Statutory Jurisdiction and Constitutional Orthodoxy in *McCulloch*, *Cohens* and *Osborn*

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ABSTRACT

This essay examines the underappreciated element of statutory jurisdiction in McCulloch v. Maryland, Cohens v. Virginia*, and* Osborn v. Bank of the United States. *One objective is to identify more precisely the Marshall Court's jurisdictional innovations in these three foundational decisions. A close look at the question of statutory jurisdiction in the trio of* McCulloch, Cohens*, and* Osborn *reveals a kind of constitutional magnetism at work. In constitutional avoidance, a court adopts an interpretation in order to stay away from a constitutional problem. In contrast, the Marshall Court in* Cohens *and* Osborn *expanded the jurisdictional statutes at issue in order to conform to a constitutional vision of the Supreme Court's role as set forth in* McCulloch. *The jurisdictional maneuvering in that case likely brought to the Court's attention the statutory jurisdictional gaps that the Court filled by construction in* Cohens *and* Osborn.

Part I discusses McCulloch v. Maryland *with particular attention to its jurisdictional basis. Part II addresses the opposition to* McCulloch *in Virginia and the Supreme Court's answer in* Cohens v. Virginia. *Part III turns to Ohio's opposition and the Supreme Court's response in* Osborn v. Bank of the United States. *A concluding section offers some meditations on* McCulloch *and the maintenance of constitutional orthodoxy.*

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I. THE CURIOUS CASE OF THE FIVE UNSTAMPED BANKNOTES IN *MCCULLOCH V. MARYLAND*

As the Supreme Court's bid to serve as the ultimate locus of interpretive authority in resolving constitutional questions open to resolution in a judicial forum, *McCulloch v. Maryland* elicited responses that highlighted the inadequacies of existing jurisdictional rules. In particular, the Court needed a way to decisively maintain preeminence over state legislatures in the competition for ultimate authority. However, these kinds of problems were not in the foreground when the Supreme Court sat in February 1819 to hear arguments in *McCulloch v. Maryland*. After all, Maryland had colluded with the Bank to bring the case before the Supreme Court for review. Far from competing with Maryland's legislature for ultimate interpretive authority, Maryland's authorities presupposed the Court's authority and contrived their case against the Bank to obtain its exercise.

The Maryland tax law required covered banks to purchase stamps for their banknotes or pay a lump sum of $15,000. The Baltimore branch of the Second Bank of the United States refused to comply. This exposed the Bank and its officers to penalties under the law, including a penalty of $500 for each unstamped banknote issued. For its part, Maryland faced potential enforcement difficulties related to proof about the in-state issuance of any particular banknote because the Bank had branches in other states. As the outgoing Governor explained in a December 1818 address to the legislature, this state of affairs gave rise to an "amicable arrangement" to obtain Supreme Court resolution:

> The bank, . . . having early determined to stand a suit, negotiations were entered into, and as it professed a sincere desire to bring the question of constitutional right before the legal tribunals of the country, (to which their right to resort was unquestionable,) and to wave [sic] at once all legal delays, and carry it to the highest appellate jurisdiction, the Supreme Court of the U. States, an amicable arrangement was entered into.[1]

To carry out this contrivance, the State's Treasurer of the Western Shore, John James, brought a qui tam enforcement "action of debt" against the Baltimore branch's cashier, James M'Culloh. James sought to recover a $500 penalty for each of five unstamped banknotes. The Baltimore county court ruled for the state. M'Culloh appealed to the court of the appeals "for the western shore . . . upon a

1. *Executive Communication to the Legislature*, MD. GAZETTE AND POL. INTELLIGENCER (Dec. 17, 1818), https://msa.maryland.gov/megafile/msa/speccol/sc4800/sc4872/001288/html/m1288-0424.html [https://perma.cc/6PKW-ZHS6].

case stated, so as to rest the question upon the constitutionality of the act. A decision in favour of the state was there had by consent, and the appeal carried up to the supreme court of the United States."[2] As it came to the Court, then, a judgment in favor of "the plaintiffs" (John James and Maryland) would be "for $2500, and costs of suit."[3] If the Court were to rule for M'Culloh, by contrast, "judgment of *non pros* shall be entered, with costs to the defendant."[4]

This all seemed straightforward, and everyone came into the Supreme Court expecting the case to be a big one.[5] The Court allowed the parties to have three lawyers argue for each side, instead of the usual two.[6] The arguments themselves proceeded for several days.

Chief Justice Marshall issued his opinion for the Court on March 6, just three days after the conclusion of arguments. The entire opinion is a bold bid for ultimate interpretive authority. Marshall's opening paragraph radiates a quiet confidence in the firmness of the constitutional ground upon which the Court stood in exercising such authority:

> In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it 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. On the supreme court of the United States has the constitution of our country devolved this important duty.[7]

Every sentence of this paragraph is charged with significance. But for the purpose of trying to understand when the Court should have appreciated the fragility of its jurisdictional grasp, we should dwell a bit on the final sentence.

Notice first how Marshall frames the Court as a passive recipient of a duty from "the constitution of our country." He spells out elsewhere the connection between the existence of a single body politic ("We the people") and the Court's claim to ultimate interpretive authority. The two issues are deeply connected. A

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2. *Id*. Scholars have been unable to locate an opinion of either of the Maryland courts. It may be because none exist, just the judgments.
3. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 320 (1819).
4. *Id*.
5. *See* MARK R. KILLENBECK, M'CULLOCH V. MARYLAND: SECURING A NATION 95–96 (2006).
6. *Id*. at 96–97.
7. *Id*. at 400–01.

single country—in contrast with a confederation—cannot tolerate a plurality of interpreters claiming ultimate interpretive authority over a legal instrument that creates a government of a single people. Marshall does not connect all the dots in his first paragraph, but his use of "our country" in the final sentence lays the foundation for this crucial argument.

Unfortunately, Marshall's claim that the Constitution entrusts the duty to peacefully resolve a conflict between federal and state laws to the Supreme Court alone is incomplete. Article III does extend the judicial power of the United States to all cases arising under the Constitution. Accordingly, Maryland and the Bank had contrived a "case" that fit this description. However, the case they developed came to the Court via its appellate jurisdiction. This arrangement presented two potential problems, apparent when one considers Article III, Section 2, Clause 2:

> In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.[8]

The first was that the Distribution Clause places state-party cases in the Supreme Court's original jurisdiction. Previously, in *Marbury v. Madison*, the Court had suggested that the Distribution Clause's categories were mutually exclusive; cases placed in the original jurisdiction could not be heard in the Court's appellate jurisdiction, and vice versa.[9] This was only dictum in *Marbury*, and the issue never arose in *McCulloch*. That inattention is understandable, given that the entire objective for the parties was to obtain Supreme Court resolution. But the Court would have to confront the Distribution Clause eventually.

The second problem was the Exceptions and Regulations Clause. Even if *McCulloch* properly fit within the Court's appellate jurisdiction, that jurisdiction was subject to any exceptions or regulations made by Congress. Section 25 of the Judiciary Act of 1789 was the statutory basis for jurisdiction in *McCulloch*. But not all the exceptions and regulations governing the exercise of that jurisdiction were set forth explicitly in that section. Some regulations from Section 22 (governing Supreme Court review of federal circuit court decisions) were incorporated by reference into Section 25. The import of these regulations for the development of the Supreme Court's statutory jurisdiction has largely remained obscure. But we can begin to appreciate them by asking a question nobody seems to have asked: When the parties to *McCulloch v. Maryland* contrived their case,

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8. U.S. CONST. art. III, § 2

9. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) ("If Congress remains at liberty to give this court appellate jurisdiction where the Constitution has declared their jurisdiction shall be original, and original jurisdiction where the Constitution has declared it shall be appellate, the distribution of jurisdiction made in the Constitution, is form without substance.").

why did they set it up as a dispute over five unstamped banknotes? Why not one, two, or ten? Why five?

To answer this question, we must think like lawyers from 1818 and examine the jurisdictional statute carefully. Section 25 required the Supreme Court to conduct a review of the state-court decisions covered by that section "in the same manner and under the same regulations . . . as if the judgment or decree complained of had been rendered or passed in a [federal] circuit court. . . ."[10] Supreme Court review of federal circuit court decisions, in turn, is governed by Section 22. And that Section provides that appellate review was only available when "the matter in dispute exceeds the sum or value of two thousand dollars . . . ."[11]

The parties' agreement on $2,500 as the amount in controversy suggests that the lawyers operated under the belief that Section 25's "under the same regulations" language incorporated Section 22's amount-in-controversy regulation. In a qui tam suit against the Bank's cashier for a statute with penalties in $500 increments, a suit for $2,500 was the smallest amount that would satisfy this amount-in-controversy requirement. Far from being understood as an all-purpose instrument for reviewing questions of federal law decided adversely to federal interests by state courts, Section 25 review, then, was thought (at least by these parties) to be limited to civil controversies involving more than $2,000 in controversy.

This was a previously recognized limitation of Supreme Court review of state-court decisions adverse to federal rights. In 1814, Treasury Secretary Alexander Dallas sought legislation authorizing removal of certain actions against federal revenue officers from state courts into federal courts. In explaining why existing legal protections were inadequate, Dallas matter-of-factly asserted that Supreme Court appellate review via writ of error was limited because "the matter in dispute must exceed the value of two thousand dollars, exclusive of costs."[12]

It was easy enough to make the Bank case fit into this framework. Once again, though, the collusive nature of the litigation obscured this potential limitation on the Supreme Court's ability to maintain ultimate interpretive authority. As with the Distribution Clause, the Court would eventually have to reckon with this amount-in-controversy problem.

At this point, it is useful to speculate as to how Marshall's internal understanding about the Court's jurisdiction under Section 25 may have been in tension with the breadth of his claims about the duty devolved by the Constitution on the Supreme Court to resolve this case. Marshall asserted that the Constitution, "in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great

10. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73 (1789).

11. Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73 (1789).

12. *See* Letter from A.J. Dallas to J.W. Effes (Nov. 19, 1814), *in* 2 AMERICAN STATE PAPERS (FINANCE), 1802–1815, 881–82 (Walter Lowrie & Matthew St. Clair Clarke eds. 1832).

operations of the government."[13] When it comes to the amount-in-controversy limitation seemingly incorporated into Section 25 from Section 22, what did Marshall know or believe, and when did he know or believe it? Keeping these questions in mind will enable us to evaluate Marshall's jurisdictional moves in the wake of *McCulloch*.

These questions regarding a seemingly minor jurisdictional matter may seem somewhat obscure given the traditional focus on *McCulloch* as a case about the scope of Congress's implied powers and implied immunities on state power. Those holdings were indeed ones that drew immediate and sustained opposition from states' rights theorists and opponents of the Second Bank. As we will see, though, the way that Marshall ultimately navigated that opposition judicially involved expansive construction of statutory jurisdictional grants.

The next two sections trace the two big battles over *McCulloch* in Virginia and Ohio. These battles were fought on different terrains, with the Court's critics focusing on different aspects of the Court's decision in *McCulloch*. Each led to landmark decisions in federal jurisdiction: *Cohens v. Virginia* and *Osborn v. Bank of the United States*.

