

***Willson v. Black-Bird Creek Marsh Co.*, 25 U.S 245 (1829):  
An Early Test of the Dormant Commerce Clause**

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**Foreword**

**Title:**

*Willson v. Black-Bird Creek Marsh Co.*, 25 U.S 245 (1829): An Early Test of the  
Dormant Commerce Clause

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**Abstract:**

In 1822, Delaware authorized the Blackbird Creek Marsh Company to bank and drain the Blackbird Creek in New Castle County. Subsequently, Thompson Wilson and others destroyed the structure built by the marsh company. The marsh company subsequently sued Mr. Wilson for the damage to its property. The parties eventually appealed their dispute to the Supreme Court of the United States. The Court held that Delaware's authorization to bank and dam the creek did not conflict with the federal government's exclusive authority to regulate commerce between the several states. Ultimately, the Court decided *Willson* in a manner inconsistent with its earlier decision in *Gibbons v. Ogden* and subsequent decisions regarding navigation of U.S. waters. Additionally, Mr. Wilson likely chose not to bring a Fifth Amendment takings claim due to the lack of legal support for such a claim at the time.

**Discipline:**

Law, Legal History, Supreme Court History, John Marshall Court, Constitutional Law

***Willson v. Black-Bird Creek Marsh Co.*, 25 U.S 245 (1829):  
An Early Test of the Dormant Commerce Clause**

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MICHAEL P. COLLINS, JR.\*

On March 20, 1829, the Supreme Court of the United States decided the case of *Willson v. Black-Bird Creek Marsh Co.*<sup>1</sup> Chief Justice John Marshall, writing for a unanimous Court, affirmed the judgment of the High Court of Errors and Appeals of Delaware and held that the State of Delaware could enact legislation restricting the free navigation of the Blackbird Creek, located in New Castle County, Delaware.<sup>2</sup> According to the Court, such regulation did not violate Article I, Section Eight, of the Constitution of the United States which delegates to Congress the exclusive authority to pass legislation regarding commerce “among the several states.”<sup>3</sup> Thompson Wilson, a sloop operator who could no longer navigate the newly dammed creek, argued that restricting navigation in the creek limited his right to captain his sloop pursuant to his federal coasting license.<sup>4</sup> The Blackbird Creek Marsh Co. argued that Delaware could enact legislation regarding the waters located completely within the boundaries of the state.<sup>5</sup>

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The author transcribed approximately 80 pages of lower court papers, briefs, and opinions submitted to the United States Supreme Court during the appellate litigation in 1828 and 1829. During the transcription process, the author made very minor adjustments regarding punctuation and spelling to modernize the text for today’s readers. Almost all of the lower court documents are hand written in script and therefore, some words are unreadable. In the instance of unreadable text the author noted “unreadable” in the transcription. While some of the documents in the lower court record are paginated, most lack pagination. For documents without pagination, the author has omitted a page number from the citation.

Those interested in reviewing or consulting the lower court documents can find them in the microfilm collection of the National Archives Research Center located in Washington, D.C. with the following information: Dockets of the U.S. Supreme Court 1790-1950, Cabinet 33A, Drawer 02, Docket number 1506; Appellate Case Files of the U.S. Supreme Court, 1792-1831, Cabinet 33A, Drawer 01; Minutes of the U.S. Supreme Court, 1790-1950, Cabinet 33A, Drawer 02.

<sup>1</sup> 27 U.S. 245 (1829).

<sup>2</sup> *Id.* at 252.

<sup>3</sup> *Id.* at 250–52; U.S. CONST. art. I, § 8, cl. 3.

<sup>4</sup> *Willson*, 27 U.S. at 248–49.

<sup>5</sup> *Id.* at 249–50.

The Court decided *Willson* nearly 200 years ago. Despite the passage of almost two centuries and ample opportunity for research and discovery, no legal scholar or historian has endeavored to explore the facts of the case and the nature of the underlying controversy. Even the Court's opinion, occupying a mere eight pages in the reporter, fails to provide a detailed account of the facts of the case.<sup>6</sup> This paper sheds some light on the facts which brought *Willson* to the Court.<sup>7</sup> *Willson* represents the Court's first interpretation of the dormant commerce clause.<sup>8</sup> The Court's decision to uphold the Delaware law conflicts, at least to some degree, with the Court's decision in *Gibbons v. Ogden* and subsequent decisions regarding navigable waters.<sup>9</sup> Finally, Mr. Wilson likely did not bring a takings claim against Delaware since the Court would not have supported such a claim.<sup>10</sup>

## I. The Case

In 1822, the Delaware House of Representatives passed legislation entitled "An Act to enable the owners and possessors of the marsh cripple and low grounds, lying upon Black bird-creek in New Castle County, to bank and drain the same."<sup>11</sup> Through this statute, the Delaware general assembly created the Black Bird Creek Marsh Company.<sup>12</sup>

### A. *The Blackbird Creek Marsh Company*

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<sup>6</sup> *Id.* at 250.

<sup>7</sup> *See infra* Part I.

<sup>8</sup> *See infra* Part III.A.

<sup>9</sup> *Id.*

<sup>10</sup> *See infra* Part III.B.

<sup>11</sup> 46, Del. Laws 206 (1822).

<sup>12</sup> 46, Del. Laws § 1 (1822). In the Supreme Court opinion, and in the lower court documents, the marsh company is sometime referred to as the "Blackbird Creek Marsh Company," the "Black-Bird Creek Marsh Company," and the Black Bird Creek Marsh Company." The law passed by the Delaware General Assembly refers to the company as the "Black bird creek marsh company." The author will refer to the company as either the "marsh company" or the "Blackbird Creek Marsh Company."



The Delaware legislation created the new marsh company in 1822. According to the enabling legislation, “the owners and possessors of the marsh, cripple, and low grounds lying in Appoquinimink Hundred, New Castle County,” and “lying upon both sides of Black-bird-creek . . . shall compose a company to be called ‘The Black bird creek marsh company.’”<sup>14</sup> The act authorized the marsh company to bank Blackbird Creek by “making and constructing a suitable bank or banks, dam or dams, with the requisite trunks and sluices. . . .”<sup>15</sup> The marsh company was to hold an annual meeting on the first Monday of March and at this meeting, the owners and possessors of the marsh were to choose, by ballot, a treasurer and three managers for the ensuing year.<sup>16</sup> The act tasked these managers with building and constructing a “good and sufficient dam across” the creek at such a place as the managers or a majority of the managers found to be sufficient.<sup>17</sup> The dam to be constructed was required to be “at least three feet above the common tides.”<sup>18</sup>

The act also appointed three commissioners to view and examine the marsh so that the marsh company could establish a “valuation or rate of assessment to be observed in assessing and laying all taxes” under the act.<sup>19</sup> In making their assessments, the commissioners were to consider who among the landowners surrounding the creek would benefit, and to what degree, from the banking and damming of the creek.<sup>20</sup> Once the commissioners submitted their valuations of the estimated land improvements, cost of constructing the dam would be apportioned according to the degree which each land owner benefited from its construction.<sup>21</sup> If the landowners failed to pay

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* According to Merriam-Webster, a sluice is a device for water to flow through with a gate controlling the flow. Sluice, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/sluice>.

<sup>16</sup> 46, Del. Laws § 2 (1822).

<sup>17</sup> 46, Del. Laws § 6 (1822).

<sup>18</sup> *Id.*

<sup>19</sup> 46, Del. Laws § 8 (1822).

<sup>20</sup> *Id.*

<sup>21</sup> 46, Del. Laws § 12 (1822).

the annual fee, Delaware could impose interest on the uncollected fee at the rate of fifteen percent annually until the fee was paid.<sup>22</sup> If a landowner still refused to pay, the state could confiscate and then sell the land in order pay the outstanding fee.<sup>23</sup>

The act also imposed a penalty for anyone who damaged or otherwise broke, in any manner, the dams, banks, trunks, or sluices constructed pursuant to the act.<sup>24</sup> Likewise, the act also penalized any effort to “hinder, molest, or disturb, the managers . . . or their workmen while employed in making or constructing the aforesaid dam, banks, trunks, or sluices . . . .”<sup>25</sup> Each person convicted under the act could be fined for every offense up to \$2,000.00.<sup>26</sup> Half of this fee was to be paid to the marsh company, while the other half was to be paid to the state.<sup>27</sup> Essentially, the act created a private cause of action through which the marsh company could collect compensation for any damage to the dam.

The final section of the act permits the owners of the land lying above the bank and dam to keep “flats or scows to transport their lumber, cord wood, grain and other commodities” down the creek.<sup>28</sup> Presumably, the legislature included the right to operate scows as a means of protecting the landowner’s method of transporting materials along the river even after the marsh company

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<sup>22</sup> 46, Del. Laws § 13 (1822).

