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### *McCulloch v. Maryland* and John Marshall's Judicial Statesmanship

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John Marshall is “universally referred to as ‘the great Chief Justice,’” as his more recent successor, William Rehnquist, aptly observed.<sup>1</sup> But was the great chief justice a judicial *statesman*? Was his opinion for the unanimous Court in *McCulloch v. Maryland* an act of judicial statesmanship?

It is not unreasonable to suggest, as Justice Felix Frankfurter did, that *McCulloch* was Marshall’s “greatest single judicial performance.”<sup>2</sup> But to declare it an act of judicial *statesmanship* requires us to ascertain what “judicial statesmanship” is—indeed, to ascertain that constitutional judges can and should be “statesmen” at all.

Notions of statesmanship fit uneasily with our view of judges. It is one thing to observe that a judge’s personal qualities are statesmanlike; it is quite another to suggest that the judge’s *jurisprudence* is statesmanlike.<sup>3</sup> If we see the judge’s work as “lawyers’ work,” requiring only “a close examination of the text, history of the text, traditional understanding of the text, and so forth,”<sup>4</sup> then it is not obvious how notions of statesmanship could ever be relevant to the judge’s work, let alone virtuous. Circumscribing the work of a constitutional judge in such terms, any judicial effort to conserve a court’s “political capital” in light of public opinion “will itself detract from the very political capital that judicial statesmanship seeks to preserve,” as one thoughtful scholar recently contended.<sup>5</sup>

But as Publius recognized, the judge’s work is not merely a matter of interpretation narrowly conceived, but a matter of judgment by which the courts adjudicate cases by interpreting and applying the laws with an eye to the proper and limited constitutional role of courts in our constitutional republic.<sup>6</sup> In this we see room for a form of judicial statesmanship, one

roughly akin to the statesmanship of Edmund Burke—and one that Marshall’s opinion for the Court in *McCulloch* exemplifies.

### On Judicial Statesmanship

Discussions of “judicial statesmanship” start from particular (and particularly recent) notions of both statesmanship and the judicial office. But to best understand judicial statesmanship, we should begin with older and better notions of both.

**Tocquevillian Judging and Judicial Statesmanship.** As with so many other matters, notions of judicial statesmanship can be traced to the “perceptive Frenchman,”<sup>7</sup> Alexis de Tocqueville. Reporting on the young American republic, Tocqueville concluded that federal judges “must not only be good citizens” but must even be statesmen.

Federal judges . . . must not only be good citizens, educated and upright men—qualities necessary to all magistrates—*one must also find statesmen in them*; they must know how to discern the spirit of their times, to confront the obstacles they can defeat, and to turn away from the current when the flood threatens to carry them away with the sovereignty of the Union and the obedience due its laws.<sup>8</sup> (Emphasis added.)

Tocqueville’s assessment of federal judges followed from his assessment of the Supreme Court’s then-seven justices. His account sometimes risks grandiosity: “In the hands of seven federal judges rest ceaselessly the peace, the prosperity, the very existence of the Union,” such that while “the president can fail without the state’s suffering,” the corruption of the Supreme Court could well bring “anarchy or civil war.”<sup>9</sup> But if Tocqueville’s rhetoric occasionally went too far, the heart of his assessment of judges was subtle, realistic, and accurate: Their power is “immense; but it is a power of opinion. They are omnipotent as long as the people consent to obey the law; they can do nothing when [the people] scorn it.”<sup>10</sup>

And, he warned, the people would be more likely to scorn judges' decisions in controversial cases if the people saw the judges as willfully and eagerly reaching out for matters to decide, instead of waiting passively for cases to reach them—a risk that seems particularly significant in a nation where, as Tocqueville famously observed, “almost no political question in the United States . . . is not resolved sooner or later into a judicial question.”<sup>11</sup>

For Tocqueville, then, the key to a judge's self-preservation is ultimately his self-restraint and subtlety in service of a republican rule of law. Because the judge does not “take the initiative” or “attack laws in a theoretical and general manner,” he does not “[enter] onto the political stage with a bang.” Instead, “when the judge attacks a law in an obscure debate and over a particular application” in cases brought to him by parties, “he in part hides the importance of the attack [on a statute] from the regard of the public.”<sup>12</sup>

In sum, by Tocqueville's appraisal, “the American judge is led despite himself onto the terrain of politics. He judges the law only because he has to judge a case, and he cannot prevent himself from judging the case.”<sup>13</sup> But even against the backdrop of judicial self-restraint, the Tocquevillian judge is a “statesman” only to the extent that he can successfully “discern the spirit of their times, to confront the obstacles they can defeat, and to turn away from the current when the flood threatens to carry [them] away.”<sup>14</sup>

Largely absent from Tocqueville's seminal account of judicial statesmanship, however, is an account of judicial interpretive methodology. Tocqueville recognizes that the Constitution is “the first of laws” and thus commands judges' obedience above all other law,<sup>15</sup> but he specifies no interpretive methodology for judges to apply in the adjudication of cases under the Constitution. This silence on judicial interpretive methodology places Tocqueville at a remove from modern debates over the Supreme Court's work; in the era of textualism, methodology is at the center of debate, and increasingly it is the exclusive focus.

**20th-Century Judicial Statesmanship.** “Let me timidly suggest caution in the use of the word *statesmanship* with regard to judges,” Justice Oliver Wendell Holmes wrote to Professor Felix Frankfurter in 1923, for “the word suggests a more political way of thinking than is desirable and

also has become slightly banal.”<sup>16</sup> (First emphasis added; second emphasis omitted.) Perhaps Holmes was gently rebuffing Frankfurter’s suggestion, just months earlier in a tribute to Holmes himself, that the Supreme Court’s development of “constitutional law,” especially on questions of federalism and the separation of powers, “plainly” requires the justices to “move in the field of statesmanship.”<sup>17</sup> What Frankfurter meant precisely by this “statesmanship” is not obvious: Sometimes he applies the term in service of syrupy sycophancy;<sup>18</sup> elsewhere he undercuts his own cause by dubiously or at least imprudently bestowing the title “statesman” on the infamous Chief Justice Roger Taney, whose “statesmanship on the Bench has unfortunately been obscured by the tragic dicta of the *Dred Scott* case.”<sup>19</sup>

But in the final analysis, Frankfurter seems to define judicial statesmanship as something untethered to constitutional text. He declares the Court’s commerce clause decisions to be unambiguous “acts of statesmanship,” for the Court “has drawn its lines where it has drawn them because it has thought it wise to draw them there. The wisdom of its wisdom *depends upon a judgment about practical matters and not upon a knowledge of the Constitution.*”<sup>20</sup> (Emphasis added.)

Frankfurter’s own nebulous view of judicial statesmanship echoes throughout his other writings, but he did not venture a coherent and complete analysis of the subject. Collecting some of these scattered fragments, Gary Jacobsohn observes that while “Frankfurter’s stand on the *importance* of judicial statesmanship is thus clear[,] his views on *how* a jurist might fulfill the statesman’s role are considerably less so.”<sup>21</sup> (Emphasis added.)