II. WOKE VIRGINIA AND THE COHEN BROTHERS

Justice Marshall's opinion for the Court in *McCulloch* on March 6, 1819, quickly unleashed a torrent of opposition among leading states' rights theorists in his home state of Virginia and home city of Richmond. This section first describes the dueling newspaper essays that pitted Marshall against forces led by Spencer Roane. It then addresses Marshall's decision for the Court in *Cohens v. Virginia*, in which he was able to respond judicially to Virginia through a claim of jurisdictional supremacy.

A. The Newspaper Essays

On March 23, Richmond Enquirer editor Thomas Ritchie republished *McCulloch v. Maryland,* along with an editorial call to defend states' rights:

> We solemnly beg the attention of all classes of readers to the important and alarming opinion of the Supreme Court of the United States on the National Bank. We beseech most particularly the attention of those firm Republicans of the Old School; of those who in '98, resisted the federal doctrines, which gave birth to the alien and sedition laws, and who still rally round the banners of the constitution, defending the rights of the state against federal usurpation. . . .[14]

Having recently returned to Richmond from the Supreme Court's term in Washington, Marshall immediately knew what he and the Court were up against.

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13. *McCulloch*, 17 U.S. at 400.

14. Thomas Ritchie, Editorial, *Opinion of the Supreme Court*, RICHMOND ENQUIRER, Mar. 23, 1819, at 3.

Writing to his junior colleague Joseph Story the next day, Marshall observed that his *McCulloch* opinion had "roused the sleeping spirit of Virginia—if indeed it ever sleeps. It will I understand be attacked in the papers with some asperity; and as those who favor it never write for the publick it will remain undefended & of course be considered as damnably heretical."[15]

Marshall foresaw correctly. Over the spring and summer, three sets of pseudonymous newspaper essays in Virginia attacked *McCulloch*. Following these challenges, Marshall responded in two sets of his own pseudonymous essays.

Writing under the name Amphictyon, William Brockenbrough began the onslaught when he authored two essays published in the *Enquirer* on March 30 and April 2. Early on, Brockenbrough framed the constitutional issues in party terms. The subject of *McCulloch*, wrote Brockenbrough, "is one which has, perhaps more than any other, heretofore drawn a broad line of distinction between the two great parties in this country."[16] Lest it be overlooked, he noted that Marshall had "employed his thoughts, his tongue, and his pen, as a politician, and an historian, for more than thirty years" in addressing issues of federal power and states' rights.[17] Against "some of the doctrines maintained by the supreme court," Brockenbrough sought "to oppose to their adjudication some of the principles which have heretofore been advocated by the republican party in this country."[18] He cited fifteen paragraphs from James Madison's 1799 report for a committee of the Virginia House of Delegates, which was elicited in connection with opposition to the Alien and Sedition Acts. Brockenbrough's focus was on the third resolution of this report, including its defense of the right of states "to interpose, for arresting the progress of the evil," when there has been a "deliberate, palpable, and dangerous exercise" of powers not granted to the federal government.[19]

Brockenbrough's second Amphictyon essay trained fire on *McCulloch*'s "enlarged" or "liberal" construction of the Necessary and Proper Clause.[20] In contrast with Ohio, where the congressional power to create a bank corporation was not contested, but the opinion's tax holding was, Brockenbrough took no issue with the tax holding of *McCulloch*.[21] He was also willing to acquiesce in the constitutionality of the Second Bank itself. His problem, however, was with the "principles" and the "consequences of the principles" on which the Bank's

15. Letter from John Marshall to Joseph Story (Mar. 24, 1819), *in* 8 THE PAPERS OF JOHN MARSHALL, 280 (Charles Hobson ed. 1995).

16. William Brockenbrough, *A Virginian's "Amphictyon" Essays*, *in* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 52, 54 (Gerald Gunther ed., 1969).

17. *Id.*

18. *Id.*

19. *Id.* at 59.

20. *Id.* at 73.

21. *Id.* at 76. ("If the Bank law be constitutional law, or if it be acquiesced in as such, it seems to follow that the states cannot forbid the establishment of one in their territory, nor expel it; and I think the conclusion drawn by the court is at least feasible, that it cannot be taxed."); *id.* at n.* ("On this proposition however I have not bestowed much reflection, and should be glad to see the arguments of the counsel for the State of Maryland on it.").

constitutionality was decided. He therefore concluded with a call for the Virginia legislature to "do her duty" by passing resolutions in opposition to *McCulloch*.[22]

At the same time that Brockenbrough was writing his essays, Marshall was writing to his colleague, Bushrod Washington. He ascribed opposition to *McCulloch* to the "[g]reat dissatisfaction" of "the politicians of Virginia."[23] They had no problem with the outcome, Marshall asserted, and "would probably have been seriously offended with us had we dared to have decided otherwise, but they required an obsequious, silent opinion without reasons."[24] This reasoning was not just incorrect, but "heretical" and "pronounced most damnable."[25] Marshall predicted that "[w]e shall be denounced bitterly in the papers," and "shall undoubtedly be condemned as a pack of consolidating aristocratics."[26] As in his March 24 letter to Story, Marshall bemoaned that nobody would rise to the Court's defense; the legislators who enacted the Bank law and the executive who put it into operation would "escape with impunity" because they "have power & places to bestow," while the "poor court who have nothing to give & of whom nobody is afraid, bears all the obloquy of the measure."[27]

In response to Amphictyon, Marshall wrote, and arranged for Bushrod Washington to place for publication in Philadelphia's *Union* newspaper, two essays under the name, "A Friend of the Union." As in his letters to Story and Washington, Marshall invoked an awakened spirit: "A spirit which was supposed to have been tranquillized by a long possession of the government, appears to be resuming its original activity in Virginia."[28] He attributed opposition to political ambition.[29] And he spoke directly in terms of constitutional orthodoxy and heresy: "[I]t behoves [sic] not only the friends of the Bank, but the friends of the constitution, the friends of Union, to examine well the principles which are denounced as heretical, and those which are supported as orthodox."[30] Marshall first answered the criticisms that the Justices' opinions should have been delivered seriatim, as well as that the Court traveled out of the case to opine extrajudicially on the source of the powers delegated to the federal government.[31] He then

22. *Id*. at 77.

23. Letter from John Marshall to Bushrod Washington (Mar. 27, 1819), *in* 8 THE PAPERS OF JOHN MARSHALL DIGITAL EDITION, 281 (Charles Hobson ed., 1995).

24. *Id*. Marshall was probably taking a cue here from Ritchie's opening editorial on March 23, which said "[i]t is not the bank; it is not the tax upon the bank; but it is the *ground*, on which the constitutionality of the bank is maintained, which excites so much and curious and anxious consideration." Ritchie, *supra* note 14, at 3.

25. *Id*.

26. *Id*.

27. *Id*.

28. John Marshall, *A Friend to the Union*, *in* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 78, 78 (Gerald Gunther ed., 1969).

29. *See id*. ("The decision of the Supreme Court in the case of McCullough against the state of Maryland has been seized as a fair occasion for once more agitating the publick mind, and reviving those unfounded jealousies by whose blind aid ambition climbs the ladder of power.").

30. *Id*. at 79.

31. *Id*. at 79–82.

defended the Court's statements that the federal government "is emphatically and truly a government of the people," and "in form and in substance emanates from them."[32]

Marshall's second essay responding to Amphictyon begins with an extensive examination of Amphictyon's criticisms and the Court's reasoning regarding the scope of Congress's implied powers. Near the end, Marshall returned to a defense of having issued a detailed opinion for the Court rather than having simply acquiesced in the passage of time or Congress's judgment of necessity and propriety. Rather than hide behind "judicial modesty," Marshall contended that the Court, as a matter of honor, duty, and truth, should not have insinuated the possibility that Congress may have violated the Constitution if that was not in fact their opinion. For a Court that was "unanimously and decidedly of opinion that the law is constitutional," Marshall wrote, "[i]t was incumbent on them to state their real opinion and their reasons for it."[33]

The same day that his second *Union* essay appeared in print in Philadelphia, April 28, Marshall wrote a letter to Story about opposition to *McCulloch* in Virginia that included the religious rhetoric of sin and mercy, as well as a specific attribution of motive:

> The opinion in the Bank case has brought into operation the whole antifederal spirit of Virginia. Some latent feelings which have been working ever since the decision of Martin & Hunter have found vent on this occasion, & are working most furiously. The sin of the court is thought much more h[ei]nou[s] than that of Congress or the President. The offence would have been equally great had we pronounced the law unconstitutional. They would have been more merciful had we said simply that it was for the legislature to decide on the necessity & not for the court &c.[34]

At some point around this time, Marshall learned that the *Union* editor had mangled the ordering of his essays, so that they were published with paragraphs and columns in the wrong places. In a May 6 letter to Bushrod Washington, he supplied a detailed set of instructions for putting the pieces back together properly. In explaining why he wished to have them rearranged and republished in an Alexandria paper, he referred to the need to have a publicly released defense of the Court's opinion, as "[a] very serious effort is undoubtedly making to have it taken up in the next legislature."[35] Further, "it is said that some other essays written by a very great man are now preparing and will soon appear."[36]

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32. *Id*. at 84.

33. *Id*. at 105.

34. Letter from John Marshall to Joseph Story (Apr. 28, 1819), *in* 8 THE PAPERS OF JOHN MARSHALL 309–10 (Charles Hobson ed., 1995).

35. Letter from John Marshall to Bushrod Washington (May 6, 1819), *in* 8 THE PAPERS OF JOHN MARSHALL 311 (Charles Hobson ed., 1995)

36. *Id*.

This man was Spencer Roane, a judge of the Virginia Court of Appeals and a states' rights theorist. Roane had led Virginia's judicial opposition to the Supreme Court's first ruling on the Fairfax land ownership dispute, which the Supreme Court later resolved in *Martin v. Hunter's Lessee*. He authored four essays which appeared in the Richmond Enquirer under the pen name "Hampden" between June 11 and June 22.

These essays confirmed Marshall's speculations and fears which he expressed in a May 27 letter to Story. He wrote:

> The opinion in the Bank case continues to be denounced by the democracy in Virginia. An effort is certainly making to induce the legislature which will meet in December to take up the subject & to pass resolutions not very unlike those which were called forth by the alien & sedition laws in 1799.[37]

He described the effort as one to excite ferment so that sister states would join with Virginia in denouncing the Court. Although some of the criticisms were "too palpably absurd for intel[l]igent men," this did not mean that they would not succeed in some measure, for "prejudice will swallow anything." Marshall's primary fear was that "[i]f the principles which have been advanced on this occasion were to prevail, the constitution would be converted into the old confederation."[38] Of his newspaper responses to Amphictyon, Marshall told Story that "[t]he piece to which you allude was not published in Virginia . . ." and "[o]ur patriotic papers admit no such political heresies."

