CALIFORNIA INSTITUTE OF TECHNOLOGY

L/H/PS 148a — Tue 7:30 PM, Baxter 210
The Supreme Court in U.S. History — Prof. J. Morgan Kousser
Winter, 2011 — e-mail: kousser@hss.caltech.edu

SYLLABUS

Warning: Although I am happy to have in this class any student who accepts its challenges, I should warn you that **this is a demanding and intellectually rigorous course**. Each student must

1) make two oral presentations and, in the week following each oral presentation, submit a paper on the topic of that oral presentation;
2) prepare a brief on one of the excerpted cases every week or two, depending on the number of students in the class (there will be a sign-up sheet each week, and there are instructions and an example of a brief below);
3) each week, one student will have to provide the class with typewritten notes on the oral argument assigned for the week (there is an example of such notes below).
4) There will be no mid-term, but the 3-hour, closed-book, closed-notes, closed-everything-but-your-mind essay final will cover all the material assigned from the O'Brien casebooks, the assigned oral arguments, and anything said by me or your fellow students in class.

While I encourage discussion of the topics and work of the class outside it, you should not get help on your papers without informing me. Supreme Court opinions are not easy going, and we're going to read a lot of them in a short time. Note, please that this course is ***NOT*** available on a Pass/Fail basis. You may take the winter term of this course whether or not you take the spring term (which will cover the First Amendment, privacy, and criminal procedure). But L.148a is a prerequisite for L.148b.

The only books assigned to everyone in the class are David M.. O'Brien's *Constitutional Law & Politics*, both volumes, **seventh edition**, 2008 with the chapters corresponding to volumes I and II, and the 2010 supplement to the textbook, which is called *Supreme Court Watch 2010* and is also edited by O'Brien . In addition, each week you should make an effort to listen to recordings of the assigned oral arguments, which are available at http://www.oyez.org. (Search for the case name, then click on the link to the oral argument.) Some have transcripts, which are more convenient. But listening to the voices, stammers, hesitations, laughter, and muttering is more fun.

Date	Topic	Reading Assignment	Oral Argument
Jan. 4	Judicial Review	Ch. 1 (same in both volumes)	
Jan. 11	Input/Output	Ch. 2 (same in both volumes)	*Perry v. Schwarzenneger*, *http://www.c-spanvideo.org/program/296911-1*
Jan. 18	Presidential Powers	Vol. I, 264-369, 424-42, 461-69; Supplement, 8-41	*Medellin*
Jan. 25	Contract Clause, Substantive Due Process	Vol. I, Ch. 9	*Kelo*
Feb. 1	Economic Regulation, New Deal Crisis	Vol. I, Ch. 6	*City of Boerne*
Feb.8	Federalism	Vol. I, Ch. 7	*Hibbs*
Feb. 15	Equal Protection	Vol II, Ch. 12, pp. 1334-87	*Loving v. VA*
Feb. 22	Equal Protection	Vol. II, Ch. 12 Sections B&*C*	*Milliken v Bradley*
Mar. 1	Equal Protection	Vol. II, Ch. 12, Section D	*Lawrence v. TX*
Mar. 8	Reapportionment, Voting Rights	Vol. I, Ch. 8, Sections A & B, Supplement, 48-73	*Citizens United*

Briefs and Oral Argument reports

Many students in this course have formed informal study groups in the past, sharing their notes on cases. To formalize this, I decided some years ago to assign students to write short briefs of each case we read in O'Brien. It has worked pretty well. Each week, I'll pass around a sheet with the names of the cases for the next week on it, and students will sequentially sign up. I'll try to make sure that no one is assigned too many or too few over the quarter. The briefs should be finished **by 5 pm on <u>Monday</u> before the Tuesday class** and **emailed** (Word, WordPerfect, or Acrobat files) to Victoria Mason (<Victoria@hss.caltech.edu>). So should the outlines for the book reports and "enhanced briefs," described below. We will then print them out and put 3-hole punches in them. A set will be handed out to each student in class. You should buy a 3-ring binder to put them in. At the end of the course, everyone will have a complete set of briefs, which will be of great assistance in studying for the final exam. They will also be suitable keepsakes for the course.

