GIBBONS

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In Gibbons v. Ogden, *the first Supreme Court decision to discuss the Commerce Clause, Chief Justice John Marshall endorsed the notion of a Dormant Commerce Clause but refused to adopt it as constitutional principle. In this article, Professor Norman Williams answers why Marshall hedged on the Dormant Commerce Clause. First, Marshall apprehended the need to provide a comprehensive articulation of the scope of Congress's affirmative regulatory power under the Commerce Clause. Second, Marshall was wary of inserting the judiciary into another battle regarding the constitutional scope of state authority. This reassessment resolves an otherwise inadequately explained historical puzzle regarding the Marshall Court and sheds light upon contemporary debates regarding popular constitutionalism and the interpretive role of the Supreme Court.*

Conventional wisdom traces the origin of the "dormant" Commerce Clause to the Supreme Court's decision in *Cooley v. Board of Wardens*.[1] That wisdom, however, conceals the fact that the existence and scope of the Dormant Commerce Clause was the subject of debate long before the *Cooley* decision. The Dormant Commerce Clause did not simply spring out of thin air in *Cooley*; rather, *Cooley* refined a pre-existing understanding of the Commerce Clause that Chief Justice John Marshall first articulated over twenty-five years earlier in the seminal case *Gibbons v. Ogden*.[2]

To be sure, there is a reason why modern lawyers trace the Dormant Commerce Clause to *Cooley* rather than *Gibbons*, but it is one that provokes an even more puzzling question about the history of the Dormant Commerce Clause. In *Gibbons*, Chief Justice Marshall advanced the idea—upon which the *Cooley* Court based its notion of a Dormant Commerce Clause with respect to certain com-

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[1] 53 U.S. (12 How.) 299 (1851). Both the Court and commentators alike have viewed *Cooley* as the foundational case establishing the "dormant" or "negative" component of the Commerce Clause. *See, e.g.*, CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 87 (1987); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-2, at 1030 & n.7 (3d ed. 2000).

[2] 22 U.S. (9 Wheat.) 1 (1824).

mercial subjects[3]—that the Constitution vested the power over interstate commerce *exclusively* in Congress, thereby divesting the states of authority over interstate commercial activities even in the absence of conflicting congressional legislation regulating those activities. Indeed, Marshall spent a considerable amount of time and effort in his opinion rebutting the contrary interpretation of the Constitution that the states and the federal government shared "concurrent" authority over interstate commerce. Yet, at the end of the day, Marshall refused to ground the decision in *Gibbons*—which invalidated several New York statutes creating a private steamboat monopoly in New York waters—on the Dormant Commerce Clause. Instead, Marshall held that the Federal Navigation Act of 1793[4] preempted New York's authority to limit access to New York waters because, according to Marshall, the Act provided that all vessels holding a federal license under the Act were entitled to enter New York waters to engage in the "coasting trade."[5] In short, Marshall chose to rely on a federal statute, not the Dormant Commerce Clause, to invalidate the New York statutes.

Gibbons has puzzled Supreme Court jurists and constitutional commentators alike for decades. For one, Marshall's reading of the Federal Navigation Act itself was quite a stretch; both contemporaries and modern lawyers have demonstrated that Congress, in passing the Navigation Act, did not intend to displace state regulation of interstate navigation or to require states to open their waters to all federally licensed vessels.[6] Indeed, Marshall himself subsequently cast doubt on his own interpretation of the Navigation Act by holding that the Act did not bar states from limiting access to their waters by building a dam across an otherwise navigable stream.[7]

Even more puzzling was Marshall's tentative but unconsummated embrace of the Dormant Commerce Clause. Though Marshall's nationalist tendencies are often overemphasized,[8] Marshall's affinity for the Dormant Commerce Clause was evident enough in *Gibbons*.

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[3] *See Cooley*, 53 U.S. at 319 ("Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.").

[4] Ch. 8, 1 Stat. 305.

[5] *Gibbons*, 22 U.S. at 214.

[6] *See, e.g., id.* at 231–34 (Johnson, J., concurring); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 407–08 (New York, O. Halsted 1826); Thomas P. Campbell, Jr., *Chancellor Kent, Chief Justice Marshall and the Steamboat Cases*, 25 SYRACUSE L. REV. 497, 526 & n.173 (1974).

[7] Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252 (1829).

[8] *See* William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 895 (1978) (noting that "Marshall's nationalism was more limited in scope than the received learning suggests").

That alone makes his decision to pass over the Dormant Commerce Clause intriguing. In light of the analytical weakness in his statutory preemption ruling, however, Marshall's decision to hedge on the Dormant Commerce Clause seems mystifying.

Not surprisingly, Marshall's hedge has provoked a good deal of commentary, nearly all of it negative. Marshall's choice to praise but ultimately eschew the Dormant Commerce Clause led Felix Frankfurter to opine that Marshall's opinion was "either unconsciously or calculatedly confused."[9] Less caustically but equally critically, James Bradley Thayer lamented that Marshall's opinion demonstrated "a less comprehensive and statesmanlike grasp of the problems and their essential conditions than are found in some other parts of his work."[10] More recently, eminent Marshall Court historian Edward White declared that Marshall's opinion "settled very little and that in an awkward fashion,"[11] while David Currie criticized Marshall for his willingness "to reach out and make one-sided suggestions about an issue that he conceded he did not have to resolve."[12] Even Marshall's biographer (and U.S. Senator) Albert Beveridge—an unabashed admirer and unrepentant defender of the Chief Justice—conceded that Marshall's treatment of the Dormant Commerce Clause was "diffuse, prolix, and indirect" and, ultimately, "vague."[13]

Many theories have been proffered to explain Marshall's choice to rest *Gibbons* on a questionable reading of the Federal Navigation Act rather than on the Dormant Commerce Clause. Some commentators, such as William Crosskey, suggest that a majority of the Justices were not prepared to adopt the Dormant Commerce Clause and that, therefore, Marshall drafted an opinion that went as far as a majority of the Court would allow in praising the virtues of a dormant aspect to the Commerce Clause without actually adopting such a rule as constitutional principle.[14] Others, such as Frankfurter, speculate that Marshall was unsure of the exact contours of the Dormant Commerce Clause and so postponed a conclusive resolution of the point for a

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9 FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE 17 (Quadrangle Books 1964) (1937).

10 JAMES BRADLEY THAYER, JOHN MARSHALL 91 (Da Capo Press 1974) (1901).

11 3–4 G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835, at 579 (1988).

12 David P. Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801–1835*, 49 U. CHI. L. REV. 887, 945 (1982).

13 4 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 434–35, 443 (1919).

14 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 266–67 (1953); *see also* R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 314 (2001) ("The indeterminacy of *Gibbons* was no doubt a reflection of differences of opinions among the justices themselves.").

later case.[15] Still others, such as Charles Warren and Maurice Baxter, suggest that Marshall feared a states'-rights-based backlash were he to rest the decision in *Gibbons* on the nationalist theory that the Commerce Clause itself divested the states of their authority over interstate commercial matters.[16]

At bottom, however, all of the foregoing theories misunderstand the historical context in which Marshall was operating. As I explain, Marshall's decision to hedge on the Dormant Commerce Clause in *Gibbons* was not forced upon him by a majority of justices unwilling to adopt such a principle—he had a firm majority for such a ruling. Nor was he unable to apprehend the exact scope of the Dormant Commerce Clause—his discussion of the matter in *Gibbons* is essentially the one the Court formally adopted in *Cooley*.

Marshall chose to rest the *Gibbons* decision on the Federal Navigation Act because of the complex interplay of two mutually reinforcing concerns. On the one hand, Marshall understood the need to provide a comprehensive articulation of the scope of Congress's affirmative regulatory power under the Commerce Clause. In the wake of the War of 1812, efforts by nationalist leaders in Congress to utilize the federal commerce authority to foster economic growth had been stymied by opponents of such assistance on the ground that Congress's commerce authority empowered Congress only to set the terms of exchange for goods traveling between states. Marshall vehemently disagreed with this crabbed view of Congress's commerce power, but his position as a Supreme Court justice limited his ability to respond directly to congressional opponents of federal power. *Gibbons* provided Marshall with his first and best opportunity to weigh in on this constitutional debate. Resting the decision on the Navigation Act provided Marshall with the pretext to offer a comprehensive discussion of Congress's power under the clause. Had he chosen to ground the decision on the Dormant Commerce Clause—that the Commerce Clause itself divested states of authority over interstate navigation—Marshall would have had no occasion to discuss Congress's regulatory power under the clause. Only the impact of the Commerce Clause on state authority would have been at issue,

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[15] FRANKFURTER, *supra* note 9, at 25, 27; *see also* Campbell, *supra* note 6, at 519 (suggesting that Marshall chose preemption ground because it was "easier"); George L. Haskins, *John Marshall and the Commerce Clause of the Constitution*, 104 U. PA. L. REV. 23, 29 (1955) (suggesting Marshall "was wary of committing himself to a doctrine of exclusive power").

[16] MAURICE G. BAXTER, THE STEAMBOAT MONOPOLY: GIBBONS V. OGDEN, 1824, at 55–57 (1972); 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 627–28 (rev. ed. 1926).

and the scope of Congress's regulatory power would have been left for resolution at some indeterminate, future time.

At the same time, Marshall was wary of inserting the judiciary into another battle regarding the scope of state authority. Marshall viewed Congress, not the courts, as the primary institution charged with protecting and regulating interstate commerce. Though he steadfastly believed in the power of judicial review of state legislation, Marshall understood the dangers of using that power profligately. The Court had reviewed the constitutionality of state economic measures under the Contract Clause—one of the few constitutional restrictions on state authority in the antebellum Constitution—and its experience in the Contract Clause cases had exposed the Court to a great deal of criticism. Congressional opponents of the judiciary and its power of judicial review decried the Court's interference with the states' democratic processes and sponsored measures to weaken the Supreme Court. In the context of this opposition to judicial review, Marshall's choice to eschew the Dormant Commerce Clause was a politically savvy move to spare the Court yet another round of congressional attacks. Marshall understood that, in contrast to Constitution-based rulings setting aside state legislation, which placed the Court in direct confrontation with the states, statute-based rulings deflected such opposition by interposing Congress between the Court and the states. Thus, by relying on the Federal Navigation Act rather than the Dormant Commerce Clause, Marshall minimized the danger to the Court by asserting that it was Congress, not the Court, which chose to displace New York's authority to create the steamboat monopoly.

In short, Marshall foresaw both the need for an elaboration of Congress's affirmative regulatory power and the danger of placing the judiciary at the forefront of the battle against state protectionist legislation. Marshall chose to rest *Gibbons* on the preemptive effect of the Navigation Act rather than the Dormant Commerce Clause because he understood that such a ruling would allow him to achieve the former and avoid the latter.

Answering why Marshall hedged on the Dormant Commerce Clause allows us to better understand the *Gibbons* decision and its allegedly "calculatedly confused" nature. Of equal importance, this understanding of *Gibbons* allows us to better appreciate Marshall and his leadership of the Supreme Court in the early nineteenth century—an immensely important time in which Marshall and the Court elaborated upon the constitutional framework and the role of the Supreme Court in the American Republic, providing substantive content to the vaguely worded phrases of the constitutional text. Despite the over-

whelming attention given to Marshall in the past few years, there has been a noticeable effort by some commentators to dispute the historical status of Marshall. These commentators argue that the Great Chief Justice was, well, not so great.[17] Foremost among these critics is Michael Klarman, who in a provocative article asserted that Marshall's constitutional decisions did not "fundamentally shape[ ] the course of American national development."[18] In particular, Klarman dismisses the significance of *Gibbons* on the ground that, despite Marshall's articulation of an expansive commerce power, Congress failed to utilize the power and enact legislative measures regulating the American economy until the late 1800s.[19] As my analysis indicates, however, Klarman's appraisal of *Gibbons* fails to appreciate what Marshall achieved—in both the short and long run. Marshall did not understand his task as one of persuading Congress to actually enact comprehensive legislation regulating each and every facet of the American economy. Rather, his more limited goal was to persuade the nation that Congress had the constitutional authority to do so. In that task, Marshall was much more successful, both then and now, than Klarman acknowledges.

Lastly, my analysis of *Gibbons* casts light upon the current debate regarding the proper locus of constitutional interpretation. Angered by the Supreme Court's perceived misuse of its power of judicial review, several prominent commentators such as Mark Tushnet and Larry Kramer have called for a re-evaluation of the Court's preeminent status with respect to constitutional interpretation.[20] Kramer envisages a return to an earlier understanding of constitutional government—which he labels "popular constitutionalism"[21]—in which the People, not the judiciary, were understood to be the primary and supreme expositors of the Constitution. More radically, Tushnet calls upon the people to "reclaim" their Constitution from the Supreme Court by repealing the power of judicial review en toto.[22]

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[17] *See generally* ROBERT LOWRY CLINTON, MARBURY V. MADISON AND JUDICIAL REVIEW (1989); J.M. SOSIN, THE ARISTOCRACY OF THE LONG ROBE (1989); James M. O'Fallon, Marbury, 44 STAN. L. REV. 219 (1992).

[18] Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1112 (2001).

[19] *Id.* at 1130–34.

[20] *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 247–48 (2004) [hereinafter KRAMER, THE PEOPLE THEMSELVES]; MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4 (2001) [hereinafter Kramer, *We the Court*].

[21] KRAMER, THE PEOPLE THEMSELVES, *supra* note 20, at 8, 31; Kramer, *We the Court*, *supra* note 20, at 12.

[22] TUSHNET, *supra* note 20, at 194.

Gibbons, of course, does not resolve the ultimate validity of the modern Court's interpretive position or, correspondingly, the propriety of these critics' proposed solutions. There is a limit to which the experience of the Marshall Court can inform our understanding of the modern Court and its relationship to the political branches. The Supreme Court's institutional status vis-à-vis the political branches is a dynamic one, changing over time; the Marshall Court confronted a very different political environment than did the Warren Court or does the Rehnquist Court. That said, the Marshall Court's experiences do offer some lessons for the modern Court and its critics, and *Gibbons* illuminates one such lesson. The Marshall Court operated in an age in which its decisions were not accepted as unassailable statements of revealed constitutional truth—popular constitutionalism and its concomitant demand for the Court to respect the People's views of the Constitution were the order of the day.[23] Consequently, *Gibbons* offers a direct insight into the nature of constitutional interpretation (both inside and outside the Court) in a constitutional order premised upon popular constitutionalism.

On a positive note, Marshall's decision to hedge on the Dormant Commerce Clause so as to respond to congressional opponents of federal power over commerce reveals a subtle yet significant interplay between the Supreme Court, on the one hand, and the Congress and the President, on the other hand, in interpreting the Constitution. At no point in *Gibbons* did Marshall expressly acknowledge that his goal was to weigh in on the constitutional debate taking place within Congress and between Congress and the President regarding the federal commerce power, but that is precisely the point: The Supreme Court's consideration of the constitutional views of the other branches was often purposely concealed during Marshall's tenure, revealing itself only in indirect and subtle ways. As *Gibbons* demonstrates, the Supreme Court's views of the Constitution at the time were not shaped in a vacuum but were forged in the crucible of contemporary political circumstances. While the Supreme Court's views may have diverged from those of some in the political branches—as it did in *Gibbons*—it is a fundamental mistake to believe that the Marshall Court approached these interpretive questions unaware of, or dismissive of, the contrary views held by others.

On a more disconcerting note, *Gibbons* reveals the close connection between the judiciary's interpretive integrity—its propensity to announce its own view of what the Constitution, rightly understood, means—and the confidence it possesses in its interpretive position.

[23] KRAMER, THE PEOPLE THEMSELVES, *supra* note 20, at 189–206.

Today, no one seriously disputes that the decisions accurately reflect the sincerely held views of a majority of the justices—for example, no one believes that the majority in *Bush v. Gore*[24] embraced the Bush campaign's equal-protection challenge so as to avoid political retaliation from a Republican Congress. The public's acceptance of the judiciary's supreme interpretive position, for better or worse, has provided the Court with sufficient interpretive room to construe the Constitution in accordance with its own views of what the Constitution, rightly understood, means.

As *Gibbons* demonstrates, however, popular constitutionalism threatens this interpretive space. In an interpretive world committed to popular constitutionalism, the Court is well aware of its political limitations, and, even more importantly, it will alter constitutional doctrine so as to preserve the Court's institutional standing in the constitutional order when it fears political retaliation. In such cases, the Court's decisions do not represent the sincerely held beliefs of a majority of the justices regarding what the Constitution, rightly understood, means; rather, they represent what a majority of the justices believes will be sufficiently acceptable to the political branches so as to forestall a significant retaliatory response against the Court. Such an interpretive regime may be good or bad—any such judgment must be comparative in nature, evaluating the desirability of a regime of judicial supremacy with its possibility of unilateral judicial error versus a regime of popular constitutionalism with its danger of judicial acquiescence[25]—but it most certainly will not resemble the regime we currently have. A return to popular constitutionalism does not entail simply a more humble and less activist Court; it entails an interpretive regime in which the Court is no longer fully independent.

The organization of this article follows the foregoing analytical track. In Part I, I describe the events leading up to the *Gibbons* decision and its aftermath to provide a more robust context in which to understand Marshall's choice. In Part II, I then demonstrate that Marshall had a solid majority of justices prepared to rest the *Gibbons* decision on the Dormant Commerce Clause. In Part III, I show that, contrary to the prevailing opinion among constitutional commentators, Marshall's choice was not the product of an inability to apprehend the contours of the Dormant Commerce Clause or a fear of a popular backlash against a nationalist interpretation of the Constitution. I then demonstrate in Part IV that Marshall's hedge was

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[24] 531 U.S. 98 (2000).

[25] *Cf.* TUSHNET, *supra* note 20, at 107 (noting that assessment of desirability of judicial review must be made by comparing it to desirability of interpretive regime without judicial review).

the product of two mutually reinforcing political considerations. In Section A, I show that Marshall rested the decision on the Federal Navigation Act because he foresaw the need to rebut the views of influential Congressmen and the President, who held a narrow, crabbed view of Congress's commerce power. In Section B, I then explain that Marshall refused to adopt the Dormant Commerce Clause because he feared that Congress would retaliate against the Court were he to expand the Court's power of judicial review by subjecting state commercial regulations to review under the Dormant Commerce Clause. Finally, in Part V, I assess what *Gibbons* means for Marshall's historical status and, more broadly, what lessons it offers for the twenty-first-century Court.

To be sure, *Gibbons* is one of the great cases of American constitutional history, but its venerable age should not obscure the insight it provides for modern-day constitutional adjudication. Indeed, *Gibbons* offers a cautionary lesson for the current Court. Its power of judicial review has been widely accepted by the political branches and nation, but the Court of the twenty-first century is no different than the Marshall Court in one critical respect: It is still the weakest of the three branches.[26] Though the current Court may possess more freedom than did the Marshall Court in interpreting the Constitution, that freedom is the consequence of the great respect held by the People for the Court. That respect, of course, comes from the considered belief that the Court has done and will continue to do a good job in translating the great but vague commands of the Constitution of 1787 into workable precepts of governance for modern-day America. That confidence comes with a price; as *Gibbons* reminds us, the Court must remain mindful of the political environment in which it operates. The consequences of failing to live within those limits may be great and uniformly negative for the Court.

I
THE NEW YORK STEAMBOAT MONOPOLY AND THE DORMANT COMMERCE CLAUSE

The dramatic story behind the *Gibbons* decision, the vast bulk of which Chief Justice Marshall omitted in his abbreviated, antiseptic statement of the case, is a fascinating tale. This is not the time to recount it in detail,[27] but a more thorough understanding of the cir-

[26] *See, e.g.*, THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (declaring that judiciary is "the least dangerous" branch of federal government because it lacks both force and will).

[27] For an extensive recounting of the history of the case, see generally BAXTER, *supra* note 16.

cumstances that produced this great case offers valuable insight into Marshall's choice to structure the *Gibbons* decision in the manner that he did.

In the eighteenth century, the development of the steam engine unleashed the imaginations of many who foresaw the utility of the new source of power as a means to propel boats for transportation and commerce. In 1798, Robert Livingston, the Chancellor of New York, persuaded the New York Legislature to grant him an exclusive monopoly to run steamboats in New York waters, contingent upon his development of a suitably fast steamboat.[28] After several unsuccessful tests, Livingston teamed with Robert Fulton, an eager, young engineer, and, in 1807, they successfully developed a steamboat that was capable of running at the unprecedented speed of five miles per hour.[29] Enamored of the possibilities offered by the steamboat, the New York Legislature extended for thirty years Livingston and Fulton's monopoly on the right to navigate New York waters under steam power.[30] At the same time, though he had not invented the steamboat, Fulton filed for a federal patent to protect his particular ship design.[31]

Not surprisingly, the economic success of the monopoly began to attract other entrepreneurs intent on developing competing steamboat services. In 1812, Livingston and Fulton successfully defended their monopoly against a challenge by James Van Ingen and a group of businessmen from Albany, who had built a steamboat and begun to carry passengers between Albany and New York City. The New York Court for the Trial of Impeachments and the Correction of Errors, the court of last resort in New York at the time,[32] rejected Van Ingen's Dormant Commerce Clause–based constitutional challenge to the monopoly, holding that the Commerce Clause did not divest the states of authority to regulate commercial activities such as steamship navigation.[33] Livingston and Fulton, however, did not have much time to

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[28] Act of Mar. 27, 1798, ch. 55, 1798 N.Y. Laws 382.

[29] BAXTER, *supra* note 16, at 3–5, 12; 4 BEVERIDGE, *supra* note 13, at 400–01.

[30] Act of Apr. 6, 1807, ch. 165, 1807 N.Y. Laws 213, 214; Act of Apr. 11, 1808, ch. 225, 1808 N.Y. Laws 339.

[31] BAXTER, *supra* note 16, at 14.

[32] A hybrid entity combining elements of both the judicial and legislative branches, the Court of Errors was composed of the Chancellor, the Justices of the Supreme Court of New York, and the members of the New York Senate. N.Y. CONST. of 1777, art. XXXII. Albert Beveridge caustically declared that "[a] more absurdly constituted court cannot well be imagined." 4 BEVERIDGE, *supra* note 13, at 406 n.1.

[33] Livingston v. Van Ingen, 9 Johns. 507, 561 (N.Y. 1812) (Yates, J.); *id.* at 566, 568–69 (Thompson, J.); *id.* at 576–81 (Kent, C.J.); *see also* BAXTER, *supra* note 16, at 21 (describing *Van Ingen* challenge).

savor their legal victory. Livingston died in 1813, and Fulton died in 1815.[34]

By the time of their court victory, though Livingston and Fulton were unaware of it, the events that would lead to the Supreme Court's decision in *Gibbons v. Ogden* had begun to unfold. In 1808, Livingston and Fulton had granted to Livingston's brother, John R. Livingston, the exclusive right to run steamboats between New York City and various points in New Jersey, including Elizabethtown.[35] John Livingston began running a successful steamboat ferry service between Elizabethtown and New York City, which threatened to ruin the competing, non-steam-powered ferry service run by Aaron Ogden.[36] In response, Ogden decided to challenge the Livingston/Fulton monopoly by building a steamboat and lobbying the New York Legislature to repeal the Livingston/Fulton monopoly.[37] After his legislative efforts proved unsuccessful, Ogden capitulated and, in 1815, became a member of the monopoly, purchasing a license from John Livingston that gave Ogden the exclusive right to run a steamboat from Elizabethtown to New York City for a period of ten years.[38]

Ogden's partner in the ferry service was Thomas Gibbons, a successful businessman from Georgia who had moved to New Jersey in 1801 in search of greater commercial opportunities. The partnership between Gibbons and Ogden was a tempestuous one, and, in 1817, after a series of personal disagreements, Gibbons split away from Ogden and established his own steamboat service between Elizabethtown and New York City.[39] Though its significance was not fully understood at the time, Gibbons obtained a federal coasting license for his steamboats.[40]

Infuriated by Gibbons's actions, Ogden filed suit in October 1818 in the New York chancery court, seeking an injunction prohibiting Gibbons from continuing his ferry service.[41] Gibbons's legal position was a difficult one. The New York court was obviously predisposed to favor the validity of the New York statutes as a general matter, and, in this case, the highest court in the state had already upheld the validity

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34 BAXTER, *supra* note 16, at 29, 31.

35 *See* Gibbons v. Ogden, 17 Johns. 488, 489 (N.Y. 1820) (describing indenture dated August 20, 1808).

36 BAXTER, *supra* note 16, at 25.

37 *Id.* at 25–28.

38 *Id.* at 30; *Gibbons*, 17 Johns. at 489 (describing agreement dated May 5, 1815).

39 BAXTER, *supra* note 16, at 31–32.

40 *See Gibbons*, 17 Johns. at 491 (noting that *Bellona* was enrolled and licensed on October 20, 1818, at Perth Amboy, New Jersey).

41 Ogden v. Gibbons, 4 Johns. Ch. 150, 150 (N.Y. Ch. 1819).

of the monopoly in *Van Ingen*.[42] Left with few argumentative options, Gibbons turned to the 1793 Federal Navigation Act and argued that his federal coasting license conferred upon him the right to transport passengers to New York City despite the New York statutes creating the Livingston/Fulton steamboat monopoly. Not surprisingly, Ogden vigorously contested that the federal coasting license nullified the monopoly.[43] There was more than a hint of irony in Ogden's view of the coasting license; only a couple of years earlier—before he became a member of the Livingston/Fulton syndicate—Ogden had procured a coasting license and argued that the license gave him the right to ply New York waters.[44]

Ogden's self-serving change of heart notwithstanding, Chancellor James Kent agreed with Ogden that the federal statute did not confer a right to engage in the coast trade and granted the injunction.[45] According to Kent, the federal license served only to designate boats carrying the license as American in character and to exempt them from the higher duties applicable to foreign vessels.[46] Moreover, Kent pointed out that the federal statute had been passed in 1793, five years before New York had created the Livingston monopoly, and that, at that time, no one thought the federal statute barred New York from enacting the statute.[47]

Gibbons appealed to the Court of Errors, but it unanimously upheld the injunction.[48] In a brief opinion, Justice Jonas Platt adopted Chancellor Kent's interpretation of the federal navigation statute.[49] In fact, Platt wondered whether Congress had the constitutional

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[42] *See* Livingston v. Van Ingen, 9 Johns. 507, 561 (N.Y. 1812).

[43] *Ogden*, 4 Johns. Ch. at 152.

[44] *See* WILLIAM ALEXANDER DUER, A LETTER, ADDRESSED TO CADWALLADER D. COLDEN, ESQUIRE 94–97 (Albany, N.Y., E. & E. Hosford 1817) (reciting Ogden's petition to New York Legislature to repeal Livingston/Fulton monopoly, in which he contends that he has federal coasting license authorizing him to run his steamboat between New Jersey and New York).

[45] *Ogden*, 4 Johns. Ch. at 184.

[46] *Id.* at 157.

[47] *Id.* at 158–59.

[48] Gibbons v. Ogden, 17 Johns. 488 (N.Y. 1820). Historian Edward White suggests that Kent "probably" participated in the Court of Errors's decision, even though he did not draft the decision. *See* 3–4 WHITE, *supra* note 11, at 570; *see also* Campbell, *supra* note 6, at 512 n.85 (suggesting that Kent was "presumably" entitled to participate in decision). It is highly unlikely, however, that Kent participated in the decision in any formal manner since the New York Constitution clearly and expressly provided that, on appeals from the chancery court, the Chancellor was not allowed to sit on the Court of Errors—a prohibition obviously designed to ensure that the Chancellor did not sit on appeals from his own decisions and a prohibition that Chancellor Kent, with his respect for the law, would hardly have flouted. N.Y. CONST. of 1777, art. XXXII.

[49] *Gibbons*, 17 Johns. at 509.

authority to enact a statute overriding the Livingston/Fulton monopoly and allowing any U.S.-licensed steamboat to enter New York waters, but he noted that, whether or not it did, the 1793 statute most certainly was "not of that character."[50] Lastly, with some pique, Platt noted that any other objection to the authority of New York to confer the monopoly upon Livingston and Fulton had been resolved conclusively by the Court of Errors's decision in *Van Ingen*, in which Platt had participated as a state senator at the time and which decision he had joined.[51]

Virtually out of options, Gibbons appealed to the United States Supreme Court. Because of defects in the record,[52] the Supreme Court did not hear the case until the February term in 1824—four years after the Court of Errors's decision was issued.[53] During that time, Justice Brockholst Livingston died and was replaced by Justice Smith Thompson, who, as a justice on the New York Court of Errors, had voted to uphold the constitutionality of the monopoly in *Van Ingen*.[54] Moreover, during that time, Ogden hired the eminent William Pinkney to handle the appeal, but Pinkney died in 1822. Ogden then turned to Thomas Oakley, who had recently served as New York Attorney General, to join Thomas Emmet, the lawyer who had argued on behalf of the monopoly in *Van Ingen*, in presenting the case for the monopoly.[55] Meanwhile, Gibbons retained Daniel Webster, the renowned orator and Supreme Court litigator who had won acclaim for his argument in *McCulloch v. Maryland*,[56] and William Wirt, the current Attorney General of the United States, to present the case against the monopoly.[57] The stage was set for a showdown of historic importance.

The argument in *Gibbons v. Ogden* opened on February 4, 1824, with the gallery overflowing with spectators.[58] Among the observers

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[50] *Id.*

[51] *Id.* at 510 (referencing Livingston v. Van Ingen, 9 Johns. 507 (N.Y. 1812)).

[52] *See* Gibbons v. Ogden, 19 U.S. (6 Wheat.) 448, 450 (1821) (dismissing appeal for want of jurisdiction because record did not show that final decree had been entered by Court of Errors).

[53] BAXTER, *supra* note 16, at 35–36; 4 BEVERIDGE, *supra* note 13, at 413.

[54] *Van Ingen*, 9 Johns. at 569 (Thompson, J.).

[55] BAXTER, *supra* note 16, at 43; Campbell, *supra* note 6, at 514.

[56] 17 U.S. (4 Wheat.) 316 (1819).

[57] Although Wirt was the Attorney General, he was not appearing on behalf of the United States. Like other attorneys general in the early nineteenth century, Wirt continued to represent private clients, such as Gibbons, in addition to performing his public duties. *See* BAXTER, *supra* note 16, at 45–46.

