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William Johnson, the Dog That Did Not Bark?

Mark R. Killenbeck*

"Is there any point to which you would wish to draw my attention?"
"To the curious incident of the dog in the night-time."
"The dog did nothing in the night-time."
"That was the curious incident," remarked Sherlock Holmes.

—Arthur Conan Doyle, Silver Blaze (Adventure XIII), MEMOIRS OF SHERLOCK HOLMES

The conventional wisdom is that Justice William Johnson, Jr., was the “the first dissenter.”¹ This is not literally true. The first published opinion of the Court was Georgia v. Brailsford,² in which each member of the Court expressed his views seriatim. Ironically, the first to speak was the first Justice Johnson, Thomas of Maryland,³ whose reasoning helped create a 4-2 split that produced a number of Supreme Court firsts: the first published set of opinions, the first split decision, and the first dissent.

It was the “other” Justice Johnson, William of South Carolina, who earned the reputation as the first persistently independent voice

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². 2 U.S. (2 Dall.) 402, 405 (1792). The first published decision included only the Court’s conclusion and no statement of its reasoning. West v. Barnes, 2 U.S. (2 Dall.) 401 (1791).

³. This was the only opinion Thomas Johnson wrote, one of the realities that prompted Herb Johnson to observe that “[f]ew men have so conducted their lives to escape historical study better than Thomas Johnson of Maryland.” Herbert Alan Johnson, Thomas Johnson, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1978: THEIR LIVES AND MAJOR OPINIONS 95, 96 (Leon Friedman & Fred L. Israel eds., Chelsea House Publishers, 3d ed. 1997).
on the Court. Johnson was nominated by President Thomas Jefferson in 1804 and served for thirty years until his death in 1834. The statistics suggest that Johnson earned his reputation as the first true contrarian. He wrote over 160 opinions, close to one-third of which were either concurrences (ten) or dissents (thirty-eight). This high ratio set Johnson apart from his brethren, as the next highest number of recorded separate opinions on the Marshall Court was nine, which were lodged by Joseph Story.

I confess that it was Johnson's pronounced independence that prompted me to select him as my subject. When John G. Roberts, Jr., was in the midst of his second Term as Chief Justice of the United States Supreme Court, having succeeded his mentor William H. Rehnquist, the new Chief Justice made it clear that one of his goals was to promote unanimity on the bench, observing: "I think that every Justice should be worried about the Court acting as a Court and functioning as a Court, and they should all be worried, when they're writing separately, about the effect on the Court as an institution." Roberts gleaned that imperative from the record of the only individual to become Chief Justice at a younger age than he:

If the Court in Marshall's era had issued decisions in important cases the way this Court has over the past thirty years, we would not have a Supreme Court today of the sort that we have. ... That suggests that what the Court's been doing over the past thirty years has been eroding, to some extent, the capital that Marshall built up. ... I think the Court is also ripe for a similar refocus on functioning as an institution, because if it doesn't, it's going to lose its credibility and legitimacy as an institution.

The Chief Justice's statement highlights that the Court has departed with increasing frequency from the perspective expressed by Chief Justice William Howard Taft that "[m]ost dissents... are a form of egotism," and "[i]t is much more important what the Court thinks that it is when the Court is acting as a Court."
than what any one thinks." It remains to be seen if Roberts will enjoy meaningful success. The ebb and flow has been uneven, and it is far from clear whether the Roberts Court will be noted for its harmony, much less its unanimity. That said, his comments suggest that, while dissent is in the air, it is decidedly out of favor.

Ironically, the collegial norm offered by Chief Justice Roberts and other critics is the Marshall Court, on which William Johnson supposedly fought his battle to establish the principle that each member of the Court should feel free to state his individual views, be they expressions of concurrence or dissent. Yet the more I learned about Johnson, the more troubled I became with his label: dissenter. First, I believe that Johnson's role in establishing the principle of an independent voice, while important, is generally overstated. Second, I believe that when we focus on Johnson we should concentrate on what he did not say rather than what he did. It is in this respect that I see him as the judicial dog that did not bark, at least on those occasions when he might most have been expected to.

I.

William Johnson, Jr., was the second son and favored child of a South Carolina blacksmith who played an active part in that state's resistance to the abuses of British rule. The younger Johnson was born on December 27, 1771, and received a sound classical education, eventually graduating first in his class in September 1790 from the College of New Jersey, which is now Princeton University. Johnson

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10. During Chief Justice Rehnquist's final Term, the Court issued seventy-nine full opinions, twenty-four of which were unanimous (30.4%). The Statistics, Table I(C) (Unanimity), 119 HARV. L. REV. 415, 423 (2005). In its first year under Roberts, the Court issued eighty-one opinions, thirty-six of which were unanimous (44.4%). The Statistics, Table I(C) (Unanimity), 120 HARV. L. REV. 372, 377 (2006).

11. Compare Jeffrey Rosen, The Dissenter, N.Y. TIMES, Sept. 23, 2007, § 6 (Magazine), at 50 (characterizing the October 2006 Term as "the stormiest in recent memory, with more 5-to-4 decisions split along ideological lines than at any time in the court's history"), with Linda Greenhouse, Supreme Court Memo: in Latest Term, Majority Grows to More Than 5 of the Justices, N.Y. TIMES, May 23, 2008, at 1 (noting that up to that point in the October 2007 Term there had been only one 5-4 decision).


13. This brief summary of Johnson's upbringing and early career is taken from various sources, in particular MORGAN, supra note 1, at 3-22.
then read law under the tutelage of Charles Cotesworth Pinckney, a South Carolina lawyer and Federalist leader who played an active role in the Constitutional Convention, pressing the need for a strong national government.  

Johnson was admitted to the bar in 1793 but, like so many of his generation and background, was not content simply to practice law. He entered politics, nominally as a Republican, and was elected to the South Carolina House of Representatives in October 1794. One early biographer characterized Johnson as “having attached himself warmly to that republican party which, under the lead of Mr. Jefferson, was growing fast and strong throughout the Union, and which in South Carolina . . . [was] sustained by most of the youthful talent of the State.” That is almost certainly an oversimplification. The political situation in South Carolina was complicated, with strong support for Jefferson and the Republicans in “the distant interior of the state” offset by substantial support for a strong national government, especially in Charleston. Johnson, for example, joined the Republican majority in the South Carolina House in condemning the Jay Treaty. But in other instances, particularly on the bench, he would espouse positions at odds with Republican orthodoxy.

Johnson served three terms in the House, from 1794 through 1799. His colleagues then placed him on the Court of Common Pleas, a posting that carried with it a seat on the state’s highest appellate tribunal, the Constitutional Court. The latter appointment proved especially important as it instilled in Johnson a familiarity with and appreciation for the practice of allowing individual judges to express their own positions in the cases they heard.

Johnson came to Jefferson’s attention in February 1804 when Justice Alfred Moore resigned due to ill health. Moore’s resignation offered Jefferson the opportunity to install someone who was neither a Federalist nor appointed by a Federalist President. That was clearly a matter of considerable importance. The third President did declare famously in his first inaugural address that “every difference of

15. JOHN BELTON O’NEALL, William Johnson, in 1 BIOGRAPHICAL SKETCHES OF THE BENCH AND BAR OF SOUTH CAROLINA 72, 73 (1859).
16. Ulrich B. Phillips, The South Carolina Federalists, 1, 14 AM. HIST. REV. 529, 542 (1909). Phillips attributes this to a combination of the recognition “that commerce depended upon efficient government” and the national political ambitions of local leaders. Id.
17. The Jay Treaty was an important step in averting a possible war with Great Britain and resolved a number of issues. It was nevertheless intensely controversial and vehemently denounced by the Jeffersonians. See generally JERALD A. COMBS, THE JAY TREATY: POLITICAL BATTLEGROUND OF THE FOUNDING FATHERS (1970).
opinion is not a difference of principle. We have called by different names brethren of the same principle. We are all Republicans, we are all Federalists.” But those putatively conciliatory sentiments did not encompass John Marshall and the Court. A mere ten days later, Jefferson complained that the Federalists “have retreated into the judiciary as a stronghold, the tenure of which renders it difficult to dislodge them.” In December 1801 he repeated the sentiment, arguing:

There the remains of federalism are to be preserved . . . and from that battery all the works of republicanism are to be beaten down and erased. By a fraudulent use of the Constitution, which has made the judges irremovable, they have multiplied useless judges merely to strengthen their phalanx.

Jefferson had any number of reasons for being angry with the Federalists, not the least of which was that John Adams had appointed the so-called “midnight judges” in the waning days of his presidency. This was compounded by the fact that one of the beneficiaries was John Marshall. Jefferson recognized the power of Marshall’s intellect and his persuasive abilities. But Marshall’s sheer ability made Jefferson uneasy, for, as Story reported, he felt:

When conversing with Marshall, I never admit anything. So sure as you admit any position to be good, no matter how remote from the conclusion he seeks to establish, you are gone. So great is his sophistry, you must never give him an affirmative answer, or you will be forced to grant his conclusion. Why, if he were to ask me whether it were daylight or not, I’d reply, “Sir, I do not know, I can’t tell.”

Jefferson found Marshall’s habits and politics equally distasteful. He condemned Marshall’s “lax and lounging manners [which] have made him popular with the bulk of the people in Richmond, and a profound hypocrisy with many thinking men in our country.” The two were frequently on opposite sides regarding many of the great political questions of the day. In the early 1790s, for example, they clashed over the manner in which the new nation should respond to the

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revolution in France, an episode that prompted Jefferson to complain to Madison (with ironic and mistaken insight) that it might be best to put Marshall where he could do less harm, as “nothing better could be done than to make him a judge.”

Marshall’s criticisms of Jefferson did not help. In January 1801 the defeat of John Adams was certain, but the actual winner of the recent presidential election was still in doubt. Marshall voiced a preference for Aaron Burr, informing Alexander Hamilton that he had “almost insuperable objections” to Jefferson, whose French “prejudices seem . . . totally to unfit him for the chief magistracy of a nation which cannot indulge those prejudices without sustaining debt & permanent injury.” Two years later, Marshall added insult to injury with his opinion in Marbury v. Madison. The decision was nominally a victory for a President who would not be obliged to deliver Marbury’s commission. But Jefferson was incensed that Marshall and his colleagues, “in the outset, [having] disclaimed all cognizance of the case . . . then went on to say what would have been their opinion,” a “gratuitous” exercise that constituted “an extrajudicial opinion and, as such, of no authority.”

