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“IMPEACH JOHN MARSHALL!”  
(An Attempted Appraisal of the Warren Court)\*

GILBERT NURICK\*\*

Several months ago I had the opportunity and the privilege to listen to a group of law students commenting on significant decisions of the United States Supreme Court. After this rather spirited discussion, I could not help reflecting that if during my law school days I had answered questions in the constitutional law exam in the same manner as the Supreme Court subsequently decided the issues, I surely would have flunked the course!

I surveyed the wreckage of some of the old principles which had been preached to us as gospel. We were taught that the Commerce Clause did not encompass manufacturing, even though the enterprise involved operations in more than one state.<sup>1</sup> This formidable barrier to congressional power was torpedoed in such cases as *NLRB v. Jones & Laughlin Steel Corp.*<sup>2</sup> and *U. S. v. Darby.*<sup>3</sup> Subsequently, the Commerce Clause was stretched step by step until it now encompasses even the operations of a motel and restaurant.<sup>4</sup>

The “separate-but-equal” doctrine<sup>5</sup> with all of its encrusted barnacles was discarded in the historic decision of the Court in *Brown v. Board of Education*<sup>6</sup> which held that segregation in the public schools was unconstitutional.

In the “old days” legislative reapportionment was strictly a political issue, and the courts avoided the problem like the plague.<sup>7</sup> This tradi-

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<sup>1</sup> *U.S. v. C. C. Knight Company*, 156 U.S. 1; *Hammer v. Dagenhart*, 247 U.S. 251. See also *Utah Power & Light Co. v. Pfof*, 286 U.S. 165, *Schechter Poultry Corp. v. U. S.*, 295 U.S. 495, and *Carter v. Carter Coal Co.*, 298 U.S. 238.

<sup>2</sup> 312 U.S. 100.

<sup>3</sup> 312 U.S. 100.

<sup>4</sup> *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241; *Katzenbach v. McClung*, 379 U.S. 294.

<sup>5</sup> *Plessy v. Ferguson*, 163 U.S. 537.

<sup>6</sup> 347 U.S. 483.

<sup>7</sup> See *Wood v. Broom*, 287 U.S. 1; *Colegrove v. Green*, 328 U.S. 549.

tional trepidation of the judiciary was superseded by the "one man-one vote" rule enunciated in *Baker v. Carr* and expanded in later decisions.<sup>8</sup>

Old landmarks relating to the rights of persons accused of crime have been drowned in the long and turbulent wake of *Mapp v. Ohio*,<sup>9</sup> *Gideon v. Wainwright*,<sup>10</sup> *Escobedo v. Illinois*,<sup>11</sup> and *Miranda v. Arizona*.<sup>12</sup>

The reaction of the public to these dramatic changes has ranged from the extreme of ecstatic and automatic adulation to the opposite fringe of renting billboard space to urge the citizenry to "Impeach Earl Warren."

I thought there might be merit in undertaking the challenging task of attempting to evaluate the Supreme Court objectively. Concededly, it is difficult to ignore one's predilections in such an effort, but this psychological hazard should not deter one from trying. So here goes!

It seems to me that we can start this sensitive project by acknowledging two fundamental trends which have enabled the Court to recognize federal power over an ever-increasing array of subjects and to strike down statutes and prior decisions which permitted practices which the Warren Court deemed offensive:

1. The liberal interpretations of the Commerce Clause by the Court, together with the technique of grants-in-aid to the states under the federal spending power, have jointly resulted in a substantial erosion of the rights reserved to the states in the Tenth Amendment. Indeed, it has been several decades since the Court invalidated federal legislation for lack of constitutional power.

2. There has been a dramatic extension of the segments of the Federal Bill of Rights which are now held to be within the reach of the Due Process Clause of the Fourteenth Amendment applicable to state action.

Once we admit the verity of these observations, we are presented with the root question: "Is this good—or is it bad?" It is toward this burning question that I address myself today. In seeking an answer, we would do well to look to the lessons of the past and downgrade contemporary reactions. In other words, it is necessary to be *much more historical and much less hysterical*.

There have been fourteen Chief Justices of the United States. John Marshall was the fourth, and Earl Warren was the fourteenth. We can

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<sup>8</sup> *Baker v. Carr*, 369 U.S. 186; *Gray v. Sanders*, 372 U.S. 368; *Wesberry v. Sanders*, 376 U.S. 1; *Reynolds v. Sims*, 377 U.S. 533.

<sup>9</sup> 367 U.S. 643.

<sup>10</sup> 372 U.S. 335.

<sup>11</sup> 378 U.S. 478.

