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Cover Page Footnote

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In *McCulloch v. Maryland* (1819), the U.S. Supreme Court decided the fate not only of the Second Bank of the United States but also the shape of America's constitutional republic. Writing on behalf of a unanimous Court, Chief Justice John Marshall handed down an opinion that attracted more infamy than praise. To discredit Marshall's opinion, the *Richmond Enquirer* published a series of essays authored by Judge Spencer Roane of the Virginia Court of Appeals. Under the pseudonym "Hampden," Roane argued that Marshall's decision threatened the sovereignty of the states, and in so doing, imperiled the people's freedoms. In an attempt to repel Roane's attacks, Marshall mounted his own defense in the *Alexandria Gazette*. Thus, an unusual but spirited debate emerged in the court of public opinion.

McCulloch empowered Congress to establish a major national institution under the banner of interstate commerce, but the historical impact of *McCulloch* should not be divorced from its current significance. The case remains relevant insofar as the issues it addressed at the time of the founding continue to divide Americans at present. In *McCulloch v. Maryland*, a decisive showdown took place between the forces of nationalism and republicanism. Marshall allied himself with the Federalists' preference for a strong national government, whereas Roane sided with Anti-federalist notions of a compound republic.

Constructing a Nation Through *McCulloch*

The Supreme Court addressed two questions in *McCulloch*. First, did Congress have the authority to establish a national bank? If so, could the state of Maryland tax its state branches? Unlike the Articles of Confederation, which stipulated that Congress could not exercise any powers except those expressly delegated, Marshall argued that the Constitution's Necessary and Proper Clause made no such mention of the word *expressly*. Intentional or not, its absence led Marshall to conclude that the Constitution did not require everything to be "expressly and minutely" detailed (*McCulloch v. Maryland* 1819). Ultimately, the

Court affirmed Congress' authority to incorporate a national bank and to regulate interstate commerce, voiding Maryland's tax as unconstitutional (*McCulloch v. Maryland* 1819).

While remembered today as a nineteenth-century classic opinion, what makes *McCulloch v. Maryland* remarkable is not its ruling per se but rather Marshall's reasoning. In Marshall's dicta lies a nationalist construction of the Constitution. As a nation in the making, many begged the question of whether there was such a thing as "We, the people." During the Virginia Ratifying Convention of 1788, the electric Patrick Henry observed that if the proposed Constitution intended to fulfill the purpose for which it was devised, it should have read, "We, the States" (Allen and Lloyd 2002, 135).

In the wake of *McCulloch*, with popular sovereignty at stake, Marshall countered this Anti-federalist claim by characterizing the Constitution as "the act of the people of the United States" (Marshall [1819] 1969). Instead of emanating from the people of *these* United States, the Constitution was submitted to and ordained by the people of *the* United States. They granted the federal government its formal authority. It took an act of the American people to ratify the Constitution.

At the same time, however, he declared that the people of each state retained their separate political identities. As Marshall wrote, "No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into *one common mass*" (*McCulloch v. Maryland* 1819, emphasis added). The Constitution, in his mind, was not so much a governmental compact reached by a confederation of states. Instead, it was an act of the people united in realizing the object of the Constitution–a national government not dependent on the states.

Like Hamilton in *Federalist No. 83*, Marshall viewed the nation and its well-being as the Constitution's principal objectives. To achieve a more perfect union, Marshall thought that Congress' ability to effect necessary change could not be paralyzed by a "strict" construction of the Constitution. The Constitution brought forth a union in which the national government could act directly on the people, within its limits, and would not have to rely exclusively on the medium of state governments (Marshall [1819] 1969).

Battling Over Necessary and Proper

Having relegated state governments to their proper position, Marshall defended the national government's implied authority to create a bank. Such an act was ordinary, not to mention "necessary and proper" (U.S. Const. art. I, §8, cl. 18.). Again, *McCulloch* offered little controversy to the extent that it found the bank constitutional. After all, Congress chartered an earlier national bank in 1791, the First Bank. On February 16, 1819, Roane admitted as much to Senator James Barbour of Virginia: "I was one of those who did not distinctly see that Congress possessed the power to establish the bank; but being established, *factum valet fiery non debet* [the thing that should not be done, but is done, is valid] forcibly applies" (Roane [1819] 2021, 116). Had Marshall limited his decision to the bank's constitutionality, he might have heard nothing from Roane. Marshall, however, did not stop there. Hoping to settle the issue of federal authority, especially its reach, Marshall recognized implied powers. To say that the bank was constitutional because Congress had broad discretion in selecting the "necessary and proper" means to achieve the desired ends touched a sensitive nerve.

For Roane, a states' rights advocate, Marshall's reasoning in *McCulloch* ushered in a pernicious form of national authority—a prospect at odds with ideals set forth in the American Revolution. Roane's conception of the ratification process informed his understanding of the Constitution. Unlike Marshall, Roane construed the document as a partnership among sovereign states and accused the Chief Justice of favoring their destruction. According to Roane, the Court was so enamored with defending an expansive reading of congressional authority that they forgot the pivotal role of state governments during the ratification debates (Roane 1905, 111). Instead of emanating from one people, the Constitution was submitted to the people of the several states in the form of individual state ratifying conventions. The Constitution, therefore, was "nothing more" than a federal compact between "the people of each State, and those of all the States" (Roane 1905, 95).

In addition to the question of "We, the people," Roane and Marshall took issue with their respective readings of the Necessary and Proper Clause (Roane 1905, 86; 119). On the one hand, for Roane, the aforesaid clause only intended to grant Congress the power to carry into effect the federal government's explicit powers, not to invest the legislature with new ones. Roane reasoned that for a

power to be constitutional, it had to be "indispensably requisite" and "peculiar" to its execution (Roane 1905, 100).

