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## IT'S MORE THAN A CONSTITUTION

MARK R. KILLENBECK\*

### I. INTRODUCTION

There is a point each semester in my first Constitutional Law class when many of my students start looking at each other, dismayed by what they are hearing, and asking, albeit (usually) not aloud, “this boring stuff is con law?” Much like one of my colleagues—who frequently gushes about “how wonderful con law is, it’s all the really important stuff”<sup>1</sup>—initial student images of the course track closely those that prevail in the body politic. Constitutional law is abortion (!), and affirmative action (!!), and flag burning (!!!), and nude dancing (!!!!), and homosexual rights and marriages (!!!!!). It is, in short, a welter of hot-button issues, invariably involving questions of individual rights, cases that generate always passionate, occasionally interesting and important, but all too often dismayingly naive takes on the body of doctrine we call constitutional law.

I must confess that in that initial class I deliberately lead my students down the primrose path. The very first case we discuss is *Bradwell v. Illinois*,<sup>2</sup> where Myra Bradwell loses her fight to be admitted to the practice of law in Illinois. And where Justice Bradley, joined by two of his colleagues, informs us that “[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother.”<sup>3</sup> This is, he tells us, “the law of the Creator,”<sup>4</sup> and it is entirely appropriate for the people of the state of Illinois, speaking through their legislature, to reserve the practice of law for men, who

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\* Wylie H. Davis Distinguished Professor of Law, University of Arkansas. Many thanks to Joel Goldstein for asking me to participate in this project. I have a great deal of respect for Joel, who is both an excellent scholar and coauthor of a fine casebook that does a better than average job of documenting many of the perspectives I believe important in teaching and thinking about *M’Culloch*. See NORMAN REDLICH, JOHN ATTANASIO, & JOEL K. GOLDSTEIN, UNDERSTANDING CONSTITUTIONAL LAW 87–90 (4th ed. 2002) (notes on *M’Culloch*).

1. Actually, the word she uses is “sexy,” but we really shouldn’t put that in the text, should we?

2. 83 U.S. (16 Wall.) 130 (1872).

3. *Id.* at 141 (Bradley, J., concurring). Justices Swayne and Field agreed with Bradley.

4. *Id.*

after all have “that decision and firmness which are presumed to predominate in the sterner sex.”<sup>5</sup>

This seems, at least initially, to be great stuff. First class. First case. Natural law notions of the inherent inferiority of women, now discredited,<sup>6</sup> are trotted out as the appetizer in a constitutional law feast for a group of students within which women are now, if not in the majority, most certainly close to it. *Bradwell* seems then an exemplar of everything students believe a course in Constitutional Law should and will be: grand issues of individual rights, playing themselves out within the confines of a text that speaks eloquently of the “equal protection of the laws.”<sup>7</sup>

And then the students realize why I have them read, in its entirety, a case that is generally either ignored entirely in the standard Constitutional Law casebooks or, if noted at all, mentioned only briefly, invariably to illustrate the now untenable nature and implications of Justice Bradley’s opinion.<sup>8</sup> They begin to understand that I did not give them *Bradwell* because I wanted to initiate a conversation about rights. Or so we can discuss whether it is appropriate to employ natural law as an interpretive methodology. Or even because we can use that case to see how much things have changed as matters of both constitutional law and political faith by fast-forwarding to, say, *United States v. Virginia*,<sup>9</sup> within which Justice Ruth Bader Ginsburg (gasp!) makes it clear that stereotypical assumptions about the proper places of women (and men!) have no place in modern constitutional thought.<sup>10</sup>

No, the real lessons to be learned from *Bradwell*, at least for the purposes of my first class, are about the peculiarities and strictures of a text and a body

5. *Id.* at 142.

6. Well, mostly. Amidst the normal quotient of outrage and mirth I always see expressions on at least one or two faces—both male and female—that convey a strong sense of longing for the good old days, when men were men, and women knew their place.

7. U.S. CONST. amend. XIV, § 1.

8. For example, neither word of nor about *Bradwell* appears in the text I use. See WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS XXXV (11th ed. 2001) (Table of Cases). It garners only a brief portion of a paragraph in what many regard as the leading casebook. See KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 770–71 (15th ed. 2004).

9. 518 U.S. 515 (1996).

10. Even Justice Scalia in dissent does not seem to be arguing for such a view. See, e.g., *id.* at 566–67 (Scalia, J., dissenting) (characterizing prior generations as “close-minded[.] . . . with regard to women’s education,” but arguing that these matters should be left to the people and the states). Of course, he does append to his opinion the full text of VMI’s “The Code of a Gentleman,” which informs us, among other things, that “A Gentleman . . . [d]oes not speak more than casually about his girl friend” and “never discusses the merits or demerits of a lady.” *Id.* at 602. It’s comforting to know that I will always be able to find this Code in the pages of the United States Reports. As I can also, for that matter, find and peruse virtually every piece of patriotic doggerel, flag-division, ever penned. See *Texas v. Johnson*, 491 U.S. 397, 422–25 (Rehnquist, J., dissenting).

of law within which it matters a very great deal what sort of claim a plaintiff is making, which of the myriad provisions of the document are being applied and discussed, and whether a court may even hear the claim, notwithstanding the grand but ultimately illusory notion that, judicially speaking, “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”<sup>11</sup> And so, rather than exploring grand themes, I ask my students why Myra Bradwell asserts “that she was a citizen of the United States, and that having been a citizen of Vermont at one time, she was, in the State of Illinois, entitled to any right granted to citizens of the latter state.”<sup>12</sup> And why she is unable to avail herself of the protections afforded by Article IV, Section 2, clause 1, which declares that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” And all sorts of other boring things that suit my purposes but not, it seems to them, theirs.

For that matter, in each of the next two cases I have them read,<sup>13</sup> *Heart of Atlanta Motel, Inc. v. United States*,<sup>14</sup> and *Katzenbach v. McClung*,<sup>15</sup> we devote little if any attention to the realities and evils of racial discrimination. Rather, the focal point is why Congress used the Commerce Clause, and not the Fourteenth Amendment, as the predicate for the great civil rights measures of the 1960s. Those statutes may well address “moral wrongs.”<sup>16</sup> But they are not constitutional because they allow us to combat injustice. Instead, they are valid because they address “a national commercial problem of the first magnitude.”<sup>17</sup> And while the casebook mentions but does not reprint it,<sup>18</sup> I do not discuss—unless forced to by some irritatingly insistent student—Justice Douglas’s eloquent concurring opinion, within which he states his “belief that the right of people to be free of state action that discriminates against them because of race . . . ‘occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.’”<sup>19</sup> After all, let’s not confuse matters with discussions of right and wrong (not yet, anyway), not when our real interest is in the structure and requirements of a Constitution within which, at least as matters now stand, the presence of the word “State” in Section 1 of the Fourteenth Amendment

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11. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

12. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 137 (1872).

13. Albeit not the full reports. Even I have my limits, and my students read only the edited versions in the casebook.

14. 379 U.S. 241 (1964).

15. 379 U.S. 294 (1964).

16. *Heart of Atlanta Motel*, 379 U.S. at 257.

17. *Katzenbach*, 379 U.S. at 305.

18. See COHEN & VARAT, *supra* note 8, at 174.

19. *Heart of Atlanta Motel*, 379 U.S. at 279 (Douglas, J., concurring) (quoting *Edwards v. California*, 314 U.S. 160, 177 (1941)).

imposes a telling limit on the ability of Congress to use that provision as the constitutional predicate for a civil rights measure that seeks to eliminate both public and private acts of discrimination.<sup>20</sup>

The point I try to make in the first class is then that it is imperative that we pay close attention to the details of the Constitution, that we understand that each provision within it reflects a deliberate set of choices made by the individuals who wrote and ratified the core text and its now twenty-seven amendments, and that much of what really matters in constitutional law operates at a level far removed from the exalted notions of justice and fair play the course normally conjures up. I also emphasize that, once we do actually move from what amounts to an intensive examination of the constitutional trees to an understanding of the jurisprudential forest within which they grow, we must strive constantly to keep matters in perspective. Which brings me to the heart of the matter for the purposes of this Essay, why I find one case, *M'Culloch v. Maryland*,<sup>21</sup> so fascinating, why I believe it exemplifies virtually all of the things I think truly matter when teaching Constitutional Law, and why I try, when teaching that decision, to help my students understand that it is much more than the Constitution that we will ultimately be expounding.

