Endnote

THE STORY OF McCULLOCH: BANKING ON NATIONAL POWER

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There is no denying the importance of McCulloch v. Maryland. As of April 14, 2004, it had received a total of 7,307 cites in the Westlaw computer base. Many scholars consider it the single most important opinion in the Court's history. Later national leaders "have not hesitated to make recourse to Marshall's image whenever they needed authority to confirm the legitimacy of the national government deriving from the people of the United States, to defend the independence of the federal judiciary, to support broad constructions of Congress's Commerce Clause and Necessary and Proper Clause Powers, and to justify judicial construction of the Constitution to meet the pressing issues of the day." And a number of lines from the opinion are second-nature to any constitutional lawyer, such as Marshall's definition of the "necessary and proper" clause and his dictum that "we must never forget that it is a Constitution we are expounding."

But much less familiar is the historical setting of the decision. Chief Justice Marshall did not write on a clean slate in McCulloch. The constitutionality of a national bank had been disputed since the early days of the Republic and involved deep questions of constitutional theory. To fully understand Mar-

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3. 17 U.S. (4 Wheat.) at 407 (once amusingly paraphrased by a student on an exam as "we must never forget that it is a Constitution we are expanding").

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shall’s opinion, we need to place it firmly into historical context. Only by doing so can we understand why *McCulloch* was such a controversial decision at the time. We may also be able to see how the Court’s current debates over federalism relate to the vision Marshall articulated in *McCulloch*.4

**HOW **McCULLOCH** G**OT **TO THE **SUPREME COURT

Often, the interesting part of the development of a case relates to the lives and conduct of the parties, the litigation tactics of the lawyers, and the way that lower court proceedings contributed to the appellate decisions. With respect to *McCulloch*, however, the interesting background relates not to the earlier stages of the litigation but to prior controversies. When Marshall ruled on the constitutionality of the Bank of the United States, he was continuing a debate that had begun even before the Constitution went into effect. He was also contributing to a discussion of the nature of the Union and the scope of federal power that had begun with Hamilton, Madison, and Jefferson. The extensive oral arguments in *McCulloch* were primarily concerned with linking the case to the broad constitutional themes of this ongoing debate, setting the stage for Marshall’s historic opinion. Thus, Marshall was adding a chapter to a constitutional debate begun by others.

**THE BANK OF THE UNITED STATES AND THE FOUNDING FATHERS

Controversy about a national bank arose even before the Constitution was adopted. The country emerged from the American Revolution with serious inflation, along with over $450 million in debt and little prospect of paying it off.5 Between 1779 and 1781, congressional interest in chartering a bank rose, with the goal of stabilizing the currency on the basis of the bank’s notes.6 Robert Morris, the mastermind behind the bank plan, intended to keep the bank’s notes in circulation indefinitely

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6. *Id.* at 138.
as a form of paper money. After the Bank of North America was chartered by Congress, Morris tried unsuccessfully to push through Congress his scheme to convert the existing national debt into circulating bank notes, but he was unable to secure adequate funding. But the Bank of North America was not a complete failure. Franklin, Jefferson, and Hamilton were among its investors and depositors, and the bank handled payments for the Continental Army.

Even at this early stage, the legality of a national bank was disputed. James Wilson, soon to be an important participant in the adoption of the new Constitution, made the case in favor of the bank. He argued that "[w]henever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in congress assembled." For "many purposes," he maintained, "the United States are to be considered as one undivided, independent nation; and as possessed of all the rights, and powers, and properties, by the law of nations incident to such." Congress was warranted in establishing a bank for a variety of reasons. Such a bank provided a reliable source of nationwide paper currency. "To have a free, easy, and equable instrument of circulation is of much importance in all countries: it is of peculiar importance in young and flourishing countries, in which the demands for credit, and the rewards of industry, are greater than in any other." A bank would also provide a ready source of funds in the event of war. Wilson concluded "that in times of peace, the national bank will be highly advantageous; that in times of war, it will be essentially necessary, to the United States."

When the Constitutional Convention met in the summer of 1787, the question of a national bank was still on people's minds. During the debate on a proposal to empower Congress to build canals, Madison proposed that Congress also be given the power

7. Id. at 141.
8. Id. at 148.
9. Id. at 144-45.
12. Id. at 373.
13. Id.
14. Id. at 380.
15. Id. at 383.
16. Id.
“to grant charters of incorporation where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent.”

Rufus King of Massachusetts, who was later to be a director of the first Bank of North America, objected that such a provision would be divisive: “In Philada. & New York, It will be referred to the establishment of a Bank, which was been a subject of contention in those Cities. In other places it will be referred to mercantile monopolies.”

James Wilson (already on record as supporting a bank prior to the Convention) responded that “[a]s to Banks he did not think with Mr. King that the power in that point of view would excite the prejudices & parties apprehended.” George Mason argued for giving Congress only the power to charter canal companies, because he was “afraid of monopolies of every sort” and “did not think [they] were by any means already implied by the Constitution as supposed by Mr. Wilson.” A vote was then taken on a modified motion, limiting the power to canals as suggested by Mason. The modified motion failed, killing the broader proposal as well.

After the Constitution was ratified, Alexander Hamilton became the first Secretary of the Treasury. As a recent commentator observes, Hamilton’s bank proposal was prompted by the need to jumpstart a foundering national economy:

The scope and insight of Hamilton’s political economy was breathtaking. Suppose you were appointed Treasury Secretary of a start-up country with a poor credit history, an enormous amount of delinquent debt, both local and national, unexploited natural resources, disconnected and rudimentary product markets, and disordered and illiquid financial markets. And suppose further that your new country was “possessed of little active wealth, or in other words, little moneyed capital,” what would you do?

Building on Robert Morris’s earlier ideas, Hamilton put forward an ambitious scheme for the federal government to raise taxes through tariffs and then to refinance both the federal govern-

18. Id. at 439.
19. Id. at 141.
20. Id.
21. Id.
22. Id.
ment's war debt and those of the states. Establishing a national bank was a key part of this scheme. Like Morris, Hamilton planned to use the bank's notes to expand the national money supply. Hamilton was successful in part of this scheme. By establishing a dependable method of financing a public debt, he put the country's credit on a firm footing for the first time.24

The bank was a critical part of Hamilton's economic program. It would be the government's chief fiscal agent, making it easier to collect taxes, make payments, and obtain short-term loans. Its notes would provide a national currency, and it would provide a source of capital for financing businesses.25 This plan was modeled closely on the Bank of England, which had helped bring Britain back from the verge of bankruptcy.26

Opposition to the bank had several roots. Some opponents disagreed with Hamilton's view on the necessity of a strong currency, viewing national wealth as based solely on productivity rather than on the financial system.27 Other attacks were from defenders of agrarian values, many of them former opponents of the Constitution. They rejected Hamilton's focus on commerce and feared his efforts to build national financial institutions. They believed that, like the Bank of England, an American national bank would create a powerful class of financiers, who would in turn co-opt the federal government and undermine the autonomy of the states. These agrarians were afraid that a national bank would bring on the kind of "corruption" (primarily in the form of undue influence on legislators) that they had long criticized in English society.28 Finally, bank opponents such as Madison feared that if the bank were established in Philadelphia, this would strengthen the claim of that city to become the national capital, blocking their preferred locations on the Potomac and elsewhere.29

In Congress, opposition to the bank was led by Madison. He argued that the bank proposal was dubious as a policy matter. More importantly, he contended that it was unconstitutional. Congress had only limited enumerated powers. At most the

24. Id. at 804.
26. Id. at 228.
27. See Riesman, supra note 5, at 160-61.
29. Elkins & McKitrick, supra note 25, at 229.
bank would be convenient rather than necessary. Implication and construction could not be used to extend congressional power. Madison viewed the Bank of North America as distinguishable—technically illegal, but a wartime necessity. In particular, Madison rejected the necessary and proper clause as a basis of authority for the bank:

The essential characteristic of the government, as composed of limited and enumerated powers, would be destroyed: If instead of direct and incidental means, any means could be used, which in the language of the preamble to the bill, "might be conceived to be conducive to the successful conducting of the finances; or might be conceived to tend to give facility to the obtaining of loans. He [Madison] urged an attention to the diffuse and ductile terms which had been found requisite to cover the stretch of power contained in the bill. He compared them with the terms necessary and proper used in the Constitution, and asked whether it was possible to view the two descriptions as synonymous [ṣṣṭet] or the one as a fair and safe commentary on the other.