Decades later, Neil Siegel offered a more thorough account of judicial statesmanship, one defined in terms of the law’s “social legitimacy.” Siegel proposed that “judicial statesmanship charges judges with approaching cases so as to facilitate the ability of the legal order to legitimate itself over the long term” by accomplishing two objectives: “expressing social values as social circumstances change and sustaining social solidarity amidst reasonable, irreconcilable disagreement.”<sup>22</sup> Siegel traces the former goal, the expression of social values, to the mid-20th-century legal process school of Henry Hart, Herbert Wechsler, and Albert Sacks<sup>23</sup>; he traces the latter goal, sustaining social solidarity, to John Rawls and others.<sup>24</sup>

Defined in these terms, Siegel's judicial statesman labors to bring legal texts forward to catch up with social progress—approaching cases “so as to enable the legal system to maintain pace with those changes, to ‘bring the public administration of justice into touch with changed moral, social, or political conditions.’”<sup>25</sup> Yet at the same time, the judicial statesman “must shape and refine as he expresses,” claiming responsibility for “authoritatively expressing certain values and not others, with putting the power and prestige of the law behind the ones they embrace in an effort to ‘sort out the enduring values of a society.’”<sup>26</sup> To that end Siegel quotes Alexander Bickel's *Least Dangerous Branch: The Supreme Court at the Bar of Politics*, although his vision of statesmanship seems not entirely consistent with Bickel's own approach, which has the court “keeping pace with” social change instead of leading the people by cooling the passions of a public that would “ordinarily prefer to act on expediency rather than take the long view.”<sup>27</sup>

Siegel, anticipating the criticism that his judicial statesman is unmoored from actual law, reassures the reader that “this is hardly to suggest that ‘anything goes’ in the realm of judicial statesmanship.”<sup>28</sup> But to define the set of what “goes,” he offers only a tautology: “The Court labors under the obligation to succeed.”<sup>29</sup> (Quotation marks omitted.) If his entire approach suffers from “vagueness,” then it cannot be helped because “vagueness is to be expected when the purposes of law that statesmanship seeks to accomplish are multiple and relate paradoxically.”<sup>30</sup> And in the end, Siegel joins Frankfurter in defining “judicial statesmanship” in conflict with originalist interpretation of statutory text: “Statesmanship can take some of the pressure off of” otherwise originalist judges such as Antonin Scalia, whose resort to *stare decisis* as a brake on pure textualism suggests to Siegel that “judges cannot proceed with strictly originalist premises because law *must* express evolving social values.”<sup>31</sup> (Emphasis added.)

In the decades between Frankfurter and Siegel, however, Professor Harry Clor attempted to connect judicial statesmanship to constitutional interpretation somewhat more directly. Writing near the end of the Warren Burger Court, still in the wake of the Earl Warren Court, Clor recognized that “embattled adversaries of an aggressive, policy-making judiciary tend to shun, when they do not positively denigrate, the concept that judges

can be statesmen.”<sup>32</sup> Yet while sharing much of the criticism of progressive judicial activism, he did not share the aversion to judicial statesmanship and instead advanced a version of statesmanship that rooted judicial discretion in the country’s tradition.

Starting from Tocqueville’s own aforementioned writings on judging and judicial statesmanship, Clor embraces a view of the Supreme Court that “hardly looks like a simple court of law” but which “must possess and exercise considerable political judgment, including judgment about the temper of public opinion and consequently about what is possible or impossible to accomplish (or dangerous to attempt) by judicial decisions.”<sup>33</sup> Clor restates Tocqueville’s observations as an argument that “the power of the courts depends upon public respect for the law,” which in turn “depends upon the moral authority of the idea of law.”<sup>34</sup> This in turn requires the Court to promote, not impair, the public’s respect for the law. That final task requires not just the skills of interpreting legal documents but also the capacity for “political prudence” and “the need for judges who can be moral educators” akin to Ralph Lerner’s circuit-riding “republican schoolmasters.”<sup>35</sup>

Clor recognizes that judicial invocation of values outside the legal text itself requires the striking of a delicate balance: Reliance on certain “regime considerations” is necessary to lend the Court’s decisions the ballast of political support and sustainability, but there must not be too much of a good thing for “frequent and dramatic reliance upon constitution-transcending norms is likely to disrupt the continuity or stability of the law and undermine the people’s confidence that the law is ruling.”<sup>36</sup> (On this point Clor’s approach resembles Publius’ warning that if the courts are seen as “substitut[ing] their own pleasure to the constitutional intentions of the legislature,” then they risk the courts’ own political legitimacy.<sup>37</sup>) But this, then, is the judgment that undergirds judicial statesmanship: to grapple “to discern that *this* is or is not the appropriate time (or case), and to discern *how* the ethical standard can be incorporated in the law without injury to it—these are tasks calling for something more than the capacities of a good lawyer.”<sup>38</sup> (Second emphasis added.)

For much of the analysis, Clor harkens to Chief Justice Marshall’s example. On the question of state power and private rights in *Fletcher v. Peck*,<sup>39</sup> for example, Marshall faced a challenge that called “for something more

persuasive than an ordinary legal judgment based on technical analysis of the language of constitutional clauses,” but rather “for an appeal to large principles which are common to our free institutions . . . to preserve respect for the Constitution as law while periodically calling attention to the political theory which supports and guides the law.”<sup>40</sup> Clor contrasts his approach with the then-contemporary “non-interpretivist doctrines” prevailing on the left, especially the “democratic process rationale” advanced by John Hart Ely’s *Democracy and Distrust: A Theory of Judicial Review* and the moral-right rationale of Ronald Dworkin’s *Taking Rights Seriously*.<sup>41</sup> All these approaches, Clor concludes, “reflect very little disposition to preserve; they are, for the most part, strikingly present-oriented or forward-looking doctrines.”<sup>42</sup>

But, perhaps more importantly, Clor also contrasts his approach with the proto-textualism of conservatives such as Professor Raoul Berger, who “would confine the Supreme Court Justice almost entirely to the role of a legal and linguistic historian,” which Clor sees as insufficient for judicial resolution of questions arising from at least the more “amorphous constitutional provisions,” if not even the ones (such as the Fourteenth Amendment) that Berger saw as straightforward.<sup>43</sup> For Clor, judicial statesmanship arises when “recourse must be had to considerations beyond the written Constitution” and “the judge is obliged to take his direction from regime principles.”<sup>44</sup>

This conservative argument for judicial statesmanship spurred a conservative response. Matthew Franck’s disagreement with Clor traces to a deeper disagreement with Tocqueville over whether Supreme Court justices should attempt statesmanship at all. Franck agrees with Clor’s reading of Tocqueville as describing a “judicial statesmanship” that demands significant “political judgment.” But Franck, unlike Clor, finds Tocqueville’s own approach to be profoundly misguided<sup>45</sup> because judges must not “attend to the state of [public opinion] when rendering judgment.”<sup>46</sup>

Franck roots his own rejection of judicial statesmanship in an understanding of the *Federalist* that locates statesmanship in the president and the Senate, not the courts.<sup>47</sup> True, Publius indicates in *Federalist* 78 that judges must be (in Franck’s words) “men a cut above the ordinary,” but this is not to say that the judges would be *statesmen* exercising political judgment.<sup>48</sup> Rather, *Federalist* 78 calls for judges who are “faithful guardians

of the Constitution,” ensuring “inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice.”<sup>49</sup> Thus, Franck concludes, any theory of “judicial ‘statesmanship’” that relies on judicial consideration of values not bound up in the constitutional text itself “is not only ungrounded in the Framers’ thought but is an impeachable offense.”<sup>50</sup>