[58] *Id.* at 37; *Supreme Court*, RICHMOND ENQUIRER, Feb. 7, 1824, at 2 (reporting that gallery was "excessively crowded"); *U.S. Supreme Court*, CHARLESTON COURIER, Feb. 12, 1824 (same).

were Secretary of State John Quincy Adams and numerous members of Congress.[59] In fact, so many people crowded into the tiny courtroom in the Capitol's basement that, despite the winter chill outside, the temperature in the courtroom rose so high that, as reported by one newspaper correspondent, large drops of sweat ran down Wirt's face as he argued the case.[60]

For several reasons, it is important to understand the course and structure of the argument. First, as one might expect given the extraordinary assemblage of counsel, the arguments were remarkably sophisticated and learned. Newspapers published accounts of the arguments, with one New York paper declaring that "[p]erhaps there has never been a more elaborate argument before the Supreme Court."[61] After the case, Justice Story praised the arguments of counsel for their "profoundness and sagacity."[62] Even several decades later, Justice James Wayne declared that the arguments in *Gibbons* were not "surpassed by any other case in the reports of courts."[63]

Second and more importantly for present purposes, the course and structure of the argument reveals much about the ensuing decision. In contrast to the practice of the modern Supreme Court, in which written briefs serve as the primary mechanism for presenting the parties' arguments to the Court and oral argument is limited to a total of one hour (half an hour per side) in all but the most exceptional cases,[64] the oral argument was the focal point of an appeal to the Marshall Court. Counsel did not file written briefs detailing their arguments; rather, the oral argument served as the primary, often exclusive means for counsel to explain the case to the Court and present their legal arguments.[65] Not surprisingly, oral arguments could run for days. The oral argument in *Gibbons* lasted five days.

Opening the argument, Webster framed the question as, first, whether New York had the constitutional authority to create the

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[59] *Steam Boat Cause*, CHARLESTON COURIER, Feb. 21, 1824.

[60] *Steam Boat Cause*, CHARLESTON COURIER, Feb. 24, 1824, at 1.

[61] *Steam Boat Cause*, N.Y. EVENING POST, Feb. 13, 1824, at 2; *see also U.S. Supreme Court*, CHARLESTON COURIER, Feb. 12, 1824 (declaring that Webster delivered "one of the most powerful arguments we ever remember to have heard").

[62] *See* EVERETT PEPPERRELL WHEELER, DANIEL WEBSTER: THE EXPOUNDER OF THE CONSTITUTION 59 (1905).

[63] The Passenger Cases, 48 U.S. (7 How.) 283, 437 (1849) (Wayne, J., concurring); *see also* 3–4 WHITE, *supra* note 11, at 571 (describing praise heaped on arguments of counsel in *Gibbons*).

[64] *See* SUP. CT. R. 24, 28.3.

[65] G. Edward White, *Recovering the World of the Marshall Court*, 33 J. MARSHALL L. REV. 781, 788 (2000) (noting that, during Marshall Court, "lawyers did not have to file written briefs before the Court").

steamboat monopoly and, second, if so, whether the monopoly conflicted with any other right under the Constitution or congressional statute.[66] Framing the question in that way placed the Dormant Commerce Clause as the first and primary issue to decide; the claim that the Federal Navigation Act preempted the New York statutes was secondary and to be addressed only if the Court were to decide against Gibbons on the Dormant Commerce Clause. Turning to the Dormant Commerce Clause, Webster argued at great length that the power of Congress over commerce was exclusive and that the New York statutes, as regulations of interstate commerce, were therefore beyond the authority of New York to enact.[67] Only after he had satisfied himself that the Dormant Commerce Clause point was fully made did he turn—briefly—to the preemption claim.[68] Webster's entire argument lasted no more than two-and-a-half hours, the vast majority of which was dedicated to the Dormant Commerce Clause point and only a small portion of which at the end centered on the preemption claim. Indeed, as historian Maurice Baxter has observed, Webster's treatment of the preemption point "seemed collateral and rather weak."[69]

In support of the monopoly, Oakley likewise focused on the question whether the Constitution's allocation of powers to Congress by itself divested the states of power over such subjects.[70] In contrast to Webster, who had not raised the subject, Oakley discussed at length Congress's patent power, contending that the Constitution did not deprive the states of the authority to promote useful innovations by extending exclusive privileges to those who develop profitable uses for new inventions.[71] He then turned to the commerce power and, drawing heavily from Kent's opinion in *Van Ingen*, alleged that such power was held concurrently by the states.[72] Moreover, he asserted that the New York statutes were not regulations of interstate commerce, but rather involved the internal commerce of the state, over which Congress possessed no constitutional authority.[73] Only as an

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66 *Gibbons*, 22 U.S. at 8.

67 *Id.* at 9–27.

68 *Id.* at 27–31.

69 BAXTER, *supra* note 16, at 42; *see also* 1 CROSSKEY, *supra* note 14, at 253 (characterizing Webster's preemption argument as "secondary" in nature); 1 WARREN, *supra* note 16, at 601–02 (noting that Webster "declined to argue" case on grounds other than exclusivity of Congress's commerce power).

70 22 U.S. at 35 (arguing that "an affirmative grant of power to the United States does not, of itself, devest [sic] the States of a like power").

71 *See id.* at 44–60.

72 *Id.* at 60–71.

73 *Id.* at 71–76.

afterthought at the end of his argument did he (like Webster) turn to the preemption claim, which he dismissed on the curious ground that the coasting license could confer rights of trade only upon boats carrying goods, not passengers (to which Congress's commerce power, he contended, did not extend).[74]

Following Oakley, Emmet briefly echoed Oakley's claim that the New York statutes were not regulations of commerce because the vessels in question carried only passengers, not goods for sale,[75] and he then proceeded to argue at length that Congress's power over commerce was narrow in scope and that, in any event, the states possessed a concurrent power over interstate commerce.[76]

Like Webster and Oakley before him, Emmet viewed the preemption issue as secondary to the Dormant Commerce Clause point. The federal coasting license, he contended, could not grant a right to vessel owners to enter state waters against the will of the state because, as a constitutional matter, Congress had no power to prohibit such entry and, therefore, no power to authorize such entry.[77] Rather, following Kent, he argued that the federal coasting license only served to exempt the vessels from the higher duties paid by foreign vessels.[78] With some cheekiness, he then asserted that, even if the coasting license conferred the right of entry into state waters, the New York statutes did not interfere with that right since they did not bar steamboats from entering New York waters, only from using the steam engine as propulsion in such waters.[79] Gibbons and others were perfectly free to navigate "under sail," and, if the trip under sail took longer than under steam propulsion, that was of no legal consequence: "The utmost that can be said is, that the passage may be a little longer, and may be somewhat retarded."[80]

Emmet concluded his argument by returning to the "dormant" Patent Clause issue raised by Oakley. After pointing out that Gibbons possessed no federal patent, Emmet argued at great length that the mere existence of Congress's power to promote the sciences by granting patents did not limit the states from also promoting useful developments through the grant of exclusive rights to use such devel-

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74 *Id.* at 76–77.

75 *Id.* at 84–85; *see also id.* at 89–90 (contending that commerce power does not extend to regulation of passenger ships).

76 *Id.* at 85–131.

77 *Id.* at 131.

78 *Id.* at 132–38.

79 *Id.* at 138–41.

80 *Id.* at 139, 141.

opments in the state.[81] Together, Oakley's and Emmet's arguments in favor of the validity of the monopoly had lasted almost three days.[82]

Concluding the argument against the monopoly, William Wirt also adopted the analytical structure of the other counsel, focusing first on the constitutional issues whether Congress's commerce and patent powers were exclusive and second on the statutory-preemption question.[83] Wirt's arguments regarding the exclusivity of Congress's constitutional powers are notable primarily for the analytical compromise that he proposed. Acknowledging that interstate commerce has many facets and that the states have often adopted commercial regulations affecting interstate commerce, such as inspection and pilotage laws, he proposed the notion of selective exclusivity, according to which some commercial matters were exclusively entrusted to Congress, while others were subject to legislation by either Congress or the states.[84] Though he was unable to describe the line distinguishing the two realms—which subjects were within Congress's exclusive power and which were subject to the concurrent power of the states—he urged that the power over navigation was clearly on the exclusive side of the line.[85] Once again, only as an afterthought did he turn to the preemption claim, which (also like the other counsel) he treated only briefly and superficially at the end of his argument, adding nothing of any substance.[86]

Two salient points emerge from the argument. First, all of the counsel agreed on the analytical structure of the case, focusing initially on the constitutional questions regarding the exclusivity of Congress's patent and commerce powers—the "dormant" Patent and Commerce Clause issues—and only secondarily on the statutory preemption issue. *Second*, and more importantly, all of the counsel devoted the vast majority of their time and effort to the constitutional claims. The statutory preemption issue received only brief attention, invariably at the end of each of their arguments.[87] In fact, Oakley, Emmet, and Wirt all devoted more time to the "dormant" Patent Clause claim—which had not been raised previously in the New York courts—than to the statutory preemption issue, which had been the focus of the

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[81] *Id.* at 141–57.

[82] 1 WARREN, *supra* note 16, at 604 (noting that Oakley's argument consumed one hour on February 4th and entire day of February 5th and that Emmet's argument consumed all of February 6th and two hours on February 7th).

[83] 22 U.S. at 159–82.

[84] *Id.* at 165.

[85] *Id.* at 180–81.

[86] *Id.* at 182–83.

[87] *See* BAXTER, *supra* note 16, at 53 (noting that preemption point had been advanced by counsel with "minimal enthusiasm").

Court of Errors's decision under review. Given the course of the argument, an observer leaving the courtroom on February 9, 1824, could easily have been forgiven for thinking that the statutory preemption claim was a peripheral distraction and that the crux of the case turned upon the Supreme Court's answer to three questions: (1) Whether Congress's power over interstate commerce was exclusive; (2) if so, to what extent; and, (3) whether the New York statutes creating the Livingston/Fulton steamboat monopoly were regulations of interstate commerce within Congress's exclusive realm. Stated bluntly, the existence and scope of the Dormant Commerce Clause was the central question presented to the Court for its decision.[88]

Three weeks later, on March 2, 1824, the Court issued its decision. As we all know, the Court sided with Gibbons and ruled that New York could not create a monopoly for steamboats engaged in interstate commerce. The surprising feature of the decision was the fact that the Court rested its decision not on the Dormant Commerce Clause (or even the "dormant" Patent Clause), but rather on the statutory preemption ground.[89] Announcing the opinion of the Court, Chief Justice Marshall rejected a narrow interpretation of the Commerce Clause that limited it solely to the regulation of the traffic and exchange of goods. Rather, Marshall declared that "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse,"[90] and that commercial intercourse, Marshall continued, includes a system of navigation.[91] Moreover, Congress's power over interstate commerce reached into the interior of each state, empowering Congress to regulate those activities within a state that "affect the States generally."[92] Only the "completely internal commerce" of a state was beyond Congress's constitutional authority.[93] This was a bold, expansive view of Congress's commerce power with dramatic implications for the steamboat monopoly, as Marshall made clear:

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[88] *See* WHITE, *supra* note 11, at 571 ("All the advocates recognized that the *Gibbons* case was essentially a concurrent sovereignty case, testing whether regulatory powers existed in the states after they had been delegated to, but not exercised by, the federal government.").

[89] 22 U.S. at 193, 197.

[90] *Id.* at 189.

[91] *Id.* at 190 ("The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation . . . ."); *see also id.* at 193 ("The word [commerce] used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation, is as expressly granted, as if that term had been added to the word 'commerce.'").

[92] *Id.* at 195.

[93] *Id.*

> The power of Congress, then, comprehends navigation, within the limits of every State in the Union, so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New-York, and act upon the very waters to which the prohibition now under consideration applies.[94]

Thus far in the opinion, Marshall seemed to be tracking Webster's and Wirt's Dormant Commerce Clause analysis; having established that the regulation of interstate navigation was within Congress's commerce power, the only task left was to determine whether that power was exclusive. After briefly summarizing Oakley's and Emmet's various arguments in favor of a concurrent commerce power retained by the states, Marshall offered a point-by-point rebuttal. Contrary to Justice Thompson's conclusion in *Van Ingen*, the commerce power was not akin to the taxation power, which is concurrently held by the Federal Government and the states alike; rather, in a somewhat conclusory fashion, Marshall asserted that a state may tax individuals without assuming any power conferred by the Constitution upon Congress, but when a state regulates commerce, it is "exercising the very power that is granted to Congress."[95] Marshall likewise rejected the notion that the mere fact that states have adopted measures that affect interstate commerce, such as inspection laws, proves that they possess authority to regulate interstate commerce. Rather, as Marshall explained, the source of the state's power to enact those measures stems not from a power over interstate commerce as such (which the Constitution invested in Congress) but from the state's general police powers.[96] Marshall conceded that, in practice, the two powers might look similar and be used to enact virtually identical regulations (such as inspection laws), but he asserted that "[a]ll experience shows, that the same measures . . . may flow from distinct powers; but this does not prove that the powers themselves are identical."[97] And he quickly dispatched claims that Congress had implicitly acknowledged a concurrent power by adopting statutes contemplating state regulation of commerce as resting on a misguided understanding of the relevant statutes.[98]

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[94] *Id.* at 197.

[95] *Id.* at 199.

[96] *See id.* at 203.

[97] *Id.* at 204.

[98] *See id.* at 205–06 (rejecting inference drawn from Congress's passage of statutes requiring U.S. officials to assist in enforcement of state quarantine laws); *id.* at 206–07 (rejecting inference drawn from Congress's passage of statute prohibiting importation of

Conversely, Marshall found "great force" in Webster's and Wirt's contrary arguments in favor of an exclusive commerce power.[99] Referring to Webster's and Wirt's claim that the Commerce Clause's empowerment of Congress "to regulate" interstate commerce necessarily excluded the states from regulating interstate commerce (since regulation presumed uniformity, and uniformity could be obtained only if Congress's commerce power were exclusive), Marshall declared "the Court is not satisfied that it has been refuted."[100]

In short, Marshall had sketched a tentative view of the constitutional allocation of power that entrusted Congress with exclusive authority over all commercial activities that "affect" the states generally but that reserved to the states the authority (via their retained police powers) to enact measures for the protection of their own citizens. To be sure, Marshall did not precisely define the dividing line between these two realms of power, nor was he so naive as to believe that the two realms were clearly distinguishable from each other. To the contrary, he acknowledged that in the "complex" federal system of government created by the Constitution, conflicts regarding the scope of the two realms were inevitable.[101] Nevertheless, Marshall left no doubt of his sympathy for the notion of an exclusive commerce power that divested the states of authority to regulate interstate commerce. Yet, rather than expressly adopt the conclusion that Congress's commerce power was exclusive (at least with respect to interstate navigation), thus divesting the states of authority over such matters, he noted that the Court did not need to decide the matter and determine into which realm the New York statutes fell. In light of the conflict between the Federal Navigation Act and the state statutes creating the steamboat monopoly, "it will be immaterial whether [New York's] laws were passed in virtue of a concurrent power 'to regulate commerce with foreign nations and among the several States,' or in virtue of a power to regulate their domestic trade and police."[102] In short, Marshall not only chose to rest the decision on the statutory preemption ground, he deliberately pointed out that his entire prior discussion of the Dormant Commerce Clause had been dicta.[103]

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slaves in violation of state law); *id.* at 207–09 (rejecting inference drawn from Congress's passage of statute allowing states to adopt pilotage and lighthouse laws).

[99] *Id.* at 209.

[100] *Id.*

[101] *Id.* at 204–05.

[102] *Id.* at 210.

[103] Despite the clarity with which Marshall explained that he need not resolve the matter, some newspaper accounts of the decision treated the decision as firmly establishing

Leaving the Dormant Commerce Clause behind, Marshall turned to the question whether the Federal Navigation Act preempted the New York statutes—the point that all of the counsel had relegated to a brief mention at the end of their respective arguments. Marshall began by pointing out that the Supremacy Clause required state statutes to yield to conflicting federal statutes.[104] Here, he continued, there was no doubt that the New York statute creating the Livingston/Fulton steamboat monopoly conflicted with the Federal Navigation Act.[105] Observing that the Federal Navigation Act provided for the issuance of licenses to engage in the "coasting trade," Marshall declared that "[t]he word 'license,' means permission, or authority; and a license to do any particular thing, is a permission or authority to do that thing."[106] As for Kent's (and Oakley's and Emmet's) interpretation that the license purported only to designate the vessel as American in character, Marshall retorted that the American character of the vessel is conferred by its prior enrollment by the customs collector, not by the collector's subsequent issue of the coasting license.[107] Lastly, Marshall rejected Oakley's fanciful contention that Congress did not have the power to regulate passenger ships, concluding that passenger vessels, as much as cargo vessels, are engaged in commerce and are therefore within Congress's constitutional authority to license to engage in the coastal trade.[108] Thus, Marshall concluded, Gibbons and other shipowners holding a federal coasting license were entitled to enter state waters to engage in the coasting trade despite the existence of state-created monopolies, like the one in New York.

Despite the great amount of time counsel had devoted to the patent power in argument, Marshall declared that the Court's preemption holding made it unnecessary to consider whether Congress's patent power deprived New York of the authority to create the steamboat monopoly.[109] That point—whether there was a "dormant"

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that the commerce power was exclusively vested in Congress. *See, e.g.*, *Steam Boat Controversy*, CHARLESTON COURIER, Mar. 13, 1824.

104 *Gibbons*, 22 U.S. at 209–10; *see also* U.S. CONST. art. VI, cl. 2.

105 *See Gibbons*, 22 U.S. at 211–21.

106 *Id.* at 213.

107 *Id.* at 214; *see also id.* at 215 (ruling that license "give[s] permission to a vessel already proved by her enrolment [sic] to be American, to carry on the coasting trade").

108 *Id.* at 215–17.

109 *Id.* at 221; *see also* BAXTER, *supra* note 16, at 52 (noting that Marshall failed to resolve patent question, issue to which counsel had devoted much of their time).

Patent Clause and its scope—would have to wait a century and a half for resolution.[110]

Concurring in the judgment, Justice Johnson filed a separate opinion in which, unlike Marshall, he expressly adopted the Dormant Commerce Clause. After canvassing the history of internecine commercial warfare among the states that prompted the Constitutional Convention of 1787,[111] he concluded that "the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon."[112] Moreover, the New York statutes creating the steamboat monopoly were plainly within the scope of Congress's exclusive power since navigation and the carrying of trade via ships were clearly part of interstate commerce.[113] Hence, New York was without the constitutional authority to create the steamboat monopoly.

Like Marshall, Johnson acknowledged that the Commerce Clause did not divest the states of all authority over commercial matters and that the line between the commercial matters entrusted exclusively to Congress and those subject to the states' "municipal powers" could not be "drawn with sufficient distinctness."[114] Also like Marshall, he attempted to provide a description of the line, claiming that the key to determining whether a particular law was one that only Congress could enact or one that fell within the states' reserved police powers turned upon the purpose of the law.[115] Statutes designed to protect the health or safety of citizens, such as quarantine laws, fit comfortably within the states' reserved police powers.[116]

Johnson, however, disagreed with Marshall that the Federal Navigation Act had anything to do with the case.[117] While he agreed with Marshall that the enrollment of the vessel itself conferred the American character on the enrolled vessels, he agreed with Kent that the license served only to exempt the vessels from the higher duties

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110 Contrary to Wirt's argument in *Gibbons*, the Court concluded in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 478–79 (1974), that there was no "dormant" Patent Clause. *See also* Goldstein v. California, 412 U.S. 546 (1973) (holding that Congress does not exclusively possess copyright power).

111 *See Gibbons*, 22 U.S. at 223–26 (Johnson, J., concurring in the judgment).

112 *Id.* at 227.

113 *Id.* at 229–30.

114 *Id.* at 238.

115 *Id.* at 235–37.

116 *Id.*

117 Indeed, he claimed that Marshall had missed the point—that Gibbons's right derived from the Constitution, not from a mere statute. *Id.* at 231–32 (contending that "if the licensing act was repealed tomorrow," Gibbons would still be entitled to ply waters of New York).

paid by foreign vessels—a point that Marshall had conveniently failed to address in his opinion.[118]

None of the other justices filed opinions in the case. The decision to strike down the New York steamboat monopoly—at least as applied to vessels carrying the federal coasting license—was unanimous.[119]

The popular reaction to Marshall's decision was immediate and predominantly favorable. Many newspaper reports applauded the decision, declaring it a victory for free navigation of American waters.[120] Despite its length, several papers reprinted Marshall's opinion in full.[121] Even the hometown *New York Evening Post* praised the decision as "one of the most powerful efforts of the human mind that has ever been displayed from the bench of any court."[122] Admittedly, such acclaim was not universal; there were a few reports of the decision that criticized Marshall for construing the power of the federal government too broadly,[123] but such views were in the minority.[124] As Charles Warren observed, "[t]hroughout the United states, the newspapers, regardless of political affiliation and with few exceptions, highly praised the decision and rejoiced over the destruction of the obnoxious steamboat Monopoly."[125]

On a more tangible note, the *Gibbons* decision ushered in a new era in steamboat commerce in New York. Within days of the Supreme Court's decision, steamboats owned by competitors were carrying passengers between New York City and points in Connecticut, New Jersey, and Long Island.[126] Within a year, the

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118 *See id.* at 232.

119 Interestingly, the Supreme Court's decree did not invalidate the steamboat monopoly in its entirety; rather, it declared that the New York statutes were void only as to those vessels, such as Gibbons's, carrying a federal coasting trade license. *See id.* at 240.

120 BAXTER, *supra* note 16, at 70; 4 BEVERIDGE, *supra* note 13, at 445.

121 *See, e.g.*, *Important Opinion of the Supreme Court of the United States on the Steam-Boat Case*, 26 NILES WKLY. REG. 54–62 (1824); *Important Opinion of the Supreme Court of the United States on the Steam-Boat Case*, RICHMOND ENQUIRER, Mar. 12, 1824, at 1; *Important Opinion of the Supreme Court of the United States on the Steam-Boat Case [Concluded]*, RICHMOND ENQUIRER, Mar. 16, 1824, at 1 (running full opinion over two days); *Steam Boat Case*, N.Y. EVENING POST, Mar. 8, 1824, at 1.

122 *From Our Correspondent*, N.Y. EVENING POST, Mar. 5, 1824, at 2; *see also Steam Boat Cause*, N.Y. EVENING POST, Mar. 8, 1824, at 2 ("We presume [Marshall's opinion] will command the assent of every impartial mind competent to embrace such a subject.").

123 *See* RICHMOND ENQUIRER, Mar. 16, 1824, at 3.

124 BAXTER, *supra* note 16, at 70 (noting that reaction to decision, though primarily favorable, was not "uniformly" so); 4 BEVERIDGE, *supra* note 13, at 446 (noting Southern political leaders muted their concerns regarding Marshall's nationalism); Campbell, *supra* note 6, at 523 (noting that only "few" of Marshall's contemporaries criticized opinion).

125 1 WARREN, *supra* note 16, at 612; *see also id.* at 613 n.1 (collecting favorable newspaper accounts).

126 BAXTER, *supra* note 16, at 80; 1 WARREN, *supra* note 16, at 615.

number of steamboats servicing New York City had ballooned from six to forty-three, with twelve boats serving the much coveted New York–Albany route.[127] Even more dramatically, competition on the New York City–Albany route led to a price war that sent prices plummeting from the $7 charged by the Livingston/Fulton monopoly to as low as $1—an 85% drop.[128] Ironically, the new economic order proved too much for Gibbons and Ogden, the two protagonists whose disagreement had led to the landmark decision. Shortly after the decision, both men decided to leave the steamboat business, opening the door for others to offer steamboat service between New Jersey and New York City.[129]

To be sure, the *Gibbons* decision is one of the great constitutional decisions in American history. Marshall's biographer, Albert Beveridge, declared that the *Gibbons* decision "has done more to knit the American people into an indivisible Nation than any other one force in our history, excepting only war."[130] More modestly, one might point to the fact that Marshall's opinion continues to influence current constitutional doctrine.[131]

Yet, as the foregoing description makes clear, there is a puzzle lurking at the heart of Marshall's opinion. The primary issue presented to the Court was whether the Commerce Clause itself divested the states of authority over interstate commerce; the statutory preemption issue—though the basis for the ruling on appeal—was secondary both in the organization and in the time devoted to it by counsel. Moreover, Marshall was clearly sympathetic to the idea of the Dormant Commerce Clause depriving the states of authority over commercial matters even if Congress had not preempted the states by regulating in the particular area.[132] It is for this reason that Marshall's refusal to expressly endorse the Dormant Commerce Clause and to render his own discussion of it pure dicta is so surprising. Marshall was no stranger to dicta,[133] but, equally, there was no obvious need for him to refrain from using the exclusivity of Congress's commerce

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[127] *Steam Boats*, 29 NILES WKLY. REG. 166 (1825); *see also* 1 WARREN, *supra* note 16, at 615.

[128] BAXTER, *supra* note 16, at 81.

[129] *See id.* at 80–81 (noting that Robert Stevens became dominant steamboat operator for routes between New York City and New Jersey).

[130] 4 BEVERIDGE, *supra* note 13, at 429–30.

[131] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 553 (1995) (discussing *Gibbons*); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 251 (1964) (same); *see also infra* text accompanying notes 473–77.

[132] *See* 3–4 WHITE, *supra* note 11, at 579 (noting Marshall's "discomfort" with alternative "concurrent" sovereignty thesis).

[133] *E.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162, 176 (1803) (opining that Madison had violated legal right by refusing to deliver Marbury's commission and that

power over interstate navigation as an additional basis for invalidating the New York steamship monopoly. Marshall's decision to hedge on the Dormant Commerce Clause was a volitional choice, deliberately made. And, as such, the question emerges: Why did he do so?

II
THE JUSTICES' SUPPORT FOR THE DORMANT COMMERCE CLAUSE

A common explanation for Marshall's refusal to hold that the Commerce Clause itself limited the states' authority over interstate commerce is that Marshall needed to accommodate the views of the other Justices, who (so the argument goes) would not have gone along with such a holding.[134] William Crosskey, one of the most vocal proponents of this view, contends that Marshall's hedge was necessitated by a recalcitrant majority of Justices, who were unwilling to endorse a broad, exclusive commerce power divesting the states of power over commercial affairs.[135] Hence, even though he personally endorsed a Dormant Commerce Clause that would invalidate the New York statutes, Marshall crafted his opinion to assuage the majority, striking down the Livingston/Fulton steamboat monopoly on the narrower ground that Congress had preempted the New York statutes by authorizing all licensed, U.S.-flagged vessels to engage in the "coasting trade." Even those commentators who focus on other factors to explain Marshall's hedge—which I address in the following section—rely to some extent on the notion that Marshall was forced by the other Justices to rest the decision on the federal coasting act.[136]

There is an intuitive appeal to this explanation. After all, it explains why Marshall would spend so much time rebutting Oakley and Emmet's arguments in favor of a concurrent state power over interstate commerce and praising Webster's arguments in favor of an exclusive congressional power, yet at the critical moment would

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Marbury was entitled to issuance of writ of mandamus compelling Madison to deliver commission, even though Court lacked jurisdiction to hear Marbury's suit).

134 *See, e.g.*, 1 CROSSKEY, *supra* note 14, at 266–67; NEWMYER, *supra* note 14, at 314.

135 1 CROSSKEY, *supra* note 14, at 266–67. To bolster his point, Crosskey emphasizes that a majority of the Court was from Southern states. *Id.* Crosskey's sectarian explanation, however, does not fit with the historical evidence. Justice Johnson, who was from South Carolina, was the foremost proponent of an exclusive national power, while the principal (and sole) advocate of a concurrent state power over interstate commerce was Justice Smith Thompson, who was from New York.

136 FRANKFURTER, *supra* note 9, at 43 (arguing that Marshall's opinion was "the collaborative product of the whole Court"); NEWMYER, *supra* note 14, at 314 ("The indeterminacy of *Gibbons* was no doubt a reflection of differences of opinions among the justices themselves.").

refrain from adopting Webster's position as a constitutional principle: Marshall went as far as he could, but any further would have fractured the Court and perhaps led to some other Justice writing the opinion of the Court. Moreover, this explanation paints Marshall in heroic tones, attempting to preserve the Union by fighting a "rear-guard" action against the reactionary forces of the "States[']] Rights" camp.[137] Indeed, as Crosskey contends, given the constraints under which Marshall was operating, the wonder is not that Marshall refrained from expressly adopting the Dormant Commerce Clause but that Marshall was able "to say what he said, at all."[138]

Nevertheless, the historical evidence simply does not support the notion that Marshall was forced to hedge on the Dormant Commerce Clause. As I explain in Section A, Marshall had a firm majority of Justices willing to endorse a Dormant Commerce Clause rationale. Moreover, as I explain in Section B, any misgivings or disagreements among the Justices regarding the exact contour or scope of the Dormant Commerce Clause would not have precluded Marshall from relying on it since the Court's deliberative practices provided Marshall with a great deal of freedom in shaping the Court's opinion.

A. The Views of the Marshall Court Justices

At the time, the Court consisted of seven justices: Marshall, Bushrod Washington, William Johnson, Thomas Todd, Joseph Story, Gabriel Duvall, and Smith Thompson. Marshall's sympathy for the Dormant Commerce Clause was evident from his lengthy discussion of the matter. Justice Johnson embraced Gibbons's argument and expressly endorsed the view that the Constitution delegated the commerce power exclusively to Congress, thereby divesting the states of authority over interstate commercial activities.[139]

Likewise, though he did not write separately, Justice Joseph Story—Marshall's closest ally and his alter ego on the Court—clearly embraced the Dormant Commerce Clause. In his *Commentaries on the Constitution of the United States*, Story declared it "settled" that the power to regulate commerce "is exclusive in the government of

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[137] 1 CROSSKEY, *supra* note 14, at 280.

[138] *Id.* at 267.

[139] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 227 (1824).

> 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 but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon.

Id. (Johnson, J., concurring).

the United States."[140] Moreover, several years later in *Mayor of New York v. Miln*,[141] in which the Court upheld New York's power to require that the names of passengers on ships arriving from ports outside the state be transmitted to state officials shortly after a ship docked, Justice Story filed an impassioned dissent, claiming that "[t]he power given to congress to regulate commerce with foreign nations, and among the states, has been deemed exclusive."[142] In fact, Story declared that Chief Justice Marshall's opinion in *Gibbons* had authoritatively resolved the matter.[143]

So too, Justice Bushrod Washington certainly endorsed the view that the commerce power was exclusively vested in the federal government. Justice Washington, the nephew of George Washington and an appointee of the Federalist President John Adams, was an intellectual and judicial ally of both Marshall and Story.[144] Ten years before *Gibbons*, Justice Washington, riding circuit, had opined in *Golden v. Prince* that the grant of power to Congress over bankruptcy was exclusive and divested the states of any concurrent power over the matter.[145] The counter-argument that the states retained a concurrent power to legislate on matters entrusted to Congress whenever Congress had not acted was, Justice Washington thought, "as extravagant as it is novel."[146] To be sure, *Golden* involved Congress's bankruptcy power, not the commerce power, but Justice Washington made clear that his opinion regarding the exclusivity of congressional powers rested on a general view of the relationship between the federal government and the states and that his opinion extended to other congressional powers.[147]

For different reasons, Chief Justice Marshall could also count on the support of Justices Gabriel Duvall and Thomas Todd. Their views on the great constitutional dilemmas that confronted the Marshall

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[140] 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1063, at 512–13 (Boston, Hilliard, Gray, & Co. 1833).

