Building Federal Power

Until the mid–twentieth century, the principal units of government in the United States were state and local. Indeed, until the Gettysburg Address, “United States” was grammatically a plural phrase, recognizing the plenary power of the various sovereign states to legislate for themselves and their citizens. While the theoretical system was one of dual sovereignty, the states held most of the legislative cards in the early republic. In most towns the only visible federal presence was a post office, and the host of federal agencies and their attendant edifices we know today were unknown before the New Deal.

The early Supreme Court, particularly under the leadership of Chief Justice John Marshall, who served in that position from 1801 to 1835, laid the ground judicially for the stronger federal government that would emerge much later in all three branches. Marshall saw his states’ rights opponents as wishing to perpetuate a view of the United States as “a meer [sic] league of states” and saw their attacks on his Court as “in fact an attack upon the union.” His prime intellectual opponent, Thomas Jefferson, by contrast, embraced the notion that the United States was a “confederated fabric,” while Marshall and his colleagues wished to reverse that, turning a “general and special” government into “a general and supreme one alone.”

The Supreme Court began to build federal power from the Court’s earliest days, in several areas. These included:

- protecting the federal taxing power
- exercising jurisdiction over sovereign states
- declaring state legislation unconstitutional
- declaring the Supreme Court’s supremacy over state courts
- expansively interpreting the powers of the federal government
- federalizing the slavery question
- building a national commercial law.

We discuss the first five of these initiatives in this chapter. Separate chapters follow on the slavery and commercial law initiatives.
Treason and the Tax Collector

Opposition to taxation by a distant government was ingrained in the heritage of revolutionary America, where the Boston Tea Party of 1773 was an iconic symbol. Thus, when the new federal government began in the first decade of its existence to impose taxes to fund its needs, some patriots who had earlier fought for independence opposed those taxes as redolent of British oppression. Pennsylvanians were particularly vocal and active in resisting these taxes, leading to two historic confrontations between citizen and federal tax collector.

The first such confrontation, which began in 1794, became known as the Whiskey Rebellion because the tax at issue was a 1791 excise tax levied on distillers of that substance. Prominent among those affected by the tax were western Pennsylvania farmers who used their spare corn to distill whiskey. Many refused to pay the tax in the first three years of its levy, but their peaceful protests went unheeded, leading to more violent tactics in 1794. Those tactics included armed visits to the excise officials, seizure of their papers, threats of violence to their persons, forced oaths that the officials “would never act again in the execution of the excise law,” tarring and feathering, and action by the conspirators to “ransack . . . and burn” the house of one official. Calling out the militia from four states, President Washington, along with Treasury Secretary Alexander Hamilton, led an army of some thirteen thousand to put down the revolt.

One hundred fifty men were arrested and charged with treason, but only thirty-one indictments for that offense were returned by a grand jury sitting in Philadelphia, to which the prisoners had been marched hundreds of miles from Pittsburgh in cold winter weather. The treason charges were surprising, for the Constitution—drafted after all by men who were guilty of that offense themselves under English law—narrowly limited the definition of that capital crime. Article III, Section 3, of the Constitution provided that “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”

Only two of the treason cases went to trial—United States v. Vigol (1795) and United States v. Mitchell (1795). Both cases were tried by Supreme Court justices sitting on circuit together with a federal district judge. In his opinion in Mitchell, Justice William Patterson, who served on the Court from 1793 to 1806, declared that “if [the] object [of the insurrection] was to suppress the excise offices and to prevent the execution of an act of Congress, by force and intimidation, the offense in legal estimation is high treason; it is an usurpation of the authority of government; it is high treason by levying of war.”

Both Vigol and Mitchell were convicted of high treason and sentenced to death by hanging. Having made the point, Washington was politically astute and chose to pardon both, on the grounds of alleged mental incompetence. None of the others indicted for treason was ever tried since Washington pardoned them as well.
The second confrontation with federal taxing power was named after its leader, John Fries, a patriot from Bucks County in eastern Pennsylvania who had fought for the new nation as a soldier in the Revolutionary War. Indeed, in an ironic turn of history, Fries had fought against the Whiskey rebels as a member of Washington’s militia force of thirteen thousand a few years before he came to public notoriety for the same offense of high treason.