Unlike *Bradwell*, *M'Culloch* is a central fixture in every Constitutional Law casebook.<sup>22</sup> It has been characterized as perhaps “the most important case in the history of the Supreme Court.”<sup>23</sup> Indeed, one study rated it the most influential opinion ever issued by the Court, a “scientific” judgment reached by a process that calculated an historical value index for each of the major decisions of the Court.<sup>24</sup> There are some who disagree, arguing that it is an both an unfortunate decision and overrated.<sup>25</sup> But the consensus is that the

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20. For an exchange highlighting the continuing importance of the state action limitation, see and compare *United States v. Morrison*, 529 U.S. 598, 619–627 (2000), with *id.* at 664–66 (Breyer, J., dissenting). In particular, compare *id.* at 621 (“the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States”) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)), with *id.* at 665 (Breyer, J., dissenting) (“But why can Congress not provide a remedy against private actors?”).

21. 17 U.S. (4 Wheat.) 316 (1819).

22. One actually devotes an entire chapter to it, treating it as a “case study” that lays the foundations for much of what follows. See PAUL BREST, SANFORD LEVINSON, J.M. BALKIN & AKHIL REED AMAR, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 7–70 (4th ed. 2000). This casebook is apparently not terribly popular. But I doubt that its treatment of *M'Culloch* explains this puzzling fact. Of course, I don't use it either, but that has more to do with the needs and attention spans of the students I teach than with the characteristics of the book itself. See *infra* text accompanying 53–54.

23. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 441 (1996).

24. Montgomery N. Kosma, *Measuring the Influence of Supreme Court Justices*, 27 J. Legal Studies 333, 359 (1998) (Table 6: The Twenty-Five Most Influential Decisions).

25. See, e.g., John Yoo, *McCulloch v. Maryland*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES, at 241 (WILLIAM N. ESKRIDGE, JR. & SANFORD LEVINSON EDs. 1998) (*M'Culloch* as “tragic”); Michael J. Klarman, *How Great Were the “Great” Marshall*

principles for which *M'Culloch* stands lie at the heart of the American constitutional order, and that this is one case no course in Constitutional Law can afford to ignore.

## II. *M'CULLOCH V. MARYLAND*

The basic history and holdings of *M'Culloch* are well-known and easily summarized. In February, 1818, the state of Maryland passed "An act to impose a Tax on all Banks or Branches thereof in the State of Maryland not chartered by the Legislature."<sup>26</sup> While silent in this regard, everyone understood the measure's real purpose: to curb the influence of the Baltimore branch of the Second Bank of the United States in Maryland, perhaps even to banish it from the state. Soon thereafter, initiating what is regarded as a deliberate test case, the cashier of the Baltimore branch of the Bank of the United States, James William M'Culloh,<sup>27</sup> issued a series of notes on untaxed paper. Then, on May 18, 1818, John James, state treasurer for the Western Shore, brought an action of debt against the Bank to recover \$2500 in penalties owed on five notes.<sup>28</sup>

The case, with M'Culloh as the named party on behalf of the Bank, proceeded quickly through the Maryland courts. The opposing sides agreed on a statement of facts and the Baltimore county court found that the Bank did indeed owe the tax.<sup>29</sup> That judgment was affirmed in June in an unreported per curiam decision by the Maryland Court of Appeals, its highest court.<sup>30</sup> Then, on September 18, 1818, the Supreme Court of the United States placed the case on its docket, issuing a Writ of Error and setting it for argument in its February, 1819 Term.

Oral arguments began on February 22, 1819.<sup>31</sup> They lasted nine days. The Court, recognizing that this was a "case involving a constitutional question of great public importance, and the sovereign rights of the United States and the State of Maryland . . . dispensed with its general rule, permitting only two counsel to argue for each party."<sup>32</sup> Thus six individuals came to the podium, each regarded as one of the very best advocates of the day. The first was Daniel Webster, who framed the issues on behalf of the Bank.<sup>33</sup> Did Congress

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*Court Decisions?*, 87 VA. L. REV. 1111, 1126–44 (2001) (*M'Culloch* not as "great" as some would have it).

26. *M'Culloch*, 17 U.S. at 317.

27. The astute reader is puzzled: M'Culloh? Isn't it *M'Culloch v. Maryland*? More on that later. See *infra* notes 123–32 and accompanying text.

28. *M'Culloch*, 17 U.S. at 318–19.

29. *Id.* at 317.

30. *Id.*

31. On the significance of that date, see *infra* notes 135–37 and accompanying text.

32. *M'Culloch*, 17 U.S. at 326 n.3.

33. *Id.* at 322.

in fact have the power to create the Bank? If it did, could the state of Maryland impose its tax? And if indeed the Bank was constitutional, and the tax improper, what were the implications of these holdings for a fledgling nation that was still struggling to define and understand the implications of its unique federal structure? Webster was followed by the first attorney appearing for Maryland, Joseph Hopkinson, then by William Wirt, the current Attorney General of the United States, Walter Jones, for Maryland, and Luther Martin, the Attorney General of Maryland.<sup>34</sup> The last to speak was William Pinkney, whose three day-long defense of the Bank prompted Justice Story to observe that “I never, in my whole life, heard a greater speech.”<sup>35</sup>

Webster would fume about the length of the argument.<sup>36</sup> But he presumably had no complaint about the speed with which the Court acted. For it took just three days for Chief Justice John Marshall to prepare his opinion for a unanimous Court, which he delivered on Saturday, March 6.<sup>37</sup>

“In the case now to be determined,” he began, “the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state.”<sup>38</sup> Maryland insisted that “[t]he power of establishing corporations is not delegated to the United States, nor prohibited to the individual states,” and was, therefore, “reserved to the states, or to the people.”<sup>39</sup> But Maryland was wrong. Congress did indeed have the authority to create the Bank. The fact that such a power was not expressly mentioned in the text did not matter. A constitution, Marshall observed, could not possibly “contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution,” lest it “partake of the prolixity of a legal code” that “could scarcely be embraced by the human mind.”<sup>40</sup> The powers of the national government were accordingly both express and implied, and the test to be invoked an arguably simple one: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are

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34. *Id.*

35. Letter from Joseph Story to Stephen White (Mar. 3, 1819), in WILLIAM W. STORY, 1 LIFE AND LETTERS OF JOSEPH STORY 324, 325 (Boston, C.C. Little & J. Brown, 1851).

36. Letter from Daniel Webster to William Sullivan (Feb. 25, 1819), in THE PAPERS OF DANIEL WEBSTER: 1 CORRESPONDENCE, 1798–1814, 249 (Charles M. Wiltse & Harold D. Moser eds., 1974) (“The Bank cause is not heard thro. yet . . . I am grown impatient to be off.”).

37. I discuss one aspect of the speed with which the decision was rendered *infra* notes 69–71 and accompanying text.

38. *M’Culloch*, 17 U.S. at 400.

39. *Id.* at 374 (argument of Luther Martin, Attorney General of Maryland).

40. *Id.* at 407.

plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”<sup>41</sup>

Maryland, in turn, could not interfere with the Bank’s activities by exercising its authority to tax. That power, Marshall admitted, was “one of vital importance” that had clearly been “retained by the States” in the wake of ratification.<sup>42</sup> But “the constitution and the laws made in pursuance thereof are supreme.”<sup>43</sup> And since “the power to tax involves the power to destroy,”<sup>44</sup> a state’s exercise of that sovereign prerogative must necessarily yield in the face of the considered judgment of the nation that a national bank was both necessary and proper. “Such a tax,” Marshall concluded, “must be unconstitutional.”<sup>45</sup>

For most students then, *M’Culloch* stands for a few simple but important propositions. The most important of these, and the one for which the case is usually cited, is the doctrine of implied powers, that is, that the federal government is not limited to the exercise only of those powers specifically enumerated in the text of the Constitution. *M’Culloch* also recognizes, in no uncertain terms, that when the federal government has acted in a constitutionally permissible way its actions are supreme and may not be questioned or otherwise interfered with by the states. And we find in Marshall’s opinion a series of understandings about the nature and scope of judicial review, one of which was then and is now extraordinarily important: the assumption that, in the normal course of events, the Court will defer to the judgments of Congress when that body enacts a “law [that] is not prohibited, and is really calculated to effect any of the objects entrusted to the government.”<sup>46</sup>

I could accordingly teach *M’Culloch* by having my students read the edited version of the decision that appears in their casebook and extract from it, hopefully with their help, the three principles just mentioned.<sup>47</sup> That approach would not, however, do either the case or the students (dare I say this?) justice. It would give them what they need for the purposes of moving forward in the course. But it would deny them both important perspectives on what Marshall

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41. *Id.* at 421.