Jefferson treated Alfred Moore’s resignation as a welcome opportunity to reshape the Court. He solicited the advice of Secretary of the Treasury, Albert Gallatin, who observed that “[t]he importance of filling this vacancy with a Republican and a man of sufficient talents to be useful, is obvious, but the task is difficult.” The main problem was geographic balance. Gallatin noted that, with Moore gone, two of the six judicial circuits were not represented on the Court. He suggested that if the nominee were to be taken from “the Second District, Brockholst Livingston is certainly first in point of talents.” But in part because Moore was from North Carolina,

25. 5 U.S. (1 Cranch) 137 (1803).
28. Id. (“As there are now two circuits without a presiding Judge (the circuits of Virginia and North Carolina having yet two), the person may be taken from either.”).
29. Id. The observation proved prophetic; in 1806, Jefferson nominated Livingston to replace William Patterson.
Jefferson looked to the South for his first nominee. Gallatin steered him to South Carolina, observing that "I am told that the practice is as loose in Georgia as in New England and that a real lawyer could not easily be found there. But South Carolina stands high in that respect, at least in reputation."\textsuperscript{30} Five possible nominees were suggested by two South Carolinians, Senator Thomas Sumter and Representative Wade Hampton.\textsuperscript{31} One was William Johnson, described as "a state judge, an excellent lawyer, prompt, eloquent, of irreproachable character, republican connections, and of good nerves in his political principles about 35 years old. was speaker some years."\textsuperscript{32}

That assessment was accurate, to a point. Johnson clearly had earned the respect of many of his colleagues, who had made him speaker of the South Carolina House and had elevated him to the state bench. But Johnson also had what might charitably be described as certain personality quirks, some of which served him well but others of which ultimately limited his effectiveness. John Quincy Adams described the Johnson who served on the Court as "a man of considerable talents and law knowledge."\textsuperscript{33} Indeed, he characterized him as a "learned man [who] defends his opinions with so much earnestness and vigor" that, during one debate between the two, Adams found it "advisable, after some discussion, to waive the subject."\textsuperscript{34} But Johnson's conduct both on and off the bench compelled Adams to conclude that, while intelligent and accomplished, Johnson ultimately proved "a restless, turbulent, hot-headed, politician caballing judge."\textsuperscript{35}

The message nominating Johnson to the Supreme Court was received by the Senate on March 22, 1804, with confirmation following two days later. Secretary of State James Madison then informed Johnson of the President's decision and asked if he would accept the position.\textsuperscript{36} Johnson's biographer Donald Morgan is perhaps overly

\textsuperscript{30} Id.

\textsuperscript{31} Memorandum from Thomas Sumter and Wade Hampton to Thomas Jefferson, Characters of the Lawyers of S. C. (Feb. 17, 1804), in Gaillard Hunt, Office-Seeking During Jefferson's Administration, 3 AM. HIST. REV. 270, 282 (1898).

\textsuperscript{32} Id.

\textsuperscript{33} Diary Entry of John Quincy Adams (Mar. 27, 1820), in 5 MEMOIRS OF JOHN QUINCY ADAMS 39, 43 (Charles Francis Adams ed., 1875) [hereinafter ADAMS, MEMOIRS].

\textsuperscript{34} Diary Entry of John Quincy Adams (Sept. 2, 1818), in 4 ADAMS, MEMOIRS, supra note 33, at 128, 129.

\textsuperscript{35} Diary Entry of John Quincy Adams (Mar. 27, 1820), in 5 ADAMS, MEMOIRS (Mar. 27, 1820), supra note 33, at 39, 43.

\textsuperscript{36} 7 THE PAPERS OF JAMES MADISON: SECRETARY OF STATE SERIES 79, 79 n.1 (David B. Mattern et al. eds., 2005) [hereinafter MADISON, SEC'Y STATE] (referencing Madison's letter of Mar. 31, 1804 and noting that it "has not been found").
dramatic in his description of what followed, but his characterization of the events is worth repeating:

Toward the middle of April this communication overtook the rising young state judge in the midst of his state activities, judicial and otherwise. Would he accept? Or would he, like his mentor C. C. Pinckney before him, turn it down out of preference for a local career? He was doubtless aware of the struggle over the federal judiciary, then at its height, and of the difficulties he would encounter there. He would occupy an outpost on the front and would be called on, in the interest of Republicanism, to resist single-handed the aggressions of Marshall and the Federalists.37

Johnson himself did not seem terribly troubled by what lay ahead. He wrote Madison on April 18, 1804, conveying “my Acknowledgments to the President for this Mark of Attention and Confidence, & to communicate my willingness to accept the Appointment.”38 He asked only that he be given “until the 1st May next” to complete certain local duties and obligations.39 There were apparently no objections, and Johnson took his judicial oath on May 7, 1804.40 The supposedly Republican cat had accordingly been set among the Federalist canaries.

II.

It is difficult to reconstruct with certainty—or at least risky to pretend to do so—what actually took place when Johnson joined the Court for its February 1805 Term. William Cranch, the reporter at the time,41 first notes Johnson’s presence at a session of the Court on February 15, 1805, when arguments began in M’Ilvaine v. Coxe’s Lessee.42 Cranch claims that M’Ilvane “was the first case decided in

38. Letter from William Johnson to James Madison (Apr. 18, 1804), in 7 MADISON, SEC’Y STATE, supra note 36, at 78, 78.
39. Id.
41. Cranch was not up to the task. Frequent inconsistencies in his reporting, coupled with his inability to publish the reports in a timely manner, eventually cost him his position. Cranch’s life and service as Reporter are discussed in Craig Joyce, The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendency, 83 MICH. L. REV. 1291, 1306–12 (1985).
42. 6 U.S. (2 Cranch) 280, 280 n.† (1805).
February Term, 1805." The description is inaccurate in one important respect, as the Court actually reserved judgment at the conclusion of oral argument and did not reach a decision until February 1808. But the possibility that M'Ilvane and what was in effect a companion case, Lambert's Lessee v. Paine, were the first in which Johnson participated is intriguing. John Marshall "did not sit in [either] cause, having formed a decided opinion on the principal question, while his interest was concerned." As a result, both Lambert's Lessee and eventually M'Ilvane were resolved with the Court issuing seriatim opinions, as was its wont when Marshall was not present.

This approach likely struck a responsive yet bittersweet chord with Johnson, who many years later informed Jefferson:

While I was on our state-bench I was accustomed to delivering seriatim opinions in our appellate court, and was not a little surprised to find our Chief Justice in the Supreme Court delivering all the opinions in cases in which he sat, even in some instances when contrary to his own judgment and vote.

This letter has been one of the primary exhibits in fashioning what has for many years been a key claim about the Marshall Court: that the manner in which it conducted its business stood in stark contrast to the approach taken prior to Marshall's arrival.

A substantial number of individuals have embraced the view that Marshall "dispensed with the Supreme Court's customary practice of seriatim opinions." Morgan, agreeing with the traditional position, paints a particularly grim picture regarding the situation Johnson found when he arrived at the Court:

43. Id. at 336 n.*.
44. 8 U.S. (4 Cranch) 209 (1808).
45. 7 U.S. (3 Cranch) 97 (1805).
46. 6 U.S. at 280 n.†. M'Ilvane involved the seizure of loyalist lands by the state of New Jersey. Marshall disqualified himself, given his interests in the Fairfax lands in Virginia and his involvement in the litigation surrounding them.
47. Letter from William Johnson to Thomas Jefferson (Dec. 10, 1822), quoted in Donald G. Morgan, The Origin of Supreme Court Dissent, 10 WM. & MARY Q. 353, 369 (1953) [hereinafter, respectively, Johnson, Dec. 10 Letter, and Morgan, Origin]. To my knowledge, no complete copy of this letter has been published. It is, however, available online in the Thomas Jefferson papers section of the American Memory site maintained by the Library of Congress, http://memory.loc.gov/cgi-bin/query/F?mtj:6:./temp/-ammem_16FS:: (last visited Feb. 19, 2009).
48. VanBurkleo, supra note 4, at 121; see also Editorial Note: The Supreme Court, in 6 THE PAPERS OF JOHN MARSHALL: CORRESPONDENCE, PAPERS, AND SELECTED JUDICIAL OPINIONS NOVEMBER 1800–MARCH 1807, at 69, 70 (Charles F. Hobson ed., 1990) [hereinafter MARSHALL, PAPERS] ("The most immediate and obvious change that Marshall instituted was the abandonment of seriatim opinions in favor of a single 'opinion of the court,' usually pronounced by the chief justice."); William J. Brennan, Jr., In Defense of Dissents, 37 HASTINGS L.J. 427, 432 (1986) ("Until John Marshall became Chief Justice, the Court followed the custom of the King's Bench and announced its decisions through the seriatim opinions of its members.").
Johnson now faced formidable hurdles. At the time when he entered the courtroom in Washington he was but one against five. . . . Moreover, the rule of unanimity, now so firmly fixed, and the virtual monopoly of expression which had drifted into Marshall’s hands would set up serious obstacles to the voicing of Republican sentiments. Although Johnson parted company with the others in his conception of sound political principle, he had to contend with the smothering effect of Marshall’s practices of opinion-giving. Johnson was in an unenviable position in 1805.49

The actual record is much more complicated. Marshall did in his early years announce virtually all of the Court’s opinions, routinely using the formulation employed in the first reported case in which he participated, Talbot v. Seeman, where “Marshall, Chief Justice, delivered the opinion of the court.”50 It is simply not the case, however, that this approach originated with Marshall. Systemic change—if indeed there actually was any change—actually began when Ellsworth became Chief Justice, and the Court acceded to his preference for a brief majority opinion.51 It is also clear that the Justices were willing to speak individually, and at length, in what generally are recognized as the major pre-Marshall cases,52 belying the claim that “[b]efore Justice William Johnson ascended the Supreme Court bench the dissenting opinion was seldom more than a feeble finger of protest.”53

Jefferson was, therefore, simply wrong when he complained that it was Marshall, and Marshall alone, who was responsible for the departure from “the sound practice of the primitive court.”54 That said, we are left with the whys and wherefores of Johnson’s actual practices once he took his seat, a course of conduct that would have him write

49. MORGAN, supra note 1, at 53.
50. 5 U.S. (1 Cranch) 1, 26 (1801).
51. See WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 110 (1995) (“Before Ellsworth became Chief Justice, the Court had not developed a firm tradition regarding the use of seriatim or majority opinions.”); John P. Kelsh, The Opinion Delivery Practices of the United States Supreme Court 1790–1945, 77 WASH. U. L.Q. 137, 139 (1999) (“[M]any of the Court’s practices during these [early] years were unsettled.”); see also Natalie Wexler, In the Beginning: The First Three Chief Justices, 154 U. PA. L. REV. 1373, 1413 (2006) (“[A] study of the Supreme Court’s reported decisions in the 1790s reveals that Marshall only solidified the transition from seriatim opinions to opinions of the Court; he did not introduce the idea.”).
52. In Ware v. Hylton, 3 U.S. (3 Dall.) 199, 256–284 (1796), for example, Justice Iredell felt so strongly about the correctness of his opinion below that, while technically not sitting in the case, he nevertheless in effect lodged a dissent by reading his prior opinion into the record. In Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), each Justice spoke seriatim and Justice Iredell’s dissent was subsequently vindicated with the ratification of the Eleventh Amendment. Ware is also famous as the only case John Marshall argued before the Court. He lost.
54. Letter from Thomas Jefferson to William Johnson (June 12, 1823), in 15 JEFFERSON, WRITINGS, supra note 19, at 451.
what was, at least compared to his colleagues, an extraordinary number of concurring and dissenting opinions.