<sup>23</sup> *Id.* It remains unclear exactly why Delaware chose to create a company with the purpose of building the dam rather than building the dam with its own resources. Perhaps the state created the company in an effort to more easily tax the surrounding landowners. Specifically, enabling the company to manage the collection of the financing for the dam likely relieved some of the burden which would have otherwise rested with the state.

<sup>24</sup> 46, Del. Laws § 19 (1822).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; \$2,000.00 in 1822 equals approximately \$40,000 in 2016. Oregon State University, Consumer Price Index (CPI) Conversion Factors for Years 1774 to Estimated 2026 to Convert to ESTIMATED Dollars of 2016 (2016), <http://liberalarts.oregonstate.edu/sites/liberalarts.oregonstate.edu/files/polisci/faculty-research/sahr/inflation-conversion/pdf/cv2016.pdf>.

<sup>27</sup> 46, Del. Laws § 19 (1822).

<sup>28</sup> 46, Del. Laws § 22 (1822). A scow is a large flat-bottomed boat with broad square ends used chiefly for transporting bulk material. *Scow*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/scow>. A scow differed from a sloop in that it drew significantly less water and therefore could operate in shallower waters.

had constructed the bank and dam. The act specifically mentions that the landowners shall have “free egress and regress up and down [Blackbird Creek].”<sup>29</sup>

B. *Thompson Willson and Others*<sup>30</sup>

Thompson Wilson held a federal license to carry on the coasting trade in the waters of the United States.<sup>31</sup> According to the lower court documents, Mr. Wilson was licensed to operate a sloop called the *Sarah*.<sup>32</sup> He was licensed per the federal Coasting Act of 1793 which licensed vessels to carry on trade between the several states and in the waters of the United States.<sup>33</sup> According to the coasting license, Mr. Wilson was a mariner living in Blackbird, New Castle County, Delaware.<sup>34</sup> Together with Mr. Charles Smith, also of Blackbird, Mr. Wilson operated the *Sarah*, a sloop built at Mantua Creek, Gloucester County, New Jersey.<sup>35</sup> The ship was built in 1803 and measured forty-eight feet long,

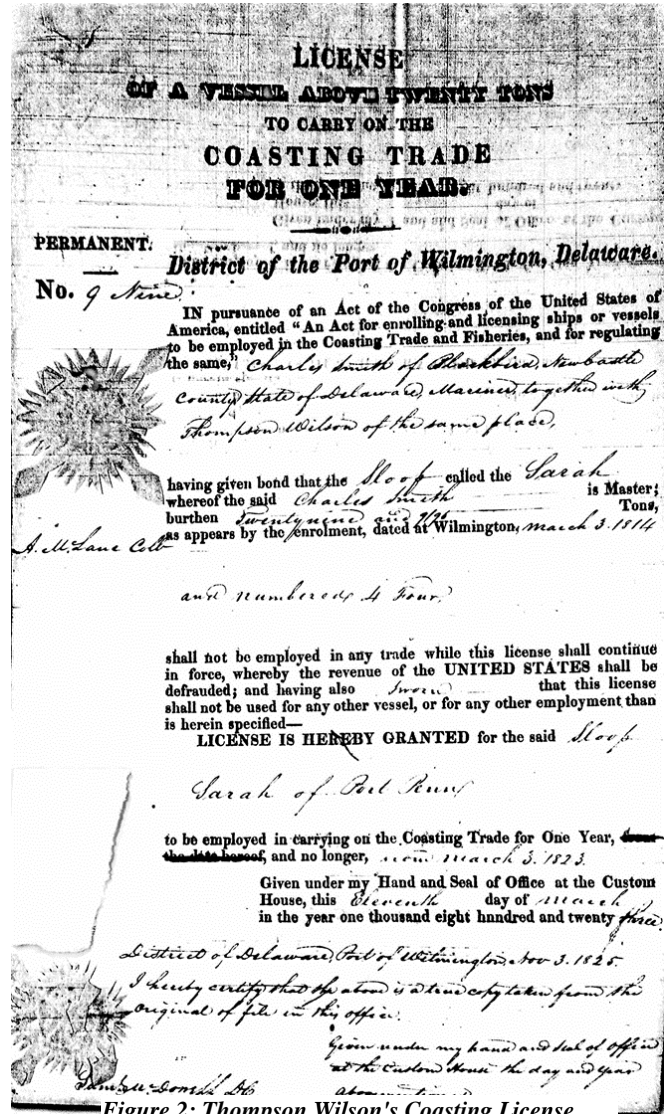


Figure 2: Thompson Wilson's Coasting License

<sup>29</sup> 46, Del. Laws § 22 (1822).

<sup>30</sup> Although the official record from the Supreme Court and the Court’s opinion spell his name “Thompson Willson” many of the lower court papers, including his coasting license, spell his name as “Thompson Wilson.” For purposes of this paper the author will refer to the defendant, and later the appellant, as Thompson Wilson.

<sup>31</sup> Answer, Black Bird Creek Marsh Co. v. Thompson Wilson (1824).

<sup>32</sup> *Id.* The Supreme Court would subsequently refer to Thompson Wilson’s ship as the *Sally*. Willson v. The Black-Bird Creek Marsh Co., 27 U.S. 246 (1829).

<sup>33</sup> An Act for Enrolling and Licensing Ships or Vessels to Be Employed in the Coasting Trade and Fisheries, and for Regulating the Same, Pub. L. 2-8, Feb. 18, 1793.

<sup>34</sup> Answer, Black Bird Creek Marsh Co. v. Thompson Wilson (1824).

<sup>35</sup> *Id.*

sixteen feet wide, drew four and a half feet, and was “flat built.”<sup>36</sup> The license authorized Mr. Wilson to operate the sloop in the coasting trade through March 3, 1824, at which time his license would require renewal.<sup>37</sup>

In the lower court documents and pleadings, several other individuals are mentioned as affiliates of Mr. Wilson. The list of Mr. Wilson’s compatriots is inconsistent and often, the names are indecipherable. Throughout the litigation—and all the way to the Supreme Court of the United States—Mr. Wilson is mentioned as the primary litigant.

Mr. Wilson probably depended, in large part, on his coasting license so that he could move goods, either for himself, or at the request of others. From 1810 to 1820, the population of the United States expanded by more than 33% to nearly ten million people by 1820.<sup>38</sup> By 1822, American commerce continued to increase yet there were very few roads.<sup>39</sup> As a result, maritime commerce remained the most cost effective means of transporting goods throughout the country.<sup>40</sup>

### C. *Breaking the Banks and Dam*

On January 27, 1824, the Delaware General Assembly repealed much of the statute enabling the marsh company to bank and dam Blackbird Creek.<sup>41</sup> The new statute stated that, the enabling act, which empowered and authorized the owners and possessors of the marsh “to stop or obstruct the free navigation of the Black-bird creek, be and the same is hereby *repealed and*

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Dep’t of Labor and Workforce Dev., State of New Jersey, United States Resident Population by State: 1790-1850, <http://lwd.dol.state.nj.us/labor/lpa/census/1990/poptrd1.htm> (last visited Nov. 16, 2016).

<sup>39</sup> GEORGE R. TAYLOR, *THE TRANSPORTATION REVOLUTION: 1815–1860*, at 133 (1951).

<sup>40</sup> *Id.*

<sup>41</sup> A Supplement to the Act Entitled “An Act to Enable the Owners and Possessors of the Marsh Cripple and Low Grounds Lying upon Black-bird creek, in Newcastle County, to Bank and Drain the Same.” 48, Del. Laws § 1 (1824). The act fails to mention any reason as to why the legislature sought to repeal the marsh company’s enabling legislation. Perhaps the land owners surrounding Blackbird Creek grew frustrated with the marsh company’s efforts or felt that the company profited at the landowners’ expense. At the Supreme Court, Mr. Wilson’s lawyer would argue that the marsh company existed only for “private emolument.” *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245, 248 (1829).



*declared null and void.*<sup>42</sup> The statute still permitted the marsh company to construct a bank or dam, but not to the extent that such construction would obstruct or stop the creek or injure the navigation of the same.<sup>43</sup> Finally, the amended statute prohibited the imposition of any penalty for breaking or otherwise damaging a bank or dam which injured the free navigation of Blackbird Creek.<sup>44</sup> Put another way, it was no longer illegal to break or destroy the dam if it prevented free passage along the creek.

