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# TEMPLE LAW REVIEW

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HIGHER EDUCATION

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**VOL. 89 NO. 1**

**FALL 2016**

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## ARTICLES

### THE LIMITS OF CONGRESSIONAL POWER

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## INTRODUCTION

What are the outer limits of Congress's legislative power? Many students of constitutional law believe that this question was answered in Chief Justice John Marshall's seemingly expansive construction of the Necessary and Proper Clause<sup>1</sup> in *McCulloch v. Maryland*.<sup>2</sup> The conventional understanding of

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1. "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [enumerated in Article I, Section 8], and all other

*McCulloch* is that a federal statute is constitutional when it is not prohibited by the Constitution and “constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”<sup>3</sup> But Marshall added a warning that “the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.”<sup>4</sup>

This warning has been prescient. The scope of congressional power, and even the meaning of *McCulloch*, has been the subject of enduring controversy. The debate is now particularly salient because certain Supreme Court Justices and scholars have recently adopted doctrines, originally asserted in 1791 by James Madison, limiting the scope of the Necessary and Proper Clause. Meanwhile, other scholars have meticulously analyzed *McCulloch* and challenged the conventional understanding by arguing that *McCulloch* is actually a moderate and limited validation of congressional power. If Madison’s doctrines or the other limiting interpretations of *McCulloch* proposed by scholars are adopted by the Supreme Court, the implied powers of Congress will be seriously curtailed.

Originating in the Report of the Committee of Detail,<sup>5</sup> the Necessary and Proper Clause was adopted by the Constitutional Convention with minimal discussion.<sup>6</sup> But that silence was deceptive, as three influential delegates—Edmund Randolph, Elbridge Gerry, and George Mason—identified its inclusion in the Constitution as a reason for their refusals to sign the final document.<sup>7</sup> In the ratification debates, insightful Anti-Federalists charged that congressional power was bounded only by the ambiguous terms “necessary” and “proper” and that if those terms were construed liberally, as they feared and expected, Congress could have unlimited power.<sup>8</sup>

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Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, § 8, cls. 1, 18.

2. 17 U.S. (4 Wheat.) 316 (1819).

3. *United States v. Comstock*, 560 U.S. 126, 134 (2010).

4. *McCulloch*, 17 U.S. (4 Wheat.) at 405.

5. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 182 (Max Farrand ed., rev. ed. 1966) [hereinafter RECORDS OF THE FEDERAL CONVENTION].

6. *Id.* at 344–45 (the vote on the clause as proposed by the Committee of Detail); *id.* at 596 (the Report of the Committee of Style).

7. *See id.* at 563 (Randolph’s objection); *id.* at 632–33 (Gerry’s objection); *id.* at 640 (Mason’s objection); *see also* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 51 (2010).

8. Brutus, one of the most perceptive opponents of ratification (whose identity has not been definitively established), wrote a series of sixteen letters cogently critiquing the scope of congressional and judicial power. He called particular attention to the vague terms and potentially wide scope of the Necessary and Proper Clause:

How far the [last] clause in the 8th section of the 1st article may operate to do away all idea of confederated states, and to effect an entire consolidation of the whole into one general government, it is impossible to say. The powers given by this article are very general and comprehensive, and it may receive a construction to justify the passing [of] almost any law. A power to make all laws, which shall be *necessary and proper*, for carrying into execution, all powers vested by the constitution in the government of the United States, or

James Madison responded unapologetically in *The Federalist No. 44* that the Necessary and Proper Clause codified the existence of implied powers, without which the new government could not function.<sup>9</sup> No enumerated power could be exercised “without recurring more or less to the doctrine of *construction* or *implication*.”<sup>10</sup> He continued with a broad construction of implied powers: “No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorised; wherever a general power to do a thing is given, every particular power necessary for doing it, is included.”<sup>11</sup>

The ratification of the Constitution validated the Necessary and Proper Clause in principle but did not settle its scope. In the First Congress, Representative Madison strenuously argued that Secretary of the Treasury Alexander Hamilton’s proposed Bank of the United States was unconstitutional because the Necessary and Proper Clause should be strictly construed.<sup>12</sup> According to Madison, the exercise of an implied power was “necessary” only if it was a “direct and incidental” means of effectuating an enumerated power. Not only did the Bank fail this test, but the Bank was not a “proper” exercise of congressional power. Congress was creating the Bank as an end in itself and then claiming that it was a necessary means to carry out express powers. Justifications for the Bank thereby inverted the ends and means of congressional power. And Madison presented an even more fundamental constitutional objection. Using a method of comparative constitutional construction, he insisted that implied powers could not equal or exceed in importance the powers explicitly expressed in the Constitution. Incorporating a privately owned and operated national bank was an important power—“an independent and substantive prerogative”<sup>13</sup>—that could have been, but was not, enumerated. Absent explicit mention, such a significant power could not be assumed.

Considering Madison’s role in creating and defending the Constitution, his interpretation of the Necessary and Proper Clause would be worth discussing even purely as a matter of legal history. But Madison’s theories have also gained prominence in the jurisprudence of constitutional law. Madison’s doctrine that

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any department or officer thereof, is a power very comprehensive and indefinite, and may, for aught I know, be exercised in a such manner as entirely to abolish the state legislatures. . . .

[I]t is a truth confirmed by the unerring experience of ages, that every man, and every body of men, invested with [such] power [as the Necessary and Proper Clause], are ever disposed to increase it, and to acquire a superiority over every thing that stands in their way.

Brutus, *Letter I*, N.Y.J., Oct. 18, 1787, reprinted in *THE FEDERALIST WITH LETTERS OF “BRUTUS”* 437, 441–42 (Terence Ball ed., 2003); see also Brutus, *Letter V*, N.Y.J., Dec. 13, 1787, reprinted in *THE FEDERALIST WITH LETTERS OF “BRUTUS”* 465, 468 (“It is, perhaps, utterly impossible fully to define this power.”).

9. See *THE FEDERALIST NO. 44*, at 219–21 (James Madison) (Terence Ball ed., 2003).

10. *Id.* at 220.

11. *Id.* at 221.

12. 2 *ANNALS OF CONG.* 1896–1901 (1791). See *infra* Part I.B. for a discussion of Madison’s full argument.

13. 2 *ANNALS OF CONG.* 1900 (1791).

an implied power must be directly and immediately related to an express power became a continuing staple of constitutional discourse.<sup>14</sup> In post-1937 constitutional jurisprudence, the critique of Congress improperly inverting means and ends was seemingly buried.<sup>15</sup> But a version of Madison's argument resurfaced in Chief Justice Roberts's opinion in *National Federation of Independent Business v. Sebelius* (*NFIB*).<sup>16</sup>

Madison's final theory—that implied powers are not “proper” means if they are equivalent in importance to “great and substantive powers”—would place the greatest restraint on congressional power. After lying dormant for over two centuries,<sup>17</sup> this theory has been recently supported by an impressive body of scholarship, revived by Roberts in *NFIB*, and subsequently endorsed by two other members of the Supreme Court.<sup>18</sup> As noted above, scholars have also argued that the conventional reading of *McCulloch* is incorrect and that this foundational decision actually imposes substantial limits on the scope of congressional power.<sup>19</sup>

This Article presents several submissions. First, Madison's doctrines are wrong.<sup>20</sup> The recent resurrections of his theories, and other proposed substantial restrictions on Congress's implied powers, are based on an erroneous historical narrative of how the First Congress and President Washington's cabinet understood the Necessary and Proper Clause, a misreading of *McCulloch*, and a failure to respect the differences between the judicial and legislative processes.

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14. Compare *United States v. E.C. Knight Co.*, 156 U.S. 1, 16 (1895), and *Carter v. Carter Coal Co.*, 298 U.S. 238, 309 (1936), with *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 40–41 (1937), and *Wickard v. Filburn*, 317 U.S. 111, 122–23 (1942).

As Justice Scalia has explained, although cases such as these tend to be written as dealing with the scope of the Commerce Clause, they are really applications of the Necessary and Proper Clause to the Commerce Clause. *Gonzales v. Raich*, 545 U.S. 1, 34 (2005) (Scalia, J., concurring). For example, the conditions of manufacturing and production are not “species of commercial intercourse.” See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 193 (1824). Regulating the conditions of manufacturing and production can be justified only as a means of regulating interstate commerce. For detailed elaborations of the “substantial effects” test as an exercise of implied powers, see DAVID E. ENGBAHL, *CONSTITUTIONAL FEDERALISM* 27–32 (2d ed. 1987) (referring to the concept as the “Particularity Feature” of the Necessary and Proper Clause); J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 616–19.

15. Compare *Hammer v. Dagenhart*, 247 U.S. 251, 269–70 (1918), with *United States v. Darby*, 312 U.S. 100, 121 (1941), and *Gonzales*, 545 U.S. at 9.

16. 132 S. Ct. 2566, 2591–93 (2012). Two subsequent Supreme Court decisions on the Affordable Care Act did not involve constitutional issues. See *King v. Burwell*, 135 S. Ct. 2480 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

17. For example, St. George Tucker, the leading juridical proponent of republican constitutionalism, asserted that the Bank was unconstitutional and adopted Jefferson's position that an implied power must be “indispensably necessary” to carry out an express power. However, he did not mention Madison's theory that some powers were too important to be derived from implication. See 1 ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES* app. note D at 263–64, 286–89 (Philadelphia, William Young Birch & Abraham Small 1803) [hereinafter TUCKER'S BLACKSTONE].

18. See *infra* Part II.A.

19. See *infra* Part II.B.

20. Yes, I know, it's James Madison. But even geniuses stumble. Shakespeare wrote *The Two Noble Kinsmen*.

These restrictive theories place arbitrary and unjustifiable limitations on the implied powers of Congress. Moreover, Madison's "great powers" thesis rests on a flawed method of constitutional construction. An alternative model better explains the construction of Congress's Article I express and implied powers.

Although the implied powers of Congress are very broad, this Article also submits that they are governed by a limiting principle. The criterion for the constitutionality of an implied power is the relation of the means to a constitutionally authorized end. If an act of Congress is "fairly adapted" to carrying out specific or aggregated enumerated powers and is not prohibited by the Constitution, it is "necessary" and "proper" under the Clause. The issue for judicial review is whether, affording an appropriate degree of deference to legislative findings and judgments, the measure used by Congress has a natural or obvious relation to specific or aggregated enumerated powers.

Madison originated the theoretical justification for restrictive interpretations of the Necessary and Proper Clause in response to Hamilton's proposed national bank. Section I of this Article begins with an examination of Hamilton's proposal for incorporating the Bank and Madison's political and constitutional objections. Section II continues by describing Chief Justice Roberts's adoption of Madison's theories, further judicial developments, and the contemporary scholarly and judicial support both for the Madisonian revival and for other limitations on Congress's implied powers. Section III returns to the Bank debate by examining the Federalist<sup>21</sup> rebuttal to Madison in the First Congress, the continued debate over the Bank in the cabinet,<sup>22</sup> other legislation enacted by the First Congress, and the use of implied powers by the Jefferson administration. This examination shows the historical invalidity of the constraints that Madison and his present-day supporters would place on Congress's implied powers.

Section IV contains an extensive analysis of *McCulloch*, connecting the early portions of the opinion to the pressing constitutional issues of the time. This analysis then evaluates Marshall's determination of the scope of the implied powers of Congress, according to the opinion's own language, its reliance on the

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21. I use the term "Federalists" as shorthand for the supporters of Hamilton's economic program. Most (but not all) were Federalists who had advocated for the Constitution during the ratification debates. Although Madison and Jefferson opposed Hamilton's economic program, including the Bank, they had not yet begun to form an organized opposition, which would become the Republican Party. See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 257, 263–70 (1993). Nevertheless, the constitutional debate over the Bank tracked the divide that developed between Federalists and Republicans.

22. The historical summary of the debates presented in this Article is taken substantially from an earlier working paper. Robert J. Reinstein, *The Great Power of the Necessary and Proper Clause* (Temple Univ. Legal Studies Research Paper Series, Research Paper No. 2015-31, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2644326](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2644326) [https://perma.cc/HJ6W-C98Y]. For a subsequently published complete narrative of these debates, see Michael Coblenz, *The Fight Goes on Forever: "Limited Government" and the First Bank of the United States*, 39 S. ILL. U. L.J. 391, 409–38 (2015). Coblenz's narrative shows that a majority of those members of the First Congress who had attended the Constitutional Convention rejected the general principle that congressional power should be construed narrowly (an approach similar to Lincoln's in the Cooper Union speech).

Federalist rebuttal in Congress, and particularly on Hamilton's opinion on the Bank (which Marshall and Story both accepted as authoritative), and other decisions of the Marshall Court. The analysis of *McCulloch* continues by explaining a significant issue that has puzzled readers for years—the application of the case's doctrines of congressional power to the constitutionality of the Bank, including reliance on Hamilton's aggregate theory of enumerated powers. This portion of the Article ties up some important loose ends in *McCulloch*, including explanations of why the “degree of necessity” is ordinarily a political question, why judicial skepticism towards the congressional inversion of means and ends results from an incorrect equation of judicial and legislative processes, what the Marshall Court meant by the “spirit of the Constitution,” and how the rational basis test should be applied to implied powers.

Although Hamilton and Marshall rejected Madison's “great powers” theory, their reasoning is not fully satisfying. Madison's theory presents important and difficult issues of constitutional construction. Section V shows that Madison's arguments, and those of his modern advocates, rest on flawed methods of constitutional construction. This Section also presents an alternative model for the construction of Congress's Article I powers that plausibly explains (1) why seemingly incidental powers are included among the express powers, (2) how the Article I enumerations serve the separation of powers, (3) how certain express powers are actually limitations on others (including, potentially, the Necessary and Proper Clause), and (4) how the constitutionality of an implied power of Congress is independent of the degree of its importance.

## I. CONSTITUTIONAL OBJECTIONS TO THE BANK OF THE UNITED STATES

### A. *Hamilton's Proposed Bank*

The Secretary of the Treasury's proposal for the creation of a national bank was the lead agenda item of the third session of the First Congress. A national bank was the latest and most ambitious component of Hamilton's plan to convert the United States from a weak confederation of states with no public credit into a nation with a fiscally sound, prosperous, and integrated economy, guided by a strong central government. As proposed by Hamilton in an extensive report submitted on December 14, 1790,<sup>23</sup> and as enacted by Congress,<sup>24</sup> the Bank of the United States would be chartered as a privately owned and operated corporation; its projected capital of \$10 million would be much larger than the collective resources of the three then-existing, state-chartered banks.<sup>25</sup> The United States would be the largest shareholder, with the ability to purchase up to

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23. Alexander Hamilton, Final Version of the Second Report on the Further Provision Necessary for Establishing Public Credit (Report on a National Bank) (Dec. 13, 1790) [hereinafter Hamilton, Report on a National Bank], reprinted in 7 THE PAPERS OF ALEXANDER HAMILTON 305, 334–39 (Harold C. Syrett & Jacob E. Cooke eds., 1963) [hereinafter HAMILTON PAPERS].

24. Act of Feb. 25, 1791, ch. 10, 1 Stat. 191.

25. See *id.* at 196; ELKINS & MCKITRICK, *supra* note 21, at 226.

\$2 million in shares.<sup>26</sup> The Bank's notes and bills of credit would be legal tender, in lieu of precious metals, for any money owed to the United States.<sup>27</sup> The charter would be for twenty years, during which Congress could not establish other banks.<sup>28</sup>

Drawing on the experiences of European countries, and using the Bank of England as a model, Hamilton began his report by asserting "two fold evidence" of the importance of well-run national banks: (1) "Trade and industry, wherever [national banks] have been tried, have been indebted to them for important aid"; and (2) national banks have come to the assistance of governments to meet "dangerous and distressing emergencies."<sup>29</sup>

Hamilton then emphasized three advantages of his proposed national bank. The Bank's first advantage was that the loans from its accumulated capital would materially increase and stabilize the nation's trade and commerce. According to Hamilton, the biggest problem in the country's economy was the shortage of money that could be used for productive purposes.<sup>30</sup> Consolidating the many small pools of capital held by individuals, a national bank "augment[s] . . . the active or productive capital of a country" by creating new trade and commerce.<sup>31</sup> Moreover, the uniformity of the Bank's notes and bills of exchange would facilitate and stabilize commerce between the states,<sup>32</sup> and the Bank's profitability would attract foreign investment in American industry.<sup>33</sup> Hamilton acknowledged that the Bank would provide much more support for trade and manufacturing than for agriculture.<sup>34</sup> However, he asserted, "by contributing to enlarge the mass of industrious and commercial enterprise, banks become

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26. See 1 Stat. at 196. The government would obtain these shares by providing the Bank with that amount from the public debt and then borrowing those funds back from the Bank. The remainder of the Bank's stock would be sold to subscribers under the supervision of executive appointees. Three-fourths of each private subscription was required to be paid in government securities (which would increase the value of government securities and consequently reduce the national debt). The shareholders would elect a private board of directors that would be responsible for operating the Bank. Foreigners could invest in the Bank but could not be directors. The maximum rate of interest that the Bank could charge on its loans was six percent. And Bank officials were required to regularly report on its operations to, and make its books available for inspection by, the Secretary of the Treasury. *Id.* at 192-96.

27. *Id.* at 196.

28. *Id.* at 192, 196.

29. Hamilton, Report on a National Bank, *supra* note 23, at 306.

30. See *id.* at 320-22.

31. *Id.* at 306-09. Bank lending creates a multiplier effect on new trade and commerce because "[b]anks in good credit can circulate a far greater sum than the actual quantum of their capital in Gold & Silver." *Id.* at 307.

32. *Id.* at 321-23.

33. *Id.* at 314. Reflecting the philosophy of Adam Smith, Hamilton assured Congress that, rather than crowding out gold and silver, the Bank would increase the government's holdings of these precious metals because the quantity of those metals in a country is determined by its balance of trade. The Bank's "support of industry" would contribute to a favorable balance of trade and a resulting increase in gold and silver holdings. *Id.* at 317-18.

34. *Id.* at 330.



*nurseries of national wealth.*”<sup>35</sup>

The Bank’s second advantage was that it would be an institution from which the government could borrow money when needed, especially in an emergency such as war.<sup>36</sup> The third advantage was that the creation of a convenient medium of uniform negotiable paper would facilitate the collection of taxes.<sup>37</sup> The Bank’s bills of exchanges would circulate throughout the country and would be honored by the United States as payments in lieu of metals. This was much more efficient and convenient, for both taxpayers and the government.<sup>38</sup>

Hamilton argued at length that there was no existing realistic option. The three existing state-chartered banks (including the Bank of North America, chartered by Pennsylvania) were too small to meet the potential borrowing needs of the United States and were chartered and regulated by different sovereigns. Foreign banks, though large enough for borrowing generally, were not reliable sources of support for the United States in the event of war.<sup>39</sup> And a public bank was not an acceptable alternative to a privately owned and operated national bank.<sup>40</sup> A bank that was owned and operated by the United States would not be trusted by private investors, particularly by foreign investors whose contributions were critical to the success of a national bank, because the temptations for governmental abuse would be too great.<sup>41</sup> On the other hand, a private bank would be creditworthy because the great bulk of investors would be “men in trade” and foreigners, who would insist on the bank being operated honestly and prudently.<sup>42</sup> It was safer to rely on the profit motive rather than on control by government officials.<sup>43</sup> Although privately owned and operated, the Bank would be subject to oversight by the Secretary of the Treasury, who would have unlimited access to its information.<sup>44</sup>

As usual, Hamilton had done his homework.<sup>45</sup> His report convincingly

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35. *Id.* at 309 (emphasis added).

36. *See id.*

37. *Id.* at 309–310.

38. *Id.*

39. *See id.* at 323–29.

40. *Id.*

41. Responding to public needs, political patronage, and perceived emergencies, a public bank would inevitably resort to bad loans and—even worse—the disastrous expedient of issuing huge amounts of unbacked paper money. *See id.* at 331–33. Printing unbacked paper money was far easier than imposing taxes and would predictably lead to hyperinflation and a dangerously bubbled economy. *Id.* at 321–22.

42. *Id.* at 312–13.

43. *Id.* at 331–33. In response to the complaint that the Bank’s initial capitalization included government investment, Hamilton pointed out that the starting capital for the Bank of England, some £1.2 million, also came from loans (including a portion from the government) and that the Bank of England’s capital had now increased to over £11 million. *Id.* at 339.

44. The British government exercised control over the Bank of England by having the statutory right to rescind its charter with only one year’s notice. The Senate rejected a motion that would have given Congress the same notice and rescission authority. Coblenz, *supra* note 22, at 407.

45. Hamilton’s experience dated back to when he was an aide to General Washington in the War of Independence. As a twenty-four-year-old colonel, Hamilton urged Congress in 1779 to create a

presented the case that a privately owned and operated national bank would be a “nursery of national wealth” that would promote the country’s trade and commerce, allow the government to borrow money in emergencies, and facilitate the collection of taxes.<sup>46</sup>

*B. Madison’s Political and Constitutional Objections*

The Bank bill was introduced in the Senate on January 3, 1791<sup>47</sup> and passed with apparent ease on January 20.<sup>48</sup> The bill then went to the House of Representatives, where it confronted the determined opposition of James Madison and a bloc of Southern members. During the first two sessions of Congress, Madison was a nationalist who had taken a leading role in establishing the executive branch and in securing federal taxes to fund the government and promote commerce and manufacturing.<sup>49</sup> But Madison had opposed (unsuccessfully) Hamilton’s major economic proposals as contrary to the values of fairness and equity that the new republic should hold.<sup>50</sup> Madison thought that the Bank also threatened those values by giving special and exclusive privileges to a moneyed elite that sought to control the country.<sup>51</sup> Where Hamilton saw English financial institutions as models for producing national wealth and power, his opponents saw them as instruments of corruption that could carry those

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national bank. BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 40–42 (1957). Hamilton’s insistence on a privately controlled bank, and his opposition to a public bank, likely derived as much from European experience as from his ideas of political economy. European countries used both private and public national banks, but the former (including the Bank of England) were usually successful, while the latter were drawn to abuses and failures. See J. G. Van Dillen, *The Bank of Amsterdam*, in *HISTORY OF THE PRINCIPAL PUBLIC BANKS* 79, 81 (1934) (discussing the Netherlands); Pierre Des Essars, *A History of Banking in the Latin Nations*, in 3 *A HISTORY OF BANKING IN ALL THE LEADING NATIONS* 1, 11–19, 31, 158–59 (New York, Journal of Commerce & Commercial Bulletin 1896) (discussing France and Italy).

46. Hamilton, Report on a National Bank, *supra* note 23, at 309, 323–29.

47. MARK R. KILLENBECK, *M’CULLOCH V. MARYLAND: SECURING A NATION* 14 (2006).

48. 2 *ANNALS OF CONG.* 1748 (1791). Because the Senate met in secret until 1794, there is no reliable record of this debate. There appears to have been little opposition on the ground that Congress lacked the constitutional power to charter a bank. See Coblenz, *supra* note 22, at 407–09; KILLENBECK, *supra* note 47, at 14–15.

49. Under Madison’s leadership, the First Congress secured a reliable source of revenue by imposing duties on imports (some of which were protectionist); established the executive branch by creating the Departments of State, Treasury, and War; recognized the unrestricted power of the President to remove executive officials; created the national judicial system; and passed the Bill of Rights. ELKINS & MCKITRICK, *supra* note 21, at 50–55, 58–75.

50. Madison proposed and argued repeatedly for a discriminatorily high tonnage tax on vessels built by countries with which the United States did not have a commercial treaty—namely, Great Britain. If enacted, this proposal could have provoked a trade war with Britain and nullified the revenues that Hamilton needed to restore the public credit. *Id.* at 65–74, 153–55. Madison opposed Hamilton’s proposal to compensate all holders of the national debt at par because he thought it favored speculators who had purchased notes at discounted rates. *Id.* at 143–45. And he tried to defeat Hamilton’s plan for the United States to assume all state debts because it penalized the states (including Virginia) that had virtuously paid off all or a large portion of their debts. *Id.* at 146–51.

51. IRVING BRANT, *JAMES MADISON: FATHER OF THE CONSTITUTION, 1787–1800*, at 332 (1950); RON CHERNOW, *ALEXANDER HAMILTON* 349–50 (2004).

infections into the new republic.<sup>52</sup>

Moreover, the audacity and risks in Hamilton's proposal were breathtaking. Hamilton's model, the enormously successful Bank of England, had functioned for close to a century,<sup>53</sup> while the Bank of the United States would be established practically at the founding of a country that had little experience with even small banks. There was a real risk of failure, and an unsuccessful run on a national bank could cripple the creditworthiness of the United States and greatly harm the economy.<sup>54</sup> Finally, as Hamilton's report acknowledged, the Bank would benefit manufacturing and commerce in the Northern states much more than agriculture in the South. The Bank bill was almost certain to generate a North-South divide in Congress.<sup>55</sup>

In his lengthy speech opposing the Bank, Madison led off with many of the objections mentioned above.<sup>56</sup> But Madison did not limit his opposition to matters of policy, as he had in opposing Hamilton's previous economic proposals.<sup>57</sup> Instead, he strenuously opposed the Bank on constitutional grounds. Madison started with a premise that no one challenged: Congress could exercise only powers given to it by the Constitution, and the Constitution did not provide Congress with the express power to establish the Bank or any other corporation.

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52. LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* 183, 149–54 (1978); 2 DUMAS MALONE, *JEFFERSON AND THE RIGHTS OF MAN* 339–40 (1951). Another basis for opposing the Bank was Southern apprehension that the establishment of such a powerful institution in Philadelphia could become a force for retaining the nation's capital in that city. ELKINS & MCKITRICK, *supra* note 21, at 229. Although Hamilton had apparently agreed to the Potomac location in return for Madison muting his opposition to the assumption of state debts, Congress had not yet enacted legislation for the location of the capital and was debating that issue at the same time as the Bank debate. *See* KILLENBECK, *supra* note 47, at 22–24. Those Southern fears nevertheless appear exaggerated because the idolized George Washington was a foremost proponent of moving the capital to the Potomac location.

53. The Bank of England was created by the Tonnage Act in 1694. A. ANDRÉADÈS, *HISTORY OF THE BANK OF ENGLAND* 72 (Christabel Meredith trans., 4th ed. 1966). The Act created a corporation called "The Governor and Company of the Bank of England," and the subscribers were private investors. Subscribers were limited to £10,000 initially and £20,000 total. *Id.* at 73; 1 JOHN CLAPHAM, *THE BANK OF ENGLAND: A HISTORY* 18 (1945). The total amount of subscriptions would be £1.2 million. ANDRÉADÈS, *supra*, at 73. There were two major differences between the Bank of England and the proposed Bank of the United States: the British government was not a shareholder in the Bank of England, and the Bank of England had a charter that could be annulled by Parliament on one year's notice.

54. Madison was less hostile than Jefferson towards banks. Madison thought the Bank's advantages would be better realized, and its political and economic risks minimized, through the establishment of smaller banks around the country. *See* BRANT, *supra* note 51, at 328.

55. In fact, the vote in the House of Representatives would divide almost entirely on sectional lines. *See infra* note 158.

56. 2 *ANNALS OF CONG.* 1894–96 (1791). Madison did not refer to the North-South divide regarding the Bank. But other Southern members opposed the Bank because it would favor Northern commerce. *See id.* at 1918–19 (statement of Rep. James Jackson of Georgia); *id.* at 1930 (statement of Rep. Michael Jenifer Stone of Maryland); *id.* at 1937–38 (statement of Rep. William B. Giles of Virginia).

57. *See id.* at 1191–95, 1262–71 (1790) (compensation for holders of debt); *id.* at 1338–42, 1377–78, 1386–90, 1534–43 (assumption of state debts); *id.* at 1570–71, 1575–77 (tonnage discrimination).

He recalled that the Constitutional Convention had rejected a proposal to give Congress the power to establish corporations.<sup>58</sup> Madison acknowledged that Congress possessed incidental or constructive powers but asserted that, in determining whether such a power could be validly exercised, Congress needed to consider both “the degree of its incidentality to an express authority” and the “degree of its importance.”<sup>59</sup>

According to Madison, there were three constitutional provisions that could conceivably support congressional legislation establishing the Bank: the power to lay and collect taxes, the power to borrow money on the credit of the United States, and the power to enact laws that were necessary and proper to carry into execution the two previous express powers.<sup>60</sup> Curiously, Madison did not include the power to regulate interstate and foreign commerce, even though Hamilton’s report had emphasized (as its first advantage) the Bank’s utility in creating trade and commerce.

Though ignoring the commerce power, Madison quickly disposed of the taxing and borrowing powers. Congress’s power to lay and collect taxes could not support the Bank bill because the Bank would not impose any taxes and because the taxing power was limited to obtaining funds to carry out Congress’s enumerated powers.<sup>61</sup> Congress’s power to borrow money was likewise irrelevant because the Bank was lending, and not borrowing, money on the credit of the United States.<sup>62</sup>

Madison then rejected the Necessary and Proper Clause as a constitutional basis for the Bank because the Bank was not “necessary” or “proper.” The Necessary and Proper Clause allowed Congress to use “appropriate, and, as it were, technical means of executing” the express powers. But to be “necessary,” the means must be “direct and incidental,” and not simply “conducive,” to carrying out those powers. The Bank might indirectly assist the government in collecting taxes, but this would hardly rise to the level of being a “necessary” means. Nor could the power to borrow money on the credit of the United States imply the power to create a means of lending to the United States.<sup>63</sup> This was an improper, bootstrap argument that inverted constitutional means and ends:

Mark the reasoning on which the validity of the bill depends! To borrow money is made the end, and the accumulation of capitals implied as the means. The accumulation of capitals is then the end, and a Bank implied as the means. The Bank is then the end, and a charter of incorporation, a monopoly . . . implied as the means.<sup>64</sup>

Instead of being “direct and incidental,” the Bank’s connections with the taxing and borrowing powers were tenuous and circular. If implications “thus

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58. *Id.* at 1896 (1791).

59. *Id.*

60. *Id.*

61. *Id.* at 1896–97.

62. *Id.* at 1897–98.

63. *Id.* at 1898.

64. *Id.* at 1899.

remote and thus multiplied” were accepted, Congress could do anything.<sup>65</sup> In summary, the Bank was at most a “convenient” legislative measure. And it was certainly not “necessary” because Congress could use the state-chartered banks to perform the same functions.<sup>66</sup>

Madison then raised a fundamental argument that the Bank, even if “necessary” for carrying out a power, could not be a “proper” exercise of congressional power. The language and construction of the Constitution “condemn the exercise of any power, particularly a great and important power, which is not evidently and necessarily involved in an express power.”<sup>67</sup> This followed from the enumeration of important powers that could have been left to implication. Madison observed that the powers to raise and support the army and navy, make rules and regulations to govern the military, call out the militia, and borrow money for the common defense were listed as express powers of Congress. But these powers could have been derived by implication from the power to declare war and were, in fact, more directly related than the Bank to carry into effect an express power of Congress. Why, then, were these powers enumerated when they might have been derived by implication? Madison’s answer: because they were so important that they needed to be expressed in the Constitution.<sup>68</sup> It therefore followed that powers of equal or greater importance that could have been enumerated, but were not, should not be considered “incidental” or “proper” under the Necessary and Proper Clause.<sup>69</sup>

Madison concluded that the Bank was not an “accessory or subaltern power, to be deduced by implication,” but rather a “distinct, an independent and substantive prerogative, which not being enumerated in the Constitution, could never have been meant to be included in it.”<sup>70</sup> Corporations were exercises of sovereignty because only a sovereign could create these artificial legal entities and vest them with privileges that shielded their members from ordinary laws governing individuals. The Bank’s incorporation by Congress thus gave its shareholders prerogatives that superseded the ordinary laws of the states. To Madison, these were palpable violations of the Tenth Amendment.<sup>71</sup>

## II. RESTRICTIONS ON CONGRESSIONAL POWER

### A. *Judicial Revivals of Madison’s Theories*

In *NFIB*, Chief Justice Roberts began by denying that the minimum

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65. *Id.*

66. *Id.* at 1901.