<sup>12</sup> 388 U.S. 436.

safely start our evaluation with the assertion that Marshall is generally regarded as the greatest Chief Justice ever to grace our Supreme Court. With such epoch-making decisions as *Marbury v. Madison*,<sup>13</sup> *Fletcher v. Peck*,<sup>14</sup> *McCulloch v. Maryland*,<sup>15</sup> *Gibbons v. Ogden*,<sup>16</sup> *Cohens v. Virginia*,<sup>17</sup> and *The Dartmouth College Case*,<sup>18</sup> he charted a course which settled the supremacy of the federal law and the significant place of the judiciary in our scheme of government. These decisions—and many others—involved controversial and volatile issues, and most were extremely unpopular in their day.

In order to understand and appreciate the impact of the Marshall Court, it is necessary to consider the social, economic and political conditions of the times. Marshall ascended to the Bench in 1801, shortly before Jefferson became President. He was an ardent Federalist and was appointed by Adams at a time when the influence of the Federalist Party was rapidly waning. As a devout Federalist, Marshall believed in a strong central government, a flexible interpretation of the Constitution, and in government by those specially qualified and privileged to serve. Jefferson, on the other hand, was an advocate of states' rights, a Federal Government of sharply limited powers and a strict construction of the Constitution. He believed in popular government with all the people participating, regardless of their educational qualifications or their property holdings. He organized the Democratic-Republican Party, which had a wide appeal among the people and swept the Federalists from power.

Marshall and Jefferson regarded each other with suspicion and distrust. One must wonder what these two giants of American history were thinking when Marshall as Chief Justice administered the oath to Jefferson as President on March 4, 1801. From their many reported utterances, we may safely assume that their eyes reflected daggers of disdain as they faced each other.

Before plunging further into the judicial opinions of Marshall, I must acknowledge that the research into this exciting era of American history produced many interesting and entertaining nuggets. The temptation to share some of them with you is irresistible.

For example, after the Jeffersonians assumed office, Marshall, who

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<sup>13</sup> 1 Cranch 137.

<sup>14</sup> 6 Cranch 87.

<sup>15</sup> 4 Wheaton 316.

<sup>16</sup> 9 Wheaton 1.

<sup>17</sup> 6 Wheaton 264.

<sup>18</sup> 4 Wheaton 518.

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was very much perturbed, wrote his good friend Charles Pinckney that "I wish, however, more than I hope, that the public prosperity and happiness will sustain no diminution under Democratic guidance. The Democrats are divided into speculative theorists and absolute terrorists." I suspect that there are some people in this very audience who still share that opinion!

Beveridge, Marshall's biographer, in describing the city of Washington as of 1801 stated that "The population was made up of people from distant states and foreign countries—the adventurous, the curious, the restless, the improvident." It would seem as though some things never change!

The city was indeed a "scattered, unformed and uncouth" municipality. Most of the senators, representatives and government officials were crowded into boarding houses which were adjacent to the Capitol, and two or more men usually shared the same bedroom. Two of the principal boarding houses were Conrad and McMunn's and the Indian Queen. At Conrad and McMunn's, the charge was fifteen dollars a week, which included general services as well as "wood, candles and liquors." At the competitive lodge, the Indian Queen, the charge was one dollar and a half a day with "brandy and whisky being free."

To those who believe that the answer to the backlog and court congestion problem is the creation of more courts and the appointment of more judges, a classic statement of Senator John Breckenridge of Kentucky might be of interest. In delivering the opening speech of the Democratic-Republicans in their effort to repeal the Federalist Judiciary Act of 1801, he contended that the Federalist Act spewed extravagance, and he contemptuously opined that "The time never will arrive when America will stand in need of thirty-eight Federal Judges."

And then there is the anecdote about the meeting between the great Chief Justice Gibson of our own State and Marshall, after Gibson was offered the appointment to the Pennsylvania Supreme Court. Gibson told Marshall that he sought his counsel because he felt that Marshall had "reached the acme of judicial distinction." Marshall is reported to have replied, "Let me tell you what that means, young man. The acme of judicial distinction means the ability to look a lawyer straight in the eyes for two hours and not hear a damned word he says."

With reluctance, we must avoid the lure of levity and return to the basic theme of this address. When Marshall was appointed Chief Justice, there was great controversy as to the right of the judiciary to re-

view the constitutionality of laws enacted by Congress or by the state legislatures. The Jeffersonians and many Federalists felt strongly that the courts did not have this prerogative. With the popular Jefferson Government in power, the Marshall Court nevertheless held in *Marbury v. Madison* that the judiciary has the power, and indeed the obligation, to pass on the constitutionality of laws enacted by Congress and to void statutes which are repugnant to the Constitution.

When this opinion was handed down, the indignation of the Jeffersonian Republicans was immediate and forceful. They determined to impeach all of the Federalist members of the Bench and to start with Justice Samuel Chase, who was quite an unpopular jurist because of his abrasive, overbearing and irascible demeanor. He was promptly impeached by the House of Representatives for high crimes and misdemeanors.