Book Reports

Students learn best actively. The "book reports" will give you the chance to "adopt" one case and one judge, and to inform us all about them. Each student is to read **one book about a case *<u>and</u>* <u>either</u> one biography <u>or</u> one book about an era** from the three lists below. For biographies, tell us, if it is possible from the book, what made the person want to be a judge and what made them qualified to be a judge; what important opinions they wrote and what they said in some of those opinions; and what their lasting importance (if any) was. Books about eras are more various. Some consist of short biographies of several justices; some focus on cases or crises or even gossip. You'll have to use your judgment and/or consult me before you present. Above all, please try to make your presentation interesting to the class. It has become customary (and now mandatory) for each oral report to be accompanied by a **typed and photocopied outline of**

your oral report for the other class members. The class may have questions to ask you, as I may. Be prepared. A week after the oral report, you should hand in to me a written report of about 8-10 double-spaced pages on the material. Write well; I read closely.

Because we have had difficulty in the past in finishing all of the oral reports (Caltech students are a talkative lot), I've decided that for the books on cases, you should file an "enhanced brief" (my term) for the week in which we discuss the case, **and then, you should complete a more conventional report on the book for the written report a week later**. I include an example of an "enhanced brief" in the handout packet. The basic idea is that you should tell us about the larger factual and theoretical contexts of the case and its short- and long-term consequences. It may be useful for the enhanced briefer to read the whole original opinion (available on Oyez or Lexis), instead of just the excerpt in O'Brien.

In giving oral reports on the briefs, the enhanced briefs, and the biographies, please TALK your reports; don't READ them. You can and should refer to notes, but don't just read what you've handed out: we can read, and though I'm pretty tolerant, other students get bored. Besides, it's good practice for pitching film scripts, scientific experiments, or yourself.

The following is a list of books, their call numbers, the number of pages in each book, and the week when the oral report should be presented:

Cases (Enhanced Briefs)

KF4575.C554.1989	Robert L. Clinton, *Marbury vs. Madison & Judicial Review*	225 pp.	Jan. 11
KF4575.A965.2005	Mark Tushnet, ed., *Arguing Marbury v. Madison*	165 pp.	Jan. 11
KF5063.M5.1970	Samuel Klaus, ed., *The Milligan Case* (skip appendix)	250pp.	Jan. 18
Kf7224.5.I76.1983	Peter Irons, *Justice at War* (on *Korematsu*)	367 pp.	Jan. 18
KF5060.M37	Maeva Marcus, Truman and the Steel Seizure Case (on *Youngstown Sheet & Tube*)	260 pp.	Jan. 18
KF9430.A53.P64.2008	H.L. Pohlman, *Terrorism and the Court: The Post-9/11 Cases* (on *Hamdi*)	310 pp.	Jan. 18
KF9430.E53.2008	*The Enemy Combatant Papers: American Justice, The Court, and the War on Terror* (on *Hamdan*)	1000 pp.	Jan. 18
KF228.C43 C73 1988	Barbara Craig, *Chadha*		Jan. 18
KF228.L63.K46.1990	Paul Kens, *Judicial Power & Reform Politics: The Anatomy of Lochner v. N.Y.*	150 pp.	Jan. 25
KF228.S545.L33.2000	Ronald M. Labbe, *The Slaughterhouse Cases: Regulation, Reconstruction, and the 14th Amendment*	250 pp.	Jan. 25
KF2355.A4.M5	George H. Miller, *Railroads and the Granger Laws*	200 pp.	Jan. 25

