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JOHN MARSHALL, *MCCULLOCH v. MARYLAND*, AND THE SOUTHERN STATES' RIGHTS TRADITION

R. KENT NEWMYER*

INTRODUCTION

The Chief Justice was returning home to Richmond after completing the 1819 term when he first heard that the Richmond Junto, the nerve center of the reigning Jeffersonian Democratic Republicans of Virginia, was mounting a major assault on his opinion in *McCulloch v. Maryland*.¹ He expressed his chagrin and his fears to Joseph Story, his colleague and chief ally on the Court: "A deep design to convert our government into a meer [sic] league of States has taken strong hold of a powerful & violent party in Virginia . . ." Marshall continued:

The attack upon the judiciary is in fact an attack upon the union. The judicial department is well understood to be that through which the government may be attacked most successfully, because it is without patronage, & of course without power, and it is equally well understood that every subtraction from its jurisdiction is a vital wound to the government itself. The attack upon it therefore is a marked battery aimed at the government itself. The whole attack, if not originating with Mr. Jefferson, is obviously approved & guided by him. It is therefore formidable in other states as well as in this; & it behoves the friends of the union to be more on the alert than they have been.²

Marshall's fears were well-founded. The main assault began on March 30, with two essays by Judge William Brockenbrough in the *Richmond Enquirer* (the mouthpiece of the Richmond Junto). On June 11, the next wave began with four essays by Spencer Roane, leading judge on the Virginia Supreme Court of Appeals and (adding to his states' rights credentials) the son-in-law of Patrick Henry. The Virginia legislature soon chimed in with a resolution condemning the decision and instructing Virginia's congressional delegation to mount a campaign to curb the Court.

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1. 17 U.S. (4 Wheat.) 316 (1819).

2. Letter from John Marshall to Joseph Story (Sept. 18, 1821), in 9 THE PAPERS OF JOHN MARSHALL 184 (Henry A. Johnson et al. eds., 1974).

Then, in the course of three years, came three books by John Taylor of Caroline County, attacking *McCulloch* and other facets of Marshall's constitutional jurisprudence. As Marshall predicted, the anti-Court sentiment in Virginia spread to other states, so that the 1820s saw a national anti-Court movement both in Congress and at the state level. The attack was aimed not only at *McCulloch*, but also at the Court, itself, and the Chief Justice. Among the more radical proposals in circulation was one for a separate new court to deal with federalism questions composed of the chief justices of the several state courts. Another would make the Senate the final court of appeals in such cases. Less drastic was the move to require unanimity in all constitutional decisions. Most feared, however, was the congressional effort to repeal Section 25 of the Judiciary Act of 1789, which could be done by a simple majority vote and would have given each state supreme court the final say on constitutional issues. Under such a plan, instead of one constitution, there would be, in time, as many constitutions as there were states.

Open state resistance to the decisions of the Supreme Court was another feature of the 1820s. Such resistance was, of course, not new: witness Georgia's opposition to *Chisholm v. Georgia*,³ Pennsylvania's defiance of *United States v. Peters*,⁴ and Virginia's running jurisdictional battle with the Court culminating in *Martin v. Hunter's Lessee*.⁵ In the 1820s, however, such defiance became contagious and endemic. Virginia led the way with the assault on *McCulloch* and followed with an attack on *Cohens v. Virginia*⁶ in 1821. At the same time, Kentucky mobilized against *Green v. Biddle*,⁷ which voided that state's claimant laws. Georgia would ultimately do the same to the Marshall Court's Cherokee Indian decisions.⁸ But before that, as the culmination of the court wars of the 1820s, came John C. Calhoun's doctrine of nullification, set forth in 1828 by the South Carolina legislature, as the "Exposition and Protest." Calhoun's doctrine was implemented in 1832 when South Carolina declared the tariffs of 1828 and 1832 null and void—a position that the state threatened to back up with force if necessary. Calhoun's doctrine was directed straight at Marshall's opinion in *Cohens* (an opinion the South Carolinian once defended). As he put it to Virgil Maxcy on September 1, 1831, "The question is in truth between the people, & the Supreme Court," and the people spoke through state government.⁹ Calhoun

3. 2 U.S. (2 Wheat.) 419 (1793).

4. 9 U.S. (5 Cranch) 115 (1809).

5. 14 U.S. (1 Wheat.) 304 (1816).

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

7. 21 U.S. (8 Wheat.) 1 (1823).

8. See generally *Cherokee Nation v. Georgia*, 30 U.S. (1 Pet.) 1 (1831).

9. Letter from John C. Calhoun to Virgil Maxcy (Sept. 1, 1831), in

drew on the Virginia and Kentucky Resolutions, but the difference was that he devised a formal constitutional mechanism to implement the "spirit of '98." Prompted by *McCulloch*, the constitutional dialectic of the 1820s generated a mode of constitutional interpretation that states' rights supporters could fight for and ultimately did.

At no time during American history, not even in the Court-packing battle of the late 1930s, was there such a sustained root-and-branch attack on the Supreme Court as an institution. Nor, I contend, was there a time when the Court's powers were more ably defended, or its place in the republican scheme of government more clearly and fully expounded. The chief defender and expounder, as it turned out, was the Chief Justice himself. It is Marshall's response and relation to the states' rights theorists of the 1820s that interests me for several reasons. First, their dialectic with the Chief Justice is worth noting because it was a unique episode in American constitutional history, one which firmly locates Marshall in his own age and highlights some of his lesser known personal qualities. More importantly, however, Marshall's defense of *McCulloch* and the ensuing discourse takes us to the heart of his jurisprudence. This is especially so regarding his theory of federalism, which is not only *not* consolidationist (as his critics maintained) but is far more nuanced and more attentive to the needs and practices of state government than is generally recognized.

In the process of refuting the charge of consolidation levelled by his Virginia critics, Marshall also set forth his fullest exposition of the Court's powers and, indeed, the role of the Supreme Court in the republican scheme of government. *McCulloch*, therefore, plays a central role in the development of Marshall's theory of judicial review; in defending it, he expounded on the full interpretive powers of the Court, which led directly to *Cohens v. Virginia*, where he set forth the idea (which he did not do in *Marbury*) that the Court's word had to be final.¹⁰ Marshall's republican vision of the Court as the *final* authority on the Constitution, I maintain, would probably not have come into being without the concerted opposition of states' rights theorists. However, what they helped call into being, they also destroyed. Which is to say that Marshall's view of the Court as the final authority on the Constitution and the republican corrective for the disabilities of republican government was undercut by the political victory of the Jacksonians in 1828 and by Jackson's appointment of a new majority on the Court. The great irony is that, despite this defeat, Marshall's view of the Court became the model for subsequent

Galloway, Maxey, Marko papers, Library of Congress.

10. See generally *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

Courts and the governing assumption of constitutional historiography (at least until the appearance of Bruce Ackerman's revisionist scholarship).¹¹

I. *MCCULLOCH V. MARYLAND* AND
"THE SLEEPING SPIRIT OF VIRGINIA"¹²

McCulloch was the watershed opinion which set in motion the constitutional dialectic of the 1820s. Why Marshall's opinion should have aroused "the violent party" in Virginia, as he called it, and how it succeeded in discrediting the Court and isolating Marshall from Virginia and Virginia from the nation is not immediately clear. A national bank, as he pointed out in the opinion, was neither a new institution to Virginia or the nation, nor were the constitutional arguments supporting it new or original. The First Bank of the United States ("BUS"), which resembled its successor in every major respect, had been in existence for twenty years before its charter was allowed to expire in 1811. Washington had carefully considered the constitutional question and so had the first Congress, which passed the charter. Even though it was thoroughly Hamiltonian and highly opposed by the agrarian wing of his own party, President Jefferson, nonetheless, left the bank in place when he took office in 1801. For ten more years, he and Madison continued to draw on its services for the benefit of the nation. Four years without the bank during the War of 1812 spoke eloquently as to the value of those services. When the charter for the Second BUS was introduced in 1816, it had the support of President Madison, who signed the bill into law, as well as moderates in both political camps, including John C. Calhoun, who led the pro-bank forces in the Senate. The combined votes of senators and representatives in the nine southern and western states, in favor of the bank, was 45 to 26. Virginia was the only state whose representatives in Congress voted against the bank. Even in Virginia, there were eleven votes against and ten for, and the latter no doubt reckoned that a branch would be located in Richmond.¹³ Among those who attacked Marshall for his opinion in *McCulloch*, as he suggested to

11. Ackerman challenges the traditional Court-centered narrative of American constitutional history. See generally BRUCE A. ACKERMAN, *WE THE PEOPLE* (1991).

12. See, e.g., Letter from John Marshall to Joseph Story (March 24, 1819), in 8 *THE PAPERS OF JOHN MARSHALL*, at 280 (stating that "[o]ur opinion in the bank case has roused the sleeping spirit of Virginia—if indeed it ever sleeps").

13. See CHARLES D. LOWERY, *JAMES BARBOUR: A JEFFERSONIAN REPUBLICAN* 80-81 (1984) (discussing the composition of Richmond Junto and the banking interests of some of its key cites); BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 240 (1957) (examining the breakdown of the charter vote).

Bushrod Washington, were many prominent BUS stockholders.¹⁴ For example, Wilson Cary Nichols, the president of the Richmond branch, was also a member of the Richmond Junto.

Given the long history of the national bank, its support among moderates in both parties, and its integration into the financial and political community of Richmond and Virginia, it is not surprising that Marshall was caught off balance by the vehemence of the attack on his opinion and on him personally. Indeed, he concluded that it was not the bank, at all, or even the doctrine of implied powers in the opinion that awakened Virginia's "sleeping spirit." Instead, it was his forceful repudiation of the states' rights theory set forth by counsel for Maryland, who rested their case on the assumption that the Constitution was nothing but a contract between sovereign states and ought, in doubtful areas, be interpreted to privilege state sovereignty. The bank case may have involved Maryland, but the theory put forth by Jones, Martin, and Hopkinson for that state belonged to Virginia and traced its lineage back to the Virginia and Kentucky Resolutions. Marshall saw the connection immediately and correctly assumed that Jefferson, stirred by pride of authorship, was also stirring the states' rights pot behind the scenes.¹⁵ "If the principles which have been advanced on this occasion were to prevail," he wrote to Story, "the constitution would be converted into the old confederation."¹⁶

But why, we might ask, was the tone so apocalyptic on both sides? After all, states' rights theorizing had been around for a long time; so had the BUS (if one counts Hamilton's first bank); and so had Jefferson's vendetta against Marshall. So what happened in 1819 and immediately thereafter to give such doomsday meaning to old ideas and old enmities? One thing was a rapid acceleration of market oriented capitalism, as reflected in the Panic of 1819 and the onset of business cycles in American history. The Second BUS was also a conspicuous feature, if not the key symbol, of the new economic age. Marshall was right to observe that Virginians were ambiguous, not to say hypocritical, regarding the bank. Opposition to Hamilton's bank had been a tenet of Virginia Republicanism from the 1790s. On the other hand, the effort of Virginia Republicans to create an alternate state banking system had been plagued with practical and ideological problems from the beginning. In Marshall's opinion, the Bank of Virginia, controlled by the Richmond Junto, was a

14. Letter from John Marshall to Bushrod Washington (March 27, 1819) in 8 THE PAPERS OF JOHN MARSHALL, at 281.

15. Letter from John Marshall to Bushrod Washington (Sept. 18, 1821), in 9 THE PAPERS OF JOHN MARSHALL, at 184 (demonstrating Marshall's harsh assessment of Jefferson).

16. Letter from John Marshall to Joseph Story (May 27, 1819), in 8 THE PAPERS OF JOHN MARSHALL, at 314.

weak financial institution, which was no doubt why many Virginians, including Marshall, preferred the Richmond Branch of the national bank. But the disparity between the two banks was precisely the point, since it seemed to illustrate the power of the BUS to destroy state financial institutions. They had a point; when the Second BUS called in loans to state banks, which they had improvidently made, to cover its own debts, which it had improvidently incurred, a default of banking institutions swept like wild fire across the southern and western states. If the "violent party" in Virginia wanted to dramatize the dangers of market capitalism, if they needed an excuse for a direct attack on Marshall and the Court, then the second BUS, under the mismanagement of William Jones, was a gift from on high.¹⁷

Marshall correctly assessed the provenance of Virginia's attack on the Bank, but he underestimated the importance of the doctrine of implied powers as a bone of contention. Fear of implied powers had been a key feature of states' rights arguments in Virginia going back to the ratification debates in 1788. It did not help matters that the dispositive paragraph on the subject in *McCulloch* came word-for-word from Hamilton. Circumstances in 1819 and the years immediately following made the doctrine even more threatening than when Jefferson and Hamilton fought it out in their famous memoranda on the bank in 1791. Not only did *McCulloch* justify the hated bank, but it overrode Madison's arguments set forth in his veto of the Bonus Bill in 1816, which maintained that Congress could not authorize internal improvements without a constitutional amendment. Marshall's implied powers doctrine made an amendment unnecessary—a point which became abundantly clear when, in an *obiter dictum*, he referred to the need for federal improvements to bind together the territories acquired in the Adams-Onis Treaty of 1819. Madison would ultimately reconcile himself to Marshall's view of judicial review, but other Virginians did not. What they saw was that *McCulloch* pitted the interpretive authority of the Court against the states, acting as constitutionally designated agents in the amending process. It was precisely this point that John C. Calhoun's theory of nullification was designed to correct.¹⁸

Lurking in the background of *McCulloch*, acting as inciting factors in the attack on Marshall, were two other issues. One was unspoken but specific in nature and omnipresent in states' rights thinking. The other was general and historical in character. The

17. For the peculiar non-capitalist qualities of southern banking, see BERTRAM WYATT-BROWN, *SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH 183-84* (1982).

18. On Madison's opposition to *McCulloch* as well as his final reconciliation with Marshall and judicial review, see DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY 68-70* (1989).

specific issue was slavery, which came to be connected to Marshall's doctrine of implied powers by the debates over Missouri's entry into the union as a slave state in 1820 and 1821. Strangely, little was said explicitly about the slavery issues in the initial attack on *McCulloch*, but the connection was there to see. After the Denmark Vesey abortive slave uprising in Charleston, South Carolina in 1822, it was impossible to ignore. The danger posed to agrarian slavery by *McCulloch* lay in the combination of an implied powers doctrine with the growth of a northern majority in Congress. If Congress could exceed the enumerated powers via the "necessary and proper" clause and if the northern free state interests could muster a majority in Congress, then they might threaten slavery in the states where it existed or, as they attempted to do in the Missouri debates, abolish it by statute in the new territories. The point is not that Virginians perceived an immediate threat to the "peculiar institution," but rather that Marshall's opinion invited them to think comprehensively about where they stood in the economic revolution gathering steam across the land. Virginians heretofore noted for their moderation and nationalism, now listened with new respect to the voices of extremism: to publicists like John Taylor of Caroline County, to professors like Nathaniel ("Beverley") and Henry St. George Tucker (all touting the Articles of Confederation as the model constitution), and to the mesmerizing oratory of John Randolph, who declared that the Constitution was worth but "a fig" and asked his fellow Virginians to calculate "the value of union."¹⁹

Virginia, as Marshall understood, had come to a historic crossroad. Like other states of the seaboard South, she faced an economic dilemma of major proportions that carried a political and ideological bite. The overarching question was whether or to what degree the dominant slaveholding agrarian-planter interests of the state could benefit by participating in the growing market economy which the Constitution, as the Marshall Court construed it, made possible. Fear of the present, uncertainty about the future, and talk of decline were familiar to Virginians: hear Wirt's lament as early as 1803 in his *Letters of the British Spy*, and witness John Randolph's wistful longing for the cultural ways of old England and old Virginia. More to the point, perhaps, was Jefferson's effort to manufacture an Anglo-Saxon constitutional tradition against which to measure the "honeyed Mansfieldism" of Marshall and Story with its modernizing subtext. Still, one might have expected that declining cotton prices, soil exhaustion, and the

19. See generally WILLIAM CABELL BRUCE, JOHN RANDOLPH OF ROANOKE, 1773-1833 (1970) (capturing the tone and substance of Randolph's biting critique of new age culture). A large portion of Volume 1 is devoted to Randolph's long career in Congress. Volume 1 also contains the quote from the *Annals of Congress*. *Id.* at 492.

prohibitive cost of maintaining a work force based on plantation slavery would have inclined Virginians to retool, regroup, and embrace market capitalism, economic specialization, and liberal individualism. In fact, this is exactly what Marshall wanted to do and what planters in the northern neck were inclined to do; moreover, it is exactly what the democratic denizens of transmontaine Virginia finally did. What the Old Dominion conservatives did, instead, was to dig in their heels against change, against the encroaching national market, against the future, and against John Marshall and his view of the Court and the Constitution.²⁰

McCulloch was their *cause celebre*. On his return home from the Court's session in 1819, he heard rumors that a newspaper assault on his opinion was being mounted and that it was to be branded as "*damnably heretical*" as he put it to Story.²¹ The attack was even more vehement, comprehensive, and long lasting than he feared. Beginning on March 30 and running through June 22, there appeared a series of anti-Court, anti-Marshall essays in the *Richmond Enquirer*; two essays were written by William Brockenbrough (writing as "Amphictyon") and four by Spencer Roane (writing as "Hampden"). The intellectual cudgel was soon picked up by John Taylor of Caroline County, Virginia's premier theorist, who produced three books in three years to exorcise the nationalist heresy introduced by Marshall's opinion. Abel Upshur weighed in later with yet another tome. Before that, the Virginia legislature got in the act with resolutions condemning both the ideas and audacity of *McCulloch*. John Randolph of Roanoke added some of his most impassioned oratory to the cause. In time, both of St. George Tucker's sons, Henry St. George at the University of Virginia and Beverley at William and Mary, attempted to refute Marshall's nationalist position in their lectures, articles and books.²² The "great Lama [sic] of the mountain" also descended from Olympus to join the fray, as Marshall noted bitterly to Story.²³ Jefferson did not openly engage Marshall, and no doubt, the attack would have occurred without him. But as Roane noted, the ex-president was the spiritual godfather of states' rights. Jefferson proudly assumed the role, spurring others (including Roane) to action and putting his

20. See DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 11-18 (1994) (discussing the Jefferson's study of the Saxon constitution and his opposition to Lord Mansfield).