[141] 36 U.S. (11 Pet.) 102 (1837).

[142] *Id.* at 158 (Story, J., dissenting).

[143] *Id.* ("Mr. Chief Justice Marshall, with his accustomed accuracy and fulness [sic] of illustration, reviewed at that time the whole grounds of the controversy; and from that time to the present, the question has been considered (as far as I know) to be at rest.").

[144] BAXTER, *supra* note 16, at 38 (noting that Washington "usually aligned" with Marshall); David A. Faber, *Justice Bushrod Washington and the Age of Discovery in American Law*, 102 W. VA. L. REV. 735, 736 (2000) ("In life, Bushrod Washington was the personal friend, judicial ally, and intellectual companion of both Story and Marshall.").

[145] 10 F. Cas. 542, 545 (C.C.D. Pa. 1814) (No. 5509).

[146] *Id.*

[147] *Id.* (noting that "the constitution of the United States contains a grant of other powers to the general government, which may equally with that immediately under consideration be exercised by the state legislatures, if such a right exist in either case").

Court are obscure to say the least. Neither Duvall[148] nor Todd[149]

[148] In his twenty-four years on the Court, Justice Duvall authored only seventeen opinions, almost all of them for the Court and none of them involving a significant issue from which his views of the Dormant Commerce Clause could be inferred. *See* LeGrand v. Darnall, 27 U.S. (2 Pet.) 664, 670 (1829) (holding that enslaved minor granted manumission by will of owner at age eleven was capable of earning livelihood and therefore entitled to freedom under law of Maryland); Nicholls v. Hodges, 26 U.S. (1 Pet.) 562, 566 (1828) (affirming award of fees to executor of estate for satisfactory settlement of estate but reversing award for services allegedly rendered to decedent by executor prior to death); Parker v. United States, 26 U.S. (1 Pet.) 293, 298 (1828) (holding that inspector general was not entitled to double rations under applicable military regulations); Rhea v. Rhenner, 26 U.S. (1 Pet.) 105, 109 (1828) (holding that, under Maryland law, married woman abandoned by her husband may not sell land without his consent or participation); Piles v. Bouldin, 24 U.S. (11 Wheat.) 325, 331–32 (1826) (holding that statute of limitations bars suit for ejectment where possessor had been in peaceful possession of land for seven years); Walton v. United States, 22 U.S. (9 Wheat.) 651, 658 (1824) (holding that, to preserve claim of error, exception must be taken during trial, not after judgment is rendered); The Frances & Eliza, 21 U.S. (8 Wheat.) 398, 405–06 (1823) (reversing forfeiture of ship under navigation act because true destination of ship was New Orleans); Boyd's Lessee v. Graves, 17 U.S. (4 Wheat.) 513, 517–18 (1819) (holding that plaintiff in ejectment suit may not contest property demarcation made by agreement of parties twenty years earlier); The Neptune, 16 U.S. (3 Wheat.) 601, 609 (1818) (holding that ship was properly forfeited to United States because replacement register was fraudulently obtained by new owner); United States v. Tenbroek, 15 U.S. (2 Wheat.) 248, 258–59 (1817) (holding that rectification of spirits does not constitute distillation of spirits under federal distillation licensing statute); Prince v. Bartlett, 12 U.S. (8 Cranch) 431, 434 (1814) (holding that claim of United States does not have priority over claims of private creditors under federal bankruptcy statute, where private creditors obtained attachment prior to claim of United States); Crowell v. McFadon, 12 U.S. (8 Cranch) 94, 98 (1814) (holding that officer of United States may not be sued for damages in performance of official duties in enforcing congressionally-mandated embargo); United States v. Patterson, 11 U.S. (7 Cranch) 575, 576 (1813) (holding that, in suit by United States to recover on bond, monies owed to debtor may not be credited until actually paid); United States v. January, 11 U.S. (7 Cranch) 572, 575 (1813) (holding that, in suit by United States to recover on bond, debtor may not apply proceeds obtained in performance of duties insured by subsequent bond to discharge earlier bond); Queen v. Hepburn, 11 U.S. (7 Cranch) 290, 298 (1813) (Duvall, J., dissenting) (arguing that, in slave's suit for freedom, hearsay evidence to establish that ancestor was freeman, not slave, was admissible); Freeland v. Heron, Lenox & Co., 11 U.S. (7 Cranch) 147, 151 (1812) (holding that commercial parties had agreed to mode of stating account as existed in London, not Virginia). One of his few separate opinions (in a case involving the interpretation of an ambiguous land patent) consisted but of one cryptic sentence. *See* McIver's Lessee v. Walker, 13 U.S. (9 Cranch) 173, 179 (1815) (Duvall, J., dissenting) ("My opinion is that there is no safe rule but to follow the needle.").

[149] Similarly, in his nineteen years on the Court, Justice Todd authored only fourteen opinions, none of them involving a significant issue from which his views of the Dormant Commerce Clause could be inferred. Rather, all but one of his opinions involved the rights to real property under the laws of the various states. *See* Riggs v. Tayloe, 22 U.S. (9 Wheat.) 483, 487–88 (1824) (holding that parol evidence regarding contents of contract is admissible where both parties to contract have lost contract); Watts v. Lindsey's Heirs, 20 U.S. (7 Wheat.) 158, 163 (1822) (holding that deed was invalid due to inadequate description of property); Miller v. Kerr, 20 U.S. (7 Wheat.) 1, 6–7 (1822) (holding that legal title to land does not vest in individuals who purchased warrant for land obtained by mistake); Clark v. Graham, 19 U.S. (6 Wheat.) 577, 578–80 (1821) (holding that, under Ohio law, deed conveying real property must be witnessed by two individuals to be valid); Perkins v.

wrote many opinions on the bench and never opined on great constitutional matters while on the Court.[150] Indeed, Justice Duvall is most famous (if that is the right characterization) for the fact that the Supreme Court reporters during his time on the bench were not sure of the spelling of his name (Duval versus Duvall)—a slight that seems inconceivable today.[151] Adding further insult, one (only partly) tongue-in-cheek assessment of the individuals who have served on the Supreme Court since its inception found it difficult to determine whether Justice Todd or Justice Duvall was the most "insignificant" Justice ever to sit on the Court, though the study ultimately concluded that the dubious distinction belonged to Justice Duvall.[152]

Nevertheless, it is almost certain that, because of their insignificance, Justices Todd and Duvall would have acquiesced to Marshall in using the Dormant Commerce Clause as an alternative ground upon which to rest the decision.[153] Neither Justice Todd nor Justice Duvall

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Ramsey, 18 U.S. (5 Wheat.) 269, 275–76 (1820) (holding that, under Virginia law, mistake in description of property renders entry invalid); Brown v. Jackson, 16 U.S. (3 Wheat.) 449, 452–53 (1818) (holding that, under Kentucky law, subsequently executed deed did not convey interest in real property that was subject of prior deed); Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 224 (1818) (holding that Tennessee statute of limitations for adverse possession did not begin to run on disputed land in Tennessee claimed by Virginia until 1802 when Tennessee and Virginia resolved border dispute); Ross & Morrison v. Reed, 14 U.S. (1 Wheat.) 482, 486–87 (1816) (holding that there was sufficient evidence of plaintiff's ownership of property located in Tennessee); Danforth's Lessee v. Thomas, 14 U.S. (1 Wheat.) 155, 157–58 (1816) (holding that, under North Carolina law, deed purporting to grant land to plaintiff was invalid by virtue of statute prohibiting surveying of lands reserved for Cherokee Indians); Preston v. Browder, 14 U.S. (1 Wheat.) 115, 124 (1816) (holding that, under North Carolina law, entry made onto land held by Indians through treaty with State was null and void); Vowles v. Craig, 12 U.S. (8 Cranch) 371, 380–81 (1814) (holding that, under Kentucky law, purchaser of specific tract of land is entitled to surplus land contained within said tract); McKim v. Voorhies, 11 U.S. (7 Cranch) 279, 281 (1812) (holding that state court had no power to enjoin enforcement of federal court judgment); Wallen v. Williams, 11 U.S. (7 Cranch) 278, 279 (1812) (Todd, J.) (holding that writ of error may not be used to review issuance of writ of *habere facias* by lower court); Finley v. Lynn, 10 U.S. (6 Cranch) 238, 252 (1810) (Todd, J., concurring in part and dissenting in part) (arguing that plaintiff in equity had waived right to relief).

150 *See* Currie, *supra* note 12, at 970 (noting that Justices Todd, Livingston, and Duvall did not write one "single" constitutional opinion while on Court).

151 *Compare Parker*, 26 U.S. at 293 (stating that "Justice Duval" delivered opinion of Court), *with Tenbroek*, 15 U.S. at 258 (stating that "Justice Duvall" delivered opinion of Court), *and Patterson*, 11 U.S. at 575 (same). The correct spelling—as evidenced by how the Justice signed his correspondence—is "Duvall." *See* 3–4 WHITE, *supra* note 11, at 321.

152 David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466, 466, 470 (1983). Judge Frank Easterbrook disagrees, contending that the distinction belongs to Justice Todd. *See* Frank H. Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. CHI. L. REV. 481, 496 (1983).

153 For example, on the rare occasions that the Court did fracture, Justice Duvall sided with Chief Justice Marshall and Justice Story. *See, e.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 332 (1827).

was particularly interested in the great constitutional issues that preoccupied Chief Justice Marshall. During his time as a lawyer and later as a judge on the Kentucky Court of Appeals, Justice Todd had devoted himself to resolving the ownership of contested lands in the frontier west of the Appalachian Mountains.[154] After President Jefferson appointed him to the Supreme Court, Justice Todd continued to focus on real property disputes in the West.[155] On the constitutional issues that came before the Court during his time as a justice, he was predisposed to follow Marshall, whose views regarding the need for a strong, central government he shared.[156] Indeed, Justice Todd never dissented from any of Chief Justice Marshall's constitutional decisions. If *McCulloch v. Maryland*,[157] with its transformative and expansive interpretation of the Necessary and Proper Clause, did not provoke Justice Todd to dissent from Chief Justice Marshall's views, it is unlikely that the announcement in *Gibbons* of a comparatively more abstract and less threatening, selectively exclusive commerce power would have induced him to split with the Chief Justice. In fact, after Todd's death, Justice Story praised Todd for his assistance in the great constitutional cases, observing that Todd "steadfastly supported the constitutional doctrines which Mr. Chief Justice Marshall promulgated in the name of the Court."[158]

Similarly, Justice Duvall was all too happy to follow Marshall's lead in constitutional cases. A Republican from Maryland who had served as Comptroller of the Treasury for nine years during both Jefferson's and Madison's administrations, Justice Duvall was interested primarily in commercial matters. Although he dissented (without opinion) from Marshall's Contract Clause decision in *Trustees of Dartmouth College v. Woodward*,[159] he otherwise voted

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154 *See* Fred L. Israel, *Thomas Todd*, *in* 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969: THEIR LIVES AND MAJOR OPINIONS 408–09 (Leon Friedman & Fred L. Israel eds., 1969) [hereinafter SUPREME COURT JUSTICES].

155 *See supra* note 149; *see also* NEWMYER, *supra* note 14, at 400 (noting that Todd rode circuit in Kentucky and, as consequence, was "especially versed" in real property law of that state).

156 *See* 3–4 WHITE, *supra* note 11, at 319 (observing that Todd's views "never differ[ed] from Marshall's position on a constitutional issue"); Israel, *supra* note 154, at 411 ("Todd undoubtedly agreed with Marshall's tenets of economic conservatism and with his belief in a strong Union.").

157 17 U.S. (4 Wheat.) 316 (1819).

158 1 LIFE AND LETTERS OF JOSEPH STORY 499 (William W. Story ed., Boston, Charles C. Little & James Brown 1851).

159 17 U.S. (4 Wheat.) 518, 713 (1819) (Duvall, J., dissenting). His refusal to state his reasons for the dissent makes it impossible to know the exact basis for his disagreement with Chief Justice Marshall. The case involved New Hampshire's passage of an act amending the royal charter granted by King George III to the trustees of Dartmouth College. The trustees sued, contending that the Contract Clause in Article I, Section 10 of

consistently with Marshall in favor of Congressional power over commerce and against state authority over the economy.[160] Indeed, Henry Wheaton, one of the Supreme Court reporters during Duvall's time on the bench, wrote that Duvall lacked the imagination to disagree with Marshall and was largely in Story's pocket.[161]

Only Justice Smith Thompson was likely to disagree with Marshall's Dormant Commerce Clause analysis. As noted above, Justice Thompson had first encountered the New York steamboat monopoly in 1812 in *Livingston v. Van Ingen*, in which he issued an opinion upholding the monopoly against Van Ingen's Dormant Commerce Clause challenge.[162] While he had conceded that there might be some powers exclusively vested in the federal government by "necessary implication," he confined such powers to those that "did not antecedently form a part of state sovereignty," and he expressly declared that "the mere grant of a power to congress does not necessarily vest it exclusively in that body."[163] Rather, he analogized the commerce power to the taxing power, which he noted was acknowl-

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the U.S. Constitution forbade any changes to the charter. Chief Justice Marshall agreed with the trustees, ruling that (1) the royal charter was a contract within the protection of the Contract Clause, and (2) the New Hampshire statute amending the charter was an "impair[ment]" of the charter. *See id.* at 640–44, 652–53. In light of the two-prong nature of the decision, Justice Duvall's silence precludes knowing which of the two holdings he rejected.

Though it is somewhat speculative, I suspect that it was the former holding—that the royal charter was a contract entitled to constitutional protection—that formed the basis of his disagreement. That issue predominated in the Court and formed the bulk of both Chief Justice Marshall's opinion for the Court and Justice Story's concurring opinion. *Compare id.* at 627–50 (discussing whether royal charter is contract), *and id.* at 682–706 (Story, J., concurring) (same), *with id.* at 650–53 (discussing whether New Hampshire statute impaired such contract), *and id.* at 706–12 (Story, J., concurring) (same). Moreover, several years after the *Gibbons* decision, Justice Duvall joined Marshall's dissent in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827), in which Marshall offered an even more expansive view of the Contract Clause and argued that it forbade interference with all contracts, both those made before and after the legislative enactment allegedly impairing such contracts. In light of his agreement with Marshall in *Saunders*, it seems likely that Justice Duvall's dissent in *Dartmouth College* was not the product of any disagreement with the Chief Justice regarding the constitutional question of the scope of state authority to abridge contracts; rather, the dissent was the result of a disagreement regarding the relatively unimportant issue whether a royal charter creating a charitable institution creates any contractual obligations for the respective parties to the charter—an issue with no bearing upon Justice Duvall's views of the Commerce Clause and residual state authority over commercial activities.

160 *See* Irving Dilliard, *Gabriel Duvall*, *in* 1 SUPREME COURT JUSTICES, *supra* note 154, at 426.

161 *See* 3–4 WHITE, *supra* note 11, at 327 & n.171 (quoting Letter from Henry Wheaton to Catherine Wheaton (Mar. 21, 1834)).

162 *See supra* text accompanying note 33.

163 Livingston v. Van Ingen, 9 Johns. 507, 565–66 (N.Y. 1812).

edged by all to be vested "concurrent[ly]" in both the states and the federal government.[164]

Moreover, Thompson's views regarding the exclusivity of the commerce power had not changed in the intervening years since *Van Ingen*. His commitment to a strict construction of the commerce power was evident in an opinion he authored thirteen years after *Gibbons* in *Mayor of New York v. Miln*.[165] Concurring in the Court's decision to uphold New York's passenger reporting statute against a Dormant Commerce Clause challenge, Justice Thompson concluded that "the states retain the exercise of powers; which, although they may in some measure partake of the character of commercial regulations, until congress asserts the exercise of the power under the grant of the power to regulate commerce."[166] More specifically, he declared that the states retain an internal police power, which authorizes them to enact a variety of commercial regulations, such as "[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, &c."[167] These bold, uncompromising proclamations of state authority left no doubt of Thompson's sympathy for the states and their constitutional claims of retained state authority.[168]

Justice Thompson, however, was in no position to demand that Marshall rest the Court's decision on the coasting act rather than the Dormant Commerce Clause. Critically, Thompson did not participate in the *Gibbons* case. Due to his daughter's death, Thompson was

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164 *Id.* at 566 (emphasis omitted).

165 36 U.S. (11 Pet.) 102 (1837).

166 *Id.* at 153. Justice Thompson's discussion of the Dormant Commerce Clause in *Miln* leaves some doubt as to whether he disagreed with the Dormant Commerce Clause in principle or only with respect to its application to the particular New York statute. He first argues that, even if the commerce power were exclusively vested in Congress, it is not implicated by the New York passenger reporting statute, which he declares is outside Congress's commerce power because it related to the "purely internal concerns of the state." *Id.* at 147. This latter claim, of course, is consistent with the existence of the Dormant Commerce Clause (though it denies its application to the instant case). However, he later states broadly that "a power admitted to fall within the power to regulate commerce, may be exercised by the states until congress assumes the exercise"—a position utterly inconsistent with the notion of a Dormant Commerce Clause. *Id.* at 149; *see also id.* at 150 (stating that "the law of New York, not coming in conflict with any act of congress, is not void by reason of the *dormant power* to regulate commerce; even if it should be admitted that the subject embraced in that law fell within such power").

167 *Id.* at 147.

168 4 BEVERIDGE, *supra* note 13, at 406 ("Justice Yates and Justice Thompson delivered States Rights opinions that would have done credit to Roane."); 3–4 WHITE, *supra* note 11, at 317 (noting that Thompson was sympathetic to claims of "concurrent state regulatory powers").

absent from the argument in *Gibbons* and did not take his seat at the Court until February 10, 1824—a day after the *Gibbons* argument had concluded.[169] Since he had missed the argument, Thompson took no part in the *Gibbons* discussion or decision.[170] Hence, Thompson's views of the case—whatever they were[171]—would not have inhibited Marshall in the least.

In any event, the important point is that Marshall had a unanimous majority of six justices prepared to join him in holding that the Constitution's grant of power to Congress to regulate commerce divested the states of authority over interstate navigation. Indeed, no less a historian of the Marshall Court than Felix Frankfurter concluded that there was clearly a majority of justices who were prepared to endorse a dormant aspect to the Commerce Clause.[172] In light of that fact, Marshall's reluctance to rest the decision on that ground—at least in part—cannot be grounded on the pragmatic (and very modern) notion that such equivocation was necessary to build a majority for invalidating the New York steamship monopoly.

B. The Marshall Court's Deliberative Practices

Even if some of the Justices harbored some misgivings about the Dormant Commerce Clause, the deliberative practices of the Marshall Court would have made any such compromise unnecessary. Critically (and in contrast to the modern practice), the opinion of the Court was not intended to be, nor was it understood to reflect, the sentiments of each of the Justices who joined in the result. Rather, it served simply as a vehicle to announce the judgment of the Court and provide an explanation for the Court's decision, not necessarily one shared by all

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169 1 WARREN, *supra* note 16, at 607; Campbell, *supra* note 6, at 515.

170 *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, at iii (1824) (noting that Thompson took his seat on February 10th and that Thompson "took no part in the decision of causes argued before that day").

171 Given his absence, it is unknown whether Thompson would have agreed with Marshall that the steamboat monopoly was preempted by the Federal Navigation Act. In his opinion in *Van Ingen*, Thompson had expressly reserved the question of the validity of the Livingston/Fulton steamboat monopoly were Congress to legislate with respect to steamboat navigation. Livingston v. Van Ingen, 9 Johns. 507, 569 (N.Y. 1812) (Thompson, J.). The preemptive effect of the Federal Navigation Act was not raised in the Court of Errors until 1820 in *Gibbons v. Ogden*, 17 Johns. 488, 501–02 (N.Y. 1820) (argument of Jones), and, by that time, Thompson had left the bench to become Secretary of the Navy. Years later, he (accurately) described the *Gibbons* decision as resting on "an actual conflict between the legislation of congress and that of the states," *Miln*, 36 U.S. at 145, but his opinion leaves unresolved whether he would have agreed with that ruling in the first instance or whether he was simply describing the holding of *Gibbons* as he understood it.

172 FRANKFURTER, *supra* note 9, at 16.

of the Justices in the majority.[173] To modern lawyers, such a practice seems hard to fathom: How could a justice not care what was said in the opinion of the Court?

The answer lies in the fact that the Marshall Court held a different jurisprudential view of the law and the role of the judicial decision in law than do modern lawyers. Contrary to modern sentiments, the opinion of the Court was not itself law but rather merely evidence of the law.[174] Law was found, not announced. Moreover, it was understood that a particular opinion might not fully or accurately capture the essence of the law.[175] To the lawyers and jurists of the late eighteenth and early nineteenth centuries, schooled as they were in the common-law tradition, adjudication was a process in which the court continually refined its understanding of the law. No single opinion held talismanic importance; rather, only over a course of time and repeated investigation could the exact content and contours of the law be apprehended. As a consequence, what was said in a particular opinion was not understood to be binding in a strict sense.

As I have discussed elsewhere,[176] the early nineteenth century was a time in which these jurisprudential shibboleths were being challenged and ultimately replaced by our more modern view of the nature of law and the place of the judicial decision in it. The common-law tradition in which law was viewed as independent of human will and as an embodiment of pure reason was replaced by the positivist notion that law was the creation of human beings, replete with all the irrationalities to which humans are susceptible.[177] Moreover, in keeping with this transformation, lawyers and judges began to understand that judicial decisions were not merely imperfect descriptions of the law, but rather law itself, capable of shaping future decisions. This change ushered in a new view of the role of precedent, as courts declared themselves bound by statements made in prior judicial deci-

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173 G. Edward White, *The Working Life of the Marshall Court, 1815–1835*, 70 VA. L. REV. 1, 39 (1984) ("An 'opinion of the Court' merely reflected one justice's effort to advance a formal justification for a majority decision made orally and informally.").

174 1 KENT, *supra* note 6, at 442 (describing judicial decision as "highest evidence which we can have of the law applicable to the subject"); 3–4 WHITE, *supra* note 11, at 195–96 (observing that, during Marshall's time, "judges did not make law but rather only discovered certain universal or fundamental principles").

175 1 KENT, *supra* note 6, at 444 ("Even a series of decisions are not always conclusive evidence of what is law . . . .").

176 *See* Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. DAVIS L. REV. 761, 824 (2004).

177 For a discussion of the common-law tradition of law as reason, see Robert Lowry Clinton, *Classical Legal Naturalism and the Politics of John Marshall's Constitutional Jurisprudence*, 33 J. MARSHALL L. REV. 935, 952–53 (2000).

sions.[178] The Marshall Court lived amidst this transformation, and though the transformation was ongoing, the Court's deliberative practices were rooted in the jurisprudential assumptions of the seventeenth and early eighteenth centuries, not the twentieth or twenty-first centuries.

As Marshall Court historian Edward White cogently observed, these jurisprudential views led the Court to adopt deliberative practices that are notably different from those of the modern Court. For one, the Justices of the Marshall Court did not attribute much significance to the actual wording of the opinion of the Court. As White has explained, "[b]ecause the role of the Court was not to make law but merely to discover and apply it, it was unnecessary for each Justice to explain the reasoning behind his decision."[179]

Moreover, the fact that the wording of the opinion did not carry dispositive jurisprudential weight freed the Justices from much of the labors of opinion drafting. Most notably, draft opinions were rarely circulated among the members of the Court.[180] After a conference at the boardinghouse at which the Justices lived during the terms of the Court—there was no office space or chambers provided to the Justices of the Marshall Court[181]—the justice assigned to draft the opinion of the Court (often Chief Justice Marshall himself in constitutional cases) would prepare an opinion to explain the basis for the Court's judgment as he understood it. That opinion was then read as the decision of the Court, even though the other Justices in the majority may not have previously seen it or expressly assented to it. Thus, as White has observed, the "opinion of the Court"—contrary to its name—was a "highly individualized product that certainly cannot be considered a concerted effort of a unified court."[182]

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178 Williams, *supra* note 176, at 824–25.

179 3–4 WHITE, *supra* note 11, at 199.

180 *Id.* at 188 & n.136; White, *supra* note 173, at 38–39.

181 White, *supra* note 173, at 5.

182 *Id.* at 39. Not surprisingly, the Marshall Court was much more speedy in its rendition of opinions: Without the need to engage in the time-consuming process of preparing a draft opinion, circulating that opinion, modifying it in accordance with the suggestions of other Justices, allowing time for the preparation of separate concurrences and dissents, and responding to those separate opinions, the Marshall Court was able to issue a decision within a few weeks, if not days, of the oral argument in the case. *Id.* at 30–31 (noting that many significant opinions were issued within five days of oral argument). The decision in *Gibbons*, for instance, was rendered a little over three weeks after oral argument. *See* 4 BEVERIDGE, *supra* note 13, at 427 n.3, 429–30 (noting that argument concluded on February 9, 1824, and opinion was issued on March 2, 1824). In contrast, the modern Court—shackled as it is by its laborious opinion-drafting protocol—often requires months to render a decision after oral argument.

These jurisprudential views and the deliberative practices that they generated were reinforced by an institutionalized collegiality created by Marshall himself. The prevailing ethos of the Marshall Court, which Chief Justice Marshall had labored to establish,[183] was to present a unified front to the outside world in which individual personalities were submerged beneath a veneer of a Court speaking as an institution. The most notable manifestation of this fraternal, collective mindset was Marshall's success in replacing the seriatim opinions of the pre-Marshall Courts with an "opinion of the Court." In Marshall's view, separate opinions threatened the institutional standing of the Court—a point that he and the other Justices often made when a particular justice filed a separate opinion.[184] In this fraternal world, the idea of filing a separate opinion to register disagreement with a footnote in the opinion of the Court would never have crossed the mind of a Marshall Court Justice. Thus, even if an individual Justice on the Marshall Court disagreed with some feature of the proposed opinion of the Court, he would not necessarily air that difference of opinion.[185]

On the one hand, these differences in the Marshall Court's deliberative practices preclude drawing the same inference from the other Justices' silence in *Gibbons* as we would such silences by modern justices in contemporary cases.[186] The other Justices may not have read either Chief Justice Marshall's or Justice Johnson's draft opinions, and, even if they had some understanding of what Marshall and Johnson would say (based on the discussion at the boardinghouse), the other Justices were under no obligation to announce that they disagreed with any of the statements therein and detail in what manner

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[183] *See* John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1945*, 77 WASH. U. L.Q. 137, 143–44 (1999) (discussing Chief Justice Marshall's adoption of practice whereby one justice delivered opinion on behalf of whole Court); White, *supra* note 173, at 41–42 (noting that Marshall established custom of having all justices reside at same boardinghouse to foster collective, fraternal camaraderie and established custom of issuing "opinions of the Court" to replace seriatim opinions).

[184] White, *supra* note 173, at 40 & n.148 (recounting Letter from William Johnson to Thomas Jefferson (Dec. 10, 1822), in which Johnson explains that, after he filed separate opinion early in his tenure, he received "nothing but lectures on the indecency of judges cutting at each other, & the loss of reputation which the Virginia appellate court had sustained by pursuing such a course").

[185] *Id.* at 39–40 ("Even justices who would have liked to disagree or to explain their reasoning were likely not to dissent to avoid discord among the Court's members.").

[186] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 689 (2002) (Souter, J., dissenting) (noting that no justice registered disagreement with principle announced in prior case, thereby suggesting endorsement of principle); Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 332 n.31 (1993) (Stevens, J., dissenting) (suggesting that failure of any justice to register disagreement in prior case demonstrates endorsement of prior decision's holding).

they did so. Their silence would not be understood as a personal endorsement of Marshall's statements, and, equally importantly, the individual statements made by Marshall in the opinion of the Court would not strictly bind the Court in subsequent cases (or so they thought at the time). Indeed, once one appreciates the manner in which the Marshall Court operated, the surprising fact is not that the other Justices sat silent after Chief Justice Marshall announced the opinion of the Court tentatively embracing the Dormant Commerce Clause; it is that Justice Johnson was willing to risk his brethren's ire by filing a separate opinion concurring in the judgment to endorse expressly such rule.[187]

On the other hand—and here's the rub—the deliberative practices and jurisprudential assumptions of the Marshall Court also freed Marshall from the laborious task of accommodating the individual views of the other Justices.[188] Since his opinion would not be understood as speaking for the other Justices in anything other than result, there was no need for him to eschew the Dormant Commerce Clause in order to accommodate any misgivings held by the other Justices. Rather, Marshall was perfectly free to adopt the Dormant Commerce Clause as an alternative ground for invalidating New York's steamboat monopoly. That freedom was made all the more real by the fact that a clear majority of the other Justices would have gone along with such a holding, and, even if one or two of them had some misgivings about how he phrased the holding, they in all likelihood would not have publicly aired such disagreement.

In short, understanding the deliberative practices of the Marshall Court accentuates rather than resolves the quandary why Chief Justice Marshall in *Gibbons* hedged on the Dormant Commerce Clause, refusing to ground the decision invalidating New York's steamboat monopoly at least in part on that basis. Marshall's refusal to embrace the exclusivity of Congress's commerce power—a view to which he clearly was sympathetic and would later embrace—was not forced upon the Chief Justice by justices unwilling to endorse such a reading of the Commerce Clause. Rather, the decision was very much his to make.

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[187] Of all the Justices who served with Marshall, Justice Johnson had one of the strongest streaks of independence and, consequently, was the most likely to file a separate opinion. *See* White, *supra* note 173, at 34 (noting that between 1816 and 1823, Justice Johnson accounted for more than one-third of all 32 separate opinions filed and, more specifically, half of all concurrences).

