the power to regulate navigation was "as expressly granted, as if that term had been added to the word 'commerce.' " [10] And he also stated that "commerce" not only comprehended every species of commercial intercourse among states and nation but the power to prescribe rules for carrying on that intercourse.[11] The second legal point was whether the power of Congress over commerce invalidated what had been done by the state of

2. 5 U.S. (1 Cranch) 137 (1803).

3. 17 U.S. (4 Wheat.) 316 (1819).

4. 19 U.S. (6 Wheat.) 264 (1821).

5. 1 STAT. 305 (1793).

6. Gibbons v. Ogden, 17 Johns. R. *488 (Ct. Err. N.Y. 1820). See also Livingston v. Van Ingen, 9 Johns. R. *507, *562 (Ct. Err. N.Y. 1812).

7. Conn. Sess. Laws 1822, c. 28; Act of Feb. 13, 1811, N.J. Acts 1811, at 298-99; Act of Feb. 18, 1822, Ohio Sess. Laws, c. 25; Act of May 23, 1822, Ohio Sess. Laws, c. 2.

8. 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 597 (rev. ed. 1947).

9. 22 U.S. (9 Wheat.) at 189.

10. *Id.* at 193.

11. *Id.* at 190.

New York. Marshall held that, under the commerce clause, an act of Congress dealing with the subject matter of the clause is superior to a state statute inconsistent therewith and dealing with the same subject matter.[12]

It is hardly an exaggeration to say of *Gibbons v. Ogden,* as does Senator Beveridge,[13] that few events in our history have had a larger and more substantial effect upon the well-being of the American people. But the importance of the decision lies less, perhaps, in the actual holding, than it does in the broad view of commerce that permeates the opinion. Marshall saw what the framers of the Constitution recognized and sought to effectuate, that the United States is an economic unit and that commerce—interstate as well as foreign—must be under national and not state control. Herein Marshall undoubtedly owed a substantial debt to Daniel Webster, who argued the case for the appellant. Although we must discount somewhat Webster's statement that, as he spoke, Marshall took in his words "as a baby takes in its mother's milk," [14] and that the opinion of the Court "was little else than a recital of my argument," [15] the impact of the argument is apparent from a comparison thereof with Marshall's decision. Of especial note is the broad perspective, the imaginative awareness of problems, that Webster exhibited. Nothing, he said, is more clear than that the purpose of the commerce clause was to rescue commerce "from the embarrassing and destructive consequences resulting from the legislation of so many different states, and to place it under the protection of a uniform law." [16] He referred to the political situation at the time of the Federal Convention, specifically to the "perpetual jarring and hostility of commercial regulation" that obtained when each state was free to regulate commerce.[17] "It is apparent," he said, "from the prohibitions on the power of the States, that the general concurrent power was not supposed to be left with them." [18] Webster urged that the notion of a general concurrent power over commerce in the states and in Congress was both "insidious and dangerous" [19] and that the power of Congress over the "high branches" of commerce is exclusive.[20] But he recognized the power of the states to enact regulations which affected commerce only incidentally—for example, quar-

12. *Id.* at 221.
13. 4 BEVERIDGE, THE LIFE OF JOHN MARSHALL 446 (1919).
14. 1 WARREN, *op. cit. supra* note 8, at 603.
15. *Id.* at 610.
16. 11 WRITINGS AND SPEECHES OF DANIEL WEBSTER 9 (1903).
17. *Ibid.*
18. *Id.* at 11.
19. *Id.* at 13.
20. *Id.* at 15.

antine laws—which he referred to as "rather regulations of police than of commerce." [21] This distinction Marshall adverts to in the opinion, and later he made it the basis of his decision in a second important commerce clause case, *Willson v. Black-bird Creek Marsh Co.*[22]