A few days later, he repeated much of his argument, this time stressing how dangerous it would be to give Congress the power to create corporations:

The power of granting Charters, he observed, is a great and important power, and ought not to be exercised, without we find ourselves expressly authorized to grant them: Here he [Madison] dilated on the great and extensive influence that incorporated societies held on public affairs in Europe: They are a great powerful machine, which have always been found competent to effect objects on principles, in a great measure independent of the people.

Madison's argument rested on a theory of interpretation that would later be called originalism. He articulated three principles of constitutional interpretation: (1) an "interpretation that destroys the very characteristic of the government cannot be just"; (2) where the meaning is clear, it must be accepted regardless of consequences; and (3) in "controverted cases, the meaning of the parties to the instrument, if to be collected by reason-

31. Id. at 531 (emphasis in original).
able evidence, is a proper guide" and may be found from "[c]ontemporary and concurrent expositions."\textsuperscript{33}

In reply, supporters of the bank made three arguments. First, they argued that establishing a bank was a "necessary incident to the entire powers to regulate trade and revenue, and to provide for the public credit and defense."\textsuperscript{34} Second, they maintained (perhaps correctly) that Madison was inventing new doctrines of interpretation that were not sanctioned by leading authorities such as Blackstone. Finally, they recalled that \textit{Federalist No. 44} (which was actually by Madison himself, though this was not known at the time) had expressly endorsed the doctrine of implied powers.\textsuperscript{35} Madison apparently failed to persuade his colleagues. Having passed the Senate already, the bank proposal passed the House by a vote of 39 to 20.\textsuperscript{36}

Madison had several discussions about the bank with Washington, who was sufficiently concerned to tell Madison to prepare a veto message for possible use. Washington then asked the Attorney General, and more importantly, Secretary of State Jefferson, to advise him about the constitutionality of the bill.\textsuperscript{37}

Hamilton's economic schemes were anathema to Jefferson. Jefferson's vision of the American future was agrarian, and he was suspicious of manufacturing, commerce, and finance. Like most Southern planters, he was deeply hostile to banks.\textsuperscript{38} Jefferson responded to Washington's request with a vigorous attack on the constitutionality of the Bank.\textsuperscript{39}

Jefferson began by cataloguing the ways in which bank statute might conflict with state laws, which it would preempt.\textsuperscript{40} In his view, the foundation of the Constitution was the Tenth Amendment's reservation of power to the states: "To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition."\textsuperscript{41} He then considered the possible sources of power. The bank could not be justified under the power to tax for the purpose of paying federal

\begin{thebibliography}{9}
\bibitem{33} \textit{Id.} at 529.
\bibitem{34} \textit{ELKINS & MCKITRICK, supra} note 25, at 231.
\bibitem{35} \textit{Id.}
\bibitem{36} \textit{Id.} at 232.
\bibitem{37} \textit{Id.}
\bibitem{38} \textit{JOHNSON, supra} note 10, at 210.
\bibitem{39} Thomas Jefferson, Feb. 15, 1791, \textit{in COGAN, supra} note 11, at 540.
\bibitem{40} \textit{Id.}
\bibitem{41} \textit{Id.} at 541
\end{thebibliography}
debt, because it did neither. Nor did it fit under the government’s power to borrow money, for the bank would be at complete liberty to decide whether to loan any money to the federal government. And although the Bank’s bills would trade in interstate commerce, issuing the bills was not interstate commerce: "For the power given to Congress by the Constitution, does not extend to the internal regulation of the commerce of a state (that is to say of the commerce between citizen and citizen) which remains exclusively with it’s own legislature; but to it’s external commerce only, that is to say, it’s commerce with another state, or with foreign nations, or with the Indian tribes."\textsuperscript{42}

Jefferson also invoked the original intent:

It is known that the very power now proposed as a means, was rejected as an end, by the Convention which formed the constitution. A proposition was made to them to authorize Congress to open canals, and an amendatory one to empower them to incorporate. But the whole was rejected, and one of the reasons of rejection urged in debate was that then they would have a power to erect a bank, which would render the great cities, where there were prejudices and jealousies on that subject adverse to the reception of the constitution.\textsuperscript{43}

Jefferson in no uncertain terms rejected the necessary and proper clause as a basis for the Bank: “It has been much urged that a bank will give great facility, or convenience in the collection of taxes. Suppose this were true: yet the constitution allows only the means which are ‘necessary’ not those which are merely ‘convenient’ for effecting the enumerated powers.”\textsuperscript{44} “Can it be thought that the Constitution intended that for a shade or two of convenience, more or less,” that “Congress should be authorized to break down the most antient [sic] and fundamental laws of the several states, such as those against Mortmain, the laws of alienage, the rules of descent, the acts of distribution, the laws of escheat and forfeiture, the laws of monopoly?”\textsuperscript{45} A similar argument could be made to give Congress every non-enumerated power, for “there is no one [power] which ingenuity may not torture into a convenience, in some way or other, to some one of so long a list of enumerated powers.”\textsuperscript{46} To construe the clause so

\textsuperscript{42} Id.
\textsuperscript{43} Id. at 542.
\textsuperscript{44} Id.
\textsuperscript{45} Id. at 543-44.
\textsuperscript{46} Id. at 542 (emphasis added).
broadly "would swallow up all the delegated powers, and reduce the whole to one phrase."

Somewhat surprisingly, Jefferson concluded by offering Washington an escape hatch. Unless Washington was "tolerably clear" that the bank bill was unconstitutional, he ought to defer to the legislature. "[I]f the pro and the con hang so even as to balance his judgment, a just respect for the wisdom of the legislature would naturally decide the balance in favor of their opinion."

After receiving Jefferson's views, Washington asked Hamilton to respond. Hamilton's response is particularly significant for present purposes, because John Marshall later "read, summarized, and reprinted" portions of the letter. Although prepared in haste—it is dated only a week and a day later than Jefferson's—Hamilton's response was cogent and powerful, anticipating in many ways the Court's opinion over three decades later in *McCulloch*.

Hamilton began with a disquisition on the nature of governmental powers. He laid down the general principle that every governmental power necessarily includes "a right to employ all the means requisite, and fairly applicable to the attainment of the ends of such power; and which are not precluded by restrictions & exceptions specified in the constitution; or not immoral, or not contrary to the essential ends of political society." The division of powers between the federal government and the states did not alter this principle: with respect to the powers allocated to them, each was fully sovereign. After all, he pointed out, the Constitution limited the powers of the states (for example, by depriving them of the power to abrogate contracts), so if sovereignty implied unlimited power then neither the federal government nor the states could be considered sovereign.

Hamilton particularly took issue with Jefferson's call for strict construction. He argued that constitutional powers, especially those relating to finances, trade, and defense, should be construed liberally. For the "means by which national exigencies

47. *Id.*
48. *Id.* at 544.
49. *Id.*
52. *See* COGAN, *supra* note 11, at 540, 544.
54. *Id.* at 545 (emphasis in original).
55. *Id.*
are to be provided for, national inconveniences [sic] obviated, national prosperity promoted, are of such infinite variety, extent and complexity, that there must, of necessity, be great latitude of discretion in the selection & application of those means.\textsuperscript{56} Hamilton rejected the argument that broad construction was more appropriate at the state level than the federal level. If anything, he maintained, the opposite was true, because a wider range and more critical set of public necessities were entrusted to the federal government.\textsuperscript{57}

Hamilton also rejected Jefferson's reliance on original intent. So far as the record showed, the only actual decision made at the convention related to incorporating canal companies and was not germane to the bank issue. Participants disagreed about just what issue was debated. And in any event, original intent was not decisive:

The Secretary of State will not deny that, whatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual & established rules of construction. Nothing is more common than for laws to \textit{express} and \textit{effect}, more or less than was intended. If then a power to erect a corporation, in any case, be deducible by fair inference from the whole or any part of the numerous provisions of the constitution of the United States, arguments drawn from extrinsic circumstances, regarding the intention of the convention, must be rejected.\textsuperscript{58}