Franck’s account differs starkly from the others in his appraisal of judicial statesmanship, seeing a vice where Frankfurter, Siegel, and Clor see virtue. But he agrees with them on a more fundamental premise: that judicial statesmanship, as they see it, is a matter of *supplementing* constitutional text with other values to reach a decision that brings the court and thus the country beyond the limits of constitutional text to a judicial decision that cannot be justified by constitutional text alone. Frankfurter’s judicial statesmanship justifies commerce clause decisions at odds with the clause’s original meaning; Siegel stresses that judicial statesmanship cannot be squared with any version of originalism save for the most faint-hearted<sup>51</sup> variety, in which originalism expressly concedes the point to other values; Clor’s judicial statesmanship occurs when “recourse must be had to considerations beyond the written Constitution” and “the judge is obliged to take his direction from regime principles.”<sup>52</sup>

Franck agrees with them, and for that very reason he finds judicial statesmanship at odds with a judge’s exercise of the Constitution’s judicial power because judges violate the Constitution when they purport to add to it.<sup>53</sup> But what if all of them, in their unanimity, are unanimously wrong? That is, what if we think of statesmanship not as a matter of *assertion*, but as a matter of *restraint*?

**Judicial Statesmanship and Restraint.** In his *Thoughts on the Cause of the Present Discontents*, Edmund Burke begins on a hesitant note: “It is an undertaking of some degree of delicacy to examine into the cause of public disorders.”<sup>54</sup> In this description of the danger Burke faced, Professor Harvey C. Mansfield finds not an “accidental” vagueness, but the “intended and studied” vagueness of a statesman.<sup>55</sup>

For as Mansfield observes, Burke’s “statesmanship must lack candor and use rhetoric.”<sup>56</sup> Burke’s restraint, Mansfield explains, reflects a statesmanship that differs from that of Frankfurter and the rest, though as we



shall see later on, it seems much more reflective of Marshall's approach in *McCulloch*. Mansfield's statesmanship begins similarly to the others: "Statesmanship is the capacity to do what is good in the circumstances, a capacity in which men, as individuals, are variously accomplished."<sup>57</sup> But the similarity between his statesmanship and the others' ends there.

As Mansfield further observes, Burke's own goal of establishing respectable party government required a particular type of statesmanship: that which is capable of winning good men's support for "honest principle," to which end the statesman "shocks no sensibilities" but instead "sacrifices some of the clear discernment" that he might otherwise employ were it not politically counterproductive.<sup>58</sup> This is not a matter of the statesman casting principles aside, but rather a matter of the statesman presenting those principles in a way that is not counterproductive.

It is not that a statesman is unprincipled or above principle; it is rather that his principle loses its refinement in the translation to public speech, and thence to party program. In such translation, a principle must be defensible as well as practicable; and defensible not to a public ready to be impressed by great statesmen, but to a party eager to correct a seeming unconformity and to a public taught to reward partisanship.<sup>59</sup>

Burke himself admits this, as Mansfield emphasizes, from the outset of his *Thoughts on the Cause of the Present Discontents*. "The temper of the people amongst whom he presides ought therefore to be the first study of a statesman."<sup>60</sup>

So, when Burke ventures to "radically [reinterpret]" Britain's limited monarchy to more closely approach popular government, for example, Burke "does not go so far as to" actually "give it a new name, popular government."<sup>61</sup> Unlike James Madison's arguments in the *Federalist*, Burke presents his own program in a way that "never flaunts its novelty."<sup>62</sup> If Burke violates "the usual rule of prudence in private men with regard to politics" (i.e., "silence"), he at least recognizes "the general duty of reserve."<sup>63</sup>

By resolving older notions of statesmanship to newer necessities of party government, Burke "reduced statesmanship to the rules of prudence,

in order to serve the needs of party government.” Thus, even when Burke’s new statesman agrees with others as to certain ends, he might differ significantly from them in his assessment of how best to further those ends. Burke’s new statesman recognizes the need “to further [one’s] ends less precipitously.”<sup>64</sup> As we shall next see, the same can be said of Chief Justice Marshall’s opinion for the Court in *McCulloch v. Maryland*.

### **The Great Chief Justice’s Restrained Opinion for the Court in *McCulloch v. Maryland***

We are by now well accustomed to accounts of *McCulloch v. Maryland* that exalt the great chief justice in the grandest terms—if not world historic, then at least nation defining. For example, *McCulloch* arrived with Marshall’s other later opinions, such as *Gibbons v. Ogden*, “like thunderbolts from on high”—with Marshall, “the American Law Giver, proclaim[ing] to all Americans what thou *shalt* and *shalt* not do.”<sup>65</sup> Others said *McCulloch* was “a ringing restatement of national supremacy,” whose “eloquent phrases have been invoked repeatedly by later generations . . . to justify the expansion of national authority at the expense of the states.”<sup>66</sup> Or, *McCulloch*’s approval of Congress’ power to charter a national bank “was nothing less than a universal touchstone to constitutional interpretation . . . a transcendent opinion that guaranteed” Marshall’s place in history.<sup>67</sup> Finally “what was really at stake in *McCulloch*, with respect to the implied powers issue, was not whether Congress could create national banks but whether the Court would find Congress’s unenumerated but implied sovereign powers to be vast.”<sup>68</sup>

But while *McCulloch* was indeed one of the most significant decisions in Supreme Court history, such exalted characterizations of Chief Justice Marshall’s handiwork obscures the crucial self-restraint that genuinely defines Marshall’s accomplishment. And here I mean not the self-restraint of a Court deferring to Congress’ interpretation of the breadth of its powers (for which *McCulloch* is commonly understood), but rather the self-restraint of a chief justice and Court quietly eschewing much broader and more aggressive arguments in favor of national power, resting instead on narrower and subtler grounds.

David Schwartz highlights this in his deft and compelling article challenging century-old conventional wisdom about *McCulloch*. In “Misreading *McCulloch v. Maryland*,” his 2015 study of the chief justice’s opinion for the Court and the legal arguments that gave rise to it, we see clearly a chief justice silently eschewing the most controversial argument proffered by the bank’s proponents.<sup>69</sup> And with that in mind, we can best understand this as a chief justice exemplifying self-restraint in a spirit of Burkean statesmanship, looking first to what Marshall said and then to what he left unsaid.

**The Bank and the Broader Debate.** The Court’s decision in *McCulloch* resolved a debate that had begun three decades earlier, with Alexander Hamilton’s thorough proposal for a national bank in his *Second Report on the Further Provision Necessary for Establishing Public Credit*. Hamilton’s report advanced myriad justifications for a national bank: It would be a source of emergency liquidity for the government and would facilitate the payment of taxes to the government, it would grow national wealth, and it would help control the money supply.<sup>70</sup> His arguments moved Congress to pass the Bank Bill in 1791, over the constitutional objections of Rep. James Madison, who at the Constitutional Convention four years earlier had unsuccessfully proposed to empower Congress to “grant charters of incorporation where the interest of the U.S. might require.”<sup>71</sup>