The broad interpretation of the commerce power, advocated by Webster and enunciated by Marshall, was to a substantial degree consonant with the purposes of the framers of the Constitution. History, in this instance at least, was on Webster's side. It is impossible to read the correspondence of Madison, Hamilton, Mason, and others without perceiving the imperative necessity that they felt of committing the regulation of trade and commerce to a single national authority. A letter from Madison to Monroe, for example, written in 1785 makes the point particularly clear. There he writes that "it surely is necessary to lodge the power [of regulating trade] where trade can be regulated with effect; and experience has confirmed what reason foresaw, that it can never be so regulated by the States acting in their separate capacities." [23] The same subject recurs frequently in the debates in the Congress of the Confederation, as well as in the legislatures of the several states from 1783-1787. For example, in Madison's notes for the Federal Convention, we find his statement that trespasses of the states on the rights of each other "are alarming symptoms. . . . The practice of many States in restricting the commercial intercourse with other States . . . is certainly adverse to the spirit of the Union, and tends to beget retaliating regulations . . . destructive of the general harmony." [24] Long afterwards, in referring to navigation laws of the states that treated other citizens as aliens, Madison commented on the "rival, conflicting and angry regulations" engendered by the want of a general power over commerce.[25] Early interstate compacts,[26] as well as the Virginia Resolution which resulted in the calling of the Annapolis Convention in 1786,[27] are proof of the general and public attention which the problem of commerce regulation attracted. Although at the time the Constitution was adopted the great preponderance of American commerce problems were those connected with foreign trade,[28] it is significant, and indicative of the wisdom of the

21. *Id.* at 14.

22. 27 U.S. (2 Pet.) 245 (1829).

23. 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 170 (1865).

24. 1 *id.* at 321.

25. 2 PAPERS OF JAMES MADISON 711 (1841).

26. *E.g.*, for the regulation of the navigation of the Potomac. 2 *id.* at 696.

27. 2 *id.* at 695, 697-98.

28. John Randolph once said that the United States government "grew out of the necessity . . . of some general power, capable of regulating foreign commerce." 2 GARLAND, LIFE OF JOHN RANDOLPH 205 (1851).

framers of the Constitution, that a formula broad enough to permit the regulation of all trade was agreed upon.

The foregoing statements of Madison make it clear that commercial rivalry and retaliatory action between the several states afforded the basis of the recognition of a need of making a broad grant of power to the federal government, and that without such a grant, the regulation of commerce by the states would have presented an ever-present threat to the permanence of the new republic. But the conclusion that the framers of the Constitution believed that the mere grant of the commerce power to Congress dislodged state power is supported at most by negative evidence only. It is to Marshall's decision in *Gibbons v. Ogden* that we owe the articulation of the doctrine, which has since become basic in constitutional law, that the commerce clause gives the Supreme Court power to place limits on state authority. This is what makes *Gibbons v. Ogden* Marshall's most profound and statesmanlike opinion. Justice Frankfurter has said that when Marshall was called upon to apply the commerce clause, "he had available no fund of mature or coherent speculation regarding its implications." [29] He had, however, rendered an opinion four years previously while on circuit at Richmond and had there asserted emphatically the broad powers of Congress over commerce.[30] Undoubtedly, the need of a strong, central government was for him "the deepest article of his political faith." [31] Experience of men and affairs reinforced this conviction, for "his mind carried a hardheaded appreciation of the complexities of government, particularly in a federal system." [32]

The practical effects of *Gibbons v. Ogden* were enormous. In the first place, it was a popular opinion—probably the only popular decision Marshall rendered—for he had stricken down a monopoly, and this is the feature of the decision chiefly emphasized by contemporary newspaper correspondents. But there were other practical effects which were not only immediate but more far-reaching. Steamboat navigation of American waters increased suddenly and at an incredible rate.[33] The opening of the Hudson River and Long Island Sound

29. FRANKFURTER, THE COMMERCE CLAUSE 12 (1937). It is curious that so few commerce questions found their way into the courts in the early part of the nineteenth century. Even so important a constitutional issue as the protective tariff, which was readily susceptible of being brought to the test of litigation, was never carried into court at all.