The only question, then, was whether incorporating a bank had the requisite relationship with any of the enumerated powers. With respect to the taxing power, a bank increased the circulation of money (remember, this was a period when currency was hard to come by), thereby providing the means for payment of taxes. Without the availability of the bank's notes as a means of payment, Hamilton said, the federal government might have been forced to accept bills from various private banks or even payment in kind.\textsuperscript{59} Regarding the power of borrowing money, the existence of a national bank would provide a source of emergency loans in the event of war or other exigencies.\textsuperscript{60} And in several respects, the bank would also relate to interstate

\textsuperscript{56} \textit{Id.} at 549.
\textsuperscript{57} \textit{Id.} at 550.
\textsuperscript{58} \textit{Id.} at 553 (emphasis in original).
\textsuperscript{59} \textit{Id.} at 560.
\textsuperscript{60} \textit{Id.} at 562.
commerce. "Money is the very hinge on which commerce turns." Expanding the money supply would provide a "convenient medium" for trade and would also eliminate the need for shipping precious metals back and forth. It was irrelevant whether other banks could also perform a similar function to some extent: the issue was the scope of congressional power, not the expediency of exercising it on any given occasion.

Given later disputes about the scope of the commerce clause, Hamilton's response to Jefferson's argument is of some interest. Recall that Jefferson had drawn a sharp line between transactions within a state and interstate commerce, with the former being no concern of the federal government. Hamilton questioned this distinction:

But what regulation of commerce does not extend to the internal commerce of every state? What are all the duties upon imported articles that amount to prohibitions, but so many bounties upon domestic manufactures affecting the interests of different classes of citizens in different ways? What are all the provisions in the coasting act, which relate to the trade between district and district of the same State? In short what regulation of trade between the States, but must affect the internal trade of each State? What can operate upon the whole but must extend to every part?

Two days after receiving Hamilton's opinion, Washington signed the bank bill. This decision carried great weight: Washington had presided at the Constitutional Convention and was of course a revered national figure. Hamilton had prevailed in the debate.

Even today, Hamilton's letter seems more forceful and focused than the statements of his opponents. Why was Hamilton's opinion more powerful than Madison's and Jefferson's? Two leading recent historians suggest that Hamilton, unlike Jefferson and Madison, was in the same position he had been when writing the *Federalist*. "Being on the offensive," they observe, "expounding the positive side of any argument, dealing with positive innovations, and being on top of one's subject all have more than a casual relation both to the energy of a person's convictions and

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61. Id. at 563.
62. Id.
63. See McGowan, supra note 23, at 812.
64. Hamilton, supra note 53, at 564.
65. ELKINS & MCKITRICK, supra note 25, at 233.
to the effectiveness with which the case is made.\textsuperscript{66} Arguing for broad construction comes easily "when convinced that a generous use of the government's powers will have a positive and salutary effect on the community, and a broad construction opinion is likely to be of high quality when behind it is a sense of urgency about taking some kind of action."\textsuperscript{67} Thus, as in the \textit{Federalist}, Hamilton was still an institution-builder, arguing that public needs required bold actions.

In contrast, Jefferson and Madison were moving away from the position of the \textit{Federalist}. They were at the turning point "at which one prefers to see the Constitution not as a sanction for achieving one's own ends but as a protection against those designs of others which have come to be seen as usurping and corrupting."\textsuperscript{68} Jefferson was able to embrace strict construction with little strain, since he had never been an ardent supporter of the Constitution, but Madison was being forced to reverse positions that he had taken in the \textit{Federalist}. He saw around him an emerging world "dominated by moneyed men and merchants subservient to the interest of England and a British system," and he was forced into an awkward constitutional stance by the imperative of combating this perceived threat to American values.\textsuperscript{69} For the time, however, the Bank issue was settled, and the battle with Hamilton moved on to other issues.

\textbf{THE LITIGATION AND THE LAWYERS}

The charter of the First Bank of the United States expired in 1811. It had become politically unpopular because of its association with the Federalist Party, opposition by the state banks, and the dominance of foreign investors among its shareholders.\textsuperscript{70} But the War of 1812 soon drove home the desirability of a national bank, and a new charter was issued in 1816. The second Bank of the United States was badly managed, and the Bank took the blame for a post-war financial collapse, resulting in intense hostility toward the bank everywhere except the Northeast. Between 1816 and 1820, Georgia, Illinois, Kentucky, Maryland, North Carolina, Ohio, and Tennessee each enacted anti-

\begin{flushleft}
\text{\textsuperscript{66}} Id.
\text{\textsuperscript{67}} Id.
\text{\textsuperscript{68}} Id. at 234.
\text{\textsuperscript{69}} Id.
\text{\textsuperscript{70}} 1 Charles Warren, \textit{The Supreme Court in United States History}, 1789-1835, at 504 (rev. ed. 1926).
\end{flushleft}
Bank legislation.\textsuperscript{71} In the meantime, further evidence of bank mismanagement came to light, with almost a $2 million loss in the Maryland branch (serious money in those days!).\textsuperscript{72}

\textit{McCulloch} began in 1818 as an action to collect a fine of $100 against James W. McCulloch, the cashier of the Maryland branch. This was the penalty for circulating a bank note without the required Maryland stamp (which could be avoided if the bank paid a $15,000 annual fee). By agreement between the state attorney general and federal officials, it became a test case on the constitutionality of the bank. The Maryland Court of Appeals upheld the Maryland state tax law in an unreported per curiam opinion, setting the stage for an appeal to the Supreme Court.\textsuperscript{73}

The oral arguments lasted nine days and brought before the Court the leading constitutional lawyers in the country.\textsuperscript{74} By way of background, something should be said about four of these lawyers, Webster, Wirt, Pinkney, and Martin. During this period, Supreme Court advocates played a particularly important role. The Court did not receive written briefs, making the oral arguments more critical.\textsuperscript{75} The leading lawyers also helped shape the legal disputes that ultimately reached the Court.

The best-remembered of the lawyers today was Daniel Webster, who argued for the Bank. He is said to have been the "most famous, the most controversial, and perhaps the most charismatic of all the leading Marshall Court advocates."\textsuperscript{76} He was also the leading orator of his time.\textsuperscript{77} His physical appearance was riveting: the "jet-black hair, . . . the massive head, the huge, dark, piercing eyes, . . . the sonorous voice, . . . the imposing carriage—taken together, these features seemed more than striking; they seemed suggestive of a powerful inner force."\textsuperscript{78} He argued many of the leading Marshall Court cases between 1819 and 1830, and lost only one major case.\textsuperscript{79} Webster was particularly

\textsuperscript{71} \textit{Id.} at 505.
\textsuperscript{72} \textit{Id.} at 506.
\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textit{Id.} at 507.
\textsuperscript{75} \textit{Id.} at 247.
\textsuperscript{77} \textit{Id.} at 276.
\textsuperscript{78} \textit{Id.} at 268.
active in shaping the Court's agenda, and he was also devoted to propounding the Marshall Court's constitutional vision to the public.\(^80\)

Also arguing on behalf of the bank was Attorney General William Wirt. He was in some ways an unlikely public figure, having no family connections or inheritance and being more inclined to literature than the law.\(^81\) He was named Attorney General in 1817 by Monroe and remained until 1829 when Jackson assumed the presidency.\(^82\) During his career, he appeared before the Supreme Court 170 times, including almost all of the great constitutional cases of the era.\(^83\)

The third notable advocate for the Bank was William Pinkney. Pinkney, though from humble origins, was renowned as a dandy for his elegant manner and fancy dress.\(^84\) He had been involved in diplomatic missions beginning in the Washington administration and was later minister to England.\(^85\) Pinkney was not well-liked. For example, Wirt said he could "not love this man for he has no heart but for himself."\(^86\) Though he was not personally popular, no one questioned his ability as a lawyer. Marshall reportedly said that he never knew Pinkney's "equal as a reasoner—so clear and luminous was his method of argumentation."\(^87\) This was not idle praise: some of Marshall's opinions closely track Pinkney's arguments.\(^88\)

