SYMPOSIUM: COMMEMORATING THE 200TH ANNIVERSARY OF MCCULLOCH V. MARYLAND

McCulloch II: The Oft-Ignored Twin and Inherent Limits on "Sovereign" Power

SANFORD LEVINSON*

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I. INTRODUCTION: "COMMEMORATION" OR "CELEBRATION"

I begin by expressing my genuine and deep appreciation for the invitation that Randy Barnett extended me to deliver this lecture. I consider Randy a true friend, more precious for the fact that we disagree so fundamentally about so many issues. So it is no small matter that in these fractious times, he was willing to trust me with access to this cherished podium.

I note the title of the overall program for this weekend here at the Supreme Court Historical Society and at the Georgetown University Law Center, a title which focuses on "commemorating" the 200th anniversary of *McCulloch v. Maryland*. There is an important distinction between "commemoration" and "celebration." Two days from now, on December 7, many people will be "commemorating" the 78th anniversary of Pearl Harbor, but I assume that no one, even in Japan, at least publicly, will be celebrating that fateful day. I will not be suggesting, even in the most critical moments that will shortly follow, that *McCulloch* is a judicial Pearl Harbor, but I take it that the we all recognize the difference between the celebration and commemoration or, indeed, the complexities even of celebration. I earlier gave a lecture this year at Northeastern University in Boston, on the occasion of Constitution Day, in which I carefully explained my willingness to celebrate the Framers of the Constitution—among other things for

* W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School; Professor of Government, University of Texas at Austin.

their audacity in recognizing that only radical changes could save a floundering Union—without equally celebrating their specific handiwork in Philadelphia, especially in structuring our own polity today.[1] I suggested, as has been a recurrent emphasis of my own work, that as a society we dangerously over-celebrate, even "venerate," the Constitution.[2] But, quite obviously, that does not require denigrating the Framers or, even more so, negate the value of paying close study to the Constitution inasmuch as it plays an important part, for good and, I increasingly believe, for ill in the actual workings of our political order.

So it is with *McCulloch v. Maryland*. The back jacket of David Schwartz's marvelous new book on *McCulloch,* which is definitely worth celebrating, includes my justified praise of his "indispensable study of the single most important Supreme Court case in the canon."[3] I believe it is true both that his book is "indispensable" *and,* even more to the point, that the case is of truly singular importance in the canon of constitutional law. It is, I am confident, one of the few cases that is taught in *every* course charged with introducing students to the United States Constitution. In fact, in a constitutional law casebook that I co-edit, it is the one and only case that is presented without any editorial erasures.[4]

Jack Balkin and I published an essay in the *Harvard Law Review* about twenty years ago on the multiple canons of constitutional law.[5] We identified three such canons. First, there are cases that must be taught to law students, the *pedagogical*

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1. *See* Sanford Levinson, *Celebrating the Founders or Celebrating the Constitution: Reflections on Constitution Day*, *2019*, 12 NE. U.L. REV. 375 (2020). This was originally delivered at the United States Supreme Court as the annual Salmon P. Chase Lecture, under the auspices of the Supreme Court Historical Society and the Georgetown Center for the Constitution's Sixth Annual Salmon P. Chase Distinguished Lecture & Faculty Colloquium on December 5, 2019. I am extremely grateful to Randy Barnett for the invitation and the opportunity to participate in the ensuing discussions of *McCulloch v. Maryland* on the following day at Georgetown University Law Center. Although I have revised the lecture as delivered for publication, I have retained the overall tone of the lecture, including, in the second paragraph, the reference to the specific date on which it was delivered. I had previously given an "out-of-town-tryout" at a conference organized by David Schwartz at the University of Wisconsin. I am grateful for the responses I received there, as well as for later detailed suggestions by Schwartz himself. I also benefitted greatly from responses by Mark Killenbeck. And, as always, I am grateful to Jack Balkin and Mark Graber.

2. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 185–94 (2d ed. 2011), which includes an "Afterword" explaining precisely why I lost the "constitutional faith" I had been willing to profess by "signing the Constitution" at the Bicentennial Exhibit in Philadelphia in 1987, the time when the first edition was being written and published. For an explanation of why I refused to "sign the Constitution" at the opening of the National Constitution Center in Philadelphia in 2003, *see also* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 11–24 (2006).

3. DAVID SCHWARTZ, THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF *MCCULLOCH V. MARYLAND* (2019). It is worth noting that it is not the only recent notable book published about the case. See ERIC LOMAZOFF, RECONSTRUCTING THE NATIONAL BANK CONTROVERSY: POLITICS AND LAW IN THE EARLY AMERICAN REPUBLIC (2018), which throws illuminating new light on the particular context of the debate over the Bank of the United States and the arguments made by some "Madisonians," albeit ignored by John Marshall, to justify their change of constitutional position from 1791 to 1816

4. PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 39 (7th ed. 2018).

5. Jack M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 975–76 (1998).

canon; there are also cases that all lawyers, and even educated members of the general public, are expected to be able to identify: that is the *cultural literacy canon*; and, finally, there are the cases that academics who write articles on "constitutional theory" in fact continue to discuss, the *academic theory canon*. *McCulloch* may well be the only case the is clearly part of all three canons. I have publicly justified, for example, my long-time refusal to teach *Marbury v. Madison,* which is surely part of the cultural literacy canon and even, on occasion, the academic theory canon, for a quite simple reason: in order to teach it well, especially to students who are increasingly ignorant of basic American political history and, therefore, of the particularities of the Election of 1800 and its aftermath, I believe it requires far too much class time that is more valuably spent on other cases,[6] most certainly including *McCulloch,* on which I always spend several weeks.[7] In any event, the importance of *McCulloch* is undeniable and easily explains gathering this weekend to commemorate it.

As you may already have guessed, given my distinction between commemoration and celebration, there is an important "but" that now follows. In a famously snarky 1904 address by Oliver Wendell Holmes on John Marshall, the sage of Boston wrote that it was simply impossible to "separate John Marshall from the fortunate circumstance that the appointment of chief justice fell to John Adams" and not to Thomas Jefferson, who would succeed him less than six months later and would not under any conceivable circumstances have appointed his distant relative to any national office. Even more to the point, Holmes asserted that "[a] great man represents a great ganglion in the nerves of society . . . and part of his greatness consists in his being there. . . . [I]f I were to think of John Marshall simply by number and measure in the abstract," as against ostensible metrics of true "greatness" in judging, "I might hesitate," said Holmes, "in my superlatives."[8]

So we have to ask whether the undoubted "importance" of *McCulloch* (and Marshall) is synonymous with "greatness," if by that term we mean not, say, "influence" or even canonicity, but, rather, its ability genuinely to serve as a model of the enterprise that we sometimes call "thinking like a lawyer" or writing

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6. Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either*, 38 Wake Forest L. Rev. 553, 554–59 (2003).

