

# 1

## The Destructive Legacy of *McCulloch v. Maryland*

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*McCulloch v. Maryland* is arguably the Supreme Court's single most influential opinion and certainly one of its most celebrated.<sup>1</sup> In a 1919 biography of its author, Albert Beveridge wrote:

In effect John Marshall [in *McCulloch*] rewrote the fundamental law of the Nation; or perhaps it may be more accurate to say that he made a written instrument a living thing, capable of growth, capable of keeping pace with the advancement of the American people and ministering to their changing necessities. This greatest of Marshall's treatises on government may well be entitled the "Vitality of the Constitution."<sup>2</sup>

Later, Justice Felix Frankfurter concurred with James Bradley Thayer's assessment that "the conception of the nation that Marshall derived from the Constitution and set forth in *McCulloch v. Maryland* is his greatest single judicial performance."<sup>3</sup> More recently, an academic discussion of "canonical cases" began "with a legal document that generates no contention at all: John Marshall's opinion in *McCulloch v. Maryland*, which established an expansive view of national power under the U.S. Constitution."<sup>4</sup>

As these and countless other commentators have recognized, *McCulloch*'s importance arises from its doctrine of implied congressional powers, which has been applied even to constitutional amendments adopted decades after the *McCulloch* decision.<sup>5</sup> Revered though it may now be, Chief Justice Marshall's opinion provoked a hostile commotion when it was issued, so much so that he was moved to defend it in a series of anonymous

newspaper essays.<sup>6</sup> The opinion remained controversial for many years, and it deserves to become controversial once again.

The issue in *McCulloch* was whether the Second Bank of the United States could legally refuse to pay a tax that the state of Maryland imposed on its Baltimore branch. After deciding that Congress had an implied constitutional power to incorporate a bank, the Court held that Maryland's tax was unconstitutional. Both conclusions were debatable, but the opinion was unanimous. Marshall articulated an elegant and defensible legal standard for assessing congressional exercises of implied powers, but his application of that standard was extremely lax.

Subsequently, *McCulloch* was used to justify expanding federal power far beyond its proper constitutional bounds. Although Marshall's opinion lends itself to this use, the decision need not and should not be relied on as a precedent for such expansion. *McCulloch*'s bicentennial is an apt occasion for reevaluating its indisputably significant contribution to American jurisprudence.

### **The Bank Controversy Begins**

The constitutionality of a national bank was thoroughly debated during the founding period. When President George Washington appointed Alexander Hamilton secretary of the treasury, one of his first projects was to stabilize the government's fiscal affairs. As part of that initiative, Hamilton offered Congress a detailed proposal for the incorporation of a predominantly private bank in which the federal government would be a minority shareholder. This government-sponsored enterprise would provide banking services to the government, but it would operate like other banks for its owners' profit.

The Senate passed the bill, apparently without much discussion. The House of Representatives also approved it by a large margin, but Rep. James Madison led a vigorous opposition. His constitutional objections began with the principle that Congress has only the powers given to it in Article I of the Constitution. Implied powers certainly exist, as the necessary and proper clause confirms,<sup>7</sup> but every one must be closely tied to the end and nature of an enumerated power. He argued that once one accepts

devices, such as the proposed bank, that are merely conducive or indirectly related to the exercise of an enumerated power, “a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.”<sup>8</sup> That would violate the principle that the federal government is one of limited powers, and it would subvert the states’ reserved powers.

Madison also mentioned in passing that the Constitutional Convention had rejected a proposal to give Congress an enumerated power to grant charters of incorporation. As it happens, Madison himself made that proposal. Apart from any relevance the convention’s decision might have to the constitutional issue (which is open to considerable doubt), Madison’s proposal suggests that his argument for a narrow reading of implied powers was not based on policy objections to this particular power or on political or policy objections to Hamilton’s bank proposal.<sup>9</sup> Although his own administration had proposed the bill, President Washington sought opinions about its constitutionality from members of his cabinet.

