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M'Culloch in Context

Mark R. Killenbeck*

M'Culloch v. Maryland is rightly regarded as a landmark opinion, one that affirmed the ability of Congress to exercise implied powers, articulated a rule of deference to Congressional judgments about whether given legislative actions were in fact “necessary,” and limited the ability of the states to impair or restrict the operations of the federal government.¹ Most scholarly discussions of the case and its legacy emphasize these aspects of the decision.² Less common are attempts to place *M'Culloch* within the ebb and flow of the Marshall Court and the political and social realities of the time. So, for example, very few individuals have examined *M'Culloch's* robust theory of national power in the light of two other major cases decided in the same Term, *Trustees of Dartmouth College v. Woodward*³ and *Sturges v. Crowninshield*.⁴ Fewer still try to explain it by placing it within

* Wylie H. Davis Distinguished Professor, University of Arkansas School of Law. I owe an immense debt to David Schwartz, who kindly invited me to be a part of the Wisconsin “Schmooze” within which this article was initially presented. David, Sandy Levinson, Mark Graber, and Yxta Murray have in turn made their papers from that extraordinary event available to the Arkansas Law Review, for which both the Review and I thank them. Portions of this article are based on, and in some instances are taken from, my book on M'Culloch, cited in note 5. Those appear here with the permission of the University Press of Kansas.

1. See generally *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). There is disagreement about the proper spelling of the case, with most opting for McCulloch. I prefer the spelling actually used by the Court in its reports, which is itself incorrect, as the Cashier of the Baltimore Branch of the Bank consistently identified himself as James William M'Culloh.

2. See, e.g., RICHARD E. ELLIS, *AGGRESSIVE NATIONALISM: MCCULLOCH V. MARYLAND AND THE FOUNDATION OF FEDERAL AUTHORITY IN THE YOUNG REPUBLIC* 216 (2007) (stressing that *M'Culloch* articulates some of “the most enduring principles of American constitutional law” even as he laments “that they were applied to the wrong case”). This is neither the time nor the place to note some of the problems that infect an otherwise excellent book. It is, however, appropriate to note that those wishing to reconsider M'Culloch and its place in our constitutional order are well-advised to read with care a superb new study, DAVID S. SCHWARTZ, *THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF MCCULLOCH V. MARYLAND* (2019).

3. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

4. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).

the contexts provided by other significant events of the time: legal, economic, and political issues of which the Justices were surely aware, the implications of which almost certainly influenced the manner in which Chief Justice John Marshall couched his opinion for the Court.⁵ Finally, virtually none recognize that key aspects of *M’Culloch* did not actually break new constitutional ground.⁶

I will then focus on three things. The first will be the extent to which *Dartmouth College* and *Sturges* provide important contextual glosses on *M’Culloch*. For example, what can we glean from Marshall’s take on the nature and scope of state authority over its domestic institutions in *Dartmouth College*? In a similar vein, what can be said about the manner in which Marshall discusses “the opinion of Congress” on the subject of “uniform” or “partial” laws on bankruptcy and/or insolvency in *Sturges*? I will then examine events of the time that almost certainly played a role in how the Court approached *M’Culloch*. One of the reasons I continue to regard it as a landmark is that it was fashioned in a political and social environment within which major external issues made the Court’s support of the Bank and affirmation of robust federal power especially remarkable and significant. Finally, I will focus on the reality that two key aspects of Marshall’s opinion in *M’Culloch* had actually been established much earlier: implied powers, and deference to Congress. Consistent with the manner in which he wrote most of his opinions, Marshall does not acknowledge these precedents. Nor,

5. Ellis, for example, merely observes that *M’Culloch* was one of three major cases decided in the Court’s 1819 Term, naming the other two but never discussing them. He also simply mentions the Spencer Committee Report in passing, see ELLIS, *supra* note 2, at 197, and characterizes John Taylor’s extensive attacks on *M’Culloch* as a harbinger of problems for the institution of slavery as “a small attempt.” *Id.* at 141. At the risk of shameless self-promotion, one exception is MARK R. KILLENBECK, *M’CULLOCH V. MARYLAND: SECURING A NATION* (2006) [hereinafter *SECURING A NATION*].

6. Indeed, few have explored the opinion with the rigor Sandy Levinson employs when he argues that *M’Culloch* “bequeathed to us a completely muddled and perhaps incomprehensible notion of ‘sovereignty.’” Sanford Levinson, *The Confusing Language of McCulloch v. Maryland: Did Marshall Really Know What He Was Doing (Or Meant)?*, 72 ARK. L. REV. 7, 29(2019). In a similar vein, few have established with the degree of nuanced clarity that Mark Graber provides when states, and supports, the reality “that the Supreme Court probably would have overruled *McCulloch*’s holding that the federal government was constitutionally authorized to incorporate a national bank if a proper vehicle for doing so had come before the court.” Mark A. Graber, *Overruling McCulloch?*, 72 ARK. L. REV. 79, 80 (2019).

for that matter, did any of the six individuals who argued the case rely on them in the same manner that advocates would today. They were nevertheless on the books, and it is worth exploring what they said.

I. THE 1819 TERM

There is a general willingness to recognize that there were three notable decisions rendered in the Court's February, 1819 Term.⁷ In chronological order they were *Dartmouth College*,⁸ *Sturges*,⁹ and *M'Culloch*.¹⁰ Two questions might profitably be asked. Did either *Dartmouth College* or *Sturges* lay foundations for *M'Culloch*? And are there aspects of the two they are especially notable in the light of what followed?

Dartmouth College was a small private school founded in 1769 by the Reverend Eleazor Wheelock via royal charter. Its original purpose was to educate and convert young Native Americans, a goal that was gradually expanded to include instructing the residents of the State. The charter established a trust fund overseen by a self-perpetuating board of trustees. As described by Marshall for the Court, the net effect was to create "a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed on individuals on the faith on the charter."¹¹ The litigation that bears the college name was in turn triggered

7. See, e.g., R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 291 (2001) ("The year 1819 was 'the great term' of the Marshall Court and the high point as well of Marshall's career as chief justice."). Justice Story recognized this at the time in a letter within which he characterized *M'Culloch*, *Dartmouth College*, and *Sturges* as cases that would "probably" make the "next term of the Supreme Court . . . the most interesting ever known." Letter from Joseph Story to Henry Wheaton (Dec. 9, 1818), in 1 LIFE AND LETTERS OF JOSEPH STORY 312, 313 (William W. Story ed., 1851) [hereinafter LIFE AND LETTERS].

8. *Dartmouth College*, 17 U.S. (4 Wheat.) 518. The case was actually argued during the prior Term, on March 10 and 11, 1818, but the decision was not announced until February 2, 1819.

9. *Sturges*, 17 U.S. (4 Wheat.) 122. *Sturges* was argued on February 8, 1819, and the decision was handed down on February 17, 1819. For whatever reason, Wheaton chose to place it ahead of *Dartmouth College* in his report volume.

10. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *M'Culloch* was argued over nine days, February 22 through March 3, 1819, with the decision announced on March 6th.

11. *Dartmouth College*, 17 U.S. (4 Wheat.) at 630.

when the New Hampshire legislature passed a measure in June, 1816 that would have transformed the college from a private into a public institution.¹² As Kent Newmyer has noted, that was significant for both the college and the nation,

for it touched the sensitive nerve ends of political conservatism and nascent industrial capitalism; the continuation of unfettered private educational institutions (many of which, like Dartmouth and Harvard, were sympathetic to conservative principles and conscious of their conservative responsibilities); and the power of democratic state legislatures to meddle with private property and regulate corporate rights.¹³

Two sets of developments shaped the litigation. The first were a series of disputes that broke out within the college regarding its internal governance. The second grew out of the ongoing split between the Federalists, who favored a strong national government, and the party styled variously as the Democratic Republicans or simply Republicans, which was apprehensive about federal power and championed the need for a robust conception of state rights and state sovereignty.

The events that gradually led to the Court began with internal disputes within the college. Its board had gradually become deeply divided over religious and political questions.¹⁴ That,

12. For a comprehensive summary of the case and many of its documents, see JOHN M. SHIRLEY, *THE DARTMOUTH COLLEGE CAUSES AND THE SUPREME COURT OF THE UNITED STATES* (1879) [hereinafter SHIRLEY]. For briefer treatments, see *Editorial Note, Dartmouth College v. Woodward*, in 8 *THE PAPERS OF JOHN MARSHALL* 217, 217-23 (Charles F. Hobson ed., 1995) [hereinafter MARSHALL PAPERS]; 3-4 G. EDWARD WHITE, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35*, at 612-28 (1988) [hereinafter MARSHALL COURT AND CULTURAL CHANGE]. See also William Geyer North, *The Political Background of the Dartmouth College Case*, 18 *NEW ENGLAND Q.* 181, 181 (1945).

13. R. Kent Newmyer, *Daniel Webster as Tocqueville's Lawyer: The Dartmouth College Case Again*, 11 *J. AM. LEGAL HIST.* 127, 130 (1967).

14. For a nuanced discussion of the background issues, see Steven J. Novak, *The College in the Dartmouth College Case: A Reinterpretation*, 47 *NEW ENGLAND Q.* 550, 550-51 (1974). Novak argues that "[t]he Supreme Court's 1819 decision in favor of the trustees was . . . a major victory for the cause of evangelical education." *Id.* at 563. See also Eldon L. Johnson, *The Dartmouth College Case: The Neglected Educational Meaning*, 3 *J. EARLY REPUBLIC* 45, 45-47 (1983) (discussing in particular the public/private divide in the early nation); George Thomas, *Rethinking the Dartmouth College Case in American Political Development: Constituting Public and Private Educational Institutions*, 29 *STUD. AM. POL.*

combined with concerns about the college's administrative structure, made it a significant issue in the election of 1816. As described by Professor White:

[P]olitical factionalism had re-emerged in New Hampshire with the renaissance of the Federalist party after 1810, and the Dartmouth College schism was seen as a debate between Federalists, "the maintenance of chartered rights, and the established religious order" on the one side and Republicans, "reform in college management, and equality of religious sects," on the other.¹⁵

The Republicans prevailed in the election, which yielded both a Republican majority in the legislature and a Republican Governor, William Plumer.

Plumer had previously been a Federalist, but had shifted allegiances to the Republicans and agreed that his obligation as Governor was to "perpetuat[e] the republican majority in the State."¹⁶ The status and governance of Dartmouth became a focal point for him. In his inaugural address he declared that "[t]he college was formed for the public good, not for the benefit or emolument of its trustees; and the right to amend and improve acts of incorporation of this nature has been exercised by all governments, both monarchical and republican."¹⁷ He emphasized that the college charter was anathema to sound Republican principles, observing that "[a]s it emanated from royalty, it contained, as was natural it should, principles congenial to monarchy."¹⁸ He accordingly asked the legislature to "make such further provisions as will render this important institution more useful to mankind,"¹⁹ declaring that the College charter, with its perpetual governance by a self-regenerating board of

DEV. 23, 23 (2015) (exploring in particular the implications of the case regarding separation of church and state).