7. There is merit, regrettably, to Mark Graber's observation that full appreciation of *McCulloch* also requires significant historical knowledge that most of our students do not possess. Mark Graber to Sanford Levinson, Sunday, August 9, 2020 12:25 PM. Students should be aware, for example, of the extent to which to which the establishment of the original Bank of the United States was a defining cleavage between Washington's two cabinet members, Alexander Hamilton and Thomas Jefferson,—not to mention James Madison, Hamilton's erstwhile colleague in *The Federalist*—and directly contributed to the rise of the first American party system. Perhaps one should hope that our students are at least aware of Lin-Manuel Miranda's *Hamilton* in this regard! Graber notes my own omission of the important fact that Maryland had "announce[d] that in advance that . . . they will honor the Supreme Court's opinion." *Id.* That is, of course, not always an empirical given, especially in the formative period of the early republic. See, for example, Georgia's vociferous refusal to acknowledge federal jurisdiction in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

8. The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr. 207 (Richard A. Posner ed., 1992).

as a judge. I think not, though I confess that was not always my view. But I now find both the opinion and its author simply too question-begging and often adopting a rhetorical style that can only be described as bullying. There is no notion of genuine dialogue, only pronouncements from on high that become questionable if one probes too deeply. I confess that my reaction is sometimes similar when I read certain Socratic dialogues, where I am less impressed by Socrates's reasoning than by his dismissive tone toward arguments that seem to me altogether sensible.

To be sure, *McCulloch* remains immensely useful as an exemplification of what my colleague Philip Bobbitt calls the various "modalities" of constitutional law,[9] which might be analogized to the "grammar" of what I sometimes call "law talk," particularly in its constitutional form. Marshall does draw on the text, history, and structure of the Constitution, in addition to including a number of "prudential" arguments touching on the consequences of a different outcome to the potential flourishing of an ever-expanding nation. Although he cites no judicial precedents, he does tip his hat to the precedent established by congressional authorization of the First Bank of the United States in 1791 and its general acceptance thereafter. The only modality that is missing is what Bobbitt terms "ethical argument," by which he means an appeal to the fundamental values underlying the American experiment.

But it would be odd if that pedagogical value—and even later utility to one's career when making arguments employing "law talk"—is enough to model something we call "greatness as a lawyer-judge." That would require reducing lawyering, and, more particularly, the craft of writing opinions as part of judging, to simple skill in the various rhetorical tropes that constitute one's handiwork as a professional lawyer. At the end of the day, what Holmes elsewhere called "living greatly in the law," assuming that is possible, must be more than displays of rhetorical virtuosity, especially when we can see through them and see them *only* as such displays. After all, adepts in English grammar can spin out dubious, even repulsive, sentences that nonetheless could be deemed "perfect" in their adherence to the grammatical rules themselves. So the relationship between undoubted rhetorical virtuosity and ultimate worth—perhaps we might even call it "wisdom"—is the ultimate question posed by Marshall and by *McCulloch*. Having earlier evoked Socrates somewhat critically, I will note that this skepticism about the arts of rhetoric is at the heart of Plato's *Gorgias* dialogue. The title character is the leading Sophist, i.e., teacher of rhetoric, in Athens, an achievement that Socrates recognizes but scarcely respects, not least because its practical success is measured by one's skill in making the "lesser" (or unjust) argument prevail over a "greater" one through clever manipulation of rhetorical tropes. If, as I often believe, American schools are the modern equivalent of Gorgian academies of

9. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11–22 (1991); *see also* Jack M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771 (1994) (discussing Philip Bobbitt, Constitutional Fate: Theory of the Constitution (1984)).

rhetoric, we might well, at the very least, have mixed feelings about that reality, unless, of course, we believe that the entire Socratic emphasis on objective standards of justice and truth is chimerical.

In considering *McCulloch,* it is essential to note that many legal academics, most certainly including myself, distinguish sharply between what is often called by those in the trade *McCulloch* I and *McCulloch* II. Seventy-five paragraphs comprise the case in its entirety, but they differ remarkably both in subject and tone. The first forty-five paragraphs, i.e. *McCulloch* I, address whether Congress may charter the Bank of the United States. It is that part of *McCulloch,* as a matter of empirical fact, that strides atop the various canons of constitutional cases. But the case goes on for another thirty paragraphs, as *McCulloch* II, and they concern the power of Maryland to levy a tax on the Bank. I presume that is part of the pedagogical canon, though far diminished in importance from *McCulloch* I; it is, however, not really part of the other two canons.

Not the least important aspect of *McCulloch* I is its confirmation of Charles Black's famous—and altogether accurate—observation that by far the most important function of the Court, relative to legislative acts of Congress, has been to *legitimize* them by endorsing their congruence with the Constitution, even if, to be sure, that legitimation function depended on the theoretical possibility, occasionally realized, that the Court might in fact say no. It is this that accounts for the excessive role that *Marbury,* a remarkably atypical case, plays in the standard curriculum.[10] But the Court most often serves as the loyal ally of Congress. The justification for subsequent Courts saying yes, particularly after the New Deal paradigm shift, was of course frequent citation of what my students learn to call Paragraph 38[11] and its capacious reading of the powers assigned to Congress. To be sure, the Court of the late 19th and early 20th century also frequently cited key sentences in Paragraph 42,[12] in which Marshall assured readers that "pretextual" assertions of power would be reined in by a vigilant Court doing its "painful

10. *See* Charles Black, The People and The Court: Judicial Review in a Democracy (1960). For a more recent confirmation of this essential point in Keith Whittington's magnum opus, *see* Keith Whittington, Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present 25, 143 (2019). *See also* Sanford Levinson, *Mastering the Cases and Delineating the Role of the Supreme Court*, 35 Const. Comment. 13, 18 (2020) (review of Whittington).

11. "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended, But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. 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 that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

12. "Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land." *Id.* at 423.

duty." But, at least since *Darby Lumber,*[13] extremely few occasions have been found for any such duty, and Paragraph 38 has certainly taken supremacy.

So *McCulloch I* is certainly what we tend to teach and write about, not least because it is what the Court writes about.[14] This is true, as well, of Schwartz's superb book; for him, *McCulloch* is in fact *McCulloch* I. Schwartz reinforces the proclivity of most modern readers to treat Paragraph 44 as the *de facto* conclusion of the entire case: "[A]fter the most deliberate consideration, it is the unanimous and decided opinion of this Court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land." Paragraph 45 simply asserts that the "branches" of the home office located in Philadelphia "are equally constitutional." What more needs to be said for most modern readers?

However, there *are* thirty more paragraphs yet to come, concerning the twinned decision of so-called *McCulloch* II, even if, as we often find with twins—think only of Esau and Jacob—one ends up, justly or not, with a decidedly greater inheritance and historical importance. I suspect that to the degree *McCulloch* II is taught, most teachers, including myself, take a quite short time to note (something like) "the Court went on to hold that because the Bank is a 'federal instrumentality'—that is, chartered by the United States itself and not, for example, a merely 'private bank'—it cannot be taxed by Maryland." That is, to be sure, the "holding" with regard to the fact that Maryland had levied what may or may not be a quite substantial tax on the operations of the Bank of the United States (but not on its own state-chartered banks).[15] But what, exactly, is the rationale for disabling the state's taxing power? Or, more to the point, do Marshall's various rationales necessarily stand up under close analysis offered by someone who, like myself, might be described as "obsessive" in trying to decode the various possibilities contained within the seventy-five paragraphs?

As the reader will no doubt have already gathered, I do not regard this as a rhetorical question. Perhaps the answer is yes, that they do withstand close analysis because Marshall may be a master dialectician as well as, most certainly, a master of some rhetorical arts; at the very least, though, one should examine very

13. U.S. v. Darby Lumber Co., 312 U.S. 100 (1941).

14. For a similar point in a recent illuminating essay, see Mark Killenbeck, *McCulloch II, All Banks in Like Manner Taxed? Maryland and the Second Bank of the United States*, 44 J. SUP. CT. HIST. 7 (2019). He tellingly notes that a 2014 "[r]eenactment of the *M'Culloch* argument" focused exclusively on Congress's power to charter the Bank and omitted any mention of Maryland's power to tax. *Id.* at 8.