42. *Id.* at 425.

43. *M’Culloch*, 17 U.S. at 426.

44. *Id.* at 431.

45. *Id.* at 437.

46. *Id.* at 423.

47. As Professors Balkin and Levinson note, see J. M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 974 n.44 (1998), only one casebook, theirs, see BREST ET AL., *supra* note 22, gives the student the full text of the decision. And even they do not provide the full report of the case, which includes a brief summary the facts, *M’Culloch*, 17 U.S. at 317–22; summaries of the arguments of all six counsel, *id.* at 322–400; and Marshall’s opinion and judgment, *id.* at 400–37.

and his colleagues accomplished and a full understanding of why the case merits the acclaim it has garnered. It would also ignore the political and social movements within which the events that led to *M'Culloch* transpired, contexts that have assumed considerable importance in a twenty-first century within which many of the issues posed in the early years of the nineteenth now recur.

There are any number of arguments I could make to illustrate why I believe *M'Culloch* is important and what I think it tells us about teaching Constitutional Law. In the interests of brevity, I will limit myself to two. But before doing so, in the interests of candor, I note the following.

First, my views regarding *M'Culloch* are hardly unbiased. I am under contract to write what will be—if I ever finish it—the first detailed, book-length discussion of that case.<sup>48</sup> I have also written one of the relatively few law review articles that focuses on that decision and its implications,<sup>49</sup> have contributed a piece on *M'Culloch* to one edited volume,<sup>50</sup> and have completed a similar piece for another.<sup>51</sup> And I also discussed the Bank in some detail in an earlier article.<sup>52</sup> In certain respects then this Essay might be seen as an exercise in shameless self-promotion. Of course, the fact that I have done and am doing this work is also presumably why I was asked to participate in this project and in particular use, if I chose to do so, *M'Culloch* as my focus. So I at least hope, and in most ways expect, that this bit of drum-beating will be excused.

Second, even I do not cover everything I believe important about *M'Culloch* when I teach that case. Indeed, I don't usually include or discuss many of the things I am about to set out in this itself truncated treatment in that segment of the single class within which we read and explore *M'Culloch*.<sup>53</sup>

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48. That carefully qualified claim reflects the fact that there is one, and only one, scholarly book devoted to *M'Culloch*. See JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND (Gerald Gunther ed., 1969) [hereinafter MARSHALL'S DEFENSE]. My volume will be titled SECURING THE NATION: M'CULLOCH V. MARYLAND, and will be published as part of the University Press of Kansas series Landmark Law Cases and American Society.

49. Mark R. Killenbeck, *Madison, M'Culloch, and Matters of Judicial Cognizance: Some Thoughts on the Nature and Scope of Judicial Review*, 55 ARK. L. REV. 901 (2002).

50. Mark R. Killenbeck, *James William McCulloch: The Second Bank of the United States*, in ONE HUNDRED AMERICANS MAKING CONSTITUTIONAL HISTORY: A BIOGRAPHICAL HISTORY 134 (Melvin I. Urofsky ed., 2004). When I wrote this I embraced the spelling "McCulloh." I have now changed my mind. See *infra* notes 123–32 and accompanying text.

51. Mark R. Killenbeck, *M'Culloch v. Maryland*, in THE PUBLIC RESPONSE TO CONTROVERSIAL SUPREME COURT DECISIONS (Melvin I. Urofsky ed., forthcoming 2005).

52. Mark R. Killenbeck, *Pursuing the Great Experiment: Reserved Powers in a Post-Ratification, Compound Republic*, 1999 SUP. CT. REV. 81, 117–27.

53. I should note that at Arkansas Constitutional Law is a required, four credit-hour course that covers all of the usual subjects for such a course, with the single important exception of the First Amendment, which is relegated to a separate three credit-hour elective. I have of late taught Con Law twice a week in two, two-hour classes. Hence, the reality is that *M'Culloch* occupies one portion of what is usually the fifth class of the semester.

Most of the students I teach are not interested in grand constitutional theory or historical details. They want to master what they need to know to pass the bar examination. And within that, their particular interest is in the so-called black letter rules. There are exceptions. Like most state law schools, our students are a mix of high and low achievers with a variety of backgrounds and interests. Our best students compare favorably with those at virtually any of the forty-plus law schools that believe themselves to be one of the top ten or fifteen such institutions in the nation. Thus, the realities of what I teach, where I teach, and who I teach are such that what follows is an ideal assessment, rather than a declaration that this is in fact what I invariably do when I teach *M'Culloch*.<sup>54</sup>

### III. *M' CULLOCH*'S CONSTITUTIONAL IMPORTANCE

I begin with a point made earlier: the importance of the case and decision. Professors Balkin and Levinson characterize Marshall's opinion as "a legal document that generates no contention at all" and observe that "[a]t least within the field of constitutional law, almost everyone seems to agree that *McCulloch* is canonical."<sup>55</sup> And while they note an ironic dimension to all of this—the fact that "articles about *McCulloch* rarely appear in American law reviews"<sup>56</sup>—this amounts to a quibble about how we determine a decision is central to the subject, rather than whether the judgment that it is essential is valid. Critics in turn dispute both its significance and wisdom. Professor Klarman, for example, argues that *M'Culloch* exemplifies "an interesting and relatively underexplored question," the "belief . . . that Supreme Court decisions are more consequential than they plausibly could be."<sup>57</sup> Professor Yoo in turn describes it as a constitutional "tragedy," believing that "[i]n the course of that decision, Marshall gave voice to an expansive reading of [the Necessary and Proper] clause that bestowed upon Congress broad powers that the Framers never contemplated."<sup>58</sup>

Now, I do not for a minute believe that these brief comments do justice to the points Professors Klarman and Yoo make. I could—and will at some point, in some other venue—both examine their critiques more fully and take issue with many aspects of what they have to say. Rather, I assume for the sake of argument that much of what they say is correct and posit that we

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54. At least when I teach it in our core course. I have a seminar on the case in the works.

55. Balkin & Levinson, *supra* note 47, at 973.

56. *Id.* at 974–75. They're right. There are only a handful of articles devoted to the case, and (so far!) only one book. Rather than padding this footnote with a list, I leave it to the reader to try and recall them.

57. Klarman, *supra* note 25, at 1182.

58. Yoo, *supra* note 25, at 243–44.

should still conclude that *M'ulloch* is both an extraordinarily important decision and a great case to teach.

For example, Professor Klarman is surely correct when he observes that “with regard to the concrete issue involved in *McCulloch*—the constitutionality of the national bank—the decision was completely unexceptionable.”<sup>59</sup> He notes, as do some but not all of the casebooks, a number of interesting pieces of evidence in support of this contention. One, which he mistakenly identifies as a statement by “now-President James Madison . . . as he signed the Bank recharter,”<sup>60</sup> is found in the message Madison issued when he vetoed the first such measure to reach him in January 1815. The question of constitutionality, Madison observed, was “[w]aiv[ed] . . . as being precluded in my judgment by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation.”<sup>61</sup> A second example is found in the opening passages of Marshall’s opinion for the Court, where he states:

It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognised by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.<sup>62</sup>

The judgment that the Bank was constitutional was not universal. Maryland clearly did not agree and, as the post-decision reaction would demonstrate, there were any number of others who shared these reservations. Nevertheless, Madison and Marshall were largely correct: In 1819 virtually all informed and objective observers believed that the constitutional question, which had been argued at length and with passion in both 1791 and 1811, had now been resolved. But for our purposes two aspects of the Madison and Marshall statements are of special interest.

The first is that each seems to be acknowledging the importance of judgments reached by other actors in the constitutional system. Madison “waives” the question, recognizing, as he would note many years later, that there was “evidence of the Public Judgment, necessarily superseding

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59. Klarman, *supra* note 25, at 1128–29.

60. *Id.* at 1129.

61. James Madison, *Veto Message*, in 8 THE WRITINGS OF JAMES MADISON, 327, 327 (Gaillard Hunt ed., 1908) [hereinafter MADISON’S WRITINGS]. Madison goes on to discuss his purely practical objections to the measure, which provided the bases for his veto. *See id.* (noting the details of the proposal before him do not indicate that “the proposed bank . . . appear[s] to be calculated to answer the purposes” for which it is being created).