When Attorney General Edmund Randolph and Secretary of State Thomas Jefferson supplied President George Washington with memoranda criticizing the constitutionality of a national bank, Hamilton replied with yet another memorandum of his own, adding yet another argument in favor of the bank—namely, that Congress’ power to charter a national bank is, like its power to construct lighthouses and other aids to navigation, a power granted not expressly by the constitutional text but allowed by the Constitution’s commerce clause, its necessary and proper clause, and the “sound maxim of construction namely, that the powers contained in a constitution of government, especially those which concern the general administration of the affairs of a country, its finances, trade, defence &c ought to be construed liberally, in advancement of the public good.”<sup>72</sup> Finally, Hamilton argued that the power to charter a national bank followed from the Constitution’s grant of power to tax, spend, borrow, and

coin money, and even that the power to charter a national bank inhered in the sovereignty of all nations.<sup>73</sup>

Washington signed the Bank Bill in 1791. Twenty-five years later, after the bank's first charter expired, the bank was rechartered by legislation signed by the bank's previous critic, President Madison, who by 1816 saw the bank as justified in light of present exigencies, if not necessary and proper for all times. The legislative debate was marked by Rep. John C. Calhoun's Hamiltonian arguments, contending that a national bank was justified by Congress' constitutional power to tax, its power to coin money, and "the broad claim that currency control is an inherent attribute of sovereignty."<sup>74</sup>

Accordingly, when the Supreme Court received the litigation over the bank's constitutionality—arising from Maryland's lawsuit attempting to force the bank to pay taxes and penalties under state law—Marshall knew well the arguments for and against the bank. Indeed, his *Life of George Washington* recounted the debates for and against the bank, including Hamilton's arguments.<sup>75</sup>

And, as Schwartz observes, Marshall was well acquainted with not just the constitutional arguments raised during the decades-long debates around the national bank's constitutional legitimacy but also the much larger debates over national power, of which the bank debate was just one iteration. In that respect, legal debates surrounding the bank were recognized as reflecting arguments over internal improvements and the rest of Henry Clay's "American System," including the debate over whether Congress had implicit power to build internal improvements pursuant to the Constitution's commerce clause or other provisions.

"The arguments pro and con had been extensively debated in Congress and between Congress and three successive presidents," Schwartz writes. "The Bank controversy itself cannot be fully understood without reference to the rest of the American System," for "the arguments for congressional power embraced or ignored in the Bank debate"—especially with respect to the proper interpretation of Congress' enumerated constitutional powers and the breadth of its implied constitutional powers—"would also have had implications readily apparent to lawmakers at the time for the internal improvements question." As Marshall himself observed in *The Life of Washington*, "this great and radical division of opinion" over the bank

“would necessarily affect every other question on the authority of the national legislature.”<sup>76</sup>

When the bank issue reached the Supreme Court in *McCulloch*, for oral argument over nine days, the bank’s lawyers—William Pinkney, Daniel Webster, and Attorney General William Wirt—did not hesitate to assert the broad arguments for constitutionality that had obvious ramifications for internal improvements.<sup>77</sup> Thus, when the case arrived at Court, the bank issue, however momentous it might have been, was overshadowed by the still greater issues of internal improvements and federal power that possibly hinged on the Court’s eventual decision. Yet the chief justice, writing for the Court, took a markedly different approach.

**The Court’s Opinion: What Chief Justice Marshall Said.** “No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision.”<sup>78</sup> From its first paragraph onward, Chief Justice Marshall’s opinion for the Court evoked a sense of obligation, self-restraint, and respect for settled institutions. In all this, the words that Chief Justice Marshall offered in explaining the Court’s judgment exemplified Tocquevillian judicial statesmanship. Without reciting the Court’s opinion in full, a few aspects deserve particular attention.

Marshall’s opinion begins by recognizing the gravity of the matter, the parties’ dispute cutting all the way down to the first principles of American constitutionalism: “The Constitution of our country, in its most interesting and vital parts, is to be considered, the conflicting powers of the Government of the Union and of its members, as marked in that Constitution, are to be discussed, and an opinion given which may essentially influence the great operations of the Government.”<sup>79</sup> But upon emphasizing the gravity of the case, Marshall immediately turned to *minimizing* the Court’s place in the dispute, framing the Court not as powerful but as constrained—not as *empowered* to act but as *obligated* to act.

No tribunal can approach such a question without a deep sense of its importance, and of the awful *responsibility* involved in its decision. But it *must* be decided peacefully, or remain a source of hostile legislation, perhaps, of hostility of a still more serious nature; and if it is to be

so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the Constitution of our country devolved this important *duty*.<sup>80</sup> (Emphasis added.)

Marshall returned to this theme—accepting obligations, disclaiming power—at the end of his opinion’s first part. Having explained why the bank is constitutional (for reasons to which I will turn shortly), Marshall emphasized that if the bank were not justified, then “it would become the painful *duty* of this tribunal” to declare the bank unconstitutional.<sup>81</sup> (Emphasis added.) And he even casted the bank’s *critics*, rather than its proponents, as the ones urging the Court to aggrandize power to itself.

But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the decree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. *This Court disclaims all pretensions to such a power*.<sup>82</sup> (Emphasis added.)

In all this, Marshall’s approach exemplifies Tocqueville’s description of judges wielding political power reluctantly, being led into the political arena not by their own ambition: “The American judge is led despite himself onto the terrain of politics. He judges the law only because he has to judge a case, and he cannot prevent himself from judging the case.”<sup>83</sup>

Having set the stage, Marshall justified the bank’s constitutionality by responding to Maryland’s arguments against it. Here, too, Marshall’s analysis is one of constraint rather than empowerment because he presented the Court as largely constrained by the weight of decades of precedent surrounding the institutions of government, which place obligations on courts.

Has Congress power to incorporate a bank?

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.

It will not be denied that a bold and daring usurpation might be resisted after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted, if not put at rest by the practice of the Government, ought to receive a considerable impression from that practice. An exposition of the Constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.<sup>84</sup>

Among those who “said . . . that this can scarcely be considered as an open question” were President Madison, a critic of the First Bank of the United States but now a proponent of the Second Bank. He made this point in his 1815 veto message to Congress, explaining why an earlier version of the Second Bank was bad policy but not unconstitutional: “The question of the constitutional authority of the Legislature to establish an incorporated bank” was “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>85</sup> Madison’s 1815 statement, though seemingly at odds with his opposition to a national bank decades earlier in the first Congress, exemplified his recognition in *Federalist* 37 that the Constitution’s words are often best understood in light of the actual practice of government: “All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”<sup>86</sup>

Having presented himself as doubly obligated—first by his duty to hear the momentous case and second by his duty to defer to the weight of historical precedent—the chief justice then proceeds to the merits of the constitutional question. But even here, Marshall further frames the question by the past several decades of the nation’s actual governance and institutional weight. Marshall understands that the Constitution is one of

“enumerated powers” and that enumeration includes no power “of establishing a bank or creating a corporation,” but he concludes that incorporating the bank was Congress’ reasonable means for carrying into execution the other “great powers” of government: “to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies.”<sup>87</sup> And he invokes these powers not as abstractions, but in the concrete terms of the nation’s decades of growth and governance.

Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the Nation may require that the treasure raised in the north should be transported to the south that raised in the east, conveyed to the west, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise, by withholding a choice of means?<sup>88</sup>

From these premises, Marshall undertakes his seminal analysis of the bank as being Congress’ “necessary and proper” means for executing the Constitution’s “great powers.” Focusing not on an abstraction of national banking power but on the actual bank embodying decades of practical experience, and then situating that bank in the “vast republic” as it then existed, Marshall’s justification for the bank reflected not abstractions but institutional weight and practical reality.