### **Edmund Randolph’s Opinion**

The attorney general was the first to respond.<sup>10</sup> Randolph went into some detail about the specific functions of the proposed corporation and about how those functions might be tied to specific powers conferred on Congress by the Constitution. His conclusion was the same as Madison’s:

If the laying and collecting of taxes brings with it every thing which, in the opinion of Congress, may facilitate the payment of taxes; if to borrow money sets political speculation loose, to conceive what may create an ability to lend; if to regulate commerce is to range in the boundless mazes of projects for the apparently best scheme to invite from abroad, or to diffuse at home, the precious metals; if to dispose of or to regulate property of the United States, is to incorporate a bank, that stock may be subscribed to it by them, it may without exaggeration be affirmed that a similar construction on every specified federal power, will stretch the arm of Congress into the whole circle of state legislation.<sup>11</sup>

Randolph's opinion is notably careful to reject some arguments that would have supported his conclusion that the proposed bank was unconstitutional. He contended, for example, that the Constitution's use of the word "proper" in the necessary and proper clause does not add to the limits on implied powers that would otherwise exist.

Similarly, Randolph rejected an argument according to which the Constitution's enumeration of some powers that might have been inferred implies that similar un-enumerated powers (such as a power to establish corporations) should not be inferred. And he refused to rely on statements supposedly made at Philadelphia and in the ratifying conventions: "Ought not the Constitution to be decided on by the import of its own expressions? What may not be the consequence if an almost unknown history should govern the construction?"<sup>12</sup>

### **Thomas Jefferson's Opinion**

The secretary of state also believed the bank bill was unconstitutional, in part for reasons similar to those on which Madison and Randolph primarily relied.<sup>13</sup> In significant respects, however, he went further.

Jefferson, for example, began with a long list of ways in which he believed that particular aspects of the bank bill were inconsistent with various state laws. Why that was relevant to the bill's constitutionality he did not explain. Nor would it have been easy to do so. Congress is authorized to override state laws when acting within the scope of the powers granted by the Constitution, and Congress is not authorized to exceed those powers whether or not doing so would conflict with state law.

Unlike Randolph, Jefferson relied on reports that the Constitutional Convention had rejected a proposal to give Congress power to establish corporations. One objection to the proposal, he apparently had heard, was that Congress "would have a power to erect a bank, which would render the great cities, where there were prejudices and jealousies on the subject, adverse to the reception of the Constitution." Here again, he seems to have thought this was self-evidently relevant. But it certainly was not. Indeed, Jefferson was apparently the only participant in the bank debates who believed that such reports should affect the interpretation of the Constitution.<sup>14</sup>

Perhaps most important, Jefferson argued that the word “necessary” in the necessary and proper clause means *absolutely* necessary. The Constitution, he maintained, was “intended to lace [Congress] up straitly within the enumerated powers, and those without which, as means, those powers could not be carried into effect . . . that is to say, to those means without which the grant of power would be nugatory.”<sup>15</sup> Jefferson seemed to think that unless one took this extremely narrow view of implied powers, there would be no limits at all on Congress.

Did he really believe this? Oddly, Jefferson’s opinion ends with an implicit concession that the bill’s constitutionality may have been a much closer question than his whole preceding string of arguments and assertions had suggested:

It must be added, however, that unless the President’s mind on a view of everything which is urged for and against this bill, is tolerably clear that it is unauthorized by the Constitution; if the pro and the con hang so even as to balance his judgment, a just respect for the wisdom of the legislature would naturally decide the balance in favor of their opinion. It is chiefly for cases where they are clearly misled by error, ambition, or interest, that the Constitution has placed a check in the negative of the President.<sup>16</sup>

The opinion leaves us to wonder what Jefferson thought could reasonably be said against his position and why he was not sure he had refuted those arguments. It also leaves us to wonder why he later told Madison that anyone who attempted to establish or operate a branch of the bank in Virginia would be guilty of treason against the state and should be sentenced to death by the state courts.<sup>17</sup>

### **Alexander Hamilton’s Opinion**

Writing under extreme pressure created by the constitutional deadline for the president’s decision, the secretary of the treasury produced a powerfully detailed defense of the constitutionality of his bank proposal.<sup>18</sup> He attempted to refute every argument advanced by the other two cabinet members, and he offered his own alternative legal analysis.