62. *M’ulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819).

individual opinions.”<sup>63</sup> Marshall in turn speaks of “[a]n exposition of the constitution, deliberately established by legislative acts” that “ought not to be lightly disregarded.”<sup>64</sup> And he notes that the question of constitutionality was debated “in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law.”<sup>65</sup>

We live in an age where numerous commentators postulate and lament a Supreme Court that has, in their estimation, arrogated to itself the role of sole arbiter of the Constitution. Like many of the issues to which I allude in this Essay, this is a matter of considerable importance and one that can and should be examined at length—somewhere else. For present purposes, it is enough to note both the significance of Madison and Marshall’s sweeping statements about the manner in which constitutional interpretation transpires and the value they have as teaching tools.

For example, we know, both because Marshall himself once told us,<sup>66</sup> and because the current Court continually reminds us,<sup>67</sup> that questions of constitutionality are ultimately resolved by the Court. That simple rule does not, however, exhaust the subject. It tells us very little about what sort of information the Court should consider, much less find persuasive. *M’Culloch*, writ large, helps us answer these questions. We can, for example, because the report of the case provides them,<sup>68</sup> compare Marshall’s final work product with

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63. Letter from James Madison to N. P. Trist (December, 1831), in 9 MADISON’S WRITINGS, *supra* note 61, at 471, 477.

64. *M’Culloch*, 17 U.S. at 401.

65. *Id.* at 402. The minds to which he refers are those of James Madison, Edmund Randolph, Thomas Jefferson, and Alexander Hamilton. See James Madison, *The Bank Bill*, in 13 THE PAPERS OF JAMES MADISON 372 (Charles F. Hobson & Robert A. Rutland eds., 1981) (Madison’s remarks in the House of Representatives) [hereinafter MADISON, *The Bank Bill*]; Edmund Randolph, *The Constitutionality of the Bank Bill* (Feb. 12, 1791), in H. JEFFERSON POWELL, THE CONSTITUTION AND THE ATTORNEYS GENERAL 3 (1999) (Attorney General opinion); Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, in 19 THE PAPERS OF THOMAS JEFFERSON 275 (Julian P. Boyd ed., 1974) (opinion provided as Secretary of State); Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1791), in 8 THE PAPERS OF ALEXANDER HAMILTON 97 (Harold C. Syrett & Jacob E. Cooke eds., 1965) (opinion provided to Washington as Secretary of the Treasury) [hereinafter HAMILTON, *Final Version*]. Marshall would also presumably include George Washington in this list, who as President signed the bill creating the First Bank.

66. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 138, 177 (1803) (“It is emphatically the provinces and duty of the judicial department to say what the law is.”).

67. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (“Congress’ discretion is not unlimited . . . and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution.”).

68. See *M’Culloch*, 17 U.S. (4 Wheat.) at 322–400.

the summaries of the arguments presented by the six men who appeared before the Court. That is an important exercise, for it allows us to see the extent to which a lengthy opinion, issued only three days after oral arguments concluded, borrowed from or was influenced by what actually transpired when the case was presented. Beveridge states that “it seems not unlikely that much of [the opinion] had been written before the argument.”<sup>69</sup> That may be. But careful examination of the opinion and the summaries of oral argument give every indication that Marshall paid close attention to what was presented.

Full details of such an exercise, mercifully, belong elsewhere, and the one example I now offer must suffice. In his argument before the Court, Webster observed that “[a]n unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation.”<sup>70</sup> In Marshall’s hands this becomes one of the most notable and noted passages in the opinion:

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.<sup>71</sup>

We do not know for a fact that Marshall’s words were provoked by Webster’s. But the comparisons are worth making, and the questions worth asking.

We can also compare the Marshall opinion to prior discussions of the constitutional matters it explores. Perhaps the most important example of this is the opinion Hamilton wrote for President Washington when the Bank bill was debated in the Cabinet in 1791. Hamilton argued that a

*general principle is inherent in the very definition of Government and essential to every step of the progress to be made by that of the United States; namely—that every power vested in a Government is in its nature sovereign, and includes by force of the term, a right to employ all the means requisite, and fairly applicable to the attainment of the ends of such power; and which are not precluded by restrictions & exceptions specified in the constitution; or not immoral, or not contrary to the essential ends of political society.*<sup>72</sup>

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69. 4 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL: THE BUILDING OF THE NATION 1815–1835*, at 290 (1919).

70. *M’Culloch*, 17 U.S. at 327.

71. *Id.* at 431.

72. HAMILTON, *Final Version*, *supra* note 65, at 98. Hamilton’s reference to matters “immoral” is interesting because a sense of moral outrage may well have colored Madison’s reaction to the Bank bill. See JACK N. RAKOVE, *JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC* 95 (2d ed. 2002) (noting Madison’s “disgust” with “fevered speculation in public securities and bank notes”).

For Hamilton, a Bank had “a natural relation to . . . the acknowledged objects [and] lawful ends of the government.”<sup>73</sup> The Necessary and Proper Clause, in turn, should be given an expansive reading. Both the “grammatical” and “popular sense” of the word “necessary,” for example, supported the conclusion that a given act needed simply to be that which “the interests of the government or person require, or will be promoted, by the doing of this or that thing.”<sup>74</sup> The determinative constitutional criterion thus became

the *end* to which the measure relates as a *mean*. If the end be clearly comprehended within any of the specified powers, & if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution—it may safely be deemed to come within the compass of the national authority.<sup>75</sup>

These are not, of course, Marshall’s precise words in *M’Culloch*. But they are virtual mirror images of what he did write, providing an important and interesting bridge between the events of 1791 and those of 1819.

The second notable aspect of the Madison and Marshall statements is their inclusion of the judiciary within the list of actors who had debated and resolved the constitutional question, in particular Marshall’s reference to “cases of peculiar delicacy.”<sup>76</sup> Neither Madison nor Marshall identified which cases they had in mind. But I suspect their logic was the same as that of Representative Robert Wright of Maryland, who noted during the 1816 debate on the bill to recharter the Bank that “the supreme judicial tribunal had decided on its constitutionality, by often recognising it as a party, and it was now too late to insist on the objection.”<sup>77</sup>

One such case was *The Bank of the United States v. DeVeaux*,<sup>78</sup> which arose, ironically, when the Bank refused to pay a tax that the state of Georgia attempted to levy on its stock. In yet another Marshall opinion, the Court held “that the right to sue,” conferred on the Bank in its original charter, “does not imply a right to sue in the courts of the union, unless it be expressed,”<sup>79</sup> and that the citizenship of a corporation is determined by “the character of the individuals who compose” it.<sup>80</sup> The Bank’s attempts to avoid the tax were, accordingly, defeated. The Court had no jurisdiction. The Bank could not bring a federal question action, and could not maintain one in diversity, given

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73. HAMILTON, *Final Version*, *supra* note 65, at 100.

74. *Id.* at 102.

75. *Id.* at 107.

76. *M’Culloch*, 17 U.S. at 401.

77. LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 709 (M. St. Clair Clarke & D. A. Hall eds., Washington, Gales & Seaton 1832) [hereinafter Clarke & Hall] (statement by Representative Robert Wright on the House floor, April 5, 1816).

78. 9 U.S. (5 Cranch) 61 (1809).

79. *Id.* at 86.

80. *Id.* at 92.

the strictures imposed by the rule of complete diversity.<sup>81</sup> Marshall did not discuss whether the Bank itself had been constitutionally created. But he did lay the foundations for key aspects of what was to follow in *M'Culloch*, observing that “[a] constitution, from its nature, deals in generals, not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles.”<sup>82</sup>

That formulation did not, obviously, have the ring or staying power of Marshall’s subsequent admonition that a constitution cannot “partake of the prolixity of a legal code.”<sup>83</sup> But it does add telling force to the idea that much of the constitutional thought set forth in *M'Culloch* is not original. For that matter, in another early decision, *United States v. Fisher*,<sup>84</sup> Marshall outlined much of what would follow regarding the nature and reach of the Necessary and Proper Clause.

*Fisher* was a bankruptcy action, and the specific question before the Court was “whether the United States, as holders of a protested bill of exchange . . . are entitled to be preferred to the general creditors, where the debtor becomes bankrupt?”<sup>85</sup> The debtors objected, arguing “[t]hat if the act of congress gives the preference to the extent claimed, it is unconstitutional, and not a law.”<sup>86</sup> Marshall’s discussion of this issue in *Fisher* reads like a primer for *M'Culloch*. He begins by noting that “[i]n the case at bar, the preference claimed by the United States is not prohibited; but it has been truly said that under a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised.”<sup>87</sup> His response, which I quote at length for obvious reasons, is as follows:

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

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81. That rule, of course, being one that the Court recognized three years earlier when it held that that is what Congress intended when it implemented diversity jurisdiction in the Judiciary Act of 1789. See *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267 (1806).

