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COUSIN HUMPHREY

*Ruth Wedgwood**

Chief Justice John Marshall is known for his celebration of a strong national voice for the early Supreme Court, and so it is hardly surprising that we tend to overlook the philosophical cuckoo in his family nest. Not all Americans willingly conceded a monopoly in constitutional interpretation to the early nineteenth century Court. One of the most powerful challenges to the authority and method of the Supreme Court came from within Marshall's family, scattered across the frontier of Virginia and Kentucky.

Distant from the frontier's problems of economy and politics, the Court used a lace-cuff coastal jurisprudence of vested rights to overthrow the land laws of the backcountry, designed to assist settlers clearing and improving the land. Henry Clay warned that the judgments in *Green v. Biddle*,¹ overturning Kentucky land laws, threatened "the most tremendous effects of any ever delivered by a judicial tribunal."² Rhetorical insurrectionists accused the Court of imposing an alien jurisprudence, unsuited to the circumstances of ordinary men and local needs.

A fractious member of John Marshall's own family joined this levée en masse against the Court, campaigning for interpretive comity. Humphrey Marshall—first cousin and brother-in-law to the Chief Justice, former Senator, newspaper editor, and, oddly enough for a self-styled Federalist, a firebrand of republican rhetoric—insisted that the Supreme Court should give weight to the constitutional views of popular bodies, including state legislatures, even be checked by popular means.

Cousin Humphrey lived a provocative life, stubbornly persisting as a Federalist in Kentucky from the 1780s through the 1820s, even when Federalists were profoundly unpopular. He was

* Professor of Law, Yale Law School. This essay was presented at the American Historical Association. Harry Scheiber, Sandra VanBurkleo, and Robert Bone had thoughtful comments.

1. 21 U.S. (8 Wheat.) 1 (1823).

2. Letter from Henry Clay to Benjamin Watkins Leigh (March 6, 1823), in Melba Porter Hay et al., eds., *The Papers of Henry Clay, Supplement 1793-1852* at 133 (U. Press of Kentucky, 1992).

a unionist, casting Kentucky's lot with the political consortium of the Atlantic coast states, despite the natural gaze of Kentucky down its watercourse to the Mississippi, New Orleans, and the Gulf of Mexico. He opposed the calls in the 1780s for Kentucky to declare unilateral independence from Virginia. He voted for ratification of the new federal Constitution in the Virginia Convention in 1788, despite Kentucky's anger that the federal government indifferently defended American navigation rights on the Mississippi, and he consented to the Jay Treaty in the United States Senate. He constantly denounced and opposed the schemes—real and imagined—of Wilkinson, Burr, and Harry Innes to involve Kentucky with the Spanish and French in the Mississippi Valley. Strangely enough for a dyed-in-the-wool Federalist,³ one of Cousin Humphrey's most spirited adventures toward the end of his life was his attack upon the United States Supreme Court.

Sketching Cousin Humphrey's complaints may help us understand something of the political culture of the 1820s, and why John Marshall's view of a single hierarchical structure for the resolution of constitutional questions was seen as unattractive by so many Virginians and Kentuckians. It has been a tenet of faith in American constitutional law that John Marshall's method and logic were right—that the Supreme Court has properly tried to enforce a monopoly of voice in constitutional matters and to establish the High Court's final power to measure the federal Constitution by its own lights, without indulgence of the contrary views of state courts or legislators. To those of us who have witnessed the renewed debate of the late twentieth century on how to balance the center against the periphery, and how to reconcile cooperative union with local desires for self-governing authority, the normative superiority of Nathan Dane, Joseph Story, and John Marshall may no longer seem self-evident. To those who have watched the Supreme Court spurn other guides to interpretation of the federal Constitution—be it the customary international law of human rights, or state supreme courts' differing views of what rights are fundamental to republican government as witnessed by their own constitutions—the federal Supreme Court's interpretive hermeticism is less attractive. The possibility of a constitutional comity, in which the Court seeks to generate

3. "The real Federalist, is a Republican," said Humphrey Marshall to Kentucky voters in 1810. "I am a Republican—a Federal Republican—an American Republican." This is "the very reverse of a Frenchified—or Spanish Kentucky, Republican." *Extract, from a hand-bill, addressed by H. Marshall, to the Independent Electors of Franklin County, American Republic (Frankfort, Ky.)* 4 (July 10, 1810).

consensus, and recognizes other law-speaking bodies as deserving weight, brings the voices of early Southern Republican writers back into earshot. The claims of Southern Republican writers were strong enough to attract even Cousin Humphrey, when Kentucky's own interests were at stake.

The immediate occasion for Humphrey Marshall's attack on the Court was the decision of *Green v. Biddle*, a challenge to the landholding system of Kentucky. Kentucky's laws provided compensation for settlers ejected from improved land when their title later proved to be defective. The constitutional battle derived from the tension between guaranteeing the proprietary rights of Virginia-based land claims in Kentucky, and aiding Kentucky settlers harried by uncertain titles.

The "Kentucky District of Virginia," as it was called, won independence and statehood in 1792. Virginia's charter claims ran to the Ohio River and the Mississippi, and the parent state consented to Kentucky's independence only after a long period of agitation in the west.⁴ To promote economic growth and attract settlement despite the uncertainty generated by lingering Virginia claims, the Kentucky General Assembly early on created a remedy for settlers displaced from their land by absentee claimants. Kentucky statutes of 1797⁵ and 1812⁶ provided that settlers who had a colorable claim of land title could not be thrown off their homesteads by a legal action of ejectment or writ of right, unless they were paid for permanent improvements made to the land: the clearing of forest areas, the preparation of fields, and the construction of buildings. Kentucky's statutes also limited an ejected farmer's liability for prior use of the land. No rents or profits accrued until occupancy was challenged in court (under the 1797 statute) or a final judgment was entered (under the 1812 statute).

From Kentucky's point of view, strong policy supported these laws. Kentucky needed to settle the land, for prosperity and as a buffer against Indian activities. Land warrants had been issued profligately by Virginia before Kentucky's independence in exchange for military service and for purchase money. Ken-

4. To Kentucky complainants, the 1787 national constitution had a counterrevolutionary cast—guaranteeing the territorial integrity of existing states. No breakaway state would be recognized inside existing state borders without the parent state's consent. U.S. Const., Art. IV, § 3.