	(on *Munn*)		
KF4606.B38	Maurice Baxter, *The Steamboat Monopoly: Gibbons v. Ogden*	130 pp.	Feb. 1
KF3552.W6	Stephen B. Wood, *Constitutional Politics in the Progressive Era: Child Labor & the Law* (on *Hammer v. Dagenhart*)	300 pp.	Feb. 1
(see me)	Richard C. Cortner, *The Jones and Laughlin Case*	170 pp.	Feb. 1
KF4541.C873.1998	Barry Cushman, *Rethinking the New Deal Court* (on *Jones and Laughlin*)	225	Feb. 1
KF8742 .L48 1995	William Leuchtenburg, *The Supreme Court reborn : the constitutional revolution in the age of Roosevelt* (on *Jones and Laughlin*)		Feb. 1
KF1322.N66.2002	John T. Noonan, *Narrowing the Nation's Power* (on *City of Boerne*)	150 pp.	Feb.8
LC214.23.L56.U53.1999	Elizabeth Jacoway, *Understanding the Little Rock Crisis* and		
F419.L7.B3.1986	Daisy Bates, *The Long Shadow of Little Rock* (on *Cooper v. Aaron*)	365 pp.	Feb. 8
KF4545.S5.F432	Don Ferenbacher, *Slavery, Law, & Politics: The Dred Scott Case*	300 pp.	Feb. 15
KF4545.S5.M35.2007	Earl Maltz, *Dred Scott and the Politics of Slavery*	150 pp.	Feb. 15
KF4545.S5.A948.2006	Austin Allen, *Origins of the Dred Scott Case*	230 pp.	Feb. 15
KF4757.L64.1987	Charles Lofgren, *The Plessy Case*	200 pp.	Feb. 15
KF662.V5	Clement Vose, *Caucasians Only: The Supreme Court, The NAACP, and the Restrictive Covenant Cases* (on *Shelley v. Kramer*)	250 pp.	Feb. 15
KF4155.S77.2010	Philippa Strum, *Mendez v. Westminister, School Desegregation and Mexican-American Rights*	160 pp.	Feb. 22
KF4155.C68.2003	Robert Cottrol *et al., Brown v. Board*	250 pp.	Feb. 22
KF4155.R46.1992	Mark Whitman, ed., *Removing a Badge of Slavery The Record of Brown v. Board of Education*	345 pp.	Feb. 22
LC 214.23.C43.D68.1995	Davison M. Douglas, *Reading, Writing, and Race: The Desegregation of the Charlotte Schools* (on *Swann*)	250 pp.	Feb. 22
KF228.S9.S39.1986	Benjamin Schwartz, *Swann's Way: The School Busing*		

	Case and the Supreme Court		Feb. 22
KF228.B34.B35.2000	Howard Ball, *The Bakke Case*	206 pp.	Feb. 22
(see me)	Paul A. Sracic, *San Antonio v. Rodriguez*	153 pp.	Mar. 1
KF228.S553.Z45.2004	Charles L. Zelden, *The Battle for the Black Ballot: Smith v. Allwright and the Defeat of the Texas All-White Primary*	150 pp.	Mar. 8
JK1348.A2.Z5.1960	Bernard Taper, *Gomillion v. Lightfoot*		Mar. 8

Biographies

KF8745.M3.J64.1997	Herbert A. Johnson, *The Chief Justiceship of John Marshall*	315 pp.	Jan. 11
KF8745.M3.N49.2001	R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (concentrate on pp. 146-385)		Jan. 11
KF8744.W5.HUM	G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* (compare several)	400 pp.	Jan. 11
KF8745.S83.N48.1985	R. Kent Newmyer, *S.Ct. Justice Joseph Story*	400 pp.	Jan. 18
KF4541.S73.2005	Stuart Streichler, *Justice Curtis in the Civil War Era*	270 pp.	Jan. 18
KF8745.M5.R67.2003	Michael Ross, *Justice of Shattered Dreams: Samuel Freeman Miller and the S.Ct. During the Civil War Era*	290 pp.	Jan. 18
E415.9.C4.N58.M25	John Niven, *Salmon P. Chase*	450 pp.	Jan. 18
E415.9.D25.K5.1976	Willard L. King, *Lincoln's Manager, David Davis*	380 pp.	Jan. 25
KF8745.S4.S776.1986	Daniel G. Strong, *Supreme Court Justice William Strong, 1808-1895*	425 pp.	Jan. 25
KF8745.F5.K46	Paul Kens, *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age*	280 pp.	Jan. 25
KF8745.C3.K38.1998	Andrew Kaufman, *Cardozo* (concentrate on pp. 455-578)		Feb. 1
KF8745.C3.P59.1997	Richard Polenburg, *The World of Benjamin Cardozo*	250 pp.	Feb.1
KF8745.B67.U748.2009	Melvin Urofsky, *Brandeis*, pp. Ix-45, 201-28, 300-27, 430-89, 545-618, 691-720		Feb. 1