15. MARSHALL COURT AND CULTURAL CHANGE, *supra* note 12, at 613.

16. Letter from Isaac Hill to William Plumer (Apr. 22, 1816), in LYNN W. TURNER, WILLIAM PLUMER OF NEW HAMPSHIRE, 1759-1850 245, 245 (1962) (internal quotation marks omitted).

17. William Plumer, Inaugural Address (June 6, 1816), *reprinted in* SHIRLEY, *supra* note 12, at 105-06.

18. *Id.* at 105.

19. *Id.* at 107.

trustees was “hostile to the spirit and genius of a free government.”²⁰

The legislature took up the invitation. In an act approved on June 27, 1816 it declared that “knowledge and learning generally diffused through a community, are essential to the preservation of a free government” and professed as its goal that “the college of the State may, in the opinion of the legislature, be rendered more extensively useful.”²¹ This was supplemented by two additional measures in December, 1816, the net effect of which, as Daniel Webster argued on behalf of the College, was that “[i]f these acts are valid, the old corporation is abolished, and a new one created.”²²

The incumbent trustees responded by filing an “action of trover” seeking to recover “the book of records, corporate seal, and other corporate property, to which the plaintiffs allege themselves to be entitled.”²³ The case made its way to the New Hampshire Supreme Court, which sustained the legislation. Writing for the court, Chief Justice William Richardson emphasized the difference between private and public corporations, those “created for the immediate benefit and advantage of individuals,”²⁴ versus those “which are created for public purposes.”²⁵ Parsing both the royal charter and the New Hampshire statutes, he declared that education was a “matter[] of public concern.”²⁶ The newly styled Dartmouth University was, accordingly, “[a] corporation, all of whose franchises are exercised for public purposes” and, as such “a public corporation.”²⁷ The legislation was then proper, for “[a]ll public interests are proper objects of legislation; and it is peculiarly the

20. *Id.* at 105.

21. Act of the Legislature of New Hampshire (June 27, 1816), *quoted in* Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 539 (1819).

22. *Dartmouth College*, 17 U.S. (4 Wheat.) at 554. Webster was an alumnus of the College. In an impassioned final statement, he famously declared that “as I have said, [it is] a small college. And yet there are those who love it!” Peroration (Mar. 10, 1818), *in* 3 THE PAPERS OF DANIEL WEBSTER: LEGAL PAPERS 153, 154 (Andrew J. King ed., 1989) [hereinafter WEBSTER LEGAL PAPERS].

23. *Dartmouth College*, 17 U.S. (4 Wheat.) at 624.

24. Trustees of Dartmouth College v. Woodward, 1 N.H. 111, 115 (1817).

25. *Id.* at 116.

26. *Id.* at 119.

27. *Id.* at 117.

province of the legislature, to determine by what laws those interests should be regulated.”²⁸

The opinion did not, however, confine itself to the state constitutional and statutory claims, which might arguably have insulated it from review by the Supreme Court. Noting that the plaintiffs had argued “that the charter of 1769 is a contract,”²⁹ Richardson also discussed whether the legislation in question posed a Contracts Clause issue. He disposed of this by declaring that the charter was did not fall within the meaning of the Clause, which stipulates that “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts.”³⁰ A “contract,” he maintained, was “an actual agreement between parties, by which something is granted or stipulated, immediately for the benefit of the actual parties.”³¹ That did not include “grants of power and authority, by a state to individuals, to be exercised for purposes merely public.”³² Any holding to the contrary would pose great problems, he averred, for “[i]f the charter of a public institution, like that of Dartmouth College, is to be construed as a contract . . . it will, in our opinion, be difficult to say what powers, in relation to their public institutions, if any, are left to the states.”³³ The statutes in question were then valid “general legislation, in relation to the common interests of all.”³⁴

A writ of error was taken to the Supreme Court and the case was argued over two days in March, 1818.³⁵ No decision was rendered by the close of the Court’s Term.³⁶ In the wake of that the parties discussed various possibilities for bringing the issues

28. *Id.* at 120-21.

29. *Dartmouth College*, 1 N.H. at 132.

30. U.S. CONST. art. I, § 10, cl. 1.

31. *Dartmouth College*, 1 N.H. at 132.

32. *Id.*

33. *Id.* at 133-34.

34. *Id.* at 135.

35. The writ of error confined the Court’s jurisdiction to the Contracts Clause issue, which bothered Justice Story. See Letter from Joseph Story to Jeremiah Mason (Oct. 6, 1819), in 1 LIFE AND LETTERS, *supra* note 7, at 323.

36. Nothing about the case appears in the reports for the 1818 Term. Professor White notes that “Marshall announced on March 13, 1818, that the case would be continued until the 1819 Term because some judges had not formed opinions and others were of different opinions.” MARSHALL COURT AND CULTURAL CHANGE, *supra* note 12, at 615 (citing Supreme Court Docket, Mar. 13, 1818).

back to the Court in an alternate form.³⁷ They were accordingly surprised when Chief Justice Marshall handed down an opinion in favor of the College on the second day of the Court's subsequent Term, February 2, 1819.³⁸

Early in his opinion Marshall made it clear that the Court took seriously both the Contract Clause and the principles for which it stood: "On the judges of this Court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the constitution of our country has placed beyond legislative control; and, however irksome the task may be, this is a duty from which we dare not shrink."³⁹ The charter establishing the College was, in turn, a contract within the meaning of the Clause:

It can require no argument to prove, that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application, it is stated that large contributions have been made for the object, which will be conferred on the corporation, as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found.⁴⁰

Marshall conceded that "education is an object of national concern."⁴¹ But, recognizing how colleges and universities had actually developed in the fledgling nation, he pointedly asked "[i]s education altogether in the hands of government?"⁴² In particular, he posed a familiar argument, the slippery slope, inquiring whether "every teacher of youth become[s] a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not

37. See, e.g., Letter from Daniel Webster to Jeremiah Mason (April 28, 1818), in WEBSTER LEGAL PAPERS, *supra* note 22, at 182 (noting that he had seen Justice Story who is "evidently expecting a [new] case" and that "[t]he question we must raise in one of these actions, is, 'whether by the general principles of our governments, the State legislators be not restrained from divesting vested rights?'").

38. For an argument that it would have been better for all concerned if Marshall had not done what he did, see Maurice G. Baxter, *Should the Dartmouth College Case Have Been Reargued?*, 33 NEW ENGLAND Q. 19, 19, 34-36 (1960).

39. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 625 (1819).

40. *Id.* at 627.

41. *Id.* at 634.

42. *Id.*

the will of the donor, becomes the law of the donation?”⁴³ Corporations, he stressed, are “artificial being[s] . . . existing only in the contemplation of law.”⁴⁴ They derived their nature and status from the terms under which they are created, not simply on the basis of performing some function that might be in the public interest. “[T]his being does not share in the civil government of the country, unless that be the purpose for which it was created.”⁴⁵

The various acts of the legislature at issue, in turn, clearly altered the original understandings enshrined in the charter and, in doing so, impaired the obligations of the contract formed. The legislation had attempted to transform a private college into a public university. “The will of the State is substituted for the will of the donors, in every essential operation of the college.”⁴⁶ This was not, Marshall opined, an “immaterial change.”⁴⁷ The state had “totally changed” the nature and character of the institution: “It is reorganized; and reorganized in such a manner, as to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government.”⁴⁸ The state statutes were, accordingly, “repugnant to the constitution of the United States, and so not valid.”⁴⁹

Marshall’s opinion was described as being for the Court, but was not unanimously embraced.⁵⁰ In particular, Justice Story filed a lengthy concurring opinion within which he emphasized his preferred approach to the case: that the common law governing corporations provided a strong, independent basis for invalidating the New Hampshire statutes.⁵¹ “When a private

43. *Id.*

44. *Dartmouth College*, 17 U.S. (4 Wheat.) at 636.

45. *Id.* See also *id.* at 638 (“The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created.”).

46. *Id.* at 652.

47. *Id.*

48. *Id.* at 653.

49. *Dartmouth College*, 17 U.S. (4 Wheat.) at 715.

50. Justice Washington filed a separate concurring opinion, emphasizing many of the same points that Marshall made. See *id.* at 654-66 (Washington, J., concurring). Justice Johnson concurred without opinion, “for the reasons stated by the Chief Justice.” *Id.* at 666 (Johnson, J., concurring). Justice Livingston concurred, without opinion, “for the reasons stated by the Chief Justice, and Justices Washington and Story.” *Id.* (Livingston, J., concurring).

51. *Id.* at 675 (Story, J., concurring).

eleemosynary corporation is thus created by the charter of the crown, it is subject to no other control on the part of the crown, than what is expressly or implicitly reserved by the charter itself.”⁵² This was, as one of Story’s biographers noted, not a disagreement with anything Marshall had said. Rather, it was an attempt “to open the majority opinion to the broadest possible construction.”⁵³ As such, it served as part of Story’s general goal of developing a “doctrine of public and private corporations,” creating a “crucial bridge from private eleemosynary educational institutions to the American business corporation.”⁵⁴

Certain aspects of the Marshall opinion are worth noting in the light of what was to come. Clearly, the case affirmed Marshall’s strong support for property rights, in particular the need to protect them from the vicissitudes of state politics. As Webster stressed in his argument before the Court, “[i]t will be a dangerous, a most dangerous experiment, to hold these institutions subject to the rise and fall of popular parties, and the fluctuations of political opinions.”⁵⁵ Cynics might also suggest that the result reflects a Federalist Marshall’s antipathy toward measures promoted by Jeffersonian Republicans.⁵⁶ Marshall’s concerns were, however, more general, seen in his assessment of why the Contracts Clause was deemed necessary. “[I]t must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt; and to restrain the legislatures in future from violating the right to property.”⁵⁷

52. *Id.*

53. R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 130 (1985).

54. *Id.* at 131.

55. *Dartmouth College*, 17 U.S. (4 Wheat.) at 599.

56. One interesting but little-known facet of the case was Jefferson’s support for the approach that Governor Plumer outlined in his message to the legislature. In a letter to Plumer, Jefferson condemned “[t]he idea that institutions established for the use of the nation, cannot be touched nor modified.” Letter from Thomas Jefferson to William Plumer (July 21, 1816), in XV THE WRITINGS OF THOMAS JEFFERSON 46, 46 (Andrew A. Lipscomb & Albert Ellery Bergh, eds., 1905) [hereinafter JEFFERSON WRITINGS]. The notion that the college charter was inviolable “may perhaps be a salutary provision against the abuses of a monarch, but is most absurd against the nation itself.” *Id.* This position was consistent with the one taken by Jefferson twenty years earlier when Virginia attempted to take over the property of a private academy. See James Morrison Hutcheson, *Virginia’s “Dartmouth College Case,”* 51 VA. MAG. OF HIST. & BIOGRAPHY 134, 139 (1943).