5. Ky. Acts 132 (1796-97); 1 Bradford's Ky. Stat. 202.

6. An Act, to amend an Act, entitled an act concerning Occupying Claimants of Land, Ky. Acts 11 (1812), also in William Littell and Jacob Swigert, 2 A Digest of the Statute Law of Kentucky 957 (Kendall and Russell, 1822).

tucky inherited Virginia's complicated system of perfecting land title with innumerable technical requirements whose absence defeated a claim. Land warrants gave the right to claim an abstract quantity of land, but it was up to a warrant holder to stake his claim by "locating" the warrant on vacant acreage; he also had to make "entry" on the land, commission and record a private land survey, and gain a land patent. There was no public survey of plots, and warrants were issued far in excess of Kentucky's arable land. The hills and pasture land of Kentucky came to be "shingled" many times over by conflicting claims. Often land could be identified only by reference to what water course it lay upon, highly approximate distances, and vanished landmarks such as buffalo roads and corner trees. With poor survey and recording methods, it was only after the actual trial of contested claims, with *viva voce* testimony about the notoriety of landmarks in the neighborhood years before, that the superiority of one title over another could be established. Farmers would sensibly be reluctant to travel west and improve land when all their work might later go for naught.⁷

To create an incentive to settlement, Kentucky provided in the so-called "occupying claimant" laws that a displaced farmer who had a colorable claim to title should at least walk away with compensation for the improvements he had made to the land. This statute bore resemblance to Roman law,⁸ and the Napoleonic Code.⁹ But English common law was unrelievably harsh. By

7. See generally, Stephen Aron, *How the West Was Lost: The Transformation of Kentucky from Daniel Boone to Henry Clay* (Johns Hopkins U. Press, 1996); Paul Gates, *Tenants of the Log Cabin*, 49 *Mississippi Valley Historical Rev.* 3 (1962).

8. See *The Institutes of Justinian*, Book II, Title I, § 30 ("if the builder of [a] house has possession of the land, and the owner of the latter claims the house by real action, but refuses to pay for the materials and the workmen's wages, he can be defeated by the plea of fraud, provided the builder's possession is in good faith: for if he knew that the land belonged to some one else it may be urged against him that he was to blame for rashly building on land owned to his knowledge by another man."); Celsus, *Digest*, Book 3, in *The Digest of Justinian*, Book VI, 38 (equity should be adjusted to the facts of the case: "You inadvertently bought land belonging to another, built or planted on it, and then were evicted by the owner; the good judge's order will vary according to the persons involved and the facts of the case"). See also Papinian, *Replies*, Book 2, in *The Digest of Justinian*, Book VI, 48 ("[w]here a possessor in good faith has incurred expense on land which is shown to belong to someone else, . . . he can be indemnified by raising the defense of fraud, at the judge's discretion based on principles of fairness, so long as his expenses exceed the amount of profits which he received before joinder of issue. Thus, since set-off is allowed, the owner is made to pay the amount spent in excess of profits, where the land has been improved").

9. See *The Code Napoleon*, Book II, Title II, ch. I, ¶ 549-550 ("The mere possessor can not make the fruits his own but where he is in possession *bonâ fide* . . . He is [a] *bonâ fide* possessor who possesses as owner, by virtue of a title transferring the ownership, the defects of which title he is ignorant of. He ceases to be *bonâ fide* possessor from the

English common law, as well as late eighteenth century Virginia common law, the superior titleholder regained possession of land without paying compensation for improvements, and with a full right to back rents and profits from the prior occupant's use.¹⁰ Neither the English common law nor the Virginia rule had been designed with the particular problems of frontier Kentucky in mind.

The immediate controversy in *Green v. Biddle* arose from the compact Kentucky made with Virginia in 1789 as a condition of obtaining independence. Many Virginia families, including the Marshalls, made livelihoods trading in Kentucky land, and the chance that Virginia claims would be disregarded was unacceptable. Kentucky promised Virginia that

*all private rights and interests of lands within the said district [of Kentucky], derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state [of Virginia].*¹¹

In the three decades before *Green v. Biddle* was decided, Virginia never suggested that Kentucky's occupying claimant laws violated the compact. In Humphrey Marshall's view, as a rather good lawyer, the compact meant merely that land claims in Kentucky, derived from Virginia warrants not yet perfected with a patent, must be honored and permitted to mature. It did not mean that the remedies for conflicting claimants were frozen in time.

moment when such defects are known to him"); *id.*, ch. II, § 1, ¶ 555 ("If the owner prefers to retain such plantations and structures, he must make good the value of the materials and the price of the labor").

10. The occupying claimant laws are analyzed in William Weston Fisher III, *The Law of the Land: An Intellectual History of American Property Doctrine, 1776-1880* at 180-84 (Ph.D. thesis, Harvard University, 1991) and in Sandra VanBurkleo, "That Our Pure Republican Principles Might Not Wither": *Kentucky's Relief Crisis and the Pursuit of "Moral Justice," 1818-1826* (Ph.D. thesis, U. of Minnesota, 1988).

11. An Act Concerning the Erection of the District of Kentucky into an Independent State (1789), § 7, in 13 *Hening's Laws of Virginia* 17, 19 (Philadelphia, 1823) (emphasis added). The proviso was also made part of Kentucky's state constitution, and was indirectly referred to in the federal act consenting to the formation of the new state and admitting Kentucky into the Union. See Constitution or Form of Government for the State of Kentucky, Art. 8, sec. 7 (1792) ("The compact with the State of Virginia, subject to such alterations as may be made therein, agreeably to the mode prescribed by the said compact, shall be considered as a part of this Constitution"); and An Act declaring the consent of Congress, that a new State be formed within the jurisdiction of the Commonwealth of Virginia, and admitted into this Union, by the name of the State of Kentucky, 1 Stat. 189 (Feb. 4, 1791) ("Whereas the legislature of the commonwealth of Virginia, by an act . . . have consented . . ."). Kentucky's admission took effect on June 1, 1792.

At least one warrant-holder did not agree. Virginian John Green brought suit against Kentucky resident Richard Biddle, arguing that the interstate compact voided Kentucky's laws requiring compensation for improvements. The 1789 common law of Virginia set Kentucky's future course, said Green, and forbade Kentucky's legislature from granting any relief to hardscrabble farmers.

What happened next was either a comedy of errors or feckless jurisprudence. The dispute was certified to John Marshall's Supreme Court in 1816 by a division of the federal circuit court in Kentucky, consisting of District Judge Harry Innes and Circuit Justice Thomas Todd. Five years went by; the original plaintiff died and his heir Betsey Green was substituted; the Supreme Court finally called the case in the 1821 winter term. When Biddle's counsel did not arrive from Kentucky, the Court heard Green's counsel alone, without an adversary hearing, and passed by lingering problems of mootness and imperfect diversity jurisdiction. Joseph Story's cursory opinion for the Court, announced seventeen days after the one-sided argument, explained that the Virginia-Kentucky compact must be given a weight that went beyond a general law of property, and so must accomplish more than guarding Virginia warrants and titles. Respect for foreign inchoate land titles, a transplantation of Virginia law into Kentucky's jurisdiction, was already mandated by "general principles of law" and "the first principles of justice"—a constitutionalized choice-of-law unsurprising from the Justice who would, two decades later, write *Swift v. Tyson*.¹² The political compact was designed to go further and to prevent any "material impairment" whatsoever of the rights and interests of owners of land at the hands of the Kentucky legislature. Story rejected any distinction of right and remedy: the remedies of Virginia land law were to be applied in perpetuity, displacing any subsequent Kentucky legislation.

