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Inherent National Sovereignty Constitutionalism: An Original Understanding of the U.S. Constitution

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Article

**Inherent National Sovereignty
Constitutionalism: An Original
Understanding of the U.S. Constitution**

Robert J. Kaczorowski[†]

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This Article makes several boldly novel claims. It presents an original understanding of the United States Constitution that seems to have been forgotten. This understanding is predicated on the assumption that the national government is a sovereign government and that Congress, as a sovereign legislature, possesses the legislative powers that sovereign legislatures possess. I call this theory inherent national sover-

eignty constitutionalism. This theory of the Constitution defined “enumerated powers” not only semantically, but as a list of powers the Constitution delegates to Congress and to which Congress is limited. Adherents of inherent national sovereignty also understood “enumerated powers” as a statement of ends and objects for which Congress may exercise its inherent legislative powers. In addition to the enumerated powers of Article I, the inherent national sovereignty theory also understood the Constitution’s Preamble and other clauses that might require federal action as additional delegations of ends and objects that authorize the federal government to exercise its inherent legislative powers to achieve.

According to the inherent national sovereignty theory, Congress, like the British Parliament after which it was somewhat modeled, possesses the primary authority to interpret the Constitution, including the scope of its legislative powers and the discretion of when and how to exercise them. Proponents of this theory consequently understood the Constitution as a dynamically evolving framework of government whose meaning would develop over time through the political process and the specific actions taken by Congress and the executive branch of the federal government. When the meaning of a constitutional clause or power was disputed or was ambiguous, advocates of inherent national sovereignty constitutionalism looked to Congress to resolve the dispute or to clarify the ambiguity by interpreting the disputed text in accord with other clauses of the Constitution and/or relevant political practice. Ultimately, however, the people are the final authority and arbiters of constitutional meaning, as this understanding is predicated on the theory of popular sovereignty.

The inherent national sovereignty theory of American constitutionalism relegated the Supreme Court to a secondary, deferential role in interpreting constitutional meaning and the scope of constitutional powers. Its role was to affirm the constitutionality of congressional laws unless Congress’s action is explicitly prohibited or explicitly reserved to the states or to the people. The Court, in the words of Chief Justice John Marshall, was authorized to void an act of Congress only if the act was a “bold and plain usurpation” of legislative power.¹ In the opinion credited with creating the Supreme Court’s power of judicial review, *Marbury v. Madison*, the Chief Justice repeatedly spoke

1. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819).

of a congressional act as “repugnant” to the Constitution before the Constitution authorized the Court to void the act.² Indeed, the Chief grounded the Court’s power of judicial review, in part, on a theory of inherent judicial power when he stated that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”³

The nature of inherent national sovereignty constitutionalism just described appears to be oxymoronic. The ideas of inherent powers and constitutionally delegated powers appear to be mutually exclusive. How can a government possess inherent powers and also be limited to delegated powers? Even proponents of inherent national sovereignty constitutionalism readily acknowledged that the United States government is a government of limited powers, of constitutionally delegated powers. They reconciled these two apparently irreconcilable ideas by limiting the federal government’s authority to exercise inherent sovereign powers to those that are appropriate to achieve the objects and ends delegated to the federal government in the enumerated powers of Article I, the Preamble, and other clauses in the Constitution.

Proponents of inherent national sovereignty constitutionalism asserted this understanding of the Constitution in support of congressional legislation that was opposed by advocates of another “original” understanding of American Constitutionalism. Many early Americans asserted a states’ rights oriented, strict construction constitutionalism and insisted that the meaning of the Constitution’s text is fixed and should be strictly interpreted to limit the powers of the national government to those that are enumerated in Article I and those unenumerated powers required to carry enumerated powers into effect. It is this strict construction constitutionalism that today’s “new originalists” claim to be *the* original understanding of the Constitution.⁴

But the assertion of inherent national sovereignty constitutionalism in the political and legislative debates in our early history over the meaning of the Constitution and how and by whom the Constitution should be interpreted is irrefutable evidence that strict construction constitutionalism was not the on-

2. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138, 176, 177, 180 (1803).

3. *Id.* at 177.

4. There is substantial scholarly literature on the New Originalism. See for example the works cited in the papers published in Symposium, *The New Originalism in Constitutional Law*, 82 *FORDHAM L. REV.* 371 (2013).

ly original understanding of the Constitution. Today's "new originalists" use a theory of constitutional construction that is founded on an assumption that is contradicted by the historical evidence presented within, namely, that they are embracing an understanding of the Constitution that was *the* general understanding of the Constitution. Moreover, proponents of inherent national sovereignty constitutionalism often won these constitutional debates. Indeed, the Federalist Party of Alexander Hamilton, the principal initial proponents of inherent national sovereignty constitutionalism, dominated the federal government from 1789 to 1800, and their theory of the Constitution was adopted in Congress and embraced by the Supreme Court on occasions long after they ceased to exist.

This Article will demonstrate that early Congresses and presidential administrations asserted the inherent national sovereignty theory and applied it as constitutional authority for actual decisions they made and actions they took by examining the debates around Congress's incorporation of the First and Second Banks of the United States. Proponents of these corporations rejected opponents' argument that Congress, as a legislature whose powers are limited to those enumerated in Article I, semantically understood, does not possess the power of incorporation because this power is not expressly or even impliedly delegated to Congress. Bank proponents answered that Congress, as a sovereign legislature, possesses the power of incorporation as one of the sovereign powers that inheres in all sovereign governments. However, bank proponents acknowledged that Congress may exercise this power only to achieve the ends or objects delegated to it by the Constitution. They thereby reconciled the government's inherent sovereign powers with the theory that its powers are limited to those delegated by the Constitution. They consequently distinguished the federal government as a government of limited powers from the sovereign governments of other nation-states that are authorized to exercise their sovereign powers generally, without such limitations.

The research on which this Article is based yields another striking revelation regarding the validity of original understandings of the Constitution, namely, that constitutional interpretations were as much an expression of economic, financial, geographical, and political interests as they were intellectual commitments to textual meanings and constitutional values. This will be seen in the interpretations of specific individuals and groups, such as James Madison and the Demo-

cratic Republican Party that he, with Thomas Jefferson, founded, as well as Hamilton's Federalists, who asserted or opposed constitutional interpretations at one moment in time and then adopted opposite interpretations at a later time when the change served their interests. The practical necessity for congressional action to meet a particular national need or a desired national objective often determined individuals' understandings of the Constitution and of congressional power; at times practical necessity overrode individuals' doubts regarding the Constitution's delegation of legislative authority for a particular action. The evidence presented in this Article strongly suggests that, when the federal government was up and running and political decisions had to be made, original understandings of the Constitution served as political arguments to support or to oppose specific interests more than they reflected principled interpretations of constitutional meanings. The manipulation of constitutional meaning to advance individual and group interests raises serious doubts regarding the propriety and validity of binding contemporary interpretations of constitutional texts to their assumed original understandings.

This Article examines certain political actions of the founding generation and its immediate successors that reveal how these historical actors interpreted and applied the Constitution in actually governing the new nation. It focuses on the debates leading to the incorporation of the First Bank of the United States in 1791, its expiration in 1810–11, the incorporation of the Second Bank of the United States in 1815–16, and the U.S. Supreme Court's decision in *McCulloch v. Maryland* upholding Congress's inherent sovereign power of incorporation in 1819. These debates present case studies of how the members of the three branches of the U.S. government understood the process of constitutional government, the role of constitutional interpretation in this governing process, Congress as the primary authority to interpret the Constitution, and how the federal government exercised constitutional power in actually governing.

This Article also contends that Chief Justice John Marshall's opinion in *McCulloch v. Maryland*, which many scholars consider to be the most important opinion in the U.S. Supreme Court's history,⁵ has been misinterpreted by scholars and the

5. See, e.g., Daniel A. Farber, *The Story of McCulloch: Banking on National Power*, in *CONSTITUTIONAL LAW STORIES* 33 (Michael C. Dorf ed., 2009) (reporting that *McCulloch* was cited in over 2400 cases as of January 1, 2009).

Court. The constitutional theories expressed in the political debates relating to the incorporation of the two national banks presented in this Article have been overlooked by scholars and by jurists, but this Article demonstrates that they are indispensable to an accurate understanding of Marshall's opinion and the Court's decision in *McCulloch*. Placed in the context of these debates, one can see that Chief Justice Marshall and the unanimous Supreme Court adopted the inherent national sovereignty theory of the Constitution and affirmed Congress's power of incorporation as one of its inherent sovereign powers that bank proponents had successfully argued in Congress to support the incorporation of the national banks.

Part I of this Article reviews the congressional debates over Congress's power to incorporate the First Bank in 1791. Part II recounts the debate in President George Washington's cabinet among Thomas Jefferson, Edmund Randolph, and Alexander Hamilton. Part III analyzes the congressional debates relating to the failed effort to extend the Bank's charter in 1810–11. Part IV analyzes the congressional debates over the incorporation of the Second Bank in 1815–16 and President James Madison's support for this measure. Part V examines the lawyers' arguments and Chief Justice Marshall's opinion in *McCulloch v. Maryland*.

I. THE FIRST BANK OF THE UNITED STATES & CONGRESS 1791

A. HISTORICAL BACKGROUND OF ALEXANDER HAMILTON'S BANK OF THE UNITED STATES

To understand the constitutional significance of the First and Second Banks of the United States, one must know something of their joint governmentally and privately owned corporate structures, the roles they were to play in the nation's economic and financial sectors, and the political divisions relating to them. The First Bank of the United States was proposed by Alexander Hamilton, Secretary of the Treasury during President George Washington's first administration, in December 1790. It was part of Hamilton's economic plan, endorsed by the Federalists, to develop the United States into a powerful commercial and prosperous mixed economy. Subsistence and commercial farming were the primary economic activities at the time. Hamilton's economic plan was designed to develop the manufacturing, financial, and commercial sectors of the econo-

my and to secure a system of public credit.⁶

A national banking industry hardly existed in 1790 when Hamilton proposed the national bank.⁷ Only four commercial banks existed in the U.S. at the time: the Bank of North America in Philadelphia, chartered by the Continental Congress in 1781, and state-chartered banks in New York City, Boston, and Baltimore.⁸ Most Americans were unfamiliar with banks, how they functioned, and the roles they could play in a dynamic, capitalist economy.⁹ But Hamilton understood a national bank's importance to the development of the American economy and the financial operations of the national government.¹⁰

Hamilton explained how banks could increase the sum of circulating money beyond its capital in specie and thereby increase the active capital of the nation.¹¹ In expanding the nation's money supply, banks generated employment, expanded labor and industry, and promoted the production of goods for export, which, in turn, generated a favorable balance of trade and consequent increase in the nation's quantity of gold and silver.¹² A national bank, Hamilton argued, could thereby "enlarge the mass of industrious and commercial enterprise [and assist them to] become nurseries of national wealth"—a "consequence as satisfactorily verified by experience, as it is clearly

6. See BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 114–15 (1957); CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815–1846*, at 3–27 (1991); GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 98–99 (2009).

7. See HAMMOND, *supra* note 6, at 114.

8. WOOD, *supra* note 6, at 98.

9. *Id.*

10. See HAMMOND, *supra* note 6, at 114.

11. See WOOD, *supra* note 6, at 98.

12. LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES: INCLUDING THE ORIGINAL BANK OF NORTH AMERICA 15–30 (compiled by M. St. Clair Clarke & D. A. Hall, 1832). The debates of the U.S. Senate were not recorded and are not known. The compilers of this legislative and documentary history claim they collected "the entire proceedings, debates, and resolutions," of both houses of Congress, concerning the national bank, including reports of committees and public officers relating to the establishment, constitutionality, and public uses of the bank. *Id.* at iii. They explain that, to the extent a record of the proceedings and debates exists at all, "it is in the pages of the gazettes of the day." *Id.* For these proceedings and debates the compilers relied on the files of the NATIONAL INTELLIGENCER, which they assert furnish "the most correct sources of information." *Id.* at iv. Nevertheless, they did not include the Senate debates relating to the bank bill.

deducible in theory.”¹³

A bank was also useful to the government in acquiring capital, especially in sudden emergencies, Hamilton continued.¹⁴ A bank would facilitate the payment of taxes by extending loans to taxpayers who needed them.¹⁵ It would be the sole depository of government funds, but it would also hold deposits of private individuals, both of which enabled the First Bank to create a circulating medium of exchange, or paper money, in the form of promissory notes payable to bearer based on the bank’s deposits.¹⁶ A bank’s capacity to increase the quantity of money would not only assist individuals in paying taxes, it would also assist them in satisfying their other monetary needs and help them in any business in which “money is an agent.”¹⁷ It would also enable the government “to answer any exigencies” arising in the foreign trade of merchants and other enterprises.¹⁸ A national bank would serve the commercial interests of the nation as well as the financial needs of the U.S. government.¹⁹

The First Bank would be jointly owned by the U.S. government and private investors.²⁰ Jointly owned and government-subsidized enterprises were common in the early U.S.²¹ States owned and even operated banks they chartered, and they often owned shares in and bought the bonds of turnpike companies, canal companies, insurance companies, and railroads.²² State ownership of companies declined shortly before the Civil War as their investments turned sour in the wake of

13. *Id.* at 17.

14. *Id.*

15. *Id.*

16. *See* Act of Feb. 25, 1791, ch. 10, 1 Stat. 191–96.

17. Clarke & Hall, *supra* note 12, at 18.

18. *Id.* at 23.

19. *Id.*

20. WOOD, *supra* note 6, at 98.

21. *See* STUART BRUCHEY, THE ROOTS OF AMERICAN ECONOMIC GROWTH, 1607–1861, at 112–40 (1968); LOUIS HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776–1860, at 82–104 (1948); JOHN LAURITZ LARSON, INTERNAL IMPROVEMENT: NATIONAL PUBLIC WORKS AND THE PROMISE OF POPULAR GOVERNMENT IN THE EARLY UNITED STATES 6 (2001); HARRY N. SCHEIBER, OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY, 1820–1861, at 296 (1969); GEORGE ROGERS TAYLOR, THE TRANSPORTATION REVOLUTION, 1815–1860, at 92–96 (1951); RICHARD WHITE, RAILROADED: THE TRANSCONTINENTALS AND THE MAKING OF MODERN AMERICA 26–27 (2011).

22. *See* BRUCHEY, *supra* note 21; LARSON, *supra* note 21; TAYLOR, *supra* note 21.

the economic depression of 1837.²³ The national government also financed and subsidized companies engaged in water and land transportation, such as steamboats and railroads.²⁴ The national government heavily subsidized railroad development before and after the Civil War.²⁵

Returning to the First Bank, the U.S. government contributed one-fifth of the bank's capital of \$10 million and owned one-fifth of the outstanding stock; private investors bought the remaining four-fifths of the outstanding stock.²⁶ The latter were authorized to acquire up to three-fourths of the stock with government securities, but they were required to pay for the remaining one-fourth with gold or silver.²⁷

The First Bank was chartered for a period of twenty years.²⁸ The bank was located in Philadelphia, but it was authorized to establish branches in other cities.²⁹ The First Bank eventually established branches in eight other cities.³⁰

B. THE BANK BILL IN THE U.S. SENATE 1791

Unfortunately, the Senate debates relating to the Senate's adoption of the bank bill were not recorded. The bill was reported to the Senate on January 3, 1791, and it was debated over the next two and one-half weeks.³¹ Senator William Maclay commented on the senate debates in his diary, but his entries are not very detailed.³² He mentioned that the issue of Congress's authority to charter the bank might have been inquired into, but apparently Congress's authority was not an issue since "the old [Continental] Congress enjoyed" and exercised this authority when it chartered the Bank of North

23. See LARSON, *supra* note 21, at 195–224.

24. See *id.* at 109–48.

25. See WHITE, *supra* note 21.

26. WOOD, *supra* note 6, at 98.

27. Act of Feb. 25, 1791, ch. 10, § 2, 3 Stat. 191, 192.

28. WOOD, *supra* note 6, at 98.

29. *Id.*

30. HAMMOND, *supra* note 6, at 127. Branches were opened in Boston, New York, Baltimore, and Charleston in 1792; Norfolk, Virginia in 1800; Washington, D.C. and Savannah in 1802; and New Orleans in 1805. *Id.*

31. See The Diary of William Maclay and Other Notes on Senate Debates (March 4, 1789–March 3, 1781), in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 355, 356–65 (Kenneth R. Bowling & Helen E. Veit eds., 1988).

32. See *id.*

America in 1781.³³ This suggests that senators assumed legislative precedent determined issues of constitutional construction, a doctrine of national sovereignty constitutionalism. Maclay also noted that there was a group of senators, whom he dubbed “[t]he Potowmack interest,” who sought to destroy the bank bill because they feared that the bank, “in the hands of the Philadelphians, might retard the removal of Congress” to a location on the Potomac River.³⁴ This entry reveals another aspect of constitutional construction in the early republic: economic, geographical, and partisan interests shaped views of the Constitution perhaps as much as commitment to constitutional principles. The Senate passed the bank bill on January 20, 1791, without a roll call and sent it to the House of Representatives.³⁵

C. THE BANK BILL IN THE HOUSE

1. Economic and Geographical Interests and the First Bank

The House debates are recorded in the *Annals of Congress*. However, organized as a committee of the whole, the House considered the bank bill without anyone rising in opposition until Representative James Jackson of Georgia, who opposed the bill, asked the House to recommit the bill to committee.³⁶ His opposition confirmed the observation made by Representative Michael Stone of Maryland later in the debates that individuals were influenced in their views of government policy by “habits of thinking by our local situations, and, perhaps, the distinct interests of the States we represent.”³⁷ Consequently, opinions regarding the constitutionality of this bill, Representative Stone opined, “seem to be divided by a geographical line,” and “other considerations [are] mixed with the [bank] question,” such as the future location of the capitol and the ways in which the general government affected the economic interests of different groups.³⁸ Stone then confirmed his obser-

33. *Id.* at 347.

34. *Id.* at 364.

35. HAMMOND, *supra* note 6, at 116.

36. 2 ANNALS OF CONG. 1891 (1791) (statement of Rep. Jackson).

37. *Id.* at 1930 (statement of Rep. Stone).

38. *Id.*; *see also id.* at 1891 (statement of Rep. Jackson) (arguing that a national bank would only benefit the mercantile class). Southerners feared that a national bank located in Philadelphia might become an insurmountable obstacle to their desire to move the nation’s capitol to the Potomac River. *See* STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 229 (1993);

vation by opposing the bank bill, in part, because a national bank would “give ‘partial advantages’ to the States,” contrary to the Constitution.³⁹ He also objected that it would create a moneyed interest “at the devotion of Government” and that it would “swallow up the State banks.”⁴⁰

The economic interests of Representative Jackson’s constituents led him to oppose the bank bill, and evidently informed his constitutional arguments. Jackson argued that the Bank would benefit only a small portion of the American population: the mercantile elite.⁴¹ Farmers and yeomanry, such as his constituents, would benefit not at all.⁴² Jackson correctly identified the intended beneficiaries of the First Bank; he was also correct in asserting that the First Bank would not benefit farmers.⁴³ Representative William Giles of Virginia also opposed the bank, in part because it favored Philadelphia over other port cities in violation of the provision in the Constitution that prohibits giving any preference by the regulation of commerce or revenue to the ports of one state over another.⁴⁴

Scholars have long recognized that economic and geographical interests shaped partisan interests which significantly influenced how the Constitution was interpreted as well as the constitutional positions legislators argued regarding the bank bill.⁴⁵ The House votes on chartering the First Bank reflected

Kenneth R. Bowling, *The Bank Bill, The Capital City and President Washington*, in 1 *CAPITOL STUDIES* NO. 1, at 59 (1972). However, Benjamin B. Klubes rejects this view in *The First Federal Congress and the First National Bank: A Case Study in Constitutional Interpretation*, 10 *J. EARLY REPUBLIC* 19, 27 n.19 (1990).

39. 2 *ANNALS OF CONG.* 1936 (1791) (statement of Rep. Stone).

40. *Id.*

41. *Id.* at 1891 (statement of Rep. Jackson).

42. *Id.* For a discussion of the question whether the bank would favor special interests or the nation’s general welfare, see *infra*, notes 233–44 and accompanying text.

43. See WOOD, *supra* note 6, at 99 (stating that the bank did not want to make short-term mortgage loans to farmers); 2 DUMAS MALONE, *Jefferson and the Rights of Man*, in JEFFERSON AND HIS TIME 340 (1951) (stating that the doubts farmers had about the bank were borne out by experience).

44. 2 *ANNALS OF CONG.* 1940 (1791) (statement of Rep. Giles). The clause in the Constitution Representative Giles was referring to is Article I, Section 9, Clause 6, which states in relevant part: “No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another.”

45. See HAMMOND, *supra* note 6, at 115–18; Charles A. Beard, *Historiography and the Constitution*, in *THE CONSTITUTION RECONSIDERED* 159, 161–66 (Conyers Read ed., 1938); Klubes, *supra* note 38, at 20–28.

geographical groupings. Of the thirty-nine votes in favor of the bank, thirty-three were from the states comprising New England and the states of New York, New Jersey, and Pennsylvania, states with the largest commercial cities and the greatest proportion of incipient manufactures.⁴⁶ Fifteen of the twenty votes against the bank bill came from the states of Virginia, North and South Carolina, and Georgia, states that remained mostly rural and local.⁴⁷ It is also important to remember that the bank bill was a politically partisan issue, with Federalists generally supporting it and opponents eventually forming the Jeffersonian or Democratic Republican Party.⁴⁸ Constitutional interpretation on both sides was influenced by these economic, geographic and partisan interests.