30. The Brig Wilson v. United States, 1 Brock. 423, 431 (C.C.D. Va. 1820). It is surprising that neither Webster nor his associate William Wirt made any reference in their arguments to this case which would have strengthened their position.

31. FRANKFURTER, *op. cit. supra* note 29, at 14.

32. *Ibid.*

33. MEYER-MACGILL, HISTORY OF TRANSPORTATION IN THE UNITED STATES 107, 108, table 21 (1917).

to the free passage of steamboats gave immediate impetus to the growth of New York as a commercial center,[34] while New England manufacturing was given new life because the transportation of anthracite coal became cheap and easy.[35] From a less immediate standpoint, *Gibbons v. Ogden* was the needed guarantee that interstate rail, telephone and telegraph, oil and gas pipe lines might be built across state lines without the threat of local interference from state action. In short, Marshall's opinion was what the late Charles Warren termed the "emancipation proclamation of American commerce." [36]

The political effect of Marshall's decision was, at the time, at least as potent as its economic effect. The underlying premise as to the scope of federal commerce power represented a radical departure from many contemporary views, for example those expressed by President Monroe in his veto of the Cumberland Road bill in 1822.[37] The decision filled Jefferson, an old man of 82, with horror,[38] and the audacious doctrine there proclaimed created great alarm in the South because of its possible applicability to commerce in slaves.[39] At the same time, the decision marked another step in the broad construction of federal powers, and it became a potent "weapon in the hands of those statesmen who favored projects requiring the extension of Federal authority." [40] Marshall had never unlearned the nationalism he had learned from Washington, and one of his enduring contributions lies in his having helped to educate the public mind to a "spacious view" [41] of the Constitution, thereby furthering the idea that "though we are a federation of States we are also a nation." [42]

The economic and political consequences of *Gibbons v. Ogden* must not be permitted to distract attention from the importance of that decision in the development of constitutional doctrine. For all the statecraft reflected in the opinion, the case is particularly significant because it illustrates the greatness of Marshall's work as a judge. Marshall was not content to strike down the New York monopoly on the ground of collision with the Federal Coasting Act. He was aware of how a decision may serve as the beginning of the doctrinal process, and he purposely opened up certain of the broader issues which the

34. 1 WARREN, *op. cit. supra* note 8, at 616.
35. WARREN, A HISTORY OF THE AMERICAN BAR 396 (1913).
36. 1 WARREN, *op. cit. supra* note 8, at 616.
37. Wickersham, *Federal Control of Interstate Commerce*, 23 HARV. L. REV. 241, 243 (1910).
38. 1 WARREN, *op. cit. supra* note 8, at 620.
39. *Id.* at 621-32.
40. *Id.* at 616.
41. FRANKFURTER, *op. cit. supra* note 29, at 44.
42. *Id.* at 18-19.

constitutional question before him implied. But he was conscious of the limitations which concrete situations impose upon doctrine, and these issues, though adumbrated in dicta, were left open by the decision. Did it follow, for example, that because congressional acts could override a state regulation of commerce, the power to regulate commerce is exclusively in Congress, so that state laws constitutionally cannot have any application to interstate transactions or shipments? Or did it follow that, until Congress enacts legislation, the states are free to regulate interstate commerce until there is an inconsistent exercise of federal power? Although adverting to the relation of the commerce clause to the reserved power of the states, Marshall was wary of committing himself to a doctrine of exclusive power. He was even more unwilling to adopt a theory of concurrent power under which the way would be open for the creation of those conflicting and retaliatory state regulations which he held it was a principal object of the Constitution to make impossible.