Kentuckian Henry Clay was present in the District of Columbia when Story delivered his opinion, and as self-styled attorney for the situation, Clay intervened as friend of the court.¹³ The Court's *ex parte* decision would cause disruption to "numerous occupants of land" throughout the region, warned Clay, and deserved full rehearing. The Supreme Court withdrew its deci-

12. 41 U.S. (16 Pet.) 1 (1842).

13. This was the first *amicus curiae* brief filed in Supreme Court history.

sion and set the case down for the February 1822 Term.¹⁴ Henry Clay and George Bibb appeared for Biddle at the second argument. Green won again, in an opinion announced by Virginia Justice Bushrod Washington in the 1823 term, this time mustering the federal Constitution's contracts clause as the source of protection—the interstate compact was a public contract, and any of its beneficiaries could sue to enforce it. Newly provoking was the Supreme Court's decision to act by a minority vote—only five of the seven appointed Justices attended the 1823 term, and only three joined in the opinion striking down Kentucky's land-holding regime.

There are puzzles throughout the Supreme Court's procedure, minutes, and official report of the case. (These irregularities are doubly ironic in a case that dwells on the jot and title of Virginia's remedies law.) The Court was far from the orderly institution familiar in our century. Wheaton's *United States Reports* announces that Kentucky Justice Thomas Todd—Circuit Justice for the western Seventh Circuit, who faced an onerous journey from Frankfort, Kentucky, to join the February Term—was “present” at the 1821 Supreme Court decision, and the 1821 decision is said by Justice Story to be “the unanimous opinion of the Court.”¹⁵ Yet the Supreme Court's manuscript minutes state that “Judge Todd did not sit in this cause.”¹⁶ Todd was present in Court for a portion of the 1822 reargument, left abruptly in the middle, and was not present at all in the 1823 term.¹⁷ The Court did not defer decision to await his participation, even though he was the Justice most familiar with the practical problems facing Kentucky in land use. The factual vernacular of constitutional pragmatism, a first hand description of the mischief a statute seeks to remedy—brought to the Supreme Court in the twentieth century realism of Louis Brandeis—was not yet seen as essential. Justice Brockholst Livingston of New York was also missing in the 1823 Term, taken ill, and the Court did not await his recovery or replacement.

The greatest puzzle is Chief Justice Marshall. He is noted in the minutes and in Wheaton's *Reports* as present at the 1821 de-

14. Minutes of the Supreme Court, 208 (Mar. 14, 1821), National Archives Microfilm Publication M215.

15. 21 U.S. (8 Wheat.) at 17 & n.a.

16. Minutes of the Supreme Court, 192 (Mar. 5, 1821), National Archives Microfilm Publication M215. Wheaton's reporting has misled even the most distinguished historians. See G. Edward White, *The Marshall Court and Cultural Change, 1815-35* at 646 (Oliver Wendell Holmes Devise, Macmillan Publishing Company, 1988).

17. Minutes of the Supreme Court, 279-288 (Mar. 8-13, 1822), 380 (Feb. 27, 1823), National Archives Microfilm Publication M215.

cision, and the minutes say he attended the 1822 reargument and the 1823 decision, yet at least one newspaper report of the 1823 decision states that "Marshall refused to sit,"¹⁸ and the disappointed litigants speak of the Court as acting only by a three man plurality—Bushrod Washington, Joseph Story, and Gabriel Duvall, without Marshall.¹⁹ One might almost surmise that until the last, John Marshall reserved the right to be in or out of the case, according to the temper he sensed in the Court's political audience.

Cousin Humphrey Marshall's cannonade at the Supreme Court was double-barrelled and let loose even before the revised decision. In four essays published in the summer of 1821 in the Frankfort Commentator,²⁰ curiously called "*I, By Itself*," Humphrey Marshall lambasted the Court for hearing the case at all. The Virginia-Kentucky compact contained an arbitration clause; any dispute between the states was to be referred for decision to a panel of arbitrators to be chosen by the two states. Immediately after the initial Supreme Court decision was withdrawn in 1821, negotiations were begun between Virginia and Kentucky to set up the arbitration panel. The politically adept Henry Clay served as intermediary with Virginia, appealing to the common republican past of the sister states in the 1798 fight against the Alien and Sedition Acts, and chiding that a family dispute should not be resolved by the federal stranger. Humphrey Marshall's broadsides mocked the Court for applying one part of the compact with severity, while ignoring the arbitration clause, as if the Court were frightened of any rival law-speaking voice, thwarting the arbitration as an unwanted challenge to its guild monopoly.²¹ And what if both states should agree there was no violation of the compact from Kentucky's oc-

18. *Occupying Claimant Laws*, Argus of Western America (Frankfort, Ky.) 2 (May 21, 1823); accord, *To the Editor of the Lexington [Ky.] Monitor*, Richmond Enquirer (Richmond, Va.) 3 (Nov. 29, 1822) ("[T]he chief justice, and the associate justice from this state, do not sit in the cause now pending . . . , in that court, touching the validity and constitutionality of our occupying claimant laws").

19. "The manner of the decision has been as unhappy as the decision itself will be unsatisfactory. It was communicated as the opinion of three judges to one. Those three were Washington, Duval, & Story, Judge Johnson being the dissentient." Letter from Henry Clay to Benjamin Watkins Leigh (March 6, 1823) (cited in note 2).

20. Letters of *I, By Itself*, Commentator (Frankfort, Ky.) 2 (Aug. 9, 1821); 3 (Aug. 16, 1821); 2 (Aug. 23, 1821); 2 (Aug. 30, 1821). See also *I, By Itself* Broadside (republished by H. Marshall, Nov. 18, 1823), in *Durrett Collection* (Broadside, Broad sheets, and Circulars, Box 1, Folder 23) (Joseph Regenstein Library, U. of Chicago).

21. *I, By Itself*, Part II, Commentator (Frankfort, Ky.) at 3 (Aug. 16, 1821). "[I]f this is our situation, and we are prepared to bear it—our mouths may be bridled—our backs saddled—and we, rode away to the King's white hall!" *I, By Itself*, Part IV, at 2 (Aug. 30, 1821).

cupying claimant laws? Should the Court place its own reading above the state parties?²² Inter-jurisdictional arbitration and mediation was highly familiar to Kentuckians—American commissioners were meeting to settle matters with Spain under Pinckney's Treaty²³ and with Great Britain under the Treaty of Ghent.²⁴ The possibility that a state might speak as a class representative for its citizens' civil interests thus had a familiar analogy in international matters. Especially where the entitlement was created by the states' own compact, rather than arising from any claimed constitutional protection for all remedies concerning property, the role of a state as intermediary in resolving disputes was plausible.