On April 1, 1824, the marsh company filed a complaint in Delaware alleging that Thompson Wilson and several other men destroyed a portion of the dam at Blackbird Creek.<sup>45</sup> Specifically, the complaint alleged that at some point prior to April 1, 1824 (the date is left blank), Thompson Wilson and others “with force and arms, to wit, guns, pistols, hatchets, axes, spades, shovels, mattocks, and other iron instruments . . . did break, damage and destroy the said banks and dam made of mud gum piles and plank.”<sup>46</sup> The marsh company brought an action against Thompson Wilson for *trespass vi et armis*—or by force and arms—for the destruction of its property in Blackbird Creek.<sup>47</sup> The marsh company sued for \$20,000 in damages—what would be approximately \$500,000.00 in 2016.<sup>48</sup>

The actual date of the dam’s destruction remains unclear. The lower court papers reveal that the court issued an order to the sheriff for the arrest of Thompson Wilson and several others on November 8, 1823.<sup>49</sup> If the dam had already been torn out by November 1823, Thompson

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<sup>42</sup> *Id.* (emphasis added).

<sup>43</sup> 48, Del. Laws § 2 (1824).

<sup>44</sup> 48, Del. Laws § 3 (1824).

<sup>45</sup> Complaint, Black Bird Creek Marsh Co. v. Thompson Wilson (1824).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*; Oregon State University, Consumer Price Index (CPI) Conversion Factors for Years 1774 to Estimated 2026 to Convert to ESTIMATED Dollars of 2016 (2016), <http://liberalarts.oregonstate.edu/sites/liberalarts.oregonstate.edu/files/polisci/faculty-research/sahr/inflation-conversion/pdf/cv2016.pdf>.

<sup>49</sup> Black Bird Creek Marsh Co. v. Thompson Wilson (1823).

Wilson would have acted long before the marsh company's enabling legislation had been repealed. The sheriff took Mr. Wilson into custody, but he would be released by February 19, 1824.<sup>50</sup> The trial court proceeding was scheduled for the March term in 1824.<sup>51</sup>

At the trial court, James Rogers, the Attorney General of Delaware, represented the marsh company.<sup>52</sup> James Rogers served as the Attorney General of Delaware from 1815 until 1830.<sup>53</sup> George Read, Jr. represented Mr. Thompson Wilson.<sup>54</sup>

#### D. *The Trial Court and Subsequent Appeals*

At the trial court, Mr. Wilson mounted several defenses. First, Mr. Wilson argued that the place of his alleged trespass, Blackbird Creek, was "a public and common navigable Creek in the nature of a highway in which the tides and waters . . . have flowed and reflowed."<sup>55</sup> Essentially, the marsh company had no right to stop the free navigation of a creek which ebbs and flows with the tide and is in the nature of a public thoroughfare. Without pulling up the gum piles and planks, wrongfully placed in the creek, Mr. Wilson and his fellow citizens could no longer freely navigate Blackbird Creek.<sup>56</sup>

Second, he argued that the company no longer had any right to stop the free navigation of Blackbird Creek since Delaware repealed, in large part, the enabling act of the marsh company in January 1824.<sup>57</sup> Specifically, the legislature repealed every provision of the act which had previously imposed a penalty, fine, or punishment, upon anyone who cut or destroyed any bank,

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<sup>50</sup> Black Bird Creek Marsh Co. v. Thompson Wilson (1824).

<sup>51</sup> *Id.*

<sup>52</sup> Complaint, Black Bird Creek Marsh Co. v. Thompson Wilson (1824).

<sup>53</sup> Delaware Dep't. of Justice, About the Office, <http://attorneygeneral.delaware.gov/executive/about.shtml> (last visited Nov. 16, 2016).

<sup>54</sup> Answer, Black Bird Creek Marsh Co. v. Thompson Wilson (1824). For a more detailed description of Mr. Read, please see the biographical appendix.

<sup>55</sup> Answer, Black Bird Creek Marsh Co. v. Thompson Wilson (1824).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

dam, or obstruction erected across or in Blackbird Creek.<sup>58</sup> The mud and gum piles in Blackbird Creek were wrongfully there since the statute now prohibited any obstruction to the free navigation of the creek.<sup>59</sup> To remove these obstructions, Thompson Wilson removed the mud and gum piles so that citizens could freely navigate the creek thereafter.<sup>60</sup>

Third, and finally, Mr. Wilson argued that, since the creek was a navigable and public highway, the landowners surrounding the creek were entitled to “reasonable wharfage.”<sup>61</sup> Even if the creek was not open to *everyone*, at least those individuals with land lying along the creek should be permitted to use the creek for access to their lands<sup>62</sup>

On April 3, 1824, the trial court heard demurrers from both the marsh company and Mr. Wilson.<sup>63</sup> After hearing the arguments, the trial court found in favor of Mr. Wilson and dismissed the claims of the marsh company.<sup>64</sup> The marsh company appealed immediately.<sup>65</sup>

On June 20, 1825, the High Court of Errors and Appeals found in favor of the marsh company.<sup>66</sup> The appellate court reviewed the trial court record and reversed and annulled the lower judgment.<sup>67</sup> The appellate court directed the trial court to convict Mr. Wilson of trespass, and to award damages to the marsh company.<sup>68</sup> The appellate court also directed the trial court to conduct further fact finding regarding the amount of damages to be awarded to the marsh company.<sup>69</sup>

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Black Bird Creek Marsh Co. v. Thompson Wilson (1824).

<sup>64</sup> *Id.*

<sup>65</sup> Black Bird Creek Marsh Co. v. Thompson Wilson (1825).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

On November 2, 1825, the trial court impaneled a jury to consider the issue of damages.<sup>70</sup> After hearing the evidence presented—and instructions that Thompson Wilson was already found to have trespassed—the jury awarded damages to the marsh company in the amount of \$650.00.<sup>71</sup> On December 2, 1825, the court issued an order fieri facias for the collection of the outstanding damages owed by Thompson Wilson.<sup>72</sup> Fieri facias is an order for the sheriff to collect, seize, and then sell a debtor’s property to satisfy a money judgment.<sup>73</sup> The Sheriff would later write to the court that only the property of Mr. Wilson could be found and annexed.<sup>74</sup>

On June 19, 1826, Mr. Wilson appealed to the High Court of Errors and Appeals.<sup>75</sup> He alleged again that there was no trespass upon the marsh company and that, in the alternative, the damages awarded by the jury were much greater than properly warranted.<sup>76</sup> On June 29, 1826, the High Court of Errors and Appeals affirmed the judgment of the trial court with costs to Mr. Wilson.<sup>77</sup> The appellate court did not issue an opinion, and simply affirmed the lower judgment.<sup>78</sup>

On June 6, 1827, the marsh company received an order to appear before the Supreme Court of the United States.<sup>79</sup> Mr. Wilson decided to take his case all the way to the Court in an effort to

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* \$650.00 in 1825 equals approximately \$15,800.00 in 2016. Oregon State University, Consumer Price Index (CPI) Conversion Factors for Years 1774 to Estimated 2026 to Convert to ESTIMATED Dollars of 2016 (2016), <http://liberalarts.oregonstate.edu/sites/liberalarts.oregonstate.edu/files/polisci/faculty-research/sahr/inflation-conversion/pdf/cv2016.pdf>.

<sup>72</sup> Black Bird Creek Marsh Co. v. Thompson Wilson (1825).

<sup>73</sup> *Fieri Facias*, BLACK’S LAW DICTIONARY (10th ed. 2014); *See also* 30 Am. Jur. 2d Executions and Enforcement of Judgments § 14, at 50–51 (1994) (“The writ of ‘fieri facias’ . . . was an early common-law means of enforcing payment on a judgment; it was, in effect, an order to the sheriff of the court to enforce a judgment against the debtor by levy, seizure, and sale of his personalty to the extent needed to satisfy a judgment.”).