KF8745.T3.M3.1965	Alpheus T. Mason, *William Howard Taft*	305 pp.	Feb. 1
KF8745.M25.M3.1974	Matthew McDevitt, *Joseph McKenna (1843-1926)*	250 pp.	Feb.1
KF8745.H6.A66.2000	Albert Alschuler, *Law Without Values . . . Justice Holmes*	325 pp.	Feb. 1
KF8745.S88.P3.1969	Joel F. Paschal, *Mr. Justice Sutherland, A Man Against The State*	270 pp.	Feb. 8
KF8745.S8.M25	Alpheus T. Mason, *Harlan Fiske Stone* (2 reports: split at p. 467)		Feb.8
KF8745.R87.F47.2004	John M. Ferren, Salt of the Earth, Conscience of the Court: . . .Wiley Rutledge (concentrate on SupCt years)	550 pp.	Feb. 8
KF373.J55.Y37	Tinsley Yarbrough, *Judge Frank Johnson & Human Rights in Alabama*	225 pp.	Feb. 15
KF373.J87.K46.1991	Frank R. Kemerer, *William Wayne Justice*	400 pp.	Feb. 15
KF8745.H3.P79.1999	Linda Przybyszewski, *The Republic According to John Marshall Harlan* (on Court 1877-1911)	200 pp.	Feb. 15
KF8745.F7.U76.1991	Melvin Urofsky, *Felix Frankfurter*	179 pp.	Feb. 15
KF8745.B55.B298.1996	Howard Ball, *Hugo L. Black*	251 pp.	Feb. 15
KF8745.W3.W45.1982	Edward White, *Earl Warren*	370 pp.	Feb. 15
KF8745.F65.K35.1990	Laura Kalman, *Abe Fortas*	400 pp.	Feb. 15
KF8745.M8.H6	J. Woodford Howard, *Mr. Justice Murphy*	500 pp.	Feb. 15
KF8745.T3.L4	Walker Lewis, *Without Fear or Favor, A Biography of Chief Justice Roger Brooke Taney*	500 pp.	Feb. 15
KF373.W332.Y37.1987	Tinsley Yarbrough, *A Passion for Justice: J. Waites Waring & Civil Rights*	250 pp.	Feb. 22
KF8745.P69.J44.1994	John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* (concentrate on pp. 222-562)		Feb. 22
KF373.H644.M3.1983	Genna McNeil, *Groundwork: Charles Hamilton Houston & The Struggle for Civil Rights*	225 pp.	Feb. 22
KF8745.W3.S37.1983	Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court* (2 reports, split at 336)		Feb. 22
KF8745.B68.S74.2010	Seth Stern and Stephen Wermiel, *Justice Brennan, Liberal Champion*, esp. 195-484		Feb. 22
KF4755.M34. T87.1997	Mark Tushnet, *Making Constitutional Law: Thurgood Marshall and the Supreme Court,*		

	1961-1991	200 pp. Feb. 22
KF373.H38.W37.1984	Gilbert Ware, *William Hastie*	250 pp. Feb. 22
KF213.S66.S56.1988	Robert Sickels, *John Paul Stevens and the Constitution*	175 pp. Mar. 1
KF8745.O25.B57.2005	Joan Biskupic, *Sandra Day O'Connor*	400 pp. Mar. 1
	Joan Biskupic, *American Original: Scalia* Mar. 2	
KF8745.S68.Y37.2005	Tinsley Yarbrough, *David Hackett Souter*	300 pp. Mar. 1
KF8745.B555.Y37.2008	Tinsley Yarbrough, *Harry A. Blackmun*	350 pp. Mar.1
KF8745.T48.M47.2007	Kevin Merida and Michael A. Fletcher, *Supreme Discomfort: The Divided Soul of Clarence Thomas*	380 pp. Mar. 8

Eras

KF8742.H368.2008	Matthew P. Harrington, Jay and Ellsworth, *The First Courts*, pp. 1-203	Jan. 11
KF8742.S47.1998	Scott Douglas Gerber, ed., *Seriatim: The Supreme Court Before John Marshall*, 1-154, 198-230, 292-350	Jan. 11
KF8742.M32.2008	Brian McGinty, *Lincoln and the Court*	315 pp., Jan. 18
KF8742.S54.1998	David M. Silver, *Lincoln's Supreme Court*	236 pp., Jan. 18
KF8742.K46.2010	Paul Kens, *The Supreme Court Under Morrison Waite, 1874-1888*	172 pp., Jan. 25
KF4541.C873.1998	Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution*	225 pp., Feb. 1
KF8742.L48.1995	William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age Of Roosevelt*	250 pp., Feb. 1
KF8744.H63.1996	Jeffrey D. Dockett, *New Deal Justice: the Constitutional Jurisprudence of Hugo L. Black, Felix Frankfurter, And Robert H. Jackson*	300 pp., Feb. 1
KF8744.F45.2010	Noah Feldman, Scorpions: *The Battles and Triumphs Of FDR's Great Supreme Court Justices*	433 pp., Feb. 1
KF8742.U76.1997	Melvin Urofsky, *Division and Discord: The Supreme*	