21. Letter from John Marshall to Joseph Story (March 24, 1819), in 8 THE PAPERS OF JOHN MARSHALL, at 280.

22. See generally ELIZABETH K. BAUER, COMMENTARIES ON THE CONSTITUTION: 1700-1860 (1952) (discussing the treatises of Taylor, Upshur, and Henry St. George Tucker).

23. Letter from John Marshall to Joseph Story (Sept. 18, 1821), in 9 THE PAPERS OF JOHN MARSHALL, at 183 (referring to Jefferson).

imprimatur on the attack, in general. Marshall paid his arch antagonist a backhanded compliment by assuming that he was responsible for spreading Virginia theory to other states.²⁴

Marshall did not foresee the specific course of antebellum history, but experience taught him to read history in a tragic light. Like his old friend Adams, he feared that the rousing oratory of Virginia radicals would convert the Constitution into the old Confederation.²⁵ He viewed the crisis of the 1820s not only as someone who thought of himself as an American, but also as one who loved Virginia and believed that nationalism and state interests were inseparably connected, not mutually exclusive. He also believed that *McCulloch* provided for precisely that symbiotic connection between national and state power. In order to prove this point and show that the charges of consolidationism leveled against him were both false and dangerous, he decided to answer Brockenbrough and Roane. He knew the risk of going public, and it was something he had deliberately avoided following the impeachment of Chase in 1805. He surely appreciated the contradictions of doing so in light of his effort to cast the Court as a legal institution and to leave politics to the political branches and the politicians. What called him to the barricades in 1819 was the realization that the Court was already at the center of a political storm (which it was), and his fear that the states' rights conflagration in Virginia might spread to other states. History was repeating itself; it was the ratification struggle, the 1790s, and the first campaign against Jefferson all over again. If Virginia would do right, she might save herself and regain the position of honor in the councils of the nation that she once had. So he took up his pen and entered the political fray to defend both the Constitution and the Court. Neither would survive in the form he hoped, but his efforts left an indelible mark on the American constitutional tradition and on the Supreme Court as an institution.

II. DEFENDING *MCCULLOCH*:

BALANCING NATIONAL SOVEREIGNTY AND STATES' RIGHTS

The assault began on March 23 when the *Richmond Enquirer* published the text of Marshall's opinion in *McCulloch*. Accompanying the opinion was a proclamation by Thomas Ritchie, editor of the *Enquirer* and leader of the Richmond Junto (and son-in-law of Roane), praising the Virginia and Kentucky

24. Scholars are indebted to Gerald Gunther for discovering and reclaiming the text of many of these remarkable essays and for his insightful introduction to them. See generally JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* (Gerald Gunther ed., 1969) [hereinafter GUNTHER].

25. Letter from John Marshall to Story (May 27, 1819), in 7 THE PAPERS OF JOHN MARSHALL, at 314.

Resolutions and demanding that Marshall's heretical departure from them "be controverted and exposed." A week later Ritchie put his editorial imprimatur on the first of two essays by William Brockenbrough, also a member of the Junto. Following these, beginning June 11 and ending June 22, were Roane's four essays, which were much attended to because he was the leading judge on the Virginia Supreme Court of Appeals. Marshall answered Brockenbrough with two "A Friend of the Union" essays which appeared in the Philadelphia *Union* and the *Alexandria Gazette*. By publishing in Philadelphia, Marshall no doubt hoped to preserve his anonymity, but the essays were so badly mangled in the printing that he instructed Justice Bushrod Washington, who was his accomplice in the venture, to place them in the *Gazette and Alexandria Daily Advertiser*, where they appeared with Marshall's corrections. Marshall answered Roane in nine essays written under the *nom de plume*, "A Friend of the Constitution," which appeared in the *Gazette* from June 30 to July 15.²⁶

Marshall's essays not only responded directly to the charges against him, but they also stand as a coherent and carefully structured statement on the nature and location of power in the federal system. Brockenbrough and Roane, though perfectly united in their distaste for *McCulloch*, did not synchronize their efforts nearly as well—a fact which gave Marshall a leg up. "Amphictyon I" was short, hesitant in tone, highly derivative, and quoted verbatim and at length from the Virginia and Kentucky Resolutions. Brockenbrough's second essay, perhaps in response to Marshall's heated reply, focused on the specifics of implied powers. It was decidedly harder-hitting, but it did not soar. Roane's essays, however, took the argument to another level in more ways than one. They were highly personal in tone and laced throughout with irony and sarcasm; they were also learned in the law, brilliantly argued, and comprehensive. The focus was on *McCulloch* and the doctrine of implied powers, but Roane drew freely on anti-federalist arguments first made in the Virginia ratifying debates, especially those of his father-in-law Patrick Henry. Like Brockenbrough, he drew freely on the Virginia and Kentucky Resolutions as well as Madison's Virginia Report of 1799, which was a brilliant restatement of the Virginia Resolutions of the previous year. Roane quietly cast aside Madison's subtle qualifications, however, and opted for absolute state sovereignty. With independence from England, his

26. See GUNTHER, *supra* note 24, at 12-13 (discussing Marshall's efforts to accurately print his essays through the good offices of Bushrod Washington). On Roane and confrontation with Marshall, see Samuel R. Olken, "John Marshall and Spencer Roane: An Analysis of their Conflict over U.S. Supreme Court Appellate Jurisdiction," *JOURNAL OF SUPREME COURT HISTORY* (1990), 125-41.

argument went, sovereignty (itself indivisible) devolved on each of the new states. The Constitution of 1787, which was ratified by state conventions, was a contract created by sovereign people in the sovereign states who were parties to the contract. Therefore, he maintained, the purpose of the Constitution and the very essence of constitutionalism, itself, was to *limit* the national government, not to strengthen and empower it, as Marshall contended in *McCulloch*. If the states were truly sovereign and the Constitution was a mere contract among states, rather than the creation of the entire American people speaking collectively, then all doubtful cases of interpretation went automatically to the states and not the national government. By this standard—and it was the gravamen of Roane's entire argument—Marshall's grant of discretionary power via the Necessary and Proper Clause was blatant usurpation.

The Chief Justice gave as good as he got, which is to say that he came out swinging, responding first to Brockenbrough's essays of March 30 and April 2. "Amphictyon" I and II contained more assertion than argument, but nonetheless, they defined the issues and established the ironic, sarcastic tone of the entire debate. Brockenbrough referred to Marshall as a judge "of the most profound legal attainments" and admitted that his opinion was "very able."²⁷ Nevertheless, there were problems. One was that Marshall's opinion was far too sweeping, and another was that his weak-kneed colleagues uncritically followed him. Moreover, the Chief Justice, for all of his claims of impartiality, was blinded by Federalist politics and Hamiltonian values. For these reasons, the Court's decision was "not more binding or obligatory than the opinion of any other six intelligent members of the community."²⁸ As for the true view of the Court's power of review, Brockenbrough cited Roane's opinion for the Virginia Supreme Court of Appeals in *Hunter v. Martin*,²⁹ which repudiated the Supreme Court's appellate jurisdiction under Section 25. For the true view of the Constitution, he quoted at length from the third resolution of Madison's 1799 Report. He concluded by addressing the dangerous policy consequences of *McCulloch*, expanding beyond just the scope of the Bank and touching on internal improvements, education, the promotion of agriculture, poor relief, as well as religion. On all counts, he concluded that Marshall's enlarged "construction is inadmissible."³⁰

While Marshall's first essay (April 24) began to address the substantive issues of judicial authority and implied powers, it made a special effort to disarm his critics by exposing the

27. *Id.* at 54 (reprinting "Amphictyon I").

28. *Id.* at 55.

29. 18 Va. (4 Munf.) 1 (1816).

30. See GUNTHER, *supra* note 24, *Id.* at 75.

hyperbolic nature of their charge and the cynicism of their motives. He targeted not only Amphictyon, but also Ritchie and the whole states' rights party of Virginia. Here, he repeated in public what he had written in private: that the attack on *McCulloch* had little to do with the BUS, which "had become law, without exciting a single murmur," but was merely the occasion "for once more agitating the publick [sic] mind, and reviving those unfounded jealousies by whose blind aid ambition climbs the ladder of power."³¹ The Court was attacked because it couldn't answer back. The purpose of the assault was simply to bring the Justices into disrepute, to distort the way they did business, which was collective in nature and not the monopoly of one man.

On top of that, "Amphictyon" and "Hampden" deliberately mangled what the Court had said. "It cannot escape any attentive observer that Amphictyon's strictures on the opinion of the supreme court, are founded on a total and obvious perversion of the plain meaning of that opinion, as well as on a misconstruction of the constitution."³² Besides, it was not the Court's decision that changed the Constitution, but critics, like counsel for Maryland echoed by "Amphictyon," who introduced states' rights theories from the 1790s to make their case. If Marshall's critics branded him as a consolidationist, he branded them as radical ideologues who wanted to undo the Constitution and return the country to the chaos of the 1780s. In short, he felt that they wanted to redirect the entire course of American constitutional history. As he put it:

[T]he principles maintained by the counsel for the state of Maryland, and by Amphictyon, would essentially change the Constitution, render the government of the Union incompetent to the objects for which it was instituted, and place all its powers under the control of the state legislatures. It would, in a great measure, reinstate the old confederation.³³

Whether, given the radical transforming nature of the Constitution itself, Marshall was entitled to stake out the conservative ground here and brand his opponents as radicals is perhaps an open question. On one point, however, he was correct: that his states' rights critics looked to the Articles of Confederation, not the Constitution, as the true republican constitution.

The Marshall-Brockenbrough exchange cast the debate as a mix of history, law, and ideology. Just as clearly, it was a confrontation of personalities and a war of reputations. Thus, as was the habit in Virginia, it was a matter of honor. The more so

31. *Id.* at 78 (reprinting Marshall's "A Friend of the Union" essays)

32. *Id.* at 99-100.

33. *Id.* at 99.

when the Chief Justice of the United States took up his pen to refute and discredit the leading judge of the Virginia Supreme Court of Appeals, whose "Hampden" essays picked up where Amphictyon left off. Spencer Roane, "the great judge," as Marshall sarcastically called him, was a formidable combatant. As the leading judge of Virginia's highest court, he spoke with special authority. In addition, although he was not actively engaged in Junto politics, he had been intimately connected with the states' rights movement in Virginia for more than two decades. Almost certainly, he was consulted about the plan to diminish Marshall's influence. Like Brockenbrough, Thomas Ritchie, in his introductory paragraph to Roane's "Hampden" I, rhetorically conceded that the Supreme Court "is a tribunal of great and commanding authority," and, admittedly, the Chief Justice is a judge of "great abilities."³⁴ Nevertheless, Ritchie maintained, the Court's opinions must not be received from on high as "the law and the prophets' . . . nor should Marshall's opinion be canonized."³⁵ Stripped of false politeness and phony compliments, both Ritchie and Roane took the position that Marshall was simply dead wrong and had to be brought down. Ritchie, introducing Roane's "Hampden" essays, wanted the people of Virginia and the members of the General assembly, who were scheduled to meet at the end of the year, "to . . . *hear him for his cause.*"³⁶ That famous phrase, straight from the Patrick Henry speech that launched the Revolution in Virginia in 1765, said it all. It was the Revolution all over again, and Roane was Patrick Henry stepping forth to defend liberty from the evils of consolidating and corrupting power. Roane alerted the reader that the cause was the "Rights of 'The States,' and of 'The People,'"³⁷ The text to be explicated was the Tenth Amendment, which reserved to the states all powers not delegated to the national government.³⁸

Roane's four essays were orchestrated for maximum impact. They appeared at regular three or four day intervals over the period from June 11 to 22, giving readers a chance to digest and discuss the complex issues. Though skillfully interconnected and even repetitious (not unwise given the complexities of the argument), each essay fit into the overall argument. The first threw down the gauntlet in general terms and set the tone of the debate. The second bore down on the general constitutional theory of implied powers. The third focused sharply on Marshall's opinion, taking his argument up point by point. The final piece

34. *Id.* at 106 (reprinting Thomas Ritchie's introductory paragraph to the "Hampden" essays).

35. GUNTHER, *supra* note 24, at 106.

36. *Id.* (italics in original).

37. *Id.* at 106.

38. *Id.* at 108.

attacked the jurisdiction of the Court itself and, by necessary implication, Marshall's entire concept of judicial review. Roane's rhetorical strategy throughout was to submerge his own voice in the collective wisdom of Virginia. The issue was tyranny, "the proneness of all men to extend and abuse their power."³⁹ The evil was not England, as it had been in the decade before the Revolution, but "our federal rulers," whose deliberate aim was to "obliterate the state governments, forever, from our political system."⁴⁰ Or again, the problem was "a renegado [sic] congress," which had adopted "the outrageous doctrine of Pickering, Lloyd, or Sheffey,"⁴¹ and yet again, "the parasites of a government gigantic in itself" who were "turn-coats and apostates."⁴²

Chief among those "turn-coats" and traitors to liberty was the Chief Justice and his colleagues, who by "a judicial *coup de main*," in *McCulloch*, gave "a general letter of attorney to the future legislators of the union."⁴³ That opinion by the man who "eulogized" Hamilton and supported his consolidationist philosophy, was "the '*Alpha* and '*Omega*, the beginning and the end, the first and the last—of federal usurpations."⁴⁴ Roane's self designated role was to arouse the people of Virginia who "are sunk in apathy, . . . sodden in the luxuries of banking," who have given in to "[a] money-loving, funding, stock-jobbing spirit, . . . [and who] are almost prepared to sell our liberties for a 'mess of pottage."⁴⁵ The problem, it would appear, was not that market capitalism was failing but that it was succeeding too well. To rouse them from their prosperity-induced "torpor,"⁴⁶ Roane presumed to speak for "our forefathers, of glorious and revolutionary memory,"⁴⁷ for Mason and Henry and Jefferson. His goal was "liberty."⁴⁸ His "Magna Charta" and "political bible" was Madison's "celebrated report to the legislature of Virginia, in the year 1799."⁴⁹ Virginia wisdom, illuminated by the common law itself (at least as it was practiced in Roane's court) would reveal Marshall's tyrannous usurpation. Of necessity, Marshall, himself, would be exposed for the traitor he was, and by his next door neighbor, no less.

Historians and mythmakers (who are sometimes one and the same) agree that Marshall was an even-tempered, moderate, and superbly rational man who brought those personal qualities to his

39. *Id.*

40. GUNTHER, *supra* note 24, at 107.

41. *Id.* at 109.

42. *Id.* at 112.

43. *Id.* at 110.

44. *Id.* at 114.

45. GUNTHER, *supra* note 24, at 112.

46. *Id.*

47. *Id.* at 111.

48. *Id.* at 112.