If the Senate had brought forth a verdict of guilty, it is clear that Marshall's official head would be the next to fall. The populace was agitated and aroused, and the cry "Impeach John Marshall" was heard throughout the land. Indeed, Senator William Branch Giles of Virginia, who was the Jeffersonian leader in the Senate, confided to the newly elected Federalist Senator from Massachusetts, John Quincy Adams, that "We want your offices, for the purposes of giving them to men who will fill them better." He publicly announced that since the Justices of the Supreme Court dared to declare an act of Congress unconstitutional, it was the undoubted right of the House to impeach them and of the Senate to remove them. He proclaimed that not only must Justice Chase be stripped of his robes, but the same fate must fall upon "all other Judges of the Supreme Court except the one last appointed." Of course, the last one, Justice William Johnson of South Carolina, happened to be appointed by Jefferson. There is little doubt that if a guilty verdict had been found on the Chase impeachment, this program would have been implemented swiftly and with alacrity. After one of the greatest trials in our history, Chase was acquitted by a very narrow margin. This saved Marshall and the other Federalist members of the Court.

To those who are prone to criticize the Warren Court for its decisions in the area of protection of persons accused of crime, I respectfully suggest that they hark back to the trial of Aaron Burr in Richmond, Virginia, at which Chief Justice Marshall presided. Jefferson had vowed to convict Burr, and the vast majority of the people were of the same bent. Marshall's rulings with respect to procedural rights of a

defendant accused of crime and his substantive definition of treason were the prime factors which resulted in Burr's acquittal. Jefferson expressed his deep anger in a letter to William Thompson of Petersburg, Virginia, in which he said, "We had supposed we possessed fixed laws to guard us equally against treason and oppression. But it now appears we have no law but the will of the Judge. Never will chicanery have a more difficult task than has been now accomplished to warp the text of the law to the will of him who is to construe it."

There is credible evidence indicating that in a preliminary draft of a proposed message to the Congress which Jefferson prepared shortly after the Burr trial, he included a statement urging the House to impeach Marshall. Since both Houses of Congress were overwhelmingly Democratic-Republican, it is clear again that Marshall probably would have been impeached and convicted were it not for the fortuitous diversion of the interest and energies of our government by the increasing gravity of our relations with Britain and Spain and the probability of war ahead.

Even though Congress did not proceed with impeachment proceedings, there was thunder throughout the nation. The *Richmond Inquirer*, an influential paper from Marshall's home State, bellowed "Let the Judge be impeached." The Republican press of the country carried numerous condemnations of Marshall. He was called "a disgrace to the bench of justice" and was accused of having "prostrated the dignity of the Chief Justice of the United States." In Baltimore, the feeling was so high that a mob executed Marshall in effigy.

Despite these vehement reactions, Marshall stood his ground with dignity and determination, although, in personal correspondence to friends, he frequently condemned the emotional reaction of those in high places as well as the people in general.

Again, when Marshall wrote the Court's opinion in *Fletcher v. Peck*, the reaction was prompt and furious. In that case, the Court struck down a statute of the State of Georgia which rescinded a previous statutory grant of the Yazoo Lands. The Court held that it had the power to invalidate laws of a state legislature as well as laws of Congress. It further concluded that the act rescinding the previous grant violated the constitutional prohibition against laws impairing the obligation of contracts.

George M. Troup, Congressman from Georgia, took the floor of the House of Representatives and trumpeted the sentiment of the vast majority of the people when he declared that the opinion of Marshall was

a pronouncement "which the mind of every man attached to Republican principles must revolt at." He mournfully asked, "Why \*\*\* do the judges who passed this decision live and live unpunished? \*\*\* The foundations of the Republic are shaken, and the judges sleep in tranquility at home."

The resentment of the populace was intensified in 1819 when Marshall handed down his celebrated opinion in *McCulloch v. Maryland*, holding that Congress had the power to incorporate a national bank and the states had no right to tax such an institution. Beveridge records that the voices of the Republican organization and of Localism boomed in fury. "As soon as they recovered from their surprise and dismay, they opened fire from their heaviest batteries upon Marshall and the National Judiciary."

At that time, the most widely read and influential publication in the country was the *Weekly Register* published by Hezekiah Niles. In the first issue after this significant opinion was delivered, the editor began an attack that spread throughout the aroused nation. He thundered, "A deadly blow has been struck at the sovereignty of the states, and from a quarter so far removed from the people as to be hardly accessible to public opinion." Niles asserted that Marshall "has not added \*\*\* to his stock of reputation by writing it—it is excessively labored." In subsequent issues, Niles contended that the opinion was "far more dangerous to the union and happiness of the people of the United States than \*\*\* foreign invasion."

