The principal control by the Federal Government of the relations between a state and private persons prior to passage of the Fourteenth Amendment was by means of the contract clause. No clause, therefore, had to be construed so frequently by the Supreme Court in the early Nineteenth Century. After the "due process" clause was adopted in 1868, however, the contract clause played a less significant role. Both clauses now became possible grounds for Supreme Court decisions. But prior to 1868 and during the entire span of Johnson's judicial term, the contract clause was most vital.

When the Constitutional Convention assembled in 1787, this clause was not unknown. Six weeks previously it had been adopted in the Northwest Ordinance which created the governmental system for the land north of the Ohio River. Also, the creditor class, the interested proponent of the Constitution, especially desired this protective clause to safeguard commercial transactions. The actual framers of the Constitution applauded the wisdom of enacting this Section. James Madison indicated the desire of the Nation for a stable financial policy. Alexander Hamilton perceived that the contract section was a method to extinguish the hostile commercial statutes among the states. Despite the seemingly wide favor of a clause to prohibit state laws impairing the obligations of contracts, the facts surrounding the adoption of this particular clause were curious. On the Convention floor, merely the "bills of attainder" and "ex post facto law"
phrases were accepted. Since a few delegates believed that “ex post facto law” applied only to criminal statutes, plans to add another phrase for civil statutes were promulgated. Meanwhile, the draft of the document had been sent to Gouverneur Morris, Chairman of the Revision Committee, to perfect the wording. Without authority, Morris attached to Section 10 of Article I:

“No State shall pass . . . laws altering or impairing the obligation of contracts.”

The Convention received the perfected draft, struck out the words “altering or,” and adopted the remainder of the clause.

This historical incident, however, did not refute the theory that commercial interests promoted this protective prohibition against State laws. On the contrary, at least two delegates to the Convention have expressed the need for security to commerce. In such manner was the protection of the commercial class created. How did the Supreme Court and Justice Johnson react?

In 1795, the Georgia Legislature granted twenty million acres of land in the Yazoo Valley to four land companies for $500,000. Although Georgia’s title to the land conveyed was questionable, both parties of the transaction considered the sale consummated. Apparently the bargain was a fair one for the State. History, however, has disclosed the Yazoo land sale as the worst public fraud in American life because the State legislators were openly bribed to pass these legislative grants. The four grantee companies immediately transferred the titles to Northern land companies who in turn sold the land to the innocent general public. Most of these transactions occurred before 1796 when Eli Whitney’s cotton gin celebrated its third birthday and was acknowledged a practical success: The revolutionary effect of this invention on Southern agriculture became apparent, so the rich, black soil of the Yazoo Valley skyrocketed in value. Georgia citizens, dis-


207. Bancroft, History of the Constitution (1882) 214. The quotation was an excerpt from a letter by Roger Sherman and Oliver Ellsworth, the second Chief Justice of the United States, to the Governor of Connecticut recommending the adoption of the Constitution.

208. See I Warren, The Supreme Court (1922) 392-99. Because of poor surveyor’s maps, the actual amount of land transferred was thirty-five million acres.


210. Umbreit, Our Eleven Chief Justices (1938) 175. See also I Warren, loc. cit. supra note 208.

211. For example, the Georgia Co. sold its titles to the New England-Mississippi Co., a corporation of Boston capitalists, which sold exclusively to individual land investors in New England and the Midwest.
covering the gross fraud of the Legislators and the increased value of the land, clamored for action. A completely new Legislature was elected on the pledge that it would undo the evils of the old; so in 1796, a statute was enacted revoking the 1795 grants. But the question still remained as to how the titles could be reacquired from the bona fide purchasers. 212

With this question still unsettled, Georgia transferred to the Federal Government after Jefferson's inauguration its claim to the Yazoo Valley land. Many Congressmen felt the titles in the innocent buyers should not be recognized after such an outrageous legislative scandal. Public opinion grew so violent over the dishonest affair that Jefferson appointed a Commission of three cabinet members to solve the problem. 213 They recommended that five million acres be set aside to settle all title claims held by innocent purchasers on a pro rata basis. Jefferson supported the proposal; however, the Southern wing of the Republicans guided by John Randolph of Virginia thwarted any Congressional action. After twelve years and no settlement, it occurred to the various claimants that relief might be had from the federal judiciary, as yet a little-used department of the national government.

These facts were the background for the celebrated case of _Fletcher v. Peck_ 214 presented in 1810. John Peck, an innocent purchaser, had conveyed a deed for a plot of Yazoo Valley land to Robert Fletcher for $3,000. The Court had to determine if the covenants in the deed which asserted legislative authority to make the grant were broken by the revoking law of 1796. Marshall spoke for the majority. 215 He held the land sale by the Legislature valid, for the Georgia Constitution did not prohibit such a grant. The defendant's allegations of legislative fraud bore no weight with the Chief Justice as the Judiciary had no power to question the Legislator's motives in enacting any statute. Then the important problem of the effect of the 1796 Revoking Act was answered. On general principle an executed land contract cannot be annulled even by a state where the bona fide purchaser has acquired legal title. But the nub of the majority opinion denied operation of the Revoking Statute because it impaired the obligations of the land contracts; hence, the act was repugnant to the Federal Con-

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212. The history of the great land fraud is best explained in _I Warren, loc. cit. supra_ note 208, and _Umbrett, op. cit. supra_ note 210, at 174-78.
213. Secretary of State Madison, Secretary of Treasury Gallatin, and Attorney-General Lincoln.
214. 6 Cranch 87 (U. S. 1810). Fletcher declared the Georgia Legislature had no authority to grant the title so Peck's covenant was broken. Peck pleaded that the Governor of Georgia had authority to grant the land. Fletcher demurred to this plea. This demurrer was sustained for if Fletcher "tendered an issue of fact upon this plea, it would have been a departure from his declaration." _Id._ at 126. After amending the plea, Fletcher again demurred and a rehearing on the principal issues was held.
215. _Id._ at 127.
stitution and void. Thus, for the first time, the Supreme Court had held a state statute unconstitutional.\textsuperscript{216}

Justice Johnson concurred in the result;\textsuperscript{217} but he specifically refrained from deciding the case on the constitutional issue.\textsuperscript{218} He contended:\textsuperscript{219}

"I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity.

"... When the legislature have once conveyed their interest or property in any subject to the individual, they have lost all control over it; have nothing to act upon; it has passed from them; is vested in the individual; becomes intimately blended with his existence, as essentially as the blood that circulates through his system."

Since the 1796 Revoking Act was inoperative, the Justice deemed it unnecessary to discuss the contract clause. And in addition he criticized severely the broad interpretation which Marshall had given to this prohibition. Marshall had stated:\textsuperscript{220}

"Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the Legislature the power of seizing, for public use, the estate of an individual in the form of a law, annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making this distinction."

The Chief Justice "scarcely conceived" how an "argument in favour of presuming an intention to except a case, not excepted by the words of the constitution," could be endorsed.\textsuperscript{221}

But Johnson replied:\textsuperscript{222}

"To give it the general effect of a restriction of the state powers in favour of private rights, is certainly going very far beyond the obvious and necessary import of the words, and would operate

\textsuperscript{216} See 1 Carson, The Supreme Court of the United States (1892) 219.
One state court had already been confronted with the general issues decided in Fletcher \textit{v. Peck}. In Derby \textit{v. Blake}, 226 Mass. 619 (1799), the plaintiff endorsee sued defendant endorser on a promissory note. Plaintiff had given defendant a subscription to Yazoo Valley land as consideration for defendant's endorsement. The defense was "no consideration" because the Revoking Act had annulled this subscription. The defense was denied for the executed legislative grant in the possession of a buyer could not be revoked, and the Georgia statute of 1796 was voided by the contract clause.

\textsuperscript{217} Fletcher \textit{v. Peck}, 6 Cranch 87, 143 (U. S. 1810).

\textsuperscript{218} "I have thrown out these ideas that I may have it distinctly understood that my opinion on this point is not founded on the provision in the Constitution of the United States, relative to laws impairing the obligation of contracts." \textit{Id.} at 144.

\textsuperscript{219} \textit{Id.} at 143.

\textsuperscript{220} \textit{Id.} at 138.

\textsuperscript{221} \textit{Id.} at 139.

\textsuperscript{222} \textit{Id.} at 145.
to restrict the states in the exercise of that right which every community must exercise, of possessing itself of the property of the individual, when necessary for public uses . . .” 223

In a situation requiring no constitutional decision, William Johnson had refused a judicial interpretation of that document. In addition he indicated the weakness of the Chief Justice's broad application of the contract clause. Thirty-eight years later, the Supreme Bench invoked Johnson's analysis of this limitation on the impairment prohibition. In *West River Bridge Co. v. Dix et al.*, 224 Justice Daniel, speaking for the Court, held that the contract clause, as Johnson had already hinted, did not prohibit the states from enacting laws to impair contract obligations in order to possess private property for public use.

Another criticism of the majority decision was enunciated by the Justice. He had "extreme difficulty" in defining or limiting the words, "obligation of contracts;" 225 so where it was needless to become involved in this delicate task he deemed it wise for the Court to refrain from any definition. This reluctance to decide a constitutional question where it was not essential was best displayed in his final paragraph: 226

"I have been very unwilling to proceed to the decision of this cause at all. It appears to me to bear strong evidence, upon the face of it, of being a mere feigned case. It is our duty to decide on the rights, but not on the speculations of parties. My confidence, however, in the respectable gentlemen who have been engaged for the parties, has induced me to abandon my scruples, in the belief that they would never consent to impose a mere feigned case upon this court." 227

223. See Johnson, *The Contract Clause of the United States Constitution* (1928) 16 Ky. L. J. 222, 224-5, wherein a criticism of this analysis is presented: "It is of some interest as to the early conception of the clause, however, to note that he regards the provision as being too equivocal to form the basis of restricting the states' power to interfere in private contracts. . . . It is apparent that in this regard Justice Johnson lacked the prescience of a Madison and the fatal logic of a Marshall." Madison's prescience was found in *The Federalist* No. 44 (Everyman's ed. 1934), where he discussed the objectives of the contract clause. Certainly it was arguable that Justice Johnson did not intend to state that Section 10 was equivocal, but rather he wished to warn that some contract obligations would have to be impaired in order to protect certain sovereign rights as the right of eminent domain.

224. 6 Howard 507 (U. S. 1848). Plaintiff was granted a charter by Vermont to construct a bridge in 1795 to remain one hundred years. After the bridge was built, defendant under authority of a Vermont statute of 1839 sought to appropriate the private bridge for a public road offering just compensation. Plaintiff sought an injunction; defendant demurred. The Supreme Court dismissed the bill.

225. See Fletcher v. Peck, 6 Cranch 87, 145 (U. S. 1810).

226. *Id.* at 147.