The tax involved in Fries’s Rebellion was the work of President John Adams. Fearing an impending war with France, he obtained the enactment of a federal tax on houses in 1798 to finance projected war costs. In an attempt to impose a progressive tax, the amount levied was calculated by the number of windows in the house. The burden fell heavily on Pennsylvania homeowners, with that state given a quota of more than 10 percent of the total tax across the thirteen states.

Curiously, out of the entire nation, only the eastern part of Pennsylvania made any significant protest against the tax. After initial peaceful protests and a petition drawn by Fries and signed by fifty-two taxpayers were unsuccessful, Fries used force to stop the assessors from collecting the tax and then led a small band to a jail in Bethlehem, Pennsylvania, using threats of force to obtain the release of other tax protesters.

Fries and several of his band were then indicted for treason, with Fries tried first. There were two trials for Fries, and he was convicted in both. The first trial was before Supreme Court justice James Iredell and Pennsylvania district judge Richard Peters. After a nine-day trial, the jury was given substantially the same charge on the elements of treason that had been given in the cases of the Whiskey rebels. It came back with a guilty verdict in three hours, and Fries was then sentenced to death. After the discovery that one juror had prejudged the case, however, the verdict was set aside for jury misconduct, and Fries was retried, this time before Judge Peters and Supreme Court justice Samuel Chase.

In the second trial, Chase made a critical tactical error, which became the basis for one of the charges against him when the Jeffersonian Republicans later impeached him. Chase gave his jury charge, which followed the precedent in *Mitchell* and *Vigol*, in written form to the defense at the start of the trial. This violated the applicable practice at the time because lawyers in their closings argued the law as well as the facts, and Chase’s actions prevented this by declaring what the law was at the start of the trial. This was critical to Fries. His only real defense to the treason charge was to argue that the law announced in his first trial and in the trials of Whiskey rebels Mitchell and Vigol was wrong. Given the evisceration of their planned defense, the skilled defense counsel of wily Philadelphia lawyers refused to proceed and convinced Fries to decline any replacement counsel. Chase then remarkably decided to represent Fries himself, while simultaneously serving as co–trial judge. His charge to the jury explained that “the court are of opinion, that if a body of people conspire and mediate an insurrection to resist or oppose the
execution of any statute of the United States by force, that they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force, [then] they are guilty of the treason of levying war, and the quantum of force employed neither lessens nor increases the crime."

Fries was again convicted and again sentenced to death. Other trials of Fries’s rebels followed. Two others were convicted and sentenced to death; two more were acquitted. Once again all were pardoned, this time by President Adams.

What emerges from the trials of the Whiskey rebels and Fries’s rebels is a strong judicial proclamation of federal power, making any use of force against the implementation of any federal statute a capital crime. Although no death sentence was ever carried out, the power to do so was meant to cow tax protesters into submission, and the threat worked; there was no more forcible resistance to federal tax collectors in the early republic. While certainly stretching the treason clause of the Constitution in defining so broadly what constitutes “levying War,” the law declared in these cases by Supreme Court justices sitting on circuit was substantially embraced by the full Court in *Ex Parte Bollman* (1807) and is still the law today.

**Judging Sovereign States**

Less than five years after it was established, the Supreme Court delivered one of its most audacious decisions in favor of an expanded federal judicial power, at the expense of traditional state sovereignty. In *Chisholm v. Georgia* (1793), it decided by a vote of four to one that the State of Georgia could be ordered to pay a judgment to the estate of a South Carolina merchant who had sold clothing during the Revolutionary War to agents of Georgia. At issue was the proper construction of Article III, Section 2, of the Constitution, which provided for federal trial-court jurisdiction over controversies between “a State and Citizens of another State.”