[188] Occasionally, Chief Justice Marshall did just that, *see id.* at 43 (citing Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 206–08 (1819)), but White, after reviewing the decisions of the Marshall Court, concluded that "most" of the Marshall Court's decisions were written in the "unedited language" of John Marshall. *Id.*

III
MARSHALL'S UNDERSTANDING OF THE DORMANT COMMERCE CLAUSE AND ITS IMPLICATIONS FOR STATE SOVEREIGNTY

Acknowledging that Chief Justice Marshall was free to ground the *Gibbons* decision on the Dormant Commerce Clause only deepens the mystery since it places the responsibility for the doctrinal hedge squarely in Marshall's lap. Many commentators theorize that Marshall's decision to avoid formally adopting the Dormant Commerce Clause was a "pragmatic" move made by a politically astute chief justice fearful of antagonizing the political opponents of a strong, central government.[189] Prominent among these commentators is Felix Frankfurter, who declared (before he himself became a Justice) that Marshall disliked the constraining influence of clear doctrine and instead preferred the flexibility provided by the ambiguous, "calculatedly confused" opinion in *Gibbons*.[190] According to Frankfurter, Marshall understood and appreciated the value of limiting state authority over commercial matters by adopting the Dormant Commerce Clause, but he nevertheless "was not yet prepared to transmute this possibility into constitutional doctrine."[191] Frankfurter offers two, somewhat inconsistent theories to explain Marshall's reluctance: first, that Marshall had yet to sort out for himself exactly to what extent the Dormant Commerce Clause divested the states of authority to regulate commercial matters;[192] and second, that Marshall feared a public backlash against a contraction of state authority based on the Dormant Commerce Clause, and so he shrewdly bided his time so as "not to arouse needlessly the combination of forces against the imperceptible but steady enlargement of federal authority."[193] Indeed, Frankfurter sees *Gibbons* as a manifestation of a generally more cautious disposition on Marshall's behalf. Marshall had "too much of an instinct for the practical to attempt rigidities which could not possibly bind the future" and, hence, "his views were often tentative and suggestive."[194]

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189 *See, e.g.*, BAXTER, *supra* note 16, at 56 (contending that Marshall knew he had "to thread his way carefully somewhere between consolidationist nationalism and excessive leniency to states' rights"); 4 BEVERIDGE, *supra* note 13, at 442–43 (noting that Marshall avowed "the most determined Nationalism" but was "cautious" about resting Court's decision on it).

190 FRANKFURTER, *supra* note 9, at 17.

191 *Id.* at 18.

192 *Id.* at 27 (noting that, in *Gibbons*, notion "begins to emerge" that states have control over distinctly local matters within their police powers).

193 *Id.* at 25.

194 *Id.* at 44–45.

Other prominent commentators share Frankfurter's views. Kent Newmyer and Maurice Baxter claim that Marshall foresaw the growing Jacksonian tide of states'-rights sentiment and crafted the opinion so as to quell possible opposition to the decision.[195] Charles Warren in particular points to the hotly contested issue of the regulation of slavery, suggesting that an unrepentantly nationalist decision adopting an exclusive commerce power would have enraged the slave states.[196] In addition, echoing Frankfurter, Newmyer and others believe that Marshall was unable or unwilling to adopt the notion of a selectively exclusive commerce power and that, consequently, he decided to leave for another day the question of (and possible scope of) the Dormant Commerce Clause.[197]

These explanations of Marshall's decision are hardly ones that fans of the Great Chief Justice are likely to embrace. Distilled to their essence, Frankfurter's and Warren's descriptions of the Chief Justice are of a jurist who is either too short-sighted or too fearful (or both) to authoritatively describe the extent to which the Commerce Clause itself restricts state authority over commercial activities. Newmyer's and Baxter's descriptions are only slightly more tempered, suggesting that Marshall's doctrinal maneuver left open the possibility of adopting the Dormant Commerce Clause when political circumstances were more favorable. Ironically, Frankfurter thought himself to be offering reasons to praise Marshall and his "calculatedly confused" opinion in *Gibbons*.

These explanations are an improvement over Crosskey's, but they too miss the mark. As I explain in Section A, Marshall was able to apprehend the extent to which the Commerce Clause divested states of authority over commercial activities; indeed, his elaboration

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[195] NEWMYER, *supra* note 14, at 314 (contending that Marshall "pushed nationalism only as far as the moment allowed but no further"); *see* BAXTER, *supra* note 16, at 56.

[196] 1 WARREN, *supra* note 16, at 627–28.

> So the long-continued controversy as to whether Congress had exclusive or concurrent jurisdiction over commerce was not a conflict between theories of government, or between Nationalism and State-Rights, or between differing legal construction of the Constitution, but was simply the naked issue of State or Federal control of slavery. It was little wonder, therefore, that the Judges of the Court prior to the Civil War displayed great hesitation in deciding this momentous controversy.

Id.; *see also* BAXTER, *supra* note 16, at 56–57.

[197] BAXTER, *supra* note 16, at 51, 55; NEWMYER, *supra* note 14, at 410 (arguing that Marshall's hedge was designed to produce "doctrinal maneuverability" for Supreme Court in future cases); Haskins, *supra* note 15, at 29 (suggesting that Marshall "was wary of committing himself to a doctrine of exclusive power" but also "unwilling to adopt a theory of concurrent power"); *see also* Campbell, *supra* note 6, at 519 (noting Marshall's approval of Dormant Commerce Clause but declaring that he "did not develop it and quickly left it to his sucessors in favor of an easier federal supremacy assertion").

of the matter in *Gibbons* became the accepted description of the Dormant Commerce Clause. In Section B, I then demonstrate that Marshall's reluctance to embrace the Dormant Commerce Clause was not the product of any concern on his part of antagonizing pro-states'-rights forces. Rather, Marshall elaborated a stridently nationalist interpretation of the Commerce Clause, which he knew would inflame defenders of states' rights.

A. Marshall's Understanding of the Dormant Commerce Clause's Scope

Let's take the claim that Marshall was unable to apprehend the exact contours of the Dormant Commerce Clause at the time of the *Gibbons* decision—that, in short, Marshall needed more time to sort out the extent to which the states would be able to regulate economic activities if the Commerce Clause were deemed to vest such power exclusively in Congress. Frankfurter's principal evidence to support this claim is that Marshall rejected the doctrinal compromise proffered by Attorney General Wirt of a selectively exclusive commerce power that divested the states of power only over certain, essentially national matters, such as interstate navigation.[198] Frankfurter speculates that Marshall preferred the idea of a fully exclusive commerce power, but he did not know how to cabin its reach to allow the states to regulate local concerns.[199] To this, Baxter adds that the intellectual environment of the early nineteenth century (which he does not describe in any detail) predisposed Marshall to favor the categorization of governmental powers and, correspondingly, to eschew the division of such powers in the way that Wirt's compromise would require.[200]

This explanation, however, misapprehends both the amount of time and the sophistication of thought that Marshall had given to the question of the extent to which the Constitution's grants of power to Congress worked themselves to divest the states of authority over such matters. Contrary to the implication of Frankfurter's argument, *Gibbons* was not a tentative first step towards resolving the scope of state authority over matters entrusted by the Constitution to Con-

198 FRANKFURTER, *supra* note 9, at 24 (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 180 (1824)).

199 *Id.* at 25.

200 *See* BAXTER, *supra* note 16, at 55 ("Thus the idea of dividing a power and mixing jurisdictions and relying upon degrees of legislative use of power seemed unattractive to the chief justice.") (emphasis omitted); *see also* Campbell, *supra* note 6, at 519 (suggesting that Marshall approved of exclusive commerce power theory, but chose preemption ground because it was "easier").

gress, let alone a preliminary proposal made by a jurist wandering through an area of law with which he was unfamiliar. To the contrary, by the time *Gibbons* came before the Court, Marshall had already begun to formulate his own ideas regarding the extent to which the Constitution's grants of power to Congress operated to divest the states of authority over certain matters.

Marshall's first opportunity to opine on the question arose five years before *Gibbons*, when the Court struck down as unconstitutional a New York bankruptcy statute in *Sturges v. Crowninshield*.[201] Marshall, who wrote for the unanimous Court, rested the decision on the Contract Clause, which he interpreted to prohibit states from enacting retroactive bankruptcy statutes.[202] In the course of his opinion, however, Marshall also touched upon the analytically prior question whether the states had the constitutional authority to enact bankruptcy laws notwithstanding the fact that the Constitution empowered Congress to enact bankruptcy statutes.[203] In short, Marshall was confronted with the question—analogous to that he would take up in *Gibbons*—of a dormant bankruptcy clause divesting states of the power to regulate insolvency in the absence of congressional legislation. Moreover, in the course of the argument, counsel for the debtor (who was urging concurrent state authority over bankruptcy matters) expressly invoked the New York Court of Errors's decision in *Van Ingen*.[204] Hence, no less than five years prior to his decision in *Gibbons*, Marshall was confronted with the analogous question of the preclusive scope of the Constitution's grant of the bankruptcy power to Congress and, moreover, had been exposed to New York's ruling that the Commerce Clause did not divest the states of authority over commercial matters.

Those unfamiliar with *Sturges* will no doubt be surprised to learn that Marshall rejected the notion of a dormant bankruptcy clause and upheld state authority to enact debtor relief laws in the absence of congressional legislation preempting state authority. As Marshall explained (in words that would be quoted back to him five years later), "[i]t is not the mere existence of the power, but its exercise [by Congress], which is incompatible with the exercise of the same power by the States."[205] Indeed, Marshall's language upholding concurrent state authority over insolvency issues seemed so categorical that some commentators, such as Frankfurter and White, have seized upon it as

201 17 U.S. (4 Wheat.) 122 (1819).
202 *Id.* at 207.
203 *Id.* at 192–97.
204 *Id.* at 148–49 (argument of Hunter).
205 *Id.* at 196.

demonstrating an ambivalence on Marshall's part regarding the exclusivity of federal powers.[206]

Far from producing an irreconcilable tension with his subsequent opinion in *Gibbons*, however, Marshall's opinion in *Sturges* reveals that Marshall had already begun to formulate a sophisticated analytical approach to resolving the question of the extent to which the Constitution's allocation of power to Congress deprives the states of authority over the same subjects. First, as a purely technical matter, Marshall made clear that his decision in *Sturges* was not to be understood as a categorical affirmation of concurrent state authority over all subjects entrusted by the Constitution to the federal government. To the contrary, Marshall expressly declared that, even when the Constitution does not expressly forbid the states from acting, the mere grant of authority to Congress may—in certain circumstances—divest the states of power over such subjects.[207] As Marshall explained, such implied exclusivity could result either from the terms of the grant of power or from "the nature of the power" itself.[208] Though Marshall concluded that neither "the peculiar terms" of the bankruptcy power nor its nature signified that such power was entrusted exclusively to the federal government,[209] he made clear that his discussion was limited solely to the bankruptcy power and did not extend to the other, "several grants of power to congress, contained in the constitution."[210] In short, each grant of power was to be taken and analyzed on its own terms, paying due regard to the role of such power in our federal system.

Second, and more importantly, Marshall's discussion of the nature and scope of Congress's bankruptcy power bore a striking similarity to the analytical approach that he would subsequently employ in *Gibbons*. Showing his propensity for classifying statutes by their nature, Marshall declared that there was a difference between bankruptcy laws, which he was willing to assume that Congress was exclusively empowered to enact, and insolvency laws, which the states retained authority to pass.[211] Marshall conceded that the "line of partition" between the two categories of statutes was "not so distinctly marked as to enable any person to say, with positive precision, what belongs exclusively to the one, and not to the other class of laws,"[212]

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206 *See, e.g.*, FRANKFURTER, *supra* note 9, at 16; 3–4 WHITE, *supra* note 11, at 579.
207 *Sturges*, 17 U.S. (4 Wheat.) at 193.
208 *Id.*
209 *Id.*
210 *Id.* at 196.
211 *Id.* at 194.
212 *Id.*

yet he explored whether there was a coherent way in which to distinguish the two types of law.[213] Ultimately, he decided that no such line could be drawn with respect to bankruptcy statutes and that, therefore, it should be left solely to Congress to decide when to displace state insolvency regulations. Nevertheless, Marshall's attempted categorization of bankruptcy and insolvency statutes foreshadowed his analogous efforts in *Gibbons* to distinguish between commercial regulations, which only Congress could enact, and police measures, which the states retained the authority to pass.

In short, Marshall's discussion in *Sturges* reveals that, well before *Gibbons*, Marshall had already formulated an analytical approach for resolving which constitutional grants of power to Congress by themselves divested the states of authority over such subjects (i.e., which powers had a dormant component to them) and how to reconcile such grants of exclusive authority with the acknowledged power of the states to legislate over closely related matters. Thus, contrary to Frankfurter's suggestion that Marshall was intellectually unable to overcome the difficulties posed by a Dormant Commerce Clause, *Gibbons* demonstrates Marshall's ability to refine and apply an analytical approach that he had begun to create no less than five years earlier.

More fundamentally, *Gibbons* itself belies Frankfurter's and others' claims that Marshall was unprepared to embrace the Dormant Commerce Clause because of his inability to perceive how to cabin the preemptive reach of such a ruling. In his opinion in *Gibbons*, though he endorsed the notion that Congress's power over interstate commerce was exclusive, he expressly observed that the states retained the power to adopt measures, such as inspection and quarantine laws, that have a "considerable influence on commerce."[214] The states possessed the power to adopt these measures not by virtue of any concurrent authority over interstate commerce; rather, echoing his distinction between bankruptcy and insolvency statutes in *Sturges*, he declared that the states maintained the power to enact these measures by virtue of their retained police powers, which empower the states to act on an item "before it becomes an article of foreign commerce, or of commerce among the States."[215] To be sure, this division of sovereignty was hardly an obvious one. Marshall gave virtually no

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[213] Marshall's efforts in this respect were not novel. Justice Livingston, riding circuit, had earlier distinguished bankruptcy laws from insolvency statutes on the ground that the former related only to debts incurred by merchants, while the latter related to any and all debts. *See* Adams v. Storey, 1 F. Cas. 141, 142 (C.C.N.Y. 1817) (No. 66).

[214] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824).

[215] *Id.*

indication as to how to identify into which category—commercial or police—a given regulatory action would fall, and modern commentators have enjoyed the sport of demonstrating that the distinction between commercial regulations and police regulations is an illusory one.[216] Even at the time, Marshall apprehended this problem, acknowledging that conflicts regarding which government was empowered to act with respect to some matter were sure to arise.[217]

Nevertheless, it is a long way from embracing the criticism that Marshall's formalistic categorization of governmental actions was unclear to the separate claim that Marshall himself thought it inappropriate to rest the *Gibbons* decision on such ground until he could provide a better definition of the two categories. Marshall had already demonstrated that, when such categorization was impossible—as it was with respect to bankruptcy versus insolvency statutes—he was prepared to hold that the states retained the power to enact measures regarding the contested subject matter until Congress preempted them. In contrast, Marshall's discussion in *Gibbons* clearly reveals that he thought that the distinction between commercial and police regulations was a sufficiently workable one. Indeed, the tone of Marshall's discussion of the Dormant Commerce Clause is a confident one, revealing not the slightest hesitation or concern that his description of the respective spheres of sovereignty over commercial matters was an incoherent or insufficiently detailed one.

Any doubt on this matter is put to rest by subsequent decisions regarding the Dormant Commerce Clause, which confirm that Marshall thought that the framework he announced in *Gibbons* provided a workable foundation for assessing Dormant Commerce Clause challenges. Five years after *Gibbons*, in *Willson v. Black Bird Creek Marsh Co.*,[218] Marshall relied on the distinction between commercial and police regulations to reject a Dormant Commerce Clause challenge to a state law authorizing the building of a dam across a navigable stream. Noting that the dam would increase property values and improve the health of nearby inhabitants by draining a downstream marsh, Marshall ruled that the statute was a police measure and, therefore, did not violate the Dormant Commerce Clause.[219]

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[216] *See, e.g.*, Haskins, *supra* note 15, at 29; *see also* Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 147 (2001) (criticizing Marshall's distinction as "incomplete").

[217] 22 U.S. at 204–05 ("In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous State governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise.").

[218] 27 U.S. (2 Pet.) 245 (1829).

[219] *Id.* at 251.

Indeed, emphasizing the point that he had made earlier in *Gibbons*, he reassured the states that "[m]easures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states."[220]

Similarly, in *Mayor of New York v. Miln*,[221] the Court upheld a state statute requiring ship captains to report certain information regarding their passengers to the city officials shortly after docking. Applying Marshall's *Gibbons* framework, the Court upheld the act because "the act is not a regulation of commerce, but of police."[222] Dissenting, Justice Story contended that the Court had long ago resolved that Congress's commerce power was exclusive, citing *Gibbons*, and that the act, properly understood, was a regulation of commerce.[223] In fact, Story chided the majority for its erroneous categorization of the New York law, declaring that Marshall's discussion in *Gibbons* of the distinction between commercial and police regulations could not have been "better expounded."[224] Moreover, Story's views were clearly those of Marshall. Story announced that Marshall, who had participated in the original argument of the case but who had died before a majority of the Court could agree on a decision,[225] believed that the case "fell directly within the principles established in . . . *Gibbons*."[226]

In short, on the two occasions after *Gibbons* in which Marshall confronted Dormant Commerce Clause challenges to state regulations of commercial matters, Marshall steadfastly adhered to the view that his opinion in *Gibbons* provided the authoritative framework for assessing the constitutional validity of the state regulations. More-

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220 *Id.*

221 36 U.S. (11 Pet.) 102 (1837).

222 *Id.* at 132; *see also* The Passenger Cases, 48 U.S. (7 How.) 283, 429–31 (1849) (Wayne, J.) (stating that, in *Miln*, majority of Court agreed that Congress's commerce power was exclusive, but nevertheless upheld New York statute because it was police regulation).

223 36 U.S. at 156–58 (Story, J., dissenting).

224 *Id.* at 156.

225 *Miln* was originally argued during the January 1834 term, while Marshall was still alive, but the absence of Justice Johnson led to the Court splitting 3-3 on the constitutionality of the statute. *See* 4 BEVERIDGE, *supra* note 13, at 583. Announcing that the Court would not issue a decision in a constitutional case unless a majority agreed on the result, Marshall put the case over for the subsequent term. 33 U.S. (8 Pet.) 118, 122 (1834). The following year, the case was again delayed, this time due to Justice Duvall's resignation. 34 U.S. (9 Pet.) 85 (1835). Marshall died the following July, and the case was reargued in the January 1837 term before the reconstituted Court dominated by President Jackson's appointees, Chief Justice Roger Taney and Associate Justices John McLean, Henry Baldwin, James M. Wayne, and Philip Barbour.

226 *Miln*, 36 U.S. at 161 (Story, J., dissenting).

over, not once did Marshall suggest that his discussion in *Gibbons* was tentative or exploratory—indeed, according to his friend and compatriot Story, Marshall evidently thought that *Gibbons* had actually decided that Congress's power over interstate commerce was exclusive. Nor did Marshall once offer any refinement or modification to the framework that he announced in *Gibbons*. Admittedly, one cannot put too much weight upon these post-*Gibbons* statements (since the certitude and bravado that they exude may have been acquired only after the *Gibbons* decision had been received so well), but they do corroborate the other evidence suggesting that Marshall believed that his analytical approach to the Dormant Commerce Clause was the appropriate one.

These subsequent decisions also illuminate the error in Frankfurter's reliance on the notion that Marshall rejected the doctrinal compromise proffered by Wirt of a selectively exclusive commerce power that divested the states of power only over certain, essentially national matters, such as interstate navigation.[227] Marshall never rejected Wirt's compromise; to the contrary, he embraced it, though in a reconstituted form. Marshall's discussion of Congress's commerce power in *Gibbons* suggests that he believed that Congress's authority was fully exclusive—that the states possessed no concurrent commerce authority over any subject. Yet, Marshall agreed with Wirt that the states retained significant authority to adopt measures that would significantly affect commerce, such as inspection and other health laws. The difference between Marshall and Wirt was formalistic rather than substantive: While Wirt justified the state regulations on the ground that Congress's commerce power was exclusive only with respect to certain essentially national matters and allowed states to adopt commercial regulations regarding other, local concerns, Marshall upheld state power to adopt such measures on the ground that such regulations were police measures, not commercial regulations. Stated differently, Marshall rejected Wirt's proffered notion of concurrent state authority over certain subjects only to re-import that very notion into his framework under the guise that such regulations were acceptable as state police regulations. This was not a rejection of Wirt's proposal; rather, it was a conscious translation of Wirt's proposed compromise in a way that described more accurately (at least in Marshall's eyes) the respective spheres of sovereignty over commercial activities and the basis for retained state authority over some commercial matters.

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[227] FRANKFURTER, *supra* note 9, at 24 (quoting *Gibbons*, 22 U.S. at 180).

In fact, Frankfurter's suggestion that Marshall did not know how to translate his aversion to concurrent state authority into constitutional doctrine suffers from the embarrassing defect that Marshall's own contemporaries—some of who were deeply sympathetic to claims of retained state power—understood *Gibbons* to provide a workable, authoritative framework for assessing Dormant Commerce Clause challenges to state regulations of commercial activities. Marshall's distinction between commercial and police regulations became the accepted touchstone for Dormant Commerce Clause challenges in the decades leading up to the Civil War. Thirty years after *Gibbons*, the Court was unable to describe the contours of the Dormant Commerce Clause any better than that Congress's power was exclusive with respect to "national" matters for which a uniform rule was desirable but concurrent with respect to "local" subjects for which a uniform rule was not necessary—a distinction that was indistinguishable in practice from Marshall's distinction between commercial and police regulations.[228]

B. Marshall and Appeasement

Shifting gears, Frankfurter and others explain Marshall's hedge as the choice of a chief justice politically astute enough to understand that the political context in which he was operating would not welcome a decision resting on the Dormant Commerce Clause. As Frankfurter puts it, Marshall "felt that the time was not ripe" for a ruling embracing a Dormant Commerce Clause.[229] Similarly, Kent Newmyer proclaims without elaboration that Marshall pushed nationalism "as far as the moment allowed."[230]

Stated in such blunt terms, these are not explanations but bare conclusions. Perhaps Marshall did not think that the time was "ripe" for announcing a Dormant Commerce Clause, but that simply begs the question why Marshall thought that the time was not "ripe." Was it because he thought a more suitable case involving a more sympathetic factual circumstance would arise in short order? Or was it because he thought Congress would retaliate against the Court were he to adopt a Dormant Commerce Clause? Or, instead, was it because he was skeptical of the judiciary's institutional ability to police state regulations of commercial activity under the guise of the Dormant Commerce Clause? Any one of these theories could explain why he did not think the time was "ripe" to announce a Dormant

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228 *See* Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 319 (1851).

229 FRANKFURTER, *supra* note 9, at 25.

230 NEWMYER, *supra* note 14, at 314.

Commerce Clause, but, needless to say, each of these theories provides a dramatically different account of Marshall's choice. In short, to claim that Marshall wished to await a later case to announce a Dormant Commerce Clause is simply to restate the obvious fact that Marshall declined to rest *Gibbons* on such ground—it does not explain why Marshall chose to await that later case.

Charles Warren and Maurice Baxter attempt to provide some substance to these ephemeral claims, contending that Marshall's caution was the product of his realization that a nationalist decision adopting the Dormant Commerce Clause and its concomitant restriction on state authority would have provoked pro-states'-rights political forces. Warren in particular suggests that such a decision would have enraged Southern states, which were jealously guarding their authority over slavery.[231]

There is much to be commended in these accounts, which represent a marked improvement over Frankfurter's and Newmyer's vague protestations that the time simply was not "ripe" for announcing the Dormant Commerce Clause. To be sure, Marshall was acutely aware of the political divide between proponents of a strong, central government and their states'-rights opponents. The clash of these opposing forces was the defining political struggle of the antebellum period, and Marshall well understood that the Court played an important part in this struggle. His opinions in *McCulloch v. Maryland*[232] and *Cohens v. Virginia*,[233] both of which had endorsed expansive conceptions of the federal government's power, had provoked vehement criticism from those sympathetic to state authority.[234] In fact, the strident attacks on his *McCulloch* opinion had forced Marshall, writing under the pseudonyms "A Friend of the Union" and "A Friend of the Constitution," to draft a series of newspaper editorials to defend the decision.[235]

The problem with Warren's and Newmyer's explanations, however, is that, while they correctly view *Gibbons* as a response to the political context of the times, they mistakenly attribute Marshall's hedge to a reluctance on Marshall's part to embrace a nationalist

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231 *See* 1 WARREN, *supra* note 16, at 627–28; *see also* BAXTER, *supra* note 16, at 56–57, 59 (suggesting that Marshall's caution was partly product of slavery controversy).

232 17 U.S. (4 Wheat.) 316 (1819).

233 19 U.S. (6 Wheat.) 264 (1821).

234 3–4 WHITE, *supra* note 11, at 552–55 (recounting letters published in *Richmond Enquirer* from Amphictyon—later identified as William Brockenbrough—criticizing decision in *McCulloch*).

235 *Id.* at 555–59, 562–67 (discussing Marshall's "Friend of the Union" and "Friend of the Constitution" editorial letters in Philadelphia *Union* and Alexandria *Gazette*, respectively, in support of *McCulloch*).

interpretation of the Constitution, as he did in *McCulloch* and *Cohens*. As I discuss more fully below,[236] fear of retaliation by pro-states'-rights forces did play a role in Marshall's decision, but it was a fear of retaliation because of the Court's expansion of the power of judicial review, not because of the Court's embrace of nationalism and its concomitant expansion of the power of the federal government. Stated differently, *Gibbons* was not another *McCulloch* or *Cohens*, in which the expansion of federal authority would provoke popular outrage. The steamboat monopoly was widely reviled, and, while Marshall could not be positively certain of the public reaction to the decision as he was drafting it, he must have surely suspected that the decision would be welcomed by a public infuriated by New York's attempt to close its waters to all but the Livingston/Fulton steamboats. In fact, Webster had opened his argument by pointing to the retaliatory statutes passed by other states which were angered by New York's actions.[237] The public desired an end to the monopoly,[238] and this desire provided Marshall with a great deal of discretion in framing his decision.

More fundamentally, there is no evidence to support the notion that Marshall consciously *structured* his *Gibbons* opinion to avoid nationalist overtones that would fuel opposition from pro-states'-rights forces. Marshall was aware of the sensitivity of many to questions of state authority, but that knowledge did not influence his choice regarding which ground—either the statutory preemption/Supremacy Clause ground that he selected or the Dormant Commerce Clause ground that he eschewed—to use to invalidate the steamboat monopoly. Both grounds portended significant limitations on state authority, and, hence, use of either ground would anger the steadfast defenders of state authority over commercial matters. Consequently, it is not sufficient for proponents of this explanation to show that Marshall was aware of pro-states'-rights sentiment; rather, the burden is to demonstrate that he believed that there would be less risk of a states'-rights-oriented backlash if he were to rest the decision on the preemptive effect of the Federal Navigation Act rather than on the notion that the Commerce Clause itself vests Congress with exclusive power with respect to interstate navigation. In short, the inquiry must be comparative in nature, assessing the likely reaction to a decision

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236 *See infra* text accompanying notes 367–82.

237 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 4–5 (1824).

238 1 WARREN, *supra* note 16, at 616 (noting that "the chief importance of the case in the eyes of the public of that day was its effect in shattering the great monopoly against which they had been struggling for fifteen years").

resting on the Dormant Commerce Clause versus the likely reaction to a decision resting on the Federal Navigation Act.

On the one hand, had Marshall expressly adopted the Dormant Commerce Clause as the basis for the decision, it seems highly unlikely that there would have been significant protests against the nationalist implications of the opinion. The endorsement of the Dormant Commerce Clause would not have suggested that the states retained no authority over commercial matters. As noted above, Marshall's own discussion of a Dormant Commerce Clause expressly acknowledged the continuing power of the states to enact police regulations over a wide range of subjects, even though those regulations might affect interstate commerce. Indeed, Marshall himself had attempted to reassure the states of the broad scope of their retained authority under his framework, stating that police measures comprised part of "that *immense* mass of legislation, which embraces every thing within the territory of a state, not surrendered to the general government."[239] Moreover, to invalidate the steamboat monopoly on Dormant Commerce Clause grounds, Marshall would only have had to hold that the grant of a monopoly with respect to interstate navigation was a regulation of commerce and not a police measure. Such a limited holding would hardly have suggested that the states were without authority over a wide range of commercial subjects and, consequently, would have provided little ground for alarm among pro-states'-rights forces. Indeed, even congressmen who took a narrow view of Congress's commerce power agreed that it encompassed interstate navigation and, specifically, the "coasting trade."[240]

On the other hand, what Marshall actually said in *Gibbons* with respect to the statutory preemption point was sure to antagonize those strident pro-states'-rights forces that opposed the expansion of federal authority and its concomitant limitation on state authority. Marshall's choice to rest the decision on the ground that the Federal Navigation Act of 1793 preempted New York's authority to confer an exclusive monopoly for interstate navigation between New Jersey and New York necessitated an exploration of the scope of Congress's affirmative power over commerce. Did Congress have the constitutional authority to regulate coastal navigation between the states? Marshall answered this question unhesitatingly in the affirmative,[241] but, rather than simply offer a short discussion focused on the narrow question of

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239 *Gibbons*, 22 U.S. at 203 (emphasis added).

240 41 ANNALS OF CONG. 1337 (1824) (statement of Rep. Tucker); *see also infra* text accompanying notes 272–74 (discussing views of commerce power held by pro-states'-rights congressmen).

241 22 U.S. at 211.

the Federal Navigation Act's constitutionality, Marshall used the occasion to delineate in a comprehensive fashion the full scope of Congress's power. And, lest anyone forget, it was a breathtaking conception of federal authority.

In words that still echo to this day, Marshall declared that Congress is empowered to regulate "commerce" and that "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse."[242] Moreover, "commerce" includes "navigation," and, therefore, Congress's power to regulate navigation "is as expressly granted, as if that term had been added to the word 'commerce'" in the Constitution.[243] In addition, Marshall declared that Congress's commerce authority is not confined merely to regulating cross-border transactions; rather, Congress's power over commerce extends "into the interior" of each state.[244] And, if that were not enough, Marshall then stated that Congress could regulate those matters "which affect the States generally."[245] To be sure, he reassured the states that Congress's commerce power did not reach "the completely interior traffic of a State,"[246] but he immediately discounted the significance of that reservation of state authority by defining it to encompass only those commercial activities that "are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."[247] Lastly, Marshall declared that the commerce power was plenary; it is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[248] In fact, in a passage sure to enrage pro-states'-rights forces, which steadfastly denied that the Constitution had created a consolidated, national government, Marshall declared that the power over commerce "is vested in Congress as absolutely as it would be in a single government."[249]

This, of course, was an expansive interpretation of Congress's commerce power—one sure to antagonize opponents of federal authority. And it did. Thomas Jefferson reacted with "horror" at the decision's embrace of Congress's power to regulate all forms of com-

242 *Id.* at 189.

243 *Id.* at 190, 193.