<sup>74</sup> Black Bird Creek Marsh Co. v. Thompson Wilson (1825). As to the other persons involved in the case (which the author has not mentioned due to their irrelevance to the case at hand) the sheriff wrote that he could not find any of Mr. Wilson’s co-conspirators, and therefore failed to collect any other property. *Id.*

<sup>75</sup> Thompson Wilson v. Black Bird Creek Marsh Co. (1826).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Thompson Wilson v. Black Bird Creek Marsh Co. (1827).

affirm his right to freely navigate Blackbird Creek. The Court received the lower court record on February 13, 1828.<sup>80</sup>

## II. The Court's Reasoning

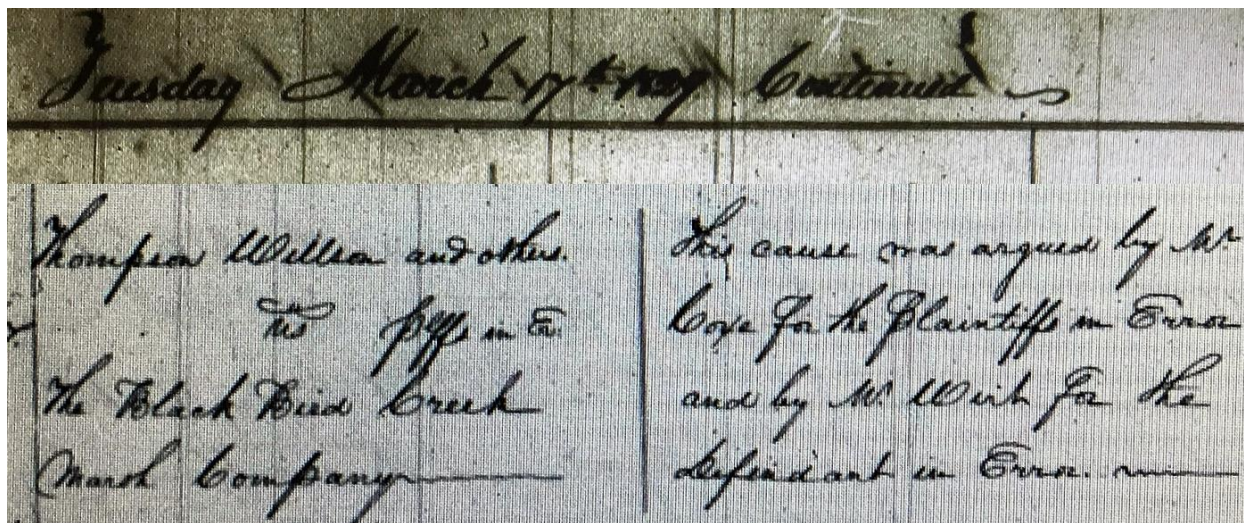


Figure 3: Minutes of the Supreme Court – March 17, 1829

The Court heard arguments in the case of *Willson v. Black Bird Creek Marsh Company* on March 17, 1829.<sup>81</sup> In *Willson*, the Supreme Court, via a unanimous decision, affirmed the judgement of the High Court of Errors and Appeals of Delaware and held that Delaware could authorize a company to obstruct the free flow of waters completely within the state.<sup>82</sup> While Chief Justice Marshall authored the only opinion in the case, his decision can be divided into two sections. The first section of the opinion discusses whether the court had jurisdiction to hear the case.<sup>83</sup> The second section of the opinion discusses, in an even shorter analysis than that accompanying the issue of jurisdiction, the merits of the parties' claims on the constitutional

<sup>80</sup> *Willson v. Black-Bird Creek Marsh Co.*, No. 1506 (1828).

<sup>81</sup> 27 U.S. 245, 252 (1829).

<sup>82</sup> *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245, 247–50 (1829).

<sup>83</sup> See *infra* Part III.A.

issue.<sup>84</sup> As was customary of Supreme Court opinions of the late eighteenth and early nineteenth century, the reporter included a summary of the arguments for each of the parties regarding both the jurisdictional and constitutional issues.<sup>85</sup> William Wirt argued on behalf of the marsh company.<sup>86</sup> Richard S. Coxe argued on behalf of Thompson Willson.<sup>87</sup>

### A. *Jurisdiction*

Before moving to a decision on the merits—that is, the constitutional issue regarding whether Delaware could impede the free navigation Blackbird Creek—the Court first considered whether it had jurisdiction to hear the case.<sup>88</sup>

#### 1. *The Arguments*

On the issue of jurisdiction, Mr. Coxe argued on behalf of Thompson Wilson that the Supreme Court could hear the case pursuant to section twenty-five of the Judiciary Act of 1789.<sup>89</sup> Mr. Coxe argued that the highest court of Delaware, the High Court of Errors and Appeals, had considered the issue of the act’s constitutionality in rendering its affirmation of the award of damages from the lower court.<sup>90</sup> The only way by which the High court of Errors and Appeals

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<sup>84</sup> See *infra* Part III.B.

<sup>85</sup> *Willson*, 27 U.S. at 247–50.

<sup>86</sup> For more information regarding Mr. Wirt, see the biographical appendix.

<sup>87</sup> The Supreme Court opinion mentions only that “Mr. Coxe” argued on behalf of Thompson Wilson. According to the Attorney Rolls of the Supreme Court of the United States, Mr. Richard S. Coxe was admitted to practice before the Court on February 4, 1823. John D. Coxe was also admitted to practice on August 1, 1791. Given the dates of each lawyer’s respective admission, it seems likely that Richard S. Coxe served as counsel for Mr. Wilson.

<sup>88</sup> *Willson*, 27 U.S. at 250–51.

<sup>89</sup> *Id.* at 247–48. Section twenty-five of the Judiciary Act of 1789 reads, in relevant part:

That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or *where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution*, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error . . . .

Judiciary Act of 1789, Pub. L. 1-20, Sept. 24, 1789, § 25 (emphasis added).

<sup>90</sup> *Willson*, 27 U.S. at 247–48.

could have affirmed the lower court decision would have been to uphold the act authorizing the marsh company to bank and dam Blackbird Creek.<sup>91</sup>

Mr. Wirt, arguing on behalf of the marsh company, asserted that the record failed to present a case in which the Court had jurisdiction.<sup>92</sup> The courts of Delaware might have decided for the marsh company “without sustaining the constitutionality of the act of incorporation . . . .”<sup>93</sup> Mr. Wirt cited the case of *Mathews v. Zane* for the proposition that the Court should not find jurisdiction unless the issue of constitutionality arose “inevitably”.<sup>94</sup> In actuality, *Mathews v. Zane* did not squarely support Mr. Wirt, but did interpret the Judiciary Act of 1789 as subservient to the jurisdictional restrictions of the Constitution.<sup>95</sup>

## 2. *The Decision*

Ultimately, Chief Justice Marshall agreed with Mr. Coxe and found that the Court did in fact have jurisdiction to hear the merits of the claims.<sup>96</sup> “Undoubtedly,” he wrote “the plea might have stated in terms that the act, so far as it authorized a dam across the creek, was repugnant to the Constitution of the United States . . . .”<sup>97</sup> The marsh company relied exclusively on its legislative authority to build a dam across Blackbird Creek; the marsh company did not argue that it had a private right to obstruct the creek.<sup>98</sup> Since the marsh company did not rely on any other right, outside of the legislative authorization, the state courts must have considered the

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 249.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (citing *Mathews v. Zane*, 20 U.S. 164 (1822)).

<sup>95</sup> *Mathews v. Zane*, 20 U.S. 164, 206 (1822).

<sup>96</sup> *Willson*, 27 U.S. at 250.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

constitutionality of the act.<sup>99</sup> The act’s “consistency with, or repugnancy to the constitution of the United States necessarily arises upon these pleadings, and must have been determined.”<sup>100</sup>

To be sure, Chief Justice Marshall noted that the Court had decided in favor of jurisdiction in at least three similar cases. In *Martin v. Hunter’s Lessee*, the Supreme Court announced that the Court could review state court decisions and that federal review could override a state judgment by virtue of the Supremacy Clause in the Constitution.<sup>101</sup> Likewise, in *Miller v. Nicholls*, the Court upheld jurisdiction where the facts giving the Court jurisdiction appear on the record or could be necessarily implied therefrom.<sup>102</sup> In *Williams v. Norris*, the Court found jurisdiction even where the record did not reveal that the constitutionality of the act was drawn into question.<sup>103</sup> All of these cases allowed Chief Justice Marshall to conclude that it is not necessary to state in terms on the record “that the constitution or a law of the United States was drawn into question.”<sup>104</sup>

## B. *The Merits*

After establishing the Court’s jurisdiction to hear the case, Chief Justice Marshall then moved to a consideration of the merits.<sup>105</sup> Specifically, the Court considered whether Delaware could pass a statute which infringed the free navigation of a public creek, and whether such a law would conflict with the Congress’s exclusive authority to regulate commerce between the states.

### 1. *The Arguments*

Mr. Coxe argued on behalf of Thompson Wilson that the act of the Delaware legislature violated the Constitution and principles of common law.<sup>106</sup> The judgement of the High Court of

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> 14 U.S. 304 (1816).

<sup>102</sup> 17 U.S. 311 (1819).

<sup>103</sup> 25 U.S. 117 (1827).

<sup>104</sup> *Willson*, 27 U.S. at 251.

<sup>105</sup> *Id.* at 251–52.

<sup>106</sup> *Id.* at 248–49.