2. Congress's Inherent Sovereign Power To Provide for the Nation's Needs and Exigencies

One of the main constitutional arguments the bank bill's proponents asserted in favor of its enactment was the theory that Congress possessed inherent sovereign powers to meet national needs and exigencies and to accomplish the objects for which the Constitution was adopted, regardless whether the requisite sovereign powers were enumerated in Article I or could be implied from any enumerated power. Like Treasury Secretary Hamilton, bank supporters argued that a national bank was necessary to promote the nation's economy, one of the purposes for which the Constitution was established, and that it was indispensable to serve the government's financial needs in times of crises.⁴⁹ For example, Fisher Ames of Massachusetts explained that the new capital of the bank "will invigorate trade and manufactures with new energy. It will furnish a medium for the collection of revenues; and if Government should be pressed by a sudden necessity, it will afford seasonable and effectual aid."⁵⁰ Ames asserted that these considerations made the establishment of a bank not simply a question of expediency but of duty.⁵¹

46. HAMMOND, *supra* note 6, at 117.

47. *Id.* Charleston, South Carolina, was an important commercial city, however.

48. *See id.* at 118–22.

49. *See* 2 ANNALS OF CONG. 1903 (statement of Rep. Ames); *see also infra* notes 130–47 and accompanying text (Hamilton's arguments).

50. 2 ANNALS OF CONG. 1903 (statement of Rep. Ames).

51. *See id.*

The discussion that follows will show that supporters and opponents asserted different understandings of the nature of Congress's legislative powers and the powers enumerated in Article I of the Constitution. Bank opponents argued the states-rights-centered, strict construction theory of the Constitution and insisted that Congress's legislative powers are fixed and limited to the enumerated powers. Some conceded that Congress may also exercise unspecified powers, but they limited these implied powers to those without which Congress could not carry into execution its enumerated powers.⁵² The issues for them, therefore, were the semantic meaning of an enumerated power and whether the proposed legislative action could be understood to be within the meaning of and essential to the exercise of this power. Opponents' understanding of enumerated and implied powers was essentially definitional and abstract rather than pragmatic. Thus, Representative Michael Stone of Maryland rejected an argument by Representative Theodore Sedgwick of Massachusetts that Congress's power to charter a bank is implied in the government's delegated powers to borrow money and to lay and collect taxes.⁵³ Stone explained that chartering a bank is not the usual means of borrowing money or of collecting taxes.⁵⁴

3. The Doctrine of Congress's Inherent Sovereign Authority To Legislate

In contrast to opponents, bank supporters understood enumerated powers, along with the Constitution's Preamble and other provisions, as delegations of ends or objects for which Congress possesses the powers of any sovereign nation to accomplish. Representative Elbridge Gerry of Massachusetts argued in support of Congress's power to charter a bank based on its inherent sovereign legislative powers.⁵⁵ Popular sovereignty was the predicate for this inherent power theory. Referring to the Constitution as "the great law of the people, who are themselves the sovereign Legislature," Gerry quoted the Preamble to the Constitution, and declared: "These are the objects for which the Constitution was established, and in administering it we should always keep them in view."⁵⁶ The "common sense" of

52. For example, see *id.* at 1940–41 (statement of Rep. Stone).

53. *Id.* at 1934.

54. *Id.* at 1934–35.

55. *Id.* at 1946–48 (statement of Rep. Gerry).

56. *Id.* at 1947–48.

these terms, Gerry opined, dictates the measures to achieve these objects, “for the security of our property, families, and liberty—of everything dear to us, depends on our ability to defend them.”⁵⁷

Representative John Lawrence of New York argued that the government’s ends are broader than the objects specified in the Preamble. They “are contained in the context of the Constitution” generally.⁵⁸ Asserting a theory of inherent sovereign power, he inferred that “every power necessary to secure these [objects] must necessarily follow” from them.⁵⁹ Looking back to the deficiencies and powerlessness of the Continental Congress, he asserted that it was “to capacitate the Government of the United States, and [to] form a more perfect union, [that] the Constitution” was adopted.⁶⁰ To deny Congress the power to enact legislation to achieve any of its purposes for which the Constitution was adopted “involves the grossest absurdity,” Lawrence insisted.⁶¹

Representative Elias Boudinot of New Jersey cited Alexander Hamilton’s *Federalist No. 23* and declared that no argument of the same length “could more forcibly and pointedly elucidate and prove the construction contended for in support of the bill on the table.”⁶² In this number, Hamilton identified some of the “principal purposes” for which the U.S. was established, but he focused on national defense to illustrate his theory of the national government’s inherent sovereign powers to accomplish its purposes and to meet national exigencies.⁶³ Hamilton declared that “[t]hese powers ought to exist without limitation.”⁶⁴ The reason is that the circumstances that may endanger the nation’s safety are infinite, and “*it is impossible to*

57. *Id.* at 1948.

58. *Id.* at 1914–15 (statement of Rep. Lawrence).

59. *Id.* at 1915.

60. *Id.*

61. *Id.*

62. *Id.* at 1926 (statement of Rep. Boudinot).

63. The national purposes Hamilton listed are: the common defense; preservation of the peace as well against “internal convulsions as external attacks”; the regulation of commerce with other nations and among the states; and the “superintendence of our intercourse, political and commercial, with foreign countries.” *THE FEDERALIST NO. 23*, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

64. *Id.* Hamilton included the following powers: raising an army; building and equipping a fleet; prescribing rules for the governance of each; directing their operation; providing for their support. *Id.*

*foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.*⁶⁵ Consequently, “[Congress’s] power ought to be coextensive with all the possible combinations of such circumstances.”⁶⁶ The circumstances that may create a national exigency are unlimited and cannot be anticipated.⁶⁷ Consequently, the national government should be entrusted with all of the powers “a free people *ought to delegate to any government,*” and that are sufficient “for the management of our NATIONAL INTERESTS.”⁶⁸

Based on Hamilton’s *Federalist No. 23*, Boudinot asserted conceptions of the Constitution that Chief Justice Marshall employed in his *McCulloch* opinion: an enumeration in the Constitution of every power Congress might exercise would take on the prolixity of a legal code, and a developmental conception of the Constitution expanding Congress’s legislative powers to meet unforeseen circumstances.⁶⁹ Boudinot stated that “it was universally understood that whenever a general power was given, especially to a supreme Legislature, every necessary means to carry it into execution were [sic] necessarily included.”⁷⁰ This was the universal understanding of mankind, “without which it would require a multitude of volumes to contain the original powers of an increasing Government that must necessarily be changing its relative situation every year or two.”⁷¹ It is important to keep in mind that Boudinot’s theory of “general power” included inherent sovereign powers to accomplish the objects and ends for which the Constitution was ratified and the national government established, in particular, to provide for the general welfare.⁷²

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 156.

69. See 2 ANNALS OF CONG. 1924, 1925–28 (1791) (statement of Rep. Boudinot).

70. *Id.* at 1925.

71. *Id.* For Chief Justice Marshall’s statement in *McCulloch*, see *infra* notes 391–94 and accompanying text.

72. See 2 ANNALS OF CONG. 1925 (1791) (statement of Rep. Boudinot); see also *infra* notes 126–27 and accompanying text.

4. Bank Opponents Reject Supporters' National Sovereignty Theory

Opponents of the bank bill acknowledged proponents' inherent national sovereignty theory in support of Congress's implied power to charter a corporation, and they rejected it. Representative Stone observed that several supporters thought "all Governments, instituted for certain ends, draw to them the means of execution as of common right."⁷³ Reading the Constitution's Preamble, he declared: "Here is your Constitution! Here is your bill of rights!"⁷⁴ He suggested that supporters of the bank bill needed nothing more "respecting the powers of Congress, than a description of the ends of Government."⁷⁵ Stone asked rhetorically, "I would ask if there is any power under Heaven which could not be exercised within the extensive limits of this preamble?"⁷⁶ Under the bank proponents' doctrine, the Constitution's enumerated powers would become a dead letter. Under their doctrine of implied powers, Stone objected, there was no need to specify the powers to accomplish "the ends mentioned in the preamble."⁷⁷ James Madison also rejected the idea that the Preamble was a source of Congress's legislative powers, stating that "the preamble only states the objects of the Confederation, and the subsequent clauses designate the express powers by which those objects are to be obtained."⁷⁸

D. CONFLICTING THEORIES OF INDEPENDENT AND SUBSTANTIVE SOVEREIGN POWERS

Madison made an elaborate argument against the theory of independent and substantive powers implied from the sovereign nature of the national government that bank supporters were arguing Congress may exercise to accomplish the ends or objects stated in the Preamble. He distinguished between powers "necessary and proper for the Government or Union," which he characterized as "expressly enumerated," and powers that were "necessary and proper for executing the enumerated powers," which he asserted "were included in the enumerated pow-

73. 2 ANNALS OF CONG. 1931 (statement of Rep. Stone).

74. *Id.*

75. *Id.*

76. *Id.* at 1931.

77. *Id.* Representative William Giles of Virginia also made the same points. *See id.* at 1937-45 (statement of Rep. Giles).

78. *Id.* at 1957 (statement of Rep. Madison).

ers [and] were not expressed, but [were] to be drawn from the nature of each.”⁷⁹ This enumeration of substantive sovereign powers “constituted the peculiar nature of the [U.S.] Government; no [independent and substantive] power, therefore, not enumerated could be inferred from the general nature of Government.”⁸⁰ Madison illustrated this distinction by noting that, had the framers failed to enumerate the power to make treaties, the national government would not have been able to make treaties without a constitutional amendment granting this power, however lamentable this failure might have been.⁸¹

From his theory of sovereign and independent powers and implied powers, Madison argued that Congress did not have the power to charter a national bank. The power to charter a corporation “could never be deemed . . . a means of executing another power,” he insisted.⁸² The power of incorporation “was in its nature a distinct, an independent and substantive prerogative, which not being enumerated in the Constitution, could never have been meant to be included in it, and not being included, could never be rightfully exercised” by Congress.⁸³ “By exercising this power and creating a bank,” Madison argued, this bill would create “an artificial person, previously not existing in law. It confers important civil rights and attributes, which could not otherwise be claimed.”⁸⁴

Additionally, the corporation thus created would supersede and infringe the sovereign rights of the states. It was “a power . . . obnoxious to the States, whose laws would then be superseded, not only by the laws of Congress, but by the by-laws of a corporation within their own jurisdiction.”⁸⁵ This power also substantively affected the rights of the individual. “It involves a monopoly, which affects the equal rights of every citizen. It leads to a penal regulation, perhaps capital punishments, one of the most solemn acts of sovereign authority.”⁸⁶ From this perspective, Madison concluded, the power of incorporation

79. *Id.* at 1900.

80. *Id.*

81. *Id.* at 1900–01.

82. *Id.* at 1900.

83. *Id.*

84. *Id.* at 1899–1900.

85. *Id.* at 1900.

86. *Id.*

could never be considered an incidental means to carry into execution an enumerated power.⁸⁷

Fisher Ames of Massachusetts rebutted Madison's arguments with a powerful argument of his own based on a similar hypothetical that demonstrated the need for Congress to exercise an unenumerated substantive, sovereign power to meet a national exigency. Suppose the Constitution had failed to confer on Congress the power to raise an army when the country is invaded by another nation, Ames hypothesized.⁸⁸ Who could deny that the national government would have the power to raise an army to defend the nation from such an attack?⁸⁹ From the instant a government is formed, Ames argued, "it has tacitly annexed to its being, various powers which the individuals who framed it did not separately possess, but which are essential to its effecting the purposes for which it was framed."⁹⁰ Presaging Marshall's *McCulloch* opinion, Ames admonished, "to declare, in detail, every thing that Government may do could not be performed, and has never been attempted. It would be endless, useless, and dangerous; exceptions of what it may not do are shorter and safer."⁹¹

Representative Boudinot also rejected Madison's constitutional construction. He made an argument that anticipated Chief Justice Marshall's national sovereignty theory of Congress's inherent penal powers, which constitutes the Supreme Court's effective rejection of Madison's constitutional construction. Boudinot asserted that congressional penal powers are inherent in Congress's *implied* power to establish federal courts.⁹² "Examine the law with regard to crimes and punishments under the power of establishing courts, we have implied the power of punishing the stealing and falsifying the records, and ascertained the punishment of perjury, bribery, and extortion."⁹³

87. *See id.*

88. *See id.* at 1903, 1905–07 (statement of Rep. Ames).

89. *Id.*

90. *Id.* at 1905. For Alexander Hamilton's version of this theory of inherent sovereign powers, which he referred to as "resulting" powers, see *infra* notes 201–10 and accompanying text.

91. 2 ANNALS OF CONG. 1905 (1791) (statement of Rep. Ames). For Chief Justice Marshall's statement, see *infra* notes 391–94 and accompanying text. Boudinot made the same point. *See supra* note 71 and accompanying text.

92. *See* 2 ANNALS OF CONG. 1919, 1925–26 (1791) (statement of Rep. Boudinot).

93. *Id.* at 1925. Chief Justice Marshall used this example of an inherent sovereign power in his opinion in *McCulloch*. *See infra* notes 401–03 and ac-

John Vining, also of Delaware, similarly insisted that, as a free and independent nation, the U.S. possesses all of the sovereign powers possessed by a sovereign nation. He argued that from “the act by which the United States became a free and independent nation . . . they derive all the powers appertaining to a nation thus circumstanced, and consequently the power under consideration.”⁹⁴ Vining traced the origins of corporations and concluded that, from the first corporation to the present day, “all civilized and independent nations have been in the practice of creating them.”⁹⁵ Consequently, Congress may also create them.

Madison replied to Vining and insisted that the theory that a sovereign government necessarily possesses every sovereign power does not apply to the United States. “However true this idea may be in the theory,” Madison opined, he denied “that it applied to the Government of the United States,” because of “the restrictive clause in the Constitution.”⁹⁶ He could not see a way to avoid the limitations the Tenth Amendment imposed on Congress’s unenumerated powers.⁹⁷

E. DOES THE TENTH AMENDMENT EXPAND OR LIMIT CONGRESS’S POWERS?

Supporters of the bank bill did not understand the Tenth Amendment as a preclusion of Congress’s inherent sovereign powers. Like Chief Justice Marshall in *McCulloch*,⁹⁸ they interpreted the Tenth Amendment in exactly the opposite way: the amendment confirmed the doctrine that Congress may exercise any power necessary to accomplish an end or object for which the Constitution was established so long as the power is not expressly prohibited or explicitly reserved to the states or to the people. Thus, Representative Ames asserted that “Congress may do whatever is necessary to the end for which the Constitution was adopted, provided it is not repugnant to the natural rights of man, or to those which they have expressly reserved to

companying text.

94. 2 ANNALS OF CONG. 1955 (1791) (statement of Rep. Vining).

95. *Id.* at 1957.

96. *Id.* (statement of Rep. Madison).

97. *See id.*

98. For Chief Justice Marshall’s discussion, see *infra* notes 385–88 and accompanying text.

themselves, or to the powers which are assigned to the States.”⁹⁹

Bank supporters objected that restricting Congress’s implied powers to those that are indispensable to carrying into execution its enumerated powers, as the bank’s opponents argued, would render unconstitutional most of the statutes Congress had enacted over the preceding two years, “for few, if any of them, could be proved indispensable to the existence of the Government.”¹⁰⁰ Representative Gerry complained that, under Madison’s interpretation of the Tenth Amendment, “our whole code of laws is unconstitutional.”¹⁰¹ “The usage of Congress” demonstrates that federal legislation was “generally the result of a liberal construction” of the Constitution.¹⁰² Representative Gerry cited legislation that conferred on the President the exclusive power to remove executive officers and suggested that Madison was inconsistent in his constitutional construction because he had supported the executive removal statute Congress enacted in 1789.¹⁰³ The Constitution is silent on this matter, Gerry noted, and, according to Madison’s constitutional interpretation, the power to remove executive officers “is vested in the States and the people.”¹⁰⁴ Nevertheless, when the bill that delegated to the President the power to remove executive officers was before Congress in 1789, Madison had argued that this unenumerated sovereign power should be vested in the President alone because it is implied from the nature of executive powers to remove executive officials.¹⁰⁵

F. THE POWER TO REMOVE EXECUTIVE OFFICERS IS INHERENT IN THE NATURE OF THE EXECUTIVE

During the 1789 legislative debates over who has the power to remove executive officers, Madison made the most elaborate argument that it should rest exclusively in the President because the removal power is inherent in the nature of execu-

99. 2 ANNALS OF CONG. 1906 (1791) (statement of Rep. Ames). Representative Lawrence made the same point. *See id.* at 1914–19 (statement of Rep. Lawrence). For Chief Justice Marshall’s discussion, see *infra* notes 388–89, 391–97, and accompanying text.

100. 2 ANNALS OF CONG. 1911 (1791) (statement of Rep. Sedgwick).

101. *Id.* at 1951 (statement of Rep. Gerry).

102. *Id.*

103. *See id.*

104. *Id.*

105. *See id.*

tive powers.¹⁰⁶ Madison declared: “I conceive that if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws. If the Constitution had not qualified the power of the President in appointing to office, by associating the Senate with him him [sic] in that business,” Congress would have been powerless “to unite the Senate with the President in the appointment to office,” and the President would have had the exclusive authority to make these appointments.¹⁰⁷ Since the Constitution is silent with respect to the removal power, which, Madison asserted, is “as much of an Executive nature as the other,” Congress does not “have a right to associate [the Senate with the President] in removing persons from office.”¹⁰⁸ The appointment power “only is authorized by being excepted out of the general rule established by the Constitution, in these words, ‘the Executive power shall be vested in the President.’”¹⁰⁹

Not only did Madison infer exclusive removal power in the President from the nature of executive powers in 1789, he also led a group of representatives who argued that Congress is the institution that resolves questions of constitutional construction and interpretation when the answers are unclear, and its interpretation has precedential authority. Thus, Madison insisted that where the Constitution is silent in apportioning powers, the apportionment “becomes a subject of legislative discretion,” a constitutional construction consistent with the *McCulloch* court’s conclusion that Congress is the institution

106. For recent and conflicting accounts of these debates, compare Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 656–64 (2004), with Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 300–02 (2001). For additional analyses of these debates, see 1 CORWIN ON THE CONSTITUTION 317–71 (Richard Loss ed., 1981); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 36–41 (1997); JAMES HART, *THE AMERICAN PRESIDENCY IN ACTION 1789*, at 155–89 (1948); CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY, 1775-1796*, at 140–65 (1922).

107. 1 ANNALS OF CONG. 463 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison). For other representatives making the same argument, see *id.* at 460 (statement of Rep. Sedgwick); *id.* at 469–70, 583 (statement of Rep. Boudinot); *id.* at 474 (statement of Rep. Ames); *id.* at 483 (statement of Rep. Lawrence); *id.* at 489 (statement of Rep. Clymer); *id.* at 511–12 (statement of Rep. Vining); *id.* at 561 (statement of Rep. Sylvester).

108. *Id.* at 463 (statement of Rep. Madison).

109. *Id.*

that is to adapt the Constitution to changing circumstances.¹¹⁰ Madison stated,

If the construction of the Constitution . . . relates to a doubtful part of the Constitution, I suppose an exposition of the Constitution may come with as much propriety from the Legislature, as any other department of the Government. If the power *naturally* belongs to the Government, and the Constitution is undecided as to the body which is to exercise it, it is likely that it is submitted to the discretion of the Legislature, and the question will depend upon its own merits.¹¹¹

Madison later commented that the House's resolution of this issue "demand[ed] a careful investigation and full discussion," because its constitutional construction would become a part of the Constitution.¹¹² Madison stated, "our decision will involve the decision of all similar cases. The decision that is at this time made, will become the permanent exposition of the Constitution; and on a permanent exposition of the Constitution will depend the genius and character of the whole Government."¹¹³ Madison thus assumed that Congress's interpretation of the Constitution carried the authority of precedent.¹¹⁴

G. FIRST BANK OPPONENTS REJECT NATIONAL SOVEREIGNTY CONSTITUTIONALISM AND ASSERT STRICT CONSTRUCTION CONSTITUTIONALISM

Given the positions they asserted in the executive removal debates of 1789, Gerry's conclusion that bank opponents were inconsistent in their constitutional constructions in the 1791 bank debates was a reasonable critique of the opposition's arguments generally. Bank opponents rejected bank proponents' theory of Congress's inherent sovereign powers and insisted

110. *Id.* at 462. For other representatives making the same argument, see *id.* at 475 (statement of Rep. Ames); *id.* at 481 (statement of Rep. Hartley); *id.* at 484–85 (statement of Rep. Lawrence); *id.* at 584–85 (statement of Rep. Tucker). For the Supreme Court's conclusion, see *infra* notes 385–99, 405–12, 425–31, 448–52, 473–74, and accompanying text.

111. 1 ANNALS OF CONG. 461 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison) (emphasis added).

112. *Id.* at 495.

113. *Id.* During these congressional debates, Madison confided to Samuel Johnston that "the exposition of the Constitution is frequently a Copious Source [of difficulty], and must continue so untill [sic] its meaning on all great points shall have been settled by precedents." Letter from James Madison to Samuel Johnston (June 21, 1789), in 5 THE WRITINGS OF JAMES MADISON 409 n.1 (Gaillard Hunt ed., 1904).

114. For a discussion of precedent as constitutional authority for legislation, see *infra* notes 145–60 and accompanying text.

that the Constitution limited Congress to the powers enumerated in Article I.