	Court Under Stone and Vinson, 1941-53	250 pp.,	Feb. 8
KF8742.B427.2004	Michal Belknap, *The Supreme Court Under Earl Warren, 1953-1969*	315 pp.,	Feb. 15
KF8742.P678.2009	L. Scot Powe, *The Warren Court and American Politics*, (2 reports: 1-208, 209-502 – there's an online copy)		Feb. 15
KF8742.A5.W367.1994	Bernard Schwartz, *The Warren Court*, 21-158, 195-284,		Feb. 15
KF8742.B76.1991	Charles M. Lamb and Stephen C. Halpern, *The Burger Court: Political and Judicial Profiles*, 1-34, 63-162, 238-374,		Feb. 22
KF8742.W66	Bob Woodward and Scott Armstrong, *The Brethren* (on the Burger Court)	440 pp.,	Feb. 22
KF8748.K43.2004	Thomas M Keck, *The Most Activist Supreme Court In History: The Road to Modern Judicial Conservatism* (Burger and Rehnquist Courts)	295 pp.,	Feb. 22
KF8742.S28.1992	David Savage, Turning Right: *The Making of the Rehnquist Supreme Court*, pp. 3-148, 305-422		Feb. 22
KF8742.R475.203	Earl Maltz, ed., *Rehnquist Justice* (essays on each justice)	290 pp.,	Feb. 22
KF8742.H78.2007	David L. Hudson, Jr., *The Rehnquist Court: Understanding Its Impact and Legacy*	150 pp.,	Feb. 22
KF8742.R467.2006	Craig Bradley, ed., *The Rehnquist Legacy*, Pp. 1-80, 187-204, 301-82		Feb. 22
KF8748.T66.2007	Jeffrey Toobin, *The Nine* (Rehnquist Court)	340 pp.	Mar. 1
KF8742.Y36.2000	Tinsley Yarbrough, *The Rehnquist Court and the Constitution*	269 pp.,	Mar. 1

Enhanced Brief for *McCulloch v. MD* (1819), from original text

Factual Context

From the earliest days of the Republic, two issues were fundamental to controversies over the limits of the power of the national government: slavery and banking. The Northwest Ordinance prohibiting slavery in the territories north of the Ohio River was passed in the Continental Congress simultaneously with the holding of the Constitutional Convention in 1787. The controversy over the Bank of the United States (B.U.S.) began before its establishment in 1791.

Before the Civil War, the national government did not issue paper currency (fiat money), and the currency in circulation was issued by state-chartered banks and the B.U.S. These banks would accept deposits of specie (gold or gold coins) and issue paper money or other forms of credit on the basis of the "real money," as the idiotic commercials on tv often call it today. But there was little regulation of the amount of specie each bank had to hold, and except for the B.U.S., there was no central body to decide exactly what each bank's paper currency was worth (to "discount" the bank's notes). State banks tended to inflate the currency and contribute to speculation. "Runs" on banks – demands by depositors for their specie back – caused crashes. Compared to even the weak regulation that contributed to the crash of 2008, the early 19th century regulation was puerile, indeed.

Although the 20-year charter of the B.U.S. was allowed to lapse in 1811, it was rechartered for another 20 years in 1816 because of the financial disorganization that an unregulated system in the midst of a damaging war (Washington, D.C. was burned during the War of 1812 and President James Madison had to flee in disarray) caused. When the B.U.S. required state banks to resume meeting depositors' demands for specie (called "resumption"), the economy crashed.

The B.U.S. was a semi-public corporation, the largest corporation in the country at the time, with a capital of $35 million, and it made heavy contributions to politicians in Congress. Several states at this time tried to tax the B.U.S. out of existence. Maryland levied a tax of $15,000 a year, Ohio, $50,000, and Kentucky, $120,000. Indiana and Illinois prohibited it from opening offices in their states. There were 18 branches of the B.U.S. around the nation.