This religious-dispute framing continued on the opposition side, as well. *Enquirer* editor Thomas Ritchie preceded the first of Roane's Hampden essays with an editorial note describing the Supreme Court of the United States as "a tribunal of great and commanding authority; whose decisions, if not received as 'the law and the prophets,' are always entitled to the deepest attention."[39] Of Marshall, Ritchie wrote, "[t]o the presiding Justice of that court, we are always ready to pay that tribute, which his great abilities deserve—but no tribunal, however high, no abilities, however splendid, ought to canonize the opinions which are advanced."[40]

Roane's opening essay adopted a similar tone. "I shall not hesitate to speak with the spirit of a freeman," he wrote.[41] "I shall not be over-awed by the parasites of a government gigantic in itself, and inflated with recent victories."[42] Roane criticized the "apathy" and "torpor" of his fellow citizens, and he

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37. Letter from John Marshall to Joseph Story (May 27, 1819), *in* 8 THE PAPERS OF JOHN MARSHALL313, 314 (Charles Hobson ed., 1995).

38. *Id.*

39. Thomas Ritchie, *Introduction* to Spencer Roane, *Hampden I*, *in* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 106, 106 (Gerald Gunther ed., 1969).

40. *Id.*

41. Spencer Roane, *Hampden I*, *in* JOHN MARSHALL'S DEFENSE *OF MCCULLOCH V. MARYLAND* 107, 112 (Gerald Gunther ed., 1969).

42. *Id.*

condemned them for being "sodden in the *luxuries* of banking" in place of "that noble and magnanimous spirit which achieved our independence."[43] Adopting the mantle of prophet, Roane lamented:

> A money-loving, funding, stock-jobbing spirit has taken foothold among us. We are almost prepared to sell our liberties for 'a mess of pottage.'—If Mason or Henry could lift their patriot heads from the grave, while they mourned the complete fulfilment of their prophecies! [T]hey would almost exclaim with Jugurtha, 'Venal people! you will soon perish, if you can find a purchaser.'"[44]

In describing the authorities on which he would be relying, Roane referred to the authors of *The Federalist* as having been "eulogised by the Chief Justice, in his life of Washington, for their talents and love of union; and by the Supreme Court, in the opinion before us."[45] Roane said he would also cite as authority "the celebrated report to the legislature of Virginia, in the year 1799," a work which has "often been called by an eloquent statesman [John Randolph],—his political bible."[46] This report "was the *Magna Charta* [sic] on which the republicans settled down, after the great struggle in the year 1799. Its principles have only *been departed* from since . . . by turn-coats and apostates."[47] For his conclusion to this first essay, Roane drew from both the Book of Samuel and the Book of Revelation: "I am provided with a sling and a stone, but I fear the inspiration will be wanting. I consider that opinion [*McCulloch*] as the '*Alpha* and *Omega*, the beginning and the *end*, the first and the *last*—of federal usurpations.'"[48]

Roane's second essay was published June 15. This essay was more substantive and less vituperative than the first. Two days later, Marshall wrote to Bushrod Washington that "[t]he storm which has been for some time threatening the Judges has at length burst o[n] their heads & a most serious hurricane it is. "[49] He did not name Roane as the author, but did not need to, stating that "[t]he author is spoken of with as much confidence as if his name was subscribed to his essays."[50] Marshall explained his concern, writing, "I find myself more stimulated on this subject than on any other because I [believe] the design to be to injure the Judges & [impair] the constitution."[51] This threat prompted him to formulate a plan to respond with another round of pseudonymous newspaper essays. He instructed Justice Washington that he would send these for publication in the Alexandria

43. *Id.*
44. *Id.* at 112–13.
45. *Id.* at 113.
46. *Id.*
47. *Id.*
48. *Id.* at 114.
49. Letter from John Marshall to Bushrod Washington (June 17, 1819), *in* 8 THE PAPERS OF JOHN MARSHALL DIGITAL EDITION 313 (Charles Hobson ed., 1995).
50. *Id.* at 313–14.
51. *Id.* at 314.

paper in successive numbers, but that the first was not to be published until he had sent the last of them.[52]

Roane's third and fourth essays appeared on June 18 and June 22. These continued in a similar vein as the first two. Picking up on a theme that appeared in his first essay, Roane pointed to the amendment process as the only way of remedying defects in the Constitution. He wrote:

> [T]he great fault of the present times is . . . in considering the constitution as perfect. It is considered as a nose of wax, and is stretched and contradicted at the arbitrary will and pleasure of those who are entrusted to administer it. It is considered as *perfect*, in contravention of the opinion of those who formed it. Their opinion is greatly manifested, in the ample provisions it contains for its amendment. It is so considered in contravention of every thing that is human: for nothing made by man is perfect.[53]

Roane's fourth essay was devoted primarily to a discussion of the nature of the federal government as proceeding from a compact among the states and the impermissibility of the Supreme Court exercising jurisdiction in a dispute between the federal and state governments. "If one of the states should differ from the United States, as to the extent of the grant made to them, there is *no* common umpire between them, but the *people*."[54] Summing up his main charges near the end, Roane wrote:

> I have shewn, or endeavored to shew, that the supreme court has erroneously decided the actual question depending before it: that it has gone far beyond that question, and in an extrajudicial manner established an *abstract* doctrine: that they have established it in terms so loose and general, as to give to congress an unbounded authority, and enable them to shake off the limits imposed on them, by the constitution: I have also endeavored to shew that the supreme court has, without authority, and in the teeth of great principles, created itself the *exclusive* judge in this controversy. I have shewn that these measures may work an entire change in the constitution, and destroy entirely the state authorities.[55]

Appealing to the "force of public opinion" to "calmly rectify the evil," Roane ended on a low note, stating that "[s]uch is the torpor of the public mind, and such the temper of the present times," that "[i]t would require more than the pen of Junius, and all the patriotism of Hampden, to rouse our people from the fatal coma which has fallen upon them."[56]

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52. *Id*. Clearly still bothered by the mix-up with his earlier essays, Marshall noted "[a]s the numbers will be marked I hope no mistake will be made by the printer & that the manuscript will be given to the flame."

53. Roane, *supra* note 41, at 130.

54. *Id*. at 149.

55. *Id*. at 153–54.

56. *Id*. at 154.

Near the end of June, Marshall wrote to Washington that he hoped the publication of his essays would begin and that he wanted to change the name to "A Constitutionalist." He worried that "A Friend of the Constitution" was too similar to "A Friend of the Union," such that it would raise suspicions of identity.[57] Marshall noted that "[t]he letters of Amphyction [sic] & of Hampden have made no great impression in Richmond but they were designed for the country & have had considerable influence there."[58] He asked for a few sets of the papers because he wanted "the refutation to be in the hands of some respectable members of the legislature as it may prevent some act of the assembly [that is] silly & wicked."[59]

Marshall's nine "A Friend of the Constitution" essays appeared in the Alexandria Gazette between June 30 and July 15. From beginning to end, Marshall made clear that the attack on the judiciary should be perceived as an attack on the Constitution for the purpose of returning to a confederation form of government.

> If it be true that no rational friend of the constitution can wish to expunge from it the judicial department, it must be difficult for those who believe the prosperity of the American people to be inseparable from the preservation of this government, to view with indifference the systematic efforts which certain restless politicians of Virginia have been for some time making, to degrade that department in the estimation of the public.[60]

He compared the leaders of this plan to "skilful [sic] engineers" who "batter the weakest part of the citadel, knowing well, that if that can be beaten down, and a breach effected, it will be afterwards found very difficult, if not impracticable, to defend the place."[61] They targeted the judiciary because it was the weakest: "The judicial department, being without power, without patronage, without the legitimate means of ingratiating itself with the people, forms this weakest part; and is, at the same time, necessary to the very existence of the government, and to the effectual execution of its laws."[62] Answering Roane's charge that latitudinary constructions of the Constitution by the Supreme Court amount to a new mode of amendment, Marshall flipped the charge around:

> It is not less possible that the constitution may be so expounded by its enemies as to become totally inoperative, that a new mode of amendment, by way of reports of committees of a state legislature and resolutions thereon, may pluck from it power after power in detail, or may sweep off the whole at once by

57. Letter from John Marshall to Bushrod Washington (June 28, 1819), *in* 8 THE PAPERS OF JOHN MARSHALL DIGITAL EDITION 317 (Charles Hobson ed., 1995).

58. *Id*.

59. *Id*.

60. John Marshall, *A Friend of the Constitution*, *in* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 155, 155 (Gerald Gunther ed., 1969).

61. *Id*. at 155–56.

62. *Id*. at 156.

> declaring that it shall execute its acknowledged powers by those scanty and inconvenient means only which the states shall prescribe, and without which the power cannot exist.—Thus, "by this new mode of amendment," may that government which the American "people have ordained and established," "in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity," become an inanimate corpse, incapable of effecting any of these objects.[63]

Marshall was correct that Virginia's General Assembly would make efforts to introduce resolutions to censor the doctrines of *McCulloch*. But these efforts would not take place until the General Assembly met in December.[64] His newspaper wars in Richmond would end months before then. United States Attorney George Hay, writing as Hortensius, wrote three essays criticizing *McCulloch* in late July and early August.[65] But Marshall did not respond. Nor did the eventual General Assembly resolutions amount to much. The House of Delegates passed three critical resolutions, including one that directed Virginia's federal lawmakers to seek a constitutional amendment creating a separate tribunal for deciding disputes between the respective powers of the state and federal governments. But the Senate declined to take them up, reportedly for "lack of time 'to consider and digest' them."[66]

Thus ended the dispute over *McCulloch* in Virginia. But the battle over interpretive authority and the nature of the Union would flare up to an even greater degree soon enough, eventually resulting in the Supreme Court's 1821 opinion in *Cohens v. Virginia* and another set of newspaper essays by Roane.

B. Cohens v. Virginia

The next phase in Virginia's contest with the Supreme Court over constitutional orthodoxy came quickly. The Supreme Court, via writ of error, reviewed the judgment of a Virginia state court regarding a criminal prosecution for selling lottery tickets.[67]

The Cohen brothers, Felix and Mendes, had been prosecuted for selling tickets for the federally authorized Grand National Lottery without Virginia's permission. This situation seems to have been a test case of sorts; as in *McCulloch*, the parties agreed on the case. The Cohens acknowledged that they were guilty under Virginia's law but argued that they had complete protection from state prosecution because their tickets were authorized by Congress, and therefore, the state

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63. *Id.* at 160.

64. Charles Hobson, *Editorial Note* to 8 THE PAPERS OF JOHN MARSHALL 282, 286 (Charles Hobson ed., 1995).

65. *Id.*

66. *Id.*

67. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 375 (1821).

had no authority to interfere.[68] The state court rejected this argument and fined the Cohen brothers fifty dollars each.[69] The case progressed to the Supreme Court.[70]

At the Supreme Court, the Cohens' merits claim was overshadowed by jurisdictional arguments. Virginia's receipt of the summons ordering it to appear at the Supreme Court and to defend its prosecution of the Cohens sparked a hot public debate over the Supreme Court's authority to call a state to answer before that tribunal. The jurisdictional stakes were high. The debates included echoes of *Chisholm v. Georgia*, as anti-jurisdiction forces invoked the Eleventh Amendment. Even fresher in the memory of both sides was *Martin v. Hunter's Lessee*. That case resulted after the Virginia Court of Appeals, just five years earlier, had refused to follow a Supreme Court decision on remand, contending that the Supreme Court had no authority to tell Virginia's highest court what to do, even on questions of federal law. *Cohens* was to reprise this aspect of *Martin*, now in the inflamed context of the Court's *McCulloch* decision.