In particular, portions of the \textit{McCulloch} opinion essentially paraphrase Pinkney's oral argument.\(^89\) If Justice Story is to be believed, the impact of Pinkney's three-day (!) oral argument was well-deserved. Of the argument, Story said:

I never, in my whole life, heard a greater speech; it was worth a journey from Salem to hear it. His elocution was excessively vehement, but his eloquence was overwhelming. His language, his style, his figures, his arguments were most brilliant and sparkling. He spoke like a great statesman and patriot, and a sound constitutional lawyer. All the cobwebs of sophis-

\begin{itemize}
\item \textsuperscript{80} WHITE, \textit{supra} note 76, at 288.
\item \textsuperscript{81} \textit{Id.} at 255.
\item \textsuperscript{82} \textit{Id.} at 256.
\item \textsuperscript{83} \textit{Id.} at 264.
\item \textsuperscript{84} \textit{Id.} at 241.
\item \textsuperscript{85} \textit{Id.} at 245-46.
\item \textsuperscript{86} \textit{Id.} at 253.
\item \textsuperscript{87} \textit{Id.} at 243.
\item \textsuperscript{88} \textit{Id.} at 247.
\item \textsuperscript{89} \textit{Id.} at 248-49.
\end{itemize}
try and metaphysics about State rights and State sovereignty
he brushed away with a mighty besom [broom].

The towering figure on the other side of the case was Luther Martin, the long-time attorney general of Maryland. In his younger days, he had been a delegate to the Constitutional Convention, where he defended the prerogatives of the small states and opposed expansive federal power. He later became a Federalist, modifying his views in the process. His personal manner and appearance were a stark contrast with Marshall: he was known for his slovenly dress, overindulgence in alcohol, soiled clothing, rambling speech, and bad table manners. His argument in McCulloch was said to be "characteristically long, rambling, and exhaustive," with much attention to the views of the Framers (including Martin himself, of course). At the end of Martin's argument, he read aloud some remarks that John Marshall had made years earlier at the Virginia convention to ratify the Constitution. When he finished, Marshall apparently took a deep breath; when Story asked him about it after the argument, Marshall said he was relieved that he had not said anything really foolish in the debate. Martin suffered a major stroke weeks after the argument and never really recovered. His closing days were spent as a boarder in the house of Aaron Burr, whom he had earlier defended against treason charges.

THE ORAL ARGUMENTS

The oral arguments revealed three important cleavages between the Bank's defenders and its attackers. These cleavages related to the nature of the Union, the scope of the necessary and proper clause, and the extent of the state's power of taxation.

Most fundamentally, the two sides had different conceptions of the nature of the Union. Arguing for the bank, Pinkney contended that the Constitution "springs from the people" rather

90. WARREN, supra note 70, at 507-08.
91. WHITE, supra note 76, at 235.
92. Id. at 230.
93. Id. at 231.
94. Id. at 237.
95. Id. at 238.
96. WARREN, supra note 70, at 507.
97. WHITE, supra note 76, at 240.
98. Id.
than the states in their corporate capacity. In contrast, the state’s lawyers argued that the Constitution is “a compact between the states, and all the powers which are not expressly relinquished by it, are reserved to the states.” The Constitution was founded, “not by the people of the United States at large, but by the people of the respective states.” The constitutional system “was established by reciprocal concessions and compromises between the state and federal governments.”

As to the scope of the necessary and proper clause, the Bank’s defenders embraced a wide definition and relied heavily on nonjudicial precedent regarding the clause’s application to the bank. Webster pointed out that the bank question had been fully explored in the early years of the republic, and that all three branches had been acting for over thirty years on the assumption that the bank was constitutional. Such a longstanding interpretation “must be considered as ratified by the voice of the people.” This construction, Pinkney said, was especially entitled to deference because it was contemporaneous with the Constitution and made by the authors of the Constitution themselves. Indeed, by the time the bank was rechartered, the president (Madison himself) had admitted that the constitutional issue was not longer subject to dispute.

In terms of the meaning of the clause itself, Webster continued that “necessary” and “proper” were to be considered synonymous, and meant only “such powers as are suitable and fitted to the object; such as are best and most useful in relation to the end proposed.” Whether Congress had chosen the best possible means was not for a court to decide. Similarly, Wirts maintained that “necessary and proper” was “equivalent to needful and adapted,” cited Johnson’s Dictionary as support. In any event, Wirt said, no one could deny that “banks, dispersed throughout the country, are appropriate means of carrying into execution” the federal government’s powers. The extent of

100. Id. at 363.
101. Id. at 363.
102. Id. at 373.
103. Id. at 322.
104. Id. at 353.
105. Id. at 378-79.
106. Id. at 380.
107. Id. at 324-25.
108. Id. at 325.
109. Id. at 356.
110. Id. at 354.
federal power could not depend on a judgment by the court regarding the degree of necessity. Such a context-based standard would make the validity of federal policies “dependent for their being, on extrinsic circumstances, which, as these are perpetually shifting and changing, must produce correspondent changes in the essence of the powers on which they depend.” Rather, claimed Wirts, the degree of necessity “presents a mere question of political expediency, which, it is repeated, is exclusively for legislative consideration.” Pinkney emphasized the practical need for a broad construction, because it was impossible for the framers to have gone into every detail or to “foresee the infinite variety of circumstances, in such an unexampled state of political society as ours, forever changing and forever improving.” Courts were incompetent to judge the degree of necessity; they could merely confirm that “what has been done is not a mere evasive pretext.”

In response, the state’s advocates minimized the significance of early practice and advocated a narrow interpretation of the clause. Admittedly, in an earlier era, a national bank may have been necessary for the purpose of the federal government, but necessity “has relation to circumstances which change; in a state of things which may exist at one period, and not at another.” In contrast to conditions when the Bank was rechartered in 1816, the situation had been much different in the early years of the Republic. When Hamilton argued on behalf of a national bank “there were but three banks in the United States, with limited capitals, and contracted spheres of operation.” Moreover, the need to establish branches in states such as Maryland was even less clear. Indeed, that decision had been made by the bank itself rather than Congress. Making a nondelegation argument, the state’s lawyers claimed that only Congress could make such a vital decision about overriding state preferences, because Congress was the only tribunal which “may be safely trusted; the only one in which the states to be affected by the measure, are

111. Id. at 355.
112. Id. at 357.
113. Id. at 385.
114. Id. at 389-90.
115. Id. at 387.
116. Id. at 331.
117. Id. at 332.
all fairly represented."\textsuperscript{118} Such a power could not be delegated to an essentially private corporation.\textsuperscript{119}

Furthermore, the state drew a distinction between "means which are incidental to the particular power" in question and those "which may be arbitrarily assumed as convenient to the execution of the power, or usurped under the pretext of necessity."\textsuperscript{120} Necessary, in this context, means "indispensably requisite."\textsuperscript{121} Again, the state relied on the original intent: "The people never intended they [the federal government] should become bankers or traders of any description. They meant to leave to the states the power of regulating the trade of banking, and every other species of internal industry," subject merely to the regulation of interstate and foreign commerce by Congress.\textsuperscript{122}

The taxation issue seemed to present the greatest difficulty for the defenders of the Bank. Pinkney viewed this as the "last and greatest, and only difficult question" in the case.\textsuperscript{123} "If the states may tax the bank," Webster asked, "to what extent shall they tax it, and where shall they stop?"\textsuperscript{124} He added, in words echoed by Pinkney\textsuperscript{125} and later by the Court, that the power to "tax involves, necessarily, a power to destroy."\textsuperscript{126} If states could tax the bank, maintained Wirts, "they may tax the proceedings in the courts of the United States," and "nothing but their own discretion can impose a limit upon this exercise of their authority."\textsuperscript{127} "But, surely," he added, "the framers of the constitution did not intend that the exercise of all of the powers of the national government should depend upon the discretion of the state governments"—for that "was the vice of the former confederation, which it was the object of the new constitution to eradicate."\textsuperscript{128} Pinkney proclaimed that "[w]hatever the United States have a right to do, the individual states have no right to undo. The power of congress to establish a bank, like its other sovereign powers, is supreme, or it would be nothing."\textsuperscript{129} It would be very difficult for a court to determine when the level of