49. *Id.* at 113.

job as Chief Justice. And so he did. As a "Friend to the Union," and "Friend of the Constitution," however, he was not speaking for the Court but for himself. He could take off the judicial gloves and did just that, lashing back at his critics as "certain restless politicians of Virginia,"⁵⁰ a party of "skilful [sic] engineers,"⁵¹ who set out to destroy the Court because it lacked "power" and "patronage" and was "without the legitimate means of ingratiating itself with the people."⁵² Nor was that the worst of their sins. Attacking the Court, Marshall charged, was really their way of destroying the Union itself and the Constitution, which bound it together. Here, he spoke passionately of the "zealous and persevering hostility" of Virginia states' rights supporters, going back to the original ratification debates, and their effort "to reinstate that miserable confederation, whose incompetency to the preservation of our union" was so abundantly demonstrated by "the short interval between the Treaty of Paris and the meeting of the general convention at Philadelphia."⁵³ This, then, was the glorious tradition of Virginia that Hampden with his "ranting declamation" and "rash impeachment" of the Court sought to resuscitate.⁵⁴

This was not the easy-going, fun-loving John Marshall whom Richmonders knew and loved. What they thought of his transformation into a fighting polemicist we can only surmise, but it was clear to all that he put his reputation on the line and bet his character, so to speak, against that of his adversary. If the congenial, kindly, and neighborly Marshall was *that* agitated, the message said, then there must be good reason. Marshall not only spoke from passionate conviction, but also from a strength, which was a special blend of textual analysis and doctrinal exegesis fashioned into a sustained argument that seemed plain as day and above mere partisan bickering. The main point to be refuted was Roane's contention that *McCulloch*—its historical foundation, its doctrine, its rules of interpretation, as well as its practical consequences—was consolidationist and that it would literally obliterate the states themselves. Marshall answered each element in Roane's charge, but not before charging him with deliberately misrepresenting what the Court actually said. Judicial opinions, he observed, especially concerning "[g]reat constitutional questions," often "depend on a course of intricate and abstruse reasoning, which it requires no inconsiderable degree of mental exertion to comprehend, and which may, of course, be grossly

50. GUNTHER, *supra* note 24, at 153 (reprinting Marshall's "A Friend of the Constitution" essays).

51. *Id.*

52. *Id.* at 156.

53. *Id.* at 155.

54. *Id.* at 157.

misrepresented.”⁵⁵ By Marshall’s reckoning, this was precisely what Hampden had done, beginning with his allegation that the Court had gone outside the record to decide the case.⁵⁶

Marshall, hurt by the accusation, rose to the defense of his colleagues. “Their construction may be erroneous,” he conceded and may certainly be “open to argument.”⁵⁷ But the notion that the decision was an act of judicial usurpation “exists only in the imagination of Hampden”⁵⁸ and “can impose on no intelligent man.”⁵⁹ Marshall was probably sincere in his outrage, but Roane’s claim that the cause was improperly before the Court ought not to be dismissed as mere malice. At the very least, we need to recognize that the origins of the case were much more complex and murky than either Marshall admitted or the formal record revealed. Indeed, as Richard Ellis has shown, there was a strong element of collusion in the bank case.⁶⁰ In fact, the governor of Maryland mentioned publicly that the decision by the Maryland Court of Appeals “was there had by consent” so that it could be carried to the Supreme Court for final decision.⁶¹ Noticeably, too, there was no real opposition to the decision in Maryland, even though it went against the state—most probably because the major economic players favored the bank. Justified or not, Marshall’s high dudgeon served a rhetorical purpose. The point of the first exchange was that Roane was playing games with the reader, whom Marshall either explicitly or implicitly described as the model republican citizen. By distorting the words and the work of the Supreme Court, Roane was counting on emotion and fear rather than rational argument, which was a decidedly un-republican thing to do. Marshall admonished his readers to read the opinion for themselves, which he sarcastically noted was more than Roane had done.⁶²

Having neutralized “the bitter invectives which compose the first number of Hampden,” and perhaps even have turned them to his own favor, Marshall then proceeded “to a less irksome task—the examination of his arguments,” beginning with the assertion that “the constitution conveyed only a limited grant of powers to the general government, and reserved the residuary powers of the

55. GUNTHER, *supra* note 24, at 156.

56. *Id.* at 159.

57. *Id.* at 159.

58. *Id.*

59. *Id.*

60. See, e.g., Richard Ellis, “The Maryland Origins of *McCulloch v. Maryland* (1819)”, Address delivered at the Organization of American Historians meeting in Washington, D.C. (1995).

61. Governor Charles Ridgley, Speech (July 8, 1818), in MD. GAZETTE AND POLITICAL INTELLIGENCER, Dec. 17, 1818 (on file with author).

62. GUNTHER, *supra* note 24, at 180.

government to the states and to the people.”⁶³ The advantage of dealing with this principle of limited national sovereignty was that Marshall agreed with it and, in fact, begged leave “to add to the numerous respectable authorities quoted by Hampden in support of it.”⁶⁴ Among the authorities Marshall threw back at Roane was his own argument in *McCulloch*:

The government (of the United States) is acknowledged by all to be one of the enumerated powers. The principle that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted.⁶⁵

What Marshall had done in “A Friend of the Constitution” II was what common law lawyers often did in pleadings when they demurred; that is, they admitted to the truth of what their adversary charged, but denied the legal consequences that presumed to flow from it. Hampden’s “incontrovertible” propositions, “if admitted to be true, so far from demonstrating the error of that opinion [*McCulloch*], do not even draw it into question. They may be all true, and yet every principle laid down in the opinion be perfectly correct.”⁶⁶ Marshall’s tactics were effective both rhetorically and substantively. Rhetorically speaking, he permitted Virginia readers to agree with much of what Roane said about states’ rights, which they probably were inclined to do anyhow. At the same time, he backed away from the union-busting, Constitution-destroying implications of his position.

More to the point, however, by arguing that the national government was limited by the Constitution and that states’ rights were constitutionally protected, Marshall argued what he sincerely believed and set forth as law in his Bank opinion. For him, as for the framers, there was a fundamental distinction between sovereignty as the ultimate foundation of the government and sovereignty as the actual power to govern. The former was indivisible and rested with the American people; the latter was divisible and had, in fact, been divided by the Constitution between the states and the federal government. Here then was Marshall’s theory of divided sovereignty. It was, as he admitted, not easy to understand. This was especially so when he added his final corollary. What Marshall expected his republican readers to understand was that the powers given to the national government were not only limited (because they were divided) but that they

63. *Id.* at 161.

64. *Id.*

65. *Id.* at 161-62.

66. *Id.* at 161.

were also supreme. Compared to Roane's simple, monolithic theory of state supremacy, Marshall's principle of divided sovereignty was subtle and complex. It rested, to paraphrase a line from Holmes, not on logic but rather on common sense and historical experience. What the practical-minded framers recognized in 1787 was that any constitution which attempted to obliterate state government (in an age when local government was all that people knew) would be doomed from the start. What Marshall assumed he was doing was reaffirming the wisdom of the framers. But in the 1820s, wisdom was one thing, security another. For Virginians, surrounded as they were by uncertainty and beleaguered by anxiety, complexity was a hard sell. Marshall had the experience and intent of the framers on his side; Roane had logic and the deep insecurity of Virginians.

In defending *McCulloch's* doctrine of divided sovereignty against Roane's passionate, doctrinal assault, Marshall fell back, as he had done in *Marbury* and would soon do in *Cohens v. Virginia*, on Federalist constitutional theory or "American principles," as he called them. In this scheme of government, the sovereign authority in the republic belongs to the American people, who speak only in the constitutional convention and who have spoken through a written constitution, which is the supreme law of the land. In that constitution, the actual power to govern (distinct from the question of ultimate sovereignty) is divided between the states and the nation. In his first response to Roane, Marshall put the matter in plain language that ordinary citizens could understand:

In fact, the government of the union, as well as those of the states, is created by the people, . . . who administer it for their own good The constitution has defined the powers of the government, and has established that division of power which its framers, and the American people, believed to be most conducive to the public happiness and to public liberty.⁶⁷

Marshall wanted a system of dual federalism, one which balanced the rights of the states with those of the national government:

The equipoise thus established is as much disturbed by taking weights out of the scale containing the powers of the [central] government, as by putting weights into it. His hand is unfit to hold the state balance who occupied himself entirely in giving a preponderance to one of the scales.⁶⁸

Marshall's last point was a simple but compelling one in terms of the debate: it was not the national government but the states that were claiming absolute authority. Roane and his colleagues in the Junto were the radical purists, not Marshall and the Court.

67. GUNTHER, *supra* note 24, at 159-60.

68. *Id.* at 160.

The next phase of the debate shifted from general constitutional theory to the interpretation of the Necessary and Proper Clause. Here, the exchange quickly devolved into a battle of uncommonly able common law lawyers over common law hermeneutics. Roane looked to Vattel to support his argument “[t]hat the limited grant to Congress of certain enumerated powers, only carried with it such additional powers as were fairly incidental to them, or, in other words, were necessary and proper for their execution.”⁶⁹ Marshall admitted the point (saying that it was in fact what *McCulloch* said) but disputed Roane’s use of Vattel, who, according to Marshall, really said something entirely different.⁷⁰ For lawyer Marshall,

[t]he only principle which can be extracted from Vattel, and safely laid down as a general independent rule is, that parts are to be understood according to the intention of the parties, and shall be construed liberally, or restrictively, as may best promote the objects for which they were made.⁷¹

Roane responded with his heavy artillery, citing the formidable Lord Coke to prove that the word “necessary” in the Necessary and Proper Clause meant nothing. Marshall objected this time on two grounds. The first was that Roane did not know his Coke (almost a indictable offense in Richmond legal circles). Marshall’s second and more revealing objection was that law did not always supply a “technical rule applicable to every case, which enjoins us to interpret arguments in a more restricted sense than their words import.”⁷² Marshall was subtly working his way from the common law to common sense (arguing of course that both were the same). The common law, common sense view was that “[t]he nature of the instrument, the words that are employed, the object to be effected, are all to be taken into consideration, and have their due weight.”⁷³ Interpretation, in other words, is subject to “that paramount law of reason, which pervades and regulates all human systems.”⁷⁴ The Constitution was not controlled by ordinary common law, however much of the spirit and principles of that law may have insinuated itself into the document. What Roane had done, Marshall went on to explain, was to take those narrowly focused principles of the common law, which applied to contracts between individuals, and make them the touchstone of the constipated constitutional interpretation that he wanted.

In *McCulloch*, Marshall urged the people to remember “that it

69. See *Id.* at 115 (reprinting Roane’s “Hampden” II essay).

70. See *Id.* at 163 (stating that “[t]he proposition itself, I am perfectly willing to admit”).

71. *Id.* at 166.

72. GUNTHER, *supra* note 24, at 169.

73. *Id.*

74. *Id.* at 168.

is a *constitution* we are expounding.”⁷⁵ In answering Roane, he exegeted those now famous words with Edmund Burke to guide him. What he said goes to the heart of his constitutional philosophy:

[The Constitution] is not a contract between enemies seeking each other's destruction, and anxious to insert every particular, lest a watchful adversary should take advantage of the omission. —Nor is it a case where implications in favor of one man impair the vested rights of another. Nor is it a contract for a single object, every thing relating to which, might be recollected and inserted. It is the act of a people, creating a government, without which they cannot exist as a people. The powers of this government are conferred for their own benefit, are essential to their own prosperity, and are to be exercised for their good, by persons chosen for that purpose by themselves It is intended to be a general system for all future times, to be adapted by those who administer it, to all future occasions that may come within its own view. From its nature, such an instrument can describe only the great objects it is intended to accomplish, and state in general terms, the specific powers which are deemed necessary to those objects.⁷⁶

Here, I submit, was the single most telling statement in his debate with Hampden, one that all Virginians, lawyers or not, could comprehend. Marshall put his reputation as a lawyer, as a Virginian, and as a statesman of the Revolution on the line for America. Roane did the same. Arguing from *The Federalist* papers, common law, history, and whatever was available, Roane insisted that *McCulloch* had transformed the Necessary and Proper Clause into a grant of additional power to Congress when, in fact, that clause, if it was not merely “tautologous and redundant” verbiage, was meant to delimit congressional power and reaffirm the limiting nature of constitutional government.⁷⁷ Marshall responded point-by-point and with what seemed at times mind-numbing detail. Whether he argued from the common law, or *The Federalist* papers, or Hamilton's memorandum to Washington in 1791, he fell back on one fundamental axiom: that the Necessary and Proper Clause, as the Court interpreted it in *McCulloch*, did not grant Congress additional powers and, therefore, did not destroy the concept of a national government of enumerated powers. The one and only thing it did was grant to Congress the legislative means necessary to effect the specific powers granted to it by Article I, Section 8, which was the same range of discretion that Congress would have had if the Clause had not been inserted. This, Marshall maintained, was all the Court said and meant to say. When Roane claimed otherwise, he

75. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

76. GUNTHER, *supra* note 24, at 170-71.

77. *Id.* at 125 (reprinting Roane's “Hampden” III essay).

“misstates either directly or by insinuation” what the Court said.⁷⁸

The plain sense of the matter, put “without fear of contradiction,” was this:

[T]hat the general principles maintained by the supreme court are, that the constitution may be construed as if the clause which has been so much discussed, had been entirely omitted. That the powers of congress are expressed in terms which, without aid, enable and require the legislature to execute them, and of course, to take the means for their execution. That the choice of these means devolved on the legislature, whose right, and whose duty it is, to adopt those which are most advantageous to the people, provided they be within the limits of the constitution. Their constitutionality depends on their being the natural, direct, and appropriate means, or the known and usual means, for the execution of a given power.⁷⁹

This does not mean that the Constitution is a blank check to Congress (as Roane claimed and as some historians have assumed Marshall meant). “In no single instance does the court admit the unlimited power of Congress to adopt any means whatever, and thus to pass the limits prescribed by the constitution.”⁸⁰ If it did so, if

[C]ongress under the pretext of executing its powers, pass[ed] laws for the accomplishment of objects, not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.⁸¹

Marshall's point was telling: judicial review, which the states' rights forces were attacking, was the quintessential instrument of limited government which they liked.

Marshall would return to defend the Court's powers of review again in his final essay and more forcefully in *Cohens v. Virginia*, but before he did so, he circled back, in Essays VI and VII, to the central theme of divided sovereignty. In these essays, Marshall confronted Hampden's oft-repeated charge that *McCulloch* made the Constitution into “a consolidated, and not a federal government,” and that the states would be annihilated in the process.⁸² To make his point yet again and for a final time that *McCulloch* did no such thing, Marshall quoted no less than twelve specific instances from the opinion's text that acknowledged the constitutional foundation of states' rights. Additionally, for good measure, he zeroed in on state taxing power, which was at issue in *McCulloch*, and quoted from that opinion:

78. *Id.* at 186.

79. *Id.*

80. *Id.* at 186-87.

81. GUNTHER, *supra* note 24, at 187 (quoting *McCulloch v. Maryland*).

82. *Id.* at 192.

That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the union; that it is to be concurrently exercised by the two governments; are truths which have never been denied.⁸³

“Two governments”—the nation and the states—was Marshall’s mantra, and to reach states’ rights doubters in Virginia, he cited one of their own. Now it was not just Marshall against Roane but James Madison, too, who said in *The Federalist* No. 39 that the Constitution “is neither a national, nor a federal constitution; but a composition of both.”⁸⁴ Marshall next addressed Federalist constitutional theory and Hampden’s charge that the only “people” in the constitutional formula of the republic were people of the states. Contrary to “Hampden,” the Court, like the old Federalists, recognized the bedrock idea that “the people were divided into distinct societies” called states.⁸⁵ But this fact does not mean there were no “people of the United States.”⁸⁶ Does Hampden deny this? “Have we no national existence? We were charged by the late emperor of France with having no national character,” said Marshall, drawing on his experience in the XYZ mission.⁸⁷ Marshall continued, saying:

[B]ut not even [the emperor of France] denied our theoretical or constitutional existence. If congress declares war, are we not at war as a nation? Are not war and peace national acts? Are not all measures of the government national measures? The United States is a nation; but a nation composed of states in many, though not in all respects, sovereign. The people of these states are also the people of the United States. The two characters, so far from being incompatible with each other, are identified. This is the language of the constitution.⁸⁸

This is what *McCulloch* proclaimed and what the American people in their sovereign capacity mandated at the time of ratification.

Marshall’s final statement on divided sovereignty, presented in Essay VII, was a refutation of Roane’s states’ rights ratification theory. Like the anti-federalists before him and John C. Calhoun afterwards, Roane rested his case for state sovereignty on the fact that ratification took place in specially called state conventions elected by the people of each state. From that he deduced that the Constitution was simply a contract created by sovereign states as the primary contracting parties; the national government was

83. *Id.* at 193.

84. THE FEDERALIST NO. 39 (James Madison) 286.

85. GUNTHER, *supra* note 24, at 194.

86. *Id.*

87. *Id.* at 195.

