

June 1937

## The Commerce Clause Under Marshall, Taney, and Waite

Julius Cohen  
*West Virginia University*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Commercial Law Commons](#), and the [Constitutional Law Commons](#)

---

### Recommended Citation

Julius Cohen, *The Commerce Clause Under Marshall, Taney, and Waite*, 43 W. Va. L. Rev. (1937).  
Available at: <https://researchrepository.wvu.edu/wvlr/vol43/iss4/15>

This Book Review is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE.  
By Felix Frankfurter. Chapel Hill, N. C. University of North  
Carolina Press, 1937. Pp. 114.

The strains of the judicial symphony of 1801-1888 are with us once again. The baton, the tempo, the tone-quality of the instruments are not the same, but the score remains essentially unchanged. Echoes of nationalism, state's rights, legislative *laissez-faire*, and judicial supremacy resound loudly throughout the great halls of justice. It is fortunate for the lay auditor that he has at his disposal such excellent program notes as those prepared by Professor Frankfurter.

Professor Frankfurter selects one single theme, interstate commerce, and traces its variations through the virtuosity of Chief Justices Marshall, Taney, and Waite. Narrow as the theme may be, it nevertheless illuminates the entire judicial horizon, and brings into bold relief the patterns of our current judicial struggles. We can clearly recognize in the present court, vestiges of Marshall's organic theory of commerce, Taney's cautious adherence to the dichotomy of federal structure, and Waite's obliging deference to legislative policy.

Marshall, today, would have found no difficulty in sanctioning federal encroachment into the zone of usual state activity. In *Gibbons v. Ogden* he endowed us with a concept of interstate commerce sufficiently ambiguous and therefore elastic enough to cloak whatever powers the national government would desire. Mr. Justice Holmes once wrote, "There fell to Marshall perhaps the greatest place that was ever filled by a judge." That he took advantage of his lot is to be seen in the tremendous impetus that his views on national power gave to the court even beyond his time.

Professor Frankfurter makes one hesitate in ascribing to Taney the usual fanaticism of "state's rights" philosophy. He points out that Taney's alleged passion for state dominance, especially in the field of the commerce power, was no more than a refusal to believe that non-action on the part of the national government implied state paralysis. He is zealous in his desire to explode the Taney pro-slavery myth, asserting that it was "not slavery, but Taney's fear of the growing power of northern finance" that "was most clearly reflected in his opinions"; and that "one hopes it will become intellectually disreputable to see him predominantly as the judicial defender of slavery."

The chief virtue of Waite was his appreciation of the narrowness of judicial power. He was willing that the court volunteer some of its blood in order to check the possibility of legislative anemia. His judicious altruism provided soil for the sprouting of *Munn v. Illinois*, and unwittingly brought nurture for a subsequent expansion of Congressional powers into the field of economic activity. Waite certainly lacked the statesmanship of Marshall, the "artistic felicity" of Holmes, and the legal brilliance of Brandeis. But it is to his credit to say that a consistent application of his doctrine would today have carried up quite far from the deadening silence of what some have called "the no-man's zone" of inactivity.

Professor Frankfurter at the end of his little book quotes with unsparing approval a lengthy passage from James Bradley Thayer's, *Our New Possessions*. The passage seems to endow the Constitution with a pair of heavenly wings, and detracts from the realist's conception of that instrument as being continuously hand-carved. One is left with the impression that only our imperfect vision has prevented us from understanding its full meaning—that the Constitution is actually "wiser and more far-looking than man had ever thought." On page three, however, the author tells us realistically that "the judicial application of the Constitution is a function of the dominant forces of our society". Just what prompted him to deviate from his usual path of realism is not clear.

JULIUS COHEN.

West Virginia University,  
Morgantown, West Virginia.