15. I think it is fair to say that the conventional wisdom, which I certainly had taught, was that Maryland passed a truly onerous tax with the purpose of driving the Bank out of Maryland. Perhaps it says something about the relative lack of interest by most scholars in *McCulloch* II that such an essential factual point remains at issue, in part because of the careful skeptical analysis presented in RICHARD ELLIS, AGGRESSIVE NATIONALISM: MCCULLOCH V. MARYLAND AND THE FOUNDATION OF FEDERAL AUTHORITY IN THE YOUNG REPUBLIC (2007). The most thorough analysis of the subject is Killenbeck, *supra* note 14, who concludes that the conventional wisdom is well-founded. One reason, perhaps, for the paucity of scholarly work, as I will note below, is that for Marshall nothing seems to turn on the actual facts of the tax, i.e., whether it was "mild" or "confiscatory."

carefully the arguments (as well as the rhetoric) offered by one of the consummate three-card-monte players in our entire judicial history. That is the aim of what follows.

II. So may the "sovereign State" of Maryland, "without violating the constitution, tax" the Baltimore Branch of the Bank?

This is the so-called "second question" that Marshall states to be presented by *McCulloch*. Maryland had, after all, levied a $15,000 tax on all branches of banks not chartered by the State, a class, perhaps not surprisingly, of one. Marshall, rather remarkably, in his very first sentence of the opinion, had described Maryland as a "sovereign state."[16] I often ask students to read portions of the opinion aloud, and I always wonder if the term should be read with a sarcastic inflection. After all, Maryland's "sovereignty" is in tatters by the end of the opinion, at least if one were naïve enough to believe that the term recognized the presence of unlimited power in the hands of the putative sovereign.[17] *McCulloch* II deals, after all, with perhaps the central domestic aspect of "sovereign" authority, i.e., the power to tax.

I cannot forbear a slight digression in noting, as have many others, that Marshall was notably averse to discussing, or even citing, previous cases. With regard to state "sovereignty," one might have expected him at least to acknowledge the first great case decided by the Supreme Court, *Chisholm v. Georgia*,[18] where the Court correctly decided that Georgia possessed no sovereign immunity against suit by a South Carolinian (overturned, of course, in the Eleventh Amendment). At that time, a decade prior to the final adoption of the custom of issuing a singular "Opinion of the Court," the Court followed English practice of offering separate opinions addressing the issues before the tribunal.[19] Two of the opinions, by Justices Cushing and Blair, simply emphasized the clear text of Article III stating that "The Judicial Power" of federal courts "shall extend . . . to Controversies . . . between a State and Citizens of another State." What more

16. *See* Sanford Levinson, *The Confusing Language of* McCulloch v. Maryland: *Did Marshall Really Know what He Was Doing (or Meant)?*, 72 Ark. L. Rev. 7 (2019).

17. For a brilliant and highly readable study of the transformation of the meaning of "sovereignty" from its (more or less) 17th century origins as a device for ending the gory wars of religion to the considerably different meaning it turns out to have in Marshall's hands, see Don Herzog, Sovereignty: RIP (2020).

18. 2 U.S. (2 Dall.) 419 (1793).

19. Marshall is often given credit for shifting the Court's practice in this regard, but Mark Killenbeck has demonstrated that it actually began during the generally overlooked tenure of Oliver Ellsworth as Chief Justice and that "the Court acceded to his preference for a brief majority opinion." Mark R. Killenbeck, *William Johnson, the Dog That Did Not Bark?*, Vand. L. Rev. 407, 416 (2009). Thus, Killenbeck writes, "Jefferson was, therefore, simply wrong when he complained that it was Marshall, and Marshall alone, who was responsible for the departure from 'the sound practice of the primitive court'" of issuing seriatim opinions. *Id.* (citing Letter from Thomas Jefferson to William Johnson (June 12, 1823), *in* 12 The Writings of Thomas Jefferson 277 (Paul Leicester Ford ed., 1905).

needs to be said in the presence of unequivocal text?[20]

The answer is, quite a bit. Both Chief Justice Jay and, even more so, Justice James Wilson went far beyond reliance on plain text to write what might be called "state papers" setting out the basic theory of popular sovereignty undergirding the national Constitution. Wilson, of course, was a principal delegate at the Philadelphia Convention and America's first great lecturer on law. Like Jay, he thundered that the one and only sovereign in the United States was "the People." Whatever exactly that might mean,[21] it clearly entails that Georgia (in this case standing for any and all states) was "NOT a sovereign state."

The case would have been gratifyingly easy had Article I, Section 10, contained a limitation on the power of the state to tax any federally-chartered corporations. Obviously, it does not, perhaps because the text does not explicitly authorize federally chartered corporations at all. To imply such a power is what makes *McCulloch* I so important. It is, as Mark Graber has suggested, the first example of federal *pre-emption* of what would otherwise be the unproblematic assertion of state power.[22] But what is also crucial is that the pre-emption is every bit as much "implied" as is the power of Congress to charter the Bank.

The Framers knew how to expressly limit power when they wished to do so, as quite literally spelled out in Sections 9 and 10 of Article I. Thus, in Section 10, one finds a number of limitations on states, including the prohibition of continuing the state tariff wars that had been a feature of politics under the Articles of Confederation. Even inspection fees generated by a reasonable desire to control certain commercial imports would be limited to recovery of the states' own expenses in running the inspections, with any excesses going to the national treasury. It would have been easy enough to add a provision stating something to the effect of "nor shall any state levy taxes on any instrumentality of the national government," but, of course, the Framers did not do so. Should we treat that as a mere oversight, akin to a scrivener's error, or instead read Article 10 as in effect containing an implicit message of authorization, perhaps as a "penumbra" and "emanation"?[23]

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20. *See, e.g.*, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020); McGirt v. Oklahoma, 140 S. Ct. 2452 (2020). Both of Justice Gorsuch's recent opinions emphasize the priority of plain meaning in construing the law.

21. It *could* mean, after all, that not even the United States government should be viewed as possessing "sovereign immunity." Chief Justice Jay recognized this possibility even while suggesting that its resolution could be saved for another day.

22. Email from Mark Graber to Sanford Levinson, August 9, 2020, 12:25PM ("I teach Part II in large part because what Marshall does in Part Ii is invent preemption doctrine. As you point out, we might simply have Congress declare in advance what state laws can and cannot do with respect to federal legislation, then treat this is a supremacy clause issue. Gorsuch and Thomas are almost there. But Marshall insists no. . . . So what is most interesting about McCulloch II is the way Marshall makes a central doctrine of contemporary constitutional law seem natural, when, as you point out, it is not").