88. *Id.*

nothing but “an alliance, or a league” of sovereign states.⁸⁹ As a creature of the states, the Constitution ought to be construed to favor them—that is to say that the benefit of the doubt, in cases like *McCulloch*, should go automatically to states who, in fact, should be the final judges of the constitutionality of congressional acts.

Marshall's response was simple and common sensical. Ratification took place at the state level, not because the states were sovereign, but because that was the only practical and convenient way to proceed, since the American people could not ratify en masse. Or, to put it another way, it was the representatives of the whole American people meeting in various states that decided the issue of ratification. Beyond that, Federalist constitutional theory applied: if the sovereign people wanted to divide governmental powers between the national government and the states, they had the ultimate authority to do so. If they wanted to make the government of the nation supreme within its sphere of action, they could do that too. And that, according to Marshall's climactic argument, is precisely what they did:

I will premise that the constitution of the United States is not an alliance, or a league, between independent sovereigns; nor a compact between the government of the union, and those of the states; but is itself a government, created for the nation by the whole American people, acting by convention assembled in and for their respective states.⁹⁰

Moreover, he continued:

[T]he government of the union, 'within its sphere of action,' is 'supreme'; and, although its laws should be in direct opposition to the instruction of every state legislature in the union, they are 'the supreme law of the land, any thing in the constitution or laws of any states to the contrary notwithstanding.'⁹¹

By connecting the words of the Constitution (specifically, the Supremacy Clause of Article VI) with the historical framework of the Constitution itself, Marshall finally rested his case on the experience of history and the wisdom of the founders. Marshall saw the Articles of Confederation, which Virginia theorists pushed as the essence of constitutional wisdom, as “that awful and instructive period in our history.”⁹² The weakness of the Confederation led to “national disorder, poverty, and insignificance,” said Marshall, quoting Hamilton's *Federalist No.*

89. *Id.* at 198.

90. GUNTHER, *supra* note 24, at 202.

91. *Id.*

92. *Id.* at 199.

15.⁹³ In 1787, the American people were faced with a choice: either transform the Articles into

[A]n effective government [under the Constitution], or . . . fall to pieces from the weight of its constituent parts, & the weakness of its cement . . . The wisdom and patriotism of our country chose the former. Let us not blindly and inconsiderately replunge into the difficulties from which that wisdom and that patriotism have extricated us.⁹⁴

Marshall's final "Friend of the Constitution" essay appeared on July 15, 1819, leaving us to ponder the consequences and historical significance of his debate with Roane and Brockenbrough. Certainly, the dialogue was remarkable in the annals of American constitutional history for the fact that the chief judicial officers of a state and the nation were involved, for the passion and asperity of the exchange, and for the conspicuous brilliance and learning on both sides. Marshall's genius for argument is also on display for students to see as is the passionate side of his personality, which we do not often see. Eleven brilliant essays in less than four pressure-filled months should also remove doubts raised by some that Marshall could not have turned out some of his great opinions so quickly without the help of others.⁹⁵

However, what comes through most profoundly in his final essay and indeed in all of his essays, is that Marshall spoke as a Burkean conservative (or as much of one as American circumstances allowed). He was repelled by reductionist abstractions as well as abstract idealism, even when it was couched, as was much of southern constitutionalism, in terms of a mythical past. He worked from the "given," accepted the world as it was, and relished "the disorder of experience," to borrow a phrase from Charles Rosen.⁹⁶ This included the federal system created by the founders. The doctrine of divided sovereignty, which Marshall set forth in *McCulloch* and tried to explain to Virginians in 1819, was grounded in the complex structure of state-federal relations in the early republic. It is fashionable, of course, to emphasize the great moments of conflict between the states and nation in this system—and there were many. But as

93. *Id.* at 200.

94. *Id.*

95. The speculation here centered on *Gibbons* and a possible Marshall-Story collaboration. On February 24, 1824, the NEW YORK COMMERCIAL ADVERTISER reported that Marshall had fallen and dislocated his shoulder (which was true), but noted that Story was "now engaged in completing" Marshall's opinion in *Gibbons*. See 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 608 (1926) (relating the newspaper story about Marshall).

96. Charles Rosen, *The Romantic Generation*, THE NEW YORKER, Feb. 3, 1997, at 74.

Leonard White showed many years ago, one of the truly great accomplishments of the early republic was the fact that it worked out, both institutionally and in practice, a system of state-national cooperation which touched almost all areas of government, including public finance, tax collection, exports and imports, and a working relationship between federal and state judiciaries (as outlined by Article III of the Constitution, the Judiciary Act of 1789 and the Federal Process Acts of the 1790s).⁹⁷ Even Congress, whose authority was so much the issue in *McCulloch*, was inseparable from the states. The federal electorate, to start with, was keyed to state election laws. State legislatures elected federal Senators who were expected to represent the state interests. House delegations did the same. Senators and Representatives also roomed together in Washington, consolidating even further their state and regional outlook. Even the Justices of the Supreme Court, in the age of circuit riding, were expected to be conversant with the interests of their own states and sections.⁹⁸

Marshall's theory of divided sovereignty rested on this kind of experiential reality. It was a view of constitutional federalism built not just on peaceful coexistence of the state and national governments, but on mutual cooperation between the two. Banking was a case in point. Judged by the hostile standoff between state banks and the national bank in 1819, wherein flagrant mismanagement of the BUS contributed to equally flagrant mismanagement of state banks, the story was not pretty to be sure. But state banks had in fact grown and prospered for twenty years under the supervising management of the First BUS, and they would do so again after 1823 when the Bank, under the presidency of Nicholas Biddle, once again operated on sound principles of management.⁹⁹ State banks and the Bank of the United States could peacefully and profitably coexist and, indeed, had done so in Virginia. The Richmond branch of the Second BUS was not only managed by Virginians, but also, if Marshall is to be believed, by members of the Virginia state banking establishment itself. *McCulloch* was not designed to destroy state banks, then, but to keep states (or, as Marshall would have said, state politicians) from destroying the national bank. State-federal cooperative banking was not a tidy arrangement, but it had worked well for a long time and could do so again. This was

97. See generally LEONARD D. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY, 1789-1801* (1948) (detailing the establishment of the government of the United States and the role of the Federalists in the process).

98. See generally JAMES S. YOUNG, *THE WASHINGTON COMMUNITY, 1800-1828* (1966) (discussing the boardinghouse phenomenon in Washington, D.C.).

99. See generally THOMAS P. MCGOVERN, *NICHOLAS BIDDLE: NATIONALIST AND PUBLIC BANKER, 1786-1844* (1959).

Marshall's assumption and that of most states as well, including Maryland.¹⁰⁰

What was true in regard to state banking was also true in regard to the vast apparatus of state mercantilism that existed in the early republic. State law touched the lives of Americans much more extensively than did federal law, including, as scholars have shown, an extensive body of promotive and regulatory economic legislation.¹⁰¹ Marshall's decision in *McCulloch*, despite the hue and cry raised by Virginia, left this vast area of state power largely untouched, including southern state-regulation of slavery. What the states could not do, according to Marshall's constitutional jurisprudence, was destroy the still shaky structure of national government or defeat the intention of national laws passed by a government in which they were abundantly represented as states. *McCulloch* did not mandate a national bank, as, for example, the modern Court mandated a one-man one-vote system in *Baker v. Carr*,¹⁰² but only authorized Congress to create a national bank if it decided to do so. To put it another way, Marshall, in the spirit of deferential government, trusted the freely elected representatives of the people to do the right thing; Virginia democrats attempted to deny them the opportunity.

Indeed, trust was the fundamental point on which Marshall and Roane parted company. Marshall saw both judicial and congressional power in terms of eighteenth century deference; the officials of the government were expected to govern because they were presumed to be honest and able. The problem was that the American people, whom he trusted to elect men they trusted, were themselves not in a trusting mood. The more they felt the transformative consequences of the market revolution, the more distrustful they became, and the more they liked the reductionist solutions offered up by demagogic politicians. Marshall's moderate nationalism and his moderate conservatism gradually yielded the high ground to the states' rights radicals like John Randolph, John Taylor, and John C. Calhoun. History, which Marshall hoped to control with institutions, was out of control. In a decade and a half, the Bank, whose existence he upheld in 1819, would be dead: the victim of Jackson's wrath, the political incompetence of Nicholas Biddle, and ambitions of laissez-faire minded state capitalists. Marshall's doctrine of implied powers

100. See generally HAMMOND, *supra* note 13 (discussing the interwoven role of banking and nationalism).

101. On the vast domain of state economic activity in the antebellum United States, see generally OSCAR HANDLIN & MARY HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861* (1947), and LOUIS HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860* (1948).

102. 369 U.S. 186 (1962).

along with other aspects of his moderate nationalism would be shelved or modified by the Jacksonian Court under Roger Taney. Rather than strengthen the federal union, *McCulloch*, despite Marshall's valiant effort to explain and defend it, set in motion the forces that would weaken nationalism and ultimately force the nation to defend itself on the field of battle. Ironically, the only thing that survived the conflict set in motion by *McCulloch* was the Court's power of judicial review. It is because of this unlikely victory that we must now turn to complete the story of Marshall's running war with his own state and with nineteenth century history.

III. DEFENDING (AND DEFINING) JUDICIAL REVIEW

On September 1, 1831, John C. Calhoun wrote Virgil Maxcy concerning the Marshall Court:

The question is in truth between the people & the Supreme Court. We contend, that the great conservative principle of our system is in the people of the States, as parties to the Constitutional compact, and our opponents that it is in the Supreme Court. This is the sum total of the whole difference.¹⁰³

At the time Calhoun wrote this, South Carolina was putting his theory of nullification to the test, and his colleague, Senator Hayne, was defending his theory of the Constitution as a contract against Daniel Webster in the soon-to-be famous Webster-Hayne debate. In the course of a decade of constitutional wrangling over *McCulloch*, the Court and the Chief Justice found themselves in the eye of the storm. Invariably, policy questions turned into constitutional issues that pitted the states against the nation and coalesced states into regional alignments. The final question was not just what the Constitution said about the location of power in the federal system, but how constitutional disputes should be resolved. Calhoun's theory of nullification, building on the Virginia and Kentucky Resolutions, put the states at the center of the interpretive process. The chore of defending and, indeed, defining the Court's role fell on Marshall's shoulders, as the chief interpreter of the Constitution. Which brings us back to *McCulloch*—this time with a focus not on the powers of Congress but on the position of the Court in American government.

McCulloch is not generally seen as a major judicial review case, but it is exactly that, providing we see judicial review in the proper light.¹⁰⁴ Judicial review was not the creation of any great moment or single case. Not even, as we have seen, the famous

103. See generally *supra*, note 9.

104. I define judicial review as the authority of the Court to void acts of states that conflict with the Constitution, federal laws, and treaties, or to strike down acts of Congress that conflict with the Constitution.

case of *Marbury v. Madison*¹⁰⁵ clearly delineated the perimeters of judicial review. Rather, the authority of the Supreme Court, as the chief expounder of the Constitution, grew incrementally, starting with the Constitution itself and developing simultaneously (and often in response to) the changing configuration of Congress and the executive. In this long period of gestation, *McCulloch* (as critics of the case were quick to observe) occupied a pivotal position. Both his theory of divided sovereignty and continued emphasis on the Constitution as a body of general principles rather than a code of law, doubtless, account for *McCulloch*'s centrality. By refusing to locate sovereignty with finality (as states' rights theorists did), Marshall made judicial review part of an on-going process of interpretation. Or, to put it another way, since there was no bright line that separated state and national power and since general constitutional principles would have to be applied case-by-case to "the various crises of human affairs,"¹⁰⁶ judicial interpretation was built into the constitutional process. Marshall wisely did not expand on the point, but he promised in no uncertain terms that the Court would preside impartially over the process—even if it meant holding acts of Congress unconstitutional.¹⁰⁷

Judging by the way Marshall resolved the uncertainty in *McCulloch* (again as his critics perceived), judicial review unavoidably evolved into constitutional exposition; it is, a priori, a *reasoned justification* for saying yes or no to requests for power from Congress or the states, which draws on textual interpretation, history, and policy. Constitutional *exposition* was Marshall's hallmark: "the grand style," as Karl Llewellyn would later call it, was more of a state paper than a judicial opinion in the ordinary sense of the word. Expounding on the meaning of the Constitution (rather than simply 'settling' disputes) signaled the emergence of the Court as an educational institution no less impressive than the president's bully pulpit and considerably more in Marshall's case because no less than six different presidents were in power during the course of his tenure. Adding to the Court's authority was the simple fact that what it said carried with it not only the force of words, but also the force of law (assuming the president backed it up with the power of the state).¹⁰⁸

105. 5 U.S. (1 Cranch) 137 (1803).

106. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

107. For the developmental nature of judicial review, see generally CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* (1986).

108. For a succinct analysis of Marshall's style of opinion writing, see G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 7-34 (expanded ed. 1988). See also JAMES BOYD WHITE,

All this appeared to turn the Court into a sitting constitutional convention, and *McCulloch* was the classic case-in-point. Marshall did in *McCulloch* what he only adumbrated in *Marbury*. Judicial review now applied to all acts of Congress and not just those dealing with the judiciary. In one opinion, Marshall told Congress what it could do, and, with equal force, he told the states what they could not do. Moreover, since the case came up under Section 25 of the Judiciary Act of 1789, it also involved the exercise of final appellate authority over the decisions of the state supreme courts. Building on early cases of review as it did, Marshall's opinion looked like a carefully planned conspiracy to aggrandize the Supreme Court at the expense of its interpretive rivals: Congress, state legislatures, and state courts.

Virginia critics of Marshall's opinion were quick to focus on its expansive implications for judicial review. Had Marshall used the Section 25 power to strike down the act of Congress, there would have been no complaints, and antebellum history might have been considerably different. Rather, both Congress and the Court strengthened their power, and since both were agents of the national government, it seemed like a double barreled conspiracy against the states. Marshall emerged as the chief conspirator. For his critics, he stood as the evil genius who first went out of his way and beyond the scope of his authority to reach the decision in the first place and then bamboozled his colleagues into going along with the usurpation. This was Jefferson's position, and it was also Roane's and Brockenbrough's. Both men (with Jefferson's encouragement) set out to humble Marshall and the Court.

The public assault on the judicial review dimension of *McCulloch* began in the first "Amphictyon" essay. In his essay, Brockenbrough condemned the Justices for not writing opinions seriatim—a tradition he claimed was of special importance "on this great constitutional question, affecting very much the rights of the several states composing our confederacy,"¹⁰⁹ and especially since the decision "abrogated the law of one state, and is supposed to have formed a rule for the future conduct of other states."¹¹⁰ Brockenbrough followed Jefferson on this point and again when he accused Marshall of traveling "out of the record to decide a point not necessarily growing out of it."¹¹¹ Brockenbrough also preached the constitutional gospel according to the third resolution of Madison's Report, which assailed the power of the Court to rule

WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 247-74 (1984) for a thorough examination of the cultural resonance of each section of Marshall's opinion in *McCulloch*.

109. GUNTHER, *supra* note 24, at 53.

110. *Id.* at 53-54.

111. *Id.* at 155.

with finality on questions regarding the powers of the states as "parties to the Constitutional compact."¹¹²

Roane continued the direct assault against the Court in his first essay, arguing not just that Marshall's interpretation of the Constitution was wrong but that he lacked authority to interpret it at all. As Roane saw it, Marshall's whole opinion was "a judicial *coup de main*."¹¹³ The Justices "have gone out of the record," he claimed, but by not attending to the 10th Amendment, they have completely misread "necessary and proper," and, indeed, have "expunged those words from the constitution."¹¹⁴ Great as it may be, Roane concluded the "power of the supreme court . . . does not extend to everything; it is not great enough to *change* the constitution."¹¹⁵ Not only did the opinion expand the powers of Congress "to legislate for us in all cases whatsoever," it expanded the authority of the Court to rule in all cases whatsoever, even those involving the powers of the sovereign states.¹¹⁶

In Roane's "Hampden" Essay IV, he returned again to the theme of judicial usurpation, picking up on Brockenbrough's earlier reference to Madison's "celebrated report of 1799."¹¹⁷ Madison's point there was that the Court's powers, whatever they might be, do not and cannot "be raised above the authority of the sovereign parties to the constitution," who are, the states themselves.¹¹⁸ Such a power "would *annul* the authority delegating it, and its concurrence in usurpation, might subvert, forever, that constitution which all were interested to preserve."¹¹⁹ To support this principle further, Roane turned to his own opinion "in the case of *Hunter v. Fairfax*"¹²⁰ in which the Virginia Supreme Court of Appeals denied the Supreme Court's appellate authority over state decisions under Section 25. Since state judiciaries had concurrent jurisdiction with federal courts to try federal questions, this would be to make the states themselves final judges of the constitutionality of their own acts. Roane also cited the "state of Pennsylvania[s] . . . case of commonwealth [sic] v. Cobbett"¹²¹ on this point and quoted extensively from the resolution of the

112. *Id.* at 64.