Marshall, on the other hand, averred that everything provided within the Constitution was meant to endure. The Founders intended the constitutional articles to be "adapted to the various crises of human affairs" (*McCulloch v. Maryland* 1819). As Hamilton expressed in *Federalist Paper No. 23*, it would be nearly impossible, "to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them" ([1788] 2003, 149) Bearing in mind Hamilton's idea of "useful" and "conducive," *McCulloch* offers an alternative understanding of the Necessary and Proper Clause. Marshall argues that as long as the ends are legitimate and the means are appropriate, Congress' power is constitutional (*McCulloch v. Maryland* 1819).

Although Roane thought that the phrase "necessary and proper" was included out of "abundant caution" and in no way indicated an enlargement of particular powers, Marshall insisted that the clause must be read in relation to its context within the Constitution itself (Roane 1905, 90). When looking at the Constitution, Marshall explained, the founders intentionally placed the Necessary and Proper Clause "among the powers of Congress," not its limitations (*McCulloch v. Maryland* 1819). This placement indicated, for Marshall, that the clause purported implied powers otherwise not listed at the Constitutional Convention. Such a broad construction of the Constitution did not sit well with Roane.

Fighting for Supremacy

While Marshall exalted the national government's status, declaring that it was "supreme within its sphere of action," Roane sought to spur the people to action (*McCulloch v. Maryland* 1819). Speaking more like a politician and less like a judge, Roane questioned the inclusion of the word supreme: "A government which [was] only entrusted with a few powers and [was] limited in acting upon those powers by the expression of the Constitution…can scarcely be said to be supreme" (Roane 1905, 98). Roane objected to the notion that the government and its departments superseded the people. For him, the "people [were] *only*…supreme" (Roane 1905, 98). Roane deemed the people as an active sovereign, exercising a perpetual role in the interpretation and enforcement of the Constitution.

The people of the states—and not the U.S. Supreme Court—acted as America's constitutional umpire. While the power of the Supreme Court "[was] indeed great," Roane stressed, it did not imply that their power extended to everything (Roane 1905, 81). The Court had no special claim to the Constitution and its interpretation, and Roane appealed to Madison's compound republic to prove that.

In Madison's compound republic, a concept known as departmentalism embraced the three branches as equal and independent. If issues were to arise among the states, which differs from an internal disagreement within the federal government, Madison contended that *each* governmental branch would have a say in interpreting the Constitution, "without any branch's interpretation necessarily binding the others" (Fallon Jr. 2018). Using the same logic, Roane convinced fellow Virginians that the U.S. Supreme Court could not be the final umpire of the Constitution as they were considered to be an equal department in the federal government.

But, as expected of a Chief Justice, Marshall asserted that the final arbiter in resolving constitutional disputes was the U.S. Supreme Court. Since the Court was made "perfectly independent," it has no personal interest in "aggrandizing" the power of the legislature (Marshall [1819] 1969). Thus, it can resolve constitutional questions both within the federal government and between state and national authority.

The Debate Continues

The legacy of *McCulloch* and Marshall's defense, both within his opinion and against Roane, continues to be a touchpoint in American politics. As an American legal scholar observes, Marshall's reasoning in *McCulloch*, "commands our attention not merely for what it says but for *how* it says [it]" (Amar 1999, emphasis added). While times have turned the tide of opinion, it cannot be denied that *McCulloch* addressed issues that extended beyond the constitutionality of the Second Bank.

When Marshall labelled the bank as a major institution that promoted the "great powers" of collecting taxes and regulating commerce, Roane predicted that such actions would lead to an expansion of federal power under the

Commerce Clause and Necessary and Proper Clause. Once again, few constitutional scholars, then and now, cared about the Second Bank. Writing centuries later in *Sabri v. United States* (2004), Justice Clarence Thomas cited *McCulloch* in his concurring opinion. Regarding the Necessary and Proper Clause, Thomas questioned the extent to which the Supreme Court applied the clause in relation to Congress' spending power. "In particular," he qualified, "the Court appears to hold that the Necessary and Proper Clause authorizes the exercise of any power that is no more than a 'rational means' to effectuate one of Congress' enumerated powers" (*Sabri v. United States* 2004). Despite rejecting the rational means test, Thomas nonetheless recognized that such a lenient test derived from the Court's characterization of *McCulloch*.

Moreover, concerning the matter of "We, the people," Justice Thomas utilized *McCulloch* to legitimize federal supremacy. Realizing one of Roane's greatest fears, Thomas wrote in *Moore v. Harper* (2023) that the supremacy of the federal Constitution and its laws remain "unavoidable," if not "uncontroversial" (*Moore v. Harper* 2023). From a historical vantage point, evolving jurisprudence seems to have validated Roane's concerns as the issues raised in *McCulloch* extended far beyond the constitutionality of the Second Bank of the United States. Nationalism versus states' rights, the proper interpretation of America's founding document, and the role of "We, the people" in the political process—each of these timely as well as timeless debates found expression in *McCulloch* and its contentious aftermath.

By evaluating the premises and arguments of Marshall and Roane, contemporary Americans may calmly and rationally come to a coherent opinion in questions that continue to manifest themselves in new policy areas. Indeed, whenever questioning the proper authority of the federal government in relation to the sovereign people, conclusions should be supplemented with the ideas presented by *both* Marshall and Roane. Contrary to how Justice Thomas, and many others, view it today, few legal minds then shared Marshall's opinion in *McCulloch*.

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