

Constitutional History of the United States

By

Dr. Frank Mallonee

Florence State University

March 9, 1972

The Principal of Judicial Review

John Marshall's decision in the Marbury VS Madison Case was a master stroke. He wrote of this Judiciary Act of 1789 in not issuing the Writs of Mandamus (an order to a government official to deliver up a court decision). Marshall was a strict Constitutionalist. And the court declined to issue the order which left Jefferson and Madison with nothing to resist. But that Writ was refused, not because the court lacked the power but because the court asserted and the court exercised much greater power by acting upon an act of Congress.

The Draftsman of our Constitution had not specially provided for their power of Judicial Review. The Constitution did not give the Supreme Court power to declare acts of Congress and President null and void. Such evidence there is of contemporary practice does uphold Marshall's decision. Marshall did not set any precedence. But state courts found means of striking down state laws. In number 78 of the Federalist Papers Alexander Hamilton had argued very strongly in favor of Judicial Review. These are the arguments from which Marshall borrowed and most people did not voice a strong objection to the doctrine of Judicial Review at this time, but did denounce his attempts to obstruct Madison and Jefferson.

In more modern time Judicial Review has been criticized as being undemocratic in that it turns policy making decisions over to a life time judiciary that is responsible to the popular will. One method of covering this undemocratic criticism is to admit and to point out that the democratic quality is not the sole task of an institution in the American System. Our constitution does not provide for a simple democratic regime that responds to a majority will.

Another criticism admits that the Supreme Court is undemocratic but asserts that it is not dangerously so. Congress controls many of the Supreme Courts members, powers and jurisdiction. The execution of its judgment and appointment of its members are dependent on the President. The Supreme Court is not immune from pressures.

At the time of Marshall's appointment in 1801 the court was generally considered the one branch of the United States government that had failed in its purpose. But under Marshall it emerged as an equal partner. As Chief Justice, Marshall became the courts sole spokesman and he was a very forceful spokesman. In 1803 in the Marbury vs Madison Case Marshall declared the Article 13 of the Judiciary Act of 1789 to be Null and Void. It was a bold move. The Supreme Court became a coordinated branch of the United States Government. In the next thirty four years Marshall declared 42 cases of Congress.

March 21, 1972

McCulloch vs Maryland.

Another great Marshall decision in 1819.

John Marshall's most comprehensive exposition of the American Constitution system was his opinion in the McCulloch VS Maryland Case. The first bank of the United States had been proposed by Alexander Hamilton. Hamilton was a very interesting man from the West Indies. He had an out spoken affection for the British Monarchy, and he was no great democrat. He was born on the wrong side of the blanket, an illegitimate child. He was well born even though he was born as a bastard. This bank was established over the bitter protest of Jefferson and Madison. They were opposed to any financial power in the federal government. Jefferson and his strict constitutionalist followers argued that the constitution did not specifically grant the United States Congress the power to create a bank. Since the constitution did not grant the power to Congress, than Congress had no right to establish the bank. The bank was established. It was inefficiently run and unpopular. Consequently, its charter was not renewed in 1811. Instead, the states chartered a number of banks to take care of the financial needs of the country. Chaos, rather than stability resulted. The financial situation was so desperate that by the time that Madison became President something had to be done. The second bank of the United States was chartered in 1816 to avoid further financial difficulties. The second bank was not managed as efficiently as the first bank.

The McCulloch vs Maryland Case resulted from the second bank. The new bank did not check speculation, did not improve financial difficulties. It produced a serious panic in 1819. It was followed by a serious depression. That depression caused much banking and business failures, caused unemployment, and discontent throughout most of the country since branches of the bank had engaged in reckless speculation that almost ruin the bank.

A number of states passed laws or constitutional amendments designed to restrict the activities of the bank on their borders, particularly in the south and west. States took action to stop the operation of the bank in their borders, either by direct prohibition in the state constitution or prohibitory taxation. Maryland was one where in 1818 the Maryland state legislature place heavy taxes on the Baltimore branch and the cashier was William McCulloch. The validity of Maryland taxing the National Bank was upheld by the Maryland state courts where upon the bank appealed the case to the United States Supreme Court. This case was very elaborately argued by six of the greatest lawyers America has ever produced. Daniel Webster from Massachusetts and William Pinckney spoke for the bank. Joseph Hoskins, and Luther Martin spoke for Baltimore. Luther Martin was an ardent state rights of that time. Luther Martin had a very successful and productive carrier.