113. *Id.* at 110 (reprinting Roane's "Hampden" I essay).

114. GUNTHER, *supra* note 24, at 110.

115. *Id.* at 111.

116. *Id.* at 112.

117. *Id.* at 148.

118. *Id.* at 149.

119. GUNTHER, *supra* note 24, at 149.

120. *Id.* Roane's reference is to the Virginia Supreme Court of Appeals' disposition in the Fairfax land dispute. *Hunter v. Martin*, 18 Va. (4 Munf.) 1 (1816), *rev'd* 14 U.S. (1 Wheat.) 304 (1816).

121. GUNTHER, *supra* note 24, at 149. The Supreme Court of Pennsylvania's decision in *Cobbett* is reported in the United States Reporter. See generally *Republica v. Cobbett*, 3 U.S. (3 Dall.) 467 (1798).

Pennsylvania legislature instructing their representatives in Congress to oppose the re-charter of the First BUS in 1811. The Pennsylvania resolution of January 11, 1811, declared that the Constitution "to all intents and purposes" was "a treaty among sovereign states."¹²² The "general government, by this treaty, was not constituted the *exclusive* or final judge of the powers it was to exercise; for if it were so to judge, then *its judgment*, and not the constitution, would be the measure of its authority."¹²³ The Supreme Court, in effect, has claimed "the right . . . to change the government: to convert a federal into a consolidated government. The supreme court is also pleased to say, that this important right and duty has been devolved upon it by the *constitution*."¹²⁴ But nowhere is that power of judicial review stated in the Constitution. The Constitution "could not give it, without violating a great principle; and we certainly cannot supply by *implication*, that which the convention dared not to express."¹²⁵ The Constitution gives the Court the power to decide cases between states, Roane conceded, but "it has not given to it a jurisdiction over its own controversies, with a state or states."¹²⁶ To have done so would have made the Court and the national government the final judge in its own case.

Roane cut to the heart of his dispute with Marshall, but he also exposed the chink in his own constitutional armor. If, as Marshall declared, sovereignty was divided between the states and the national governments, if there was no bright line, and if federalism cases had to be settled as they came up in constantly changing circumstances, then whoever had the power to settle the disputes had the ultimate power in the system. Roane opted for state power. But there were questions and problems on both sides. For starters, how, by what method, and according to what procedures were the states to proceed in resolving disputes over federalism? Moreover, how can there be one Constitution and one Union under it if each state gets to say what the Constitution means? Can a theory of states' rights that claims to be rooted in the Constitution be taken seriously if it ends up destroying the Constitution? On the other hand, how can Marshall lodge the power to interpret the Constitution in the Court, which of all branches of the government, state or federal, is furthest removed from the people who are admittedly sovereign? How, on a practical level, can the Court gain the trust of the states or of sister branches for that matter? What happens to the law if the states resist the decisions of the Court? And what if the Justices,

122. GUNTHER, *supra* note 24, at 150.

123. *Id.*

124. *Id.* at 152.

125. *Id.* at 153.

126. *Id.*

human beings that they are, err? Does the Court have some special institutional qualities to minimize the mistakes of its members and eliminate personal bias or self interest?

Marshall's main effort to answer Roane and clarify and justify the true meaning of judicial review came in *Cohens v. Virginia*.¹²⁷ But first, he opened his defense of judicial review in the debate over *McCulloch*. In his first "A Friend to the Union" essay, he confronted Brockenbrough's charge that the Justices had abandoned seriatim opinions and surrendered to the dominance of the Chief Justice. "The opinion is delivered," Marshall said, referring to *McCulloch*, "not in the name of the chief justice, but in the name of the whole court," and this applied to the reasoned justification of the opinion as well as its conclusion.¹²⁸ Moreover, Marshall continued, the author of the Court's opinion "never speaks in the singular number, or in his own person, but as the mere organ of the court. In the presence of all the judges, and in their names he advances certain propositions as their propositions, and certain reasoning as their reasoning."¹²⁹ Then he asks Amphictyon (and his readers) "whether the judges of the Supreme Court, men of high and respectable character, . . . sit by in silence, while great constitutional principles of which they disapproved, were advanced in their name, and as their principles."¹³⁰ Rather,

[t]he opinion which is to be delivered as the opinion of the court, is previously submitted to the consideration of all the judges; and, if any part of the reasoning be disapproved, it must be so modified as to receive the approbation of all, before it can be delivered as the opinion of all.¹³¹

Judges can join the majority opinion for their own reasons, and they can dissent if they want. But one way or another (and here the Court differed fundamentally from Congress), each judge accepts responsibility for the Court's decision. Moreover, since "their decisions are reported and are in the possession of the publick [sic]," each opens his work to public scrutiny.¹³² The Court may look aristocratic, as critics maintain, but in the final analysis, it is more open and responsible than its rivals—or so Marshall argued.

In addressing Brockenbrough's charge that *McCulloch* was entirely *obiter dictum*, Marshall replied that his discussion about the nature of the Union was in direct response to arguments of counsel. As to the allegedly unavoidable national bias in the Supreme Court's opinions regarding federalism, Marshall only

127. 19 U.S. (6 Wheat.) 264 (1821).

128. GUNTHER, *supra* note 24, at 80.

129. *Id.*

130. *Id.*

131. *Id.* at 81.

132. *Id.* at 80.

alluded to what he spelled out elsewhere: the Court was bound and kept honest by the intent of the framers.¹³³ Marshall's final effort to discredit Amphictyon, delivered in "A Friend to the Union" II, was a subtle jab at Brockenbrough for rousing the people against the Court, which was merely doing its constitutional duty, and for assailing the Court because it "is less popular, and therefore more vulnerable" than the other branches of government.¹³⁴ Neither argument carried much weight in post-*McCulloch* Virginia, but Marshall made a point dear to his heart: that the whole assault on the Court was a cowardly affair perpetrated by a new class of ambitious politicians who were turning their back on Virginia's history.

Marshall amplified this line of defense in his first response to Roane on June 30, 1819. Here, he repeated his Hamiltonian argument about the Court's institutional vulnerability to popular prejudice. Not only is it "without power, without patronage, without the legitimate means of ingratiating itself with the people," but its work, by its "intricate and abstruse" nature, is hard to understand and can easily "be grossly misrepresented."¹³⁵ To attack the Court while attacking its decisions, was, in short, all but irresistible to Virginia states' rights supporters, especially since attacking the Court amounted to assailing "the very existence of the [national] government."¹³⁶ It was this point—that the very existence of the Constitution depended on the Court's powers of judicial review—that Marshall would make his main line of defense against Spencer Roane in *Cohens*.

The Roane-Marshall exchange over the nature of the Supreme Court in *McCulloch* was a warm up for the main bout. It was a punch and counterpunch with no knockout blows on either side. Roane depicted the Court as a special engine of oppression. Marshall responded that the Court was adhering "to those American principles" set forth in the Constitution, which imposed on it "the duty, of preserving the constitution as the permanent law of the land."¹³⁷ Roane claimed that the Court had traveled outside the record to do its dirty work. Marshall, referring to the obligatory jurisdiction imposed on it by Article III of the Constitution and the Judiciary Act of 1789, denied that it "had thrust itself into the controversy between the United States and the state of Maryland" or that it had "unnecessarily volunteered its services."¹³⁸ This is how it went, with the exchange becoming more heated and more personal as it progressed.

133. GUNTHER, *supra* note 24, at 81-85.

134. *Id.* at 104.

135. *Id.* at 156.

136. *Id.*

137. *Id.* at 158.

138. GUNTHER, *supra* note 24, at 158.

Perhaps the most important and prophetic exchange took place over the Court's jurisdiction in cases involving the rights of states—a bitterly contested point, which went back to *Martin v. Hunter's Lessee* and beyond. Marshall delivered a couple of sharp *ad hominem* jabs in answering Roane, but mainly he took the high ground of Federalist constitutional theory. Roane's mistake was his assumption that the Supreme Court was a creature of the national government, when, in reality, it was the creation of the written Constitution which emanated from the American people in solemn convention. The Court was not a "partial, local tribunal" (presumably like the Virginia Supreme Court of Appeals on which Roane sat), but a tribunal "erected by the people of the United States" for "the decision of all national questions."¹³⁹ It was true that the Virginia Supreme Court of Appeals denied this authority in *Hunter v. Martin*, with Roane speaking. But it was also true that this was "the only example furnished by any court in the union of a sentiment favorable to that 'hydra in government, from which,' says the Federalist, 'nothing but contradiction and confusion can proceed.'"¹⁴⁰ Marshall's main point, however, was that *Hunter* "was reversed by the unanimous decision of the Supreme Court" in *Martin*, which has not been disapproved by any other state court even though they had many opportunities to do so.¹⁴¹ Indeed, "[i]n every instance, except that of *Hunter and Fairfax*, the judgment of reversal has been acquiesced in, and the jurisdiction of the [supreme] court has been recognized."¹⁴² To put the matter in the most personal way, which Marshall clearly delighted in doing:

If the most unequivocal indications of the public sentiment may be trusted, it is not hazarding much to say, that, out of Virginia, there is probably not a single judge, nor a single lawyer of eminence, who does not dissent from the principles laid down by the court of appeals in *Hunter and Fairfax*.¹⁴³

Thus, the debate, which began over the scope of congressional powers under the Necessary and Proper Clause, turned into a struggle between lawyers, indeed, between judges, and between courts. The personal, political, and professional rivalry between Marshall and Roane was also deeply rooted in Virginia history and instructive on that count. Both men descended from elite Virginia families and consolidated their social and economic standing by marrying into the first family network. Both served in the Virginia House of Delegates in the 1780s (though on opposite sides

139. *Id.* at 203.

140. *Id.* at 205-06.

141. *Id.*

142. *Id.* at 205.

143. GUNTHER, *supra* note 24, at 205.

of that decade's political divisions), and both served on the governor's council. Roane's legal education was more formal than Marshall's, but both men studied law with George Wythe at William and Mary. They probably even knew one another since Roane graduated in 1780, while Marshall attended the Wythe lectures in the summer of that year. Both men studied the same books, entered the legal profession in the 1780s, and shared the basic assumptions of Virginia legal culture. The difference was that Roane never cut his ties with that culture and Marshall did—not by repudiating it, but by applying what Virginia taught him to the governance of the nation.

From the 1780s onward, Roane identified with “the genius of Virginia,” as his future father-in-law put it at the Virginia ratifying convention. As a supporter of the states' rights party in the 1790s, Roane found himself in opposition to Marshall on almost all the great issues of that passionate decade—not just political issues but legal ones, too. Roane and Marshall first crossed swords as lawyers in the 1780s, but the legal rivalry, which climaxed in *Cohens*, began in earnest when Roane became a state judge, first on the General Court (the primary trial court in Virginia) then, until his death in 1822, as a member of the Virginia Supreme Court of Appeals. As a state judge, Roane's opposition to Marshall was both personal and institutional. As a member of the state judiciary, he ruled consistently against the Marshall syndicate in the protracted Fairfax litigation (a fact which Marshall noted with asperity).¹⁴⁴ Roane was a member of the Supreme Court of Appeals, which voted to uphold the Virginia statute of escheats of 1777 that finally defeated the claims of the syndicate at the state level. When the United States Supreme Court reversed that decision on a Section 25 writ of error in *Fairfax Devisee v. Hunter's Lessee*,¹⁴⁵ Roane's court retaliated in *Hunter v. Martin*, which denied the Supreme Court jurisdiction to review state court decisions under Section 25. The opinion, in turn, generated *Martin v. Hunter's Lessee*, in which Justice Story, writing for a unanimous Supreme Court (and with the enthusiastic approval of Marshall), reaffirmed the appellate jurisdiction of the Supreme Court over state courts under Section 25, even in cases involving state common law.¹⁴⁶

144. For an in-depth discussion of the long history of the Fairfax litigation, see generally John A Treon, *Martin v. Hunter's Lessee: A Case History* (1970) (Ph.D. dissertation, University of Virginia) (on file with the author).

145. 11 U.S. (7 Cranch) 603 (1812).

146. On Virginia's conflict with the Court and Marshall in the Fairfax Land litigation, see Charles Hobson, *Editorial Note*, in 8 THE PAPERS OF JOHN MARSHALL, at 108-21. See also G. EDWARD WHITE & GERALD GUNTHER, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835* 165-73 (1988). For an excellent brief treatment of Roane and Virginia legal culture, see generally TIMOTHY S. HUEBNER, *THE SOUTHERN JUDICIAL TRADITION: STATES JUDGES*

Inseparable from the long personal and professional rivalry between the two men was the rivalry between the Virginia Supreme Court of Appeals and the Supreme Court of the United States. Ironically, the Virginia Court was, as noted, among the first in the nation to claim the power of judicial review. Marshall was familiar with those cases, admired the judges who handed down the opinions, and used both the men and the opinions as models. Roane employed the same tradition to strengthen the Supreme Court of Appeals' state judiciary—not only in his opinions but in his effort to persuade his colleagues to abandon seriatim opinions. By the time Roane challenged Marshall over *McCulloch*, he was the dominant voice on the Virginia high court and the leading spokesman for Virginia's legal community. Their confrontation in *Cohens v. Virginia* was the climactic struggle between two of Virginia's sharpest legal minds and between two rival constitutional traditions both deeply rooted in Virginia history.¹⁴⁷

The dispute over Section 25 jurisdiction in *Cohens* was perfectly calculated to join the issue between the two courts and the two judges. It was also an issue central to antebellum history. Section 25 of the Judiciary Act of 1789 allowed the Supreme Court to "reverse or affirm" decisions from the highest state courts on federal questions where the right claimed under the Constitution, federal law, or treaties, was denied. Since federal questions were routinely heard in state courts, the right of review provided by Section 25 was absolutely essential; unless, of course, it was desired that each state, via the interpretations of its own courts, should have its own version of the Constitution. If Section 25 was necessary for a unitary Constitution, it was also, in its wording and operation, unavoidably demeaning to state courts, judges, and lawyers. The writ of error itself, in its ancient common law lineage, was a writ issued by a superior to an inferior court for the purposes of correcting errors of law made at the lower level. Customarily drawn by the party appealing the state decisions, the writ could be activated by the approval of a single Supreme Court justice, and, once issued, it demanded, peremptorily, that the state court supply all the appropriate records of the decision in question. In effect, one justice could call the highest court of the state before the bar of the Supreme Court to defend itself. In fact, it was by means of Section 25 jurisdiction that the Marshall Court set itself up to overturn both state statutes and the state court decisions interpreting them. Among those cases were *Fletcher v. Peck*,¹⁴⁸

AND SECTIONAL DISTINCTIVENESS, 1790-1890 10-39 (1999).

147. For a discussion of Roane's influence on the Virginia Supreme Court of Appeals, see generally HUEBNER, *supra* note 146.

148. 10 U.S. (6 Cranch) 187 (1810).

Fairfax Devisee v. Hunter's Lessee,¹⁴⁹ (and, of course, *Martin v. Hunter's Lessee* itself), *Dartmouth College v. Woodward*,¹⁵⁰ *Ogden v. Saunders*.¹⁵¹ In fact, most of the Court's contract decisions arrived via Section 25. So did *Gibbons v. Ogden*¹⁵² and the controversial bankruptcy cases of *Sturges v. Crowninshield*¹⁵³ and *Ogden v. Saunders*. So would the Cherokee Indian cases in the 1830s.¹⁵⁴

McCulloch was also a Section 25 case, providing Roane with the opportunity to once again challenge *Martin v. Hunter's Lessee*, which he was obviously hankering to do. Marshall, it should be noted, was involved in the *Martin v. Hunter's Lessee* controversy, even though he had formally recused himself from the case. Since he was the dominant figure on the Court and was also close to Story, who wrote the opinion, it is not unreasonable to assume that Story had consulted with Marshall and perhaps, given the intimate living arrangements of the Court, other Justices as well. In fact, Justice Story boasted that the Chief Justice, "approved every word of the opinion," which has led some scholars to speculate that Marshall may have helped write it. What is beyond dispute is that Marshall went to unusual lengths (perhaps even unethical ones) to bring the case forward. He did not sign the petition for the issuance of the writ of error, as he would ordinarily have done had he not recused himself (because the case came from his judicial circuit). He did, however, as G. Edward White has shown, draft the petition itself. Perhaps, as White suggests, Marshall (having recused himself) did this as a private citizen who was a party to the case.¹⁵⁵ Or perhaps the embryonic ethical traditions of recusement at this time permitted him to do so. But clearly he pushed to the limits, and probably beyond, in an effort to bring the ruling of the Virginia Supreme Court of Appeals before his own Court. Virginia did not recognize the Court's power to issue the writ in the *Martin* case and, indeed, never acknowledged having received it. Thus, the seeds were sown that produced such bitter fruit in *Cohens v. Virginia*.