III.

One of Marshall’s innovations was the custom of having the Justices live together in a boardinghouse during the few weeks they were in Washington when the Court was in session. Marshall believed this was one of the most important aspects of how the Court went about its business. As Ted White has stressed: “Under Marshall the boardinghouse setting became an integral part of the Court’s working pattern.”

One key objective was to foster unanimity, which Marshall made quite clear in May 1831 as new appointments to the Court, particularly that of Henry Baldwin, threatened to end the practice. In a letter to Story, Marshall complained that “the revolutionary spirit which displayed itself in our circle will like most other revolutions, work inconvenience and mischief in its progress,” offering as evidence the apparent collapse of the common living arrangement in the wake of the decision of “our younger brother,” Baldwin, to lodge with “some other person.” He then speculated about the potential impact of this development on decision practices, stating: “I think this is a matter of some importance, for if the Judges scatter ad libitum the docket, I fear, will remain quite compact, losing very few of its causes; and the few it may lose will probably be carried by seriatim opinions.”

We do not know precisely when William Johnson arrived in Washington or first met John Marshall. The circumstances and his feelings about them were presumably much like those Story experienced when he joined the Court in February 1812. “We live very harmoniously and familiarly,” Story wrote, and “moot questions as they are argued, with freedom, and derive no inconsiderable advantage from the pleasant and animated interchange of legal acumen.” The brethren, Story observed, “are very interesting men”


57. Id. at 63.

58. Id.

59. Letter from Joseph Story to Nathaniel Williams (Feb. 16, 1812), in 1 Life and Letters of Joseph Story 213, 214 (William W. Story ed., 1851) [hereinafter Story, Life and Letters].
and "live in the most frank and unaffected intimacy... united as one, with a mutual esteem which makes even the labors of Jurisprudence light." The boardinghouse arrangement, in turn, fostered a shared approach to decisionmaking. The "conferences at our lodgings often come to a very quick, and, I trust, a very accurate opinion, in a few hours." It is highly likely that William Johnson had been instructed in the collegial ways of the Court prior to taking his seat on the bench. As part of that communal process, he would have learned, assuming he did not already know from reading recent decisions, that the practice was for John Marshall, in virtually every case decided, to deliver "the opinion of the Court." Johnson took issue with this custom. In the same letter in which he confessed his "surprise" on learning of this approach, he declared: "I remonstrated in vain; the answer was, he is willing to take the trouble, and it is a mark of respect to him."

The first indication that Johnson would not go along came on February 27, 1805, in Huidekoper's Lessee v. Douglass. Marshall spoke for the Court, which sided with a group of speculators and overruled the Pennsylvania Supreme Court's interpretation of the operative state statute. Johnson filed a concurring opinion, indicating that "there was a question suggested and commented on in the argument which has not been noticed by the court, but which appears to me to merit some consideration." Johnson was silent the next Term, but he lodged two firsts in February 1807. He delivered his first opinion for the Court in Marshall v. Currie, a truly forgettable land dispute from Kentucky that the Court resolved in part by parsing the significance of initials scored into the trunks of trees. He also

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60. Letter from Joseph Story to Samuel P.P. Fay (Feb. 24, 1812), in 1 STORY, LIFE AND LETTERS, supra note 59, at 215, 215.
61. Id. at 215–16.
64. 7 U.S. (2 Cranch) 1 (1805).
66. Huidekoper's Lessee, 7 U.S. at 72 (Johnson, J., concurring). This was actually one of two separate opinions filed that Term. See United States v. Fisher, 6 U.S. (2 Cranch) 358, 397 (1805) (statement of Washington, J.) (implicitly dissenting by "declaring the reasons which induced the circuit court... to pronounce the opinion which is to be re-examined here").
67. 8 U.S. (4 Cranch) 172 (1807).
68. See id. at 176 (discussing "the impression of a certain mark upon such a tree").
authored the first of his dissents in *Ex parte Bollman* and *Ex parte Swartwout*, which grew out of the Burr conspiracy trial.

Marshall wrote for the Court. He held that it had the power to issue the writs of habeas corpus in question, arguing that "the sound construction" of the provision in the Judiciary Act involved "is, that the true sense of the words is to be determined by the nature of the provision, and by the context," rather than a "strict grammatical construction." Johnson disagreed, arguing at some length that the Court "can exercise appellate jurisdiction in no case, unless expressly authorised to do so by the laws of congress." He made it clear that he spoke reluctantly but with a sense of duty, beginning with the declaration that "[i]n this case, I have the misfortune to dissent from the majority of my brethren," and ending by describing "the painful sensation resulting from the necessity of dissenting from the majority of the court." Nevertheless, "[a]s it is a case of much interest, I feel it incumbent upon me to assign the reasons upon which I adopt [my contrary] opinion." Johnson subsequently recounted his version of what happened in the wake of his dissent:

Some case soon occurred, in which I differed from my brethren, & I thought it a thing of course to deliver my opinion. But, during the rest of the session I heard nothing but lectures on the indecency of judges cutting at each other, and the loss of reputation which the Virginia appellate courts had sustained by pursuing such a course. At length I found that I must either submit to circumstances or become a cypher in our consultations as to effect no good at all. I therefore bent to the current, and persevered until I got them to adopt the course they now pursue, which is to appoint someone to deliver the opinion of the majority, but leave it to the discretion of the rest of the Judges to record their opinions or not ad libitum.

A number of things are worth noting. If, for example, Johnson "bent to the current," it was for a remarkably short time: during the next three Terms, he wrote six concurring opinions and six dissents. More importantly, Johnson was not alone in his inclination to concur or dissent. For example, Justice Bushrod Washington wrote what was in effect a dissent during Johnson’s first Term on the Court.

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69. 8 U.S. (4 Cranch) 75 (1807).
70. Id. at 95.
71. Id. at 103 (Johnson, J., dissenting).
72. Id. at 101.
73. Id. at 107.
74. Id. at 101. Johnson, refferring to Chase, who was ill and could not participate, stressed that he was "relieved . . . in being supported by the opinion of one of my brethren, who is prevented by indisposition from attending." Id. at 107.
76. In *United States v. Fisher*, Justice Washington, while technically not participating by virtue of being one of the ruling judges below, implicitly dissented by "declaring the reasons
Brockholst Livingston, the second of three Jeffersonian Justices, joined the Court in 1807 and wrote a number of separate opinions in each of the three Terms from 1808 through 1810. John Marshall found himself forced to dissent in 1810. Even Thomas Todd, the third and final Jeffersonian, who came on board in May 1807 and wrote only fourteen opinions during his nineteen years on the Court, signaled a willingness to dissent. Thus, while Johnson may have set the standard for “cutting at each other,” he was hardly alone. Concurring and dissenting opinions on the early Marshall Court may have been infrequent, at least by modern standards. But they were filed, and not just by William Johnson.

Johnson’s claim that he “got [the Court] to adopt” a revised practice is also troubling. The Court did not sit in 1811, a combination of illnesses and vacancies having prevented it from assembling a quorum. When it reconvened in February of 1812, it had two new members, Joseph Story and Gabriel Duvall, who were placed on the Court by James Madison. Their appointments set the membership of the Marshall Court for the next eleven years and ten months, the longest continuous period of service for a single group of Justices in the Court’s history. It also eliminated one possible factor in Marshall’s calculations regarding how the Court should conduct its business: the need to accommodate the shortcomings of certain of its members. This is not to say that Duvall or, for that matter, Todd were shining judicial stars. They were not. It is clear, however, that the core of the Court—Marshall, Washington, Johnson, Livingston, and Story—was sound, and Marshall could count on the dedicated services of four Justices who were up to the tasks before them.

Johnson discussed these matters in his characteristically blunt style when he informed Jefferson of “the real cause” of Marshall’s “opinion of the court” practice: “Cushing was incompetent, Chase could not be got to think or write—Patterson was a slow man and willingly declined the trouble, and the other two judges you know are commonly estimated as one judge.” There is obviously ample room to disagree

which induced the circuit court . . . to pronounce the opinion which is to be re-examined here.” 6 U.S. (2 Cranch) 358, 397 (1808).


79. Although he did not speak or write an opinion at the time, Todd subsequently announced that he agreed with Johnson’s dissent in Rose. See Hudson, 10 U.S. at 285 n.*.

with his assessments of Chase and Washington.\textsuperscript{81} Patterson’s health had been an issue, however, for many years and was a major factor in Adams’s refusal to consider him for Chief Justice when Ellsworth resigned. Cushing’s age and infirmities, in turn, caught up with him during the period in question.

There is, therefore, at least a partial ring of truth in Johnson’s observations, and these realities likely influenced Marshall’s assessment of how best to distribute the workload prior to 1812. A second consideration was the number of cases coming before the Court. Marshall’s willingness and ability to write virtually every opinion during his initial years on the bench almost certainly reflected the fact that there were not that many cases on the docket. In 1801, for example, Marshall’s first Term on the Court, he wrote four opinions; in 1803, the Court not having sat in 1802, he wrote twelve; and in 1804, eight.\textsuperscript{82} But from 1805, the year Johnson arrived, and especially after 1812, the docket expanded steadily to the point that it would be rare for the Marshall Court to hear and decide fewer than thirty cases.\textsuperscript{83}

I deliberately left one final consideration, arguably the most important one, for last in my assessment of Marshall’s policies and Johnson’s responses. In the final years of his life, Jefferson complained bitterly and often about Marshall and the Court. This does not imply that he was silent while President or, for that matter, in his early retirement years. Marshall angered Jefferson repeatedly, prompting him to complain to Madison that “[h]is twistifications of the law in the case of Marbury, in that of Burr, & the late Yazoo case shew how dexterously he can reconcile law to his personal biasses.”\textsuperscript{84}

These early criticisms were nevertheless mild compared to those lodged after landmark opinions like \textit{M’Culloch v. Maryland}\textsuperscript{85} and \textit{Cohens v. Virginia}.\textsuperscript{86} Both, notably, were unanimous, and both bolstered the authority of the national government at the expense of the states. They therefore represented all that Jefferson abhorred about the Court, from its conception of its role to its interpretation of

\begin{footnotes}
\item[83] See \textit{Morgan}, supra note 1, at 306–07 (finding that from 1812 through 1833, the lowest number of cases was twenty in both 1820 and 1825).
\item[84] Letter from Thomas Jefferson to James Madison (May 25, 1810), in 11 \textit{The Works of Thomas Jefferson} 139, 141 (Paul Leicester Ford ed., 1905) [hereinafter \textit{JEFFERSON, WORKS}].
\item[85] 17 U.S. (4 Wheat.) 316 (1819).
\item[86] 19 U.S. (6 Wheat.) 264 (1821).
\end{footnotes}
the Constitution. And in their wake, Jefferson became increasingly vocal and began for the first time to harp on the extent to which individual Justices “hid” behind Marshall’s voice and persona.