While this provision undoubtedly conferred jurisdiction over such cases in the federal courts, it did not expressly deal with the more critical issue of whether state sovereign immunity barred the exercise of such jurisdiction to render a judgment against a sovereign state where it had not waived sovereign immunity. In Federalist 81 even Hamilton had conceded that sovereign immunity survived the creation of the federal judicial power. In considering the criticism that the proposed judicial power might lead to the prosecution of one state for payment of a public debt in federal court through the assignment of its public securities to a citizen of another state, Hamilton demurred, stating that such a suggestion was “without foundation,” because of the “inherent” nature of state sovereignty, which rendered a state “not to be amenable to the suit of an individual without its consent.” He therefore considered it “altogether forced and unwarrantable” to suggest the existence of such a power in the federal courts.

At the trial-court level, Justice James Iredell of North Carolina, sitting on circuit with the local federal trial judge, agreed and ordered the suit dismissed. On appeal Georgia refused to appear in the Supreme Court, and the case was argued
in its absence. Appearing for the merchant’s estate, Edmund Randolph, the sitting attorney general of the United States, acting (as was then permitted) in his private capacity, made a strenuous and successful argument that the text of the Constitution supported exercise of jurisdiction over a state by the federal judiciary. In that era, in which each justice delivered a separate opinion, four of the five (all except Iredell) agreed with Randolph’s conclusion, although on different grounds.

Pennsylvania’s justice James Wilson, a noted legal scholar who founded the University of Pennsylvania Law School, delivered the most-detailed opinion in favor of this expansive federal judicial power. Wilson, who believed in the concept of “popular sovereignty” that would later find acceptance in the era of the Marshall Court, declared that, for purposes of the United States as a union, Georgia was “not a sovereign state.”

The reaction to the Chisholm decision was immediate and totally negative, not only from Georgia and Virginia, but from Massachusetts as well. Within two days a constitutional amendment was introduced into Congress, and it passed in the following Congress, being enacted as the Eleventh Amendment in 1798. It provides that “the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

Georgia’s immediate reaction was even more hostile. Its lower house passed a bill that provided the death penalty—by hanging and “without benefit of clergy”—for any federal official who tried to execute on the Chisholm judgment. While the Eleventh Amendment prohibition was repeatedly skirted by the Court in later years, the concept of inherent state sovereignty has received significant support on the Court in recent years, particularly from Justice Clarence Thomas.

Invalidating State Legislation

An inherent part of sovereignty is the power to legislate. From the earliest days, however, strongly nationalist founders had announced that the federal courts could invalidate legislation that contravened provisions of the Constitution. In Federalist 78, for example, Hamilton declared that “no legislative act . . . contrary to the Constitution can be valid,” and further that “whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.” In the Virginia debates considering ratification of the Constitution, John Marshall agreed, stating, “if Congress were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. . . . They would declare it void.”

Marbury v. Madison

When the Supreme Court authoritatively addressed this issue, it followed the Federalist view in the landmark case of Marbury v. Madison (1803). There Chief Justice
Marshall's opinion for a unanimous five-member Court proclaimed the view both
he and Hamilton had previously expressed. He announced that "It is emphatically
the province and duty of the judicial department to say what the law is. . . . If two
laws conflict with each other, the courts must decide on the operation of each."
Most significantly he concluded that "a law repugnant to the constitution is void;
and . . . courts, as well as other departments, are bound by that instrument."

*Marbury* arose in the fallout from the defeat of President John Adams and the
Federalist Party in the presidential election of 1800. After Thomas Jefferson of
the new Republican Party won that election, the Federalists secured passage of the
Judiciary Act of 1801 in the lame-duck session that followed the election but pre-
ceded Jefferson's inauguration as president. That legislation created new judicial
positions that were filled in the waning days of the Adams administration with so-
called midnight judges. This court-packing plan aroused immediate and vigorous
attacks by the Republicans.

