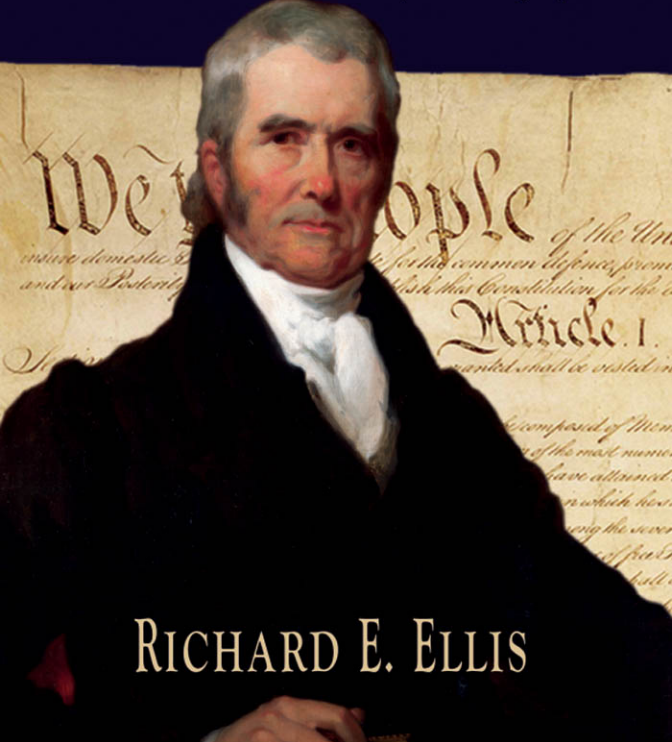
Aggressive Nationalism

McCulloch v. Maryland and the Foundation of Federal Authority in the Young Republic



RICHARD E. ELLIS

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RICHARD E. ELLIS

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FOR MY CHILDREN, WHO HAVE MADE ME
A TRULY BLESSED PERSON:
ISOBEL AND JON ELLIS
DANIEL ELLIS
REBEKAH ELLIS AND MIKE ANTONAS
DEBORAH ELLIS

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Introduction

During the struggle over the ratification of the U.S. Constitution in 1787–1788, James Madison responded to Antifederalist criticism that it created a consolidated national government by pointing out in the *Federalist*, No. 39, the numerous powers retained by the state governments. He concluded by famously observing that "the proposed Constitution . . . is in strictness neither a national nor a federal Constitution, but a composition of both."[1] Madison was, of course, right. Yet at no point does either he or the Constitution itself precisely explain how power is to be shared by the different governments. As a consequence, what has been termed *intergovernmental relations* has been a recurring and controversial issue since the adoption of the Constitution in 1788. The most serious efforts to resolve this question have come in decisions handed down by the U.S. Supreme Court. And of those decisions none has proved to be more significant than *McCulloch v. Maryland* (1819), which most scholars consider to be one of the most important decisions ever handed down by the U.S. Supreme Court.

Unquestionably, much of the praise for the decision, if extravagant, is merited. For it is brilliantly argued, far reaching in its implications, and unusually eloquent. Among other things, it provides an enduring nationalist interpretation of the origins and nature of the Constitution and the union and a broad definition of the necessary and proper clause (Article I, section 8), which has laid the foundation for the living Constitution, and with it the means for an almost infinite increase in the powers of the federal government. It also contains an explicit narrowing of the meaning of the Tenth Amendment, the bulwark of states' rights thought. Major excerpts from Chief Justice John Marshall's decision in *McCulloch v. Maryland* are included in every casebook on constitutional law, and its findings—the constitutionality of the Bank of the United States and the prohibition it imposed on the states against taxing it and its branches—are described in just about every textbook on American history.