Given this background, *Cohens v. Virginia* became one of the most controversial cases decided by the Supreme Court under Chief Justice John Marshall. It is also one of the most important and enduring. Written in broad, bold strokes, Chief Justice Marshall's opinion for the Court in *Cohens* held—in the face of vehement opposition outside the Court—that Article III of the Constitution authorizes Supreme Court appellate review of state criminal prosecutions that fit within Article III's extension of the federal judicial power to cases that arise under federal law.[71]

After reciting the procedural history of the case, Chief Justice Marshall's opinion for the Court opens his analysis in *Cohens v. Virginia* with a paragraph echoing many of the themes contained in the opening paragraph of *McCulloch v. Maryland*:

> The questions presented to the Court . . . are of great magnitude, and may be truly said vitally to affect the Union. They exclude the inquiry whether the constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review; and maintain that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made, by a

68. *Id.* at 290, 296, 375. In essence, their argument was that Virginia's law was invalid insofar as it conflicted with supreme federal law. This is the same basic theory that worked in *McCulloch v. Maryland* a couple years earlier and in *Osborn v. Bank of the United States* a few years later. In both of those cases, the Supreme Court held the federally chartered Second Bank of the United States to be immune from state taxes levied on it.

69. *Id.* at 375.

70. A procedural note of interest to which I return later is that the case went from the quarterly session court of Norfolk Virginia directly to the Supreme Court. There was no state appellate court review.

71. *Cohens*, 19.U.S. at 430.

> part, against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the constitution of the United States has provided no tribunal for the final construction of itself, or of the law or treaties of the nation; but that this power may be exercised in the last resort by the Courts of every State in the Union. That the constitution, laws, and treaties, may receive as many constructions as there are States, and that this is not a mischief, or, if a mischief, is irremediable. These abstract propositions are to be determined; for he who demands decision without permitting inquiry, affirms that the decisions he asks does not depend on inquiry.[72]

The entirety of the Court's constitutional analysis should be understood as a direct response to Roane, Brockenbrough, and Marshall's other states' rights critics, such as John Taylor of Caroline County. Marshall skillfully justifies the opinion's level of detailed reasoning, an anticipatory answer to critics standing ready to accuse him once again of traveling outside of the case to address "abstract" matters.

This essay does not undertake a detailed exposition and analysis of all the jurisdictional reasoning in *Cohens*. It suffices here to discuss jurisdictional questions papered over in *McCulloch* by the concurrence of the parties in seeking Supreme Court review, followed by a few key passages in which Marshall continues from *McCulloch* his project of defining and defending constitutional orthodoxy regarding the nature of the Union and the role of the Supreme Court.

The first set of jurisdictional questions addressed in *Cohens* falls under the heading of "whether the jurisdiction of [the Supreme] Court is excluded by the character of the parties, one of them being a State, and the other a citizen of that State?"[73] This issue never arose in *McCulloch v. Maryland* because all the parties, including the State, wanted the Supreme Court to exercise jurisdiction, as did the Court.

Marshall first disposed of the claim that the case between the Cohen brothers and Virginia did not "arise under" federal law because the issue of federal law arose only by way of defense.[74] Marshall then turned to the question of whether to recognize an exception from "arising under" jurisdiction for cases in which a state is a party. Without controverting the general proposition "that a sovereign independent State is not suable, except by its own consent," Marshall reasoned

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72. *Id*. at 376-77.

73. *Id*. at 378.

74. On this point, Marshall stated that "[a] case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either." *Id*. at 379. The enforcement action against Felix and Mendes Cohen did not itself arise under federal law, but their defense, and thus the "case" between them and Virginia, did. In support of this interpretation of Article III, Marshall observed that Section 25 of the Judiciary Act of 1789 was based on such an understanding, in that it provided for Supreme Court review via writ of error in certain cases in which a state court denied a right asserted under federal law, regardless of whether that right was asserted offensively or defensively in state court. *See id*.

that consent "may be given in a general law," and that whether it has been given "depends on the instrument by which the surrender is made."[75]

Next follows an extensive disquisition on the claim that "[t]he American States, as well as the American people, have believed a close and firm Union to be essential to their liberty and to their happiness."[76] Quoting both the Supremacy Clause and the Preamble, Marshall contends that "[w]ith the ample powers confided to this supreme government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the States, which are made for the same purposes."[77] He describes "[t]he powers of the Union, on the great subjects of war, peace, and commerce, and on many others," as "in themselves limitations of the sovereignty of the States. . . ."[78] He then notes that, "in addition to these, the sovereignty of the States is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the constitution."[79] Then follows one of Marshall's most characteristic descriptions of the federal government's and federal judiciary's duties: "The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department."[80] Marshall concludes that the Court is not at liberty to insert a state-party exception into Article III's extension of the judicial power to all cases arising under the Constitution and laws of the United States.[81]

Another issue Marshall had to address was the Distribution Clause: "[I]n all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction."[82] Counsel for Virginia contended that original jurisdiction was the only form of jurisdiction that the Supreme Court could exercise in state-party cases, such as the one presently before the court. In rejecting this claim, Marshall

75. *Id*. at 380.
76. *Id*. at 380-81.
77. *Id*. at 382.
78. *Id*.
79. *Id*.
80. *Id*.
81. *Id*. at 382-83. ("[The judicial department] is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a State may be a party. When we consider the situation of the government of the Union and of a State, in relation to each other; the nature of our constitution; the subordination of the State governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States, is confided to the judicial department; are we at liberty to insert in this general grant, an exception of those cases in which a State may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to that case.").
82. U.S. CONST., art. III, § 2.

needed to confront dicta from *Marbury v. Madison*: "If Congress remains at liberty to give this court appellate jurisdiction where the Constitution has declared their jurisdiction shall be original, and original jurisdiction where the Constitution has declared it shall be appellate, the distribution of jurisdiction made in the Constitution, is form without substance."[83]

Counsel for Virginia trundled out this language in arguing that this was a state-party case in which Congress had purported to give the court "appellate jurisdiction where the Constitution has declared their jurisdiction shall be original."[84] Marshall distinguished *Marbury* and determined that the Distribution Clause's distribution of state-party cases to the Supreme Court's original jurisdiction applied only to those cases in which jurisdiction is given because a State is a party—not to those in which jurisdiction is given because the case arises under the Constitution or laws of the United States.

Virginia also relied on the Eleventh Amendment, which states that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign State."[85] Marshall reasoned, in part, that the amendment "was intended for those cases, and for those only, in which some demand against a State is made by an individual in the Courts of the Union. . . ."[86] He asserted that "no interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its Courts, the constitution and laws from active violation."[87] Marshall further concluded that "the defendant who removes a judgment rendered against him by a State Court into this Court, for the purpose of re-examining the question, whether that judgment be in violation of the constitution or laws of the United States, does not commence or prosecute a suit against the State. . . ."[88]

Another cluster of jurisdictional questions addressed in *Cohens* fell under the contention that the Supreme Court's "appellate power cannot be exercised, in any case, over the judgment of a State Court."[89] The Supreme Court had already rejected this contention in *Martin v. Hunter's Lessee*, but Marshall was recused from that case because of his interest in some of the land at issue. *Cohens v. Virginia* was his opportunity to answer judicially the jurisdictional criticisms of Roane, Brockenbrough, and others, which he had only been able to address extrajudicially in the wake of *McCulloch*.

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83. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).
84. *Cohens*, 19 U.S. at 301.
85. *Id.* at 405-06 (quoting U.S. CONST. amend. XI).
86. *Id.* at 407.
87. *Id.*
88. *Id.* at 412. Marshall added that "should we in this be mistaken, the error does not affect the case now before the Court." The case was a dispute between Virginia and its own citizens and was therefore not a suit commenced or prosecuted "by a citizen of another State, or by a citizen or subject of any foreign State." *Id.*
89. *Id.* at 413.

Marshall opens this section with a soaring affirmation of the unity of the nation and of the American people:

> In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other.[90]

This one government for one people is supreme in effecting the objects within its competence. "The exercise of the appellate power over those judgments of the State tribunals which may contravene the constitution or laws of the United States, is, we believe, essential to the attainment of those objects."[91]

In support of this reasoning from general principles, Marshall draws on contemporaneous exposition from Federalist Nos. 80 and 82, authored by Alexander Hamilton, as well as Section 25 of the First Judiciary Act. He adds that the Supreme Court's prior decisions exercising jurisdiction under Section 25 "have been assented to, with a single exception [Virginia in *Martin*)], by the Courts of every State in the Union whose judgments have been revised."[92] Having isolated his Virginia states' rights critics with this assessment, he concludes that "[t]his concurrence of statesmen, of legislators, and of judges, in the same construction of the constitution, may justly inspire some confidence in that construction."[93]

In a final section of jurisdictional analysis, Marshall rejected Virginia's claim that the case before it did not fall within the Section 25 grant. The version of this argument advanced by Virginia was that the federal law authorizing the Grand National Lottery should be understood as a law for the District of Columbia rather than a federal law within the meaning of Section 25.[94]

In all of this jurisdictional analysis, neither counsel for Virginia nor Marshall nor anybody else addressed the jurisdictional problem that Section 25 did not extend to review of criminal prosecutions (rather than suits). Nor did anyone find it a problem that, even if the case against the Cohen brothers was a "suit" within the meaning of Section 25, the more-than-two-thousand-dollars amount in controversy requirement incorporated from Section 22 had not been met.

I have detailed elsewhere the arguments for this interpretation of Section 25.[95] I will not repeat them here, but I will note that those arguments are reinforced by the construction given to Section 25 by the lawyers who argued the collusive case

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90. *Id*. at 413-14.
91. *Id*. at 415.
92. *Id*. at 420.
93. *Id*. at 421.
94. *Id*. at 424.
95. *See generally* Kevin C. Walsh, *In the Beginning There Was None: Supreme Court Review of State Criminal Prosecutions*, 90 NOTRE DAME L. REV. 1867 (2015) (setting forth arguments for the civil-only interpretation of Section 25 and its incorporation of Section 22's amount-in-controversy requirement).

of *McCulloch v. Maryland*. As noted above, the best explanation for framing the case as about five unstamped bank notes was to ensure compliance with the jurisdictional threshold that they believed to have been incorporated into Section 25 from Section 22.

It would not be until two years after *Cohens*, in *Buel v. Van Ness,* that the Supreme Court would reject the argument that Section 25's "under the same regulations" language incorporates Section 22's amount-in-controversy regulation. That rejection would turn in part, though, on the Court's exercise of Section 25 jurisdiction without reference to the amount-in-controversy requirement in *Cohens*. In his opinion for the Court in *Buel*, Justice Johnson wrote:

> Questions of mere *meum* and *tuum*, are those to which the 22d section relates; but those intended to be provided for by the 25th section, are noticed only for their national importance, and are deemed proper for an appellate tribunal, from the principles, not the sums, that they involve. Practically, we know, that experience has vindicated the foresight of the Legislature in making this distinction.[96]

Whatever its flaws respecting statutory jurisdiction, the constitutional reasoning in *Cohens v. Virginia* was clearly aimed directly at providing a definitive response to the jurisdictional criticisms leveled against the Court by Virginia's states' rights theorists in the wake of *McCulloch v. Maryland*. Not surprisingly, these critics were not mollified. Taking once again to the papers, this time under the pen name "Algernon Sidney," Spencer Roane published a series of newspaper essays critical of *Cohens v. Virginia*.