244 *Id.* at 194; *see also id.* at 196 ("The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States.").

245 *Id.* at 195.

246 *Id.* at 194.

247 *Id.* at 195.

248 *Id.* at 196.

249 *Id.* at 197.

mercial activity.[250] Congressman John Randolph declared that "[n]ot one or two but many states in the Union see with great concern and alarm the encroachments of the General Government on their authority." Even some newspapers that applauded the end of the steamboat monopoly confessed concern over the broad interpretation of Congress's power that Marshall laid out.[251]

Moreover, Marshall's broad construction of Congress's commerce power was certain to enrage defenders of slavery. Marshall's broad definition of commerce and his assertion that the power intruded into the interior of each state, reaching any and all activities that "affected" other states, provided the constitutional foundation for the congressional regulation and eventual prohibition of slavery. Indeed, had the slave states any doubts on the matter, Marshall went out of his way to dispel them, declaring that the Slave Migration Clause, which prohibited Congress from banning the importation of slaves prior to 1808,[252] was an exception to the general power of Congress to regulate commerce.[253] The implication of that observation was that, after 1808, Congress's commerce authority encompassed a power to regulate slavery.

Not surprisingly, Southern defenders of slavery reacted with alarm. One congressman from Virginia protested that the broad interpretation of federal powers portended "the usurpation, on the part of Congress, of the right to legislate on a subject which, if you once touch, will inevitably throw this country into revolution—I mean that of slavery."[254] In light of this reaction, which Marshall must clearly

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[250] *See* 1 WARREN, *supra* note 16, at 620. A year later, after which time Congress had begun to employ its expansive commerce power, Jefferson lamented that

> [u]nder the power to regulate commerce, they [in Congress] assume indefinitely that also over agriculture and manufactures, and call it regulation to take the earnings of one of these branches of industry, and that too the most depressed, and put them into the pockets of the other, the most flourishing of all.

Letter from Thomas Jefferson to William B. Giles (Dec. 26, 1825), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 354, 355 (Paul Leicester Ford ed., N.Y., G.P. Putnam's Sons 1899).

[251] *See, e.g.*, CITY GAZETTE & COM. DAILY ADVERTISER (Charleston, S.C.), Mar. 10 & 24, 1824 ("By this decision, it would appear that the sovereignty of a State under the Federal Constitution is not unlimited."); RICHMOND ENQUIRER, Mar. 16, 1824, at 3 (contesting decision's implicit embrace of "most liberal" construction of Congress's powers).

[252] U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . . .").

[253] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 206–07 (1824).

[254] 42 ANNALS OF CONG. 2097 (1824) (statement of Rep. Garnett); *see also* 41 ANNALS OF CONG. 1308 (1824) (statement of Rep. Randolph) ("If Congress possesses the power to do what is proposed by this bill [for surveying of roads and canals], they may not only enact a sedition law . . . but they may emancipate every slave in the United States—and with stronger color of reason than they can exercise the power now contended for.").

have foreseen, Warren's suggestion that Marshall's hedge was the product of his desire to avoid a confrontation with pro-slavery forces seems quite far-fetched—a narrow Dormant Commerce Clause holding focusing solely on interstate navigation rights would have done far less to enrage Southern slave politicians than this broad and express declaration of federal constitutional authority over slavery.

Lastly, and perhaps most powerfully, Marshall ended his opinion with a searing criticism of states'-rights forces that dispels any suggestion that Marshall structured his *Gibbons* opinion to appease them. Marshall clearly understood that his opinion was sure to anger opponents of federal authority. Rather than attempt to deflect their criticism, Marshall ended his opinion with a direct challenge to them:

> Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union, are to be contracted by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use.[255]

This was manifestly not an attempted conciliation with pro-states'-rights forces; rather, it was a call to arms for defenders of a strong, central government.

In sum, Marshall's choice to rest the *Gibbons* decision on the preemptive scope of the Federal Navigation Act was not the product of any uncertainty regarding the scope of the Dormant Commerce Clause, nor was it the result of a strategic ploy by Marshall to appease pro-states'-rights forces by disavowing a nationalist interpretation of the Constitution. Marshall chose to hedge on the Dormant Commerce Clause, but it was not a choice made from a lack of imagination or desire to curry favor with pro-states'-rights forces by buying into their crabbed view of federal authority.

IV
THE POSSIBILITY AND PROMISE OF STATUTORY PREEMPTION REVIEW

In my view, Marshall's choice to eschew the Dormant Commerce Clause and rest the *Gibbons* decision on a strained reading of the 1793 Federal Navigation Act was the product of two mutually reinforcing factors. First, Marshall saw the need for a comprehensive articulation of Congress's affirmative power to legislate with regard to interstate

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[255] *Gibbons*, 22 U.S. at 222.

commerce—a need that would have gone unmet had Marshall rested the decision on the narrow ground that the Dormant Commerce Clause divested the states of authority over interstate navigation. Second, Marshall viewed Congress, not the courts, as the primary institution entrusted by the Constitution with the protection of interstate commerce from parochial state legislation. These two concerns—one instrumental, one institutional—ultimately led Marshall to refrain from relying upon the Dormant Commerce Clause as the foundation for the *Gibbons* decision. In short, Marshall's hedge was a strategic choice, and it was one made by a chief justice far-sighted enough to understand the need for and value of empowering Congress, not the courts, in the battle against state protectionist legislation.

A. Defining the Scope of Congress's Regulatory Power

To understand Marshall's choice, one needs to appreciate more fully the historical context in which Marshall was operating at the time of the *Gibbons* decision. Despite the fact that thirty-five years had passed since the ratification of the Constitution, the Supreme Court had yet to address the scope of Congress's commerce authority. This omission had produced a great deal of uncertainty in Congress regarding the scope of its authority, with opponents of federal regulation contesting the constitutional propriety of a whole host of proposed legislative measures that today would be widely acknowledged as within Congress's authority.

One of the most salient legislative debates regarding the scope of Congress's commerce authority during the early nineteenth century involved the authority of Congress to provide for a system of internal improvements, such as roads and canals, in the states. This debate began in earnest after the conclusion of the War of 1812. In 1816, Congress rechartered the Bank of the United States.[256] As consideration for the grant of the exclusive license to operate the bank, Congress required that the bank's incorporators pay a "bonus" of $1.5 million to the United States.[257] Little time elapsed before Congress began contemplating ways in which to spend the bonus. In December of that year, Representative James Calhoun of South Carolina (who had yet to discover the partisan advantage of adopting a virulently pro-states'-rights platform) proposed to set aside the bonus, as well as

256 Act of Apr. 10, 1816, ch. 44, § 1, 3 Stat. 266, 266.

257 *Id.* § 20, 3 Stat. at 276.

the federal government's share of its dividends from the Bank, to fund a system of roads and canals to be surveyed and constructed later.[258]

The "Bonus Bill" prompted an extended and heated debate in Congress regarding the scope of Congress's constitutional authority, including its authority under the Commerce Clause.[259] Critics of the bill argued for a narrow construction of Congress's powers, contesting Congress's constitutional authority to provide for internal improvements.[260] Though the critics failed to prevail in Congress, President Madison in one of his last acts as president vetoed the bill on the ground that Congress lacked the constitutional authority to build roads or canals in the states.[261] As he explained in his veto message to Congress, the power to build internal improvements was not one of the enumerated powers in Article I, Section 8 of the Constitution, nor was it proper to infer such power from the enumerated powers.[262] In fact, Madison expressly declared that the commerce power "cannot include a power to construct roads and canals."[263]

Efforts to provide for a system of roads and canals continued under President Monroe. Hopes were briefly raised when Monroe, in his first inaugural address in 1817, acknowledged the benefit likely to be obtained by constructing a system of roads and canals to "bind the Union more closely together."[264] Yet, Monroe qualified his endorsement with the vague proviso that the development of any system of internal improvements "proceed[ ] always with a Constitutional sanction."[265] The ambiguity latent in that phrase—whether Monroe meant to endorse the constitutionality of such measures or to suggest that there was a constitutional limit to Congress's authority to build roads and canals—was resolved nine months later when Monroe declared in his first annual message to Congress that, despite his

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258 H.R. 29, 14th Cong. § 1 (1816); *see also* 30 ANNALS OF CONG. 296 (1816) (noting Representative Calhoun as sponsor of bill).

259 *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829, at 260–71 (2001).

260 Representative Philip P. Barbour of Virginia, for example, declared that the power to "regulate" commerce did not encompass the power to facilitate commerce, only "to prescribe the manner, terms, and conditions, on which that commerce should be carried on." 30 ANNALS OF CONG. 897 (1817); *id.* at 876 (statement of Rep. Pitkin); *see also* H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 132 (2002) (noting that Bonus Bill was "fiercely opposed by a coalition of Federalists and dissident Republicans").

261 30 ANNALS OF CONG. 1060 (1817).

262 *Id.*

263 *Id.* Madison's veto shocked congressional supporters of the bill, since Madison had expressly endorsed the building of internal improvements in his 1815 annual message to Congress. *See* CURRIE, *supra* note 259, at 269–70; POWELL, *supra* note 260, at 130–31.

264 30 ANNALS OF CONG. 223 (1817).

265 *Id.*

"early impressions," it was now his "settled conviction" that Congress lacked the constitutional authority to provide for internal improvements.[266] Congress, he urged, should turn its attention to proposing a constitutional amendment granting it power to construct internal improvements.[267]

Monroe's remarks galvanized proponents of federal public works. The day after Monroe delivered his message, the Speaker of the House, Henry Clay, appointed a select committee for internal improvements to report on the President's message.[268] The committee, chaired by Representative Henry St. George Tucker of Virginia (the son of the famous jurist), took little time to formulate a report rebutting Monroe's constitutional claims. According to the committee's report, Congress had the constitutional authority to build roads and canals so long as the affected states consented to such improvements.[269] Though the committee rested its conclusion primarily on the Constitution's grant of authority to establish postroads and its delegation of military power to the federal government, the committee also invoked Congress's commerce power. "[T]he power to make canals and roads, for the promotion and safety of internal commerce between the several States," the committee reported, "may justly be considered as not less incidental to the regulation of internal commerce than many of the powers exercised under the authority to regulate foreign commerce are accessary [sic] to that power."[270] Hence, the committee recommended reintroducing the Bonus Bill partly in order "to promote and give security to the internal commerce among the several States."[271]

Opponents of federal power seized upon the select committee's invocation of the commerce power, declaring that the committee's conclusion that the power to regulate commerce included the power to facilitate it would authorize Congress to undertake a myriad of measures under the guise of "facilitating" commerce. Representative Alexander Smyth of Virginia warned that, if the committee's interpretation were correct, "Congress may assume the whole internal legislation of the nation; the whole administration of justice; the whole police, as well of the country as of cities; for all these will facilitate and

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266 30 ANNALS OF CONG. 18 (1817).

267 *Id.*

268 *Id.* at 405; *see also* POWELL, *supra* note 260, at 138 (stating that Clay "stacked" committee with nationalists).

269 31 ANNALS OF CONG. 460 (1817).

270 *Id.* at 457.

271 *Id.* at 460.

give security to internal commerce."[272] Rather, Smyth asserted, the commerce power authorized Congress only to "lay duties on imports from another State, designate ports, prescribe rules for the coasting trade, grant licenses, and so on."[273] Representative (and future Supreme Court Justice) Philip Barbour declared that Congress could only "prescribe the terms, manner, and conditions on which that trade should be carried on."[274]

This debate culminated in an equivocal result. Unable to muster the support to reenact the Bonus Bill,[275] the House supporters of internal improvements put forward four nonbinding resolutions for consideration. The House approved the first resolution—which declared that Congress had the power to "appropriate money" for the construction of "post roads, military, and *other roads*, and of canals"[276]—but it rejected the three other resolutions—which declared that Congress had the power to "construct," respectively, "posts roads and military roads," "roads and canals necessary for commerce between the States," and, "canals for military purposes."[277] Moreover, congressional support in principle for federal spending on internal improvements failed to translate into actual spending; for the next four years, efforts to enact legislation providing for a comprehensive system of roads and canals funded by the federal government went nowhere.[278]

Meanwhile, the need for federal investment in public works grew. This need was felt most acutely with regard to the Cumberland Road, which ran from Cumberland, Maryland to Wheeling, Ohio. The Cumberland Road had been built by the federal government as part of the deal involving the admission of the State of Ohio.[279] Surprisingly, the initial decision to build the road during Jefferson's adminis-

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272 *Id.* at 1140.

273 *Id.*

274 *Id.* at 1158.

275 *Id.* at 1249 (rejecting by one vote resolution declaring that it is "expedient" that bonus and dividends owed to United States from Bank of United States be used to constitute fund for internal improvements).

276 32 ANNALS OF CONG. 1381, 1385–86 (1818).

277 *Id.* at 1386–89. Interestingly, the third resolution—regarding roads for commercial purposes—failed by the widest margin (71 in favor, 95 against). *Id.* at 1388.

278 CURRIE, *supra* note 259, at 278–79; POWELL, *supra* note 260, at 144.

279 Act of Apr. 30, 1802, ch. 40, § 7, 2 Stat. 173, 175. In return for Ohio's pledge to exempt purchasers of federal land in Ohio from state taxes for five years, the federal government pledged to use five percent of the proceeds of such sales to fund the construction of a road linking Ohio to a port city on a navigable river on the eastern seaboard. *Id.* In 1806, three years after Ohio's admission as a State, Congress authorized the President to appoint commissioners to lay out a road from Cumberland, Maryland to the State of Ohio and to begin construction on the road. Act of Mar. 29, 1806, ch. 19, §§ 1, 3, 2 Stat. 357, 357–59.

tration had not provoked much debate regarding Congress's power to construct it; only during the debates regarding the Tucker committee report in 1818 did Congress question the road's constitutionality.[280] In any event, the road had been built,[281] and, by 1822, it was falling into disrepair.[282] Finally spurred into action, Congress enacted a bill to establish tolls on the Cumberland Road to provide for its maintenance and upkeep.[283] President Monroe, however, vetoed the bill.[284] Even though he thought the measure was a desirable one, Monroe reiterated that, in his view, Congress lacked the constitutional authority under the Postal Roads Clause, Commerce Clause, or any other provision to regulate a system of roads or other internal improvements.[285]

Up until this point the Supreme Court had remained on the sidelines of this debate, which was taking place within Congress and between Congress and the President. That was now to change as Monroe purposefully attempted to obtain the support of the Supreme Court in his battle with Congress. To further publicize his views, Monroe restated his reasons for vetoing the Cumberland Road tollgate bill in a pamphlet entitled "Views on the Subject of Internal Improvements," which he sent to the Justices.[286] Wisely, Chief Justice Marshall refused to be drawn into the fray in such an overtly political manner. Instead, Marshall thanked Monroe for sharing his views and offered only a brief, non-constitutional (and equivocal) response to Monroe's arguments against the bill:

> A general power over internal improvement, if to be exercised by the Union, would certainly be cumbersome to the government, & of no utility to the people. But, to the extent you recommend, it would

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[280] Supporters of federal improvements contended that the road served as a precedent establishing federal power, while opponents argued that the road, if it were constitutional, was a special case involving Congress's power to erect improvements with the consent of state legislatures. *See* CURRIE, *supra* note 259, at 272–78 (summarizing role of Cumberland Road in congressional debates regarding internal improvements).

[281] Construction began in 1806 and, by 1818, the road had reached Wheeling, Ohio. 4 GEORGE ROGERS TAYLOR, THE TRANSPORTATION REVOLUTION, 1815–1860, at 22 (Henry David et al. eds., 1951).

[282] CURRIE, *supra* note 259, at 278–79.

[283] *Id.* at 278–79.

[284] *See* 39 ANNALS OF CONG. 1803–05 (1822) (veto message).

[285] *Id.* at 1804 (rejecting notion that commerce power includes authority to create or regulate internal improvements).

[286] 6 THE WRITINGS OF JAMES MONROE 216–84 (Stanislaus Murray Hamilton ed., 1902) (reprinting pamphlet); *see also* 1 WARREN, *supra* note 16, at 595–97 (describing exchange of letters).

> be productive of no mischief, and of great good. I despair however of the adoption of such a measure.[287]

Only Justice Johnson responded to the substance of Monroe's arguments, contending (contrary to Monroe's view) that *McCulloch* had resolved the constitutionality of legislation providing for internal improvements, at least "as applied to Postroads and Military Roads."[288] In fact, despite the prohibition against rendering advisory opinions,[289] Johnson purported to speak on behalf of the Court on this matter.[290]

And so matters stood as the Eighteenth Congress—the Congress during which *Gibbons* would be decided—convened. Within days of the first session's opening in December 1823, bills were introduced that would, if passed, create a comprehensive, nationwide survey of possible routes for roads and canals "of national importance, in a commercial or military point of view;"[291] establish tolls on the Cumberland Road to provide for its maintenance and upkeep;[292] and extend the Cumberland Road further west from its then-current terminus at Canton, Ohio.[293]

Debate in the House on the Survey Bill—the most contentious of the foregoing legislative measures—began on January 12, 1824, less than a month before the argument of *Gibbons* began.[294] Once again, arguments regarding the scope of Congress's commerce power played a central (though not exclusive) role. Opposing the bill, Representative Philip Barbour once again denied that Congress's commerce power included the power to construct roads; rather, as he argued,

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287 *See* Letter from John Marshall to James Monroe (June 13, 1822), *in* 9 THE PAPERS OF JOHN MARSHALL 236 (Charles F. Hobson ed., 1998).

288 Letter from William Johnson to James Monroe (n.d.), *in* 1 WARREN, *supra* note 16, at 596–97. With some cheekiness, Johnson urged Monroe to have the Court's decision in *McCulloch* printed and "dispersed through the Union." *Id.*

289 *See* Letter from Chief Justice Jay and the Associate Justices of the Supreme Court to President George Washington (Aug. 8, 1793), *in* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 93 (4th ed. 1996) (refusing to render advisory opinion in response to inquiry by President regarding legality of proposed action as beyond power of judiciary).

290 *See* Letter from William Johnson to James Monroe (n.d.), *in* 1 WARREN, *supra* note 16, at 596 (noting that he "had the Honour to submit the President's argument on the subject of internal improvement to his Brother Judges and is instructed to make the following Report").

291 H.R. 5, 18th Cong. § 1 (1823).

292 H.R. 9, 18th Cong. § 1 (1823).

293 H.R. 14, 18th Cong. § 1 (1823).

294 41 ANNALS OF CONG. 990 (1824). Proponents of the bill also pointed to the federal government's postal and military powers as sufficient to justify the bill's constitutionality. *See, e.g., id.* at 1327–32 (statement of Rep. Barbour) (justifying bill by way of Congress's military and naval powers).

Congress's commerce power extended only "to prescribing the terms on which this commerce shall be conducted" and did not include the power to construct roads and canals.[295] In a similar fashion, Representative John Randolph of Virginia bombastically declared that "never was greater violence done to English language" than by proponents of the bill, who would construe the power to regulate commerce to include "the right to construct the way on which [commerce] is to be carried."[296] Representative Silas Wood of New York took an even more restricted view of Congress's authority, declaring that interstate commerce excluded the "internal trade" of the states and encompassed only the "coasting trade."[297]

Meanwhile, proponents of the Survey Bill rose to defend its constitutionality. Representative Louis McLane traced the power to build roads and canals to Congress's commerce power, which he viewed in expansive terms.[298] The commerce power, McLane argued, encompassed the power to secure for the people "the right of carrying on commercial intercourse with any and every other part [of the Union], and of affording and preserving the means of intercourse, independent of all interference by any local authority."[299] Moreover, Speaker Henry Clay directly rebutted Philip Barbour's views of the commerce power, declaring that the power to regulate commerce, "if it has any meaning, implies authority to foster it, to promote it, to bestow on it facilities similar to those which have been conceded to our foreign trade."[300]

It was in the midst of these debates that the Court considered and issued its opinion in *Gibbons*. In light of the years of congressional debate regarding the scope of Congress's commerce power, it should come as little surprise that Marshall used the opportunity provided by *Gibbons* to weigh in on the constitutional debate. Indeed, it would have been more surprising had Marshall passed on this opportunity. Marshall understood that the congressional stalemate created by Congress's doubts about the constitutional scope of its regulatory

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295 *Id.* at 1008; *see also id.* at 1355 (statement of Rep. Rives) (arguing that commerce power "gives to Congress no other power than that of making the rules or prescribing the terms upon which commerce among the States shall be conducted").

296 *Id.* at 1306–07.

297 *Id.* at 1055; *see also id.* at 1337 (statement of Rep. Tucker) (arguing that "the coasting trade was all that was intended by the trade between the States"). For other attacks on the constitutionality of the bill, see *id.* at 1059–63 (statement of Rep. Mallary) (contesting constitutionality of bill); *id.* at 1239–43 (statement of Rep. Archer) (same); *id.* at 1273–79 (statement of Rep. Stevenson) (same).

298 *Id.* at 1220.

299 *Id.* at 1221.

300 *Id.* at 1036; *see also id.* at 1253 (statement of Rep. Stewart) (defending constitutionality of bill as within commerce power).

powers not only inhibited Congress's ability to facilitate commerce through pro-growth measures like the Survey Bill; more perniciously, such indecision left the nascent but burgeoning post-war economy vulnerable to parochial state regulation. As William Nelson has observed, Marshall appreciated the dangers of state regulation and used *Gibbons* to insure that Congress had the power to supervise such state regulation.[301]

Consistent with this motivation, Marshall's opinion in *Gibbons* provided proponents of the Survey Bill (and other bills) with strong ammunition to counter the critics who contested Congress's power to promote commercial activity and displace contrary state regulations. Though Marshall's opinion did not expressly touch on any of the pending bills—Marshall was far too shrewd to intrude in such a clumsy way in the congressional debates—his elaboration of the scope of Congress's power put to rest the notion that Congress's commerce power was a trivial one, confined (for example) solely to regulating the "coasting trade." Not only did Marshall declare that commerce among the states included commerce within the states (exempting the "completely internal" commerce), he even briefly alluded to Congress's power to regulate transportation within the states:

> The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States. The sense of the nation on this subject, is unequivocally manifested by the provisions made in the laws for transporting goods, by land, between Baltimore and Providence, between New-York and Philadelphia, and between Philadelphia and Baltimore.[302]

And, to those who doubted whether Congress could facilitate such commerce or merely prescribe the terms upon which it would be conducted, Marshall replied that Congress's power over interstate commerce was "plenary" and vested as "absolutely" as it would be in a unitary government.[303]

Gibbons had a subtle but perceptible impact on the congressional consideration of the Survey Bill. The House had already concluded its debate on the bill by the time that the decision was issued,[304] but the Senate did not begin its consideration of the bill until April 21—more than a month after the decision had been released.[305] As in the

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[301] *See* Nelson, *supra* note 8, at 946 (stating that, in *Gibbons*, Marshall "wanted to insure that Congress could either authorize or eliminate . . . restraints [on commerce]").

[302] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824).

[303] *Id.* at 197.

[304] 41 ANNALS OF CONG. 1471 (1824) (approval of Survey Bill by House).

[305] 42 ANNALS OF CONG. 534 (1824) (opening debate on Survey Bill and proposed amendment thereto). The Court announced its decision in *Gibbons* on March 2, 1824.

House, opponents of the bill contested its constitutionality, but the intervening decision in *Gibbons* altered the terms of the debate in the Senate. Though the *Annals of Congress* do not record in any detail the arguments of the Senate proponents of the bill[306]—whether, for example, they expressly invoked *Gibbons*—the *Annals* do record the arguments of several of the opponents. And those arguments are telling, revealing that *Gibbons* had affected the Senate's consideration of the bill. Senator John Holmes, echoing John Randolph and Philip Barbour in the House, contended that "[t]o 'regulate commerce' is not to create it, but to prescribe rules by which it is to be managed."[307] Though Holmes did not mention *Gibbons* by name, Holmes referred obliquely to the case, warning his colleagues that the Supreme Court would not overturn the Survey Bill if it were enacted. According to Holmes, the Court would hold that "the right in Congress to construct roads and canals is derived from the power 'to regulate commerce;' that the original power is exclusive, and so is the derivative."[308] Senator John Taylor of Virginia was more direct, expressly invoking *Gibbons*—incredibly and erroneously—to bolster his argument that Congress's commerce power did not encompass a power to construct roads and canals. Taylor pointed to the Court's acknowledgment that the "completely internal" commerce of the state was outside Congress's authority and contended that the power to construct roads and canals was part of this "completely internal" commerce.[309] These arguments, however, failed to persuade a majority of the Senate,

306 *See, e.g.*, 42 ANNALS OF CONG. 558 (1824) (statement of Sen. Johnson) (supporting constitutionality of Congress "mak[ing] road and canals" and supporting bill "[i]ndependent of the Constitutional question").

307 *Id.* at 545.

308 *Id.* at 543.

309 *Id.* at 563 (statement of Sen. Taylor). Taylor was able to make this argument only by misquoting Marshall's opinion. According to Taylor, *Gibbons* held that "the completely internal commerce of a State, then, may be considered as reserved for the State itself, and turnpike roads, ferries, &c., are component parts of this mass." *Id.* This was a clever consolidation of two, separate statements in the *Gibbons* opinion. Discussing the scope of commerce "among the several States," Marshall writes that "[t]he completely internal commerce of a State, then, may be considered as reserved for the State itself." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194–95 (1824). Several pages later, in discussing the State's reserved *police* powers, Marshall then states that "[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect *turnpike roads, ferries, &c., are component parts of this mass*." *Id.* at 203 (emphasis added). Manifestly, Marshall did not mean that laws respecting roads and ferries were part of the "completely internal" commerce of a state; indeed, in upholding the 1793 Federal Navigation Act, *Gibbons* established the power of Congress over such modes of interstate transportation.

which quickly passed the bill without much further debate.[310] Soon thereafter, President Monroe signed the bill into law.[311]

B. *Avoiding the Dangers of Constitutional Judicial Review*

Of course, Marshall's desire to articulate a broad construction of Congress's commerce power explains only his decision to employ the statutory preemption ground—with its necessary exposition on the scope of Congress's commerce authority—as the basis for the *Gibbons* holding. It does not explain Marshall's reluctance to adopt the Dormant Commerce Clause as an additional, alternative ground upon which to rest the decision. To understand that feature of his opinion, one must understand Marshall's views of the respective roles of Congress and the courts in policing state-protectionist legislation. Stated directly, Marshall viewed Congress, not the courts, as the primary guardian of interstate and foreign commerce. Though he saw great value in the Dormant Commerce Clause, he was unprepared to craft an opinion that would have placed the Court at the forefront of such battles against state protectionism—as *Gibbons* would have done had he actually used the Dormant Commerce Clause as a basis for the decision.

In general, Marshall preferred empowering Congress to empowering the courts in matters of federalism. Marshall never failed to seize upon an opportunity to construe Congress's affirmative legislative powers in a broad fashion at the expense of state power: *McCulloch* and *Gibbons* are the most salient examples. Beyond demonstrating Marshall's desire to construe expansively federal regulatory powers, *McCulloch* and *Gibbons* also demonstrate Marshall's preference for displacing state law on statutory grounds; state law must yield because Congress, and the national consensus such congressional legislation theoretically reflected, demanded it.[312]

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310 42 ANNALS OF CONG. 570–71 (1824).

311 Act of Apr. 30, 1824, ch. 46, 4 Stat. 22. Whether Monroe had been persuaded by *Gibbons* is unclear because Monroe did not explain his reasons for signing the bill into law. Professor Currie, however, suggests that, even apart from *Gibbons*, Monroe would have found no constitutional problem with the Survey Bill. Although Monroe objected to the assertion of regulatory jurisdiction by Congress over internal improvements in the States (for the reasons stated in his veto message of the 1822 Cumberland Road Bill), he did not object to the public funding of internal improvements, which is all the Survey Bill contemplated. *See* CURRIE, *supra* note 259, at 279–82 (arguing that Monroe distinguished Congress's construction of roads, which was invalid, from Congress's collection of tolls as exercise of spending power, which was valid).

312 *See* Nelson, *supra* note 8, at 953–54 (noting that Marshall Court only invalidated state statutes "to validate policies already adopted by large majorities of the Congress").

In contrast, Marshall was less enthusiastic about placing the judiciary and its power of judicial review at the forefront of the battle against state interference with federal rights and privileges. Although Marshall fervently believed in the principle of judicial review, Marshall well understood the political limitations of the judiciary. Echoing Alexander Hamilton's remarks in *Federalist No. 78* that the judiciary was the weakest of the three branches,[313] Marshall confided to Story that "[t]he judicial department is well understood to be that through which the government may be attacked most successfully because it is without patronage, & of course without power."[314]

Marshall's appreciation of the judiciary's vulnerability was a product of a number of experiences, but, in the years preceding *Gibbons*, his experience in the Court's Contract Clause cases provided Marshall with the most pointed reminder of the judiciary's political weakness. The Contract Clause was to the early nineteenth century what the Equal Protection Clause would be to the late twentieth century: the focal point for constitutional adjudication against the states. The various provisions of the Bill of Rights, such as the Takings Clause and Due Process Clause of the Fifth Amendment, did not apply to the states,[315] and the reconstruction amendments were still a half-century in the future. The antebellum Constitution contained few express restrictions on state authority,[316] and, of these, the Contract Clause was the most politically contentious constitutional restriction on the states enforced by the Supreme Court.

The Court's early experience in enforcing the Contract Clause against the states was not a happy one. The *Dartmouth College* case had triggered some controversy, primarily in New England,[317] but it was *Green v. Biddle*,[318] decided in 1823 (the year before *Gibbons*) that truly demonstrated the political danger associated with the judiciary's assumption of too great a role in policing state legislation via its power of judicial review. *Green* involved a Contract Clause challenge to several Kentucky statutes that provided occupying tenants on

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313 THE FEDERALIST NO. 78, *supra* note 26, at 465 (Alexander Hamilton) ("The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment . . . .").

314 Letter from John Marshall to Joseph Story (Sept. 18, 1821), *in* 9 THE PAPERS OF JOHN MARSHALL, *supra* note 287, at 184.

315 Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243, 250–51 (1833) (holding that Fifth Amendment's Taking Clause does not apply to states).

316 *See, e.g.*, U.S. CONST. art. I, § 10.

317 *See* 1 WARREN, *supra* note 16, at 488–90 (describing reaction to *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819)).