This was the frame in which the chief justice engaged Maryland’s arguments. The Constitution lacked an express legislative power to incorporate a bank, but the bank was “a means by which other objects [of the Constitution] are accomplished.”<sup>89</sup> And the bank was a sufficiently “necessary and proper” means to administering the legislative branch’s constitutionally granted “great powers”—putatively the maintenance of armies and navies and the transportation of federal funds<sup>90</sup>—because Congress



was not unreasonable in choosing the bank as a means to its ends.<sup>91</sup> When Maryland urged the Court to construe “necessary and proper” in the strictest possible sense of “necessary,” the Court preserved room not just for Congress’ “capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances”<sup>92</sup> but also for “the good sense of the public” to endorse operations of government as constitutionally necessary and proper though not *strictly* necessary.<sup>93</sup>

In all this, the chief justice presented himself not just doubly obligated but triply so. As noted above, he expressly observed that he was obligated to decide the case and that he owed deference to the weight of historical precedent. But his legal analysis, rooted firmly in the actual functioning of government, conceded his obligation to decide the case in light of the concrete choices faced by Congress and the people that elected it.

**The Court’s Opinion: What Chief Justice Marshall Left Unsaid.** Chief Justice Marshall’s opinion for the Court summarizes Maryland’s arguments against the bank and offers responses drawn directly from the bank’s lawyers’ own arguments. But as Schwartz observes, to focus on the chief justice’s words is to miss the most important part of his famous opinion—namely, the words he left unsaid, the arguments he left unnoted.

These arguments [against the bank] are familiar to us because Marshall summarizes them as he proceeds to rebut them. Marshall’s rebuttals are all adopted from arguments of the Bank’s counsel, which in turn are thus familiar to us, even though Marshall understandably asserts them as the Court’s opinion without attribution. . . . What makes the oral argument worth a close read is to identify arguments made but *not* addressed or adopted in the *McCulloch* opinion; these show the limits of what Marshall was willing to do to advance the cause of nationalism in *McCulloch*.<sup>94</sup>

In other words, Marshall’s narrow grounds for decision—namely, that after decades of operation, the national bank’s status as “a convenient, a useful, and essential instrument in the prosecution of its fiscal operations” can no longer be “a subject of controversy”<sup>95</sup>—delivered victory to the bank but withheld from proponents of national power a much broader and

more consequential victory and thus withheld from *opponents* of national power a much more controversial and threatening edict. In affirming the bank, Marshall's opinion gave his fellow nationalists a victory in this particular debate and great reason for optimism in future debates over national power, but it withheld any express judicial endorsement of the broader national agenda.

First, by affirming the bank as an essential instrument of Congress' "fiscal operations" without more specific explanation, Marshall delivered an opinion sufficiently vague to let both sides in the larger federal power debate declare victory or at least maintain that the larger debate was not lost: "Nationalists could claim that fiscal operations related to multiple powers . . . and all Jeffersonians (even perhaps hard line strict constructionists) might have noted that Marshall did not endorse a general governmental power to regulate the currency."<sup>96</sup>

Second, even when he suggests that the power to charter a bank was not "the end for which other powers are exercised, but a *means* by which other objects are accomplished,"<sup>97</sup> (emphasis added) Marshall subtly stops short of expressly describing precisely *which* great "objects" of national power are being accomplished, and thus he leaves his fellow nationalists without a foothold for future assertions of national power. Marshall makes general reference to some of the federal government's "great powers," especially its military and fiscal powers, but he stops short of identifying either of them (or any other of Congress' enumerated legislative powers) as the crux of the Court's analysis, the starting point for the next advance by proponents of national power. His construction of the necessary and proper clause is famous: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional."<sup>98</sup> But it assumes a "legitimate" end of government without precisely specifying it.

"Reading the opinion carefully," Schwartz observes, "one sees that Marshall never actually applies his own test of 'necessary and proper' laws to the Bank." But while prominent scholars have speculated that Marshall's opacity reflects his desire to reach a pro-nationalist result that could not actually be achieved on the merits under public scrutiny, Schwartz sees precisely the opposite explanation: Marshall had the bank's counsel's

arguments at his disposal; he could “easily” have declared the bank to be a necessary and proper means for carrying out Congress’ powers to tax, borrow, declare war, or regulate interstate commerce, but he chose another path instead, “avoid[ing] the analysis” to make the Court’s decision “less nationalistic, not more.”<sup>99</sup>

Similarly, Chief Justice Marshall’s opinion “steers entirely clear” of arguments advanced by Webster, Calhoun, Pinkney, and Hamilton with obvious ramifications for internal improvements: Pinkney’s invocation of Congress’ building of lighthouses and other internal improvements that, like the bank, were not expressly allowed under the Constitution; Webster’s argument’s invocation of the commerce clause; or Hamilton’s and Calhoun’s arguments that a national bank supports Congress’ assumed power to impose a “uniform national currency.”<sup>100</sup>

Finally, Schwartz highlights how even Marshall’s embrace of the necessary and proper clause, in his discussion of Congress’ need to have flexibility for meeting those “exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur,”<sup>101</sup> is less nationalistic than it appears at first glance. “While on the surface this language seems to support an aggressive nationalism interpretation of *McCulloch*, two ambiguities should be noted as an initial matter.”<sup>102</sup>

The first ambiguity goes to Marshall’s notion of necessity. His repeated references to Congress meeting “crises” and “exigencies” gives at least some weight to those who (like President Madison)<sup>103</sup> saw that Congress’ power to charter banks was a national power contingent on temporary necessity, a necessity that would ebb and flow as emergencies themselves ebb and flow.<sup>104</sup> “This sort of caginess,” Schwartz writes, “fails to endorse any significantly nationalist argument pressed on the Court at oral argument or readily found in the Bank’s history and congressional debates. If anything, Marshall’s references to crises and exigencies lean in a Madisonian direction.”<sup>105</sup>

The second ambiguity is in his description of the Court’s readiness to intervene in more difficult cases. Marshall eschewed the bank’s lawyers’ broad claims for judicial deference to Congress’ judgment and instead couched his analysis with adverbs and other modifiers hinting that the Court retained power to scrutinize Congress’ assertions of power in cases in which the need for the law was not so self-evident.<sup>106</sup> Again, “Let the

end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are *plainly* adapted to that end, which are not prohibited, but consist with the *letter and spirit* of the Constitution, are Constitutional.”<sup>107</sup> (Emphasis added.) Or, “But where the law is not prohibited, and is *really* calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the decree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground.”<sup>108</sup> (Emphasis added.) Congress would get great deference in its assessment of exigency or necessity—but not *unbounded* deference. As Marshall vaguely indicated, the Court would remain ready to undertake the “painful duty” of negating Congress’ pre-textual or utterly unreasonable claims of necessity<sup>109</sup>—at least in theory.