23. For such a "penumbral" reading of the Constitution, *see* Griswold v. Connecticut, 381 U.S. 479 (1965).

Marshall is fully aware of such arguments. He begins his substantive consideration of Maryland's retained power to tax with the observations "[1] [t]hat the power of taxation is one of vital importance; [2] that it is retained by the States; [3] that it is not abridged by the grant of a similar power to the government of the Union; [and 4] that it is to be concurrently exercised by the two governments."[24] Marshall claims these "are truths which have never been denied."[25] Moreover, he recognizes that "[s]tates are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws."[26] One might believe from reading this that Maryland was on its way to victory, especially since Marshall had earlier, in *McCulloch* I, quoted the same passage of text and its prohibition of all except "absolutely necessary" duties in order to bolster his argument that the absence of the word "absolutely" in the "Necessary and Proper Clause" of Article I, Clause 18 implied a far more permissive definition of the terms.[27]

We quickly discover, however, that the interpretive principal at this point is not *exclusio unius,* a well-trodden maxim of interpretation which would support the belief that the explicit prohibition of state taxing authority in the case of imports leaves all other authority untouched, at least in the absence of specific action by Congress (especially if, contrary to Wilson, one takes seriously the description of Maryland as a "sovereign state"). Instead, any hopes that Maryland might have will prove to be cruelly dashed.

Perhaps it is a deficiency of the Constitution that it seemingly allows taxes like Maryland's. But we all know that deficiency does not equal unconstitutionality.[28] After all, Madison, in speaking to the House of Representatives, unsuccessfully, about the unconstitutionality of Congress's chartering the Bank of the United States, relied on the fact that the Constitution had not explicitly authorized such corporate charters.[29] He argued that if the Constitution had failed to include a treaty power, however much that would count as a "defect," the only way to cure it would be through an Article V constitutional amendment.[30] To adopt Donald Rumsfeld's aphorism about fighting wars with the armies one actually has, one might suggest that Madison was arguing that we must live under the Constitution

24. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 425 (1819).

25. *Id.*

26. *Id.*

27. *See id.* at 388–414.

28. *See, e.g.*, Constitutional Stupidities, Constitutional Tragedies (William N. Eskridge, Jr. & Sanford Levinson, eds., 1998) (offering a plethora of "stupid," even potentially dangerous, provisions of the Constitution).

29. *See* James Madison, Speech in Congress Opposing the National Bank (February 2, 1791), *in* Madison: Writings 480 (Jack Rakove ed., 1999).

30. *Id.* at 488 ("Had the power of making treaties, for example, been omitted, however necessary it might have been, the defect could only have been lamented, or supplied by an amendment of the constitution.").

we have, not the one we might well wish we had.[31]

Not so, according to Marshall, in the case of the Bank Tax. Instead, Marshall flips to a version of another classic maxim of interpretation, *esjusdem generis*, by which a specific prohibition is taken to include anything similar to it that "is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used."[32] This still leaves open a variety of questions. These include the meaning of how exactly we determine what is the "nature" of any particular law or how we determine whether it is "absolutely repugnant" to another law. Or, perhaps most importantly, whether we necessarily, whatever one's definition of *this* term, want judges to make these decisions instead of more ordinary leaders we call, respectfully or not, "politicians" operating within a decidedly political process.

Moving along, though, we find in the very next paragraph assertions that are at least as important, rhetorically, as anything in *McCulloch* I. Although, as Marshall freely admits, "[t]here is no express provision for the case," he nonetheless sustains the claim that Maryland's tax is constitutionally invalid "on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds."[33] I am fond of describing this as the introduction of "texturalism" as a complement to "textualism." More accurately, it is the foundational stone of what we all know now as "structural" argument, often identified with the heretofore mentioned Charles Black.[34] The "materials which compose" the constitutional order include both states, whether or not they are truly "sovereign," and the national government itself, with its own claims to supremacy as set out, say, in Article VI.[35] The challenge, then and now, is to figure out how (and if) "texturalism" actually works as a truly legal principle instead of an invitation to apply (and impose) one's own views about the extent to which we are a truly "consolidated" system, as was feared by the Constitution's opponents, or one that really does accommodate the political fact, desirable or not, that states persist as an operative part of the American system. My friend, Harvard Law School Dean John Manning, perhaps the leading textualist in the legal academy, has notably criticized the contemporary Supreme Court for its inventing of a variety of "structural federalism" doctrines, and the lineage of

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31. Eric Schmitt, *Iraq-Bound Troops Confront Rumsfeld Over Lack of Armor*, N.Y. TIMES (Dec. 8, 2004), https://www.nytimes.com/2004/12/08/international/middleeast/iraqbound-troops-confront-rumsfeld-over-lack-of.html [https://perma.cc/LZA2-G3JG].

32. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 425 (1819).

33. *Id*. at 426.

34. *See* CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

35. *Id*. at 15 (discussing McCulloch v. Maryland and the "relational proprieties between the national government and the government of the states.").

such invention, for better or worse, certainly goes back to Marshall and *McCulloch* II.[36]

At this point, Marshall puts on the robes of a logician, setting out what he terms "an axiom" that allows us to "deduce[] as corollaries" basic truths of our constitutional order.[37] He sets them out as follows:[38]

> These are, 1st. That a power to create implies a power to preserve. 2nd. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3rd. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

These "abstract truths," as Marshall describes them in the next paragraph, "would, perhaps, never be controverted," save, of course, by Maryland itself, with what Marshall describes, sincerely or not, as "a splendor of eloquence, and strength of argument, seldom, if ever, surpassed."[39] But we should not be taken in. The remaining twenty-five paragraphs are devoted to demonstrating by sheer force of reason (or assertion) that reasonable disagreement is basically impossible, not least because it would only highlight the problematics of the Court granting its imprimatur to only one side of what it would recognize as a genuinely debatable question. Praising Maryland in this instance might be analogous to offering praise for an argument devoted to flat-earthism (or perhaps it is like praising the cook at a dinner party for the liver and onions that one in fact slipped to the dog underneath the table).

The central issue, as already suggested, is that neither the Constitution nor the statute establishing the Bank simply denies in plain words the power of Maryland to tax the Bank. Does this entail that Maryland's power to tax is unlimited because it does not fall within the plain meaning of Section 10? I resist that conclusion. One might happily argue that the Constitution contains a "reasonableness" proviso that applies to *all* assertions of, or, indeed, to all limits on, governmental power. It is not much of a stretch to argue that a particular state tax that *in fact* threatened the existence of the national government—or, for that matter, a national tax that did the same regarding state governments or even truly confiscatory levels of taxation that would in effect turn all of us into slaves simply working for the state—would be unconstitutional, even in the absence of requisite textual prohibition. The Constitution, it is often suggested, is not a "suicide pact."[40] One might agree with that proposition but, at the very least, believe that

36. *See* John Manning, *The Supreme Court 2013 Term Foreword: The Means of Constitutional Power*, 128 Harv. L. Rev. 2 (2014).

37. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 426 (1819).

38. *Id.*

39. *Id.*

40. *See* Terminiello v. City of Chicago, 337 U.S. 1, 37 (1947) (Jackson, J., dissenting).

any claims that national suicide is threatened by some policy would require discussion of the actualities of the tax and the consequences of accepting its validity.

This is not Marshall's approach. There is no reference at all in *McCulloch* II to what might be viewed as mundane facts. Instead, he simply (and simplistically) treats "the power to tax" as equivalent to "the power to destroy." Indeed, he states "it is too obvious to be denied" that Maryland's power to tax the Bank entails that it could be "exercised so as to destroy it."[41] Just as I am perplexed by Marshall's insistence on describing Maryland as "sovereign" in the very first sentence of *McCulloch,* I truly wonder why he chose to emphasize the destructive implications of the power to tax.[42] I am sometimes tempted to describe this sentence of Marshall's as perhaps the most mischievous in the entire United States Reports, inasmuch as it both takes advantage of and feeds the basic American impulse to oppose *all* taxes and not only those levied "without representation."