67. *Id.* at 1899.

68. *Id.*

69. *See id.* at 1899–1900.

70. *Id.* at 1900.

71. *See id.* at 1901. Madison and others throughout this debate referred to this as the “Twelfth Amendment.” Congress had approved twelve amendments, but only ten were ratified and became part of the Constitution on December 15, 1791. One of the remaining two was eventually ratified in 1992 as the Twenty-Seventh Amendment.

coverage requirement (called the individual mandate) of the Affordable Care Act could be upheld under the express power to regulate interstate commerce.<sup>72</sup> By requiring individuals to purchase health insurance, Congress was forcing them to participate in interstate commerce. And such an effort to “create” commerce was outside the express power because only existing commerce could properly be “regulated.”<sup>73</sup>

The Chief Justice then rejected the government’s argument that the individual mandate should be upheld under the Necessary and Proper Clause.<sup>74</sup> The government made the following now-familiar argument of why the individual mandate was “necessary.” Two of the most important reforms in the Affordable Care Act were prohibiting insurance companies from both denying coverage and charging higher premiums to people with preexisting conditions. No one questioned the power of Congress to legislate these reforms under the commerce power. But the reforms would substantially raise the payments that insurance companies make to medical providers, resulting in significantly higher premiums. To avoid these results, the mandate would increase the insurance pool by (hopefully) enlisting large numbers of healthy, but presently uninsured, individuals. The mandate was therefore designed as the means to effectuate the

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72. Nat’l Fed’n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2585–91 (2012).

73. *Id.* at 2586. This Article does not deal with the scope of the Commerce Clause, but the following comment is added because of the Bank’s relation to commerce.

The Chief Justice argued that “creating” commerce was not a form of regulation because “regulating” commerce can apply only to commercial activity that already exists, a position also held by the four dissenting Justices. *Id.*; *id.* at 2648 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (referring to “[t]he mandating of economic activity” as outside the commerce power). In his friendly questioning of the Solicitor General, Justice Breyer asked whether the establishment of the Bank and *McCulloch* were precedents for Congress’s power to create new commerce. Transcript of Oral Argument at 15, Dep’t of Health & Human Servs. v. Florida, 132 S. Ct. 2566 (2012) (No. 11-398), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-398-Tuesday.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf) [<https://perma.cc/TSK2-NETM>]. Declining to adopt this helpful suggestion, the Solicitor General responded that the Government was relying on a “narrower rationale.” *Id.* at 17. But Justice Breyer did not give up. He posed the same question to counsel representing the challengers, *id.* at 62–64, who denied that the Bank was an exercise of the commerce power and also pointed out that no one was forced to participate in the Bank, *id.* at 64–65.

With that colloquy, the Bank practically disappeared from the case. (Justice Ginsburg refers to it briefly in her opinion. *NFIB*, 132 S. Ct. at 2627 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).) But Justice Breyer was onto something important. The Bank was indeed established under the commerce power (as well as the borrowing and taxing powers). Hamilton’s report to Congress on the Bank stressed as its first advantage that, through the accumulation of capital and lending, the Bank would provide merchants and manufacturers with the ability to create substantial new trade and commerce. In Hamilton’s felicitous phrase, the Bank would be the “nurser[y] of national wealth.” Hamilton, Report on a National Bank, *supra* note 23, at 309. Both the Federalists in Congress and Hamilton in his opinion to Washington used the Commerce and Necessary and Proper Clauses as a constitutional foundation for the Bank and emphasized how it would be a mechanism for creating new trade and commerce. *See supra* notes 30–35 and *infra* notes 154–156, 211–215 and accompanying text. “Money is the very hinge on which commerce turns.” Alexander Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 23, 1791) [hereinafter Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank], in 8 HAMILTON PAPERS, *supra* note 23, at 97, 126.

74. *NFIB*, 132 S. Ct. at 2591–93.

insurance reforms that Congress was authorized to enact under the commerce power. Congress could have used different means to achieve the same ends, as the four dissenting Justices argued.<sup>75</sup> But rejecting Congress's choice of means because other less controversial choices existed appears to conflict with a fundamental principle of *McCulloch*: the judiciary cannot dictate its own preferences on the choice of means.<sup>76</sup>

The Chief Justice did not question Congress's judgment that the mandate was necessary to make the insurance reforms effective, but he emphasized that implied powers must not only be "necessary" to carry out an express power but must also be "proper."<sup>77</sup> The mandate was not proper because it was only designed to cure problems that Congress itself created in the Affordable Care Act:

[T]he individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms. Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power. . . . The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power.<sup>78</sup>

This conflation of means and ends<sup>79</sup> is the same bootstrapping argument that Madison made in challenging the constitutionality of the Bank—that the power to borrow money on the credit of the United States did not imply the power to create the institution from which the United States could borrow.<sup>80</sup> Like Madison, Roberts asserted that the claimed incidental power amounted to an inversion of means and ends.

The Chief Justice then invoked Madison's great powers theory: forcing individuals to purchase a commodity was a fundamental change in "the relation between the citizen and the Federal Government."<sup>81</sup> Allowing Congress to

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75. *Id.* at 2647 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) ("With the present statute, by contrast, there are many ways other than this unprecedented Individual Mandate by which the regulatory scheme's goals of reducing insurance premiums and ensuring the profitability of insurers could be achieved. For instance, those who did not purchase insurance could be subjected to a surcharge when they do enter the health insurance system. Or they could be denied a full income tax credit given to those who do purchase the insurance.")

76. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 409–10, 423 (1819).

77. *NFIB*, 132 S. Ct. at 2585.

78. *Id.*

79. One of the scholars who developed this argument articulated it colorfully:

Look at what is happening here. Congress exercises its commerce power to impose mandates on insurance companies and then claims these insurance mandates will not have their desired effects unless it can impose mandates on the people, which would be unconstitutional if imposed on their own. By this reasoning, Congress would now have the general police power the Supreme Court has always denied it possessed.

Randy E. Barnett, *Turning Citizens into Subjects: Why the Health Insurance Mandate is Unconstitutional*, 62 *MERCER L. REV.* 608, 614 (2011).

80. For a discussion of this argument, see *infra* Part IV.D.4.

81. *NFIB*, 132 S. Ct. at 2589.

achieve this result under the Necessary and Proper Clause would “work a substantial expansion of federal authority” by which Congress could “draw within its regulatory scope those [people] who otherwise would be outside of it” under its express powers.<sup>82</sup> Accordingly, the mandate amounted to a “great substantive and independent power” whose exercise must be, but was not, expressly authorized by the Constitution.<sup>83</sup>

Roberts and Madison evaluated the validity of an implied power by examining “the degree of its incidentality to an express authority” and the “degree of its importance.”<sup>84</sup> This approach to the Necessary and Proper Clause differs significantly from the conventional understanding of the scope of Congress’s incidental powers as articulated in *McCulloch*. The conventional view is that Congress may use any means that is conducive to carrying out an express power and does not violate any prohibition in the Constitution. This view of *McCulloch* was stated in important cases that predate and postdate *NFIB*. In *Gonzales v. Raich*,<sup>85</sup> the Supreme Court upheld a federal prohibition on the possession of a commodity (marijuana) as a necessary and proper means of making effective Congress’s nationwide ban on the sale of that commodity. In *United States v. Comstock*,<sup>86</sup> decided only two years before *NFIB* and with Roberts as Chief Justice, the Court upheld a federal statute providing that dangerous and mentally ill sexual predators could be civilly committed even after completing their prison sentences. Because the statute was not challenged as violating individual rights, the only issue before the Court was whether the statute was within the scope of the Necessary and Proper Clause. In holding that it was, the Court declared that the question was “whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”<sup>87</sup> And in *United States v. Kebodeaux*,<sup>88</sup> decided only one year after *NFIB*, the Court applied the same doctrine of incidental powers to uphold the Sex Offender Registration and Notification Act (SORNA)<sup>89</sup> as applied to a former member of the military who had been convicted by court martial of sex offenses.

Each of the incidental powers upheld in these cases—banning the mere possession of a commodity, ordering civil commitment of persons who had completed their federal sentences, and imposing sex offender registration on persons no longer in the military—regulated conduct that was outside the regulatory scope of the enumerated powers themselves.<sup>90</sup> Because these statutes

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82. *Id.* at 2592.

83. *Id.* at 2591, 2593 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819)).

84. 2 ANNALS OF CONG. 1896 (1791).

85. 545 U.S. 1 (2005).

86. 560 U.S. 126 (2010).

87. *Comstock*, 560 U.S. at 134.

88. 133 S. Ct. 2496 (2013).

89. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of 42 U.S.C. and 18 U.S.C.).

90. That is, prohibiting the possession of a commodity is not regulating commerce among the several states; applying SORNA to *former* members of the armed forces is not a rule for the



thus appeared to “work a substantial expansion of federal authority,” they could be characterized as “great powers” that are among the traditional police powers of the states. Moreover, none of these implied powers were directly and immediately related to an express power. For example, the implied power in *Comstock* was four steps removed from any express power.<sup>91</sup>

The Supreme Court has never held an implied power of Congress unconstitutional on the ground that it is a “great substantive and independent power” and thus improper under the Necessary and Proper Clause.<sup>92</sup> However, the revival of this theory may be gaining traction. Consider *Comstock*. Justice Breyer’s majority opinion explained at length how the civil commitment statute was consistent with the expansive conventional reading of *McCulloch*.<sup>93</sup> But instead of ending the opinion there, he added four factors sustaining the statute’s constitutionality: the present civil commitment statute is “a modest addition to a set of federal prison-related mental-health statutes,”<sup>94</sup> Congress “reasonably” extended its longstanding civil-commitment system,<sup>95</sup> the federal statute “properly accounts for state interests,”<sup>96</sup> and the relationship between the statute and enumerated Article I powers is not too attenuated.<sup>97</sup> Of these four factors, only the last has any relevance to the conventional understanding of *McCulloch*. The other three seem designed to minimize the importance of this exercise of Congress’s implied powers.

*Kebodeaux* followed a similar pattern. Again writing for the majority, Justice Breyer adopted the classic understanding of *McCulloch* and showed that Congress could apply SORNA to former members of the military under the Military Regulation and Necessary and Proper Clauses.<sup>98</sup> But he then added that Congress’s action was “eminently reasonable” for public safety<sup>99</sup> and amounted to a very modest extension of federal law.<sup>100</sup> As in *Comstock*, the Court deemed

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governance and regulation of the military; and the civil commitment of individuals who have completed their prison sentences is not within the scope of any express power.

91. See *Comstock*, 560 U.S. at 147 (“Congress has the implied power to criminalize any conduct that might interfere with the exercise of an enumerated power, *and* also the additional power to imprison people who violate those (inferentially authorized) laws, *and* the additional power to provide for the safe and reasonable management of those prisons, *and* the additional power to regulate the prisoners’ behavior even after their release.” (emphasis added)); see also *id.* at 148 (rejecting the argument “that the Necessary and Proper Clause permits no more than a single step between an enumerated power and an Act of Congress”).

92. John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 59 n.349 (2014) (“[I]n no case has the Court ever invalidated an act of Congress on the ground that it employed a ‘great substantive and independent power,’ in contravention of the Necessary and Proper Clause.” (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819))).

93. *Comstock*, 560 U.S. at 133–37.

94. *Id.* at 137.

95. *Id.* at 142.

96. *Id.* at 143.

97. *Id.* at 146.

98. *United States v. Kebodeaux*, 133 S. Ct. 2496, 2502–03 (2013).

99. *Id.* at 2503.

100. *Id.* at 2504–05.

it important to demonstrate that this use of implied powers was, well, not very important. Chief Justice Roberts was not satisfied with these limitations in the majority opinion. Concurring only in the judgment, Roberts applied the Madisonian doctrine of great powers.<sup>101</sup> While agreeing that SORNA could be applied as incidental to the Military Regulation Clause, Roberts dissociated himself from any implication in the majority opinion that an implied power could be used to “help protect the public . . . and alleviate public safety concerns.”<sup>102</sup> The Framers could not have intended to confer on Congress a police power of “that magnitude” by “implication rather than expression.”<sup>103</sup> On the other hand, the application of SORNA as incidental to the Military Regulation Clause was “less substantial” and therefore “not such a ‘great substantive and independent power’ that the Framers’ failure to enumerate it must imply its absence.”<sup>104</sup>

Roberts is not the only Justice who embraced the great powers theory. Two others (Justices Scalia and Thomas) endorsed that theory in a case involving the use of the Necessary and Proper Clause to enforce treaties.<sup>105</sup>

### B. Scholarly Contributions

Contemporary scholars have rediscovered Madison’s great powers theory and support it with impressive arguments. William Baude, the theory’s most prominent advocate, argues that it follows from the logic of the Constitutional Convention’s decision to vest Congress with great powers that are specifically enumerated in the Constitution.<sup>106</sup> Implied powers should be inferior to the enumerated powers because they exist only as incidental measures to carry out the express powers. Baude thus deems it inconsistent with the constitutional design to recognize incidental powers that are at least as important as express powers: “[S]ome powers are so great, so important, or so substantive, that we should not assume that they were granted by implication, *even if* they might help effectuate an enumerated power.”<sup>107</sup> In other words, “[i]f the power was important enough, it was one that the Constitution would be expected to grant

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101. *Id.* at 2505, 2507–08 (Roberts, C.J., concurring in the judgment).

102. *Id.* at 2503 (majority opinion).

103. *Id.* at 2507 (Roberts, C.J., concurring in the judgment).

104. *Id.* at 2508 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819)).

105. *Bond v. United States*, 134 S. Ct. 2077, 2101 (2014) (Scalia, J., concurring). Justice Scalia, joined by Justice Thomas, argued that the Necessary and Proper Clause authorized Congress only to assist the President in “making treaties.” *Id.* at 2101, 2104, 2106. Therefore, any legislation implementing non-self-executing treaties outside of the Article I enumerated powers would be invalid as a “great substantive and independent power.” *Id.* at 2101 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 411). To support the contention that the Necessary and Proper Clause could not carry such “weight,” Scalia cited the leading scholarly article advancing the great power theory. *Id.* (citing William Baude, *Rethinking the Federal Eminent Domain Power*, 122 *YALE L.J.* 1738, 1749–55 (2013) [hereinafter Baude, *Rethinking*]). For a historical showing that the Necessary and Proper Clause has been regularly used to implement treaties, see Jean Galbraith, *Congress’s Treaty-Making Power in Historical Perspective*, 56 *WM. & MARY L. REV.* 59, 81–108 (2014).

106. Baude, *Rethinking*, *supra* note 105, at 1749.

107. *Id.*

explicitly, if at all.”<sup>108</sup> And, as argued by Robert Natelson, to the extent that the drafters of the Necessary and Proper Clause were influenced by principal-agent doctrines, the incidental powers of Congress should be subordinate to the express powers to which they are attached.<sup>109</sup>

This scholarship relies on Madison’s method of comparative constitutional construction to show that a broad application of incidental powers would render many of the express powers redundant. Madison’s example was the war powers. The powers to raise and support the army, provide and maintain a navy, regulate the armed forces, and call up the militia could all be incidental to the power to declare war. The only plausible reason for their enumeration is that they are too important to be left to implication.<sup>110</sup> Professor Baude offers the taxing power as another example, claiming that “[i]f it were not for the idea of great powers, taxes would not need to be enumerated.”<sup>111</sup> His argument is that Congress has the incidental power to impose taxes to fund each exercise of the enumerated powers; thus, Congress could carry out all of its powers and duties without an express power of taxation. Yet, as acknowledged in *McCulloch*, levying taxes is certainly a “great substantive and independent power.”<sup>112</sup> A power of such enormous magnitude could hardly be left for implication. Hence, by Baude’s reasoning, only the great powers theory explains including the taxing power in Article I, Section 8.<sup>113</sup>

Judges and scholars have criticized this theory as too indeterminate.<sup>114</sup>

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108. *Id.* at 1752. As the title of Baude’s article suggests, eminent domain is his principal example of a potentially improper federal incidental power. For a challenge to Baude’s historical narrative concerning eminent domain, see Christian R. Bursset, *The Messy History of the Federal Eminent Domain Power: A Response to William Baude*, 4 CAL. L. REV. CIR. 187 (2013).

109. See Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, in THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 84, 84–93 (2010). Other scholarship that elaborates on these ideas includes William Baude, *Sharing the Necessary and Proper Clause*, 128 HARV. L. REV. F. 39 (2014); Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267 (2011), [http://www.yalelawjournal.org/pdf/1025\\_eu5sh1vp.pdf](http://www.yalelawjournal.org/pdf/1025_eu5sh1vp.pdf) [<https://perma.cc/7KNY-D5TA>]; Ilya Somin, *The Individual Mandate and the Proper Meaning of “Proper,”* in THE HEALTH CARE CASE: THE SUPREME COURT’S DECISION AND ITS IMPLICATIONS 146 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., 2013) [hereinafter THE HEALTH CARE CASE]; John Valauri, *Baffled by Inactivity: The Individual Mandate and the Commerce Power*, 10 GEO. J. L. & PUB. POL’Y 51 (2012); Daniel Rice, Note, *Territorial Annexation as a “Great Power,”* 64 DUKE L.J. 717 (2015). For earlier theories restricting the Necessary and Proper Clause, see Beck, *supra* note 14; Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1639–41 (2002).

110. 2 ANNALS OF CONG. 1899–1900 (1791).

111. Baude, *Rethinking supra* note 105, at 1754.

112. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819).

113. Baude, *Rethinking, supra* note 105, at 1754–55.

114. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2627–28 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); Andrew Koppelman, “Necessary,” “Proper,” and *Health Care Reform*, in THE HEALTH CARE CASE, *supra* note 109, at 105, 111–15; John Harrison, *Enumerated Federal Power and the Necessary and Proper Clause*, 78 U. CHI. L. REV. 1101, 1122–27 (2011).

After all, how is one to ascertain, except through intuition, whether a particular exercise of an incidental power is so important as to rise to the level of a great power? But the advocates of the theory acknowledge this problem,<sup>115</sup> and other current doctrines of federalism encounter the difficulty of drawing fully workable lines (consider the commercial versus noncommercial, and activity versus inactivity distinctions in modern federalism jurisprudence).<sup>116</sup>

Critics also claim that the great powers theory contradicts *McCulloch*, which deferred to Congress as having the primary responsibility for executing the Necessary and Proper Clause.<sup>117</sup> But *McCulloch* is more ambiguous than its conventional broad reading supposes.

Marshall characterized the express powers of Congress as “great,”<sup>118</sup> “ample,”<sup>119</sup> and “vast.”<sup>120</sup> These enumerated powers are “distinct and independent”<sup>121</sup> and “great substantive and independent power[s].”<sup>122</sup> In contrast, he referred to the implied powers of Congress as “minor ingredients,”<sup>123</sup> powers of “inferior importance,”<sup>124</sup> and a “vast mass of incidental powers.”<sup>125</sup> And one should read carefully Marshall’s famous maxim on congressional power: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are *appropriate*, which are *plainly adapted* to that end, which are not prohibited, but consist with the letter *and spirit* of the constitution, are constitutional.”<sup>126</sup> The italicized words leave room for requirements that an implied power must be reasonable, cannot amount to an inversion of means and ends, and cannot be as or more important than an enumerated power.

Separately from the great powers theory, other scholars disagree with the conventional reading of *McCulloch* as providing expansive congressional power to select the means of implementing its constitutional authority. Most recently, David S. Schwartz impressively argued that *McCulloch* is not an “aggressively nationalistic” opinion but rather a modest validation of congressional power that

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115. See, e.g., Baude, *Rethinking*, *supra* note 105, at 1810–12.

116. See, e.g., *United States v. Lopez*, 514 U.S. 549, 566 (1995) (“Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress’ authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender ‘legal uncertainty.’”).

117. See, e.g., Koppelman, *supra* note 114, at 108–110; Alison L. LaCroix, *The Shadow Powers of Article I*, 123 *YALE L.J.* 2044, 2060–63 (2014); Manning, *supra* note 92, at 78–81; David A. Strauss, *Commerce Clause Revisionism and the Affordable Care Act*, 2012 *SUP. CT. REV.* 1, 8–12, 22–23.

118. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

119. *Id.* at 408.

120. *Id.*

121. *Id.* at 421.

122. *Id.* at 411.

123. *Id.* at 407.

124. *Id.* at 408.

125. *Id.* at 421.

126. *Id.* (emphasis added).

is largely defensive in protecting federal prerogatives against intrusions by the states.<sup>127</sup> Schwartz's work builds on the positions taken by such eminent scholars as G. Edward White<sup>128</sup> and David P. Currie.<sup>129</sup>

Marshall's characterization of the relationship of express and implied powers in *McCulloch* raises questions about the expansive conventional reading of that decision as affording Congress very broad incidental powers.<sup>130</sup> However, parsing words or phrases from that opinion is not sufficient to establish doctrines that would substantially restrict the scope of Congress's incidental powers. For example, immediately after referring to the implied powers as "inferior," Marshall emphasized that

a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.<sup>131</sup>

And Marshall hardly discounted the Bank of the United States as a "minor ingredient" of Congress's express powers.<sup>132</sup>

With all of its linguistic ambiguities, *McCulloch* cannot be fully understood without examining critically and in detail the opinion's relationship to the 1791 debates over the Bank of the United States. Moreover, even if *McCulloch* had never been decided, the debates in the First Congress and in the cabinet would have important precedential value.<sup>133</sup> The Bank debate was the second great

127. David S. Schwartz, *Misreading McCulloch v. Maryland*, 18 U. PA. J. CONST. L. 1, 7–24 (2015).

128. G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35*, at 548–50, 594 (Paul A. Freund & Stanley N. Katz eds., 1988).

129. DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888*, at 163–65 (1985) [hereinafter CURRIE, *THE FIRST HUNDRED YEARS*]; see also CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 123 (1996) (stating that *McCulloch* was a decision of "negative or defensive" nationalism).

130. Of course, this is ironic in light of the adamant reliance on such a reading by advocates of the individual mandate's constitutionality. See, e.g., Stewart Jay, *On Slippery Constitutional Slopes and the Affordable Care Act*, 44 CONN. L. REV. 1133, 1165–66 (2012); Akhil Reed Amar, *The Lawfulness of Health-Care Reform* 17–24 (Yale Law Sch., Research Paper No. 228, 2011), <http://ssrn.com/abstract=1856506> [<https://perma.cc/7BPR-E3RR>]; Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1 (2011), <http://yalelawjournal.org/forum/bad-news-for-mail-robbers-the-obvious-constitutionality-of-health-care-reform> [<https://perma.cc/Z8RX-LQG7>].

131. *McCulloch*, 17 U.S. (4 Wheat.) at 408.

132. *Id.* at 422–23 ("All those who have been concerned in the administration of our finances, have concurred in representing [the Bank's] importance and necessity . . . The time has passed away, when it can be necessary to enter into any discussion, in order to prove the importance of this instrument, as a means to effect the legitimate objects of the government.").

133. For Supreme Court decisions placing special weight on the actions of the First Congress, see, for example, *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1834 (2014); *Printz v. United States*, 521 U.S. 898, 909 (1997); *Harmelin v. Michigan*, 501 U.S. 957, 980 (1991); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983); *Myers v. United States*, 272 U.S. 52, 136 (1926); *Tennessee v. Davis*, 100 U.S. 257, 265

debate in the First Congress on the fundamental structure of the Constitution. The first, concerning removal, was over the extent of presidential power. This debate over the Bank, which extended into President Washington's cabinet, was over the extent of congressional power.

A number of scholars who advocate limiting the scope of the Necessary and Proper Clause rely on Madison's speech in Congress and the debate over the Bank in the President's cabinet.<sup>134</sup> According to these scholars, Attorney General Edmund Randolph<sup>135</sup> and Hamilton issued written opinions agreeing in principle with Madison's limits on the scope of implied powers but disagreeing with how those limits applied to the Bank.

The scholars who advocate Madison's theories tend to skip from his speech in Congress to the cabinet debate.<sup>136</sup> As an initial matter, their reliance on Randolph and Hamilton seems clearly misplaced. But this approach also bypasses the important and persuasive Federalist rebuttal in the House and other legislative actions of the First Congress that rejected the limits that Madison would have placed on the Necessary and Proper Clause. And it overlooks another aspect of the early history of the new Republic—how those who originally advocated limiting implied powers later exercised more expansive powers when they controlled the government. The Section that follows examines the prevailing Federalist rebuttal, the cabinet debate on the Bank, other legislation of the First Congress, the actions of the Jefferson administration, and the lessons that can be drawn from this history.

### III. THE SCOPE OF LEGISLATIVE POWER IN THE EARLY REPUBLIC

#### A. *The Federalist Defense of the Bank*

The Federalists in Congress justified their broad interpretation of the Necessary and Proper Clause with arguments that would appear twenty-eight years later in *McCulloch*: “[W]hen a general power is granted, and the means are not specified, they are left to the discretion of those in whom the trust is reposed, provided they do not adopt means expressly forbidden.”<sup>137</sup> The Constitution is not a code of laws that could list all of the means that might be necessary to carry out the express powers, particularly because the powers of Congress must be

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(1879); *McCulloch*, 17 U.S. (4 Wheat.) at 401–02; *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 351–52 (1816). For an argument in favor of affording greater reliance to legislation in determining constitutional issues, see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 176–92 (2004).

134. See, e.g., Baude, *Rethinking*, *supra* note 105, at 1751–61; Beck, *supra* note 14, at 593–98; Rice, *supra* note 109, at 724–27.

135. Technically, Randolph was not part of the cabinet because the Attorney General was simply the President's legal advisor. I have promoted him to the cabinet for ease of presentation.

136. See Baude, *Rethinking*, *supra* note 105, at 1751–61; Beck, *supra* note 14, at 593–98; Rice, *supra* note 109, at 726–27.

137. 2 ANNALS OF CONG. 1922 (1791) (statement of Rep. Elias Boudinot); see also *id.* at 1904–05 (statement of Rep. Fisher Ames) (“We may err . . . but we are to exercise our judgments, and on every occasion to decide according to an honest conviction of its true meaning.”).

adaptable to future and unpredictable needs.<sup>138</sup> “Necessary” is a relative term that depends on circumstances,<sup>139</sup> and a strict standard of necessity would cripple the government.<sup>140</sup> “[E]very power” must be available to Congress to effectuate the enumerated powers,<sup>141</sup> and the choice of means must be left “to the honest and sober discretion of the Legislature.”<sup>142</sup>

Thus, the Federalists argued that because no one questioned the constitutionality of a publicly owned and operated national bank, Congress should have the choice of using the same express powers to establish a more reliable and effective national bank that would be privately owned and operated. As Fisher Ames, an influential Federalist, remarked sarcastically: “If Congress has the authority to do this business badly, the question returns, whether the powers of a corporation, which are essential to its being well done, may be annexed as incident to it.”<sup>143</sup>

The Federalists acknowledged that the Supreme Court would ultimately decide the constitutionality of the Bank, but they said that the issue was for Congress in the first instance.<sup>144</sup> It was simply too late in the day, they asserted, to deny the broad applicability of implied powers.<sup>145</sup>

Madison’s strict construction of implied powers—as represented by his “direct and incidental” standard and bootstrap contention—was inconsistent with the actions that Congress had taken from the beginning. For example, the First Congress had, with Madison’s support, enacted laws incidental to its power to regulate foreign and interstate commerce. These included a tonnage tax on ships engaged in the foreign or coastal trade, the erection and maintenance of lighthouses, buoys, and piers, and a labor code for seamen.<sup>146</sup> Because these statutes were not regulations of foreign or interstate commerce, they could be justified only by a broad construction of implied powers to facilitate trade and commerce.<sup>147</sup>

Having answered Madison’s argument of strict construction, the Federalists

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138. *Id.* at 1912 (statement of Rep. Theodore Sedgwick).

139. *Id.* at 1946–47 (statement of Rep. Elbridge Gerry).

140. *Id.* at 1911 (statement of Rep. Theodore Sedgwick).

141. *Id.* at 1915 (statement of Rep. John Lawrence).

142. *Id.* at 1912 (statement of Rep. Theodore Sedgwick); *see also id.* at 1907–08 (statement of Rep. Fisher Ames).

143. *Id.* at 1908 (statement of Rep. Fisher Ames). Madison’s contention that the Convention did not give Congress the power of incorporation was irrelevant for two reasons: (1) there was no record of this ambiguous event; and (2) the Constitution must be construed as it was written, not according to what might have been said behind closed doors. *Id.* at 1952–53 (statement of Rep. Elbridge Gerry).

144. *Id.* at 1916 (statement of Rep. John Lawrence); *id.* at 1927 (statement of Rep. Elias Boudinot). This is additional evidence of an original understanding that the Supreme Court would have the ultimate power to determine the constitutionality of congressional legislation.

145. *Id.* at 1904 (statement of Rep. Fisher Ames); *id.* at 1929–30 (statement of Rep. William L. Smith).

146. *See id.* at 1904 (statement of Rep. Fisher Ames); *see also* Act of Aug. 7, 1789, ch. 9, 1 Stat. 53 (statute for lighthouses, buoys, and piers); Act of July 20, 1790, ch. 29, 1 Stat. 131 (labor code for seamen); Act of July 20, 1789, ch. 3, 1 Stat. 27 (repealed 1790) (tonnage tax).

147. *See infra* Parts III.C.2 and III.C.3 for a discussion of these statutes.

rejected his great powers thesis as contrary to logic and history. Fisher Ames warned that “[n]ot exercising the powers we have, may be as pernicious as usurping those we have not.”<sup>148</sup> Ames derided Madison’s assertion that Congress would not have the incidental power to raise an army to defend the country if that power had not been expressly listed in the Constitution.<sup>149</sup>

To the Federalists, the express powers were the “great ends” of the government, while the incidental powers were the “subordinate means.”<sup>150</sup> But Madison confused the *constitutional inferiority* of the incidental powers with the *degree of their importance*. Corporations could not be employed generally and for whatever purpose, as they could if they had been included in the express powers. Instead, corporations could be employed only selectively—when necessary to carry out one or more of the express powers.<sup>151</sup> As one of the handful of Southern supporters of the Bank explained, the Federalist argument was not that Congress could do whatever it thought was necessary or expedient. The choice of means was limited to those necessary to carry out an express power, but the determination of necessity was a matter of judgment for each member of Congress.<sup>152</sup> Thus, employing a “known and usual means,” such as a corporation, was unquestionably within the scope of the Necessary and Proper Clause.<sup>153</sup>

In making these arguments of constitutional theory, the Federalists did not minimize the importance of the Bank. On the contrary, they echoed Hamilton’s arguments that the Bank was essential to trade and commerce and as a lender to the government in the event of emergencies.<sup>154</sup> But the Bank’s importance did not make it a great power, requiring enumeration for validity. To prove this, the

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148. 2 ANNALS OF CONG. 1905 (1791) (statement of Rep. Fisher Ames).

149. *Id.*

150. *Id.* at 1912 (statement of Rep. Theodore Sedgwick).

151. *Id.* at 1906–08 (statement of Rep. Fisher Ames); *id.* at 1910, 1912 (statement of Rep. Theodore Sedgwick).

152. *Id.* at 1936–37 (statement of Rep. William L. Smith).

153. *Id.* at 1911–12 (statement of Rep. Theodore Sedgwick); *see also id.* at 1924 (statement of Rep. Elias Boudinot) (referring to a “common and usual necessary means”).