It is surprising, therefore, that no in-depth study of *McCulloch v. Maryland* has been published before now. What treatments exist of the origins of the case and the constitutional issues involved in it are to be found in various general histories of the U.S. Supreme Court and in biographies of John Marshall.[2] Unfortunately, these analyses of the case tend to be done almost exclusively from the vantage point of Chief Justice John Marshall's decision. No attempt is made to examine the case from the point of view of the losing side, which is to be regretted because it dealt with relevant and important issues, many of which are crucial to understanding the case.[3] Indeed, the chief justice chose not to consider many of these arguments in his decision, probably because they would have seriously undercut his own argument. In fact, what Marshall mainly did in his famous decision was to reiterate the arguments of the attorneys for the Second Bank of the United States (2BUS). Modern-day constitutional scholars who have treated the case have also tended to ignore a number of astute treatments by financial and banking historians of the early nineteenth century, which shed useful light on the economic issues of the time, for *McCulloch v. Maryland* is, after all, a case that was profoundly influenced by the banking problems that existed in the early nineteenth century.[4]

Three arguments in particular against the 2BUS were ignored by Marshall. The first had to do with the essentially privately controlled

and profit-making characteristics of the bank. Private investors owned 80 percent of its stock and elected a similar percentage of its board of directors. The bank made a profit by lending money at interest, by various investments, and by charging fees for its financial services to everyone except the federal government, which it was prohibited from doing by the provisions of its charter. It almost immediately turned out to be a very profitable institution, which led to a sharp increase in the value of its stock and the payment of high dividends. Although it performed a number of important financial services for the federal government, it hardly qualified, in many people's minds, to be considered an instrument of the federal government, which is the way Chief Justice Marshall characterized it in his *McCulloch* decision by claiming it was analogous to the mint, the post office, the custom house, and the federal courts.

A second issue had to do with the relationship of the 2BUS and its branches to the state governments. The charter granted to the 2BUS by Congress in 1816 gave it the right to establish branches wherever it saw fit. Many states viewed this as an assault upon their sovereignty and believed a state's permission should be required in order to establish and maintain a branch within its boundaries. Many states also feared that the establishment of branches by the 2BUS would adversely affect the revenue stream they obtained by taxing and regulating their own locally chartered banks by taking business away from them and by being a more profitable investment for local capitalists as a consequence of not being subject to state taxes. Beyond this, some feared that other national corporations, particularly lottery and insurance companies, might also be established that could operate within a state and yet be beyond its control.

Finally, there was the question of state taxation of the branches of the 2BUS. The only taxes explicitly prohibited to the states by the U.S. Constitution were import and export duties. In *McCulloch v. Maryland*, Marshall argued that "the power to tax is the power to destroy." To be sure, the purpose of the taxes levied by Kentucky and Ohio was to drive the branches of the 2BUS out of their states. But the tax levied in other states, particularly Maryland, which was of central importance because it was the tax being ruled on by the U.S. Supreme Court, was clearly for revenue purposes and was no higher than the taxes it levied on its own

chartered banks. This raised some very difficult issues, about which there was much uncertainty and confusion, even among supporters of the 2BUS. What, in effect, Marshall did in his famous decision was to use a case that came up from Maryland to rule on developments in Kentucky and Ohio, even though the issues involved were significantly different. Consequently, he totally avoided discussing the differences between a tax levied for revenue purposes and one that was meant to make it impossible for a branch to continue doing business in a state.

These were all significant and potent issues, and it is no wonder, in light of Chief Justice Marshall's unwillingness to deal with them, that many people at the time found his decision to be unsatisfactory. In particular, it was the cause of considerable dissatisfaction in Ohio, where proponents of the state's tax believed that the state had a right to be heard on its own behalf. They finally achieved this in the case of *Osborn et al. v. the Bank of the United States* (1824), which was essentially a rehearing of *McCulloch v. Maryland* except that, once again, Marshall found a way to finesse the many key federal-state issues that were involved.

A close examination of *McCulloch v. Maryland* also sheds new light on the role that Maryland played in the case, a development that is usually quickly passed over by scholars. For in addition to levying its tax for the purpose of raising revenue, it is clear that Maryland was not in any sense opposed to the 2BUS or its branch in Baltimore for either constitutional or policy reasons. Rather, *McCulloch v. Maryland* was an arranged case in which the state played the role of facilitator in order to get a case dealing with the question of state taxation of the branches of the 2BUS before the U.S. Supreme Court as quickly as possible. After the decision was handed down, the state quietly accepted it and totally withdrew from the fray.