Five years later, faced with a different factual situation in another commerce clause case, *Willson v. Black-bird Creek Marsh Co.*,[43] he recognized the right of state laws to operate on interstate commerce matters, but he placed that right upon a different footing. In that case the Court held that a dam, constructed under state authority, could validly close a stream to interstate commerce because erected to protect health by draining marshes. Although denying the power of a state to regulate interstate commerce, Marshall there held that a state law enacted in the exercise of the state's police powers might validly operate on interstate commerce transactions, since this was not a regulation of the commerce itself and hence not an invasion of the field granted to Congress. The state law, he said, was not "repugnant to the power to regulate commerce in its dormant state. . . ." [44]

From a practical standpoint, the test that Marshall sought to establish through a distinction between different kinds of powers may be viewed as merely verbal, since the same language can accomplish the same practical results. The sameness of these results cannot be obscured by differing labels. Furthermore, commercial legislation and police legislation are not separate, much less abstract, processes, and in concrete situations differentiation is frequently impossible to achieve. Hence Marshall's distinction between types of power resulted, in the hands of less able judges, in a mass of artificial and arbitrary distinctions which are with us to this day. But despite Marshall's formulation in terms of commerce versus police power, it seems reasonably clear

43. 27 U.S. (2 Pet.) 245 (1829).
44. *Id.* at 252.

that he recognized that, though commerce must be regulated by Congress, local interests pressed for and required recognition. In his own words, the "circumstances of the case" dictated the decision.[45] In Marshall's time, national problems were not seen in the same terms that they are today because economic relationships were less interdependent and certainly less complex than they subsequently became. State legislation, though it had woven sporadic networks about interstate commerce, was not seen to affect national commerce except in terms of its practical effects. Hence it was possible to look to the purposes of state legislation in order to determine its validity and to find that a particular domain of state activity was primarily a matter of police. On this basis, the *Black-bird* case can be reconciled with *Gibbons v. Ogden.* In both cases the concrete elements of the situation were the basis of the decision, and in the *Black-bird* case, it should be noted, there was but little likelihood of the kind of retaliatory state action which was so important a feature of the *Ogden* case.

It has been suggested [46] that Marshall probably would have agreed with the statement of Justice Holmes, in *Swift & Co. v. United States,*[47] that commerce "is not a technical legal conception, but a practical one, drawn from the course of business." [48] Probably he would not have formulated the idea in those terms. Yet Marshall understood the organic relationships of commercial transactions, and it is unfortunate that his insights were insufficiently expressed to guide the formulation of coherent doctrine. It is even more unfortunate that his decisions were so readily interpreted as laying down a mechanical distinction between "commerce" as opposed to "police" regulations, each confined within sharply separated areas of power. It was not until the case of *Cooley v. Board of Wardens,*[49] in 1851, that the Court articulated a new test in terms of "all the circumstances of the case" and their relation to the effects on national commerce. In that case a state regulation requiring a vessel entering a harbor to have a pilot was upheld as a valid regulation of commerce by holding that there was a concurrent power in the states—in the absence of congressional action—to regulate matters of "local" as opposed to "national" concern. Marshall's distinction thus went into temporary eclipse.[50] However, the difficulties of determining what is national or local soon became ap-

45. *Ibid.*

46. FRANKFURTER, *op. cit. supra* note 29, at 42.

47. 196 U.S. 375 (1905).

48. *Id.* at 398. *Cf.* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 547 (1944).

49. 53 U.S. (12 How.) 299 (1851).

50. RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE 73 (1937).

parent, particularly with the expansion and growing interdependence of the economy, and ultimately the courts reverted to Marshall's distinction between commerce regulations and police measures which affect commerce only incidentally. But the application of the test was not expressed, as Marshall expressed it, in terms of an abstract determination of the particular governmental power exerted, but in terms of whether the regulation imposes an undue "burden" upon interstate commerce in the light of the facts. Thus, while a state statute restricting the speed of trains at crossings was first upheld as only incidentally affecting interstate commerce,[51] the same statute was subsequently held invalid upon a showing of its burdensome effects upon the actual operations of interstate trains.[52] Today the test has been broadened in the sense that the Court tends to balance uniformity versus locality, and to inquire "whether the state interest is outweighed by a national interest in the unhampered operation of interstate commerce." [53]