154. *See id.* at 1903 (statement of Rep. Fisher Ames) (“This new capital will invigorate trade and manufactures with new energy. It will furnish a medium for the collection of the revenues; and if Government should be pressed by a sudden necessity, it will afford seasonable and effectual aid.”); *id.* at 1906 (statement of Rep. Fisher Ames) (“[The Bank] is of the first utility to trade. Indeed the intercourse from State to State can never be on a good footing without a [national] bank, whose paper will circulate more extensively than that of any State bank.”); *id.* at 1906–07 (statement of Rep. Fisher Ames) (arguing that the government needs a source for emergency loans, which neither state nor foreign banks can be relied upon to supply; the alternative is the vice of issuing paper money); *id.* at 1913 (statement of Rep. Theodore Sedgwick) (arguing that the Bank is needed to unleash the productive capacity of merchants and manufacturers, and it will create backed uniform bills and notes that will stabilize the economy); *id.* at 1915 (statement of Rep. John Lawrence) (“[A] full uncontrollable power to regulate the fiscal concerns of this Union is a primary consideration in this Government . . . .”); *id.* at 1922–23 (statement of Rep. Elias Boudinot) (arguing that the Bank is a necessary source for emergency borrowing; the government cannot rely on individuals, state-chartered banks, or foreigners); *id.* at 1948–49 (statement of Rep. Elbridge Gerry) (arguing that only a national bank can be relied upon in an emergency).



Federalists compared the creation of the Bank to earlier laws enacted by the First Congress that were, they said, more important exercises of implied powers—the most prominent being the creation of incorporated governments in the territories<sup>155</sup> and the recognition of the President’s unrestricted power to remove executive officials.<sup>156</sup>

Madison’s response to the Federalists’ arguments was mostly repetitive and conclusory,<sup>157</sup> and the House of Representatives passed the Bank bill by a vote of thirty-nine to twenty.<sup>158</sup>

## B. *The Cabinet Debate over the Bank*

### 1. Jefferson’s Opinion

The Secretary of State’s opinion is famous for how strictly he construed the powers of Congress—even more strictly than Madison had in the congressional debate. According to Jefferson, the term “necessary” in the Necessary and Proper Clause meant indispensable.<sup>159</sup> Congress could use only “those means

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155. *Id.* at 1907 (statement of Rep. Fisher Ames); *id.* at 1916 (statement of Rep. John Lawrence); *id.* at 1925 (statement of Rep. Elias Boudinot).

156. *Id.* at 1910 (statement of Rep. Theodore Sedgwick); *id.* at 1925 (statement of Rep. Elias Boudinot); *id.* at 1929 (statement of Rep. William L. Smith); *id.* at 1951 (statement of Rep. Elbridge Gerry); *id.* at 1955 (statement of Rep. John Vining). Not surprisingly, the Federalists taunted Madison by repeatedly asking how the incidental power of removal, which he had successfully championed, was any different than the incidental power to establish the Bank, which he condemned. The Federalists offered other examples of important exercises of incidental powers. Madison had said that Congress’s power to borrow could not imply the power to lend, but the Federalists pointed out that Congress had lent federal funds. *See id.* at 1905 (statement of Rep. Fisher Ames). Congress had also mortgaged federal revenues; why was this a lesser prerogative power than establishing the Bank? *Id.* at 1913 (statement of Rep. Theodore Sedgwick); *id.* at 1925 (statement of Rep. Elias Boudinot). Congress had by law set the time for its next session. *Id.* at 1951–52 (statement of Rep. Elbridge Gerry); *see* Act of September 29, 1789, ch. 27, 1 Stat. 96. The Constitution requires Congress to meet at least once a year and authorizes Congress to pass a law setting a date for that meeting. U.S. CONST. art. I, § 4, cl. 2. The President is also authorized to convene Congress “on extraordinary Occasions.” *Id.* art. II, § 3. But there is nothing in the Constitution that authorizes Congress to enact laws that set the dates for its next sessions. Again, why was this yet another prerogative power that was not, but should have been, expressly listed in the Constitution?

157. *See* 2 ANNALS OF CONG. 1956–59 (1791). Madison now acknowledged that the commerce power was a potential source of authority but tersely asserted that the Bank had nothing to do with trade. As for the territorial governments being a great incidental power that was inconsistent with his theory, Madison said they were “*sui generis*.” And the presidential removal power was “different,” although the record of the debates unfortunately does not include Madison’s explanation of how that was the case. *Id.* at 1957–59.

158. *Id.* at 1960. Only five of twenty-four Southern members of the House voted in favor of the Bank bill. All but one of the thirty-one Northern members voted for the Bank bill. *Id.* (listing the individual members’ votes); *see Members of the First Federal Congress*, FIRST FED. CONGRESS PROJECT, <http://www.gwu.edu/~ffcp/exhibit/p1/members/> (last visited Nov. 14, 2016) [<https://perma.cc/A9VU-FYNQ>] (identifying each member by state).

159. Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791) [hereinafter Jefferson, The Bill for Establishing a National Bank], in 19 THE PAPERS OF THOMAS JEFFERSON 275, 278 (Julian P. Boyd ed., 1974).

without which the grant of the [express] power would be nugatory.”<sup>160</sup> Any looser construction would undermine the foundation of the Constitution, which, according to Jefferson, was the Tenth Amendment.<sup>161</sup>

Jefferson easily disposed of the taxing and borrowing powers as justifications for the creation of the Bank: the Bank would not impose any taxes or borrow on the credit of the United States. As for the commerce power, Jefferson made an interesting comment:

To erect a bank, and to regulate commerce, are very different acts. He who erects a bank creates a subject of commerce in it's [sic] bills: *so does he who makes a bushel of wheat*, or digs a dollar out of the mines. Yet neither of these persons regulates commerce thereby. To erect a thing which may be bought and sold, is not to prescribe regulations for buying and selling.<sup>162</sup>

Jefferson's exceptionally strict construction of the Necessary and Proper Clause is generally discredited, partly because its logic would paralyze Congress and partly because of Jefferson's own actions when he was president.<sup>163</sup> But Jefferson's distinction between creating and trading a commodity and his assertion that producing “a bushel of wheat” could not be regulated<sup>164</sup> continue to attract some support.<sup>165</sup>

## 2. Randolph's Opinions

The Attorney General presented President Washington with two opinions on the Bank bill.<sup>166</sup> The first concluded that incorporating the Bank was unconstitutional. Randolph's general position on the required relation between the implied and enumerated powers landed somewhere between the Federalists' in Congress and Madison's.<sup>167</sup> Randolph argued that the rules for interpreting a constitution should be broader than those for interpreting a statute because

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160. *Id.*

161. Like Madison, Jefferson was relying on a proposed constitutional amendment that had not yet been ratified by the necessary three-fourths of the states. *Id.* at 276.

162. *Id.* (emphasis added).

163. See *infra* Part III.D for a discussion of the exercise of implied powers during the Jefferson administration.

164. Jefferson, The Bill for Establishing a National Bank, *supra* note 159, at 276. Any reader who does not identify this statement with *Wickard v. Filburn*, 317 U.S. 111 (1942), has not studied constitutional law.

165. See *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring); *cf.* *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2648 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (“*Wickard v. Filburn* has been regarded as the most expansive assertion of the commerce power in our history.”).

166. Edmund Randolph, Opinion on the Constitutionality of the Bank (Feb. 12, 1791) [hereinafter Randolph, Opinion], in 7 THE PAPERS OF GEORGE WASHINGTON 331 (Dorothy Twohig ed., 1998); Edmund Randolph, Additional Considerations on the Bank Bill (Feb. 12, 1791) [hereinafter Randolph, Additional Considerations], in 7 THE PAPERS OF GEORGE WASHINGTON, *supra*, at 337.

167. Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General's First Constitutional Law Opinions*, 44 DUKE L.J. 110, 119 (1994).

“[t]he one comprises a summary of matter, for the detail of which numberless Laws will be necessary; the other is the very detail.” Thus, a constitution should be construed with “discreet liberality.”<sup>168</sup> However, the rules of construction should be stricter for the United States Constitution than for the constitutions of the states because “there is a greater danger of Error in defining partial than general powers.”<sup>169</sup> He warned that the Necessary and Proper Clause should not be construed too broadly: “[L]et it be propounded as an eternal question to those, who build new powers on this clause, whether the latitude of construction which they arrogate, will not terminate in an unlimited power in Congress?”<sup>170</sup>

Randolph concluded that “[t]he rule therefore for interpreting the specified powers seem[s] to be, that, as each of them includes those details which properly constitute the whole of the subject, to which the power relates, the details themselves must be fixed by reasoning.”<sup>171</sup> Thus, the details constituting the whole, or components, of an enumerated power are the means that Congress can employ under the Necessary and Proper Clause. Randolph attempted to identify the components (which he called the “heads of power”) of the taxing, borrowing, and interstate and foreign commerce powers. These components were relatively discrete and narrow<sup>172</sup> and did not encompass or justify the Bank.<sup>173</sup>

The Attorney General’s second opinion, offered as a supplement to correct erroneous arguments in the Bank debate, is less well known but more interesting. He was unimpressed with the Madison-Jefferson argument that the Convention had rejected giving Congress the express power of incorporation:

An appeal has been also made by the enemies of the bill, to what passed in the federal convention on this subject. But ought not the Constitution to be decided on by the import of its own expressions? What may not be the consequence, if an almost unknown history should govern the Construction?<sup>174</sup>

Randolph then addressed and rejected Madison’s great powers theory—that the inclusion of certain incidental powers in the list of express powers meant that other incidental powers of like magnitude (such as the Bank) could not be implied.<sup>175</sup> Randolph first challenged this theory with an astute observation that

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168. Randolph, Opinion, *supra* note 166, at 333.

169. *Id.*

170. *Id.* at 337.

171. *Id.*

172. For example, “the heads of [the power to regulate commerce among the several states] are little more, than to establish the forms of commercial intercourse between them, & to keep the prohibitions, which the Constitution imposes on that intercourse, undiminished in their operation: that is, to prevent taxes on imports or Exports; preferences to one port over another by any regulation of commerce or revenue; and duties upon the entering or clearing of the vessels of one State in the ports of another.” *Id.* at 334 (emphasis omitted).

173. *See id.*

174. Randolph, Additional Considerations, *supra* note 166, at 339.

175. *Id.* at 337–39 (“The enemies of the bill have contended, that a rule of construction, adverse to the power of incorporation, springs out of the constitution, itself; that after the grant of certain powers to Congress, the Constitution, as if cautious, against usurpation, specially grants several other powers, more akin to those before given, than the incorporation of a bank is to any of those, from

Madison's argument rested on a faulty "scheme of reasoning" that presupposed the Constitution's "[s]tyle or arrangement, as being logically exact." This method of constitutional construction presumed the "Constitution were ever so perfect, considered even as a composition."<sup>176</sup>

Randolph then set out to prove that Madison's theory was incorrect by focusing on the seemingly incidental enumerated powers (such as raising armies) that Madison said could have been implied from principal powers (such as the power to declare war). According to Randolph, "[t]hose similar powers, on which stress is laid, are either incidental, or substantive, that is independent powers."<sup>177</sup> If these powers are incidental, the argument that because some incidental powers were expressed, others of a similar nature were excluded "would not only be contrary to the common forms of construction, but would reduce the present Congress to the feebleness of the old one, which could exercise no powers, not expressly delegated." Thus, the Bank's advocates could still insist that the power to incorporate the Bank was an incidental power "notwithstanding this supposed rule of interpretation."<sup>178</sup>

Randolph's alternative assumed that the powers identified by Madison were substantive and independent, not incidental:

If these similar powers be substantive *and independent* (as on many occasions they are, that is, as they can be conceived to be capable of being used, independently of what is called the principal power) it ought not to be inferred, that they were inserted for any other purpose, than to bestow an *independent* power, where it would not otherwise have existed.<sup>179</sup>

The key word in this sentence is "independent." Randolph understood that express powers that appear "similar" to important incidental powers may in fact be "substantive *and independent*" of the principal power to which they are said to be attached.<sup>180</sup> If they were in fact independent of the principal express powers, they could not be derived from implication and thus must be enumerated in order to exist. Randolph's conclusion: "Hence the rule contended

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which it is deduced." *Id.* at 337.). Randolph gave several examples upon which opponents of the Bank relied, including Madison's argument that the power to declare war implied the other express military powers vested in Congress. *Id.* at 338.

176. *Id.* at 338.

177. *Id.*

178. *Id.* Randolph conceded that the implied power of unrestricted presidential removal supported the Bank bill, but he regarded the congressional legislation on removal to be a constitutional error. *Id.* at 339–340. Randolph evidently understood the unrestricted removal power to have been created by congressional legislation, rather than to have been constitutionally based. President Washington could not have been pleased with Randolph's criticism of the implied removal power or his comment that "it is never too late to correct it." *See id.* Randolph also did not accept the proponents' analogy of corporate governments in the territories because he stated, without explanation, that they could be based on an apparently broad construction of the power to make needful rules and regulations concerning the territories. *Id.* at 339.

179. *Id.* at 338–39 (emphasis added).

180. *See infra* Part V.B for an elaboration on this insight and explanations for the construction of the Article I powers.

for by the enemies of the bill is defective every way.”<sup>181</sup>

### 3. Hamilton’s Opinion

Hamilton’s brilliant opinion on the constitutionality of the Bank<sup>182</sup> synthesized the arguments that the Federalist supporters of the Bank had made during the great debate in the House of Representatives. His opinion would also become the blueprint for a portion of *McCulloch*.

Hamilton began with a dissertation on sovereignty. Although the federal government did not have unlimited power, it had complete sovereignty in exercising the powers that were vested in the United States by the Constitution.<sup>183</sup> An “axiom” that applies to all governments is:

[E]very power vested in a Government is in its nature *sovereign*, and includes by *force* of the *term*, a right to employ all the *means* requisite, and fairly *applicable* to the attainment of the *ends* of such power; and which are not precluded by restrictions & exceptions specified in the constitution; or not immoral, or not contrary to the essential ends of political society.<sup>184</sup>

Therefore, “[i]t is not denied, that there are *implied*, as well as *express* powers [in the Constitution], and that the former are as effectually delegated as the latter.”<sup>185</sup> The scope of such powers depended on a “fair reasoning & construction upon the particular provisions of the constitution.”<sup>186</sup> “The only question must be, in this as in every other case, whether the mean to be employed, or in this instance the corporation to be erected, has a natural relation to any of the acknowledged objects or lawful ends of the government.”<sup>187</sup>

According to Hamilton, “necessity” was not a criterion for constitutionality because that would make the exercise of implied powers “depend on *casual & temporary* circumstances.” The political “expediency” of exercising a power did depend on such circumstances, “but the constitutional right of exercising it must be uniform & invariable—the same to day, as to morrow [sic].”<sup>188</sup> A law that was constitutional when enacted does not become unconstitutional because of changed external circumstances. Similarly, “[t]he *degree* in which a measure is necessary, can never be a test of the *legal* right to adopt it. That must ever be a matter of opinion; and can only be a test of expediency.”<sup>189</sup> Thus, the

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181. Randolph, Additional Considerations, *supra* note 166, at 339.

182. Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank, *supra* note 73, at 97.

183. *Id.* at 98–99.

184. *Id.* at 98.

185. *Id.* at 100. Hamilton also asserted that there was a third class of federal powers, which he called “resulting powers.” These powers were said to arise “from the whole mass of the powers of the government & from the nature of political society.” His example was the acquisition of territory by conquest. However, Hamilton disclaimed reliance on such inherent powers to justify the Bank. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 102.

189. *Id.* at 104.

“accidental” existence of state banks was relevant politically but not constitutionally.<sup>190</sup>

The Necessary and Proper Clause confirmed the presence of implied powers in Congress.<sup>191</sup> The purpose of the Clause was to “give a liberal latitude to the exercise of the specified powers.”<sup>192</sup> The term “necessary” often meant “no more than *needful, requisite, incidental, useful, or conducive to.*”<sup>193</sup> Jefferson’s construction, on the other hand, would effectively nullify congressional powers by, in effect, adding “absolutely” or “indispensably” as adjectives.<sup>194</sup> Hamilton exposed the fallacy in Jefferson’s argument. Such strict construction would “beget endless uncertainty & embarrassment” because “[t]he cases must be palpable & extreme in which it could be pronounced with certainty, that a measure was absolutely necessary.” Only in the rarest instances does Congress have available just one means to carry out an express power. Consequently, very few measures of any government could satisfy such a test. The result would cripple the government.<sup>195</sup>

Randolph’s reason for construing the powers of Congress restrictively, albeit more liberally than Jefferson, was also incorrect. According to Hamilton, the scope of powers in the Constitution should be interpreted more broadly than the powers in state constitutions: “[T]he variety & extent of public exigencies, a far greater proportion of which and of a far more critical kind, are objects of National than of State administration.”<sup>196</sup>

The means by which national exigencies are to be provided for, national inconveniences obviated, national prosperity promoted, are of such infinite variety, extent and complexity, that there must, of necessity, be great latitude of discretion in the selection & application of those means. Hence consequently, the necessity & propriety of exercising the authorities intrusted to a government on principles of liberal construction.<sup>197</sup>

Some scholars claim that Hamilton endorsed, at least tacitly, Madison’s great powers thesis.<sup>198</sup> They partially quote Hamilton’s comment that a “strange fallacy” had arisen in which a corporation “seems to have been regarded as some great independent substantive thing; as a political [end] and of peculiar magnitude and moment . . . .”<sup>199</sup> But in the text omitted by the ellipsis, Hamilton

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190. *Id.* at 102.

191. *Id.* at 106.

192. *Id.* at 102–03.

193. *Id.* at 102.

194. *Id.* at 103.

195. *See id.*

196. *Id.* at 105.

197. *Id.* Hamilton criticized Randolph at length for construing the express powers too narrowly by omitting important and obvious components of the powers to borrow, tax, and regulate commerce. *Id.* at 115–19.

198. Baude, *Rethinking*, *supra* note 105, at 1755; Rice, *supra* note 109, at 725–27.

199. Baude, *Rethinking*, *supra* note 105, at 1752–53 (omission in original) (quoting Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank, *supra* note 73, at 101).

explains why this is fallacious: “whereas it is truly to be considered as a *quality, capacity, or mean* to an end.”<sup>200</sup>

These scholars also ignore that Hamilton specifically addressed and rejected Madison’s argument that a power of great importance must be granted expressly.<sup>201</sup> His rejoinder relied on enumerated powers that were not involved in the Bank dispute. For example, Congress had the express power “to exercise exclusive legislation in all cases whatsoever” over the district constituting the nation’s capital and in places purchased from the states for certain purposes.<sup>202</sup> Congress could therefore establish corporations in the District of Columbia and other such places.<sup>203</sup> This in itself disproved Madison’s contention that the exercise of such an important power could not be implied from an expressed power.<sup>204</sup> Hamilton also drew upon the examples the Federalists had used during the debate in the House to show that Congress had utilized similarly important implied powers.<sup>205</sup> Most significant was the creation of the territorial governments—“the institution of a government; that is, the creation of a body politic, or corporation of the highest nature.”<sup>206</sup> If Congress could erect a government in the territories as a means of carrying into effect one express power, it plainly could charter a corporation, such as a private bank, to carry into effect another express power.<sup>207</sup>

The only constitutional question was whether the Bank had a “natural” or “obvious” relation to any of the enumerated powers.<sup>208</sup> “If the end be clearly comprehended within any of the specified powers, & if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution—it may safely be deemed to come within the compass of the national authority.”<sup>209</sup>

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200. Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank, *supra* note 73, at 101.

201. “This may not be an improper place to take notice of an argument which was used in debate in the House of Representatives. It was there urged, that if the constitution intended to confer so important a power as that of erecting corporations, it would have been expressly mentioned.” *Id.* at 113.

202. *Id.* at 112 (quoting U.S. CONST. art. I, § 8, cl. 17).

203. *Id.* at 112–13.

204. “But the case which has been noticed is clearly one in which such a power exists, and yet without any specification or express grant of it, further than as every *particular implied* in a general power, can be said to be so granted.” *Id.* at 113–14.

205. Like the Federalists in Congress and Randolph, Hamilton dismissed as ambiguous and irrelevant the Convention’s alleged rejection of a proposal to give Congress the power of incorporation. *Id.* at 110–11.

206. *Id.* at 119. For Hamilton’s further reliance on the territorial governments, see *id.* at 118–20, 128.

207. *Id.* at 131–32. Hamilton’s other examples were the “signal instance” of Congress enacting legislation recognizing the implied power of the president to remove executive officials, *id.* at 106, and the act concerning the erection of lighthouses, buoys, and public piers which was not itself a regulation of commerce but was an important measure to facilitate commerce, *id.* at 104.

208. *Id.* at 100, 107.

209. *Id.* at 107.

Hamilton then wrote that he would apply this doctrine “by tracing a natural & obvious relation between the institution of a bank, and the objects of several of the enumerated powers of the government; and by shewing that, *politically* speaking, it is necessary to the effectual execution of one or more of those powers.”<sup>210</sup> These passages are important because they show both Hamilton’s denial that the degree of a law’s necessity was a constitutional issue (as opposed to political) and his recognition of limits on congressional power.

Hamilton identified four enumerated powers to which the Bank had a “relation more or less direct”—collecting taxes; borrowing money; regulating trade between the states; and raising, supporting, and maintaining armies and fleets.<sup>211</sup> He then repeated the demonstrations in his initial report on how the Bank would help effectuate those express governmental objectives.<sup>212</sup> The Bank facilitated the collection of taxes by creating a “convenient medium” through which taxes could be paid. It was an essential institution for government borrowing, particularly in cases of emergency when armies and navies had to be raised or maintained. The Bank could create a national medium of exchange and increase the circulation of money in the country, which would in turn create and stabilize trade and commerce.<sup>213</sup> Congress had enacted laws “to give encouragement to the enterprise [sic] of our own merchants, and to advance our navigation and manufactures”—the very functions that the Bank would perform.<sup>214</sup> “Money is the very hinge on which commerce turns.”<sup>215</sup>

Hamilton tersely dismissed the alternatives—using a federally owned and operated bank or relying on state or foreign banks—as constitutionally irrelevant because they were “grounded on the erroneous idea, that the *quantum* of necessity or utility is the test of a constitutional exercise of power.”<sup>216</sup> As for the political issue of the relative effectiveness of these alternatives, Hamilton simply referred back to his report.<sup>217</sup>

Hamilton made two other constitutional arguments not implicit in his report. The first was his broad construction of the commerce power. Jefferson had argued that the commerce power was limited to regulating buying and selling, while the Bank’s creation of commerce was production rather than regulation. Hamilton turned this argument upside down: the terms of buying and selling were “details” that the federal government could regulate but were trivial matters that should be left to local jurisdictions. The Constitution contemplated that Congress should set “general political arrangements concerning trade on which [the country’s] aggregate interests depend, rather than [arrangements for]

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210. *Id.* at 120.

211. *Id.* at 121.

212. *Id.* at 121–34.

213. *Id.* at 126.

214. *Id.*

215. *Id.*

216. *Id.* at 133.

217. *Id.*



the details of buying and selling,”<sup>218</sup> and that Congress could reach into the internal commerce of the states when necessary to regulate foreign or interstate commerce.<sup>219</sup> “A power to make all needful rules & regulations concerning territory has been construed to mean a power to erect a government. A power to *regulate* trade is a power to make all needful rules & regulations concerning trade.”<sup>220</sup>

Hamilton’s other original argument was that the Bank could be justified through an “aggregate view of the constitution.”<sup>221</sup> The Constitution vested Congress with the powers to lay and collect taxes and appropriate those revenues, borrow money, coin money, and regulate foreign coin and property of the United States. These powers combined “to vest in congress all the powers requisite to the effectual administration of the finances of the United States.”<sup>222</sup> National banks operate in practically all principal commercial nations to carry out the fiscal policies of government; hence, the Bank is a constitutional means of carrying into effect this aggregate fiscal power.<sup>223</sup>

Faced with the conflicting opinions in his cabinet, President Washington, who had chaired the Constitutional Convention, sided with Hamilton and signed the Bank bill into law.<sup>224</sup>

### C. *Lessons from the First Congress*

#### 1. The Bank

The supporters and opponents of the Bank in the First Congress agreed that the Necessary and Proper Clause codified the existence of implied powers inextricably tied to enumerated powers. They disagreed on how those incidental powers could be “necessary” or “proper.” The Federalists, who prevailed in a lopsided vote, interpreted the Necessary and Proper Clause as giving Congress considerable, albeit not unlimited, discretion in choosing means to carry out the express powers. They maintained that a federally chartered but privately owned and operated national bank would effectively carry out the enumerated powers and that its creation did not amount to an improper inversion of means and ends. And they insisted that the importance of an incidental power was irrelevant to its constitutionality.

The scholarly reliance on Madison’s attempts to limit the scope of the Necessary and Proper Clause would be more persuasive if Madison’s arguments had prevailed. Madison’s position on the President’s removal power has special persuasiveness because he carried the House in its first great constitutional debate. But in the House’s second great constitutional debate, Madison’s

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218. *Id.* at 126.

219. *Id.* at 127.

220. *Id.* at 131.

221. *Id.* at 132.

222. *Id.*

223. *Id.* at 132–33.

224. Act of Feb. 25, 1791, ch. 10, 1 Stat. 191.

positions on the scope of congressional power were soundly rejected by a nearly two-to-one vote in favor of the broad incidental powers favored by the Federalists.

The resolution of the Bank debate is the strongest evidence of the First Congress's position on the scope of the Necessary and Proper Clause. But other statutes passed by the First Congress, which figured prominently in the Federalists' rebuttal of Madison, are also informative.

## 2. The Tonnage and Lighthouse Acts

Before the Constitution was enacted, states imposed tonnage taxes on vessels using their ports. This provided revenue for building and maintaining lighthouses, buoys, and other devices that facilitated commerce.<sup>225</sup> However, the Constitution prohibited states from "lay[ing] any Duty of Tonnage" without the consent of Congress.<sup>226</sup> This clause was an integral part of the Convention's overall plan to put Congress in control of regulating foreign and interstate trades.<sup>227</sup>

Instead of granting consent to the states, Congress enacted a federal tonnage tax.<sup>228</sup> On April 21, 1789, a motion was introduced in the House of Representatives to impose a modest per ton tax on vessels built in the United States.<sup>229</sup> Madison supported the motion because this revenue "was necessary for the support of light-houses, hospitals for disabled seamen, and other establishments incident to commerce."<sup>230</sup> The federal Tonnage Act was enacted on July 20, 1789.<sup>231</sup> For constitutional purposes, the Act is striking in how far

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225. See Adam S. Grace, *From the Lighthouses: How the First Federal Internal Improvement Projects Created Precedent That Broadened the Commerce Clause, Shrank the Takings Clause, and Affected Early Nineteenth Century Constitutional Debate*, 68 ALB. L. REV. 97, 105 (2004).

226. U.S. CONST. art. I, § 10, cl. 3.

227. John Langdon of New Hampshire proposed the Tonnage Clause, "insist[ing] that the regulation of tonnage was an essential part of the regulation of trade and that the States ought to have nothing to do with it." 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 5, at 625–26. Banning tonnage taxes on the cargoes of vessels entering and leaving ports prevented states from circumventing the prohibition on import and export duties. See U.S. CONST. art. I, § 10, cl. 2. Some opponents of both the Tonnage and Import-Export Clauses argued that they were redundant because state taxation of foreign and interstate trade was already prohibited by the negative implications of the Commerce Clause. See Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37, 87 (2006); Erik M. Jensen, *Quirky Constitutional Provisions Matter: The Tonnage Clause, Polar Tankers, and State Taxation of Commerce*, 18 GEO. MASON L. REV. 669, 669–70 (2011). Because the clause is archaic in light of the vast changes in trade that have occurred since the country's founding, applying it to modern conditions has proven difficult. See *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1 (2009).

228. Grace, *supra* note 225, at 112–13.

229. 1 ANNALS OF CONG. 176 (1789) (Joseph Gales ed., 1834).

230. *Id.*

231. Act of July 20, 1789, ch. 3, 1 Stat. 27 (repealed 1790). The Act set a higher tax on foreign vessels than American vessels, which Madison defended as a means of preferentially encouraging trade on American ships. 1 ANNALS OF CONG. 190, 196–97 (1789) (Joseph Gales ed., 1834). Enactment of the tonnage tax was delayed by a lengthy debate over Madison's unsuccessful attempt to impose a surtax on the vessels of countries that did not have commercial treaties with the United States (i.e.,

removed it is from regulating foreign and interstate commerce. At the time of its passage, the United States had not owned or operated any lighthouses, buoys, piers, and other such devices—the “establishments incident to commerce”—which still belonged to and were maintained by the states.<sup>232</sup> Nonetheless, it made perfect sense for the United States to assume responsibility over devices that facilitated the foreign and coastal trade. And as a practical matter, the decision to federalize the tax meant that Congress would assume responsibility over these “establishments.”<sup>233</sup>

Congress took the logical next step on August 7, 1789, with the enactment of the lighthouse statute.<sup>234</sup> That law provided for the creation of a lighthouse on the Chesapeake Bay and for federal responsibility over, and payment of all expenses for, all lighthouses, beacons, buoys, and public piers that were ceded to the United States by the several states. Congress left to state regulation the selection of pilots and direction of navigable routes into ports.<sup>235</sup> Again, it is easy to see why this implementation of federal authority would help facilitate the foreign and coastal trades. But facilitating trade is simply not the same as regulating it. As David Currie observed: “[T]he construction and operation of these establishments is not itself *regulation* of commerce, and not obviously necessary or proper for its regulation, which is what the Constitution seems literally to require.”<sup>236</sup>

The lighthouse statute could be justified under the Commerce and Necessary and Proper Clauses only through a chain of implied powers that seems quite natural: (1) Congress would enact a tonnage tax to obtain the revenues necessary to build and maintain lighthouses, buoys, and other “establishments incident to commerce”; (2) it would create or obtain those “establishments” from the states; (3) it would use those establishments to facilitate the foreign and coastal trades; and (4) facilitating trade would be a proper means of regulating commerce.

The tonnage and lighthouse statutes certainly do not conform to Madison’s

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Great Britain). *See supra* note 52.

232. Grace, *supra* note 225, at 103–04, 108.

233. *Id.* at 115–16. The Tonnage Act could also have been based on the taxing power. The commerce power is the more likely source of authority both because of the statements in Congress and because the differential between American and foreign ships was clearly designed to promote American commerce. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801, at 56–58 (1997) [hereinafter CURRIE, THE FEDERALIST PERIOD]. Even if the Tonnage Act had been enacted under the taxing power, it would still be, in combination with the lighthouse statute, part of a larger package of implied powers to facilitate commerce. And if facilitating commerce (as opposed to regulating it) is not within the commerce power—an issue that animated later debates over federal support for the construction and maintenance of roads and canals—the Tonnage Act would support the principle that the taxing power is not limited to carrying out Congress’s enumerated powers. *See infra* Part V.B.2.

234. Act of Aug. 7, 1789, ch. 9, 1 Stat. 53.

235. *See id.*

236. CURRIE, THE FEDERALIST PERIOD, *supra* note 233, at 70. Opponents of the tonnage and lighthouse statutes argued unsuccessfully that these matters should be left to the states. *See id.* at 70 & n.117; Grace, *supra* note 225, at 116–17.

assertion in the Bank debate that implied powers must be “direct and incidental” to enumerated powers. And, by “creat[ing] the necessary predicate [a tonnage tax] to the exercise of an enumerated power [the commerce power],”<sup>237</sup> these statutes are also incompatible with the bootstrap arguments that Madison made against the Bank and that Chief Justice Roberts made against the individual mandate.