In *Exposé* essays in 1823, one of which survives,²⁵ Cousin Humphrey renewed his harry of the Justices for disdaining the Virginia-Kentucky negotiations and rushing to judgment with an under-staffed Court. The negotiations for setting up an arbitration panel ran into a snare in the Virginia Senate in early 1823, and rather than allow another session of the Virginia legislature to solve the difficulty, the Justices plowed ahead to judgment as a rump Court—four participating, three voting to condemn Kentucky's law as a violation of the federal contracts clause. The Court's haste to act seemed evident when, after announcing the Court's decision in February 1823, Justice Bushrod Washington refused to release the opinion for another six months, holding the text under wraps until August 1823.

Humphrey Marshall's second complaint went far beyond the lost jurisdiction of the arbitrators and the short-handed pretension of the Supreme Court justices. Rather, it concerned the appropriate power of self-determination in a republican system of

22. Members of the Kentucky legislature debated whether they needed a guarantee of indemnity from the Virginia legislature against non-resident claimants, who might pursue federal court remedies outside the arbitration. Opponents of the indemnity "contended that the decision of the commissioners, if made in season, would probably influence the decision of the Supreme Court, as it would express the opinion of the parties on the construction of a contract between them." *Debate of the Kentucky Legislature*, in *Richmond Enquirer* (Richmond, Va.) 3 (Nov. 26, 1822). If "one decision was favourable to us, the other would be . . . It is asserted in conversation . . . that Chief Justice Marshall had said that such a decision would in his opinion be the true one for the supreme court to make." *To the Editor of the Lexington [Ky.] Monitor*, *Richmond Enquirer* at 3 (cited in note 18).

23. Treaty of Friendship, Limits and Navigation Between the United States and the King of Spain, 8 Stat. 138, Treaty Ser. No. 325 (1795).

24. Treaty of Peace and Amity Between His Britannic Majesty and the United States of America, 8 Stat. 218, Treaty Ser. No. 109 (1814).

25. H. Marshall, *An Exposé, Of the final Opinion, of the Supreme Court of the United States, in the case of Green, against Biddle*, *Commentator* (Frankfort, Ky.) 2 (Nov. 15, 1823) (misprinted in masthead as 1821).

government. The Union was a structure of co-equal states, said Humphrey, and it was inconceivable that a compact of independence should place an eternal servitude on the land. Analogies here waxed rich. Kentucky's good faith promises under the Virginia compact, signed to obtain self-governance, had deteriorated to "abject bondage"²⁶—a form of peonage or slavery, ravishment, a colonial dependency unimaginable in independent America. The Court's "gauzy sophistry" reduced Kentucky to a servitude below other states: "if the compact with Virginia, was verily such as the court have made it, Kentucky should have been excluded from the Union as a mere appendage to Virginia[.]"²⁷ In a Hobbesian turn, Humphrey doubted whether such a compact could even be consistent with natural law: "whether the people, or a nation, can bind themselves by compact, to ruin themselves, may well be doubted."²⁸ The right of a state to undertake measures affecting land was a central part of self-government. The Virginia compact as read by the Court could prevent abolishing imprisonment for debt in the purchase of land, taxing land, or using the power of eminent domain to obtain land for public purposes. A republican legislature had a duty to respond to economic distress, especially where the unavailability of other institutional forms (e.g., the modern expedient of title insurance) left occupants without protection.²⁹ Kentucky "would . . . have rejected" the compact as rewritten by the Court, for denuding her of the "proper and necessary exercise of internal legislation."³⁰ In his prospectus for a new edition of *The History of Kentucky*, in October 1823, Humphrey Marshall trumpeted that the Supreme Court decision "would render all legislation as to lands, held or claimed by Virginia warrants, a mere useless labour . . . there shall at least, be one record of the author's disapprobation . . . of its perversion, and misapplication of the compact."³¹ Where any other reading was possible, a republican

26. *Id.* at 2, col. 1. The states should not be "dwarf-vassals" without the power to regulate land. See *Preamble and Resolutions of the Legislature of Kentucky*, in *Argus of Western America* (Frankfort, Ky.) 1 (Feb. 4, 1824). ("If one unaltered and unalterable system of laws was destined to regulate, in perpetuity, the concerns of the people of the republics of America . . . why the afflicting expence of sustaining twenty-four different States . . . ? Why . . . are they taunted with the *mock* lineaments, contexture and aspect of sovereigns, when in *very deed* they are dwarf-vassals?") (emphasis in original).

27. H. Marshall, *An Exposé* at 2 (cited in note 25).

28. *Id.*

29. Land patents were not protected by warranties of title—the grantor state gave none, and even on resale, a private warrantor might become insolvent.

30. H. Marshall, *Occupying Claimants*, *The Harbinger* (Frankfort, Ky.) 1 (Aug. 10, 1825).

31. *Kentucky Reporter* (Lexington, Ky.) (Oct. 20, Oct. 27, and Nov. 3, 1823).

judge should be loathe to read the Virginia compact to exclude these ordinary prerogatives of self-government.

Cousin Humphrey's attack upon the Supreme Court had a sharp edge, not only because he was a faithful Federalist and enjoyed frequent victories in the Court's land cases.³² His newspaper essays had the distinction of being adopted by the Kentucky legislature as part of the state's official remonstrance to the United States Congress concerning the decision in *Green v. Biddle*.³³

Kentucky Senator Richard Johnson, Congressman Robert Letcher, Governor John Adair, newly elected Speaker of the House Henry Clay, and others, suggested varied new solutions to deter the Supreme Court from overactive intrusion into state affairs, greatly alarming John Marshall. Expand the Court, so that Justices familiar with western problems would join in its deliberations.³⁴ Forbid the Supreme Court from deciding cases involving land. Require a two-thirds majority to invalidate state laws on constitutional grounds.³⁵ Require individual opinions from the Justices, to test their true concurrence in the decision.³⁶ Give the Senate final appellate jurisdiction in constitutional cases, as a properly representative body. The Republican Guarantee Clause of the Federal Constitution could be used by Congress to reverse or constrain the Supreme Court's actions, for "no people could be free without control over their soil."³⁷ If events required, said Humphrey Marshall, impeachment³⁸ and even insurrection³⁹ was a curative.

32. See Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic—Kentucky 1789-1816* at 187-89 (Princeton U. Press, 1978).

33. See *Preamble and Resolutions of the Legislature of Kentucky*, in *Argus of Western America* (Frankfort, Ky.) 1 (Feb. 18, 1824).

34. "In the Judiciary out of seven Judges we have but one," complained "A Western Citizen." "And the interpretation of the most important laws, and the decision of questions of the greatest moment, are submitted to a tribunal composed of men strangers to us and strangers to our respective codes." *A Western Citizen, To the People of the United States*, *Commentator* (Frankfort, Ky.) 1 (Jan. 23, 1822).