Looking back over the past 130 years of decisions under the commerce clause, I think it can be said that that clause has been treated by the Court, on the one hand, as providing a source of federal power and, on the other, as imposing a restriction upon the powers of the states. It was with the latter aspect of the commerce clause that Marshall was primarily concerned. And indeed it was that aspect with which the courts were almost exclusively concerned throughout the 19th century until, after the enactment of the Interstate Commerce Act in 1887 [54] and the Sherman Act in 1890,[55] the federal government began to exercise its power on a scale that challenged important litigation.[56] Since that time, until the 1940's, questions involving the commerce clause as a source of federal power were the principal questions that came before the Court, and the important issues raised tended to fall generally under two headings: (1) For what purposes may the federal commerce power be exercised, and to what extent, if any, does the exercise of the power place a limitation upon it? (2) May Congress, in regulating commerce, extend its prohibition to acts and matters which do not themselves constitute such commerce or form a part of it? Questions included in the first of the two classifications were raised

51. Southern Ry. v. King, 217 U.S. 524 (1910).

52. Seaboard Air Line Ry. v. Blackwell, 244 U.S. 310 (1917). In this case, the Court distinguished Southern Ry. v. King, *supra* note 51, on the ground that the latter case "went off on a question of pleading." 244 U.S. at 315. *But cf.* dissenting opinion, *id.* at 316.

53. California v. Zook, 336 U.S. 725, 728 (1949). *Cf.* Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 186-87 (1950); Southern Pacific Co. v. Arizona, 325 U.S. 761, 767 (1945).

54. 24 STAT. 379 (1887).

55. 26 STAT. 209 (1890).

56. Wickard v. Filburn, 317 U.S. 111, 121-24 (1942).

by such statutes as the Anti-Lottery Act,[57] the Pure Food and Drug Act,[58] and the National Motor Vehicle Theft Act.[59] These statutes, of course, involved interstate commerce, but the imposition of the regulation was for the purpose of promoting some supposed social good, such as public health or morals, rather than to increase the flow, or advance the interests, of commerce. Such legislation has therefore been subjected to continuing attack, first, on the basis of Marshall's theory that the nature of a governmental power must be determined by the object for which it is exercised, and second, on the basis of his statements that the original purpose of the commerce clause was to protect commerce from state interference. Both of these bases of attack have been repeatedly repudiated by the Supreme Court.[60]

Although Marshall's legal distinctions have been less significant in this area of the scope of federal power than elsewhere, his thinking with respect to the furtherance of nation-wide trade by removing state lines as impediments to intercourse between the states has had a pronounced and continuing influence on Supreme Court decisions.[61] In 1944 in *United States v. South-Eastern Underwriters Ass'n*,[62] for example, the Court adopted Marshall's description of commerce announced in *Gibbons v. Ogden* and went on to state that the purpose of the commerce clause was not confined to empowering Congress with the negative authority to legislate against state regulations inimical to the national interest:

> "The power granted Congress is a positive power. It is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states than one; —to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing. This federal power to determine the rules of intercourse across state lines was essential to weld a loose confederacy into a single, indivisible Nation; its continued existence is equally essential to the welfare of that Nation." [63]

57. 28 STAT. 963 (1895). Lottery Case, 188 U.S. 321 (1903).

58. 34 STAT. 768 (1906). Hipollite Egg Co. v. United States, 220 U.S. 45 (1911).

59. 41 STAT. 324 (1919). Brooks v. United States, 267 U.S. 432 (1925).

60. *E.g.*, Brooks v. United States, 267 U.S. 432, 436-37 (1925), where Chief Justice Taft states that the powers granted Congress, within their limits, may be employed for the same objective as the national police power.