### 3. The Seamen’s Act

The Seamen’s Act<sup>238</sup> was “[p]ossibly the most ambitious exercise of the commerce power during the First Congress.”<sup>239</sup> This statute required the masters or commanders of all vessels leaving a United States port for a foreign or interstate destination to enter into written labor contracts with all crew members, pay their wages promptly, and provide adequate food and medicine. Crew members could require leaky vessels to be brought into port for repairs. And as a quid pro quo, the statute imposed major sanctions on crew members who did not report or who deserted, as well as on anyone who harbored them.<sup>240</sup>

As Fisher Ames stated in the Bank debate, the Seamen’s Act was an important exercise of an implied power to facilitate commerce.<sup>241</sup> The obvious rationale was that a well-treated and reliable crew could make commerce safer and more expeditious. But that means-end relationship does not appear to conform with Madison’s “direct and incidental” requirement. The Seamen’s Act rests upon precisely the means-end relationship that the pre-1937 Supreme Court characterized as “indirect” and therefore beyond the scope of congressional power.<sup>242</sup>

### 4. The Territorial Governments

In the Bank debate, the Federalists used the territorial governments to refute Madison’s great powers theory. They emphasized that Congress had established incorporated territorial governments even though the Constitution does not expressly give Congress this power.<sup>243</sup> Congress had the express power

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237. Nat’l Fed’n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2592 (2012).

238. ch. 29, 1 Stat. 131 (1790).

239. CURRIE, *THE FEDERALIST PERIOD*, *supra* note 233, at 65.

240. ch. 29, 1 Stat. 131.

241. 2 ANNALS OF CONG. 1904 (1791). Although there was no legislative debate on the Seamen’s Act (or it has disappeared), the Commerce and Necessary and Proper Clauses are the most likely sources of constitutional authority inasmuch as the statute “applied only to ships in the oceanic and interstate coasting trades.” Jonathan M. Guttoff, *Fugitive Slaves and Ship-Jumping Sailors: The Enforcement and Survival of Coerced Labor*, 9 U. PA. J. LAB. & EMP. L. 87, 93 (2006).

242. *E.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 307 (1936) (rejecting Congress’s power to regulate the employment conditions of businesses engaged in interstate commerce, and stating that “we are brought to the final and decisive inquiry, whether here that effect [on commerce] is direct, as the ‘preamble’ [of the statute] recites, or indirect. The distinction is not formal, but substantial in the highest degree”).

243. 2 ANNALS OF CONG. 1907 (1791) (statement of Rep. Fisher Ames); *id.* at 1916 (statement of Rep. John Lawrence); *id.* at 1925 (statement of Rep. Elias Boudinot).

“to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>244</sup> This express power provided Congress with the authority to enact federal laws that would regulate individuals and property in the territories. Accordingly, Congress had the incidental power to create executive and judicial offices to enforce those laws. But Congress went much further when it effectively reenacted the Northwest Ordinance<sup>245</sup> and, after accepting North Carolina’s cession of territory to the United States, when it applied almost all of the Northwest Ordinance to the new national territories.<sup>246</sup> Instead of enacting laws that would govern the territories, Congress delegated its lawmaking powers to territorial governments, which were modeled on the colonial governments established by the Crown.

Congress subdivided these territories into smaller areas that would become states and created governments for those territories. When a territory had a sufficient number of residents, a general assembly became the governing legislative authority. The assembly consisted of an elected House of Representatives and an appointed five-member council, with the appointees nominated by the President and approved by the Senate (and subject to removal by the President).<sup>247</sup> The assembly was given the power to enact laws governing the territories, subject to the governor’s unqualified veto but *not* subject to the disapproval of Congress.<sup>248</sup> Congress thereby used incidental powers to delegate its own legislative authority over the territories to these corporate governments that were largely controlled by executive officials. What could possibly constitute a greater power, established by implication, than the creation of an independent legislature that included and could be controlled by executive officials?<sup>249</sup>

## 5. Removal

Removal followed closely behind territorial governments in the Federalist

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244. U.S. CONST. art. IV, § 3, cl. 2.

245. The Northwest Ordinance was enacted by the Confederation Congress, even though nothing in the Articles of Confederation authorized such action. The First Congress passed the Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 n.a, which “adapted” the Ordinance to the Constitution by transferring the appointing authority for the federal officials from Congress to the President. Technically, Congress did not reenact the Northwest Ordinance, but the statutory adaptation was viewed as equivalent.

246. Act of Apr. 2, 1790, ch. 6, 1 Stat. 106 (accepting North Carolina’s cession); Act of May 26, 1790, ch.14, 1 Stat. 123 (incorporating terms of the Northwest Ordinance with the conspicuous exception that slavery was not prohibited in the Southwest Territories).

247. Act of Aug. 7, 1789, ch. 8, 1 Stat. 51, 51–52 n.a. Until a territory had sufficient residents, its government was a council consisting of the governor and three judges, all appointed by the President with the approval of the Senate. The council had the power to enact legislation subject to the disapproval of Congress. *Id.* at 51 n.a.

248. *Id.* at 52 n.a.

249. In contrast to the legislation establishing the territorial governments, the Constitution explicitly prohibits any executive official from simultaneously being a member of Congress. U.S. CONST. art. I, § 6, cl. 2.

lexicon of great incidental powers.<sup>250</sup> The Constitution gave the President the power to appoint executive officials with the consent of the Senate,<sup>251</sup> and it gave the two Houses of Congress (without the involvement of the President) the power to remove those officials by impeachment.<sup>252</sup> No express power gave the President authority to remove executive officials. Yet Congress enacted legislation authorizing or recognizing that such a power should be implicit to the office of the President *and* that it could be exercised without Senate consent or legislative restriction.<sup>253</sup>

The great debate over removal presents the much mooted question of whether the legislation establishing the Department of State (then called the “Department of Foreign Affairs”) recognized the President’s plenary constitutional authority to remove executive officials at will, or recognized such authority absent restrictions imposed by Congress.<sup>254</sup> In *Myers v. United States*,<sup>255</sup> Chief Justice Taft and a majority of the Supreme Court asserted that the debate and votes over the Department of State legislation established the former principle,<sup>256</sup> while Justice Brandeis’s dissenting opinion asserted the latter.<sup>257</sup> This issue continues to divide scholars.<sup>258</sup>

For the purposes of this Article, it does not matter which position is correct because each recognizes the hugely important power of removal as an implied power. Those who advocated the constitutional position (Madison being the lead advocate in the First Congress) derived an implied presidential power of unrestricted removal from the Executive Vesting Clause,<sup>259</sup> the Appointments Clause,<sup>260</sup> and the President’s duty to take care that the laws be faithfully

250. See *supra* note 156 and accompanying text.

251. U.S. CONST. art. II, § 2, cl. 2.

252. U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cls. 6, 7; *id.* art. II, § 4.

253. Act of July 27, 1789, ch. 4, 1 Stat. 28; 1 ANNALS OF CONG. 495–501 (1789) (Joseph Gales ed., 1834).

254. There were actually four positions in the removal debate: (1) impeachment is the sole constitutionally authorized mode of removal, (2) the President has the removal power subject to the advice and consent of the Senate, (3) Congress has the power to vest the removal power exclusively in the President or jointly with Congress or the Senate, and (4) the President has an Article II executive power of unrestricted removal. J. DAVID ALVIS ET AL., *THE CONTESTED REMOVAL POWER 1789–2010*, at 18–19 (2013).

255. 272 U.S. 52 (1926).

256. *Myers*, 272 U.S. at 111–35, 161.

257. *Id.* at 284–85, 286 n.75 (Brandeis J., dissenting).

258. The literature on this subject is extensive. See, e.g., 1 EDWARD S. CORWIN, *CORWIN ON THE CONSTITUTION* 332 (Richard Loss ed., 1981) (arguing the statutory basis); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 23–30 (1994) (arguing the statutory basis primarily because of how the First Congress legislated with respect to removal in other departments and offices); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006) (arguing the constitutional basis).

259. See generally Prakash, *supra* note 258, 1040–42 (analyzing the congressional debate).

260. *Myers*, 272 U.S. at 119 (Taft, C.J.) (stating that the supporters and almost all of the opponents of the removal bill acknowledged that an executive power of removal could be implied from the executive appointment power); *id.* at 161 (“The [presidential] power to remove . . . executive officers . . . is an incident of the power to appoint them, and is in its nature an executive power.”).

executed.<sup>261</sup> Those who advocated the statutory position relied on Congress's implied powers under the Necessary and Proper Clause to define the tenure of officials whose appointments it authorized in departments that it created.<sup>262</sup>

As for being a great power, an unrestricted executive power of removal may be more important than the enumerated appointment power. When the President's nominee for an executive position is blocked by the Senate, he or she can choose another person from a wide pool. But when an executive official's performance is unsatisfactory or does not comply with the President's policies, an unrestricted power of removal becomes important—and perhaps indispensable, depending on the office. Although Madison said (without recorded explanation) that an implied unrestricted power of removal was consistent with his great powers theory, there does not appear to be any principled justification for that conclusion.

The removal power joins the other consistent precedents set by the First Congress as contrary to the constraints that Madison would have placed on the implied powers of Congress in his opposition to the Bank.<sup>263</sup>

#### D. *The Jefferson-Madison Administration*

One of the most powerful arguments pressed by Hamilton and his Federalist allies in the First Congress for a liberal construction of the Necessary and Proper Clause was that changed times and circumstances could require the use of means that were inconceivable to the Founders. Ironically, that prediction first became a reality during the administration of Thomas Jefferson, our first strict constructionist president, and his Secretary of State James Madison, the great powers theorist. With the practically unanimous support of a Republican Congress, the administration employed implied powers whose importance cannot be overstated. The scope of these actions dwarfs any exercise of implied powers taken by Jefferson's Federalist predecessors and rivals in importance any action taken in subsequent United States history. These uses of implied powers made possible the greatest accomplishment of Jefferson's presidency.

In 1803, President Jefferson appointed James Monroe and Robert

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261. For Madison's reliance on the Take Care Clause, see, for example, 1 ANNALS OF CONG. 496–97 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison).

262. As summarized by one scholar:

[C]onsensus does not exist as to where the power to remove from office lies—that is, whether the power to remove lies with (1) whoever appointed the officer as an incident of the power to appoint, (2) the President as an incident of the “executive Power” or of his duty to “faithfully execute[]” the laws, or (3) Congress as an incident of the power to create an office, either directly by allowing Congress to reserve a role in removal for itself or indirectly by putting limitations on the power of other actors to remove.

Steven Breker-Cooper, *The Appointments Clause and the Removal Power: Theory and Séance*, 60 TENN. L. REV. 841, 851 (1993) (second alteration in original) (footnotes omitted).

263. See *supra* Parts III.C.2–4 for a discussion of the Lighthouse Act, Seamen's Act, and territorial governments as examples of congressional action that conflicts with Madison's view on implied powers.

Livingston to negotiate the purchase of New Orleans from France.<sup>264</sup> They returned from Paris with a proposed treaty in which Napoleon Bonaparte agreed to cede the entire Louisiana Territory to the United States.<sup>265</sup> France would sell this vast territory of some 827,000 square miles for the bargain-basement price of \$15 million.<sup>266</sup> This deal was too good to turn down—the problem was its constitutionality. As John Quincy Adams would later write, the Louisiana Purchase could be justified only on “an assumption of implied power greater in itself and more comprehensive in its consequences than all the assumptions of implied powers in the twelve years of the Washington and Adams Administrations put together.”<sup>267</sup>

The Constitution does not contain an express power for the acquisition of foreign territory, through purchase or otherwise. Acquiring new territory should have been a major constitutional problem for Jefferson, Madison, and their strict constructionist followers. Under the Articles of Confederation, Canada could be automatically admitted into the Union, and Congress could admit foreign colonial territories by the vote of nine states.<sup>268</sup> No similar provision was included in the Constitution. Congress was given the power to admit new states<sup>269</sup> and to make “Rules and Regulations respecting the Territory . . . [of] the United States.”<sup>270</sup> But, construed narrowly, those provisions meant that Congress could govern and form new states from the existing territories. Acquiring new territories and admitting them into the Union as states were actions not directly related to express constitutional powers. Moreover, according to Jefferson and other Republicans, and contrary to the Federalist defense of the 1795 Jay Treaty,<sup>271</sup> the constitutional scope of the treaty power was limited to objects within the enumerated powers.<sup>272</sup> Jefferson himself had

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264. Thomas Jefferson, Commission for James Monroe and Robert R. Livingston (Jan. 12, 1803), in 39 THE PAPERS OF THOMAS JEFFERSON 320 (Barbara B. Oberg ed., 2012) [hereinafter JEFFERSON PAPERS].

265. Treaty Between the United States of America and the French Republic, Fr.-U.S., Apr. 30, 1803, 8 Stat. 200; Convention Between the United States of America and the French Republic, Fr.-U.S., Apr. 30, 1803, 8 Stat. 206; Convention Between the United States of America and the French Republic, Fr.-U.S., Apr. 30, 1803, 8 Stat. 208.

266. *Louisiana Purchase*, THOMAS JEFFERSON'S MONTICELLO, <https://www.monticello.org/site/jefferson/louisiana-purchase> (last visited Nov. 14, 2016) [<https://perma.cc/J5TJ-RWEZ>].

267. Diary Entry of John Quincy Adams (Oct. 20, 1821), in 5 MEMOIRS OF JOHN QUINCY ADAMS 364, 364–65 (Charles Francis Adams ed., 1875) [hereinafter JQA MEMOIRS].

268. ARTICLES OF CONFEDERATION of 1781, art. XI.

269. U.S. CONST. art. IV, § 3, cl. 1 (“New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”).

270. U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .”).

271. Alexander Hamilton, *The Defence No. XXXVI*, HERALD (New York), Jan. 2, 1796, reprinted in 20 HAMILTON PAPERS, *supra* note 23, at 3, 6–9.

272. See David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1164–68, 1178–79, 1187–88 (2000).



emphasized that the treaty power could not extend beyond the enumerated powers of Congress because “the President and Senate cannot do by treaty what the whole Government is interdicted from doing.”<sup>273</sup> Similarly, how could Congress appropriate funds to pay for the Louisiana Territory when spending for the “general welfare” was deemed limited to objects within the express powers?<sup>274</sup>

The administration quickly resolved the previously-abstract issue of acquiring new territory by treaty. In an argument straight out of the Federalist playbook, Secretary of the Treasury Albert Gallatin asserted that the United States has “an inherent right to acquire territory,” that the treaty power can be used for that purpose, and that “whenever the territory has been acquired, Congress [has] the power either of admitting into the Union as a new State, or of annexing to a State with the consent of that State, or of making regulations for the government of, Such territory.”<sup>275</sup> Temporarily suppressing his doubts, Jefferson agreed,<sup>276</sup> as did the supporters and opponents of the treaty. In fact, “[e]very speaker [in Congress], without distinction of party, agreed that the United States government had the power to acquire new territory either by conquest or by treaty.”<sup>277</sup> And, although Jefferson would waver on this issue,<sup>278</sup> he was isolated in his doubts and ultimately acquiesced.<sup>279</sup>

That the United States could acquire *some* foreign territory was the extent of the consensus on the constitutional issues related to the Louisiana Treaty. The

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Golove argues that Madison did not share Jefferson’s restrictive views of the treaty power. *Id.* at 1179–86.

273. THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE: FOR THE USE OF THE SENATE OF THE UNITED STATES § LII (Wilbur Samuel Howell ed., Washington, Joseph Milligan & William Cooper 2d ed. 1812) (1801), <http://www.constitution.org/tj/tj-mpp.htm> [<https://perma.cc/X2J6-S74S>], cited in Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1341 n.84 (2006).

274. See *infra* notes 475–76 and accompanying text.

275. Letter from Albert Gallatin to Thomas Jefferson (Jan. 13, 1803), in 39 JEFFERSON PAPERS, *supra* note 264, at 324, 326 (footnote omitted).

276. Letter from Thomas Jefferson to Albert Gallatin (Jan. 13, 1803), in 39 JEFFERSON PAPERS, *supra* note 264, at 327, 328. As Dumas Malone observes, Jefferson had consulted Madison before dispatching Monroe and Livingston to purchase New Orleans by treaty, so he must have accepted the power to acquire territory at that point. 4 DUMAS MALONE, JEFFERSON THE PRESIDENT: FIRST TERM 1801–1805, at 312–13 (1970). But recall that the administration was then contemplating the purchase of only New Orleans, whose control was necessary for foreign commerce, and not the entire Louisiana Territory.

277. 2 HENRY ADAMS, HISTORY OF THE UNITED STATES OF AMERICA DURING THE FIRST ADMINISTRATION OF THOMAS JEFFERSON 113 (Antiquarian Press Ltd. 1962) (1891).

278. See, e.g., Letter from Thomas Jefferson to John Dickinson (Aug. 9, 1803), in 41 JEFFERSON PAPERS, *supra* note 264, at 169, 170; Letter from Thomas Jefferson to John Breckinridge (Aug. 12, 1803), in 41 JEFFERSON PAPERS, *supra* note 264, at 184, 186 (“[T]he constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our [U]nion.”).

279. Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), in 41 JEFFERSON PAPERS, *supra* note 264, at 346, 347; see EVERETT SOMERVILLE BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE 1803–1812, at 20–29 (1920); 4 MALONE, *supra* note 276, at 313–14.

contentious remaining issues were varied and complex. What follows is a summary of the constitutional objections and defenses of the treaty that are relevant to this Article.<sup>280</sup>

In a role reversal, Federalist opponents of the Louisiana Treaty raised constitutional arguments that sounded in Madison's great powers theory.<sup>281</sup> Their opposition, based on the *magnitude* of the treaty, made three interrelated points.

First, the limited acquisition of New Orleans to secure American navigation rights on the Mississippi River (and hence maintain foreign commerce) was quite different than the immense acquisition of the entire Louisiana Territory for indeterminate purposes. Moreover, one of the strongest arguments against creating a strong national government had been that the United States was already too large to be governed centrally with republican principles.<sup>282</sup> The Louisiana Treaty would double the size of the United States; settlement of such a vast area could endanger the country's republican character.

Second, how would the Louisiana Territory and its inhabitants be treated following acquisition? If the territory were not incorporated into the Union, then it would become a colony. But governing a colony "was contrary to the historic policy embodied in the Northwest Ordinance," a document that had acquired a quasi-constitutional stature.<sup>283</sup> On the other hand, if states were admitted from the Louisiana Territory, a new nation would effectively be created, shifting the entire balance of power away from the states that formed the Union.<sup>284</sup> The treaty's opponents argued that it was simply impossible to believe that the original states would have agreed to any exercise of federal power that would have so reduced their political influence.

Third, Article III of the treaty appeared to require the admission of the territory as states, the mass naturalization of its foreign inhabitants, and the interim adoption of foreign law into an area over which the United States exercised sovereignty.<sup>285</sup> And these consequences were said to be binding on the

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280. The discussion that follows summarizes the constitutional debates over Louisiana that are treated extensively in 2 ADAMS, *supra* note 277, at 74–134; BROWN, *supra* note 279, at 14–83; 4 MALONE, *supra* note 276, at 284–310; 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1278–81, at 156–60 (Boston, Hilliard, Gray & Co. 1833) [hereinafter STORY COMMENTARIES].

281. These opponents did not include Hamilton, who supported the treaty and its implementing legislation. CHERNOW, *supra* note 51, at 671.

282. Madison had, of course, brilliantly refuted this doctrine in *THE FEDERALIST NO. 10*; but Federalists in 1803 had reason to view that position cynically as they watched Madison take the lead in forming the Republican Party as a dominant nationwide faction.

283. 4 MALONE, *supra* note 276, at 330 (also noting that some Federalists "frankly favored" governing the territory as a colony).

284. To an extent, this was a reprise of the debate in the Convention over the western territories. Although there was widespread support for westward expansion and for admitting new states on an equal footing with the existing states, some Northern delegates opposed expansion and equal treatment because of the effect it would have on the political power of the "old States." Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1044–49 (2014).

285. Treaty Between the United States of America and the French Republic, *supra* note 265,

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country as a result of actions of the President and the Senate, at the expense of Congress's express powers to admit new states and to govern the territories.

The treaty's opponents focused on the territory's magnitude and the controversial requirements of Article III. Without crediting Madison by name, Federalists attacked the constitutionality of the Louisiana Treaty by appropriating his great powers theory.

Compounding the role reversal of this debate, Jefferson's supporters of the Louisiana Treaty asserted a broad doctrine of implied powers that could have come from the pen of Alexander Hamilton: The Constitution did not contain any provision that prohibited the acquisition of new territories. The United States could acquire territory by conquest, as incidental to Congress's war powers, or by diplomacy, as incidental to the treaty power. Under accepted customs of international law, nations used treaties to acquire territory. If, as the opponents admitted, the United States could acquire New Orleans by treaty, why could it not likewise acquire the entire Louisiana Territory?<sup>286</sup> To be sure, the treaty must be implemented by congressional legislation. But if the treaty itself is valid, it is the law of the land under the Supremacy Clause, and Congress is duty-bound to enact implementing legislation under the Necessary and Proper Clause. Congress has the implied powers to enforce the treaty by appropriating the necessary funds, governing the new territories, determining the rights and privileges of inhabitants, and laying the groundwork for the territories' admission as states.

The approval of the Louisiana Treaty and the enactment of implementing legislation by Congress vindicated the broad construction of incidental powers under the Constitution. As Joseph Story would remark: "In short, there is no possibility of defending the constitutionality of this measure, but upon the principles of the liberal construction, which has been, upon other occasions, so earnestly resisted."<sup>287</sup> And John Quincy Adams explained how it fundamentally rejected the great powers theory:

[The treaty] made a Union totally different from that for which the Constitution had been formed. It gives despotic powers over the territories purchased. It naturalizes foreign nations in a mass. It makes

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art. III, at 202 ("The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.").

286. An interesting example is the colloquy in the Senate between Samuel White, a Delaware Federalist, and John Breckinridge, a Kentucky Republican. White argued that the purchase of New Orleans was constitutional because of the need to secure American navigation rights on the Mississippi River, but that there was no constitutional justification for—and considerable danger in—purchasing the immense Louisiana Territory. 13 ANNALS OF CONG. 33–35 (1803). Breckinridge, one of Jefferson's principal lieutenants in the Senate, responded that any constitutional distinction on the size of the purchase would be irrational—simply a matter of degree—and that the idea that the United States would become too big to be governed effectively, or that the character of the country would change, was "an old and hackneyed doctrine." *Id.* at 60–62.

287. 3 STORY COMMENTARIES, *supra* note 280, § 1281, at 159.

French and Spanish laws a part of the laws of the Union. It introduces whole systems of legislation abhorrent to the spirit and character of our institutions, and all this done by an Administration which came in blowing a trumpet against implied powers. After this, to nibble at a bank . . . was but glorious inconsistency.<sup>288</sup>

#### IV. UNDERSTANDING *MCCULLOCH V. MARYLAND*

In 1819, twenty-eight years after the Bank was chartered and three years

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288. Diary Entry of John Quincy Adams (Nov. 17, 1821), in 5 JQA MEMOIRS, *supra* note 267, at 400, 401. The Louisiana Treaty set a precedent that Adams used as President Monroe's Secretary of State. In a remarkable feat of diplomacy, Adams negotiated the Transcontinental Treaty with Spain, by which the United States acquired Florida and territory that extended to the Pacific Ocean. Treaty of Amity, Settlement, and Limits, Between the United States of America and his Catholic Majesty, Spain-U.S., Feb. 22, 1819, 8 Stat. 252. This accomplishment approached the Louisiana Treaty in scope and importance. See SAMUEL FLAGG BEMIS, THE LATIN AMERICAN POLICY OF THE UNITED STATES: AN HISTORICAL INTERPRETATION 36–37 (1943). The Transcontinental Treaty also included the same provision for the rights of the territory's inhabitants and incorporation into the Union that Adams had found so offensive. Treaty of Amity, Settlement, and Limits, Between the United States of America and his Catholic Majesty, *supra*, arts. V–VI, at 256–58.

In a case testing the legality of the judicial department of Florida's territorial government, the Supreme Court ratified the acquisition of territory as incidental to the war and treaty powers and upheld the implied power of Congress to establish governments in the territories that did not include constitutional guarantees applicable in the Union. *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542–43, 546 (1828) (upholding the acquisition of Florida and the appointment of federal judges who did not enjoy life tenure). The more complex issues related to incorporating new territory into the United States were not settled by the Supreme Court until *The Insular Cases*. See, e.g., *Downes v. Bidwell*, 182 U.S. 244, 346 (1901) (reciting the doctrine of territorial incorporation in which the Constitution applies in full to incorporated territories that would become states, but only partially to unincorporated territories); *Dorr v. United States*, 195 U.S. 138, 148–49 (1904) (holding that there was no right to a jury trial in unincorporated territories unless conferred by an express congressional statute).

Jefferson also used a broad construction of the commerce power in an action that became the greatest disaster of his administration. In 1807, Congress enacted legislation, at Jefferson's urging, that indefinitely prohibited all ships or vessels departing any port of the United States from sailing to any foreign port. See Embargo Act of 1807, ch. 5, 2 Stat. 451 (repealed 1809). Rather than being a war measure, Jefferson insisted that the embargo was needed to protect American commerce from the hostile actions of "belligerent" European countries. Message from President Thomas Jefferson to the Senate and House of Representatives of the United States (Dec. 18, 1807), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, at 421, 421 (James D. Richardson ed., New York, Bureau of Nat'l Literature, Inc. 1897) [hereinafter MESSAGES AND PAPERS]. The embargo produced a national economic disaster, see 4 ADAMS, *supra* note 277, at 274–81, and was strongly resisted in New England. 5 DUMAS MALONE, JEFFERSON THE PRESIDENT: SECOND TERM, 1805–1809, at 651–55 (1974). One study found that Massachusetts juries issued acquittals in fifty-three of the sixty-five federal embargo prosecutions in 1808 and 1809. Douglas Lamar Jones, "The Caprice of Juries": *The Enforcement of the Jeffersonian Embargo in Massachusetts*, 24 AM. J. LEGAL HIST. 307, 326–28, 326 n.68 (1980). The embargo was challenged as being outside the commerce power—the power to regulate commerce did not include the implied power to "annihilate" commerce indefinitely. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 191–93 (1824) (describing challenge to embargo). Joseph Story stated that the embargo went to "the utmost verge of constitutional power" but was justified by a liberal construction of the Constitution. 3 STORY COMMENTARIES, *supra* note 280, § 1285–86, at 162–63. The embargo's constitutionality was not decided by the Supreme Court. However, it was upheld by a district court judge as within a broad construction of the commerce power. *United States v. The William*, 28 F. Cas. 614, 622–24 (D. Mass. 1808) (No. 16,700).

after it was rechartered, the Supreme Court held that the Bank was a constitutional exercise of congressional powers.<sup>289</sup> The analysis of this issue in the *McCulloch* opinion is divided into four parts: (1) a declaration that history has settled the Bank's constitutionality, (2) a refutation of Jeffersonian compact theory and strict construction of the Constitution, (3) a dissertation on the scope of Congress's implied powers, and (4) a decision that the Bank is constitutional on the merits.<sup>290</sup> This Section analyzes all four parts and then addresses some loose ends in *McCulloch* that require further analysis.

A. *The Bank is Constitutional*

Accepting the opening arguments of the Bank's lawyers,<sup>291</sup> the *McCulloch* opinion begins with the assertion that the constitutionality of the Bank is settled.<sup>292</sup> The bill establishing the Bank in 1791 was passed by the First Congress, debated tenaciously and brilliantly in the cabinet, and signed by President Washington. The Bank had operated for twenty years; then, when it was allowed to expire, its absence created "embarrassments" that convinced even those "most prejudiced" against its establishment (namely, James Madison)<sup>293</sup> of its necessity and constitutionality. Under these circumstances, "[i]t would require no ordinary share of intrepidity" for the Bank to be considered unconstitutional.<sup>294</sup>

Marshall could have stopped there. This was not the first time that the Marshall Court relied on such historical precedents to uphold a contested statute. *Stuart v. Laird*<sup>295</sup> involved a constitutional challenge to the practice of Supreme Court Justices sitting as Circuit Court judges—a system mandated by the Judiciary Act of 1789 and despised by Justices. It had been eliminated in lame-duck judicial reforms enacted by the outgoing Federalist Congress in 1801. But the Judiciary Act of 1802 repealed that reform legislation, thus requiring the Justices again to ride circuit.<sup>296</sup> When the 1802 Act was challenged as

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289. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 400–24 (1819).

290. The second portion of the opinion, which is not discussed in this Article, held that Maryland's tax on the Bank violated the Supremacy Clause. *Id.* at 424–36.

291. *Id.* at 322–26 (argument of Webster); *id.* at 352–53 (argument of Wirt); *id.* at 378–81 (argument of Pinkney).

292. *Id.* at 401–02.

293. When the Second Bank bill was under consideration, Madison waived constitutional objections as "precluded" by the "repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications . . . of a concurrence of the general will of the nation." Veto Message from President James Madison to the Senate (Jan. 30, 1815), in 2 MESSAGES AND PAPERS, *supra* note 288, at 540, 540. Although he vetoed the bill for policy reasons, Madison urged Congress to fix the problems he identified, see James Madison, Seventh Annual Message (Dec. 5, 1815), in 2 MESSAGES AND PAPERS, *supra* note 288, at 547, 549–51, and signed a subsequent bill into law, Act of Apr. 10, 1816, ch. 44, 3 Stat. 266.

294. *McCulloch*, 17 U.S. (4 Wheat.) at 402.

295. 5 U.S. (1 Cranch) 299 (1803).

296. *E.g.*, RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 26–27, 780 (7th ed. 2015).

unconstitutional, the Supreme Court's response was as follows:

To this objection . . . it is sufficient to observe, that [the] practice and acquiescence . . . for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course the question is at rest, and ought not now to be disturbed.<sup>297</sup>

Thus, that act of the First Congress and subsequent practice had put the issue "at rest." Full stop. The Court in *Stuart* did not proceed to discuss the constitutional claim ab initio on the merits. After stating that the Bank's constitutionality was settled for the same reasons, Marshall could have also stopped.

Why didn't Marshall stop? One plausible reason is that the Marshall Court was not exactly a paragon of judicial restraint, and *McCulloch* gave Marshall the opportunity to write a foundational opinion on core questions of constitutional law. But another plausible reason—which I consider more persuasive—is that Marshall could not stop because there had never been a consensus on the constitutionality of the Bank, and that was an important and urgent issue in 1819, when the Second Bank was under siege by hostile state legislation that threatened its continued existence.

Notwithstanding Marshall's historical account of uniform acquiescence, many Jeffersonians never agreed that the Bank was constitutional. When the Bank's charter came up for renewal in 1811, it met strong opposition in Congress on constitutional grounds, and Vice President George Clinton relied upon those grounds for his tie-breaking vote against the Bank in the Senate.<sup>298</sup> Opposition to the Bank went into remission when it was rechartered in 1816 because of the serious fiscal problems that had resulted from its elimination.<sup>299</sup> But the opposition and constitutional objections were forcefully renewed when the Second Bank played a leading role in plunging the country into an economic disaster.<sup>300</sup>

Before the Second Bank opened on January 7, 1817, the state-chartered banks had been providing easy credit that expanded the postwar economic boom. Instead of reining in the state banks, the Second Bank gave up the ability to assert uniform control over them by decentralizing with semi-autonomous branches throughout the country. To make matters worse, the Bank also adopted liberal lending policies that accelerated the financial bubble caused by

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297. *Stuart*, 5 U.S. (1 Cranch) at 309. Justice Paterson, who had become an arch-Federalist on the bench, delivered the opinion. Marshall did not participate because he had decided the case on the circuit court, where he also rejected the challenge.

298. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 1801–1829*, at 252–53 (2001) [hereinafter CURRIE, *THE JEFFERSONIANS*].

299. See *infra* notes 406–10 and accompanying text.

300. The summary that follows is taken from HAMMOND, *supra* note 45, at 251–59; MURRAY N. ROTHBARD, *THE PANIC OF 1819: REACTIONS AND POLICIES* 7–14 (1962); and SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 205–16 (2005).

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bad loans. When the bubble began bursting in 1818, the Bank adopted a policy of contraction, tightening credit and calling in its loans. This policy, combined with the deflation in commodity prices caused by overproduction in Europe, led to a huge number of personal bankruptcies, as well as banking, manufacturing, and agricultural collapses. The Bank's mismanagement thus largely contributed to the nation's first financial depression. The depression caused suffering throughout the country, and high unemployment arose for the first time in cities. Blaming the Bank for the depression, Maryland and five other states imposed taxes on it, a practice that, if not checked, could destroy it. The Bank's survival was at stake in *McCulloch*, and its constitutionality once again at issue. A question of such magnitude and urgency called for more than a summary decision by the Supreme Court.