57. *Dartmouth College*, 17 U.S. (4 Wheat.) at 628.

Marshall also laid down important markers for his general approach to the interpretation and application of the Constitution. He noted, for example, that “[a]ccording to the theory of the British constitution, their parliament is omnipotent.”⁵⁸ That was not the situation in this nation, within which our Constitution provided, via the Contracts Clause a “rule” that must be adhered to “unless some plain and strong reason for excluding it can be given.”⁵⁹ That stricture, in turn, should be heeded “unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.”⁶⁰

Above all, Marshall affirmed the supremacy of the Constitution and the Court’s interpretations of it, even where the case involved a state domestic institution. He stressed that “[o]n more than one occasion, the Court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared, that, in no doubtful case, would it pronounce a legislative act to be contrary to the constitution.”⁶¹ But this was not such a case. The college charter established contractual relationships that must be protected. And “the American people have said . . . that ‘no State shall pass any . . . law impairing the obligation of contracts.’”⁶² The Court was obligated, accordingly, to discharge its “high and solemn duty of protecting . . . contracts which the constitution of our country has placed beyond legislative control.”⁶³

Sturges in turn arose when Richard Crowninshield issued two promissory notes to Josiah Sturgis in March, 1811.⁶⁴

58. *Id.* at 643.

59. *Id.* at 644.

60. *Id.* at 645.

61. *Id.* at 625. *Cf. M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (“Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution . . . it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land.”).

62. *Dartmouth College*, 17 U.S. (4 Wheat.) at 625.

63. *Id.*

64. *Sturges* is yet another case where spelling becomes an issue. As Charles Hobson notes, the correct spelling is Sturgis, but the case title in the reports uses Sturges. *Editorial Note, Sturgis v. Crowninshield*, in *MARSHALL PAPERS*, *supra* note 12, at 243 n. 1. One of the remarkable things about Sturges is that there are, at least that I have found, no articles focusing on the case, although it is mentioned in passing in many. Details regarding it are

Crowninshield was originally from Massachusetts, but had moved his shipping business to New York City.⁶⁵ He became insolvent and invoked a New York statute that allowed debtors to be discharged once they assigned their property to their creditors.⁶⁶ Sturgis contested the claim, but Crowninshield obtained his discharge in February, 1812.⁶⁷ He then returned to Massachusetts, where he entered the textile business and prospered.⁶⁸ Sturgis sued in the United States Circuit Court in Boston in 1816 to recover his debt.⁶⁹ The case was to be heard by Justice Joseph Story, riding the circuit, and District Judge John Davis.⁷⁰ But they did not actually have the case argued, agreeing to divide their opinions and certify it to the Supreme Court.⁷¹

The first issue was whether the New York statute was valid. Crowninshield's main argument was that the Bankruptcy Clause, Article I, Section 8, Clause 4, gave Congress the sole power to make "uniform Laws . . . on the subject of Bankruptcies, throughout the United States."⁷² There were two problems. Congress had not yet passed any such law. The question of whether that mattered had in turn been litigated in at least two others cases, within which two members of the Court riding the

taken from two sources: *Editorial Note, Sturgis v. Crowninshield*, in MARSHALL PAPERS, *supra* note 12, at 239-44, and MARSHALL COURT AND CULTURAL CHANGE, *supra* note 12, at 633-41.

65. *Editorial Note, Sturgis v. Crowninshield*, in MARSHALL PAPERS, *supra* note 12, at 241.

66. *Id.* at 239-44.

67. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 122 (1819).

68. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 439 (1st ed. 1996).

69. *Id.*

70. Gerald T. Dunne, *Joseph Story: The Great Term*, 79 HARV. L. REV. 877, 896 (1966); Stephen J. Lubben, *A New Understanding of the Bankruptcy Clause*, 64 CASE W. RES. L. REV. 319, 350 (2013); R. Kent Newmyer, *Justice Joseph Story on Circuit and a Neglected Phase of American Legal History*, 14 AM. J. LEGAL HIST. 112, 119 (1970).

71. This case is not reported in Federal Cases. For the background details, see GERALD T. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 164 (1970). Dunne quotes a letter from William Prescott to Leverett Saltonstall to the effect that "[Story] proposes that the Court shall divide and carry the case to the Sup. Court without argument or opinion here." *Id.*

72. *Sturges*, 17 U.S. (4 Wheat.) at 192 ("[C]ounsel for the plaintiff contend, that the grant of this power to congress [sic], without limitation, takes it entirely from the several states.").

circuits, Justices Brockholst Livingston and Bushrod Washington, had staked out diametrically opposed positions.⁷³

Writing for the Court, Marshall aligned himself with Justice Washington.⁷⁴ In an opinion that styled itself as unanimous but was certainly anything but, he declared that “[i]t is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the States.”⁷⁵ The failure of Congress to act created a void that New York was free to fill. The Constitution gave certain powers to the national government, but “it was neither necessary nor proper to define the powers retained by the States.”⁷⁶ This meant that the individual States, “in most respects, sovereign,” retained “almost every legislative power . . . among others, that of passing bankrupt laws.”⁷⁷ Congress could, if it wished, alter that legislative landscape. But “the right of the States to pass a bankrupt law is not taken away by the mere grant of that power to Congress, it cannot be extinguished; it can only be suspended, by the enactment of a general bankrupt law.”⁷⁸

This shifted the focus to second question: “Does the law of New York, which is pleaded in this case, impair the obligation of contracts, within the meaning of the constitution of the United States?”⁷⁹ Unlike bankruptcy, this was an area where the Court did not write on a clean slate. Nine years earlier, in *Fletcher v. Peck*,⁸⁰ it had held that the State of Georgia could not pass a law invalidating a series of land purchases authorized by a prior state

73. Compare *Golden v. Prince*, 10 F. Cas. 542, 547 (C.C.D. Pa. 1814) (No. 5,509) (Washington, J., holding that state laws on bankruptcy were invalid), with *Adams v. Storey*, 1 F. Cas. 141, 151 (C.C.D.N.Y. 1817) (No. 66) (Livingston, J., holding that the same act invoked by Sturgis was valid). Dunne observes that “Story . . . doubtless regretted being unable to add anything new to the analysis [but] was in a tactical position to speed the issues to a conclusion.” Dunne, *supra* note 70, at 164.

74. See generally *Golden*, 10 F. Cas. 542; *Sturges*, 17 U.S. (4 Wheat.) at 196.

75. *Sturges*, 17 U.S. (4 Wheat.) at 196.

76. *Id.* at 193.

77. *Id.* at 192-93.

78. *Id.* at 196.

79. *Id.* at 197.

80. 10 U.S. (6 Cranch) 87, 139 (1810).

statute. And just six days earlier it had again parsed that Clause in *Dartmouth College*.⁸¹

The Court held in *Fletcher* that the land grants in question were contracts. It acknowledged that Georgia would have been within its rights to alter or rescind the grants were it “a single sovereign power.”⁸² But that was not the case:

She is part of a large empire; she is a member of the American union; and that union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass. The Constitution of the United States declares that no state shall pass any . . . law impairing the obligation of contracts.⁸³

As was his wont, Marshall did not cite or discuss *Fletcher* or *Dartmouth College* in *Sturges*.⁸⁴ Instead, again as was his wont, he penned a discussion on the importance and “inviolability of contracts” which must “be protected in whatsoever form [they] might be assailed.”⁸⁵ Marshall rejected the contention that since the New York measure was an insolvency law it was not within the meaning of the Contracts Clause. “It is said . . . that laws which merely liberate the person are insolvent laws, and those which discharge the contract, are bankrupt laws.”⁸⁶ That did not matter, given the underlying reality that Sturges and Crowninshield had negotiated and entered into a contract.⁸⁷ More tellingly, Marshall argued that in a contest between the “spirit” of the Constitution and its words, careful attention must be paid to what the Constitution actually said:

“[A]lthough the spirit of an instrument, especially that of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an

81. See generally *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

82. *Fletcher*, 10 U.S. (6 Cranch) at 136.

83. *Id.*

84. See generally *Sturges*, 17 U.S. (4 Wheat.) 122.

85. *Id.* at 200.

86. *Id.* at 194.

87. *Id.* at 198.

instrument expressly provide, shall be exempted from its operation.”⁸⁸

Marshall’s opinion has appropriately been described as a compromise, an attempt to paste over deep divisions on the Court in the face of his strong desire that it speak with a unified voice. As Justice William Johnson would subsequently explain, “[t]he Court was . . . greatly divided in their views of the doctrine, and the judgment partakes as much of a compromise, as of a legal adjudication.”⁸⁹

That said, three elements of *Surges* merit our attention. The first is its affirmation that the powers of Congress, although arguably limited, are supreme: “That the power is both unlimited and supreme, is not questioned.”⁹⁰ The States, with their residual sovereignty, may well have the ability to address the issue of bankruptcies. But that authority was circumscribed by the reality that the states are, as *Fletcher* stressed, “part of a large empire . . . member[s] of the American union . . . that has a constitution the supremacy of which all acknowledge[.]”⁹¹ Accordingly, “[w]henver the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the State Legislatures, as if they had been expressly forbidden to act on it.”⁹²

A second salient factor is that Congress enjoys substantial deference regarding both whether it chooses to exercise its powers and what it actually does. As Marshall observed, the authority to enact a uniform bankruptcy code “is, like every other part of the subject, one on which the Legislature may exercise an extensive discretion.”⁹³ Marshall recognized that there were complications and “inconveniences” posed by the distinctions between and among bankruptcy and insolvent laws. “It may be

88. *Id.* at 202.

89. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 272-73 (1827) (Johnson, J., concurring).

90. *Surges*, 17 U.S. (4 Wheat.) at 192. *Cf. M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (“If any one proposition should command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action.”).

91. *Fletcher*, 10 U.S. (6 Cranch) at 136.

92. *Surges*, 17 U.S. (4 Wheat.) at 193.

93. *Id.* at 195.

thought more convenient, that much of it should be regulated by State legislation, and Congress may purposely omit to provide for many cases to which their power extends.”⁹⁴ But these were matters best left to Congress. “[B]e this as it may, the power granted to Congress may be exercised or declined, as the wisdom of that body shall decide.”⁹⁵

Finally, there is Marshall’s gloss on the interpretive process, within which attention is paid to both the letter and spirit of an admittedly general document, a Constitution that, as he would subsequently observe, does not “partake of the prolixity of a legal code.”⁹⁶ As Marshall stressed:

[I]f . . . the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision in the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting that application.⁹⁷

Taken together, *Dartmouth College* and *Sturges* envision a national government that is supreme within the spheres of its operation, with its actions superior to those of states if and when federal authority is “properly” invoked.⁹⁸ They also strongly intimate that Congress should enjoy substantial deference in making judgments about what is in the national interest and when, and how, it should act to effectuate those interests. Finally, they articulate an approach to constitutional adjudication that is highly sensitive to the notion, most famously embraced in *M’Culloch*, that “we must never forget, that it is *a constitution* we are expounding,” a document that, if it attempted to account for every possible situation and development “could scarcely be embraced by the human mind.”⁹⁹ In short, they both anticipate and flesh out key aspects of what would follow in *M’Culloch* and, in doing so, provide a more comprehensive account of the principles that

94. *Id.*

95. *Id.* at 195-96.