35. On March 11, 1824, Senator Van Buren, "from the judiciary committee, reported a bill providing that no law of any of the states shall be rendered invalid without the concurrence of at least five judges of the supreme court; their opinions to be separately expressed." *Congress*, *Kentucky Reporter* (Lexington, Ky.) 3 (Apr. 5, 1824) (emphasis in original).

36. *Id.*

37. Remarks of John Rowan, *Kentucky Legislature: House of Representatives*, Dec. 12, 1823, in *Argus of Western America* (Frankfort, Ky.) 2 (Dec. 17, 1823). See *id.* ("He was averse to sneaking by Congress as if afraid to be seen, and creeping into the court to beg where begging was vain . . .").

38. *From the Commentator*, in *Kentucky Gazette* (Lexington, Ky.) 2 (Sept. 25, 1823) ("Nothing less than the clear expression of one, or both branches of the national legisla-

"[T]his is no longer a private controversy," Humphrey wrote. "A state has been disenfranchised. A state contends for her rights."⁴⁰ "Kentucky will remember, if not detest, the court of the United States, as the pregnant cause of all the perplexity, injury and embarrassment consequent upon every new occasion of a similar kind. . . ."⁴¹ "To tell her, that she has bartered away her rights of a *free state*, in a compact for *independence*, would add insult to injury. . . . Believe us, the sentiment of 'independence of Virginia and her laws,' other than those voluntarily adopted, . . . is inbred and radical. The contrary doctrine . . . may be hacked into their veins with the sword; but it would flow out again with their blood. . . ."⁴²

The recovery of a major text—a letter from John Marshall to Speaker of the House Henry Clay in 1823⁴³—shows John Marshall's pronounced alarm at these efforts to restrict the Court's jurisdiction. "[I]t is among the most dangerous things . . . to legislate for a nation under a strong excitement," said Marshall. "[I]t is not easy for the legislator, intent only on that object, . . . to perc[e]ive and guard against the serious mischiefs with which his measure may burn." Proposals to increase the Court's size or "requir[e] more than a majority of all the Judges to decide any case" caused Marshall a visible *frisson*, and evoked his strong appeal to Clay's discretion.

In particular, Marshall took alarm at Kentucky Senator Richard Johnson's proposal to increase the Court to ten Justices, by adding three new western and southwestern circuits, and to require the concurrence of seven Justices to hold state or federal

ture, on impeachment, or otherwise, should quiet the insulted, and degraded rights of Kentucky legislation.") (emphasis added).

39. H. Marshall, *An Exposé* at 2 (cited in note 25) ("Should I be placed in the legislature, of which there is a possibility, it will be a primary object to obtain a *proper representation of the case*, in the name of the commonwealth, to the Supreme court, in full session, for a rehearing and reversal of their decision. . . . if this course is not taken, a worse will be pursued; which may even lead the state to insurrection.") (emphasis in original).

40. Marshall, *Occupying Claimants*, *The Harbinger* at 1 (cited in note 30).

41. *Id.* at 1.

42. *The Remonstrance [Concluded]*, *The Harbinger* (Frankfort, Ky.) 1-2 (Aug. 17, 1825) (emphasis in the original).

43. Letter from John Marshall to Henry Clay (Dec. 22, 1823) (text reproduced at Appendix A). The letter has been known to scholars only by its date. See Irwin S. Rhodes, 2 *The Papers of John Marshall: A Descriptive Calendar* 220 (U. of Oklahoma Press, 1969); and Melba Porter Hay, et al., eds., *The Papers of Henry Clay, Supplement 1793-1852* at 305 (cited in note 2). The text was made available to the author at the sale of a manuscript collection in June 1990 in New York City. The letter is now in the Gilder Lehrman Collection, GLC 141, on deposit at the Pierpont Morgan Library, New York City, and is reproduced by generous permission of the Morgan Library.

laws unconstitutional.⁴⁴ Johnson's proposal brought Chief Justice Marshall to protest his own faith that judicial review was immanent in the Constitution. Marshall appealed to spirit and sensibility rather than to the cold logic of *Marbury*.⁴⁵ "It is I think difficult to read that instrument attentively without feeling the conviction that it intends to provide a tribunal for every case of collision between itself and a law, so far as such case can assume a form for judicial inquiry; and a law incapable of being placed in such form can rarely have very extensive or pernicious effects."⁴⁶

A proposal such as Johnson's might bind the court, the Chief Justice tocsined, even as it violated a legislator's duty: "[L]et me ask your attention . . . whether it accords with the spirit of the constitution? If it goes to defeat an object which the constitution obviously designs to accomplish, I need not say to you that, although the judiciary may be bound by it, a conscientious legislator can never assent to it."⁴⁷

The memory of *Stuart v. Laird*⁴⁸ was still fresh: the Court had acquiesced in a new Republican Congress' decision to abolish the federal circuit courts created by the Federalist Congress of 1801. John Marshall recused himself from William Paterson's opinion in *Laird*, but clearly despised it. As he said to Clay:

If congress should say explicitly that the courts of the union should never enter into the enquiry concerning the constitutionality of a law, or should dismiss for want of jurisdiction, every case depending on a law deemed by the court to be unconstitutional, could there be two opinions respecting such an act? And what substantial difference is there between such a law, if law it may be called, and one which makes the decision to depend on an event which will seldom happen? What substantial difference is there between withdrawing a question from a court, and disabling a court from deciding that question? Those only, I should think, *who were capable of drawing the memorable distinction as to tenure of office, between remov-*

44. "[T]remendous evils might result to the country," warned Senator Johnson, "from the powers imparted to its judiciary, when a whole State, and a State that had always been loyal to the Government, might be convulsed to its very centre by a judicial decision." Johnson proposed forming three additional circuits, for Tennessee and Alabama, Mississippi and Louisiana, and Illinois and Missouri, and as well a law "to require a concurrence of at least seven judges in any opinion, which may involve the validity of the laws of the United States, or of the States respectively." See *Remarks and Resolution of Senator Richard Johnson*, 41 Debates and Proceedings in the Congress of the United States, 18th Cong., 1st Sess., 28 (Dec. 10, 1823).

45. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

46. Letter from John Marshall to Henry Clay (Dec. 22, 1823), Appendix A.

47. *Id.*

48. 5 U.S. (1 Cranch) 299 (1803).

*ing the Judge from the office, and removing the office from the Judge, can take this distinction.*⁴⁹

Yet as Marshall remembered, Congress acted with just that logic in 1802.