The peculiar factual environment and legal issues of *Cohens* added fuel to the fire. On one level, it involved a clash between congressional and state statutory law—not identical to that in *McCulloch* but close enough to raise southern hackles. On the federal side, the Congressional Statute of 1802 organized the

149. 11 U.S. (7 Cranch) 603 (1812).

150. 17 U.S. (4 Wheat.) 518 (1819).

151. 25 U.S. (12 Wheat.) 213 (1825).

152. 22 U.S. (9 Wheat.) 1 (1824).

153. 17 U.S. (4 Wheat.) 122 (1819).

154. *Cherokee Nations v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

155. WHITE & GUNTHER, *supra* note 146, at 164-73.

District of Columbia into “a body politic and corporate”¹⁵⁶ and authorized the sale of lottery tickets to effect “any important improvements in the City.”¹⁵⁷ On the state side, the Virginia Act of 1820 criminalized the sale of all lottery tickets in the state except those authorized by the state legislature. The jurisdictional phase of the case, which quickly overshadowed the conflict between federal and state statutory law, began when the Cohen brothers, who were citizens of Virginia and agents for the D.C. lottery, were convicted and fined \$100 in the Norfolk Borough Court for selling national lottery tickets in defiance of the Virginia law. Upon being denied appeal to the Superior Court—“inasmuch as cases of this sort are not subject to revision by any other courts of the commonwealth”¹⁵⁸—lawyers for the brothers requested a writ of error from the Supreme Court reviewing the Hustings Court decision. The writ was issued and accompanied, as was customary in such cases, by notice to the Governor and Attorney General of Virginia, summoning the state to defend itself before the bar of the Supreme Court.

The significance of the case was clear from the outset, so much so that some (contemporaries and historians alike) felt that the case was contrived to give Marshall another shot at Roane and company. A leading scholar of the Marshall Court concludes that there is no convincing evidence establishing the feigned nature of the litigation.¹⁵⁹ Nevertheless, the appearance of a joint letter in the nationalist *Niles' Weekly Register* by five leading members of the Supreme Court bar supporting the Cohen brothers (only one day after they petitioned for a writ of error) raised unanswered questions. Shortly after these national-minded lawyers pounced on the case, states' rights supporters responded in the *Richmond Enquirer* with their own account. Their essays attacked Marshall and the Court for its nationalizing doctrines and restated old arguments about state sovereignty and the compact nature of the Constitution. But what really concerned them was the Court's appellate authority under Section 25, which they vehemently rejected. This was the main thrust of Roane's editorials, and it was the position taken by the Virginia legislature, which instructed counsel for Virginia to argue only the jurisdictional question in *Cohens*. By the time the Court decided the case, the newspaper war had spread to the Washington papers and beyond. Whether the case was feigned or not did not matter, since both sides, still in battle formation after *McCulloch*, were anxious for a

156. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) at 269.

157. *Id.* at 285.

158. WHITE & GUNTHER, *supra* note 146, at 507 (quoting the *Richmond Enquirer*).

159. WHITE & GUNTHER, *supra* note 146, at 504-524 (providing a full and scholarly account of the *Cohens* case).

final showdown. The American people awaited the outcome.¹⁶⁰

Whether the American people fully understood Marshall's complex opinion, however, is doubtful; though, on one level, it was as straightforward as it was unoriginal. The main points decided were these: that Section 25 of the Judiciary Act was constitutional (which was hardly surprising after *Martin v. Hunter's Lessee*). Additionally, it applied to this case regardless of the 11th Amendment, which Virginia argued protected the state from being hauled before the Supreme Court by private citizens, and despite the fact that the case came directly to the Supreme Court from the Norfolk Borough Court, rather than from the highest court in the state, as the literal reading of Section 25 requires. The significance of the opinion was in both the details of Marshall's argument and his memorable language. *Cohens* was one of Marshall's most eloquent and quotable opinions. In some ways it was also the most tedious and tendentious, which is not surprising since it was Marshall's definitive answer to Roane and Virginia states' rights lawyers on the Court's appellate authority.¹⁶¹

Were it not for Marshall's determination to answer Roane and the States' rights supporters conclusively, the case might have been resolved quietly. Certainly, there was plenty of room for maneuvering and ample reason to downplay the conflict between Virginia and Congress as well as Virginia and the Court. There is even some doubt as to whether a federal question was involved at all, which is necessary to activate Section 25. For example, the Congressional Act of 1802, under which the Cohen brothers claimed the right to sell lottery tickets in Virginia, was clearly limited to the governance of the newly created District of Columbia. To be sure, the Cohen brothers claimed that the law authorized them to sell tickets in Virginia, but the more restricted reading of the statute was readily available to Marshall. A restrictive (that is to say, non-confrontational) reading of that act appears all the more reasonable when it is recalled that the Virginia law in question appeared to come under the general category of police power legislation—the authority that states were assumed to possess by all (including Marshall), which allowed them to legislate for the general well-being of the people of the state. Laws governing lotteries could readily be seen as legislation within the police powers of the state. But in any case, the statute under which the Cohen brothers were convicted was a

160. For a discussion of the Court's Approach to *Cohens*, see 1 WARREN, *supra* note 95, at 541-64. For Marshall's reaction to Roane's charge that *Cohens* was "feigned," see John Marshall to Henry Wheaton (June 2, 1821), in 9 THE PAPERS OF JOHN MARSHALL, at 150.

161. For an admirable discussion of the issues addressed in *Cohens*, see Charles Hobson, *Editorial Introduction*, in 9 THE PAPERS OF JOHN MARSHALL, at 106-13.

criminal law, the ultimate in local laws, and one heretofore exempt from Section 25 review. The wording of both Section 25 and the 11th Amendment presented problems for the Cohen brothers and provided discretionary latitude for Marshall. First, Section 25 provided for appeal only from the *highest* court in the state. This condition was not met by the facts in *Cohens*. Regarding the 11th Amendment, there was a real question whether the Cohen brothers were suing the state at all (such suits were prohibited by the 11th Amendment) since they were appealing a criminal conviction brought against them by the state. To uphold the Court's jurisdiction, Marshall would, then, have to read Section 25 broadly and the 11th Amendment narrowly. He did both with persuasive force. But the fact remains that the interpretive play in the statute and the amendment would have allowed him to go the other way had he chosen to do so. These are the shades of *Marbury*.

Why then did he decide to take on Virginia and by what means, to what end, and with what consequences? Marshall's most conspicuously legalistic constitutional opinion was also his most political, and no doubt, the two aspects of his opinion were very much connected. Although he had a plausible, legal way out of the case, circumstances beyond his control left him little real choice. By the time the case reached the Court, it had become so thoroughly politicized that not responding to it would have appeared to be capitulation. Not only had the political press of Virginia challenged the Court openly, but the Virginia legislature had joined the fray with its instructions to counsel. There was no doubt in Marshall's mind that Jefferson had put his imprimatur on the proceedings, and there was the Roane rivalry to contend with as well. "Hampden" had been answered in the papers, to be sure, but the Court itself had yet to officially address the on-going challenge of Virginia jurists concerning the Supreme Court's appellate authority. Moreover, the danger was spreading. National newspapers, for the first time in history, devoted coverage to the debate over *McCulloch* and could be expected to do the same with *Cohens*. More serious was the escalating struggle between Ohio and the Court over the Bank decision in the pending case of *Osborn v. Bank of the United States*,¹⁶² which challenged the authority of the Court to enforce its decision in *McCulloch* under Section 25. As he made clear to Story, Marshall viewed the widespread challenge to the jurisdiction as a challenge to the Union itself.¹⁶³ Circumstances called for a definitive answer to Roane the lawyer, Jefferson the politician, and to states right

162. 22 U.S. (9 Wheat.) 738 (1824).

163. Letter from John Marshall to Joseph Story (Sept. 18, 1821), in 9 THE PAPERS OF JOHN MARSHALL, at 184.

theorists wherever they were.¹⁶⁴

Cohens was fashioned for the crisis at hand, but it was also vintage Marshall: both in its language (which radiated impartiality and reason) and carefully planned rhetorical strategy (wherein self-evident and unprovable generalizations preceded lawyerly "proof"). The Chief Justice rhetorically opened by restating the arguments made by the counsel of Virginia:

They maintain that the nation does not possess a department capable of restraining, peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain the constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the Courts of every State in the Union.¹⁶⁵

To quote, Marshall assumed, was to damn; and to state Virginia's arguments in their baldest form was to signal what the Court's response would be. That response, the Chief Justice assured his readers, stemmed not from the Court's aggrandizing power but from its sense of legal and moral obligation. The words, which he invited his readers to read through republican-colored glasses, were familiar ones to Court watchers:

If such be the constitution, it is the duty of the court to bow with respectful submission to its provisions. If such be not the constitution, it is equally the duty of this Court to say so; and to perform that task which the American people have assigned to the judicial department.¹⁶⁶

The message was that the law—not judges—ruled, and the Supreme Court, despite the charges of aristocracy levelled against it, derived its authority (no less than did the political branches) from the sovereign people speaking, as only they could speak, in a written Constitution.

Having put the Court's and his own republican honor on the line, Marshall abruptly turned to Virginia's objections to the Court's assertion of jurisdiction under Section 25. He might have confronted that section directly, but instead, (following the logic of Justice Story's argument in *Martin v. Hunter's Lessee*) Marshall decided to rest his case first on the text of the Constitution,

164. Marshall anticipated a showdown over *Cohens* as early as February 1821 and expressed his desire to Bushrod Washington "that the court be as full as possible when it is decided." Letter from John Marshall to Bushrod Washington (Feb. 8, 1821), in 9 THE PAPERS OF JOHN MARSHALL, at 101. For Marshall's response to the Virginia reaction, see Letter from John Marshall to Joseph Story (June 15, 1821), in 9 THE PAPERS OF JOHN MARSHALL, at 167-68.

165. *Cohens*, 19 U.S. (6 Wheat.) at 377.

166. *Id.*

particularly Articles III and VI. Virginia claimed that a “sovereign independent state” could not be sued against its will: Article III granted the federal courts jurisdiction over cases in which the state was a party. Indeed, by ratifying the Constitution, “it shall appear that the state has submitted to be sued, then it has parted with this sovereign right of judging, in every case on the justice of its own pretension, and has entrusted that power to a tribunal in whose impartiality it confides.”¹⁶⁷ That impartial tribunal is the Supreme Court. And why, Marshall asked, did the states entrust that power to the Supreme Court? Because, he said, in oft quoted words:

The American states, as well as the American people, have believed a close and firm Union to be essential to their liberty and to their happiness. They have been taught by experience, that this union cannot exist, without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent States. Under the influence of this opinion, and thus instructed by experience, the American people, in the conventions of their respective States, adopted the present constitution.¹⁶⁸

In addition to being eloquent and quotable rhetoric, this brief passage was central to Marshall’s argument. First, it established, by the authority of the written text of the Constitution, the general principle that states could be sued and that the Supreme Court could hear such suits. In addition, it permitted him to discourse again on the theory of divided sovereignty that he had expounded in *McCulloch* and in the newspaper war with Roane and Brockenbrough.

In those earlier discussions, Marshall aimed to refute the “consolidationist” accusation and to downplay the powers of the national government (even while he was enlarging them through implied powers). In *Cohens*, he emphasized the “supremacy” of the national government—a word he used several times in two paragraphs. Sovereignty was still divided between nation and the states, to be sure, but his emphasis was now on Article VI, which made federal law supreme over state law.

This [Article] is the authoritative language of the American people; and, if gentlemen please, of the American states. It marks, with lines too strong to be mistaken, the characteristic distinction between the government of the union, and those of the States. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is part of the constitution; and if there be any who deny its necessity, none can

167. *Id.* at 380.

168. *Id.* at 380-81.

deny its authority.¹⁶⁹

Thus far, two principles essential to the Court's powers had been set forth. First, the Court's powers reside in the text of the Constitution, which had been agreed to, not only by the American people, but by the states themselves. Second, the portion of sovereignty granted to the national government was (again by the authority of the text of the Constitution) supreme. The third principle, which followed logically from the first two, concerned the appellate powers of the Supreme Court. If the Constitution is supreme, if it created a national government which is supreme in its granted sphere of powers, and if the Court is granted the power to try constitutional cases coming from state courts, then it too, in these cases is supreme. It is literally the *Supreme* Court of the United States. The purpose of the Court, according to the Constitution itself, was "the maintenance of these principles in their purity."¹⁷⁰

The Supreme Court is authorized to decide all cases of every description, arising under the Constitution or laws of the United States. From this general grant of jurisdiction, no exception is made for cases in which a state may be a party. When we consider the unique relationship between the federal and state governments, the nature of the Constitution in which state governments are subordinate to the federal, and the great purpose for which Section 25 jurisdiction over cases arising under the constitution and laws of the United States is confided to the judicial department, then the question remains. Are we at liberty to insert into this general grant an exception for those cases in which a state may be a party? Will the spirit of the Constitution justify this attempt to control its words?

In the course of justifying the Court's jurisdiction, Marshall defined the Supreme Court's role in sweeping republican language. Its domain was constitutional principle, and in the spirit and language of the Constitution, it was the keeper of the flame. He went on to argue in incendiary language (to Virginia, at least) that the Court was uniquely suited to this high purpose, especially when compared to state judiciaries. It was a matter of historical fact, he continued, that "[d]ifferent states may entertain different opinions on the true construction of the constitutional powers of Congress," and "States may legislate in conformity to their opinions, and may enforce those opinions by penalties."¹⁷¹ Then, turning to state courts (with an eye on Spencer Roane and the Virginia Supreme Court of Appeals), Marshall continued: "It would be hazardous too much to assert, that the judicatures of the

169. *Id.* at 381-82.

170. *Cohens*, 19 U.S. (6 Wheat.) at 382.

171. *Id.* at 386.

States will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals."¹⁷² This was especially true since judges in many states "are dependent for office and for salary, on the will of the legislature."¹⁷³ The Constitution cannot be placed in the keeping of such institutions:

[It] is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter. No government ought to be so defective in its organization, as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day.¹⁷⁴

The federal judiciary, with the Supreme Court at its head, was the means that the framers chose to secure the execution of its own laws "and of preserving them from all violation, from every quarter, so far as judicial decisions can preserve them"¹⁷⁵

There are no references in this opening statement to either Section 25 or the 11th Amendment, and one must assume that for rhetorical reasons Marshall opened, instead, with a simple proposition: the American people themselves created the Supreme Court to serve as the special guardian of the Constitution and the federal union, itself, as against the states. To drive home this point he argued further (taking his cue from Story's expansive and much contested opinion in *Martin v. Hunter's Lessee*), that even without Section 25, Article III of the Constitution established the Court's authority as the final interpreter and protector. Virginia argued that Article III suits against the state could come only under original jurisdiction, which was not the case in *Cohens*. Marshall countered in fourteen pages of intricate argumentation that Article III was intended to cover all contingencies, including those in *Cohens*. Nowhere was his rhetoric, legal logic, or interpretive skill more forcefully displayed—or his contempt for Virginia theorists—than in these pages. He admitted that most suits involving states would come under original jurisdiction, but he insisted that states could also be sued under appellate jurisdiction, provided that the subject matter in the case involved a question of constitutional or federal law:

The truth is, that where the words confer only appellate jurisdiction, original jurisdiction is most clearly not given; but where the words

172. *Id.*

173. *Id.* at 386-87.

174. *Id.* at 387.

175. *Cohens*, 19 U.S. (6 Wheat.) at 388.

admit of appellate jurisdiction, the power to take cognizance of the suit originally, does not necessarily negative the power to decide upon it on an appeal, if it may originate in a different Court.¹⁷⁶

The analysis comes down to a loaded game of chance: heads the Supreme Court wins, tails Virginia loses. The general rule of construction is this: "Every part of the article must be taken into view, and that construction adopted which will consist with its words, and promote its general intention. The Court may imply a negative from affirmative words, where the implication promotes, not where it defeats the intention."¹⁷⁷ Virginia's argument that the Court could not rightfully entertain *Cohens* because it was an appellate case brought under Section 25, rather than an original jurisdiction case, went down in flames.