Theoretical Context

From the struggle of the Anti-Federalists against the adoption of the constitution through the present day, there have been battles over the often-competing powers of the national and state governments that have often turned on vague and open-ended clauses of the constitution. There were two clauses at issue in *McCulloch*, the "necessary and proper" clause and the "supremacy" clause, which read (Article I, Section 8, Clause 18) "That Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof." And (Article VI, Paragraph 2): "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;

and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Did the necessary and proper clause constrain or expand the powers of Congress? Could Congress pass only those laws that were absolutely necessary to carry out the powers laid out in Article I or elsewhere? How much discretion did Congress have? If courts regulated the amount of discretion, was Congress impotent? And how much discretion did courts, state and federal, have to rule on whether congressional or presidential actions had been made "in pursuance" of the constitution? Could a state court in effect rule a law of Congress unconstitutional? Nearly every issue concerning the balance of state and national powers could be considered under the rubrics of these two clauses.

Facts

James McCulloch, the "cashier" (principal officer) of the Baltimore branch of the B.U.S. refused to pay the tax to Maryland, and an agreed-upon case was arranged to test the constitutionality of the B.U.S. Interestingly, McCulloch and certain directors of the branch were later found to have been looting the B.U.S. for years, though they later escaped conviction on a technicality.

McCulloch was sued in state court by an executive of the State, lost, appealed, lost again, and appealed to the U.S. Supreme Court.

Oral Argument (this is not always important)

Beginning on Feb. 22, 1819, five days after the House of Representatives had passed the Tallmadge Amendment banning slavery in the new state of Missouri – the opening round of the constitutional and political crisis that led to the Missouri Compromise in 1820 –, the oral argument lasted nine days! It involved six of the most prominent attorneys in the country: William Pinkney, Daniel Webster, and Attorney General William Wirt, for the Bank; Maryland Attorney General Luther Martin, Joseph Hopkinson, and Walter Jones for Maryland. Pinkney held the floor for three days, and Justice Joseph Story (the second most prominent justice on the Marshall Court) wrote of Pinkney's argument: "I never, in my whole life, heard a greater speech; it was worth a journey from Salem [Massachusetts, Story's home] to hear it; his elocution was excessively vehement, but his eloquence was overwhelming. His language, his style, his figures [of speech], his arguments were most brilliant and sparkling. He spoke like a great statesman, and a sound constitutional lawyer. All the cobwebs of sophistry and metaphysics about State rights and State sovereignty he brushed away with a mighty besom [broom]. We have had a crowded audience of ladies and gentlemen; the hall was full almost to suffocation." During the oral argument, the House of Representatives held a heated debate on a bill to repeal the charter of the Bank, which might have rendered the case moot.

Opinion of the Court, 7-0, by Chief Justice John Marshall (There were only 7 members of the Court at that time.)

Preface: Recognized the importance of the case, which Marshall said "may essentially influence the great operations of the Government. 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." [Note the passive voices in essential parts of this paragraph.]

I. Does Congress have the power to incorporate a bank?

A. No precedents [He cites only one state case and no federal cases.], but

1. The power has been exercised since 1791, and many contracts, etc. are dependent on the legitimacy of the BUS.

2. B.U.S. was chartered after vigorous debate.

3. Allowed to expire, it was rechartered after more debate.

B. Maryland insists that the Const was a compact of sovereign states

1. The concon was called by the states, and the document was ratified by conventions in each state, but

2. "It is true, they assembled in their several States -- and where else should they have assembled?"

3. " The government proceeds directly from the people . . ." not the states, which lacked veto power over its adoption.

C. Maryland contends that the national government has only enumerated powers.

1. But within its sphere, it is supreme, quoting supremacy clause.

2. True, creating a bank isn't one of the powers enumerated in the const, but

3. Even the 10th Amendment omits the word "expressly," which had been in the Articles of Confederation and had embarassed that govt.