In several passages, especially those refuting the arguments that were peculiar to Jefferson's shoddy opinion, Hamilton was, in my view, completely successful. For example, not only was Jefferson's interpretation of the word "necessary" contrary to ordinary usage but it would also absurdly cripple the government and thus make the necessary and proper clause into what Hamilton called "a rule to justify the overleaping of the bounds of constitutional authority, [rather] than to govern the ordinary exercise of it."<sup>19</sup>

Hamilton's principal response to Randolph met the attorney general's argument head-on. Randolph had canvased several enumerated congressional powers and set out additional powers that he thought could be inferred from them. Hamilton argued that these implied powers were incomplete and that the power of incorporation was as easy to infer as many others that would not be controversial. A lot can be said for Hamilton's objection to Randolph's opinion on this point.

It is much less clear that Hamilton's own criterion for assessing the scope of the legislature's implied powers is sound. He argued that every government has the inherent power to employ those means that have a natural relation to any lawful end. Accordingly, the federal government may use "all means" that relate to pursuing such ends "to the best and greatest advantage." But the Constitution does not, he said, authorize Congress to supervise the health, safety, or morals of Philadelphia residents, so a federal corporation may not be established for that purpose. Similarly, said Hamilton, "the constitutional test of a right application [of money] must always be, whether it be for a purpose of general or local nature."<sup>20</sup>

Skeptics such as Madison and Randolph could justifiably have wondered whether a distinction between general and local purposes is capable of providing any real security against the danger that so concerned them. But Hamilton made a stronger argument in defense of the bank bill itself. He analyzed in considerable detail the relation between the establishment of a bank and the enumerated congressional powers dealing with trade, government finances, and national defense. The ability to exercise those powers would, in many circumstances, be extremely constrained without access to banking services, and a law ensuring those services' availability would not necessarily be a step

toward occupying what Madison called “the whole compass of political economy.”<sup>21</sup>

Notwithstanding Hamilton’s thorough defense of the bill, President Washington apparently remained uneasy. He discussed the issue several times with Rep. Madison, who drafted a veto message at his request.<sup>22</sup> In the end, Washington approved the legislation without comment.

### **Establishment of the Second Bank of the United States**

The charter that Washington signed expired by its terms in 1811, and Congress did not pass a bill reestablishing a bank until 1815. By then, Madison was president. He disapproved the bill, saying in his veto message that he did not think it offered the government sufficient “security for attaining the public objects of the institution.”<sup>23</sup> But he added that constitutional objections were “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, accompanied by indications in different modes, of a concurrence of the general will of the nation.”<sup>24</sup>

The next year, Congress passed a bill that satisfied President Madison’s policy concerns, and he signed it. Like its predecessor, the Second Bank of the United States was a federally chartered private corporation in which the federal government owned a 20 percent interest. The First Bank, created at a time when there were only three or four state-chartered banks in the whole country, served a pretty obvious and pressing government purpose.<sup>25</sup> By 1816, some 246 banks had been established.<sup>26</sup>

Competition from the Second Bank could threaten state banks’ profits and even their viability, which had obvious political implications. Less obviously, the proliferation of state banks might have affected the constitutional issue because it lessened the need for a national bank and increased the opportunity for federal interference with state policies. It is at least arguable that what was necessary and proper in 1791 might not have met that criterion in 1816.