A typical, but by no means isolated, example came in December 1820 when Jefferson complained that “[t]he judiciary of the United States is the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated republic.” It was not just the results that he objected to: “An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his mind, by the turn of his own reasoning.”

Jefferson renewed the assault in October 1822 in a letter to Johnson that attempted to enlist the services of his first nominee in his battle against Marshall. Jefferson alleged, incorrectly, that the seriatim opinions... in the supreme Court of the US... continued I know to the end of the 3d Dallas in 1800,” that is, to approximately “that time the present C.J. came to the bench.” This was unfortunate, he maintained, as:

Some of these cases too have been of such importance, of such difficulty, and the decisions so grating to a portion of the public as to have merited the fullest explanation from every judge seriatim, of the reasons which had produced such convictions on his mind. It was interesting to the public to know whether these decisions were really unanimous, or might not perhaps be of 4. against 3. and consequently prevailing by the preponderance of one voice only.

This deprived the nation of its only remedies against the members of the Court, “[i]mpeachment” and “[i]ndividual reputation,” as the “practice compleatly withdraws them from both. For nobody knows what opinion any individual gave in any case, nor even that he who delivers the opinion, concurred in it himself.” Jefferson also maintained that “[t]he practice is certainly convenient for the lazy, the modest & the incompetent.”

Johnson’s reply included revelations about his experiences when he joined the Court and various claims about how he “fought the good fight,” eventually persuading his brethren to designate a single

87. Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), in 12 JEFFERSON, WORKS, supra note 84, at 175, 177.
88. Id. at 177–78.
89. Letter from Thomas Jefferson to William Johnson (Oct. 27, 1822), in 12 JEFFERSON, WORKS, supra note 84, at 246, 249.
90. Id.
91. Id. at 249–50.
92. Id. at 250.
Justice to deliver the opinion of the Court while leaving the others free to write separately if they wished. He did not, however, accede to the notion that seriatim opinions should be the norm. Rather, he suggested that the appropriate way to deal with Jefferson's complaints was to reduce the size of the Court and provided a brief outline of the reforms he had in mind.\textsuperscript{93} Jefferson was not mollified and renewed his assault in March 1823, expressing his "hope that the judges will see the importance and the duty of giving their country the only evidence they can of fidelity to its constitution and integrity in the administration of its laws... by every one's giving his opinions seriatim and publicly on the cases he decides."\textsuperscript{94}

Jefferson achieved partial success. In April 1823, perhaps worn down by Jefferson's barrage of words, Johnson informed his patron that "[o]n the subject of seriatim opinions in the Supreme Court I have thought much, and have come to the resolution to adopt your suggestion on all subjects of general interest; particularly constitutional questions. On minor subjects it is of little public importance."\textsuperscript{95} He did not, however, resurrect the practice of seriatim opinions. Rather, he simply continued his past practice of writing concurring and dissenting opinions.\textsuperscript{96}

Johnson did not retreat from two important principles. One, discussed in the next Section, was his support for some of the most important constitutional doctrines articulated by the Marshall Court, particularly its embrace of implied powers and the supremacy of the federal government within certain spheres. The other was his agreement with Marshall that it was important for the Court, wherever possible, to speak with a strong, clear voice.

It is worth recalling that Marshall had very good reasons for acting as he did when he became Chief Justice. The pre-Marshall Court was a distant third in the federal hierarchy, a judicial backwater that commanded scant respect and had only an occasional impact on national affairs. John Jay expressed the sentiments of many of his contemporaries when he refused to return to the Court for a second stint as Chief Justice:

\textsuperscript{93} Letter from William Johnson to Thomas Jefferson (Dec. 10, 1822), quoted in MORGAN, supra note 1, at 182–83 & n.64.

\textsuperscript{94} Letter from Thomas Jefferson to William Johnson (Mar. 4, 1823), in 15 JEFFERSON, WRITINGS, supra note 19, at 419, 422.

\textsuperscript{95} Letter from William Johnson to Thomas Jefferson (Apr. 11, 1823), in 1 S.C. HIST. & GENEALOGICAL MAG. 206, 210 (1900) [hereinafter Johnson, Apr. 11 Letter].

\textsuperscript{96} Morgan, for example, has Johnson issuing twelve concurrences and fourteen dissents from 1805 through 1821, compared to nine concurrences and eighteen dissents from 1823 until his death in 1834. MORGAN, supra note 1, at 306–07.
I left the Bench perfectly convinced that under a System so defective, it would not obtain the Energy weight and Dignity which are essential to its affording due support to the national Government; nor acquire the public Confidence and Respect, which, as the last Resort of Justice of the nation, it should possess. Hence I am induced to doubt both the Propriety and Expediency of my returning to the Bench under the present System, especially as is would give some Countenance to the neglect and Indifference with which the opinions & Remonstrances of the Judges on this important Subject have been treated.97

Jefferson and his allies were at least partially responsible for the low esteem in which the Court was held. William Duane, the strong Jeffersonian editor of the influential newspaper, the Aurora, expressed the Jeffersonians' views when it appeared that Jay might get the appointment:

John Jay after having thro' decay of age become incompetent to discharge the duties of Governor, has been appointed to the sinecure of Chief Justice of the United States.

That the Chief Justiceship is a sinecure needs no other evidence, than that in one case the duties were discharged by one person who resided at the same time in England; and by another during a year's residence in France.98

Marshall's determination to make the Court a strong, effective, and coequal branch was therefore understandable. One key aspect of his approach was to have the Court speak with a single voice. In one of his anonymous, post-decision essays defending M'Culloch, for example, Marshall argued:

The course of every tribunal must necessarily be, that the opinion which is to be delivered as the opinion of the court, is previously submitted to the consideration of the judges; and, if any part of the reasoning be disproved, it must be modified as to receive the approbation of all, before it can be delivered as the opinion of all.

And, as the Cohens controversy unfolded, he observed to Story, "The harmony of the bench will, I hope & pray, never be disturbed. We have external & political enemies enough to preserve internal peace."99

Johnson shared these views. He was, admittedly, determined "to avoid having an ambiguous decision hereafter imputed to me, or an opinion which I would not wish to be understood to have given."100 He therefore reserved the right to voice his own opinions occasionally. But he also sought to strengthen the Court:

97. Letter from John Jay to John Adams (Jan. 2, 1801), in 1 DOCUMENTARY HISTORY, supra note 37, at 146, 146–47.
100. Marine Insurance Company v. Young, 9 U.S. (5 Cranch) 187, 191 (1809) (Johnson, J., dissenting). Johnson's statement is found on the Errata page. Id. at viii (having been "mislaid and omitted to be inserted in its proper place.").
One thing, however, I resolved on at a very early period—to let no private or party feeling run counter to the great interests of the United States. If an executive, a legislative and judicial department are necessary to the well-being of the community, it behooves those who fill those departments always to have an eye to the importance of giving a character to those departments—of preserving that respectability without which they would cease to answer the ends proposed in their institution.\footnote{Johnson, Dec. 10 Letter, supra note 47, at 369.}

The traditional view is that Johnson stood alone in the face of a Marshall juggernaut. A.J. Levin, for example, concluded the second of eight articles devoted to Johnson with the observation that he “was not only the first dissenter on the American constitutional scene, he was the first creative, the first scientific dissenter.”\footnote{Levin, supra note 53, at 548.} Oliver Schroeder spoke approvingly of “Johnson’s independence of thinking and freedom from Chief Justice Marshall’s restraining influence.”\footnote{Oliver Schroeder, Jr., The Life and Judicial Work of Justice William Johnson, Jr. Part II, 95 U. Pa. L. Rev. 344, 385–86 (1947).} And biographer Donald Morgan, noting Johnson’s death on August 4, 1834, following surgery on his jaw, declared that “[h]e died as he lived—resolute, courageous, alone.”\footnote{MORGAN, supra note 1, at 280.} The most extravagant claim was made in a Note by Meredith Kolsky, who argued that “[h]ad Johnson not initiated the practice of writing separately, the Court could have gone without a meaningful dissent during its first thirty-five years.”\footnote{Meredith Kolsky, Note, Justice William Johnson and the History of the Supreme Court Dissent, 83 GEO. L.J. 2069, 2081 (1995).}

Johnson did doggedly pursue what he believed to be his obligation and right to speak separately in a series of concurring and dissenting opinions that are notable both for their sheer numbers and the high proportion of his overall contributions they represent. But the “opinion of the Court” practice he contested did not originate with Marshall. And, after the years when Marshall arguably had only Washington to assist him and the comfort of a comparatively small docket, Marshall no longer labored alone. I doubt that Johnson caused the shift in any meaningful sense, as it had begun before he arrived and would have been completed without him. More tellingly, if we look carefully at the Court’s work during this period, the truly striking thing about Johnson’s output lies not in what he wrote when he concurred and dissented, but in his telling silence on numerous other occasions.
IV.

Johnson was a persistently independent voice on the Court, but his legacy is not simply that of someone who said “no.” For example, Johnson’s first major opinion for the Court, *United States v. Hudson & Goodwin*, became a landmark. The question was whether federal courts could exercise common law jurisdiction in criminal cases. Johnson parsed the text of Article III, stressing that only the Supreme Court “possesses jurisdiction derived immediately from the constitution.” All other federal courts “possess no jurisdiction but what is given them by” Congress, “the power that creates them.” That had not been done. Johnson conceded that all federal courts must, of necessity, possess certain implied powers, but he maintained that “jurisdiction of crimes against the state is not among those powers.” That, Johnson declared, was the holding of “the majority of this Court,” a qualification that excluded Story, who did not file a dissent but refused to accept the ruling.