\textsuperscript{118} \textit{Id.} at 336.
\textsuperscript{119} \textit{Id.}
\textsuperscript{120} \textit{Id.} at 365.
\textsuperscript{121} \textit{Id.} at 367.
\textsuperscript{122} \textit{Id.} at 368.
\textsuperscript{123} \textit{Id.} at 390.
\textsuperscript{124} \textit{Id.} at 327.
\textsuperscript{125} \textit{Id.} at 391.
\textsuperscript{126} \textit{Id.} at 327.
\textsuperscript{127} \textit{Id.} at 361-62.
\textsuperscript{128} \textit{Id.} at 362.
\textsuperscript{129} \textit{Id.} at 391.
a tax had passed the threshold of reasonableness, and by the
time the evidence of harm was sufficiently clear, it might be too
late.\textsuperscript{130} Nor was this a truly nondiscriminatory tax, for no other
bank had a branch office in Maryland. And if Maryland's law
was upheld, what could be done about Kentucky's imposition of
a $60,000 annual tax on the bank?\textsuperscript{131}

The state's advocates had several arguments on the taxation
issue. They argued that the bank was essentially private, not a
federal instrumentality, and therefore not entitled to any kind of
sovereign immunity from taxation.\textsuperscript{132} Moreover, a "sovereign
putting his property within the territory and jurisdiction of an-
other sovereign, and of course, under his protection, submits it
to the ordinary taxation of the state, and must contribute fairly
to the wants of the revenue."\textsuperscript{133} And the defenders of the Consti-
tution had said "again and again" in the ratification debates that
the state's right of taxation was "sacred and inviolable."\textsuperscript{134} The
"unlimited power of taxation results from state sovereignty."\textsuperscript{135}
The only limit placed by the Constitution on state taxation was
the ban on imposts and tonnage duties.\textsuperscript{136} True, the power to tax
could be abused, but so could the federal government's powers;
the Constitution could only function effectively so long as the
states and the federal government maintained a cooperative re-
lationship.\textsuperscript{137} Only "mutual confidence, discretion and forbear-
ance" can prevent clashes between the two levels of govern-
ment.\textsuperscript{138} Luther Martin conceded that abuse of the tax power,
either by the states or by the federal government, was possible.
But he viewed this risk as unavoidable, stemming from the in-
ability of the Constitutional Convention (to which, recall, he was
a delegate) to fully resolve the difficult issues posed by concur-
rent powers of taxation.\textsuperscript{139}

Overall, the state stressed the extent to which the Bank was
relying on implications piled on implications. First the power to
create a bank was implied, then from that the power to create
branches, and from that the immunity of the branches from taxa-

\textsuperscript{130} Id. at 392.
\textsuperscript{131} Id. at 393.
\textsuperscript{132} Id. at 339-40.
\textsuperscript{133} Id. at 342.
\textsuperscript{134} Id. at 344.
\textsuperscript{135} Id. at 370.
\textsuperscript{136} Id. at 369.
\textsuperscript{137} Id. at 349-50.
\textsuperscript{138} Id. at 371.
\textsuperscript{139} Id. at 376.
tion, the state's "most vital and essential power."\textsuperscript{140} The argument for the bank was like the famous fig tree of India, whose branches shoot from the trunk to a considerable distance; then drop upon the earth, where they take root and become trees, from which also other branches shoot, and plant and propagate and extend themselves in the same way, until gradually a vast surface is covered, and everything perishes in the spreading shade.\textsuperscript{141}

At the narrowest level, the dispute between the two sides involved questions of burden of proof and judicial competence. In terms of competence, at issue was whether a court had the capacity to review the aptness of Congress's choice of means under changing circumstances or the ability to determine the economic impact of a state tax on a federal instrumentality. Assuming that courts could not or should not draw such distinctions, a bright-line rule was needed, and the question was then which side to favor. The arguments for a rule favoring the federal government were based on the supremacy clause, the need for an effective central government, and the political safeguard against abuse because every state and its people were represented in Congress. The arguments for favoring the state governments were the compact theory of the Constitution, state sovereignty, and the need to maintain enforceable limits on the enumerated federal powers. If the federal government got the benefit of the doubt, the Court would not review the actual necessity of congressional measures and would embrace a per se rule against state taxes of federal activities. If the state got the benefit of the doubt, the Court would determine whether a given congressional measure (at least one as extraordinary as chartering a bank) was really indispensable under current conditions and would rely on cooperation between levels of government to prevent abuse of the state's powers of taxation. The choices were to rely on the courts to make factual determinations about legislative measures, rely on Congress to exercise its powers responsibly, or rely on the states to behave fairly toward the federal government. Which of these institutions to trust was the fundamental issue posed by the oral arguments.

\textsuperscript{140} Id. at 347.
\textsuperscript{141} Id.
THE SUPREME COURT DECISION

Only two of the Justices were Federalists. The other five were Democrats, the party that had been founded by Madison and Jefferson in their opposition to Hamilton and his fellows. Nevertheless, Webster anticipated a favorable decision. It came only three days after the end of Pinkney's argument.

Not surprisingly, the unanimous opinion was written by Marshall. To a greater extent than any other Chief Justice in history, Marshall dominated the Court during his tenure. He transformed the office of the chief justiceship. He wrote nearly half of the majority opinions during his tenure as Chief Justice, including nearly every opinion in constitutional cases; in his early days, he wrote almost all of the Court's opinions. With the notable exception of Thomas Jefferson, nearly everyone he interacted with liked and admired him, an especially useful trait in the close-knit world of early Washington society. His "humility, good humor, flexibility, and patience" were invaluable in persuading other Justices to adopt his views or at least suppress their dissents. He is also said to have been "unquestionably one of the great legal reasoners of his time: contemporaries regularly testified to his ability to march from premise to conclusion." What made his opinions "peculiarly authoritative" was his "invocation of the supposedly timeless principles of the founding age," on which constitutional language was founded.

Marshall began his opinion in *McCulloch* by stressing the imperative need for the Court to resolve the issue. The magnitude of the issues and its practical significance might "essentially influence the great operations of the government." But the question "must be decided peacefully, or remain a source of hostile legislation, perhaps, of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made." His opinion is not notable for its originality; essentially every idea can be traced to the oral arguments summa-

142. WARREN, *supra* note 70, at 508-09.
143. *Id.* at 508-09.
144. *Id.* at 510.
145. WHITE, *supra* note 76, at 368.
146. *Id.*
147. *Id.* at 372.
148. *Id.* at 373.
149. *Id.*
150. *Id.* at 375.
151. 17 U.S. (4 Wheat.) at 400.
152. *Id.* at 400-01.
rized above. But the opinion has a flow to it that makes the conclusions seem almost inevitable. Below, we consider his analysis of the three major questions posed by the case.

THE SOVEREIGNTY ISSUE

In discussing the sovereignty issue, Marshall began with a paraphrase of the state's claims. The state maintained that in construing the Constitution, it was important to "consider that instrument, not as emanating from the people, but as the act of sovereign and independent states." Hence, the powers of the federal government were "delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion."

In Marshall's view, however, the state governments did not and could not create the federal government. The Constitution drew its power from the state ratification conventions, which represented the people. The state sovereignties were competent to form a league, such as the old Articles of Confederation, but not to "change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people." Deriving, as it did, its powers directly from the people, the federal government was necessarily "supreme within its sphere of action," though that sphere was limited to the extent of its delegated powers: "It is the government of all; its powers are delegated by all; it represents all, and acts for all."

McCulloch derives federal power from "We the People," but does not address a longtime dispute about the nature of popular sovereignty. Are "We the People" one people, though voting within particular state boundaries, or multiple state peoples, each preserving its own group identity? Various theories have been offered on this point during American history. Lincoln believed that Americans were one nation from the moment of independence. Others have believed that the separate state peoples gave rise to one unified People when the Constitution was ratified, while still others maintain that the state Peoples remain completely separate even today. These distinctions

153. Id. at 402.
154. Id.
155. Id. at 403.
156. Id. at 404.
157. Id. at 405.
seem somewhat fine, if not theological, like medieval disputes over the nature of the Trinity, but that has not prevented them from having large political consequences at times in our history.