### John Marshall and Congress' Implied Powers

*McCulloch* was not the first case to consider the extent of Congress' implied powers. In *United States v. Fisher*, the Court upheld a statutory provision requiring that debts to the United States be given priority when distributing the assets of an insolvent or bankrupt debtor.<sup>27</sup> Although Marshall asked what the source of congressional authority for the regulation was, he rather strangely ignored the bankruptcy clause.<sup>28</sup> After alluding instead to the necessary and proper clause, he offered this analysis:

Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution.

The government is to pay the debt of the union, and must be authorised to use the means which appear to itself most eligible to effect that object.<sup>29</sup>

Any means at all, no matter how unnecessary or improper they may be? *Fisher's* holding looks like a free pass that exempts Congress from any meaningful judicial scrutiny. And if there was a good reason to rule so broadly, instead of relying on the bankruptcy clause, Marshall did not say what it was.

*Fisher* is not mentioned in *McCulloch*, which proceeds more judiciously.<sup>30</sup> The opinion includes an acknowledgment that the principle of limited and enumerated powers "is now universally admitted," along with two distinct arguments for upholding the bank.<sup>31</sup> First, the constitutionality of a national bank, "if not put at rest by the [long] practice of the Government, ought to receive a considerable impression from that practice."<sup>32</sup> Only a "bold and plain usurpation," Marshall suggested, would justify the Court in repudiating an established exercise of congressional power.<sup>33</sup> Second, even without such an established practice, both the dictates of reason and the necessary and proper clause authorize Congress to choose appropriate means of executing the powers given to it.<sup>34</sup>

Marshall set forth this second conclusion in what became a celebrated legal test.



Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional.<sup>35</sup>

Although *McCulloch* contains other language that resembles the parallel passage in *Fisher*,<sup>36</sup> this formulation is carefully calibrated to respect both the federal government's legitimate needs and the limited scope of federal power. Marshall, moreover, promises that the Court will stop Congress from invoking its lawful powers as a pretext for accomplishing objects not entrusted to it.<sup>37</sup>

As an abstract matter, even Madison and Randolph might have acquiesced to this general rule from *McCulloch*. But how does one determine which means are appropriate and which are inconsistent with the spirit of the Constitution? How plainly must a means be adapted to a legitimate end? And how should a court investigate the possibility that the exercise of a granted power is a pretext for usurpation? Depending on how such questions are answered in specific cases, the apparent difference between *Fisher* and *McCulloch* could easily disappear.

Unfortunately, *McCulloch* does little more than gesture vaguely at the contribution a bank can make to the exercise of Congress' enumerated powers.<sup>38</sup> This contrasts with the detailed exposition in Hamilton's opinion, with which Marshall was quite familiar. When you add that the economy's banking sector was far more developed in 1816 than it had been in 1791, Marshall could be seen as suggesting, in the spirit of *Fisher*, that the Court should rubber-stamp congressional exercises of power whenever there has not been "a bold and plain usurpation."

It would no doubt be unreasonable to expect judges to demand the kind of detailed argument about the need for a bank that Hamilton offered to President Washington. But there were some obvious reasons for doubting that this particular bank law was consistent with the spirit of the Constitution. The *McCulloch* opinion never mentions that Congress had not established a government agency but instead had incorporated an essentially private bank controlled by private shareholders who sought profits for themselves. That institution, moreover, was given competitive advantages over state banks.

Shouldn't the Second Bank's lawyers at least have been required to justify these features of the law, perhaps with evidence that the government's ability to carry out its legitimate functions was threatened by deficiencies in the existing banks? And how did the Court know that the Second Bank was structured to serve the government's interests rather than as a pretext to enrich the private shareholders? For example, did the bank's practice of establishing branches anywhere it chose serve any real purpose other than increasing private profits?