Having rejected Virginia's interpretation of Article III, Marshall then turned to Virginia's remaining objections to the Court's jurisdiction. The first objection centered on the 11th Amendment, which states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State"¹⁷⁸ Arguing this time for a broad interpretation of the Constitution, Virginia contended that the amendment was intended, out of respect for the dignity and sovereignty of the state, to prohibit all suits in federal courts brought by individuals whether or not they were citizens of other states or foreign countries. Uncharacteristically, Marshall now argued for a narrow interpretation. The true meaning of the amendment, he said, was to be found in the specific problem which gave rise to it. Specifically, in *Chisholm v. Georgia*,¹⁷⁹ the problem related to the fact that Georgia had been sued by citizens of South Carolina to recover debts against the state. The 11th Amendment, on both first impression and extended inquiry, was "intended for those cases, and for those only, in which some demand against a State is made by an individual, in the Courts of the Union."¹⁸⁰ He willingly conceded "a general interest might well be felt in leaving to a State the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it"¹⁸¹ On the other hand, "no interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its Courts, the constitution and laws from active violation."¹⁸² But in any case, the

176. *Id.* at 397-98.

177. *Id.* at 398.

178. U.S. CONST. amend. XI.

179. 2 U.S. (2 Dall.) 419 (1793).

180. *Cohens*, 19 U.S. (6 Wheat.) at 407.

181. *Id.*

182. *Id.*

amendment did not apply to cases like *Cohens*. That case originated not as a suit by an individual against the state but as an action brought by the state against an individual and appealed by him to another court. Appropriately, that court was the Supreme Court of the United States when the party based his appeal on the Constitution or a federal law (finally bringing Marshall to Section 25, which provided precisely for such appeals).

Section 25 of the Judiciary Act of 1789, passed by a majority of the first Congress, made up largely of men who had served in the Constitutional Convention, was arguably one of the most important statutes passed by that Congress or any other. Because it provided appeal from state court interpretations of federal law, it was the one essential link to national sovereignty. It was the *sine qua non* of a unified system of constitutional law. For precisely that reason, it became the focal point of the struggle between Virginia and the Marshall Court in 1816 and the starting point of the states' rights logic of John C. Calhoun after 1823. In *Cohens*, Marshall found himself on the front line of a major constitutional battle and, indeed, on the fault line of a major constitutional realignment. Virginia premised its position on "the supposed total separation of the judiciary of a State from that of the Union, and their entire independence of each other."¹⁸³ This "hypothesis" was, as he correctly perceived, merely another manifestation of states' rights theory which maintained that the national government was the mere agent of states who, as parties to the contract, retained absolute sovereignty. Marshall's theory of divided sovereignty recognized that states had sovereign powers that the Court was bound to respect. Now he asked Virginia to acknowledge those areas in the Constitution which affirmed the supremacy of the national government and bound Americans together as a nation.

In his famous words:

[T]hat the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and, in that character, they have no other. America has chosen to be, in many respects and for many purposes, a nation, and for all these purposes, her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and

183. *Id.* at 413.

the laws of a state, so far as they are repugnant to the Constitution and the laws of the United States, are absolutely void. These states are constituent parts of the United States; they are members of one great empire—for some purposes sovereign, and for some purposes subordinate.¹⁸⁴

The doctrine here is familiar, but the words warrant notice because they display not only Marshall's rhetorical skills, but also the passion of his convictions. In an age that cherished great preaching, Marshall was both a great preacher and a great believer, and in him, the two were inextricably connected. His peroration also fit his argument. By declaiming on the great nation-building purpose of the Constitution, he laid an emotional foundation for his justification of the Court's appellate authority. The Supreme Court and the nation were bound together, and if the Court was to do its duty, then the reach of its jurisdiction must equal the reach of the nation's law.

We think that in a government acknowledgedly supreme, with respect to the objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The exercise of the appellate power over those judgments of the state tribunals which may contravene the constitution or laws of the United States, is, we believe, essential to the attainment of those objects.¹⁸⁵

It follows inexorably that the Supreme Court, provided for in Article III, is inseparable from the supreme law, provided for in the Supremacy Clause of Article VI. The founding fathers, wise from the experience of the Articles period, deliberately made it that way, and "contemporaneous exposition"¹⁸⁶ verified their intent. Chief among contemporaneous expositions of the intent of the framers, standing right along side of *The Federalist*, was the Judiciary Act of 1789 and most particularly Section 25.

Given the centrality of Section 25, in the case at hand, one would expect an extensive discussion of it. But, in fact, Marshall dispenses with it summarily, referring readers who wanted more to Story's opinion in *Martin v. Hunter's Lessee*. In fact, Marshall followed Story's *Martin* argument, which is to say that he rested the Court's appellate powers on the wording of the Constitution, amplified for effect by his own rendition of Revolutionary history. It made for stirring rhetoric, but it was also a brilliant strategy. To have emphasized Section 25, to have suggested even faintly that the Court's appellate authority rested solely on that statute

184. See *id.* at 413-14 (expounding on the relationship of the states within the national system of governance).

185. *Cohens*, 19 U.S. (6 Wheat.) at 414-15.

186. *Id.* at 420.

would have encouraged the Court's enemies to repeal it, which they could do by a simple majority vote of Congress. Instead, Marshall, like Story, rested the case on the Constitution itself. Section 25, then, becomes evidence of the framers' intent. Compelling evidence it was, since as he noted, "in the congress which passed that act were many eminent members of the Convention which formed the constitution."¹⁸⁷ Moreover, he added (in a statement that was hard to prove but impossible to refute) "not a single individual, so far as is known, supposed that part of the act which gives the Supreme Court appellate jurisdiction over the judgments of the State Courts, in the cases therein specified, to be unauthorized by the constitution."¹⁸⁸ Behind Marshall's reading of the Constitution were these eminent legislators as well as eminent state judges, "whose talents and character would grace any bench"¹⁸⁹ and who had acknowledged the appellate jurisdiction of the Court. Roane and Jefferson stood alone in their obstinacy, because their ideas, if followed, would destroy the Constitution and the federal union. The gauntlet was down, and it did not matter that the Court went with Virginia on the merits of the case, which it did almost as an after-thought.

Cohens was Marshall's last and greatest statement on the nature of the federal union and the republican responsibilities of the Court. But it did not settle the matter. Nor did it silence Roane, who instantly answered *Cohens* in a series of essays in the *Richmond Enquirer*, published between May 15 and July 13, 1821, this time writing as "Algernon Sidney." "Somers" and "Fletcher of Salturn," whose identities are not known, also joined in the assault. These various essays are notable for their assertions concerning the inevitable subjectivism of judicial decisions and their *ad hominem* assault on Marshall, who is depicted as a traitor to Virginia. As "Somers" put it, he "may have performed his *novitiate* there . . . but the moment he passes the federal threshold, he looks back with indifference on the schemes of his juvenile experience; discards his former allegiance; and enters with all the enthusiasm of a new convert."¹⁹⁰ Roane's criticisms, which echoed Jefferson's, were especially personal. Marshall's "most awful" opinion, in addition to being all wrong was "unusually tedious, and tautologous" (which it was).¹⁹¹ It was replete with "premises which cannot be conceded" and took for granted "the very points which are to be proved."¹⁹² Roane

187. *Id.*

188. *Id.*

189. *Id.* at 421.

190. RICHMOND ENQUIRER, May 15, 1821 (on file with author).

191. RICHMOND ENQUIRER, May 25, 1821 (on file with author).

192. "Algernon Sidney," RICHMOND ENQUIRER, May 29, 1821 (on file with author).

professed to want “no insurrections, no rebellions, no revolutions,” but he summoned the Spirit of ‘98, and the spirit of the American Revolution to aid Virginians in their renewed struggle against tyranny.¹⁹³ He promised that Virginia judges would not be bowled over “by the breath of a single man,” and that he would hold the ground staked out by Jefferson.¹⁹⁴

Marshall had, in effect, been expelled from his own state for disloyalty. He was distressed but chose not to respond to the attacks on *Cohens*, and when Roane died unexpectedly on September 4, 1822, the great debate between the two men was over for good. By that time, however, the arguments on both sides had taken on a life of their own—in Virginia, in the course of the 1820s and early 1830s, and in the nation at large. Marshall feared the worst. Indeed, at one point in *Cohens*, he prophesied that the struggle with Virginia, should it become “universal” among the other states, might end in a union-destroying war. “The people made the constitution, and the people can unmake it.”¹⁹⁵ If there is a general “determination” to destroy the Union, “its effects will not be restrained by parchment stipulations; the fate of the constitution will not then depend on judicial decisions.”¹⁹⁶ Marshall glimpsed here at what the 1820s would make more clear: that the Court would not, in its ultimate relationship with democratic politics, have the final word. He can be forgiven for concluding that a Court that was not final was no court at all. Historians, armed with retrospective wisdom, know that he was wrong.

IV. A REPUBLICAN COURT IN A DEMOCRATIC POLITY

It might appear that Marshall won his great duel with Roane and the Virginia theorists. After all, *McCulloch* still stands as both a source of national authority and the universal touchstone of constitutional interpretation. *Cohens* endures as the definitive statement on the Court’s appellate authority. Marshall’s series of brilliant polemic essays, written with passion and genius in the heat of battle (and in the midst of his regular duties on circuit), connect these two landmark decisions into a coherent statement on the nature of sovereignty, the meaning of the Constitution, and the republican duties of the Court. With the authority of the Court behind him as well as, presumably, the force of the nation, we might assume that the golden age of the Marshall Court was indeed the golden age of American nationalism.

193. “Algernon Sidney,” RICHMOND ENQUIRER, June 1, 1821 (on file with author).

194. “Algernon Sidney,” RICHMOND ENQUIRER, June 8, 1821 (on file with author).

195. *Cohens*, 19 U.S. (6 Wheat.) at 389.

196. *Id.*

This familiar interpretation, which relies heavily on what Marshall said rather than what happened as a consequence of what he said, needs to be modified. If the 1820s saw “the awakening of American nationalism,” it also witnessed an even more dramatic resurgence of states’ rights and sectional self-consciousness. Rather than clinching a victory for nationalism, Marshall’s opinion in *McCulloch* set in motion the forces of states’ rights that charted the direction of antebellum history. *McCulloch* did, of course, put constitutional footing under the BUS, which functioned effectively for several more years (thanks to the ability of Nicholas Biddle, who became its president in 1823). What Marshall’s law established, however, Jacksonian politics and Andrew Jackson, himself, undid. The president’s suspicion of banks, like much else in his political persuasion, was rooted in personal experience. But it did not help that the Bank gave preferential treatment to his opponents in the election campaign of 1828 or that a sizeable chunk of the Bank stock was held by British investors. More important still was the convenience of the “Monster Bank” as a political symbol of aristocracy in an age of growing egalitarianism. Clay and Webster, Jackson’s political rivals in 1832, sealed the Bank’s fate (and their presidential ambitions as well) when they made early recharter an issue in the election. Though it lived on after 1836 as the Bank of Pennsylvania, Biddle’s Bank and the idea of a central regulatory banking institution of any kind effectively died and remained dead at least until the Civil War (and in reality until the creation of the Federal Reserve system in 1913).¹⁹⁷

Gone also, in a practical sense, with the emergence of the Jacksonian Democrats, was Marshall’s celebrated doctrine of implied powers. The party of Jackson, which did so much to set the permanent political agenda during the antebellum period, believed as did Jefferson, whose ideas they borrowed, that the best government was the least. The defeat of John Quincy Adams in 1828 doomed Clay’s American Plan. While Congress retreated from national planning, the new Jacksonian majority on the Taney Court reasserted the constitutional primacy of states’ rights. Implied powers, in short, was not called on significantly again by the Court until the surge of national legislation in the 1880s. It was also entirely consistent with Jacksonian constitutional principles that Taney’s opinion in *Dred Scott v. Sandford*¹⁹⁸ should have voided an act of Congress. Not coincidentally, that decision also put to rest the possibility that Marshall’s doctrine of implied powers announced in 1819 would be put to antislavery uses.¹⁹⁹

197. HAMMOND, *supra* note 13, chs. 13 & 14.

198. 60 U.S. (19 How.) 393 (1857).

199. For a discussion of the temporary demise of *McCulloch*, see R. Kent Newmyer, *John Marshall and the Southern Constitutional Tradition*, in AN

In other ways, political resistance diminished the authority of the Marshall Court's decisions. Some state challenges were beat back, most noticeably in *Osborn v. Bank of the United States*,²⁰⁰ where the Court faced down Ohio over the enforcement of *McCulloch*. Even when the Court's decisions were left standing, however, their effect could be diluted or postponed by state obstruction. Often, the Court itself modified earlier decisions under pressure, through the familiar common law process of distinguishing and clarifying terms. In some cases, outright resistance was successful. An early example is New Jersey's disregard for Marshall's opinion in *New Jersey v. Wilson*.²⁰¹ In 1823, in the circuit case of *Elkison v. Deliesseline*,²⁰² Justice William Johnson "hung himself on a democratic snag,"²⁰³ to use Marshall's memorable words, when he ruled that South Carolina's Negro Seaman Act was unconstitutional. *Elkison* is a decision that was never enforced or reviewed by the Supreme Court. In the same year Kentucky grassroots democracy successfully nullified the impact of *Green v. Biddle*,²⁰⁴ which struck down Kentucky claimant laws designed to actually protect settlers against absentee owners. Continued resistance to *Green* persuaded the Court to silently reverse itself (via a statute of limitations argument) in *Hawkins v. Barney*.²⁰⁵ More well known, but not atypical, was Georgia's defiance of the Marshall Court's later decisions in the Georgia Indian cases.²⁰⁶

The message in all this—in the political and legal dissipation of *McCulloch* and the considerable, varied state resistance to the Court's appellate authority and to its substantive rulings—was that law was not autonomous, the word of the Court was not always final, and constitutional law was unavoidably connected to politics. Given the origins and nature of the Constitution, it could hardly have been otherwise. Certainly, the factors which the framers at Philadelphia attempted to answer were as much political (and economic) as legal. The document they submitted to the states for ratification reflected this reality. The Constitution

UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH (Kermit L. Hall & James W. Ely, Jr., eds. 1989).

200. 22 U.S. (9 Wheat.) 738 (1824).

201. 17 U.S. (7 Cranch) 164 (1812).

202. 8 F. Cass. 493 (C.C.D.S.C. 1823) (No. 4366).

203. Letter from John Marshall to Joseph Story (Sept. 26, 1823), 9 PAPERS OF JOHN MARSHALL at 338.

204. 21 U.S. (8 Wheat.) 1 (1823).

205. U.S. (5 Pet.) 457 (1831). For a discussion of Kentucky's opposition to *Green v. Biddle*, see 1 WARREN, *supra* note 95, at Ch. 16. For an admirably lucid discussion of Henry Clay's role in *Green v. Biddle*, see generally MAURICE G BAXTER, HENRY CLAY THE LAWYER (2000).

206. See, e.g., Steven R. Boyd, *The Contract Clause and the Evolution of American Federalism, 1789-1815*, 44 WM. & MARY Q. 529, 529-48 (1987).

was Supreme Law and the Supreme Court it created was a legal institution. But the Court was also dependent on the political branches—on Congress in matters of structure, on the Senate and the President in matters of appointments, and on the Executive Branch regarding execution. A court, given the power to interpret a constitution that was inherently political, was bound to be enmeshed in politics. Nowhere was this more apparent than in the constitutional clash between state and nation. When we consider how imperfectly the line was drawn by the founding fathers—how they backed away from clarity in order to achieve agreement—we can appreciate just how political the law, which Marshall and his Court aimed to administer and clarify, really was. Long before Tocqueville said it, Marshall realized that in America every major political question sooner or later, in one way or another, turns into a constitutional one. When he admitted in *Cohens* that the people who made the Constitution can also destroy it, he acknowledged the *political* vulnerabilities of supreme law.²⁰⁷

The real question is what did Marshall do with his wisdom about the connectedness of constitutional law and democratic politics? What he *professed* to do was to separate the two and make the Court, first and foremost, a legal institution. This was the central theme of his jurisprudence—proclaimed in *Marbury*, acted on in *McCulloch*, defended against Roane, and reaffirmed in *Cohens*. Marshall's pronouncements, on and off the Court, in this regard ought to be seen as a coherent response to the larger developments of the new age, especially to the newly emerging democratic polity represented by the rise of political parties and the emergence of the Jacksonian Democrats. Marshall intuited what historians have come to understand more clearly: that the Richmond Junto used the Court issue to consolidate the Republican Party in Virginia, which—thanks to the organizing genius of Martin Van Buren—joined with the Albany Regency in 1827 to form the Democratic Party of Andrew Jackson. The new party was professedly egalitarian and refashioned Jeffersonian ideology to make the point. Like Jefferson, it believed that the best government was the one that governed least. National planning, like that championed by Henry Clay and John Quincy Adams, was out, and state pluralism and states' rights were in. So were political parties and professional politicians. Brokerage was their forte. Operating on the principle that half-a-loaf is better than none, the newly arisen tribe of professional politicians worked to attract enough voters to dominate legislatures, win

207. On the complexity of federalism in the Constitution, see JACK ROKAVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION ch. 7 (1997).

executive offices at the state level, and ultimately capture the presidency itself. Old deferential leaders "stood" for office; modern politicians "ran." What they chased was political power. It was a new and different way to govern. Jefferson called it democracy; Marshall called it demagoguery. In the new age, political compromise rather than republican truth became the guiding spirit of the Constitution.²⁰⁸

By fashioning the Court as a *legal* institution and viewing judges as republican statesmen above the fray, Marshall set himself against this new way of conducting constitutional business. His plan, as Virginia critics hurried to point out, was unavoidably elitist. In the political vernacular of the times, it was "aristocratic" and, in the historian's view, "deferential." Even friends of Marshall conceded the point, as did William Ellery Channing, who defended Marshall's opinion in *McCulloch* on the same ground that he defended the role of the learned clergy in expounding scripture: that is, the God-given right of the learned to interpret the text for the unregenerate. Even Marshall, at times, seemed to concede the point, as when, in his debate with Roane, he hoped that the people would *trust* the Court with the power he claimed it had. Trust, of course, was the watchword and justification of the old deferential system of politics that Marshall knew as a young man in Virginia. It was the glue that bound the followers to natural leaders. It is not surprising that in his defense of *McCulloch*, Marshall put his own reputation on the line to make the point.