Errors and Appeals was erroneous, “because the act . . . so far as the same authorized the company to shut up and embank across a navigable stream, below the ebb and flow of the tide is repugnant to the Constitution of the United States . . . .”<sup>107</sup> Blackbird Creek is a navigable river and rights to its navigation belong to all citizens of the United States.<sup>108</sup> Furthermore, the right to use a navigable stream is *jus publicum*—a right of the public.<sup>109</sup> Anticipating or responding to an argument from Mr. Wirt, Mr. Coxe explained that the enabling act by the Delaware legislature did not aim to improve the lives of Delawareans, but instead allowed the operators of the marsh company to enrich themselves through the construction and operation of the dam and bank.<sup>110</sup>

Mr. Coxe, relied extensively on the Court’s decision in *Gibbons v. Ogden*.<sup>111</sup> Just as the Court prevented New York from restricting a particular vessel from the waters between New York and New Jersey, here too, the Court should not allow Delaware to stop the navigation of a creek.<sup>112</sup> Thompson Wilson’s sloop was, in fact, licensed to carry on the coasting trade, just as Gibbons was licensed to operate his steamboat.<sup>113</sup> Both Wilson and Gibbons were licensed according to the Coasting Act of 1793.<sup>114</sup> If in *Gibbons*, New York could not prohibit the exercise of a right granted by a federal license, here too, Delaware could not prohibit the free navigation of Blackbird Creek.<sup>115</sup>

Mr. Coxe also argued that the act of the legislature, in 1824, repealed the incorporating legislation and prohibited the marsh company from constructing any obstruction in Blackbird

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<sup>107</sup> *Id.* at 248.

<sup>108</sup> *Id.* at 248.

<sup>109</sup> *Id.* at 248.

<sup>110</sup> *Id.* (“The statute of Delaware does not look to the preservation of the health of the citizens of the state, but to private emolument.”).

<sup>111</sup> *Id.* at 248–49.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> An Act for Enrolling and Licensing Ships or Vessels to Be Employed in the Coasting Trade and Fisheries, and for Regulating the Same, Pub. L. 2-8, Feb. 18, 1793.

<sup>115</sup> *Willson*, 27 U.S. at 248–49.

Creek.<sup>116</sup> The repeal of the enabling act could have presented the Court with an opportunity to find that, regardless of the constitutional issue in the case, the marsh company no longer had statutory authority to bank or dam the creek.<sup>117</sup> Rather than considering this issue, Chief Justice Marshall omitted all argument with regard to the act's repeal and did not discuss the issue further.<sup>118</sup>

Mr. Wirt admitted that Blackbird Creek is navigable and in the nature of a public highway.<sup>119</sup> Despite the navigability and public nature of Blackbird Creek, it rests entirely within the boundaries of the state of Delaware.<sup>120</sup> How could the Court hold that a state lacked the constitutional authority to regulate subjects entirely within its geographic boundaries? Surely, Mr. Wirt argued, it “cannot be urged that the power to regulate commerce can interfere with the rights of the states over the property within their boundaries.”<sup>121</sup> He emphasized that Delaware had merely exercised its state police powers: “While the waters of the United States belong to the whole people of the nation, this creek continued subject to the power of the state in whose territory it rises.”<sup>122</sup> He went to great lengths to explain that Blackbird Creek is “one of those sluggish reptile streams” which “spreads its venom and destroys the health of all those who inhabit its marshes.”<sup>123</sup>

The power to regulate commerce pursuant to Article One, Section Eight of the constitution could not be construed to interfere, to such a great extent, with state police powers.<sup>124</sup> Furthermore, if it could be so construed, there was no federal right with which the Delaware law interfered.<sup>125</sup>

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<sup>116</sup> *Id.* at 248.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* (“The Court not having noticed this point in their decision, the arguments of counsel upon it are omitted.”).

<sup>119</sup> *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245, 249 (1829).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 249–50.

<sup>125</sup> *Id.* at 250.

Put another way, despite the fact that Mr. Wilson was licensed to carry on the coasting trade by a federal statute, Mr. Wirt argued that there had been no legislation by Congress with which the Delaware legislation interfered.<sup>126</sup>

## 2. *The Decision*

Having established that the Court could hear the case, and considering the arguments of the litigants, Chief Justice Marshall turned to “the more doubtful question” of “whether the act incorporating the Black Bird Creek Marsh Company is repugnant to the Constitution, so far as it authorizes a dam across the creek.”<sup>127</sup> Chief Justice Marshall found some merit in Mr. Wirt’s argument regarding the negative impacts of Blackbird Creek prior to the legislature’s passage of the enabling act.<sup>128</sup> He explained “this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance.”<sup>129</sup> He agreed that the value of the property along the banks of Blackbird Creek must have been enhanced by draining the same.<sup>130</sup> He also noted that the lives and health of those who reside beside and near the creek were probably improved greatly.<sup>131</sup>

Even if the act of the Delaware legislature vastly increased the value of property situated along the creek and improved the lives of the Delawareans living there, the act would still be unconstitutional if it interfered with a federal statute or right.<sup>132</sup> At this point, Mr. Wilson might have thought the he was about to prevail in the case and succeed in overturning the decision of the High Court of Errors and Appeals. Alas, his hopes were dashed when Chief Justice Marshall went

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* The entirety of Marshall’s discussion of both the jurisdiction of the Court and the merits spans not even three pages in the United States Reporter. Despite Chief Justice Marshall referring to the “more doubtful question” he spends no more time discussing the merits than he does in a discussion of jurisdiction.

<sup>128</sup> *Id.* at 251.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

on to explain that Delaware interfered with no such right.<sup>133</sup> Mr. Wilson’s argument regarding the Delaware law rested entirely on its “repugnancy to the power to regulate commerce with foreign nations and among the several states.”<sup>134</sup> Such an objection could only be valid if Congress had taken some kind of legislative action regarding Blackbird Creek.<sup>135</sup> According to the Court, Congress had passed no legislation regarding the creek and therefore Delaware was completely within its right to take legislative action regarding its improvement.<sup>136</sup> Chief Justice Marshall cited no precedent to support his holding regarding the commerce clause holding. He closed the opinion by summarizing, “We do not think that the act empowering the [marsh company] to place a dam across the creek, can . . . be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.”<sup>137</sup>

The Court held that there was no error and affirmed the judgment of the High Court of Errors and Appeals with costs.<sup>138</sup>

#### IV. Analysis

Article I, Section Eight, of the Constitution empowers Congress to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . . .”<sup>139</sup> In *Gibbons v. Ogden*, the Court determined that Congress had *exclusive* authority to regulate commerce between the states.<sup>140</sup> *Willson* represents the first decision to interpret what has since been recognized as the dormant commerce clause.<sup>141</sup> In addition, the jurisprudence of the early nineteenth century indicates that the Congress possessed the exclusive power to regulate all

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<sup>133</sup> *Id.* at 251–52.

<sup>134</sup> *Id.* at 252.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>140</sup> 22 U.S. 1 (1824).

<sup>141</sup> *See infra* Part III.A.

navigable waters in the United States.<sup>142</sup> In this context, *Willson* represents a decision inconsistent with the Court's later cases which would hold that Congress possessed exclusive regulatory power in navigable waterways.<sup>143</sup>

Aside from a commerce clause challenge, one might ask why Thompson Wilson did not argue, at any stage in the litigation, that the Delaware legislation amounted to a taking of his coasting license. The answer to this question lies in the fact that, at the time, the Court had decided very few cases regarding the Fifth Amendment's Takings Clause. The Court's decision in *Barron v. Baltimore*, which came after *Willson*, held the Fifth Amendment applied only to the federal government—meaning that citizens could not assert a Fifth Amendment takings claim against a state government. The lack of Supreme Court precedent regarding takings, and the generally accepted belief that the rights protected in the Bill of Rights applied only to the national government, and not the individual states, likely dissuaded Mr. Wilson's lawyers from claiming a taking.<sup>144</sup> Even if Mr. Wilson brought a takings claim according to modern jurisprudence, his claim would still fail since the value of his coasting license was not completely eliminated by the Delaware law.<sup>145</sup>

A. *The Court Applied the Dormant Commerce Clause While Ignoring the Navigability of Blackbird Creek.*

In response to one of the several failures of the Articles of Confederation, many of the delegates of the Constitutional Convention recognized the need for the federal Congress to regulate

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *See infra* Part III.B.