Marshall does not clearly address this question in *McCulloch*. He did say that the "government of the Union" is "emphatically and truly, a government of the people." 159 He continued: "In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." 160 This language suggests the existence of a unitary national people. But earlier, in speaking of ratification, he had said that it was true that the people had assembled in their separate states. "No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states." 161 That language may suggest that the American people have not actually fused into a single whole, though it can also be read to mean that the state Peoples retain their own identities and provide a forum for action even though a unified American people also exists. *McCulloch*, however, does not take a firm position on the fine points of popular sovereignty (though Marshall did have more to say on the subject after the opinion came down). The opinion does make it clear, however, that true sovereignty does not reside in state governments and that those governments are subordinate to the federal government.

Marshall’s axiom that federal sovereignty is supreme over the state governments provides the underlying theme for the rest of the opinion. This axiom implies that ultimate trust is to be reposed in the judgment of Congress, not in the judgment of the state legislatures. This in turn supports a broad interpretation of the necessary and proper clause and a narrow construction of state powers over federal entities.

THE SCOPE OF FEDERAL POWER

Marshall began his argument about the scope of federal power, as had the Bank’s lawyers, by referring to the long and consistent practice of the other branches of government. He did not deny "that a bold and daring usurpation might be resisted,

160. *Id.* at 405.
161. *Id.* at 403.
after an acquiescence still longer and more complete than this.""162 But at least where the issue related to the allocation of powers among the people's delegates, rather than to individual rights, such governmental practice should receive considerable weight."163

_McCulloch_ emphasizes the paramount importance of federal power and the need for broad construction. "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.""164 Hence, the nature of the Constitution required "that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.""165 In considering the scope of federal powers, then, "we must never forget that it is a Constitution we are expounding.""166 And given the "ample powers" entrusted to the federal government—the "sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation"—it must be entrusted with equally "ample means.""167 It was in "the interest of the nation" to facilitate the exercise of this power; "[i]t can never be in their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution.""168 The power to create a corporation was just a means, like any other means, to be used where appropriate."169

Marshall rejected the argument that the word "necessary" limited the Congress's discretion over the choice of means. He had already indicated that, even without the necessary and proper clause, Congress would have had broad discretion over means. Thus, the state's argument came down to the idea that the necessary and proper clause actually narrowed the discretion which Congress might otherwise have derived directly from the various enumerated powers. Marshall found that claim implausible, since the text treats the clause as an additional source of

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162. _Id._ at 401.
163. _Id._
164. _Id._ at 407.
165. _Id._
166. _Id._
167. _Id._ at 407-08.
168. _Id._ at 408.
169. _Id._ at 409-11.
power rather than a limitation on powers already granted. The word "necessary" was capable of a broad range of meanings, depending on context, and "frequently imports no more than that one thing is convenient, or useful or essential to another." Indeed, elsewhere the Constitution used the term "absolutely necessary." A narrow construction would defeat "the execution of those great powers on which the welfare of a nation essentially depends." In a Constitution "intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs," it would have made no sense to "provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur."

In famous language, Marshall set out the parameters of congressional power: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to the end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Marshall found it clear that the Bank met this test:

Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred, which would render these operations difficult, hazardous and expensive?

As to the practical utility of the Bank, Marshall relied on the consensus among the nation's financial authorities over time. Nor was the existence of the state banks as an alternative relevant, as the state had contended. The federal government is not to be dependent on the states "for the execution of the great

170. Id. at 419-20.
171. Id. at 413.
172. Id. at 414 (citing U.S. Const. art. I, § 10, cl. 2).
173. Id. at 415.
174. Id.
175. Id. at 421.
176. Id. at 408.
177. Id. at 423-24.
powers assigned to it."\textsuperscript{178} In any event, "congress alone can make the election" between the "choice of means."\textsuperscript{179}

\textbf{INTERGOVERNMENTAL IMMUNITY}

This left only the question of whether Maryland could tax the activities of a lawful federal instrumentality such as the Bank. Like the Bank's lawyers, Marshall embraced the proposition that the power to tax is the power to destroy.\textsuperscript{180} But, said Marshall, it is "of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence."\textsuperscript{181} (As with most of the premises of Marshall's argument, he cites no authority for this proposition—it is seemingly presented as a self-evident truth which only an idiot could deny.)

"No taxation without representation" was part of the founding American creed. Marshall begins his analysis of the tax issue by explaining that the only check against abuse of the tax power is "found in the structure of the government itself," because in "imposing a tax, the legislature acts upon its constituents."\textsuperscript{182} But although the people of a state give their government the power to tax themselves, the power of taxation extends only to the "subjects over which the sovereign power of a state extends," and this does not include the federal government.\textsuperscript{183} This standard—the tax power corresponds with the extent of sovereignty—provides an "intelligible standard," freeing the court from "the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power."\textsuperscript{184} It also eliminated the need to repose confidence in the government of each state. For why "would the people of any one state" be "willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests?"\textsuperscript{185}

\textsuperscript{178} Id. at 424.  
\textsuperscript{179} Id.  
\textsuperscript{180} Id. at 427.  
\textsuperscript{181} Id.  
\textsuperscript{182} Id. at 428.  
\textsuperscript{183} Id. at 429.  
\textsuperscript{184} Id. at 429-30.  
\textsuperscript{185} Id. at 431.
Marshall rebuffed the claim that state taxation of the federal government and federal taxation of the state government were equivalent. His argument presages what later became known as the process theory of constitutional law. The critical passage encapsulated much of the opinion's rationale and is worth quoting at length:

But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in Congress, and by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.  

All of Marshall's rationales stem from the lawyer's oral presentations. Given the shortness of time it could hardly have been otherwise. But he hangs the arguments on a framework that seems all his own. His basic premises were that the federal government was entrusted with the most important powers of government by the people themselves and that it was necessarily supreme over the states whose powers derived from only subsets of the people. Given these premises, Marshall's conclusions flowed as inexorably as water down a steep mountain.

THE IMMEDIATE IMPACT OF McCULLOCH

Even before the opinion was announced, McCulloch was seen as the most important case of the Term.  

Response to the opinion was explosive, especially in the South and what was then the West (now the Midwest). A Mississippi paper said that the "last vestige of the sovereignty and independence of the individ-

186. Id. at 435-36.
187. See WHITE, supra note 76, at 542.
ual States composing the National Confederacy is obliterated at one fell swoop.” In Tennessee, a newspaper said the decision has “awakened public attention to the aristocratical character of the Court, and must sooner or later bring down on the members of it the execration of the community,” while a Kentucky paper said Marshall’s principles “must raise an alarm throughout our widely-extended empire” because they “strike at the roots of State-Rights and State Sovereignty.”

The most significant attacks on *McCulloch* came in the form of anonymous essays by Virginia Judge Spencer Roane and another member of the inner circle of Virginia politics, probably Judge William Brockenbrough. Virginia was not particularly anti-Bank, but it was a stronghold of the Jeffersonian states’ rights ideology. Thus, the attacks focused on the broad nationalist principles of the opinion rather than its specific holding concerning the Bank.