It was not just trust, on one hand, and noblesse oblige, on the other, that Marshall relied on to justify and restrain the Court's powers. Rather, it was legal science, as the lawyers of the early republic understood that concept, and as he had practiced it for nearly two decades in the Courts of Virginia. The heart of early national legal science was the "taught tradition of the common law." The framers, who did most to shape the institutional contours of the federal court system in the Constitution, were profoundly influenced by common law training and experience.²⁰⁹ So were those members of the first Congress who passed the Judiciary Act of 1789 and the several process acts of the 1790s, which defined the working rules for the federal courts. No one,

208. For a discussion of the Virginia-New York axis and the emergence of the Jacksonian Democratic Party, see generally ROBERT REMINI, *THE ELECTION OF 1828* (1963). For an exploration of the compromise function of the American party system, see generally HERBERT AGAR, *THE PRICE OF UNION* (1950); PETER B. KNUPFER, *THE UNION AS IT IS: CONSTITUTIONAL UNIONISM AND SECTIONAL COMPROMISE, 1787-1861* (1991).

209. See generally FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985) (treating the common law aspects of the Constitution on the common law background of Marshall's constitutionalism).

least of all John Marshall, could ignore the fact that interpreting a written constitution that was the supreme law was a unique and distinctly American undertaking. Still, the whole idea of a separate system of courts, proceeding by the adversarial method, and applying generally agreed upon rules by agreed upon procedure, originated in the common law. Marshall's constitutional world, as Charles Hobson has shown so clearly, rested on a common law foundation.²¹⁰

Marshall's conception of republican judging also rested on common law premises. Specifically, it drew on the well developed tradition of statutory interpretation—one which, as Jefferson Powell has persuasively shown, was readily applicable to the text of the written constitution.²¹¹ In this tradition, interpretation was not only acceptable but indispensable. In common law hermeneutics, judges who interpreted statutes and other written instruments of the law did not make law wholesale in the process of applying it retail. What kept judging objective was the master principle of *stare decisis*, which bound judges to previous decisions when the factual situation was similar, plus the countless rules of construction and substantive legal principles established in centuries of case law. Probably no practicing common law judge thought these principles were applied automatically and with absolute objectivity. On the other hand, few doubted that the common law system provided consistent and workable rules, free of judicial whimsy and gross subjectivity. The simple fact that ninety percent or more of the Supreme Court justice's work involved common law cases made it all the easier to believe that the same objective judging applied to constitutional cases as well.

The evidence points to the fact that Marshall sincerely believed what he said in both *Marbury* and his defense of the Court in the 1820s against the charge of political bias. He hoped, no doubt (following the percolation-up principle in *Federalist No. 51*), that Justices would be republican statesmen because they were the best and brightest. But legal science helped make disinterested statesmen of able judges who were all too human. Principled judging did not have to be perfect either, since the Court was competing for republican laurels with state legislatures. Scholars know all too little about the actual process of law-making at the state level in this period or at the congressional level for that matter. But Marshall knew state legislatures first hand (as

210. CHARLES HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* Ch. 2 (1996). See also SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* (1990).

211. For a discussion on the common law tradition of Constitutional interpretation, see H. Jefferson Powell, *The Original Understanding of Original Interpretation*, in *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* 53-116 (Jack N. Rovake, ed. 1990).

did Madison), and he did not respect what he saw. Structural reforms possibly improved the legislative process at the state level in the early republic as they did in Congress. But the overriding development, as Marshall correctly perceived, was the emergence of political parties. The driving principle of party power was fundamentally linked to functional compromise. However, this principle was at serious odds with the republican tradition of disinterested statesmanship, which Marshall associated with the Court.²¹²

CONCLUSION

What impact, we may ask, did Marshall's belief in republican (i.e. disinterested) judging have on the Court and its battle for survival in the new democratic age? The definitive history of the anti-court movement of the 1820s has yet to be written, and, in any case, it is difficult if not impossible to trace precisely the impact that ideas have on history. But certain things do seem clear, the first being that the debate between Marshall and Virginia—from the Virginia and Kentucky Resolutions to *Marbury* onward and most intensively during the Roane-Marshall debate from 1819 to 1821—set the stage for what followed. What followed was an outpouring of measures for curbing judicial power and undoing the position Marshall advocated in *Marbury*, *McCulloch* and *Cohens*. Roane proposed that the state courts, sans Section 25, were the corrective. Jefferson worked behind the scenes, urging Justice Johnson to reintroduce seriatim opinions and dissents as a way of undercutting Marshall's dominance, which the South Carolinian did in fact do. Senator Johnson from Kentucky joined in the demand for institutional curbs on judicial review. Even Marshall's cousin Humphrey Marshall joined the feeding frenzy. Several state legislatures joined in with anti-court resolutions and a wide range of reforms designed to curb the Court's interpretive powers. John Bannister Gibson of the Pennsylvania Supreme Court added intellectual respectability to the attack (although it should be noted that his blast against Marshall's conception of judicial review in *Eakin v. Raub*²¹³ appeared in a dissenting opinion). State opposition carried into Congress, too, which debated various measures for curbing the Court. One of the most revealing suggestions—since it was based on the premise that all constitutional adjudication was political—was to make the senate the final judge in constitutional cases involving federalism. Another was to create a special court

212. Joseph Story justifies judicial review à la Marshall by reference to legal science, see JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, Book III, Chs. 4, 5, & 38 (1891).

213. 1825 WL 1913 (Pa. April 26, 1825).

composed of the chief justices of all the states with the final authority in such cases.²¹⁴

Most of these measures barely got off the ground and all crashed for want of support. The most threatening was the attempt, spearheaded by Virginia, to repeal Section 25, which could be done by a simple legislative majority and which would make the supreme court of each state the final authority on the Constitution. One man who watched the process of this movement carefully and learned from it was John C. Calhoun of South Carolina. Calhoun began his career as a nationalist and shifted to states' rights only when state interests in South Carolina demanded it. As late as 1823, he was so bold as to support Marshall's decision regarding that section in *Cohens*. However, the states' rights sentiment prompted by the slave rebellion in Charleston in 1822 changed his mind. He ended up backing the movement to curb the Court's appellate powers, and when that failed, he crafted his own method of asserting state control over constitutional interpretation. This theory of state control, known familiarly as the theory of nullification, was adopted by the South Carolina legislature in 1828 and put into action in 1831.

Calhoun took over where Roane and Virginia left off. Like them, he believed, as he put it to Virgil Maxcy in 1831, that the issue was between the Supreme Court and the people of the states.²¹⁵ Working from the tradition begun in 1798 and indeed in the ratification debates, Calhoun came forward with a device that made states (or as Calhoun would say, the people of the state) the final authorities on the Constitution. Acting through specially called constitutional conventions, states could challenge the constitutionality of an act of Congress by declaring it null and void within the state. If the national government let the nullification stand, then *ipso facto* the law was void—presumably not only in the state that nullified it, but also in other states as well. On the other hand, Congress could initiate an amendment authorizing Congress to enact the disputed law (say a protective tariff), and if a sufficient number of states ratified, the constitutional contract (as Calhounites referred to the Constitution) was in effect redrawn. Each state, as party to the contract (in Calhoun's formulation), then had a choice. They could ratify or not. If one fourth of the states plus one failed to do so, those states in effect would have exercised a veto. In this way, a minority of slaveholding states had a concurrent veto over the dominant majority. If the amendment was ratified, any state that did not

214. For a discussion on the anti-Court movement, see WARREN, *supra* note 95, at ch. 17.

215. See UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN, (Ross M. Lence ed., 1992) (providing a collection of relevant documents).

accept the new Constitution would thus secede from the Union. Building on the assumption that the Constitution was a contract created by sovereign states, Calhoun supplied what early theorists like Taylor, Jefferson, and Madison had only hinted at: a mechanism of implementation, which claimed to be both peaceful and constitutional.²¹⁶

The pending showdown between Marshall, the Court, and the forces of states' rights, which Calhoun predicted, came in 1832 when South Carolina applied Calhoun's theory by nullifying the tariffs of 1828 and 1832. What happened would appear to be a decisive victory for Marshall's view of the Court as the final interpreter of the Constitution. First, because no other state, in the North or South, joined South Carolina at the nullification barricade, and second, because President Jackson threatened to use federal troops to suppress South Carolina's resistance to federal law. The fact that Jackson was elected on a states' rights platform and had, in fact, opposed Marshall's version of constitutional nationalism made his action all the more significant.²¹⁷ Equally telling in this regard was the fact that James Madison, whose ideas and authority contributed to Calhoun's doctrine, now in the last years of his life, threw his support to the Court. Madison, it will be recalled, called Marshall into action in defense of the Constitution and judicial review in the Virginia ratifying convention and praised Marshall for his efforts. As president, he had backed the Marshall Court in its bitter confrontation with Pennsylvania in 1809. Madison was also the author of the Kentucky Resolution of 1798 and the Virginia report of 1799. He had serious constitutional objections to Marshall's opinion in *McCulloch* and the broad conception of judicial power on which it was based. When confronted with the radical, unhinging implications of nullification, however, he shifted course yet again. Calhoun had taken both Jackson and Madison to the precipice, and after gazing into the abyss, they withdrew to moderate ground. An imperfect Court was better than a perfectly logical constitutional system which almost certainly would destroy the union.²¹⁸

Thanks to Marshall's fans, however, and especially the New England publicists who came to his defense in the 1820s, it was not an imperfect Court (or a less than perfect Chief Justice) that made it into American text books. New England "sectional

216. For a discussion of Calhoun and the nullifiers, see CHARLES M. WILTSE, *JOHN C. CALHOUN, NULLIFIER, 1829-1839* ch. 8 (1949).

217. See generally WILLIAM W. FREEHLING, *PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816-1836* (1996).

218. On Madison's opposition to nullification, see DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* ch. 4 (1989).

nationalists" (as one insightful scholar has called them) had the final word on Marshall and his enemies.²¹⁹ What they said and wrote contributed both to the myth of both Marshall and the Supreme Court. Never mind that New England's law-abiding statesmen retreated into states' rights theorization after losing to Jefferson in 1800 or that they defied national law on a massive scale during the War of 1812, and took their section to the brink of secession in the Hartford Convention. New England rediscovered nationalism again in the 1820s when it suited its economic interests. When New England capitalists joined the nationalist market revolution, they gained a new appreciation of Marshall and the Court. What New England thought counted throughout the rest of the nation. With Boston as its hub and Harvard as its intellectual nerve center, New England conservatives mobilized New England culture against Southern states' rights supporters. John Marshall and his Court were among the chief beneficiaries. In the several years after 1815, for example, the *North American Review* (the leading New England journal of the period) contained no less than seven essays and reviews that praised Marshall, his Court, and criticized his critics. More importantly, the leading lawyers of New England came to his defense—none more effectively than Daniel Webster. Webster identified himself with New England, New England with the nation, and the nation with Marshall's constitutional nationalism. When the "godlike" thundered, New England, indeed the nation, listened. Webster spoke consistently before the Court, where he contributed to Marshall's thinking. Now he spoke on behalf of the Court—and never more effectively than in the Webster-Hayne debates of 1830. There, with the help of Justice Story, Webster set out to prove to the nation that John Marshall's Court was the last best hope of national union against the unhinging doctrines of John C. Calhoun.²²⁰

Webster was a host, but it was really Marshall's colleague Story, who had the final word, one which was much amplified by his reputation on the Court and his position as Dane Professor at Harvard Law School. Working with Nathan Dane and Josiah Quincy, Story brought the Law School back from the dead in the same year that Jackson attained the presidency. Its avowed purpose was to train elite lawyers equipped with up-to-date commercial law and nationalist constitutional principles to

219. For the definitive work on New England conservatives, see generally HARLOW W. SHEIDLEY, *SECTIONAL NATIONALISM: MASSACHUSETTS CONSERVATIVE LEADERS AND THE TRANSFORMATION OF AMERICA, 1815-1836* (1998).

220. See R. KENT NEWMYER, *JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 155-195* (1985) (discussing New England's conservatism as forming the basis of it as a constitutional nationalist).

counteract the new professional states' rights politicians. To this end Story wrote his *Commentaries on the Constitution* in three volumes in 1833.²²¹ He dedicated this remarkable work to John Marshall in an impassioned letter, which celebrated his republican virtue and unparalleled knowledge of the Constitution which was "destined to enlighten, instruct, and convince future generations" and, more to the task at hand, "dissipate the illusions of ingenious doubt and subtle argument and impassioned eloquence" of his southern critics.²²² Marshall responded with much gratitude and the hope that the *Commentaries* would rescue the country from states' rights madness. Indeed, this was its avowed purpose. Written in the midst of the nullification crisis, the massive work was a direct response to Calhoun's theory of nullification. To that end, it was also a massive justification of Marshall's view of the Court as final republican interpreter of the Constitution. Following Marshall and quoting his opinions copiously, Story justified judicial review because the Justices were uniquely situated institutionally and intellectually to exercise it objectively. Like Marshall, he believed that the intent of the framers was set forth in the words of the Constitution for the guidance of the Justices. Armed with the science of the law, the Court could apply those principles fairly and equitably. To aid them in that noble enterprise, he listed nineteen specific "Rules of Interpretation," most of which came directly from Marshall's opinions and particularly those from the 1820s.²²³

Story's *Commentaries* remained the preeminent text on the Constitution for the remainder of the 19th Century and into the 20th as well. As much as anything except the Supreme Court reports themselves, it established the lasting reputation of John Marshall and his view of the Court as an institution above politics. At the very moment of its inception, however, this view was out of sync with the realities of history, and Marshall himself stood witness to the fact. His republican vision of the Court, like Story's and Tocqueville's too, was that the Court, armed with constitutional truth and legal science, would curb democracy or the "tyranny of the majority," as Tocqueville put it. But rather than standing above the political process, the Marshall Court increasingly became a part of it—an integral part, no less. The anti-Court movement of the 1820s and early 1830s tells the story. What it tells us is that the Court survived, but not because South Carolina conceded to the wisdom of Marshall, which it most assuredly did not, or because Jackson converted to Marshall's view

221. JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (Melville Madison Bigelow, ed. 1891).

222. *Id.* at ch. 5.

223. *Id.* See also R. KENT NEWMYER, *JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* chs. 5 & 8 (1959).

of the Constitution, his conversion was a temporary and partial. What happened instead was that the Court saved itself. First, it deftly maneuvered and conceded to the states a good bit of what they demanded, which Marshall's federalism properly allowed it to do. What mainly placated the Court's enemies, however, was that they gradually gained a voice on the Court itself—loud enough, if we are to believe Marshall, to “revolutionize” the institution from the inside out. Marshall did not give up the battle for republican truth, but he recognized that the Court which was supposed to be above politics and indeed to control politics, had itself been politicized. This did not mean that the Court had lost its power, as Marshall concluded, but only that its decisions were not final. It was not an easy truth for Marshall to live with. He died believing that the Court and the Constitution he loved were in a downward and perhaps irreversible spiral.