The first important question was whether or not the United States Congress had power to incorporate a bank. John Marshall said absolutely yes and in analyzing this question Marshall proceeded to analyze the nature of the Constitution and the American Union. He upheld National Sovereignty by emphasizing that the Federal Government rested upon a popular base. Marshall insisted that the Federal Government at Washington derived its power from the people of the states rather than the states as sovereign entities. His

Constitutional Authority was the first line of the Preamble of the Constitution. This argument that National Authority was derived from a direct popular base was later to be reasserted eloquently by Abraham Lincoln.

Then John Marshall set forth what was essentially the same of broad power that Hamilton had favored. Marshall admitted that the right to establish their bank was not one of the listed powers of Congress. But he held that the National Government also possessed Implied Powers.

Luther Martin almost died from outrage. He felt that nothing as implied. Martin said, "If you have these full Implied Powers where do you get them?" John Marshall said, "Alright Luther, you can get them from two sources:

1. Every legislature must by its very nature have the right to select the appropriated means to carry out its power.
2. Marshall pointed to the Necessary and Proper Clause which he considered as broadly as broadly as Alexander Hamilton."

The southerners said it meant absolutely indispensable. John Marshall said there are varying degrees of necessities. Marshall said it is true that you have given Congress the power to establish post offices and raise armies. A bank would enable Congress to carry out its enumerated functions. He insisted that the United States had rights to establish a bank.

The second question was whether or not the state of Maryland could constitutionally tax a branch of the National Bank. In defending Maryland's rights to tax the bank Martin resorted to the classic states' rights, dual federalism. According to this view the states and federal government constituted two mutually exclusive fields of power. Luther Martin said that the right to charter a corporation is a state right.

Therefore, the state has power to exclude from its limits corporations it had not chartered.

Marshall said absolute nonsense. In reflecting Martins argument, Marshall again resorted to the Principle of National Supremacy. He pointed to Article 6, the Supremacy Clause. Marshall said the national law must prevail. The national bank is a lawful authority. The Act of Congress must prevail against any state attempt to limit the bank or control its function. Marshall said the attempt of Maryland to tax the bank was unconstitutional. He declared the Maryland Act Null and Void because the power to tax involves the power to destroy. If federal functions could be taxed by the state the contingents would be dependent upon the state. Marshall concluded that the American people did not design their national government to depend on the national states. Therefore the Maryland tax act was unconstitutional, void.

The importance of the Case. In the conservative circles of the northeast the decision was generally approved, partly because the national bank was in power there and partly because Nationalism was in popularity in that section. The decision was condemned very bitterly in the south and west. A majority of the people we saw their effort to get rid of an evil bank stopped by a tribunal government beyond the control of public opinion.

March 24, 1972

Nullification Case

Conflict between state and national interest had always been a very fruitful source of political and constitutional controversy. The champions of state interest repeatedly denounced federal encroachment upon state autonomy. These state writers had even declared that the states in their union were sovereign whose constitutional rights were at least equal, if not superior to those of the national government, and at least in one great constitutional crises, that of 1798, a state's rights faction lead by Jefferson and Madison had formulated a fairly coherent theory of union as resting upon a compact of those states who possessed the right to interpose against what were deemed as usurpation of the national government.

Between 1807 and 1815 certain politicians had taught states' rights. New England politicians had used nullifications. When the great nullification controversy came in 1832 state sovereignty was not a new idea, but they had not been determined. When in 1832 South Carolina climaxed her growing opposition to the tariff with actual attempts to nullify it were possible of the politicians to claim that they were following in the footsteps of Madison, Jefferson and New England politicians. However, the great tariff crisis of 1832 differed from earlier state-federal conflicts very sharply.

In the first place the state of South Carolina did what no other state, except for Georgia, had never done before. She took possible steps to block the major federal statues in the state. These South Carolina nullificaters developed a far more coherent theory of the union as a

mere league of sovereign states as a remedy for constructional federal legislation that anyone had here before advanced under John C. Calhoun. His theories were so developed that they were accepted in the great slavery issues.