Schwartz, parsing the terms of Chief Justice Marshall’s opinions and the terms of counsel’s oral arguments, keenly observes that Marshall quietly rejected the far more consequential formulations Webster and Pinkney urged.<sup>110</sup> Thus, Marshall’s opinion for the Court “gives plenty of ammunition to both sides of a debate over the role of the Court and the standard which it will apply.” For every occasion that Marshall’s opinion suggests the Court *must* defer to Congress’s legislative choices, another part of the opinion tempers such suggestions with a countervailing hint of the Court’s power to second guess that choice.<sup>111</sup>

Having highlighted clearly the distance between the arguments of bank counsel and the reasoning of Marshall’s opinion for the Court, Schwartz compellingly demonstrates that “Chief Justice John Marshall was far more concerned with avoiding controversy than with affirmatively endorsing expansive congressional power.”<sup>112</sup> Schwartz keenly identifies Marshall’s deft use of silence, self-restraint, and ambiguity. We can best understand them as Mansfield’s Burkean statesmanship: a careful “vagueness” that is not “accidental, but intended and studied.”<sup>113</sup> Thus, John Marshall’s carefully framed argument serves not to stifle his and others’ aspirations for a truly great nation, but rather to advance them—preserving the political viability of their national agenda by not making the already fractious debate over the First Bank of the United States into an even more factious debate over all other aspects of their national agenda.

For Marshall, “American Nationalism was [his] one and only great conception, and the fostering of it the purpose of his life.”<sup>114</sup> Thus, the

distance between Marshall's *McCulloch* opinion and the arguments his fellow nationalists advanced is best understood as a measure of Marshall's own judicial statesmanship: the Burkean statesmanship of a judge who (in R. Kent Newmyer's words) "understood that half a nationalist loaf was better than none, which is to say he was willing to let doctrinal inconsistencies stand unresolved as the price paid for winning majority support on the Court."<sup>115</sup> Adopting the much more aggressive arguments of Webster, Wirt, or Pinkney (to say nothing of the late Hamilton) may have risked unsettling the unanimity that the chief justice labored to maintain throughout his tenure on the bench and may also have risked public support—or even accelerated the nation's eventual fracture.

As William Nelson writes, Marshall "recognized better than his more extreme Federalist brethren that no American statesman could or should ignore the people's will." For him, the task at hand "was to reconcile the people's transcendent power with the law's immutable principles."<sup>116</sup> The *McCulloch* decision was controversial enough, as Marshall himself would experience firsthand after the Court issued its opinion.<sup>117</sup> ("Our opinion in the bank case has roused the sleeping spirit of Virginia," Marshall wrote to Joseph Story, two weeks after the Court issued its decision.<sup>118</sup>) His task was to minimize the controversy, at least as much as possible.

To that end, Chief Justice Marshall relied on judicial statesmanship—not a statesmanship of supplementing the Constitution's terms with values of his own choosing, but a statesmanship of knowing which constitutional principles *not* to advance at a given moment, no matter how genuinely he might have believed in them.

### Brief Closing Thoughts on Judicial Statesmanship

*McCulloch*'s most famous line is found in Marshall's approach to construing the constitutional text: "[The Constitution's] nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. . . . We must never forget, that it is a *Constitution* we are expounding."<sup>119</sup> But Marshall—unlike Hamilton in his report on the bank or Pinkney at oral argument—never

says that the Constitution should be construed “liberally.”<sup>120</sup> Rather, Marshall says that constitutional adjudication requires “a *fair* construction of the whole instrument.”<sup>121</sup>

Reading those words, it is hard not to hear echoes of Hamilton’s earlier words in *Federalist* 78, in which Publius suggested that the courts should affirm a challenged statute’s constitutionality so long as there is not an “irreconcilable variance” between the Constitution and the statute—which is to say, the Court should always take care to reconcile seeming variances whenever possible. “So far as they can, by any *fair* construction, be reconciled to each other, reason and law conspire to dictate that this should be done.”<sup>122</sup> (Emphasis added.)

This seems to be the place where Publius’ judiciary—one that must exercise “neither force nor will, but merely judgment”—affords space for a judicial statesmanship of at least the Burkean variety. Publius’ judges are challenged not merely to declare the “best” meaning of constitutional or statutory phrases, but to respect that (as Madison, too, recognized) the law sometimes is susceptible to at least a small range of possible meanings and that in such cases the judge in our democratic republic should err on the side of allowing democratic enactments to stand.<sup>123</sup> In deciding whether a particular legal interpretation is “fair” or “unfair,” “reconcilable” or “irreconcilable,” the judge is left with at least some discretion and thus with a choice that may require an act of judicial statesmanship, rightly understood.

Finally, it is worth considering whether Chief Justice Marshall’s capacity for judicial statesmanship reflected the fact that he was not merely a justice of the Supreme Court, but the “Chief Justice of the United States,”<sup>124</sup> an office vested by law and tradition with unique powers over the operation of the Court, including especially the management of the justices’ deliberations and votes and the assignment of judicial opinions.<sup>125</sup> In these powers and duties, the chief justice has opportunities unlike any of his colleagues to shape the substance and tenor of the Court’s opinions. Chief Justice Marshall used his office (albeit at a much earlier and informal stage) to shape the Court in a way that none of his colleagues, including Justice Story, ever could; so have Marshall’s successors.

Perhaps judicial statesmanship is a matter reserved exclusively to the chief justice of the United States who, first among equals,<sup>126</sup> presides over a Court that history will remember by reference to his own name—the

Marshall Court then, the Roberts Court now. If so, then the chief justice exemplifies—or tests—Publius’ maxim that “the interest of the man must be connected with the constitutional rights of the place.”<sup>127</sup>

### Acknowledgments

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### Notes

1. William H. Rehnquist, *The Supreme Court* (New York: Vintage Books, 1987), 24.
2. Felix Frankfurter, “John Marshall and the Judicial Function,” *Harvard Law Review* 69, no. 2 (December 1955): 217, 219.
3. For that reason, R. Kent Newmyer can write at length on John Marshall’s statesmanlike personal qualities then abruptly stop short of concluding that statesmanship is exhibited in “Marshall’s jurisprudence—the substance as well as the rhetoric of his opinions.” On this point, Newmyer offers only that the question is “highly speculative,” though there was “if not a causal connection, then at least an interesting parallel between Marshall’s republican character and his law.” R. Kent Newmyer, “John Marshall as an American Original: Some Thoughts on Personality and Judicial Statesmanship,” *University of Colorado Law Review* 71 (2000): 1365, 1375. In this chapter, I attempt to focus on Marshall’s republican law in *McCulloch*, rather than on his republican character. Others have looked for judicial statesmanship in other famous Marshall opinions. See Samuel R. Olken, “The Ironies of *Marbury v. Madison* and John Marshall’s Judicial Statesmanship,” *John Marshall Law Review* 37 (2004): 391.
4. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, NJ: Princeton University Press, 1997), 46.
5. John O. McGinnis, “Judicial Statesmanship Versus Judicial Fidelity,” *Law & Liberty*, February 15, 2019, <https://www.lawliberty.org/2019/02/15/judicial-statesmanship-versus-judicial-fidelity>.
6. For example, Publius indicated in *Federalist* 78 that judges should declare a statute unconstitutional when it is at an “irreconcilable variance” with the Constitution, thus implying that some variances are actually “reconcilable” and should be preserved. As he further observed, “So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done.”
7. This was Justice Antonin Scalia’s felicitous characterization of Tocqueville in his dissenting opinion in *Hein v. Freedom from Religion Foundation*, 551 US 587, 635 (2007).



8. Alexis de Tocqueville, *Democracy in America*, trans. and ed. Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2002), 142.

9. Congress added the eighth and ninth seats to the Court in 1837, soon after *Democracy in America's* publication. Tocqueville, *Democracy in America*, 142.