In the first of the critical essays to appear, the anonymous author pointed to “two principles” in the *McCulloch* opinion that “endanger the very existence of state rights.” One was “the denial that the powers of the federal government were delegated by the states”; the other was the claim that federal powers, especially the necessary and proper clause, “ought to be construed in a liberal, rather than a restricted sense.” As to the first, the Constitution was not ratified by the mass of the people but by “the people only within the limits of the respective sovereign states,” whereby the states “in their sovereign capacity did delegate to the federal government its powers, and in so doing were parties to the compact.” As to the second, if Congress took full advantage of the Court’s interpretation of its powers, “it is difficult to say how small would be the remnant of power left in the hands of the state authorities.” The next essay in the series set out a parade of horribles: the federal government could spend money on roads and canals, create boards for internal improvement, “build universities, academies, and school

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189. *Id.* at 519-20.
191. *Id.* at 9.
194. *Id.* at 56.
195. *Id.* at 55.
houses for the poor,” incorporate companies for the promotion of agriculture, and build churches and pay ministers.196

Roane’s essays took a similar tack. He raised the alarm about the expansion of federal power: “That man must be a deplorable idiot who does not see that there is no earthly difference between an unlimited grant of power, and a grant limited in its terms, but accompanied with unlimited means of carrying it into execution.”197 The word “necessary” must be strictly construed in constitutional law, as Roane claimed it was in the common law and the law of nations.198 The Court’s interpretation would “even give congress a right to disarm the people, as nothing is more conducive to insurrection, than having the means to make it successful.”199 A similar breadth of interpretation had brought the Sedition Act into being.200

Roane also stressed that the Constitution is “a compact between the people of each state, and those of all the states, and it is nothing more than a compact.”201 “Can it be said, after this, that the constitution was adopted by the people of the United States as one people? Or can it be denied that it was adopted by the several states, by the people of the said states respectively, and are they not parties to the compact?”202 Thus, he said, “[o]ur general government then . . . is as much . . . a ‘league,’ as was the former confederation. The only difference is, that the powers of this government are much extended.”203 Thus, “this government may be, in some sense, considered as a continuation of the former federal government.”204

Marshall was sufficiently alarmed to publish his own anonymous defenses of the decision. With respect to the necessary and proper clause, he challenged Roane’s analogies to other areas of the law. None of the circumstances “which might seem to justify rather a strict construction” in the situations cited by Roane “apply to a constitution”:

196. Id. at 75.
197. Roane’s “Hampden” Essays, RICHMOND ENQUIRER, June 11-22, 1819, in JOHN MARSHALL’S DEFENSE, supra note 190, at 110.
198. Id. at 117-24.
199. Id. at 134.
200. Id.
201. Id. at 127 (emphasis in original).
202. Id. at 142 (emphasis in original).
203. Id. at 146 (emphasis in original).
204. Id. (emphasis in original).
It is not a contract between enemies seeking each other's destruction, and anxious to insert every particular, lest a watchful adversary should take advantage of the omission.—Nor is it a case where implications in favor of one man impair the vested rights of another. Nor is it a contract for a single object, everything relating to which, might be recollected and inserted. It is the act of a people, creating a government, without which they cannot exist as a people.  

But Marshall also denied that *McCulloch* gave Congress unlimited powers. "The reasoning of the judges," he said, "is opposed to that restricted construction which would embarrass congress, in the execution of its acknowledged powers; and maintains that such construction, if not required by the words of the instrument, ought not to be adopted of choice; but makes no allusion to a construction enlarging the grant beyond the meaning of its ends."

Marshall staunchly rejected Roane's assertion that the United States remained a confederation, as it had been before the Constitution was adopted:

Will [Roane] deny that there is such a people as the people of the United States? Have we no national existence?... The United States is a nation; but a nation composed of states in many, though not in all, respects, sovereign. The people of these states are also the people of the United States. ...[W]e are all citizens, not only of our particular states, but also of this great republic.

Admittedly, Marshall said, the Constitution was adopted "by the people acting as states." But he observed that a government's character depended on its constitution, not on its manner of adoption. The United Kingdom was a single nation, even though it came into being through the separate actions of the parliaments of England, Scotland, and Ireland.

Unlike the Articles of Confederation, "our constitution is not a league" but a "government." Marshall insisted that Americans should think twice before reducing the country to the

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206. Id. at 182.
207. Id. at 195.
208. Id. at 197.
209. Id. at 197-98.
210. Id. at 199.
chaos and weakness it suffered under the Articles.\textsuperscript{211} "Our constitution," maintained Marshall, "is not a compact."\textsuperscript{212} Rather, it is "the act of a single party. It is the act of the people of the United States, assembling in their respective states, and adopting a government for the whole nation."\textsuperscript{213} Hence, "[a]ll arguments founded on leagues and compacts, must be fallacious when applied to a government like this."\textsuperscript{214}

Some of the fallout over \textit{McCulloch} was legal rather than political, as states attempted other methods of attacking the Bank. A later case, \textit{Osborn v. Bank of the United States},\textsuperscript{215} gave Marshall the opportunity to reemphasize some of his themes from the earlier opinion. Ohio had passed a law imposing a $50,000 tax on each of the Bank's branches. Pursuant to this law, the state auditor decided to seize the funds from the bank. The Bank obtained a federal injunction against collection of the tax, but state officials went ahead anyway. After being refused payment of the tax, Osborn's assistant entered the bank's vault and took everything he could find, to the tune of $120,000. The lower federal court issued an order directing the return of the funds to the bank.\textsuperscript{216}

Today, \textit{Osborn} is mostly known only to experts in the law of federal jurisdiction, primarily because of the Court's holding that a federal court could hear any suit brought by the bank as a federal instrumentality. For present purposes, however, the more important point was the injunction against the state officers. Just as he had rejected state authority to tax the bank, Marshall repudiated the claim that state sovereign immunity shielded its officers' interference with the bank. He stressed the possible impact of a contrary holding on federal supremacy, for state officers could then "arrest the execution of any law in the United States." If a state administrator imposed a fine or penalty on a federal official, the official would be unable to obtain an injunction. The postman, the tax collector, the U.S. marshall, the military recruiter, would all be at risk of ruinous penalties like those assessed against the Bank. In short, Marshall said, a state would be "capable, at its will, of attacking the nation, of arresting its progress at every step, of acting vigorously and effectually in the

\begin{itemize}
\item \textsuperscript{211} \textit{Id.} at 200.
\item \textsuperscript{212} \textit{Id.} at 203.
\item \textsuperscript{213} \textit{Id.}
\item \textsuperscript{214} \textit{Id.} at 203.
\item \textsuperscript{215} \textit{22 U.S. (9 Wheat.) 738 (1824).}
\item \textsuperscript{216} \textit{WARREN, supra} note 70, at 526, 528-29.
\end{itemize}
execution of its designs, while the nation stands naked, stripped of its defensive armour." Once again, national supremacy was the prime imperative.

McCulloch, like Osborn after it, must be seen as part of the battle over states' rights that began with the Virginia and Kentucky Resolutions and ended at Appomattox Courthouse. Jefferson and Madison, in the Resolutions they drafted, embraced the compact theory of the Constitution and toyed with state interposition against the federal government. Roane himself had earlier used the same theories to argue that the state courts were not subject to appellate review by the Supreme Court, because one sovereign could not direct the actions of another. A little later, the compact theory formed the basis for John Calhoun's theory of nullification, and after that, for Southern secession. On the other side of this debate were figures such as Marshall, Webster (not only in McCulloch but in important public speeches), and later Lincoln. The debate over strict construction derived from this basic difference in how to conceptualize the Union. Was it merely a league of sovereign states, or was it a sovereign nation in its own right?

THE CONTINUING IMPORTANCE OF McCULLOCH TODAY

The Bank of the United States died an inglorious death at the hands of Andrew Jackson, who first vetoed a renewal of its charter and then brought it down by withdrawing all federal deposits. Perhaps confirming the views of its supporters about genuine need for the Bank, the economy promptly went into a tailspin. By the time Jackson left office, says one historian, "America was in the early stages of its biggest financial crisis to date." But the Bank of the United States never rose again, though today the national bank system and the Federal Reserve serve much the same functions that Hamilton intended for the Bank.

Yet the significance of McCulloch far outlived the dispute that gave rise to the case. As the late Gerry Gunther explained,

217. Id. at 847-48, 857-58.
218. See FARBER, supra note 158, at 45-69.
219. See JOHNSON, supra note 10, at 293-95.
220. Id. at 296.
221. Id.
With his elaborate endorsement of constitutional flexibility and congressional discretion, Marshall unmistakably cast the Court's weight on the centralizing side in the recurrent struggle about allocation of authority between nation and states. With this opinion, the Court provided a reservoir of justifications for national action perhaps even fuller than Marshall intended—one repeatedly drawn on during the Era of Good Feelings and the Age of the Robber Barons and the New Deal and our civil rights crises by those who have sought to expand the area of national competence.222

Despite the almost iconic stature of the case in American constitutional law, its meaning and current significance remains a bone of contention on today's Supreme Court. As basic issues about the nature of federalism are once again being debated, some dissonance appears to exist between Marshall's nationalist vision and the inclinations of some of the current Justices.