227. The "respectable" counsel for Peck, seeking to sustain the validity of the grants, were John Quincy Adams and Robert Goodloe Harper, a noted Federalist politician. Adams botched his argument badly. His self-consciousness caused him much difficulty when speaking. On reargument Joseph Story replaced Adams. See Bates, *The Story of the Supreme Court* (1936) 108. Luther Martin, Attorney-General of Maryland and for thirty years an outstanding attorney, was counsel for
Johnson’s accusation of a “feigned case” was extraordinary, but the fact that he was correct in his suspicion was even more startling. It indicated Marshall’s blindness to case or controversy, and his sole desire to define the extent of federal power, particularly the power of the Supreme Court.\textsuperscript{228} Once before the Supreme Court had decided a “feigned” case,\textsuperscript{229} but the settled principle so firmly announced by Justice Johnson has been to deny an opinion unless an authentic controversy was presented.\textsuperscript{230} Johnson’s shifting of the responsibility and blame to the counsel offered a means of escape from entering a stronger statement against the “feigned” case. Both Jefferson and Madison desired a decision on the case to bolster their compromise settlement of the problem. Undoubtedly Johnson accepted their wishes allowing the decision to pass with only his vigorous warning.\textsuperscript{231} As a practical matter, the victory for the innocent purchasers had little effect. Not until 1814 when Randolph left Congress was the settlement of five million acres effected to give unclouded legal titles to the Northern claimants.\textsuperscript{232}

Fletcher. Martin was a heavy drinker in an age of heavy drinkers. During his argument in \textit{Fletcher v. Peck}, he was so intoxicated that the Court adjourned to keep him from completing his argument. See 3 Beveridge, \textit{The Life of John Marshall} (1919) 186 n. 1, 586 n. 1.\textsuperscript{228} See I Warren, op. cit. supra note 208, at 398-9; Umbreit, op. cit. supra note 210, at 177-8. Justice Livingston told Adams at Madison’s Inaugural Ball in March, 1809, when the first arguments were being heard that the Court was reluctant to decide on a case created merely to obtain an opinion on the speculative issues involved. Marshall, himself, stated the same idea to Chief Judge William Cranch of the District of Columbia Circuit Court. 3 Beveridge, op. cit. supra note 227, at 585.\textsuperscript{229} In Hylton v. United States, 3 Dallas 171 (U. S. 1796), the United States argued both sides of the question of a tax on carriages. If the tax were direct then being unapportioned it would be unconstitutional. Thus the Federalist doctrine of judicial review would be established. If the tax were indirect and valid, it would bear more heavily on the Southern Republicans who had more carriages than Northern Federalists. Since either decision resulted in victory, the opportunity for an opinion could not pass the Federalist administration unheeded. Bates, loc. cit. supra note 227. Attorney-General Charles Lee and Alexander Hamilton argued for the tax’s validity while Attorney-General Ingersol of Pennsylvania and United States District Attorney Campbell of Virginia, who had originally sued defendant to collect the tax, sought to void the tax. Hylton v. United States, supra at 171-2. The tax was held indirect and valid.\textsuperscript{230} See Mr. Justice Brandeis, concurring in Ashwander v. Tennessee Valley Authority, \textit{et al.}, 297 U. S. 288, 346 (1935): “The court will not pass upon the constitutionality of legislation in a friendly, non-adversary proceeding, declining because to decide such questions is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.” See also United States v. Appalachian Electric Power Co., 311 U. S. 377 (1940). Justice Reed’s opinion for the court on the scope of the federal commerce power said at 423: “The briefs and arguments at the bar have marshaled reasons and precedents to cover the wide range of possible disagreement between Nation and State in the functioning of the Federal Power Act. To predetermine, even in the limited field of water power, the rights of different sovereignties, pregnant with future controversies, is beyond the judicial function. The courts deal with concrete legal issues, presented in actual cases, not abstractions.”\textsuperscript{231} See 3 Beveridge, op. cit. supra note 227, at 592-3.\textsuperscript{232} Bates, op. cit. supra note 227, at 109; Umbreit, op. cit. supra note 210, at 177-8.
Not until 1818 did the contract clause create a further constitutional problem. In that year, Dartmouth College appealed from a judgment denying a trover action against Woodward, its former Secretary and Treasurer, for the College records and seal. 233 Woodward denied the College's title to this personalty claiming that two New Hampshire statutes of 1816 had abolished the College Board of Trustees, plaintiff in the suit. A royal charter of 1769 had created this Board of Trustees. The question was whether the State could impair the obligations of this charter. A skillful argument by Daniel Webster supporting the College Trustees still left the justices undecided: Marshall and Washington favored the college; Duval and Todd obdurately supported Woodward; Johnson and Livingston were neutral. With the decision postponed until the 1819 Term when reargument was to be made at Woodward's request, Rev. Francis Brown, President of Dartmouth College, visited the great Chancellor Kent in Albany, New York, and one of the College Trustees presented to the learned Judge a copy of Webster's argument. Kent's original impression held the College a public corporation. If so, New Hampshire had the sovereign power of altering the charter of the public body at will. Webster's analysis of the College as a private corporation changed Kent's notion. When Justice Johnson, later in 1818, visited the New York capital, he discussed the case with Kent. Livingston did likewise. Both became convinced, thereby, that the College was a private corporation, and New Hampshire could not impair the obligations of its charter. 234

Also in the summer of 1818, Marshall was busy. Without a majority determined, he wrote his opinion. When the 1819 Term began and William Pinckney arose to present Woodward's reargument, the Chief Justice ignored him for he now had Johnson's and Livingston's support. Waving the counsel aside, he announced a decision had been reached, then read his memorable opinion. 235

Justice Johnson rendered no opinion in this case; he openly concurred, however, with Marshall's reasoning. 236 In substance, the Chief Justice held the College to be a private corporation so that its

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234. See 4 BEVERIDGE, op. cit. supra note 227, at 256-8 and notes; Corwin, JOHN MARSHALL AND THE CONSTITUTION (1919) 164.
236. See Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 666 (U. S. 1819). Johnson's practice of openly voting on important cases even if he rendered no opinion was praised by Jefferson. See 4 RANDOLPH, JEFFERSON'S CORRESPONDENCE (1839) 375, Letter to Justice Johnson on June 12, 1823: "Why should not every judge be asked his opinion, and give it from the bench, if only by yea or nay? Besides ascertaining the fact of his opinion, which the public have a right to know, in order to judge whether it is impeachable or not, it would show whether the opinions were unanimous or not, and thus settle more exactly the weight of their authority."
charter was a contract to be protected by Section 10 of Article I. Since the New Hampshire statutes impaired the obligations created by the charter, they were unconstitutional. Hence, the Board of Trustees had legal title to the College records and seal, and trover could be maintained. A reversal of the New Hampshire court's judgment for Woodward, therefore, was declared. But Marshall heeded Johnson's earlier warning that the contract clause could not apply to some contracts. The Chief Justice refused to give such a sweeping interpretation to Section 10 as announced in *Fletcher v. Peck.* He definitely qualified the application of this clause.

Although no formal opinion was tendered by Johnson, his influence on Marshall's opinion was discernible. He formed the necessary majority for the celebrated opinion; his opinion in *Fletcher v. Peck* probably aided the Chief Justice to recognize that certain limits were required on the contract clause prohibition.

The next state statutes involving Justice Johnson and Section 10 were the Kentucky Property Acts of 1797 and 1812 arising in *Green v. Biddle.* When Kentucky separated from Virginia, a compact was made with the new state promising:

"... 'that all private rights, and interests of lands within the said District' (of Kentucky) 'derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State.'" [Virginia].

In the 1797 and 1812 Acts, Kentucky provided for certain legal relief for the adverse possessor who improved the land possessed, which relief was not permitted in Virginia. A suit to procure a writ of right for possession presented the issue of the contract clause to the Circuit Court which certified the question of the constitutionality of the Kentucky legislation. Justice Story summarily held the legislation repugnant to Section 10 with no dissent from his colleagues. The people of Kentucky, aroused over this decision, accused the Supreme Court of usurping personal liberties and states' rights. The bitter feeling
and the importance of the problem required the Supreme Bench to grant Henry Clay a rehearing. The final decision, rendered in 1823, came from Justice Washington, Marshall's alter ego. The majority found the answer to the question to be that the Kentucky Statutes impaired the obligation of the contract between the two States. A strict test to determine what was impairment came from the opinion:

"The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms . . . however minute or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation."

Johnson rejected both the constitutional answer certified to the Circuit Court and the test of impairment. His opinion repudiated the need for determining the controversy on any constitutional grounds. Since Kentucky had included the compact provision in its State Constitution, the Justice stated:

"While the [Kentucky] constitution continues unrepealed, it is putting a fifth wheel to the carriage to invoke the contract into this cause."

Since the State Legislature must act within the local constitution, the compact provisions must be observed. If the acts violated the Kentucky Constitution they were void. No federal constitutional issue was, therefore, involved. The federal court merely sat and adjudicated in the capacity of Kentucky judges to determine whether the statutes were repugnant to the State Constitution.

Johnson felt also that the compact provisions in the State Constitution did not fetter Kentucky to the thousands of intricate land rules of Virginia as Washington's impairment test outlined. It was enough that the broad principles of the mother State's land laws were followed. Where to draw the line between these two categories was not in issue, so this difficult question was left unanswered.

In addition, procedural grounds were present on which the case could be decided without the aid of the contract clause. The Circuit Court in whose jurisdiction the case arose had been created before the

246. See the quotation from Johnson's letter at page 168, supra.
248. Id. at 84.
249. Id. at 94-107.
250. Id. at 97.
251. Id. at 103-5.
State of Kentucky existed. By the Judiciary Act of 1789, the practice of Virginia was made the practice for this federal court which continued even after Kentucky became a sovereign power. Under the accepted practice, the plaintiff who proved his title, as had been done in the instant case, would get judgment. So the Kentucky statutes of 1797 and 1812 could not:

"... lay the courts of the United States under an obligation to withhold from a plaintiff the judgment to which, under the established practice of that Court, he had entitled himself."

Also, even assuming the federal court has acquiesced in Kentucky practice which would deny recovery until the statutory provisions were fulfilled, still the provision for a Board of Commissioners to determine the legal relief could not be permitted. The right of trial by jury guaranteed under the Seventh Amendment of the Federal Constitution would thus be denied, so the acts would be void.

On strict legal principles, Justice Johnson solved the controversy correctly. But again the majority grasped the opportunity to entrench the power of the Federal Judiciary over the States. As a result of this, an interesting sidelight on the case was revealed. The actual majority group consisted of only three of the seven Justices. Marshall did not sit, for one of his relatives was interested in the case; Todd, the Kentucky Justice, and Livingston were absent because of illness; and Johnson refused to decide on the constitutional issue. The public demanded some curb for nullification of state statutes by a minority of the Supreme Court, so Senator Johnson of Kentucky introduced a bill to require the concurrence of all seven Justices to declare a Congressional or state statute unconstitutional. Senator Martin Van Buren reported the revised bill, requiring concurrence of only five of the seven Justices, from the Committee on the Judiciary. The bill was defeated on the Senate floor, and the first attempt to restrain the Supreme Court had failed.

From these opinions by Mr. Justice Johnson, his treatment of the contract clause may be noted. Two policies guided his thought: no constitutional issue should be decided unless the solution of the

252. Id. at 106.
253. The majority had interpreted the Board of Commissioner's authority to act only in controversies between the states. Private persons were unaffected by the Board. It was necessary to interpret it thusly for the defendant had pleaded that the federal court was without jurisdiction as the plaintiff had not gone through the procedure before the Board of Commissioners. Id. at 90-91. Johnson interpreted the Board's authority to extend to private controversies deciding the legal relief to be granted. To this the federal court could not be bound.
254. Id. at 107.
255. 2 WARREN, op. cit. supra note 208, at 100-102.
256. 2 WARREN, op. cit. supra note 208, at 123-4.
controversy absolutely demanded it; no state should be shackled by the
impairment prohibition under a strict interpretation of Section 10.
This latter doctrine was further proclaimed in *Ogden v. Saunders*. Here: Saunders of Kentucky sued Ogden of Louisiana in assumpsit
on bills of exchange accepted by Ogden in 1806 but unpaid at maturity.
Ogden pleaded a certificate of discharge obtained under the New York
Insolvent Debtor’s Act of 1801. Again the Circuit Court certified a
question to the Supreme Court. Was the New York Act of 1801
constitutional? Johnson held it was, with Marshall violently dissent-
ing. For the first time, the Chief Justice was defeated on a major
constitutional issue. Justice Johnson accomplished this by forsaking
Marshall and aligning himself with the proponents of states rights—
Trimble, Thompson—and Washington on this particular occasion.
Duval and Story followed

Before pursuing Johnson’s opinion, the precedents for this case
must be investigated. In *Sturges v. Crowinshield*, the New York
Insolvency Act which operated retroactively to discharge debtors was
held unconstitutional as repugnant to the contract clause. *M’Millan v.
M’Neill* on similar facts followed this precedent only a few months
later. But Marshall dropped a powerful hint of what he would do in
the situation later presented in *Ogden v. Saunders* when he said:

> “That the circumstance of the State law, under which the debt was
> attempted to be discharged, having been passed before the debt
> was contracted, made no difference in the application of the prin-
> ciple.”

Here was planted the seed for applying the contract clause prohibition
to state statutes operating either retrospectively or prospectively.