His disagreements with Marshall were occasionally prophetic. In *Fletcher v. Peck* for example, Johnson did “not hesitate to declare,” in line with Marshall’s opinion for the Court, “that a state does not possess the power of revoking its own grants.” But he made it clear that his “opinion on this point [was] not founded on the provision in the constitution of the United States, relative to laws impairing the obligation of contracts.” Rather, he appealed to natural law, “a general principle, on the reason and nature of things: a principle which will impose laws even on the deity.” He also refused to accept the notion that these limits on state authority were absolute, rejecting the idea that a state could never impair a contract. He returned to that theme in *Ogden v. Saunders*, arguing that “to assign to contracts, universally, a literal purport, and to exact for them a

106. 11 U.S. (7 Cranch) 32 (1812).
107. Id. at 33.
108. Id.
109. Id. at 34.
110. Id.
111. Id. at 32.
112. Story’s reservations about *Hudson* and subsequent attempts to distinguish or evade it are detailed in R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* 100–06 (1985).
113. 10 U.S. (6 Cranch) 87 (1810).
114. Id. at 143 (Johnson, J., concurring).
115. Id. at 144.
116. Id. at 143.
117. Id. at 145.
rigid literal fulfillment, could not have been the intent of the
constitution." That position subsequently became a core element in
Chief Justice Hughes's opinion for the Court in Home Building &
Loan Association v. Blaisdell, a decision that vindicated Johnson,
while at the same time almost certainly misreading the Contracts
Clause's original purpose.

These and other examples of Johnson's contributions are
interesting and would be worth examining in greater detail had I "but
world enough and time." The important point for current purposes
is that Johnson did not wield the bully pulpit of separate opinions to
distance himself from the Marshall Court holdings that lay at the
heart of the criticisms mounted by Jefferson and his allies. Indeed, in
one of his letters to Jefferson, Johnson stated directly and
unequivocally both that the Court had been largely correct in its
decisions and that the people realized this:

I cannot I acknowledge but flatter myself that in the main the Country is satisfied with
our Decisions. . . . I acknowledge that some things have fallen from particular Judges
which are exceptionable, and I exceedingly regret their Publication. But when the
Decisions are examined upon their own Merits independently of the bad or defective
Reasons of the Judge who delivers them, I do flatter myself that all in which I ever
concurred will withstand constitutional scrutiny.

Most scholars recognize that Johnson was not a doctrinaire
Republican and certainly not a clone of Jefferson. Many attribute
this to Marshall's influence. But the reality is much more
complicated, especially if we look carefully at one of the most
important bones of contention in the struggle between the Marshall
Court and the Jeffersonian Republicans: the "heresy of implied
powers." Johnson's so-called silence in these matters was both
principled and entirely in character. It was also quite significant given

118. 25 U.S. (12 Wheat.) 213, 286 (1827) (opinion of Johnson, J.). The four Justices in the
majority (Washington, Johnson, Thompson, and Trimble) delivered their opinions seriatim.
Marshall, in his only dissent in a major constitutional case, wrote for himself, Duvall, and Story.
119. 290 U.S. 398 (1934).
120. See generally id. at 453–64 (Sutherland, J., dissenting) (exploring the original intent at
length).
121. I have waited far too long to borrow a line from one of my favorite poems and cite one of
my all time favorite books. The line is from Andrew Marvell's poem To His Coy Mistress, which
may be found in FRANCIS CONNOLLY, MAN AND HIS MEASURE 535–36 (1964).
122. Johnson, Apr. 11 Letter, supra note 95, at 210.
123. See, e.g., WHITE, MARSHALL COURT, supra note 55, at 342 ("On issues of federalism . . .
the two men diverged.").
124. See, e.g., MORGAN, supra note 1, at 289 ("Johnson came to share much of Marshall's
nationalism.").
125. See id. at 110–25 (containing chapter entitled, "The Heresy of Implied Powers").
Johnson’s personality, the contexts within which the cases were decided, and the opportunities they presented.

One of the major themes in the small body of scholarship focusing on Johnson is the “lost years,” the period when this heretofore courageous, independent voice was muted, even as Marshall fashioned many of the most important artifacts in his nationalist vision. In particular, Johnson is described as having gone absent without leave in the struggle to maintain state sovereignty in the face of an increasingly powerful federal presence. Morgan states, for example, that “Johnson’s campaign for free expression had brought results. Yet beginning in 1819 he virtually relinquished the right he had earlier secured. At four terms he merged his voice with the others and nodded his approval of Marshall’s nationalizing opinions.”

Morgan argues that Johnson “silent[ly] acquiesce[d] in 1819” and that he “recovered his balance . . . [d]uring the winter of 1822-1823 [when] he took a fresh look at the judicial function.” But if we examine carefully the period in question, a different picture emerges. The numbers, for example, show that Johnson’s pen was not still. Morgan’s own tally has Johnson writing six opinions for the Court in 1819; five majority opinions, one concurrence, and one dissent in 1820; seven majority opinions and one dissent in 1821; and two majority opinions in 1822. The dam supposedly broke in 1823, when Johnson wrote five majority opinions, two concurrences, and two dissents.

This is not the record of a judicial hermit who had temporarily taken a vow of silence. Moreover, Johnson was hardly a shrinking violet when he did express himself. Indeed, the circumstances leading up to one of his dissents, filed in *The Amiable Isabella*, are worth recounting in some detail, as they show that Johnson’s independent spirit was certainly alive—albeit hardly well—during the period in question.

*The Amiable Isabella* was initially argued in March 1820. When Marshall announced that it would be “continued to the next Term for advisement,” Johnson publicly expressed his rage. As recounted by Henry Wheaton, then reporter for the Court:

Mr. Justice J. announced, with great emotion, his determination to fire off—stating that his mind was unalterably made up, and as the last argument, so far from shaking, had confirmed his first impression, he thought the party entitled to the benefit of his vote,

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127. Id.
128. MORGAN, supra note 1, at 307.
129. 19 U.S. (6 Wheat.) 1 (1821).
which might be lost in case death, or any other cause, should prevent him being present next Term.\(^{131}\)

Johnson was not content, however, to simply "read the same opinion which he first drew up."\(^{132}\) Rather, he also lashed out at William Pinkney for his argument on behalf of the respondents, "treating it with the utmost contempt as a flimsy declamation of a venal advocate for privateerism, masked under the appearance of the sanction of the Government."\(^{133}\) Wheaton concludes his account with a description of the response to Johnson's outburst:

Pinkney was so outraged that it was with difficulty that Wirt and myself could keep him from getting up and discharging his resentment in open Court. Every person present was equally struck with the extraordinary want of dignity, or rather of decency, in the learned judge's conduct; and nothing is talked of but his tirade. The judges lament this extravagant sally, which was the more unfortunate as great numbers of persons were assembled for the purpose of hearing the decision of the Court. Judge Washington assures me that everything was done that could be done to prevent it, but in vain.\(^{134}\)

Johnson was clearly not someone who had receded into the background, silent and cowed. He was, rather, "restless, turbulent, hot-headed," and "flaringly independent," as John Quincy Adams described him in his account of the episode.\(^{135}\) The William Johnson of 1819 through 1822 did not lose his voice. Instead, he selected, more or less carefully, those occasions when he would use it.\(^{136}\)

This brings me to my main point: Johnson supported implied federal powers and, by necessary extension, joined decisions placing limits on state sovereignty. The primary exhibit in most discussions of these issues is Marshall's opinion for the Court in *M'Culloch v. Maryland*,\(^{137}\) which Johnson joined. Morgan initially argues that this "silent acquiescence" was at best grudging, citing Johnson's December

\(^{131}.\) Letter from Henry Wheaton to Joseph Story (Mar. 17, 1820), quoted in White, Marshall Court, supra note 55, at 334 [hereinafter Wheaton Letter]. Wheaton was also an occasional advocate before the Court and was counsel for respondents in this case.

\(^{132}.\) Id. This presumably occurred on March 4, 1820. The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 15 (1821).

\(^{133}.\) Wheaton Letter, supra note 131, at 334.

\(^{134}.\) Id.; see also Diary Entry of John Quincy Adams (Mar. 27, 1820), in 5 Adams, Memoirs, supra note 33, at 39, 43 (noting Johnson's "very extraordinary sally" and "great passion"). Adams noted that Johnson "threatened to publish his speech, but afterwards thought better of it." Id.

\(^{135}.\) Diary Entry of John Quincy Adams (Mar. 27, 1820), in 5 Adams, Memoirs, supra note 33, at 39, 43.

\(^{136}.\) The Court eventually ruled for Pinkney's clients in an opinion by Story, with Johnson dissenting. The Amiable Isabella, 19 U.S. at 25 (opinion of Story, J.); id. at 81 (Johnson, J., dissenting, preceded by notation "three Judges dissent"). Regarding the context for all of this, see White, Marshall Court, supra note 55, at 334 ("Behind Johnson's outburst... was a controversy between him and Story over the latter's efforts for expand the admiralty jurisdiction of the federal courts, a tendency Johnson firmly opposed.").

\(^{137}.\) 17 U.S. (4 Wheat.) 316 (1819).
1822 letter to Jefferson in which he characterized implied powers as “that Bane of our civil Tranquility.” Morgan subsequently seems to change that assessment, however, implying that Johnson influenced the manner in which Marshall wrote the opinion.

The suggestion that Johnson helped shape what Marshall wrote in *M'Culloch* is plausible. Marshall’s opinion argued for considerable deference toward Congress, one of Johnson’s favorite themes. But the record also shows that, if anything, Johnson’s embrace of implied powers was even more pronounced than Marshall’s.

To his credit, Morgan acknowledges that Johnson’s support for these “Hamiltonian views,” which stood in stark contrast to Jefferson’s, was nothing new. In 1801, while still on the state bench, Johnson declared in *State v. Pitman* that “[t]he national government may pass such laws as may be proper and necessary to avoid the mischiefs arising from the counterfeiting, and passing, as true, the forged bills of credit of the bank of the nation.” Johnson also recognized that this necessarily limited the authority of the states, observing that “[s]tate governments may not also pass such laws, as they shall deem necessary, to the welfare of their internal concerns, in relation to the same subject.”

Jefferson may well have had second thoughts about appointing Johnson had he known about *Pitman* when Gallatin recommended Johnson in 1804. But the vetting process at the time was much more informal than it is now. Gallatin and Jefferson relied on general assurances that Johnson had appropriate “Republican connections.” That characterization proved wrong as Johnson time and again cast his lot with Marshall during the protracted process that led to *M'Culloch*. That was significant; Johnson could have made life quite


139. MORGAN, supra note 1, at 250 (“The Charlestonian had endorsed the McCulloch opinion, and in return had very probably brought pressure on Marshall to qualify its scope.”).