For example, Representative Stone objected that the national sovereignty theory is “hostile to the main principle of our Government,” arguing that if members of Congress “are allowed to range in their sober discretion for the means [to accomplish its ends], it is plain they have no limits.”¹¹⁵ He reminded the House that “[i]t has been shown that the ends of [our] Government will include every thing.”¹¹⁶ The bank proponents’ doctrine “turn[s the Constitution] upside down, and instead of being a grant of particular powers, guarded by an implied negative to all others, it is made to imply all powers.”¹¹⁷ Stone claimed that the framers “forgot to guard it by express negative provisions,”¹¹⁸ a claim that is contradicted on the face of the Constitution.¹¹⁹ Indeed, Chief Justice Marshall had used the express prohibitions of Congress’s powers to argue in *McCulloch* that the Constitution thereby delegated to Congress unenumerated sovereign powers that are not explicitly prohibited; otherwise, why include explicit prohibitions on substantive powers not expressly granted.¹²⁰

H. CONGRESS IS AUTHORIZED TO DETERMINE ITS SOVEREIGN POWERS

An important part of bank proponents’ constitutional arguments supporting Congress’s inherent sovereign powers was their insistence that Congress is empowered to interpret the nature and scope of its constitutional powers. This is a constitutional construction Madison embraced in 1789 and abandoned in 1791. National sovereignty advocates based this doctrine on the nature of a written Constitution as necessarily incomplete and indefinite in the number and scope of Congress’s legislative powers, on the constitutional duty imposed on Congress to achieve national objectives and to meet national exigencies, and on the discretionary nature of Congress’s legislative powers in fulfilling its constitutional duties. They main-

115. 2 ANNALS OF CONG. 1983 (1791) (statement of Rep. Stone).

116. *Id.*

117. *Id.* at 1983–84.

118. *Id.* at 1984.

119. See U.S. CONST. art. I, § 9 (listing many prohibitions on Congress’s legislative powers).

120. For the prohibitions, see *id.* For Chief Justice Marshall’s statement, see *infra* notes 393–94 and accompanying text.

tained that doubtful questions of constitutionality and of constitutional interpretation must therefore be left to the discretion of Congress.

Thus, Fisher Ames asserted that “it is rather late in the day to adopt it as a principle of conduct” that Congress may not determine and exercise implied powers, because two years of work would be lost.¹²¹ Ames observed that, for the better part of two years, “we have scarcely made a law in which we have not exercised our discretion with regard to the true intent of the Constitution.”¹²² He noted that the First Congress had “adopted it as a safe rule of action to legislate beyond the letter of the Constitution.”¹²³ The reason, he explained, is that “the ingenuity of man was unequal to providing, especially beforehand, for all the contingencies that would happen.”¹²⁴ Ames insisted that Congress must exercise its judgment as to the meaning of the Constitution.¹²⁵

Representative Boudinot made a similar argument based on Congress’s legislative function and responsibilities, asserting that the means of achieving the general purposes and ends of the government, such as providing for the general defense and the general welfare of the nation, must be left to Congress, as “it was their duty to fix on the best mode of effecting the purposes of their appointment . . . provided they do not adopt means *expressly forbidden*.”¹²⁶ Consequently, whether a bank is “a mere conveniency for the purpose of fiscal transactions, but not necessary to attain the ends proposed in the Constitution . . . at best is mere matter of opinion, and must [therefore] be left to the discretion of the Legislature to determine.”¹²⁷

Representative William Smith of South Carolina invoked James Madison’s earlier views in support of Congress’s power to construe the Constitution.¹²⁸ Smith cited to Madison’s statements in the 1789 congressional debates over the President’s power to remove executive officials.¹²⁹ In this debate Madison declared that the Congress had “as good a right as any branch

121. 2 ANNALS OF CONG. 1954 (1791) (statement of Rep. Ames).

122. *Id.*

123. *Id.*

124. *Id.*; *see also id.* at 1960 (statement of Rep. Sedgwick).

125. *Id.* at 1954 (statement of Rep. Ames).

126. *Id.* at 1973 (statement of Rep. Boudinot) (emphasis added).

127. *Id.* at 1977; *see also id.* at 1990 (statement of Rep. Giles).

128. *Id.* at 1980 (statement of Rep. Smith of S.C.).

129. *Id.*

of the Government to declare our sense of the meaning of the Constitution. Nothing has yet been offered to invalidate the doctrine, that the meaning of the Constitution may as well be ascertained by the legislative as by the judicial authority.”¹³⁰ Smith insisted that Madison’s view of Congress’s discretionary authority to interpret its constitutional powers applied to the bank bill.¹³¹

Bank supporters also based Congress’s authority to interpret its constitutional powers on a republican theory of popular sovereignty, which recognized “the people themselves”¹³² as the ultimate authority in deciding questions of constitutional interpretation. Congress legislates to achieve its great objects at its peril, Representative Gerry argued, for the members of both Houses of Congress “are responsible to their constituents for their conduct in construing the Constitution.”¹³³

However, four members of Congress commented that the judiciary possessed the power to set aside an unconstitutional act of Congress. Only one bank opponent made this claim, Representative William Giles of Virginia.¹³⁴ Three of the bill’s supporters conceded the power of the courts to check Congress should it unconstitutionally usurp legislative power.¹³⁵

It is not clear that these legislators were expressing a theory of judicial review as we understand it today, as a judicial power to void a statute and extinguish it as a law as distinguished from declaring a statute null and void and consequently refuse to enforce it. Representative Boudinot clearly expressed this latter understanding. He responded to legislators who opposed the bank bill because it might be adjudged by the judiciary as “contrary to the Constitution, and therefore void; and *not lend their aid to carry it into execution.*”¹³⁶ In any case, Boudinot retorted that this claim strengthened his resolve to

130. *Id.* at 546–47 (1789) (statement of Rep. Madison). For a fuller discussion of Madison’s theory of congressional supremacy in interpreting the Constitution, see *supra* notes 110–14 and accompanying text.

131. 2 ANNALS OF CONG. 1980, 1988 (1791) (statement of Rep. Smith of S.C.).

132. The idea of “the people themselves” as the ultimate authority on questions of constitutionality is taken from LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

133. 2 ANNALS OF CONG. 2003 (1791) (statement of Rep. Gerry).

134. *Id.* at 1996 (statement of Rep. Giles).

135. *Id.* at 1966 (statement of Rep. Lawrence); *id.* at 1988 (statement of Rep. Smith of S.C.); *id.* at 1978 (statement of Rep. Boudinot).

136. *Id.* at 1978 (statement of Rep. Boudinot) (emphasis added).

vote for the bill and “all subjects of a constitutional nature,” because, “he reflected that if . . . he should do wrong, that there was a power in the Government which could constitutionally prevent the operation of such a wrong measure from effecting his constituents.”¹³⁷ Boudinot gloated that “it was the glory of the Constitution that there was a remedy even for the failures of the supreme Legislature itself.”¹³⁸

Reflecting his departmentalist view of constitutional interpretation, Madison rejected the claim of those who maintained that the judiciary “will rectify our mistakes.”¹³⁹ He did not see how a judge might decide such a question other than “by rules of expediency.”¹⁴⁰ The position Madison asserted on this issue in the House debates was consistent with the view he expressed in his *Federalist No. 44*, where he identified political process as the ultimate check on Congress’s usurpation of power.¹⁴¹ There he observed that the success of a congressional usurpation of power depended upon the executive and judicial departments, “which are to expound and give effect to the legislative acts.”¹⁴² However, “in the last resort a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers.”¹⁴³ Although Madison’s views on this point were consistent, on other important points Madison moved 180 degrees away from the principles he affirmed in *Federalist No. 44*. Moreover, he took the opposite view and supported Congress’s power to charter the national bank as President in 1816.¹⁴⁴

I. CONSTITUTIONAL PRECEDENT AS AUTHORITY FOR CONSTITUTIONAL DOCTRINE

It was a logical progression to reason from Congress’s authority to define its constitutional powers to the doctrine that Congress’s prior actions may serve as precedent for its subse-

137. *Id.* (emphasis added).

138. *Id.* at 1979.

139. *Id.* at 2010 (statement of Rep. Madison).

140. *Id.*

141. THE FEDERALIST NO. 44, at 285–86 (James Madison) (Clinton Rossiter ed., 1961).

142. *Id.* at 286.

143. *Id.* This is one of the main claims of KRAMER, *supra* note 132, at 8.

144. See *infra* notes 225–29 and accompanying text (describing this support).

quent actions.¹⁴⁵ Opposition leader Representative Giles acknowledged that the bank's proponents argued that a source of Congress's implied power to charter a bank was the "former usages and habits of Congress."¹⁴⁶ He distinguished the examples supporters referred to and declared that unconstitutional acts of the past should be stopped and not be used to support unconstitutional acts in the present.¹⁴⁷

The doctrine of constitutional precedent was an important theory of determining governmental power and individual rights in eighteenth century Anglo-American law.¹⁴⁸ Many of the colonists' legal/constitutional arguments for and against the acts of Parliament and colonial rights that led to the American Revolution were based on historical precedent.¹⁴⁹ William E. Nelson relates other aspects of colonial constitutional norms and practices that political leaders carried into the new nation in the forthcoming volume four of *The Common Law of Colonial America*.¹⁵⁰

Arguments from precedent were made for and against Congress's power to charter the First Bank. The bill's supporters based their argument that Congress had legislative authority to enact the bank bill in part on the precedent of the Bank of North America enacted by the Continental Congress in 1781. Representative Lawrence asserted that the Bank of North

145. See 2 ANNALS OF CONG. 1975-76 (1791) (statement of Rep. Boudinot); *id.* at 1981 (statement of Rep. Smith of S.C.); *id.* at 2008 (statement of Rep. Vining) (supporting the authority of Congress to define its constitutional powers); *supra* notes 110-13 and accompanying text.

146. 2 ANNALS OF CONG. 1995 (1791) (statement of Rep. Giles).

147. *Id.*

148. For the most thorough examination of the doctrine and authority of precedents and how they were used in the pre-Revolutionary struggle between the American colonies and Parliament, see JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION (1986-1993). For an abridged edition of these four volumes, see JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION (abridged ed. 1995). The importance of precedent, especially legislative precedent as constitutional authority for subsequent legislation and public policy, is explained in JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO LEGISLATE, 166-71, 198-200, 211-21, 246-72 (1991).

149. *E.g.*, JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO TAX 122-34 (1987) (describing the use of the theory of precedent in arguing for and against Parliamentary taxes).

150. William E. Nelson, *The Common Law of Colonial America, Volume Four: On the Eve of Revolution, 1735-1776*, at 370-88 (Oct. 17, 2016) (unpublished manuscript) (on file with author).

America was precedential authority from an inherent national sovereignty theory.¹⁵¹ Lawrence argued that “the old Congress exercised the power, as they thought, by a fair construction of the Confederation.”¹⁵² He insisted that no one would disagree that the present government was vested with powers equal to the late Confederation.¹⁵³

Interestingly, Madison conceded bank proponents’ argument that precedent established Congress’s authority to charter the First Bank, but he insisted that the Bank of North America was distinguishable and therefore not precedential authority for the First Bank bill.¹⁵⁴ Madison maintained that “[t]his [Bank of North America] was known . . . to have been the child of necessity. It never could be justified by the regular powers of the articles of Confederation.”¹⁵⁵ He explained that the national government’s financial needs in 1791 could be supplied by state banks, which did not exist in 1781.¹⁵⁶ His position appears to endorse bank proponents’ constitutional doctrine of inherent sovereign powers to meet national exigencies.

Representative Boudinot countered that state banks, private investors, and foreign sources of credit were insufficient to meet the nation’s government constitutional obligations in 1791 and also argued the national sovereignty theory in support of the First Bank bill.¹⁵⁷ The Constitution delegates to Congress the duty to provide for the general defense, especially during war, and the general welfare of the nation.¹⁵⁸ Consequently, Congress must possess the power “to secure institutions at home from which loans may be obtained at all times at moderate terms and in such amounts as the necessity of the State

151. 2 ANNALS OF CONG. 1965 (1791) (statement of Rep. Lawrence).

152. *Id.*

153. *Id.* at 1941. For other proponents who cited the Bank of North America as a precedential authority, see *id.* at 1975 (statement of Rep. Boudinot); *id.* at 2005 (statement of Rep. Gerry).

154. Madison had asserted the principle of congressional precedent as an authoritative constitutional construction in the debates relating to the executive removal power. See *supra* notes 110–13 and accompanying text.

155. 2 ANNALS OF CONG. 1947 (1791) (statement of Rep. Madison).

156. *Id.* The same argument is made in *id.* at 2011 (asking whether “precedents in war [are] to justify violations of private and State rights in a time of peace”); *id.* at 1984 (statement of Rep. Stone); *id.* at 1995 (statement of Rep. Giles) (denying that the Bank of North America was a precedent for the First Bank because the necessity for the bank in 1781 did not exist in 1791).

157. *Id.* at 1973–75 (statement of Rep. Boudinot).

158. See *id.* at 174 (describing reliance on foreign loans as contrary to this provision).

might require.”¹⁵⁹ Boudinot asserted that a national bank is a “necessary means, without which the end could not be obtained.”¹⁶⁰

J. POWERS IMPLIED FROM ENUMERATED POWERS

In addition to the broad theories of Congress’s inherent sovereign legislative powers, the bank bill’s proponents also broadly construed Congress’s powers implied from those enumerated in Article I. They argued that Congress’s power to charter a national bank is implied in several of the enumerated powers, such as the power to levy and collect taxes, to borrow money, to pay the debts of the U.S., to regulate commerce, and to provide for the general defense and welfare of the U.S.¹⁶¹

Interpretations of powers implied from enumerated powers were made in connection with interpretations of the Necessary and Proper Clause.¹⁶² These interpretations, both broad and narrow, are well known. Opponents of the bank bill insisted that Congress may exercise only those implied powers that are indispensably necessary to carry into execution the enumerated powers to which they are incidents.¹⁶³ Thus, Representative Giles interpreted “necessary” in the same way Maryland’s counsel interpreted it in *McCulloch v. Maryland*,¹⁶⁴ as a power without which “the end could not be produced.”¹⁶⁵ Madison more broadly defined the Necessary and Proper Clause “according to the natural and obvious force of the terms and the context” as “limited to means necessary to the end, and incident to the nature of the specified powers.”¹⁶⁶

It is important to note that Madison acknowledged that Congress possesses implied powers even without the Necessary and Proper Clause.¹⁶⁷ He asserted that “[t]he [Necessary and Proper] [C]lause is merely declaratory of what would have re-

159. *Id.*

160. *Id.*

161. See *infra* notes 162–67 and accompanying text (describing how this power was argued to be implied).

162. U.S. CONST. art. I, § 8, cl. 18.

163. 2 ANNALS OF CONG. 1967 (1791) (statement of Rep. Jackson); *id.* at 1985–87 (statement of Rep. Stone); *id.* at 1990–95 (statement of Rep. Giles).

164. See *infra* notes 426, 433, 458–63, and accompanying text, especially notes 462–63, for further analysis of this case.

165. 2 ANNALS OF CONG. 1993 (1791) (statement of Rep. Giles).

166. *Id.* at 1947 (statement of Rep. Madison).

167. *Id.*

sulted by unavoidable implication, as the appropriate, and, as it were, the technical means of executing those powers.”¹⁶⁸ Madison appears to have been paraphrasing his *Federalist No. 44*.¹⁶⁹ Madison thus asserted a broader theory of implied powers than congressional supporters of strict construction constitutionalism, but narrower than congressional advocates of national sovereignty constitutionalism. Nevertheless, Madison and the other opponents of the bank bill insisted that the power to charter a bank was not incidental to any of Congress’s enumerated powers.¹⁷⁰

K. CONGRESS’S INHERENT POWERS TO PROVIDE FOR THE NATION’S GENERAL WELFARE

Even though some bank proponents claimed that Congress could charter the proposed bank as a power implied from enumerated powers, they continued to employ an inherent sovereign powers theory based on the power to provide for the general welfare and other ends stated in the Preamble, Article I, and throughout the Constitution.¹⁷¹ Congress may therefore exercise any power that is necessary to achieve the purposes and ends for which it was established. Consequently, its powers “are so numerous,” and “capable of such infinite variation, as to render an enumeration impracticable, and must therefore be left to construction and necessary implication.”¹⁷² Thus, many supporters of the bank bill confirmed Madison’s view that supporters’ interpretation of Congress’s legislative powers, in pursuing the general welfare, “will reach every object of legislation, every object within the whole compass of political economy.”¹⁷³

Representative Gerry applied William Blackstone’s last rule of interpretation of legal texts in support of Congress’s inherent sovereign powers: “when the words are dubious,” to ascertain “the true meaning of a law,” one should look to “the reason and spirit of it, or the cause which moved the Legislature.”¹⁷⁴ Essentially paraphrasing the Constitution’s

168. *Id.*

169. Madison, *supra* note 141, at 285.

170. *See, e.g.*, 2 ANNALS OF CONG. 1950 (1791) (statement of Rep. Madison) (stating that the bank would be only convenient, not necessary).

171. *See infra* notes 172–76 and accompanying text (outlining this theory).

172. 2 ANNALS OF CONG. 1962 (1791) (statement of Rep. Sedgwick); *see also supra*, notes 61–65 and accompanying text (describing this theory).

173. 2 ANNALS OF CONG. 1949 (1791) (statement of Rep. Madison).

174. *Id.* at 2002 (statement of Rep. Gerry).

Preamble, Gerry broadly defined the causes that moved the people to adopt the Constitution: “[A]n imperfect Union, want of public and private justice, internal commotions, a defenceless [sic] community, neglect of the public welfare, and danger to our liberties.”¹⁷⁵ If these causes produced the Constitution, they not only empower Congress to remove them, but they also require Congress to make all laws that are necessary and proper for carrying these ends into effect.¹⁷⁶

The House debates leading to the creation of the First Bank demonstrate that the primary constitutional theory supporters of the bank bill asserted was inherent national sovereignty constitutionalism that encompassed a doctrine of Congress’s inherent sovereign powers that were limited to accomplishing the ends and objects stated in the Preamble and the other clauses in the Constitution. In anachronistic twenty-first-century terms, supporters were asserting a kind of federal police power defined by and limited to the ends and objects established in the Constitution.

Opponents essentially acknowledged this theory.¹⁷⁷ James Madison noted that the bank’s supporters failed to distinguish between powers “inferred from the general nature of Government” and powers that are “necessary and proper for executing the enumerated powers.”¹⁷⁸ He complained that supporters maintained that Congress may exercise sovereign powers that are not enumerated, ignoring the “peculiar nature of the [national] Government” in which “the powers composing the Government were expressly enumerated.”¹⁷⁹ Consequently, although the supporters’ theory of general powers applied to other nation-states, Madison reasoned, it did not apply to the U.S. government, and sovereign powers of government that are not enumerated in the Constitution “could not be inferred from the general nature of [the national] Government.”¹⁸⁰ Madison’s argument here is 180 degrees opposite to his analysis of Con-

175. *Id.*

176. *Id.*

177. See *infra* notes 178–81 and accompanying text for Madison’s views on the issue.

178. 2 ANNALS OF CONG. 1950 (1791) (statement of Rep. Madison).

179. *Id.*

180. *Id.* at 1900; see also *id.* at 1957 (arguing that the Constitution limits the powers of government to those expressly written).

gress's legislative powers in *Federalist No. 44* and as President.¹⁸¹

It was with good reason that the bank's opponents warned that, if it were conceded that Congress may charter the proposed bank, it could charter manufacturing companies, canal companies, and even religious societies and employ religious teachers in every parish and pay them from the U.S. Treasury.¹⁸² If supporters' national sovereignty and inherent congressional powers constitutionalism were adopted, Congress would soon possess "all possible powers" of government, reducing the Constitution to "nothing but a name."¹⁸³

The House nevertheless passed the bank bill on February 8, 1791, by a vote of thirty-nine yea to twenty nay.¹⁸⁴ Bray Hammond has reported that thirty-three out of the thirty-nine votes in favor of the bill came from representatives from New England, New York, New Jersey, and Pennsylvania.¹⁸⁵ Most of the votes against the bill, fifteen of twenty, were cast by representatives from Virginia, the Carolinas, and Georgia.¹⁸⁶ The vote confirms the views of historians and members of the First Congress who claimed that legislators' views regarding the constitutionality of the First Bank were affected, and possibly determined, by their economic, financial, and geographical interests.¹⁸⁷

The bill was sent to President George Washington for his signature.¹⁸⁸ However, the President referred the bill to his attorney general, Edmund Randolph, his secretary of state, Thomas Jefferson, and his secretary of the treasury, Alexander Hamilton, for their views regarding the bill's constitutionality.¹⁸⁹ Jefferson's and Hamilton's reports on the bill's constitutionality have achieved canonical status on the theories of implied powers.

181. See *supra* notes 110–14 and accompanying text; *infra* notes 451–53, 477–80, and accompanying text (discussing Madison's opposing position that the powers of government are not limited to those expressly enumerated).

182. 2 ANNALS OF CONG. 1897 (1791) (statement of Rep. Madison).

183. *Id.* at 1917 (statement of Rep. Jackson).

184. HAMMOND, *supra* note 6, at 116–17.

185. *Id.* at 117.

186. *Id.*

187. See *supra* notes 34–47 and accompanying text.

188. HAMMOND, *supra* note 6, at 117.

189. *Id.*

II. THE CONSTITUTIONAL DEBATE IN PRESIDENT WASHINGTON'S CABINET

A. SECRETARY OF THE TREASURY ALEXANDER HAMILTON'S OPINION ON THE CONSTITUTIONALITY OF THE BANK

Secretary of State Jefferson and Attorney General Randolph echoed the strict construction constitutionalism asserted by congressional opponents of the First Bank. It is well known, and I have already explained the theory.¹⁹⁰ Alexander Hamilton's opinion has not been fully understood and requires some elaboration.