Johnson denounced the theory that state statutes already
enacted would impair contract obligations created thereafter and
queried:

> “Why may not the community set bounds to the will of the
> contracting parties in this as in every other instance?”

To him the New York Insolvent Debtor’s Act, in effect when the con-
tact was formed, merely set the bounds in which the contracting par-

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257. 12 Wheat. 213 (U. S. 1827). The bankruptcy portion of the case is discussed
at page 355 et seq., infra.
259. 4 Wheat. 122 (U. S. 1819). Plaintiff sues defendant as maker of two prom-
issory notes. Defendant pleaded a certificate of discharge obtained under authority of
an act passed after the notes were made. The certified question on the constitutionality
of the act was answered in the negative, for the contract obligation was impaired.
260. 4 Wheat. 209 (U. S. 1819).
261. Id. at 212-213.
263. Id. at 289.
ties could act. This translation was understandable after observing the Justice’s definition of a contract obligation: 264

“Whatever I by my contract give another a right to require of me, I by that act lay myself under an obligation to yield or bestow. The obligation of every contract will then consist of that right or power over my will or actions, which I, by my contract, confer on another.”

When the contract was made between Ogden and Saunders, the factor of the Insolvent Debtor’s Act had to be recognized in determining what right or power over Ogden’s will or actions was created in Saunders. Saunders contracted with the knowledge that Ogden would be protected by the statute so no impairment of any contract obligation resulted when the act was applied. Marshall elucidated the contrary: 265

“But insolvent laws are to operate on a future, contingent, unforeseen event. The time to which the word ‘impairing’ applies, is not the time of the passage of the act, but of its action on the contract. That is, the time present in contemplation of the prohibition. The law, at its passage, has no effect whatever on the contract... When then does its operation commence? Then, if ever, and not until then, it acts on the contract, and becomes a law impairing its obligation.”

In this manner, the Chief Justice sought to protect the creditor class from any interference with their contract obligations, even by statutes enacted before the contract was formed. He believed that the “reform government” was organized in 1787 to rectify the commercial antagonism which existed between the creditor and debtor classes. Only a literal meaning of Section 10 could produce this relief in his eyes. 266 At least, Marshall was consistent with his dictum in M’Millan v. M’Neill. What he apparently attempted to do was to protect the liberty to contract, unhampered by any insolvency laws which injured the creditor group’s claims against the debtors. An attempt was thus made to maintain the independence and power of creditors in face of the growing political strength of the debtor class. 267

Justice Johnson refused to be bound by this “severe literal construction” of Section 10: 268

264. Id. at 282.
265. Id. at 337.
266. Id. at 354-5.
267. Sharp, Movement in Supreme Court Adjudication (1932) 46 Harv. L. Rev. 361, 366-71. Sharp explained that Marshall’s attempt to protect the liberty of contract did not attain recognition until the Fourteenth Amendment in 1868.
268. 12 Wheat. 213, 286 (U. S. 1827).
“It appears to me, that a great part of the difficulties of the cause, arises from not giving sufficient weight to the general intent of this clause in the constitution, and subjecting it to a severe literal construction, which would be better adapted to special pleadings. . . . But to assign to contracts, universally, a literal purport and to expect from them a rigid literal fulfillment, could not have been the intent of the Constitution. It is repelled by a hundred examples. Societies exercise a positive control as well over the inception, construction and fulfillment of contracts as over the form and measure of the remedy to enforce them.” 269

Furthermore, the general proposition that a government necessarily violates the contract obligation by putting an end to its performance was not true. 270

“It is the motive, the policy, the object, that must characterize the legislative act, to affect it with the imputation of violating the obligation of contracts.”

This principle of a liberal construal has become the accepted constitutional doctrine. A wide field of statutes affecting contract obligation has been permitted to enforce the state’s police power. 271 And today the interpretation announced by Johnson has been adopted to permit the retrospective operation of a law to give debtor’s relief. In Home Building and Loan Asso. v. Blaisdell, 272 Chief Justice Hughes spoke for the majority and said: 273

269. Justice Black in his dissenting opinion in Wood v. Lovett, 313 U. S. 362 (1941) relied upon this statement and remarked at page 382: “The accuracy of this statement cannot be questioned by one who reflects upon the extent to which contracts and agreements are a part of the daily activities of our society. For, so nearly universal are contractual relationships that it is difficult if not impossible to conceive of laws which do not have either direct or indirect bearing upon contractual obligation. Therefore, it would go far toward paralyzing the legislative arm of state governments to say that no legislative body could ever pass a law which would impair in any manner any contractual obligation of any kind.” The majority opinion in this case held a statute, repealing a curative statute which gave the vendee of the tax title a valid ownership, in violation of the contract clause of the Federal Constitution because it impaired the obligation of the contract between the State and its vendee.

270. Id. at 291.

271. Butchers Union Slaughterhouse v. Crescent City Livestock Co., 3 U. S. 274 (1884), the exclusive right to unload livestock granted by the Louisiana Legislature may be repealed for health reasons without violating the contract clause; Union Dry Goods Co. v. Georgia Public Service Corp., 248 U. S. 372 (1919), a contract to provide electricity made by private persons can be abrogated by a Georgia statute to enforce regulation of public utilities without violating Section 10.

272. 290 U. S. 398 (1934). The Minnesota Moratorium Law of April 18, 1933, providing, during the declared emergency, for an extension of the usual one year period of redemption on foreclosure sales was held constitutional. The State court was to fix an equitable redemption period, but in no case was the period to last beyond May 1, 1935. Although the relief granted was only an extension of a year at most, still the contract obligations created before the passage of the act were altered. Section 10 was held inapplicable to this retrospective legislation. The mortgage foreclosure crisis in the farming area created ample economic and social reasons for condoning this Minnesota action to protect the general welfare of the State.

273. Id. at 428.
"But full recognition of the occasion and general purpose of the clause does not suffice to fix its precise scope . . . To ascertain the scope of the constitutional prohibition we examine the course of judicial decisions in its application. These put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula. Justice Johnson in *Ogden v. Saunders*, adverted to such a misdirected effort. . . ."

Thus, in this decision, often termed the greatest contract clause decision in constitutional history excepting the *Dartmouth College* case,\(^274\) Hughes credited Justice Johnson with the doctrine of a liberal construction for Section 10. The Minnesota legislation ending the literal performance of contract obligations, was held constitutional because of the "motive, the policy and the object" to give relief during the economic crisis confronting the State. So over a century after his judgment on the spirit of this clause, Johnson’s opinion wielded powerful influence.\(^275\)

The final disposition of *Ogden v. Saunders* saw Johnson’s return to the Marshall group. Since the State statute was held constitutional, the problem remained whether Saunders, a citizen of Louisiana, was bound by the New York discharge. Johnson now spoke for Marshall, Story, Duval, and himself. As the plaintiff had not been within the jurisdiction of New York when the discharge was granted, the State could not affect his relation with Ogden. No discharge of a state could operate beyond its borders to modify the foreign creditor’s claim.\(^276\)

Justice Johnson’s rule of deciding a constitutional case on procedural grounds if possible was again followed in *Satterlee v. Mathewson*.\(^277\) The majority through Justice Washington held a Pennsylvania statute which made a void contract valid no impairment of a contract obligation. In fact it did just the contrary, so Section 10 was not violated. The plaintiff had sought ejectment, proving a deed which established a Connecticut title in Pennsylvania land. A peculiar Pennsylvania rule barred these titles from legal significance so eject-

\(^{274}\) Wright, *op. cit. supra* note 2, at 109.

\(^{275}\) See also *East New York Savings Bank v. Hahn, et al.*, 66 S. Ct. 69 (1945), wherein Justice Frankfurter followed Johnson’s opinion in the *Ogden* case, stating at page 70: "... when a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the state to safeguard vital interests of its people is not to be denied by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment."

\(^{276}\) 12 Wheat. 213, 358-69 (U. S. 1827). Precedent for this holding was found in *Watson v. Bourne*, 10 Mass. Rep. 337 (1813), where a Rhode Island discharge was denied as a defense against one who was a Massachusetts citizen and did not enter Rhode Island’s jurisdiction during the insolvency proceedings.

\(^{277}\) 2 Pet. 380 (U. S. 1829).
ment was denied in 1825, but the Supreme Court of the State granted a new trial. In 1826, a statute removed the invalidity of plaintiff's title. When the State Supreme Court decided on the new appeal it held valid the Connecticut deed giving title. Johnson concurred on the narrow ground that since a new trial had been granted on the first appeal, the plaintiff's rights had not as yet been determined. The Pennsylvania statute was then applied prospectively and the title deed held valid. It was as though the judiciary power of the State had settled conflicting decisions on this issue so the valid legal right proved after the settlement must be sustained, even if no actual claim would have existed previously. No question of the contract clause was, therefore, involved.

If it had been, the Justice left no doubts as to his attitude on such statutes:

"To give efficacy to a void contract, is not, it is true, violating a contract, but it is doing infinitely worse; it is advancing to the very extreme of that class of arbitrary and despotic acts, which bear upon the individual rights and liabilities, and against the whole of which the Constitution most clearly intended to interpose a protection commensurate with the evil."

This vehemence was startling. Certainly when persons contracted they intended to be bound. Unenforceable obligations were not tolerated in the commercial world. If some legal quirk barred enforcement of an intended obligation as in this case, the rectifying legislation merely destroyed an unintended defense. It did not impose an unintended obligation. How could this act be "arbitrary and despotic?" Unfortunately, no clear controversy on this issue ever arose. It would have proved interesting to observe whether the Justice, who persisted in a narrow application of the impairment prohibition, could have expanded Section 10 to include this situation which had just the opposite meaning from the impairment of a contract obligation. Quite probably, Johnson had a basis for holding such legislation invalid under the ex post facto law phrase of Section 10 as he interpreted it. In both Ogden v. Saunders and Satterlee v. Mathewson, the Justice had expressed the belief that the difficulties in the contract clause cases resulted from a misconception of the meaning of ex post facto laws. The other Justices had applied it only to criminal cases; Johnson employed it for civil cases, too. On the authorities before 1787, he was correct

278. Id. at 414-16.
279. Id. at 414-15.
280. 12 Wheat. 213, 286 (U. S. 1827).
281. 2 Pet. 380, 416 (U. S. 1829).
as he indicated in a special memorandum submitted to the Court.\textsuperscript{282} But a belief arose among the Constitutional delegates that civil statutes were not covered by the \textit{ex post facto} law phrase.\textsuperscript{283} Also in \textit{Calder v. Bull},\textsuperscript{284} the Supreme Court had stated that civil statutes were not barred under the \textit{ex post facto} law prohibition. The phrase on impairment of contract obligations, it was contended, had been included to cover the civil acts. Once starting on the wrong foot, the Court had to toil uphill to protect contract obligations from retroactive legislation.\textsuperscript{285} Johnson's interpretation which had been the accepted principle before 1787\textsuperscript{286} would have been an easy method to destroy the retroactive state statutes and probably would have made the impairment phrase a superfluous prohibition. This development would explain the Justice's strong language against the constitutional situation in \textit{Satterlee v. Mathewson}.

Once again the Virginia-Kentucky compact\textsuperscript{287} was confronted in \textit{Hawkins et al. v. Barney's Lessee}.\textsuperscript{288} Kentucky adopted a period of seven years for its Statute of Limitations on real property actions; Virginia had a twenty years' period. Justice Johnson applied his dictum in \textit{Green v. Biddle},\textsuperscript{289} to hold that Kentucky was not shackled in its sovereign power to the intricate details of Virginia land law. If the general principles were followed, the compact obligation was fulfilled. Since the rule of a Statute of Limitations had been retained, no breach of the obligation of contract was created by the seven years' Statute. A "strict literal construction" was denied by a unanimous court. This decision involved the constitutionality of the Kentucky Act, as Johnson stated. No mention of Section 10 was made, however, which implies that the Justice's opinion in \textit{Green v. Biddle}, applying the Kentucky Constitution only, was adopted. If true, the other members of the Court had forsaken their custom of imposing the Federal Constitution whenever possible, and had accepted Johnson's rule of not applying the contract clause where it was unnecessary for a decision.