The power to tax, among other things, is the power to create a truly functioning government; there may be debates about the optimal rates of taxation or who exactly could levy the relevant tax, but there was none over whether taxes were, in fact, necessary (and not, one might add, over whether they were merely "useful" or "convenient"). As Justice Holmes famously wrote, "[t]axes are what we pay for civilized society."[43] As my University of Texas colleague, Calvin Johnson, has reminded us, a primary impetus for the 1787 Convention in Philadelphia was the realization that perhaps the most "imbecilic" feature, to quote Hamilton's dismissive term in *Federalist* 15 of the existing American government under the Articles of Confederation, was its practical inability to garner sufficient revenue to operate effectively. The "requisition system," under which Congress almost pathetically requested a given amount from each state, was patently unsuccessful. In 1786, the national government received $663 from the total thirteen states![44] As a practical matter, the inability to tax is every bit as destructive of any operative polity as is the potential overreach of the taxing power of the national government.

One might, moreover, apply the mantra of "the power to _do X_ as the power to destroy" to a variety of powers assigned by the Constitution. The most dramatic and self-evident example is surely the power to declare war or exercise the powers associated today with the assignment to the president of the commander-in-chief power. One might even say the same thing of the right to "keep and bear arms," inasmuch as it places in private hands the sovereign power of killing others as a means of self-defense (not to mention other potentially fatal uses of

41. *McCulloch*, 17 U.S. (4 Wheat.) at 427.

42. *See* Levinson, *supra* note 16.

43. Compania Gen. de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting). And, of course, Holmes famously asserted that "the power to tax is not the power to destroy while this court sits," Panhandle Oil Co. v. Mississippi *ex rel*. Knox, 277 U.S. 218, 223 (1928).

44. *See* CALVIN JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 1 (2005).

one's arms).[45] Moving away from such literal threats of death and destruction, one can also note that the critiques of the modern Commerce Clause, beginning in the late 19th century, almost all invoked Paragraph 42 from *McCulloch* I and rued the possibility that powerful national regulation would destroy the American federal system as we knew it.[46] Indeed, it is this tradition that was carried on by Professor Barnett in his effort to obtain a declaration that the Affordable Care Act transcended the limits established on the national government by the Constitution. Anyone motivated by a "jurisprudence of fear" can easily find many witches and hobgoblins throughout the U.S. Constitution.

Maryland's argument, at least as described by Marshall, is equally categorical and "logical" in form: i.e., "taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it." To put it mildly, Marshall exhibits complete disdain for any such argument, as is perhaps merited, inasmuch as it embraces the maximalist notion of "sovereign power" as articulated, say, by Bodin and Hobbes or, for that matter, original theorists of Divine Sovereignty.[47] But what he never comes close to addressing is that there may be a spectrum of possibilities in which "trust" will be accorded to those who are granted powers—whether Congress or states—that nonetheless come up against some limits, should the trust demonstrably be violated. This, after all, is the practical tension set up between Paragraph 38—Congress can basically do whatever it wants—and Paragraph 42—trust us to monitor Congress should it act in bad faith. Should *any* government agency be granted an absolute presumption of being either always and necessarily pure in heart or, on the contrary, as never to be trusted? No reasonable person, I believe, would regard either as sensible. The former is Pollyannish, the latter ultimately paranoid.

Perhaps one believes that the $15,000 tax levied by Maryland would easily meet any standard of invalidity, beyond its merely being a tax, but Marshall dismisses the idea that there is any obligation to demonstrate this. Mark Killenbeck, after meticulous examination of the tax, states that it is an "inevitable conclusion . . . that it was indeed a punitive measure directed at the Second Bank" and not a "mild" tax designed to raise revenue.[48] However, in place of anything that may count as the lessons of empirical experience, a key motif of the Framers'

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45. *See* Sanford Levinson, *Postscript: Some Observations about Guns and Sovereignty*, 80 L. & Contemp. Probs. 239 (2017)

46. *See, e.g.*, Justice Day's argument for the Court in Hammer v. Dagenhart, 247 U.S. 351 (1918). Fears that enhanced national power would destroy what Justice Black sometimes referred to "Our Federalism" were an important part of Justice Miller's opinion in the Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873).

47. *See, e.g.*, Jean Bethke Elshtain, Sovereignty, God, and Self (2008).

48. *See* Killenbeck, *supra* note 14. Killenbeck was impelled to examine the tax by Richard Ellis's suggestion that Maryland's critics (and Marshall's defenders) had too easily accepted the onerous nature of the tax. Perhaps it is relevant to note that I myself do not feel qualified truly to adjudicate this dispute inasmuch as it draws on talents for economic analysis that I do not possess. But the point is that Marshall

thoughts, we are instead treated to sentence after sentence about the implications of "sovereignty" and the destructive implications of allowing states to tax without limit. Most relevant, perhaps, is Marshall's assertion that adoption of his absolute logic-driven principle that states have no power at all to tax a federal instrumentality means that "we are not driven to 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." Arguments about "degree" are presumably for other branches of the government, most obviously the legislature. Judges are made for other tasks, including, presumably, the delineation of basically unempirical and logically-compelled formal distinctions that will, when applied, allow us to give definite content to our otherwise thoroughly "perplexing" system of separation of powers, whether horizontal or vertical. This is just the kind of black-letter rule for which first-year law students yearn. But what, if anything, commends its acceptance beyond the fact that it can easily be memorized?

One might obviously ask if Marshall was correct in his description of what was "unfit for the judicial department." Some people today might think so. Justice Scalia once denounced the very idea that judges could "balance" conflicting constitutional norms and maintain his own desiderata of a "law of rules." For roughly the past century, perhaps under the influence of Holmes's critique of the notion of law as truly controlled by "logic," that idea has seemed almost foolish, most certainly with regard to its ability to provide an accurate understanding of what judges actually do. Perhaps the pendulum is shifting back closer to Marshall in this regard, though I have my doubts that the pendulum will continue its movement in that direction. But if one accepts the view that judges are not to behave like legislators, then one conclusion is that they should place the relevant decision-making entirely in the hands of legislators. One might treat this as a truly "political question" about which judges simply have nothing useful to say because of the particular institutional limitations under which they operate.

But Congress, even if limited in power, surely does not suffer from the same kinds of limitations as are felt by the judiciary. If one accepts the copious notion of congressional power set out in *McCulloch* I, it would appear obvious that Congress could place in the corporate charter a provision exempting "its" Bank from being taxed by the states, leaving the Court to inquire only whether any such limitation on what would otherwise be a state's "sovereign" power had been spelled out. Or, perhaps, the congressional charter could authorize states to engage in limited taxation. But, obviously, deference to a congressional resolution is not Marshall's response. *McCulloch* II is judicial interventionism full tilt, leaving open only the question as to whether Congress can affirmatively authorize a state to tax a presumed federal instrumentality.