The Supreme Court found occasion to debate the nature of the Union in the 1995 Term Limits case, which involved a state's power to set term limits for members of Congress.223 The majority view in Term Limits was that control over federal legislators pertained solely to the new government created by the Constitution rather than to any preexisting state authority, and hence was not "reserved" by the Tenth Amendment. Justice Stevens's majority opinion lays out the conventional modern view of state and federal sovereignty. Under the Articles of Confederation, Stevens said, "the States retained most of their sovereignty, like independent nations bound together only by treaties."224 The new Constitution "reject[ed] the notion that the Nation was a collection of States, and instead creat[ed] a direct link between the National Government and the people of the United States."225 Stevens's view harkened back to Daniel Webster's assertion that "[t]he people of the United States are one people."226

In contrast, Justice Thomas's dissent, joined by Chief Justice Rehnquist, Justices Scalia and O'Connor, squarely rejected this vision of national sovereignty. "Because the majority fundamentally misunderstands the notion of 'reserved' powers," he said, "I

222. JOHN MARSHALL'S DEFENSE, supra note 190, at 6.
224. Id. at 803.
225. Id.
start with some first principles.”227 The most basic of those first principles, according to Justice Thomas, was this: “The ultimate source of the Constitution’s authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.”228 Justice Thomas argued that under the Constitution “the people of each State retained their separate political identities” even after ratification.229

Justice Kennedy refused to go along with Thomas’s view of state sovereignty in Term Limits. In his view, the basis of the federal government’s legitimacy is “that it owes its existence to the act of the whole people who created it.”230 Kennedy denied that “the sole political identity of an American is with the State of his or her residence.”231 He disputed the view that “the people of the United States do not have a political identity as well, one independent of, though consistent with, their identity as citizens of the State of their residence.” Like the states, Kennedy concluded, the national government is “republican in essence and in theory,” drawing its power from the People.232 Later, however, in Alden v. Maine,233 Justice Kennedy joined the four Term Limits dissenters in proclaiming that the states retain “a residuary and inviolable sovereignty” or at least, as he quickly added, “the dignity, though not the full authority, of sovereignty.”234 Apparently, the sovereignty issue remains unsettled, even today.

This is not surprising, because the Framers themselves apparently had no very clear conception about the location of sovereignty under the Constitution. As a leading historian explains, “no single vector neatly charted the course the framers took in allocating power between the Union and the states.”235 In Federalist No. 39, which refers to the origins of the Constitution in the “federal” action of the peoples of the various states, Madison concludes by speaking of the untidy, mixed nature of the new government. “The proposed Constitution,” he said, “is, in strictness, neither a national nor a federal Constitution, but a composition of both.”236

228. Id.
229. Id. at 849
230. Id. at 839 (Kennedy, J., concurring).
231. Id. at 840.
232. Id. at 839-42.
234. Id. at 715.
It combines some features of each. "In its foundation," he said, "it is federal, not national." But "in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national." Finally, according to Madison, the amendment process "is neither wholly federal nor wholly national." Thus, if there was a simple answer about the location of sovereignty after ratification, the Framers themselves apparently didn't know it. As a leading historian of the Framing period says, after 1789, "sovereignty itself would remain diffused—which is to say, it would exist everywhere and nowhere."

If experience is any guide, the ambiguity of the historical record is likely only to fuel the debate. Sovereignty remains a live issue in American law, almost two centuries after McCulloch. Not surprisingly, the meaning of McCulloch itself remains a bone of contention in these debates. Justice Thomas quoted McCulloch to the effect that no political dreamer ever thought of "compounding the American people into one common mass," in support of his theory that sovereignty remains with the separate populaces of each state. Justice Kennedy, however, also quoted McCulloch to support the theory that the government derives its power from the people of America, not from the states. Justice Thomas is probably right that Marshall viewed ratification as a state-by-state process. But as his response to Roane shows, Marshall did not agree that the peoples of the states remained entirely separate; rather, he emphasized that ratification of the Constitution simultaneously created the People of the United States as an entity.

Thomas's dissent in Term Limits, plus the Court's growing interest in protecting state sovereign immunity from congressional or judicial interference, suggests a possible leaning toward the compact theory that was rejected by Marshall. But whatever uncertainties may exist about its theoretical substructure, the le-

\[\text{237. \hspace{0.5em} Id.}\]
\[\text{238. \hspace{0.5em} Id.}\]
\[\text{239. \hspace{0.5em} Id.}\]
\[\text{240. \hspace{0.5em} Jack N. Rakove, Making a Hash of Sovereignty, Part I, 2 Green Bag 2d 35, 41 (1998); see also Jack N. Rakove, Making a Hash of Sovereignty, Part II, 3 Green Bag 2d 51 (1999).}\]
\[\text{241. \hspace{0.5em} U.S. Term Limits, 514 U.S. at 849 (Thomas, J., dissenting).}\]
\[\text{242. \hspace{0.5em} Id. at 839 (Kennedy, J., concurring).}\]
\[\text{243. \hspace{0.5em} See Martin S. Flaherty, John Marshall, McCulloch v. Maryland, and "We the People": Revisions in Need of Revising?, 43 WM. & MARY L. REV. 1339, 1370-79 (2002).}\]
gal framework created by Marshall—one of broad national power untrammeled by potential resistance from state governments—remains firmly in place. Today's disputes take place at the margins of federal power, such as the ability of Congress to compel the affirmative assistance of state legislators and administrators. Neither Thomas nor anyone else on the modern Supreme Court would argue that all federal powers must be construed as narrowly as possible or that states have the authority to restrict federal programs with which they disagree. Thus, the fundamental holding of *McCulloch* is now legal bedrock.

**CONCLUSION**

Perhaps the most striking aspect of *McCulloch* is the broad strokes with which Marshall paints. He does discuss some details of the constitutional text, such as the contrast between "necessary" in the necessary and proper clause and "absolutely necessary" elsewhere in the Constitution. But he makes little reference to the specifics of the ratification debates, the legal authorities cited by the parties, or the specific reasons given in Congress for chartering a bank. Rather, he relied primarily on his understanding of the Constitution's "objects, ends, and nature." In doing so, he drew on the structural points made by Webster, Pinkney, and Wirts in the oral argument, some of which traced all the way back to Hamilton. But he bound them together with an overriding theme: the federal government must be supreme as to any matter of common concern among the states, because it alone represented the people of the entire nation.

Constitutional law is generally thought to involve the interpretation of a text. But in *McCulloch*, it may be more accurate to say that Marshall was interpreting an *action*: the agreement of the peoples of the various states to transform the existing league into a nation, in the process transforming themselves from thirteen separate state peoples into "We, the People of the United States." By adopting the text of the Constitution, the people not only created a government but also a nation. The words they used can only be understood as a constituent part of this act of self-creation. It is this that is probably the deepest message of the *McCulloch* opinion.

APPENDIX

DANIEL A. FARBER'S CONTRIBUTIONS TO CONSTITUTIONAL COMMENTARY


Two Cheers for Warren Burger, 4 CONST. COMMENT. 1 (1987).

Post-modern Dental Studies, 4 CONST. COMMENT. 219 (1987).

The Zapp Complex, 5 CONST. COMMENT. 13 (1988).


The Bush Court, 6 CONST. COMMENT. 13 (1989).


Constitutional Oddities, 15 CONST. COMMENT. 211 (1998)

Book Review, 15 CONST. COMMENT. 571 (1998) (reviewing DAVID M. RABBAH, FREE SPEECH IN ITS FORGOTTEN YEARS (1997)).


The Trouble With Tarble's: An Excerpt from an Alternative Casebook, 16 CONST. COMMENT. 517 (1999).


Constitutional Law Haiku, 18 CONST. COMMENT. 481 (2001) (pseudonymous work with Jim Chen).

Playing without a Referee: Congress, the President, and Foreign Affairs, 19 CONST. COMMENT. 693 (2002) (reviewing H. JEFFERSON POWELL, THE PRESIDENT’S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION (2002)).

The Importance of Being Final, 20 CONST. COMMENT. 359 (2003).