\textsuperscript{282} 2 Pet. 691, Appendix I (U. S. 1829).

\textsuperscript{283} See page 345, \textit{supra}.

\textsuperscript{284} 3 Dall. 386 (U. S. 1798). After the appeal period had expired, a Connecticut law was passed to permit an appeal to be made. Such was constitutional on the grounds that the Legislature had power to alter Judicial decisions anyway, so \textit{a fortiori} it could provide an appeal.

\textsuperscript{285} Smead, \textit{The Rule against Retroactive Legislation} (1936) 20 Minn. L. Rev. 775, 792-3. Smead contends Justice Johnson was right in his interpretation of the \textit{ex post facto} phrase to cover both criminal and civil laws.

\textsuperscript{286} Id. at 791 n. 51; Corwin, \textit{Twilight of the Supreme Court} (1934) at 57, 198 n. 9.

\textsuperscript{287} See pages 352-3, \textit{supra}.

\textsuperscript{288} 5 Pet. 457 (U. S. 1831).

\textsuperscript{289} 8 Wheat. 1, 103-5 (U. S. 1823).
The last contract clause opinion by Justice Johnson came in 1833. The Pennsylvania statute in Lessee of Livingston v. Moore permitted certain State Commissioners to sell real property to satisfy liens held by the State on the realty. These liens had been in existence prior to the act permitting a sale for satisfaction. The lessee of Livingston claimed that the contract obligation of the liens was impaired by this order to sell; but when Moore offered a title derived from such a sale in defense of an ejectment action, the unanimous opinion of the Court sustained his title. The State statute was summarily held to be no violation of the contract clause; Moore's title was valid.

These last two cases indicated how far the Supreme Bench had advanced. No federal constitutional decision was to be given unless necessary; a strict literal interpretation was not to be applied to Section 10. The wise observations of Justice Johnson in Fletcher v. Peck had become accepted law. The opinion of one Justice had grown in two decades' time to unanimous opinions as Marshall's original principles were erased. Such was the effect of Johnson's interpretations of the contract clause.

**The Commerce Clause**

As early as July 13, 1785, the Confederation had recognized the need for some national power to regulate commerce among the independent states. A Committee of the Continental Congress suggested at that time that this legislative body should be vested with the power "of regulating the trade of the States as well with foreign nations as with each other."

The trade barriers erected by one state's duties and imposts had fostered retaliatory measures from neighboring states. Aware of this rival, hostile spirit, the commercially-minded delegates to the Constitutional Convention had adopted without dissent the commerce clause. None, apparently, questioned the scope of the authority granted; no doubt appeared as to its meaning. Yet it would be difficult to conceive that the political leaders of 1787 foresaw the vastness of the power delegated to Congress. It remained for the

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290. 7 Pet. 469 (U. S. 1833).
292. HAMILTON, THE FEDERALIST No. 22 (Everyman's ed. 1934) 103. See also No. 7 at 28-9 and No. 11 at 52-3.
293. U. S. CONST, ART. I, § 8: "The Congress shall have power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."
294. WARREN, op. cit. supra note 291, at 570.
Supreme Court to unfold the full extent of Congressional authority. That this process has proceeded with wisdom, as a general rule, was conceded by Charles Warren, the eminent Supreme Court historian.\textsuperscript{295}

"To untrammeled intercourse between its parts, the American Union owes its preservation and strength. Two factors have made such intercourse possible—the railroad, physically; the Supreme Court, legally."

But the High Court did not immediately fulfill the destiny of Section 8. It began as a slow process. In fact, not until 1824 was the original decision rendered—a silence of thirty-five years was broken with the landmark case of \textit{Gibbons v. Ogden}.\textsuperscript{296} Compared with the commerce clause opinions today, this absence of a decision was remarkable. In 1937, 16 opinions from a grand total of 152 opinions read by the Court had as subject matter the commerce power, while in 1938 the figure was 22 out of 141.\textsuperscript{297} Before investigating Johnson’s work in this important precedent for the modern decisions, several facts must be noted to explain the significance of the controversy in 1824.

James Monroe, re-elected to the Presidency in 1820, continued to promote his Jeffersonian policies. In 1822, Congress adopted the Cumberland Road Bill providing for toll-gates on the federal highway to be operated by the national government. Congress presumed that since federal funds built the interstate highway such federal regulation was permitted. On May 4, 1822, Monroe vetoed the act and sent a lengthy message to Congress discussing the commerce power delegated to that body. The pith of the President’s theory was this: \textsuperscript{298}

"Commerce between independent powers or communities, is universally regulated by duties and imposts. It was so regulated by the States before the adoption of this Constitution equally in respect to each other and to foreign powers. The goods and vessels employed in the trade are the only subjects of regulation. It can act on none other. A power, then, to impose such duties and imposts in regard to foreign nations, and to prevent any on the trade between the States, was the only power granted."

Such was the Chief Executive’s explanation of the commerce clause—narrow and illogical. Illogical because the framers of the Constitution in another section had specially provided for the prohibition of state

\textsuperscript{295} I \textsc{Warren}, \textit{The Supreme Court in United States History} (1922) c. VIII.
\textsuperscript{296} 9 \textsc{Wheat}, 1 (U. S. 1824). For a discussion of the long absence of a decision on this section see 2 \textsc{Willoughby}, \textit{The Constitution of the United States} (2d ed. 1929) 721.
\textsuperscript{297} \textsc{Hart}, \textit{The Supreme Court—1937 and 1938 Terms} (1940) 53 \textsc{Harv. L. Rev.} 579, 602-3.
\textsuperscript{298} \textsc{Annals of Congress}, 17th Cong., 1st Sess. (1822), 1809, 1833.
duties, impost, and tonnage duties unless Congress consented. This provision would completely embrace Monroe’s concept of the commerce authority in Congress, and the grant of power under Section 8 would be superfluous. This contention was hardly plausible in a charter recognized for its brevity and succinctness. Although state duties and impost were the major cause of commercial upheaval before 1787, the commerce clause was probably included to guard the Union from the dangers of other state regulation. Specific perils could not be enumerated, but the general hazards were recognized, and Section 8 acted as a safeguard.

After his veto message, James Monroe requested an informal opinion from the Supreme Court on the extent of federal authority over internal improvements. Justice Johnson replied for the Court:

"The Judges are deeply sensible of the mark of confidence bestowed on them in this instance and should be unworthy of that confidence did they attempt to conceal their real opinion. Indeed, to conceal or disavow it would be now impossible as they are all of the opinion that the decision on the Bank Question completely commits them on the subject of internal improvements, as applied to Post Roads and Military Roads. . . . The principle assumed in the case of the Bank is that the granting of the principal power carried with it the grant of all adequate and appropriate means of executing it. That the selection of these means must rest with the General Government, and as to that power and those means the Constitution makes the Government of the United States supreme."

Since Congress was deemed to have power over foreign and interstate commerce, the analysis of the Bank decision would signify that "all ade-

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299. U. S. CONST. ART. I, § 10: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: . . . and all such Laws shall be subject to the Revision and Control of the Congress. No State shall, without the Consent of Congress, lay any duty on tonnage. . . ."

300. MADISON, THE FEDERALIST No. 42 (Everyman’s ed. 1934) 214-15. See also Sholley, Negative Implications of the Commerce Clause (1936) 3 U. OF CHI. L. R. 556, 562. But see Sharp, Movement in Supreme Court Adjudication (1933) 46 HARV. L. R. 593, 594, wherein it was stated that it has not been adequately shown that it was against the more subtle types of interference with interstate commerce, condemned by modern cases, that the general affirmative words of the commerce clause were directed.

301. 2 WARREN, op. cit. supra note 295, at 56. Justice Johnson suggested that the President should publish and distribute the opinion in the Bank case, McCulloch v. Maryland, throughout the Union. This extra-official opinion rendered by the Court was most unusual and could not happen today. See HUGHES, THE SUPREME COURT OF THE UNITED STATES (1928) 30-31.

302. McCulloch v. Maryland, 4 Wheat. 316 (U. S. 1819). A Maryland statute taxed the issuance of any notes by a bank or its branch which was not chartered by the Maryland Legislature. The Baltimore branch of the United States Bank, created by Congress, refused to pay the tax. Maryland sued to recover the penalties prescribed by the statute. Marshall held that Congress had power to create the National Bank, and having such power could provide for the issuance of banknotes as a necessary business procedure of a bank. Since the State statute interfered with this federal power, it was void.
quate and appropriate means of executing it" had been granted to Congress also. This informal hint from Johnson indicated that the Supreme Bench would probably not be shackled by as narrow an interpretation of the commerce power as Monroe's veto message had proclaimed.

Only the next year, the Justice faced a controversy involving foreign commerce in the Sixth Circuit Court at Charleston. In *Elkison v. Deliesseline*, a British negro sailor, imprisoned under a South Carolina statute, sought a writ of habeas corpus in the Federal Court. The statute provided that all free negro sailors entering the State on any vessel must be detained in the local jail until the ship sailed. Once before a similar situation had occurred, and Johnson had voluntarily prevailed on the State Judiciary to release the entire crew who had been detained. This temporary solution did not solve the problem, however, so Judge Johnson sought to rectify the outrage in the legal controversy now presented to him. The actual holding of the decision could be stated in a short space and on narrow grounds: the authority to issue a writ of habeas corpus under Section 14 of the Judiciary Act of 1789 existed only when the prisoner was detained in the custody of federal officers so none could be issued here where the State officers held the sailor; the civil writ of *de homine replegiando* which the British negro also requested could be issued, for such must be given to any free man who petitioned for it. Had the Judge rested here, the case would probably pass unnoticed in the mass of lower court decisions which have been reported. But this did not happen. Carefully he recited the prohibitory effect which the act had upon foreign commerce. Captains, fearful of losing crew members, would avoid South Carolina ports. In fact, the statute was so severe it made no exception for negro sailors who entered the harbors on a ship even in an emergency. Charleston, the great port of the State, would become a neglected city.

The Justice, in addition, skillfully indicated the retaliatory measures which other nations would impose against South Carolina sailors and American crews. This warning of the economic folly of the statute was followed by a legal analysis of the quantity of power in Congress over foreign commerce.

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304.  Id. at 493-4.
305. "A writ which lies to replevy a man out of prison, or out of the custody of a private person, upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him." BLACK, LAW DICTIONARY (3d ed. 1933) 514.
306. Johnson doubted if this writ would be of practical aid in this situation, however. See *Elkison v. Deliesseline*, cited *supra* note 303, at 497.
307.  Id. at 495.
"But the right of the general government to regulate commerce with the sister states and foreign nations is a paramount and exclusive right... That this has been the received and universal construction from the first day of the organization of the general government is unquestionable; and the right admits not of a question any more than the fact... It is true that it [Constitution] contains no prohibition on the States to regulate foreign commerce. Nor was such a prohibition necessary, for the words of the grant sweep away the whole subject, and leave nothing for the States to act upon."

This principle of exclusiveness over the commerce power was an extreme interpretation for 1823. It was most questionable if Congress did have this authority, for no authoritative decision had as yet illuminated Section 8. In the light of his veto message, President Monroe would certainly question the broad rule announced by Johnson, while the legislators of South Carolina demonstrated they had not accepted this interpretation as the "universal construction" of the commerce clause. When the Judge proclaimed the State statute repugnant to the commerce power in the Constitution and void, bitter criticism swept through the State. Much pressure had been exerted on the Judge to suppress his sweeping opinion, but Johnson had abided by his convictions. The Charleston Mercury assailed the Justice by expressing the general sentiment of the local populace:

"Or are we to understand that when a citizen becomes a servant of the General Government, he is to disregard the views, opinions, and feelings of those among whom he was bred, and from whose

308. See Hamilton, The Federalist No. 32 (Everyman's ed. 1934) 154, where Hamilton analyzed the constitutional problem of interpreting federal and state authority: "We there find that, notwithstanding the affirmative grants of general authorities, there has been the most pointed care in these cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States. The tenth section of the first article consists altogether of such provisions. This circumstance is a clear indication of the sense of the convention, and furnishes a rule of interpretation out of the body of the act..." By this test, the only prohibition on state authority over foreign commerce was the laying of any imposts or duties on imports or exports. Other authorities were apparently held with Congress, concurrently.