Marshall *does* offer a defense as to why one might be far more skeptical of the states' taxing of federal instrumentalities than when the national government

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in effect renders the dispute legally pointless inasmuch as the categorical nature of his assertion makes the actual facts of the matter irrelevant.

does the same regarding vital state interests. The long and the short of his argument is that he believes that we can have no CONFIDENCE (his capitalization) in states should they tax any aspect of the national government, but, presumably, we are entitled to place our confidence in the national government's imposition of taxation. One might view him as anticipating John Hart Ely's famous theory of representation reinforcement.[49] State representatives, who, as modern political scientists would insist, were probably driven primarily by a desire to be re-elected by their constituents, had no incentive at all to impose taxes on locals who detest taxes per se. Still, states *do* need the money and, therefore, taxes. The incentive now will be to put the burden of taxation on out-of-staters who have no say in local government. They constitute the equivalent of a "discrete and insular minority" that Footnote Four of *Carolene Products* would later tell us deserves special solicitude by the Supreme Court on the watch for predictable legislative discrimination.[50]

Any of us who have paid exorbitant rental car fees at airports, hotel taxes in tourist meccas, or tolls on the Delaware Turnpike appreciates the validity of this insight. One of the great pleasures in life is to have one's own desires paid for by others. So why not have federal courts give what we would today called "heightened scrutiny" to *all* state taxation that falls disproportionately on outsiders who are not represented in state political institutions? Jack Balkin has noted that *McCulloch* is cited by Justice Stone in Paragraph Three of the seminal "footnote 4" of *Carolene Products,* the ur-text of Ely's theory of judicial review. So should we view Marshall as "anticipating" Stone (and Ely), presumably to his credit, or, instead, as being mired in the way of looking at the judicial capacity that Stone and his colleagues ultimately dismiss (and that we should dismiss, as well)?

Marshall's theory of CONFIDENCE helps to explain why one should be skeptical that Maryland will play fair with regard to non-Maryland institutions. But does it necessarily support the free-wheeling legitimation of congressional legislation that is the meaning of *McCulloch* I, including Congress's own decisions as to its use of the all-important taxing power authorized the very first clause of Article I, Section 8? What some might regard as a simplistic theory of "representation" would say yes, viewing the formality of election as the end-all and be-all. But contemporary social choice theorists (or neo-Marxists) might argue that there is really no more reason to have confidence in the national government when it imposes taxes—of perhaps passes much other legislation—than we repose in Maryland when it taxes not only federal institutions, but also any Maryland nonresidents (or residents who do not vote).

Marshall's argument is that Congress represents the whole country so that it will not, like Maryland's state legislators do, have an incentive to gang up on outsiders. But the crucial question is how we conceptualize the boundaries that

49. I am grateful to Jack Balkin for this suggestion.

50. United States v. Carolene Prods. Co., 304 U.S. 144, 152, fn. 4 (1938). *See* Jack Balkin, *The Footnote*, 83 Nw. U.L. Rev. 83, 275 (1988).

enable us to distinguish insiders from outsiders. For Marshall, geography shaped destiny. There is undoubtedly some truth to that, but many of us might also believe that other factors shape destiny as well, including where one stands within the class structure as measured by (in)equality of wealth and resources. As Benjamin Page and Martin Gilens argue in their tellingly titled *Democracy in America? What Has Gone Wrong and What We Can Do About It,* those who are far above the median in terms of wealth have far, far more influence in the actual making of federal tax policy than those who are in, say, even the 75th percentile of the distribution. There appears to be a widespread consensus that the wealthy were the primary beneficiaries of the Trump Administration's signature tax cuts passed in 2017, for example. Nor does polling data, even before Covid-19 shut down the country, offer much reason to believe that ordinary Americans place much confidence in national governmental institutions to be solicitous of their interests. A country in which, on a good day, only one in six Americans "approve" of Congress[51] cannot be said to exude confidence in this institution that is supposed to most represent their views and interests.

From one perspective, one might applaud Marshall's recognition that whether or not one has CONFIDENCE in government requires a quite sophisticated theory of political science or political economy. Still, not even the most radical libertarian, save for genuine anarchists, would support the argument that the national government should be stripped of taxing power completely because, after all, "the power to tax is the power to destroy," and one can have no CONFIDENCE in those, even if national political officials, doing the taxation. More sophisticated analysis is necessary as to both when one should trust decision-makers and when one should indeed be wary.

So we are presented with two quite different questions. One is whether we can—indeed *must*—free ourselves of what Holmes called the "rhetorical absolute"[52] that Marshall presents in *McCulloch* II, in favor of some kinds of "reasonableness" or "balancing" tests that in fact constitute our politics, as well as much of our jurisprudence. The other, as suggested earlier, is the role the judiciary should play in any such monitoring of state or federal taxation. One might support judicial intervention only when the taxation is so truly "unreasonable" that it manifests evidence of a pretext, such as the de facto destruction of the federal instrumentality. Surely there is no self-evident unreasonableness to taxing the Bank of the United States at all, especially if they are liable to the same incidence of taxation as in-state banks. So if the decision in *McCulloch* II is correct, it can only be because Maryland was grotesquely overreaching.

But, to repeat, Marshall avoids any discussion of the actualities of the tax. Instead, he reverts to the worst kind of Philosophy 101 slippery-slopism. The

51. *See* Congressional Job Approval, REAL CLEAR POLITICS, https://www.realclearpolitics.com/epolls/other/congressional_job_approval-903.html [https://perma.cc/CKV4-FTFN] (last visited Nov. 15, 2020).

52. Panhandle Oil Co. v. Mississippi *ex rel*. Knox, 277 U.S. 218, 223 (1928).

"principle for which the State of Maryland contends," which is absolutely limitless powers of taxation (save for the explicit prohibition in Section 10), leads logically to the conclusion that it "may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people." No doubt he is right, but one can still wonder if *McCulloch* really tests the power to tax the mail or the mint. Did Luther Martin, representing Maryland, concede (perhaps because he was drunk?) that his argument entailed the legitimacy of taxing the mail or the mint? None of us today, I presume, would teach the advisability of such a response in a clinic on appellate advocacy!

And here we come to what, in some ways, is the most glaring problem presented by *McCulloch* for anyone who wishes to valorize it as a model of judicial decisionmaking. *The Bank of the United States,* in either its first or second incarnation, is tendentiously described only as a "federal instrumentality"; in turn, we get what is a profoundly misleading account of Maryland's proposed tax. An entity is most clearly a "federal instrumentality" when it is an entity truly controlled by the government of the United States, perhaps like the United States Mint. However, both Banks were what today we would describe as joint ventures between private investors and the United States, with the former in fact enjoying a hefty majority of the shares. This is, indeed, a major point made by Andrew Jackson in his famous veto of the renewal of the Bank's Charter in 1832.

More important, though, in this context is the following contention in the letter written by President James Monroe's Secretary of the Treasury, James Crawford, to the new president of the Second Bank in 1819: "The first duty of the Board [of Directors] is to the stockholders, the second is to the nation."[53] Does Crawford's letter not count as a classic "smoking gun" against the notion that the Bank is a genuine "federal instrumentality," unless, at least, we define—and not merely cynically describe as—one function of such instrumentalities as generating profits for private shareholders even at the cost of national interests? As with *Marbury,* where all of the most important facts required to understand the actual decision are well outside the four corners of the opinion,[54] this crucial fact never once appears in Marshall's opinion.[55] Thus, the easiest way to distinguish taxation of the Mint from taxation of the Bank is to note that the Mint is in fact wholly owned and operated by the United States, while the United States is only a minority shareholder in the Bank, however "useful" it might be to have such a bank

53. Richard E. Ellis, Aggressive Nationalism: McCulloch v. Maryland and the Foundations of Federal Authority in the Young Republic 107 (2007).

54. *See* Sanford Levinson & Jack Balkin Sanford Levinson, *What are the Facts of Marbury?*", 20 Const. Comment. 255 (2004).