<sup>145</sup> *Id.*

commerce not only with foreign nations, but also between the several states.<sup>146</sup> For this reason, the new federal Constitution empowered Congress to pass laws regarding trade between the states.<sup>147</sup>

In the seminal case of *Gibbons v. Ogden*, the Court struck down a New York law which granted an exclusive steamboat monopoly in the waters between New York and New Jersey.<sup>148</sup> In 1809, New York granted Robert Livingston and Robert Fulton exclusive authority to operate steamboats in the waters of New York for twenty years.<sup>149</sup> Aaron Ogden eventually obtained the rights to the monopoly and attempted to enforce the state-created monopoly against his former business partner, Thomas Gibbons.<sup>150</sup> Ultimately, the Court decided that New York could not create such a monopoly on the steamboat business in New York waters.<sup>151</sup> Specifically, the Court held that “commerce”, as used in Article I, Section Eight, included navigation of waterways.<sup>152</sup> Congress, according to Chief Justice Marshall, had the exclusive authority to regulate commerce between the states.<sup>153</sup> In his explanation of the commerce power granted to Congress in Article I, Section Eight, Chief Justice Marshall wrote one sentence which made *Gibbons* the first case to recognize the dormant commerce clause:

The grant [of the power to regulate commerce] does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the grantee; but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or *lie dormant*.<sup>154</sup>

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<sup>146</sup> See generally Federalist No. 15. In Federalist No. 15, Alexander Hamilton explained that the Articles of Confederation failed to pass essential laws for the entire nation, relying instead on the inconsistent regulations in the states, “[G]overnment implies the power of making laws. It is essential to the idea of a law that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience[.]” *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> 22 U.S. 1 (1824).

<sup>149</sup> *Id.* at 4–6.

<sup>150</sup> *Id.*

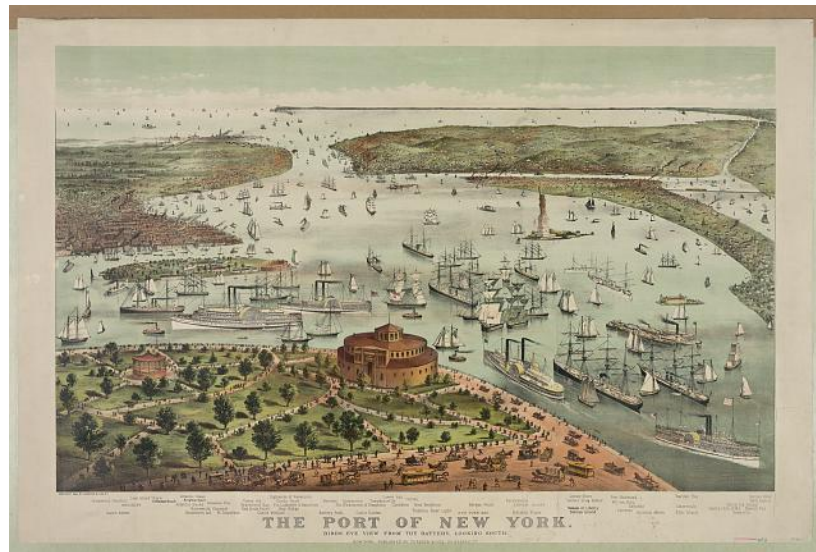
<sup>151</sup> *Id.* at 186.

<sup>152</sup> *Id.* at 190–91.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 189 (emphasis added).

In this way, Chief Justice Marshall explained that the exclusive power of Congress to regulate commerce between the states necessarily implied that the states themselves did not possess power to regulate, and therefore impede commerce between the states.<sup>155</sup>



**Figure 4: The Port of New York**<sup>156</sup>

In *Willson*, Chief Justice Marshall recognized that Thompson Wilson challenged the Delaware law as a violation of the dormant commerce clause. For this reason, in an already very short opinion, the Chief Justice explained that the Court’s decision did not offend the dormant commerce clause:

We do not think that the [Delaware] act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its *dormant* state, or as being in conflict with any law passed on the subject.<sup>157</sup>

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<sup>155</sup> James Madison also recognized that the commerce clause should be viewed as a prohibition upon the individual states. See The Founders’ Constitution, Article I, Section 10, Clause 3, THE UNIVERSITY OF CHICAGO (available at [http://press-pubs.uchicago.edu/founders/documents/a1\\_10\\_3s2.html](http://press-pubs.uchicago.edu/founders/documents/a1_10_3s2.html)) (Madison “was more & more convinced that the regulation of Commerce was in its nature indivisible and ought to be wholly under one authority”).

<sup>156</sup> Currier & Ives, The Port of New York —Birds Eye View from the Battery, Looking South (1892) (available at <http://www.loc.gov/pictures/resource/pgs.00863/>).

<sup>157</sup> *Willson v. Black-Bird Creek Marsh Co.*, 25 U.S 245, 252 (1829) (emphasis added).

According to the Court, the marsh company's enabling act was not an awakening of the dormant commerce clause which would have caused the state action to conflict with the exclusive authority of Congress. Following the Court's decision in *Gibbons*, the decision in *Willson* might have come as a surprise. In *Gibbons*, the Court struck down a state regulation which impeded the free flow of navigation and therefore commerce. Yet, in *Willson*, the Court found no problem with a state regulation which prohibited Thompson Wilson from navigating Blackbird Creek. Thompson Wilson and Thomas Gibbons both challenged the state restrictions on the basis that the restrictions conflict with the rights granted to them by the Coasting Act. Rather than considering the issue of the coasting license, Chief Justice Marshall flatly ignored the issue.<sup>158</sup>

*Gibbons* and *Willson* were different in at least two ways which might explain the divergence in outcomes. First, the regulation in *Gibbons* was purely of a commercial nature.<sup>159</sup> New York sought to exclude all other steamboat operators for the economic advantage of the state's exclusive license.<sup>160</sup> In *Willson* though, the Delaware legislature allegedly aimed to bank or dam Blackbird Creek to improve the lives of the citizens living nearby.<sup>161</sup> Second, the port of New York (at issue in *Gibbons*), it can be safely assumed, was far busier and hosted many more vessels than Blackbird Creek. These two factors, the economic nature of the legislation, and the nature of the waterways involved, have been offered as possible differentiations which might explain why the Court inconsistently decided *Gibbons* and *Willson*.<sup>162</sup>

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<sup>158</sup> CARL BRENT SWISHER, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOL. V: THE TANEY PERIOD, 1836–64*, 362 (1974) (“Chief Justice Marshall, choosing to ignore a federal coasting license like that which had been stressed in the *Gibbons* case . . .”).

<sup>159</sup> *Gibbons v. Ogden*, 22 U.S. 1, 4–6 (1824).

<sup>160</sup> *Id.*

<sup>161</sup> *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245, 249 (1829).

<sup>162</sup> G. EDWARD WHITE, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOL. III: THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35*, 583–85 (1988). The state action in *Gibbons* and *Willson* differed in another important way. In *Gibbons*, New York created a shipping monopoly. In *Willson*, Delaware's regulation had the collateral effect of picking winners and losers. In this case, Mr. Wilson happened to be the loser. Delaware likely had a much stronger reason to exercise its state police power. Where New



After *Willson*, the Court cited the case to uphold state regulations which could have been viewed as impediments to commerce between the states. For example, in *Cooley v. Board of Wardens of Philadelphia*, the Court upheld a Pennsylvania law which required all ships entering the port of Philadelphia to hire a local pilot for the vessel.<sup>163</sup> The Court held that the law did not infringe upon the authority granted to Congress since Congress, although having authority to pass laws concerning pilotage, had not passed a law regarding pilotage in Philadelphia.<sup>164</sup> Pennsylvania did not offend the Constitution since Congress was silent on the subject.<sup>165</sup> The Court cited *Willson* for the proposition that in the absence of congressional legislation, states may act to regulate commerce.<sup>166</sup> Today, *Willson* has yet to be expressly overturned or questioned by any Supreme Court decision.



**Figure 5: The Port of Philadelphia<sup>167</sup>**

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York merely exercised state power in an effort to create a monopoly—with no real advantage to the citizens of the state—Delaware acted to dam the creek in an effort to prevent the spread of its “venom” as referenced in the Supreme Court opinion. The Court, in approving state action in *Willson* likely did so more as an approval of Delaware’s state police powers.

<sup>163</sup> 53 U.S. 299 (1851).

<sup>164</sup> *Id.* at 320.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 319.

<sup>167</sup> Penn’s Tree with the City & Port of Philadelphia, on the River Delaware from Kensington (date unknown) (available at <http://www.loc.gov/pictures/resource/pga.04343/>).

*Willson* further conflicts with the Court’s subsequent decisions regarding state regulations which impede the navigation of rivers. After *Willson*, the Court routinely held that Congress possessed the sole authority to regulate the navigable waters of the United States.<sup>168</sup> The Court clearly stated in *Gilman* and *Wheeling & Belmont Bridge Co.* that Congress had the exclusive authority to pass all laws regarding the navigation of the waters of the United States. If Blackbird Creek was a navigable river, this would seem to render *Willson* inconsistent with these later cases. In this sense, *Gilman* and *Wheeling & Belmont Bridge Co.* at least partially overruled, *sub silentio*, the rationale employed by the Court in *Willson*.