Georgia's Defiance of Federal Authority. Georgia's defiance with the United States in the Indian question. South Carolina's defiance of federal law was anticipated in a controversy between Georgia and the United States which had been inspired with Georgia's attempt to remove the remaining Creek and Cherokee Indians from the western portion of the state. In the course of that controversy Georgia defied the authority of federal treaties governing the status of the Indians. Georgia threatened to use armed force against federal troops to defend the state.

The status of American Indians was left unclear under the constitution. The American Indian was almost outside of our constitutional system. They were denied citizenship, exempted from taxation, not counted in appointment of representation and direct taxes. The United States Congress was merely authorized commerce with Indian Tribes and under that authority and under treaty making power, and war power. The federal government from the beginning have dealt with the Indians as autonomous nations. The federal government had pursued a policy of removing the Indians from the paths of the white men as the tide of movements move westward. In accordance the federal government had under taken to secure for Georgia at federal expense all Indian lands lying within the state and the stipulation was that this would be done as early as it could be done as early as those lands could be obtained on reasonable terms. The Indians in Georgia were highly civilized. They were determined not to give up their land in Georgia. These Indians didn't want to leave Georgia. They were determined to remain. Evacuation proceeded very

slowly. It proceeded so slowly that during the 1820's the Georgians became dissatisfied in the slowness of the federal government to remove the Indians. Georgia was determined to exert authority over the Indians. In 1826 the Creeks were "persuaded" by the federal government to cede all their lands, except a narrow strip on the western borders.

Then the Georgians elected a very militant governor George Troup. He very bitterly charged the federal government's failure to carry out its promise. He issued orders for the lands in question to be surveyed. Whereupon President Adams sent Governor Troup a note saying, "George, don't do that." Troup adopted a very arrogant posture. John Adams said it might precipitate civil war and Governor Troup prepared to defend Georgia's sovereignty by arms. An open clash was avoided because the Creek Indians left for Alabama and Mississippi.

The Cherokees began to act up. The Cherokees decided that they would organize themselves as an independent nation. Georgia said that there would be no independent Indian Nation within the confines of Georgia.

In 1827 the Cherokees adopted a written constitution and proclaimed themselves an independent state in the state of Georgia. The state legislature was made. They decided to extend the state law over all Indian Territory. They repealed all Indian laws and directed the seizure of all Indian land. They decided to exert jurisdiction by tying George "Corn" Tassel for murder. The United States Supreme Court attempted to intervene. The state of Georgia renounced. Governor Troup said he would resist all federal government laws in state courts. Tassel was executed. By that time Andrew Jackson had ascended the throne in Washington. Andrew Jackson refused to take action to protect the Indian Treatises. But friends of the Cherokee Indians sought

an injunction in the Supreme Court to restrain Georgia from enforcing its law over the Indians.

In 1831 in the case of the Cherokee Nation vs Georgia the Court held in the opinion of John Marshall that an Indian Tribe was not a state in the union nor was it a foreign nation within the meaning of the constitution. Therefore, an Indian Tribe could not maintain a defense in the federal court. But Marshall said they are domestic nations. They are under the dominion of the United States. John Marshall said they have unquestioned right to their land until the title is extinguished by voluntary cession to the United States.

In 1832 the Case of Worcester vs Georgia, case involving conviction of Samuel Worcester, convicted by Georgia because he resided upon Indian lands without license from the state. In that decision John Marshall held that the Cherokee Nation was a distinct political community and it had territorial borders within which the laws of Georgia can have no force. The citizens of the state of Georgia had no right to enter the Indian lands unless given an invitation by the Cherokees.

Georgia refused to acknowledge any of these decisions. Andrew Jackson refused to take any steps to implement those decisions. Again John Marshall scolded Andrew Jackson. He implied that it was the duty of the President to up hold Indian rights. Under federal law Andrew Jackson replied, "John Marshall has made his decision let him enforce it."

Georgia's conduct constituted a very ominous precedent of state nullifications of federal authority. But this conflict did not assume a serious crisis because vast majorities of Americans accepted the removal of the Indians desirable and inevitable. They sympathized with

Georgia's decision. These circumstances permitted Georgia to defy the federal government very successfully.

South Carolina was watching this successful defiance of federal authority. Georgia got away with murder. Within a few months South Carolina attempted to nullify the famous Tariff Act in 1832.

A constitutional crisis of major proportion took place.