Hamilton wrote his report after he had examined those of Jefferson and Randolph. Hamilton's report was far more comprehensive and detailed than the other two combined. His analysis embraced the national sovereignty constitutionalism argued by the House bank proponents, and it followed a structure of analysis and asserted constitutional constructions that Chief Justice Marshall later adopted in his *McCulloch* opinion.¹⁹¹ That is, Hamilton first presented arguments and interpretations based on general reasoning and general principles of government.¹⁹² He then offered his interpretation of enumerated and implied powers.¹⁹³

Hamilton's opinion was a rebuttal to Jefferson's and Randolph's arguments against the constitutionality of the bank bill because the power of incorporation is a sovereign power that the Constitution does not explicitly delegate to Congress.¹⁹⁴ Hamilton's reply was based on his understanding that the national government possesses the sovereign powers inherent in all sovereign governments.¹⁹⁵ He articulated national sovereignty constitutionalism when he proclaimed:

[T]his *general principle* is *inherent* in the very *definition* of *Government* and *essential* to every step of the progress . . . of the United States; namely—that every power vested in a Government is in its

190. See *supra* note 4 and accompanying text (explaining strict construction constitutionalism).

191. HAMMOND, *supra* note 6, at 117–18; see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

192. Alexander Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 23, 1791), in 8 THE PAPERS OF ALEXANDER HAMILTON, Feb. 1791–July 1791, 97, 98 (Harold Syrett ed., 1965).

193. *Id.* at 100.

194. *Id.* at 112.

195. *Id.* at 98.

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 power¹⁹⁶

There are only two limitations on the national government's exercise of these inherent powers, Hamilton argued: the first limitation consists of any restriction or prohibition that is explicitly stated in the Constitution or would violate a principle of morality or good government; the second limitation is that the United States exercise its powers to achieve an end or ends that the Constitution vests in it.¹⁹⁷

Satisfied that general political theories establish that governments, including the U.S. government, possess inherent sovereign powers, Hamilton concluded that "[t]his general & indisputable principle puts at once an end to the *abstract* question—Whether the United States have power to *erect a corporation*"¹⁹⁸ He explained that "it is unquestionably incident to *sovereign power* to erect corporations, and consequently to *that* of the United States, in *relation to the objects* intrusted to the management of the government."¹⁹⁹ Hamilton thus recognized a distinction between a government whose authority "is general," which can therefore "create corporations in *all cases*" and a government, such as the U.S. government, whose authority is confined to certain objects and ends.²⁰⁰ The U.S. government may exercise the sovereign powers that inhere in governments generally, but "only in those cases" related to its objects and ends.²⁰¹

Hamilton identified three classes of national governmental powers. It is undeniable, he asserted, "that there are *implied*, as well as *express* powers, and that the former are as effectually delegated as the latter."²⁰² However, there is a third class of powers, Hamilton opined, which he labeled "*resulting* powers."²⁰³ These are powers that "result from the whole mass of the powers of the government & from the nature of political so-

196. *Id.*

197. *Id.* at 99–100.

198. *Id.* at 99.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 100.

203. *Id.* Representatives Madison, Ames, Boudinot and Vining debated whether the national government may exercise substantive sovereign powers that are not expressly delegated. *See supra* notes 79–97 and accompanying text.

ciety, than a consequence of either of the powers specially enumerated.”²⁰⁴

Hamilton illustrated resulting powers with the example of the United States asserting dominion over territory it might have conquered from another country. The national government “would possess sovereign jurisdiction over the conquered territory” even though this sovereign power is neither express nor implied.²⁰⁵ Hamilton asserted that this example “furnishes a striking illustration of the general doctrine contended for.”²⁰⁶ Congress’s “power of erecting corporations is either implied in, or would result from some or all of the powers, vested in the National Government.”²⁰⁷ “The only question,” then, is “whether the mean to be employed,” that is, whether the unenumerated power, “has a natural relation to any of the acknowledged objects or lawful ends of the government.”²⁰⁸ For Hamilton, this was an empirical question of fact and not a semantic question of textual meaning as strict constructionists argued. Hamilton illustrated this point by noting that Congress did not have the power to charter a corporation “for superintending the police of the city of Philadelphia,” the city in which Congress met in 1791, “because they are not authorised to *regulate* the *police* of that city.”²⁰⁹ But Congress may charter a corporation to achieve national ends “because it is the province of the federal [sic] government to regulate those objects & because it is incident to a general *sovereign* or *legislative power to regulate* a thing, to employ all the means which relate to its regulation to the *best & greatest advantage*.”²¹⁰

Hamilton asserted another maxim of government, the “sound maxim of construction namely, that the powers contained in a constitution of government . . . ought to be construed liberally, in advancement of the public good.”²¹¹ Hamilton explained that “[t]he means by which national exigencies are to be provided for, national inconveniences obviated, na-

204. *Id.* Justice Joseph Story also affirmed the doctrine of resulting powers in his treatise on the Constitution. See *infra* notes 512, 514–16, and accompanying text.

205. Hamilton, *supra* note 192, at 100.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 100–01.

211. *Id.* at 105.

tional 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 . . . [based] on principles of liberal construction.”²¹²

The only restriction limiting Congress’s powers, such as its powers to tax and spend for the general welfare, “which does not apply to other governments,” is that Congress “cannot rightfully apply the money they raise to any purpose *merely* or *purely* local.”²¹³ With this exception, Hamilton maintained, Congress has “as large a discretion in relation to the *application* of money as any legislature whatever. The constitutional *test* of a right application must always be whether it be for a purpose of *general* or *local* nature. If the former, there can be no want of constitutional power.”²¹⁴ Furthermore, the extent to which Congress’s action really promotes the nation’s welfare “must be a matter of [Congress’s] conscientious discretion.”²¹⁵ Arguments relating to Congress’s discretion whether to use its legislative power to promote the general welfare “must be arguments concerning expediency or in expediency, not constitutional right.”²¹⁶

B. THE FIRST BANK AND BANKING, 1791–1811

Secretary Hamilton’s arguments persuaded President Washington that the bank bill was constitutional. The President signed the bank bill into law on February 25, 1791, two days after he received Hamilton’s report.²¹⁷ The government of the U.S. acquired \$2 million of the initial \$10 million stock issue.²¹⁸ Other investors included one-third of the members of Congress and at least one-half of the members who had voted for the bank bill.²¹⁹ Merchants, professional men, speculators, other politicians, the Boston-based Massachusetts Bank, Harvard College, and the state of New York also invested in shares of First Bank stock.²²⁰ Located in Philadelphia, the First Bank

212. *Id.*

213. *Id.* at 129.

214. *Id.*

215. *Id.*

216. *Id.*

217. HAMMOND, *supra* note 6, at 118.

218. *Id.* at 123.

219. *Id.*

220. *Id.*

opened branches in eight other cities from 1792 to 1805.²²¹ Three of these branches were opened during Thomas Jefferson's presidency with his approval, albeit unhappily.²²²

Apart from constitutional scruples, the First Bank's incorporation was a defining issue in the development of political parties. The First Bank was a Federalist Party institution opposed by southern anti-Federalists.²²³ The bank, along with other Federalist Party policies led to the creation of the first party of opposition, the Jeffersonian or Democratic Republican Party. The bank was run by Federalists, who were perceived to have operated it as an instrument of partisan politics and patronage.²²⁴ This perception, the fact that a majority of its stock was owned by British and European investors, and "the extreme jealousy of the State banks" made it "an object of general odium."²²⁵ These political, economic, and financial interests played important roles in legislators' determinations whether the First Bank was constitutional and whether Congress should extend the First Bank's charter in 1811.

III. CONGRESS DEBATES RECHARTER OF THE FIRST BANK IN 1811

A. ECONOMIC, POLITICAL, AND GEOGRAPHICAL BACKGROUND OF THE SECOND BANK

The First Bank's charter was due to expire in 1811. At the behest of the Senate, President Madison's treasury secretary, Albert Gallatin, issued a report to Congress on March 9, 1809, urging Congress to renew the bank's charter for another twenty years.²²⁶ Congress did not take up the measure until January 1810, but it did not give it concentrated attention until January 1811.²²⁷ After vigorous debate, the House decided by one vote (sixty-five to sixty-four) on January 24, 1811, to postpone the

221. *Id.* at 127. Branches were opened in Boston, New York, Baltimore, Charleston, Norfolk, Washington, Savannah, and New Orleans.

222. *Id.* These branches were Washington, D.C., and Savannah, Georgia, in 1802 and New Orleans, Louisiana, in 1805.

223. 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 504 (1926).

224. *Id.*

225. *Id.*

226. HAMMOND, *supra* note 6, at 209.

227. *Id.* at 209–10.

bill indefinitely.²²⁸ This effectively defeated the extension of the First Bank's charter in the House. The Senate then took up a bill on February 5, 1811.²²⁹ This measure was also defeated by one vote, eighteen to seventeen, on February 20.²³⁰ The Senate's deciding vote was cast by Vice President George Clinton when the floor vote tied at seventeen.²³¹ The First Bank's charter consequently expired in 1811.

One of the findings of this study is that economic, political, geographic, and occupational interests as much as, if not more than, commitment to constitutional values and principles determined the constitutional positions of political actors. The First Bank was a partisan institution at its creation and over its entire life. The political divisions in Congress for and against the First Bank in 1811 differed from those in 1791.²³² The original bank bill was mostly supported by northern Federalists and business interests, and the bank served their banking needs and economic interests as did the national government through its promotion and protection of trade and economic development.²³³ Southerners were mostly agrarians and opposed the bank and the national government's economic policies.²³⁴

The political alignments of 1791 had changed by 1811. Bank supporters and opponents cut across party and geographical lines by the time its charter came up for renewal in 1811. James Madison, who had led the opposition in the House and argued against the bank's constitutionality in 1791, as President in 1811 supported renewing the First Bank's charter.²³⁵ Many of the administration's Democratic Republican congressional allies from the North, the South, and the West also favored the charter's renewal, though others opposed it.²³⁶ The bill's floor leaders in the Senate and the House were both Democratic Republicans.²³⁷ Federalists from the North and the South also split.²³⁸

228. *Id.* at 210.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 219.

234. *Id.* at 210–11, 219.

235. *Id.* at 210.

236. *Id.* at 210–11.

237. *Id.* at 210. The floor leaders were Senator William Crawford of Geor-

Over the course of the First Bank's life, the states became involved in promoting economic expansion and diversification, and they increased the number of state-chartered banks from three to more than seventy.²³⁹ State banks served many of the local financial needs of merchants and state governments for short-term credit as well as the long-term credit needs of mechanics, manufacturers, and farmers.²⁴⁰ According to financial historian Bray Hammond, many businesses increasingly favored the state governments and state banks, and many agrarians turned increasingly to the national government and the First Bank.²⁴¹ Moreover, Democratic Republicans were no longer overwhelmingly agrarian and yeoman farmers. They included commercial farmers, artisans, mechanics, and entrepreneurs.²⁴² Consequently, attitudes toward the First Bank, the national and state governments, the emerging state banks, and public policy became more complicated and mixed among economic groups, sections of the country, and the political parties.

Hammond expressed skepticism regarding the sincerity of some of the opposing leaders' concern over the bank's constitutionality, naming Senator Samuel Smith of Baltimore, Maryland, Senator Henry Clay of Lexington, Kentucky, and Representative Peter B. Porter of Buffalo, New York.²⁴³ This skepticism would apply equally to bank supporters. Legislators who debated the question of the First Bank's recharter support Hammond's skepticism because they asserted that constitutional arguments were inspired by the economic and partisan interests of their constituents.²⁴⁴ These views suggest that, although many political leaders may have held and asserted theories of constitutional interpretation out of a commitment to constitutional principles independent of other interests, for many who argued the First Bank recharter question, constitutional interpretation was as much or more a matter of political argument to advance economic, political, and other interests as it was sincerely held belief.

gia and Representative William Findley of Pennsylvania.

238. *Id.* at 210–11.

239. WOOD, *supra* note 6, at 296.

240. *Id.*

241. HAMMOND, *supra* note 6, at 219.

242. *Id.* at 219–20; WOOD, *supra* note 6, at 296.

243. HAMMOND, *supra* note 6, at 214.

244. *See, e.g.*, 28 ANNALS OF CONG. 663–64 (1814) (statement of Rep. Hanson); *id.* at 665 (statement of Rep. Grosvenor).

B. THEORY OF CONGRESS'S INHERENT SOVEREIGN POWERS

Members of Congress reasserted many of the arguments regarding the First Bank's constitutionality that had been advanced by its proponents and opponents in 1791. For example, First Bank supporters again insisted that Congress's legislative powers are sovereign powers and that Congress possesses the inherent sovereign power to charter a corporation to accomplish the objects, ends, and purposes for which the Constitution was adopted.²⁴⁵ They agreed that the power to charter a corporation "is an act of sovereignty."²⁴⁶ Moreover, "[t]he right to create a corporation is a right inherent in every sovereignty," and, since everyone agreed that banks are necessary to handle the financial affairs of the nation, "it appears to be established that the Federal Government does possess this right."²⁴⁷ Bank supporters admonished bank opponents that "[o]ur power to perform these acts results from the nature of the national sovereignty created by this Constitution."²⁴⁸ They paraphrased Alexander Hamilton's constitutional construction and insisted that

every 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 and exceptions specified in the Constitution, or not immoral, or not contrary to the essential ends of political society.²⁴⁹

Supporters of the bank charter renewal also interpreted Congress's enumerated powers as statements of the objects, purposes, and ends for which Congress possesses inherent powers of a sovereign legislature to accomplish. Thus, if "the Government is sovereign as to any object," Representative Stanley explained, "the power to incorporate companies, as the fit and necessary means for the attainment of that object, must regu-

245. 22 ANNALS OF CONG. 659 (1811) (statement of Rep. Key); *id.* at 755 (statement of Rep. Garland); *id.* at 308 (statement of Sen. Pickering); *id.* at 219 (statement of Sen. Pope).

246. *Id.* at 798 (statement of Rep. Stanley); *id.* at 272–73, 280 (statement of Sen. Brent); *id.* at 297 (statement of Sen. Taylor). *But see id.* at 211–12 (statement of Sen. Clay).

247. 22 ANNALS OF CONG. 144 (1811) (statement of Sen. Crawford); *see also id.* at 141. Chief Justice Marshall asserted this position in his *McCulloch* opinion. *See infra* notes 395–98 and accompanying text.

248. *Id.* at 231 (statement of Sen. Pope); *see also id.* at 273, 276 (statement of Sen. Brent).

249. *Id.* at 663 (statement of Rep. Pickman, Jr.); *see also id.* at 137 (statement of Sen. Crawford).

larly result from and be appurtenant to this sovereignty.”²⁵⁰ Like their congressional predecessors in 1791, congressional bank proponents in 1811 argued that the objects and ends of the national government are stated in the Constitution’s Preamble as well as in the delegated powers of Article I.²⁵¹

Moreover, Representative Stanley declared that Congress’s sovereign “power is not left to inference,” because the Constitution’s Necessary and Proper Clause and the Supremacy Clause establish Congress’s sovereignty.²⁵² Thus, bank supporters defined an enumerated power as “an authority to attain a given end.”²⁵³ Specifically how Congress may achieve the given end is within Congress’s discretion since there are many means by which a power may be executed and the end achieved, and the choice of these means is explicitly vested in Congress by the Necessary and Proper Clause.²⁵⁴ More broadly, Representative Key maintained that “[w]e need not look to the Constitution always for precise terms to justify an exercise of power, because it is but an enumeration of first principles,”²⁵⁵ arguably a version of Hamilton’s theory of resulting powers. According to this view, the erection of a bank is not a constitutional question but merely a question of discretion to achieve a public good.²⁵⁶ U.S. Senators made similar arguments when the Senate debated the bank’s recharter.²⁵⁷

As they did in 1791, First Bank opponents acknowledged that bank supporters asserted an inherent sovereignty theory of congressional legislative power, and they rejected it and argued the strict construction theory of limited congressional powers.²⁵⁸ Notably, Senator Smith of Maryland alarmingly de-

250. *Id.* at 798 (statement of Rep. Stanley); *see also id.* at 715 (statement of Rep. Gold); *id.* at 762, 769 (statement of Rep. Nicholson); *id.* at 781 (statement of Rep. Tallmadge).

251. *Id.* at 762–63 (statement of Rep. Nicholson).

252. *Id.* at 798 (statement of Rep. Stanley); *see also id.* at 799.

253. *See, e.g., id.* at 661 (statement of Rep. Key).

254. *Id.*; *see also id.* at 280 (statement of Sen. Brent).

255. 21 ANNALS OF CONG. 1941 (1810) (statement of Rep. Key).

256. 22 ANNALS OF CONG. 661 (1811) (statement of Rep. Key); *see also id.* at 672 (statement of Rep. Alston).

257. *See, e.g., id.* at 228, 231 (statement of Sen. Pope); *id.* at 141–42, 144 (statement of Sen. Crawford); *id.* at 273, 276, 284 (statement of Sen. Brent).

258. *Id.* at 631–32, 634, 636, 639–40 (statement of Rep. Porter). Others make essentially the same arguments. *See id.* at 676 (statement of Rep. Wright); *id.* at 696 (statement of Rep. Barry); *id.* at 720 (statement of Rep. Johnson); *id.* at 810 (statement of Rep. Rhea); *id.* at 180 (statement of Sen. Giles).

clared that bank supporters' national sovereignty theory was so broad that the United States would no longer have a written guide to Congress's powers and that it would take the United States back to Great Britain where the constitution was found in the statutes, precedents, parliamentary guide.²⁵⁹

The "radical source" of the bank's supporters' error, opponents argued, was their assumption that the Constitution is "a mere general designation of the ends or objects for which the Federal Government was established, and leaving to Congress a discretion as to the means or powers by which those ends shall be brought about."²⁶⁰ Bank opponents objected that bank supporters "confound the *power* and the *object* of [the power] together, and make the attainment of the object, and the execution of the power given to accomplish it, convertible terms. Whatever, they say, attains the object for which any power is given, is an execution of that power."²⁶¹ In other words, bank supporters believed "that the execution of a power and the attainment of its object, are synonymous terms."²⁶² Their theory of Congress's powers would enable Congress to adopt "any measure not expressly prohibited by the Constitution."²⁶³ This is precisely what bank proponents argued.²⁶⁴ Bank opponents objected that the "constitutionality [of every bill] is made to depend on its [fitness and] general tendency to promote the ultimate objects for which these different powers were given. In other words, it is made to depend on its expediency."²⁶⁵

C. CONGRESS'S POWER AND DUTY TO PROMOTE ECONOMIC DEVELOPMENT AND PROSPERITY

Bank proponents argued that one of the national government's primary duties, objects or ends, and first principles is to promote economic development and thereby promote and secure the nation's prosperity and general welfare.²⁶⁶ Representa-

259. *Id.* at 268 (statement of Sen. Smith of Md.).

260. *Id.* at 636 (statement of Rep. Porter).

261. *Id.* at 634.

262. *Id.* at 634–35.

263. *Id.* at 644; *see also id.* at 652–53 (statement of Rep. Desha).

264. *Id.* at 660–61 (statement of Rep. Key); *see also id.* at 672 (statement of Rep. Alston); *id.* at 780–81 (statement of Rep. Tallmadge); *id.* at 771 (statement of Rep. Nicholson). For Madison's assertion of this principle in his THE FEDERALIST NO. 44, *see infra* notes 451–55 and accompanying text.

265. 22 ANNALS OF CONG. 645 (1811) (statement of Rep. Porter).

266. *Id.* at 601 (statement of Rep. Fisk); *see also id.* at 314–15 (statement of Sen. Pope).

tive Jonathan Fisk of New York, for example, insisted that the First Bank's continuation was an "imperious necessity" to maintain the nation's credit system, its agricultural, business and commercial development, and its economic prosperity.²⁶⁷ Some argued that Congress's powers to lay and collect taxes, to pay the debts of the United States and to provide for its general welfare, combined with Congress's power to pass all laws that are necessary and proper for carrying its powers into execution gave Congress ample power to extend the First Bank's charter "without calling in the aid of the general grant of powers as contained in the Constitution—from which some gentlemen seem to turn with such disgust"²⁶⁸

Bank opponents did not disagree that government should actively promote economic development and prosperity. But they countered by maintaining that state and local banks could offer any needed financial services, thus rendering the First Bank unnecessary.²⁶⁹ As did their congressional predecessors, bank opponents also insisted that the First Bank infringed states' rights and state sovereignty.²⁷⁰ They regarded the operation of the national bank and its agents in the states without

267. *Id.* at 602–03, 609 (statement of Rep. Fisk). For similar statements, see *id.* at 670, 672 (statement of Rep. Alston); *id.* at 756, 759 (statement of Rep. Garland); *id.* at 750 (statement of Rep. Crawford); *id.* at 761–62, 773–74 (statement of Rep. Nicholson); *id.* at 779 (statement of Rep. Tallmadge); *id.* at 164–70 (statement of Sen. Lloyd); *id.* at 220–21, 240 (statement of Sen. Pope); *id.* at 276, 289, 291 (statement of Senator Brent); *id.* at 311, 314 (statement of Sen. Pickering); *id.* at 148, 150, 345 (statement of Sen. Crawford).

268. *Id.* at 756 (statement of Rep. Garland); see also *id.* at 781 (statement of Rep. Tallmadge); *id.* at 1804 (1810) and 295 (1811) (statement of Rep. Taylor); *id.* at 1811–12 (statement of Rep. Findley); *id.* at 1941 (statement of Rep. Key); *id.* at 139 (statement of Sen. Crawford); *id.* at 275–76 (statement of Sen. Brent); *id.* at 310–11 (statement of Sen. Pickering).