309. Judge Johnson also invalidated the statute for conflicting with the United States Commercial Treaty with Great Britain since the Federal Treaty was supreme under Article 6 of the Constitution. See Elkison v. Deliesseline, cited supra note 303, at 495-6.


311. Caroliniensis (1823) 30. This pamphlet of articles on the famous case appearing in the Charleston Mercury indicated that the legal decision covered only the jurisdictional ground for issuance of the two writs desired. It also presented arguments for upholding the statute as constitutional alleging that the local government could regulate foreign commerce to maintain domestic peace and order while the Federal Treaty did not actually conflict with the act.

But argument over the noted opinion was not confined to South Carolina. It extended to New England, also. See 6 Adams, Memoirs of John Q. Adams (1875) 176.
early notice of him, he perhaps derives the exalted honor of being a Judge of the Supreme Court of the United States?"

The Justice fought this criticism. He endeavored to prohibit the enforcement of the Statute, even pleading for aid to fulfill this task from the Chief Executive in Washington. But he lost the fight. South Carolina openly enforced the imprisonment statute for twenty-five years afterwards. This defeat resulted from his violation of a primary rule for deciding constitutional issues established by the Judge as early as 1810 in *Fletcher v. Peck*—no constitutional decision should be made unless other grounds for decision were non-existent. One possible explanation for this amazing dicta was Johnson's belief that commerce was a vital element in the life of his native State as well as his country. He desired to protect this precious economic asset from any retaliatory regulations imposed by other jurisdictions.

Further dicta in the opinion must also be scrutinized. The statute had been intended to prevent the intercourse of rebellious ideas from the free negro to the slave. Practically, it worked just the contrary, demonstrated the Justice. Since it brought free negroes ashore to the local jails, closer contact with slaves was possible, which Johnson pri-

312. Appendix to *Cong. Globe*, 31st Cong., 1st Sess. (1850) 1661. Letter of July 3, 1824, from Johnson to Secretary of State Adams. "I know not from whom the Government expects communications such as the present, but I am daily made sensible that the eyes of the community are turned most particularly to the Judges of the Supreme Court for protection of their constitutional rights, while I feel myself destitute of the power necessary to realize that expectation. Hence, although obliged to look on and see the Constitution of the United States trampled on by a set of men who, I sincerely believe, are as much influenced by the pleasure of bringing its functionaries into contempt, by exposing their impotence, as by any other consideration whatever, I feel it my duty to call the attention of the President to the subject, as one which may not be unworthy of an official remonstrance of the Executive of the State." The Justice then admitted that the negro sailor received only twelve lashes for his entrance into Charleston, but the act allowed the State court to inflict twelve thousand, if need be; hence, the sanction of the statute was most severe.


314. See pages 346, 351, supra.

315. See *Elkison v. Delieseline*, cited supra note 303, at 495, where Johnson stated: "If this law were enforced upon such vessels, retaliation would follow; and the commerce of this city, feeble and sickly, comparatively, as it already is, might be fatally injured. Charleston seamen, Charleston owners, Charleston vessels, might, eo nomine, be excluded from their commerce, or the United States involved in war and confusion."

In *The Amiable Isabella*, 6 Wheat. 1 (U. S. 1821), Johnson had dissented to a strict construction of a Commercial Treaty with Spain which the majority required in order to qualify a vessel as a neutral ship not subject to a Prize Court. Story spoke for the majority and stated that unless a formally prescribed passport was annexed to the ship's papers the boat could not be protected from condemnation. Johnson replied if in substance the passport requirement was fulfilled this was sufficient in order to permit freedom of commerce for American ships and goods which was the intent of the Treaty. See especially from 87-8, where the strong desires of the Justice to protect freedom of commerce were noted.
vately believed defeated the intent of the State Legislature. But even assuming the legislation sensible, Johnson judicially believed the commerce clause must prevail.\textsuperscript{316} The Judge trod delicate ground here, for the state police power to preserve peace and order was involved. The manner in which he summarily stated that Section 8 was supreme must be disputed. The state police power should have been considered to a greater extent and given due weight in his analysis of this difficult conflict.

Since \textit{Elkison v. Deliesseline} could be limited to jurisdictional grounds, these strong dicta, one of which invalidated the State statute, were foolish gestures—unwise politically and injurious legally. Chief Justice Marshall has exposed his views on this opinion in a letter to Justice Story: \textsuperscript{317}

"Our Brother Johnson, I perceive, has hung himself on a democratic snag in a hedge composed entirely of thorny States-rights in South Carolina, and will find some difficulty, I fear, in getting off into smoother, open ground. . . . You have, it is said, some laws in Massachusetts, not very unlike in principle to that which our brother has declared unconstitutional. We have its twin brother in Virginia; a case has been brought before me in which I might have considered its constitutionality, had I chosen to do so; but it was not absolutely necessary, and as I am not fond of butting against a wall in sport, I escaped on the construction of the act."

Usually eager to assert national power, Marshall had refused to tread this path which Johnson now eagerly followed. The Associate Justice thereby revealed his strong feeling regarding the commercial affairs of the Union. He risked his legal reputation in boldly and independently seeking to define a broad federal power when such a task was unnecessary. But this decision only heralded stronger words which were to come.

In 1824, \textit{Gibbons v. Ogden} \textsuperscript{318} was presented to the Supreme Court and Johnson had his opportunity for a powerful expression on Section 8. Because of the vast importance of this controversy, its interesting facts must be fully noted.\textsuperscript{319}

Robert Livingston had secured in 1798, a twenty year monopoly to navigate by steamboat the rivers and waters of New York State. In return, the youthful inventor had to produce within two years' time

\textsuperscript{316} \textit{Elkison v. Deliesseline}, cited supra note 303, at 496.
\textsuperscript{317} \textit{Bates}, \textit{op. cit. supra} note 313, at 128.
\textsuperscript{318} \textit{9 Wheat. 1} (U. S. 1824).
\textsuperscript{319} \textit{Cushman}, \textit{Leading Constitutional Decisions} (7th ed. 1940) 274-5, where the facts are outlined.
a steamship capable of traveling four miles an hour against the Hudson River current. The steamship was not produced.\textsuperscript{320} In 1803 and 1807 the monopoly grant was renewed with Robert Fulton named as Livingston's partner. Finally, on a hot August day in 1807, Fulton's steamboat, "The Clermont," made the memorable trip from New York to Albany at a speed exceeding that required by the grant. So in 1808 the Legislature granted the parties an extension of time in their monopoly allowing an additional five years for each steamship commissioned with thirty years' period as the maximum for the monopoly. No other person was permitted to operate a steam vessel in New York unless licensed by the partnership; any unlicensed vessel was to be forfeited to the firm. Competition was stymied, but the partnership flourished. Regular service from New York to Albany and Fulton Street, New York, to New Jersey was offered to the public. Business continued to expand as other jurisdictions like the Territory of Orleans granted the firm monopolies too. The partners eventually controlled the vital waters around New Orleans which prohibited much competition on the great Mississippi River System.

The inevitable retaliation soon occurred. A New Jersey act in 1811 permitted any person, who lost his steam vessel through forfeiture to the firm as prescribed by the New York legislation, to capture and hold any New York licensed steamship. Connecticut in 1822 prohibited any licensee of Livingston and Fulton from using the State's waters. Other states proceeded in a similar manner. The scientific achievement which had accelerated navigation from Pittsburgh to New Orleans from 100 to 30 days was being shackled by state regulations.\textsuperscript{321} The blessings of wider markets and increased production were being stifled under the burdens of local discrimination.

The economic condition, therefore, was acute when Ogden, a licensee of Livingston and Fulton, sought to enjoin Gibbons, a New Jersey competitor, from operating his steamboat between Elizabeth-town, New Jersey, and New York City. Gibbons relied on his license under the Federal Coasting License Act of 1793 to refute Ogden's New York license. The New York Court of last resort granted the injunc-

\textsuperscript{320} The skeptical Legislature was not surprised. It had believed Livingston's plan a folly and passed the grant amidst catcalls and jeers. \textit{Id.} at 274.

\textsuperscript{321} The retaliatory measures usually took two forms: monopolies were granted to their own citizens by Pennsylvania in 1813, Georgia in 1814, Massachusetts in 1815, New Hampshire in 1816; or, prohibitions against the licensees of the New York monopoly in the waters of the state as in Ohio's statute of 1822, where no licensee could enter the waters of Lake Erie in Ohio unless the privilege of navigation in New York waters was granted to Ohio citizens except in case of great emergency where human life was endangered. See \textsc{Meyer} and \textsc{MacGill}, \textit{Transportation in the United States Before 1860} (1917) 106-8.
tion holding no conflict existed between the Federal Act and State statute. On appeal, the Supreme Court dissolved the injunction.

A brief study of the Chief Justice's oft-quoted opinion must first be made. Marshall, after renouncing any strict theory of interpretation of the Constitution, defined the commerce power to include authority over navigation.

But the remainder of the opinion was cloudy. No definite expression was stated whether the commerce clause was an exclusive or concurrent power in the Federal Government, even though this State statute itself was repugnant to Section 8. Also the "direct collision" between the Federal Coasting License Act and the New York legislative grant voided the State statute under the provision for supremacy of federal laws in Article 6 of the Constitution. Thus Marshall's opinion was ambiguous. It could rest on either ground—the commerce clause or the supremacy of the federal laws. None could object to this cautious statement, however. To make a bold declaration on national power over commerce would have been unwise in a period when states rights were still strongly supported.

Johnson's opinion differed greatly. Justice Frankfurter recognized that:

"The concurring opinion of Mr. Justice Johnson shows how the case might have served as a vehicle for unambiguous doctrine . . . In contrast to Johnson's characteristic trenchancy, Marshall's opinion was either unconsciously or calculatedly confused."

To the concurring Justice, no time needed to be spent discussing the conflict between federal and state legislation. The only clear constitutional issue was the attempted regulation of interstate commerce by the New York act. Such was unconstitutional. Once again the

322. Gibbons v. Ogden, 17 Johns. 488 (N. Y. 1820). No discussion of the commerce clause was presented in the unanimous opinion.
323. 9 Wheat. 1, 186-222 (U. S. 1824).
324. Id. at 189-190.
325. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all 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, any Thing in the Constitution or Laws of any State, to the Contrary notwithstanding."
326. 4 Beveridge, op. cit. supra note 310, at 442-3. Mr. Justice Frankfurter recognized Marshall's weariness on asserting the full power of exclusiveness in the days of strong states rights interest. See FRANKFURTER, THE COMMERCE CLAUSE (1937) 25: "But he was not full-throated even in announcing his own theory of complete 'exclusiveness.' He must have felt the time was not ripe for such contraction of state sovereignty in the name of national interest."
327. FRANKFURTER, op. cit. supra note 326, at 17.
328. 9 Wheat. 1, 222-239 (U. S. 1824).
Justice's conception of the vast importance which commerce played in the economic life of the nation was expressed.\textsuperscript{329}

"If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."

Perhaps Johnson unwarrantedly overemphasized the significance of commerce.\textsuperscript{330} After all, the prohibitions on state legislation enumerated in Article I, Section 10\textsuperscript{331} of the Constitution were adopted to unsaddle commerce among the states from the heaviest burdens imposed during that period.\textsuperscript{332} Nevertheless with his belief in the importance of commerce, Johnson was expected to give an opinion strongly nationalistic, in order to destroy all state regulation. He fulfilled expectations.

At the outset, he discarded the use of any theory for interpreting the words of the Constitution: \textsuperscript{333}

"In attempts to construe the constitution, I have never found much benefit resulting from the inquiry, whether the whole, or any part of it, is to be construed strictly, or literally. The simple, classical, precise, yet comprehensive language in which it is couched, leaves at most, but very little latitude for construction."

To the Justice's mind the "precise" language of the Constitution granted to Congress exclusive power to regulate commerce among the states: \textsuperscript{334}

"The 'power to regulate commerce,' here meant to be granted, was that power to regulate commerce which previously existed in\

\textsuperscript{329} Id. at 231.