82. *Deveaux*, 9 U.S. at 87.

83. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

84. 6 U.S. (2 Cranch) 358 (1805).

85. *Id.* at 385. The use of the plural here (“United States . . . are”) is interesting. One of the major debates of the time, and a central element in the post-*M'Culloch* dialogue, was about whether the Constitution created a nation or simply a confederation of sovereign states. Marshall’s use of the plural here is arguably at odds with the position he would subsequently stake out in *M'Culloch* and defend vigorously in its wake. See *infra* notes 104–06 and accompanying text.

86. *Id.* at 371.

87. *Id.* at 396.

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

Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution.<sup>88</sup>

Marshall then dismisses the argument that the federal measure “interfere[s] with the rights of the state sovereignties respecting the dignity of debts.”<sup>89</sup> This is, he declares, “an objection to the constitution itself.”<sup>90</sup> And he states that “[t]he mischief suggested, so far as it can really happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of congress extends.”<sup>91</sup>

Once again, Marshall’s subsequent statements are the ones we remember, or at least they are the ones we all teach.<sup>92</sup> Is that incorrect? Is *M’Culloch* simply a reprise of what has come before, albeit a more eloquent one?

If our focus is simply on the constitutional trees, then the answer to that question might well be yes. But it is important to understand that *M’Culloch* was litigated and decided at a crucial juncture in American history. For example, while there was indeed a general consensus that the measure creating the Second Bank was constitutional, the fact that the Marshall Court would place its imprimatur on that institution was significant given events that had begun to engulf that institution. Moreover, the Court’s opinion contained any number of statements that, while arguably *obiter dicta*, were especially significant given the political realities of the time and the spectre posed by one issue in particular, slavery.

The focal point for *M’Culloch* was, of course, the Second Bank of the United States. That institution was arguably misnamed. As Joseph Hopkinson would observe during oral argument, “[i]s it then exempt, as being a bank of

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88. *Id.*

89. *Fisher*, 6 U.S. at 396–97.

90. *Id.*

91. *Id.* The Court reversed the decision of the circuit court. Justice Washington, while noting that “I take no part in the decision of this cause,” explained at length why he believed the lower court’s construction of the applicable statutes was correct. *Id.* at 397–405. He did not, however, address or dispute Marshall’s discussion of the constitutionality question.

92. The casebooks tend to ignore both *Deveaux* and *Fisher*. The only reference found in any of the three I have used for the purposes of this Essay is in SULLIVAN & GUNTHER, *supra* note 8, where *Fisher* is noted and quoted, briefly, as a decision that “gave support to” and “anticipated [Marshall’s] more elaborate discussion in *McCulloch*.” *See id.* at 103 & n.3. Interestingly, the one casebook that treats *M’Culloch* in the sort of depth I believe appropriate, BREST ET AL., *supra* note 22, mentions neither.

the United States? How is it such? In name only.”<sup>93</sup> He was correct. The Bank was a private corporation, of which the United States held only one-fifth of the stock and appointed only five of its twenty-five directors.<sup>94</sup> Nevertheless, the relationship between the federal government and the Bank was such that it was appropriately named. And, given the manner in which it was viewed by the states, and the contexts within which the debate about constitutionality transpired, it was equally appropriate for Marshall and his colleagues to characterize and treat it as they did.

Both the First and Second Bank were important institutions that played a pivotal role in the development of the nation.<sup>95</sup> They were also intensely controversial, both as a matter of general policy and, in particular for the Second Bank, actual operations. Part of the opposition to the Bank was principled, reflecting deep-seated reservation about banks in and of themselves and about the implications of a nominally federal bank for states that viewed themselves as distinct and coequal sovereigns in a federal compact, rather than as constituent members of a national union. Equally important, however, were concerns about the Bank itself, in particular about the extent to which its policies had either created or exacerbated the severe economic dislocations that eventually became known as the Panic of 1819.<sup>96</sup>

When the Second Bank began to do business in January 1817, the economy was inflationary but generally sound. But the Bank’s desire to compete with established state banks, and its attempts to assume what its directors believed to be its rightful role as the primary engine for economic growth, led it to make too many loans for paper currency, unbacked by specie (gold and silver). When commodity prices fell sharply in 1818, the combination of inflation and indebtedness overwhelmed the system. By 1819 more than three million individuals—one-third of the population—were feeling the effects of the resulting depression. The Bank, however, seemed insensitive to the situation, demanding repayment of its debts at precisely the moment it had become most difficult to do so.

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93. *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 339 (1819).

94. *See* An Act to incorporate the subscribers to the Bank of the United States, 3 Stat. 266, 266 (1816) (setting a capital of \$35 million, of which \$7 million came from the United States); *id.* at 269 (creating a board of twenty-five directors, of whom five “shall be annually appointed by the President of the United States, by and with the advice and consent of the Senate”).

95. The classic study is BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* (1957). For discussions of the Bank itself, see RALPH C. H. CATTERALL, *THE SECOND BANK OF THE UNITED STATES* (1902); EDWARD S. KAPLAN, *THE BANK OF THE UNITED STATES AND THE AMERICAN ECONOMY* (1999); WALTER BUCKINGHAM SMITH, *ECONOMIC ASPECTS OF THE SECOND BANK OF THE UNITED STATES* (1953).

96. *See generally* MURRAY N. ROTHBARD, *THE PANIC OF 1819: REACTIONS AND POLICIES* (1962).

The Bank did not cause the Panic in any meaningful sense. But its policies did exacerbate an already tenuous situation. More to the point, rumors of corruption and mismanagement began to surface, reinforcing the perceptions of an already skeptical public that the Bank was the enemy. Questions were raised about the Bank in Congress in the fall of 1818, and in the House a committee was appointed to investigate. It issued a report on January 16, 1819, within which the Bank's management was accused of violating the Bank's charter, mismanaging its affairs, and engaging in inappropriate speculation.<sup>97</sup> That report did not recommend any specific actions or sanctions, believing that "the salutary power lodged in the Treasury Department will be exerted, as occasion may require, and with reference to the best interests of the United States."<sup>98</sup> But various members of the House were not satisfied and argued, ultimately unsuccessfully, that the Bank's charter should be repealed. This provoked an extended debate that began on February 18, four days before the Court took up *M'Culloch*, and ended on February 25, during the arguments themselves.

The Bank's role in precipitating the emerging financial crisis was then clearly on everyone's mind when the case was argued, as was the growing story of fraud and abuse. The full details of what was wrong with the Bank, and in particular its Baltimore branch, had not emerged at the point *M'Culloch* was decided. But the alarm had been raised, and the realities surrounding the Bank could not have escaped Marshall and his colleagues. Their willingness to issue a ringing endorsement of an institution that was at that point viewed with considerable suspicion is then an aspect of the decision that is both worth noting and makes it especially noteworthy.

The reaction to the decision was immediate (as matters went those days) and intense. Individuals and newspapers of a nationalist bent applauded the decision. One Washington newspaper observed that "[t]he Supreme Judicial authority of the Nation has rarely, if ever, pronounced an opinion more interesting in its views, or more important as to its operation, than that recently given, as to the right of a state of the Union to tax the National Bank."<sup>99</sup> But, as virtually all of the casebooks note, *M'Culloch* was greeted with outrage in some quarters, especially in areas where either banking, or the federal government, or both, were viewed with suspicion. In Virginia in particular the press would lament "the alarming errors of the Supreme Court of the United

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97. Report of the committee appointed to inspect the books, and to examine into the proceedings of the Bank of the United States (Jan. 16, 1819), reprinted in CLARKE & HALL, *supra* note 77, at 714–32.

98. *Id.* at 732.