*B. Demolishing the Compact Theory*

Marshall ended his preface with this comment: "These observations belong to the cause; but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the constitution."<sup>301</sup>

Inasmuch as the Court was determined to decide ab initio that the Bank was a constitutional exercise of Congress's implied powers, one might expect an opinion on the merits to follow immediately from the preface. Instead, Marshall devoted the next segment of the opinion to demolishing the Jeffersonian compact theory and extolling the nationalist alternative.<sup>302</sup> Marshall was addressing the compact theory, he wrote, because the attorneys representing Maryland argued that it was "of some importance" to their challenge of the Bank's constitutionality.<sup>303</sup> This explanation appears disingenuous. Judges do not have to address every argument of lawyers, and Marshall did not even admit that the compact theory was relevant to the Bank's constitutionality.<sup>304</sup>

Actually, the compact theory was highly relevant because it was the juridical basis for strictly construing the proper scope of Congress's powers. Perhaps even more importantly, this theory bore upon the most significant and dangerous debate over Congress's implied powers that was taking place at the very moment that *McCulloch* was being argued and decided—the nature and continued existence of the Union.

1. Compact Theory and Strict Construction

The compact theory of the Constitution was most fully developed by St. George Tucker in his treatise on *Blackstone's Commentaries*, which was published in 1803.<sup>305</sup> Tucker's treatise became the Bible of Jeffersonian

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301. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402 (1819).

302. *Id.* at 402–09.

303. *Id.* at 402.

304. Instead, Marshall ended his long discussion of the compact theory, and his opposing nationalist theory, for "whatever may be the influence" it might or might not have for the case. *Id.* at 404–05.

305. 1 TUCKER'S BLACKSTONE, *supra* note 17, app. note D.

constitutionalism, and Tucker's compact theory and corollary of strict construction were so familiar that the lawyers for Maryland could summarize them by rote in arguing *McCulloch*.<sup>306</sup>

The compact theory posited that the Constitution, like the Articles of Confederation, was formed by the voluntary agreement of independent and sovereign states. The Constitution was ratified—and therefore was brought into existence—by the people of the several states, representing their respective states, and not by the people of the United States. In forming the Constitution, the states ceded certain powers to the federal government. To be sure, those powers were greater than those ceded by the states to the United States in the Articles of Confederation. But the nature of the Union did not change. Apart from the powers expressly listed in the Constitution, the states retained complete sovereignty and independence. And because the states reluctantly ceded powers to the United States, those federal powers must be construed strictly and narrowly. Every expansion of federal power contracts the sovereignty of the several states. Moreover the compact theory held that the several states, which possess ultimate sovereignty, are the final judges on whether Congress has violated the compact by exceeding its delegated powers.<sup>307</sup>

Strict constructionism was therefore a corollary of the compact theory. Every Jeffersonian argument for limiting the scope of both the enumerated and implied powers ultimately derived from this theory.<sup>308</sup> This is why, in the Bank debate, Jefferson called the Tenth Amendment the foundation of the Constitution.

Marshall could have refuted strict constructionism without addressing the compact theory. In his opinion on the constitutionality of the Bank, Hamilton had identified a fatal logical fallacy in the argument that Congress can utilize only those means that are “indispensably necessary” to carrying out an express power. There is rarely, if ever, only one means by which Congress can effectuate an enumerated power. “There are few measures of any government, which would stand so severe a test.”<sup>309</sup> The result of imposing such a strict construction on Congress's implied powers would be legislative paralysis.

Marshall was thoroughly familiar with Hamilton's opinion on the

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306. See *McCulloch*, 17 U.S. (4 Wheat.) at 363–66 (argument of Jones); *id.* at 372–74 (argument of Martin).

307. 1 TUCKER'S BLACKSTONE, *supra* note 17, app. note D, at 140–73. Tucker adapted Jefferson's and Madison's assertions of the compact theory in the Kentucky Resolutions of 1798 and 1799 and the 1799–1800 Report on the Virginia Resolutions. Thomas Jefferson, Kentucky Resolutions of 1798 and 1799 [hereinafter Kentucky Resolutions], *reprinted in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 540, 540 (Jonathan Elliot ed., William S. Hein & Co., Inc. 2d ed. 1996) (1891); James Madison, Report on the Virginia Resolutions [hereinafter Madison's Report on the Virginia Resolutions], *reprinted in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra*, at 546, 547–49.

308. WHITE, *supra* note 128, at 489–90.

309. Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank, *supra* note 73, at 103.



constitutionality of the Bank<sup>310</sup> and adopted this very argument in *United States v. Fisher*,<sup>311</sup> decided in 1805. That case involved an act of Congress that gave the United States, as the holder of contested bills of exchange, which had not been negotiated in the ordinary course of trade, an absolute preference over all general creditors when a debtor became bankrupt. Marshall upheld the statute as a necessary and proper means of effectuating Congress's power to pay the debts of the United States. Marshall disposed of the strict construction argument and adopted an extremely broad doctrine concerning Congress's choice of means:

In construing [the Necessary and Proper] clause it would be incorrect and would produce endless difficulties, if the opinion should be maintained that no law was authorised which was not indispensably necessary to give effect to a specified power.

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.

The government is to pay the debt of the union, and *must be authorised to use the means which appear to itself* most eligible to effect that object. It has consequently a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe.<sup>312</sup>

Marshall could have cited *Fisher* in *McCulloch* and disposed of strict constructionism as having already been rejected by the Supreme Court. But Marshall may have come to believe that *Fisher* swung the pendulum too far in the opposite direction.<sup>313</sup> The sentences following the rejection of strict construction can certainly be read as giving Congress practically unlimited power in the choice of means. The potentially unlimited scope of the Necessary and Proper Clause was reinforced by Justice Joseph Story in *Martin v. Hunter's Lessee*:<sup>314</sup>

The constitution unavoidably deals in general language... [Congress's] 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.*<sup>315</sup>

*McCulloch* provided the Marshall Court with the opportunity to qualify *Fisher* and *Martin* while rejecting altogether the compact theory and strict construction. More importantly, the compact theory needed to be demolished because it potentially had a second, and much more dangerous, corollary.

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310. See *infra* notes 378–80 and accompanying text.

311. 6 U.S. (2 Cranch) 358 (1805).

312. *Fisher*, 6 U.S. (2 Cranch) at 396 (emphasis added).

313. See CURRIE, THE FIRST HUNDRED YEARS, *supra* note 129, at 163.

314. 14 U.S. (1 Wheat.) 304 (1816).

315. *Martin*, 14 U.S. (1 Wheat.) at 326–27 (emphasis added).

## 2. Compact Theory, Nullification, and Secession

Marshall and Story were obsessed with the potential consequences of Tucker's compact theory. Indeed, Story devoted a large segment of his *Commentaries on the Constitution of the United States* to disparaging Tucker.<sup>316</sup> To Marshall and Story, whose views on constitutional law were close to identical, if not totally so,<sup>317</sup> Tucker's compact theory implicitly contained an inevitable corollary—that the individual states, as sovereign and independent, could refuse to obey and resist federal laws that they determined were unconstitutional and, in the last resort, could secede from the Union.<sup>318</sup> Nullification and secession were not abstract issues. During the exact period of time that *McCulloch* was being argued before the Supreme Court, the first phase of the Missouri crisis was exploding in Congress.

In December 1818, Speaker of the House Henry Clay submitted a motion for the admission of Missouri as a state. On February 13, 1819, Representative James Tallmadge, Jr., of New York, lit the fuse that set off Jefferson's famous "fire bell in the night,"<sup>319</sup> by moving to condition the admission of Missouri with a proviso that prohibited the further introduction of slavery and, after Missouri became a state, freed all children of present slaves upon reaching maturity.<sup>320</sup> The debate over this amendment was exceptionally bitter, involving as it did the combustible issues of slavery and political power.<sup>321</sup>

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316. 1 STORY COMMENTARIES, *supra* note 280, §§ 320–72, at 287–343.

317. WHITE, *supra* note 128, at 100–01, 382.

318. *Id.* at 493; *see* HOBSON, *supra* note 129, at 123 (“[Marshall’s] overriding concern was that strict construction would inexorably transform the union into a league of sovereign states—a belated triumph for antifederalism.”). Paul Nagel reminds us that for the first three decades of its existence under the Constitution, the Union was generally considered as an experiment, a *means* of establishing a nation rather than a nation itself. PAUL C. NAGEL, ONE NATION INDIVISIBLE: THE UNION IN AMERICAN THOUGHT, 1776–1861, at 14–31 (1964). As Nagel recounts, Jefferson (as Vice President) advanced the doctrines of nullification and interposition within ten years of the establishment of the new government. Five years later, Federalist opponents of the Louisiana Treaty stated publicly that secession was a remedy for this massive (and in their view unconstitutional) change in the United States; and within another ten years, Federalists threatened secession even more forcefully during the War of 1812. *Id.* Even George Washington viewed the new national government as an experiment that might fail. In his Farewell Address, Washington asked: “Is there a doubt whether a common government can embrace so large a sphere?” This was not a rhetorical question; his answer expressed as much concern as optimism: “Let experience solve it. . . . We are authorized to *hope* that a proper organization of the whole, with the auxiliary agency of governments for the respective subdivisions, will afford a happy issue to the experiment. *It is well worth a fair and full experiment.*” George Washington, Farewell Address (Sept. 17, 1796), in 1 MESSAGES AND PAPERS, *supra* note 288, at 205, 208 (emphasis added).

319. Letter from Thomas Jefferson to John Holmes (Apr. 22, 1820), <https://www.loc.gov/exhibits/jefferson/159.html> [<https://perma.cc/6ZMK-L9F5>].

320. GLOVER MOORE, THE MISSOURI CONTROVERSY 1819–1821, at 35 (1953).

321. Even with the Three-Fifths Clause, the South had lost control of the House of Representatives to the more heavily populated North. The Senate was almost evenly divided between free and slave states. If Tallmadge's amendment passed and was applied to the admission of all new states, the free states would have control of the Senate as well. 1 WILLIAM W. FREEHLING, THE ROAD TO DISUNION: SECESSIONISTS AT BAY 1776–1854, at 144–50 (1990).

Supporters of Tallmadge's amendment argued that Congress had the implied power to place conditions on the admission of Missouri as incidental to its express Article IV, Section 3 power to admit new states, and some invoked Congress's duty under Article IV, Section 4 to guarantee a republican form of government.<sup>322</sup> Southern members united in opposing the amendment. Relying on the compact theory and strict construction, Southern representatives maintained that Congress could only carry out the literal terms of Article IV, Section 3 and decide whether to admit a new state without attaching qualifications. Congress did not have any implied power to go beyond that literal language.<sup>323</sup> The opponents of Tallmadge's amendment also argued that it would violate the equal rights of the states and, with the emancipation of slaves following statehood and the Guarantee Clause justification, would endanger slavery within the existing states. They threatened disunion and civil war if Tallmadge's amendment was enacted.<sup>324</sup>

Nevertheless, Tallmadge's amendment and a bill admitting Missouri with this restriction passed the House on a sectional vote on February 16, 1819.<sup>325</sup> The Senate struck the Tallmadge amendment and, on March 2, 1819, voted to admit Missouri without restriction.<sup>326</sup> Later that day, the House voted again to restore the amendment and returned the matter to the Senate. The Senate adhered to its position, which started a new debate in the House in which Southerners again threatened disunion and civil war. But the House voted again in favor of Tallmadge's amendment, and "[t]he next day, March 3, 1819, the Fifteenth Congress adjourned, leaving the fate of Missouri still in doubt."<sup>327</sup>

Note the exact correspondence between the first phase of the Missouri crisis and the arguments and decision in *McCulloch*. The Bank's appeal in *McCulloch* was docketed in the Supreme Court on September 18, 1818,<sup>328</sup> shortly before Clay filed his motion to admit Missouri. Oral arguments in *McCulloch* were held between February 22 and March 3, 1819,<sup>329</sup> when the House floor was filled with arguments over compact theory and implied powers, and with threats of disunion and civil war. Tallmadge's incendiary amendment was passed by the House four times during this short period.<sup>330</sup> The Court's decision was issued on March 7, four days after Congress adjourned with the future of Missouri—and of the United States—still unresolved.

Unless this timing is incredibly coincidental, the Missouri crisis explains

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322. MOORE, *supra* note 320, at 41–45.

323. *See id.* at 46.

324. *Id.* at 46–50.

325. *Id.* at 47, 52–53.

326. *Id.* at 54–55.

327. *Id.* at 59.

328. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 506–07 (1922).

329. *See id.* at 507.

330. In addition to the three votes described in this Part, the House had passed the amendment, sitting as the Committee of the Whole, on February 15, 1819. MOORE, *supra* note 320, at 41, 47, 52, 59; *see also* KILLENBECK, *supra* note 47, at 115 (referring to the temporal relation between *McCulloch* and the Missouri crisis).

Marshall's determination to use *McCulloch* to discredit the compact theory, which was, at that moment, being used to justify secession. Thus, by addressing and resolving the two most important and urgent issues of Congress's implied powers—the constitutionality of the Bank and the lack of any constitutional basis for the compact theory and its corollaries—Marshall wrote a foundational opinion for his time and, as it has turned out, for the future.<sup>331</sup>

331. In a recent article that contends that *McCulloch* is not as aggressively nationalistic as it was ordinarily portrayed, Professor Schwartz places considerable reliance on Marshall's failure to address what Schwartz claims were the leading constitutional controversies of the day—internal improvements, a national power over the money supply, and the scope of the Commerce Clause. Schwartz, *supra* note 127, at 4–5, 24–50. A full reply to this thoughtful and provocative article would require another article. The following summarizes why I believe that Schwartz is wrong:

1. *Internal improvements.* According to Schwartz, Marshall must have been aware that “the most contentious political issue involving implied powers was . . . internal improvements.” *Id.* at 46. Although there were divisions within Congress over its power to legislate internal improvements, the real contest was between Congress and the three presidents of the Virginia Dynasty. Jefferson had announced that a constitutional amendment was needed for federally authorized internal improvements. President Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805) [hereinafter Jefferson, Second Inaugural Address], in 1 MESSAGES AND PAPERS, *supra* note 288, at 366, 367. However, he inexplicably signed the law establishing the Cumberland Road. When peace was restored following the War of 1812, Madison stressed the importance of establishing roads and canals throughout the country and said that this should be done by the national government. President James Madison, Seventh Annual Message (Dec. 5, 1815), in 2 MESSAGES AND PAPERS, *supra* note 288, at 547, 552–53. He urged Congress to create a national system of roads and canals under its existing authority or, if necessary, by a constitutional amendment. President James Madison, Eighth Annual Message (Dec. 3, 1816), in 2 MESSAGES AND PAPERS, *supra* note 288, at 558, 561. Congress agreed and passed a bill providing for internal improvements. But to just about everyone's amazement, Madison then vetoed it on his last day in office, asserting that Congress had no such constitutional power. See President James Madison, Veto Message (Mar. 3, 1817) [hereinafter Madison, Veto Message], in 2 MESSAGES AND PAPERS, *supra* note 288, at 569, 569. Monroe pledged in his inaugural address enthusiastic support for national roads and canals “proceeding always with a constitutional sanction.” President James Monroe, First Inaugural Address (Mar. 4, 1817), in 2 MESSAGES AND PAPERS, *supra* note 288, at 573, 577. Then Monroe told Congress that internal improvements were not within Congress's power and called for a constitutional amendment. President James Monroe, First Annual Message (Dec. 2, 1817), in 2 MESSAGES AND PAPERS, *supra* note 288, at 580, 586–87.

The constitutionality of federal internal improvements was certainly an important and festering issue, but there is scant evidence that it influenced the course of *McCulloch*. In the extensive reported arguments of counsel, internal improvements was mentioned only once, and then as a rhetorical device. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 368 (1819) (argument of Jones) (As one of a parade of horrors, Maryland's attorney argued that if creating corporations could be used to establish a bank, “it might also be exercised to create corporations for the purpose of constructing roads and canals; a power to construct which has been also lately discovered among other secrets of the constitution, developed by this dangerous doctrine of implied powers.”). Furthermore, internal improvements was not a pressing issue when *McCulloch* was before the Supreme Court. Although Speaker Henry Clay and some of his followers attacked Monroe's message, and a committee report in the House supported Clay, no bill was introduced to authorize federal roads or canals. CURRIE, THE JEFFERSONIANS, *supra* note 298, at 267–77. Instead, the House voted on four abstract resolutions on the scope of congressional power. *Id.* at 277–78. In terms of either its relevance to the *McCulloch* case or its urgency or importance, internal improvements pales in comparison to the Missouri crisis and the survival of the Bank. That issue could await future opinions, either by the Court or by Joseph Story in his *Commentaries on the Constitution*.

As it turned out, the Marshall Court was not presented with a case involving the constitutionality

### 3. Story, Marshall, and Lincoln

Marshall's decision to indict Tucker's compact theory—under the guise of responding to counsel's argument, but likely mindful that its dangerous potential corollary was a real threat to the Union—was not unprecedented. *Martin v. Hunter's Lessee*, decided only three years before *McCulloch*, upheld the constitutionality of Section 25 of the 1789 Judiciary Act, which gave the Supreme Court appellate jurisdiction over the state courts in federal question cases.<sup>332</sup> The issue directly implicated one premise of the compact theory—that the individual states had the ultimate authority to determine whether their laws were consistent with the powers that they had ceded to the federal government.<sup>333</sup> Judicial review of state laws by the federal courts was viewed as an anathema because those courts would predictably use that authority to expand the power of the federal government as a whole.<sup>334</sup>

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of federal internal improvements. But Story filled that gap by confirming Congress's authority both to fund roads and canals under the appropriations power and to construct them under the Commerce and Necessary and Proper Clauses. 3 STORY COMMENTARIES, *supra* note 280, § 1268, at 149–50 (appropriations power); *id.* §§ 1269–70, at 150–51 (commerce and implied powers). Story reiterated that federal internal improvements must be incidental to the exercise of an enumerated power, such as the Commerce Clause. *Id.* § 1271, at 151–52. He then stated: “To go over the reasoning at large would, therefore, be little more, than a repetition of what has been already fully expounded.” *Id.* §1271, at 152 & n.1 (citing *McCulloch*, 17 U.S. (4 Wheat.) at 406–07, 413–21).

2. *National power over the money supply.* Whether Congress could establish a national currency was debated intermittently in Congress, but no proposal was seriously considered (and to my knowledge, no bill had been introduced) for a national currency. Moreover, as developed later in this Article, a principal reason for rechartering the Bank was to exert influence towards uniformity in the currency markets, and Marshall would adopt Hamilton's aggregate theory of enumerated powers and uphold the Bank as a necessary instrument for administering the finances of the nation. *See infra* notes 418–423 and accompanying text.

3. *The Commerce Clause.* An exposition of the scope of the Commerce Clause would only have been necessary had the issues of internal improvements and a national currency been involved in *McCulloch*. The Supreme Court had not decided a Commerce Clause case prior to *McCulloch*. Although I am not suggesting that the Marshall Court was an exemplar of judicial restraint, opining on the outer limits of the Commerce Clause was wholly unnecessary. When that question did arise five years later, Marshall followed Hamilton in broadly construing the Clause. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), held that Congress could license the operation of a passenger ferry [!] under the Commerce Clause. This decision extended the Clause beyond buying and selling, trade, and traffic. Marshall's definition of commerce—“every species of commercial intercourse”—could hardly be broader. *Id.* at 193. And Marshall also followed Hamilton with an expansive interpretation of the power to “regulate”: “to prescribe the rule by which commerce is to be governed. This power . . . is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.” *Id.* at 196.

For an interesting post-*McCulloch* sequel on Congress's powers over internal improvements, see *infra* note 479.

332. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 351 (1816).

333. *See Kentucky Resolutions*, *supra* note 307, at 545 (“That the several states who formed that instrument, being sovereign and independent, have the unquestionable right to judge of the infraction . . .”); Madison's Report on the Virginia Resolutions, *supra* note 307, at 549–50 (asserting that, although judicial review by the federal courts should ordinarily be respected, the state legislatures have the ultimate authority to determine whether the federal government usurped state power).

334. *See WHITE*, *supra* note 128, at 126–27.

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The constitutionality of Section 25 turned on an interpretation of the scope of federal judicial power under Article III and Congress's power to enforce that Article. Justice Story<sup>335</sup> was writing in the wake of secession threats by New England Federalists, who had forcefully opposed the War of 1812 and had appropriated Tucker's theory to justify secession until the abortive Hartford Convention. Before addressing the merits, Story launched into a refutation of Tucker's compact theory and Jeffersonian strict construction that was aimed as much at his fellow New Englanders as at the theory's Virginian advocates. And, as Marshall would do later in *McCulloch*, Story explained that these introductory comments responded to the arguments of counsel.

Before proceeding to the principal questions, it may not be unfit to dispose of some preliminary considerations which have grown out of the arguments at the bar.

The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by "the people of the United States." There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. . . . [T]he people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions . . . .

The government . . . of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grow out of the context expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.<sup>336</sup>

These passages should look familiar because Marshall restated them in *McCulloch*: The Constitution was created by the people of the United States, not

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335 Marshall had publicly recused himself because of a financial conflict of interest, although he remained active in the case behind the scenes. *See id.* at 167–73. Justice Johnson concurred with a narrower opinion. *Martin*, 14 U.S. (1 Wheat.) at 362.

336. *Martin*, 14 (1 Wheat.) U.S. at 324–26 (quoting U.S. CONST. pmbl.). As in *McCulloch*, Story also asserted that the constitutionality of Section 25 was virtually settled by history: appellate review of state court decisions was common ground for both sides in the ratification conventions; Section 25 was passed by the First Congress and had been exercised for three decades (allegedly without objection). *See id.* at 351–52.

by the states. The government of the United States therefore derived its entire authority from the people. “Much more might the legitimacy of the general government be doubted, had it been created by the States.”<sup>337</sup> The Confederation had been an “alliance” of sovereign States, but the people “change[d] this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people.”<sup>338</sup> And then came the manifesto that Abraham Lincoln would restate more concisely and eloquently at Gettysburg: “The government of the Union, then . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.”<sup>339</sup>

Again following Story (and Hamilton), Marshall acknowledged that the national government is one of enumerated powers; but “the government of the Union, though limited in its powers, is supreme within its sphere of action,” and its actions are binding on the states.<sup>340</sup> Moreover, there was nothing in the Constitution, unlike the Articles of Confederation, that excluded implied or incidental powers. Implied powers were implicit in the Constitution so that Congress could effectively carry out its great powers. The scope of these powers—and therefore the extent of federal supremacy—could be determined only by a “fair construction” of the Constitution.<sup>341</sup> And who resolves competing powers of the federal and state governments? Not the states. “On the Supreme Court of the United States has the constitution of our country devolved this important duty.”<sup>342</sup>

### C. *The Scope of Implied Powers*

*McCulloch*’s emphatic (to use one of Marshall’s and Story’s favorite words) rejection of the compact theory and endorsement of nationalism was the bridge to a broad construction of Congress’s implied powers. If the states had created the Constitution and reluctantly ceded a defined and limited amount of their powers, a strict construction of those powers, including particularly the Necessary and Proper Clause, would seem essential to preserve state sovereignty and independence. However, if the “people of the United States” created the Constitution and vested “vast” and “great” powers in a government that would be “effective” and operate directly on the people for their benefit, then those powers should be construed broadly. Congress should, therefore, have considerable discretion in choosing the means by which those powers should be exercised to provide the most benefit to the people.<sup>343</sup> Under this nationalist view, the Constitution is not a legal code but an “outline” that enumerates vast

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337. *McCulloch*, 17 U.S. (4 Wheat) at 404.

338. *Id.*

339. *Id.* at 404–05.

340. *Id.* at 405.

341. *Id.* at 406–07.

342. *Id.* at 401.

343. *Id.* at 404.

powers of the government and, in order to be effective, contains implied powers that are within the broad discretion of Congress.<sup>344</sup> Broad, but not necessarily unlimited.

The similarity of this portion of *McCulloch* to Hamilton's opinion on the constitutionality of the First Bank (which itself synthesized the Federalist arguments of the First Congress) has been frequently noticed.<sup>345</sup> Marshall had studied the debates over the Bank in the First Congress and in the cabinet. Jefferson, Randolph, and Hamilton conducted the cabinet debate through private letters to Washington, and these letters had not been made public. When Marshall published the fifth volume of his biography of George Washington in 1807, he summarized the debates in his text<sup>346</sup> and took the extraordinary step of publicizing Hamilton's opinion<sup>347</sup> by appending a note setting forth that opinion at considerable length, with many of Hamilton's key paragraphs reproduced verbatim.<sup>348</sup>

Marshall was not alone in being so heavily influenced by Hamilton's opinion on the Bank. Joseph Story also drew from it extensively, citing it at least as much as *McCulloch*, in his *Commentaries on the Constitution* on the scope of Congress's incidental powers and the constitutionality of the Bank.<sup>349</sup> Story thought that Hamilton's opinion was so authoritative that he reproduced large portions of it (taking up more than twelve pages of his treatise in small print) to give that document wider circulation.<sup>350</sup>

The debates over the Bank in the First Congress and in Washington's cabinet are important not only as precedents, but they are also significant for understanding *McCulloch*.<sup>351</sup> Standing alone, some of Marshall's more important

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344. *Id.* at 407.

345. *See, e.g.*, HOBSON, *supra* note 129, at 122 ("Scarcely a passage in the first part of *McCulloch* could not be traced to Hamilton's advisory opinion or to some earlier writing, speech, or legal argument."); R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 292-93 (2001) ("Marshall also drew freely . . . and most notably, on Hamilton's Bank of the United States memorandum to Washington in 1791 in *McCulloch*."); Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J. L. & LIBERTY 581, 599 (2010) (commenting that Marshall could be accused of having "plagiarized" Hamilton's opinion).

346. 5 JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 293-97 (Philadelphia, C.P. Wayne 1807) [hereinafter MARSHALL, THE LIFE OF GEORGE WASHINGTON].

347. *See* 5 MALONE, *supra* note 288, at 358 n.35.

348. 5 MARSHALL, THE LIFE OF GEORGE WASHINGTON, *supra* note 346, app. note 3, at 3-11. Although Marshall purported to present both sides of the debate, he dealt cursorily with Jefferson's arguments and, in a much more extensive narrative, made clear that he agreed with Hamilton.

349. 3 STORY COMMENTARIES, *supra* note 280, §§ 1240-47, at 115-21 (incidental powers); *id.* §§ 1257-66, at 130-48 (the Bank).

350. *Id.* § 1261, at 135 n.4. Hamilton's opinion was also well known to the attorneys who argued *McCulloch*. *See* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 331-33 (1819) (argument of Hopkinson).

351. Although the *McCulloch* opinion is almost always identified as Marshall's, the seven-member Court included five Justices appointed by Presidents Jefferson and Madison. 1 WARREN, *supra* note 328, at 508-09. "[T]he opinions of William Johnson, [Marshall's] most independent colleague, suggest that all seven Justices shared a common view of the Constitution down to many



statements in *McCulloch* are fairly ambiguous. Those statements can be better understood by relating them back to Hamilton's blueprint. Moreover, although their opinions are substantially the same, there are some distinguishing features in Marshall's advancement of certain arguments that Hamilton did not make and his omission of others that he did. These discrepancies can also inform our understanding of the scope of congressional power sanctioned in *McCulloch*.

### 1. Madison's "Great Powers" Theory

By relating *McCulloch* to Hamilton's opinion and the 1791 debate over the Bank in Congress, we can better understand why Marshall referred to the express powers of Congress as being "great" and "vast" powers that were "distinct and independent" and constituted "great substantive and independent power[s],"<sup>352</sup> while referring to the implied powers as "incidental" and powers of "inferior importance."<sup>353</sup> Marshall explained the difference between the express and implied powers exactly as Hamilton and the Federalists in the First Congress had done: the express powers could be used generally for any purpose not prohibited by the Constitution, while the implied powers could be used only selectively to carry out the express powers.<sup>354</sup> The incidental powers of Congress are inferior in breadth, but not necessarily in importance. Thus, with respect to the incidental power of incorporation:

Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it.<sup>355</sup>

Madison's argument against the Bank in the First Congress was brought back in the challenge to the constitutionality of the Second Bank in *McCulloch*. Representing Maryland, Luther Martin invoked Madison's great powers theory and method of constitutional construction to limit the scope of Congress's implied powers.<sup>356</sup> Hamilton had refuted that argument by pointing to the creation of the territorial governments. In Note Three of *The Life of George Washington (Washington Note)*, Marshall restated Hamilton's argument as follows:

[The Territory Clause] implied the right to create a government; that is, to create a body politic or corporation of the highest nature . . . . Thus has the constitution itself refuted the argument which contends that, had it been designed to grant so important a power as that of erecting corporations, it would have been mentioned.<sup>357</sup>

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matters of mere detail." CURRIE, *THE FIRST HUNDRED YEARS*, *supra* note 129, at 62.

352. *McCulloch*, 17 U.S. (4 Wheat.) at 407–08, 411, 421.

353. *Id.* at 406, 408.

354. *Id.* at 410–11, 421–22.

355. *Id.* at 421–22.

356. *Id.* at 373–74 (argument of counsel).

357. 5 MARSHALL, *THE LIFE OF GEORGE WASHINGTON*, *supra* note 346, app. note 3, at 10.

Marshall used the same example in *McCulloch*:

The power to “make all needful rules and regulations respecting the territory or other property belonging to the United States,” is not more comprehensive, than the power “to make all laws which shall be necessary and proper for carrying into execution” the powers of the government. Yet all admit the constitutionality of a territorial government, which is a corporate body.<sup>358</sup>

But Marshall also added his own example that addressed both the idea of great powers and the associated method of constitutional construction. That example was the power of Congress to enact and enforce criminal laws.

So, with respect to the *whole penal code of the United States*: whence arises the power to punish in cases not prescribed by the constitution? All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress. *The right to enforce the observance of law, by punishing its infraction, might be denied with the more plausibility, because it is expressly given in some cases.*<sup>359</sup>

There are three provisions in the Constitution—two of which are in Article I, Section 8—that expressly authorize Congress to enact criminal laws.<sup>360</sup> Under Madison’s method of construction, the inclusion of these three express powers could mean that Congress lacks the power to enact and enforce criminal laws implemented to carry out other enumerated powers—an assertion Jefferson made in challenging the Sedition Act.<sup>361</sup>

To twenty-first century readers, it must seem obvious that the national government should have the power to punish those who violate its laws. But under the Articles of Confederation, Congress was denied the power to enact criminal laws, and there was no executive or judicial branch to enforce the laws. The states retained exclusive authority to enact and prosecute crimes, even those that threatened the interests of the Union.<sup>362</sup> The authority of a government to

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358. *McCulloch*, 17 U.S. (4 Wheat.) at 422 (quoting U.S. CONST. art. IV, § 3; *id.* art. I, § 8). Marshall also pointed to the Bank’s importance as “required for [the government’s] fiscal operations.” *Id.*

359. *Id.* at 416 (emphasis added).

360. U.S. CONST. art. I, § 8, cls. 1, 6 (“Congress shall have the Power . . . [t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States . . .”); *id.* art. I, § 8, cls. 1, 10 (“Congress shall have the Power . . . [t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . .”); *id.* art. III, § 3, cl. 2 (“Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.”).