\textsuperscript{330} Sholley, \textit{supra} note 300, at 560 n. 16. See Sharp, \textit{supra} note 300, at 597, wherein Johnson's statement of the commercial object of the Constitution was criticized: "...it does not follow that means for preserving commercial freedom not provided for by the ordinary meaning of words in the Constitution must be implied from these words."

\textsuperscript{331} See note 299 \textit{supra}.

\textsuperscript{332} Sholley, \textit{supra} note 300, at 562. See also Sharp, \textit{supra} note 300, at 594.

\textsuperscript{333} 9 Wheat. 1, 223 (U. S. 1824). There were two theories on constitutional construction: the liberal view, expounded by Marshall, using the Constitution as a charter for granting impliedly broader powers to the Federal Government than actually expressed in the document; and the strict view, the corollary to the states rights doctrine limiting federal power to the express authority granted. See 1 WilloUGHBY, \textit{op. cit. supra} note 296, at 77-80.

\textsuperscript{334} 9 Wheat. 1, 227 (U. S. 1824). Johnson in applying the exclusive power theory interpreted the prohibitions on state duties or imposts and tonnage taxes, adopted in Section 10 of Article I, most unusually. Instead of following Hamilton's basis of construction as presented in note 308 \textit{supra}, he adopted the other extreme for his interpretation, at 237. "But this whole clause, as to these two subjects, appears to have been introduced \textit{ex abundanti cautela}, to remove every temptation to an attempt to interfere with the powers of Congress over commerce, and to show how far Congress might consent to permit the states to exercise that power. Beyond those limits, even by the consent of Congress, they could not exercise it." This strained view has been criticized by Sholley, \textit{supra} note 300, at 562.
the States . . . The States were, unquestionably, supreme; and each possessed that power over commerce, which is acknowledged to reside in every sovereign State . . . The power of a sovereign State over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom, necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive; it can reside in but one potentate; and hence the grant of this power carries with it the whole subject, leaving nothing for the State to act upon.”

For these reasons, the New York act regulating interstate commerce was void since no power had remained in the states for such commercial regulation.

Where Marshall had hesitated, Johnson advanced confidently. The opinion which the Chief Justice’s pen could be expected to write came from his associate, the very man appointed two decades before to restrain the nationalism of the Federalist Chief. One historian has even contended that Marshall feared the publishing of a strong nationalist opinion, so he utilized the remarkable talents and political background of Johnson to produce the real interpretation of the commerce clause which the Chief Justice favored.335 This assertion was most questionable.336 But one fact which is unquestionable was the reaffirmance given to Johnson’s interpretation in later years.

In Gloucester Ferry Co. v. Pennsylvania,337 Pennsylvania sought to tax a ferry corporation for doing business in the State. The only property owned in the State by the company was a lease to dock at a Philadelphia pier. All the rest of the property was located in New Jersey. In substance the tax was upon the discharging of passengers in Philadelphia which was a tax on commerce between the states so repugnant to Article I, Section 8 of the Constitution. In holding the State statute void, Justice Field stated: 338

“Congress alone, therefore, can deal with such transportation, its non-action is a declaration that it shall remain free from burdens imposed by State legislation.”

335. 4 BEVERIDGE, op. cit. supra note 310, at 443.
336. By this period, Johnson had already indicated his desire to establish the supreme commercial authority of the Federal Government in Elkison v. Deliesseline. Also two years later in 1826 his eulogy delivered at Charleston on Thomas Jefferson revealed sympathy for the Nationalistic ideals. He believed Jefferson’s warning to beware of an overzealous Federal Government was a wise but needless thought at that late date. Johnson also expressed Jefferson’s thoughts, as he interpreted them, on free commerce. He approved the Louisiana Purchase, as he envisaged a great commercial nation from sea to sea united by “every tie of interest, consanguinity, and feeling.” See JOHNSON, EULOGY ON THOMAS JEFFERSON (1826) at 26-33.
337. 114 U. S. 196 (1884).
338. Id. at 204.
Then the learned Justice impliedly acknowledged Johnson's opinion, as the actual decision stated in *Gibbons v. Ogden*.339

"Although the sole point in judgment was whether the State could regulate commerce on her waters in the face of such legislation by Congress, yet the argument of the court was that such attempted control of the navigable waters of the State was an encroachment upon the power of Congress, independently of that legislation."

Johnson's, not Marshall's, opinion had held the controversy was decided on the commerce clause alone, independent of any federal legislation.

Also Johnson's contention that where a federal power is exclusive, no state may act upon it, was sustained in *Robbins v. Shelby Taxing District*340 when Justice Bradley wrote:341

"Another established doctrine of this court is, that where the power of Congress to regulate is exclusive the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the States, except in matters of local concern only . . . is repugnant to such freedom. This was held by Justice Johnson in *Gibbons v. Ogden.*"

Despite the almost universal credit extended to Marshall in later years for his decision in the celebrated commerce clause case, much regard should also be given to Justice Johnson's opinion which sharply asserted this "unambiguous doctrine" of exclusive federal power.

Several general statements in the Justice's penetrating opinion were worthy of discussion. He accepted the police power of the state as permissive impositions on interstate commerce thus acknowledging a factor which had been undeveloped in *Elkison v. Deliesselene*. State health, inspection,342 and quarantine laws were allowed, but they must not be utilized to regulate the commerce among the states. He even stated where to draw the dividing line between commerce regulation and police power control:343

"Wherever the powers of the respective governments are frankly exercised, with a distinct view to the ends of such powers, they

339. Id. at 211.
340. 120 U. S. 489 (1886). A Tennessee statute which licensed a "drummer" soliciting business for an Ohio corporation was held unconstitutional for violating the commerce clause.
341. Id. at 493.
342. Inspection Laws were allowed by Article I, Section 10 of the Constitution, as quoted in note 299 supra.
343. 9 Wheat. 1, 230 (U. S. 1824).
may act upon the same object, or use the same means, and yet the powers be kept perfectly distinct."

In other words, the state legislature could express the purposes for which the statute was enacted. If it were for police power control, then the law might "act upon" interstate commerce. This rule of thumb has since been abandoned. The Supreme Court in Railroad Co. v. Husen decided:

"It [the State] may not, under the cover of exerting its police power, substantially prohibit or burden either foreign or interstate commerce... in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

Legislative intent was outlawed; henceforth the practical effect of the law determined whether it regulated commerce or was merely an exercise of the police power.

At least one other judicial thought, however, expressed by Justice Johnson has been maintained to this modern time in a highly refined manner. The basis for the present doctrine of the occupation of the field may be implied from these words:

"The practice of our government certainly has been, on many subjects, to occupy so much only of the field opened to them, as they think the public interests require."

These remarks alone were not indicative, perhaps, of the doctrine, but coupled with his primary belief that the commerce power was exclusive, the real implication was obvious. Federal power would regulate only that portion of the entire field subject to Congressional authority which was deemed to the public's best interest. Once regulating a portion of this field, Congress thereby barred any state action in the unregulated area, however wise or beneficial. The application of this rule in relation to the Interstate Commerce Commission was illustrated by Justice Brandeis in Napier v. Atlantic Coast Line where Congress had delegated to the Interstate Commerce Commission authority to regulate steam locomotives. An Alabama statute requiring auto-

344. Greeley, What is the Test of a Regulation of Foreign or Interstate Commerce (1887) 1 Harv. L. Rev. 159, 163.
345. 95 U. S. 495 (1877). A Missouri statute enacted to prevent communication of disease from cattle transported in interstate shipments was declared unconstitutional by the Supreme Court, speaking through Justice Strong because the "natural and reasonable effect" of the law was to regulate interstate commerce even though the health of the State was intended to be protected.
346. Id. at 472.
347. 9 Wheat. 1, 233-234 (U. S. 1824).
348. But see Bikle, The Silence of Congress (1927) 41 Harv. L. Rev. 200, 203, n. 6, where the significance of this sentence alone, as the germ for the occupation of the field doctrine, was acknowledged.
349. 272 U. S. 605 (1926).
matic fire doors for health and safety purposes was held void. The federal administrative agency had not prescribed this device as it felt public interest did not require such; however, it had exclusive power over the entire field of steam locomotive regulation which precluded any state action.

Probably the most dynamic sentence of Johnson's concurring opinion in *Gibbons v. Ogden*, however, was the Justice's definition of "commerce." He forecast its broad scope in later years:

"Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labour, transportation, intelligence, care, and various mediums of exchange, become commodities and enter into commerce; the subject, the vehicle, the agent, and their various operations become the objects of commercial regulation."

This important declaration supported Attorney General Wickersham's proposal in 1910 for a Federal Incorporation Act to charter interstate corporations. Wickersham sought to control the holding companies which had been created to achieve a national organization for local state companies in similar businesses. This new-style corporation had evaded any state regulation, while no federal authority existed to regulate its operation to prevent unethical manipulations. The proposed legislation was to cure this unfortunate situation. In reply to critics who denied any federal authority so broad as to permit the Incorporation Act, the Attorney General contended "no novel principles" of the commerce clause need be created to include such a statute within its spirit. Justice Johnson's definition of commerce had presaged

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351. See note 349 *supra*.
352. Not until 1935 did the full importance of the "various operations" of industry as reflected in labor's being a commodity of commerce become recognizable. The statements of finding and of policy for the National Labor Relations Act were amply predicted in this paragraph of Johnson's opinion. See 49 Stat. 449 (1935), 29 U. S. C. § 151 (1940): "The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or necessary effect of burdening or obstructing commerce. . . . It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."
353. A complete explanation of the evils arising from the holding company and the impossibility for proper state regulation was offered in *Burco, Inc. v. Whitworth et al.*, 81 F. (2d) 721, 734 (C. C. A. 4th, 1936). The holding company was apparently primarily designed to escape the state regulation imposed on the act of doing business in a state under the rule set out in *Bank of Augusta v. Earle*, 13 Pet. 579 (U. S. 1839), as Wickersham indicated in *Federal Control of Interstate Commerce* (1910) 23 Harv. L. Rev. 241, 256-257.
the full extent of the commerce power over 85 years previously, observed the Attorney General. And on this 1824 decision he relied for the constitutionality of his proposed act.356

One may understand therefore, the keen analysis of Section 8 which Justice Johnson had displayed. He recognized the amazing growth which was to come in the field of commerce; hence, he desired to formulate a broad translation of authority in order to prepare for the vast commercial developments. Such early wisdom in interpretation has allowed Chief Justice Hughes to say:358

"The Commerce clause has not been enlarged, it has simply been applied."

The immediate effect of the decision in Gibbons v. Ogden was impressive. Wide acclaim fell upon Marshall for destroying the steamboat monopoly. This decision was probably the only truly popular one ever issued by the great Chief Justice.357 No better indication of the commercial effect of this result could be found than the increase in steamboat construction. The number of vessels built in the important years were:358

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Thus were the benefits of cheaper, faster transportation unleashed to permit commercial progress. Justice Johnson's part in this scene of American history was truly important as exemplified by his comprehensive opinion.

Chief Justice Marshall never attained this clear conception of exclusive federal power over interstate commerce which his associate displayed. Although Marshall's decision in Brown v. Maryland359 has been credited with the removal of all doubt over the exclusive power,360 in reality the opinion held the Maryland statute unconstitutional because the prohibition of state duties on imports had been violated.361 The violation of the commerce clause was merely a second ground for the invalidity of the act. Two years later the final decision

355. Wickersham, supra note 353, at 258-259.
356. HUGHES, op. cit. supra note 301, at 142.
357. CUSHMAN, op. cit. supra note 319, at 204.
358. MEYER AND MACGILL, op. cit. supra note 321, at 108.
359. 12 Wheat. 419 (U. S. 1827). A Maryland statute licensing wholesale importers of foreign goods by bale or package was held unconstitutional, so the indictment for a penalty on defendant who refused to obtain the $50.00 license was quashed.
on Section 8 came in *Willson et al. v. Black Bird Creek Marsh Co.* where the exclusive power theory was denounced by the Chief Justice. Then Marshall concluded that the State act was not repugnant to the federal commerce power "in its dormant state." Here perhaps was the complete renunciation of Johnson's skillful theory of exclusive power over national commerce. Mr. Justice Frankfurter recognized some authority for holding that the Chief Justice had retreated from his "generalized doctrine of 'exclusiveness'" as found in *Gibbons v. Ogden*, but he himself interpreted the decision as expressing the right of Delaware to legislate on its police power.