One midnight appointment under the 1801 act was that of Justice of the Peace
William Marbury in the District of Columbia. Marbury's commission for that
office was signed by the outgoing secretary of state John Marshall but was not de-
ivered to him. When the new secretary of state, James Madison, refused to deliver
the commission, Marbury sued to compel Madison to do so.

In his opinion Chief Justice Marshall outlined why Marbury would be entitled
to delivery of his commission but declined to grant such relief. He ruled instead
that the provision of the Judiciary Act of 1789 conferring original jurisdiction on
the Supreme Court to award such relief was itself unconstitutional because it was
inconsistent with the Constitution.

Significantly the Judiciary Act of 1801 was repealed before the decision in *Mar-
bury*, and judges appointed under its authorization were dismissed. Republicans
continued thereafter to attack the Federalists for attempting to undermine the
Republican electoral victory by packing the courts. Indeed two Federalist judges—
District Judge John Pickering of New Hampshire and Justice Samuel Chase of
the Supreme Court—were impeached in 1803 and 1804 respectively. Pickering,
who was senile, was convicted in 1804, but the Senate acquitted Chase in 1805. By
his approach in the 1803 *Marbury* opinion, Marshall avoided exacerbating the
existing political upheaval in favor of a more important longer-term outcome. He
accomplished this by simultaneously announcing the principle of judicial review
while denying Marbury the delivery of his midnight commission.

*Ware v. Hylton*

*Marbury* invalidated a federal law, the first of the two times the Supreme Court did
so before the Civil War. (The other was the infamous decision involving Dred
Scott, *Scott v. Sanford* [1857], discussed below in chapter 2.) After *Marbury*, how-
ever, the question remained as to whether and to what degree this power of the
federal judiciary over a coordinate branch of the federal government also extended to declare laws passed by sovereign states unconstitutional. In the early case of *Ware v. Hylton* (1796), the Supreme Court had considered the constitutionality of a 1777 Virginia law that permitted Virginia debtors to British subjects to discharge their debts by making payment to the Virginia state treasury in inflated American currency. The impact of this law in the case before the Court would have been to permit the Virginia debtor to discharge his debt of fifteen hundred pounds sterling incurred in 1774 for an effective payment of fifteen pounds.

The constitutional issue arose when British creditors made a challenge to this law, invoking federal court jurisdiction under the 1783 Treaty of Paris, which permitted foreign creditors to recover on their loans without legal restrictions. In separate opinions all four justices agreed that the Virginia law was contrary to the treaty and must therefore fall under the Supremacy Clause of Article VI of the Constitution. In reaching this decision, the Court rejected the mainly technical arguments based on international law and a strained construction of the Treaty of Paris made by Virginia’s counsel, future chief justice John Marshall, who lost the only case he ever argued before the Court he would lead for nearly thirty-five years.

*Fletcher v. Peck*

*Ware v. Hylton* was not a frontal challenge on the general power of states to legislate without federal court interference because it involved the construction of a treaty, a subject that clearly fell within the sphere of federal governmental power. The broader issue of state sovereign power to legislate on domestic matters arose in the great case of *Fletcher v. Peck* (1810), which involved the power of the Georgia state legislature to undo a corrupt action of the previous state legislature in the notorious Yazoo land scandal. In 1795 the first legislature sold thirty-five million acres of land to private companies at about 1.5 cents per acre. All but one of the state legislators who voted in favor of this deal were bribed, and the next legislature therefore voted to set the land purchase aside in 1796. In the interim, however, millions of acres were sold to third parties, whose rights in the land they had purchased would be invalidated by the act of the second group of Georgia state legislators. Many prominent northern Federalists were among those who invested in Yazoo lands, including Supreme Court justice James Wilson and Robert Morris, the financier of the American Revolution and the founder of the first great commercial bank in the United States, which later would be known as First Pennsylvania Bank. Both served time in debtors’ prison as a result of their failed Yazoo and other investments.