269. See, e.g., *id.* at 1797–99 (statement of Rep. Love); *id.* at 655 (statement of Rep. Desha); *id.* at 202 (statement of Sen. Giles); *id.* at 245–46, 251, 258–59 (statement of Sen. Smith of Md.). For the debate on this issue, see *id.* at 1797–99 (statement of Rep. Love); *id.* at 1804–05, 1808–09 (statement of Rep. Taylor of S.C.); *id.* at 1811–12 (1810) and 703 (1811) (statement of Rep. Findley); *id.* at 1943 (statement of Rep. Troup); *id.* at 584 (statement of Rep. Burwell); *id.* at 623 (statement of Rep. Seybert); *id.* at 639 (statement of Rep. Porter); *id.* at 683 (statement of Rep. Wright); *id.* at 712, 716 (statement of Rep. Gold); *id.* at 750 (statement of Rep. Crawford); *id.* at 756 (statement of Rep. Garland); *id.* at 764–65 (statement of Rep. Nicholson); *id.* at 672 (statement of Rep. Alston); *id.* at 779–80 (statement of Rep. Tallmadge); *id.* at 791, 794 (statement of Rep. Eppes); *id.* at 798–99 (statement of Rep. Stanley).

270. See, e.g., *id.* at 153, 154 (statement of Sen. Leib); *id.* at 201 (statement of Sen. Giles); *id.* at 213 (statement of Sen. Clay); *id.* at 342 (statement of Sen. Crawford).

the states' permission as a violation of state sovereignty. Some argued that the First Bank interfered in local affairs, regulated the rights and relations of property between citizens, exercised the power to destroy local banks, thus creating disharmony and conflict, and "obliterate[ing] and destroy[ing] the distribution of powers between the federal and state governments."²⁷¹ Porter concluded that the doctrine of implied powers "compass, at a single sweep, all the rights of the States; and form the basis of a consolidated Government."²⁷²

D. BANK SUPPORTERS ARGUE FROM PRECEDENT AND POLITICAL PRACTICE

As did their predecessors in 1791, bank supporters cited congressional precedent in answering opponents' rejection of their doctrine of inherent national sovereignty, which opponents condemned as "unknown to the Constitution, and abhorrent to Republicanism, and dangerous to our liberties."²⁷³ Bank supporters also argued that past political practices associated specifically with the Bank of the United States established the First Bank's constitutionality.²⁷⁴ President Madison approved the charter's extension "on the ground, he said later, admitting 'expediency and almost necessity,' of 'deliberate and reiterated precedents.'"²⁷⁵

E. SUPPORTERS ARGUE NATIONAL EXIGENCIES AUTHORIZE CONGRESS TO CHARTER A BANK

Supporters also insisted that Congress may legislate to meet national exigencies and that such exigencies rendered the bank constitutional. For example, Representative Thomas R.

271. *Id.* at 645–46 (statement of Rep. Porter); *see also id.* at 584–85 (statement of Rep. Burwell); *id.* at 155 (statement of Sen. Leib); *id.* at 206 (statement of Sen. Giles).

272. *Id.* at 646 (statement of Rep. Porter); *see also id.* at 684 (statement of Rep. Wright); *id.* at 697 (statement of Rep. Barry); *id.* at 717, 727 (statement of Rep. Johnson); *id.* at 755 (statement of Rep. Crawford); *id.* at 201 (statement of Sen. Giles).

273. *Id.* at 799 (statement of Rep. Stanley); *see, e.g., id.* at 669 (statement of Rep. Pickman); *id.* at 820–21 (statement of Rep. McKee); *id.* at 139, 144 (statement of Sen. Crawford); *id.* at 276 (statement of Sen. Brent); *id.* at 309–11 (statement of Sen. Pickering).

274. *See id.* at 666 (statement of Rep. Pickman); *see, e.g., id.* at 712 (statement of Rep. Gold); *id.* at 145–46 (statement of Sen. Crawford); *id.* at 230 (statement of Sen. Pope); *id.* at 281 (statement of Sen. Brent).

275. HAMMOND, *supra* note 6, at 210.

Gold of Whitestown, New York proclaimed his deep conviction that the national bank was necessary to the administration of the nation's finances and to the exigencies of war.²⁷⁶ More broadly, Gold declared that the national government was a sovereign government, and Congress may exercise those powers that are "necessary to the exigencies of the country."²⁷⁷ Representative John Taylor of South Carolina argued that, "as we have been told by the Secretary of the Treasury, the highest authority in the nation, on financial affairs, that a banking institution is absolutely necessary for collecting and transferring the revenue of the United States, I am saved the trouble of establishing the constitutionality of the Bank of the United States."²⁷⁸

Representative Joseph Desha of Mays Lick, Kentucky, directly rebutted this argument and rejected bank supporters' idea that expediency and constitutionality are synonymous terms.²⁷⁹ In Desha's view, this theory would render the Constitution a nullity and would leave the judgment of members of Congress as the only restraint on congressional power.²⁸⁰ Supporters replied that opponents erroneously confounded the means by which an end is attained with the end itself.²⁸¹ Thus, if a bank is useful and necessary to achieve an end or object of government, such as the collection of taxes or the payment of the public debt, then the bank bill is constitutional.²⁸² If a bank is the best mode of effectuating these powers, then Congress is duty bound to establish it.²⁸³ Supporters argued further that twenty years of experience with the Bank of the United States had "evinced its' utility to the government" in achieving its objects and ends, and so the bank should be re-chartered.²⁸⁴

276. 22 ANNALS OF CONG. 712 (1811) (statement of Rep. Gold).

277. *Id.*; *see also id.* at 1941 (statement of Rep. Key).

278. LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES, *supra* note 12, at 458.

279. 22 ANNALS OF CONG. 653 (1811) (statement of Rep. Desha).

280. *Id.* at 654.

281. *See, e.g., id.* at 660 (statement of Rep. Key).

282. *Id.* at 661.

283. *Id.*

284. *Id.* at 666 (statement of Rep. Pickman).

F. BANK PROPONENTS ARGUE THAT CONGRESS MAY EXERCISE POWERS THAT ARE NOT EXPRESSLY PROHIBITED OR EXPRESSLY RESERVED TO THE STATES OR TO THE PEOPLE

Bank supporters asserted the principle of statutory construction, *expressio unius est exclusio alterius* or, the expression of one thing is the exclusion of another, as a sound rule of construction which “governs the construction of all grants and instalments in public or in private life.”²⁸⁵ This is an alternative expression of the view that Congress may exercise those sovereign powers that are not expressly prohibited to it, or expressly reserved to the states or to the people. Consequently, “where a grant creates a general power and enumerates exceptions to its exercise,” Representative Philip B. Key of Maryland opined, “the expression and enumeration of those exceptions operate to exclude all others.”²⁸⁶ Under this view, a “power” is “an authority to attain a given end.”²⁸⁷ Consequently, the Constitution authorizes Congress to exercise those sovereign powers that it does not explicitly prohibit or explicitly reserve to the states or to the people. This principle also derives from a broad construction of the Tenth Amendment.²⁸⁸

G. BANK OPPONENTS COUNTER THAT THE TENTH AMENDMENT PRECLUDES IMPLIED POWERS

Opponents of re-chartering countered that the Tenth Amendment, strictly interpreted, excludes implied powers. For example, Representative Joseph Desha of Kentucky asserted that the Tenth Amendment expressly prohibits the theory of “constructive powers” bank proponents relied on.²⁸⁹ Congress may exercise only those legislative powers the Constitution expressly delegated to it. He defied anyone to identify a clause in the Constitution that would justify granting monopolies or exclusive privileges, such as the national bank.²⁹⁰ Desha rejected the doctrine of implied powers as absurd and dangerous, claim-

285. *Id.* at 660 (statement of Rep. Key).

286. *Id.*; *accord id.* at 781 (statement of Rep. Tallmadge). See *infra*, notes 451, 453, and accompanying text for Madison’s assertion of this principle in THE FEDERALIST NO. 44.

287. 22 ANNALS OF CONG. 661 (1811) (statement of Rep. Key).

288. *Id.* at 780–81 (statement of Rep. Tallmadge); *see also id.* at 771 (statement of Rep. Nicholson); *infra* note 525.

289. *Id.* at 652 (statement of Rep. Desha); *see also id.* at 753 (statement of Rep. Crawford).

290. *Id.*

ing that he had thought the doctrine of implied powers had long ago been exploded when the Alien and Sedition Acts were enacted under this doctrine, and the people expressed their disapproval of the doctrine by throwing the congressional majority out of power.²⁹¹ He objected that the doctrine of implied powers destroyed the barriers of the Constitution, rendering its limitations on power a “dead letter.”²⁹² Representative John Rhea of Tennessee asserted the opposite constitutional construction to that of bank proponents. Rhea argued that since the power to charter a bank was not enumerated in the Constitution nor prohibited to the states or to the people, it was reserved to the states and to “the people in their individual State capacities.”²⁹³

After all of these arguments, the bill to recharter the First Bank failed by one vote in the House (sixty-four to sixty-five) and one vote in the Senate (seventeen to eighteen), with the tie-breaking vote cast by Vice President George Clinton.²⁹⁴ The demise of the First Bank was ill-timed, because the War of 1812 broke out shortly after it. The war demonstrated the utility of a national bank.

IV. THE SECOND BANK OF THE UNITED STATES 1816

A. ECONOMIC AND POLITICAL BACKGROUND OF THE SECOND BANK

Events following the demise of the First Bank led to the creation of the Second Bank. First, the number of state-chartered banks exploded. Second, the War of 1812 created a financial crisis. In the five years between 1811 and 1816, states chartered 175 banks, almost twice the number they had chartered in the twenty-year period between 1791 and 1811.²⁹⁵ Freed from the restraining power of the First Bank in 1811, state banks “went wild” issuing paper notes, greatly exceeding their gold and silver reserves, depreciating the value of paper money, and forcing the banks to suspend specie payments in an 1814 run on the banks by alarmed depositors, who were fright-

291. *Id.* at 652–53.

292. *Id.* at 652.

293. *Id.* at 816 (statement of Rep. Rhea).

294. *Id.* at 346–47, 826.

295. WOOD, *supra* note 6, at 296.

ened by the British raid on Washington and threatened seizure of Baltimore.²⁹⁶

The national government was also disabled by the absence of a national bank. The government turned to state banks to handle its financial business, but they proved to be “nearly useless.”²⁹⁷ Without a national bank, the national government was unable to transfer funds across the country or to pay the escalating costs of the war. Needing \$50 million to pay the government’s debts, President Madison’s treasury secretary, George W. Campbell, was unable to borrow the needed funds, and in November 1814 the government defaulted on the national debt.²⁹⁸ With the national government bankrupt and the public credit in shambles, Treasury Secretary Campbell resigned.²⁹⁹ His replacement, Alexander Dallas, recommended that the government increase internal taxes and establish a new, enlarged Bank of the United States to meet the country’s desperate condition.³⁰⁰

B. PRESIDENT JAMES MADISON’S TREASURY SECRETARY,
ALEXANDER DALLAS, ASKS CONGRESS TO CHARTER THE SECOND
BANK

Secretary Dallas informed Congress that the country needed a national bank to meet its financial exigencies by restoring a specie-based national currency and a nationally circulating system of sound bank notes, thus restoring the government’s creditworthiness and stimulating the infusion of credit into the private economy.³⁰¹ Leading banking houses and wealthy businessmen, such as Stephen Girard, John Jacob Astor, and David Parish, instigated others to petition Congress for a new national bank.³⁰²

Undoubtedly speaking for President Madison, Secretary Dallas addressed the question of the bank’s constitutionality.³⁰³

296. *Id.* at 692; *see also* HAMMOND, *supra* note 6, at 227–28.

297. HAMMOND, *supra* note 6, at 229. The desperate condition of the nation’s currency and public credit is described by Treasury Secretary Alexander Dallas in his Treasury Report to the House of Representatives on October 17, 1814. 28 ANNALS OF CONG. 401–03 (1814) (report of Sec. Dallas).

298. WOOD, *supra* note 6, at 692; *see also* HAMMOND, *supra* note 6, at 229–30.

299. WOOD, *supra* note 6, at 692.

300. *Id.*

301. 28 ANNALS OF CONG. 401–03 (1814) (report of Sec. Dallas).

302. HAMMOND, *supra* note 6, at 231.

303. *Id.* at 232–34.

Madison had changed his view regarding the First Bank's constitutionality in 1810–11 on the bases of congressional precedent and political practice.³⁰⁴ The experience of the War of 1812 further convinced him that the public credit and financial needs of the nation's economy required a new national bank. Thus, acknowledging that highly placed individuals had opposed the First Bank on constitutional grounds, Dallas expressed the view that changes in circumstances during and after the War of 1812 had produced changes in these opinions.³⁰⁵ Recognizing the authority of congressional precedent, he asserted that twenty years of political practice had sanctioned the First Bank and established with finality the bank's constitutionality.³⁰⁶ He therefore demanded that discussion and disagreement over the national bank's constitutionality must cease "and decision shall become absolute."³⁰⁷

Opposition in Congress to the national bank's constitutionality collapsed. The Senate enacted a bill chartering a national bank on December 9, 1814, without debating the question of the bank's constitutionality.³⁰⁸ Even Senator William H. Wells of Delaware, who presented the most elaborate argument against the bank bill in the Senate, conceded that the question of Congress's constitutional power to incorporate a bank was "now at rest," and he did not wish to revive it.³⁰⁹ The question at issue, he maintained, was the "true character and just extent of this authority."³¹⁰ The bill then went to the House of Representatives.

C. THE HOUSE OF REPRESENTATIVES DEBATES IN 1814 ON THE SECOND BANK'S CONSTITUTIONALITY, BUT WITH LITTLE DISAGREEMENT

The House debates reflected wide support for a national bank and for the bank's constitutionality,³¹¹ but a large number

304. 28 ANNALS OF CONG. 189 (1815) (message from Pres. Madison).

305. *Id.* at 408 (report of Sec. Dallas).

306. *Id.* at 409.

307. *Id.* at 408.

308. *Id.* at 126.

309. 29 ANNALS OF CONG. 258–59 (1816) (statement of Sen. Wells).

310. 28 ANNALS OF CONG. 259 (1814).

311. *See, e.g., id.* at 428 (1814) (statement of Rep. Oakley); *id.* at 496 (statement of Rep. Wright); *id.* (statement of Rep. Burwell); *id.* (statement of Rep. Duvall); *id.* at 496–97 (statement of Rep. Stanford); *id.* at 497, 671–72, 676 (statements of Rep. Grosvenor); *id.* at 497 (statement of Rep. Wilson); *id.* at 498 (statement of Rep. McKee); *id.* at 561, 988, 1028 (statements of Rep.

of legislators opposed the proposed bank on practical, financial grounds.³¹² Federalists, for example, supported a national bank and Congress's constitutional authority to charter a bank as they had in 1791, but they thought the proposed bank was too weak and ineffectual.³¹³ Nevertheless, some legislators opposed a new national bank on the grounds that it was unconstitutional,³¹⁴ but few made constitutional arguments against the bill.³¹⁵ Representative John Clopton of Virginia made an elaborate argument against Congress's constitutional authority to charter a second national bank, but he simply reiterated the arguments asserted by bank opponents since 1791.³¹⁶

Statements made in the House as the debate drew to a close indicate that congressmen believed the nation's finances were in desperate shape and that a national bank was an indispensable curative. The House overwhelmingly passed the Senate bill with amendments on January 7, 1815, by a vote of 120 yeas and 38 nays.³¹⁷

D. PRESIDENT MADISON AGREES THAT THE NATIONAL BANK IS CONSTITUTIONAL ON A THEORY OF POLITICAL PRACTICE

President James Madison vetoed the bill in January 1815. In his veto message, President Madison conceded Congress's

Fisk); *id.* at 568, 572–73 (statements of Rep. Gaston); *id.* at 604, 1028 (statements of Rep. Ingersoll); *id.* at 663–64, 665 (statements of Rep. Hanson); *id.* at 686–88 (statement of Rep. Miller); *id.* at 692 (statement of Rep. Kilbourn); *id.* at 1027 (statement of Rep. Hall); *id.* at 1028 (statement of Rep. Alston).

312. *See, e.g., id.* at 428 (statement of Rep. Oakley); *id.* at 496 (statement of Rep. Burwell); *id.* (statement of Rep. Stanford); *id.* at 497, 665–71 (statements of Rep. Grosvenor); *id.* at 498 (statement of Rep. Post); *id.* at 562 (statement of Rep. Sharp); *id.* at 564, 987 (statements of Rep. Gaston); *id.* at 1014–23 (statement of Rep. Webster); *id.* at 1028 (statement of Rep. Robertson); *id.* at 1025–26 (statement of Speaker Cheves).

313. HAMMOND, *supra* note 6, at 238.

314. *See, e.g.,* 28 ANNALS OF CONG. 496, 497, 976–78 (statements of Rep. Clopton); *id.* at 496 (statement of Rep. Eppes); *id.* at 497, 585 (statements of Rep. Hawkins); *id.* at 1028 (statement of Rep. Macon); 29 ANNALS OF CONG. 1339 (1816) (statement of Rep. Randolph); *id.* at 1340 (statement of Rep. Hardin). *But see id.* at 1340 (statement of Rep. Wright) (arguing that the Supreme Court has tacitly recognized the bank's constitutionality by recognizing it as a party in several cases).

315. 29 ANNALS OF CONG. 1339 (1816) (statement of Rep. Webster); *see also id.* at 259 (statement of Sen. Wells) (reiterating the argument that an express power to charter a national bank had been discussed and intentionally omitted from the Constitution).

316. *See* 28 ANNALS OF CONG. 976–85 (1814) (statement of Rep. Clopton).

317. *Id.* at 1044–45.

constitutional power to incorporate a bank on the authority of political practice. He explained that the question of the bank's constitutionality was "precluded, in my judgment, by repeated recognitions, under varied circumstances, of the validity of such an institution, in acts of the Legislative, Executive, and Judicial branches of the Government," with which "the general will of the nation" expressed its concurrence.³¹⁸ Madison thereby acknowledged the authority of political practice in resolving questions of constitutional construction and political process, as distinguished from judicial review, as a method of resolving questions of constitutional construction. This represented a 180-degree shift in Madison's position when he led the opposition to Congress's authority to charter the First Bank in 1791.

The reasons for the President's veto were financial. Madison stated that he did not believe the proposed bank was calculated to revive the public credit, to provide a national medium of circulation, to aid the Treasury by facilitating the collection of the revenue, or to afford the public "more durable loans."³¹⁹ In short, the proposed bank bill did not meet the nation's financial and economic needs.

E. THE MADISON ADMINISTRATION'S PROPOSAL FOR THE SECOND BANK

On December 5, 1815, President Madison sent his annual message to Congress. Among the subjects he discussed were the needs to restore the public credit, to pay the debt incurred in the War of 1812, and to establish a uniform national currency.³²⁰ Madison advised Congress to create a national bank to achieve these goals.³²¹

Secretary Dallas sent a proposed bank bill with a letter explaining its details the very next day.³²² The proposed bill called for a national bank capitalized at \$35 million, with Congress authorized to increase its capital to \$50 million. Its capital was to consist of three-quarters of public stock and one-quarter of specie. Like the First Bank, the proposed second bank was a governmental institution for the collection and distribution of

318. 28 ANNALS OF CONG. 189 (1815) (message of Pres. Madison).

319. *Id.*

320. Letter from James Madison, Pres. of the United States, to Congress (Dec. 5, 1815) (on file with the American Presidency Project), <http://www.presidency.ucsb.edu/ws/?pid=29457>.

321. *Id.*

322. 29 ANNALS OF CONG. 505 (1815) (letter of Sec. Dallas).

the government's revenues and a private commercial bank to accommodate "the uses of commerce, agriculture, manufactures, and the arts, throughout the Union."³²³ The bank was also "required to restore and maintain the national currency; and . . . the circulation of the national wealth."³²⁴

The Second Bank, again like the First Bank, was owned jointly by the national government and private investors. The federal government was authorized to purchase \$7 million of the \$35 million capitalization.³²⁵ Unlike the First Bank, the President appointed five of the twenty-five Second Bank directors, including the chairman of the board of directors.³²⁶ The national government was both an investor in the Second Bank and a participant in the bank's governing structure. The board of directors was authorized to establish branches as they deemed appropriate.³²⁷ Each branch was to have a board of thirteen directors, and the Secretary of the Treasury, with the approval of the President, was authorized to appoint the president of each branch.³²⁸

In justifying the President's power to appoint bank directors, Secretary Dallas emphasized the bank's dual nature as a governmentally and privately owned and operated institution. He contended that "[t]he National Bank ought not to be regarded simply as a commercial bank . . . created for the purposes of commerce and profit alone, but much more for the purposes of national policy, as an auxiliary in the exercise of some of the highest powers of the Government."³²⁹

F. THE REVISED SECOND BANK BILL IN CONGRESS

The bank's constitutionality had no prominence at all in the debates of 1814, 1815, or 1816, particularly if one compares these debates to those of 1791 and 1810-11.³³⁰ Thus, when he introduced the bank bill to the House on January 8, 1816, Representative John C. Calhoun of South Carolina observed that the issue whether Congress possessed the constitutional authority to incorporate a bank did not have to be debated be-

323. *Id.* at 506.

324. *Id.*

325. *Id.* at 512.

326. *Id.* at 499.

327. *Id.* at 503.

328. *Id.*

329. *Id.* at 508.