This essay, which summarizes *Cohens* as offering a jurisdictional response to Roane's and other Virginians' post-*McCulloch* criticisms, is not the place to discuss the details of Roane's responses to *Cohens*. But as we move to consideration of *Osborn v. Bank of the United States* as another jurisdictional response to post-*McCulloch* criticisms—this time, Ohio's—it is worth noting that Ohio's bank-opposition leader Charles Hammond also wrote a series of newspaper essays criticizing *Cohens*. In a quirk of history, these Hammond essays had for a while been mistakenly attributed to Roane because Hammond used the pen name previously used by Roane in criticizing *McCulloch*. Our concern in what follows, however, will be on Hammond's intellectual and political leadership in responding to *McCulloch*.

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96. Buel v. Van Ness, 21 U.S. (8 Wheat.) 312, 323 (1823). *See also id.* 321-22 ("Thirty-four years has this Court been adjudicating under the 25th section of the act of 1789, and familiarly known to have passed in judgment upon cases of very small amount, without having before had its attention called to the construction of the 25th section now contended for.").

III. OHIO'S INJURED INDEPENDENCE AND *OSBORN V. BANK OF THE UNITED STATES*

Unlike in Virginia, which had not imposed a tax on the United States, Ohio had done so just weeks before the Supreme Court's decision in *McCulloch v. Maryland*. The question whether it was both constitutional and expedient to tax the Second Bank of the United States had first come to a head in Ohio in December 1817. This first exploration resulted in a deferral of the question for another time, but the Ohio House formally claimed the right to tax the bank should it decide to do so. The legislature introduced new legislation in December 1818 and passed a $50,000 per branch tax in February 1819.[97]

The Supreme Court handed down the decision in *McCulloch v. Maryland* a few weeks later, on March 6. Some Ohio leaders believed the decision's tax-immunity reasoning to be incorrect, and they decided not to acquiesce. The intellectual leader of Ohio's opposition to the Bank was Charles Hammond, a lawyer and editor then serving in the Ohio house. Hammond expressed the hope that Ohio would "feel enough of the spirit of independence to afford the Judges an opportunity of reviewing their opinions."[98] He wrote, "It is time enough to succumb, when the western states have been heard, and when their rights have been decided upon in a case where they are themselves parties."[99] While defiant in tone, the substance of this statement indicates a willingness to abide by a binding judgment, if one were to be reached. As Ohio's tax collection threatened to ripen into a more convulsive state-federal conflict, Hammond worked with former political and editorial rival James Wilson (grandfather of Woodrow Wilson) to steer "Ohio's opposition into constitutional and legal channels."[100]

The threat was real. As September 15, the date the tax payment was due, approached, neither side seemed to back down. If the payment was not made by this date, Ohio's law authorized the state auditor to hire an agent to collect the tax by going into "every closet, box or drawer in such banking-house to open and search."[101] The Bank's officials did not seem to think Ohio would use this authority. They were mistaken.

On September 17, 1819, armed agents led by a hired gun named John Harper forcibly entered the Chilicothe branch of the Second Bank of the United States and spirited away specie and notes totaling $120,425.[102] Harper and his men acted under the direction of Ohio's auditor, Ralph Osborn. He ordered the tax to be forcibly collected under Ohio's "Crowbar Law" (so called because it authorized forcible entry for collection), even though a federal judge issued an injunction

97. For an account of pre-*McCulloch* events in Ohio, *see* RICHARD E. ELLIS, AGGRESSIVE NATIONALISM 143-51 (2007).

98. Francis Phelps Weisenburger, *A Life of Charles Hammond: The First Great Journalist of the Old Northwest,* 43 OHIO HIST. J. 337, 353 (1934).

99. *Id.*

100. *See* ELLIS, *supra* note 97, at 156 (2007).

101. Weisenburger, *supra* note 98, at 353.

102. ELLIS, *supra*, at 97.

against collection of the tax a few days earlier.[103] This injunction rested on the seemingly solid ground of the recent decision in *McCulloch v. Maryland*. While Harper was transporting the money to the capital in Columbus, the Bank's agents served him with the federal injunction, ordering him to give the money back.[104] Harper ignored it.[105] Next, the Bank sought another injunction against Osborn.[106] By the time they served it, though, Osborn claimed the money was no longer his responsibility because it had been handed over to the State Treasurer.[107]

The Bank's money came to rest only after yet another injunction from the federal circuit court ordering state officials to segregate the funds and make no disposition of them until further order. This federal circuit court injunction was backed up by another injunction later issued by Chief Justice John Marshall. In the meantime, Ohio had paid Harper and his men their collection fee of $2,000 and returned the extra money they had taken—above the $100,000 in taxes due.[108] The federal Bank's money—the $98,000 that remained in Ohio's possession—then sat in a box, untouched, for over four years while a bevy of legal proceedings swirled around it.[109]

In December 1820, a joint committee of the two houses of the Ohio legislature issued an extensive report defending Ohio's continued refusal to return the money to the Bank. This report, primarily authored by Charles Hammond, "was the fullest and most precisely argued justification, in constitutional terms, of Ohio's dispute with the [Second Bank of the United States] and its unwillingness to abide by *McCulloch v. Maryland*."[110]

The Ohio Joint Committee Report included the exact kinds of legislative resolutions that Marshall had attempted to head off in his newspaper essays responding to Amphictyon and Hampden. The Bank's opponents in Ohio drew on the Virginia and Kentucky Resolutions, as well as Madison's Report, when denying that "the Federal Judiciary are the exclusive expositors of the Federal Constitution."[111] While the Ohio Report's reasoning on this point was more extensive and detailed than Roane's or Brockenborough's, it ended in a similar place:

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103. *Id*. The Bank's lawyers had bungled the matter by serving the wrong papers on Osborn; he followed the advice of other Ohio officials and legal counsel that he should collect the tax because he had not been properly served. The lawyers likely erred due to time constraints. The Bank's tax payment was already several months overdue and would become subject to forcible collection on September 15, but the Bank did not seek an injunction until September 14. They simply did not believe that Ohio would enforce its tax in light of *McCulloch*.

104. *Id*.

105. *Id*.

106. *Id*.

107. *Id*.

108. *Id*.

109. *Id*.

110. *Id*. at 162.

111. 37 ANNALS OF CONG. 1693 (1821)

> Resolved by the General Assembly of the State of Ohio, That in respect to the powers of the Governments of the several States that compose the American Union, and the powers of the Federal Government, this General Assembly do recognise and approve the doctrines asserted by the Legislatures of Kentucky and Virginia in their resolutions of November and December, 1798, and January, 1800, and do consider that their principles have been recognised and adopted by a majority of the American people.[112]

By necessity, given the ongoing litigation about the money taken from the Second Bank, the Ohio Report spent much time analyzing an issue that Virginia did not need to address, namely the authority of federal circuit courts over state officers carrying out state duties. The resulting protest resolution stated that the "General Assembly do protest against the doctrines of the Federal circuit court sitting in this State, avowed and maintained in their proceedings against the officers of State upon account of their official acts, as being in direct violation of the eleventh amendment to the Constitution of the United States."[113]

The Ohio Report's next two resolutions captured the primary substantive theme of Ohio's opposition to *McCulloch*: the Second Bank of the United States was not a public instrumentality like the Mint or Post Office, but a private corporation of trade. These two resolutions are: (1) This General Assembly do assert, and will maintain, by all legal and Constitutional means, the right of the States to tax the business and property of any private corporation of trade, incorporated by the Congress of the United States, and located to transact its corporate business within any State; and (2) [T]he Bank of the United States is a private corporation of trade, the capital and business of which may be legally taxed in any State where they may be found.[114]

The Ohio Report's final constitutional resolution, articulating a version of a position later adopted by Abraham Lincoln in connection with *Dred Scott*, denied the binding authority of Supreme Court decisions on states in cases in which they are not parties:

> [T]his General Assembly do protest against the doctrine that the political rights of the separate States that compose the American Union, and their powers as sovereign States, may be settled and determined in the Supreme Court of the United States, so as to conclude and bind them in cases contrived between individuals, and where they are, no one of them, parties direct.[115]

Before delving into some of the details of the Ohio Report's arguments, it is worth noting some of the most obvious differences between this Report and the Virginian states' rights newspaper essays. One difference is rhetorical: there is no

112. *Id.* at 1714.
113. *Id.*
114. *Id.*
115. *Id.*

talk here of orthodoxy and heresy, no prophetic language, and no biblical quotations. This difference makes sense, given the different kinds of rhetoric one expects from newspaper essays in comparison with a formal legislative report. Another difference is substantive: the Ohio Report spends no time criticizing the congressional power holding in *McCulloch* but devotes extensive argumentation to the tax immunity question. This flips the emphasis of the Virginians' criticisms.[116]

Hammond begins the Report's discussion of the constitutionality of the tax by recalling that Georgia had previously asserted the right to tax the Second Bank's predecessor and had actually collected the tax.[117] Against this backdrop, Congress's creation of the Second Bank without an express tax exemption should be construed as not to interfere with state taxing power:

> When the charter of the present bank was enacted, it was known that the States claimed, and had practically asserted, the power of taxing it; yet no exemption from the operation of the power is stipulated by Congress. The natural inference from the silence of the charter upon this point would seem to be, that the power of the States was recognised, and that Congress were not disposed to interfere with it.[118]

The Report augments this argument from silence about tax exemption in the corporate charter with the Supreme Court's description of corporations in *Dartmouth College v. Woodward*: "A corporation is an artificial being; invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."[119] This understanding of a corporation then undergirds the Report's acceptance of Congress to create the Second Bank as a corporation of this sort.[120]

The Report links the absence of a tax exemption in the Second Bank's charter to a political process argument about the impropriety of reading one in:

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116. The Ohio Report's discussion of Congress's power to create the Second Bank as a corporation also makes use of the Supreme Court's discussion of corporations in *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). Decided right at the beginning of the 1819 Term, shortly before arguments in *McCulloch*, the *Dartmouth College* case did not feature into either Maryland's arguments or the Virginians' criticisms.

117. 37 ANNALS OF CONG. 1695 (1821). The Report states: "The bank brought a suit to recover back the money in the federal circuit court of Georgia. This suit was brought before the Supreme Court, upon a question not directly involving the power of taxation. The Supreme Court decided the point before them in favor of the bank, upon such grounds that the suit was abandoned, and the tax submitted to." The case discussed here is *Bank of United States v. Deveaux*, 9 U.S. 61 (1809).

118. 37 ANNALS OF CONG. 1695-96 (1821).

119. *Id.* at 1698.