Having confronted Georgia before and lost in the fallout from the *Chisholm* case, the Court was not able to decide the validity of the rescinding legislation in a suit involving the state as a defendant, given the intervening passage of the Eleventh
Amendment, which prohibited suits against a state to be filed in a federal court. To get a case before a federal court, a band of Federalists representing a Massachusetts company that had bought much of the Yazoo land and resold it at great profits created a contrived case. Thus both sides in the case—supposedly adversaries—wanted to invalidate the actions of the rescinding legislature and thereby insulate the purchasers from the original land company from the remedial legislation.

The case that was brought involved a purchaser from New Hampshire (Fletcher) who sued his Massachusetts seller (Peck) in federal court, basing jurisdiction on the fact that this was a “dispute” between citizens of different states. Fletcher sued for breach of warranty of title, claiming that Peck lacked the ability to transfer clear title to him because of the cloud on his title from the rescinding legislation.

The case provided the foundation for building a federal commercial law, a subject to which we will return in chapter 3. For present purposes, however, the significance of *Fletcher v. Peck* is that it settled that the federal courts would exercise the power to invalidate state legislation on domestic matters, where that legislation violated the Constitution.

In *Fletcher*, Chief Justice Marshall’s opinion for four of the five members of the Court discussed the provisions of Article I, Section 10, of the Constitution, which prohibited any state from passing “any . . . Law impairing the Obligation of Contracts.” The Court ruled that the 1795 law functioned as a contract and that the purchasers whose title depended on the validity of that law had protected contractual rights under which they had received “a title good at law.” As such, “when absolute rights have vested under that contract, a repeal of the law cannot [divest] those rights.” The novelty of this ruling was its treatment of state legislation as akin to a contract and the consequent application of the Contracts Clause of the Constitution to it. This twist was so unprecedented that the Supreme Court left the precise foundation of its ruling vague, concluding only that “the State of Georgia was restrained, either by general principles, which are common to our free institutions, or by particular provisions of the Constitution of the United States.” In either event the rescinding state legislation could not stand.

The Cherokee Cases

Georgia and the Supreme Court continued their decades-long adversity after *Chisholm* and *Fletcher*, and squared off for a third time more than twenty years after *Fletcher* in two historic cases involving the rights of Native Americans. Both *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832) arose from Georgia’s actions in claiming legislative power over Cherokee Nation lands situated within its borders. Those legislative incursions onto Native American lands were challenged, first by the Cherokee Nation itself and next by a Congregationalist minister who succeeded legally where the Cherokees had failed.
The background of these cases involved attempts by certain southern states to pass laws affecting tribal lands occupied by the so-called Five Civilized Tribes in the South. These were the Cherokee in Georgia and adjoining states, the Creek in Alabama, the Chickasaw and Choctaw in Mississippi and Alabama, and the Seminole in Florida. Georgia led these efforts, passing a law in December 1828 that would place all Native Americans within its territorial boundaries under state jurisdiction in six months. Georgia’s action was prompted by the Cherokee Nation’s previous declaration of complete sovereignty, its adoption of an American-style constitution, and its installation of a capital at New Echota in northern Georgia. The Cherokee were truly “civilized” according to the mores of the time; they had a written language, a newspaper, and schools for their children. Indeed, in a particularly odious imitation of their white models, some even owned slaves.

The existing frictions between whites and Native Americans in the American South were soon exacerbated by the influx of white prospectors into northern Georgia after gold was discovered there in the summer of 1829. To address the problem, President Andrew Jackson supported relocation of the Five Civilized Tribes to a new Indian territory located in present-day Oklahoma. The Removal Act passed in May 1830 provided for the voluntary exchange of the new land for the southern tribal lands. Jackson’s case for the Removal Act included the reasoning that “it will relieve the whole State of Mississippi and the western part of Alabama of Indian occupancy, and enable those States to advance rapidly in population, wealth, and power. It will separate the Indians from immediate contact with settlements of whites; free them from the power of the States; enable them to pursue happiness in their own way and under their own rude institutions; will retard the progress of decay, which is lessening their numbers, and perhaps cause them gradually, under the protection of the Government and through the influence of good counsels, to cast off their savage habits and become an interesting, civilized, and Christian community.” Jackson concluded with a question that to him was rhetorical: “What good man would prefer a country covered with forests and ranged by a few thousand savages to our extensive Republic, studded with cities, towns, and prosperous farms, embellished with all the improvements which art can devise or industry execute, occupied by more than 12,000,000 happy people, and filled with all the blessings of liberty, civilization, and religion?”