140. See id. at 112 (stating that Johnson had “started down the path” of supporting these views “[l]ong before” *M'Culloch*).


142. Id.

143. Then again, perhaps not, as President Jefferson seemed much more enthused about implied powers than he would be in his later years. See, e.g., Mark R. Killenbeck, *Pursuing the Great Experiment: Reserved Powers in a Post-Ratification, Compound Republic*, 1999 SUP. CT. REV. 81, 127–31 (contrasting Jefferson’s views with his actual conduct) [hereinafter Killenbeck, *Pursuing*]. It is at least plausible that Johnson was the first “stealth nominee,” an issue I will explore in another article, but note now to claim pride of authorship for the phrase and concept.

144. See supra text accompanying note 32 (discussing Johnson’s reported “republican connections”).
difficult for Marshall and the Court at any number of points during this sequence.

One criticism of *M'Culloch* is that it is "overrated" because, "with regard to the concrete issue involved in *McCulloch*—the constitutionality of the national bank—the decision was completely unexceptionable."146 That is certainly true as a technical matter; the implied powers doctrine had been recognized long before the bank question came to the Court. Indeed, it was initially outlined by Marshall during Johnson's first Term on the Court in *United States v. Fisher*, a case in which Marshall rejected the argument that "no [federal] law was authorized which was not indispensably necessary to give effect to a specified power."146 Rather, he emphasized:

> Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution.147

Johnson joined Marshall's opinion and apparently did so without reservation. That is not, of course, because he felt compelled to toe the line, for it is quite clear that dissonant voices were tolerated at the time. *Fisher* was, after all, the case in which Justice Washington, while stating, "I take no part in the decision of this cause,"148 explained at length why his construction of the applicable statutes was correct. Washington did not address or dispute Marshall's discussion of the constitutional question. The fact of his statement is nevertheless significant, for it certainly presented an opportunity for the newest member of the Court to join forces with a respected elder, assuming that he felt inclined to disagree with what Marshall had to say.

Johnson himself subsequently recognized the existence of implied powers in his opinion for the Court in *Hudson & Goodwin*.149 He then concurred in the next important statement of that principle, *Martin v. Hunter's Lessee*.150 Story wrote for the Court, Marshall

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146. 6 U.S. (2 Cranch) 358, 396 (1805).

147. *Id*.

148. *Id* at 397 (statement of Washington, J.).

149. See supra text accompanying notes 106–12.

150. 14 U.S. (1 Wheat.) 304 (1816).
having at least in theory, but perhaps not in fact, recused himself
because of his and his family’s interests in the land at issue.151 Story
observed in language that anticipated one of the most noted passages
in M’Culloch that “[t]he constitution unavoidably deals in general
language.”152 This meant that “its powers are expressed in general
terms, leaving to the legislature, from time to time, to adopt its own
means to effectuate legitimate objects, and to mould and model the
exercise of its powers, as its own wisdom, and the public interests,
should require.”153

Johnson filed a concurring opinion, stating, “I acquiesce in
their opinion, but not altogether in the reasoning, or opinion, of my
brother who delivered it.”154 His disagreement, in effect, was one of
form rather than function. He agreed that “the general government”
must have “the power of protecting itself in the exercise of its
constitutional powers.”155 The Virginia court’s refusal to recognize and
give effect to the Supreme Court’s judgments was “truly alarming.”156
He did not, however, see fit to join in what “amounts to an assertion of
the inferiority or dependence of the state tribunals.”157 The
“constitution and laws,” he declared, “place us ... supreme over
persons and cases as far as our judicial powers extend, but not
asserting any compulsory control over the state tribunals.”158 This
sensitivity to the prerogatives and status of the states and state courts
tracked in important respects Republican orthodoxy at the time.
Johnson did not, however, use this occasion to distance himself from
the doctrine of implied powers.

The foundations for M’Culloch had been laid carefully, with the
willing support of William Johnson, long before the case was decided.
The bank decision itself was, of course, wildly unpopular in certain
quarters, particularly Virginia. One of the most important set of
responses was initiated by Thomas Ritchie, editor of the Richmond
Enquirer, who decried the “alarming errors” committed by the Court

151. See, e.g., G. Edward White, Reassessing John Marshall, 58 WM. & MARY Q. 673, 679–84
(2001) (discussing Marshall’s involvement). Chuck Hobson disagrees, characterizing White’s take
on Marshall’s actions as an “elaborate tale.” Charles F. Hobson, Letter to the Editor, 59 WM. &
MARY Q. 331, 331 (2002).
that the Constitution does not “partake of the prolixity of a legal code” but rather “requires ... only [that] its great outlines should be marked”).
153. Id. at 326–27.
154. Id. at 362 (Johnson, J., concurring).
155. Id. at 363.
156. Id. at 364.
157. Id. at 379.
158. Id. at 362
and declared that “[w]henever state rights are threatened or invaded, Virginia will not be the last to sound the tocsin.” He then “earnestly recommended” the first of William Brockenbrough’s two Amphictyon essays to the paper’s readers. These precipitated two of the most extraordinary exchanges in American legal history, as John Marshall responded anonymously first to Brockenbrough in his “A Friend to the Union” pieces and then to Spencer Roane’s Hampden articles as “A Friend to the Constitution,” in the pages of the Alexandria Gazette.

Marshall’s willingness to step beyond the strict bounds of judicial propriety was remarkable, but in character. He believed that “as those who favor [the decision] never write for the publick it will remain undefended & of course be considered as damnably heretical.” He therefore thought it imperative to fill the gap and defend both the institution to which he had dedicated his life and its decision.

It was, interestingly, an example Johnson followed some years later when one of his opinions on circuit, Elkison v. Deliesseline, was denounced. South Carolina passed the Negro Seamen Act in 1822, authorizing the seizure of “free Negroes or persons of color” who came into the state on ships docking in its harbors. Henry Elkison, a British subject, was seized pursuant to the law and filed a petition for relief with Johnson, who was sitting in his capacity as Circuit Justice. Johnson held the operative section of the statute unconstitutional. He ruled that the act was inconsistent with the federal commerce power, which he characterized as “a paramount and exclusive right.” The opinion was denounced bitterly and at length by state-rights activists, who characterized it as “utterly at variance with the fundamental principles of our government.”

159. On the Opinion of the Supreme Court, Richmond Enquirer (Va.), Mar. 30, 1819, at 3.


163. Morgan, supra note 1, at 192.

164. Elkison, 8 F. Cas. at 496.

165. 22 U.S. (9 Wheat.) 1 (1824).

166. Elkison, 8 F. Cas. at 495.

Marshall before him, responded, defending the holding both in signed letters and under the pseudonym Philonimus, and warning that "if public opinion does not rally to put down such gross attacks, public decency is at an end, and bullies and duellists alone must 'judge the land.'"^{168}

The controversy generated by *M'Culloch* was protracted and intense. Jefferson joined the fray in September 1819 in a letter to Spencer Roane within which he commended him for expressing "the true principles of the revolution of 1800" and complained that Marshall and his colleagues had made the "constitution... a mere thing of wax in the hands of the judiciary, which they may twist, and shape in any form they please."^{169} In a similar vein, one of Jefferson's staunchest allies, John Taylor, wrote a book-length attack that linked the decision to one of the festering issues of the day, slavery, predicting that the implied powers doctrine "will beget new usurpations of internal powers over persons and property, and these will beget a dissolution of the union."^{170}

Johnson was certainly aware of all of these criticisms. But they clearly did not faze him. In 1821, he offered an even more sweeping statement of the implied powers principle in the first post-*M'Culloch* affirmation of it, *Anderson v. Dunn.*^{171} Writing for a unanimous Court, Johnson held that the House of Representatives had the power to "punish for contempts" even though "there is no power given by the constitution" to do so.^{172} He conceded the theoretical point that "the genius and spirit of our institutions are hostile to the exercise of implied powers."^{173} He then asked: "But what is the fact? There is not in the whole of that admirable instrument[] a grant of powers which does not draw after it others, not expressed, but vital to their exercise, not substantive and independent, indeed, but auxiliary and subordinate."^{174}

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^{169} Letter from Spencer Roane to Thomas Jefferson (Sept. 6, 1819), in 12 JEFFERSON, WORKS, *supra* note 84, at 135, 135–37.


^{171} 19 U.S. (6 Wheat.) 204 (1821).

^{172} Id. at 225.

^{173} Id.

^{174} Id. at 225–26.
The day after the Anderson decision, Marshall delivered the unanimous opinion of the Court in Cohens v. Virginia, a case that, if anything, provoked an even more hostile reaction than M'Culloch. Two brothers had been convicted for selling District of Columbia lottery tickets in Virginia. They claimed that the lottery had been authorized by Congress and that the Virginia prohibition was invalid. The Court rejected that defense, holding that the lottery statute applied only in the District. It did not, however, accept Virginia's argument that the Court did not have jurisdiction, either as a general matter given that state's longstanding objections to federal judicial review of its courts' decisions, or as a consequence of the Eleventh Amendment.

Cohens generated significant controversy and commentary both before and after the Court's decision. Virginians believed that the case posed a conflict that ran to "the very teeth of the constitution." A holding that jurisdiction existed posed the specter—or at least so they believed and argued—that "every case whatsoever may be brought before the [federal courts], and the extent of their jurisdiction depends on their own will." Marshall acknowledged what was at stake: "To interfere with the penal laws of a State, where they are not levelled against the legitimate powers of the Union, but have as their sole object the internal government of the country, is a serious measure, which Congress cannot be supposed to adopt lightly, or inconsiderately." Nevertheless, "the judicial department . . . is authorized to decide all cases of every description, arising under the constitution or laws of the United States." This was one such case, and the fact that the state was a party did not eliminate jurisdiction. Marshall rejected Virginia's argument that the Eleventh Amendment was intended to protect "a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation." In his mind, a careful examination of the facts that gave rise to that amendment revealed that it "extended to suits commenced or prosecuted by individuals, but not to those brought by States."

175. 19 U.S. (6 Wheat.) 264 (1821).
178. Cohens, 19 U.S. at 443.
179. Id. at 382.
180. Id. at 406.
181. Id. at 407. Marshall's views on the Eleventh Amendment are worth exploring, albeit at another time and in another place. For some perspectives, see WHITE, MARSHALL COURT, supra
The outcry after *Cohens* was so intense that Marshall declared that the Court's opinion was being "attacked with a degree of virulence superior even to that which was employed in the Bank question." He suspected that Jefferson was behind this, musing that "there is some reason to believe that the essays written . . . were, in a degree at least, stimulated by this gentleman; and that, although the coarseness of language belongs exclusively to the Author, its acerbity has been increased by his communications with the great Lama of the mountains."  

