



## THE SUPREME COURT HISTORICAL SOCIETY

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### NATIONAL HERITAGE LECTURE

Held on September 19, 2002

To characterize the Tenth National Heritage Lecture as a lecture is somewhat misleading, as this remarkable program took the form of an historical re-argument of the landmark case *Gibbons v. Ogden*. The importance attached to the ruling in the Supreme Court case of 1824 was that for the first time, the Marshall Court defined broadly Congress's right to regulate commerce, through the interpretation of Article 1, Section 8 of the Constitution. In the 20<sup>th</sup> century, Chief Justice John Marshall's broad definition of commerce was used to uphold legislation protecting civil rights. The decision was highly influential in its explication of the federal structure of the government of the United States.

For the re-enactment, Justice Antonin Scalia acted as the Marshall Court. Representing the litigants were two experienced and able members of the Supreme Court Bar. Teresa Wynn Roseborough presented arguments for Gibbons and Philip Allen Lacovara argued for Ogden. Ms. Roseborough is an attorney with Sutherland, Asbill & Brennan in Atlanta, Georgia. Prior to entering private practice, she served as Deputy Assistant Attorney General in the Office of Legal Counsel in the U.S. Department of Justice, and served as a clerk to Justice John Paul Stevens and Judge James Dickson Phillips of the U.S. Court of Appeals for the Fourth Circuit. Mr. Lacovara currently is a partner at Mayer, Brown, Rowe & Maw in New York. In his career he has been in private practice and served as Deputy Solicitor General of the United States and Counsel to the Watergate Special Prosecutor, as well as working in the corporate sector as Vice President and Senior Counsel for Litigation and Legal Policy for General Electric Co.

"In *Gibbons*, the Court faced the challenge of defining both the scope of the power granted to Congress under the Commerce Clause and the power of the States to themselves engage in the regulation of commerce," explained Ms. Roseborough. "Virtually every law student's study of the Commerce Clause begins with the decision of the Court in *Gibbons v. Ogden*, and I was honored by this opportunity to re-enact the arguments made on behalf of Mr. Ogden in front of the Court."

Society President Frank C. Jones conducted the session,



The participants in the re-enactment of *Gibbons v. Ogden* were Philip Lacovara, (left) representing Ogden, Justice Antonin Scalia (center) who represented the Marshall Court, and Teresa Roseborough (right) who represented Gibbons.

providing an introduction to Justice Scalia, as well as one for Professor Melvin Urofsky of Virginia Commonwealth University, who gave an historical overview of the case prior to the re-enactment. The case concerned the operation of steamboats in the State of New York. Aaron Ogden had been granted a license to operate steamboats under a grant from the New York legislature. His one-time business partner, Thomas Gibbons, received a federal coasting license to run steamboats that he operated in direct competition with those of Ogden. Ogden filed a complaint in New York seeking to prevent Gibbons from operating his boats, claiming the competition had destroyed what had been a monopoly on steamboat service in the area. The case was heard by two courts, the New York Court of Chancery and the Court of Errors of New York, both of which found in favor of Ogden. Not satisfied with these rulings, Gibbons brought his case before the Supreme Court of the United States on February 4-9, 1824.

During the re-enactment, counsel presented arguments based on the historic arguments, but also included original thinking and points. Both responded to numerous questions

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posed by Justice Scalia from the bench in his capacity as the “Marshall Court.”

In his argument for the appellant, Mr. Lacovara suggested that the case was about whether each State has the “power to choke off a vital instrument of commerce by closing its waters to vessels not enjoying the State’s patronage.” His appeal rested on the basis that the N.Y. Statutes “violated the U.S. Constitution because they asserted power to regulate interstate commerce, a power exclusively entrusted to Congress” and because they deprived Mr. Gibbons of the right under an act of Congress. He further argued that “navigation and carriage of goods and people fell naturally within the meaning of commerce; that among the obstacles that rendered the Articles of Confederation impotent and destructive were constraints on free movement of commerce; that the power of Congress must extend to every species of commercial intercourse between the U.S. and foreign nations and among States; that power over commerce cannot stop at jurisdictional lines of States; and that power itself is the authority to prescribe rules by which such commerce is governed.”

At the conclusion of the argument portion of the program, Justice Scalia provided a thought-provoking summary of the Supreme Court’s judgment in the case, touching upon the major points on which the decision was based. While admitting he did not necessarily agree with the decision of the Supreme Court in the case, he also stated he “could not find it in his heart to overrule the Marshall Court.”

The program was a stimulating exchange of ideas and

knowledge which provided the audience an opportunity to contemplate several of the sometimes competing issues involved in balancing the powers of Congress to regulate interstate commerce as weighed against the interests and powers of the individual States.



**The principals in the re-enactment posed together. Left to right front row, Philip Lacovara, Justice Scalia and Teresa Roseborough. Back row, left to right, Lori Fenner who served as Marshal of the Court, Frank C. Jones, and Professor Melvin Urofsky, who provided an historical overview of the significance of the case.**