All the Five Civilized Tribes eventually accepted the exchange of lands authorized by the Removal Act but only after pressure and threats and only after litigation by the Cherokee Nation to protect its rights guaranteed by treaties with the federal government came to nothing. The Cherokee were forced into litigation against Georgia when Georgia began to enforce its state law claiming jurisdiction over the Cherokee living within state borders. In January 1831 Georgia executed a Cherokee named Corn Tassel for a murder committed within Cherokee lands, doing so despite a Supreme Court stay of execution granted pending its review of
the case. In the same month, the Cherokee Nation filed suit seeking an injunction against Georgia’s further exercise of power over Cherokee land and people, having hired former attorney general William Wirt, who later became the 1832 presidential candidate of the Anti-Mason Party, to plead their case. Wirt chose to file an action against the State of Georgia directly in the Supreme Court, under its original jurisdiction, which was authorized despite the Eleventh Amendment, if the Cherokee Nation were found to be a “foreign state.” Georgia, following a pattern it began in the *Chisholm* case, simply refused to appear or submit to Supreme Court jurisdiction.

Chief Justice Marshall’s short opinion was lyrical in its description of the Cherokee and their plight: “If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made.”

Lyricism notwithstanding, the Cherokee lost. Marshall found that the Court lacked jurisdiction even to hear the case because the Cherokee were not a “foreign state” but rather a “domestic dependent nation,” a “ward” of their “guardian,” the federal government, and a people still “in a state of pupilage.” In so ruling, he found support in the wording of Article I, Section 8, of the Constitution, which permitted Congress to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,” thus distinguishing those tribes from “foreign nations.”

A second Georgia law, passed in December 1830, came before the Court in the *Worcester* case. Under that state law, no white was permitted to enter Cherokee land in Georgia without a license or permit from the Georgia governor. For violations of this law, eleven men were arrested, nine of whom took pardons, conditioned on their leaving the state. One who did not was Samuel Worcester, a white Congregationalist minister who also served as the federal postmaster of New Echota, a position from which President Jackson promptly fired him to prevent the interposition of a federal-official defense. Worcester was sentenced to four years at hard labor and appealed his conviction to the Supreme Court.

Once again Georgia failed to appear. This time, however, the Supreme Court chose to decide the case, jurisdiction being clear, since Worcester was a citizen of Vermont and could appeal his criminal conviction under the Eleventh Amendment exception recognized in *Cohens v. Virginia* (1821). Speaking for four of the Court’s six members, with a fifth concurring in the outcome, Marshall ignored his
prior year’s opinion in the *Cherokee Nation* case and ruled that the Cherokee were in fact a nation entitled to enter into treaties and that those treaties, which were the supreme law of the land, had been violated by the Georgia law. For good measure Marshall also accepted Wirt’s arguments that the Georgia law violated the Contracts and Commerce clauses of the Constitution.