120. "To this definition of a corporation, the committee see no reason to object; and when the true character of a private banking company is correctly understood, there seems to be no cogent reason why it may not be incorporated by Congress upon the principles here defined." *Id.*

> Every privilege claimed by the company, when inserted in the charter has received the sanction of the legislative authority and is open to the examination of all. But to invest them with unknown and latent privileges to any extent that the Supreme Court may deem convenient, to preserve, not only their corporate franchises, but the most beneficial use of them, is undoubtedly a new doctrine as applied to corporations, and as dangerous as it is novel.[121]

While Maryland's counsel made variations of the foregoing arguments—other than the reliance on *Dartmouth College*—the Ohio Report includes a slavery-related argument aimed at the Court's reasoning that implied tax immunity is necessary to preserve the bank branches from being burdened by the tax power. The Report runs a similar argument about being burdened by state law prohibiting slavery:

> By their charter, they are authorized to employ officers, clerks, and *servants*. Should the company claim to send slaves into Ohio, and employ them in their branches as *servants*, the committee would conceive the claim as well founded, and as likely to be sustained, as the exemption from taxation. It stands upon the same principle. If the States may control the company in the employment of servants, they may embarrass its operations, and impede a free and unrestrained exercise and enjoyment of their corporate faculties.[122]

This slavery-related argument, which appears in the Ohio Report, was neither advanced nor answered in *McCulloch*.

Another argument not discussed in *McCulloch* is an Incompatibility Clause argument designed to show that "[t]he Bank of the United States is not a mean of the Government of the Union in the same sense with the Mint and the Post Office, but in the same sense with contractors to supply public stores, or to carry the mail."[123] Officials of the Mint and Post Office, such as "[t]he director, assayer, chief coiner, engraver, treasurer, melter, and refiner, of the Mint," as well as "the Postmaster General and deputy postmasters," are public officers. As such, "[t]hey cannot hold their offices and seats in Congress at the same time; they are appointed to and take an oath of office."[124] This ineligibility contrasts not only with the stockholders, president, and directors of the Bank of the United States, but also with the directors appointed by the Government, none of whom are public officers.

> They are eligible to seats in Congress, which is conclusive evidence upon this point; and it is a monstrous doctrine to maintain that corporations created by the Government of the Union, in point of privilege and exemption, are

121. *Id.* at 1704.
122. *Id.* at 1704-05.
123. *Id.* at 1707.
124. *Id.*

> principal means of Government, not to be distinguished from the officers of the Mint and the Post Office, while all the members and officers of such corporations are eligible to seats both in the Congress of the Union and the Legislatures of the several States. By this doctrine, the great principle of separating the departments of Government is completely broken down.[125]

The Report bolsters this Incompatibility Clause argument with additional quotations from the *Dartmouth College* case. The Report quotes Justice Story's concurrence that contrasted banks whose stock is owned by the Government (public corporations) with those whose stock is owned by private persons (private corporations).[126] The Report also paraphrases Marshall's opinion for the Court in *Dartmouth College*:

> If, then, a natural person or State bank employed by the Government of the Union to receive, keep, and pay out public moneys, would not become a public officer, or be considered as a member of the civil government, how is it that this artificial being, created by law for the purpose of being employed by the same Government for the same purposes, should become a part of the civil government of the country? Is it because its existence, its capacities, its powers, are given by law? Because the Government has given it the power to take and to hold property, in a particular form and for particular purposes, has the Government a consequent right (as over all members of the civil government it must have) substantially to change that form, or to vary the purposes to which the property is to be applied? This principle has never been asserted or recognised, and is supported by no authority.[127]

As the Report notes, however, the Court announced this reasoning on February 2, 1819, just before *McCulloch* was argued and decided. "And the doctrine that the Government, by chartering a private corporation of trade, placed the association upon the same foundation with the Mint and the Post Office, had then never been recognised in a court of law. . . ."[128]

While the Ohio Report remains an important and underappreciated source for understanding state resistance to *McCulloch*, it was less consequential than the court decisions resulting from the battle over Ohio's tax. On this litigation front, Hammond eventually reached an agreement with opposing counsel Henry Clay that would set the stage for a Supreme Court decision involving the relitigation of the authority-to-tax issue decided in *McCulloch*.[129] This case—captioned *Osborn v. Bank of the United States* when taken up to the Supreme Court—was argued before the Supreme Court twice. While Hammond argued the first round (in

125. *Id.*
126. *Id.* at 1708.
127. *Id.*
128. *Id.*
129. ELLIS, *supra* note 97, at 166-67.

1823), he could not argue the second round (in 1824) because he needed to stay in Ohio with his gravely ill wife.[130]

Some of the jurisdictional arguments in this report seem partially self-defeating if the practical objective is to get the Supreme Court to change its mind. If one goal, as professed, was to force the Supreme Court to reconsider *McCulloch* in light of Ohio's arguments, then it did not make much tactical sense to advance jurisdictional arguments that would keep the Bank's suits against Ohio's officials out of all of the federal courts, including the Supreme Court. But that is the tactic that Ohio first employed in this report.

As Virginia had in *Cohens*, Ohio also relied on the Eleventh Amendment. But Ohio's arguments were stronger than Virginia's. The Ohio Report argued that the Bank's suits for injunctive and legal relief should be characterized as suits against the State because: (1) they were brought against Ohio's officials for actions undertaken in their official capacity; (2) the final process would operate directly upon the State through specific execution sent to the State Treasury; and (3) proof of the acts undertaken was based not on affidavits but rather on public notoriety as acts of the State.[131] If the suits were to be deemed as against the State, the Ohio Report argued, they could only have been brought in the Supreme Court's original jurisdiction. That is where Article III placed state-party suits. The Eleventh Amendment, however, eliminated such suits entirely: "By the eleventh amendment to the Constitution, this power to call a State to answer before the Supreme Court, at the suit of a citizen, was wholly taken from the federal judiciary."[132]

The next step in Ohio's argument is that officer suits would not have been allowed if the State itself could have been sued directly.[133] The two parts of this argument are: (1) "The principal, and not the ministerial, agent is always the proper defendant in [a suit involving the direct action of the State sovereignty, like tax collection]"; and (2) "That principal being directly and personally amenable in the Supreme Court, his case could not be drawn to a tribunal that had no jurisdiction over the principal, by instituting a suit against the agent alone."[134]

The final step is that the Eleventh Amendment should not be construed as expanding the jurisdiction of federal circuit courts to encompass a case that would not have been within their jurisdiction before its ratification: "It is, therefore, a strange doctrine to maintain that an amendment to the Constitution, expressly forbidding the judges so to construe the Constitution as to call States before the supreme courts as defendants, at the suit of individuals, is to operate as

130. Weisenburger, *supra* note 98, at 360.

131. 37 ANNALS OF CONG. 1685-86 (1821).

132. *Id.* at 1686-87.

133. *Id.* at 1687 ("[B]efore this amendment to the Constitution was made, the circuit court of the United States could not have entertained jurisdiction of a suit in equity, enjoining the State officers from executing the State laws, in a case of the direct action of the State sovereignty, like that for the collection of taxes.").

134. *Id.*

vesting the circuit courts with powers to do that indirectly which they never had any direct power to do."[135]

The Ohio Report adds several additional related jurisdictional arguments that are unnecessary to set forth here.[136] The conclusion of all these arguments taken together, though, is that the Eleventh Amendment:

> "[P]laced the States and the United States in a relation to each other different from that in which they stood under the original Constitution—different in this: that, in all cases where the States could not be called to answer in the Federal courts, these courts ceased to be a Constitutional tribunal to investigate and determine their power and authority under the Constitution of the United States. The duty of the courts to declare the law terminated with their authority to execute it."[137]

To this Eleventh Amendment analysis, the Ohio Report adds a set of arguments about why the State was not bound to treat *McCulloch* as the final word on the constitutionality of its tax on the Second Bank. The basic principle is that "[n]ot being subject to [Federal courts'] jurisdiction, no State can be concluded by the opinions of these tribunals."[138] The application of this principle does not change "[i]f, by the management of a party, and through the inadvertence or connivance of a State, a case be made, presenting to the Supreme Court for decision important and interesting questions of State power and State authority."[139] The Report continues, "[U]pon no just principle ought the States to be concluded by any decision had upon such a case. The committee are clearly of opinion that such is the true character of the case passed upon the world by the title of *McCulloch vs. Maryland*."[140] In support of this assessment of *McCulloch*, the Report includes a detailed discussion about that case's procedural history.[141] The Report alluded to the Bank's financial troubles, noted how *McCulloch* "served to prop its sinking credit," and asserted that "[i]t is truly an alarming circumstance if it be in the power of an aspiring corporation and an unknown or obscure individual thus to

135. *Id.*
136. *Id.* at 1687-92.
137. *Id.* at 1692.
138. *Id.* at 1696.
139. *Id.*
140. *Id.*
141. *Id.* at 1696–97 ("This case, dignified with the important and high-sounding title of "McCulloch vs. the State of Maryland," when looked into, is found to be an ordinary *qui tam* action of debt, brought by a common informer, of the name of John James; and it is, throughout, an agreed case, made expressly for the purpose of obtaining the opinion of the Supreme Court of the United States upon the question whether the States could constitutionally levy a tax upon the Bank of the United States. This agreed case was manufactured in the summer of the year 1818, and passed through the county court of Baltimore county and the court of appeals of the State of Maryland in the same season, so as to be got upon the docket of the Supreme Court of the United States for adjudication at their February term, 1819. It is only by the management and concurrence of the parties that causes can be thus expeditiously brought to a final hearing in the Supreme Court.").

elicit opinions compromitting the vital interests of the States that compose the American Union."[142]

All of these arguments made in the Ohio Report were made after *McCulloch* but before *Cohens*. The Ohio House approved the report December 23, 1820; the Senate, January 3, 1821. The Supreme Court decided the jurisdictional issues in *Cohens v. Virginia* on March 2, 1821. That decision required some modification of Ohio's arguments, although the Supreme Court rejected those modified arguments as well.

The short version of the Supreme Court's response to Ohio's reliance on the Eleventh Amendment is that the Eleventh Amendment did not apply because Ohio was not a party of record to the case. The suits in the federal circuit court had been brought against state officials, not the State. At no time was the State of Ohio named as a party of record.

The longer version of the Court's response is that it fell back to the fiction of these officer suits not being against the State as a way to avoid drawing attention to the relatively weak basis for statutory jurisdiction, which was not based on diversity but "arising under" jurisdiction. The Court's adoption of this fallback approach has distorted reception and application of the Eleventh Amendment through the present day, even while the practical workaround of officer suits has stuck.