B. *The Delaware Legislation Did not Constitute a Taking in 1829, or Today.*

In 1824, at least one Delaware representative, in advocating for the repeal of the marsh company’s enabling legislation, argued that the legislation, amounted to a taking in that it prohibited the free navigation of Blackbird Creek.<sup>169</sup> More specifically, the opponent argued that Mr. Wilson and others like him, previously had a right to travel up and down Blackbird Creek.<sup>170</sup> Now, with the passage of the enabling act and the subsequent construction of the banks and dam, Mr. Wilson had suffered a form of taking—his coasting was now worth considerably less since he could not navigate the creek.<sup>171</sup>

Since at least one representative argued that the regulation, preventing the free navigation of Blackbird creek amounted to a taking, one might ask why Mr. Wilson did not bring such a claim when he sued the marsh company. Mr. Wilson likely did not bring a takings claim since the Court

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<sup>168</sup> See *Gilman v. Philadelphia*, 70 U.S. 713, 725 (1866) (recognizing that, for the purposes of navigation and navigable rivers, “Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England.”); see also *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518 (1852) (upholding an injunction which prohibited the construction by Virginia of a bridge which would have impeded the navigation of the Ohio River).

<sup>169</sup> *Legislature of Delaware: House of Representatives*, American Watchman, Mar. 9, 1824.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

had not yet applied the Fifth Amendment to the states.<sup>172</sup> Specifically, the rights enumerated in the Bill of Rights applied, according to the Court at that time, only to the federal government.<sup>173</sup> In 1833, the Court heard the case of *Barron v. Baltimore*.<sup>174</sup> In *Barron*, the Court considered whether a wharf owner could bring a takings claim, under the Fifth Amendment, against Baltimore and Maryland after the wharf's value was reduced as a result of a municipal plan to improve drainage in Baltimore.<sup>175</sup> The Court held that the Fifth Amendment applies only to actions by the federal government.<sup>176</sup> Chief Justice Marshall explained that the states could pass their own constitutional measures requiring just compensation after a taking.<sup>177</sup> The federal Constitution imposed the requirement of just compensation upon the federal government alone.<sup>178</sup> The Fifth Amendment would not be applied to the states until the end of the nineteenth century.<sup>179</sup> Quite simply, Mr. Wilson's lawyers likely believed that the Fifth Amendment did not apply to state actions which would therefore prohibit Mr. Wilson's claim from succeeding.

Even today, the Delaware legislation would not amount to a taking which requires just compensation pursuant to the Fifth Amendment.<sup>180</sup> In *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*,<sup>181</sup> the Court incorporated the Takings Clause of the Fifth Amendment into the

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<sup>172</sup> The Court would not incorporate the Fifth Amendment until 1897. *Chicago, Burlington and Quincy Railroad v. City of Chicago*, 166 U.S. 226 (1897).

<sup>173</sup> Through the process of selective incorporation, the Court chooses, on a case-by-case basis, which of the rights in the Bill of Rights would be incorporated by the Fourteenth Amendment and applied to the states. For a more detailed discussion of the incorporation doctrine see GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET, & PAMELA S. KARLAN, *CONSTITUTIONAL LAW* 739–41 (7th ed. 2013).

<sup>174</sup> 32 U.S. 243 (1833).

<sup>175</sup> *Id.* at 244–46.

<sup>176</sup> *Id.* at 247 (“the fifth amendment must be understood as restraining the power of the General Government, not as applicable to the States.”).

<sup>177</sup> *Id.* at 247–48 (“In their several constitutions, they have imposed such restrictions on their governments, as their own wisdom suggested, such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.”).

<sup>178</sup> *Id.* at 247.

<sup>179</sup> *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

<sup>180</sup> U.S. CONST. amend V. The Fifth Amendment provides, in relevant party, “nor shall private property be taken for public use, without just compensation.” *Id.*

<sup>181</sup> 166 U.S. 226 (1897).

Due Process Clause of the Fourteenth Amendment, and required states to provide just compensation after seizing private property for public use.<sup>182</sup> According to the Court's modern taking's jurisprudence, a regulatory taking occurs when some form of government action, not necessarily the exercise of eminent domain authority, significantly reduces property rights.<sup>183</sup> Under the modern doctrine, Mr. Wilson would have a significantly better chance of challenging the Delaware legislation, but his takings claims would still fail since the value of his coasting license was not reduced to zero.

*Pennsylvania Coal Co. v. Mahon* and *Penn Central Transportation Co. v. New York City*, form the bedrock of American takings jurisprudence.<sup>184</sup> Essentially, these decisions, both of which relate to land, require that states must compensate property owners after the passage of regulations of a certain character.<sup>185</sup> While states possess the power to regulate property, when a regulation "goes too far," the regulation amounts to a taking which entitles the property owner to just compensation.<sup>186</sup>

For example, in *Mahon*, the Court held that a Pennsylvania regulation amounted to a taking for the owners of coal mines.<sup>187</sup> The statute at issue prohibited coal companies from mining the coal columns left in mines to prevent mine collapses.<sup>188</sup> Not only did these columns prevent the collapse of the mines, but it also prevented the land above the mine, which was often developed with residential or commercial property, from collapsing into the ground.<sup>189</sup> The Court held that,

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<sup>182</sup> *Id.*

<sup>183</sup> See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

<sup>184</sup> For a more detailed discussion of the decisions which followed *Mahon* and *Penn Central*, and the Court's rules regarding just compensation, see Michael P. Collins, Jr., Note, *Horne v. Department of Agriculture: Just Compensation Left to Wither on the Vine*, 75 MD. L. REV. 838, 845-48 (2016).

<sup>185</sup> *Mahon*, 260 U.S. at 415.

<sup>186</sup> *Id.*

<sup>187</sup> *Mahon*, 260 U.S. at 412-13.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

since the statute eliminated any interest in the columns, which the coal companies previously held, the regulation amounted to a taking.<sup>190</sup> In *Mahon*, the Court held that the regulation “went too far,” and therefore worked a taking on the owners of the coal mine.<sup>191</sup>

In *Penn Central*, the Court upheld New York’s efforts to protect historical buildings in New York City.<sup>192</sup> The regulation created a system which prohibited certain property owners from further developing properties, but enabled them to transfer these development rights to neighboring properties.<sup>193</sup> The Court held that the regulation did not amount to a taking since the development rights were not abrogated, but simply made transferrable.<sup>194</sup>

If the Court were to apply *Mahon* to Mr. Wilson’s case, it would likely find that, unlike the coal owners in *Mahon*, Mr. Wilson did not suffer a complete taking of any property. In *Mahon*, the court focused on the fact that the regulation amounted to a *complete* restriction on the mining of the coal columns, making them essentially worthless.<sup>195</sup> But, Mr. Wilson did not suffer a complete taking of his coasting license. Unlike the coal companies, who could not mine any more of their coal, Mr. Wilson could still operate his coasting vessel anywhere in the United States, with the exception of the Blackbird Creek. Just as the landowners in *Penn Central* could transfer development rights, Mr. Wilson could navigate in any other waterway in the United States.<sup>196</sup> Therefore, the Court would not find that the Delaware regulation “went too far” by working a taking on Mr. Wilson.

#### IV. Conclusion

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<sup>190</sup> *Id.* at 415.

<sup>191</sup> *Id.*

<sup>192</sup> *Penn Central Transp. v. New York City*, 438 U.S. 104, 108–09 (1978).

<sup>193</sup> *Id.* at 110–11.

<sup>194</sup> *Id.* at 137.

<sup>195</sup> *Mahon*, 260 U.S. at 415.

<sup>196</sup> *Penn Central Transp.*, 438 U.S. at 137.

In *Willson v. Black-Bird Creek Marsh Co.*, the Supreme Court held that a Delaware law permitting the construction of a dam along Blackbird Creek in New Castle, Delaware did not conflict with the exclusive power of Congress to regulate commerce and therefore, navigation between the states.<sup>197</sup> *Willson* represents the Court’s first interpretation of the dormant commerce clause.<sup>198</sup> While the facts of *Willson* might seem similar to the facts of *Gibbons v. Ogden*,<sup>199</sup> Chief Justice Marshall likely reached a different conclusion in *Willson* due to the economic and geographic differences of the two cases.<sup>200</sup> Additionally, the Court’s decision would later conflict with subsequent cases concerning navigation of the waters of the United States, and the exclusive authority of Congress to regulate such waters.<sup>201</sup> Finally, Mr. Wilson likely chose not to bring a takings claim—alleging a reduction in the value of his coasting license—since the jurisprudence of the time would not have supported such a claim.<sup>202</sup> Even today, Mr. Wilson did not suffer a taking as a result of the Delaware law.<sup>203</sup>

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<sup>197</sup> 25 U.S. 245 (1829).

<sup>198</sup> *See supra* Part III.A.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *See supra* Part III.B.