Such questions were raised by Maryland's lawyers. Marshall ignored those questions while expatiating without any clear necessity on the political theory of the union. He plausibly rejected conclusions that could have crippled the federal government, but he did not address serious issues raised by the specific statute before the Court. He presumably could have provided a reasoned justification for the statute's problematic aspects, and such a justification might have persuaded reasonable and disinterested observers.<sup>39</sup> If Marshall had taken this path, it would be harder to interpret *McCulloch* as a slightly disguised reaffirmation of *Fisher*'s blatant invitation to congressional overreach. Unfortunately, the opinion's airy silence in the face of these problems has made it all too easy to treat *McCulloch* as just such an invitation.

How could this silence have been justified? David S. Schwartz maintains that Marshall was writing in the shadow of controversies about the federal government's power over internal improvements, control of the money supply, and the scope of the commerce clause.<sup>40</sup> For that reason, Schwartz believes, "The most logical inference from *McCulloch*'s failure to [construe one or more specific enumerated powers] is that Marshall wanted to avoid interpreting any enumerated powers, and thereby embroiling the Court in further controversy."<sup>41</sup> Perhaps. But a jurist with half of John Marshall's legal skills could easily have upheld the statute, after addressing its problematic aspects, without effectively resolving other cases not before the Court.

In any event, there was an even easier way to avoid further controversy, and Marshall himself showed what it was. As President Madison had already pointed out, the constitutionality of the Second Bank was not politically controversial. Like Madison, Marshall attributed great significance to this fact:

It has been truly said that this can scarcely be considered as an open question entirely unprejudiced by the former proceedings of the Nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognised by many successive legislatures, and has been acted upon by the Judicial Department, in cases of peculiar delicacy, as a law of undoubted obligation. . . .

. . . 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.<sup>42</sup>

He could have stopped there, as President Madison did in his 1815 veto message, and held (rightly or wrongly) that the issue had been settled by concrete expressions of the nation's general will. Instead, Marshall went on to discuss the *hypothetical* case that would have been presented "were the question entirely new."<sup>43</sup> Thus, he unnecessarily opened up questions that he then declined to address. This made for a much *broader* ruling than the case required according to Marshall's own analysis.<sup>44</sup>

In a private letter written a few months after *McCulloch* was decided, Madison denounced the opinion because of "the high sanction given to a latitude in expounding the Constitution, which seems to break down the landmarks intended by a specification of the powers of Congress; and to substitute for a definite connection between means and ends, a legislative discretion as to the former, to which no practical limit can be assigned."<sup>45</sup> Consistent with the venerable traditions of the common law, he believed, judicial interpretation of the laws (including the Constitution) should result from a course of particular decisions, rather than having those decisions proceed "from a previous and abstract comment on the subject."

Implicitly rebuking those who framed the constitutional controversy over the bank as a choice between a license for a potentially all-powerful federal leviathan and a return to the pathetic weakness of the confederation, Madison maintained:

There is certainly a reasonable medium between expounding the Constitution with the strictness of a penal or other ordinary Statute, and expounding it with a laxity, which may vary its essential character,

and encroach on the local sovereignties with which it was meant to be reconcilable.

And if experience were to show that the federal government's powers are deficient, Madison added, the Constitution itself spells out the proper mode of drawing new powers from their legitimate source.<sup>46</sup>

### **The Constitutionality of Maryland's Tax**

*McCulloch's* analysis of Maryland's tax is even weaker than its insouciant discussion of the constitutional issues the federal statute raised. Much of the analysis is devoted to refuting an extreme claim advanced by Maryland's lawyers, according to which the states have an absolute and unfettered constitutional right to tax the federal government. Marshall ably refuted this theory and rightly refused to adopt a doctrine whose logic would leave the nation's fisc at the mercy of hostile or irresponsible state governments. It does not follow, however, that Maryland's tax on the Baltimore branch was prohibited.