361. Kentucky Resolutions, *supra* note 306, at 540.

362. For the trials of piracies and felonies on the high seas, Congress could “appoint” state courts to adjudicate those cases (assuming the states cooperated). ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 1. The general denial of federal criminal laws applied even to violations of the law of nations that could have led to serious friction with another country. An important example is the *De Longchamps* case. *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (Pa. Oyer & Terminer 1784). *De Longchamps* had threatened Marbois, the Consul General and Secretary of the French delegation, in the home of the French minister (which was the French embassy) and then assaulted Marbois on a public street. *Id.* at 111. Congress passed a resolution declaring that *De Longchamps*’s actions violated

use force against its citizens to compel compliance with the laws goes to the heart of sovereignty. It is certainly an important power—one of the most important that a government can possess.<sup>363</sup>

Marshall added an argument on the breadth of the Necessary and Proper Clause that neither Hamilton nor the Federalists in Congress had employed. Using his own method of constitutional construction, Marshall emphasized that the Necessary and Proper Clause was itself an enumerated power listed in Article I, Section 8, which grants powers to Congress. If the Convention had intended to restrict the scope of implied powers, it would have placed that clause (with appropriately modified language) in Article I, Section 9, where powers are restricted.<sup>364</sup>

Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been, or can be assigned for thus concealing an intention to narrow the discretion of the national legislature under words which purport to enlarge it.<sup>365</sup>

## 2. The Need for Broad Construction of the Implied Powers

The thrust of this portion of *McCulloch* is that, in order for the federal government to operate most effectively and beneficially for the people, Congress must have broad discretion in choosing the most appropriate means of carrying out its express powers. *McCulloch* does not require Madison’s “direct” relation of the implied to enumerated powers. On the contrary, regarding the breadth of the implied powers, Marshall states: “To employ the means necessary to an end,

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the law of nations and called on the states to prosecute him. Report of the Committee of Congress on a Note from the Minister of France Respecting an Assault and Battery on Mr. Marbois (May 28, 1784, adopted May 29, 1784), in 6 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 810, 810–11 (Francis Wharton ed., Washington, Gov’t Printing Office 1889). Fortunately, one of the states stepped up. De Longchamps was prosecuted by Pennsylvania, found guilty of violating the law of nations, fined, and sentenced to two years imprisonment. *De Longchamps*, 1 U.S. (1 Dall.) at 118.

363. Consider *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), and its aftermath. This was the first case in which the Supreme Court asserted jurisdiction under Section 25 to review the constitutionality of a state criminal law. “A case could not have been better designed to alarm the zealous guardians of states’ rights. That Virginia should be cited to appear at the bar of the Supreme Court to defend its right to enforce its own penal laws was regarded as a monstrous invasion of state sovereignty and independence.” HOBSON, *supra* note 129, at 127. Virginia’s lawyer asserted: “It would degrade the State governments, and [divest] them of every pretension to sovereignty, to determine that they cannot punish offences without their decisions being liable to a re-examination” in the Supreme Court. *Cohens*, 19 U.S. (6 Wheat.) at 321 (argument of Smyth); see also KILLENBECK, *supra* note 47, at 165 (“*Cohens* posed a much greater threat to state sovereignty [than *Martin*], as the state court decision that Virginia now tried to defend involved a matter of criminal law, an area within which state prerogatives were especially pronounced.”). The Supreme Court’s assumption of jurisdiction in *Cohens* was met with hostile resolutions of the Virginia legislature, see WHITE, *supra* note 128, at 505, and essays from Jeffersonians that exceeded in vehemence their attacks on *McCulloch*. See *id.* at 521–23.

364. See *McCulloch*, 17 U.S. (4 Wheat.) at 419–20.

365. *Id.* at 420. I discuss later why this argument may not be persuasive. See *infra* Section V.

is generally understood as employing any means calculated to produce the end . . . .”<sup>366</sup> And Marshall adopts the position of Hamilton and the Federalists in the First Congress—the degree of necessity is a question of political expediency and not a test of constitutionality.<sup>367</sup>

The practical necessity of affording Congress a broad choice of means traces directly back to Hamilton, in a passage that Marshall restated verbatim in his *Washington Note*<sup>368</sup>:

The means by which national exigencies are to be provided for, national inconveniencies obviated, national prosperity promoted, are of such infinite variety, extent and complexity, that there must, of necessity, be great latitude of discretion in the selection & application of those means. Hence consequently, the necessity & propriety of exercising the authorities intrusted to a government on principles of liberal construction.<sup>369</sup>

Story had developed this theme in *Martin* more profoundly by emphasizing the necessity of adapting legislative means to future circumstances and challenges:

The constitution unavoidably deals in general language. . . . The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages . . . . It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence 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.<sup>370</sup>

Again, this passage should look familiar because Marshall reiterated Story’s futuristic vision (via Hamilton)<sup>371</sup> in one of the more famous passages in

366. *Id.* at 413–14. Similarly, consider Marshall’s and Hamilton’s broad definitions of “necessary.” According to Hamilton, “*necessary* often means no more than *needful, requisite, incidental, useful, or conducive to.*” Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank, *supra* note 73, at 102. According to Marshall, “*necessary*” commonly means “no more than that one thing is convenient, or useful, or essential to another. . . . [and] is generally understood as . . . calculated to produce the end.” *McCulloch*, 17 U.S. (4 Wheat.) at 413–14.

367. *McCulloch*, 17 U.S. (4 Wheat.) at 423.

368. 5 MARSHALL, THE LIFE OF GEORGE WASHINGTON, *supra* note 346, app. note 3, at 10.

369. Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank, *supra* note 73, at 105.

370. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 326–27 (1816).

371. As Publius, Hamilton wrote that in construing the scope of congressional powers, we must bear in mind, that we are not to confine our view to the present period, but to look forward to remote futurity. Constitutions . . . [should be framed] with the probable exigencies of ages . . . . Nothing therefore can be more fallacious, than to infer the extent of any power, proper to be lodged in the National Government, from an estimate of its immediate necessities. There ought to be a CAPACITY to provide for future contingencies, as they may happen; and, as these are illimitable in their nature, it is impossible safely to limit

*McCulloch*:

The subject is the execution of those great powers on which the welfare of a nation essentially depends. . . . [T]heir beneficial execution. . . . could . . . be done . . . [only by] leav[ing] it in the power of Congress to adopt any [means] which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers . . . would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.<sup>372</sup>

## 3. Is the Choice of Means Unlimited?

The passages quoted above emphasize that Congress must have broad discretion in the choice of means. Furthermore, Marshall agreed with Hamilton that neither the importance nor the degree of necessity of an implied power is a criterion of its constitutionality. These are reasons for reading *McCulloch* as validating essentially unlimited congressional power: Congress may use any means that, in its judgment, might carry out an enumerated power. That appeared to be the standard set out in *Fisher*<sup>373</sup> and *Martin*.<sup>374</sup> Marshall also enunciated this standard—taken directly from Hamilton—in one of his concluding passages on the scope of congressional power: “[W]here the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.”<sup>375</sup>

However, as scholars have observed,<sup>376</sup> this passage cannot be read in isolation. Even in the famous passage about “ages to come,” Marshall states that Congress may adopt any means that “might be appropriate” and conducive to an

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that capacity.

THE FEDERALIST NO. 34, at 153 (Alexander Hamilton) (Terrence Ball ed., 2003).

372. *McCulloch*, 17 U.S. (4 Wheat.) at 415. Perhaps Marshall was thinking of Jefferson and Madison, the architects of the Louisiana Purchase and the 1807 embargo, as well as Story and Hamilton, when he wrote these words. It was natural that Madison and Jefferson would advocate limited congressional powers when they opposed Hamilton’s program to transform the economy. And it was also natural that they would push those powers to extreme limits when faced with unforeseen exigencies that provided huge opportunities for, or dangers to, the country.

373. *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805) (“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.”).

374. *Martin*, 14 U.S. (1 Wheat.) at 326–27 (“[The Constitution’s] 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.”).

375. *McCulloch*, 17 U.S. (4 Wheat.) at 423.

376. See, e.g., CURRIE, *THE FIRST HUNDRED YEARS*, *supra* note 129, at 163–64; KILLENBECK, *supra* note 47, at 119; WHITE, *supra* note 128, at 548–50; Schwartz, *supra* note 127, at 68–72.

end.<sup>377</sup> Moreover, he repeats this qualification, and some others, in his even more famous maxim:

[W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it . . . . Let the end be legitimate, let it be within the scope of the constitution, and all means which are *appropriate*, which are *plainly adapted* to that end, which are *not prohibited*, but consist with the *letter and spirit* of the constitution, are constitutional.<sup>378</sup>

The italicized terms in this maxim are four potential qualifications on the implied powers of Congress. And Marshall added a fifth in his warning about “pretexts”:

Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land.<sup>379</sup>

That Congress could not adopt means prohibited by the Constitution is self-evident. The requirement that the means must be “plainly adapted” to an end echoed Hamilton’s criterion that an implied power must have a “natural” or “obvious” relation to an enumerated power.<sup>380</sup> But “appropriate” is an ambiguous term, which was not defined. Nor did Marshall explain when a means is a “pretext”<sup>381</sup> or is inconsistent with the “spirit” of the Constitution. The extent to which these terms are applied broadly or narrowly determines the scope of congressional power.

Thus, *McCulloch* established that Congress has broad discretion in the choice of means. However, that discretion is not unlimited and may be subject to a number of qualifications. And, although Hamilton had insisted that the express and implied powers of Congress must be given a “liberal” construction, that term is conspicuously absent in *McCulloch* (as it was similarly absent in *Martin*). Thus, one might think that the Jeffersonians would have drawn some comfort from these potential limits. They did not. In the essay war that followed *McCulloch*, they insisted that the Supreme Court had sanctioned unlimited federal power.<sup>382</sup> Writing anonymously, Marshall denied that the Court had given a “liberal” construction to congressional powers but insisted that it had instead employed a

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377. *McCulloch*, 17 U.S. (4 Wheat) at 415–16.

378. *Id.* at 421 (emphasis added).

379. *Id.* at 423.

380. See Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank, *supra* note 73, at 106–07. He reiterated this criterion when he turned from general principles to the specific argument that the Bank was constitutional. *Id.* at 120.

381. This principle was suggested, without elaboration, by one of the Bank’s attorneys. *McCulloch*, 17 U.S. (4 Wheat.) at 387 (argument of Pinkney).

382. For a summary of these debates and public reaction to *McCulloch*, see WHITE, *supra* note 128, at 552–67, 933–35.

“fair” construction.<sup>383</sup>

Marshall’s constitutional opponents were not reassured, and for good reasons. He also wrote, more aggressively, that the Necessary and Proper Clause could not “be construed to restrain the powers of congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government.”<sup>384</sup> As for adopting a “fair” construction of the Constitution, Hamilton had begun his defense of the Bank’s constitutionality by claiming to apply a “fair” construction, which then morphed into a “liberal” construction.<sup>385</sup> In *Martin*, Story likewise insisted that the Court was adopting a “reasonable” construction of the Constitution<sup>386</sup> and then proceeded to interpret the Article III powers as exceptionally broad. Story and Marshall may not have used the term “liberal” in *Martin* and *McCulloch* respectively because that term was a fighting word to the Jeffersonians. But there was good reason to believe that a “fair” or “reasonable” construction meant a “liberal” construction, and Story would use the latter term candidly when describing the construction of implied powers in his *Commentaries on the Constitution*.<sup>387</sup>

Still, “liberal” is not the same as “unlimited.” Hamilton had placed restrictions on the implied powers—they must have a “natural” or “obvious” relation to specific or aggregated enumerated powers, and they must not be prohibited by the Constitution. The extent to which Marshall’s potential qualifications adopted Hamilton’s doctrine or further restrained congressional power depended on who would later interpret and apply them. Marshall left no doubt that the final authority would not be the states, but a department of the federal government—the Supreme Court of the United States. Thus, as G. Edward White remarked in his superb account of the Marshall Court, the Jeffersonians viewed *McCulloch* as an assertion of unlimited federal power, despite its potentially limiting language, because the federal government would determine the scope of its own powers.<sup>388</sup>

Of course, Marshall responded by emphasizing the independence of the federal judiciary.<sup>389</sup> But Jeffersonians were entitled to take this with more than a grain of salt. After all, Story had asserted in *Martin* that the Constitution “presumed” that state judges were so parochial and biased that they could not be

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383. John Marshall, *A Friend to the Union*, UNION (Philadelphia), Apr. 28, 1819 [hereinafter Marshall, *Friend to the Union*], reprinted in JOHN MARSHALL’S DEFENSE OF *MCCULLOCH V. MARYLAND* 91, 92 (Gerald Gunther ed., 1969); John Marshall, *A Friend to the Constitution*, ALEXANDRIA GAZETTE, July 5, 1819 [hereinafter Marshall, *Friend to the Constitution*], reprinted in JOHN MARSHALL’S DEFENSE OF *MCCULLOCH V. MARYLAND*, *supra*, at 187.

384. Marshall, *Friend to the Union*, *supra* note 383, at 97 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 420).

385. Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank, *supra* note 73, at 100 (“fair reasoning & construction”); *id.* at 103 (“liberal latitude”); *id.* at 105 (“liberal construction”).

386. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816).

387. 3 STORY COMMENTARIES, *supra* note 280, §§ 1246–48, at 120–22.

388. WHITE, *supra* note 128, at 558–62.

389. Marshall, *Friend to the Constitution*, *supra* note 383, at 211–12.

trusted to objectively apply the law in cases involving national interests.<sup>390</sup> Why would the converse not also be true—that, as federal officials, the Supreme Court Justices were prone to exalt federal over state authority? Indeed, this was one of the premises of Tucker’s compact theory.<sup>391</sup>

Notwithstanding the Jeffersonian skepticism, the limits on congressional power stated in *McCulloch* could indeed be applied more strictly than Hamilton’s criterion for constitutionality. Whether that is what the Court meant can be determined by reviewing how it applied those limits to the Second Bank.

#### D. *Revisiting the Constitutionality of the Bank*

In the fourth portion of *McCulloch*, Marshall ended where he started—the Second Bank of the United States is a constitutional exercise of Congress’s powers. This portion of the opinion is surprisingly short, and commentators have focused more on what it seemingly omits than what it says. From the apparent omissions, these commentators have argued that *McCulloch* does not actually support the conventional interpretation that the decision affords extremely broad implied powers to Congress. In their view, the omissions instead demonstrate that *McCulloch* is a moderate opinion that presents a conservative, defensive form of nationalism.<sup>392</sup>

##### 1. Enumerated Powers and the Bank

The first omission is said to be Marshall’s failure (or refusal) to identify the enumerated powers upon which the Bank was established. But Marshall did say early in the opinion: “Although, among the enumerated powers of government, we do not find the word ‘bank’ or ‘incorporation,’ we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies.”<sup>393</sup>

On its face, this passage appears to identify the enumerated powers that are relevant to the Bank’s constitutionality. However, according to Professor Schwartz, no one understood the passage that way, then or now.<sup>394</sup> But Joseph Story certainly did.<sup>395</sup> And Hamilton’s opinion on the constitutionality of the Bank identified these enumerated powers as the principal “specified powers of government” upon which the Bank was founded. In applying his doctrine of implied powers to the Bank, Hamilton asserted that the institution “has a relation more or less direct to the power of collecting taxes; to that of borrowing money; to that of regulating trade between the states; and to those of raising,

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390. *Martin*, 14 U.S. (1 Wheat.) at 346–47 (“The constitution has presumed . . . that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control . . . the regular administration of justice.”).

391. WHITE, *supra* note 128, at 126.

392. See *supra* notes 128–30.

393. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

394. Schwartz, *supra* note 127, at 61–62.

395. 3 STORY COMMENTARIES, *supra* note 280, § 1259, at 132–33.



supporting & maintaining fleets & armies.”<sup>396</sup> And Marshall restated these same powers as the foundation for the Bank in his *Washington Note*.<sup>397</sup>

It is of course possible that Marshall randomly picked these enumerated powers as illustrative of the “vast” powers granted to the national government. But their exact overlap with the four principal enumerated powers identified both in Hamilton’s opinion and in Marshall’s restatement of the Federalist position on the Bank is strong evidence that the apparent meaning of this passage is its real meaning.

2. The Bank as “Appropriate” and “Plainly Adapted” to . . .

a. *Specific Enumerated Powers*

Marshall had no trouble declaring that a corporation was an “appropriate” means to effectuate the enumerated powers. Corporations were “means not less usual, not of higher dignity, not more requiring a particular specification than other means” previously used by Congress and clearly constitutional.<sup>398</sup> What “other means”? Marshall was referring to the territorial governments, which are themselves corporate bodies.<sup>399</sup> Marshall’s use of the territorial governments as a benchmark denotes a very high bar for challenging the appropriateness of legislative means.<sup>400</sup>

But was the Second Bank of the United States “plainly adapted” to carrying out the enumerated powers that Marshall had identified? At this point, one would have expected Marshall to show how the Second Bank was related to the specific powers of laying and collecting taxes, borrowing money, regulating commerce, and raising and supporting the army and navy. He could have easily

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396. Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank, *supra* note 73, at 121. Although Hamilton did not separately include the power to declare war, he stressed that a national bank would be particularly useful, if not essential, for the borrowing power of the United States when the “nation is threatened with a war.” *Id.* at 124.

397. 5 MARSHALL, THE LIFE OF GEORGE WASHINGTON, *supra* note 346, app. note 3, at 11.

398. *McCulloch*, 17 U.S. (4 Wheat.) at 421.

399. *Id.* at 422.

400. See *supra* notes 206–07, 244–50 and accompanying text. Hamilton had stated that a means was inappropriate when it was “immoral” or “contrary to the essential ends of political society.” Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank, *supra* note 73, at 98. Marshall would echo this when he discussed the “spirit” of the Constitution in another case. See *infra* Part IV.D.5. Hamilton also applied the limitation that the means should not “abridge a preexisting right of any State, or of any individual.” Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank, *supra* note 73, at 107. Although the latter formulation might appear broad, Hamilton then invoked the Supremacy Clause and narrowed it to apply only to rights secured by the Constitution. *Id.* at 107–110.

Two Federalists had stated in Congress that the Bank was a “known and usual” means. In context, however, this was an argument that there was nothing out of the ordinary in creating a banking corporation (although actually there was). “Appropriate” could not be limited to “known and usual” means without contradicting the need to adapt new means to deal with unforeseeable future problems. And, like Hamilton and Marshall, the Federalists in Congress repeatedly invoked the corporate territorial governments as plainly appropriate and within the implied powers of Congress. See *supra* notes 154–156 and accompanying text.

done so by summarizing Hamilton's extensive demonstration.<sup>401</sup> Yet that showing is absent from the *McCulloch* opinion. There are two plausible explanations for this omission.

First, Marshall may have thought that the relation of the Bank to these enumerated powers was so obvious that it did not need elaboration. This suggestion may appear incredulous—unless one goes back to the *Washington Note*. After explaining in great detail the Federalist position on the scope of implied powers, and having identified the enumerated powers supporting Congress's establishment of the Bank, Marshall deemed it unnecessary to catalogue the actual relation of the means to the ends:

The secretary of the treasury next proceeded, by a great variety of arguments and illustrations, to prove the position that the [Bank] was a proper mean for the execution of the several powers which were enumerated, and also contended that the right to employ it resulted from the whole of them taken together. To detail those arguments would occupy too much space, and is the less necessary, because their correctness obviously depends on the correctness of the principles which have been already stated.<sup>402</sup>

Similarly, Marshall may have believed that the relation between the Bank and the specified enumerated powers was so apparent under the same principles—a matter that was familiar to all of the participants in the litigation—that it was unnecessary to restate the obvious.

There is a problem with this hypothesis. Hamilton was dealing with the constitutionality of the First Bank of the United States, which was chartered in 1791. *McCulloch* involved the constitutionality of the Second Bank of the United States, chartered in 1816. One of Maryland's attorneys practically conceded that "General Hamilton" was correct in his opinion on the constitutionality of the First Bank but maintained that circumstances had changed so much in the intervening twenty-five years that Hamilton's analysis was obsolete.<sup>403</sup> The primary change was the proliferation of state banks. When Hamilton proposed creating a national bank, there were only a few small state-chartered banks. That number grew exponentially to about 250 operating when the Madison administration proposed that Congress charter the Second Bank in 1815.<sup>404</sup> The paucity of state banks in 1791 meant that they were not a reasonable alternative to a national bank. But, the argument went, the major problems identified by Hamilton—the need to accumulate capital for productive purposes, to have currency notes that could facilitate trade nationwide, and to have a source for borrowing, particularly in the event of emergencies—could all be resolved in 1815 by federal regulations of the state banks. And, as G. Edward White has argued, the United States was able to fight the War of 1812 without a national

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401. Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank, *supra* note 73, at 121–32.

402. 5 MARSHALL, THE LIFE OF GEORGE WASHINGTON, *supra* note 346, app. note 3, at 11.

403. *McCulloch*, 17 U.S. (4 Wheat.) at 331–33 (argument of Hopkinson).

404. ROTHBARD, *supra* note 300, at 7.

bank.<sup>405</sup>

However, the differences in the factual conditions of 1791 and 1815 do not establish any material difference relevant to either the utility or constitutionality of the First and Second Banks. If it were true that a multiplicity of state banks could have been as effective as a national bank, why would James Madison, the principal opponent of Hamilton's bank, propose rechartering it? The Bank had performed remarkably well during its twenty-year charter. Albert Gallatin, Jefferson's and Madison's Secretary of the Treasury, was a strong supporter of the Bank because he recognized its fiscal importance. That importance grew with the proliferation of state banks. There was no uniformity in the regulation and operations of these banks, neither within nor among states, and the Bank of the United States performed an important function in establishing uniform standards.<sup>406</sup>

The Bank of the United States closed just before the War of 1812 began. The Treasury Department had difficulty borrowing money to fund the war (particularly because New England banks, which held most of the nation's specie and were located in the section of the country strongly opposed to the war, refused to lend),<sup>407</sup> and chaos in the currency markets caused a disintegration of the nation's fiscal system.<sup>408</sup> These calamities led the administration to propose that Congress charter the Second Bank of the United States.<sup>409</sup> This Bank would be much larger and more powerful than the First, with a charter providing capital of \$35 million compared to \$10 million for the First Bank.<sup>410</sup>

Marshall could have used these facts to refute the claim of changed circumstances due to the proliferation of state banks, and he did refer to the "embarrassments" caused by the Bank's closure in 1811.<sup>411</sup> But there was a more fundamental problem: Maryland's argument of changed circumstances flew in the face of Hamilton's repeated insistence that the degree of necessity was not a criterion of constitutionality. The "accidental" existence of state banks—established and regulated by different sovereigns—was constitutionally irrelevant.<sup>412</sup> This became Marshall's answer to the argument of changed circumstances: the degree of necessity "is to be discussed in another place."<sup>413</sup> As a matter of principle, the United States cannot depend on the states for the execution of its powers.<sup>414</sup> "But were it otherwise, the choice of means implies a

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405. WHITE, *supra* note 128, at 549.

406. ROTHBARD, *supra* note 300, at 1–2.

407. RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 556 (1990); ROTHBARD, *supra* note 300, at 3.

408. KETCHAM, *supra* note 407, at 588–89.

409. HAMMOND, *supra* note 45, 230–33.

410. *Id.* at 244.

411. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402 (1819).

412. Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank, *supra* note 73, at 104–06, 123, 133.

413. *McCulloch*, 17 U.S. (4 Wheat.) at 423.

414. *Id.* at 424; *see also* 3 STORY COMMENTARIES, *supra* note 280, § 1265, at 147 ("It would be

right to choose a national bank in preference to State banks, and Congress alone can make the election.”<sup>415</sup>

*b. An Aggregated Fiscal Power*

The above discussion provides an explanation of Marshall’s treatment of the Bank as related to several specific enumerated powers. But there is a second explanation. Here is how Marshall sustained the Second Bank’s constitutionality:

To use [a corporation], must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That [the Bank] is a convenient, a useful, and essential instrument *in the prosecution of its fiscal operations*, is not now a subject of controversy. All those who have been concerned *in the administration of our finances*, have concurred in representing its importance and necessity . . . .

But, were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place.<sup>416</sup>

This passage has puzzled scholars because Congress does not possess a specific enumerated power to prosecute the government’s “fiscal operations.”<sup>417</sup> However, Marshall’s position becomes clear if we return to Hamilton’s “aggregate view of the constitution.”<sup>418</sup> Hamilton had asserted that the specific enumerated powers relating to taxing, appropriating, borrowing, coining money, and regulating the value of foreign coin should be viewed in combination: “That it is the manifest design and scope of the constitution to vest in congress all the powers requisite to the effectual administration of the finances of the United States.”<sup>419</sup> The Bank was Congress’s agent in carrying out this aggregate power. In almost all principal commercial nations, national banks “are an usual engine in the administration of national finances, & an ordinary & the most effectual instrument of loans & one which in this country has been found essential.”<sup>420</sup> And Hamilton’s report explained at length why the national bank should be a privately owned and operated corporation.<sup>421</sup>

There is additional evidence that Marshall was adopting Hamilton’s doctrine of an aggregate fiscal power. In his *Washington Note*, Marshall stated that Hamilton had shown that the Bank was “a proper mean for the execution of the several powers which were enumerated, *and also contended that the right to*

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utterly absurd to make the powers of the constitution wholly dependent on state institutions.”).

415. *McCulloch*, 17 U.S. (4 Wheat.) at 424.

416. *Id.* at 422–23 (emphasis added).

417. *E.g.*, CURRIE, *THE FIRST HUNDRED YEARS*, *supra* note 129, at 164; Schwartz, *supra* note 127, at 59–60.

418. Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank*, *supra* note 73, at 132.

419. *Id.*

420. *Id.*

421. *See* Hamilton, *Report on a National Bank*, *supra* note 23, at 312–13, 321–22, 330–33.

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*employ it resulted from the whole of them taken together.*"<sup>422</sup> And Marshall's alter ego, Joseph Story, relied most heavily on this argument in sustaining the constitutionality of the Bank. Story restated Hamilton's aggregate theory, observed that national banks were the usual institutions charged with the administration of national finances, and asserted that the Bank was an essential instrument for administering the fiscal operations of the United States government. Story found no problem in relying on an aggregation of enumerated powers because the Bank "touches the administration of all the various branches of the powers of the government."<sup>423</sup>

If this explanation is correct (and it is very difficult to match Marshall's language with any other theory), Marshall adopted Hamilton's *broadest* theory of enumerated and implied powers. So much for the proposition that *McCulloch* is a decision of moderate and defensive nationalism.

Still, there are loose ends in the *McCulloch* opinion that need to be addressed.

### 3. The "Degree of Necessity" as a Political Question

Hamilton had argued strenuously that the degree of necessity of a measure was not a criterion of constitutionality. Marshall adopted this principle in *McCulloch*. He dismissed reliance on the state banks as inconsistent with federal supremacy. But the First and Second Banks of the United States were private banks with the federal government owning only twenty percent of the shares. Professor White makes the important point that by deeming "necessity" a political question, Marshall avoided having to show how a *private* bank was "necessary" to administer the federal government's fiscal policies and why it was better suited than the existing state-chartered banks.<sup>424</sup>

Marshall's rejection of the state banks as a constitutionally required alternative seems clearly correct. Congress might have been persuaded in 1815 that the state-chartered banks now possessed the necessary capital to carry out Hamilton's original vision. And Congress might have *chosen* to fashion some form of cooperative federalism that relied upon, but placed controls over, the state banks. As a political matter, that choice would be highly debatable (and prone to opposition from both nationalists and defenders of states' rights) but certainly defensible. However, *requiring* such a choice as a constitutional matter would make the United States dependent on state-created entities for the implementation of federal powers—a reversion to the ideology of the Articles of Confederation.

But this specific application of federal supremacy to justify the Bank does not establish the *general* proposition that the degree of necessity is *always* a political issue for Congress to decide. We should return to Hamilton's report for

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422. 5 MARSHALL, THE LIFE OF GEORGE WASHINGTON, *supra* note 346, app. note 3, at 11 (emphasis added).

423. 3 STORY COMMENTARIES, *supra* note 280, § 1262, at 135.

424. WHITE, *supra* note 128, at 548–50.

answers to this question.<sup>425</sup> The first issue that Hamilton addressed was the need for a national bank. He contended that national banks provide great advantages to nations, particularly in promoting trade and commerce and in being a source of borrowing. But at bottom, Hamilton's advocacy for a national bank was based on his vision of the future economic and political development of the country. Madison and the Southern bloc in Congress had a different vision.<sup>426</sup> They opposed Hamilton's mercantilism, saw the Bank as a danger to the republican virtue, and feared that it would enrich the North at the South's expense. Whether the Bank would be beneficial to the country was not a question that could be proven or disproven in litigation. It was a matter of opinion for legislators to decide.

Assuming that members of Congress were persuaded that a national bank was worth trying, the next question was what form the bank should take. There were three options: (1) a federally owned and operated agency, (2) a privately owned and operated bank with federal investment and oversight, and (3) the state-chartered banks. Each option involved an assessment of effectiveness, political ideology, and practical politics. From a purely judicial perspective, a federally owned and operated agency that functioned like a bank would be most closely related to the enumerated powers. But the public option had political drawbacks. Hamilton and his supporters were convinced that a public bank would not be credible to investors, who would be concerned that it would be operated less professionally and would be more prone to corruption than a private bank. Of course, Madison and other opponents saw a federally chartered private bank as a windfall for wealthy business people and an invitation to corruption (as did Andrew Jackson some forty years later when he vetoed the Second Bank's recharter largely for these reasons). But Madison's alternative—that Congress should utilize the state-chartered banks to carry out federal fiscal functions—raised its own questions of effectiveness, policy, and politics. Without some central fiscal authority, how could Congress be satisfied that their myriad fiscal operations would operate according to a centripetal, rather than a centrifugal, force? And strict federal regulations of the state-chartered banks likely would have been opposed as more of an infringement of state sovereignty and independence than the creation of a private national bank. Politically, direct federal regulation of the state-chartered banks was probably a nonstarter.

Congress's decisions to charter and recharter a privately owned and operated national bank were not merely the results of empirical debates on the "degree of necessity." As with most major legislation, necessity turned not only on a weighing of benefits and risks but also on policy preferences, ideology, and, yes, on politics. Congressional power over the choice of means is ordinarily a political question that is outside of the province of apolitical courts.<sup>427</sup> Hamilton

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425. See Part I.A for a more in-depth discussion of Hamilton's position.

426. See Part I.B for a more in-depth discussion of Madison's position.

427. I added the term "ordinarily" because there can be a judge-made exception when a statute presumptively violates a constitutional guarantee of liberty, property, or equality. Under prevailing Supreme Court decisions, the government's heavy burden of justification in such cases may include a

and Marshall were right.

#### 4. Legislative and Judicial Means and Ends

In *NFIB*, the Chief Justice rejected the Government's argument that the mandate was necessary to effectuate the important reforms in the Affordable Care Act because he saw it as a bootstrap method of inverting constitutional means and ends. According to Roberts, Congress does not have "the extraordinary ability to create the necessary predicate to the exercise of an enumerated power."<sup>428</sup>

This is the same argument that Madison made in challenging the constitutionality of the Bank—that the power to borrow money on the credit of the United States did not imply the power to create the institution from which the United States could borrow. That is, Congress would first create the Bank, and then it would justify the Bank as a means by which Congress can effectuate its borrowing power.<sup>429</sup> To Madison, this was a plainly improper inversion of means and ends. Marshall did not explain in *McCulloch* why Madison was wrong. Indeed, Marshall's warning about pretextual legislation<sup>430</sup> (which he also did not explain) could be used to fortify Madison's argument.<sup>431</sup>

Unlike the Bank, the mandate was enacted to make effective a statutory scheme (the reforms in the national health care insurance market) whose constitutionality under the Commerce Clause was not seriously questioned. There is certainly nothing novel about Congress enacting legislation that creates side effects that need to be remedied with means that Congress could not otherwise use.<sup>432</sup> And two of the Justices who would have struck down the entire

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showing of necessity. Because this Article deals with the scope of governmental *power*, and not the interpretation of constitutional *prohibitions*, I do not address the extent to which the use of necessity in the latter situations may be constitutionally permitted or required.

428. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2592 (2012).

429. See *supra* notes 63–66 and accompanying text.

430. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

431. Of course, there is a major conceptual difference in relating Marshall's pretext language to the enumerated and implied powers. The enumerated powers are plenary sovereign powers and can be used for any reason that is not prohibited by the Constitution. Marshall made this point in *McCulloch*, 17 U.S. at 405–06, and emphasized it in *Gibbons v. Ogden*, 22 U.S. (6 Wheat.) 1, 196–97 (1824). Marshall was once again following Hamilton. See *supra* notes 184–85 and accompanying text. On the other hand, the legitimacy of an implied power rests on its relation to an enumerated power. I understand Marshall's pretext language as applying only to the relationship of the implied to the enumerated powers.

432. Consider, for example, the venerable rate regulation cases. Congress has the power to set interstate transportation rates but does not have the general power to set rates for transportation that is wholly within a state. If Congress sets the interstate rates higher than the local rates, this can create the unfortunate result of relatively lower local costs and, therefore, greater demand for the locally shipped products. To eliminate this side effect of the interstate regulation, Congress can raise the intrastate rates to eliminate the competitive advantage for local commerce. *Hous., E. & W. Tex. Ry. Co. v. United States (Shreveport Rate Cases)*, 234 U.S. 342, 358–59 (1914). Congress likewise does not have the general power to change state statutes of limitations for state-created claims. But the grant of supplemental jurisdiction in the federal district courts (first by judge-made law and subsequently by congressional codification and expansion) created a side effect that needed rectifying. A plaintiff

Affordable Care Act wrote two years later that Congress could indeed use its incidental powers in that manner.<sup>433</sup>

But let us assume that the Bank or the mandate (more probably the Bank) represented an inversion of means and ends. Supreme Court Justices may be naturally sympathetic to the idea that this approach is constitutionally suspect because it is contrary to the way that *judges* decide cases. A cardinal principle of the judicial process is that a court first determines whether it has constitutional power over the dispute; only when subject matter jurisdiction is established may the court exercise its power to decide the merits. The legislative process operates in exactly the opposite way. Members of Congress set policy goals and then determine whether there is a constitutional power by which to achieve their objectives. In short, Congress almost always inverts ends (legislative goals) and means (constitutional power) in considering and enacting legislation. Courts do not possess the authority to supervise the internal operations of the legislature, let alone to demand that the legislative process conform to the judicial process.

##### 5. The “Spirit” of the Constitution

Marshall completed the “let the end be legitimate” maxim by stating that a means must not be prohibited and must “consist with the letter *and spirit* of the constitution.”<sup>434</sup> This is another tantalizing phrase that Marshall did not explain or apply directly to the Bank. Modern readers would probably understand this phrase as connoting underlying constitutional values. If that were Marshall’s meaning, then the scope of congressional power would depend in large part on the federalism balance that individual judges hold—a conflict between the view that Congress must be given great deference in enacting legislation and the view that a substantial amount of residual state sovereignty must be maintained against congressional overreaching in order to preserve limited government. This is the contest that divided the majority and dissent in *NFIB* in their applications of the Commerce and Necessary and Proper Clauses.

However, we actually know what Marshall meant by the “spirit” of the Constitution when he wrote *McCulloch*, and reliance on underlying values was not it. In a decision rendered contemporaneously with *McCulloch*, Marshall had

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might not bring her federal and state claims together under the supplemental jurisdiction statute out of concern that, if the state claim was dismissed, it might be extinguished by the running of the state statute of limitations. To make effective the grant of supplemental jurisdiction, Congress used the Necessary and Proper Clause to toll the state statute of limitations. *Jinks v. Richland Cty.*, 538 U.S. 456, 462–65 (2003). In both situations, the enactment of a federal statute was a predicate for enacting legislation under the Necessary and Proper Clause to make the statute effective.

433. *United States v. Kebodeaux*, 133 S. Ct. 2496, 2509 (2013) (Alito, J., concurring) (“When Congress, in validly exercising a power expressly conferred by the Constitution, creates or exacerbates a dangerous situation . . . , Congress has the power to try to eliminate or at least diminish that danger.”); *id.* (Scalia, J., dissenting) (“I do not agree [with Justice Thomas] that what is necessary and proper to enforce a statute validly enacted pursuant to an enumerated power is not itself necessary and proper to the execution of an enumerated power. It is my view that if ‘Congress has the authority’ to act, then it also ‘possesses every power needed’ to make that action ‘effective.’” (internal quotation marks omitted) (quoting *Gonzales v. Raich*, 545 U.S. 1, 36 (2005))).

434. *McCulloch*, 17 U.S. (4 Wheat.) at 421 (emphasis added).



warned that such a judicial approach was “dangerous in the extreme.” The oral arguments in *McCulloch* commenced on February 22, 1819. The Court’s opinion in *Sturges v. Crowninshield*<sup>435</sup> was issued three days earlier. That case involved difficult questions on the powers of states to enact bankruptcy or insolvency laws and whether a certain state law violated the Contracts Clause. In relying on the language and purpose of the Contracts Clause, Marshall had this to say about the “spirit” of the Constitution as a guide for holding the legislation unconstitutional:

[A]lthough the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.<sup>436</sup>

Applying this standard in *McCulloch* would inevitably lead to the conclusion that the creation of the Bank was not contrary to the “spirit of the Constitution.” No clauses in the Constitution created a literal inconsistency as applied to the Bank. The Necessary and Proper Clause confirmed the existence of implied powers,<sup>437</sup> and this was consistent with the Tenth Amendment, which omitted the word “expressly.”<sup>438</sup> The ordinary definition of “necessary” in the Necessary and Proper Clause<sup>439</sup> was reinforced by the stricter usage of “absolutely necessary” in Article I, Section 10.<sup>440</sup> And most importantly, any theory that broad residual state sovereignty could trump a law passed in pursuance of the Constitution was negated by the literal language of the Supremacy Clause.<sup>441</sup> Thus, so long as the Bank was “plainly adapted” to

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435. 17 U.S. (4 Wheat.) 122 (1819).

436. *Sturges*, 17 U.S. (4 Wheat.) at 202–03.

437. *McCulloch*, 17 U.S. (4 Wheat.) at 420–21.

438. *Id.* at 406–07.

439. *Id.* at 413–15.

440. *Id.* at 414–15.

441. *Id.* at 405–06. Legal positivism had become Marshall’s standard by the time that *McCulloch* was decided. Earlier, as a firm believer in natural rights, Marshall had attempted to infuse the protection of vested property rights into the Constitution. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), seemed to rest at least as much on vested rights as on the Contract Clause. The Georgia statute rescinding the earlier land grants was void “either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States.” *Id.* at 139.

carrying into effect congressional powers, its establishment would not violate the “spirit” of the Constitution.

#### 6. The Rational Basis Test

When *McCulloch* is analyzed alongside the Federalist principles on which it was based—particularly Hamilton’s opinion—the limits of congressional power are that the means used by Congress must not be prohibited by the Constitution and must be “plainly adapted” to an enumerated power. In Hamilton’s words:

If the end be clearly comprehended within any of the specified powers, & if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution—it may safely be deemed to come within the compass of the national authority.<sup>442</sup>

Under this standard, a tenuous relationship between a law and an enumerated power would not “safely” bring that means within the scope of congressional power. The relation between the gun-free school zone law and the regulation of interstate commerce in *United States v. Lopez*<sup>443</sup> would appear to be an excellent example. Yet four dissenters voted to uphold the law and accused the majority of violating the rational basis test, which is the conventional understanding of *McCulloch*’s constitutional standard.<sup>444</sup> But is the rational basis test actually required by *McCulloch*? The simple answer is no, because *McCulloch*’s requirement of a natural or obvious relation of the means to an end is more demanding than accepting any conceivable or hypothetical relationship.

However, as with practically every other thorny question raised by *McCulloch*, the simple answer may be too superficial. The rational basis test is a judicial construct that reflects the courts’ degree of deference towards Congress. Instead of requiring the government to prove that there is a natural or obvious relation between a means and an end, the rational basis test puts the burden on the party challenging the law to disprove such a relation. Marshall suggested such a standard in *McCulloch*:

The government which has a right to do an act . . . must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.<sup>445</sup>

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However, by 1819, the idea that natural rights were enforceable as the “spirit” of the Constitution had been discarded. Thus, in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), Daniel Webster’s principal argument was that New Hampshire’s legislative changes in the college’s charter violated natural rights. *Id.* at 557–88. His secondary argument was that the state had violated the Contract Clause. *Id.* at 588–98. Marshall’s opinion ignored Webster’s vested rights argument and rested solely on a construction and application of the Contract Clause. *See id.* at 627–28. The opinions in *Dartmouth College*, *Sturges*, and *McCulloch* were all issued in February and March of 1819.

442. Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank, *supra* note 73, at 107.

443. 514 U.S. 549 (1995).

444. *Lopez*, 514 U.S. at 603 (Souter, J., dissenting); *id.* at 615–17 (Breyer, J., dissenting).

445. *McCulloch*, 17 U.S. (4 Wheat.) at 409–10.

To an extent, *some form* of a rational basis test is necessarily required by *McCulloch*. Article I, Section 7 of the Constitution, which sets out detailed requirements for the enactment of federal legislation, does not require Congress to explain how a measure relates to an enumerated power or to make factual findings to justify such a relationship. Ordinarily, courts will have to make assumptions concerning the relation of a law to Congress's enumerated powers. Such a relation will often be apparent. When it is, the immediacy of the relation—that is, the number of steps between the implied and enumerated power—is irrelevant. The First Congress's enactments of the Tonnage and Lighthouse Acts<sup>446</sup> are examples of statutes that have a natural relation to interstate and foreign commerce even though the connection requires a chain of reasoning.<sup>447</sup>

Still, there is certainly room in *McCulloch* for judicial skepticism that goes beyond the pure rational basis test in cases where the relation between means and ends is tenuous and not apparent. Or, as with the Bank, a relationship between the means and ends may be obvious to some proponents of legislation but not to others, and certainly not to the opponents—and perhaps not to outside observers (such as judges). After all, think of how much ink Hamilton used to convince Congress and President Washington that the Bank had an obvious or natural relation to enumerated powers.<sup>448</sup> How should such cases be decided?

Hamilton's *Report on a National Bank*, which was requested by the First Congress and upon which it relied, provides a model. Few members of that Congress (and the general public) were familiar with banking, political economy, and the history of national banks in other countries. If obviousness were equated with first impressions, the idea that a privately owned and operated national bank would be related to Congress's powers to borrow, collect taxes, and regulate commerce would have been considered at least dubious, if not downright weird. Hamilton's report educated Congress that a private national bank was a natural measure that could indeed serve those functions. Of course, Madison and the Southern bloc were not persuaded, but that was a difference of opinion and ideology. The constitutional issue was not whether Hamilton or Madison was right in his conflicting views on the benefits and dangers of the Bank. The issue was whether an adequate demonstration had been made that

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446. See Part III.C.2. for a discussion of the Tonnage and Lighthouse Acts.

447. *But see* Beck, *supra* note 14, at 584 (advocating a relatively direct and immediate relationship between congressional means and constitutional ends); David Loudon, *When Do the Ends Justify the Means?: The Role of the Necessary and Proper Clause in the Commerce Clause Analysis*, 10 U. Mass. L. Rev. 294, 339–40 (2015) (adopting Beck's proposed doctrine that "[t]he Court should examine (1) whether Congress is really using an intrastate regulation to pursue an enumerated end or if it is simply using that as a pretext to bring about an end outside its authority, and (2) whether the regulation directly supports an enumerated power, or if it only does so through 'numerous intermediate or intervening causes'" (footnote omitted) (quoting Beck, *supra* note 14, at 612)).

448. See Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank*, *supra* note 73, at 121–34; Hamilton, *Report on a National Bank*, *supra* note 23, at 305–39.

the Bank had a natural relation to Congress's enumerated powers. On the constitutional issue, Hamilton was right.

When, usually following hearings, Congress thoughtfully investigates and shows (in the statute or in the legislative history) how the legislation is related to carrying out its enumerated powers, that showing should ordinarily satisfy the Necessary and Proper Clause. That is a lesson from the First Congress that was incorporated into *McCulloch*. As Mark Killenbeck stated: “[*McCulloch*] seems to impose on Congress an obligation to consider carefully what it does and make certain that the resulting legislation is both necessary and proper.”<sup>449</sup>

Consider *Lopez* and *United States v. Morrison*<sup>450</sup> under this approach. There was no apparently obvious or natural relation between the statutes in either case (establishing a gun-free school zone in *Lopez* and creating a federal remedy for gender-based violence in *Morrison*) and the regulation of interstate commerce. Treating the cases identically, the Supreme Court held each statute unconstitutional.

But the cases were not identical. In *Lopez*, the government's attorneys defended the nonapparent relationship of gun-free school zones and the regulation of interstate commerce by hypothesizing creative post hoc rationalizations for which there is no evidence that Congress ever considered. For that reason, the decision in *Lopez* is certainly defensible—that is, unless one adopts a pure rational basis judicial standard of review. In *Morrison*, on the other hand, Congress held extensive hearings and found, distressingly and probably to most people surprisingly, that gender-based violence against women was a pervasive national problem and that state and local governments were not providing effective remedies. Congress determined that the national epidemic of gender-based violence against women had a strong relationship with the regulation of interstate commerce and that a federal remedy was necessary.<sup>451</sup> In considering whether to enact a federal remedy for gender-based violence against women, Congress did exactly what *McCulloch* called upon it to do. *Morrison* was decided incorrectly.

Instead of following *McCulloch*, the *Morrison* Court announced a categorical doctrine governing Congress's power to regulate local conduct as a means of exercising its commerce powers—the local conduct must always be economic in nature.<sup>452</sup> This doctrine makes sense as a working rule of inclusion: local economic conduct, when carried out by many people, has an obvious relationship to the regulation of interstate commerce. The doctrine can also make sense as a working presumption of exclusion because noneconomic conduct does not have the same apparent relationship. The Court's error was in making the presumption of exclusion absolute and thereby creating a formalistic

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449. See KILLENBECK, *supra* note 47, at 119.

450. 529 U.S. 598 (2000).

451. See *Morrison*, 529 U.S. at 628–36 (Souter, J., dissenting) (summarizing the extensive congressional hearings, detailed findings, and relation of the federal remedial statute for gender-based violence to interstate commerce).

452. *Morrison*, 529 U.S. at 614–17.

distinction between economic and noneconomic activities. There is no a priori reason to believe that noneconomic activities can *never* have a relationship to interstate commerce that justifies federal remedial legislation. When Congress does its job correctly and determines that such regulation is necessary and that such a relationship exists, its remedial legislation is constitutional under the Necessary and Proper Clause.<sup>453</sup>

The Court's refusal to honor those determinations in *Morrison* represented an unfortunate and extraordinary lack of deference to the branch of government that is empowered by the Necessary and Proper Clause.

## V. THE CONSTRUCTION OF LEGISLATIVE POWERS

The Federalists in the First Congress, Hamilton, and Marshall refuted Madison's great powers theory by showing that it was inconsistent with such seminal legislative acts as the establishment of autonomous and executive-dominated territorial governments, recognition of an unrestricted presidential removal power, and enactment of a federal code of criminal laws. Adding the Louisiana Treaty (and its implementing legislation) and the Bank provides an impressive body of evidence rejecting the proposition that Congress's implied powers are constrained by the degree of their importance.

While this argument of rejection by example is strong, none of the opponents of Madison's great powers argument showed why this theory is doctrinally wrong. It rests on a method of constitutional construction that draws a dividing line between the enumerated and implied powers. An evaluation of this theory requires a deeper examination of how and why Congress's enumerated powers were constructed.

Edmund Randolph, a person who is not ordinarily identified as a profound constitutional thinker, was the participant in the Bank debates who exposed some of the doctrinal flaws in Madison's constructive argument. This Section builds on Randolph's insights and provides additional reasons why Madison's method of constitutional construction and the theory upon which it is based are doctrinally incorrect. Moreover, there is an alternative model that better explains the construction of the Article I legislative powers and the relation of enumerated and incidental powers.

### A. *The Imperfectly Drafted Constitution*

As Randolph had astutely observed, Madison's method of construction incorrectly presumes that the Constitution was so perfectly drafted that one could draw definitive conclusions from its "[s]tyle or arrangement, as being logically exact."<sup>454</sup> As a significant example of its imperfection, consider the

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453. This approach also has the virtue of answering the slippery-slope argument ("If Congress can do this, it can do anything.") that resurfaced in *Morrison*. *Id.* at 616–17. Of course, this is exactly the same argument that Jefferson launched against the Bank of the United States and that Jefferson's ideological followers launched against *McCulloch*.

454. Randolph, Additional Considerations, *supra* note 166, at 338. *See supra* notes 174–76 and

suspension of the writ of habeas corpus.<sup>455</sup> Although the Supreme Court has never squarely addressed the issue, the “overwhelming” view of judges and scholars is that only Congress, and not the President, may suspend the writ of habeas corpus.<sup>456</sup> This consensus is based largely on the placement of the Suspension Clause in Article I. As stated by one scholar:

The presence of the Suspension Clause in Article I is the most important evidence that the decision to suspend rests with Congress. While the Clause, written in the passive voice, does not itself identify who has authority to suspend, its placement in Article I reflects an assumption that Congress is the branch to which the authority belongs.<sup>457</sup>

The Suspension Clause’s placement in Article I is *an* indication that the suspension power is vested in Congress, but the importance of its placement is exaggerated. The placement argument would be settled if the suspension conditions were in an Article I, Section 8 enumerated power. For example, “Congress shall have the power to suspend the Privilege of the Writ of Habeas Corpus when in cases of Rebellion or Invasion the public Safety may require it.” But the suspension conditions were instead placed in Article I, Section 9. If all of the other prohibitions in Section 9 applied only to Congress, the necessary inference would be that the Suspension Clause is likewise a limitation on legislative power. However, while most of the Section 9 limitations are addressed to Congress, others limit or impose duties upon the executive branch (that no expenditures of public funds can be made except “in Consequence of Appropriations made by Law” and that regular statements of receipts and expenditures must be published),<sup>458</sup> or upon the legislative, executive, and

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accompanying text.

455. U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

456. Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 257–58, 258 n.13 (2014) (collecting references of judges’ and scholars’ views); *see, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 561–63 (2004) (Scalia, J., dissenting); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807); *Ex parte Merryman*, 17 F. Cas. 144 (Taney, Circuit Justice, C.C.D. Md. 1861) (No. 9487).

457. Barrett, *supra* note 456, at 258; *see also, e.g.*, *Merryman*, 17 F. Cas. at 148–49; Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 664–65 (2009) (“The text of the Suspension Clause and its placement in Article I strongly suggest that it recognizes an emergency power (albeit one that is strictly constrained by its own terms). To be sure, the Clause is framed in the negative and therefore merely implies that what it prohibits—namely, suspension in the absence of a ‘Rebellion or Invasion’—is permitted where those conditions exist. For this reason, scholars have observed that the suspension authority is best understood as ‘an ancillary power to implement one of Congress’s substantive powers that is relevant to the particular emergency.’” (footnotes omitted) (first quoting U.S. CONST. art. I, § 9, cl. 2; then quoting Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 600 (2002))).

458. U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”). The first of these provisions—on drawing money from the Treasury—is a prohibition on the executive that reinforces Congress’s fiscal powers. 3 STORY COMMENTARIES, *supra* note 280, §§ 1340–42, at 213–14. The second of these provisions—the Statement and Account Clause—appears to impose a duty on the executive,

judicial branches (that no titles of nobility shall be granted “by the United States”<sup>459</sup> and that no official of the United States may accept any title, appointment, or payment from a foreign State without the consent of Congress).<sup>460</sup>

Under comparative construction, it could follow that, because certain clauses in Article I, Section 9 restrain the powers of Congress *and* the President, the Suspension Clause likewise places limits on the powers of both Congress *and* the President. One could therefore conclude, through this method of construction, that the writ of habeas corpus may be suspended both by Congress (when exercising its Article I military powers) and by the President (when exercising his or her Article II commander-in-chief power). Although that conclusion would certainly have comforted Abraham Lincoln,<sup>461</sup> this exceptionally important question cannot be resolved through a method of constitutional construction alone. More is needed to demonstrate that the Constitution vested Congress, and not the President, with the power to suspend the writ of habeas corpus.<sup>462</sup>

Comparative construction is certainly a legitimate and useful tool for interpreting particular terms in the Constitution, but it is not a silver bullet.<sup>463</sup> The habeas example illustrates the wisdom of Randolph’s observation that comparative construction must be utilized with extreme care because it erroneously presumes that the “Constitution were ever so perfect, considered

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which is responsible for receiving and spending public money. It might also have been meant to impose an auditing duty on Congress but has not been understood that way, with the regular statements of accounts being compiled and issued by the Treasury Department. *Cf.* *United States v. Richardson*, 418 U.S. 166, 168 (1974).

459. U.S. CONST. art. I, § 9, cl. 8 (“No Title of Nobility shall be granted by the United States . . .”).

460. *Id.* (“[N]o Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”).

461. See Abraham Lincoln, Special Session Message (July 4, 1861), in 7 MESSAGES AND PAPERS, *supra* note 288, at 3221, 3226 (“Now it is insisted that Congress, and not the executive, is vested with this power; but the Constitution itself is silent as to which or who is to exercise the power; and as the provision was plainly made for a dangerous emergency, it can not be believed the framers of the instrument intended that in every case the danger should run its course until Congress could be called together . . .”).

462. The strongest (and, in my view, unanswerable) case for ultimate congressional authority to suspend the writ derives from the English history of parliamentary constraints on monarchical power that was well known to, and profoundly influential upon, the founding generation. English monarchs had claimed the prerogative power to suspend the writ, but that purported prerogative was eliminated by the Habeas Corpus Act of 1640, 16 Car. 1, c. 2, and the Habeas Corpus Act of 1679, 31 Car. 2, c. 10. It seems inconceivable that the Convention would have vested the President with a power that had been affirmatively denied to English monarchs for over a century. There is not a single example in the Constitution of a presidential power that is greater than its royal prerogative counterpart, as recognized in British law as of 1787. Robert J. Reinstein, *The Limits of Executive Power*, 59 Am. U. L. Rev. 259, 271–307 (2009).

463. For a modern critique of this methodology (and particularly “intratextualism”), see William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar’s Bill of Rights*, 106 MICH. L. REV. 487 (2007).

even as a composition.”<sup>464</sup> And even if done with extreme care, comparative

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464. Randolph, Additional Considerations, *supra* note 166, at 338. See *supra* notes 174–175 and accompanying text. A second example is found in the Necessary and Proper Clause itself. That clause gives Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [of Congress], and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, § 8, cl. 18 (emphasis added). In two original and sophisticated articles, John Mikhail argues that the italicized language of the Clause must mean that enumerated powers are not the sole source of governmental authority and that there are additional implied powers in Congress of indeterminate scope, perhaps including a general welfare power. John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature and Implied Powers*, 101 VA. L. REV. 1063, 1069 (2015) [hereinafter Mikhail, *The Constitution and Philosophy of Language*]; John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1057 (2014) [hereinafter Mikhail, *The Necessary and Proper Clauses*].

According to Mikhail, the Necessary and Proper Clause is a “precise constitutional text.” Mikhail, *The Necessary and Proper Clauses*, *supra*, at 1128. He reasons as follows: (1) the Clause refers to “[p]owers vested by this Constitution in the Government of the United States”; (2) however, “the Constitution does not expressly vest any powers in the government of the United States as such, as distinct from the powers it vests in its various departments or officers”; (3) hence, the italicized language in the Necessary and Proper Clause “must, therefore, be taken to refer to implied powers” that are independent of, and in addition to, the enumerated powers. Mikhail, *The Constitution and the Philosophy of Language*, *supra* at 1092–93 (quoting U.S. CONST. art. I, § 8, cl. 18).

Perhaps this reasoning is correct. However, this language in the Clause may not be “precise” (why should it be more precise than the terms “necessary” and “proper”?), and there are enumerated powers to which this portion of the Clause may naturally relate. At least one power is vested by the Constitution in the government of the United States as a whole: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and . . . against domestic Violence.” U.S. CONST. art. IV, § 4. Although phrased as a duty, this Clause necessarily connotes a national power (just as the Take Care Clause, which is phrased as a duty, connotes an executive power to enforce the laws). Other powers are vested in “the government” in the sense that they cannot be exercised either solely by Congress or by “any Department or Officer thereof”—the treaty and appointment powers in Article II, Section 2, which require joint action by the President and the Senate, and the major role of the President in the approval (or rejection) of legislation proposed by Congress. *Id.* art. I, § 7. Mikhail does have responses, Mikhail, *The Constitution and the Philosophy of Language*, *supra*, at 1094–96, 1094 n.101, 1096 n.105, but they do not contradict the normal understanding of powers vested in the government (recall, for example, that a treaty is a binding international agreement between the “government of the United States” and a foreign government).

Mikhail also presents an original historical treatment of the drafting of the Necessary and Proper Clause in the Convention. But he does not account for the absence of historical support in the ratification debates, and this undermines his thesis. Background historical facts in the ratification debates suggest a more limited reading of that portion of the Clause because (1) the Federalists did not claim that the Constitution vested independent implied powers in the federal government, and (2) it is barely possible that some of the state conventions would have ratified the Constitution if they had thought that Congress was being vested with such potentially all-embracing unstated powers. Moreover, Mikhail’s reliance on the Preamble as a source of implied powers was adamantly rejected by Joseph Story, who was no shrinking violet when it came to broadly interpreting federal power. 1 STORY COMMENTARIES, *supra* note 280, § 462, at 445 (“The preamble never can be resorted to, to enlarge the powers confided to the general government, or any of its departments. . . . It can never be the legitimate source of any implied power, when otherwise withdrawn from the constitution. Its true office is to expound the nature, and extent, and application of the powers actually conferred by the constitution, and not substantively to create them.”). Story accepted Hamilton’s theory of aggregate enumerated powers, 3 *id.* § 1262, at 134–35, but denied that Congress possessed a general welfare power, 2 *id.* §§ 906–07, at 369–71.



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construction is only one tool for interpreting the Constitution. Members of the First Congress understood and employed other important tools that continue to be utilized: “text, structure, history, purpose, practice, and the avoidance of absurd consequences.”<sup>465</sup>

*B. Express and Incidental Article I Powers*

The imperfect style and arrangement of the Constitution caution against accepting as definitive Madison’s doctrine of constitutional law, or any doctrine based solely on a particular method of constitutional construction. However, this does not fully answer the claim of Madison and his present-day supporters that *only* the great powers theory can explain why the Constitution expressly lists some seemingly incidental powers in Article I. That claim is based on a logical syllogism: The major premise is that many of the express powers of Congress are incidental to principal express powers and, therefore, did not have to be enumerated. The minor premise is that the only reason for enumerating such powers is that they were considered too important to be left for implication. The conclusion is that other similarly important powers that are incidental to principal express powers could have likewise been enumerated, but, having been left unstated, cannot be derived from implication. In short, they are not “proper” implied powers.

The following structural analysis of Article I powers shows that the major and minor premises—and hence the conclusion—are incorrect. An alternative model advanced in this Part provides better explanations for the relations between principal and seemingly incidental express powers, and for enumerating powers that could have been derived through implication. Respecting Randolph’s warning, I am not suggesting that this model provides *the* correct explanations for the structure of Article I powers. My submission is that the explanations that follow are more plausible and better grounded in constitutional development, structure, and history. But even the lesser conclusion—that these explanations are simply *as* plausible—would disprove the claim of Madison and his present-day supporters that the language and construction of the Constitution “condemn the exercise of . . . a great and important power, which is not evidently and necessarily involved in an express power.”<sup>466</sup>

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All that said, Mikhail presents original ideas that need to be seriously considered, and there may be nonenumerated powers that are incidents of sovereignty. Hamilton and Story thought so in their endorsement of “resulting powers.” But Hamilton’s one example (acquisition of territory by conquest) can just as easily be derived (and was) as incidental to the enumerated war and treaty powers. See *supra* note 289. And perhaps Mikhail’s theory can be connected to Hamilton and Marshall’s doctrine of aggregate enumerated powers. But the possible existence and identification of independent implied powers in “the Government of the United States” is a difficult question that cannot be determined through linguistic analysis or constitutional construction.

465. CURRIE, *THE FEDERALIST PERIOD*, *supra* note 233, at 117 (footnotes omitted).

466. 2 ANNALS OF CONG. 1899 (1791) (statement of Rep. James Madison).

### 1. The War Powers

To illustrate the validity of his great powers theory, Madison applied his method of comparative constitutional construction to the war powers. According to Madison, the powers to raise and support the army and navy, to regulate the military, and to call up the militia could all have been derived by implication from the express power to declare war. But these seemingly incidental powers were expressed because they were too important to be left for implication. It therefore followed that powers of similarly great import (such as the Bank) must be expressed in the Constitution and not derived from implication.<sup>467</sup>

Randolph identified the flaw in this reasoning in his second objection to Madison's theory—if some of the express military powers were in fact *independent* of the power to declare war, they could not have been derived by implication from that principal power. Take the power to raise and support the army.<sup>468</sup> There was considerable opposition to a standing army in peacetime.<sup>469</sup> But, as was emphasized time and again in *The Federalist*, a standing army was needed not only to deter and repel aggression from foreign powers, but also to suppress insurrections and to protect settlers from attacks by Native Americans.<sup>470</sup> The Constitution authorized Congress to raise a peacetime standing army that could be used for purposes beyond waging or deterring war with foreign nations. These uses of a standing army are independent of, and could not be implied from, the power to declare war.

Madison included the Militia Clause as another great power that was incidental to the power to declare war. Giving Congress the power to commandeer the state militias was indeed a great power that tested the boundaries of federalism, but it was also independent of any principal power. The Militia Clause is actually the clearest example of an independent military power because it states the purposes for which it can be exercised. Congress can “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”<sup>471</sup> Only the third of these purposes is incidental to the power to declare war; the other two relate to internal crises.<sup>472</sup>

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467. See *supra* notes 68–71 and accompanying text.

468. U.S. CONST. art. I, § 8, cls. 12, 13.

469. See THE FEDERALIST NO. 8, at 31–33 (Alexander Hamilton) (Terence Ball ed., 2003).

470. E.g., THE FEDERALIST NOS. 24, 27, 28 (Alexander Hamilton).

471. U.S. CONST. art. I, § 8, cl. 15.

472. Congress understood and implemented the breadth of these powers. In 1795, Congress authorized the President, on his own initiative, to call up the militia to repel actual or threatened invasions, suppress insurrections, and enforce the laws of the United States whenever those were being obstructed by combinations too powerful to be suppressed by ordinary means. Act of Feb. 28, 1795, ch. 36, 1 Stat. 424. In 1807, Congress authorized the President, again on his initiative, to employ the army and navy for the same purposes. Act of Mar. 3, 1807, ch. 39, 2 Stat. 443. There are two other express military powers in Article I, Section 8, Clause 11 that are also broader in scope than the power to declare war. Granting letters of marque and reprisal is a power that can be exercised in peace as well as war. Indeed, the Articles of Confederation gave Congress the power to grant letters of marque and reprisal “in times of peace.” ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1. Similarly, the power to make rules concerning captures on land and water applies in peace (consider piracy) as well

## 2. The Taxing Power

Professor Baude argues that the addition of the taxing power proves the validity of the great powers theory. He uses the same method of comparative constitutional construction as Madison. Because Congress has the incidental power to impose taxes and spend those funds to execute every enumerated power, Congress could carry out all of its powers and duties without an express power of taxation. Thus, only the great powers theory can explain why a power of such magnitude was enumerated rather than left to implication.<sup>473</sup>

Interestingly, Marshall described the taxing power in *McCulloch* as “a great substantive and independent power, which cannot be implied as incidental to other powers.”<sup>474</sup> Marshall was correct because the taxing power, as written, is both broader and narrower than powers to tax that would be derived incidentally from the other express powers.