96. *M’Culloch*, 17 U.S. (4 Wheat.) at 407.

97. *Sturges*, 17 U.S. (4 Wheat.) at 202-03.

98. *See generally Trustees of Dartmouth College*, 17 U.S. (4 Wheat.) 518; *Sturges* 17 U.S. (4 Wheat.) 122.

99. *M’Culloch*, 17 U.S. (4 Wheat.) at 407.

Marshall and his colleagues deemed important as they fashioned a vision for the nation and articulated a role for the Court.

II. CONTEMPORARY CONTEXTS

No case is litigated in a vacuum. A lawsuit is brought within the matrix provided by its particular facts and circumstances, elements that vary even when different causes of action present essentially the same legal questions. In a similar vein, each case is pursued within and in the light of a wider social and political context, within which multiple events and issues may well have a bearing on how the litigation is viewed and resolved.

M'Culloch is a perfect example. The technical focus was whether Congress had the authority to create the Second Bank of the United States and whether the State of Maryland could tax its operations. But those issues were litigated in an environment within which at least three extrinsic factors had a potentially profound influence on how Marshall and his colleagues approached the case: the Panic of 1819, which many attributed to the policies and actions of the Bank; the Bank itself, an institution that was unpopular and corrupt; and the "Missouri Question," a euphemism of the time that was a place-holder for the issue of slavery.

A. THE PANIC OF 1819

One of the arguments in favor of the Bank's creation had been that it would serve as an example to the state banks, a sound institution backed by and able to pay in specie.¹⁰⁰ But both the economic situation and the Bank's own policies conspired against it. As Bray Hammond stressed in his important study of banks and banking, "[t]he Bank began business in the midst of temptations on every hand to over-extend itself."¹⁰¹ A "vast business parade was forming" and "[i]n such a situation the

100. See, e.g., MURRAY N. ROTHBARD, *THE PANIC 1819: REACTIONS AND POLICIES* 7 (1962) (noting that the "monetary situation" in the wake of the War of 1812 "was generally considered intolerable" and that the Second Bank was regarded as "an attempted solution," an institution that would "redeem its notes in specie, and was expected to provide a sound and uniform currency").

101. BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 257 (1957).

restraining powers of a central bank were spurned. All that was wanted was more steam.”¹⁰² The Bank “yielded,” to both greedy stockholders pursuing profits and to “borrowers in general,” adopting an “open-handed philosophy.”¹⁰³

The administration of the Bank adopted policies that were designed to allow it to compete with established state banks in pursuit of economic expansion.¹⁰⁴ It also embraced an aggressive rather than controlled approach to lending, in stark contrast to the more measured policies followed by the First Bank. Taken together, this meant that the Second Bank made too many loans for paper currency, unbacked by specie (gold and silver). As a result, its stocks of specie declined precipitously. That problem was compounded by the fact that gold and silver became increasingly scarce and, as a result, commanded a premium that made their acquisition expensive.¹⁰⁵

This did not go unnoticed. In February, 1818, for example, *Niles Weekly Register* observed that “[t]he time *was* when to the name of a bank was associated the pleasant idea of an institution bottomed upon solid capital, derived from men who had money to spare, and conducted by men of high and honorable minds, on just and liberal principles.”¹⁰⁶ That had changed. “[T]he *common*

102. *Id.*

103. *Id.*

104. For detailed discussions of the Second Bank and its policies, *see generally* RALPH C.H. CATTERALL, *THE SECOND BANK OF THE UNITED STATES* (1903); HAMMOND, *supra* note 101; WALTER BUCKINGHAM SMITH, *ECONOMIC ASPECTS OF THE SECOND BANK OF THE UNITED STATES* (1953).

105. For an alternate view, *see* Smith, *supra* note 104, at 113. Smith notes that both William Jones, the first President of the Second Bank, and Nicholas Biddle, the third and last President of the Bank attributed much of the blame to the federal government which, according to Biddle, “urged and goaded” the Bank “into an enlargement of its business,” such that “if fault there were, [it] belonged rather to the Government than to the Bank.” *Id.* (quoting Biddle). *See also* Brutus, *Bank of the United States No. IX*, WEEKLY AURORA, Nov. 30, 1818, at 322 (arguing that “it is very perceptible, that general Hamilton apprehended *some dreadful calamity* to the nation, should the management of the bank be conducted or *influenced by the government*”); Brutus, *Bank of the United States No. VI*, WEEKLY AURORA, Nov. 16, 1818, at 307 (“All these are objects connected and interwoven with one another, the bank with the government, and the government with bank, like a complicated knot of iniquity, whose different parts cannot be discerned or separated.”).

106. H. Niles, *Editorial Address*, NILES’ WEEKLY REGISTER, Feb. 28, 1818, at 2 [hereinafter *Editorial Address*]. *Niles Weekly Register* was one of the few truly national publications at the time. It was published in Baltimore, a matter of no small importance in terms of its awareness of and sensitivity to issues posed by the Bank in general and its Baltimore branch in particular.

idea of a bank now is, that has only a paper capital, *manufactured* by [men] who, instead of being able to lend, really want to *borrow* money, and conducted by men who prostrate every rule of right to subserve their own personal views.”¹⁰⁷ The focus of these remarks was clear: the Second Bank, which “has already, in one short year, exhibited a conduct in direct opposition to that which was expected of it.”¹⁰⁸

The combination of aggressive lending and a lack of specie posed significant problems for the Bank. It was required by law to pay specie for its notes and was subject to a twelve percent penalty if it failed to do so, which would only make the situation worse. These general difficulties were exacerbated by another of the Bank’s mandates, paying the debts of the government, in specie. One of those fell due in October, 1818, two million dollars owed for the Louisiana Purchase.¹⁰⁹ That equaled the Bank’s entire stock of specie at the time, and the government was forced to go abroad, to London, to satisfy the obligation.¹¹⁰

To its credit, the Bank’s administration realized that the situation had become untenable and they began to curtail its expansionist policies. In the summer of 1818 they ordered its branches to have the state banks redeem the notes owed them.¹¹¹ This had a multiplier effect, forcing state banks to curtail their activities and seek repayment of their debts so that they could settle their accounts with the Bank.¹¹² The money supply decreased substantially, provoking a rapid and dramatic drop in prices. This overwhelmed the system. Bankruptcies multiplied and by 1819 over three million individuals—one-third of the population—were feeling the effects of the resulting depression, which became known as the Panic of 1819.¹¹³

There has been a continuing debate about whether the Bank and its policies caused of the Panic or were simply one of its

107. *Id.*

108. H. Niles, *To Correct Abuses by the Bank*, NILES’ WEEKLY REGISTER, March 7, 1818, at 23.

109. ANDREW H. BROWNING, *THE PANIC OF 1819: THE FIRST GREAT DEPRESSION* 157 (2019).

110. SMITH, *supra* note 104, at 100.

111. *Id.* at 107-08.

112. *Id.* at 108.

113. For a comprehensive discussion of the origins and details of the Panic, see generally Rothbard, *supra* note 100.

precipitating forces.¹¹⁴ The best that can be said is that the Bank exacerbated an already tenuous situation. In the alternative, and more troubling, is the distinct likelihood that it initiated the chain of events that produced the most severe economic dislocation in the young nation's history.

Regardless, public perceptions of the Bank declined. Its old enemies acquired new ammunition and a new cadre of opponents joined a growing national chorus that viewed the Bank "like the plague of frogs, and other *unclean* things, inflicted on the Egyptians."¹¹⁵ The attacks launched by William Duane were especially sharp. Duane was a staunch Republican.¹¹⁶ The newspaper he owned and edited, the *Aurora*, was described by Thomas Jefferson as one that "has unquestionably rendered incalculable services to republicanism thro' all it's struggles with the federalists, and has been the rallying point for the orthodox of the whole Union."¹¹⁷ Widely circulated, the *Aurora* had great influence and the views expressed by its publisher had a profound impact in the body politic.

It was accordingly significant that Duane became a frequent and pointed critic of the Second Bank. In September, 1818, for example, he observed that

[i]t was long since imagined, even by those the least disposed to suspect ill, in men, whom they ought to have known incapable of better; that the measure of iniquity of the *paper bank managers*, was full, even to overflowing. It was deemed impossible, that they could go further, without rousing public indignation to an open and decisive rebellion against them, their corrupt bank, and their oppressive measures.¹¹⁸

114. Catterall, for example, states that the Bank's "curtailments had, indeed, precipitated the panic, for which, however, it was hardly more responsible than was Noah for the flood." CATTERALL, *supra* note 104, at 61.

115. H. Niles, *Banks and Banking*, NILES' WEEKLY REGISTER, March 7, 1818, at 1.

116. For a discussion of Duane and his political views, see JEFFREY L. PASLEY, *THE TYRANNY OF PRINTERS: NEWSPAPER POLITICS IN THE EARLY AMERICAN REPUBLIC 176-95* (2001); Kim T. Phillips, *William Duane, Philadelphia's Democratic Republicans, and the Origins of Modern Politics*, 101 PA. MAG. HIST. & BIOGRAPHY 365 (1977).

117. Letter from Thomas Jefferson to William Wirt (Mar. 30, 1811), in 3 THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES 15, 15 (J. Jefferson Looney et al. eds., 2006).

118. Brutus, *The National Bank—Against the People*, WEEKLY AURORA, Sept. 21, 1818, at 213.

As part of its economy measures, the Bank terminated its policy that each branch must redeem the notes of the other branches.¹¹⁹ The goal was to protect branches that had conservative credit policies, mainly in the east, from those that had pursued unbridled expansion, mainly in the south and west. Duane was outraged:

For even imagination revolts from the contemplation of an act, which implies that *last* and *blackest degree*, of turpitude and folly. What then was the astonishment, what the indignation, and the embarrassment of the public, without one exception of party, or social feelings, when the managers of this swindling bank, *refused to receive their own branch notes on deposit, or in payment of debts to the bank itself? When they refused to receive THEIR OWN NOTES?*¹²⁰

The criticisms were continuous and savage. He declared that the policies embraced reflected “blundering stupidity.”¹²¹ They were the actions an “unprincipled fraternity of *speculators*” that have produced “the complete prostration of our social and political rights.”¹²² And he argued that “[i]f we endure this, I repeat, in the existence of that corrupt spawn of all that is evil and hateful to liberty, prosperity, and equal rights—the ‘national bank’—we can no longer claim the character or exercise the functions of freemen.”¹²³

These observations were echoed in a number of publications and by any number of critics who believed that the Bank was responsible for the Panic of 1819. Hezekiah Niles, for example, declared that “[t]he bank, like an *abandoned* mother, has most imprudently BASTARDIZED its offspring, and deserves not the countenance or support of honest people.”¹²⁴ The Bank was accordingly repeatedly assailed as an institution whose priorities and actions were adverse to the national interest. Duane, for example, proclaimed in October, 1818 that “[a] great crisis approaches . . . slow in its march, but deadly and relentless as the yellow fever which desolated your cities.”¹²⁵ Niles agreed,

119. *See id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. Brutus, *The Political Bank*, WEEKLY AURORA, Sept. 28, 1818, at 250.