Some passages in *McCulloch* suggest that any state tax on a federal instrumentality is inherently unconstitutional,<sup>47</sup> presumably even if authorized by Congress.<sup>48</sup> But no constitutional provision says or implies that such a general ban exists, and it would border on absurdity to say that Congress is powerless to authorize a state tax on a federal instrumentality.<sup>49</sup> Perhaps Marshall only meant to advance the more modest and plausible claim that the statute establishing the bank forbade the states to tax it.<sup>50</sup>

The supremacy clause provides that the Constitution and federal statutes are the supreme law of the land, by which judges are bound, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."<sup>51</sup> That means a state law may not override any provision of the federal Constitution or a valid federal statute. If asked, Congress might have banned a tax like Maryland's, or it might have expressly acquiesced to such a tax. But Congress was not asked and did not answer.

Marshall seemed to think it was obvious that Maryland's tax violated the statute establishing the bank. That conclusion was not even close to

being evident. The statute did not address the permissibility of state taxes one way or the other, and Marshall offered no argument for inferring that this tax was forbidden.

Nor would it have been easy to do so. Maryland taxed its own banks separately from out-of-state banks, using somewhat different tax structures.<sup>52</sup> The default tax on Maryland banks applied to their capital stock, while the default tax on other banks applied to certain transactions. As an alternative to the default tax, all banks could satisfy their obligations with a specified lump-sum payment.

For out-of-state banks, the rate was \$15,000 per year. State banks were permitted to make a joint payment of \$200,000 that would cover their obligations for the next 20 years. Precise comparisons would require additional information, but there is no apparent reason to suppose that the tax on the national bank would have been especially burdensome. In May 1819, the Baltimore branch was capitalized at \$5,646,000 and had recently recorded loans of \$9,289,000.<sup>53</sup> In light of those figures, \$15,000 per year seems a modest annual assessment.

Unlike the state-chartered banks, moreover, the Second Bank had the flexibility to choose each year between the default tax or the lump sum, depending on which was most advantageous at that time. The tax on the national bank could have had an even less adverse effect than the tax Maryland imposed on its own banks.

The more important point, of course, involves the absolute rather than the comparative effect of Maryland's tax on the national bank, and there is some evidence on this question. At least one director of the national bank apparently thought that sound policy would dictate yielding to the tax.<sup>54</sup> When the bank did challenge Maryland's statute, the lawsuit was apparently an "amicable controversy."<sup>55</sup>

If the tax actually posed a real threat, one would expect that the bank or the Treasury Department would have planned, in the event it was upheld in court, to ask Congress to expressly preempt it, as Congress certainly could have done. On the contrary, Secretary of the Treasury William Crawford believed that a bill to exempt the Baltimore branch from the state tax would have been *defeated* in Congress.<sup>56</sup> The assumption that Maryland's tax was a threat to the national bank, a proposition for which Marshall offered no evidence, was likely false.

The practical effect of *McCulloch* was to create, through judicial fiat, a law that Congress had not enacted and possibly would have refused to enact. This form of judicial governance is now conducted under the rubric of “obstacle preemption.” This is an interpretive device through which the Supreme Court enforces policies that the justices like to imagine the legislature would enact if asked, but which it has not enacted. Obstacle preemption has since become a standard routine in the activist repertoire of the modern Court, which in no way excuses the *McCulloch* Court for exercising a power that did not belong to it.<sup>57</sup> The Supreme Court, not Maryland, violated the Constitution.

Apart from the unconstitutionality of the ruling in *McCulloch*, its scope is thrown into doubt by some confusing concluding dicta. The opinion’s last paragraph draws an unexplained distinction between a forbidden tax on the bank’s operations, on the one hand, and permissible taxes on certain bank property, on the other.

[This declaration of unconstitutionality] does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the Government of the Union to carry its powers into execution. Such a tax must be unconstitutional.<sup>58</sup>

Does “in common with” mean that a state can tax federal entities so long as it also taxes other similar entities? If so, Maryland’s tax should have been upheld because it did tax other banks as well (a fact that Marshall did not mention). If not, is it because the bank’s “operations” were constitutionally different from its real property and the proprietary interest of Marylanders? Why would that be? And are these the *only* objects a state may tax? What about the bank’s movable property and its employees’ salaries?