55. Killenbeck, *supra* note 14, at 8-9, quotes Harold J. Plous and Gordon E. Baker on this point: "Marshall's famed opinion did not even undertake to answer the most challenging points raised by the state."

available to the national government. In *McCulloch* and its crucial companion case *Osborn,*[56] the Bank's purported status as a "public corporation created for public and national purposes" immunized it from state taxation. This obviously rests on a sharp distinction between "the public" and the "private" as legal concepts, with attendant constitutional consequences.

But consider the fact, as Mark Killenbeck has emphasized, that 1819 was more than the year of *McCulloch*. It also featured, altogether relevantly, the once equally famous *Dartmouth College Case*,[57] where New Hampshire was prevented by the Court from revising the charter originally issued by His Royal Majesty King George III in 1769 and still operative following a war designed to throw off the mantel of royal power.[58] Whether New Hampshire could modify the charter—treated as a "contract" by the Court—turned at least in part on how one described the College. Was it "private" or was it (in today's terms) a joint venture between its donors and the State that helped to finance the College? "It is often forgotten," George Thomas has written, "that the very nature of Dartmouth College—whether, in fact, it was a private or public institution—was *the* central question in a larger institutional struggle."[59] The notion of a "private" college was basically unknown in the 18th century, especially in the New England states that unequivocally continued to view themselves as having a religious, as well as civil, identity. In any event, the Masschusetts colleges of Bowdoin (prior to the creation of Maine as an independent state), Williams, Amherst, and Harvard received funds directly, important to keeping them "solvent," from the Massachusetts state government. "[I]t would," Thomas writes, "be very difficult to consider Harvard a 'private' university as we now use the term until well into the nineteenth century," given that it both received land from the State and "the president of Harvard College was often paid directly by the General Court."[60] Ironically, Daniel Webster himself, who later defended his beloved Darthmouth College against the New Hampshire government, agreed in 1821 that Harvard was founded by the Commonwealth of Massachusetts, "not in consequence of

56. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). No one disputes that Ohio, the state of which Osborn was an official, was in fact trying to destroy the Bank.

57. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). By "once famous," I am suggesting that it has basically dropped out of the various canons, *supra* note 5, though it may be that Daniel Webster's expression of his affection for the College—"It is, Sir, as I have said, a small college. And yet there are those who love it"—remains itself part of the cultural canon for at least some segment of the population (especially alumni of Dartmouth!).

58. *See* Mark Killenbeck, *M'Culloch in Context*, 72 ARK. L. REV. 35, 37 (2018).

59. George Thomas, *Rethinking the* Dartmouth College *Case in American Political Development: Constituting Public and Private Educational Instituitons*, 29 STUD. AM. POL. DEV. 23, 24 (2015) (emphasis in original). *See also* John Whitehead & Jurgen Herbst, *How to Think about the Dartmouth College Case*, 26 HIST. ED. Q. NO. 3, 333 (1986). I am very grateful to my colleague David Rabban, who is working on what will undoubtedly be an important book on the legal regulation of higher education, for encouraging me to look more deeply at the issues raised by *Dartmouth College*.

60. Thomas, *supra* note 59, at 28.

having granted the Charter, but in consequence of having made the first endowment."[61]

Dartmouth was certainly no less ambiguous (unlike, say, Brown, Princeton or Rutgers, apparently), perhaps akin to the duck-billed platypus in melding characteristics that we would otherwise keep apart in classifying species. Indeed, James Madison, in *Federalist* 37—sadly ignored relative to *Federalist* 10 or 51, let alone every lawyer's favorite, *Federalist* 78 (written by Hamilton)—emphasized the truly slippery nature of language and the sheer fatuity of believing that the Constitution, or the law more broadly, necessarily spoke with unequivocal clarity in its use use of master concepts.[62] This would certainly include the "public-private" distinction.[63] The central ideological issue was the extent to which "public" schools should continue being highly sectarian, as was Dartmouth with regard to their sense of mission or, indeed, to the requirements that faculty subscribe, as was the case at William and Mary and the 39 Articles of Faith of the Anglican Church. But legislative actions dissolving these de facto "establishments" of religion required identifying the colleges in question, like Dartmouth, as sufficiently "public" to justify state legislation affecting their original sectarian charters. The Supreme Court of New Hampshire held that Dartmouth was indeed a "public" corporation and thus, subject to modification in the public interest, as determined by the legislature.[64] Webster's intervention, plus Marshall's manipulation of constitutional meaning, changed everything.

Justice John Marshall presents Dartmouth as unequivocally private. Indeed, the case is often treated as an important endorsement of the all-important autonomy of such institutions as a part of civil society that is free from state control. Perhaps that is a good thing, politically. But Justice Story himself, in his concurring opinion, notes that Dartmouth received property at its foundation from the states of Vermont and New Hampshire. It, too, could easily be regarded as a joint venture between the states and the religious groups that saw the College as an instrument of reinforcing the faith.[65] It would have been quite easy to describe Dartmouth as sufficiently "public" to be subject to at least "reasonable" revisions of its charter by the State, or, similarly, that it would been equally easy to describe the Bank as sufficiently "private" to be subject to at least "reasonable" and non-

61. *Id*. at 30.
62. The Federalist No. 37 (James Madison).
63. *See* Jack M. Balkin, *Nested Oppositions*, 99 Yale L.J. 1669 (1990).
64. Trs. of Dartmouth Coll. v. Woodward, 63 N.H. 473 (1819).
65. *See* Thomas, *supra* note 50, at 24. Thomas emphasizes that

> [t]he distinction between 'public' and 'private' educational institutions does not accurately capture the American colleges in existence in the late eighteenth and early nineteenth centuries. On the contrary, the majority of such educational institutions are best characterized as 'church-state' schools forged in an era when the church and state were not separated.

Id. One must never forget when thinking of the American constitutional order of the famous opening line of L. P. Hartley's famous opening line in *The Go Between,* "The past is a different country; they do things differently there."

discriminatory state taxation. As Thomas concludes, "Dartmouth College may have had some claim to be a 'private' institution, though the Supreme Court's opinion could easily have gone the other way." [66] There is simply no "fact of the matter" prior to the performative utterance of the apex Court, in this case of course reversing the state's apex court, that A is X (private) rather than Y (public). One might perceive more than a whiff of "motivated reasoning" or out-and-out political preferences emanating from both *McCulloch* and *Dartmouth College*.

Indeed, Mark Graber has also demonstrated that Marshall's 1821 opinion in *Cohens v. Virginia*,[67] which ultimately upheld Virginia's right to prevent out-of-staters from selling tickets for a lottery chartered by Congress itself, makes little sense, at least doctrinally, when placed next to *McCulloch* II.[68] What may be the crucial factor, however, is that Maryland had pledged to respect the decision of the Court, whereas Virginia might have proved far less compliant. It turned out to be irrelevant that Attorney General William Wirt "condemned the Cohens prosecution as inconsistent with the principles of national supremacy declared in the national bank case."[69] It was far easier, as was Marshall's wont, to "misrepresent[ ] both Virginia and federal law" in order to avoid explaining "why Virginia could ban out-of-state [congressionally chartered] lotteries, but Maryland could not tax out-of-state banks."[70]

But wait, there's more. Along the way, Marshall quite stunningly brushes aside what might be learned from reading *The Federalist,* in this instance *Federalist* 32, concerning what Marshall himself concedes are the undoubtedly concurrent powers of taxation enjoyed by states and the national government alike. Publius—in fact, Alexander Hamilton—readily admits that some "inconvenience" might be generated by such concurrent powers.[71] So what is the solution? The answer, Publius suggests, lies in politics itself, not in the federal judiciary. Such judgments of degree of taxation are "questions of prudence" that might require "reciprocal forbearance" by the respective leaders of state and national governments.[72] There is no suggestion that taxpayers should beseech federal judges for relief or, even more to the point, that judges should be available to resolve such complaints. Mark Graber has definitively refuted Tocqueville's too-often quoted dictum that all American constitutional controversies are ultimately decided by the Supreme Court.[73] Instead, most such controversies, at the very time Tocqueville was writing, were resolved by Congress or some other non-judicial body. However,

66. *Id*. at 38.