Virginia's reaction to the decision in *McCulloch v. Maryland* has received much more attention from scholars, and for good reason. The debate that took place in the newspapers involved one of the rare instances where a member of the U.S. Supreme Court, in this case Chief Justice Marshall, writing anonymously, defended his decision against two formidable critics: William Brockenbrough and Spencer Roane. Moreover, the issues debated were the origins and nature of the

union and the meaning of the necessary and proper clause, but significantly, the debate only barely touched on the 2BUS and its branches. What is not generally recognized is how atypical this debate was, for most Virginians, including Spencer Roane, who was considered Marshall's chief nemesis, had not opposed the creation of the 2BUS, and Virginia never levied a tax on it. Instead, the debate was for the most part a continuation of the great debate that had taken place in Virginia over the adoption of the U.S. Constitution in 1787–1788 and that continued to rage in the Old Dominion's politics for the next forty years, which was the baseline for most of Marshall's constitutional thought.

Developments in Ohio were much more typical of the kinds of issues raised by the states against the 2BUS and its branches. The spectacular forced removal of the tax by the state under the "crowbar law" has attracted substantial attention from scholars, who generally explain this development in political and economic terms. Yet Ohio quickly moderated its stance, returned the money, and defended its right to tax the branches of the 2BUS in legal and constitutional terms. Under the strong leadership of Charles Hammond, it launched so formidable and penetrating an attack on Marshall's *McCulloch* decision that the U.S. Supreme Court was forced to rehear the case in *Osborn et al. v. the Bank of the United States* (1824).

Chief Justice Marshall's role in all of these developments deserves careful scrutiny. The hearing of feigned cases on controversial constitutional issues in the early republic was nothing unusual. But Marshall's involvement appears to have gone way beyond this. There is circumstantial evidence to strongly indicate that he played a key role in helping the 2BUS at a time when it was under assault not only by various states but also by Congress. His cooperation was necessary to get the Supreme Court to hear the case as quickly as it did. He may also have indirectly influenced the content of the argument made on behalf of the 2BUS by its lawyers, which among other things allowed the chief justice to engage in the *obiter dicta* that constituted the extensive first part of his decision. Marshall also delivered his famous decision in just three days after the closing of oral arguments. The timing of this was important because the High Court's ruling came down only a day before the

Pennsylvania legislature was to begin debating the levying of a tax on the 2BUS in Philadelphia and its branch in Pittsburgh. Pennsylvania was a large and important state, and its taxation of the 2BUS would have immeasurably strengthened the course of action already taken by Kentucky and Ohio. As it turned out, Pennsylvania chose not to challenge the decision handed down in *McCulloch v. Maryland* and instead proposed an amendment to the U.S. Constitution, which would have limited the creation of a national bank to the District of Columbia, where it would not interfere with the states. It also prohibited the creation of branches in the states unless they granted their permission. In the end, the proposed amendment went nowhere. Finally, when things were going badly for the 2BUS in the *Osborn* case, Marshall unexpectedly ruled that the case should be continued to the next term, because a similar case would be heard then. This effectively removed Hammond from the case, because he had a very sick wife in Ohio. The other case turned out to be *The Bank of the United States v. the Planters' Bank of Georgia* (1824). When Marshall finally handed down his decision in the two cases, he made no attempt to link them up. If anything, the decision he handed down in the Georgia case contradicted in an important way his decisions in *McCulloch* and *Osborn*.

A word of explanation about my use of the term *aggressive nationalism* in the title of this volume is in order. The context in which *McCulloch v. Maryland* was decided was a series of innovative, major social and economic changes that swept over the United States during the beginning of the nineteenth century, especially in the years after 1815. These changes were numerous and converging. They included a growth in population and the rapid economic development, albeit in different ways, of almost all of the areas east of the Mississippi River. Louisiana became a state in 1812, Indiana in 1816, Mississippi in 1817, Illinois in 1818, Alabama in 1819, and Missouri and Maine in 1820. It was also a period when the older, established, urban areas like New York, Philadelphia, Baltimore, Charleston, and New Orleans underwent rapid population and economic growth. At the same time, a number of boom towns emerged: Pittsburgh, Lexington, Louisville, Cincinnati, St. Louis, Rochester, Nashville, Huntsville, Mobile, Milledgeville, and Natchez.