124. H. Niles, *Banks and Banking*, NILES' WEEKLY REGISTER, Sept. 12, 1818, at 33.

125. SMITH, *supra* note 104, at 115 (quoting Brutus, WEEKLY AURORA, Oct. 19, 1818).

declaring that “[t]he Bank of the United States has committed an act of *suicide*;—whether it will cause its death or not, the *doctors* at Washington city and at the seats of the several state governments, will soon have to determine.”¹²⁶

Marshall and his colleague had to be aware of this. They also almost certainly knew that a decision supporting the Bank—“this bastard brat of treasonable vices”¹²⁷—would be viewed with alarm. It was one thing to affirm the power of Congress to charter a corporation that made positive contributions to the nation and its economy, as had the First Bank. It was quite another to give supreme judicial sanction to an institution that was responsible for “the most extensive and ruinous bankruptcies . . . amongst us that have ever befell any people.”¹²⁸ *M’Culloch* would, accordingly, be roundly condemned as the work of a Court that “sanction[ed] the most stupendous fraud ever recorded upon the pages of history, and g[a]ve a legal reputation to this rank colossus of corruption is. . . a problem, in the career of political delinquency, which nothing short of a heart sickening prostitution of principle can solve, or explain.”¹²⁹ The willingness of the Court to chart the path it did in the face of all of this is, accordingly, noteworthy.

B. MIS-, MAL- AND NONFEASANCE: THE SPENCER REPORT

The issues posed by the Bank’s economic policies were not the only ones that it faced. Its structure and operations provided ample opportunities for individuals to exploit it for their own personal gain. This was especially true at its Baltimore branch, although it was not the only local office where corruption and mismanagement occurred.¹³⁰ A number of the Bank’s board members attempted to manipulate the price of Bank stock to their advantage. This included its President, William Jones, who

126. H. Niles, *Banks and Banking*, NILES’ WEEKLY REGISTER, Sept. 12, 1818, at 33.

127. Brutus, *The Bank System of Political Corruption*, No. II, WEEKLY AURORA, March 8, 1819, at 22.

128. *Id.* at 1.

129. Brutus, *The Bank System of Political Corruption*, No. V, WEEKLY AURORA, March 27, 1819, at 35.

130. See CATTERALL, *supra* note 104, at 37-39 (discussing overall mismanagement); *id.* at 42-50 (focusing on the activities of the Baltimore branch).

bought and sold over two hundred thousand dollars' worth of stock, abetted by three Baltimoreans, who secretly purchased one thousand shares of Bank stock which they then gave Jones, who sold it at a profit of some eighteen thousand dollars.¹³¹

The Baltimore activities were by far the most extensive, a record of mis-, mal-, and nonfeasance that reflected a combination of the manner in which the business community in that city operated and the predilections of the men who would oversee the operations of the Baltimore branch office. As John Quincy Adams would subsequently observe, "there [wa]s not a city in the Union which . . . had so much apparent prosperity, or within which there has been such complication of profligacy."¹³² This atmosphere suited James William M'Culloch, who served as the branch's chief operating officer.¹³³ M'Culloch was both personally and professionally ambitious. He was also a harsh critic of the First Bank, which he believed had squandered many opportunities, and argued that the Second Bank should not repeat its mistakes.

The Bank of the United States must assume its stand, and, supported by the Government, might improve the medium of the country very essentially. The old bank did much to injure it. . . . Instead of extending its operations so as to embrace every real demand of commerce; instead of expanding its views as the country and its trade grew, it pursued a timid and faltering course, and invited, by its measures, the erection of rival institutions to share its business, and contaminate the character of this country's medium.

That bank had a glorious field before it; and this has one almost as much so, whilst it harmonizes with the Government and meets every real call of commerce.¹³⁴

131. *Id.* at 32-41.

132. 4 JOHN QUINCY ADAMS, *The Department of State*, in MEMOIRS OF JOHN QUINCY ADAMS, 383 (Charles Francis Adams ed., 1875); *see also* CATTERALL, *supra* note 104, at 42 ("Baltimore at this time was the center of airy speculation and of all sorts of characterless and illegitimate business.").

133. M'Culloch's formal title was Cashier. The spelling of his name, in turn, has become a matter of controversy over the years. I am convinced that M'Culloch is correct, based on manuscript documents found in various archives. For a discussion of M'Culloch's ruin and eventual redemption, *see* SECURING A NATION, *supra* note 5, at 90-94, 184-90.

134. Letter from Jas. W. M'Culloch to William Crawford (Mar. 17, 1817), in 4 AMERICAN STATE PAPERS: FINANCE 774 (Washington, Gales & Seaton 1858).

It became clear, however, that these views were not widely shared and that both the Bank's and the government's actions were viewed with alarm. "In vain will this nefarious institution, attempt through the *connivance* of a corrupt administration, to shake off the overwhelming load of iniquity, that drags it down the channel of popular odium, to final ruin and disgrace."¹³⁵ The constant criticism of the Bank could not be ignored. On November 25, 1818 Representative John C. Spencer of New York offered a resolution in the House of Representatives asking "[t]hat a committee be appointed to inspect the books and examine into the proceedings of the Bank of the United States, and to report whether the provisions of its charter have been violated or not."¹³⁶ Spencer stated that "[a]s to the necessity of the inquiry proposed, he presumed there were few of those near him who were not aware of the agitation which exists in the public mind on this subject, and who did not perceive that, from one end of the country to the other, loud complaints were made against the conduct of the officers of the banks."¹³⁷ He tied the need for an investigation to the fortunes of the Bank itself. "The friends of the bank," he thought, "ought to solicit the inquiry proposed," for a "full and fair view of the whole subject, thus obtained, would be attended with the most happy consequences to the nation and to the bank."¹³⁸ And he emphasized that "no one could doubt the utility of such an institution to the nation, if properly conducted."¹³⁹

A request was made to give the House "time to reflect on it,"¹⁴⁰ and the matter was taken up again on November 30th. There was an extended discussion about the economic situation, the extent to which the Bank had fulfilled the roles promised by its supporters, and the details of the proposed investigation. Modifications were made to the original motion and a final

135. Brutus, *Bank of United States, No. V.*, WEEKLY AURORA, Nov. 2, 1818, at 284.

136. MR. SPENCER'S RESOLUTION AND REPORT, 15TH CONG. (Nov. 25, 1818), reprinted in M. ST. CLAIR CLARKE & D. A. HALL, LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 714 (Washington, Gals and Seaton 1832) [hereinafter CLARKE & HALL]. The Clarke and Hall volume is an invaluable resource for those interested in the history of both the First and Second Bank.

137. 33 ANNALS OF CONG. 318 (1818).

138. *Id.*

139. *Id.* at 319.

140. *Id.*

version emerged that was designed to give the committee the freedom to conduct an inquiry that would “embrace all the topics respecting which the public mind had been agitated, and to obtain a report thereon from a respectable committee of this House.”¹⁴¹ A five person committee was appointed, consisting of Spencer, William Lowndes of South Carolina, Louis McLane of Delaware, Burwell Bassett of Virginia, and a future President of the United States who would play an important role in the long-term fate of the Bank, John Tyler, also of Virginia.¹⁴²

The committee filed its report on January 16, 1819.¹⁴³ It indicated that the members had conducted a thorough examination of the Bank’s books and had “interrogated, on oath” officers and officials of the Bank at its headquarters in Philadelphia and branch offices in Baltimore, Richmond, and Washington.¹⁴⁴ The committee stressed that its focus had been on “the general management of the bank, and the conduct of its officers, and those which were connected with the question of a violation of its charter.”¹⁴⁵

The first portion of the report recited the events that had provoked the investigation. The committee observed that the Bank had been in a position to do much good, noting that it had the power to “coerce[]” the state banks “into a moderate and reasonable reduction of their circulating notes.”¹⁴⁶ But the Bank did not do that. Rather, it participated willingly in the general rush to profit and acted only when it found itself in peril. Then, its response was Draconian. As the report noted, “when the bank began to call for specie, its demands were so considerable as to not only expose the local banks, but the citizens in their vicinity, generally, to very severe pressure.”¹⁴⁷

The committee accordingly placed much of the blame for the resulting economic problems on the Bank. “The committee think it evident . . . that the bank did not exercise, with sufficient

141. *Id.* at 327.

142. For a discussion of Tyler’s future role in the fate of the Bank, see *SECURING A NATION*, *supra* note 5, at 177-79.

143. See *CLARKE & HALL*, *supra* note 136, at 714-32 (containing the full committee report); see also 33 *ANNALS OF CONG.* 552-80 (1819) (containing the full report).

144. 33 *ANNALS OF CONG.* 552.

145. *Id.*

146. *Id.* at 553.

147. *Id.* at 554.

energy, the power which it possessed, and might have retained, but rather afforded inducements to the State banks to extend the amount of their circulating notes, and this increased one of the evils it was intended to correct.”¹⁴⁸ It also criticized the conduct of the branches, singling out Baltimore as one that “continued its drafts and discounts, and drained the specie from the Northern offices.”¹⁴⁹ It concluded that the New York, Boston, and Philadelphia “were, in fact, made tributary to Baltimore; and all their means and energies were required to supply its extravagant issues.”¹⁵⁰ Baltimore had, in effect, “impoverished the Northern offices, and the cities where they were established were made to feel the pressure.”¹⁵¹

The report also emphasized that inappropriate, perhaps even illegal conduct had occurred. It stressed that “[t]he effect of these [actions] was, very obviously, to enable those who had made large purchases to retain their stock without paying for it, and to declare a benefit from its probable advancement in price.”¹⁵² In particular, substantial amounts of the Bank’s capital were “placed beyond its control.”¹⁵³ Many of “the loans actually made were . . . unreasonable and excessive in their amount; they were not made to the merchant and trader, but to a few persons consisting of directors, brokers, and speculators; and have been renewed and continued, almost invariably, at the option of the borrower.”¹⁵⁴ Indeed, “many of the directors, as well those appointed by the Government as those elected by the stockholders, appear to have been the most forward and the most active in trafficking in stock.”¹⁵⁵

The report established quite clearly that there had been substantial misconduct and violations of the Bank’s charter.¹⁵⁶ Nevertheless, it did not recommend any specific actions or sanctions, believing that “the salutary power lodged in the

148. *Id.*

149. 33 ANNALS OF CONG. 555 (1819).