The second contention has been repudiated in repeated statements that the power to regulate is not merely a power to promote or to liberate the thing regulated but to restrict and control it. See generally RIBBLE, *op. cit. supra*, note 50, at 171-81.

61. *E.g.*, Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389, 395 (1952); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 550-51 (1944); Wickard v. Filburn, 317 U.S. 111 (1942).

62. 322 U.S. 533 (1944).

63. *Id.* at 552.

It was the development of transportation and the growing interrelations of all sectors of the economy that brought to the fore, at the end of the last century, the question of how far federal power to regulate commerce extends and what are its limits. At the same time, the expansion of a nation-wide market continued to raise in new form the old problem of rivalry between the states and of national restrictions upon state power. Since the mid-1940's, these questions, rather than the scope of federal power, have provided the basis of most of the controversies involving the commerce clause. Thus, the aspect of the commerce clause with which Marshall was concerned in *Gibbons v. Ogden* continued, and still continues, to present vital constitutional questions. In the resolution of such questions, Marshall's influence has a vitality of which we have not yet witnessed the end.

In this short paper, it is impossible to do more than to advert briefly to the type of questions that continue to arise and in which Marshall's influence is plain. Take, for example, *Baldwin v. Seelig, Inc.*,[64] involving the validity of a New York statute that prohibited the sale of milk bought outside the state unless the producer had been paid the same price as that required within the state. Justice Cardozo held the statute invalid on the ground that such a statute opens the door to those very rivalries and reprisals meant to be avoided by the commerce clause.[65] Again, in *Southern Pacific Co. v. Arizona*,[66] a case involving the validity of a state statute restricting the length of trains, the Court asserted unequivocally its function of checking the states in the maintenance of the federal system. Chief Justice Stone, speaking for the Court, stated that between the extremes of whether a state may or may not interfere with interstate commerce lies an area where the reconciliation of the conflicting claims of state and national power is to be attained only by some "appraisal and accommodation of the competing demands of the state and national interests involved." [67] Notice here that, although pragmatic tests are adopted in lieu of the judicial boundaries Marshall sought to establish between state and congressional action, Marshall's underlying principle is upheld: to maintain the federal system, the Court is the final arbiter of the validity of state laws, even in the absence of congressional action.

In this area of limitations imposed by the commerce clause upon state power, no more prolific source of litigation has arisen than in connection with the power to tax. Here the problem is less one of pre-

64. 294 U.S. 511 (1935).
65. *Id.* at 522-28.
66. 325 U.S. 761 (1945).
67. *Id.* at 769.

venting retaliatory state action than in furthering, at the expense of residual state power, the unified national objectives contemplated by entrusting the commerce power to Congress. At the outset, in considering this problem, we must turn back to the starting point that Marshall provided, not in *Gibbons v. Ogden* or in the *Black-bird* case, but in *Brown v. Maryland,*[68] which is the third, though chronologically the second, of his commerce clause decisions. In *Brown v. Maryland,* decided in 1827, Marshall stated that the doctrine of *McCulloch v. Maryland*[69] was applicable to state taxation of interstate commerce,[70] and he all but held that the commerce clause impliedly prohibits *all* taxation of interstate commerce. This doctrine of Marshall's runs like a red thread throughout the cases dealing with state taxation, and the underlying principle to which the Court has sought to give effect is that the states have no power to withhold, or to burden unduly, the privilege of engaging in interstate commerce.[71] At the same time, it has been recognized that the power of the states to tax in order to maintain their governments must not be unduly curtailed, and that interstate commerce must pay its way.[72] Hence, there has arisen in the field of taxation the same problem of accommodating state and national interests with which Marshall was concerned in the *Ogden* and *Black-bird* cases, and the Court has repeatedly recognized the relevance of those cases to the problem of state taxation.[73]

It would be a hopeless task to embark on any discussion of the numerous forms of state taxes and the circumstances under which they have been declared valid or invalid. Exceedingly technical and complex rules have been developed with respect thereto, and generalization is both difficult and unsafe. But it should be a matter of especial interest that the Court, in determining the validity of a state tax, will today turn back to Marshall's decisions for guidance in its own. Thus, in the 1944 case of *Northwest Airlines v. Minnesota,*[74] Mr. Justice Jackson stated in a concurring opinion:

> "We are at a stage in development of air commerce roughly comparable to that of steamship navigation in 1824 when *Gibbons v. Ogden,* 9 Wheat. 1, came before this Court. Any authoriza-

68. 25 U.S. (12 Wheat.) 419 (1826).