Or does “in common with” mean “uniformly with”? Uniform tax rates can affect different objects of taxation differently, even when they are

objects of the same kind, and it may often be impossible to tell in advance what those effects will be. And what would happen if a state imposed a uniform tax rate on the operations of all banks or on their real estate while separately subsidizing the state-chartered banks but not the national bank? Would that violate whatever principle of uniformity Marshall had in mind? He did not explain how one should go about answering these and many other questions.

Marshall avoided hard questions about the bank statute's constitutionality by deferring to Congress' judgment about the scope of its own powers. But he refused to leave hard questions about the desirability of banning all state taxes on the bank or tolerating some of them, when the Constitution clearly left those questions squarely in Congress' hands. Judging from the fulsome encomiums that have swelled *McCulloch*'s reputation over the past two centuries, the irony is apparently easy to overlook.<sup>59</sup>

### **President Jackson on the Authority of *McCulloch***

In 1832, Andrew Jackson issued an elaborate veto message when presented with a bill to recharter the Second Bank before its term expired.<sup>60</sup> Like Madison, he acknowledged that a sufficiently clear and durable national consensus could settle debatable constitutional questions. But the bank precedents established by past practice were mixed, and controversies over the issue had persisted.

Nor did *McCulloch* settle the matter. In Jackson's view, the Supreme Court has no authority to control the president in exercising his legislative powers. In any event, Jackson maintained that *McCulloch* had merely decided in general terms that incorporating a bank is permissible, leaving the political branches to exercise their own constitutional judgment on particular legislative proposals.

Jackson provided a detailed analysis of many unconstitutional features he perceived, rightly or wrongly, in this particular bank's structure. He agreed that a bank could constitutionally be established, and he offered to propose a way to do it. But he rightly refused to conflate a judicial decision or majority sentiment in Congress with what Madison called "the general will of the nation."

In *McCulloch*, Marshall predicted that “the question respecting the extent of the powers actually granted [by the Constitution] is perpetually arising, and will probably continue to arise so long as our system shall exist.”<sup>61</sup> Quite right. And Jackson understood that a mere Supreme Court opinion is not a good reason to treat that question as closed. Unfortunately, his sense of responsibility to the Constitution went out of fashion. Too many presidents and legislators came to believe that the Constitution allows Congress to do anything that an incurious and indulgent Supreme Court will countenance.

### ***McCulloch’s Destructive Legacy***

The Court rarely rules that Congress has exceeded its powers except when it violates an individual right that the justices have selected for enforcement from the Constitution<sup>62</sup> or have exuberantly imputed to it.<sup>63</sup> From the New Deal through the mid-1990s, the justices signaled that the commerce clause gives Congress authority to regulate virtually everything in human life that is not protected by one of these judicially favored individual rights.<sup>64</sup>

Thus, if a small business buys and sells products across state lines, that is all it takes to justify congressional regulation of labor relations in the company.<sup>65</sup> The federal government can decide how much workers must be paid and how long they may work, so long as their employer produces goods destined for another state.<sup>66</sup> The commerce power can be used to ban racial discrimination at any small business that uses products from another state or serves customers from other states.<sup>67</sup>

Limits can be put on the crops a farmer may grow, even for his or her own use at home, if such use by enough farmers could affect the price of farm products in other states.<sup>68</sup> A local loan shark can be prosecuted under federal law because some other loan sharks belong to gangs that have interstate operations.<sup>69</sup> Good luck finding anyone who does much of anything that is not also done by some interstate enterprise or could not affect interstate commerce if enough people did it.