150. *Id.* at 556.

151. *Id.*

152. *Id.* at 561.

153. *Id.* at 565.

154. 33 ANNALS OF CONG. 566 (1819).

155. *Id.*

156. *Id.* at 572-73 (detailing four violations of the Charter).

Treasury Department will be exerted, as occasion may require, and with reference to the best interests of the United States.”¹⁵⁷

The report had an immediate and predictable effect. William Jones was forced out as President in January, “resign[ing]” shortly after he had been reelected to the position.¹⁵⁸ An interim President, James C. Fisher, served until March, 1819, when Langdon Cheves, the former Speaker of the House, assumed that office.¹⁵⁹ Cheves proved to be an able administrator and initiated a number of needed reforms.¹⁶⁰ These included a general housecleaning, one of the victims of which would be James M’Culloch, who was forced to resign from his position in May, 1819.¹⁶¹

The House took up the report and the issues it presented on February 19, 1819, four days before the Court met to hear arguments in *M’Culloch*.¹⁶² Two specific proposals were considered. The first was a measure that had been introduced on February 1st that asked the Attorney General to issue a *scire facias*, a writ requiring the Bank “to show *cause* wherefore the charter, thereby granted, should not be declared forfeited.”¹⁶³ The second requested that the Committee on the Judiciary “be instructed to report a bill to repeal” the Bank’s charter.¹⁶⁴

These provoked extended debate, which came to an end on February 25th, three days after the oral argument of *M’Culloch* had begun. All of the Bank’s sins were paraded before the House and the nation in an extended discussion that both praised the Bank as “covered with virtues and perfection . . . occupying a station almost superhuman” and condemned it as one that “was not in a condition to respond to the confidence or business of the country.”¹⁶⁵ It was also quite clear that those engaging in that debate knew they were not the only ones actively judging the Bank. On the February 24th, for example, Representative David

157. *Id.* at 573.

158. SMITH, *supra* note 104, at 116.

159. *Id.* at 116-17.

160. For details of the Cheves regime, see HAMMOND, *supra* note 101, at 262-79; SMITH, *supra* note 104, at 117-46.

161. SECURING A NATION, *supra* note 5, at 194.

162. 34 ANNALS OF CONG. 1240 (1819); HAMMOND, *supra* note 101, at 264 (emphasis added).

163. CLARKE & HALL, *supra* note 136, at 732-33.

164. 34 ANNALS OF CONG. 1240.

165. *Id.* at 1394-95.

Walker of Kentucky observed that “[h]ave we not got reasons to believe, from the known complexion of a majority of the members of the United States Supreme Court, that the court will determine that the United States Bank have a right to extend her branches over every individual State in the Union, and that the States have no right to prune them?”¹⁶⁶

None of this could have escaped the notice of the Court. In 1819 Washington was a very small place. Its sole business was government, and the three branches were acutely aware of what each was doing. Indeed, the Court met in a smallish chamber in the Capitol itself, barely separated from the House.¹⁶⁷ As Justice Story observed in a letter to his mother, there was a “busy circle[] of politics” within which the decisions of the Court “excite[] great interest, and in a political view [are] of the deepest consequence to the nation.”¹⁶⁸

The proverbial bottom line is that in the early months of 1819 the Second Bank had been laid bare as a corrupt institution unworthy of support. It was routinely attacked in both the halls of Congress and the press. As Brutus stressed in mid-January, 1819, “[t]he system of paper fraud, and dishonest speculation . . . has been so *manifestly*, so *avowedly*, licentious, vicious, and unlawful, as to dispel all doubts, and take away all reservation, as to the *turpitude* of those who planned, those who executed, and those who continue it.”¹⁶⁹ Yet in the face of this the Court both sustained its constitutionality and praised it as an institution conceived and implemented to cure “the embarrassments to which the refusal to revive [the First Bank] exposed the government.”¹⁷⁰

These were then the actions of a Court that exhibited considerable political and social courage in the midst of a pervasive climate of distrust. Indeed, if anything, the protracted and sometimes savage attacks mounted against both the decision and Marshall in the months that followed—especially in the heart

166. *Id.* at 1406.

167. See G. Edward White, *The Working Life of the Marshall Court, 1815-1835*, 70 VA. L. REV. 1, 1, 3 (1984).

168. Letter from Joseph Story to Mehitable Story (Mar. 7, 1819), in 1 LIFE AND LETTERS, *supra* note 7, at 325.

169. Brutus, *Calamities of Banking, Vulgar Abuse and Denunciation*, WEEKLY AURORA, Jan. 18, 1819, at 330.

170. *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402 (1819).

of state rights territory, his home state of Virginia—amply supported Marshall's observation that "[o]ur opinion in the bank case has roused the sleeping spirit of Virginia . . . and will be attacked in the papers with some asperity."¹⁷¹ *M'Connell* must, accordingly, be read and assessed in the light of these realities.

C. THE MISSOURI QUESTION

Marshall was of course aware of just how deeply certain segments of the body politic resented the Bank and all it stood for. As he stressed at the outset of his opinion, after summarizing the issues before the Court:

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.¹⁷²

Marshall understood the significance of the questions before the Court. But he also believed that the threshold issue, whether Congress could actually create the Bank, was settled:

It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period in our history, has been [recognized] by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.¹⁷³

He placed special emphasis on the legislative proceedings and the public response to the creation of the First and Second Banks, noting that "[a]n exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly

171. Letter from John Marshall to Joseph Story (Mar. 24, 1819), in VIII THE PAPERS OF JOHN MARSHALL, 280, 280 (Charles F. Hobson ed., 1995). For a discussion of the attacks, and Marshall's own responses to them, see *SECURING A NATION*, *supra* note 5, at 123-58.

172. *M'Connell*, 17 U.S. (4 Wheat.) at 400-01.

173. *Id.* at 401.

disregarded.”¹⁷⁴ And he stressed the significance of the fact that the Second Bank was created after “a short experience of the embarrassments to which the refusal to revive [the First Bank] exposed the government,”¹⁷⁵ observing that “[i]t would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance.”¹⁷⁶

The fact that Marshall included the judicial branch within the list of those that had given their assent to the Bank is especially noteworthy. He was not alone in this belief. Both Madison in his 1815 Veto and Representative Robert Wright of Maryland during the 1816 debate had alluded to judicial approval of the Bank, each without specifying what decisions they had in mind.¹⁷⁷ Marshall now confirmed what the others had said: prior recognition of the Bank as a proper party in cases before the Court offered tacit recognition that Congress did indeed have the power to charter the Bank.¹⁷⁸

It is accordingly difficult to believe that Marshall thought that the constitutionality of the Bank itself represented an issue on which the fate of the nation rode. The hostility toward it at the time, bolstered by the Spencer Committee Report, certainly made its status controversial. But there was widespread agreement that it was constitutional, a view that was even more significant given prior decisions of the Court that had already affirmed both the existence of implied powers and the need to defer to congressional judgments about the necessity for federal action. As Marshall stressed, it required “no ordinary share of intrepidity” to question these basic constitutional principles.¹⁷⁹

Something more seemed to be afoot, and there was in fact another issue being actively discussed at the time, within which a newly robust doctrine of implied federal powers would be viewed with alarm by individuals quite willing to argue in response that they had a right to both defy the nation and, if necessary, to leave

174. *Id.*

175. *Id.* at 402.

176. *Id.*

177. See James Madison, Veto Message, in *IA COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897*, 555, 555 (James D. Richardson ed., 1896); 29 *ANNALS OF CONG.* 1340 (1816).

178. *M’Culloch*, 17 U.S. (4 Wheat.) at 401.

179. *Id.* at 402.

it. That issue was slavery, with the particular manifestation of that divisive matter the question of the status of Missouri.

Congressional debate about both slavery in general and Missouri in particular were constant themes during the session, especially in the House. In December, 1818 a resolution was introduced that would allow Missouri to form a territorial government in anticipation of its eventual admission to the union.¹⁸⁰ In early January, 1819, in turn, concerns were expressed about individuals engaging in the slave trade, violating federal law in ways that “demanded the interposition of Congress.”¹⁸¹ The two issues were then linked on February 1, 1819, when an amendment to the Missouri Territory measure was proposed that would “substantially . . . limit the existence of slavery in the new State, by declaring all free who should be born in the Territory after its admission into the Union, and providing for the gradual emancipation of those now held in bondage.”¹⁸² Extensive debates on the paired questions then began on February 15th, just one week before the Court would begin to hear arguments in *M'Culloch*.¹⁸³

The southern states harbored deep concerns about the ability of Congress to impose conditions on the admission of new states, believing “that Congress had no right to prescribe to any State the details of its government, any further than that it should be republican in its form.”¹⁸⁴ Part of the argument against slavery would in fact be that it was incompatible with that form of government. Representative Timothy Fuller of Massachusetts, for example, argued that “[t]he existence of slavery in any State is so far a departure from republican principles,” citing the Declaration of Independence, and declaring that “[s]ince, then, it cannot be denied that slaves are men, it follows that they are in a purely republican government born free, and are entitled to liberty and the pursuit of happiness.”¹⁸⁵ These individuals also rejected the idea that Congress had the authority to bar slavery from national territories, maintaining that any such action “portend[ed]

180. 33 ANNALS OF CONG. 413 (1818).

181. *Id.* at 442.

182. *Id.* at 1166.

183. *See id.* at 1169-94.

184. *Id.*

185. 33 ANNALS OF CONG. 1180 (1819).

destruction to the liberties of th[e] people, directly bearing on their rights of property.”¹⁸⁶ Neither power was mentioned in the Constitution. But both would be countenanced by an expansive reading of the text, in particular one sanctioning the existence of implied powers and the notion that decisions about the necessity for such matters were best left to the political process.

M’Culloch accordingly struck fear into the hearts of the pro-slavery factions on both counts. In Maryland, for example, “Maryland planters knew well that if federal power reached far enough outside constitutional bounds it might fall on slavery.”¹⁸⁷ Indeed, Representative John W. Taylor of New York, possibly anticipating that decision, emphasized that “Congress has no power unless it be expressly granted by the Constitution, or necessary to the execution of some power clearly delegated.”¹⁸⁸

Post-decision reactions verified that the slavery issue was front and center. Jefferson, for example, lamented, with *M’Culloch* clearly on his mind, “[t]he steady tenor of the courts of the United States to break down the constitutional barriers between the co-ordinate powers of the States and of the Union” in “a formal opinion lately given by five lawyers of too much eminence.”¹⁸⁹ He stressed that “nothing has ever presented so threatening an aspect as what is called the Missouri question.”¹⁹⁰ Jefferson admittedly believed that this was primarily a political maneuver designed to split the Republican Party in the election of 1820.¹⁹¹ Nevertheless, he recognized that it posed a distinct threat to the institution of slavery, which now became “merely a question of power,”¹⁹² observing that

186. *Id.* at 1195. This observation was made by John Scott of Missouri, who warned against “the introduction . . . of any principle . . . the obvious tendency of which would be to sow the seeds of discord in, and perhaps eventually endanger, the Union.” *Id.* See also Brutus, *The Bank System of Political Corruption*, No. VI, WEEKLY AURORA, Mar. 22, 1819, at 36 (stating that, “[t]his judgment forever annihilates the *independency of the states*, and forever blasts the rights and liberties of the people.”).