These same years also saw a rapid increase in the demand from Europe for American agricultural commodities, particularly cotton, grain, and meat products. The spread of the cotton culture throughout the old Southwest was immeasurably aided by the development of the cotton gin. At the same time, major changes in transportation occurred: the building of roads and canals and the widespread use of the steam boat, which enabled goods to be shipped to market more quickly and cheaply than ever before. This also led to a quickening of the transfer of information and communication between different parts of the country. During the early decades of the nineteenth century, a legal system emerged that encouraged and protected the country's economic development and transformation. Perhaps most important, the United States during these years underwent a major financial revolution based on the proliferation of banks, which made capital easily available, and an increase in the money supply, which replaced the older barter system that many small farmers had been using in economic transactions.

Taken together, these fundamental changes are referred to by a number of historians as "the market revolution," and it is clear that it had consequences that were good, bad, and controversial.[5] With it came the early development of a truly national economy, prosperity for many people, and an increase in people's standard of living. It also contributed in a major way to the urbanization of America and to the creation of a powerful and dynamic middle class, one that began to push for a broad variety of reforms which included attempts to bring under control the country's excessive consumption of alcohol; the establishment of a public educational system; improved sanitary conditions; better treatment for the insane, orphans, and criminals; and eventually the women's rights movement. On the other hand, the market revolution also contributed in a major way to the growth and expansion of slavery by turning cotton into the country's leading export commodity. It also created an inequality of wealth much greater than anything that had existed in the eighteenth century and brought widespread inflation, debt, and speculation. Moreover, as a consequence of the market revolution, the United States entered into the boom-bust cycle that would characterize the American economy throughout the nineteenth century and into the twentieth. It also tended to leave behind

various workers, mechanics, small farmers, and farm laborers who did not have the business skills to achieve and maintain success, or who were simply unlucky.

Much of the country was divided over the significance of the market revolution. This division first became apparent in the struggle over the adoption of the U.S. Constitution in 1787–1788. The great majority of those who supported the adoption of the Constitution were found mainly in the country's commercial farming and urban areas, while those opposed were found mainly in backcountry areas, far from navigable waterways and thus lacking the cheap transportation necessary to participate in the market. This changed during the course of the market revolution. Many welcomed the economic growth it brought, but just as many were skeptical or hostile to it, while still others were unsure or ambivalent about its implications. A large number changed their positions as the country veered sharply between periods of prosperity and depression. These divisions continued well into the nineteenth century. One particularly astute historian has noted that the main division between the Jacksonians and their Whig opponents was that "the Whig party spoke to the explicit hopes of Americans, as Jacksonians addressed their diffuse fears and resentments."[6]

Many of the people hostile to the market revolution were not opposed to making money and getting ahead by means of hard work and frugality, but they were opposed to speculation, excessive debt, and the granting of special privileges through acts of incorporation. They were also critical of the market revolution because they found themselves increasingly subject to forces, both national and international, that they could neither understand nor control. Viewing the strong and active national government created by the U.S. Constitution as under the control of aggressive commercial interests, who not only had created the 2BUS but also favored a federal program of internal improvements, and perceiving the idea of privately controlled national corporations as dangerous, they rallied around the banner of states' rights. Indeed, the states were not so much attacking the 2BUS as they were defending themselves from it. This all came together with particular force in the reaction to the decision in *McCulloch v. Maryland* because it involved two national institutions, the 2BUS and the U.S.

Supreme Court, that were not amenable to popular control and that had become aggressive, intrusive, and coercive. These concerns also contributed in a major way to Andrew Jackson's election to the presidency in 1828. Moreover, Jackson's famous veto of the bill rechartering the 2BUS in 1832 was, on its most basic level, a response to John Marshall's decision in *McCulloch v. Maryland*.