After setting forth Ohio's arguments that the case should not proceed without making the State a party and "[i]f this cannot be done, the Court cannot take jurisdiction of the cause," Marshall opens his analysis: "The full pressure of this argument is felt, and the difficulties it presents are acknowledged."[143] He admits that "had it been in the power of the Bank to make it a party, perhaps no decree ought to have been pronounced in the cause, until the State was before the Court." But he denies that this could have been done: "The eleventh amendment of the constitution has exempted a State from the suits of citizens of other States, or aliens; and the very difficult question is to be decided, whether, in such a case, the Court may act upon the agents employed by the State, and on the property in their hands."[144]

The striking feature of this move is that Charles Hammond, counsel for Ohio in the first round of argument in *Osborn*, admitted that Ohio could have been made a party in a federal-court suit, notwithstanding the Eleventh Amendment. This admission, while a shift from Ohio's earlier arguments, was responsive to Hammond's recognition from *McCulloch* and *Cohens* that the denial of all federal jurisdiction in state-party cases would be a loser. Marshall never addressed Ohio's new admission but—without argument—concluded the opposite. That divergent conclusion then formed the basis for the rest of his reasoning in support of the party-of-record rule.

142. *Id.* at 1697.
143. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 846 (1824).
144. *Id.* at 847.

In this portion of his opinion in *Osborn*, Marshall does not distinguish "arising under" cases from any others in describing the effect of the Eleventh Amendment on suits against States brought by out-of-state citizens or aliens.[145] This is so, even though, according to Marshall, the Bank's case *did* arise under federal law.[146] From following Marshall's premise that the Eleventh Amendment would have foreclosed jurisdiction over Ohio in the Bank's "arising under" case, one can infer that the Eleventh Amendment would also bar suits by out-of-state citizens or aliens in other cases against states that arise under federal law.[147]

Still, other aspects of Marshall's opinion point in the other direction, suggesting that a suit "arising under" federal law would be within federal court jurisdiction, even if brought by an out-of-state citizen or alien against a State. For example, Marshall describes the "full effect" of the Eleventh Amendment as simply erasing from Article III the provisions extending federal judicial power to suits against States by out-of-state citizens or aliens.[148] If that is the amendment's "full effect," then the amendment had no effect on the other parts of Article III, Section 2 that extend the federal judicial power to other kinds of cases or controversies, including cases that arise under federal law.

The Court's adoption of the party-of-record rule made it unnecessary, as a practical matter, to address this tension—which is unfortunate. But to understand *Osborn* as a jurisdictional response to the criticisms of *McCulloch*, we should turn to Marshall's arguments about why it is essential to allow officer suits if States themselves cannot be sued to stop ongoing violations of federal law. These arguments are the beating heart of *Osborn*.

Hearkening back to the same themes from the opening of his analyses in *McCulloch* and *Cohens*, Marshall conjures the vision of States attacking a defenseless Union at every step:

> A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts, that the agents of a State, alleging the authority of a law void in itself, because repugnant to the constitution, may arrest the execution of any law in the United States. It maintains, that if a

145. *Id.* at 850–52.

146. *Id.* at 819–28.

147. *See id.* at 849. ("That the Courts of the Union cannot entertain a suit brought against a State by an alien, or the citizen of another State, is not to be controverted."); *id.* at 846–47 ("The direct interest of the State in the suit, as brought, is admitted; and had it been in the power of the Bank to make it a party, perhaps no decree ought to have been pronounced in the cause, until the State was before the Court. But this was not in the power of the Bank. The eleventh amendment of the constitution has exempted a State from the suits of citizens of other States, or aliens; and the very difficult question is to be decided, whether, in such a case, the Court may act upon the agents employed by the State, and on the property in their hands.").

148. *Id.* at 857–58. ("The amendment has its full effect, if the constitution be construed as it would have been construed, had the jurisdiction of the Court never been extended to suits brought against a State, by the citizens of another State, or by aliens.").

> State shall impose a fine or penalty on any person employed in the execution of any law in the United States, it may levy that fine or penalty by a ministerial officer, without the sanction even of its own Courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the government. The carrier of the mail, the collector of the revenue, the marshal of a district, the recruiting officer, may all be inhibited, under ruinous penalties, from the performance of their respective duties; the warrant of a ministerial officer may authorize the collection of these penalties, and the person thus obstructed in the performance of his duty, may indeed resort to his action for damages, after the infliction of the injury, but cannot avail himself of the preventive justice of the nation to protect him in the performance of his duties. Each member of the Union is capable, at its will, of attacking the nation, of arresting its progress at every step, of acting vigorously and effectually in the execution of its designs, while the nation stands naked, stripped of its defensive armour, and incapable of shielding its agent or executing its laws, otherwise than by proceedings which are to take place after the mischief is perpetrated, and which must often be ineffectual, from the inability of the agents to make compensation.[149]

Powerful rhetoric. But is it true? If it is, then the answer to Marshall's next question is easy. It would be a variation on the very same question answered in the opening of *McCulloch* and *Cohens*: Has the Constitution supplied a federal tribunal for the peaceful resolution of disputes over the reach of federal and state power? As formulated in *Osborn*, "[t]he question, then, is whether the constitution of the United States has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union, from the attempts of a particular State to resist the execution of those laws."[150]

Marshall's well-known answer to this question turns on a mistake about what Ohio had argued. Immediately after formulating this question, he says, "[t]he State of Ohio denies the existence of this power."[151] That was Ohio's old argument, advanced by Charles Hammond and others in the Ohio Report. But their argument shifted at the Supreme Court. The gist of Hammond's new jurisdictional argument at the Supreme Court in *Osborn* was that the Bank had filed for federal judicial relief in the wrong federal court. The federal circuit court lacked jurisdiction, Hammond argued, because the Constitution dictates that the Supreme Court is the only federal court with jurisdiction over a suit against a state that arises under federal law. Unlike the Eleventh Amendment argument advanced earlier, which would have eliminated all federal court jurisdiction over suits against states, this argument in *Osborn* would have left open a path to a federal court for cases arising under federal law.

149. *Id.* at 847-48.
150. *Id.* at 849.
151. *Id.*

The textual basis of this argument in the Constitution is the second paragraph of Article III, Section 2. After the first paragraph, which describes the extent of the federal judicial power, the second paragraph distributes various exercises of this federal judicial power between the Supreme Court's original and appellate jurisdiction:

> In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.[152]

Hammond argued that this language of "all cases" assigns all cases "in which a state shall be a party" to the original jurisdiction of the Supreme Court.

This textual argument finds strong support, Hammond contended, in *Marbury v. Madison*. In that case, the Supreme Court held that Congress could not expand the Supreme Court's original jurisdiction by assigning to the Court's matters of original jurisdiction that Article III assigned to the Court's appellate jurisdiction. In reaching this holding, Chief Justice Marshall interpreted Article III's jurisdictional distribution as unalterable by Congress. This principle, Hammond argued, prevents Congress from assigning to an inferior federal court matters that Article III says shall be in the original jurisdiction of the Supreme Court.

Hammond bolstered this argument from precedent with an argument from purpose. He asserted that it is unlikely that the Constitution provided for original federal jurisdiction in ambassador and state-party cases "for no other purpose than limiting the power of Congress, as to the cases in which they should give the Supreme Court original jurisdiction."[153] The more rational inference, he argues, is that the distribution was intended "to prevent Congress from subjecting [the states] to the power of any inferior tribunal."[154] The "same solicitude" regarding peace with foreign powers that induced a provision for Supreme Court original jurisdiction in cases affecting their agents also explains the provision for Supreme Court original jurisdiction in state-party cases.[155] In order for this purpose to be given effect, the Supreme Court's original jurisdiction must be exclusive—not only of state-court original jurisdiction, but also of original jurisdiction in inferior federal tribunals.

The next step in the argument is to address why the Bank's suit was one in which an original federal suit may be brought against a state. In making this argument, Hammond asserts that the Bank's case "arises under the constitution and the [Bank's] charter,"[156] and that "[t]he constitution has made the State amenable

152. U.S. CONST. art. III, § 2, cl. 2.
153. *Osborn*, 22 U.S. (9 Wheat.) at 757–58.
154. *Id.* at 758.
155. *See id.*
156. *Id.* at 763.

to justice before the Supreme Court of the nation."[157] Lest there be any confusion about the extent and basis of his argument, Hammond explicitly avers of the Bank's case: "The bill might have been filed in the Supreme Court; the injunction might have been allowed by a Judge of that Court in vacation; the whole case might have been proceeded as the framers of the constitution intended."[158] And this would have been fitting: "The high and solemn measure of citing a sovereign State before a Court of judicature, to defend its attributes of sovereignty, and the exercise of its power, ought not to be permitted to any authority but the highest tribunal of the nation."[159]

Hammond recognized that the success of this argument for exclusive original federal jurisdiction in the Supreme Court would depend on his ability to distinguish *Cohens v. Virginia*. Chief Justice Marshall's opinion for the Court in *Cohens* had determined that Article III's requirement of original Supreme Court jurisdiction in state-party cases did not apply to "arising under" cases, only those in which federal jurisdiction depended on the character of the parties. *Cohens* did this to secure the Supreme Court's appellate jurisdiction to review state-court determinations of federal law. And while Hammond had been deeply critical of *Cohens*, he was too good a lawyer to believe that the Court would accept any argument that would require it to give up the appellate jurisdiction in "arising under" cases secured by *Cohens*. Accordingly, Hammond explained *Cohens* as having settled "that the judicial power of the United States extends to a class of cases which cannot originate in any federal tribunal, and that this jurisdiction must, of necessity, be appellate."[160] Hammond then argued that the provision for Supreme Court original jurisdiction in "all cases" in which a state shall be a party refers "only to cases in which original jurisdiction is vested in the federal judiciary."[161] Under this interpretation, there are two ways in which a state-party "arising under" case may end up in the Supreme Court:

> [I]f a case arise under the constitution, or a law of the Union, in which an original suit may be sued against a State, the constitution requires such suit to be brought in the Supreme Court. If a State be plaintiff or defendant in a State Court, and a question arise under the constitution, or a law of the Union, and a case be made at the trial, upon which the federal judicial power attaches, the constitution authorizes the Supreme Court to exercise appellate jurisdiction.[162]

If this interpretation is correct, "[t]he jurisdiction of the Supreme Court may, consistently, be extended to the proper class of cases where a State is a party,

157. *Id.*
158. *Id.* at 764.
159. *Id.*
160. *Id.* at 761.
161. *Id.*
162. *Id.*

without so interpreting the constitution, as to subject the States to original actions in the inferior national tribunals."[163]

We do not have Marshall's answer to this argument because he did not acknowledge it. His assertion that the Eleventh Amendment forecloses a suit against Ohio in these circumstances did not distinguish between "arising under" cases and others. And while the text of the Eleventh Amendment might seem to support him, that text could easily be confined to cases in which jurisdiction depends on the character of the parties—the same move that he made in *Cohens* to confine the provision for the Supreme Court's original jurisdiction in state-party cases.