187. ROBERT J. BRUGGER, MARYLAND: A MIDDLE TEMPERAMENT 1634—1980 197 (1988).

188. *Id.* at 1171.

189. Letter from Thomas Jefferson to Albert Gallatin (Dec. 26, 1820), in XII THE WORKS OF THOMAS JEFFERSON 185, 186 (Paul Leicester Ford ed., 1905) [hereinafter Jefferson to Gallatin].

190. *Id.* at 186-87.

191. See DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 288-89 (1994).

192. Jefferson to Gallatin, *supra* note 189, at 187.

if Congress once goes out of the Constitution to arrogate a right of regulating the condition of the inhabitants of the States, its majority may, and probably will, next declare that the condition of all men with the United States shall be that of freedom; in which case all the whites South of the Potomac and Ohio must evacuate their States; and most fortunate those who can do it first. And so far this crisis seems to be advancing.¹⁹³

He took these questions up again in June, 1821, noting in a letter to Spencer Roane that “I have read Colonel Taylor’s book of ‘Constructions Construed,’ with great satisfaction, and, I will say, with edification; for I acknowledge it corrected some errors of opinion into which I had slidden without sufficient examination.”¹⁹⁴ That book, he declared,

is the most logical retraction of our governments to the original and true principles of the Constitution creating them, which has appeared since the adoption of that instrument. I may not perhaps concur in all its opinions, great and small; for no two men ever thought alike on so many points. But on all its important questions, it contains the true political faith, to which every catholic republican should steadfastly hold.¹⁹⁵

John Taylor was an ardent state rights advocate and prolific spokesman for that position.¹⁹⁶ The book Jefferson praised, *Construction Construed, and Constitutions Vindicated*,¹⁹⁷ was nominally about *M’Culloch*. It examined the decision at great, albeit often tedious length. But it was more than simply an attack on “a mode of construction . . . introduced to advance the interests of mercenary combinations.”¹⁹⁸ It was rather, a conscious effort to link *M’Culloch* to both the Missouri Question and slavery. As Thomas Ritchie made clear in his prefatory remarks, “[t]he Missouri Question is probably not yet closed. The principle, on

193. *Id.* at 187-88.

194. Letter from Thomas Jefferson to Spencer Roane (June 27, 1821), in XV JEFFERSON WRITINGS, *supra* note 56, at 326, 327.

195. *Id.* at 327-28.

196. For a discussion of Taylor, his views, and his influence, see Benjamin F. Wright, *The Philosopher of Jeffersonian Democracy*, 22 AM. POL. SCI. REV. 870, 880-89 (1928).

197. See generally JOHN TAYLOR, CONSTRUCTION CONSTRUED, AND CONSTITUTIONS VINDICATED (Sheppard & Pollard 1820) [hereinafter CONSTRUCTION CONSTRUED].

198. *Id.* at 6.

which it turns, is certainly not settled.”¹⁹⁹ Taylor accordingly had both a specific target, *M’Culloch*, and a wider aim, combating any inference that *M’Culloch* meant that Congress could appropriately resolve the questions posed by slavery.

Taylor’s general philosophy mirrored that of Jefferson and his Republican allies. He complained, for example, of the “habit of corrupting our political system, by the instrumentality of inference, convenience and necessity.”²⁰⁰ He believed that sovereignty resided with “the people of each state, by whom it has been and may be exercised” and does not belong “to the people of the United States, by whom it never has been nor can be exercised.”²⁰¹ Banks in turn were evil. “A catalogue of the immoral tendencies of banking ought to be awful to a republican government, which many great writers assert to be incapable of subsisting long, except by the preservation of virtuous principles.”²⁰²

Taylor’s attacks on the Court were pointed. He asked, for example, “[w]hich can do most harm to mankind, constrictive treasons or constructive powers? The first takes away the life of an individual, the second destroys the liberty of a nation. The machine called inference can act as extensively in one case as in the other.”²⁰³ And he excoriated Marshall for sanctioning the notion of implied powers, observing:

As ends may be made to beget means, so means may be made to beget ends, until the co-habitation shall rear a progeny of unconstitutional bastards, which were not begotten by the people; and their rights being no longer secured by fixed principles, will be hazarded upon a game at shuttlecock with ends and means, between the general and state governments. To prevent this, means as well as ends are subjected by our constitutions to a double restraint. The first is special. In many instances, the means for executing the powers bestowed, are defined, and by that definition, limited. The other is general, and arises necessarily from the division of powers; as it was never intended that powers given to one department, or one government, should be

199. *To the Publick, in Construction Construed*, *supra* note 197, at i.

200. *Construction Construed*, *supra* note 197, at 2.

201. *Id.* at 121.

202. *Id.* at 183.

203. *Id.* at 22-23.

impaired or destroyed, by the means used for the execution of powers given to another. Otherwise, the indefinite word 'means' might defeat all labour expended upon definition by our constitutions.²⁰⁴

Taylor argued that implied powers posed special risks for the states. He believed that a proper understanding of the Constitution meant that "[t]he ends with which [the federal and state] governments are respectfully entrusted . . . have been exclusively bestowed, and neither could constitutionally use its legitimate ends, to defeat or absorb the legitimate ends assigned to the other."²⁰⁵ *M'Culloch* upset that balance. "If the means to which the government of the union may resort for executing the powers confided to it, are unlimited, it may easily select such as will impair or destroy the powers confided to the state governments."²⁰⁶

Taylor's observations on the subject of slavery were especially telling, both for their support of each state's right to determine that issue and the extent to which he connected it to the Bank and banking. He declared that:

[o]ne portion of the union is afflicted by negro slavery; therefore, make it tributary to capitalists. Cultivation by slaves is unprofitable; therefore, make it tributary to capitalists. The freedom of labour deprives it of the benefit of being directed by intelligence; therefore, subject it to capitalists. Taxation is preferable to economy; therefore, enhance it for the nourishment of capitalists, and the gratification of avarice.²⁰⁷

And he predicted the logical outcome of these matters in a passage that would prove tellingly prescient:

Let us recite the succession of events. The great pecuniary favour granted by congress to certificate-holders, begat banking; banking begat bounties to manufacturing capitalists; bounties to manufacturing capitalists begat an oppressive pension list; these partialities united to begat the Missouri project; that project begat the idea of using slavery as an instrument for effecting a balance of power; when it is

204. *Id.* at 84.

205. Construction Construed, *supra* note 197, at 83.

206. *Id.*

207. *Id.* at 257 (internal quotations omitted).

put in operation, it will beget new usurpations of internal powers over persons and property, and these will beget a dissolution of the union.²⁰⁸

Taylor's extensive discussion of *M'Culloch* and the Missouri Question made it quite clear that state rights advocates, in particular those in the slave-holding states, saw dangerous parallels between Marshall's expansive read on implied powers and the ability of Congress to invoke that doctrine as the basis for terminating the institution of slavery. In any such debate, Spencer Roane stressed in a letter to Senator James Barbour of Virginia, "[t]he decision of the Supreme Court will be the principal object; as that claims a right to every thing possessed by the States."²⁰⁹

Roane agreed, and in the wake of a second Marshall opinion, *Cohens v. Virginia*,²¹⁰ took to the pages of the *Richmond Enquirer* under the pseudonym Algernon Sydney to condemn decisions that "completely negative[] the idea, that the American states have a real existence, or are to be considered, in any sense, as [sovereign] and independent states."²¹¹ As part of these attacks, Roane implied that slavery was not safe, declaring that the Court had "exalted the dignity of a statute of the United States" and "given a force" to them "in every State in the Union . . . to supercede and repeal their most undoubted and salutary laws."²¹²

There are those who dispute this, arguing that linking *M'Culloch*, *Cohens*, and slavery "make[] a superficial and dubious connection between what are different and, in many ways, disconnected strains of states' rights thought."²¹³ I disagree. As I am about to note, *M'Culloch* gave an already

208. *Id.* at 298.

209. Letter from Spencer Roane to James Barbour (Dec. 29, 1819), reprinted in *Missouri Compromise*, 10 WM. & MARY Q. 5,7 (1902); In February, 1820, Linn Banks, a member of the Virginia House of Delegates, stressed that "[s]laves by our laws are considered property." Letter from Linn Banks to James Barbour (Feb. 20, 1820), reprinted in *Missouri Compromise*, 10 WM. & MARY Q. 5, 20 (1901). He argued that recent events suggested that there were those who believed that Congress "would have it in their power to legislate exclusively for our property of every description" and that, if true, "would sound the tocsin of freedom to every negro of the South." *Id.* at 21.

210. *See generally* 19 U.S. (6 Wheat.) 264 (1821).

211. Algernon Sydney, *On the Lottery Decision, No. 1*, RICHMOND ENQUIRER (May 25, 1821).

212. *Id.*

213. Ellis, *supra* note 2, at 140. Ellis also argues that John Taylor was an exception who made only a "small attempt to link the two debates." *Id.* at 141. That is simply wrong.

recognized right of Congress to act on the basis of implied powers new impetus. In particular, Marshall's willingness to defer to Congress regarding whether a given action or policy was "necessary" placed a renewed emphasis on the balance of power in a Congress that had already shown a willingness to restrict the slave trade.²¹⁴ The debate about Missouri, and its eventual resolution via the Missouri Compromise, placed the question of slavery front and center. It defies imagination to argue that Marshall and his colleagues were somehow blithely unaware of the potential impact of *M'Connell* in those ongoing and bitter disputes. Their contemporaries certainly did, and we cannot and should not ignore the sentiments of individuals who believed that *M'Connell* might well "induce [Congress] to meddle with forbidden fruit" such that "the essence of our political system will be destroyed, and with it our vaunted residence in a region of political fecundity."²¹⁵

III. INNOVATION, OR REPLICATION?

A final important contextual reality is that much of what Marshall actually stated in *M'Connell* had in fact been said before, by the Court, in opinions Marshall himself wrote. These decisions did more than simply acknowledging that the Bank existed, and was presumably a constitutionally proper institution that was a proper party in cases that came before the Court.²¹⁶ Rather, on at least three different occasions the Court acknowledged the reality that federal power extended beyond those narrow and specific grants of authority that were articulated in the text.