Jackson's veto brought an end to the 2BUS; therefore, in a narrow sense, the Supreme Court's decision in *McCulloch v. Maryland* was short-lived in its impact. But on a more basic level, the significance of the decision has grown in the nearly two hundred years since it was handed down, so that it has become the foundational statement for a strong and active central government and the broadening of its powers. While the problem raised by federal-state relations remains a source of constant dispute, the context in which it has taken place has been altered in major ways by history, politics, and ideology. Further, changed social and economic circumstances have undercut the kind of loyalties that existed for most people in the early nineteenth century. This, of course, is a long and complicated story, one that does not lend itself to telling in a short space. Moreover, it is not the main purpose of this book, which is mainly to place the great case of *McCulloch v. Maryland* and the immediate reaction to it in their proper historical context. What all of this means, at least in historical terms, is that the original significance of an event and its results are often two different things.

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ONE

The U.S. Supreme Court versus the States

The end of the War of 1812 was a major turning point in American history. The war itself had not gone very well. The country had been unprepared militarily, there were financial problems galore, there had been considerable opposition both from Federalists and from many Republicans, and President James Madison's administration had been so wracked by various personality and policy conflicts that the war effort was marked by chaos and inefficiency.[1] Yet despite all of this, the results of the war for Madison and the national republican wing of the Jeffersonian party were clear and glorious: a spirit of nationalism pervaded most parts of the United States (southern New England excepted), enhanced by Andrew Jackson's extraordinary, if belated, victory at the Battle of New Orleans. As Albert Gallatin observed in 1816:

> The war has been productive of evil and good, but I think the good preponderates. Independent of the loss of lives, and the losses in property by individuals, the war has laid the foundation of permanent taxes and military establishments, which the

> Republicans had deemed unfavorable to the happiness and free institutions of the country. But under our former system we were becoming too selfish, too much attached exclusively to the acquisition of wealth, above all, too much confined in our political feelings to local and state objects. The war has renewed and reinstated the national feelings and character which the Revolution had given, and which were daily lessened. The people have now more general objects of attachment with which their pride and political opinions are connected. They are more American; they feel and act more as a nation; and I hope that the permanency of the Union is thereby better secured.[2]

On a more specific and political level, control of the federal government had fallen into the hands of a group of visionary and optimistic Jeffersonians who generally shared a common desire to encourage American economic development, a nationalist interpretation of the Constitution, and an elitist view of how the political process should operate. This group was mainly made up of a new and rising generation of Americans and was personified by Henry Clay, John C. Calhoun, John Quincy Adams, William Lowndes, Langdon Cheves, Samuel Smith, Nicholas Biddle, and Joseph Story. Their agenda included an expansion of national institutions that would have the power to override the activities of the state governments. Just how far some of these nationalists wanted to go in their antagonism toward local prerogatives is laid out in unusually frank terms by U.S. Supreme Court associate justice Joseph Story in a letter written in February 1815:

> Never was there a more glorious opportunity for the Republican party to place themselves permanently in power. . . . Let us extend the national authority over the whole extent of power given by the Constitution. Let us have great military and naval schools; an adequate regular army; the broad foundation laid of a permanent navy; a National bank; a national system of bankruptcy; a great Navigation act, a general survey of our ports, an appointment of port wardens and pilots; Judicial Courts which shall embrace the whole Constitutional powers; national notaries; public and national justices of the peace, for

> the commercial and national concerns of the United States. By such enlarged and liberal institutions the Government of the United States will be endeared to the people, and the factions of the great states will be rendered harmless.[3]