Marshall staked his appeal, finally, on the far-reaching practical consequences of Johnson's proposal. Though filmy on the surface, its disabling result seemed plain to him. "When we consider the remoteness, the numbers, and the age of the Judges, we cannot expect that the assemblage of all of them, when they shall amount to ten, will be of frequent recurrence. The difficulty of the questions, and other considerations, may often divide those who do attend. To require almost unanimity, is to require what cannot often happen, and consequently to disable the court from deciding constitutional questions."⁵⁰ A "law requiring more than a majority to make a decision as much counteracts the views of the constitution as an act requiring more than a majority of the legislature to pass a law."⁵¹

The measures to limit constitutional jurisdiction were outrun by the Court's adroit retreat. Senator Johnson's proposal lingered in the Senate,⁵² while Kentucky state courts openly disdained and defied the decisions in *Green*, relying on the small politeness that it was, after all, a short-handed Court. "[W]e still entertain the opinion, that the act of 1812, concerning occupying claimants, contains nothing incompatible with the constitution of the United States, or the compact between Virginia and Kentucky," said Judge Owsley of the Kentucky Court of Appeals in 1825. "[T]he case of *Green v. Biddle*, was decided by three only of the seven judges . . . we have no hesitation, under the circum-

49. Letter from John Marshall to Henry Clay (Dec. 22, 1823), Appendix A (emphasis added).

50. *Id.*

51. *Id.*

52. In April 1824, Daniel Webster wrote Justice Joseph Story that some "gentlemen of the West" had proposed "requiring the assent of a majority of all the judges to [any] judgment" holding a state law void under the federal Constitution. "Do you see any great evil in such a provision?" asked Webster. "Judge Todd told me he thought it would give great satisfaction in the West." Letter from Daniel Webster to Joseph Story (April 10, 1824), in Charles M. Wiltse, ed., *The Papers of Daniel Webster: Correspondence, 1798-1824*, at 356 (U. Press of New England, 1974). Joseph Story's *Letterbooks* also record a note of inquiry from Rufus King, New York's Federalist Senator, reciting and underlining the first phrase of Article III, "The Judicial Power of the U.S. shall be vested in *one Supreme Court*," and putting the "Question, may the supreme Court be so constituted, or changed by law, as to require more than a majority of the Judges to give a Decision?" Letter from Rufus King to Joseph Story (undated holograph in *Letterbooks of Joseph Story*, Manuscript Division, Library of Congress) (notated by archivist as "1820?," but more likely to be 1824 or 1825) (emphasis in the original).

stances . . . in not yielding to its authority."⁵³ In 1827, the Kentucky Court of Appeals declared that the constitutionality of the 1812 occupying claimant law was "no longer open to discussion . . . until some tribunal, *capable of controlling this court*, shall by its mandate set it again at large."⁵⁴ The Supreme Court acquiesced in this flouting, instructed as well by the Kentucky legislature's attempt to overthrow the state court of appeals by creating a rival court.⁵⁵ The Supreme Court also pledged a rule of good housekeeping, promising that it would never again decide constitutional questions except by an actual majority of the appointed Justices.⁵⁶

Finally yielding the long-sought quiet to Kentucky land titles, the Marshall Court in 1831 unanimously approved a new Kentucky statute shortening the time for suits over land. An adverse possessor could keep improvements—and the land as well—after seven years, even though Virginia land law had required 20 years adverse possession. "Let the language of the [Virginia-Kentucky] compact be literally applied," said Justice Johnson in *Hawkins v. Barney's Lessee*, on behalf of a new majority that included Marshall, Duvall, and Story, "and we have the anomaly presented of a sovereign state governed by the laws of another sovereign."⁵⁷ "It can scarcely be supposed that Kentucky would have consented to accept a limited and crippled sovereignty"⁵⁸ This retreat signalled a deep change in the Court's view of vested rights, and may be taken as a companion, even as incubus, to the more famous evolution in the Court's

53. *Bodley v. Gaither*, 19 Ky. (3 T.B. Monroe) 57, 58-59 (Ky. Ct. App. 1825).

54. *Sanders's Heirs v. Norton*, 20 Ky. (4 T.B. Monroe) 464, 465 (Ky. Ct. App. 1827) (Mills, J.) (emphasis added). Accord *M'Kinney v. Carroll*, 21 Ky. (5 T.B. Monroe) 96, 97-98 (1827) (Mills, J.).

55. See Arndt M. Stickles, *The Critical Court Struggle in Kentucky, 1819-29* (Indiana U. Press, 1929); Lowell H. Harrison and James C. Klotter, *A New History of Kentucky* 109-112 (U. Press of Kentucky, 1997).

56. In a challenge to a state debtor relief statute, the Court delayed action for two successive terms, because Todd was ill and the Court lacked a majority. The Court then upheld the insolvency statute by a split vote, with Marshall, Story, and Duvall dissenting. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 332 (1827). Marshall confirmed this new rule of prudence in *Briscoe v. Commonwealth's Bank of Kentucky* and *New York City v. Miln*, 33 U.S. (8 Pet.) 118, 122 (1834):

The practice of this court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in opinion, thus making the decision that of a majority of the whole court. In the present cases four judges do not concur in opinion as to the constitutional questions which have been argued. The court therefore direct these cases to be reargued at the next term, under the expectation that a larger number of the judges may then be present.

57. *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457, 467 (1831).

58. *Id.* at 547.

treatment of legislative power over corporate charters, from *Dartmouth College*⁵⁹ to *Charles River Bridge*,⁶⁰ and state insolvency laws, from *Sturges v. Crowninshield*⁶¹ to *Ogden v. Saunders*,⁶² all the more striking since Marshall, Story, and Duvall came along in *Hawkins* without dissent. By 1874, the Congress had added its own imprimatur to the justice of occupying claimant statutes.⁶³

An equally important part of the story is to gain a sense of how opponents of the Court saw their efforts. This was, from one vantage, a more innocent time in our history, when jurisdictional questions were not mere watchwords for racial politics, when gradual emancipation of slaves was still debated even in the South. Issues of state autonomy did not reduce, always and everywhere, to simple apologies for racism. Local resisters against Supreme Court authority in the land law controversy saw themselves as part of a broad movement of republicanism and self-determination. The Kentucky newspapers of the early 1820s are filled with news of the success of Simon Bolivar against Spanish monarchists in South America, bulletins hailing the struggle of the Greeks against the Turks, and Italy's fight for independence. Early recognition of the independence of Latin American countries was championed by Henry Clay. The issuance of the Monroe Doctrine to protect the new republics against Spanish attempts at reconquest marked the romantic sense that republicanism was still in advance, that the American model had not lost its worldwide appeal. Americans on the frontier did not see themselves as remote from the broader sweep of history, and in this self-conception they were aided even by Lord Byron, whose poems were reprinted in Kentucky newspapers: *The Age of Bronze* praised Washington and Franklin as heroes left to the world after Nelson's death and Napoleon's shrinkage from Jupi-

59. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

60. *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

61. 17 U.S. (4 Wheat.) 122 (1819).