330. HAMMOND, *supra* note 6, at 233.

cause it had been so freely and frequently discussed that legislators had made up their minds on the issue.³³¹ The questions to be addressed were the practical questions of whether and what kind of bank Congress should establish.³³²

While the constitutionality of a national bank was a settled question generally, one important legislator took until 1816 to change his mind. As a U.S. Senator, Henry Clay opposed extending the charter of the First Bank in 1811, in part, on constitutional grounds. In 1816, as Speaker of the House, he supported the bank and Congress's constitutional authority to charter it. His changed view stemmed from the theories that Congress possesses the power to legislate to meet the nation's exigencies; that Congress possesses the power to fulfill "many of the objects specifically enumerated in the Constitution," indefinable in their nature though they may be; and his acceptance of a developmental theory of a living Constitution.³³³ Though the Constitution never changes and is always the same, he conceded, "the force of circumstances, and the lights of experience, may evolve to the fallible persons charged with its administration, the fitness and necessity of a particular exercise of constructive power to-day, which they did not see at a former period."³³⁴ This necessity "may not be perceived, at one time, under one state of things, when it is perceived, at another time, under a different state of things."³³⁵

The House passed the bank bill on March 14, 1816.³³⁶ The Senate passed the bank bill with minor amendments on April 3, 1816 by an almost two-to-one vote of twenty-two to twelve.³³⁷ The House concurred in the Senate amendments and enacted the bill two days later.³³⁸ President Madison signed the bill into law a week later, on April 10, 1816.

G. ECONOMIC, GEOGRAPHICAL, AND POLITICAL ALIGNMENTS IN CONGRESS

The political alignments on the question of incorporating the Second Bank in 1816 were the opposite to the alignments

331. *Id.* at 234–35.

332. 29 ANNALS OF CONG. 1060 (1816) (statement of Rep. Calhoun).

333. *Id.* at 1191–92 (statement of Speaker Clay).

334. *Id.* at 1192.

335. *Id.*

336. *Id.* at 1219.

337. *Id.* at 281.

338. *Id.* at 1344.

regarding the creation of First Bank in 1791. The Second Bank was similar to the First Bank adopted by the Federalists in 1791, and the Federalists had not changed their views on banking in 1816. Nevertheless, Daniel Webster and the Federalists voted against the Second Bank.³³⁹ Bray Hammond characterized Webster's and the Federalists' opposition to the Second Bank as captious and motivated by "partisanship rather than principle."³⁴⁰ Republican policy, on the other hand, had changed fundamentally. The party "had got into a position where a national Bank was as essential to it as it had been to the Federalists twenty-five years before."³⁴¹ With some exceptions in both parties, the incorporation of the Second Bank was a Republican measure enacted over the opposition of the Federalists.³⁴²

Geographical alignments also switched.³⁴³ In 1791, the North supported the incorporation of the First Bank, and the South opposed it.³⁴⁴ In 1816, the South and West established the Second Bank and the North opposed it.³⁴⁵ The senators and representatives from the states of New England and the mid-Atlantic opposed the Second Bank by a vote of forty-four to fifty-three.³⁴⁶ Those of the southern and western states voted for it by an almost two to one margin of fifty-eight to thirty.³⁴⁷ Virginia was the only southern state a majority of whose federal legislators voted against the bank, but it was a majority of one: ten to eleven.³⁴⁸ The majority of legislators from only three of the nine northern states voted for the Second Bank: New Jersey, New York and Rhode Island.³⁴⁹ Hammond concluded that this vote in 1816 was more regional than either of the votes in 1791 and 1811.³⁵⁰

Unfortunately, the Second Bank was operated in a politically partisan manner. It was mismanaged and failed to comply with its charter obligations. It did not perform its restraining

339. HAMMOND, *supra* note 6, at 241.

340. *Id.* at 239.

341. *Id.*

342. *Id.* at 241.

343. *Id.* at 240.

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

functions as a central bank.³⁵¹ The Second Bank's actions intensified the economic contraction that led to the economic depression and the Panic of 1819.³⁵² Congress considered but ultimately rejected proposals to repeal the Second Bank's charter in early 1819.³⁵³

The Second Bank engendered deep bitterness that persisted in many parts of the country long after the economic recovery that followed the depression of 1819. Senator Thomas Hart Benton of Missouri declaimed in 1832, "[a]ll the flourishing cities of the West are mortgaged to this moneyed power. They may be devoured by it at any moment. They are in the jaws of the monster! A lump of butter in the mouth of a dog! One gulp, one swallow, and all is gone!"³⁵⁴

Political leaders felt justified in trying to eliminate the Second Bank by taxing the bank's branches located in their states. Ironically, Maryland did not tax the Second Bank's Baltimore branch for this reason; rather, it taxed the branch to raise revenue.³⁵⁵ This helps to explain the government's decision to challenge Maryland's tax in a test case.

V. *MCCULLOCH V. MARYLAND*

McCulloch v. Maryland arose when James McCulloch, cashier of the Baltimore branch of Second Bank, refused to pay an annual tax of \$15,000 or a tax of two percent on the notes issued by the Second Bank which the state of Maryland imposed on any bank not chartered by the state.³⁵⁶ The case presented two questions: whether Congress possessed the constitutional authority to charter the Second Bank; and whether the tax Maryland imposed on Second Bank was constitutional. The case's deeper significance lay in the fact that opposing counsel presented to the Court for resolution the conflicting inherent national sovereignty and state sovereignty theories of American constitutionalism that the political branches of the government had been debating since the First Congress.³⁵⁷

351. *Id.* at 257.

352. *Id.*

353. *Id.* at 259.

354. 11 ABRIDGMENT OF THE DEBATES OF CONG. 478 (1860) (statement of Sen. Benton); *see also* HAMMOND, *supra* note 6, at 259.

355. *See* HAMMOND, *supra* note 6, at 263 (describing the bank tax of the Maryland legislature).

356. *Id.*

357. *Id.* at 264–65.

The court reporter acknowledged that *McCulloch*'s significance transcended the legal questions presented for decision.³⁵⁸ The Court was to decide fundamental questions concerning the nature of the Constitution, congressional powers, American federalism, and national and state sovereignty.

Each side was allowed three attorneys rather than the usual two, and oral arguments were made over ten days, February 22 to 27 and March 1 to 3.³⁵⁹ The reporter summarized the arguments over seventy-eight pages,³⁶⁰ just over twice the length of the Court's thirty-seven page opinion by Chief Justice Marshall. Opposing counsel repeated the conflicting theories of American constitutionalism and arguments regarding the bank's constitutionality that were made in the congressional debates of 1791, 1810–1811 and 1814, 1815–1816 and in President Washington's cabinet in 1791.³⁶¹

Chief Justice Marshall acknowledged the legal gravity and political and sectional divisiveness engendered by these issues and the profoundly important questions of constitutional construction they involved.³⁶² The public also recognized the importance of the questions raised in this case.³⁶³

The Court affirmed national sovereignty constitutionalism and its theory of Congress's inherent sovereign powers that bank supporters had argued since 1791. The Court rejected the strict construction constitutionalism and its theory of state sovereignty argued by bank opponents in these debates. Chief Justice Marshall's opinion closely tracked Alexander Hamilton's arguments, which were adopted by the bank's attorneys, particularly by William Pinkney, whom Marshall regarded as "the

358. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 322 n.3 (1819). See *supra* note 5 and accompanying text for the importance of *McCulloch*'s impact on the Court's jurisprudence.

359. *Id.*

360. *See generally id.*

361. *See id.* at 322–40.

362. *Id.* at 400–01.

363. The NATIONAL INTELLIGENCER reported that "[t]he argument has involved some of the most important principles of constitutional law which have been discussed with an equal degree of learning and eloquence and have constantly attracted the attention of a numerous and intelligent auditory," and the Court's decision "is anxiously expected." WARREN, *supra* note 223, at 508 (quoting NAT'L INTELLIGENCER, Feb. 25, 1819). The NILES REGISTER similarly informed its readers that the *McCulloch* case "involves some of the most important principles of constitutional law and the decision is anxiously expected." *Id.* (quoting NILES REG., Feb. 27, 1819).

greatest man he had ever seen in a Court of justice.”³⁶⁴ Justice Story, not one to give high praise, gushed over Pinkney’s argument in *McCulloch*: “I never, in my whole life, heard a greater speech; it was worth a journey from Salem to hear it . . . his eloquence was overwhelming.”³⁶⁵ This helps to explain the alacrity with which the Court issued its decision. Chief Justice Marshall issued his opinion just four days after the end of days of oral arguments.³⁶⁶

A. POLITICAL PRACTICE AS A METHOD OF CONSTITUTIONAL INTERPRETATION

Chief Justice Marshall, writing for a unanimous Court, first took up the question of the bank’s constitutionality. But before he began his analysis of this issue, he asserted principles of constitutional construction that affirmed the national sovereignty constitutionalism that First and Second Bank congressional supporters had argued since the First Congress.

The Chief Justice began his opinion by asserting that political practice is an authoritative method of interpreting the Constitution and the constitutionality of Congress’s legislative actions. Marshall declared that doubtful questions regarding the powers of the people’s representatives, “in the decision of which the great principles of liberty are not concerned . . . if not put at rest by the practice of the government, ought to receive a considerable impression from that practice.”³⁶⁷ Affirming Con-

364. G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835*, at 244 (1988) (quoting SAMUEL TYLER, *MEMOIR OF ROGER BROOKE TANEY*, LL.D. 141 (Baltimore, John Murphy & Co. ed., 1872) (White also noted that Pinkney’s adversary, Walter Jones, “added that ‘no such man has ever appeared in any country more than once in a century.’” *Id.* at 244. Chief Justice Roger Brooke Taney also lauded Pinkney many years later: “I have heard almost all the great advocates of the United States, both of the past and present generation, but I have seen none equal to Pinkney.” TYLER, *supra* at 71.

365. Letter from Joseph Story to Stephen White (Mar. 3, 1819), in *1 LIFE AND LETTERS OF JOSEPH STORY* 324–25 (William W. Story ed., 1851). Story reported that “[a]ll the cobwebs of sophistry and metaphysics about State rights and State sovereignty [Pinkney] brushed away with a mighty besom [broom].” *Id.*

366. See *McCulloch*, 17 U.S. (4 Wheat.) at 322, 400.

367. *Id.* at 401. Marshall’s opinion reflects Pinkney’s argument at 379–80, Webster’s argument at 322–23, and Wirt’s argument at 352–53. Congressional bank supporters used this theory of constitutional construction in support of the First Bank bill in the First Congress. See *supra* notes 110–14, 145–60, 273–75, and accompanying text. Political practice is very close to the doctrine of precedent in determining constitutional powers and individual rights in eighteenth century Anglo-American law.

gress's authority to interpret its constitutional powers, Marshall declared: "An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded."³⁶⁸ This doctrine is possible only if Congress possesses inherent sovereign powers. It is utterly impossible under strict construction constitutionalism.

McCulloch was not the first time the Court used political practice as an authoritative explication of the Constitution's meaning. Six days after it had decided *Marbury v. Madison*,³⁶⁹ the Supreme Court unanimously decided *Stuart v. Laird* with the observation "that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the [constitutional] construction"³⁷⁰ that determined the result.

Political practice was used as authority most recently in *NLRB v. Noel Canning*, in which Justice Stephen Breyer stated that, "[i]n light of some linguistic ambiguity, the basic purpose of the [Recess Appointments] Clause, and the *historical practice* we have described, we conclude that the phrase 'all vacancies' includes vacancies that come into existence while the Senate is in session."³⁷¹ In this case, Justice Breyer cited as authority *Mistretta v. United States*, which in turn quoted Justice Felix Frankfurter's "gloss on the executive power" theory of constitutional interpretation.³⁷²

Justice Frankfurter's "gloss" theory is an extension of Chief Justice Marshall's approach to interpreting the Constitution by using political practice. Frankfurter cited *McCulloch* for "a spacious view" of the Constitution and declared that

a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by the Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.³⁷³

368. *McCulloch*, 17 U.S. (4 Wheat.) at 401.

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

370. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803).

371. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2573 (2014) (emphasis added).

372. *Id.* at 32–33, (quoting *Mistretta v. United States*, 488 U.S. 361, 401 (1989)).

373. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (J.

In the same case, Justice Robert Jackson articulated his tripartite approach to interpreting constitutionality of presidential actions on the basis of the interaction between Congress and the executive over time. Jackson derived this approach from the same theory of constitutional construction based on political practice.³⁷⁴ As a Supreme Court Justice, William Rehnquist explained the Court's decision in *Dames & Moore v. Regan*,³⁷⁵ relying on a refined version of Justice Jackson's tripartite analysis and Justice Frankfurter's gloss on executive powers theory. Chief Justice John Roberts also used these theories in explaining the Court's decision in *Medellin v. Texas*.³⁷⁶ Justice Antonin Scalia recognized "constitutional practice" as persuasive authority in *United States v. Printz*, when he declared that "[t]he constitutional practice we have examined above tends to negate the existence of the congressional power asserted here," though it was not conclusive.³⁷⁷

B. CONTEMPORANEOUS EXPOSITION OF THE CONSTITUTION AS AUTHORITY FOR CONSTITUTIONAL CONSTRUCTION

Political practice was of special significance in *McCulloch*. Chief Justice Marshall noted that the challenged legislative power was exercised initially by the First Congress when it chartered the First Bank in 1791 for a period of twenty years after a zealous and able legislative debate.³⁷⁸ The bank bill was then debated in the cabinet of President George Washington "with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law," the Chief Justice recounted.³⁷⁹ Allowed to expire in 1811, the short experience without the national bank exposed the government to financial embarrassments, Marshall noted, which "convinced those who were most prejudiced against the measure [in 1791] of its necessity, and induced the

Frankfurter, concurring).

374. *Id.* at 635–38 (J. Jackson, concurring).

375. *Dames & Moore v. Regan*, 453 U.S. 654, 668–69, 674, 686 (1981).

376. *Medellin v. Texas*, 552 U.S. 491, 524–25 (2008).

377. *United States v. Printz*, 521 U.S. 898, 918 (1997); *see also* *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915) ("The long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent.").

378. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401–02 (1819).

379. *Id.* at 402.

passage of the present law [in 1816].”³⁸⁰ This was a not-too-veiled reference to James Madison—who, as President, signed the Second Bank bill into law—and Madison’s Democratic Republican supporters. Having reviewed this legislative and political history, Marshall repeated the authority of political practice and consequent deferential standard of judicial review: “It would require no ordinary share of intrepidity, to assert that a measure adopted under these circumstances, was a bold and plain usurpation, to which the constitution gave no countenance.”³⁸¹ Marshall added that the court would find the challenged statute constitutional even if it were a case of first impression.

C. DEFERENTIAL JUDICIAL REVIEW

Another principle of national sovereignty constitutionalism is judicial deference to the political process in interpreting constitutional powers, with the exception of powers relating to individual liberties. From the Founding through the Civil War and Reconstruction, the Supreme Court was deferential to Congress—recognizing its delegated powers as broad, plenary, and supreme—and to the political process in affirming the constitutionality of federal statutes.³⁸² The Supreme Court declared unconstitutional only two federal statutes prior to the Civil War: Section 13 of the Judiciary Act of 1789 in *Marbury v. Madison* and the Compromise of 1820 in *Dred Scott v. Sandford*.³⁸³ It declared unconstitutional thirty-one state statutes in this period, which supports the view that the Supreme Court’s power of judicial review was originally understood as a federal judicial protection of federal law from state infringements. The

380. *Id.* Marshall’s opinion closely tracks the banks’ history as it was recounted in the argument of Attorney General Wirt in *McCulloch. Id.* at 352–54. William Pinkney curtly asserted that the question of the bank bill’s constitutionality had been waived in 1816 “as being settled by contemporaneous exposition, and repeated subsequent recognitions.” *Id.* at 380.

381. *Id.* at 402.

382. See generally BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 235 (2009); KRAMER, *supra* note 132; WILLIAM E. NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 82 (2000); SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 125 (1990).

383. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Court did not embark upon an activist judicial review of federal statutes, as we understand it today, until the 1860s and 1870s.

Chief Justice Marshall grounded the Court's deference to Congress on the doctrine of political practice. He wrote that, in cases such as the one before the court, in which Congress had previously exercised the challenged power of incorporating a bank, in which subsequent congresses affirmed the power through supporting legislation, and in which the courts decided cases concerning the bank as if it were constitutional without actually deciding its constitutionality, the constitutionality of the statute "can scarcely be considered as an open question."³⁸⁴ To declare such a legislative act unconstitutional, Marshall opined, it would have to be "a bold and daring usurpation."³⁸⁵ Marshall said this would have been the standard of review even if the issue were an open question. "A bold and daring usurpation" is an extraordinarily high standard that would infrequently justify a court's finding that a federal statute is unconstitutional.

Notably, the Chief Justice acknowledged that the power to incorporate a national bank is not among the enumerated powers delegated to Congress in Article I. He explained, however, that the national government's powers greatly transcend the powers enumerated in Article I for several reasons.

D. POWERS IMPLIED FROM THE CONSTITUTION'S TEXT

One reason Marshall cited for Congress's inherent powers is the text of the Constitution. Unlike the Articles of Confederation, the Constitution does not expressly "[exclude] incidental or implied powers; and [require] that everything granted [to the national government] shall be expressly and minutely described."³⁸⁶ Even the Tenth Amendment does not contain the word "expressly," Marshall observed, but leaves the question "to depend on a fair construction of the whole instrument."³⁸⁷

384. *McCulloch*, 17 U.S. (4 Wheat.) at 401 (1819). *McCulloch*'s attorneys had argued this theory to the Court. *See id.* at 325–26 (Webster); *id.* at 357 (Attorney General Writ); *id.* at 386–87 (Pinkney).

385. *McCulloch*, 17 U.S. (4 Wheat.) at 401. Marshall suggested an equally high standard of review in *Marbury* when he declared that "an act of the legislature, repugnant to the Constitution, is void." 5 U.S. (1 Cranch) at 177. Though he embraced state sovereignty, strict constructionist constitutionalism, Thomas Jefferson was nevertheless deferential to Congress regarding doubtful questions of constitutionality. *See MALONE, supra* note 43, at 280.

386. *McCulloch*, 17 U.S. (4 Wheat.) at 406.

387. *Id.* The Tenth Amendment states: "The powers not delegated to the

He interpreted the Tenth Amendment to mean that Congress may exercise a power to achieve its objects or ends so long as the Constitution does not *explicitly* prohibit it or reserve the power to the states or to the people.³⁸⁸

The Court's construction of the Tenth Amendment is the exact opposite of the construction adopted by the Supreme Court today.³⁸⁹ Maryland's attorney general, Luther Martin, had interpreted the Tenth Amendment as it is understood today and argued that a power not delegated to the United States nor prohibited to the states "is, therefore, reserved to the states, or to the people."³⁹⁰ The Court unanimously rejected this reading of the Tenth Amendment. Marshall's analysis opens the question of what is the source of Congress's inherent powers.

E. POWERS IMPLIED FROM THE NATURE OF A WRITTEN CONSTITUTION

A second reason Marshall offered to explain Congress's inherent powers is the nature of the U.S. Constitution. The Court concluded that the nature of written constitutions generally precludes the possibility of specifying all of the powers a government may exercise. The Chief Justice elaborated:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, [sic] that only its great outlines should be marked, *its important objects designated*, and the minor ingredients which compose those objects, be deduced from the nature of those objects themselves.³⁹¹

United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

388. See *McCulloch*, 17 U.S. (4 Wheat.) at 316. The bank's attorneys interpreted the Tenth Amendment in the same way. See, e.g., *id.* at 384–85 (Pinkney's argument). See *supra* notes 98–105, 260–65 for citations to congressional debates on this issue.

389. See, e.g., *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2572 (2012); *Printz v. United States*, 521 U.S. 898, 907 (1997); *New York v. United States*, 505 U.S. 144, 161 (1992). *But see* *Reno v. Condon*, 528 U.S. 141, 151 (2000).

390. *McCulloch*, 17 U.S. (4 Wheat.) at 374. Hopkinson argued that the states reserve all powers "that are not expressly prohibited, or necessarily excluded." *Id.* at 338.

391. *Id.* at 407. Marshall's explanation parrots the view of Charles Pinkney. See *id.* at 385. Attorney General Wirt held similar views. See *id.* at 356–57.

Notice that the Chief Justice refers to “objects” and not “powers” that the Constitution designates from which Congress’s unstated powers might be deduced.

Marshall attributed this understanding to the framers of the U.S. Constitution, which he inferred from the Constitution’s text. “That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language,” Marshall opined.³⁹² “Why else were some of the limitations, found in the ninth section of the 1st article, introduced?”³⁹³ Article I, Section 9 is a litany of prohibitions on Congress’s legislative powers, such as prohibiting Congress from suspending the writ of habeas corpus except in specified cases, from enacting bills of attainder and ex post facto laws, and many other actions. “In considering this question, then, we must never forget, [sic] that it is a Constitution we are expounding,”³⁹⁴ Marshall emphasized in a much-quoted statement.

F. IMPLIED POWERS INHERENT IN CONGRESS AS A SOVEREIGN LEGISLATURE

A third reason the Constitution authorizes Congress to exercise inherent powers has generally been overlooked by scholars and jurists: it is the nature of Congress as a sovereign legislature. Marshall asserted this theory of national sovereignty constitutionalism in refuting the argument that Congress does not possess the power to charter a corporation because the power of incorporation is a sovereign power, and the only sovereign powers Congress may exercise are those enumerated in Article I.³⁹⁵ “On what foundation does this argument rest,” Marshall asked rhetorically. He answered: “On this alone: the power of creating a corporation is one appertaining to sovereignty, and is not expressly conferred on Congress.”³⁹⁶ Conceding “This is true,” Marshall rebutted the argument by emphasizing the sovereign nature of Congress and its legislative powers, both expressly enumerated and inherent:

392. *Id.* at 407.

393. *Id.* Marshall’s reference is to Article I, Section 9 of the Constitution.

394. *Id.* at 407. Marshall’s constitutional construction echoes that of Alexander Hamilton in *THE FEDERALIST* NO. 23, at 152–57 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

395. *McCulloch*, 17 U.S. (4 Wheat.) at 409.