The outcome of *Worcester* did not save the Cherokee people, or even the victorious minister. He served out part of his term before being pardoned and expelled from the state. A small minority of the Cherokee Nation, under the “Treaty Party” led by Major and John Ridge, signed the 1835 Treaty of New Echota, named for their short-lived capital city. Under that treaty they accepted an exchange of lands. Some eight million acres of Cherokee land in Georgia, North Carolina, Tennessee, and Alabama were surrendered for a payment of $4.5 million. The Cherokee were given two years to move to their new lands in the west. When the deadline passed, they were forcibly removed. Some eighteen thousand were taken to relocation camps, put on steamboats and transported down the Tennessee River, loaded thereafter onto railroad boxcars, and then forced to walk what became known as “The Trail of Tears” to their final destination. Of the eighteen thousand who made this long journey, estimates of the number who died range from a low of four thousand to a high of nearly ten thousand. All in all, some one hundred million acres of Native American land were acquired by the United States in the eight years of the Jackson presidency, with more than forty-five thousand Native Americans “relocated.”

**Declaring Federal Judicial Supremacy**

While the Supreme Court established its supremacy over state *legislatures* in its early decisions in *Ware v. Hylton* and *Fletcher v. Peck*, the question of its power over state *courts* was still open in the second decade of the nineteenth century. That question was finally resolved by Justice Joseph Story’s decisive opinion for a unanimous Supreme Court in *Martin v. Hunter’s Lessee* (1816).

*Martin* involved a challenge to a Virginia state law by the heirs of the Fairfax family of Virginia. Since those heirs were British subjects, their rights to inherit the land were voided by a Virginia state law, and the land was sold off to third parties, including none other than Chief Justice Marshall and his brother. The Fairfax interests challenged the state law as unconstitutional in light of international treaties that they argued confirmed their title. The case came before the Supreme Court twice, with Chief Justice Marshall not participating in either decision because of his interest in the lands in litigation.

The second decision, in the *Martin* case, posed the question whether the Supreme Court could reverse the decision of the highest court of Virginia on a question of federal constitutional law. The answer was not obvious from the text of the Constitution, which was silent on the question. Congress had, however, in
Section 25 of the original Judiciary Act of 1789 conferred jurisdiction on the Supreme Court to review final judgments of the highest court of a state in several instances, including where a state law was upheld against a federal constitutional challenge, as was true in the *Martin* case. Thus the *Martin* Court needed to determine whether Section 25 was itself constitutional.

Southern legal scholars had argued that the Supreme Court could not displace the rulings of the highest courts of sovereign states even on questions of federal law because the Constitution was the product of a compact among sovereign states, and those states retained any powers not expressly surrendered to the new federal government. Chief among these scholars was Virginia’s own Spencer Roane, the son-in-law of Patrick Henry and a judge on the Virginia Court of Appeals, the court from which the *Martin* appeal had been taken. Roane and his colleagues saw their court as entitled to the same deference on questions of constitutional law as the Supreme Court, given the silence of the Constitution on the issue.

Following the same theory of popular sovereignty found in Justice Wilson’s earlier opinion in *Chisholm v. Georgia*, Story rejected the retained sovereignty argument, concluding that the Constitution represented a vote of the people of the United States and not that of separate sovereign states. Moreover, Story noted, from a practical standpoint, permitting the highest courts of thirteen separate states each to determine potentially the same issue would only result in “jarring and discordant judgments,” which would be destructive of the Constitution and the Union and inconsistent with the Supremacy Clause contained in Article VI of the Constitution. As such Section 25 of the Judiciary Act was constitutional; the judgment of the Virginia court was reversed; and the Fairfax heirs prevailed.

**Expanding the Reach of Federal Government**

The watershed opinion of the Marshall Court on the powers of the federal government was that delivered for a unanimous Court in *McCulloch v. Maryland* (1819). *McCulloch* involved two questions of vast importance to the future of the country—the power of Congress to incorporate a national bank and the power of a state to impose taxes on such an institution. Marshall’s opinion recognized its own significance, stating early on that “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.”

The power of Congress to create a national bank was a critical issue debated from the very beginnings of the United States, when Treasury Secretary Alexander Hamilton suggested the concept in 1791 and Secretary of State Thomas Jefferson and his congressional ally from Virginia, James Madison, opposed it. To the
Anti-Federalists, succeeded in turn by the Jeffersonian Republicans and the Jacksonian Democrats, the Bank of the United States was an antidemocratic vehicle of corporate greed and private monopoly, the great white whale to be hunted down and killed, once and for all.