62. 25 U.S. (12 Wheat.) 213 (1827).

63. See An Act for the Benefit of Occupying Claimants, 18 Stat. 50, ch. 200 (1874): [W]hen an occupant of land, having color of title, in good faith has made valuable improvements thereon, and is, in the proper action, found not to be the rightful owner thereof, such occupant shall be entitled in the Federal courts to all the rights and remedies, and, upon instituting the proper proceedings, such relief as may be given or secured to him by the statutes of the State or Territory where the land lies, although the title of the plaintiff in the action may have been granted by the United States after said improvements were so made.

ter to Neptune;⁶⁴ *Don Juan* praised Daniel Boone and his band as unspoiled men, virtuous models for the world.⁶⁵

Kentucky resisters saw themselves as serving the experimentalism of American political science. The adaptation of principles of natural justice to the American scene required the empiricism familiar to Franklin, and state autonomy served this end. "By the genius of the free governments instituted here, great inroads were necessarily made in the code of England," said Charles Humphreys to the Kentucky Institute in his *Sketch of the Science of Law*. "[E]ach state must perfect its own system." The thwarting particularity of American law was all to the good, allowing safe experiment and innovation. "Young states, as well as young men, display enterprize." "A greater variety of experiments can be made without involving such important consequences, as if they operated on the whole nation; and if the results are beneficial, other states can follow the example."⁶⁶ Each state's system of jurisprudence had an ethos that a nondomiciliary could not easily understand. A Justinian would have to "go in person from state to state to inform himself" and "stay in each long enough to read, compare, study and understand the true spirit of the jurisprudence of the country; and before he could go half round the circle, the progress of legislation in the states which he had left, would render his . . . performance almost valueless."⁶⁷ Property law and land law did not stand outside this healthy process of adaptation, Charles Humphrey remarked:

64. *The Age of Bronze*, Argus of Western America (Frankfort, Ky.) 1 (July 2, 1823):

[T]hat hallowed name / Which freed the Atlantic? May we hope the same / For
outworn Europe? . . . / The prophets of young freedom, summoned far / From
climes of Washington and Bolivar; / Henry, the forest-born Demosthenes, /
Whose thunder shook the Philip of the seas; / And Stoic Franklin's energetic
shade, / Robed in the lightnings which his hand allay'd; / And Washington the
tyrant-tamer, wake, / To bid us blush for these old chains, or break.

65. See Daniel Boon, *From the last Canto of "Don Juan"*, Kentucky Reporter (Lexington, Ky.) 4 (Oct. 6, 1823); also in Argus of Western America (Frankfort, Ky.) 3 (Oct. 15, 1823):

Of all the great names which in our faces stare, / The GENERAL BOONE, back
woodsman of Kentucky, / Was happiest amongst mortals any where; // . . .
around him grew / A sylvan tribe of children of the chase, // . . . tall and strong
and swift of foot . . . / Beyond the dwarfing city's pale abortions, / Because their
thoughts had never been the prey / Of care, of gain; the green woods were their
portions; / . . . / Corruption could not make their hearts her soil.

Byron's local hero lost his own lands in Kentucky through "the niceties of law . . . The few lands he afterwards was enabled to locate, were through his ignorance generally swallowed up, and lost by better claims." To the Honorable the Senate and House of Representatives of the General Assembly for the State of Kentucky, *The Memorial of Daniel Boone*, in the Kentucky Gazette (Lexington, Ky.) 1 (Feb. 4, 1812).

66. C. Humphreys, *A Sketch of the Science of Law in the United States, Read Before the Kentucky Institution*, Kentucky Reporter (Lexington, Ky.) 1 (June 21, 1824).

67. Id.

Real actions have always been considered the most abstruse part of the law; and all adjudications, connected with the investigation of land titles, require much learning and experience. The character of legal tenures in Kentucky was peculiar, growing out of the particular nature of the statutes of Virginia disposing of her waste lands; and a course of decisions has been adopted in Kentucky, under the particular circumstances of the country, that lawyers resident elsewhere could not anticipate; yet by the most enlightened men of the country, it was considered equitable and necessary.⁶⁸

And indeed, in his letter to Kentucky critic Henry Clay, John Marshall conceded that perhaps his jurisprudence was dated, facing the privilege of youth “to disregard entirely the wise sayings of the old.”⁶⁹

It was within this setting that the attacks against John Marshall’s Court carried a particular sting. The Court was likened to the Holy Alliance, Europe’s counter-revolutionary triad quelling republican dissent, and in this metaphor, John Marshall was Met-ternich. “[W]e are assailed by an army of Judges armed with constructions,” said the *Argus of Western America*. “[B]y placing them above popular control it is attempted to make their opinions as final and as fatal to the liberties of the people and the rule of majorities as the bayonets of the Holy Alliance of Europe.”⁷⁰ Classical Rome also provided analogy: a Court which declined to release opinions promptly resembled the Roman emperor who wrote his decrees too high on the wall to be read. “[T]hree men, a minority of the Judges, have prostrated a system of Laws which has been thought essential to their prosperity by almost half a million of people constituting an independent state,” lamented the *Argus*. “Nor would they permit [remonstrant counsel] Messrs. Rowan and Clay to have a copy of the Opinion, unless they would pledge themselves not to publish it! . . . we could not help thinking of the Roman tyrant who posted his laws so high, that no man could read them, and then punished his people for violating them.”⁷¹

The style of opinions also came under siege: the Court’s opinions were like imperial edicts, with obedience demanded from force, not persuasion, for the issue most in dispute was an-

68. *Id.*

69. Letter from John Marshall to Henry Clay (Dec. 22, 1823), Appendix A.

70. *Victorian Dinner, No. 1*, . . . *The curtain drawn from the Holy Alliance of America*, *Argus of Western America* (Frankfort, Ky.) 3 (Feb. 11, 1824). See also *id.*, at 2, 3, (Feb. 18, 1824).

71. *Occupying Claimant Laws*, *Argus of Western America* 2 (May 21, 1823).

nounced *ex cathedra* as self-evident and inexorably true.⁷² "Nice verbal distinctions and learned metaphysical constructions" were substituted for popular understanding. It was "the most alarming of all doctrines" that

the Judges in determining upon the constitutional powers of the people's representatives in the state governments, may totally disregard all legislative, popular and practical expositions of the constitution, adopted by all the departments of government . . . and substitute for this universal understanding and practice, their own SUPPOSITIONS of what the constitution may be, deduced from nice verbal distinctions and learned metaphysical constructions. This doctrine sweeps from the people and from every branch of the government, except the Judiciary, the right of understanding and expounding the constitution . . . these men would bring the people's fundamental law as completely within their grasp as was the civil code within the power of Rome's tyrant Emperors . . .⁷³

The Supreme Court's unitary voice, without individual seriatim opinions, also brought analogy to the *primus inter pares* of earlier triumvirates. And veering from one civil war to another, puckish Kentucky critics summoned Country against Court. "The Court Party contend, that the people have no right . . . to make occupying claimant laws, to remunerate those persons who have devoted a long life of labor and toil, in improving lands which they had every reason to believe their own," levelled the Argus.