Other newspapers picked up this theme, and the demagogical, caustic and critical language was chorused by politicians and the prevailing press. "Amendment of the Constitution by Judicial interpretation is taking the place of amendment by the people" was the rallying cry of the indignant foes of Marshall. In fact, Marshall was so disturbed by these attacks that he did something entirely uncharacteristic and of doubtful ethics. He wrote a reply under an assumed name and procured its publication in the *Philadelphia Union* which was the successor of the *Gazette of the United States* and was the strongest Federalist newspaper then in existence.

The Virginia House of Delegates—the legislative body of Marshall's own State—passed a resolution by the overwhelming vote of 117 ayes to 38 nays roundly condemning the "dangerous doctrine" expounded by the Chief Justice. Other states joined in the chorus. The Ohio Legislature presented a memorial to the U.S. Senate asserting that

the rights of the states had been assailed and ignored. The Pennsylvania Legislature proposed an amendment to the Constitution to overrule the action of the Court. Ohio, Indiana, Illinois and Tennessee likewise registered their alarm and dissatisfaction through legislative expressions. Books and pamphlets abounded in criticism of the Chief Justice, and there was no ceiling on the invectives that were leveled at Marshall.

Even though the stature of Marshall and the public affection for him improved measurably during the latter years of his service, there were still those who viewed his death in 1835 with an obvious sense of relief. For example, the *New York Evening Post* in commenting on his passing stated: "His situation \*\*\* at the head of an important tribunal, constituted in utter defiance of the very first principles of democracy, has always been \*\*\* an occasion of lively regret. That he is at length removed from that station is a source of satisfaction."

From this brief and sketchy review of the reaction to some of the epochal decisions of the Marshall Court, we must conclude that contemporary response is not a very dependable barometer. How, then, does one determine the ultimate decree of history with respect to the reputation of the Warren Court?

It is easy to look into the past and report what actually happened. It is much more difficult to forecast which of the memorable decisions of the Court will prove to be milestones and which, if any, will develop into milestones. Nevertheless, with a sense of trepidation, I shall venture into the world of prophecy. I assure you that this "trip" is not induced by psychedelic drugs.

There will undoubtedly be areas in which the discerning pen of history will record that some decisions of the Warren Court proved to be detrimental to the public interest. After all, no reasonable person can expect even the United States Supreme Court to bat 1,000 per cent! Some doctrines may well be found wanting when tested in the crucible of telling experience. Maybe events will demonstrate that the Court should not have intruded into the political environment of legislative apportionment or that it was overly zealous in the sweep of its decisions delineating the rights of persons accused of crime. Some political scientists might well conclude that in certain decisions the Court usurped policy-making powers which should have been the prerogative of Congress.

I have a strong conviction, however, that when historians look back at the Warren Court a half century from now, they will conclude that, by

and large, the Court made a significant contribution toward the accommodation of our great Constitution to the present and future needs of our nation.

They will observe that in the field of transportation in 1968, one could travel the 3,000 miles across the continent in less time than one could journey 25 miles when the Constitution was promulgated. When the historians get around to their evaluation, they will undoubtedly be able to traverse the entire continent in less time than the delegates to the Convention could travel 10 miles!

They will reflect that the operations of our industrial complex during the Warren Era were so intertwined among the states that vexing social and economic problems inherent in the system were national in scope and required national attention and action.

They will note that then, as ever, polluted water and polluted air simply refuse to turn back when they encounter state lines.

They will ponder the fact that the science of communications had produced instantaneous contact throughout the nation and, indeed, throughout most of the world.

They will surely note that if the Court had not drastically restricted the surreptitious use of the ever more sophisticated electronic surveillance devices, there would have been a real threat not only to our privacy and to our freedom of expression, but also to the very core of our human dignity.

They will discern that the tremendous migration of the population to urban areas and the awesome problems resulting therefrom required federal action, since it became painfully obvious that the state and local governments were simply powerless to solve these festering conditions without federal intervention. And they will see, in reality, the currently predicted multistate megalopolis extending for hundreds of miles.

They will undoubtedly assert that our nation waited far too long for the meaningful implementation of the letter and spirit of the Thirteenth, Fourteenth and Fifteenth Amendments, and something drastic had to be done on the federal level.

I sincerely believe that the historians of the future will conclude that the Warren Court adhered to the basic constitutional philosophy of Marshall so eloquently enunciated in *Cohens v. Virginia*:

A constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and

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tempests, and its framers must be unwise statesmen indeed, if they have not provided it\*\*\* with the means of self-preservation from the perils it may be destined to encounter. No government ought to be so defective in its organization as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day.

Thank you very much.