99. WASH. DAILY NAT'L INTELLIGENCER, Mar. 13, 1819, at 3.

States” and declare that “[w]henver state rights are threatened or invaded, Virginia will not be the last to sound the tocsin.”<sup>100</sup>

Sound they did. Spencer Roane, a judge on the Virginia Court of Appeals and bitter foe of Marshall, mounted a broad attack on the decision in a series of four essays published in the *Richmond Enquirer* under the pseudonym “Hampden,” within which he complained of a judicial conception of federal “legislative power which is every where extending the sphere of its activity and drawing all power into its impetuous vortex.”<sup>101</sup> And John Taylor of Carolene, in a book-length work published in 1820, asked “[w]hich can do most harm to mankind, constructive treasons or constructive powers?”<sup>102</sup> For Taylor the answer was, of course, the latter, that is, the Court in general and *M’Culloch* in particular, for “[t]he first takes away [only] the life of an individual, [while] the second destroys the liberty of a nation.”<sup>103</sup>

These assaults on the Court did not go unanswered. Indeed, Marshall himself—in an extracurricular exercise that seems at least curious if not shocking by current standards—would enter the lists in a series of articles written under the pseudonyms “A Friend to the Union” and “A Friend to the Constitution.” The heart of the matter for him was his belief that the views expressed by Roane and his allies suffered “from the fundamental error, that our constitution is a mere league, or a compact, between the several state governments, and the general government.”<sup>104</sup> He warned that “the principles maintained by” the opponents of *M’Culloch* “would essentially change the constitution, render the government of the Union incompetent to the objects for which it was instituted, and place all of its powers under the control of the state legislatures. It would, in a great measure, reinstate the old confederation.”<sup>105</sup> Such a state of affairs would lead “to the utter subversion of the constitution,” such “that [the] grand effort of wisdom, virtue, and patriotism, which produced it, will be totally defeated.”<sup>106</sup>

These exchanges were, obviously, about more than the Bank. The also lay at the heart of the American constitutional experience. Questions about the nature and structure of the nation, and in particular the role of the states within that nation, are as old as the text itself and lie at the heart of the federalism

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100. RICHMOND ENQUIRER, Mar. 30, 1819, at 1.

101. Spencer Roane, *Hampden No. 1*, in MARSHALL’S DEFENSE, *supra* note 48, at 107, 108.

102. JOHN TAYLOR, CONSTRUCTION CONSTRUED, AND CONSTITUTIONS VINDICATED 22 (Richmond, Shepherd & Pollard 1820).

103. *Id.* at 22–23. Taylor also expressly linked *M’Culloch* to an issue that would divide the nation in far more profound ways, slavery. See *infra* notes 118–19 and accompanying text.

104. John Marshall, *A Friend of the Constitution No. VIII*, in 8 THE PAPERS OF JOHN MARSHALL 353, 354 (Charles F. Hobson ed., 1995).

105. *Id.*

106. John Marshall, *A Friend of the Constitution No. IX*, in 8 THE PAPERS OF JOHN MARSHALL 359, 363.

decisions of the Rehnquist Court. As are quarrels about another aspect of *M'Culloch* that assumed increasing importance in the wake of that decision: the nature and scope of judicial review itself.

For example, Madison agreed with Roane and his colleagues that *M'Culloch* posed serious questions for those devoted to state sovereignty. But Madison was also deeply concerned about what *M'Culloch* implied about the role of the Court. In a letter to Roane a few weeks after the decision he focused virtually all of his attention on “the single question concerning the rule of interpreting the Constitution” and the Court’s role in that process.<sup>107</sup> He asked “[d]oes not the Court relinquish by their doctrine, all controul on the Legislative exercise of unconstitutional powers?”<sup>108</sup> Madison believed that Marshall’s opinion signaled that “the expediency & constitutionality of means for carrying into effect a specified Power are convertible terms; and Congress are admitted to be Judges of the expediency.”<sup>109</sup> This, he believed, largely removed the Court from the Constitutional equation, for “a question, the moment it assumes the character of mere expediency or policy . . . evidently [goes] beyond the reach of Judicial cognizance.”<sup>110</sup>

These are also, of course, questions of considerable importance today. Recent decisions seem, at least at first blush, and quite possibly even after considered assessment, to have reversed directions, breathing new life into federal power at the expense of the states.<sup>111</sup> We can and should debate the extent to which recent decisions have in fact altered the federal balance.<sup>112</sup> We can also argue about whether the political process model is an appropriate approach to such matters.<sup>113</sup> The point here, of course, is that *M'Culloch* has a

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107. Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 MADISON’S WRITINGS, *supra* note 61, at 447, 452–53.

108. *Id.* at 449.

109. *Id.*

110. *Id.*

111. Compare, e.g., *Tennessee v. Lane*, 541 U.S. 509 (2004) (sustaining Congressional abrogation of state immunity under Title II of the Americans with Disabilities Act in cases involving access to the courts), with *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) (rejecting ADA abrogation under Title I in cases seeking money damages for disparate treatment). For an excellent recent discussion of the cases and apparent contradictions, see Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1 (2004).

112. For one example of the debate, compare Jesse H. Choper, *Taming Congress’s Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 ARK. L. REV. 731 (2002), with Ronald J. Rotunda, *The Implications of the New Commerce Clause Jurisprudence: An Evolutionary or Revolutionary Court?*, 55 ARK. L. REV. 795 (2002).

113. Compare, e.g., Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000), and Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001), with Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001), and

great deal to say about all of this. As it does about a number of other matters that arose then and are in many instances debated now.

The nature of this project makes it essential that I note only briefly some of the many issues that make the decision especially noteworthy given the situation at the time it was decided. One of these, the long-standing debate about whether a federal program of internal improvement was constitutional, would ironically arise almost immediately and play itself out in ways that seemed to contradict what the Court held in *M'Culloch*.

The debate about internal improvement focused on whether the federal government had the authority to engage in a wide spectrum of public-works projects viewed as essential to the development of the emerging nation. With a few very specific exceptions,<sup>114</sup> this too became an argument about the extent to which the power to act could be inferred where no express provision authorizing it could be found.<sup>115</sup> But unlike the Bank, internal improvement never gained the Court's imprimatur. One member of the Court, Justice William Johnson, did maintain in a letter to President Monroe that the members of the Court were "of [the] opinion that the decision on the Bank question completely commits them on the subject of internal improvement, as applied to Postroads and Military Roads."<sup>116</sup> But the Court itself has never directly addressed the question and never accepted the argument. Of course, there is now a massive federal presence in myriad programs that accomplish the same ends as those proposed, but largely rejected, during the late eighteenth and early nineteenth centuries. But these programs accomplish these goals by indirection, largely through the spending process. Indeed, they do so in ways that, at least as matters now stand, arguably compromise much more deeply the sovereignty of the states.<sup>117</sup>

We can also tie *M'Culloch* to the then-simmering, soon to explode debate about slavery. The first congressional discussions of the admission of Missouri to the union as a slave state were held in the weeks just before *M'Culloch* was decided. The South harbored deep concerns about the ability of Congress to condition admission on an end to slavery and bar slavery from

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Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001).

114. See, e.g., U.S. CONST. art. I, § 8, cl. 7 (granting Congress the power to "establish Post Offices and post Roads").

115. I discuss the internal improvement debate in Killenbeck, *supra* note 51, at 117–37. For a definitive history of these matters, albeit one that does not devote as much attention to the constitutional matters as it might, see JOHN LAURITZ LARSON, INTERNAL IMPROVEMENT: NATIONAL PUBLIC WORKS, AND THE PROMISE OF POPULAR GOVERNMENT IN THE EARLY UNITED STATES (2001).

116. Letter from Justice William Johnson to President James Monroe (undated), *quoted in* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 596–97 (2nd ed., 1926).

117. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987) (sustaining a federal measure that required the state to raise its drinking age as a condition of receiving federal highway funds).

national territories. Neither power was mentioned in the Constitution. But both would, presumably, fall within the ambit of any expansive reading of the text, in particular one sanctioning both the existence of implied powers and the notion that such matters were best left to the political process. *M'Culloch* accordingly struck fear into the hearts of the pro-slavery factions on both counts. John Taylor's editor would raise the alarm in his statement "To the Publick," observing that "[t]he crisis has come" and "[t]he *Missouri Question* is probably not yet closed."<sup>118</sup> And Taylor himself would in turn argue against any notion that the Court ought play a role in these matters, observing that "[a] political balance of power, and a crusade against slavery, through the bowels of the constitution, are two things so very distinct, that a thousand reasons might be urged against their consanguinity."<sup>119</sup>

*M'Culloch* is then a case for virtually all seasons, one that offers us the opportunity to explore a substantial number of important constitutional questions, only some of which are embedded within the opinion itself. Competent, dedicated teachers of Constitutional Law do not need to do this. The core holdings are sufficiently important, and their discussion sufficiently interesting, to serve most pedagogical needs. But the wealth of opportunities presented are certainly worth noting and, time permitting, pursuing.

#### IV. CONTEXTUAL ASPECTS OF *M'CULLOCH*

The second reason I find *M'Culloch* so compelling is that there are so many human dimensions to the case that can be used to bring it, the Constitution, and constitutional history alive. Many of these involve details of the case that are not found in the report of the decision, much less in the versions contained in the casebooks and the additional materials that appear within them.

