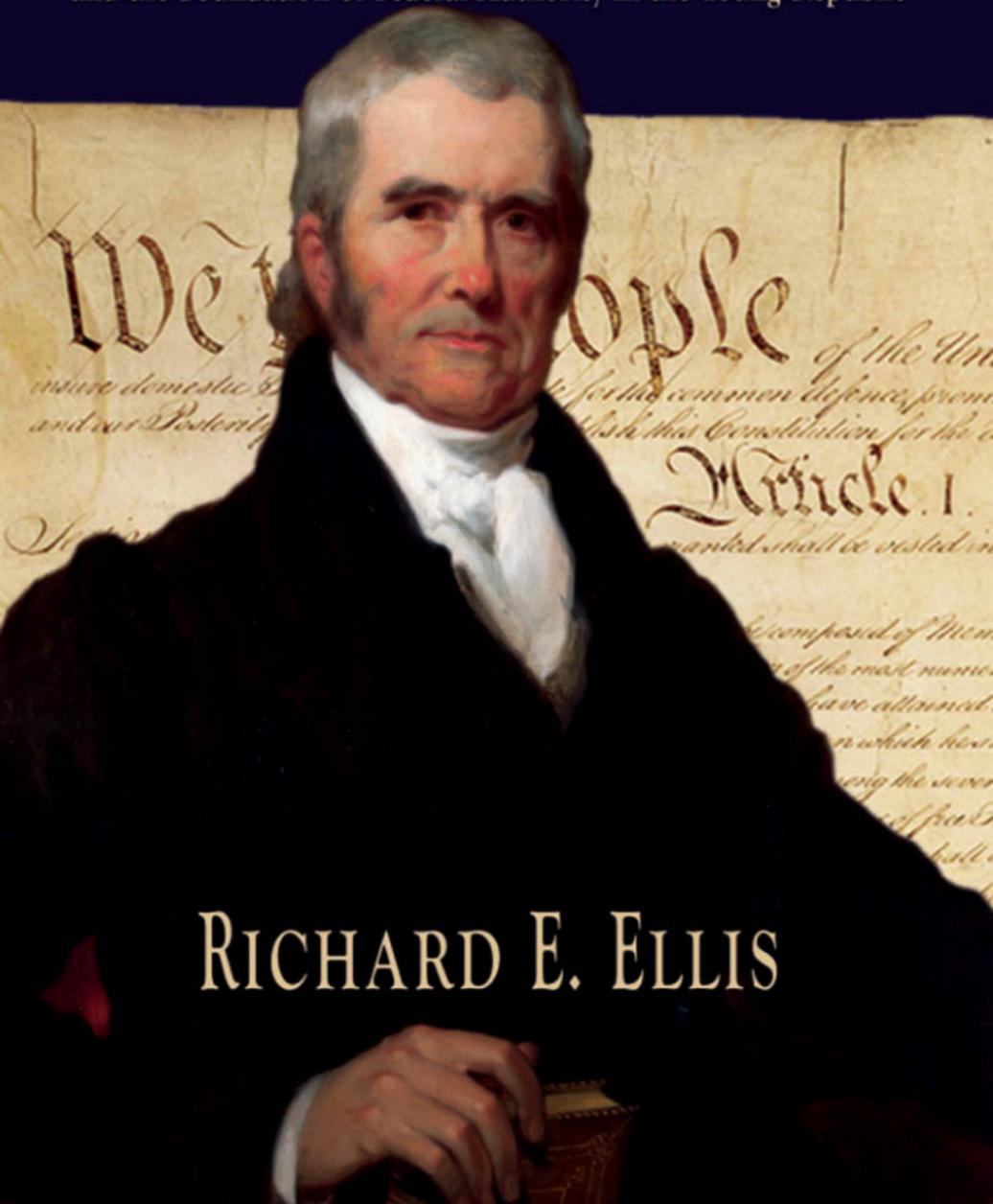


Aggressive Nationalism

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



RICHARD E. ELLIS

**AGGRESSIVE
NATIONALISM**

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OF FEDERAL AUTHORITY IN THE YOUNG REPUBLIC

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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NATIONALISM**

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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