Kentucky now has her Federalists and Republicans, her *Court Party* and her *Country Party*. . . . People of Kentucky, . . . be upon your guard, not against *the wild man of the woods*; but a more dangerous enemy, the Federalists and the Aristocrats of the Court Party, who are endeavoring to . . . reduce you to a

72. *Patrick Henry, No. XI*, Argus of Western America (Frankfort, Ky.) 2, 3 (June 9, 1824) (emphasis in original):

It is almost the invariable practice of Chief Justice Marshall, the great file leader, (on the heels of whom the Chief Justice of Kentucky is always found except when pressed by impatience he takes the lead . . .) on all constitutional questions which disrobe the states of power, to reject all state and popular precedents, frequently basing the arguments which conduct to his decision on his naked assertion of what he is pleased to call *truths none can have the boldness to deny*, but which are in fact the very points in dispute. This practice corresponds admirably with that of the tyrant who disdained in his order to assign any cause.

"Decius said, most mighty Caesar, let me know some cause, lest I be laughed at when I tell them so."

"Caesar replied, "the cause is in my will."

73. *Id.* (emphasis omitted).

condition, little better than that enjoyed by your ancestors as British colonists.⁷⁴

These attacks upon the Supreme Court in the 1820s never led to any radical restriction of the Court's jurisdiction, in part because the Court acquiesced in the parties' disobedience. The Court grew more regular in its practices, avoiding short-handed decisions, and became a more representative institution with the addition of two additional justices in 1837.⁷⁵ The tensions of the Southern position in regard to federal power were also an obstacle—even as they denounced Supreme Court intrusion into domestic affairs, Kentucky and other frontier states were eager for federal sponsorship of internal improvements and thus were seduced by the Supreme Court's generous construction of Congressional powers in the *McCulloch* bank case.⁷⁶ But the failure of the tinder to catch fire should not blind us to what was attractive in the Southern position, especially as a source of challenge to current interpretive practices. John Marshall's opponents, including Cousin Humphrey, saw themselves as celebrating self-determination and republican independence in a world that was still young.

74. *Argus of Western America* (Frankfort, Ky.) 3 (June 30, 1824) (emphasis in original).

75. See Judiciary Act of 1837, ch. 34, 5 Stat. 176.

76. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). See Harry N. Scheiber, *The Transportation Revolution and American Law: Constitutionalism and Public Policy*, in *Transportation and the Early Nation* (Indiana Historical Society, 1982).

APPENDIX A
LETTER FROM JOHN MARSHALL
TO HENRY CLAY, WASHINGTON

Richmond Dec^r 22^d 1823

Dear Sir

Your favour of the 11th reached me in due time and I can assure you that its perusal gave me no "trouble". With an abatement, which I dare say you are prepared to expect, that is—that few non residents of Kentucky will concur with the citizens of that state in opinion, either on their laws respecting the occupants of lands, or what is miscalled their "relief system", I had a sort of half way disposition to think with you on several points, till that section of my mind which was disposed to arrange itself with you was completely routed by M^r Johnsons proposition in the Senate. That gentleman, I percieve has moved a resolution requiring a concurrence of more than a majority of all the Judges of the supreme court to decide that a law is repugnant to the constitution.

It is the privilege of age to utter *wise sayings* somewhat like proverbs, in the shape of counsel, as a substitute for that powerful and convincing argument which it has lost the faculty of making; but this privilege is more than countervailed by another which is possessed and generally exercised by the middle aged as well as the young—it is to disregard entirely the wise sayings of the old. When I exercise my privilege, I am not quite so old or so unreasonable as to suspect that you are not in perfect readiness to exercise yours also.

But for the apothegm. If I do not come to it quickly you will think I waste more time in preparing for it than it is worth after being introduced. I will say then at once that it is among the most dangerous things in legislation to enact a general law of great and extensive influence to effect a particular object; or to legislate for a nation under a strong excitement which must be suspected to influence the judgement. If the mental eye be directed to a single object, it is not easy for the legislator, intent only on that object, to look all around him, and to percieve and guard against the serious mischiefs with which his measure may burn. I am perhaps more alive to what concerns the judicial department, and attach more importance to its organization, than my fellow citizens in the legislature or executive, but let me ask if serious inconvenience is not to be apprehended from a very numerous supreme

court? It ought not to be too small; but the one extreme is as much to be avoided as the other.

Let me ask too, and I put the question very seriously if a regulation requiring a concurrence of more than a majority of all the Judges to decide any case, ought not to be well considered in all its bearings, before its adoption? To say nothing of the influence of such a rule on the business of the court, let me ask your attention to the inquiry whether it accords with the spirit of the constitution? If it goes to defeat an object which the constitution obviously designs to accomplish, I need not say to you that, although the judiciary may be bound by it, a conscientious legislator can never assent to it. It is I think difficult to read that instrument attentively without feeling the conviction that it intends to provide a tribunal for every case of collision between itself and a law, so far as such case can assume a form for judicial inquiry; and a law incapable of being placed in such form can rarely have very extensive or pernicious effects.

If this be the obvious intention of the constitution, can the legislature withdraw such cases from that tribunal without counteracting its views and defeating its objects? If congress should say explicitly that the courts of the union should never enter into the enquiry concerning the constitutionality of a law, or should dismiss for want of jurisdiction, every case depending on a law deemed by the court to be unconstitutional, could there be two opinions respecting such an act? And what substantial difference is there between such a law, if law it may be called, and one which makes the decision to depend on an event which will seldom happen? What substantial difference is there between withdrawing a question from a court, and disabling a court from deciding that question? Those only, I should think, who were capable of drawing the memorable distinction as to tenure of office, between removing the Judge from the office, and removing the office from the Judge, can take this distinction.

That the measure proposed in the senate has this tendency is not, I presume, doubted by any person; that it will very often have this effect practically is, I think, as little to be questioned. When we consider the remoteness, the numbers, and the age of the Judges, we cannot expect that the assemblage of all of them, when they shall amount to ten, will be of frequent recurrence. The difficulty of the questions, and other considerations, may often divide those who do attend. To require almost unanimity, is

to require what cannot often happen, and consequently to disable the court from deciding constitutional questions.

A majority of the court is according to constant usage and the common understanding of mankind, as much the court, as the majority of the legislature, is the legislature; and it seems to me that a law requiring more than a majority to make a decision as much counteracts the views of the constitution as an act requiring more than a majority of the legislature to pass a law.

But I will detain you no longer with my prosing & will only add that I am with great respect & esteem

your obed^t Serv^t
J Marshall