Madison’s opposition questioned the constitutional power of Congress to charter a bank, since that power was not explicitly conferred on Congress in Article I of the Constitution. President Washington asked Hamilton and Jefferson to prepare memoranda on the question and accepted the Hamiltonian view that the power to charter a bank was conferred by the “Necessary and Proper” Clause of Article I, Section 8. This led to the creation of the First Bank of the United States under a twenty-year charter that ran from 1791 to 1811. In 1811 the prevailing Republicans under now-president Madison refused to recharter the bank. The impact of the War of 1812 caused Madison to alter his views, however, and the bank was resuscitated in 1816, with a new charter that ran to 1836.

The Second Bank of the United States, the stock of which was held 80 percent by private investors and 20 percent by the United States government, soon began to foster land speculation by granting loans on up to 80 percent of the purported value of the land. This shortly led to a land bubble that burst in the Panic of 1819, causing the failure of many state-chartered banks and large investor losses. This reigned populist antibank sentiment, with many states taxing branches of the Second Bank and two states prohibiting its operations within their borders. One such tax was imposed by Maryland, where two land speculators who lent themselves money on an unsecured basis ran the local Second Bank branch. The constitutionality of this state tax was the subject of the second question decided in *McCulloch*.

Marshall’s opinion in *McCulloch* began by upholding the power of Congress to charter a national bank, echoing the arguments of the long-dead Hamilton from nearly thirty years earlier. First the popular sovereignty model was affirmed: “The government of the Union . . . is emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.” Second Marshall declared that “the government of the Union, though limited in its powers, is supreme within its sphere of action.” Third, relying upon the “Necessary and Proper” Clause, while the power to establish a bank was not expressly granted by the Constitution, “we must never forget, that it is a constitution we are expounding.” As such “we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. *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.”

On the question of the power of Maryland to tax a creature of the federal legislature, Marshall firmly announced that “the power to tax involves the power to destroy,” an apt observation given the actions of many states at that very time either to prohibit outright or to tax the local branches of the Second Bank of the United States in the fallout from what would become the Panic of 1819. The opinion concluded that “the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.”

Opposition to Marshall’s broad views of federal power and state subordination soon surfaced in a series of articles by southern judges and theorists, including Spencer Roane. So serious were these attacks that Marshall himself, writing anonymously, answered them with his own series of newspaper essays, defending his view of the federal government’s implied powers.

The Hamilton-Marshall view prevailed in both the short and long terms, but was seriously challenged thirteen years after *McCulloch*, when President Andrew Jackson vetoed recharter of the Bank of the United States in 1832. Jackson had a Jeffersonian view of the relationship between the federal and state governments. In 1829, in his first inaugural address, he announced that “in such measures as I may be called on to pursue in regard to the rights of the separate states I hope to be animated by a proper respect for those sovereign members of our Union, taking care not to confound the powers they have reserved to themselves with those they have granted to the confederacy.”

Jackson’s views on the Bank of the United States also reflected a limited view of federal power. Influenced in part by his own financial losses in the Panic of 1819, Jackson saw the bank as a monopoly owned “principally” by “Eastern and foreign stockholders” who were “rich and powerful” and had aligned themselves against “the humble members of society—the farmers, mechanics, and laborers—who have neither the time nor the means of securing like favors to themselves.” While the Supreme Court had held in *McCulloch* that Congress possessed the power to establish a national bank, Jackson demurred, reasoning that the view of the Supreme Court was not binding on him but was only entitled “to have . . . such influence as the force of their reasoning may deserve.” This was the view Lincoln later adopted with respect to the binding power of the *Scott v. Sandford* decision on slavery. Jackson’s attempt to kill the Bank of the United States also failed but only after the Civil War, which arose out of the powder keg of slavery and the political “slave power” of the South.