396. *Id.*

But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; . . . there would be some difficulty in sustaining the authority of congress to pass other laws for the accomplishment of the same objects. The government which has a right to do an act, and has imposed on it, the duty of performing that 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.³⁹⁷

Given Congress's sovereignty, Marshall said the Court could not "well comprehend the process of reasoning which maintains, that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government."³⁹⁸ In other words, it is to "subserve" the federal government's legitimate objects that Congress may exercise its explicitly delegated and inherent sovereign powers.

Chief Justice Marshall asserted here a doctrine of implied powers inherent in the sovereign nature of the national government generally and of Congress specifically. In other words, as a sovereign legislature Congress possesses sovereign legislative powers that are inherent in all sovereign governments, but Congress is limited in exercising these powers to those ends and objects for which it was created. These ends and objects are stated in the Preamble to the Constitution, the powers enumerated in Article I, and throughout the Constitution.

The doctrine of Congress's inherent sovereign powers explains why the Chief Justice repeatedly stated that Congress possesses unenumerated powers to accomplish the objects and ends for which the Constitution was adopted and the national government was created instead of limiting these powers to those that are necessarily implied in semantic definitions of the

397. *Id.* at 409–10. The bank's attorneys argued inherent sovereignty constitutionalism. *See id.* at 323 (Webster); *id.* at 358 (Attorney General Wirt); *id.* at 382–83 (William Pinkney). For explicit congressional sources of the inherent sovereignty theory, see *supra* notes 56–99, 171–83, 260–65, and accompanying text. For Alexander Hamilton's assertion of the inherent sovereignty theory, see *supra* notes 195–216 and accompanying text.

398. *McCulloch*, 17 U.S. (1 Wheat.) at 410–11.

enumerated powers of Article I.³⁹⁹ Inherent sovereign powers is the reason why political practice can become an authoritative construction of the Constitution. It also explains why Congress may exercise unenumerated powers to address national needs and exigencies apart from those implied from enumerated powers.⁴⁰⁰

G. CONGRESS'S INHERENT SOVEREIGN POWERS ILLUSTRATED WITH ITS PENAL POWERS

Marshall explained the Court's understanding of Congress as a sovereign legislature that may exercise inherent sovereign powers with a discussion of Congress's penal powers. He observed that "[a]ll admit, that the government may, legitimately, punish any violation of its laws; and yet, this [penal power] is not among the enumerated powers of congress."⁴⁰¹ Indeed, Marshall declared that the power to punish violations of the law "might be denied, with the more plausibility [than the power to incorporate a bank], because it is expressly given in some cases."⁴⁰² He asked, therefore, "whence arises the power to punish, in cases not prescribed by the constitution?" And Marshall answered: "All admit, that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of congress." Moreover, Congress's powers "may exist and be carried into execution, although no punishment should be inflicted, in cases where the right to punish is not expressly given."⁴⁰³

399. See *supra* notes 391–400 and accompanying text; *infra* notes 401–07, 414–21, and accompanying text.

400. See *infra* notes 444–91 and accompanying text.

401. *McCulloch*, 17 U. S. (4 Wheat.) at 416.

402. *Id.* Article I, Section 8 delegates the power to punish in two situations: Clause 6 authorizes Congress "[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States," and Clause 10 authorizes Congress "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." U.S. CONST. art. I, § 8, cl. 6, cl. 10.

403. *McCulloch*, 17 U. S. (4 Wheat.) at 416–17. Marshall offered two illustrations of Congress's unenumerated penal powers: he implied Congress's power to punish mail theft from the government's "implied power" to carry the mails on post-roads from one post-office to another, implied from Congress's power to establish post-offices and post-roads. The other illustration is Congress's power to punish crimes of stealing or falsifying records or process of a federal court, or committing perjury in such a court. "To punish these offences, is certainly conducive to the due administration of justice," Marshall opined, but it is not necessary to the existence and functioning of these courts. *Id.*

The reason Congress may exercise inherent sovereign penal powers, even when it is not necessary, is that “[t]he good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers.”⁴⁰⁴ A means to carry into execution all sovereign powers is Hamilton’s definition of “resulting” powers, which Hamilton claimed Congress possesses in addition to powers implied from Congress’s enumerated powers.⁴⁰⁵ And when may the federal government exercise its sovereign powers? Marshall said that Congress may legislate not only to effectuate its enumerated powers but whenever Congress deems it necessary to achieve an object or end delegated to it by the Constitution.⁴⁰⁶ The end or object the Chief Justice hypothesized Congress may achieve through its penal powers is the administration of justice, which the Preamble states is one of the ends for which the people created the Constitution.⁴⁰⁷

H. DISTINCTION BETWEEN IMPLIED POWERS AND GREAT SUBSTANTIVE AND INDEPENDENT POWERS IN *MCCULLOCH V. MARYLAND*

Chief Justice Marshall clarified the nature of Congress’s inherent sovereign powers when he explained the distinction between these unenumerated powers and Congress’s “great substantive and independent” sovereign powers that are enumerated in Article I.⁴⁰⁸ Their enumeration in the Constitution identifies these powers as great substantive and independent powers as well as some of the “objects” or “ends” for which the national government was established.⁴⁰⁹ However, implied or incidental sovereign powers are so numerous they could not be explicitly enumerated.⁴¹⁰ The power to charter a corporation,

404. *McCulloch*, 17 U.S. (4 Wheat.) at 418. Representative Elias Boudinot used the penal power illustration in House debates relating to the First Bank in 1791, but he said they were implied in Congress’s power to establish federal courts. *See supra* note 93 and accompanying text.

405. Hamilton defined “resulting powers” in his opinion on the constitutionality of the First Bank. *See supra* notes 203–16 and accompanying text.

406. *See McCulloch*, 17 U.S. (4 Wheat.) at 316.

407. *Id.*

408. *Id.* at 411.

409. *Id.* at 411–13.

410. *Id.* at 411. The bank’s attorneys made arguments reflected in portions of Marshall’s opinion analyzed in this section. *See id.* at 423–25 (Webster); *id.*

though a sovereign power, Marshall explained, is not “a great substantive and independent power” because it is not specifically enumerated like the powers to make war, to levy taxes or to regulate commerce.⁴¹¹

But, in what sense are enumerated powers “independent” powers? Marshall’s answer is that they are ends or objects in themselves and may be exercised independently of the other enumerated powers and other objects or ends for which the Constitution was adopted and the national government was established. These enumerated powers may be exercised “in any case whatever.”⁴¹² They are independent also because they “cannot be implied as incidental to other powers, or used as a means of executing them.”⁴¹³

An implied sovereign power, such as the power to charter a corporation, on the other hand, “is never the end for which other powers are exercised, but a means by which other objects are accomplished.”⁴¹⁴ The power to charter a corporation “is never used for its own sake, but for the purpose of effecting something else.”⁴¹⁵ Had the framers “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,”⁴¹⁶ Marshall elaborated. This statement suggests why the enumerated powers are “great substantive and independent power[s].”⁴¹⁷ Having been expressly delegated to Congress, they are plenary powers that Congress may exercise for their own sake.⁴¹⁸ An implied sovereign power, however, is a means to accomplish something else, such as an “object,” an “end,” or to carry into execution some enumerated power.⁴¹⁹ The court considered powers implied from the sovereign nature of Congress to be a “vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.”⁴²⁰ Consequently, Marshall

at 357 (Attorney General Wirt); and *id.* at 384–85 (Pinkney).

411. *Id.* at 411.

412. *See id.* at 421.

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.* at 421–22 (emphasis added).

417. *Id.* at 411.

418. *Id.*

419. *Id.* at 421, 424.

420. *Id.* at 421.

concluded, “there could be no motive for particularly mentioning it” in the Constitution.⁴²¹

I. HOW THE NATIONAL GOVERNMENT IS A GOVERNMENT OF LIMITED POWERS AND STILL POSSESSES A VAST MASS OF UNENUMERATED, IMPLIED POWERS

Immediately after asserting that the Constitution necessarily encompasses a “vast mass of incidental powers,” Marshall declared that “all must admit, that the powers of the government are limited, and that its limits are not to be transcended.”⁴²² Indeed, earlier in his opinion Marshall asserted that “[t]his government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, . . . is now universally admitted.”⁴²³ But then he also declared that a “sound construction of the constitution must allow to the national legislature that discretion” as to the choice of means to carry into execution the powers it confers upon Congress, “which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.”⁴²⁴

The principle of a Constitution containing limited enumerated sovereign powers as well as a “vast mass” of incidental sovereign powers is paradoxical. Marshall resolved this paradox in his *McCulloch* opinion and in one of his letters rebutting newspaper articles published in the *Richmond Enquirer* attacking the Court’s *McCulloch* opinion.⁴²⁵ Judge Spencer Roane, writing as “Hampden” in his letters to the *Richmond Enquirer*, had argued in favor of the strict construction constitutionalism asserted by congressional bank opponents since 1791 and argued by Maryland’s counsel in *McCulloch*, which limited Congress’s legislative powers to those expressly delegated in Article I and implied powers without which the enumerated powers

421. *Id.* at 422. The Court thus rejected James Madison’s and the congressional bank opponents’ strict construction theories of Congress’s substantial and independent powers and of the power of incorporation as a substantial and independent power. *See supra* notes 73–97 and accompanying text.

422. *Id.* at 421.

423. *Id.* at 405.

424. *Id.* at 421.

425. *Id.* at 407; A Friend of the Constitution, Letter to the Editor, ALEXANDRIA GAZETTE, July 1, 1819, reprinted in JOHN MARSHALL’S DEFENSE OF MCCULLOCH V. MARYLAND 161–67 (Gerald Gunther ed., 1969) [hereinafter JOHN MARSHALL’S DEFENSE].

could not be carried into effect.⁴²⁶ This argument concluded that there are no enumerated powers that require Congress to charter a corporation to carry them into execution.⁴²⁷ Consequently, the power of incorporation “is not to be taken by implication.”⁴²⁸

The *McCulloch* Court rejected this strict constitutional construction, and Chief Justice Marshall subsequently clarified the Court’s understanding of enumerated and incidental powers in response to Hampden’s newspaper attacks on the Court’s opinion. Marshall explained that an enumerated power is “[t]he power to do a thing” that includes “the power to carry that thing into execution.”⁴²⁹ They are “the same power, and the one cannot be termed with propriety ‘additional’ or ‘incidental’ to the other. . . . The execution is of the essence of the power.”⁴³⁰ Marshall’s comments directly rejected Maryland’s and Hampden’s conception of enumerated and implied powers.⁴³¹ They also conflict with contemporary understandings of powers implied from enumerated powers.⁴³²

Marshall explained the Court’s understanding of enumerated and implied powers using the taxing power. He hypothesized that, pursuant to its power to lay and collect taxes, Congress enacts a law that lays taxes and provides for the collection and depositing of the tax money in the U.S. treasury.⁴³³ This law “is not the exercise of an ‘additional power’ but the execution of one expressly granted.”⁴³⁴ In other words, laws that execute the granted power “are part of the original grant.”⁴³⁵

426. Hampden, Letter to the Editor, *RICHMOND ENQUIRER*, June 18, 1819, reprinted in *JOHN MARSHALL’S DEFENSE*, *supra* note 425, at 125.

427. *Id.*

428. *McCulloch*, 17 U.S. (4 Wheat.) at 374 (quoting Maryland Attorney General Luther Martin).

429. A Friend of the Constitution, *supra* note 425, at 162.

430. *Id.*

431. *Id.* at 163 (“Hampden has been caught by the words ‘necessary,’ ‘without which,’ and ‘only means,’ . . . so as to give them a weight not given by the author, . . . [a] great and obvious error . . .”).

432. See *United States v. Comstock*, 130 U.S. 126, 134 (2010) (“We have since [*McCulloch*] made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”).

433. A Friend of the Constitution, *supra* note 425, at 162–63.

434. *Id.* at 162.

435. *Id.* at 163.

Were Congress to enact additional laws to punish those who refused to pay their taxes or to impose a preference on their estates for the collection of taxes or "other collateral provisions," such laws "may be traced to incidental powers."⁴³⁶ So, incidental or implied powers are not essential to carry into execution enumerated powers; they are not part of the original grant. Rather, they support and facilitate the government in accomplishing the objectives of the enumerated powers. These implied powers are the "vast mass of incidental powers" Marshall referred to in his *McCulloch* opinion when he explained why they could not be specifically enumerated. Moreover, these powers are sovereign powers that are inherent in government. Thus, the Court understood enumerated powers not only as authorizations to perform some action but, more broadly, as objects and ends the national government was established to accomplish and which authorize Congress to exercise its inherent sovereign powers to achieve. The Court correspondingly rejected Maryland's strict construction of Article I as a list of sovereign powers and implied powers without which the enumerated powers could not be carried into execution to which Congress is limited in accomplishing the ends and objects the Constitution delegates to Congress.

J. WHAT ARE THE LEGITIMATE ENDS AND OBJECTS AND DUTIES FOR WHICH CONGRESS MAY EXERCISE INHERENT SOVEREIGN POWERS?

This raises the question of what are the legitimate ends and objects for which Congress may constitutionally exercise an inherent sovereign power. Certainly they are expressed in the enumerated powers of Article I and other provisions in the Constitution that explicitly authorize Congress to act, such as various sections of Article IV.⁴³⁷

Chief Justice Marshall also quoted the Preamble to the Constitution as a statement of some of the objects and ends of the national government. He asserted that "[t]he government proceeds directly from the people; is 'ordained and established' in the name of the people; and *is declared to be ordained, 'in order to form a more perfect union, establish justice, insure domestic tranquillity [sic], and secure the blessings of liberty to*

436. *Id.*

437. See U.S. CONST. art. I, § 8 (enumerating the powers of Congress); *id.* art. IV, §§ 1, 3 (authorizing Congress to do certain acts).

themselves and to their posterity.”⁴³⁸ Marshall also declared that “the government of the Union [is] *sovereign with respect to those objects which . . . [the Constitution] intrusted to it*, in relation to which its laws were declared [by the Constitution] to be supreme.”⁴³⁹ Marshall again referenced the Preamble as a statement of ends or objects in his response to Hampden’s challenge of the Court’s *McCulloch* opinion.⁴⁴⁰ Chief Justice Marshall answered:

“[B]y this new mode of amendment,” may that government which the American “people have ordained and established, in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity,” become an inanimate corpse, incapable of effecting any of these objects.⁴⁴¹

The Chief Justice asserted that the Court could not understand the line of reasoning in which “a power appertaining to sovereignty . . . [that] is calculated to subserve the *legitimate objects* of that government” could not be exercised by Congress simply because it is not explicitly delegated in its Constitution.⁴⁴² Thus, several times Marshall declared that Congress may exercise implied sovereign powers to accomplish an object or achieve an end for which the Constitution was adopted and the national government was established in addition to carry into execution enumerated powers.⁴⁴³

K. THE NATURE OF THE CONSTITUTION AS A DYNAMICALLY EVOLVING, POWER-ENHANCING DOCUMENT

The *McCulloch* opinion thus described the Constitution as a dynamically evolving, power-enhancing document whose scope and meaning are to be determined through the actions of the political branches of the government it established, primarily Congress. Chief Justice Marshall suggested this under-

438. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403–04 (emphasis added); A Friend of the Constitution, *supra* note 425, at 160.

439. *McCulloch*, 17 U.S. (4 Wheat.) at 410 (emphasis added). Congressional proponents of the First Bank made and debated this argument in the First Congress. See *supra* notes 56–105 and accompanying text.

440. A Friend of the Constitution, *supra* note 425, at 160.

441. *Id.*

442. *McCulloch*, 17 U.S. (4 Wheat.) at 410–11 (emphasis added).

443. See *id.* at 409–12, 418–19, 423–24 (showing Marshall declaring that Congress may exercise implied sovereign powers to accomplish an object or achieve an end).

standing early in his opinion when he spoke of the nature of a written Constitution as designating “only its great outlines . . . , its important objects,” and leaving “the minor ingredients which compose those objects [to] be deduced [by Congress] from the nature of th[ose] objects themselves.”⁴⁴⁴ He also said the Congress would deduce its powers from its experience in meeting national exigencies as they arise from unforeseen circumstances over time.⁴⁴⁵ Understandably, Marshall declared that, although the national government is a government of enumerated powers, which may not be transcended, “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.”⁴⁴⁶ This conception of the Constitution as an evolving framework of government explains why this question will continue to arise.

L. THE NECESSARY AND PROPER CLAUSE DELEGATES “IMPLIED”
ENUMERATED AND INHERENT SOVEREIGN POWERS

Marshall, for the most part, based his understanding of Congress’s constitutional powers on “general reasoning,” attributing Congress’s implied sovereign legislative powers to the nature of the written Constitution and the nature of Congress as a sovereign legislature.⁴⁴⁷ The reasons he specified had nothing to do with the Necessary and Proper Clause. Indeed, the Chief asserted that even “*in the absence of this clause, Congress . . . might employ those [means] which, in its judgment, would most advantageously effect the object to be accomplished.*”⁴⁴⁸ Nevertheless, the Chief Justice declared: “*But the [C]onstitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added*” the Necessary and Proper Clause.⁴⁴⁹ In other words, the Necessary and Proper Clause explicitly authorizes Congress to exercise inherent sovereign

444. *Id.* at 407.

445. *See infra* notes 473–74 and accompanying text.

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

447. *See id.* at 407 (“[The Constitution’s] nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.”).

448. *Id.* at 419 (emphasis added).

449. *Id.* at 411–12 (emphasis added).

powers which Congress possesses even without this express delegation.⁴⁵⁰

Marshall evidently derived the principle of constitutional authorization and limitation of Congress's inherent legislative powers from James Madison's *Federalist No. 44* and Alexander Hamilton's *Federalist No. 23*. In *McCulloch*, Marshall declared: "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."⁴⁵¹ The Chief Justice repeated that "any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional."⁴⁵² In other words, Congress's exercise of a sovereign power that is not explicitly delegated is constitutional if that legislation is appropriate to further some end or accomplish some object the Constitution delegates to the national government or to carry into execution one or more of Congress's enumerated powers, so long as the Constitution does not explicitly prohibit Congress from exercising the power or explicitly reserve the power to the states or to the people.

Marshall's opinion here appears directly to paraphrase Madison's *Federalist No. 44*. Madison declared that, had the Constitution not included the Necessary and Proper Clause:

[T]here can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government by unavoidable implication. 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.⁴⁵³

Note that Marshall and Madison referred both to ends and powers as authorizing Congress's unenumerated powers. Madison had just explained that it would have been ineffective and

450. *Id.* at 412–13. The Necessary and Proper Clause is the last of the powers enumerated in Article I, Section 8 and states that "Congress shall have power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, 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.

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

452. *Id.* at 419.

453. THE FEDERALIST NO. 44, at 285 (James Madison) (Clinton Rossiter ed., 1961). Alexander Hamilton made the same point. THE FEDERALIST NO. 23, at 153, 155–56 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

impracticable to list every implied power.⁴⁵⁴ He punctuated the point by asserting that, had the framers “attempted to enumerate the particular powers or means, not necessary or proper for carrying the general powers into execution, the task would have been no less chimerical.”⁴⁵⁵

Chief Justice Marshall repeated his interpretation of congressional powers based on general reasoning when he analyzed the meaning of the Necessary and Proper Clause.⁴⁵⁶ However, he focused primarily, but not exclusively, on elaborating the scope of Congress’s powers implied from its enumerated powers.⁴⁵⁷ This emphasis was necessitated by the constitutional interpretation asserted by Maryland’s legal counsel. Marshall noted that they had argued that the Necessary and Proper Clause, which he thought is literally a delegation of power, “is really *restrictive* of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.”⁴⁵⁸

Conceding that the Constitution delegates sovereign powers to Congress, Maryland’s counsel insisted that the nature of the sovereign powers delegated to Congress “is modified by the terms of the grant under which it was given. They do not import sovereign power generally, but sovereign power limited to particular cases.”⁴⁵⁹ Consequently, the word “necessary” controls the Necessary and Proper Clause and limits Congress’s implied powers “to such as are indispensable, and without which the [enumerated] power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.”⁴⁶⁰ Thus, “the question again recurs, whether sovereign power was given in this particular case.”⁴⁶¹ The answer to this question, Maryland argued, is “whether the establishment of a banking corporation

454. THE FEDERALIST NO. 44, at 284–85.

455. *Id.* at 285.

456. *McCulloch*, 17 U.S. (4 Wheat.) at 419 (“[I]n the absence of this [Necessary and Proper] Clause, congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end . . . were in themselves constitutional.”).

457. *See id.* at 413–18 (elaborating the scope of Congress’s implied powers).

458. *Id.* at 412 (emphasis added).

459. *Id.* at 363–67, 412.

460. *Id.* at 413.

461. *Id.* at 363.

be indispensably requisite to execute any of the express powers of the government?”⁴⁶² Maryland’s answer was no.⁴⁶³

The Court dismissed Maryland’s argument and held that the national government is sovereign with respect to its objects and ends to the same extent as the states are sovereign with respect to theirs, although state sovereignty is subordinated to the Constitution and laws of the United States.⁴⁶⁴ The Court rejected Maryland’s narrow interpretation of the Necessary and Proper Clause because it would deprive Congress of “the choice of means” by which it might carry into execution its enumerated powers and achieve the government’s ends and objects.⁴⁶⁵

The Chief Justice offered several reasons for rejecting Maryland’s narrow interpretation of the Necessary and Proper Clause. First, he noted that the subject of this clause was “th[e] great powers on which the welfare of a nation essentially depends.”⁴⁶⁶ The framers of the Constitution must have intended “to insure, as far as human prudence could insure, their beneficial execution” by adopting whatever means, that is, powers that “were conducive to the end” of securing the Nation’s welfare.⁴⁶⁷ Maryland’s narrow interpretation of the Necessary and Proper Clause would deprive Congress of “the choice of means” by which it might carry into execution its enumerated powers and achieve the government’s ends and objects.⁴⁶⁸

Second, Marshall noted that the Necessary and Proper Clause is part of the Article I, Section 8 delegation of powers rather than the prohibitions of congressional powers in Section 9.⁴⁶⁹ Its terms “purport to enlarge, not to diminish the powers

462. *Id.* at 367 (emphasis omitted).