69. 17 U.S. (4 Wheat.) 316 (1819).

70. 25 U.S. (12 Wheat.) at 449.

71. *E.g.,* Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1952); Nippert v. Richmond, 327 U.S. 416, 425 (1946); Best & Co. v. Maxwell, 311 U.S. 454, 455-57 (1940).

72. Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938). See generally HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE cc. 2, 3 (1953).

73. *E.g.,* Freeman v. Hewit, 329 U.S. 249, 263 (1946) (concurring opinion).

74. 322 U.S. 292 (1944).

> tion of local burdens on our national air commerce will lead to their multiplication in this country. Moreover, such an example is not likely to be neglected by other revenue-needy nations as international air transport expands. . . . The air is too precious as an open highway to permit it to be 'owned' to the exclusion or embarrassment of air navigation by surface landlords who could put it to little real use.
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> "Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. *Gibbons v. Ogden,* 9 Wheat. 1, to *United States v. Appalachian Power Co.,* 311 U.S. 377. Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time." [75]

The *Northwest Airlines* case involved the validity of a Minnesota *ad valorem* property tax on all the planes of a carrier domiciled in Minnesota, but doing business on a regular basis in a number of other states as well.[76] Had the tax been a proportionate one, the problem would have been more simple,[77] but here there was the possibility that other states through which the planes passed might also impose a similar tax.[78] The effect of such other taxes was not considered in the majority opinion, and the Minnesota tax was sustained by a 5-4 vote. One of the concurring opinions expressed dissatisfaction with the "judicial formulation of general rules to meet the national problems arising from State taxation" bearing upon interstate commerce.[79] From the language used in the majority and in the concurring opinions, it is apparent that the Court was hospitable to the idea of a congressional solution of these problems.[80] In other words, may there not be situations in this area for which judicial solutions are inadequate because the total problems facing a particular industry reach the Court only by installments? [81] Suppose, for example, that a state imposes on an interstate carrier a tax based upon a formula for apportioning earnings within the state. But suppose that the carrier's net earnings are such that to meet the tax bill, the carrier must draw upon earnings

75. *Id.* at 302-03.

76. *Id.* at 293-94.

77. See the language of Justice Jackson in his concurring opinion. *Id.* at 305-07.

78. *Id.* at 305-06.

79. *Id.* at 302.

80. *Id.* at 300, 302, 306. See also McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176, 185, 188 (1940) (dissenting opinion).

81. *Cf.* Northwest Airlines v. United States, 322 U.S. 292, 307 (1944) (concurring opinion).

from other states. Obviously, if all the states in which the carrier operates exacted a tax similarly computed, the carrier would be forced into bankruptcy; if only some of those states exacted such a tax, the carrier's total earnings would be severely depressed. Would the Court strike down such a tax as an undue burden on interstate commerce, or would an act of Congress be first required?[82] If the Court were unwilling, as it was in the *Northwest Airlines* case, to consider the effect of possible taxation by other states on the ground that such possible taxes were not before the Court, the latter solution would seem to be the only alternative.[83] The old principles and doctrines may prove too difficult to apply to new problems, or at least to be embarrassing in their effects. The commerce clause, in other words, may prove to have limitations which even Marshall could not foresee.