318 21 U.S. (8 Wheat.) 1 (1823).

contested lands various rights regarding such lands, such as the right to recover from the landowner the value of any improvements the tenant had constructed and immunity from liability for any rents or profits accrued prior to notice of the owner's interest in the land.[319] These statutes were not squatters' legislation; rather, they were the Kentucky legislature's good-faith attempt to address the contested and uncertain ownership of many lands in Kentucky. Much of the land in Kentucky, which had been part of Virginia, was claimed both by Kentucky settlers and by Virginians under land grants made by Virginia prior to Kentucky's statehood.[320] The Kentucky statutes did not assign ownership to the occupying tenants but instead attempted to provide compensation to tenants who had constructed improvements on land that they (erroneously) thought to be theirs. The absentee landowners, mainly Virginians, were furious, decrying the violation of their property rights.[321] Their furor was only heightened by the fact that the value of the improvements often approached the value of the unimproved land itself.

Unable to assert a takings claim against Kentucky, the Virginian landowners instead turned to the Contract Clause to challenge the Kentucky statutes. Their argument was founded upon an interstate compact between Kentucky and Virginia. In 1789, as part of Virginia's cessation of its western lands to form the Kentucky territory, Virginia specified that "all private rights and interests of lands, within the said District, derived from the laws of Virginia, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State."[322] The Kentucky legislature agreed to this provision, incorporating the "compact" into the Kentucky Constitution.[323] The Kentucky statutes, according to the Virginia landowners, impaired their rights under this compact and, hence, were void.[324]

Green was originally argued in the 1821 term, but the counsel for the Kentucky tenant did not appear to defend the Kentucky statutes

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319 *See id.* at 3–7 (describing Kentucky acts of February 27, 1797, and January 31, 1812).

320 Ruth Wedgwood, *Cousin Humphrey*, 14 CONST. COMMENT. 247, 249–50 (1997) (describing confusion resulting from Virginia's unrestrained grant of conflicting titles to land in Kentucky territory); *see also* 1 WARREN, *supra* note 16, at 636 (noting Kentucky land controversies resulting from numerous surveys and overlapping land patents).

321 Wedgwood, *supra* note 320, at 251.

322 Act of Dec. 18, 1789, ch. 14, § 7, *reprinted in* 13 LAWS OF VIRGINIA 17, 19 (William Waller Hening ed., Phila., Thomas DeSilver 1823); *see also* Wedgwood, *supra* note 320, at 251 n.11 (reporting terms of compact).

323 KY. CONST. of 1792, art. VIII, § 7 *reprinted in* BENNETT H. YOUNG, HISTORY AND TEXTS OF THE THREE CONSTITUTIONS OF KENTUCKY 27 (Louisville, Ky., Courier-Journal Job Printing Co. 1890).

324 Wedgwood, *supra* note 320, at 251–52.

and his rights under them.[325] The one-sided argument led to an equally one-sided opinion by Justice Story a month later (in March 1821), which struck down the Kentucky statutes as a violation of the absentee landowner's rights under the Kentucky-Virginia compact.[326] Story had little difficulty concluding that the Kentucky statutes "materially impair[ed] the rights and interests of the rightful owner in the land itself," who, under Virginia law, was entitled to the rents and profits obtained by the tenant and who was not liable for any improvements constructed by the tenant without his consent.[327]

Reaction to Story's opinion was swift and hostile. Former Speaker of the House Henry Clay (a Kentuckian) promptly moved for rehearing, arguing that the decision would affect all Kentucky tenants and that, consequently, the Court should hear argument on behalf of the Kentucky statutes even if the particular tenant in the case had chosen not to appear and defend the statutes.[328] More menacingly, Senator Richard Johnson from Kentucky proposed amending the Constitution to provide that in all suits in which a state is a party or "may desire to become a party, in consequence of having the Constitution or laws of such State questioned," the Senate shall have appellate jurisdiction.[329] Johnson made no pretense about the sinister purpose of his amendment, expressly acknowledging that his intent was to eliminate the power of judicial review. The "Federal judiciary," Johnson declared, "has assumed a guardianship over the States, even to the controlling of their peculiar municipal regulations."[330] They have done so, he continued, by "assum[ing] the right of deciding upon the constitutionality of the laws of the Union and of the States, and of setting them aside at [their] pleasure."[331] To

325 Green v. Biddle, 21 U.S. (8 Wheat.) 1, 11 (1823).

326 *Id.* at 10; *see also id.* at 17 ("It is the unanimous opinion of the Court, that the acts of 1797 and 1812, are a violation of the seventh article of the compact with Virginia, and therefore are unconstitutional.").

327 *Id.* at 15–16.

328 Story's opinion for the Court was released on March 5th, and Clay filed his motion for rehearing on March 12th. *Id.* at 17–18. Clay's participation in the case was made possible by his (temporary) return to the private practice of law. After pushing through the Missouri Compromise, Clay decided to retire from public service. *See, e.g.*, ROBERT V. REMINI, HENRY CLAY: STATESMAN FOR THE UNION 192–97 (1991). He resigned as Speaker of the House of the Sixteenth Congress on November 13, 1820, and he refused to stand for reelection to the Seventeenth Congress. *See* 37 ANNALS OF CONG. 434–35 (1820) (reporting resignation). Clay's decision was motivated in part by financial considerations; Clay's finances were in disarray as a result of gambling debts and poor investments. *See, e.g.*, REMINI, *supra*, at 192–97. His time outside of Congress, however, was short-lived; he was elected to the Eighteenth Congress in the Fall of 1822.

329 38 ANNALS OF CONG. 23 (1821).

330 *Id.* at 70.

331 *Id.* at 79.

"counteract the evils which must result from this assumption, a responsible tribunal of appeal"—meaning the Senate, where each state was represented equally by Senators selected by the legislature thereof—"should be provided."[332] In fact, Johnson expressly acknowledged that his proposed amendment was a reaction to the Supreme Court's decision in *Green*, which he contended had illegitimately interfered in Kentucky's internal affairs.[333]

Johnson's heavy-handed proposal went nowhere,[334] but Clay's motion for rehearing in *Green* was granted.[335] The case was reargued in the 1822 term, with Clay appearing as amicus curiae in defense of the Kentucky statutes,[336] and, in March 1823, the Court issued its judgment in the case. The new opinion of the Court differed in several, significant respects from Justice Story's strident opinion for a unanimous Court several years before.[337] Though the Court still concluded that the Kentucky statutes were invalid, Story's opinion was withdrawn and replaced by an opinion written by Justice Washington. In contrast to Justice Story, who thought that the unconstitutionality of the Kentucky statutes was so patent as to obviate the need for an extended discussion of the matter, Justice Washington painstakingly and laboriously detailed the manner in which the Kentucky statutes displaced Virginia's common-law rules regarding real property and therefore violated the Contracts Clause. Moreover, Washington

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332 *Id.* at 81.

333 *Id.* at 23–24. Ironically, despite the fact that *Green* had upheld the constitutional claims of Virginia landowners, Senator James Barbour of Virginia seconded Johnson's resolution. Though Barbour stated that he had no opinion on the merits of the proposed amendment, he declared that there were "other" Supreme Court decisions that "produced considerable excitement," and he decried the "evil" posed by the expansion of federal authority—a thinly veiled reference to Supreme Court decisions such as *Cohens* and *McCulloch*. *Id.* at 24–25.

334 1 WARREN, *supra* note 16, at 659 (observing that Congress took action on Johnson's proposal).

335 Green v. Biddle, 21 U.S. (9 Wheat.) 1, 18 (1823).

336 Clay's appearance was evidently the first instance in which the Court appointed an amicus curiae to participate in the consideration of a pending case. *See, e.g.*, Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 96 n.18 (1993). For Clay's and his co-counsel's services, the Kentucky legislature appropriated $1000, plus expenses. *See* Act of Dec. 18, 1823, ch. 616, 1823 Ky. Acts 344.

337 Chief Justice Marshall recused himself from the rehearing because the Marshall family claimed title to 400,000 acres in Kentucky. *See* 3–4 WHITE, *supra* note 11, at 643 & n.190. In addition, Justices Livingston and Todd did not participate because of illnesses. *Id.* at 643; *Supreme Court vs. Kentucky*, RICHMOND ENQUIRER, Mar. 4, 1823, at 3. As result of these absences, Justice Story declared that it was a "crippled Court" that considered *Green*, particularly since Justice Todd was the Court's expert on Kentucky real-estate law. *See* Letter from Joseph Story to Thomas Todd (Mar. 14, 1823), *in* 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 158, at 422–23.

directly responded to critics (such as Senator Johnson) who contested the Court's authority to review the constitutionality of state laws:

> [W]e have only to add, by way of conclusion, that the duty, not less than the power of this Court, as well as of every other Court in the Union, to declare a law unconstitutional, which impairs the obligation of contracts, whoever may be the parties to them, is too clearly enjoined by the constitution itself, and too firmly established by the decisions of this and other Courts, to be now shaken; and that those decisions entirely cover the present case.[338]

Moreover, the unanimity of the earlier decision was lost, as Justice Johnson (no relation to the Senator) wrote separately for himself. Though Johnson agreed that the Kentucky statutes could not be enforced (on the curious statutory ground that they violated the federal Rules Enabling Act because they prevented the federal circuit court for Kentucky from obeying the rules of practice in effect at the time of its creation),[339] he disagreed that the Kentucky statutes violated the terms of the compact and hence violated the Contracts Clause.[340]

The disagreement between Washington and Johnson led to a great deal of uncertainty among the public regarding exactly what had been decided. Several observers thought that Johnson had dissented from the Court's opinion rather than concurred in its judgment.[341] That confusion, coupled with the absences of three of the justices, led to the belief that only three justices—a minority of the Court—had concluded that the Kentucky statutes were invalid.[342] For opponents of the judiciary, the power of judicial review was troublesome enough;

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338 *Green*, 21 U.S. at 91–92.

339 *Id.* at 105–06 (Johnson, J., concurring in judgment). Though he did not publicly reveal his views in a separate opinion, Justice Story wrote to Justice Todd that he thought Johnson's views were "peculiar." Letter from Joseph Story to William Todd (Mar. 14, 1823), *in* 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 158, at 422–23.

340 21 U.S. at 104.

> If compelled to decide on the constitutionality of these laws, strictly speaking, I would say, that they in no wise impugn the force of the laws of Virginia, under which the titles of landholders are derived, but operate to enforce a right acquired subsequently, and capable of existing consistently with those acquired under the laws of Virginia.

Id.

341 *See, e.g.*, *Supreme Court vs. Kentucky*, RICHMOND ENQUIRER, Mar. 4, 1823, at 3 (reporting "Johnson dissenting"). Surprisingly, such confusion regarding Johnson's opinion continues to this day. *See, e.g.*, James W. Ely, Jr., *The Marshall Court and Property Rights: A Reappraisal*, 33 J. MARSHALL L. REV. 1023, 1044 (2000) (characterizing Johnson's opinion as dissent).

342 *See* Letter from Henry Clay to Francis T. Brooke (Mar. 9, 1823), *in* 3 THE PAPERS OF HENRY CLAY 392, 392 (James F. Hopkins ed., 1963); *see also* MAURICE G. BAXTER, HENRY CLAY THE LAWYER 44 (2000) (noting that "many others" found three-to-one split "especially objectionable").

the idea that a minority of the Court might exercise it was downright offensive.[343]

Fortunately for the Court, when *Green* was handed down on February 27, 1823, Congress had less than a week remaining before adjournment and did not have time to consider a new assault on the judiciary.[344] Over the summer, however, anger at the decision began to rise as Washington's and Johnson's opinions were published in several newspapers.[345] Inside Kentucky, resentment at the Court grew with each passing month. Humphrey Marshall, the Chief Justice's cousin and a former Kentucky legislator, penned a series of newspaper editorials lambasting the decision.[346] The Governor, John Adair, decried the decision as a "strike at the sovereignty of the state, and the right of the people to govern themselves."[347] For its part, the Kentucky Legislature adopted a resolution protesting the "erroneous, injurious and degrading" decision in *Green*.[348] Moreover, the Legislature drafted a memorial to the U.S. Congress blasting the decision for "disrob[ing] Kentucky of her sovereign power" and calling upon Congress to restore "her co-equal sovereignty with the other states of the Union" by restricting the Supreme Court's power to review the constitutionality of state laws.[349]

Outside Kentucky, popular outrage at the judiciary and specifically its power of judicial review was also mounting. In August 1823, Justice Johnson, who was riding circuit in his native South Carolina, struck down South Carolina's "Negro Seaman Act."[350] The Act required all free persons of color serving on ships entering a South Carolina port to be seized and held in jail until the ship was ready to

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343 1 WARREN, *supra* note 16, at 640–41 (noting that "the halls of Congress rang with assaults upon the 'minority opinion'").

344 Congress adjourned four days after the decision was announced. 40 ANNALS OF CONG. 323–24 (1823) (adjournment of Senate); *id.* at 1178 (adjournment of House).

345 *See, e.g.*, *Opinion of the Supreme Court of the United States*, RICHMOND ENQUIRER, Sept. 12, 1823, at 1; *Opinion of the Supreme Court of the United States*, RICHMOND ENQUIRER, Sept. 16, 1823, at 3 (publishing over two days).

346 Wedgwood, *supra* note 320, at 255–56 (discussing *Exposé* essays published in Kentucky *Commentator*); *see also* 1 WARREN, *supra* note 16, at 641 (describing reaction in Kentucky to *Green* decision).

347 *Legislature of Kentucky: Extracts from Governor Adair's Message of November 4, 1823*, 25 NILES WKLY. REG. 203, 205 (1823).

348 Resolution of Dec. 29, 1823, 1823 Ky. Acts 516.

349 Remonstrance of Jan. 1824, 1824 Ky. Acts 520, 521, 527; *see also Kentucky*, 25 NILES WKLY. REG. 261 (1823) (reporting that Kentucky legislature proposed resolution to be presented to Congress protesting *Green* decision); *Kentucky*, 25 NILES WKLY. REG. 275 (1824) (reporting passage of resolution); 41 ANNALS OF CONG. 1428 (1824).

350 Act of Dec. 21, 1822, ch. 3, § 3, 1822 S.C. Acts 11, 12; *see* DOUGLAS R. EGERTON, HE SHALL GO OUT FREE: THE LIVES OF DENMARK VESEY 217 (1999) (noting that Justice Johnson struck down Act).

depart.[351] Moreover, the Act provided that the ship's captain was liable for the seaman's expenses while in captivity, and, if the ship's captain failed to retrieve the jailed seaman, the seaman was sold into slavery.[352] The statute, which was enacted in response to the public alarm created the year before by a failed slave revolt in Charleston led by Denmark Vesey,[353] was intended to prevent contact between slaves and free African and Caribbean seamen, who were suspected of fomenting the revolt.[354] Presaging his more comprehensive opinion in *Gibbons*, Justice Johnson concluded that the statute violated the Commerce Clause, which, he said, vests Congress with "a paramount and exclusive right" to regulate the navigation of ships involved in interstate and foreign commerce.[355] Johnson subsequently added that the statute violated the Treaty of 1815 between the United States and Great Britain, which gave British ships the right to enter American waters and to employ whatever individuals the ship's captain might think proper, including persons of color.[356] Yet, Johnson refused to grant relief to the imprisoned British sailor who had commenced the suit, ruling that federal courts did not have statutory authority to grant a writ of habeas corpus to a person in state custody.[357]

Despite its equivocal result, Southerners, particularly South Carolinians, were outraged by the decision, which was published in full by several newspapers.[358] The decision inflamed white Southerners, who lambasted Johnson's intrusion into a matter involving the "self-preservation" of Southern society.[359] In fact, South

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351 Negro Seaman Act § 3.

352 *Id.*

353 Vesey was a former slave who had purchased his freedom in 1800 after winning $1500 in a local lottery. *See* DAVID ROBERTSON, DENMARK VESEY 40 (1999); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1873 n.259 (1993).

354 EGERTON, *supra* note 350, at 217.

355 Elkison v. Deliesseline, 8 F. Cas. 493, 495 (C.C.D.S.C. 1823) (No. 4366).

356 *Id.* at 495–96.

357 *Id.* at 496–97.

358 *Important Judicial Opinion*, DAILY NAT'L INTELLIGENCER (Wash., D.C.), Sept. 8, 1823, at 2; *Judicial Opinion*, 25 NILES WKLY. REG. 12–16 (1823); RICHMOND ENQUIRER, Aug. 29, 1823, at 4.

359 *See* 4 BEVERIDGE, *supra* note 13, at 383; *Letter from Zeno*, CHARLESTON COURIER, Sept. 3, 1823; *see also Free People of Color*, 24 NILES WKLY. REG. 392 (1823) (noting that decision caused "much excitement" in Charleston); *Free People of Colour*, RICHMOND ENQUIRER, Sept. 2, 1823 (noting that decision prompted "some excitement" in Charleston); *Police Laws*, DAILY UNION (Wash., D.C.), Mar. 12, 1851, at 4 (recounting that Johnson's decision "threw Charleston into a flame").

Carolina continued to enforce the statute, routinely imprisoning free sailors on commercial vessels.[360]

Moreover, the Southern press targeted Johnson's Dormant Commerce Clause ruling that South Carolina had legislated in an area entrusted exclusively to Congress by virtue of the Commerce Clause. Benjamin Hunt, who had represented the Charleston sheriff in *Elkison* and who had defended the constitutionality of the South Carolina statute, published a pamphlet criticizing Johnson's opinion, which was broadly circulated and excerpted in several newspapers.[361] Hunt agreed that there was a Dormant Commerce Clause, but he argued that the Dormant Commerce Clause did not displace the states' police powers[362]—a view that Chief Justice Marshall would embrace a few months later in *Gibbons*. Consistent with this framework, Hunt then argued that the South Carolina statute was merely a police measure, no different in kind from a quarantine statute, designed to protect South Carolina from the dangers posed by free persons of color "fresh from the lectures of an Abolition Society."[363] Despite the glaring error in the analogy—that free persons of color posed the same danger as a foreign immigrant infected with smallpox—Hunt's views drew editorial support from Southern newspapers.[364] One newspaper editorial simply declared Johnson's ruling to be "monstrous" and urged the Supreme Court to reverse it, threatening that a failure to do so would require South Carolina to violate

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360 EDWARD A. PEARSON, DESIGNS AGAINST CHARLESTON: THE TRIAL RECORD OF THE DENMARK VESEY SLAVE CONSPIRACY OF 1822, at 151 (1999) ("Despite the decision and the subsequent uproar, South Carolinians continued to imprison black mariners for another year until the legislature modified the law to exempt free blacks serving on naval vessels from arrest.").

361 BENJAMIN FANEUIL HUNT, THE ARGUMENT OF BENJ. FANEUIL HUNT, IN THE CASE OF THE ARREST OF THE PERSON CLAIMING TO BE A BRITISH SEAMAN, UNDER THE 3D SECTION OF THE STATE ACT OF DEC. 1822, IN RELATION TO NEGROES, &C. BEFORE THE HON. JUDGE JOHNSON, CIRCUIT JUDGE OF THE UNITED STATES, FOR 6TH CIRCUIT (1823), *reprinted in* 2 FREE BLACKS, SLAVES, AND SLAVEOWNERS IN CIVIL AND CRIMINAL COURTS 1 (Paul Finkelman ed., 1988); RICHMOND ENQUIRER, Sept. 2, 1823, at 3 (publishing excerpt of Hunt's pamphlet); *see also* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1214 n.455 (2000) (noting that Hunt's pamphlet was "widely circulated").

362 HUNT, *supra* note 361, at 12 ("I admit the right to regulate commerce, is an exclusive right, but I deny that the enactment of police laws infringes that exclusive right.").

363 *Id.* at 13.

364 *Free People of Colour*, RICHMOND ENQUIRER, Sept. 2, 1823 ("The States have never parted with this jurisdiction over their own police. Their right of self preservation is too dear to them; our fathers never meant to give it up. The words of the constitution can be fully and truly satisfied without such a concession.") (emphasis omitted); *Letter from Zeno*, CHARLESTON COURIER, Sept. 3, 1823, at 3; *see also Letter from Candidus*, RICHMOND ENQUIRER, Sept. 30, 1823, at 3 (criticizing letter to editor supporting Johnson's decision).

the Constitution.[365] Johnson was so stung by the public criticism that he responded with several newspaper editorials defending his reasoning and attacking the "hasty judgments" made by opponents of the decision.[366]

Though remaining on the sidelines of this skirmish, Marshall was apprehensive about Johnson's opinion, fearing that it would give further ammunition to congressional critics of the judiciary and its power of judicial review. In a letter to Story in September, Marshall confided that he was surprised by the vehemence of the Southern reaction to the *Elkison* case, which he noted "has been considered as another act of judicial usurpation."[367] Indeed, Marshall lamented Johnson's willingness to insert the judiciary into such a heated debate, observing that "you see fuel is continually adding to the fire at which the *exaltées* are about to roast the judicial department."[368]

Marshall's concern was well-founded. Soon after the Eighteenth Congress convened in December 1823, Senator Johnson introduced a resolution that combined both a court-packing measure and a provision designed to weaken the Supreme Court's power of judicial review. The resolution called for the creation of three new circuit courts in the western states, which—under the practice of the time in which there was one Supreme Court justice for and from each circuit—would necessitate the appointment of three additional Supreme Court justices.[369] In addition, the resolution urged an amendment to the Judiciary Act of 1789 that would require the concurrence of seven justices (of the ten that would sit on the reconstituted Court) to invalidate a federal or state law.[370] Once again, Johnson expressly linked the proposed changes to the Supreme Court's decision in *Green*, which demonstrated, he said, the "tremendous evils" that could result from the Court's use of its power of judicial review.[371] Meanwhile, in the House, members of the Kentucky delegation proposed resolutions

365 *See Letter from Zeno*, CHARLESTON COURIER, Sept. 5, 1823.

366 *See Letter from Philominus* [sic], CHARLESTON COURIER, Sept. 10, 1823; *Letter from Philonimus*, CHARLESTON COURIER, Sept. 13, 1823; *Letter from William Johnson*, RICHMOND ENQUIRER, Oct. 7, 1823; *see also* Donald Morgan, *William Johnson*, *in* 1 SUPREME COURT JUSTICES, *supra* note 154, at 368 ("Johnson sparred with these adversaries in the press, and under the pseudonym 'Philonimus,' developed his views at length, particularly in relation to the treaty power.").

367 Letter from John Marshall to Joseph Story (Sept. 26, 1823), *in* 9 THE PAPERS OF JOHN MARSHALL, *supra* note 287, at 338.

368 *Id.*

369 41 ANNALS OF CONG. 28 (1823); *see id.* at 575 (1824) (statement of Sen. Johnson) (explaining that, under his proposal, Supreme Court would consist of ten justices, of which seven would have to concur to invalidate state law).

370 *Id.* at 28.

371 *Id.*

protesting the *Green* decision and calling for the repeal of Section 25 of the Judiciary Act of 1789 so as to "annihilate" the Supreme Court's jurisdiction to review decisions by state courts adverse to claims of federal right.[372]

These proposals, particularly Senator Johnson's, greatly worried Marshall. Shortly after Johnson offered his proposed reforms and just six weeks before argument in *Gibbons* would open, Marshall expressed his concern to Henry Clay, who was once again Speaker of the House.[373] Marshall began by noting his particular regard for the judiciary as an institution, declaring: "I am perhaps more alive to what concerns the judicial department, and attach more importance to its organization, than my fellow citizens in the legislature or executive . . . ."[374] In Marshall's view, Johnson's proposed changes were a strike at the Supreme Court. Johnson's proposed expansion of the Supreme Court would cause "serious inconvenience,"[375] but, in Marshall's view, Johnson's proposal that a super-majority be required to invalidate a state law was nothing short of an unconstitutional attempt to overturn *Marbury* and eliminate the Court's power of judicial review. Arguing that there was no difference in principle between a statute banning the power of judicial review and one making it more difficult for the judiciary to exercise such power, Marshall declared that "[t]o require almost unanimity, is to require what cannot often happen, and consequently to disable the court from deciding constitutional questions."[376] Such a requirement, Marshall concluded, was no more constitutional than "an act requiring more than a majority of the legislature to pass a law."[377]

As the argument in *Gibbons* opened, Congress had yet to act on Johnson's proposals. While Marshall could not know for certain how the decision in *Gibbons* would affect the congressional debate, he understood the danger posed by Johnson's proposed reforms. In contrast to his earlier support for a constitutional amendment designating the Senate as the court of final resort for constitutional challenges to state law,[378] Johnson's new proposals were statutory in nature and did not require the super-majority necessary for a constitutional amendment. Moreover, though Johnson had expressly declared that he

372 *Id.* at 915 (1824) (statement of Rep. Wickliffe); *id.* at 1428 (1824) (statement of Rep. Letcher); *see also* 1 WARREN, *supra* note 16, at 664 (describing congressional debate).

373 41 ANNALS OF CONG. 795 (1823).

374 Letter from John Marshall to Henry Clay (Dec. 22, 1823), *in* 9 THE PAPERS OF JOHN MARSHALL, *supra* note 287, at 365.

375 *Id.*

376 *Id.* at 366.

377 *Id.*

378 *See supra* note 329 and accompanying text.

thought the judiciary and its power of judicial review was a dangerous thing, his proposals did not appear on their face as an attempt to emasculate the Marshall Court. Even Justice Story thought that the addition of justices for the western states was a reasonable measure.[379] And Daniel Webster, the man who was urging the Court to strike down the New York steamboat monopoly as unconstitutional, introduced a measure in the House that would require a majority of the justices sitting on the Court, not just a majority of the justices participating in the case, to concur in an opinion invalidating a state law.[380] In short, the reasonableness of Johnson's measures concealed their sinister purpose and undermined congressional opposition to the measures.

Gibbons, of course, did not allay Johnson's concerns about the judiciary, but Marshall's opinion gave Johnson and opponents of the judiciary no additional ammunition against the judiciary. By eschewing the Dormant Commerce Clause and resting the decision on the preemptive force of the 1793 Federal Navigation Act, Marshall laid the responsibility for the decision squarely at Congress's door. The New York statutes must yield, not because the Court's own view of the Constitution required it (as was the case with the Kentucky statutes in *Green*), but because Congress (according to Marshall) had authorized ships carrying a federal coastal license to enter any American port to ply their trade. Displacing the New York statutes because of their conflict with federal law carried none of the baggage associated with the Court's use of its power of judicial review to invalidate state law on constitutional grounds. The Supremacy Clause expressly provided that federal law trumps state law,[381] and the legitimacy of the Court's power to construe federal statutes was beyond dispute. Construing statutes was what courts did.[382] Of course, perhaps Marshall was wrong in his interpretation of the Navigation Act,[383] but, if so, Congress could simply amend the statute. Absent such congressionally mandated change in the statutory language, claims that the Court had abused the judicial power in setting aside

379 Letter from Joseph Story to Daniel Webster (Jan. 4, 1824) (endorsing expansion of Supreme Court to nine justices to allow addition of justices from western states), *in* 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 158, at 435–36.

380 42 ANNALS OF CONG. 2541 (1824). Like Senator Johnson's more stringent measure, this proposal was evidently in response to the *Green* decision, in which only four of the Justices participated in the case and only three agreed that the Kentucky statutes were unconstitutional. *See supra* note 337 and text accompanying notes 333, 339–43.

381 U.S. CONST. art. VI, cl. 2.

382 *See, e.g.*, Kramer, *We the Court*, *supra* note 20, at 8–9.

383 Most modern commentators, echoing Kent, think he was. *See, e.g.*, NEWMYER, *supra* note 14, at 312; 3–4 WHITE, *supra* note 11, at 578; Campbell, *supra* note 6, at 526 & n.173.

New York's steamboat monopoly would sound shrill. And, not to gild the lily, Marshall surely suspected that Congress was not about to amend the Navigation Act to overturn *Gibbons* and authorize states to bar federally licensed coastal vessels from state waters and ports. Indeed, the New York steamboat monopoly was widely reviled in other states, which had enacted retaliatory legislation.[384]

Moreover, Marshall's hedge—and the caution from which it resulted—worked. Although we can never know for sure whether Congress would have enacted Johnson's measures had Marshall rested the decision in *Gibbons* on the Dormant Commerce Clause, we do know that, after *Gibbons*, Johnson's proposals failed to garner significant support in Congress. Responding to Johnson's resolutions, the Senate Judiciary Committee, led by Senator Martin Van Buren from New York, briefly proposed a bill requiring five of the current seven justices to concur in an opinion invalidating a state law.[385] Van Buren, however, changed his mind and had the bill returned to the Judiciary Committee for further consideration, where it died.[386] Senator Johnson himself later attempted to revive his proposal to require a supermajority of justices to invalidate a state law, but the lack of support for the measure induced Johnson to withdraw the measure before it could be voted upon.[387] Johnson's assault on the Court had been stymied.

In fact, far from being a singular event of judicial modesty, *Gibbons* signaled a new, more cautious approach to constitutional adjudication by Marshall and the Supreme Court. In subsequent years, Marshall displayed a greater sensitivity to state sovereignty in exercising the power of judicial review so as to minimize the opportunity for a revival of Johnson's or others' efforts to weaken the Court and its power of judicial review. Marshall acceded to Clay's proposed reform requiring a majority of the whole Court to invalidate a state law, adopting Clay's proposal as an informal rule of practice for the Court.[388] In addition, Marshall's use of the power of judicial review

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384 *See, e.g.*, Act of Jan. 25, 1811, N.J. Laws 298; Act of May 29, 1822, ch. 8, 1822 Conn. Pub. Acts 3; *see also* 1 WARREN, *supra* note 16, at 615 & n.1 (noting that, after *Gibbons* opened Georgia's waters, Georgians welcomed steamboats from South Carolina with cries of "down with all monopolies" and "[g]ive us *free trade* and sailor's rights" (quoting GA. J., Apr. 6, 1824)).

385 42 ANNALS OF CONG. 336 (1824) (statement of Sen. Van Buren). Nothing in Van Buren's remarks indicate that his proposal was offered in response to *Gibbons*. Indeed, *Gibbons* would have been decided the same way even under his proposed reform.

386 *Id.* at 339.

387 *Id.* at 576; *see also* 4 BEVERIDGE, *supra* note 13, at 450–54 (describing failure of various efforts after 1824 to weaken Supreme Court).