One aspect of the case that is generally recognized is that, at least at the time *M'Culloch* was litigated, James William M'Culloh was, quite simply, a crook (more of that shortly). Of course, the first thing worth noting is that he was in fact James William M'Culloh. Mentioned only twice in the opinion that now bears his name, the Court identifies him there as "the plaintiff in error, McCulloch" and "James William McCulloch, the defendant below."<sup>120</sup> Seven years later, however, when the Court took up *Etting v. The President, Directors, and Company of the Bank of the United States*,<sup>121</sup> a case within which M'Culloh is mentioned repeatedly in an action seeking to recover for financial losses attributable to his actions, he is identified in yet another manner, as one James W. M'Cullough.

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118. TAYLOR, *supra* note 102, at i.

119. *Id.* at 293.

120. *See* *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 317–18 (1819).

121. 24 U.S. (11 Wheat.) 59 (1826).

Commentators fare no better. Most histories identify him as McCulloch.<sup>122</sup> But a number of original source documents use the spelling M'Culloh, and I believe that this is the appropriate choice for a number of reasons. For example, the individual who corresponded on behalf of the Baltimore branch with Bank and government officials prior to *M'Culloch* was one James W. M'Culloh. In a July 1817 letter to the Secretary of the Treasury, M'Culloh urged legal action against another bank that had "no specie, stock, or notes of other banks" and appeared to be in danger of defaulting on four notes owed the Second Bank.<sup>123</sup> That letter would prove to be at least ironic, if not prophetic, when M'Culloh and two individuals with whom he formed a partnership, James A. Buchanan and George Williams, were indicted in Maryland in July 1819 for the fruits of that undertaking, a massive scheme to defraud that cost the Baltimore branch of the Bank in excess of \$1.5 million.<sup>124</sup>

As indicated, rumors of these activities had begun to surface in late 1818 and were grist for many of the debates about the Bank that occurred prior to and as *M'Culloch* was being argued.<sup>125</sup> By May 1819 it was common knowledge that massive acts of fraud had occurred at the Baltimore branch and the Bank's directors forced M'Culloh to resign. The July indictments followed, and in two separate trials M'Culloh and his partners evaded justice. At the first, which was held in Belle Air, Maryland in March and April 1821, the indictments were dismissed, with two members of the court accepting the defense argument that a conspiracy to defraud was neither a crime recognized by statute in Maryland nor an offense at common law. In December 1821 that verdict was reversed by the Maryland Court of Appeals, which remanded the case for a trial on the facts.<sup>126</sup> A second trial followed in March 1823. This time M'Culloh and Buchanan were acquitted,<sup>127</sup> and the indictment against Williams was dismissed.<sup>128</sup>

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122. See, e.g., WHITMAN H. RIDGWAY, *COMMUNITY LEADERSHIP IN MARYLAND, 1790–1840*, at 412 (1979) (index reference to "McCulloch, James W.").

123. Letter from James W. M'Culloh to Wm. H. Crawford (July 19, 1817), in 4 *AMERICAN STATE PAPERS: FINANCE 806–07* (Washington, Gales & Seaton, 1858). The spelling M'Culloh appears consistently in these materials, and this is the first of the sources I believe dispositive in this matter.

124. Much of the work involved in preparing the indictments was done by Luther Martin, whose argument in *M'Culloch* was one of the last he made before the Court and whose work on the indictments may have been the final blow in his rapidly deteriorating health. See PAUL S. CLARKSON & R. SAMUEL JETT, *LUTHER MARTIN OF MARYLAND 294–303* (1970).

125. See *supra* notes 97–98 and accompanying text.

126. *State v. Buchanan*, 5 H. & J. 317 (Md. 1821).

127. The statements of the three judges announcing this result may be found in ROBERT GOODLOE HARPER, *A REPORT OF THE CONSPIRACY CASES LATELY DECIDED AT BELLE AIR, HARTFORD COUNTY, MARYLAND* (Baltimore, Thomas Murphy 1823) [hereinafter *REPORT OF THE CONSPIRACY CASES*]. Once again, the consistent spelling in this document is M'Culloh, and this is the second source I believe important in resolving this matter. See *id.* at 246–47

These results almost certainly reflected a verdict against the Bank itself, rather than a judgment that the three had not actually engaged in massive fraud. M'Culloh and Buchanan's strategy was simple. They argued that "they relied too strongly on the hopes and calculations in which the whole community indulged; but the failure of their stock speculations was rather to be pitied as a misfortune, than condemned as a crime."<sup>129</sup> And, conveniently glossing over the nature and scope of their own activities, they tried to shift much of the blame to the Bank itself: "Its strange administration was an *incubus* upon it, and was another cause of depreciation of its Stock, so that, in fact, the Bank itself occasioned the losses upon which the present indictment is founded."<sup>130</sup>

In the wake of these events M'Culloh's fortunes took a strange but perhaps predictable turn.<sup>131</sup> Initially and rightfully condemned—the trials were, for example, moved to Belle Air in the belief that a fair trial could not be had in Baltimore—he soon became a figure of respect. In 1825 he was elected to the Maryland House of Delegates as a representative for Baltimore County. And on December 26, 1826, the members of the House elected him Speaker of that body.<sup>132</sup> M'Culloh also began to practice law and again entered the world of business. By the end of the decade he was recognized as one of the more important political figures in the area. In the 1830s, in turn, he became an influential lobbyist, working actively on behalf of the Chesapeake and Ohio Canal Company in its pursuit of government support for both the canal and a general program of internal improvement. He also pursued an active life of community service. In 1837, for example, the legislature designated him as a trustee of the Union Academy in Baltimore.

Thus, much like Richard Milhous Nixon, James William M'Culloh—who was indeed a crook<sup>133</sup>—lived out his life until his death in 1861 a remade individual, a successful politician, lawyer, and businessman. And this extra dimension of M'Culloh's story strikes me as especially apt for discussion when teaching a case at a time when both government and corporate mis-, mal-, and

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(statements of Judges Hanson and Williams); *see also id.* at 233–46 (statement of Judge Dorsey, dissenting).

128. *State v. Buchanan*, 5 H. & J. 500 (Md. Co. Ct. 1823).

129. REPORT OF THE CONSPIRACY CASES, *supra* note 127, at 113.

130. *Id.* at 170.

131. Discussions of M'Culloh's life and, in particular, his criminal activities (with variant spellings!) may be found in CATTERALL, *supra* note 95, at 42–50 & 78–79; BAYLY ELLEN MARKS, HILTON HERITAGE 9–11 (rev. ed. 1993); RIDGWAY, *supra*, note 122, at 62, 105, 107 & 112; and David S. Bogen, *The Scandal of Smith and Buchanan: The Skeletons in the McCulloch v. Maryland Closet*, 9 MD. L. F. 125 (1985).

132. JOURNAL OF THE MARYLAND HOUSE OF DELEGATES, DECEMBER SESSION, 1826, at 4. Once again, M'Culloh, a third and final source cementing my belief that, while there are other spellings in other documents, this is the appropriate choice.

133. Does "unindicted co-conspirator" count?

nonfeasance have become important elements in the public debate about both law and business.

There are other contextual realities that do not surface in the standard treatments that add depth to the story. For example, oral arguments in the case began on February 22, which, perhaps coincidentally, also happened to be George Washington's birthday. That was something John Marshall, Washington's biographer, surely knew.<sup>134</sup> It was also an ironic twist given Washington's role as the President whose acceptance of Alexander Hamilton's views on the matter of constitutionality allowed the First Bank to come into existence. Indeed, the date resonated for a further reason, the fact that Hamilton's written opinion on the constitutionality of the First Bank was completed in a final, frantic burst of activity that began on Tuesday, February 22, 1791, and concluded the following morning when he delivered the final product to Washington.<sup>135</sup>

Given the compressed amount of time within which the Court then worked, and a docket that included a number of other landmark cases,<sup>136</sup> it is unlikely that Marshall made a deliberate decision to select that date. Then again, we will never know, and the coincidence, if indeed that is what it is, is worth noting.

It is also of some interest that perhaps the most prominent champion of the Bank before the Court, Daniel Webster, had just a few years earlier been one of its staunchest opponents. In both 1815 and 1816, Representative Daniel Webster spoke eloquently and at length on the House floor against both the principle of a government bank and the details of the measures before him.<sup>137</sup> In 1815, for example, Webster sarcastically described "a wonderful scheme of finance" within which "[t]he government is to grow rich, because it is to borrow without the obligation of repaying, and is to borrow of a bank which issues paper without liability to redeem it."<sup>138</sup> Webster's views would change. When he appeared before the Court, the Bank was "a proper and suitable

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134. Marshall included an extensive account of both the legislative and executive debates regarding the First Bank in that biography. See 4 JOHN MARSHALL, *THE LIFE OF GEORGE WASHINGTON* 390–97 & 492–99 (2d ed., 1832) (Citizen's Guild ed., 1926).