10. Tocqueville, *Democracy in America*, 142.

11. Tocqueville, *Democracy in America*, 257.

12. Tocqueville, *Democracy in America*, 96–97.

13. Tocqueville, *Democracy in America*, 97.

14. Tocqueville, *Democracy in America*, 142.

15. Tocqueville, *Democracy in America*, 96.

16. Oliver Wendell Holmes and Felix Frankfurter, *Holmes and Frankfurter: Their Correspondence, 1912–1934*, ed. Robert M. Mennell and Christine L. Compston (Hanover, NH: University Press of New England, 1996); and Alexander M. Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper & Row Publishers, 1970), 21–22.

17. Felix Frankfurter, “Twenty Years of Mr. Justice Holmes’ Constitutional Opinions,” *Harvard Law Review* 36 (1923): 909, 911.

18. “Assuredly Mr. Justice Holmes did not bring to the Court the gifts of a lawyer who had been immersed in great affairs, and yet his work is in the school of statesmanship. He is philosopher become king. Where others are guided through experience of life he is led by the humility of the philosopher and the imagination of the poet.” Frankfurter, “Twenty Years of Mr. Justice Holmes’ Constitutional Opinions,” 919.

19. Frankfurter, “Twenty Years of Mr. Justice Holmes’ Constitutional Opinions,” 918.

20. Frankfurter is quoting Thomas Reed Powell, “Supreme Court Decisions on the Commerce Clause and the State Police Power, 1910–1914 II,” *Columbia Law Review* 22 (1922): 28, 48. But, perhaps unsurprisingly, Frankfurter strikes a much different tone regarding the Constitution’s provisions for due process of law and the equal protection of law, which “present very different problems of statecraft” because “they open the door to the widest differences of opinion” and thus counsel in favor of judicial restraint, lest “such power, affecting the intimate life of Nation and States, be entrusted, ultimately, to five men.” Frankfurter, “Twenty Years of Mr. Justice Holmes’ Constitutional Opinions,” 914–15.

21. “His more general comments on the subject are sufficiently vague that they can be taken to apply to different judicial approaches to constitutional adjudication.” See Gary J. Jacobsohn, “Felix Frankfurter and the Ambiguities of Judicial Statesmanship,” *New York University Law Review* 49 (1974): 1, 5. See also Gary J. Jacobsohn, *Pragmatism, Statesmanship, and the Supreme Court* (Ithaca, NY: Cornell University Press, 1977).

22. Neil S. Siegel, “The Virtue of Judicial Statesmanship,” *Texas Law Review* 86 (2008): 959, 979.

23. Siegel, “The Virtue of Judicial Statesmanship,” 970–71.

24. Siegel, “The Virtue of Judicial Statesmanship,” 974–76.

25. Siegel, “The Virtue of Judicial Statesmanship,” 981. Siegel is quoting Roscoe Pound, “The Causes of Popular Dissatisfaction with the Administration of Justice,” *American Law* 14 (1906): 445.

26. Siegel, “The Virtue of Judicial Statesmanship,” 983. Siegel is quoting Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*



- (Indianapolis, IN: Bobbs-Merrill Company, 1962), 26.
27. Bickel, *The Least Dangerous Branch*, 25.
  28. Siegel, "The Virtue of Judicial Statesmanship," 983.
  29. Siegel, "The Virtue of Judicial Statesmanship," 983–84.
  30. Siegel, "The Virtue of Judicial Statesmanship," 994.
  31. Siegel, "The Virtue of Judicial Statesmanship," 997.
  32. Harry M. Clor, "Judicial Statesmanship and Constitutional Interpretation," *South Texas Law Journal* 26 (1985): 397.
  33. Clor, "Judicial Statesmanship and Constitutional Interpretation," 399–400.
  34. Clor, "Judicial Statesmanship and Constitutional Interpretation," 400.
  35. Clor, "Judicial Statesmanship and Constitutional Interpretation," 400. Clor is citing Ralph Lerner, "The Supreme Court as Republican Schoolmaster," *Supreme Court Review* 127 (1967).
  36. Clor, "Judicial Statesmanship and Constitutional Interpretation," 407.
  37. *Federalist*, no. 78 (Alexander Hamilton).
  38. Clor, "Judicial Statesmanship and Constitutional Interpretation," 407.
  39. *Fletcher v. Peck*, 10 US 87 (1810).
  40. Clor, "Judicial Statesmanship and Constitutional Interpretation," 409–10.
  41. Clor, "Judicial Statesmanship and Constitutional Interpretation," 418; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980); and Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978).
  42. Clor, "Judicial Statesmanship and Constitutional Interpretation," 417.
  43. Clor, "Judicial Statesmanship and Constitutional Interpretation," 415–16. Clor is citing Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Indianapolis, IN: Liberty Fund, 1977), 284.
  44. Clor, "Judicial Statesmanship and Constitutional Interpretation," 423.
  45. Matthew Franck, "Statesmanship and the Judiciary," *Review of Politics* 51 (1989): 510, 514.
  46. Franck, "Statesmanship and the Judiciary," 515.
  47. Franck, "Statesmanship and the Judiciary," 516–19.
  48. Franck, "Statesmanship and the Judiciary," 520.
  49. Franck, "Statesmanship and the Judiciary," 520–21. Franck is quoting *Federalist*, no. 78.
  50. Franck, "Statesmanship and the Judiciary," 528.
  51. Siegel, "The Virtue of Judicial Statesmanship," 423.
  52. Clor, "Judicial Statesmanship and Constitutional Interpretation."
  53. Given the subject of this chapter, it should be noted that although Franck expressed skepticism of "judicial statesmanship," he also has written favorably regarding Chief Justice Marshall's opinion in *McCulloch*. See Matthew J. Franck, "Would That John Marshall's Great Opinion Were Cited Oftener Today," *Law & Liberty*, March 6, 2019, <https://www.lawliberty.org/liberty-forum/would-that-john-marshalls-great-opinion-were-cited-oftener-today/>.
  54. Edmund Burke, *Thoughts on the Cause of the Present Discontents*, 1770.
  55. Harvey Mansfield, *Statesmanship and Party Government: A Study of Burke and*

*Bolinbroke* (Chicago: University of Chicago Press, 1965), 20–21.