4. So an answer depends on considering the general nature of the const.

a. A constitution must be a short outline: "A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. . . .we must never forget that it is *a Constitution* we are expounding."

b. The limits of congressional power in Art. I, Sec. 9 imply that other powers can be exercised.

c. Congress has great powers: taxation, borrowing money, war, commerce. Nothing in the const denies it the "choice of means."

d. Why is the establishment of a bank different from choice of any other means on any other subject?

e. MD contends that the necessary and proper clause is a restriction on powers, meaning Cong can pass only those laws that are "indispensable" to the exercise of its powers.

f. But in common speech [no dictionary citation], necessary only means "convenient, or useful, or essential to another." "Necessary" can be modified to strengthen or weaken its meaning: "absolutely necessary," which is used elsewhere in the const.

g. Logically, the Framers couldn't have denied Cong the choice of means: "To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances."

h. The necessary and proper clause appears in Art. I, Sec. 8, enumerating the powers of Cong, not its limitations.

i. In summary, the necessary and proper clause means: " 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."

II. May MD tax the Bank?

A. The national govt may restrict state taxing powers, for const prohibits states from taxing imports or exports except where "absolutely necessary" to fund inspections.

B. If Cong can create a bank, it can preserve it.

C. If states can tax a bank, they might destroy it, for " the power to tax involves the power to destroy . . ."

D. If states could tax the bank, they may tax any of the operations of the national govt, and they, not it, would be supreme, contrary to the supremacy clause.

Immediate Reaction

Many newspapers reprinted the whole opinion, and editorials in the North praised it, while most in the South and West, particularly Ohio (which was then in "the west") condemned it. Thomas Jefferson, James Madison, and Spencer Roane (a judge on the highest court in Virginia) denounced it in newspaper columns and more or less open letters, Madison condemning Marshall for propounding an abstract doctrine not necessary to a decision in the case. Marshall responded in a series of anonymous newspaper articles.

Paradoxically, the Jeffersonians excoriated the Court for not declaring the Bank Charter unconstitutional, contradicting their position on *Marbury*. The Virginia Legislature passed a resolution attacking *McCulloch* as "eminently calculated to undermine the pillars of the Constitution itself, and to sap the foundations and rights of the State Governments" on the same day that it passed a resolution on the Missouri Compromise, Feb. 12, 1820.

The most violent reaction was in Ohio, where the legislature had passed a tax of $50,000 per year on the B.U.S. Completely ignoring the Supreme Court decision in *McCulloch*, as well as an injunction against collecting the tax issued by a federal judge, State Auditor Osborn ordered his

assistant to enter the vaults of the local branch of the B.U.S. and seize all of the specie (gold) and notes (paper) found there. He did, about six months after the decision in *McCulloch*, taking a total of $120,475. Outside of Ohio, the seizure was almost universally condemned, and two years later, a federal judge ordered Osborn to return the money, with interest. Osborn refused. Commissioners appointed by the federal court then entered the Ohio State Treasury and seized $98,000. Ohio then appealed the federal court decision to the U.S. Supreme Court, where it lost. The state legislature then passed a resolution denying the right of the U.S. Supreme Court to consider the constitutionality of an act ruled constitutional by its state supreme court, and the legislature in 1821 passed a statute "outlawing" the B.U.S. and calling on all the other states to disagree with every aspect of the *McCulloch* decision. In 1824, Marshall ruled against Ohio in the *Osborn* case, including a long disquisition on federal court jurisdiction.

Of the controversy, the leading Ohio newspaper, the *Western Herald and Steubenville Gazette*, wrote: "From the formation of the Constitution of the United States until the present time, there have been frequent contests between the Legislative power and the Courts and Judges, in almost all of which the Judges, contrary to the wishes of large majorities of the people,have succeeded in maintaining not only all the power respecting the grant of which there remained doubts, but have also arrogated to themselves an authority as well above the laws as above the Constitution itself."

Substantive Long-term Consequences

In 1832, President Andrew Jackson vetoed a bill rechartering the B.U.S., holding that regardless of Marshall's opinion in *McCulloch*, the B.U.S. was unconstitutional. In the midst of the ensuing "Bank War," state banks again went wild and the economy collapsed in the worst recession since 1819. Regulation of the economy continued to be a major issue throughout the antebellum era. In 1863, in the midst of the Civil War, Congress passed a law setting up nationally-chartered banks and taxing state-chartered banks almost out of existence, and it issued "greenbacks" to pay for the War. The greenbacks were "retired" in 1878, and bitter controversies began about monetizing silver, as well as gold. There are too many other controversies about financial regulation to detail here.

Theoretical Long-term Consequences

Those who wish to justify or expand the national government's powers have repeatedly returned to Marshall's opinion and language. Those who wish to constrain such power have largely ignored it.