Jefferson had indeed been actively complaining. Nine days after *Cohens* was decided, he informed Roane, who would write some of the most virulent attacks on the decision, that "[t]he great object of my fear is the federal judiciary. That body, like gravity, ever acting, with noiseless foot, and unalarming advance, gaining ground step by step, and holding what it gains, is ingulphing insidiously the special governments into the jaws which feeds them." That December, he maintained that "[i]t is a misnomer to call a government republican, in which a branch of the supreme power is independent of the nation." Various possible reforms, including "the erection of the Senate into an appellate court in Constitutional questions," seemed impractical. "Impeachment," in turn, "is a bugbear which [the Justices] fear not at all," as the practice of delivering a single opinion for the Court had the effect of "smothering the evidence."

One appropriate solution was, at least for Jefferson, glaringly obvious: seriatim opinions, which would force the Justices "to justify themselves to the world by explaining the reasons which led to their opinion." Who better to enlist in the battle to force the Court to return to a practice Marshall had supposedly destroyed than Jefferson's first nominee to the Court? And so Jefferson pressed his case in his exchange of letters with Johnson.

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*184. Letter from Thomas Jefferson to Spencer Roane (Mar. 9, 1821), in 12 Jefferson, Works, supra note 84, at 201, 201–02.*


*186. Id. at 214.*

*187. Id. at 215.*

*188. Id. at 216.*

*189. Id.*
Partial vindication came in Johnson’s concurring opinion in *Gibbons v. Ogden.* Johnson declared that “[t]he judgment entered by the Court in this cause, has my entire approbation.” He wrote separately, however, for two reasons. One tracked his longstanding belief that he should speak out when he had “views of the subject materially different from those of my brethren.” But he had “also, another inducement,” one that fulfilled his pledge to Jefferson, for “in questions of great importance and great delicacy, I feel my duty to the public best discharged, by an effort to maintain my opinions in my own way.”

This would not, of course, involve seriatim opinions by the Justices, which is what Jefferson wanted. Moreover, Johnson’s views offered scant comfort to his patron. Marshall’s opinion for the Court in *Gibbons* was noteworthy for its sweeping definition of commerce and its recognition that “[t]he completely internal commerce of a State . . . may be considered as reserved for the State itself.” That observation seemed to leave open a critical question: Was the federal power to regulate commerce exclusive? Marshall’s opinion arguably suggested that the answer was yes. But its reliance on the preemptive effect of the Federal Coasting Licensing Act left room for argument.

Johnson went further. Picking up where he left off the previous year in *Elkison* and anticipating aspects of his position in *Osborn v. President, Directors & Co. of the Bank of the United States,* Johnson argued for a more expansive view of the federal commerce power than Marshall’s and grounded the need for that approach in the sins of the states. The states had been “selfish,” and their insistence on passing “iniquitous laws and impolitic measures . . . was the immediate cause, that led to the forming of a convention.” The document that emerged in turn gave Congress “exclusive grants . . . of power over commerce.”

The Court eventually rejected the exclusivity theory in *Cooley v. Board of Wardens of the Port of Philadelphia.* Johnson’s opinion in *Gibbons* is nevertheless noteworthy because it came at precisely the moment when he was under assault by Jefferson, who was trying

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190. 22 U.S. (9 Wheat.) 1 (1824).
191. Id. at 222 (Johnson, J., concurring).
192. Id. at 222–23.
193. Id. at 223.
194. Id. at 195.
197. Id. at 236.
198. 53 U.S. (12 How.) 299 (1851).
mightily to persuade Johnson that “the Supreme Court has advanced beyond its constitutional limits, and trespassed on those of the State authorities.”

The full extent of Johnson’s judicial apostasy became clear seventeen days later in Osborn. The case arose when the Ohio state auditor was ordered to collect a tax on the Second Bank that had been authorized by the Ohio legislature in February 1819, just before M'Culloch was argued. State agents entered the bank’s branch in Chillicothe and confiscated over one hundred thousand dollars in cash and bank notes, which eventually were deposited in the state treasury in Columbus. The bank sought an injunction against collection, and the case eventually made its way to the Court.

Osborn is read and taught today, if at all, for the proposition that because Congress chartered the Second Bank, any case in which it was involved as a litigant was one that “[arose] under a law of the United States.” Although that was an important element of the case, it by no means does the case full justice. As Marshall noted, “[a] revision of [M'Culloch] has been requested; and many considerations combine to induce a review of it.” But the Court refused to retreat, reaffirming that the bank was both an appropriate instrument of federal policy and protected from the interference of the states:

Considering the capacity of carrying on the trade of banking, as an important feature in the character of this corporation, which was necessary, to make it a fit instrument for the objects for which it was created, the Court adheres to its decision in the case of M'Culloch against The State of Maryland, and is of opinion, that the act of the State of Ohio, which is certainly much more objectionable than that of the State of Maryland, is repugnant to a law of the United States, made in pursuance of the constitution, and, therefore, void.

Johnson filed a lengthy and vigorous dissent. He refused to believe “that the constitution sanctions the vesting of the right of action in this Bank ... merely on the ground that a question might possibly be raised in it, involving the constitution, or constitutionality of a law, of the United States.” Repeating a theme voiced on numerous other occasions, he posed the specter of a jurisdictional slippery slope, under which “[t]he whole jurisdiction over contracts, might thus have been taken from the State Courts, and conferred

199. Letter from Thomas Jefferson to William Johnson (June 12, 1823), in 12 JEFFERSON, WORKS, supra note 84, at 252 n.1, 254–55.
200. Osborn, 22 U.S. at 826.
201. Id. at 859.
202. Id. at 867–68.
203. Id. at 874 (Johnson, J., dissenting).
upon those of the United States." This was vintage Johnson—a detailed argument against judicial expansion of federal court jurisdiction, especially where he suspected that the case was either not ripe or feigned. Johnson did not, however, distance himself from the bank and, by necessary implication, the core of the implied powers doctrine. Moreover, the manner in which he indicated that he agreed that the bank was constitutional was a direct affront to Jefferson and his allies.

Johnson began by declaring that he had "little doubt that the public mind will be easily reconciled to the decision of the Court" in one important respect: the extent to which it embraced the "obvious policy" that "the Bank is to be sustained." The bank, he stressed, "is now identified with the administration of the national government." "It is an immense machine, economically and beneficially applied to the fiscal transactions of the nation. Attempts have been made to dispense with it, and they have failed; serious and very weighty doubts have been entertained of its constitutionality, but they have been abandoned."

More telling, given Jefferson's state-rights orientation, the bank was needed to counter problems posed by the states, which had succumbed to a "rage for multiplying Banks" that had "inundated the country with... bills of credit, against which it was obvious that the provisions of the constitution opposed no adequate inhibition." The appropriate national response was then a specie-paying Bank [of the United States], with an overwhelming capital, and the whole aid of the government deposits [which] presented the only resource to which the

204. Id.
205. It is also an area where Johnson's views have been embraced by the Court. Compare Osborn, 22 U.S. at 886 (Johnson, J., dissenting) ("The judicial power extends only to 'cases arising,' that is, actual, not potential cases."); and Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., concurring) ("It appears to me to bear strong evidence, upon the face of it, of being a mere feigned case. It is our duty to decide on the rights, but not on the speculations of parties."); with United Public Workers v. Mitchell, 330 U.S. 75, 89-90 (1946) ("The power of courts, and ultimately of this Court to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough."); and Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) ("The Court will not pass upon the constitutionality of legislation in a friendly, nonadversary, proceeding.").
207. Id. at 872. This tracked one portion of the Marshall opinion, where, in response to one argument raised, he stated that "[t]he Bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes." Id. at 860.
208. Id. at 872 (Johnson, J., dissenting).
209. Id. at 873.
government could resort, to restore that power over the currency of the country, which the framers of the constitution evidently intended to give to Congress alone.  

Johnson’s embrace of the bank was complete. More importantly, the manner in which he framed his opinion mounted a telling indictment of many of the core precepts championed by Jefferson and his allies, particularly Johnson’s pointed observations of the dangers posed by the “individual cupidity, and the exercise of State power.”

One final perspective on Johnson’s views is found in the other major implied powers debate during this period: the question of the federal government’s power to itself undertake internal improvement projects. The issue provoked both protracted discussion and inconsistent conduct. Jefferson, for example, recognized the value of internal improvement. But he maintained, at least in his public pronouncements, that such measures required a constitutional amendment. This did not prevent him, however, from signing the measures authorizing the construction of the Cumberland Road. Some of the constitutional concerns were arguably resolved in _M’Culloch_. Yet many individuals continued to believe that internal improvement was different and that a constitutional amendment was required. One of these individuals was President James Monroe, who announced in his first annual message his “settled conviction” that this power was “not contained in any of the specified powers granted to Congress, nor can I consider it incidental to or a necessary means, viewed on the most liberal scale, for carrying into effect any of the powers which are specifically granted.” Monroe felt obliged “to suggest to Congress the propriety of recommending to the States the adoption of an amendment . . . which shall give to Congress the right in question.”

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210. _Id._
211. _Id._
212. For a detailed discussion of these issues, see Killenbeck, _Pursuing_, _supra_ note 143, at 127–37. For a general discussion, see JOHN LAURITZ LARSON, _INTERNAL IMPROVEMENT: NATIONAL PUBLIC WORKS AND THE PROMISE OF POPULAR GOVERNMENT IN THE EARLY UNITED STATES_ (2001).
213. Thomas Jefferson, Sixth Annual Message (Dec. 2, 1806), in 1 RICHARDSON, _supra_ note 18, at 393, 397 (discussing the “great purposes of the public education, roads, rivers, canals, and such other objects of public improvement”).
214. _Id._ (believing such projects should be undertaken only if “it may be thought proper to add to the constitutional enumeration of Federal powers”).
215. _See_ An Act to Regulate the Laying Out and Making a Road from Cumberland, in the State of Maryland, to the State of Ohio, ch. 19, 2 Stat. 357 (1806).
217. _Id._
1822 act authorizing preservation and repair of the Cumberland road.\textsuperscript{218} He did not, however, simply issue a veto message. Rather, he also wrote a forty-page explanation of his constitutional reservations, setting the stage for what followed.\textsuperscript{219}

Monroe’s mini-treatise was printed and widely circulated, with the Justices of the Court among its recipients. This led to a truly remarkable extrajudicial exercise when Johnson sent Monroe the following letter, which merits quoting in its entirety:

Judge Johnson has had the honor to submit the President’s argument on the subject of internal improvements to his brother-judges and is instructed to make the following report.