463. *Id.* at 412. Walter Jones had argued that “[t]he creation of a sovereign legislature implies an authority to pass laws to execute its given powers. This [Necessary and Proper] Clause is nothing more than a declaration of the authority of Congress to make laws, to execute the powers expressly granted to it, and the other departments of the government.” *Id.* at 366 (emphasis omitted). Jones insisted that “this clause shows that the intention of the Convention was[] to define the powers of the government with the utmost precision and accuracy.” *Id.* Jones defined the words “necessary and proper” to mean “indispensably requisite,” *id.* at 367, “to the accomplishment of the end in view.” *Id.* “To give it a more lax sense, would be to alter the whole character of the government as a sovereignty of limited powers.” *Id.*

464. *Id.* at 405–06.

465. *Id.* at 409–10, 413.

466. *Id.* at 415.

467. *Id.*

468. *Id.* at 413.

469. *Id.* at 419.

vested in the government. It purports to be an additional power, not a restriction on those already granted.⁴⁷⁰

In addition, Marshall repeated his understanding of the nature of a written constitution as a dynamically evolving, power-enhancing framework of government which delegates to Congress broad discretionary powers to adapt the Constitution to meet changing circumstances.⁴⁷¹ He intoned how the Constitution is “intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.”⁴⁷² To have listed the voluminous “means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code.”⁴⁷³

It 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. To have declared that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to *deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.*⁴⁷⁴

Marshall here again declared that Congress is the institution that must adapt the Constitution to meet changing circumstances and to provide for unforeseen national exigencies.

Marshall’s conception of the Constitution as a power-enhancing framework of government also appears to have been taken from James Madison’s *Federalist No. 44*.⁴⁷⁵ In his discussion of the Necessary and Proper Clause, Madison explained why the powers conferred on the U.S. government are not limited to those expressly enumerated in the Constitution, as was the case in Article II of the Articles of Confederation.⁴⁷⁶ Madison stated:

Had the [constitutional] convention attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect, the attempt would have involved a complete digest of laws

470. *Id.* at 420.

471. *Id.* at 415.

472. *Id.*

473. *Id.*

474. *Id.* at 415–16 (emphasis added). *But see* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.”).

475. *See* THE FEDERALIST NO. 44, *supra* note 453.

476. *Id.* at 284–85.

on every subject to which the Constitution relates; accommodated too not only to the existing state of things, but to all the possible changes which futurity may produce; for in every new application of a general power, the *particular powers*, which are the means of attaining the *object* of the general power, must always necessarily vary with that object, and be often properly varied whilst the object remains the same.⁴⁷⁷

Madison here identified two factors that explain the government's unenumerated powers: the numerous possibilities of achieving the "objects" of the government as specified in its general powers; and the government's need to "accommodate" its unspecified powers to changing circumstances in the future.

Recall that Madison also asserted a theory of constitutional construction in Congress that identified Congress as the institution that is to adapt the Constitution to changing circumstances.⁴⁷⁸ As a member of the First Congress in 1789, Madison stated that doubtful questions of constitutional construction are to be resolved by Congress, and that questions relating to the apportionment of powers on which the Constitution is silent are to be submitted to Congress's discretion.⁴⁷⁹ Madison cautioned his House colleagues to give careful consideration to such questions because Congress's constitutional construction "will become the permanent exposition of the Constitution."⁴⁸⁰

M. POWERS IMPLIED FROM NATIONAL NECESSITY OR EXIGENCY

The Court held that national necessity or exigency is one of the sources of congressional power to legislate.⁴⁸¹ Several times Marshall declared that Congress may exercise its implied sovereign powers to meet national "necessities" or "exigencies." For example, the Chief Justice explained that the bank statute before the court was enacted in 1816, in part, because "a short experience of the embarrassments to which the refusal to revive it [in 1811] exposed the government, convinced those who

477. *Id.*

478. *See supra* notes 111–12 and accompanying text.

479. *Id.*

480. *See supra* notes 110–13 and accompanying text; *see also* 1 ANNALS OF CONG. 461–62 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison) (discussing the apportionment of power between the branches).

481. *See Missouri v. Holland*, 252 U.S. 416, 432–33, 435 (1920). Justice Oliver Wendell Holmes grounded the constitutionality of the Migratory Bird Treaty of 1916 and the Migratory Bird Treaty Act of 1918 on national exigencies and the national government's inherent sovereign powers to meet them. *Id.*

were most prejudiced against the measure of *its necessity*.⁴⁸² The practical necessity of the bank convinced many who had originally opposed it on constitutional grounds of its constitutionality: "So strongly have . . . [these views] been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation."⁴⁸³ This was a transparent reference to James Madison and Democratic Republicans.

N. "NECESSITY" UNDERSTOOD AS PRACTICAL NEED OR EXIGENCY

In a number of places in his analysis, the Chief Justice's use of "necessity" and "exigency" referred to the practical need for Congress to meet a pragmatic national objective rather than the degree of relationship between Congress's action and its enumerated powers. Joseph Hopkinson, arguing for Maryland, conceded the constitutionality of the First Bank because it was a practical necessity in 1791.⁴⁸⁴ But he insisted that the Second Bank was not constitutional because a national bank was not necessary in 1819, and "a power, growing out of a necessity which may not be permanent, may also not be permanent."⁴⁸⁵ However, referring to the Second Bank, the Chief Justice said: "[W]ere 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."⁴⁸⁶ Marshall identified Congress as that other place and stated that the determination of the need to act is a legislative power and function and beyond the power of the judiciary.⁴⁸⁷ The Chief Justice expressly declared that this discretion is exclusively in Congress and not the Court:

[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

482. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402 (1819) (emphasis added). Marshall was referring to the nation's experience in the War of 1812 and financial distress it caused, which convinced those who had been most prejudiced against the bank in 1791 of its necessity in 1816 and induced the passage of the Second Bank. See *supra* notes 295–98 and accompanying text.

483. *McCulloch*, 17 U.S. (4 Wheat.) at 422–23.

484. *Id.* at 331–333.

485. *Id.* at 331.

486. *Id.* at 423.

487. *Id.*

which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.⁴⁸⁸

The universal understanding of *McCulloch* among scholars today is that the Court established the doctrine of Congress's implied powers as powers derived from its enumerated powers and recognized the constitutionality of the national bank as a legitimate exercise of such an implied power. If this doctrine was central to the court's decision, one would expect Marshall to have identified the specific enumerated power or powers from which Congress's power to charter the bank was implied. It is noteworthy and, in my view decisive in understanding the Court's doctrine of Congress's implied powers that Marshall did not identify any enumerated power from which Congress's power to charter the Second Bank is implied. Clearly, scholars' interpretation of *McCulloch* is problematic.

The analysis presented here concludes that the court understood Congress's power to charter the Second Bank to be one of the sovereign powers inherent in Congress to achieve the ends or objects the Constitution delegates to the national government. Congress's penal power is another inherent sovereign power Marshall attributed to Congress. This analysis concludes that the court also based the constitutionality of the national bank on Congress's inherent sovereign power to meet national necessities and exigencies. Marshall's failure to tie Congress's power to charter the bank to a specific enumerated power or powers supports this analysis.

O. CONGRESS'S CONTEMPT POWER IMPLIED FROM ITS SOVEREIGN NATURE IN *ANDERSON V. DUNN*

Two years after *McCulloch*, the Court unanimously affirmed Congress's contempt power in *Anderson v. Dunn*.⁴⁸⁹ Justice William Johnson wrote the Court's opinion and borrowed theories of constitutional construction from Chief Justice Marshall's *McCulloch* opinion. Johnson employed the theory of Congress's inherent sovereign powers and the theory of the Constitution as a power-enhancing, dynamically evolving framework of government developed through political practice in addition to a theory of Congress's powers implied from enumerated powers.⁴⁹⁰

488. *Id.*

489. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821).

490. *See id.* at 226.

Justice Johnson explained that it was impossible for the framers of the Constitution to have established “a system of government which would have left nothing to implication.”⁴⁹¹ Like Chief Justice Marshall, he described the Constitution as a power-enhancing, dynamically evolving framework of government shaped by political experience.⁴⁹² Johnson instructed:

The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment.⁴⁹³

Consequently, “the relation between the [government’s] action and the end [it is attempting to achieve], is not always so direct and palpable as to strike the eye of every observer.”⁴⁹⁴ This is why the “maxim” of government “which necessarily rides over all others, in the practical application of government, . . . is, that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them.”⁴⁹⁵ And, the “interests and dignity” of the people “require the exertion of the powers indispensable to the attainment of the ends of their creation.”⁴⁹⁶

Johnson explained that Congress’s power to find a private citizen in contempt of Congress is inherent in Congress and implied from the purposes, ends, and objects for which it was established.⁴⁹⁷ The judiciary also possesses the inherent power to fine and imprison for contempts although the Constitution does not expressly delegate it.⁴⁹⁸ Although the contempt power had been conferred on the courts by statute, the statute was “a legislative assertion of this right, as incidental to a grant of judicial power,” which the courts would have possessed in the absence of the statute.⁴⁹⁹ That is, the judiciary’s contempt power is inherent in the judicial power.

The Court applied the same principle to Congress and affirmed its inherent power to punish all contempts of Congress even though the Constitution delegates to Congress the power

491. *Id.* at 225.

492. *See id.*

493. *Id.* at 226.

494. *Id.*

495. *Id.*

496. *Id.*

497. *Id.* at 227–28.

498. *Id.*

499. *Id.*

to punish only its own members for misbehavior in Congress.⁵⁰⁰ Anderson had argued that the Constitution, in delegating to Congress the power to punish only its own members precludes Congress from punishing ordinary citizens for alleged actions outside of Congress.⁵⁰¹ Johnson rejected the argument on “the ground [that it] is too broad, and the result too indefinite.”⁵⁰² He explained that this “argument obviously . . . annihilat[es Congress’s power] to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it.”⁵⁰³ That Anderson was a private citizen and not a member of Congress and that he committed his offense outside of Congress and not on the floor of Congress made no difference.⁵⁰⁴ “For why should the House be at liberty to exercise an ungranted, an unlimited, and undefined power within their walls, any more than without them,” Johnson queried rhetorically.⁵⁰⁵

Like Chief Justice Marshall, Justice Johnson asserted Congress’s inherent sovereign power to affirm Congress’s unenumerated penal powers. He rejected the argument “that the express grant of [Congress’s] power to punish their members . . . raises an implication against the power to punish any other than their own members.”⁵⁰⁶ Johnson replied that “[t]his argument proves too much, for its direct application would lead to the annihilation of almost every power of Congress.”⁵⁰⁷ Consequently, “all the punishing power exercised by Congress in any cases, except those which relate to piracy and offences against the laws of nations, is derived from implication.”⁵⁰⁸ It never occurred to anyone “that the express grant in one class of cases repelled the assumption of the punishing power in any other.”⁵⁰⁹ “The truth is,” Johnson opined, giving the power to punish Congress’s own members “was of such a delicate nature, that a constitutional provision became necessary to assert or

500. *Id.*; U.S. CONST. art. I, § 5, cl. 2 (providing in relevant part that “[e]ach house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member”).

501. *Id.* at 232–33.

502. *Id.* at 228.

503. *Id.*

504. *Id.* at 226–27.

505. *Id.* at 229.

506. *Id.* at 232–33.

507. *Id.* at 233.

508. *Id.*

509. *Id.*

communicate it.”⁵¹⁰ But all assumed that Congress possessed the power to punish any other violator of its laws, Johnson declared.⁵¹¹ Like Marshall, Johnson asserted a theory of Congress’s penal powers as inherent in Congress’s nature as a sovereign legislature.

Justice Joseph Story echoed Marshall’s reasoning when he explained the theory of Congress’s inherent sovereign powers in his 1833 treatise, *Commentaries on the Constitution of the United States*.⁵¹² Story called this “sort of implied power” by the same name used by Alexander Hamilton in his opinion on the bank, namely, a “resulting power.”⁵¹³ Citing to Hamilton’s opinion on the bank, Story defined resulting powers as those “arising from the aggregate powers of the national government.”⁵¹⁴ Story instructed that a resulting power is more “a result from the whole mass of the powers of the national government, and from the nature of political society, than a consequence or incident of the powers specially enumerated.”⁵¹⁵ Story offered several examples of these powers and declared that they are “natural incident[s], resulting from the sovereignty and character of the national government.”⁵¹⁶

510. *Id.*

511. *Id.* at 226.

512. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 124–25 (1833) [hereinafter STORY COMMENTARIES].

513. *Id.* at 124; *see supra* notes 202–16 and accompanying text (discussing Hamilton’s theory of resulting powers).

514. STORY COMMENTARIES, *supra* note 512, at 124.

515. *Id.*

516. *Id.* at 124–25 (citing *Dugan v. United States*, 16 U.S. (3 Wheat.) 172, 181 (1818) (holding that the United States government has the right to enforce all contracts to which it is a party or “to recover damages for their violation, by actions in . . . [its] own name,” even though this power is not delegated to it or conferred by statute); *United States v. Tingey*, 30 U.S. (5 Pet.) 115, 128 (1831) (“[Justice Story declaring that] we are of opinion that the United States have such a capacity to enter into contracts. It is in our opinion an incident to the general right of sovereignty; and the United States being a body politic, may, within the sphere of the constitutional powers confided to it, . . . enter into contracts not prohibited by law To adopt a different principle, would be to deny the ordinary rights of sovereignty.”); *United States v. Bevans*, 16 U.S. (3 Wheat.) 336, 390 (1818) (“[A] government which possesses the broad power of war; . . . has power to punish an offence committed by a marine on board a ship of war, wherever that ship may lie.”); *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 145–46 (1812) (holding that “a principle of public law” mandates “that national ships of war, entering the port of a friendly power open for their reception are to be considered as exempted by the consent of that power from its jurisdiction,” unless the sovereign destroys the immunity and exercises jurisdiction over such ships).

The Supreme Court grounded Congress's power to issue paper currency on a theory of inherent sovereign powers in the *Legal Tender Cases* four decades later. Justice William Strong, writing for the Court, explained "that important powers were understood by the people who adopted the Constitution to have been created by it, powers not enumerated, and not included incidentally in any one of those enumerated."⁵¹⁷ He cited the Suspension Clause⁵¹⁸ and the Bill of Rights,⁵¹⁹ which deny to Congress powers that were not expressly granted and could not be implied from any other powers, as evidence "that, in the judgment of those who adopted the Constitution, there were powers created by it, neither expressly specified nor deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted."⁵²⁰ Justice Strong maintained that Congress had often exercised such inherent sovereign powers and noted that Justice Joseph Story, in his *Commentaries on the Constitution*, characterized such powers as "resulting powers, arising from the aggregate powers of the government."⁵²¹ Strong also could have cited Story's source, Alexander Hamilton.

The Supreme Court has recognized the national government's inherent sovereign powers in other areas of law, such as foreign affairs, eminent domain, and immigration.⁵²²

P. STATE SOVEREIGNTY AND STATES' RIGHTS ARE SUBORDINATE TO NATIONAL SOVEREIGNTY

In deciding the second issue presented in *McCulloch*, whether Maryland's tax on the Second Bank was constitution-

517. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 532–39 (1870).

518. 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.").

519. U.S. CONST. amends. I–X.

520. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 535; see also *id.* at 555–56, 561–64 (Bradley, J., concurring) (discussing the delegation of powers to Congress).

521. *Id.* at 535.

522. See Andrew Kent, *The New Originalism and the Foreign Affairs Constitution*, 82 *FORDHAM L. REV.* 757, 775 (2013) (recognizing national government's inherent sovereign powers); Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States*, 104 *COLUM. L. REV.* 1765, 1833 (2004) (recognizing national government's inherent sovereign powers).

al, Marshall asserted a doctrine of constitutional federalism that recognized the supremacy of national sovereignty over state sovereignty. Significantly, he acknowledged that a state's power to tax is "one of vital importance," that it "is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may chuse [sic] to carry it."⁵²³

Nevertheless, the Court held that "the sovereignty of the State, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States."⁵²⁴ The Court declared the state of Maryland's tax unconstitutional on the basis of "[t]his great principle . . . that the [C]onstitution and the laws made in pursuance thereof are supreme; that they control the [C]onstitution and laws of the respective States, and cannot be controlled by them."⁵²⁵ Marshall declared Maryland's tax unconstitutional on the principle of the supremacy of national sovereignty. He explained:

It is of the very essence of [governmental] supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view, while construing the constitution.⁵²⁶

Q. REPRESENTATIVES' ACCOUNTABILITY TO CONSTITUENTS CHECKS ABUSE OF POWER

Chief Justice Marshall also applied the popular sovereignty and republican theories of government to explain why a state's tax on a national institution is unconstitutional. The state legislature derives its authority to tax from the people of the state, and it is the influence of the legislators' constituents over them that guards their constituents against the abuse of the taxing power.⁵²⁷ But the institutions created by the national government "have no such security."⁵²⁸ "Those . . . [institutions] are not given by the people of a particular State . . . which claim the right to tax them, but by the people of all the States.

523. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425, 428 (1819).

524. *Id.* at 427.

525. *Id.* at 426.

526. *Id.* at 427.

527. *Id.* at 428.

528. *Id.*

They are given by all, for the benefit of all—and upon theory, should be subjected to that government only which belongs to all.”⁵²⁹ The people of a single state cannot delegate to the state’s legislature the power to tax “those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States.”⁵³⁰ In Congress “alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.”⁵³¹ Note that Marshall based this ruling on the assumption that the remedy for the abuse of the taxing power was the political process in which legislators are held accountable to the people in elections, not judicial review.

The theories Chief Justice Marshall espoused in *McCulloch* are extraordinary to the twenty-first century reader. But, they were familiar to Americans familiar with the debates relating to the First Bank and Second Bank in 1791, 1810–11, 1814–16. The Court’s decision did not end the political partisanship surrounding the Second Bank, and the opposition to it persisted. The Second Bank was eventually “killed” by President Andrew Jackson in the 1830s. But that story must be left to another time.

CONCLUSION

This Article presents a detailed analysis of the constitutional theories argued in the legislative histories of the First Bank and Second Bank of the U.S. and in the Supreme Court’s decision affirming the constitutionality of these institutions. This analysis demonstrates that inherent national sovereignty constitutionalism played an important role in the creation of these national banks and a decisive role in the Court’s *McCulloch* decision upholding Congress’s power to incorporate them. The evidence shows that the current, predominant interpretation of the original understanding of the Constitution and of the Court’s opinion in *McCulloch v. Maryland*, that they established a national government of a few enumerated powers, is incomplete, inaccurate and, in many respects, contradicted by the historical evidence.

529. *Id.* at 428–29.

530. *Id.* at 429.

531. *Id.* at 431.

The historical evidence establishes that inherent national sovereignty constitutionalism was a theory of the Constitution as prevalent and as influential in shaping and supporting the governance of the early republic as the constitutional theory of strict construction. The constitutional debates that arose in the nation's early history between advocates of these conflicting theories, the decisions they made consistent or conflicting with these theories, the court decisions that decided questions of law arising from these theories and political decisions demonstrate beyond cavil that the original meaning of the Constitution was not fixed, as today's new originalists insist, but was tentative, open-ended, and ever evolving.

Proponents of national sovereignty constitutionalism thus defined the Constitution as a developmental, dynamically-evolving framework of government which centered governing power primarily in Congress. Because they assumed that Congress's unenumerated powers to achieve the national government's ends and objects are vast and vary with changing circumstances, the Constitution could not possibly specify all of the powers Congress might exercise to fulfill its responsibility to provide for the nation's needs and welfare. They understood the Constitution as an outline of government and governmental powers, and its meaning was to evolve over time within the political process of governing through the actions of the political branches of government. Consistent with the theory of popular sovereignty and republican political theory which underlie the Constitution, they insisted that Congress has the primary responsibility and authority to interpret the Constitution's meaning and the extent of the national government's powers because the people delegated their sovereign lawmaking power and the primary responsibility to provide for the nation's welfare to Congress. The Court is to defer to these judgments and to set them aside only if they are unequivocally contrary to the Constitution or relate to individual rights.

Chief Justice Marshall's opinion in *McCulloch v. Maryland* shows that the Supreme Court unanimously adopted this inherent national sovereignty theory of the Constitution. As noted within, the Court affirmed this theory in many other decisions as well. The Court also expressly rejected the strict construction theory of the Constitution, consisting of fixed powers semantically understood, that is the prevailing constitutional theory of the Supreme Court's conservative Justices and of political conservatives.

Inherent national sovereignty constitutionalism is fundamentally different from today's understanding of the Constitution, of the constitutional/political process, and of the relationships of the branches of government within the constitutional structure. It entrusts much greater autonomy to Congress and the executive to govern and much greater authoritativeness to Congress's interpretation of the Constitution in its function to make law and public policy than our system today allows. It envisions a more modest role for the judiciary in reviewing Congress's legislative actions and the policies they entail. This theory centers policy making in the political branches of the government rather than in the Supreme Court where it currently exists. Moreover, inherent national sovereignty constitutionalism relegates constitutional interpretation in making political decisions to a less important role and requires decision makers to justify their actions on their practical merits instead of the Constitution's meaning. In short, inherent national sovereignty constitutionalism presents a fundamentally different understanding of the way government should function under the Constitution.

Although the constitutional/political system that the founders established is fundamentally different than today's, according to a developmental theory of the Constitution, today's system should be different than it was originally. But scholars and jurists should become aware of how the system has changed in order to assess which of these changes are worthwhile and defensible and which are not.