Congress was given the power “[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”<sup>475</sup> This power contains two provisions. The first states the purposes for which taxes can be imposed and appropriated, and those purposes (called the spending power) extend beyond carrying out Congress’s enumerated powers. The second provision prescribes a limitation on the taxing power that would not exist if it had been derived through implication from the other enumerated powers.

Consider the first provision. Baude’s argument necessarily assumes Madison’s position that taxing to provide for the “general welfare of the United States” is limited to supporting the enumerated powers of Congress.<sup>476</sup> But Hamilton<sup>477</sup> and Story<sup>478</sup> argued that, by including the “general welfare” as an object of taxation, the Constitution created a spending power that is broader than, and independent of, the other enumerated powers.<sup>479</sup> The Hamilton-Story

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as war.

473. See Baude, *Rethinking*, *supra* note 105, at 1754–55; see also Nelson, *supra* note 109, at 1639–40 (making a similar argument about the taxing power).

474. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819).

475. U.S. CONST. art. I, § 8, cl. 1.

476. See 2 ANNALS OF CONG. 1896–97 (1791) (Madison’s speech on the Bank bill); Madison, Veto Message, *supra* note 331, at 569–70. Jefferson’s position was the same. See Jefferson, Second Inaugural Address, *supra* note 331, at 366–67.

477. Alexander Hamilton, Final Version of the Report on the Subject of Manufactures (Dec. 5, 1791), in 10 HAMILTON PAPERS, *supra* note 23, at 230, 302–04.

478. 2 STORY COMMENTARIES, *supra* note 280, §§ 909–27, at 371–95.

479. This position was adopted even by the strict constructionist President James Monroe in Views of the President of the United States on the Subject of Internal Improvements (May 4, 1822) [hereinafter Monroe, Views on Internal Improvements], in 2 MESSAGES AND PAPERS, *supra* note 288, at 713, 733–36. This document was a long polemic on congressional power (mostly the lack of such power) justifying Monroe’s veto of a bill to repair the Cumberland Road, with funding to be provided by tolls. Professor Schwartz discusses this interesting sequel in detail and argues that it supports his thesis that Marshall personally held an essentially moderate position on the scope of congressional power. Schwartz, *supra* note 127, at 81–88.

Monroe's *Views* reflected a strict constructionist philosophy of congressional power, adopting Jefferson's position that implied powers must be indispensably necessary to carry out an enumerated power. Hence, Congress could not undertake internal improvements under the war, postal, and commerce powers. In some respects, Monroe's views were even narrower than Jefferson's. For example, Monroe construed the Commerce Clause to provide Congress with the powers only to impose duties on foreign commerce and to prohibit duties on domestic commerce. Monroe, *Views on Internal Improvements*, *supra*, at 730–31. (Yes, you read that correctly.)

Monroe published his *Views* as a pamphlet and sent it to, among others, each of the Supreme Court Justices. As Schwartz relates, Justice Story politely declined to take any position on Monroe's positions. Schwartz, *supra* note 127, at 82, 85 (discussing President Monroe's pamphlet, and quoting Letter from Joseph Story to James Monroe (June 24, 1822), *quoted in* 2 WARREN, *supra* note 328, at 56). Purportedly speaking for the Court, Justice Johnson responded with an advisory opinion that the principles of *McCulloch* would "completely" authorize federal internal improvements as applied to post roads and military roads. *Id.* at 86–87 (quoting Letter from William Johnson to James Monroe, *quoted in* 2 WARREN, *supra* note 328, at 56–57). (Johnson did not mention the Commerce Clause as a source of power, perhaps because the Supreme Court had yet to decide *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). *See* 2 WARREN, *supra* note 328, at 56–57.) But Johnson clearly was not speaking for the entire Court, and Marshall sent a separate response that stated:

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 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.

Letter from John Marshall to James Monroe (June 13, 1822), *in* 9 THE PAPERS OF JOHN MARSHALL 236, 236 (Charles Hobson ed., 1998).

Marshall's response seems incomprehensible, as Monroe's expressed views contradicted Marshall's bedrock opposition to strict construction. But Marshall was a master of language and said that (1) there was not an "entire concurrence" in Monroe's views but they were "generally just," and (2) a "general power over internal improvement" was not advisable. As to the first, what was there in Monroe's *Views* that Marshall could like? Actually, there were two things. The first, and most important, was that Monroe forcefully asserted that the Constitution was a compact of the whole people of the United States and could not be altered by a state or the people of a state. Monroe, *Views on Internal Improvements*, *supra*, at 716–17. This was the constitutional doctrine that Marshall cared the most about, and Monroe presented as strong a repudiation of both secession and the right of individual states to have final authority on the meaning of the Constitution as one could expect from a member of the Virginia Dynasty. Second, Monroe broke with Jefferson and Madison on the spending power, declaring that appropriations from taxes were not restricted to carrying out the other enumerated powers and could be used to fund internal improvements that were beneficial generally, as opposed to just locally. *See id.* at 733–38. As David Currie observed: "From the point of view of state interests his broad interpretation of the spending power was far more calamitous than Clay's argument that internal improvements were incidental to the powers to raise armies, to regulate commerce, and to deliver the mail." CURRIE, *THE JEFFERSONIANS*, *supra* note 298, at 281. Marshall was wrong in thinking that internal improvements would not be adopted. Monroe's views broke the logjam, and Congress passed "bill after bill" to fund internal improvement projects (including repairs of the Cumberland Road), which Monroe signed. *Id.* at 282.

Finally, what did Marshall mean when he conceded that there was no "general power" over internal improvements? Schwartz sees this as evidence of Marshall's conservatism because such a power could clearly be implied from the Commerce and Necessary and Proper Clauses under a broad reading of *McCulloch*. Schwartz, *supra* note 127, at 87. But "general power" was Marshall-Story-speak for an independent enumerated power. That is, there was no "general power" to build roads and

position has prevailed,<sup>480</sup> and with good reason. In addition to the difficulty of interpreting taxing for the purpose of promoting the “general Welfare of the United States” as taxing to “carry out the express powers of Congress,” the action of the First Congress is again instructive.

The Tariff Act<sup>481</sup> was the first tax enacted by Congress. Many members of Congress wanted high tariff rates to promote domestic production, and no member argued that this was an unconstitutional use of the taxing power.<sup>482</sup> The protectionist arguments were successful: the rates for duties on certain imports were set arbitrarily high, and the text of the Tariff Act stated that its purposes were to pay debts, support governmental functions, and provide for “the encouragement and protection of manufactures.”<sup>483</sup> Promoting manufacturing can certainly benefit the “general Welfare of the United States,” but it just as certainly is not an express power of Congress.

The taxing power is also narrower than it would be through implication. All duties, imposts, and excises must “be uniform throughout the United States.”<sup>484</sup> This places a constitutional limitation on those taxes that would not be mandatory if they were implied from various express powers.<sup>485</sup> For example, the Foreign Commerce Clause does not require uniform legislation; hence, duties on imports incidental to that clause would not necessarily have to be uniform throughout the United States.

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canals as an end itself—that would be a general welfare power, which does not exist. Similarly, there was no “general power” to create a corporation as an end in itself. But that would not prevent Congress from building roads and canals (or creating corporations) to carry into effect enumerated powers. Thus, Joseph Story denied in his *Commentaries on the Constitution* that Congress has any “general” power to construct internal improvements, but that Congress may build roads and canals as incidental to its commerce, taxing, postal, and war powers. 3 STORY COMMENTARIES, *supra* note 280, §§ 1269–71, at 150–52. And his authority for this proposition? *McCulloch v. Maryland*. *Id.* §1271, at 151–52, 152 n.1.

480. In *United States v. Butler*, 297 U.S. 1 (1936), the Court described the Madison/Hamilton-Story debate and adopted the Hamilton-Story position that the spending power was not limited to carrying into effect the other enumerated powers. *Butler*, 297 U.S. at 65–66. In application, however, the decision seemed closer to Madison. In the following (mystical) year, the Court applied the Hamiltonian position with emphasis that Congress was primarily responsible for determining what was in the “general welfare” of the United States. *See, e.g., Steward Machine Co. v. Davis*, 301 U.S. 548, 587–90, 598 (1937) (upholding the Social Security tax for unemployment compensation); *Helvering v. Davis*, 301 U.S. 619, 645–46 (1937) (upholding the Social Security tax for pensions). *Sabri v. United States*, 541 U.S. 600 (2004), is a more recent example of how the spending power can be broader than the other enumerated powers. The case involved legislation that prohibited bribery of state and local officials of entities that receive at least \$10,000 in federal funds. The Supreme Court upheld the statute, as applied to a bribe that was unconnected with the federal program being funded, under the Spending and Necessary and Proper Clauses. The Court reasoned that (a) money is fungible, and (b) bribed officials were not reliable stewards of federally funded programs. This legislation could not have been enacted as incidental to any other enumerated power.

481. Act of July 4, 1789, ch. 2, 1 Stat. 24.

482. CURRIE, THE FEDERALIST PERIOD, *supra* note 233, at 57–60.

483. 1 Stat. at 24.

484. U.S. CONST. art. I, § 8, cl. 1.

485. Unless, of course, there was an additional constitutional prohibition. *See id.* art I, § 9, cl. 5 (“No Tax or Duty shall be laid on Articles exported from any State.”).

Because the express power of taxation is thus both broader and narrower than the scope of taxing powers that could be derived from implication, it is independent of the other listed powers. The enumeration of the taxing power does not support the great powers theory.

### 3. The Articles, the Separation of Powers, and the Constitution

The preceding discussion centers on seemingly incidental powers listed in Article I, Section 8 that are in fact independent powers. However, other express powers are truly incidental. That is, they are not independent and could have been derived through implication from a principal express power. To return to the military powers, the power to make rules for the government and regulation of the land and naval forces could be derived from express powers. Why, then, was a secondary power enumerated? Actually, the real question is why would it not have been enumerated? This legislative power was vested in the old Congress by the Articles of Confederation.<sup>486</sup> There was no plausible reason for omitting it from the Constitution.

Of course, had the military regulation power not been enumerated, it almost certainly would have been derived from implication. But that would have raised difficult and important questions. As with the habeas example, from what express power would military regulation be implied, and which branch would ultimately possess such power? The military regulation power could be implied from Congress's power to raise and support the armed forces *or* from the President's power as Commander in Chief of the armed forces. If the choice turned on whether regulating the military had been historically a legislative or executive power, the President's claim would be strong because this was a prerogative power of the King of Great Britain.<sup>487</sup> Thus, if not enumerated as a power of Congress in Article I, the President could claim that, as historically an executive power, it was an implied and exclusive Article II power. By lodging the military regulation power in Congress, the Constitution resolved a potential conflict between the legislative and executive branches.<sup>488</sup>

This analysis of the military powers can be generalized as providing two plausible reasons for the enumeration of powers that could have been implied from principal express powers. First, although the Constitution did not amend the Articles of Confederation, it built upon the earlier document. Practically every power vested in the United States by the Articles was listed as an express power of the United States in the Constitution.<sup>489</sup> Suppose that the Framers of

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486. ARTICLES OF CONFEDERATION of 1781, art. IX, paras. 1, 4.

487. THE FEDERALIST NO. 69, at 336–38 (Alexander Hamilton) (Terence Ball ed., 2003); Reinstein, *supra* note 462, at 299–303.

488. The same analysis could apply to the Letters of Marque and Capture Clauses, U.S. CONST., art. I, § 8, cl. 11, which were also prerogative powers of the monarchy. See also *supra* note 468 on the independence of these clauses from the power to declare war.

489. See THE FEDERALIST NO. 45 (James Madison). The powers of Congress in the Articles of Confederation that were vested in the United States by the Constitution are: spending “for the common defence or general welfare,” ARTICLES OF CONFEDERATION of 1781, art. VIII; “determining on peace and war,” “sending and receiving ambassadors,” “entering into treaties and alliances,”

the Constitution omitted certain powers that the United States possessed under the Articles and instead relied on recognizing those powers through implication. This could have led to restrictions on federal power through *negative* implications. In other words, not all of the national powers in the Articles are so obviously essential that they would have certainly been derived from implication. The omission of such powers from the Constitution could imply that the Convention meant to remove them from the authority of the United States.

The Convention largely avoided this problem of negative implication by transporting almost all of the Articles' powers into the Constitution<sup>490</sup>—but not every one. The Convention excluded Congress's power to issue "bills on the credit of the [U]nited States,"<sup>491</sup> and this became a strong argument against the constitutionality of congressional legislation making paper money legal tender for all debts.<sup>492</sup> And the Convention's failure to expressly include Congress's

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"establishing rules for . . . captures on land or water," "granting letters of marque and reprisal in times of peace," "appointing courts for the trial of piracies and felonies committed on the high seas," and for adjudicating all cases of capture, *id.* art. IX, para. 1; adjudicating "disputes . . . between two or more states," *id.* art. IX, para. 2; deciding cases in which land is claimed under different grants by two or more states, *id.* art. IX, para. 3; "regulating the alloy and value of coin," "fixing the standard of weights and measures," "regulating the trade and managing all affairs with the Indians, not members of any of the states," "establishing and regulating post-offices," "appointing all officers of the land" and naval forces, "commissioning all [military] officers . . . in the service of the united states, making rules and regulations for the government and regulation of the land and naval forces, and directing their operations, *id.* art. IX, para. 4; ascertaining "the necessary sums of money to be raised for the service of the united states," borrowing money on the credit of the United States, building and equipping a navy, agreeing on the number of land forces, *id.* art. IX, para. 5; adjourning Congress, publishing the proceedings of Congress "except such parts thereof relating to treaties, alliances, or military operations, as in their judgment require secrecy," and entering the yeas and nays of each delegate when desired by any delegate, *id.* art. IX, para. 7.

490. The Convention decided without controversy to retain the powers vested in the United States by the Articles of Confederation. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 5, at 47; 2 *id.* at 21–22. The difficulties were determining how those powers should be allocated among the three branches and deciding what *additional* powers should be vested in the United States.

491. 2 *id.* at 308–11.

492. The controversy over the legal status of paper money began early in the Civil War, when the country's coins and gold and silver reserves were quickly exhausted. Congress authorized the issuance of hundreds of millions of dollars in unbacked paper money and declared them to be valid as legal tender for the payment of debts. Following the war, the Supreme Court first held, in a 4–3 decision, that the Legal Tender Acts were unconstitutional as applied to preexisting contracts. *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 625–26 (1869). The following year, with two new appointees, the Court upheld (5–4) the Acts in all applications and overruled *Hepburn*. The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 553 (1870); *see id.* at 528–29, 528 n.\*. The issue was finally settled in the (third) *The Legal Tender Case*, 110 U.S. 421 (1884), an 8–1 decision holding that Congress could make paper money legal tender for the payment of both public and private debts, in times of peace as well as war—in short, the legal currency of the United States. *Id.* at 449–50. Justice Gray's response to the argument of negative implication was that omitting the power to issue bills of credit from Article I, Section 8 was not the equivalent of a *prohibition* because the reasons for the omission were "quite inconclusive" and because the First Congress had established the Bank of the United States and authorized it to issue bills of credit that would be honored as payment of debts to the United States. *Id.* at 443–45. Of course, proving that an act of Congress is not prohibited is not the same as proving that it is authorized. In the third and dispositive decision, Justice Gray struggled to connect the legal tender statutes to specific enumerated powers through the Necessary and Proper Clause and

power to admit foreign colonial territories as states made the acquisition of the Louisiana Territory constitutionally questionable to President Jefferson.<sup>493</sup> These two omissions were exceptions to the almost complete incorporation of Congress's powers under the Articles. Had such exceptions been the norm, the constitutional powers of the United States might have been substantially uncertain.

The separation of powers provides the second reason for enumerating powers that could have been derived through implication. Under the Articles of Confederation, all national power was vested in Congress. When the Convention decided to create the executive and judicial branches and determined that the separation of powers would be a first principle for the Constitution, it necessarily had to decide how the powers vested in the United States should be allocated among the three branches. Because many of the powers in the Articles had been prerogatives of the King of Great Britain,<sup>494</sup> the Convention's failure to list them as express powers of Congress could have led presidents to claim them as implied *executive* powers.<sup>495</sup> Assigning most of the preexisting powers to Congress<sup>496</sup> served an important purpose in structuring the separation of powers. The enumeration of powers in Article I is a structural guarantee of the separation of powers as well as of federalism.<sup>497</sup>

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ultimately upheld the statutes on the aggregate theory of federal fiscal powers that Hamilton first advanced in his opinion on the constitutionality of the Bank and that Marshall adopted in *McCulloch*. For a more conventional analysis of the approaches towards implied powers in the three legal tender cases, see Gerard N. Magliocca, *A New Approach to Congressional Power: Revisiting the Legal Tender Cases*, 95 GEO. L.J. 119 (2006).

493. See *supra* Part III.D.

494. The royal prerogatives included in the Articles were territorial acquisition, "determining . . . peace and war," "sending and receiving ambassadors," "entering into treaties and alliances," "establishing rules for . . . captures on land and water," "granting letters of marque and reprisal," ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1, "regulating the alloy and value of coin," "fixing the standard of weights and measures," "appointing all officers of the land . . . [and] naval forces," commissioning all military officers, making rules and regulations for the government, regulating the land and naval forces and directing their operations, *id.* art. IX, para. 4, building and equipping a navy, and determining the number of land forces, *id.* art. IX, para. 5; Reinstein, *supra* note 462, at 304–05, 304 n.276.

495. Justice Thomas employed this argument, in combination with a narrow application of the Necessary and Proper Clause, to maintain that the regulation of passports is exclusively an executive prerogative. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2097–2101, 2104–06 (2015) (Thomas, J., concurring in part and dissenting in part). This prompted a rejoinder from Justice Scalia that Thomas's approach would produce "a presidency more reminiscent of George III than George Washington." *Id.* at 2126 (Scalia, J., dissenting).

496. The Constitution did not vest all of these powers in Congress. For example, the President was given the power to appoint ambassadors and make treaties with the approval of the Senate, as well as the authority (or duty) to receive ambassadors and commission all the officers of the United States. U.S. CONST. art. II, §§ 2–3. The federal courts were given jurisdiction to decide controversies between states and cases in which land is claimed under different grants by two or more states. *Id.* art. III, § 2.

497. Reinstein, *supra* note 462, at 285–306; see also 3 WILLIAM WINSLOW CROSSKEY & WILLIAM JEFFREY, JR., *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 428–29 (1953).



#### 4. Express Powers that Limit Implied Powers

The preceding analysis does not explain the enumeration of the Bankruptcy and Intellectual Property Clauses.<sup>498</sup> These clauses were not in the Articles of Confederation and might have been derived incidentally from the commerce power.<sup>499</sup> However, as with the taxing power discussed above,<sup>500</sup> these clauses vest independent powers in Congress because they are simultaneously broader and narrower than implied powers. The clauses are broader because the laws they authorize need not be connected to interstate or foreign commerce. Lacking such a connection, bankruptcy and intellectual property laws could have suffered the same fate as the 1870 Trademark Act if enacted as incidental to the Commerce Clause.<sup>501</sup> More significantly, however, including these clauses as express powers served an important purpose of explicitly *limiting* the scope of powers that could be implied from the Commerce and Necessary and Proper Clauses.<sup>502</sup>

A federal bankruptcy power might have been implied from the Commerce Clause. But *the* Bankruptcy Clause requires that all “[l]aws on the subject of Bankruptcies” shall be “uniform . . . throughout the United States.”<sup>503</sup> This placed a constitutional limitation on the bankruptcy power that would not have existed had it been implied from the commerce power. Thus, in *Railway Labor Executives’ Ass’n v. Gibbons*,<sup>504</sup> the Supreme Court held that a statute giving priorities that affected only a single regional bankruptcy violated the Bankruptcy Clause. The Court also held that the statute could not be enacted under the Commerce Clause because “enact[ing] nonuniform bankruptcy laws pursuant to the Commerce Clause . . . would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws.”<sup>505</sup> By setting explicit limits on bankruptcy laws, the Bankruptcy Clause vested Congress with powers that were independent of the Commerce Clause.

Similarly, a power to grant monopolies could be derived incidentally from the commerce power. But *the* Intellectual Property Clause places two explicit constitutional limitations on monopolies granted to “Authors and Inventors” for their “Writings and Discoveries.”<sup>506</sup> Those *specific* monopolies must be (1) “[t]o

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498. U.S. CONST. art. I, § 8, cls. 4, 8.

499. Publius observed that the power of establishing bankruptcy laws is “intimately connected with the regulation of commerce,” THE FEDERALIST NO. 42, at 208 (James Madison) (Terence Ball ed., 2003), and that “[t]he States cannot separately make effectual” protections for the rights to useful inventions. THE FEDERALIST NO. 43, at 209 (James Madison) (Terence Ball ed., 2003).

500. See *supra* Part V.B.2.

501. See *In re Trademark Cases*, 100 U.S. 82, 96–99 (1879) (holding the 1870 Trademark Act unconstitutional because it protected trademarks without requiring a connection to interstate or foreign commerce).

502. See Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119.

503. U.S. CONST. art. I, § 8, cl. 4.

504. 455 U.S. 457 (1982).

505. *Ry. Labor Execs.’ Ass’n*, 455 U.S. at 469, 473.

506. U.S. CONST. art. I, § 8, cl. 8.

promote the Progress of Science and useful Arts,” and (2) “for limited Times.”<sup>507</sup> Thus, as with the Bankruptcy Clause, the Intellectual Property Clause is an independent power because it contains explicit limitations that would not necessarily apply if derived by implication from the commerce power.<sup>508</sup>

The bankruptcy and intellectual property examples illustrate how express powers can be more limited than implied powers. But even that point may give too much weight to the drafting style of Article I. The Bankruptcy and Intellectual Property Clauses could have been included within the Commerce Clause itself, rather than being listed separately. Consider, for example, the Article I, Section 8 express powers that include explicit limitations, such as the Taxing,<sup>509</sup> Raising Armies,<sup>510</sup> and Militia Clauses.<sup>511</sup> Alternatively, the Bankruptcy and Intellectual Property Clauses could have been placed in Article I, Section 9 as restraints on the commerce power. Examples of such clauses in Section 9 are the twenty-year stay on the use of the commerce power to end American participation in the international slave trade,<sup>512</sup> the prohibition of export duties,<sup>513</sup> and the prohibition of regulations of commerce that give preference to the ports of one state over another.<sup>514</sup>

The principle that express powers should be broader than implied powers is generally correct. But as an inflexible rule, it provides another example of Randolph’s warning against drawing firm conclusions on the erroneous assumption that the Constitution’s literary form is perfect.

Yet this analysis makes questionable Marshall’s contention in *McCulloch*

507. *Id.*; see *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966) (“The clause is both a grant of power and a limitation. This qualified authority, unlike the power often exercised in the sixteenth and seventeenth centuries by the English Crown, is limited to the promotion of advances in the ‘useful arts.’”); *United States v. Martignon*, 492 F.3d 140, 146 (2d Cir. 2007) (“[T]he ‘limited Times’ language . . . is a limitation rather than part of a grant of power . . .” (quoting U.S. CONST. art. I, § 8, cl. 8)).

508. In addition, including the patent power in Article I represents a decision on the separation of powers because the King’s prerogatives included granting monopoly patents for manufacturing inventions. Statute of Monopolies, 21 Jac. 1, c. 3, § 6 (1624); see Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550–1800*, 52 HASTINGS L.J. 1255, 1271–73 (2001).

509. U.S. CONST. art. I, § 8, cl. 1 (“[B]ut all Duties, Imposts and Excises shall be uniform throughout the United States . . .” (emphasis added)).

510. *Id.* art. I, § 8, cl. 12 (“[B]ut no Appropriation of Money to that Use shall be for a longer Term than two Years . . .” (emphasis added)).

511. *Id.* art. I, § 8, cl. 15 (granting Congress the power “to execute the Laws of the Union, suppress Insurrections and repel Invasions”); *id.* art. I, § 8, cl. 16 (limiting this power by “reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress” (emphases added)).

512. *Id.* art. I, § 9, cl. 1 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”).

513. *Id.* art. I, § 9, cl. 5 (“No Tax or Duty shall be laid on Articles exported from any State.”).

514. *Id.* art. I, § 9, cl. 6 (“No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.”).

that the Necessary and Proper Clause must be read broadly because it is an Article I enumerated power. As with the Bankruptcy and Intellectual Property Clauses, the Necessary and Proper Clause may also be both a grant of and limitation on congressional power. That is, it can be interpreted as explicitly authorizing Congress to enact legislation that carries out enumerated governmental powers while simultaneously placing restrictions on those laws—the means must be “necessary” and “proper.”

Marshall relied on the placement of the Necessary and Proper Clause as an enumerated power in Article I, Section 8, as opposed to a prohibition in Article I, Section 9.<sup>515</sup> But even if the Clause were a Section 9 prohibition,<sup>516</sup> that would still imply that Congress has the power to enact “necessary” and “proper” laws to carry its specified powers into effect.<sup>517</sup> The most that may be said of the Necessary and Proper Clause is that it codifies the existence of implied powers, without revealing the magnitude of those powers. Of course, this does not make *McCulloch* incorrect. It does, however, remove one weapon—the significance of the Clause’s Article I, Section 8 location—from Marshall’s otherwise impressive arsenal.

The model presented in this Article relates many of the seemingly subordinate enumerated powers to the Articles of Confederation and the separation of powers. It also shows that many of these powers contain express grants and limitations of congressional authority that would not exist if those powers had been derived through implication.<sup>518</sup> That the Constitution should not be interpreted as if it were a literary masterpiece cautions against claiming perfection in any particular method of constitutional construction. Nevertheless, this model provides plausible explanations for listing most, if not all, of the express powers of Congress that could be characterized as incidental to principal powers.<sup>519</sup> And this analysis is fully consistent with the principles of the First

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515. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819).

516. Marshall suggested that this alternative form would read: “In carrying into execution the foregoing powers, and all others . . . no laws shall be passed but such as are necessary and proper.” *Id.* (internal quotation marks omitted).

517. For example, the Section 9 restriction on banning the slave trade for twenty years implies that Congress has the power to enact such a ban at the end of that period. U.S. CONST. art. I, § 9, cl. 1. Similarly, the restriction on suspending the writ of habeas corpus implies a power to suspend the writ. *Id.* art. I, § 9, cl. 2. Marshall’s hypothetical alternative use of Section 9 for the Necessary and Proper Clause would not, however, have presented the ambiguity in the habeas clause of which branch of government possesses the implied power because only Congress can enact *laws*.

518. This analysis also provides an answer to Justice Thomas’s contention that prevailing Commerce and Necessary and Proper Clause jurisprudence renders redundant enumerated powers such as the Bankruptcy and Intellectual Property Clauses. See *United States v. Lopez*, 514 U.S. 549, 588–89 (1995) (Thomas, J., concurring).

519. It may not be possible to account for *every* express power that is seemingly incidental to a principal power. The Counterfeiting Clause may not fit within my framework. This clause was not in the Articles of Confederation, and protecting the value of federal securities and coins certainly could be secured by legislation incidental to the commerce, coining, and borrowing powers. Presumably because this provision was uncontroversial, Publius gave it “cursory” treatment, and it is not obvious why the Convention would have bothered to enumerate this power. See THE FEDERALIST NO. 42, at 205, 207 (James Madison) (Terence Ball ed., 2003). One possibility is that, by providing retroactive

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Congress, as well as those of Randolph and Hamilton. First, express powers that appear to be incidental may in fact be independent of a principal power on account of their different breadth, and not because of their intrinsic importance. Second, comparative constitutional construction does not provide a persuasive reason for precluding Congress from utilizing implied powers of equal or greater importance than those that are expressed.

#### CONCLUSION

The First Congress's creation of a privately incorporated national bank in 1791 was a huge expansion of federal power in the early Republic. In his opposition to the Bank, James Madison attempted to impose two significant constraints on the exercise of congressional powers. The first was that an implied power must be directly related to an enumerated power and therefore cannot be an inversion of constitutional means and ends. The second was that Congress cannot employ any means (such as a privately incorporated national bank) that are as or more important than the powers enumerated in the Constitution. After one of the two most important legislative debates on the structure of government in the First Congress and a subsequent debate in the executive branch, both Congress and our first President decided that the Bank was constitutional. They found it to be a "necessary" and "proper" means of carrying into effect the powers of Congress and rejected Madison's constraints on legislative power. The First Congress also enacted other important legislation based on very broad conceptions of the scope of congressional power that are inconsistent with both of Madison's proposed constraints.

In *McCulloch*, the Supreme Court upheld the constitutionality of the Bank and "emphatically" rejected the Jeffersonian compact theory of the Constitution, including its corollary of strict construction and its potential corollary of nullification and secession. The Court thus issued an opinion on the two most important and pressing issues of the time.

*McCulloch* validated the actions of the First Congress and established that the implied powers of Congress were largely a matter of legislative discretion, although that discretion was not unlimited. The actual extent of the limitations imposed by *McCulloch* are best understood by connecting Marshall's opinion to the 1791 debates in Congress and in the cabinet, particularly to Hamilton's authoritative opinion on the Bank's constitutionality, and to other actions of the First Congress. Under *McCulloch*, an act of Congress is constitutional if it is not prohibited by the Constitution and, affording Congress an appropriate degree of deference, has a natural or obvious relation to an enumerated power or an aggregate of enumerated powers.

Following Hamilton's lead, *McCulloch* rejected constitutional criteria that would require the showing of a direct relation between a law and an enumerated power; that the law was necessary (whether standing alone or in comparison to

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protection for the "Securities and current Coin of the United States," U.S. CONST. art. I, § 8, cl. 6, the Clause assured the continuing value of property under the new Constitution.

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other available means); that the law was too important to be classified as an implied power; or that the law violated underlying values of residual state sovereignty that were part of the “spirit” of the Constitution.

Marshall and Hamilton were correct that the degree of necessity is a question of political expediency. The choice of means results from assessments of factual circumstances, political ideologies, and practical politics that are distinctively legislative issues. Moreover, any constitutional doctrine that questions a law because it is perceived by judges to represent an inversion of means and ends reflects a basic misunderstanding of the legislative process and seeks to impose the judicial process on Congress.

In upholding the Bank, which was no ordinary exercise of implied powers, Marshall ultimately adopted the broadest theory of congressional power advanced by Hamilton—that the Bank has a natural relation to the aggregation of enumerated powers that provide Congress with the authority to determine the fiscal operations of the United States. The Bank was Congress’s instrument for administering its aggregate fiscal power. Marshall used a “fair” construction of the Constitution that is actually liberal and aggressively nationalistic.

Finally, the Federalists in the First Congress, Hamilton, Randolph, and Marshall, were all correct in rejecting Madison’s great powers theory. That theory is based on a flawed construction of the enumerated powers in Article I, Section 8. The examples of seemingly incidental enumerated powers advanced by Madison and his present-day scholarly supporters do not withstand analysis because those powers are independent of, and could not be derived from, the principal enumerated powers. An alternative theory of constitutional construction—based on the incorporation of powers afforded Congress under the Articles of Confederation, the separation of powers, and the inclusion of specific grants and limitations of authority in the enumerated powers—better explains how and why Section 8 was constructed and the relation of the enumerated and implied powers.

The constitutionality of federal legislation is not inversely proportional to its importance. Great national problems sometimes require solutions by Congress’s use of great incidental powers. As Fisher Ames argued in defense of the Bank: “Not exercising the powers we have, may be as pernicious as usurping those we have not.”<sup>520</sup> Even Thomas Jefferson, the outstanding advocate of strict constructionism, came to this understanding with the Louisiana Treaty and its implementing legislation. Whether the exercise of extraordinary implied powers in any given situation is good or bad for the country should be the subject of intense political debate and will ultimately be determined by history. But as a constitutional matter, one thing should be clear: the decision to use great incidental powers belongs to Congress.

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520. 2 ANNALS OF CONG. 1905 (1791).