<sup>203</sup> *Id.*

## Appendix I: George Read, Jr. – A Biographical Sketch



*Figure 6: George Read, I*<sup>204</sup>



*Figure 7: George Read, Jr.*<sup>205</sup>

George Read, Jr. was born in New Castle County, Delaware to George and Gertrude (Ross) Read in 1765.<sup>206</sup> He studied law with his father, George Read, and ultimately became a powerful and respected jurist in Delaware.<sup>207</sup> George Read signed the Declaration of Independence and penned a letter to King George III, while serving as Attorney General of Delaware, scolding the King for taxing the colonists while not allowing them representation in Parliament.<sup>208</sup> Read also assisted in framing the United States Constitution, advocated for its ratification in Delaware, and ultimately signed the Constitution in 1789.<sup>209</sup>

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<sup>204</sup> The Reads, DELAWARE HISTORICAL SOCIETY, <http://www.dehistory.org/history/the-reads> (last visited November 22, 2016).

<sup>205</sup> *Id.*

<sup>206</sup> Read Family Papers, UNIVERSITY OF DELAWARE LIBRARY, <http://www.lib.udel.edu/ud/spec/findaids/readfam.htm> (last visited November 21, 2016).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

On October 30, 1786, George Read, Jr. married his first cousin, Mary Thompson.<sup>210</sup> He served as the first United States Attorney for the District of Delaware from 1789 until his resignation in 1816.<sup>211</sup> Upon his resignation in 1816, his son, George Read, III served as the next United States attorney.<sup>212</sup> In 1820, Attorney General William Wirt requested that George Read, along with fellow Delawarean Caesar Rodney, prepare a report regarding a disputed island in the Delaware River.<sup>213</sup> Along with Caesar Rodney, George Read offered his opinion regarding the history of an island in the Delaware River known as the Pea Patch.<sup>214</sup> Perhaps Thompson Wilson felt George Read was uniquely qualified to assist in his case since George Read likely handled several issues involving property rights and even constitutional questions upon leaving his post as U.S. Attorney in 1816.

Beginning in 1797, George Read began construction of a grand mansion and garden in New Castle, Delaware.<sup>215</sup> Construction of the house finished in 1803.<sup>216</sup> The house is 14,000 square feet and has twenty-two rooms.<sup>217</sup> In 1824, a large fire destroyed much of the Read House, but before his death in 1836, George Read, Jr. purchased land adjoining the property which allowed for the expansion of the Read House & Gardens.<sup>218</sup> Today, the house is a historical site in Delaware and welcomes visitors every year.<sup>219</sup>

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<sup>210</sup> *Id.*

<sup>211</sup> *U.S. Attorneys*, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE, <http://www.ded.uscourts.gov/us-attorneys> (last visited November 21, 2016).

<sup>212</sup> *Id.*

<sup>213</sup> *American State Papers: The Public Lands* 33: 435–38 (available at <https://books.google.com/books?id=xLMbAQAAMAAJ&pg=PA435&lpg=PA435#v=onepage&q&f=false>)

<sup>214</sup> *Id.*

<sup>215</sup> The Reads, DELAWARE HISTORICAL SOCIETY, <http://www.dehistory.org/history/the-reads> (last visited November 22, 2016).

<sup>216</sup> *Id.*

<sup>217</sup> Read House & Gardens, DELAWARE HISTORICAL SOCIETY, <http://www.dehistory.org/hours-a-fees/166-home-page/read-house-gardens/161-read-house-gardens> (last visited November 22, 2016).

<sup>218</sup> The Reads, DELAWARE HISTORICAL SOCIETY, <http://www.dehistory.org/history/the-reads> (last visited November 22, 2016).

<sup>219</sup> *Id.*



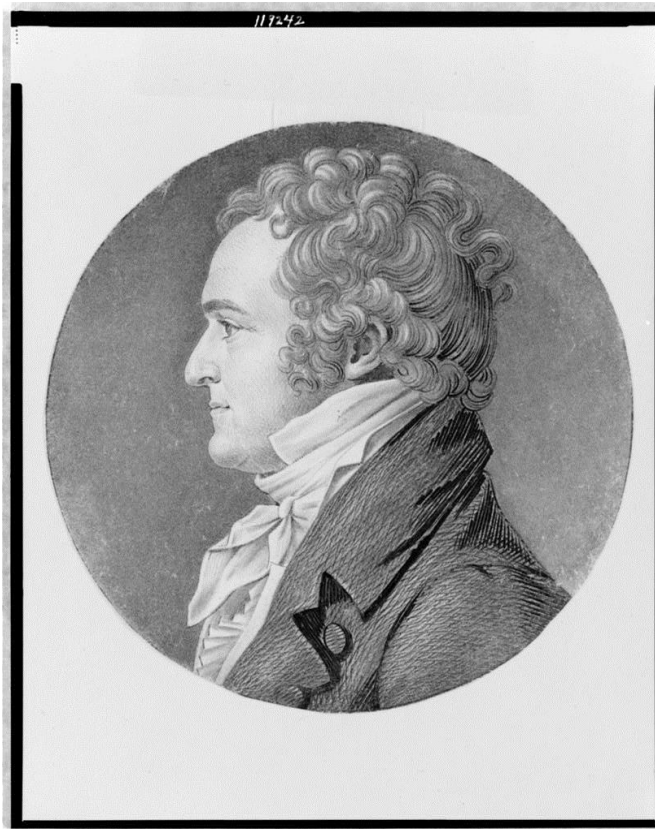


*Figure 8: Read House*<sup>220</sup>

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<sup>220</sup> Read House & Gardens, DELAWARE HISTORICAL SOCIETY, <http://www.dehistory.org/hours-a-fees/166-home-page/read-house-gardens/161-read-house-gardens> (last visited November 22, 2016).

## Appendix II: William Wirt – A Biographical Sketch



*Figure 9: William Wirt*<sup>221</sup>

William Wirt was the ninth United States Attorney General.<sup>222</sup> Wirt served in this capacity from November 13, 1817 until March 4, 1829.<sup>223</sup>

Wirt was born in Bladensburg, Maryland on November 8, 1772.<sup>224</sup> In 1807, President Thomas Jefferson appointed him to prosecute Aaron Burr for charges of treason.<sup>225</sup> Later, in 1817, President James Monroe appointed Wirt Attorney General. While serving as Attorney General, Wirt argued many cases before the Supreme Court, to include *McCulloch v.*

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<sup>221</sup> Charles Balthazar Julien Fevret de Saint Mémin, William Wirt, head-and-shoulders portrait, facing left (1807) (available at <http://www.loc.gov/pictures/item/97514239/>).

<sup>222</sup> Attorney General: William Wirt, UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/ag/bio/wirt-william> (last visited November 22, 2016).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

*Maryland*<sup>226</sup> and *Gibbons v. Ogden*.<sup>227</sup> William Wirt also served as the Supreme Court counsel for the marsh company in 1829. Recognized as one of the greatest lawyers to ever appear before the Court, Wirt dedicated his life to his work.<sup>228</sup>

In *Gibbons*, Wirt argued on behalf of Thomas Gibbons.<sup>229</sup> Thomas Gibbons, as previously discussed, sought to prevent the enforcement of the steamboat monopoly granted by New York to his former business partner, Aaron Ogden.<sup>230</sup> Mr. Wirt's argument in the case was spectacular:

Those who have witnessed Mr. Wirt's oratorical efforts, will testify to the difficulty of ever furnishing an exact report, even by himself, of the finest passages in which his taste often led him to indulge. He was in the habit often of turning aside from the direct path of argument, to amuse himself and his hearers with an occasional gambol of wit or fancy, which came with most graceful playfulness to relieve the stress and weariness of mere dialects.<sup>231</sup>

It would appear somewhat inconsistent for Mr. Wirt to argue on behalf of a mariner trying to escape the grip of a state regulation (*Gibbons*) while later arguing on behalf a company hoping to enforce a state law (the marsh company). Wirt's ability to prevail in each case, achieving a victory for both Ogden and the marsh company, is a lasting testament to his ability to persuade the learned justices of the Supreme Court, and especially Chief Justice John Marshall.

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<sup>226</sup> 17 U.S. 316 (1819).

<sup>227</sup> 22 U.S. 1 (1824).

<sup>228</sup> 2 JOHN PENDLETON KENNEDY, MEMOIRS OF THE LIFE OF WILLIAM WIRT, ATTORNEY GENERAL OF THE UNITED STATES 162–63 (1849) (“He was at this period of his life employed in the greater number of the most important cases in the Supreme Court. He was also deeply immersed in the practice of the courts of Baltimore and Annapolis”).

<sup>229</sup> *Gibbons v. Ogden*, 22 U.S. 1 (1824).

<sup>230</sup> *Id.*

<sup>231</sup> KENNEDY, *supra* 163.