One motivation for not dwelling on the Bank's case as an "arising under" case may have been the weak basis for statutory jurisdiction over it. As counsel for Ohio pointed out, the Judiciary Act of 1789 did not vest federal circuit courts with jurisdiction in state-party cases arising under the Constitution or federal law.[164]

Statutory jurisdiction in *Osborn* came not from any judiciary act, but purportedly from the Act creating the Second Bank. This Act provides that "the Bank shall be 'made able and capable in law,' 'to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all State Courts having competent jurisdiction, and in any Circuit Court of the United States.'"[165] In the earlier case of *Bank of the United States v. Deveaux*, the Court interpreted similar "sue and be sued" language from the Act creating the first Bank as giving "only a general capacity to sue, not a particular privilege to sue in the Courts of the United States."[166] Marshall distinguished *Deveaux* on the ground that the Act's language for the Second Bank specifically mentioned the ability to sue "in any Circuit Court of the United States"[167]:

> Whether [*Deveaux*] be right or wrong, it amounts only to a declaration, that a general capacity in the Bank to sue, without mentioning the Courts of the Union, may not give a right to sue in those Courts. To infer from this, that words expressly conferring a right to sue in those Courts, do not give the right, is surely a conclusion which the premises do not warrant.[168]

This distinction of *Deveaux* is the sum of Marshall's reasoning. He immediately concludes from the text of the Act and the distinction of *Deveaux* that "[t]he act of incorporation, then, confers jurisdiction on the Circuit Courts of the United States, if Congress can confer it."[169]

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163. *Id.* at 762.
164. *Id.* at 762-63.
165. *Id.* at 817.
166. *Id.* at 817–18.
167. *Id.* at 805.
168. *Id.* at 818.
169. *Id.*

An obvious objection to Marshall's interpretation here is that the Act creating the Second Bank very well may have simply been clarifying the capacity of the Bank to sue or be sued without purporting to alter the jurisdictional laws governing the courts in which they might wish to sue or be sued. We do not know Marshall's best response to this objection because he does not address it. He instead moves quickly to the constitutional questions about jurisdiction that *Osborn* is now more well known for having addressed. Whether or not this relative inattention to statutory jurisdiction is deliberate, it runs through the trio of *McCulloch*, *Cohens*, and *Osborn*.

CONCLUDING MEDITATIONS ON JURISDICTION AND THE MAINTENANCE OF CONSTITUTIONAL ORTHODOXY

Writing near the middle of the twentieth century, the American Catholic priest John Courtney Murray, S.J. was able to come to terms with the First Amendment to the Constitution of the United States by treating it as setting forth Articles of Peace rather than Articles of Faith. A similar approach has since been a prominent school of thought among American Catholics for the Constitution more generally. For those suspicious of the Constitution's Hobbesian and Lockean foundations, one challenge in accepting American institutions has been to understand the Founders as having "built better than they knew."

In the trio of *McCulloch v. Maryland*, *Cohens v. Virginia*, and *Osborn v. Bank of the United States*, John Marshall found himself with something of the opposite problem. In examining the statutory jurisdiction granted to the Supreme Court—as well as the constitutional maintenance tasks the Court needed to undertake—Marshall knew better than Congress built. He needed the Supreme Court to exercise jurisdiction over cases involving Maryland, Virginia, and Ohio in order to expound an orthodox understanding of the Constitution and the nature of the Union. But the statutory jurisdiction that he inherited was not quite enough, so he bent the statutes into shape in order to settle the constitutional foundations for the judicial exposition of constitutional orthodoxy he believed necessary and appropriate.

This is not necessarily a criticism. Marshall almost certainly acted in good faith. His implicit understanding of Section 25 as authorizing jurisdiction to review state court decisions denying claims of federal right via writ of error in criminal prosecutions or involving amounts two thousand dollars or less was adopted in 1823 in the unanimous decision of *Buel v. Van Ness*. Justice William Johnson, a Jefferson appointee who, unlike his colleagues, never hesitated to dissent from Marshall's opinions in constitutional cases and related matters, authored the opinion. Indeed, Johnson's powerful dissent in *Osborn v. Bank of the United States* on the question of statutory jurisdiction is a case in point. Marshall's relative silence in response to Johnson's jurisdictional dissent in *Osborn*—at least with respect to statutory jurisdiction, rather than constitutional jurisdiction—is brow-furrowing. But Johnson was alone in his dissent; the other five Justices joined Chief Justice Marshall.

Questions of good or bad faith aside, Marshall was acting in defense of the true Federalist faith. This was a faith forged in battle. In early 1819 when he authored the opinion for the Court in *McCulloch*, Marshall was nearing the zenith of his personal and institutional authority. He had first debuted in American history forty-four years earlier as a nineteen-year-old first lieutenant in the local militia. His service in the Culpeper Minutemen—a Virginia militia unit organized under Governor Patrick Henry—and then in the Continental Army under General George Washington, forged the Federalist fighting faith that he would maintain throughout his life.

In *McCulloch*, Marshall aimed to extract from history and experience, and then to inscribe into American constitutional law through adjudication, the constitutional orthodoxy of this Federalist faith. His preeminent concerns in *McCulloch* related to the nature of the Union and the institutional locus of authority for the exposition of constitutional orthodoxy. His delineation of Congress's implied powers and structural limitations on the powers of the States derived from his approach to these more fundamental matters.

In *Cohens v. Virginia* and *Osborn v. Bank of the United States*, Marshall captained the Court's defense against states' rights theorists in Virginia and intense on-the-ground opposition to the Second Bank in Ohio. The 1824 Term also included another constitutional classic that helped knit the nation together, *Gibbons v. Ogden*. But change was afoot, and Marshall may have begun to sense that the centrifugal forces of states' rights could not be contained. The year before, Justice Henry Brockholst Livingston had died, and Smith Thompson replaced him. And after a four-year period in which he had not written separately, Justice William Johnson had returned to his prior role of writing separate opinions, including dissents, in constitutional cases.[170]

A few years into this new period for the Marshall Court, a letter Marshall wrote in the summer of 1827 at the request of his younger friend and judicial colleague Joseph Story provides something of an interpretive key not only to *McCulloch* but also to Marshall's mature constitutional jurisprudence more generally. At the time he wrote this letter, Marshall was almost seventy-two years old. John Quincy Adams was President, soon to be replaced by the rough-and-tumble Andrew Jackson. Marshall's authority on the Court was waning, as old colleagues departed and new ones with differing ideals replaced them. The strain of holding the people and the states together in a national union was growing. The wartime experience of the Revolutionary generation was distant. It was precisely that revolutionary experience that Marshall identified as the source of his constitutional

170. *See* Walsh, *supra* note 95, at 1906–07 ("*Cohens* came in the middle of a four-year period beginning in 1819 in which Justice Johnson largely stopped writing separate opinions altogether. Justice Johnson's biographer suggests that Johnson's dissatisfaction with his job and his work on a book-length biography of Nathaniel Greene may explain some of his silence. Whatever the causes may have been, correspondence with Jefferson later shook Johnson out of his silent streak, and he was back writing separately in important cases starting in 1823.").

outlook. This handwritten letter has sixteen pages, but virtually all of Marshall's constitutional outlook may be understood by reference to one paragraph:

> When I recollect the wild and enthusiastic democracy with which my political opinions of that day were tinctured, I am disposed to ascribe my devotion to the union, and to a government competent to its preservation, at least as much to casual circumstances as to judgment. I had grown up at a time when a love of union and resistance to the claims of Great Britain were the inseparable inmates of the same bosom; when patriotism and a strong fellow feeling with our suffering fellow citizens of Boston were identical; when the maxim "united we stand, divided we fall" was the maxim of every orthodox American; and I had imbibed these sentiments so thoughroughly [sic] that they constituted a part of my being. I carried them with me into the army where I found myself associated with brave men from different states who were risking life and every thing valuable in a common cause beleived [sic] by all to be most precious; and where I was confirmed in the habit of considering America as my country, and Congress as my government. I partook largely of the sufferings and feelings of the army, and brought with me into civil life an ardent devotion to its interests. My immediate entrance into the state legislature opened to my view the causes which had been chiefly instrumental in augmenting those sufferings, and the general tendency of state politics convinced me that no safe and permanent remedy could be found but in a more efficient and better organized general government. The questions too which were perpetually recurring in the state legislatures, and which brought annually into doubt principles which I thought most sacred, which proved that everything was afloat, and that we had no safe anchorage ground, gave a high value in my estimation to that article in the constitution which imposes restrictions on the states. I was consequently a determined advocate for its adoption, and became a candidate for the convention to which it was to be submitted.[171]

This is not history but autobiography. It is the account of a man in his early seventies writing about events from his twenties and early thirties. While deeply personal, it also reveals a keen self-knowledge. Marshall exudes awareness that his constitutional outlook distinguishes him from many others in public life. He attributes his "devotion to the union, and to a government competent to its preservation" more to experience than to ideology, to practice more than to theory. And he recognizes that his "sentiments" for national union "constituted a part of my being." He carried these sentiments into the continental army, and that experience confirmed in him the "habit" of "considering America as my country, and Congress as my government." By his own account, Marshall's republican patriotism is more fundamental than any theoretical commitment or ideological outlook, such as to "democracy," which he deprecates through describing his earlier commitment to it as "wild and enthusiastic." The language of habit, bravery, and

171. Letter from John Marshall to Joseph Story (ca. July 25, 1827), *in* 11 THE PAPERS OF JOHN MARSHALL 35, 38 (Charles Hobson ed., 2002).

commitment is the language of civic virtue steeped in American experience, not Lockean social contract theory or general jurisprudence.

This foundational outlook explains Marshall's understanding of the written Constitution as a remedy to the deficiencies of confederated government. While the powers of the new government (partly national, partly federal) were to be understood as contributing to "a more efficient and better organized general government," the restrictions on the States in Article I, Section 10 were designed to provide a "safe anchorage ground." The problem here was that "questions . . . which were perpetually recurring in the state legislatures . . . brought annually into doubt principles which I thought most sacred, which proved that everything was afloat."

Again, the timing is important. The particular questions bruited in state legislatures where "everything was afloat" had changed between 1787 and 1827. But the needs for "safe anchorage ground" from the states, and for a "safe and permanent remedy" in the general government, had not. In his opinion for the Court eight years earlier in *McCulloch v. Maryland*, Marshall had identified the Constitution as that anchorage ground and the Supreme Court's exposition of it as a remedy for "the general tendency of state politics." The intervening time between that decision and this biographical letter had shaken Marshall's faith and exposed the fragility of the federal enterprise. In many ways, everything was still afloat.

The events of the next few decades would demonstrate the dangers of Marshall's reliance on Supreme Court jurisdiction to maintain constitutional orthodoxy. Over the next few decades, Joseph Story, Henry Clay, and Daniel Webster developed the unionist outlook that Marshall had judicially articulated as constitutional orthodoxy in *McCulloch*, *Cohens*, and *Osborn*. But when states' rights politicians came to control national politics, the Taney Court dialed back the broadest readings of the Marshall Court's more nationalist opinions, and *Dred Scott v. Sandford* shattered the Court's claim to fidelity as a stronghold of constitutional orthodoxy.[172]

Had he been there to witness it, Marshall's battle-tested faith would have failed him when his native Virginia joined other southern states in enacting its Ordinance of Secession in the spring of 1861. His understanding of the Union was established only when the superior force of the North subdued the South under the leadership of President Abraham Lincoln. The most powerful re-articulation of Marshall's first article of constitutional faith in the nature of the Union as the union of one people, and of the United States government as arising directly from them, was uttered in a memorial address at the dedication of a cemetery for dead soldiers.

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172. *See generally* R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT, ch. 6 (2001).