56. Mansfield, *Statesmanship and Party Government*, 21.
57. Mansfield, *Statesmanship and Party Government*, 17.
58. Mansfield, *Statesmanship and Party Government*, 17.
59. Mansfield, *Statesmanship and Party Government*, 17.
60. Burke, *Thoughts on the Cause of the Present Discontents*.
61. Mansfield, *Statesmanship and Party Government*, 163.
62. Mansfield, *Statesmanship and Party Government*, 163.
63. Mansfield, *Statesmanship and Party Government*, 229–30.
64. Mansfield, *Statesmanship and Party Government*, 245.
65. Harlow Giles Unger, *John Marshall: The Chief Justice Who Saved the Nation* (Cambridge, MA: Da Capo Press, 2014), 293.
66. Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt & Company, 1996), 445.
67. Marshall not only “put a constitutional foundation under the second Bank of the United States” but “also permitted Congress to institute a system of federal internal improvements.” R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge, LA: LSU Press, 2001), 291, 301.
68. G. Edward White, *The Marshall Court and Cultural Change, 1815–35* (New York: Macmillan Publishing Company, 1988), 544.
69. David S. Schwartz, “Misreading *McCulloch v. Maryland*,” *University of Pennsylvania Journal of Constitutional Law* 18, no. 1 (2015); and David S. Schwartz, *The Spirit of the Constitution: John Marshall and the 200-Year Odyssey of McCulloch v. Maryland* (Oxford, UK: Oxford University Press, 2019).
70. Schwartz, “Misreading *McCulloch v. Maryland*,” 28–29. Schwartz is citing Alexander Hamilton, “Final Version of the Second Report on the Further Provision Necessary for Establishing Public Credit (Report on a National Bank), 13 December 1790,” National Archives, Founders Online, <https://founders.archives.gov/documents/Hamilton/01-07-02-0229-0003>.
71. Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven, CT: Yale University Press, 1911), 615–16.
72. Alexander Hamilton, “Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank, [23 February 1791],” National Archives, Founders Online, <https://founders.archives.gov/documents/Hamilton/01-08-02-0060-0003>.
73. Hamilton, “Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank.”
74. Schwartz, “Misreading *McCulloch v. Maryland*,” 42–46.
75. Schwartz, “Misreading *McCulloch v. Maryland*,” 38. Schwartz is citing John Marshall, *The Life of George Washington* (Oxford, UK: Oxford University Press, 1805), 390–97.
76. Marshall, *The Life of Washington*, 395.
77. Marshall, *The Life of Washington*, 52–81.
78. *McCulloch v. Maryland*, 17 US 316, 400 (1819).
79. *McCulloch v. Maryland*, 17 US 316, 400 (1819).
80. *McCulloch v. Maryland*, 17 US 316, 400–01 (1819).

81. *McCulloch v. Maryland*, 17 US 316, 423 (1819).
82. *McCulloch v. Maryland*, 17 US 316 (1819).
83. Tocqueville, *Democracy in America*, 97.
84. *McCulloch v. Maryland*, 17 US 316, 401 (1819).
85. This message from President James Madison to the Senate of the United States on January 30, 1815, was reprinted in M. St. Clair Clarke and D. A. Hall, *Legislative and Documentary History of the Bank of the United States* (Washington, DC: Gales and Seaton, 1832), 594. Late in his life, President Madison reiterated these themes in an 1831 letter to Charles Ingersoll, defending his change of positions on the bank: "The charge of inconsistency between my objection to the constitutionality of such a bank, in 1791, and my assent in 1817, turns on the question, how far legislative precedents, expounding the constitution, ought to give succeeding legislatures, and to overrule individual opinions." That said, "Madison's justification of his *volte-face*," offered in that letter and elsewhere, "was not entirely convincing to his contemporaries." See Donald O. Dewey, "James Madison Helps Clio Interpret the Constitution," *American Journal of Legal History* 15 (1971): 38, 53.
86. *Federalist*, no. 37. For a description of Madison's theory of "liquidation," as exemplified by the bank debate, see William Baude, "Constitutional Liquidation," *Stanford Law Review* 71, no. 1 (2019).
87. *McCulloch v. Maryland*, 17 US 316, 407 (1819).
88. *McCulloch v. Maryland*, 17 US 316, 408 (1819).
89. *McCulloch v. Maryland*, 17 US 316, 407–11 (1819).
90. *McCulloch v. Maryland*, 17 US 316, 408 (1819).
91. *McCulloch v. Maryland*, 17 US 316, 415 (1819).
92. *McCulloch v. Maryland*, 17 US 316, 415–16 (1819).
93. *McCulloch v. Maryland*, 17 US 316, 418 (1819).
94. Schwartz, "Misreading *McCulloch v. Maryland*," 53–54. (Footnote omitted.) *McCulloch v. Maryland*, 17 US 316, 402–03 (1819).
95. *McCulloch v. Maryland*, 17 US 316, 422 (1819).
96. Schwartz, "Misreading *McCulloch v. Maryland*," 60–61. Schwartz also suggests that "moderate Jeffersonians could claim that the Bank was justified merely to facilitate tax collections until state banks resumed redemption of their notes in specie," but it is hard to square this suggestion with Chief Justice Marshall's own assertion that "the existence of State banks can have no possible influence on the question" of the bank's necessity. See *McCulloch v. Maryland*, 17 US 316, 424 (1819).
97. *McCulloch v. Maryland*, 17 US 316, 411 (1819).
98. *McCulloch v. Maryland*, 17 US 316, 421 (1819).
99. Schwartz, "Misreading *McCulloch v. Maryland*," 62.
100. Schwartz, "Misreading *McCulloch v. Maryland*," 63–64.
101. *McCulloch v. Maryland*, 17 US 316, 415 (1819).
102. Schwartz, "Misreading *McCulloch v. Maryland*," 73.
103. See James Madison, "Seventh Annual Message," University of Virginia, Miller Center, December 5, 1815, <https://millercenter.org/the-presidency/presidential-speeches/december-5-1815-seventh-annual-message>. "If the operation of the State banks can not produce this result, the probable operation of a national bank will merit consideration."

104. Schwartz, "Misreading *McCulloch v. Maryland*," 73.
105. Schwartz, "Misreading *McCulloch v. Maryland*," 61.
106. Schwartz, "Misreading *McCulloch v. Maryland*," 73–74.
107. *McCulloch v. Maryland*, 17 US 316, 421 (1819).
108. *McCulloch v. Maryland*, 17 US 316, 423 (1819).
109. *McCulloch v. Maryland*, 17 US 316, 423 (1819).
110. Schwartz, "Misreading *McCulloch v. Maryland*," 74–78.
111. Schwartz, "Misreading *McCulloch v. Maryland*," 78.
112. Schwartz, "Misreading *McCulloch v. Maryland*," 91.
113. Mansfield, *Statesmanship and Party Government*, 21.
114. Albert J. Beveridge, *The Life of John Marshall*, Vol. 4 (Boston, MA: Houghton Mifflin, 1919), 1. This was quoted in Newmyer, *John Marshall and the Heroic Age of the Supreme Court*, 267.
115. Newmyer, *John Marshall and the Heroic Age of the Supreme Court*, 316.
116. William E. Nelson, "The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence," *Michigan Law Review* 76 (1978): 893, 933.
117. See, for example, Gerald Gunther, ed., *John Marshall's Defense of McCulloch v. Maryland* (Palo Alto, CA: Stanford University Press, 1969); and Mark R. Killenbeck, *McCulloch v. Maryland: Securing a Nation* (Lawrence, KS: University Press of Kansas, 2006), 123–58.
118. Joel Richard Paul, *Without Precedent: Chief Justice John Marshall and His Times* (New York: Riverhead Books, 2018), 344.
119. *McCulloch v. Maryland*, 17 US 316, 407 (1819).
120. See Schwartz, "Misreading *McCulloch v. Maryland*," 79.
121. For the "fair and just interpretation," see *McCulloch v. Maryland*, 17 US 316, 404–07 (1819). For "fair construction," see *McCulloch v. Maryland*, 17 US 316, 406 (1819).
122. *Federalist*, no. 78.
123. *Federalist*, no. 37 (James Madison). "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."
124. 28 USC § 1.
125. See, for example, Kenneth W. et al., *The Office of Chief Justice* (Charlottesville, VA: Miller Center, 1984).
126. Alpheus Thomas Mason, "The Chief Justice of the United States: Primus Inter Pares," *Journal of Public Law* 17 (1968), 20.
127. *Federalist*, no. 51 (James Madison).