135. For an account of this process, and the frenzy of the final night, see RON CHERNOW, *ALEXANDER HAMILTON* 352–54 (2004).

136. For example, while argued in March, 1818, the Dartmouth College case had been carried over to the February 1819 Term. The decision was announced on February 2, 1819, with the Court holding that the charter creating the college was a contract protected by the Constitution. See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). On February 17, in turn, the Court handed down its opinion in *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819), within which it held that a New York insolvency measure also violated the Contract Clause.

137. See, e.g., HAMMOND, *supra* note 95, at 238–39.

138. Clarke & Hall, *supra* note 77, at 564–65 (statement on the House floor, Jan. 2, 1815).

instrument to assist the operations of the government.”<sup>139</sup> And his victory in *M’Culloch*, like the one he secured just a few weeks earlier in the Dartmouth College case, would do much to secure his reputation as one of the greatest constitutional advocates of his age.

The assessments of the Bank rendered by another individual who was center stage at the time *M’Culloch* was argued and decided are also worth noting.

In the early months of 1819, Andrew Jackson was either a hero or a villain. How one viewed him in large measure reflected how one judged his conduct as commander of the forces that had subdued the Seminole Indians, who had made a habit of raiding settlements in Georgia and then retreating to the sanctuary of their villages in then Spanish Florida.<sup>140</sup> Jackson’s role in what became known as the First Seminole War had cemented his reputation with the general public. But that popular response was arguably at odds with his actual record in those events, which was decidedly mixed. He had indeed subdued a tribe that President James Monroe characterized just prior to the expedition as having “long violated our rights, & insulted our national character.”<sup>141</sup> But Jackson had also risked an international crisis with both England and Spain. He had approved the execution of two British subjects accused of complicity in the Seminole’s actions, in one instance overruling the court martial recommendation that the accused be flogged and confined for one year at hard labor. And while he fulfilled an unspoken goal of the administration by invading and seizing Spanish Florida, he did so without formal authorization and in a manner that could not help but embarrass the Spanish.

These matters were debated in Congress at length in January and February 1819, and a series of measures that contemplated Jackson’s censure were soundly rejected. Whatever the misgivings many might have held about Jackson’s actions—and they were both profound and in large measure justified—Jackson himself felt vindicated. Leaving Washington in the wake of the Congressional debate, ostensibly to visit his godson at West Point, he made his way up the coast and was haled at virtually every step of the way. In New York alone the celebrations lasted five days. And one of the highlights there was a ball and supper held the same day that arguments in *M’Culloch* began, February 22.

The intended purpose of the event was, of course, to honor the nation’s most revered Founding Father on the occasion of his birthday. It was, however, transformed by Jackson’s presence from an evening celebrating George Washington’s life into one where “the opportunity was also embraced

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139. *M’Culloch v. Maryland* 17 U.S. (4 Wheat.) 316, at 325 (1819).

140. For an extensive discussion of these matters, see Robert V. REMINI, *ANDREW JACKSON AND THE COURSE OF AMERICAN EMPIRE 1767-1821*, at 341–77 (1977).

141. Letter from James Monroe to Andrew Jackson (Dec. 28, 1817), *quoted in id.* at 348–49.

to honor the General” who, when he entered, “was saluted by a discharge of artillery from a miniature fort raised on the orchestra.”<sup>142</sup> It became then one of a series of adulatory gatherings that would take Jackson back to his home state of Tennessee and, eventually, to the White House. Thus, at that very same time that the Court was considering and ultimately affirming the constitutionality of the Bank, the people were deeply enmeshed in a social and political process that would yield the President who would ultimately destroy that institution.

Jackson characterized the Bank as “a ‘monster,’ a ‘hydra-headed’ monster, a monster equipped with horns, hoofs, and tail and so dangerous that it impaired ‘the morals of our people,’ corrupted ‘our statesmen,’ and threatened ‘our liberty.’”<sup>143</sup> That hostility took concrete form in 1831 when he vetoed a measure that would have extended the Bank’s charter. That then became the foundation for subsequent actions that would ultimately lead to the demise of the Bank in 1836. It is accordingly worthy of note that the fates of both—the Bank and Jackson—were at issue in February and March 1819. And that the Bank itself would on that occasion be saved by a judgment of the Court, an institution that fell squarely within the ambit of Jackson’s apparent belief that “the constitution is worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary.”<sup>144</sup>

## V. CONCLUSION

One of the many phrases for which *M’Culloch* is justly noted is Marshall’s observation that “we must never forget, that it is a *constitution* we are expounding.”<sup>145</sup> Justice Frankfurter would describe this as “the single most important utterance in the literature of constitutional law—most important because most comprehensive and comprehending.”<sup>146</sup> He was certainly correct in believing that we should pay special attention to “the conception of the nation which Marshall derived from the Constitution.”<sup>147</sup> That vision came at a critical juncture in the nation’s history. Marshall may well have already outlined most of the principles that lie at the heart of *M’Culloch* in earlier decisions. It was in *M’Culloch*, however, that Marshall brought the various strands together. And it was in that decision that he invoked them in defense

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142. 2 JAMES PARTON, *LIFE OF ANDREW JACKSON* 564 (1860) (quoting a contemporary account).

143. ROBERT V. REMINI, *ANDREW JACKSON AND THE BANK WAR: A STUDY IN THE GROWTH OF PRESIDENTIAL POWER* 15 (1967) (quoting Jackson from various sources).

144. Letter from Andrew Jackson to Andrew J. Donelson (July 5, 1822), in 3 *CORRESPONDENCE OF ANDREW JACKSON* 167, 167 (John Spencer Bassett ed., 1928).

145. *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, at 407 (1819).

146. Felix Frankfurter, *John Marshall and the Judicial Function*, 69 *HARV. L. REV.* 217, 219 (1955).

147. *Id.*

of an institution whose combination of importance and flaws placed it center stage in the development of the American nation for almost fifty years, from the creation of the First Bank in 1791 to the demise of the Second in 1837.

*M'Culloch* is then a case within which both constitutional law and constitutional history are important in ways few can duplicate. It is also a decision whose story is one of triumphs and tragedies that transcend the metes and bounds of the Constitution itself. Marshall's admonitions regarding the nature and scope of a constitution as a document are important and telling. But the cases we teach in Constitutional Law courses are about something more than the text itself. They are inquiries about and discussions of the structure of a nation and the lives of the individuals who constitute it.

Narrowly understood, *M'Culloch v. Maryland* involves the Second Bank, the sovereign State of Maryland, the Necessary and Proper Clause, and the Court. But it is also about the people who shaped it. These include Alexander Hamilton and James Madison, whose visions of the nation and the Constitution are competing but complementary, and John Marshall and Spencer Roane, jurists with starkly different understandings of the role of the Court and the prerogatives of the States. There are the advocates who appear before the Court, men like Daniel Webster and Luther Martin. And there are the various Presidents whose actions over the course of almost fifty years helped shape the debate, in particular George Washington and Andrew Jackson, one of whom brought the Bank to life with his signature, and the other of whom destroyed it.

Then there is James William M'Culloh himself. Most of us do not read and certainly do not teach *M'Culloch* because we care about James M'Culloh or the details of his life. Arguably, the Court needed neither that individual nor the woes of the Baltimore branch to make its point. Maryland was not the only state to enact steep taxes on the Bank, and it was only a matter of time before some case of this sort came before Marshall and his colleagues. Indeed, a strikingly similar one did arrive at the Court in 1824, albeit one we now read for other reasons entirely.<sup>148</sup> It is then one of the ironies of history that the events that helped shape one of the most important constitutional decisions ever issued by the Court came together in a case that bears James M'Culloh's misspelled name. And that irony, and the rise, and fall, and resurrection of James M'Culloh, have a very great deal to do with how we can bring to life the rich, sometimes contradictory, but always compelling threads that constitute the full story of *M'Culloch v. Maryland*.

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148. See *Osborn v. The President, Directors, and Company of the Bank of the United States*, 22 U.S. (9 Wheat.) 738 (184). *Osborn* is a staple in courses and casebooks on federal jurisdiction, where we generally read and teach it as the first installment in our discussion of federal question jurisdiction. *Osborn* does not, however, pop up in courses on Constitutional Law; it is not even mentioned, much less included, in any of the casebooks that I have noted during the course of this Essay.