One thing seems plain from a reading of recent Supreme Court decisions, and that is a growing recogniton on the part of the Court that questions involving the power of Congress under the commerce clause cannot be decided by reference to mechanical tests or to such formulae as "direct" and "indirect" burdens upon commerce. This change is illustrated by the tax cases as well as by the regulatory cases. Thirteen years ago, Mr. Justice Jackson referred with approval to the new line of cases which invoked "broader interpretations of the Commerce Clause destined to . . . bring about a return to the principles first enunciated by Chief Justice Marshall in *Gibbons v. Ogden*. . . ."[84] It is fair to conclude, therefore, that Marshall's commerce clause decisions have a continuing significance not only for the solution of problems of state regulation of commerce, but also, and particularly in this century, from the standpoint of the broad purposes of the commerce clause, in defining the scope and extent of federal power in terms of a unified and integrated national economic structure. Chief Justice Stone once set forth the paramount importance of the commerce clause in these words:

> "Great as is the practical wisdom exhibited in all the provisions of the Constitution, . . . it will, I believe, be the judg-

82. See the concurring opinion of Justice Black, *id.* at 302: "Until [Congress] acts I think we should enter the field with extreme caution."

83. It is not entirely clear how far Congress could go in relieving an interstate carrier from the burdens of state taxation. In his concurring opinion in the *Northwest Airline* case, *id.* at 303-04, Justice Jackson said: "Congress has not extended its protection and control to the field of taxation, although I take it no one denies that constitutionally it may do so. It may exact a single uniform federal tax on the property or the business to the exclusion of taxation by the states. It may subject the vehicles or other incidents to any type of state and local taxation, *or it may declare them tax-free altogether.*" (Emphasis added.) It seems open to question whether or not an act of Congress forbidding all state taxation of interstate carriers might not be thought to exceed its power and hence not find judicial sanction.

84. Wickard v. Filburn, 317 U.S. 111, 122 (1942).

ment of history that the Commerce Clause and the wise interpretation of it, perhaps more than any other contributing element, have united to bind the several states into a nation." [85]

This continuing influence of three cases decided more than 130 years ago is in large part the result of a great quality that Marshall possessed, a quality particularly exemplified in his great decisions involving the commerce clause. *Gibbons v. Ogden* illustrates with especial force the truth of the statement of William Draper Lewis, that the lasting character of Marshall's work lay not in the fact that it was the work of a statesman but the work of a judge.[86] Had he been merely a far-sighted statesman, his cases would undoubtedly have been decided in the same way. What has made them endure is the fact that they were the work of a lawyer to whom the ground for every premise must be carefully prepared, every possible objection examined and answered, every conclusion clearly and concisely stated.[87] The completeness of analysis, the wealth of illustration, gives the reader the conviction that the subject has been not only adequately treated, but exhausted.[88] His power of phrase was such that today, when lawyers and judges wish to express the constitutional principles he enunciated, they revert to his own choice of words. Unpopular as most of his opinions were, Marshall's contemporary influence was immense, and he affected profoundly the political as well as the legal thinking of the bar. Because so many politicians of his day were lawyers, this means also that he affected to a substantial degree the political thinking of people at large. Professor Corwin has referred to the curious infusion of politics and jurisprudence which has so characterized the course of discussion and legislation in America, and he has remarked that "no public career in American history ever built so largely upon this pervasive trait of the national outlook as did Marshall's. . . ." [89] But it is submitted that his influence became all-pervasive because his opinions, carefully reasoned, lawyer-like opinions, were studied generation after generation by law students, by practitioners and by judges, and his opinions therefore live almost as if they were a part of the Constitution itself.

85. Stone, *Fifty Years' Work of the United States Supreme Court,* 14 A.B.A.J. 428, 430 (1928).

86. 2 GREAT AMERICAN LAWYERS, *John Marshall* 313, 372 (Lewis ed. 1907).

87. *Id.* at 375.

88. *Ibid.*

89. CORWIN, JOHN MARSHALL AND THE CONSTITUTION 197 (1921).