67. 19 U.S. (6 Wheat.) 264 (1821).

68. *See* Mark Graber, *The Passive-Aggressive Virtues:* Cohens v. Virginia *and the Problematic Establishment of Judicial Power*, 12 CONST. COMMENT. 67 (1995).

69. *Id*.

70. *Id*. at 70.

71. THE FEDERALIST NO. 32 (Alexander Hamilton).

72. *Id*.

73. *See* Mark Graber, *Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited*, 21 CONST. COMMENT. 485 (2004).

McCulloch II might be proffered as a source for the mistaken general wisdom, inasmuch as Marshall reached out to resolve the case. In fact, he had concluded the very first paragraph of *McCulloch* by asserting, without the slightest citation of support or any other argument, that "by this court alone" can the momentous issues presented by the case be resolved.[74]

McCulloch is in its own way a remarkably Janus-faced, perhaps even schizoid, opinion. Its first part is famous, especially in our generation, for serving as the basis of an extreme version of what came to be called "judicial restraint," especially with regard to Congress. The "necessary and proper cause" (perhaps necessarily and properly) is transformed into a license for congressional display of "minimum rationality" that I long taught as equivalent to deference to "what some nonlunatic might perceive as reasonable." On the other hand, the oft-ignored *McCulloch* II does seem to be a remarkable power grab (or, if you wish, judicial engagement), not simply in its invalidation of Maryland's tax, which would have been easy to do under alternative theories, but more importantly in its facile dismissal of the political process enunciated by Publius in *Federalist* 32.

Perhaps there is a special factor justifying the "legalization" of intergovernmental tax immunities. I once believed that reliance on the political process would be inefficacious inasmuch as Congress only rarely was in session; therefore, taxing the Bank could be viewed as an "emergency" requiring more immediate action than would be the case if one had to wait around for Congress to invalidate any state taxation. In fact, though, I have found no evidence either than such an idea was bruited about or, more importantly, that the taxation served in fact to "destroy" the Bank during the period of its collection by the states. As a theory of judicial power, however, it rests on a notion that the Court, whether or not authorized to act by virtue of what might be termed "standard-model" theory, should feel free to intervene whenever it views the United States as presented with a genuine emergency that, for whatever reason, cannot be resolved in a timely fashion by our ordinary political institutions. One is reminded of Richard Posner's defense of the Court's decision in *Bush v. Gore,* by which its legally dubious *coup de main* shutting down the election count in the 2000 election in Florida was justified as a successful attempt to save the country from a political crisis. Perhaps that's correct. But it also reminds one of Carl Schmitt's (in)famous definition of sovereignty as the power to declare a state of exception.[75] Is one message of *McCulloch* II, perhaps in contrast to *McCulloch* I, that congressional sovereignty can be complemented by judicial sovereignty when needed to save the country from destruction? All that requires, of course, is agreeing on the criteria for destruction.

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74. This is one reason, incidentally, why nothing is lost if students are not assigned *Marbury*. Paragraph one of *McCulloch* alone is enough to generate all the discussion one might want about the role of the Supreme Court as the "ultimate interpreter" of the Constitution.

75. Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty 1 (1922).

CONCLUSION

On occasion, I have asked students what grade they would award—or, perhaps more ominously, would expect me to give—a given opinion of a member of the Supreme Court. I always asked this, for example, with regard to Justice Story's dissenting opinion in *Mayor of New York v. Miln*,[76] where he presents a completely distorted, even dishonest, description of John Marshall's opinion in the seminal case of *Gibbons v. Ogden*.[77] Story proclaims, with both the official authority of a justice and the his impressive private stature as the author of what was already the leading treatise on the United States Constitution and the Dane Professorship at the Harvard Law School, that Marshall had declared that authority to regulate commerce was *exclusively* the province of Congress, not to be shared concurrently with the states. What was true—and *all* that was true—was that Marshall pronounced himself "tempted" to say so, but instead quite explicitly dodged any such declaration by holding instead that New York's law was in fact pre-empted by a coasting regulation passed by Congress in 1795. It was, therefore, unnecessary to reach the vexing question of exclusivity (which, of couse, the Court was ultimately to reject). So I suggested to my students that if they described on their own final exam Marshall's conclusion in *Gibbons* as did Justice Story, I would give them a passing grade, only because they might forgivably have confused Marshall's "temptation" with a "holding." But they certainly would not receive anything more than a D (or at best a C, if I were feeling especially generous).

The question, and my own answer, undoubtedly provoked great anxiety. If Supreme Court opinions themselves cannot be trusted to be accurate in describing prior cases, let alone the facts underlying those cases, and thus display the kind of analytic rigor that is presumably the aim of legal education, then what hope is there for ordinary students? On the other hand, perhaps what is most admirable about legal education is precisely its claim that opinions—or the justices who write them—do not speak with self-evident authority, that they are instead always susceptible to being displaced, at least in the classroom, by the sheer force of more persuasive argument, whatever the prestige of the Court in general or a given justice in particular. We are all equal when it comes to delving into the mysteries encompassed by the term "constitutional interpretation," save perhaps for the particular "modality" of *doctrinalism*, which relies to a sometimes remarkable degree on the authority of precedent, whether well-reasoned or not.

I never fail to be inspired by the concluding paragraph of *Federalist* 14, penned by James Madison: "Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own

76. Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837).
77. 22 U.S. (9 Wheat.) 1 (1824).

situation, and the lessons of their own experience?"[78] Among these "names" subject to being "overrule[d]," of course, for us and our students is John Marshall. Or we might also attend to the words of Andrew Jackson when he vetoed the renewal of the Bank's charter in 1832, addressing the fact that *McCulloch* had unequivocally upheld the constitutionality of Congress's chartering the Bank in 1816. Opinions of the Supreme Court, said Jackson, should have "only such influence as the force of their reasoning may deserve."[79]

So the primary question presented, as we commemorate the 200th anniversary of the most important single judicial opinion in our history, is how much respect "the force of [its] reasoning may deserve." I think the correct answer is not very much, even if we agree, as I do, that the result in *McCulloch* I was correct, as may even have been true with regard to *McCulloch* II. Holmes was correct. Marshall's "greatness" consists not only in being at the right place at an unusually propitious time, for both himself and for the nation, but also in the degree to which he has been the beneficiary of the fact that most historians of the Court, whether United States senators like Albert Beveridge or even modern professional historians, continue to be bewitched by Marshall. Perhaps it is time to break the spell.

78. The Federalist No. 14 (James Madison).

79. Andrew Jackson, Veto Message Regarding the Bank of the United States (1832), *available at* https://avalon.law.yale.edu/19th_century/ajveto01.asp [https://perma.cc/7DRW-XXMG].