388 *See* Briscoe v. Commonwealth's Bank, 33 U.S. (8 Pet.) 118, 122 (1834) ("The practice of this court is, not (except in cases of absolute necessity) to deliver any judgment in cases

became more circumspect. In 1830, Marshall held that a state law providing for the issuance of state bills of indebtedness violated the Bills of Credit Clause of Article I, Section 10.[389] The bravado displayed in the early Contract Clause cases, however, was replaced by a defensive, almost apologetic tone. Marshall justified the Court's action as simply a result of its duty to comply with "the mandates of law."[390] And, in a telling coda to the *Green* litigation, the Supreme Court upheld Kentucky's authority to divest absentee Virginia landowners of title to land in Kentucky and vest it in the settlers occupying the land.[391] With only a passing reference to the *Green* decision, the Court declared that Kentucky was free to vest title in occupying claimants who had lived on the land for at least seven years, even though Virginia would not recognize title via adverse possession unless the settler had lived on the land for twenty years.[392] Although the seven-years law affected absentee landowners much more severely than did the occupying-claimant laws struck down in *Green*, the Court declared that such statutes of limitation were part and parcel of the sovereign powers of each state and that Kentucky was "at liberty" to select whatever time period it wished in specifying when an absentee landowner would be deemed to have forfeited his right to land by failing to occupy it.[393] Senator Johnson, it seems, lost the battle in 1824 but won the war in 1831.

Gibbons reflected Marshall's awareness of the political vulnerability of the Court and the dangers posed by the Dormant Commerce Clause for its power of judicial review, but it equally signaled a keen appreciation on Marshall's part of the doctrinal limitations of the Dormant Commerce Clause. In Marshall's view, resting the decision on the preemptive force of a federal statute rather than the Dormant Commerce Clause also promised greater protection for interstate and foreign commerce. Recall that, according to Marshall's Dormant Commerce Clause framework, states retained the power to enact police measures to protect the health, safety, and welfare of their citizens, but they could not adopt commercial regulations affecting interstate commerce. So viewed, the Dormant Commerce Clause

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where constitutional questions are involved, unless four judges concur in opinion, thus making the decision that of a majority of the whole court.").

389 Craig v. Missouri, 29 U.S. (4 Pet.) 410 (1830).

390 *Id.* at 437–38. As Edward White has observed, *Craig* reflected a marked retreat from Marshall's protestations of national sovereignty and union that typified the earlier Marshall Court decisions to a legalist defense of judicial review. 3–4 WHITE, *supra* note 11, at 588.

391 Hawkins v. Barney's Lessee, 30 U.S. (5 Pet.) 457 (1831).

392 *Id.* at 466.

393 *Id.* at 466–67.

empowered the courts to set aside only a narrow subset of state legislative measures. State police measures, even those that disrupted or discriminated against interstate commerce, were putatively beyond the judiciary's power to invalidate. According to Marshall, however, Congress was not so limited. The distinction between commercial and police measures operated only to define the extent of the Dormant Commerce Clause and did not define the extent of Congress's affirmative commerce power. Rather, under its "plenary" commerce power, Congress could enact regulations indistinguishable in form from those enacted by the states pursuant to their police powers.[394] In short, Congress could act in situations in which the courts could not.[395]

This recognition of Congress's comparatively greater power naturally predisposed Marshall to eschew the Dormant Commerce Clause in favor of the statutory preemption ruling, which would confirm the breadth of Congress's power. Indeed, Marshall said as much in a passage that commentators often overlook:

> Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution, the Court will enter upon the inquiry, whether the laws of New-York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States," or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress . . . .[396]

In Marshall's view, Congress had greater authority (and political capacity) than the courts to invalidate protectionist measures adopted by the states. Only if Congress had not acted would it be necessary—and appropriate—for the Court to assess whether the state law ran

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394 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203–04 (1824).

395 Though the doctrinal contours are different, the same rule applies today. Congress's affirmative power over interstate commerce is much broader in scope than the judiciary's authority to set aside state legislation for violating the Dormant Commerce Clause. *Compare* Wickard v. Filburn, 317 U.S. 111, 125 (1942) (holding that commerce power authorizes Congress to regulate intrastate activities that have "substantial economic effect" upon interstate commerce), *with* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 87–89 (1986) (holding that Dormant Commerce Clause prevents states from adopting regulations that discriminate against or impermissibly burden interstate commerce).

396 22 U.S. at 209–10.

afoul of the Dormant Commerce Clause.[397] This approach, as Marshall noted, also had the benefit of obviating the need for the Court to engage in the difficult task of determining whether the state law was a commercial or police measure.

Thus, Marshall's decision to eschew the Dormant Commerce Clause and rest the *Gibbons* decision on the preemptive effect of the Federal Navigation Act was an ingenious move on Marshall's part to find a way to protect interstate commerce yet avoid placing the judiciary at the forefront of the battle against state protectionist legislation.

In light of that fact, the only question remaining is why Marshall would even think about, much less suggest adopting (as he did), the Dormant Commerce Clause. Why not simply rely on Congress to police state protectionist legislation? Why invite the criticism (mild as it would be) that would accompany the adoption and use of a Dormant Commerce Clause to invalidate state legislation?

For one, Marshall genuinely believed that the correct reading of the Constitution vested the commerce power exclusively in Congress. Stated differently, Marshall truly thought that the Constitution, properly understood, contained the Dormant Commerce Clause. By recognizing its existence in *Gibbons*, Marshall set the stage for its formal adoption and use in later cases. Marshall, unfortunately, did not live to see those cases, but his opinion in *Gibbons* provided the foundation for the Court to use in subsequent cases—as it did in the *Passenger Cases*, the first time the Court struck down a state statute based on the Dormant Commerce Clause.[398]

More instrumentally, Marshall foresaw that Congress could not be trusted entirely to police state legislation, preempting all protectionist legislation adopted by the states. The federal government circa 1824 was far different than the federal government circa 1934 or 2004. In the early nineteenth century, Congress did little to regulate commercial activities. The regulation of coastal navigation and the imposition of tariffs on imports were the most salient (and almost the only) instances in which Congress had undertaken to regulate private commercial conduct. Commerce in the 1820s was regulated, to the extent that it was regulated, by the states, and, given the pro-states'-rights sentiments of the Jacksonians (who subsequently captured and held

[397] Marshall's explanation implies that the Court should assess whether a state statute violates the Dormant Commerce Clause only after first determining that the state law is not preempted by any applicable federal statute. Incidentally, this analytical approach in Dormant Commerce Clause cases continues to this day. *See, e.g.*, *CTS Corp.*, 481 U.S. at 78 (noting that "first" inquiry is whether state law conflicted with federal statute).

[398] *See* The Passenger Cases, 48 U.S. (7 How.) 283 (1849).

both Congress and the White House for a good part of the next thirty years), that was unlikely to change. The first great federal regulatory agency, the Interstate Commerce Commission, would not be created for another sixty-three years,[399] and the first great federal regulatory program, the Sherman Antitrust Act, would not be enacted for another sixty-six years.[400] The New Deal was more than a century in the future. In light of the fact that most commercial activities would continue to be left unregulated by Congress, Marshall could not rely exclusively upon Congress and the preemptive force of its regulatory statutes to displace state protectionist legislation. The Dormant Commerce Clause, even if it was not the primary bulwark against such legislation, was a necessary supplement to Congress's affirmative regulatory power.

In sum, Marshall's decision to rest *Gibbons* on the preemptive force of the Federal Navigation Act rather than the Dormant Commerce Clause was the product of several mutually reinforcing considerations. On the one hand, Marshall saw the need to articulate an expansive conception of Congress's affirmative regulatory powers under the Commerce Clause. Conversely, he wished to avoid exposing the judiciary to greater congressional attack by adopting a constitutional rule that would embroil the judiciary in further battles with state authorities. Yet, at the same time, his goal was not to eliminate the judiciary's role entirely, leaving interstate and foreign commerce to the political vagaries of Congress. Marshall's task, as he saw it, was to empower Congress first and foremost, yet also reserve a role, albeit a secondary one, for the judiciary in policing state protectionist legislation. The brilliance of *Gibbons* was in Marshall's ability to achieve all of these goals at one time, in one case.

V

GIBBONS IN THE TWENTY-FIRST CENTURY

Understanding Marshall's hedge allows us to better appreciate *Gibbons* and its place in the history of the Dormant Commerce Clause. *Gibbons* was not a tentative exploration of an issue with which the Court was completely unfamiliar. Nor was Marshall's choice to rest the decision on the preemptive effect of the Federal Navigation Act the product of an inability to apprehend the contours of the Dormant Commerce Clause or a fear of antagonizing pro-

399 Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended in scattered sections of 42 U.S.C.).

400 Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2000)).

states'-rights forces with a nationalist interpretation of the Constitution. Rather, as demonstrated above, the story of *Gibbons* and Marshall's hedge is a much more nuanced one. Marshall appreciated the possibilities offered by the Dormant Commerce Clause, but he better understood the twin needs of empowering Congress and of avoiding an expansion of the Court's controversial role in policing state legislation directly under its power of judicial review. These insights have important ramifications for our appreciation of the Marshall Court and, more contemporarily, the role of the Supreme Court in constitutional interpretation.

A. Gibbons *and the Marshall Court*

Gibbons has always been treated as something of a second-class decision. Commentators deservedly lavish great attention and praise on *Marbury* and *McCulloch* as watershed events in our constitutional history,[401] but *Gibbons* has often been treated as a distant cousin of the great decisions. Commentators pay attention to it but only because Marshall wrote it.

As the foregoing analysis demonstrates, however, *Gibbons* is as rich as any Marshall Court decision and occupies an equally important position in our constitutional firmament as other Marshall Court decisions. For example, the conventional justification for praising *Marbury* is that Marshall was able to create a power of tremendous importance—namely, judicial review of congressional legislation—despite the lack of foundation in the constitutional text for such power and despite the fact that the Jefferson administration was adamantly opposed to such power.[402] So told, *Marbury* is the paragon of judicial accomplishment. But how does *Gibbons* differ from *Marbury* in this respect? *Gibbons* established a limitation on state authority of vital importance—namely, the Dormant Commerce Clause—despite the lack of foundation in the constitutional text for such a limitation and despite the fact that there was a good deal of opposition to the Court's use of its power of judicial review of state legislation. True, Marshall's embrace of the Dormant Commerce Clause in *Gibbons* was dicta, but

401 *See, e.g.*, Christopher L. Eisgruber, Marbury, *Marshall, and the Politics of Constitutional Judgment*, 89 VA. L. REV. 1203, 1234 (2003) (praising *Marbury* as "virtuoso performance of Marshall's political art"); Louise Weinberg, *Our* Marbury, 89 VA. L. REV. 1235, 1412 (2003) ("In *Marbury*, a great father of our country bequeathed to us his greatest legacy and our most precious inheritance—the inestimable treasure of an enforceable Constitution.").

402 *See, e.g.*, ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 40 (1960) (praising *Marbury* as "a masterwork of indirection, a brilliant example of Marshall's capacity to sidestep danger"); Weinberg, *supra* note 401, at 1236–39 (recounting this "standard narrative" and its "happy ending").

it was dicta that ultimately carried the day. Indeed, in one respect, *Gibbons* was more successful than *Marbury*. While it was another fifty-three years before the Court again used its *Marbury* power of judicial review to invalidate a federal statute,[403] the Court invoked the Dormant Commerce Clause to set aside state legislation only twenty-five years after *Gibbons*.[404] Moreover, after the debacle of *Dred Scott*, the Court used its power of judicial review of congressional legislation sparingly. In contrast, the Court aggressively utilized the Dormant Commerce Clause to invalidate state commercial regulations.[405] If a decision's importance is to be judged by its actual impact on the Court and its adjudicative authority, *Gibbons* is surely the equal of *Marbury*.

More generally, there has been a subtle but perceptible move by some commentators to question the importance of the Marshall Court.[406] Prominent among these critics has been Michael Klarman, who has directly challenged the notion that the "great" constitutional decisions of the Marshall Court played a significant role in the development of the nation.[407] Klarman attacks all of the "great" Marshall Court decisions, including *Marbury* and *McCulloch*, but it is his treatment of *Gibbons* that I wish to address here. According to Klarman, *Gibbons* is of minimal importance because, first, there was no real dispute regarding the constitutionality of the Federal Navigation Act and, second, Congress failed to capitalize upon Marshall's opinion, leaving its commerce power largely unused for most of the nineteenth century.[408]

Klarman's first reason for dismissing *Gibbons*—that the Federal Navigation Act's constitutionality was "uncontroversial"—should not

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403 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

404 The Passenger Cases, 48 U.S. (7 How.) 283 (1849).

405 *E.g.*, Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557, 577 (1886) (holding state railroad rate regulation violated Dormant Commerce Clause); *see also* James W. Ely, Jr., *"the railroad system has burst through State limits": Railroads and Interstate Commerce, 1830–1920*, 55 ARK. L. REV. 933, 945 (2003) (discussing Dormant Commerce Clause challenges in late nineteenth century to state railroad regulations).

406 *See, e.g.*, Davison M. Douglas, *The Rhetorical Uses of* Marbury v. Madison*: The Emergence of a "Great Case,"* 38 WAKE FOREST L. REV. 375, 413 (2003) ("But *Marbury*'s greatness cannot be attributed to the pathbreaking character of the decision. Rather, *Marbury* has become great because, over the years, proponents of an expansive doctrine of judicial review have needed it to assume greatness."); Klarman, *supra* note 18, at 1112. To be sure, these critics constitute a minority—most commentators feel quite confident in characterizing the great Marshall Court decisions as "great." *See, e.g.*, Jack M. Balkin, *The Use That the Future Makes of the Past: John Marshall's Greatness and Its Lessons for Today's Supreme Court Justices*, 43 WM. & MARY L. REV. 1321, 1338 (2002) ("Marshall, then, is great because he was a prophet of American nationalism.").

407 Klarman, *supra* note 18, at 1112.

408 *Id.* at 1130–31.

be taken seriously. For one, the defenders of the steamboat monopoly did contest the constitutionality of the Navigation Act as applied to the steamboat monopoly, arguing that the commerce power authorized Congress only to regulate the navigation of cargo ships, not passenger ships, because people could not be objects of commerce.[409] Indeed, Emmet even suggested that the federal statute regulating the safety of passenger ships was unconstitutional.[410] That was a poor argument—even apart from the barbaric practice of chattel slavery in the Southern states, the fact that common carriers and passenger ships generated a great deal of income from the movement of individuals demonstrated people could be part of commerce—and Marshall understandably rejected it.[411]

But more importantly, Klarman misunderstands exactly what *was* controversial in *Gibbons*. First, while the parties agreed on the general proposition that the commerce power authorized Congress to regulate coastal navigation, they disagreed as to whether the Federal Navigation Act of 1793 actually gave vessels licensed under the Act the right to enter state waters when the state in question had prohibited such vessels from entering or navigating its waters.[412] Stated differently, whether the Federal Navigation Act conflicted with the New York statutes creating the steamboat monopoly was the subject of great disagreement. No less an authority on American law than Chancellor James Kent thought that the Navigation Act did not prevent states from restricting access to state waters to certain ships.[413] Marshall too rejected that argument, ruling that the federal license granted by the Act was intended to remove state-imposed barriers to state waters for ships engaged in the coastal trade,[414] but Marshall's construction of the Navigation Act can hardly be dismissed as "uncontroversial." Indeed, Kent was not alone in thinking that Marshall had misread the Navigation Act. Several commentators believe that

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409 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 76–77 (1824) (argument of Oakley).

410 *Id.* at 96 (contending that constitutionality of Act of Mar. 2, 1819, ch. 46, 3 Stat. 488, which, *inter alia*, limited number of passengers according to size of ship, "may well be doubted").

411 *Id.* at 215–16.

> A coasting vessel employed in the transportation of passengers, is as much a portion of the American marine, as one employed in the transportation of a cargo; and no reason is perceived why such vessel should be withdrawn from the regulating power of that government, which has been thought best fitted for the purpose generally.

Id.

412 *Id.* at 131–38 (argument of Emmet).

413 Ogden v. Gibbons, 4 Johns. Ch. 150, 156–57 (N.Y. Ch. 1819).

414 *Gibbons*, 22 U.S. at 213–14.

Marshall's construction of the Act was erroneous,[415] and even Marshall's defenders agree that his interpretation of the statute was "strained."[416]

Second, even apart from the Navigation Act's construction, Klarman ignores the role of the Dormant Commerce Clause in *Gibbons*. As noted above, *Gibbons* was argued as a Dormant Commerce Clause case, with counsel for both sides devoting most of their arguments to the question whether the commerce power was vested exclusively in the federal government or shared concurrently with the states. Obviously, Marshall did not rest the decision on the Dormant Commerce Clause, but his affinity for the Dormant Commerce Clause was evident from his express rejection of the arguments pressed by Oakley and Emmet in favor of concurrent state power. Moreover, his lengthy and detailed exploration of the issue set the stage for the subsequent adoption and refinement of the Dormant Commerce Clause in future cases, such as the *Passenger Cases* and *Cooley*.

Third, Marshall's comprehensive elaboration of the scope of Congress's affirmative regulatory power over commerce was a watershed event in American constitutional law. As noted above,[417] the scope of Congress's authority was hotly contested in Congress, with Congressmen and Presidents alike construing the commerce power narrowly. According to these politicians, the commerce power authorized Congress only to regulate the exchange of goods across state lines, for example, by adopting regulations that "prescribe the terms, manner, and conditions on which that trade should be carried on."[418] Not surprisingly, the defenders of the monopoly seized upon these views, arguing that commerce includes only the "transportation and sale of commodities" and that, even then, Congress may regulate such commerce only to the extent that such commodities are transported across state lines for sale.[419] Marshall rejected these claims, adopting an expansive interpretation of the commerce power.[420]

In short, while Marshall's upholding of the constitutionality of the Federal Navigation Act may not seem all that significant or controversial to modern readers, Marshall's broad construction of the Navigation Act, his embrace of the Dormant Commerce Clause, and

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415 *See supra* note 6.

416 *See, e.g.*, 3–4 WHITE, *supra* note 11, at 577–78.

417 *See supra* text accompanying notes 259–85.

418 31 ANNALS OF CONG. 1158 (1818) (statement of Rep. Barbour); *see also id.* at 1140 (statement of Rep. Smyth) (contending that Commerce Clause authorizes Congress only to "lay duties on imports from another State, designate ports, prescribe rules for the coasting trade, grant licenses, and so on").

419 *Gibbons*, 22 U.S. at 76 (argument of Oakley); *id.* at 88–89 (argument of Emmet).

420 *Id.* at 189–97.

his comprehensive articulation of the expansive scope of Congress's regulatory power over commerce were highly contestable (and contested) legal rulings. In fact, Klarman subsequently acknowledges that Marshall's elaboration of the scope of Congress's commerce power was controversial at the time, but he dismisses that feature of the opinion on the inapposite ground that it was merely dicta.[421] Thus, Klarman can characterize the holding of *Gibbons* as "uncontroversial" only because he focuses on a minor, tertiary part of the opinion, while conspicuously disregarding or trivializing the central aspects of the decision upon which opinion outside the Court was heavily divided.

More fundamentally, one might dispute Klarman's criterion of controversiality. Klarman never explains why an opinion's "greatness" is dependent upon the controversiality of its holding. To be sure, many "great" decisions, such as *Brown v. Board of Education*,[422] were controversial at the time they were rendered,[423] but greatness and controversiality do not ineluctably go hand in hand. *Dred Scott* was a controversial decision—it precipitated the Civil War—but few if any call it a great decision.[424] Conversely, *Crowell v. Benson*[425] is undoubtedly a great case—it established that, as a constitutional matter, federal administrative agencies could adjudicate disputes between private individuals involving statutory claims, thereby paving the way for the modern administrative state[426]—but the case drew virtually no attention among the broad public when it was released.

In fairness to Klarman, he does not treat the controversiality of a decision as the sole or even principal criterion by which to measure a decision's greatness. Rather, for Klarman, the ultimately more important measure of a case is found in its impact on the development of the nation, and, according to Klarman, *Gibbons* is not all that significant because Congress did not seize upon *Gibbons* and enact legisla-

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421 Klarman, *supra* note 18, at 1161.

422 347 U.S. 483 (1954).

423 Even Herbert Wechsler—hardly a retrograde segregationist—had trouble accepting the legitimacy of the Court's construction of the equal protection clause in *Brown*, even though he thought racial segregation to be abhorrent. *See* Herbert Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 HARV. L. REV. 1, 31–34 (1959) (criticizing *Brown* as unprincipled decision).

424 *See* Christopher L. Eisgruber, Dred *Again: Originalism's Forgotten Past*, 10 CONST. COMMENT. 37, 41 (1993) (calling *Dred Scott* "worst atrocity in the Supreme Court's history").

425 285 U.S. 22 (1932).

426 *Id.* at 47–54; *see also* David P. Currie, *The Constitution in the Supreme Court: The New Deal, 1931–1940*, 54 U. CHI. L. REV. 504, 514 (1987) (describing *Crowell* as endorsing "[t]he most significant relaxation of constitutional obstacles to the modern administrative state").

tion to regulate commercial activities in the immediate aftermath of the case.[427] Congress left its commerce power largely unused until the end of the nineteenth century, when it finally began to regulate private commercial activity, enacting the Interstate Commerce Commission Act and Sherman Antitrust Act.[428] As Klarman picturesquely characterizes it, *Gibbons* extended an invitation to Congress to regulate much of the commercial activity in the country, but "that invitation was declined for nearly three quarters of a century."[429]

As an initial matter, Klarman simply sweeps under the rug the incredible and immediate impact that *Gibbons* had on interstate commercial navigation. *Gibbons* literally opened the gates to New York harbor, allowing competing steamship companies to offer service between New York City and other points on the eastern seaboard. Within a year of the decision, the number of steamboats servicing New York City had grown seven-fold.[430] Similarly, *Gibbons* freed the western rivers, such as the Mississippi and Ohio Rivers, from the threat of state-created navigation monopolies, thereby spurring investment in steamboat development on those rivers.[431] Within a year of the decision, steamboat construction on the Ohio River had doubled, and, within two years of the decision, it had quadrupled.[432]

This rapid development of steamship service had a dramatic effect on the American economy. For New York City, the opening of its harbor to free navigation was, as Charles Warren observed, "the most potent factor in the building up of New York as a commercial center."[433] Competition among steamship companies led to price wars for freight and passenger service. The cost of freight service on the Hudson River, for example, dropped from 6.2 cents per ton per mile in 1814 to .7 cents per ton per mile in 1854—a drop of nearly 90%.[434] Similarly, as noted above, passenger rates for travel between Albany and New York fell from the $7 charged by the Livingston/Fulton syndicate to as low as $1 shortly after *Gibbons* was decided.[435] By 1850, the cost for that journey was 50 cents.[436] Predictably, the growth in commerce spurred by the availability of cheap and efficient

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427 Klarman, *supra* note 18, at 1133.

428 *See supra* notes 399–400 and accompanying text.

429 Klarman, *supra* note 18, at 1133.

430 *See supra* text accompanying notes 126–27.

431 4 BEVERIDGE, *supra* note 13, at 446.

432 *Id.* at 446 n.1; *see also* 1 WARREN, *supra* note 16, at 615 (discussing effect of decision on steamship travel in South Carolina and Georgia).

433 1 WARREN, *supra* note 16, at 616.

434 4 TAYLOR, *supra* note 281, at 136.

435 *See supra* text accompanying note 128.

436 4 TAYLOR, *supra* note 281, at 143.

transportation drew individuals from the countryside and foreign nations to the bustling commercial center of New York City. In the forty years from 1820 to 1860, the population of New York City grew from 123,700 to almost 1.1 million.[437]

The effect of *Gibbons* was also felt outside New York. The availability of a cheap and speedy means to transport agricultural and manufactured goods large distances, in turn, opened new markets for the nation's farmers, manufacturers, and merchants.[438] With steamships available to carry goods quickly down and, more importantly, up the Mississippi and Ohio Rivers,[439] growth in the Ohio and Mississippi River Valleys ballooned. Cities along those rivers, such as Cincinnati, St. Louis, and New Orleans, grew from small, provincial backwaters to major urban manufacturing and commercial centers.[440] All told, *Gibbons*'s impact on American economic development in the antebellum period, while impossible to quantify precisely, was significant.

Of course, *Gibbons* would be little more than a constitutional curio if its importance were limited solely to its impact—great as it was—on commercial navigation. Obviously, *Gibbons*'s significance in American constitutional law derives from the fact that not only did it liberate steamship travel from potentially onerous state-imposed restrictions but that it also speaks more broadly to the scope of federal power over commercial activities.[441] It is this aspect of its "greatness" that Klarman targets by claiming that *Gibbons* had little influence on subsequent events in American history.

Yet, it is critical to understand exactly what Klarman demands of *Gibbons* and, implicitly, other Supreme Court decisions. Evidently, to satisfy Klarman, Marshall was obligated to persuade Congress not only that it had the constitutional authority to regulate a number of activities in the name of interstate commerce, but that it should actually employ such power in an aggressive fashion, perhaps even up to its constitutional limits. This is a standard of Klarman's own making; significantly, Marshall never understood his task to persuade Congress actually to regulate American commerce. Indeed, for policy reasons,

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437 *Id.* at 7, 389.

438 4 BEVERIDGE, *supra* note 13, at 446–47.

439 To travel up the rivers from New Orleans to Ohio on a keelboat required three months. 4 TAYLOR, *supra* note 281, at 143. By steamship, the same trip took eight days and sometimes less. *Id.*

440 *Id.* at 7, 389 (noting that, between 1820 and 1860, population of New Orleans grew from 27,200 to 168,675 and Cincinnati from 9600 to 161,000). Even more strikingly, the population of St. Louis grew from less than 8000 to 160,000.

441 *Cf.* 1 WARREN, *supra* note 16, at 616 (observing that *Gibbons*'s importance was due to its political, as well as economic, impact).

he was somewhat dubious of the merits of federal involvement in commercial matters.[442]

More importantly, however, Klarman's measure is a terribly demanding standard for greatness, one that will rarely be satisfied. In fact, by this measure, *Brown v. Board of Education* was a failure since the Court did not persuade Congress actually to enact legislation to enforce the decree; rather, Congress did not enact significant civil rights legislation for almost a decade (and then only because of the political pressure applied by the civil rights movement and the felt sense of obligation to honor President Kennedy).[443] Moreover, why limit this measure of greatness to judicial decisions? What if we applied it to the Constitution itself? Article I, Section 8 contains a number of congressional powers that went unused for decades after the Founding. For example, Congress did not enact a comprehensive immigration scheme for almost a century,[444] and it did not enact a permanent federal bankruptcy statute until well more than a century had passed since the Founding.[445] Surely, the greatness of the Constitution or the seminal judicial decisions interpreting it is not diminished by the refusal of Congress to employ its constitutionally granted powers to their full constitutional extent.[446]

For this reason, I doubt that Klarman's test for greatness is all that great, but, even were I to accept it, I do not think that *Gibbons* fails to meet its measure. The antebellum American political environment was not as hostile to federal involvement in commerce as Klarman describes. Though Congress did not enact the New Deal and Great Society immediately following *Gibbons*, equally, it did not retain the same, crabbed interpretation of its commerce power that predated *Gibbons*. This is not the time or place to undertake a comprehensive survey of congressional and presidential views of the Com-

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442 *See supra* text accompanying note 287.

443 It was not until 1964 that Congress enacted the Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.), which, *inter alia*, authorized the Department of Justice to commence suits to desegregate public schools.

444 Act of Aug. 3, 1882, ch. 376, 22 Stat. 214. *See generally* Kleindienst v. Mandel, 408 U.S. 753, 761 (1972) (noting that Congress passed first general immigration statute in 1882).

445 Act of July 1, 1898, ch. 541, 30 Stat. 544. Earlier bankruptcy statutes had lasted only a couple of years before being repealed by Congress. *See generally* Leonard J. Long, *Emerging from the Shadow: The Bankrupt's Wife in Nineteenth-Century America*, 21 QUINNIPIAC. L. REV. 489, 494–96 (2002) (describing history of early bankruptcy statutes).

446 Even today, some constitutional powers are left in a state of desuetude. It has been a long time since Congress last granted a letter of marque or reprisal. U.S. CONST. art. I, § 8, cl. 11 (authorizing Congress to grant letters of marque and reprisal). The last time Congress issued a letter of marque and reprisal was during the War of 1812. *See* C. Kevin Marshall, Comment, *Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. CHI. L. REV. 953, 954 (1997).

merce Clause in the years leading up to and following the Civil War. Nevertheless, by focusing on one aspect of congressional legislative activity—namely, the construction of internal improvements—we can see that congressional and presidential views of the commerce power grew increasingly more expansive after *Gibbons* and that *constitutional* objections (as opposed to policy-based objections) to federal legislative programs correspondingly diminished. To be sure, *Gibbons* was not the exclusive factor responsible for this change of constitutional vision, but it cannot be dismissed as wholly irrelevant to this gradual transformation.

To see this change in congressional and presidential views of the commerce power most clearly, let's contrast pre-*Gibbons* views of the commerce power with post-*Gibbons* views. Recall that, in 1816, President Madison vetoed the Bonus Bill because he thought that Congress lacked the power to provide for internal improvements, and, in like fashion in 1818, Congress rejected a series of resolutions that would have acknowledged Congress's constitutional authority to construct roads to foster interstate commerce.[447] According to Klarman, the views of the political branches did not change much over the next forty years. As evidence, Klarman points out that President Andrew Jackson (1829-1837) vetoed bills involving internal improvements and that, more generally, Whig-sponsored initiatives to construct a transcontinental railroad failed to come to fruition.[448]

Klarman, however, ignores that Congress did not share President Jackson's narrow views of the commerce power. As David Currie points out, in the years following *Gibbons*, Congress enacted a host of bills providing for the construction of federal roads and canals, which President John Quincy Adams signed into law.[449] Even after Jackson came to power, Congress continued to consider bills for internal improvements.[450] In fact, in a bold move, Congress considered constructing a road from Buffalo, New York, to New Orleans, Louisiana.[451] Though the bill did not pass, opposition to the bill arose more from fiscal and political concerns than it did from constitutional misgivings.[452] Leading opponents of the bill expressed concern about

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447 *See supra* notes 258–63, 275–79 and accompanying text.

448 Klarman, *supra* note 18, at 1131.

449 CURRIE, *supra* note 259, at 282 n.205 (listing acts).

450 *See, e.g.*, *infra* notes 463–465 and accompanying text (discussing bills).

451 *See, e.g.*, 6 REG. DEB. 637–55 (1830) (debating bill).