These examples of John Marshall's apparent vacillation on the doctrine of exclusiveness support the resolution that when a careful analysis of the commerce clause development has been made, much attention must be given to Justice Johnson; for only his far-sighted approach contemplated the necessary freedom for interstate commerce which unified this Nation. While most of the credit has been extended to the colorful Chief Justice, thoughtful praise should now be awarded also to William Johnson.

**Chapter V**

**The Contempt Power of Congress**

Article I, Section 5 of the Constitution has been considered not for its content but rather for what it failed to contain—the contempt power of Congress over non-members of the Legislature. Little dis-

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362. *2 Pet. 245* (U. S. 1829). The plaintiff who constructed a dam under the Delaware statute sued the defendant for $20,000, alleging defendant's fishing sloop hit the dam, thereby damaging it. Defendant's sloop was licensed and enrolled under the federal navigation laws. No discussion of this fact occurred which was unusual in view of Marshall's opinion in *Gibbons v. Ogden*.

363. *Id.* at 250.

364. Coleman, *op. cit. supra* note 360, at 42-43, wherein *Willson et al. v. Black Bird Creek Marsh Co.* was credited with being an example of Marshall's confusion on the commerce power as well as introducing the era of the predominance of states rights in commerce clause decisions.


366. For example, see Corwin, *The Commerce Power versus States Rights* (1936), at 5-13, where Marshall's opinion in *Gibbons v. Ogden* was heralded as the basis for a study of the interstate commerce problem.

367. Justice Frankfurter remarked that John Marshall's celebrated opinion in *Gibbons v. Ogden* represented not a solo performance but rather an orchestral rendition. Able argument of Daniel Webster and the collaborative work of his Associate Justices had much influence. See Frankfurter, *op. cit. supra* note 327, at 42-43. It could also be said that the subsequent interpretations of the commerce clause did not rely on Marshall's solo but gave cognizance to Johnson's performance also. A duet, perhaps, then formed the background for the modern symphony of Section 8 decisions.

368. U. S. Const. Art. I, § 5: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member."
discussion prevailed in the 1787 Convention over this clause, and nothing was recorded concerning the general contempt power of the Legislature. In fact, however, little doubt could be found that the delegates to the Convention intended the Federal Legislature to have power to cite non-members for contempt. In the early Colonial days and through the Confederacy no instance could be discovered where legislative bodies refused to exercise their power over contempt citations. Only in this manner were disturbances and obstructions to law-making proceedings eliminated. Authority for this exercise, therefore, remained unquestioned.

The leading case on this subject, in fact, the only case until 1880, was Anderson v. Dunn. In 1818, Lewis Williams, Congressman from North Carolina, introduced in the House of Representatives a letter he had received from Captain John Anderson. Within the envelope was a check for $500 as "part payment for extra trouble" in furthering several claims in which the Captain was interested. Representative John Forsythe of Georgia moved that the Sergeant-at-Arms should take Anderson into custody and hold him at the House's directions. Before the vote, the House's authority to act in this manner was questioned, but Henry Clay as Speaker replied there was no question over the House's power to protect its dignity and privileges. The resolution was then unanimously adopted. When John Anderson was brought before the House, a motion to discharge him was decisively defeated, 117 to 42. As the House of Representatives had indefinitely postponed Anderson's discharge, Thomas Dunn, the Sergeant-at-Arms, held him imprisoned for two months. Anderson, after exhaustive debate, was held guilty of contempt. Speaker Clay then severely reprimanded him before the Legislative body after which he was released.

Upon gaining his freedom Anderson sued Dunn for assault and battery as well as false imprisonment. The defendant pleaded his official position and the power to punish for contempt which rested in the House of Representatives to which plaintiff demurred. Justice Johnson wrote for a unanimous Court and denied recovery to Anderson by overruling the demurrer. From the extensive debate in the House over its constitutional authority to hold for contempt, it was clear that the members considered this power to be given by implica-

369. The only discussion centered around the issue of expelling a member of Congress by a majority or a two-thirds vote. 3 Gilpin, THE PAPERS OF JAMES MADISON (1840), at 1290-1291.
372. 6 Wheat. 204 (U. S. 1821).
373. Potts, cited note 370 supra, at 722-723.
Johnson substantiated this view. First he outlined his broad theory of government:

"The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment."

And then he continued:

"But there is one maxim which necessarily rides over all others, in the practical application of government, it is, that the public functionaries must be left at liberty to exercise the powers which the people have entrusted to them. The interests and dignity of those who created them, require the exertion of the powers indispensable to the attainment of the ends of their creation."

From this analysis, the practical operations of the Legislative Department required that this implied power to commit for contempt should be sustained:

"The source of the power has been recognized to lie in the necessity for self-help and self-defense—the employment of an efficient instrument to protect the institutions of government from unwarranted interferences with their work."

Nor was it odd that Johnson recognized the practical necessity of this contempt authority. He had served in the South Carolina House of Representatives, so experience had taught him the requisites for attaining the proper legislative procedure.

In answer to the fears that Congress would exceed what was considered to be just punishment, the Justice then defined the limits of this contempt power:

"Analogy, and the nature of the case, furnish the answer—'the least possible power adequate to the end proposed.'"

374. Id. at 723.
375. 6 Wheat. 204, 226 (U. S. 1821).
376. Ibid.
378. See page 164, supra. Marshall had served in the Virginia House of Burgesses in 1782 and 1787. Justice Duvall was in the House of Representatives from 1794 to 1796. Justice Story served in Congress in 1808, while in 1805 and 1810 he was a member of the Massachusetts Legislature. Justices Livingston and Todd had no legislative experience. Justice Worthington, due to illness, took no part in the case. The Court was, therefore, accustomed to legislative proceedings and had less difficulty in implying the Constitutional authority. Id. at 215 n. 272.
379. 6 Wheat. 204, 230-231 (U. S. 1821).
Also restricting the Legislature were the general considerations of the extent of this punishment power resting on well-developed precedents: 380

"... the constitution was formed in and for an advanced state of society, and rests at every point on received opinions and fixed ideas. It is not a new creation, but a combination of existing materials, whose property and attributes were familiarly understood and had been determined by reiterated experiments. It is not, therefore, reasoning upon things as they are, to suppose that any deliberative assembly, constituted under it, would ever assert any other rights and powers than those which had been established by long practice, and conceded by public opinion."

The Justice then destroyed the argument that the express power over members of the Legislature did not signify that this power alone was intended. It was necessary to give the contempt power over members as an express provision because of the "delicate nature" of the members as delegates from confederated states. 381 So this express grant did not preclude the implication of the broader inherent power to punish for contempts by non-members. 382

This original doctrine established by Johnson has remained a valuable precedent. As late as 1935, the Supreme Court cited for contempt a witness before a Senate investigating committee who had permitted the removal and destruction of papers he had been subpoenaed to produce. 383 This recent decision probably extinguished any impractical restrictions placed upon the Anderson decision by Kilbourn v. Thompson. 384 Hence, as Dean James Landis wrote, Justice Johnson "made practicality of government into constitutional doctrine" by his full appreciation of the necessity for this implied Congressional power. 385

380. Id. at 233.

381. This argument applied especially to the Senators who were considered in those days as quasi-ambassadors representing the organized governments of their respective states. See Potts, note 370 supra, at 792, n. 28.

382. Judge Johnson had already recognized the implied power of the federal courts to punish for contempt even where their authority rested entirely upon statutes. If the statute failed to express the contempt power, still it could be implied because it was an inherent power in the judiciary system. See United States v. Hudson, 7 Cranch 32, 34, also discussed at page 185 supra (U. S. 1812).


384. 103 U. S. 168 (1880), where it was held that no general power to punish for contempt was vested in either House of Congress. Only in the limited situation where the examination of a witness was necessary for the performance of its legislative duty could Congress fine or imprison a contumacious witness. From pages 199-200 Anderson v. Dunn was commented upon and the broad reasoning of the opinion was overruled and rejected.

Chapter VI
The Militia Clauses

These two clauses represented a compromise in the Constitutional Convention. Many delegates feared the dangers which might be created from a large standing army under federal control. The more enlightened of the body realized, however, that trained men were a necessity to assure adequate defense. Hamilton severely criticized the sole reliance upon the state militia indicating that the Revolution had shown the need for a regular army. In contrast the anti-Federalists were unsatisfied even with the power reserved to the states for controlling the militia since Congressional authority to call forth the state troops might be used to harry the citizens of another state in the execution of national laws. Curiously enough, the first important controversy involving the militia clause arose under a Pennsylvania statute punishing a member of the State militia for refusing to obey the calling forth of the militia by the federal government. In the critical days during the Second War with Great Britain, the states apparently forgot their earlier fears that this Congressional authority was too great. In Houston v. Moore the High Court had to determine the constitutionality of the Pennsylvania statute.

Houston, a private in the Pennsylvania militia, was ordered out by the Governor in pursuance of a requisition of State troops by President Madison in July, 1814. He neglected, however, to march with his detachment to the appointed rendezvous. Under the State act he was court-martialed and fined. Houston sued Moore, the deputy marshal, the legislature of Pennsylvania saw the defects in the means of coercing her citizens into the service; and, unwilling to bear the imputation of lukewarmness in the common cause, legislated on the occasion just as far as the laws of the United States were defective, or not brought into operation. And to vindicate her disinterestedness, she even gratuitously surrenders to the United States the fines to be inflicted. To have paused on legal subtleties with the enemy at her door or to have shrunk from duty under shelter of pretexts which she could remove, would have been equally inconsistent with her character for wisdom and for candour,” stated Johnson in Houston v. Moore, 5 Wheat. 1, 45-46 (U. S. 1820).

386. U. S. Const. Art. I, § 8: “The Congress shall have Power . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the officers, and the Authority of training the Militia according to the discipline prescribed by Congress; . . . .”


388. Wiener, The Militia Clause of the Constitution (1940) 54 Harv. L. Rev. 181, 184-185; Warren, The Making of the Constitution (1928), at 518-520. See also The Federalist No. 29 (Everyman’s ed. 1934), at 137-142, where Hamilton supported Congressional regulation of the state militia and disapproved any danger to the liberty of the states.

389. “The legislature of Pennsylvania . . . saw the defects in the means of coercing her citizens into the service; and, unwilling to bear the imputation of lukewarmness in the common cause, legislated on the occasion just as far as the laws of the United States were defective, or not brought into operation. And to vindicate her disinterestedness, she even gratuitously surrenders to the United States the fines to be inflicted. To have paused on legal subtleties with the enemy at her door or to have shrunk from duty under shelter of pretexts which she could remove, would have been equally inconsistent with her character for wisdom and for candour,” stated Johnson in Houston v. Moore, 5 Wheat. 1, 45-46 (U. S. 1820).

390. 5 Wheat. 1 (U. S. 1820).
in trespass for levying on his property to pay the fine contending that the State law was repugnant to the Federal Constitution.

Justice Washington spoke for the majority upholding the validity of the Pennsylvania act. Under a federal law adopted in 1792, any delinquent militia-man was to be punished if found guilty by a court martial of his fellow militia-officers. This act was amended by a law passed in April, 1814, providing that the militia officers composing the court martial must be drafted, detached, and called forth into the service of the United States. By this amendment and similar provisions of the 1814 act, Washington stated that "actual service" was the criterion of a national militia. Since the punishment under the Congressional act could only be imposed when the state militia had been transferred into a national militia it behooved the Court to investigate the facts to determine if Houston had entered actual federal service or not. If he had, then the State punishment could not be inflicted.

But here, Congress had not provided for federal punishment for delinquents until the militia had been drafted into actual national service, hence, power still remained in the State to punish Houston. When Congress enacted its exclusive authority the Pennsylvania act would be invalid. Since this enactment had not been accomplished Houston was validly convicted under the State law and Moore was guilty of no trespass.