I

The U.S. Supreme Court spearheaded the movement toward nationalism. Ever since its inception under the U.S. Constitution, adopted in 1788, it had been a source of political and ideological controversy. Unlike Articles I and II of the Constitution, which created the Congress and the office of the president and explicitly indicated how they were to be put into operation, Article III, which dealt with the federal courts, needed legislation to be put into operation. The Constitution mandated the creation of the Supreme Court, but did not give any indication as to its size or the qualifications of its members. The Constitution provided for federal judges to be appointed by the president with the approval of the U.S. Senate, but it was left up to Congress to decide whether or not some kind of lower federal court system was needed at all. It also indicated that the Supreme Court was to be mainly a court of appeals with original jurisdiction in only a few relatively minor matters, but did not delve into how appeals were to be made from the lower courts. As a result, the Judiciary Act of 1789 and the Process Acts that immediately followed it became one of the earliest and most significant pieces of legislation adopted by the First Congress. They provided that the Supreme Court should consist of a chief justice and five associate justices. Also, they organized an elaborate lower federal court system made up of district courts, which dealt mainly with admiralty questions, and circuit courts, which were courts of original jurisdiction in civil and criminal matters; both of these courts were to meet in different locales throughout the new nation. Although the Judiciary Act of 1789 was clearly a victory for the advocates of a strong and active national government, it was only a qualified victory: it did not give the federal courts exclusive jurisdiction on all matters dealing with federal law, since it also gave the state courts original and concurrent jurisdiction in many of those areas.[4]

The Judiciary Act of 1789 did explicitly deal with one question that had been the source of much debate since the Revolution and the creation of a central government under the Articles of Confederation: to what extent and in what manner could the federal government review and even reverse actions taken by the state governments that violated the powers and authority of the federal government? Under the Articles of Confederation written in 1777 and ratified in 1781, no provision was made to deal with this problem. It did not create a national judiciary, and while the Continental Congress under the Articles of Confederation had the power to create ad hoc courts to deal with disputes between different states, the decisions of the courts were nonenforceable. At the Philadelphia Convention which drafted the U.S. Constitution in the summer of 1787, the matter came up once again. The Virginia Plan, written by James Madison and presented by Edmund Randolph, which was the core document from which the Constitution eventually evolved, contained a provision granting to Congress the power "to negative all laws passed by the several states, contravening in the opinion of the National Legislature the articles of the Union," but it never made it to the final draft of the Constitution.[5] Instead, Article VI of the U.S. Constitution provided:

> This Constitution and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

Often referred to as the supremacy clause of the U.S. Constitution, it would seem to have settled the matter, except that it did not indicate what judges or other bodies were to decide when a state law or judicial ruling was contrary to the Constitution, a federal law, or a treaty made by the national government. Congress explicitly dealt with this problem in section 25 of the Judiciary Act of 1789 by granting the U.S. Supreme Court the right to reverse state actions that involved the federal Constitution and the laws or treaties of the United States.[6] But this was not the same thing as having the power provided for in the Constitution

itself. For if this power were contained in the Constitution itself, to eliminate or alter it would necessitate an amendment to the Constitution, which requires a two-thirds vote of both houses of Congress and the approval of three-quarters of the states. These kinds of majorities are, of course, very difficult to obtain. On the other hand, the Judiciary Act of 1789 was legislative law that could be altered by a majority vote of both houses of Congress, or even challenged on the grounds that it was unconstitutional.

II

Federal-state relations were central to two key decisions handed down by the U.S. Supreme Court during the 1790s. According to the Constitution, federal courts had jurisdiction over "controversies between a state and citizens of another state." When a South Carolina creditor sued the state of Georgia, the state denied the Supreme Court's jurisdiction on the grounds that Georgia had sovereign immunity, and refused to appear. The Supreme Court decided in the South Carolina creditor's favor and handed down an ultranationalist opinion that denied Georgia's sovereignty.[7] The response came quickly, at least by eighteenth-century standards. The Eleventh Amendment to the Constitution was proposed and ratified in 1798, denying jurisdiction to federal courts in suits by citizens of another state or country "against one of the United States." In another decision, *Ware v. Hylton* (1796), the Supreme Court overturned state laws that impeded the recovery of debts owed by Americans to British creditors, since their collection had been guaranteed by the peace treaty with Great Britain (1783) that ended the Revolutionary War, on the grounds that it had supremacy over state laws.[8]

This spirit of nationalism was not unopposed. The United States in the late eighteenth and early nineteenth centuries also had a vigorous and persistent states' rights tradition. It had its origins in the different and unconnected ways that the various colonies had been settled and developed. For many, the American Revolution bolstered this particularism because it had been fought against the only central government the Americans had ever known: Great Britain. Many others also associated