452 Many Jacksonian Democrats spoke in favor of the bill's constitutionality. *See, e.g.*, *id.* at 644–45 (statement of Rep. Hemphill), 662 (statement of Rep. Isacks). Even Representative Philip P. Barbour, though he continued to believe that the Constitution did not authorize the federal government to build internal improvements, acknowledged that con-

its cost and route;[453] some congressmen were even more venal, proposing to reroute the road through their districts and voting against the bill when their proposed changes were defeated.[454] Indeed, as historian George Taylor concluded, the "real obstacle" to internal improvement legislation during this time was not constitutional but political.[455] The sectional divisions among the states created equally balanced political coalitions, each with their own sectarian-driven view of internal improvements. Representatives from New England and the South generally opposed internal improvements (because the former believed they would not stand to benefit from them and because the latter believed that the high tariffs necessary to fund them would come out of their pockets), while representatives from the Middle Atlantic and West generally approved of them (because they believed they stood to benefit from such improvements).[456] Even so, during Jackson's first year in office, with a Congress composed heavily of Jacksonian Democrats, Congress enacted several bills for the construction and financing of internal improvements, including the extension of the Cumberland road.[457]

These actions testified eloquently to the fact that Congress had accepted a much broader understanding of its commerce power than it had only a decade or so earlier. Klarman provides no explanation why Congress's more expansive conception of its commerce power is entitled to less consideration than President Jackson's more narrow view. If President Jackson's restrictive view of federal power shows the limits of the Supreme Court's ability to influence the constitutional views held by the political branches, surely Congress's more generous view demonstrates its possibilities.

Moreover, Klarman reads too much into the presidential vetoes of several internal improvement bills. Jackson was no nationalist, committed to building a comprehensive system of roads and canals throughout the nation, but neither was he categorically opposed to all federal efforts on constitutional grounds, like Madison was. In his

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stitutional arguments were no longer well received in the House. *Id.* at 647 (noting that constitutional arguments "are in ill odor in this hall").

453 *See, e.g., id.* at 803 (statement of Rep. Buchanan) (explaining that, in his view, opposition was based on cost of this particular road, not opposition to internal improvements in general).

454 Typical of this camp was Congressman Augustine H. Shepperd of North Carolina, who proposed to amend the bill to shift the route of the road to the east through his district and who voted against the bill when his proposal failed. *Id.* at 790.

455 4 TAYLOR, *supra* note 281, at 20–21.

456 DONALD B. COLE, THE PRESIDENCY OF ANDREW JACKSON 64 (1993).

457 *See* S. 100, 21st Cong. (1830) (extending Cumberland Road from Ohio to Indiana and Illinois); H.R. 315, 21st Cong. (1830) (same); H.R. 285, 21st Cong. (1830) (authorizing purchase of stock in Maysville Road).

First Annual Message to Congress, Jackson praised the benefits that would accrue "by the improvement of inland navigation and the construction of highways in the several States."[458] Jackson acknowledged that some members of Congress thought such measures were unconstitutional, while others thought them "inexpedient,"[459] but Jackson did not declare his allegiance to either camp. Rather, Jackson diplomatically (and ambiguously) urged Congress to "endeavor to attain this benefit [produced by internal improvements] in a mode which will be satisfactory to all."[460]

Admittedly, Jackson later vetoed several internal improvements bills, including a bill to construct the Maysville road through a portion of Kentucky. In his veto of the Maysville road bill, Jackson even went so far as to declare that, if the people wanted the federal government to construct roads and canals, it was "indispensably necessary" that they adopt a constitutional amendment empowering the federal government to do so.[461] Yet, Jackson also defended his veto of the Maysville road on non-constitutional grounds. As Jackson explained, the road was purely local in character—it was entirely within Kentucky—and federal appropriations for internal improvements would divert federal revenues from Jackson's pet project of retiring the entire federal debt during his presidency.[462]

It is difficult to know for certain whether Jackson's constitutional opinion was sincere or merely a makeweight added for political advantage to appease Southern congressmen, who detested the federal import tariffs being used to fund the construction of federal internal improvements. Whatever the case, Jackson's constitutional concerns were not as strident as his veto message suggested. Just four days after his Maysville road veto, Jackson signed into law a bill funding further surveys for roads and canals under the 1824 survey bill and, even more startlingly, funding the extension of the Cumberland road from Zanesville, Ohio through Indiana and Illinois.[463] The following year, Jackson approved bills funding further road construction in Michigan, Arkansas, Ohio, Indiana, and Illinois.[464] And whatever constitutional (and fiscal) misgivings Jackson initially possessed were interred for good in 1832 when he signed into law a pork-laden bill providing federal funding for a host of road, canal, river, and port

458 6 REG. DEB. app. at 10 (1830).
459 *Id.*
460 *Id.*
461 *Id.*, app. at 140.
462 *See id.*, app. at 137–39.
463 *See* Act of May 31, 1830, ch. 232, 4 Stat. 427.
464 *See* Act of Mar. 2, 1831, ch. 58, 4 Stat. 462; Act of Mar. 2, 1831, ch. 63, 4 Stat. 469.

improvement projects throughout the nation.[465] By the end of his presidency, Jackson had spent twice as much on roads and canals than all the prior presidents *combined*.[466] In short, Jackson's strident rhetoric did not match his actions, and what little opposition he voiced to federal internal improvement projects seemed to be driven far more by political and fiscal concerns than constitutional scruples.[467] While he had not expressly embraced Marshall's expansive conception of federal power outlined in *Gibbons*, Jackson had not repudiated it either (as he had with respect to *McCulloch* and the Bank of the U.S.), and, at least with respect to internal improvements, his actions had much more in common with the liberal John Quincy Adams than the strict constructionists Thomas Jefferson and James Madison.

Most troublingly, Klarman discounts the significance of the fact that, ultimately, both Congress and the President came to accept that the protection of interstate commerce required Congress to actually use its commerce power to create federal regulatory programs to guard against the twin evils of state protectionist legislation and robber-baron capitalism. To be sure, it took more than sixty years—until the Progressive Era—for the political branches to come to this view, but come they ultimately did. Today, the federal government regulates virtually every facet of American life to some extent—from the design of motor vehicles,[468] to air and water quality,[469] to working conditions,[470] to gun ownership[471] (to name just a few examples). And, more importantly, the political branches' view of the commerce power has remained an expansive one ever since the Progressive Era. Klarman is right that *Gibbons* alone did not cause this transformation,[472] but *Gibbons* helped to provide the constitutional foundation for these programs.

Indeed, Klarman minimizes the importance of *Gibbons* only by focusing on the factors that have little or no bearing on a decision's greatness. In my view, the true measure of a decision's greatness lies in the relevance of that decision to contemporary discussions regarding the Constitution and its meaning. Does the decision shape

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465 *See* Act of July 3, 1832, ch. 153, 4 Stat. 551.

466 COLE, *supra* note 456, at 67.

467 *See also* 4 TAYLOR, *supra* note 281, at 20 (noting that Jackson's Maysville veto "hardly warrants the strict constructionist emphasis so commonly given it").

468 *E.g.*, 49 U.S.C. §§ 30,111–30,127 (2000) (motor vehicle safety standards).

469 *E.g.*, 33 U.S.C. §§ 1311–1330 (2000) (water pollution standards); 42 U.S.C. §§ 7521–7554 (2000) (emission limitations for motor vehicles).

470 *E.g.*, 29 U.S.C. §§ 651–678 (2000).

471 *E.g.*, 18 U.S.C. §§ 921–931 (2000).

472 *Cf.* Klarman, *supra* note 18, at 1137 (noting that post–War of 1812 nationalism was not caused by *Gibbons*).

or influence our views of the Constitution and its meaning? Measured in this fashion, *Gibbons* is undoubtedly a decision of transcendent importance; it is still taught in law schools around the country and cited by courts today, almost two centuries after its release. Indeed, *Gibbons* remains the focal point for constitutional debates regarding the scope of Congress's commerce power. This can be best illustrated by examining *United States v. Lopez*.[473]

Lopez is a watershed decision in recent constitutional law. It marked the first time in over sixty years that the Supreme Court had struck down a federal statute as being beyond the federal government's commerce authority. In so doing, *Lopez* has come to represent (for both its proponents and detractors) the "New Federalism" of the Rehnquist Court.[474] I do not care to rehash the heated debate whether *Lopez* was correctly decided; much ink has already been spilled on that point.[475] Rather, my point is a more modest one: *Gibbons* played a central role for both the majority and the dissenting justices in *Lopez*, with both sides contending that their conception of the commerce power was more faithful to *Gibbons* and its description of the extent of the commerce power.[476] Indeed, while the Justices disagreed regarding exactly what *Gibbons* meant, they agreed that *Gibbons* was directly relevant to determining the proper scope of Congress's commerce power. Moreover, *Lopez* is not the only case in which the Court has turned to *Gibbons* in this task.[477] In short, to this day, *Gibbons* and its exposition of the commerce power

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[473] 514 U.S. 549, 553 (1995) (invalidating Gun-Free School Zones Act of 1990, Pub. L. No. 103-322, sec. 320,904, § 922q, 108 Stat. 1796, 2125).

[474] *See, e.g.*, Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 616, 622 (1995); Gerald L. Neuman, *The Nationalization of Civil Liberties, Revisited*, 99 COLUM. L. REV. 1630, 1638 (1999); *see also* Kramer, *We the Court*, *supra* note 20, at 138 (arguing that "real revolution" in federalism began with *Lopez*).

[475] Entire law review symposia have been devoted to the case. *See, e.g.*, Symposium, *The New Federalism After* United States v. Lopez, 46 CASE W. RES. L. REV. 635 (1996); Symposium, *Reflections on* United States v. Lopez, 94 MICH. L. REV. 533 (1995).

[476] *Compare Lopez*, 514 U.S. at 553 (concluding that *Gibbons* held that commerce power did not extend to "completely internal" commerce established limit on federal power), *and id.* at 594 (Thomas, J., concurring) (contending that "the principal dissent is not the first to misconstrue *Gibbons*" and citing Wickard v. Filburn, 317 U.S. 111, 120 (1942) as example), *with id.* at 604 (Souter, J., dissenting) (concluding that *Gibbons* had recognized "broad" federal power over commerce), *and id.* at 615, 631 (Breyer, J., dissenting) (concluding that *Gibbons* recognized federal authority over intrastate commercial activities that "significantly affect interstate commerce and arguing that, had Court interpreted commerce power "as this Court has traditionally interpreted it"—citing *Gibbons* as example—it would have upheld statute).

[477] *See, e.g.*, Solid Waste Agency v. United States Army Corp. of Eng'rs, 531 U.S. 159, 181 (2001) (Stevens, J., dissenting) (accusing Court of ignoring *Gibbons* in adopting narrow interpretation of commerce power); United States v. Morrison, 529 U.S. 598, 616

remain the touchstone for discussions regarding the scope (and limits) of Congress's commerce power. One might ask (pointedly and rhetorically) what more is required for a decision to be worthy of being called "great."

B. Popular Constitutionalism: Past, Present, and Future

Lastly, even apart from its instructive value regarding the scope of the federal commerce power, *Gibbons* has significance for modern, theoretical debates regarding the role of the Supreme Court in constitutional interpretation. *Gibbons* and the political environment that produced it provide a useful insight into the complex interplay between the Supreme Court, on the one hand, and Congress and the President, on the other hand, in interpreting the Constitution. Indeed, *Gibbons* reveals that there is a close relationship between the judiciary's interpretive integrity and the confidence it possesses in its institutional position.

Only a few decades ago, in *Cooper v. Aaron*,[478] the Court declared that its interpretation of the Constitution was the final word on the Constitution's meaning.[479] The context of that declaration—the Court's almost unilateral battle (at that time) against racial segregation in public education—made the Court's pronouncement seem not only defensible but desirable as a constitutional matter.[480] Given the dispute between the Supreme Court and Governor Faubus regarding the meaning of the Equal Protection Clause, surely the Supreme Court's view must prevail. If a little high-handedness by the Court was necessary in order to desegregate the South, so be it. Whether or not the Supreme Court was correct about its supreme interpretive status as a general matter, *Cooper* carried the day, and the political branches and states accepted that, once the Court declared "what the law is," they were duty bound to follow it.[481]

In recent years, dissatisfaction with the Rehnquist Court and its heavy-handed approach to judicial review has prompted a reexamination of *Cooper* and the Supreme Court's self-declared supreme interpretive status. Mark Tushnet, for one, has provocatively recommended the wholesale repeal of the power of judicial review,

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n.7 (2000) (contending that its approach is drawn from *Gibbons*); *id.* at 641, 646 (Souter, J., dissenting) (accusing majority of misreading *Gibbons*).

478 358 U.S. 1 (1958).

479 *Id.* at 18 (stating that *Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution").

480 *Cf.* TUSHNET, *supra* note 20, at 8 (observing that *Cooper* "presented a particularly appealing setting for asserting judicial supremacy").

481 KRAMER, THE PEOPLE THEMSELVES, *supra* note 20, at 221; Kramer, *We the Court*, *supra* note 20, at 6–7, 129–30.

urging the People to "reclaim" their constitution and engage in constitutional deliberations exclusively through the political branches.[482] More modestly, Larry Kramer has proposed that the Court continue to engage in judicial review but accommodate to a greater extent than it has the People's views, as expressed through the political branches, regarding the Constitution.[483] Kramer defends his attack on judicial supremacy on the ground that, under our Constitution, it is the People, not the judiciary, who are the supreme expositor of the meaning of the Constitution.[484] Kramer labels this theory of constitutional government "popular constitutionalism."[485]

Gibbons can hardly resolve conclusively whether the popular constitutionalist conception of the Court's role is superior to a regime of judicial supremacy. The determination whether the modern Court's interpretive status is constitutionally defensible rests on a number of considerations.[486] Nevertheless, *Gibbons* can illuminate some of the trade-offs involved in attempting to restore an interpretive regime committed to popular constitutionalism because—and this is a key point—*Gibbons* was decided at a time in which popular constitutionalism, not judicial supremacy, was the dominant understanding of our constitutional order.[487] To embrace popular constitutionalism is to restore an interpretive equilibrium that existed in 1824 and, consequently, to demand that the current Court and current Congress act more like the Court of 1824 and Congress of 1824 with respect to constitutional interpretation.

On a positive note, popular constitutionalism may increase both the quantity and quality of constitutional discourse in the political branches. The triumph of judicial supremacy in the twentieth century came with a price. As the political branches came to accept that the Court's view of the Constitution was the final word on the matter, the political branches correspondingly began to rely more on the Supreme

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482 TUSHNET, *supra* note 20, at 174, 194.

483 KRAMER, THE PEOPLE THEMSELVES, *supra* note 20, at 252–53.

484 *Id.* at 247–48. In contrast, Tushnet defends his call for a repeal of the power of judicial review purely on contemporary grounds—that our Republic would be better off if the political branches rather than the courts had the final word on the meaning of the Constitution. TUSHNET, *supra* note 20, at 172–73.

485 KRAMER, THE PEOPLE THEMSELVES, *supra* note 20, at 8; Kramer, *We the Court*, *supra* note 20, at 12, 163; *see also* TUSHNET, *supra* note 20, at 194 (arguing that "public generally should participate in shaping constitutional law more directly and openly").

486 *See, e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1369–81 (1997) (contending that judicial supremacy is necessary to provide "settlement function of law"); *see also* KRAMER, THE PEOPLE THEMSELVES, *supra* note 20, at 234 (acknowledging contemporary, theoretical justifications for judicial supremacy).

487 KRAMER, THE PEOPLE THEMSELVES, *supra* note 20, at 189–90.

Court to resolve constitutional questions and to engage less frequently in serious constitutional deliberation. Indeed, there have been occasions in the recent past in which both Congressmen and Presidents alike have declared that it is not for Congress or the President to consider the constitutionality of legislation but rather for the Supreme Court to decide once the legislation has been passed and signed into law.[488] Moreover, even when Congress or the President have addressed constitutional matters, their consideration has often been drawn from and dependent upon Supreme Court doctrine, giving the appearance that they are not engaged in independent constitutional analysis but rather merely trying to forecast whether the Court will uphold or invalidate the bill under its interpretation of the relevant constitutional provision.[489] Tushnet labels this phenomenon the problem of "judicial overhang."[490]

In contrast, popular constitutionalism encourages the political branches to engage in sustained, serious constitutional analysis. As David Currie has shown, constitutional debates were common occurrences in Congress in the early nineteenth century.[491] This is particularly true with regard to legislation regarding internal improvements. In fact, at times, such as in the 1818 debates on the Tucker committee report,[492] Congress's attention was centered exclusively on the constitutional propriety of federal involvement in internal improvements. Moreover, these debates were hardly superficial; rather, the speakers often displayed a high level of sophistication and learning.[493] Thus, the circumstances surrounding *Gibbons* confirm that the anemic constitutional discourse taking place today in the political branches is not a foreordained consequence of our division of power among the three branches of government; rather, it is a byproduct of the interpretive regime.

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488 *See, e.g.*, Statement by President George W. Bush Upon Signing H.R. 2356 (Mar. 27, 2002), *reprinted in* 2002 U.S.C.C.A.N. 125, 125–26 (expressing reservations regarding bill's constitutionality and then stating that "I expect that the courts will resolve these legitimate legal questions as appropriate under the law"); 130 Cong. Rec. S10,861 (1984) (statement of Sen. Alan J. Dixon) ("I want to pass this amendment, send it to the House, have them pass it, have the President sign it, and let the Supreme Court decide whether it is constitutional to do this.").

489 *See, e.g.*, 148 Cong. Rec. S2106 (daily ed. Mar. 20, 2002) (statement of Sen. Ted Stevens) ("In terms of this legislation, I have reached the conclusion that it, too, is unconstitutional. If the bill that was reviewed in *Buckley v. Valeo* was unconstitutional, this one surely is.").

490 TUSHNET, *supra* note 20, at 57.

491 CURRIE, *supra* note 259, at 260.

492 *See supra* notes 268–74 and accompanying text.

493 CURRIE, *supra* note 259, at 344 (noting that "the acuity of constitutional debate in Congress and Cabinet during the first third of the nineteenth century was great").

Yet, *Gibbons* itself also hints at the darker side of popular constitutionalism. For one, popular constitutionalism condones—and may even require—the political branches to disobey a judicial decision when, in the political branches' opinion, the judiciary has misinterpreted the Constitution. If, for example, Congress has studied the question whether gender violence impedes interstate commerce by decreasing the productivity of women in the workplace,[494] it need not accept the Supreme Court's contrary conclusion that the commerce power does not authorize Congress to regulate gender violence.[495] If Congress has decided that late-term abortions are not encompassed within any constitutionally cognizable right to privacy and personal autonomy,[496] it need not abide the Supreme Court's contrary conclusion that the right to privacy extends to late-term abortions.[497]

Moreover, in such cases, popular constitutionalism openly licenses the political branches to retaliate against the Court for such perceived interpretive errors. Some of the tools available to the political branches for this task are innocuous, such as the congressional leadership issuing statements condemning particular decisions. Some are much more powerful, such as enacting legislation stripping the Supreme Court of jurisdiction to hear certain types of cases or impeaching the justices.[498] Indeed, it is important to recall that, as a result of the *Green* decision, Congress considered (though it did not pass) measures to divest the Supreme Court of its power of judicial review or at least make its exercise of that power much more difficult.[499] This history demonstrates that a popular-constitutionalist Congress believing that the Court has gone seriously astray will openly contemplate using the more potent levers of control over the Court.

Of course, popular constitutionalism does not *require* the political branches to retaliate against the Court for each and every interpretive error, but, equally, one cannot dismiss the likelihood of such retaliation on the ground that, today, Congress would never do any such silly thing, like strip the Court of its power of judicial review. Congress has

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494 *See* Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40,302, 108 Stat. 1902, 1941–42.

495 United States v. Morrison, 529 U.S. 598, 617–19 (2000) (invalidating Violence Against Women Act as beyond Congress's commerce power).

496 *See* Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2, 117 Stat. 1201, 1201–06 (reciting congressional findings regarding constitutionality of ban).

497 Stenberg v. Carhart, 530 U.S. 914, 930 (2000) (invalidating similar partial-birth abortion ban adopted by Nebraska).

498 KRAMER, THE PEOPLE THEMSELVES, *supra* note 20, at 249 (advocating jurisdiction stripping and impeachment as legitimate levers of control over judiciary).

499 *See supra* text accompanying notes 329–34.

in the recent past considered measures not all that different from those proposed by Senator Johnson in the 1820s. In the early 1980s, Congress considered a number of bills to strip the federal courts of the jurisdiction to adjudicate cases involving abortion rights, school busing, or school prayer because of Congress's displeasure with the federal judiciary's views regarding those matters.[500] These proposals differed from Senator Johnson's only in the fact that Johnson targeted judicial review wholesale, while these proposals targeted it piecemeal, removing the courts' power to enforce particular rights that Congress did not wish to be enforced. To be sure, these measures failed, but the reason for their failure proves the point about the likelihood of their use in a regime committed to popular constitutionalism. Congress did not strip the Court of its power of judicial review over those subjects because Congress valued the Court's role as the final arbiter on constitutional matters. Given this fact, what is so significant about the jurisdiction-stripping proposals of the 1980s is not that they failed but that they were considered by a Congress committed to judicial supremacy. A Congress committed to popular constitutionalism would be far more likely to use such measures to punish the Court for its interpretive errors (since popular constitutionalism, unlike judicial supremacy, licenses such reprisals).

Even apart from the threat of political retaliation against the Court, *Gibbons* also highlights a more subtle yet ultimately more pernicious danger potentially lurking in popular constitutionalism. Popular constitutionalism significantly constricts the judiciary's interpretive freedom. By reminding the judiciary that its views are not final and that the political branches may retaliate against the Court if the Court makes a grievous mistake (in the political branches' eyes), popular constitutionalism distorts the Court's own internal deliberations, thereby influencing the constitutional doctrine the Court announces. This internal impact can be seen in several respects in the *Gibbons* opinion.

For one, the mere fact that Marshall hedged on the Dormant Commerce Clause for reasons unrelated to any interpretive misgivings about the Dormant Commerce Clause itself demonstrates that the process of constitutional interpretation undertaken by the Court was not confined exclusively to identifying and announcing the correct interpretation (in the Court's view) of the particular constitutional provision at issue. Indeed, Marshall clearly believed that the

[500] *See* Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 129 n.1 (1981) (collecting jurisdiction stripping bills from 97th Congress, 1st Session); *see also* 1 TRIBE, *supra* note 1, at 271–280 (discussing constitutional problems with such proposals).

Commerce Clause divested the states of authority over interstate commerce, but rather than announce that rule, he only suggested it to be the case in dicta.

Even more revealing is the reason for Marshall's hedge. As discussed above, Marshall's refusal to base the Court's decision on the Dormant Commerce Clause was partly the result of his fear that announcing the existence of a dormant component to the Commerce Clause would trigger a political backlash against the Court for expanding its power of judicial review.[501] Marshall (and the Court) understood that, although the political branches were becoming more comfortable with the Court's power of judicial review,[502] there were a sizeable number of Congressmen who distrusted the Court and who were prepared to adopt measures restricting or even eliminating the Court's power of judicial review. To be sure, Congress had not taken a position with regard to the Dormant Commerce Clause, but that proves simply how politically sensitive the Court was: Congressional protests regarding prior instances in which the Court had set aside state legislation for violating the Contract Clause—an entirely different constitutional provision—was sufficient in the Court's mind to warrant the Court to hedge on the Dormant Commerce Clause. Marshall liked the notion of a Dormant Commerce Clause, but he liked the Court's power of judicial review even better; hence, Marshall (temporarily, in his mind) sacrificed the former so as to preserve the latter. And, not to put too fine a point on it, this choice had substantial doctrinal consequences: The existence and scope of the Dormant Commerce Clause remained the subject of debate within the Supreme Court for the next thirty years.

Gibbons is not alone in demonstrating the impact of popular constitutionalism upon the Court in the early nineteenth century. Chastened by the outcry over *McCulloch*, *Cohens*, and *Green*,[503] the Marshall Court embraced a more humble, politically circumspect approach to judicial review of state actions in the late 1820s and early 1830s. In fact, the Marshall Court was so stung by the political reaction to its decision in *Green* that it decided in *Hawkins v. Barney's Lessee*[504] to reverse course regarding the Contract Clause. Effectively repudiating *Green*, the Court upheld Kentucky's power to vest title to land in occupying tenants under the formalistic pretext that adverse

501 *See supra* text accompanying notes 367–84.

502 KRAMER, THE PEOPLE THEMSELVES, *supra* note 20, at 148–51; Kramer, *We the Court*, *supra* note 20, at 111–13.

503 *See supra* text accompanying notes 328–333, 345–49.

504 30 U.S. (5 Pet.) 457 (1831).

possession laws did not impair the obligations of contract.[505] Significantly, both Marshall and Story—the most stalwart defenders of an expansive interpretation of the Contract Clause—signed onto the *Hawkins* decision. *Hawkins*, of course, reflected a profound change of heart from the early Contract Clause decisions, effectively licensing state legislative assaults on vested contracts rights.[506] And, as was the case with *Gibbons*, this tactical retreat had doctrinal consequences: The Contract Clause became an increasingly weak constraint on state action, until the coup de grace was finally administered by the Court a century later in *Home Building & Loan Ass'n v. Blaisdell*,[507] which held—citing *Hawkins*—that "reasonable" restrictions on contract rights were constitutional.[508]

Gibbons and these other cases in which the Court has retreated under fire (or for fear of fire) testify eloquently to the impact of popular constitutionalism on the judiciary's interpretive integrity. Even though judicial review was readily accepted in the early nineteenth century, the prevailing commitment to popular constitutionalism nonetheless warped the Court's own deliberations regarding the meaning of the Constitution. Constitutional adjudication for the Marshall Court involved more than merely identifying what the Constitution meant; it also required the Court to ascertain whether the Court was in a position to make its interpretation stick. Would the political branches accept it? And, when the Court concluded that there was a sizeable risk that they wouldn't, the institutional interests of the Court trumped the Court's obligation to announce its view of the Constitution rightly understood. In short, popular constitutionalism entails not just an emboldened Congress (or President) but also a more timid or fearful judiciary.

Perhaps an emboldened Congress (or President) and a timid Court would be a good thing. Liberals might relish the thought of Congress staring down the Court on the constitutionality of the Violence Against Women Act; conservatives might delight in the thought of Congress pressuring the Court to uphold the constitutionality of the Partial-Birth Abortion Ban Act. Conversely, however, it might be a bad thing. Few liberals would be happy to witness the Court overrule *Stenberg*[509] simply because it feared congressional

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505 *Id.* at 466–467.

506 *Id.* at 467 (holding that statute of limitations does not offend contract rights held by absentee land owners); *see also* Wedgwood, *supra* note 320, at 261–62 (noting "deep change in the Court's view of vested rights" signaled by *Hawkins*).

507 290 U.S. 398 (1934).

508 *Id.* at 434 n.13, 445.

509 Stenberg v. Carhart, 530 U.S. 914 (2000) (invalidating partial-birth abortion ban).

retaliation, and few conservatives would welcome the overruling of *Morrison*[510] for the same reason. Of course, as is too often the case in constitutional law, one's views of the propriety of a particular theory of constitutional adjudication are often bound up with one's beliefs regarding the extent to which that theory will produce results in particular cases in accordance with one's political preferences: "I dislike *Morrison*, so popular constitutionalism sounds good since it offers the possibility of pressuring the Court to overturn it." This inability to transcend partisan doctrinal biases handicaps our ability to assess in a neutral fashion the desirability of replacing a regime dedicated to judicial supremacy with one dedicated to popular constitutionalism.[511]

But there is a deeper point here regarding the *severity* of the choice between the current regime of judicial supremacy and one committed to popular constitutionalism. Popular constitutionalism is not an incontestably superior conception of constitutional interpretation. Even if we could put aside our partisan biases—even if we could consider popular constitutionalism from the standpoint of a disinterested constitutional observer with no stakes in particular doctrinal outcomes—resolving the question whether our republic would be better served by an emboldened Congress and a timid Court in matters of constitutional interpretation would remain a tricky question. We would need to determine the likelihood of constitutional errors made by the Court under our current system of judicial supremacy, which discourages constitutional analysis by the political branches, and compare it to the likelihood of constitutional errors made by the political branches in a system of popular constitutionalism, which distorts the constitutional deliberations of the judicial branch.[512] That is no easy feat, and it is one that must be confronted head-on. It cannot be finessed by claiming that popular constitutionalism does not affect the Court's ability to identify and articulate its own independent interpretation of the Constitution—that it does not necessarily entail a timid Court. To the contrary, *Gibbons* reminds us that the competition among the three branches for authoritativeness in matters of constitutional interpretation is very much a zero-sum game. The gains of one branch invariably come at the expense of the others.

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510 United States v. Morrison, 529 U.S. 598 (2000) (invalidating Violence Against Women Act).

511 TUSHNET, *supra* note 20, at 172.

512 *Id.* at 57, 107–08.

CONCLUSION

Like all judicial decisions, *Gibbons* was a product of the times in which it was decided. In the early 1820s, pro-states'-rights forces were disputing Congress's authority to enact a variety of legislative measures. At the same time, these same forces were attacking the judiciary for using the power of judicial review too ambitiously, thereby displacing the right of the people to govern themselves through state legislatures. Marshall responded to this political environment by crafting the *Gibbons* decision in such a way as to address these attacks on national authority without provoking further attacks on the judiciary. In short, Marshall's hedge was a brilliant tactical move—much like the one he employed twenty-one years earlier in *Marbury*—permitting him to endorse a legal principle in a way that deflected the brunt of likely opposition.

Viewed in this light, Marshall's decision to eschew the Dormant Commerce Clause should be viewed much more generously than modern commentators have done. Marshall's hedge was not a "calculatedly confused" move made by a cautious jurist unable to grasp the complexities posed by an exclusive commerce power or fearful of the reaction to an avowedly nationalist interpretation of Congress's authority, as Felix Frankfurter alleged.[513] Nor was it a reflection of Marshall's grudging acceptance of—but lingering "discomfort" with—the notion that the states possessed concurrent power over interstate commerce, as Edward White has speculated.[514] And it most certainly was not the product of a chief justice unable to persuade a majority of his brethren to adopt the Dormant Commerce Clause, as Crosskey argued.[515] Perhaps Marshall's hedge did produce some doctrinal uncertainty, but that seems a small price to pay for a decision that would both provide Congress with its most expansive regulatory power and also reserve a role, albeit a secondary one, for the Court in policing state protectionist legislation.

Gibbons seems all the more brilliant when contrasted with the practice of the current Court, which seems to expect the nation to bow down obediently before its statements of constitutional meaning. *Gibbons* stands as a careful reminder that its current interpretive position is neither historically rooted nor constitutionally sacrosanct. Equally, however, *Gibbons* testifies to the possibilities of success that accompany a more modest approach to constitutional adjudication. A

513 FRANKFURTER, *supra* note 9, at 17, 25, 27.

514 3–4 WHITE, *supra* note 11, at 579.

515 1 CROSSKEY, *supra* note 14, at 266–67.

humble Court is not a timid Court and it need not be a weak Court or an unsuccessful Court. Indeed, 180 years after *Gibbons*, the Dormant Commerce Clause is alive and well.