Johnson concurred. His opinion followed the same theme in deciding on these particular facts. The Justice, in addition, emphasized the facts that the Governor had summoned Houston and that the militia-man was not in actual national service until he had reached the rendezvous. Until this time arrived no federal crime was committed. Pennsylvania by its law was merely filling in the gap to impose a sanction upon its local soldiers to force their compliance with the State orders issued under the federal requisition.

More important to this opinion, however, was the cogent dictum by Johnson that both the Federal and State Governments could impose

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391. Id. at 12-32.
392. Id. at 23.
393. Id. at 32-47. Johnson admitted that he had not been able to satisfy himself that this case was a controversy for the cognizance of the Supreme Bench. Plaintiff must show where some constitutional provision had been violated. Houston had no complaint for he admitted his illegal act but contended he was guilty under the federal act only and should therefore not be guilty of a state wrong. While the United States also could complain of nothing, for the Pennsylvania act was a "candid, spontaneous ancillary effort in the service of the United States." Id. at 33. Again Justice Johnson would be willing to dispose of a case on its jurisdictional question instead of confronting the constitutional problem which the other Justices saw in the controversy. "But from respect for the opinion of others," he offered his own remarks on the question.
punishment for the same criminal act. He contradicted Justice Washington's statements on this question:

"Why may not the same offence be made punishable both under the laws of the States, and of the United States? Every citizen of a State owes a double allegiance; he enjoys the protection and participates in the government of both the State and the United States. It is obvious, that in those cases in which the United States may exercise the right of exclusive legislation, it will rest with Congress to determine whether the general government, shall exercise the right of punishing exclusively, or leave the States at liberty to exercise their own discretion. But where the United States cannot assume, or where they have not assumed this exclusive exercise of power, I cannot imagine a reason why the States may not also, if they feel themselves injured by the same offence, assert their right of inflicting punishment also."

The danger of twice subjecting a person for the same offense and jeopardizing his life and limb would not arise under this concept of double allegiance expounded by Justice Johnson because of the "express restraint upon the exercise of the punishing power." Washington also believed that where the federal and state courts have concurrent power no double jeopardy would result for the judgment in one might be pleaded in bar of the prosecution before the other; however, Justice Story in his dissent could not adopt the contention that a conviction or acquittal in a state court barred federal prosecution, for such state control over federal jurisdiction was incomprehensible to this strongly nationalistic Justice.

Subsequent decisions on the problem of double prosecution have followed Justice Johnson. It must be acknowledged that as early as

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394. *Id.* at 32-36.

395. *Id.* at 33-34. The doctrine that several sovereignties may punish for the same crime was also advanced by Johnson at the same term in United States v. Furlong, 5 Wheat. 184, 197 (U. S. 1820): "Robbery on the seas is considered as an offence within the criminal jurisdiction of all nations. It is against all, and punishable by all; and there can be no doubt that the plea of *autre fois acquit* would be good in any civilized State, though resting on a prosecution instituted in the courts of any other civilized State." All of Johnson's associates joined in this pronouncement. Apparently "two distinct wills" could be exercised on one subject simultaneously in this situation.

396. *Id.* at 34. Undoubtedly Johnson had reference to the Fifth Amendment of the Federal Constitution.

397. *Id.* at 31. The question might be asked why Washington should be concerned with double jeopardy if he really believed that "two distinct wills" could not be exercised simultaneously against the same act. Two crimes in the same act were impossible under his concept.

398. *Id.* at 47-76. Story considered Houston to be in actual federal service when the President requisitioned the state troops, otherwise no means for enforcing the national order was obtained. If a recalcitrant or even uninterested state refused to provide any punishment and the militia were not in federal service until the rendezvous was reached, any delinquents before this time would be unpunished. The Federal Government could not be subjected to such a risk—that its commands would be unheeded.
1806 Congress enacted criminal statutes with the "saving" clause that no construction of the statute should deprive the individual states of jurisdiction over offenses made punishable by the federal act. 399 By today numerous decisions have affirmed the Johnsonian theory that coordinate power to punish for the same offense might exist in the Federal and State Governments. 400 Chief Justice Taft tersely summarized, in words reminiscent of Justice Johnson's speaking a century before, the theory of double sovereignty over a crime when he wrote: 401

"We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the Amendment (18th). Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

"It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."

Once again Justice Johnson's constitutional interpretation has become the accepted law, while the belief of his associates was forsaken.

THE BANKRUPTCY CLAUSE

Little discussion on the bankruptcy power granted to Congress occurred in the Convention of 1787. When the Committee on Detail had reported the clause 402 some criticism arose over the broad power since bankruptcies were punishable by death under English laws and several delegates objected to giving this power to the Congress. But on this extensive and delicate subject, other delegates saw no danger of abuse of the power by the Federal Legislature. Only Connecticut voted against the adoption of this section. 403 The general attitude of the public on the bankruptcy clause appeared to favor its adoption with little discussion taking place over its scope: 404

399. 2 Stat. 405 (1806), Act against counterfeiting.
401. United States v. Lanza, 260 U. S. 377, 382 (1922). Defendant pleaded specially in bar to the federal prosecution, alleging that the State of Washington had fined him already for the same offense. The Supreme Court upheld the prosecution's demurrer to the special plea permitting double prosecution for the violation of two separate liquor statutes—National and State—by the same act.
403. 3 Gilpin, The Papers of James Madison (1840) 1481.
"The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question."

The lack of discussion over this broad power was no criterion of the controversial issues which might arise from the authority granted. After the decision in *Sturges v. Crowinshield* 406 the business community and bar were left in doubt over the respective federal and state power in the bankruptcy field. 406 This doubt was resolved in *Ogden v. Saunders*. 407 Since the Court was evenly divided in 1824 the case was reargued in 1825, 1826, and finally in 1827. Because of the Uniform Bankruptcy Bill pending before Congress, the significance of this decision also was greatly emphasized. 408

As will be remembered, Justice Johnson led the majority upholding the power of New York State to enact an insolvency law. 409 The Justice believed that the use of "uniform" meant no "partial" laws affecting the individual states in different degrees. No absolute prohibition of state laws was intended for no exclusive power had been conveyed in the "uniform laws" phrase. In addition the commerce clause acted as an analogy where the states retained power over intra-state commerce while Congress had authority over commerce among the states. Nor could any argument be sustained which proposed that since naturalization rules were to be uniform under the same Section 8, immediately preceding the bankruptcy clause, the general interpretation of its exclusive authority could be implied to bankruptcy laws too. The states never had naturalization power; hence, they relinquished nothing to the Federal Government. Insolvency laws had been common in the various states under the Confederation, so unless a direct prohibition was announced the authority to enact them still remained. Finally the Federal Bankruptcy Act of 1800 had buttressed this theory of the bankruptcy clause: 410

"... that it amounts only to a right to assume the power to legislate on the subject, and, therefore, abrogates or suspends the existing laws, only so far as they may clash with the provisions of the act of Congress."

405. 4 Wheat. 122 (U. S. 1819). See also page 354, supra.
407. 12 Wheat. 213 (U. S. 1827). This case was discussed previously in connection with the contract clause at page 354 et seq., supra.
408. 1 Warren, op. cit. supra note 406, at 681-689.
410. Id. at 278-279. In Wheaton's Reports, this statement was italicized.
Universal acquiescence in this belief was, therefore, sufficient to uphold the constitutionality of the New York statute which did not conflict with any federal act.

The immediate effect of denying exclusive authority to Congress over bankruptcy laws probably was most unfortunate economically. The financial difficulties appearing in the next decade could have been better alleviated by a national statute instead of the numerous state laws. But Johnson's views on the bankruptcy problem were entitled to much more praise than criticism.

To appreciate this laudation, an investigation of the Justice's booklet proposing a Uniform Bankruptcy Law ought to be made. A summary of his proposals must suffice: the bankruptcy system should be incorporated into the judicial system of the Federal Government, a register of bankruptcy should be the common assignee in each district to operate the bankrupt's estate, security for the creditor against frauds and unequal distributions of the assets must be given, any person may become a voluntary bankrupt, only merchants and traders can be forced into involuntary bankruptcy. In general, all these suggestions were eventually adopted. The permission to become a voluntary bankrupt, as a typical example, was not proposed in the Congressional bill which was discussed during the 1820's. Not until 1841 did the Federal Legislature enact a law permitting voluntary bankruptcy. By advancing this statutory suggestion as early as 1820, Justice Johnson allied himself with the far-sighted individuals who sought a workable solution to the bankruptcy situations which protected not only the creditors but also the unfortunate debtors. He disclosed his general attitude on debtor relief when he wrote:

"For it is among the duties of society to enforce the rights of humanity; and both the debtor and the society have their interests in the administration of justice, and in the general good; interests which must not be swallowed up and lost sight of while yielding attention to the claim of the creditor. The debtor may plead the visitations of Providence, and the society has an interest in preserving every member of the community from despondency—in relieving him from a hopeless state of prostration, in which he would be useless to himself, his family, and the community. When that state of things has arrived in which the community has fairly and fully discharged its duties to the creditor, and in which, pursuing the debtor any longer would destroy the one, without bene-

411. 1 Warren, op. cit. supra note 406, at 692.
412. Johnson, A BILL TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY (1820).
413. 5 Stat. 441 (1841). Marshall had already hinted in Sturges v. Crowinsfield, 4 Wheat. 122, 194 (U. S. 1819) that a law allowing voluntary bankruptcy was constitutional.
fitting the other, must always be a question to be determined by
the common guardian of the rights of both; and in this originates
the power exercised by governments in favour of insolvents. It
grows out of the administration of justice, and is a necessary ap-
pendage to it.”

Such language on the sound philosophy behind bankruptcy legislation
demonstrated that Johnson was a century ahead of the narrowly legalis-
tic ideas of his associates. One commentator has observed that this ex-
pression in *Ogden v. Saunders* indicated the heights to which the Jus-
tice could have ascended if he had not at a “relatively early age come
under the restraining influence of Marshall.” 415 Chief Justice Hughes
also recognized the full implications of Justice Johnson’s liberal theories
in the *Minnesota Moratorium* case when he stated that “the prophetic
words of Justice Johnson in *Ogden v. Saunders*” forecasted the devel-
opment of liberalized statutes to relieve suffering debtors in order to
protect the State’s “fundamental interests.” 416 None, therefore, could
deny that the advanced outlook which Johnson utilized on bankruptcy
problems has stamped him as a progressive jurist of the early nine-
teenth century.

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**CONCLUSION**

Any summary of a Justice’s thirty years’ work must be made with
reservations. No perfectly detailed pattern could be expected. The
strains and stresses of not only political and economic elements but also
personal factors preclude a consistent development and design. Never-
theless, the general scheme is discernible.

First, William Johnson’s devoted appreciation of the Constitution
was unquestioned. His own words have removed any doubt which
might arise: 417

“In the constitution of the United States, the most wonderful in-
strument ever drawn by the hand of man, there is a comprehen-
sion and a precision that is unparalleled; and I can truly say, that
after spending my life in studying it, I still daily find in it some
new excellence.”

Next, despite the theories of certain Constitutional historians, Jus-
tice Johnson’s independence of thinking and freedom from Chief Jus-

(1934). See also page 354, supra.
tice Marshall's restraining influence were disclosed in various incidents—his persistence in expressing personal opinions whether concurrences or dissents, and especially the momentous expressions in *Gibbons v. Ogden* and *Ogden v. Saunders*.

Third, when his associates willingly overlooked technical questions of procedure to establish Constitutional precedents, the Justice refused to follow. To him the orderly legal process must be maintained even if the Federal Government were denied support from its judicial department. Yet in these very opinions, Justice Johnson hesitated not to express a fiery spirit of faith in the national government.

As significant historical facts and important legal opinions continue to unfold, one may predict with certainty that the stature of William Johnson will grow. Both his independence as a judicial thinker and his passion for the orderly legal process cannot be forgotten as long as American Constitutional Law develops upon the firm foundations which he helped to lay.418