The first of these was *United State v. Fisher*,²¹⁷ in which Marshall outlined much of what followed regarding the nature and reach of the Necessary and Proper Clause. *Fisher* was a

214. See, e.g., An Act to Prohibit the Importation of Slaves in Any Port or Place Within the Jurisdiction of the United States, From and After the First Day of January, in the Year of Our Lord One Thousand Eight Hundred and Eight, 9th Cong., 2 Stat. 426 (1807).

215. Construction Construed, *supra* note 197, at 299.

216. See, e.g., 29 ANNALS OF CONG. 1340 (1816) (noting "[T]he Supreme Judicial tribunal had decided on its constitutionality by often recognizing it as a party, and it was now too late to insist on the objection.").

217. 6 U.S. (2 Cranch) 358 (1805).

bankruptcy action.²¹⁸ The question before the Court was “whether the United States, as holders of a protested bill of exchange . . . are entitled to be preferred to the general creditors, where the debtor becomes bankrupt?”²¹⁹ The Court held that it was entitled to the preference, rejecting the contention that “[t]his claim of priority on the part of the United States will . . . interfere with the right of the state sovereignties respecting the dignity of debts, and will defeat the measures they have a right to adopt to secure themselves against delinquencies on the part of their own revenue officers.”²²⁰

Marshall’s opinion reads like a primer for *M’Culloch*. He began by noting that “[i]n the case at bar, the preference claimed by the United States is not prohibited; but it has been truly said that under a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised.”²²¹ His response was pointed and prescient:

It is claimed under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the constitution in the government of the United States, or in any department or officer thereof.

In construing this clause it would be incorrect and would produce endless difficulties, if the opinion should be maintained that no law was authorised which was not indispensably necessary to give effect to a specified power.

Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of the power granted by the constitution.²²²

Marshall dismissed the contention that the federal measure “interfere[s] with the right of the state sovereignties respecting the dignity of debts.”²²³ This was nothing more than “an objection to

218. *See id.* at 385.

219. *Id.*

220. *Id.* at 396-97.

221. *Id.* at 396.

222. *Fisher*, 6 U.S. (2 Cranch) at 396.

223. *Id.* at 396-97.

the constitution itself.”²²⁴ And he stated that “[t]he mischief suggested, so far as it can really happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative powers of congress extends.”²²⁵ In other words, as he would subsequently declare, “a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution.”²²⁶

The same approach was taken in a second case decided three years later, *The Bank of the United States v. DeVeaux* (1809).²²⁷ This cause of action began when, ironically, the First Bank refused to pay a tax that the state of Georgia attempted to levy on its stock.²²⁸ Writing for the Court, Marshall stated that “that the right to sue” conferred on the Bank in its original charter “does not imply a right to sue in the courts of the union, unless it be expressed.”²²⁹ Emphasizing that the citizenship of a corporation is determined by “the character of the individuals who compose[]” it,²³⁰ the Court held that it had no jurisdiction. The Bank could not bring a federal question action, since the statutes in question did not authorize it to do so.²³¹ It also could not maintain one in diversity, which required that no party from one side of the dispute could be from the same state as any of the opposing parties.²³²

Marshall did not discuss whether the Bank itself was constitutional in *DeVeaux*. But he did lay the foundations for key aspects of what was to follow, observing that “[a] constitution, from its nature, deals in generals, not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and

224. *Id.* at 397.

225. *Id.*

226. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819).

227. 9 U.S. (5 Cranch) 61 (1809).

228. *See id.* at 63.

229. *Id.* at 86.

230. *Id.* at 90.

231. *See id.* at 86.

232. The Court had announced that rule three years earlier in *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267 (1806), when it held that that was what Congress intended when it implemented diversity jurisdiction in the Judiciary Act of 1789.

general principles.”²³³ That formulation did not, obviously, have the ring or staying power of Marshall’s subsequent admonition that “[a] constitution” cannot “partake of the prolixity of a legal code.”²³⁴ But it does tell us that much of *M’Culloch* is not original.

Finally, both federal supremacy and the reality of implied powers were major themes in *Martin v. Hunter’s Lessee*.²³⁵ Two questions were posed in this litigation. The first was whether the State of Virginia could confiscate land owned by individuals who remained loyal to the Crown during the Revolution and then convey it to third parties.²³⁶ The Virginia Court of Appeals upheld the state actions, arguing that the 1783 and 1794 treaties that ended the war and resolved outstanding issues did not apply.²³⁷ The Court, in an opinion by Justice Story,²³⁸ disagreed, stating that “we are well satisfied that the treaty of 1794 completely protects and confirms that title of Denny Fairfax; even admitting that the [1783] treaty of peace left him wholly unprovided for.”²³⁹

The Virginia Court of Appeals then “refus[ed] . . . to obey the mandate of th[e C]ourt,”²⁴⁰ believing that “the appellate power of the Supreme Court of the United States does not extend to this court.”²⁴¹ The Court, again speaking through Justice Story, disagreed. The Judiciary Act of 1789 expressly provided for appellate review of “any suit, in the highest court of law or equity of a State in which decision in the suit could be had, where is drawn in question the validity of a treaty . . . and the decision is against [its] validity.”²⁴² The Court had jurisdiction, and its mandate must be obeyed:

The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the

233. *DeVeaux*, 9 U.S. (5 Cranch) at 87.

234. *M’Culloch*, 17 U.S. (4 Wheat.) at 407.

235. 14 U.S. (1 Wheat.) 304, 305 (1816).

236. *Id.* at 304, 306-312.

237. *See* *Hunter v. Fairfax’s Devisee*, 15 Va. (1 Munf.) 218, 228-29, 231 (1809).

238. Marshall did not participate, given that his family had a stake in the land at issue.

239. *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. (7 Cranch) 603, 627 (1812).

240. *Martin*, 14 U.S. (1 Wheat.) at 304, 305.

241. *Hunter v. Martin*, 18 Va. (4 Munf.) 1, 32 (1813).

242. Judiciary Act of 1789, ch. 20, § 25 (1789).

constitution, may declare them to be of no legal validity. Surely the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.²⁴³

Indeed, review of state court decisions was essential:

If there were no revising authority to control . . . jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states.²⁴⁴

The more telling aspects of *Martin* for current purposes are the principles it espoused regarding the nature of Congressional authority and the terms of the Constitution itself. As a threshold matter, Story, consistent with both *Fisher* and *DeVeaux*, emphasized that “[t]he government . . . of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication.”²⁴⁵ The Constitution, he emphasized, “unavoidably deals in general language. It did not suit the purposes of the people . . . to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution.”²⁴⁶ Congress in turn, has substantial discretion regarding when and how both its express and implied powers are to be exercised:

Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as to its own wisdom, and the public interests, should require.²⁴⁷

The Constitution was both a general and adaptable charter. “The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages.”²⁴⁸ It was, accordingly, essential that it be viewed as a document whose meaning and proper applications evolved over

243. *Martin*, 14 U.S. (1 Wheat.) at 344.

244. *Id.* at 348.

245. *Id.* at 326.

246. *Id.*

247. *Id.* at 326-27.

248. *Martin*, 14 U.S. (1 Wheat.) at 326.

time: “It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself.”²⁴⁹

Each of these statements has its counterpart in *M’Culloch*. That decision’s articulation of the principles of implied powers and deference to congressional judgments about necessity did not, accordingly, break new ground. Rather, Marshall simply reiterated and repackaged prior precedents without acknowledging their existence. I leave to others whether that diminishes the stature of the decision. I would disagree with any such judgment in the light of the overall nature and content of Marshall’s opinion. In particular, I regard what he penned as uncommonly eloquent and significant in the light of the circumstances and events within which he wrote it.

CONCLUSION

From the very beginning, everyone knew that *M’Culloch* was an important case. As indicated,²⁵⁰ in December, 1818 Justice Story wrote Court Reporter Henry Wheaton, noting that *M’Culloch* was one of the matters pending that would “probably” make the “next term of the Supreme Court . . . the most interesting ever known.”²⁵¹ The other two cases he mentioned, *Dartmouth College* and *Sturgis*, would also become important parts of the Court’s 1819 legacy. But *M’Culloch* would eventually occupy center stage, capturing the imagination of the Justices, the general public, and a legion of commentators that cared deeply about the issues posed by and the implications of the Court’s decision.

That narrow perspective is unfortunate. Both *Dartmouth College* and *Sturges* deserve attention as key elements in a protracted process within which Marshall and his fellow justices articulated a vision of a Constitution “of complete obligation

249. *Id.*; *Cf. M’Culloch*, 17 U.S. (4 Wheat.) at 415 (“This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.”).

250. *See supra* note 7.

251. Life and Letters, *supra* note 7, at 313.

[that] bound the State sovereignties.”²⁵² In a similar vein, many contemporary events made a decision in favor of the Bank and implied powers remarkable, given the economic and social conditions at the time, the Court’s support for an institution widely reviled, and its willingness to countenance a robust policy-making role for Congress in the face of strong regional fears about how such powers might be exercised.

The project that Marshall and his colleagues were undertaking neither began nor ended with *M’Culloch*. It was gradual. It started in 1803 with the Court’s declaration that it mattered and would fully exercise the judicial power in *Marbury v. Madison*.²⁵³ It progressed over the years in *Fisher, DeVeaux*, and *Martin*, which laid the foundations for *M’Culloch*. And it continued in *M’Culloch*’s wake, articulated in decisions like *Cohens v. Virginia*,²⁵⁴ *Gibbons v. Ogden*,²⁵⁵ and *Osborn v. The President, Directors, and Company of the Bank of the United States*.²⁵⁶

That quest was temporarily derailed by John Marshall’s replacement by Roger Brooke Taney and by decades of cases that embraced a particularly crabbed vision of the Constitution, cases within which, for example, the Court fixated on highly artificial distinctions regarding intra- versus interstate commerce in the face of Marshall’s nuanced understanding of that federal power.²⁵⁷ *M’Culloch* only became totemic, accordingly, more than a hundred years after the decision was announced. It initially gained ascendancy in the wake of anniversary observances of John Marshall’s tenure. It then emerged as a centerpiece in the judicial revolution crafted in response to the Roosevelt administration’s statutory and regulatory responses to the problems posed by the Great Depression. Those realities do not, however, diminish its stature, nor do they require that we reject the lessons it imparts.

252. *M’Culloch*, 17 U.S. (4 Wheat.) at 404.

253. 5 U.S. (1 Cranch) 137, 180 (1803).

254. 19 U.S. (6 Wheat.) 264, 444-447 (1821).

255. 22 U.S. (9 Wheat.) 1 (1824).

256. 22 U.S. (9 Wheat.) 738, 819, 821, 823 (1824).

257. I discuss the unfortunate manner in which the Court incorrectly parsed *Gibbons* in Mark R. Killenbeck, *A Prudent Regard to Our Own Good? The Commerce Clause, in Nation and States*, 38 J. SUP. CT. HIST. 281, 290-91, 293, 297-98 (2013).