The judges are deeply sensible of the mark of confidence bestowed on them in this instance and should be unworthy of that confidence did they attempt to conceal their real opinion. Indeed, to conceal or disavow it would be now impossible as they are all of the opinion that the decision on the bank question completely commits them on the subject of internal improvements as to post-roads and military roads. On the other points it is impossible to resist the lucid and conclusive reasoning in the argument.

The principle assumed in the case of the Bank is that the grant of the principal power carries with it the grant of all adequate and appropriate means of executing it. That the selection of those means must rest with the general government and as to that power and those means the Constitution makes the government of the U.S. supreme.

J. J. would take the liberty of suggesting to the President that it would not be unproductive of good, if the Sec’y of State were to have the opinion of this Court on the bank question printed and dispersed throughout the Union.

J. J. is strongly impressed with the President’s views of the difficulty and delicacy attendant on any effort that might be made by the U.S. to carry into effect any scheme of internal improvement through the states, and as a question of policy or expediency sees plainly how prudent it would be to prepare them for it by the most conciliatory means.\textsuperscript{220}

Johnson’s assertion that he had been “instructed” to act and that his letter represented the views of the full Court is doubtful for a number of reasons. The Court, in response to a request made on behalf of President Washington, had made it quite clear that it would not issue advisory opinions.\textsuperscript{221} Johnson’s letter may have been informal in the sense that it was a letter from a single Justice, but it clearly purported to be advisory and as such was contrary to Court policy.

\begin{itemize}
  \item \textsuperscript{218} James Monroe, Veto Message (May 4, 1822), \textit{in} 2 RICHARDSON, \textit{supra} note 18, at 711, 711.
  \item \textsuperscript{219} James Monroe, Views of the President of the United States on the Subject of Internal Improvements (May 4, 1822), \textit{in} 2 RICHARDSON, \textit{supra} note 18, at 713, 713–52.
  \item \textsuperscript{220} Letter from William Johnson to James Monroe (undated), \textit{in} MORGAN, \textit{supra} note 1, at 123, 123–24 [hereinafter Johnson, Letter to Monroe].
  \item \textsuperscript{221} Letter from the Justices of the Supreme Court to George Washington (Aug. 8, 1793), \textit{in} 6 DOCUMENTARY HISTORY, \textit{supra} note 37, at 755, 755.
\end{itemize}
It is also clear that Johnson did not speak for the Court. The
boardinghouse tradition remained in full force at the time and the
brethren would certainly have discussed Monroe's pamphlet. Marshall
wrote Monroe, indicating that he had read the document "with great
attention and interest." He then appeared to support some of
Monroe's arguments:

This is a question which very much divides the opinions of intelligent men; and it is not
to be expected that there will be an entire concurrence in that you have expressed. All
however will I think admit that your views are profound, and that you have thought
deeply on the subject. To me they appear to be most generally just.

A general power over internal improvement, if to be exercised by the Union, would
almost certainly be cumbersome to the government, & of no utility to the people. But, to
the extent you recommend, it would be productive of no mischief, and of great good. I
despair however of the adoption of such a measure.

Story, in turn, refused to commit himself in any way, observing that
"[u]pon the constitutional question, I do not feel at liberty to express
any opinion as it may hereafter perhaps come for discussion before the
Supreme Court."

Johnson's reading of M'Culloch was arguably narrow, confining
its endorsement of federal internal improvement projects to "post-
roads and military roads." His articulation of the general principle
was, nevertheless, sweeping. And his emphasis on the latitude
Congress presumably enjoyed in making judgments about what might
be "necessary and proper" was both consistent with his views on the
scope of congressional power and pointed in the light of the fears
expressed by those who viewed the Marshall Court decisions with
alarm.

V.

What, then, are we to make of William Johnson? Most of the
literature divides roughly into two camps. The first group, which
includes individuals such as Levin, Schroeder, and Morgan,
emphasizes Johnson the dissenter, the lonely and courageous
individual who took on John Marshall and persuaded him to abandon
his avowed intent to have the Court speak always with a single voice.
These same individuals also praise certain of Johnson's opinions,

222. Letter from John Marshall to James Monroe (June 13, 1822), in 9 MARSHALL, PAPERS,
supra note 48, at 236, 236.
223. Id.
224. Letter from Joseph Story to James Monroe (June 24, 1822), quoted in 2 CHARLES
WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 56 (1923).
finding in them an "incisive critique" of the Marshall majority and "a
unified and consistent philosophy of the Constitution."\textsuperscript{226}

The alternate view is that Johnson was a decidedly
independent voice on the Court whose legacy is, at best, mixed. Ted
White describes him as "independent, impetuous, and tactless" and
concludes that "he was a maverick rather than a figure of genuine
influence on the Marshall Court."\textsuperscript{227} Herb Johnson notes that "William
Johnson's appointment to the Court introduced a forceful personality
into the hitherto restrained atmosphere that welcomed Marshall's
leadership."\textsuperscript{228} But he also observes that William Johnson "has
enjoyed the fate of most dissenters—he is forgotten in constitutional
deserves."\textsuperscript{229} Even Morgan, who believed with some justification that
"[i]n learning, wisdom, and firmness of character, Johnson had few
peers on the early Court," ultimately concedes that Johnson was
simply unable to fulfill Jefferson's expectations and assume a
leadership role because he "lacked precisely those qualities of
personality and temperament that so well equipped Marshall for his
task."\textsuperscript{230}

I readily confess that I have just begun to develop an
understanding of Johnson's extensive and complex record. Much
remains to be done. For the time being, I believe that the most
important consideration in assessing William Johnson is what he
might have done but did not. It is in this respect that he was the
judicial dog that did indeed bark, but not when he might have been
expected to.

The Court on which Johnson sat was in the first stages of
judicial maturity, having emerged from the obscurity under which it
labored in the early years of the new nation. Its major decisions from
1816 through 1824 had "brought into operation the whole antifederal
spirit of Virginia."\textsuperscript{231} A unified front whenever possible was essential:
the Court had "external & political enemies enough."\textsuperscript{232}

\textsuperscript{226} Donald G. Morgan, \textit{Mr. Justice William Johnson and the Constitution}, 57 Harv. L. Rev. 328, 335 (1944).
\textsuperscript{227} White, \textit{Marshall Court}, supra note 55, at 343.
\textsuperscript{228} Johnson, \textit{Marshall}, supra note 6, at 33.
\textsuperscript{229} Johnson, \textit{Constitutional Thought}, supra note 1, at 132.
\textsuperscript{231} Letter from John Marshall to Joseph Story (Apr. 28, 1819), in 8 \textit{Marshall, Papers}, supra note 48, at 309, 309.
\textsuperscript{232} Letter from John Marshall to Joseph Story (July 13, 1821), in 9 \textit{Marshall, Papers}, supra note 48, at 178, 179.
M'Culloch and Cohens were unanimous opinions. Johnson, it seemed, had joined the enemy. His acceptance of implied powers had, of course, been longstanding, and his opinion in Anderson was more sweeping than any Marshall had written. But Johnson had repeatedly expressed reservations about both feigned cases and judicial expansion of federal jurisdiction at the expense of the states. Certain aspects of his silence are therefore puzzling. It was, for example, fairly widely known that M'Culloch was an “arranged” case. In December 1818, Governor Charles Ridgely of Maryland described the “negotiations” between the bank and the state that placed the issue of the bank’s constitutionality before the state trial court, where a “decision in favour of the state was there had by consent and the appeal carried up to the Supreme Court of the United States.”

Johnson could presumably, had he chosen to do so, have expressed some of the same reservations about the nature of the M'Culloch litigation that he had voiced when he complained about “feigned cases” in his concurring opinion in Fletcher. The Second Bank was highly unpopular at the time, as the Panic of 1819 deepened into a depression that would affect the lives of one-third of the U.S. population. Many blamed the bank for exacerbating, if not causing, these problems. Moreover, extensive corruption and mismanagement in the bank had been documented by a special committee of the House of Representatives in a report filed in January 1819. The report led William Duane, editor of one of the most widely circulated newspapers at the time, the Aurora, to declare that the bank was a “fetid and monstrous abortion of private avarice, and political prostitution.”

It would have been easy for Johnson to accept implied powers in M'Culloch, even as he expressed reservations about the nature of the case and the institution it embraced. The Johnson who attacked Pinkney the following March in The Amiable Isabella presumably would have done so. But the Johnson who joined Marshall’s opinions in M'Culloch and Cohens did not. Nor did he express any reservations in his Osborn dissent about those aspects of the Marshall opinion that reiterated prior principles. Indeed, if anything, he expanded on them.

233. C. Ridgely, Executive Communication to the Legislature, MD. GAZETTE & POL. INTELLIGENCER, Dec. 17, 1818, at 3. M'Culloch was not, however, as one scholar has maintained, an "'amicable controversy.'" RICHARD E. ELLIS, AGGRESSIVE NATIONALISM: M'CULLOCH V. MARYLAND AND THE FOUNDATION OF FEDERAL AUTHORITY IN THE YOUNG REPUBLIC 72 (2007) (quoting NAT'L MESSENGER, Dec. 21, 1818). Rather, it was fully contested by both sides over nine days of intense and high-quality argument before the Court. See KILLENBECK, M'CULLOCH, supra note 145, at 95–109 (summarizing the arguments).

there and in Gibbons. And in the internal improvement debate, he argued vigorously, albeit behind the scenes, for an even more sweeping vision of national power.

Johnson’s silence in key Marshall Court decisions came at a particularly crucial moment for the Court, one in which the political capital it had built up was arguably at risk as it protected the hated bank and, time and again, imposed limits on state authority. Johnson eventually declared “enough” in Osborn and Planter’s Bank on the jurisdictional front. He refused to do so, however, on implied powers. Morgan speculates that Johnson’s motives in at least one area, internal improvement, may have been less than pure, given his personal support for and stake in some such projects. That does not, however, explain why Johnson would base many of his arguments in favor of implied powers and federal exclusivity on the need to counter the destabilizing tendencies of the states.

The proper question, therefore, is not whether William Johnson could or should have become a leader on the Marshall Court, rallying other Justices to his side in a crusade against Marshall’s practices and nationalism. It would have been sufficient, given the stakes and the tenor of the times, for Johnson simply to speak, breaking the united front that otherwise prevailed. He did not, contrary to some accounts, remain silent and cowed during the period in question. His diatribe over The Amiable Isabella attests to that, and, in the wake of Gibbons and Osborn, he would write twenty-three of the forty-eight separate opinions that flowed from his pen during his tenure on the Court. This was indeed a judicial dog with a considerable bark. But his refusal to exercise it at key moments during his tenure on the Court is telling and important.

235. Morgan, supra note 1, at 124.