In 1995, the Supreme Court’s decision in *United States v. Lopez* shocked the legal world by finding that Congress had exceeded its commerce clause authority when it criminalized the possession of a firearm in or near a



school.<sup>70</sup> The Court concluded that the law had nothing to do with commerce or any economic activity and that the conduct it regulated could not substantially affect interstate commerce through repetition elsewhere. Five years later, the Court reviewed a statute that created a civil cause of action for victims of “gender-motivated violence” and held that Congress may not regulate violent criminal conduct solely because of the aggregate effect of such conduct on interstate commerce.<sup>71</sup>

*Lopez* did not purport to overrule any prior decisions, and the opinion raised more questions about the scope of the commerce power than it answered. But because the Court had finally identified *something* that is beyond Congress’ reach, many observers hoped or feared that the decision signaled a coming restoration of the principle of limited and enumerated federal powers. Soon enough, such expectations proved to have been misplaced.

Congress reenacted the gun-free school zone law, along with a new provision requiring prosecutors to prove that the firearm had at some time traveled in interstate commerce. *Lopez* had signaled that this was one way for the legislature to convert a local activity into one that Congress could regulate, and the new statute has been upheld.<sup>72</sup> If an object acquires a magical power to subject anyone who possesses it to Congress’ regulatory jurisdiction, merely because the object (or even some component of it) crossed state lines at some time in the past, the Constitution’s principle of enumerated powers is not much more than a guideline for drafting statutes.<sup>73</sup>

Congress has not yet reenacted the “gender-motivated violence” statute, but it apparently need only require that a plaintiff prove some interstate nexus. Perhaps the defendant had moved across a state line to attend college.<sup>74</sup> Or perhaps the tort was allegedly committed while he or she wore clothing manufactured in another state. Or perhaps he or she drove to the scene of the incident in an automobile containing parts manufactured out of state.

In addition to the interstate-nexus maneuver, *Lopez* also alluded to regulations forming an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless intrastate activity is regulated.<sup>75</sup> This was the basis on which a federal regulation controlling agricultural products grown for home consumption was upheld, and the Court extended the doctrine by applying it to marijuana grown and

consumed in a state where the government specifically authorized use of the plant for medical purposes.<sup>76</sup>

So far, the Court has recognized only trivial or symbolic limits on the commerce clause's reach. In *National Federation of Independent Business v. Sebelius*,<sup>77</sup> for example, five justices, including Chief Justice John Roberts, concluded that the commerce clause does not authorize Congress to force consumers to participate in commerce by purchasing specified health insurance policies that they do not want. But Roberts then joined the four who dissented from this conclusion in upholding the program anyway. The legal mandate to purchase specified insurance policies was characterized as a mere suggestion, and the statutory penalty for noncompliance was interpreted as a tax that consumers were free to avoid by complying with the suggestion. Thus, the limitation on Congress' power under the commerce clause turned out to be purely symbolic.<sup>78</sup>

### Conclusion

It was neither necessary nor proper for *McCulloch* to assume without analysis that all the features of the Second Bank were necessary and proper. Nor was it necessary and proper for later Courts to adopt a *Fisher*-esque level of deference as the standard for judging the boundaries of congressional power. Like Marshall, all the current justices can say that the abstract principle of limited and enumerated powers is "now universally admitted."<sup>79</sup> But the legacy of his opinion has been the effective destruction of that principle.

*McCulloch* famously proclaimed that "we must never forget that it is *a Constitution* we are expounding."<sup>80</sup> This sonorous aphorism is frequently, if unnecessarily and improperly, taken to mean that it is *merely* a constitution, which judges are free (or obligated) to amend under the guise of interpretation. That attitude has triumphed historically and perhaps irrevocably. Constitutional law is widely regarded now as a branch of political philosophy or as a field on which to play junior varsity statesmanship or, not infrequently, as an arena for flamboyant moral posturing or a weapon of partisan warfare.

Rather than submissively celebrate these developments, we could

choose to stop forgetting that the Constitution was originally meant to be a law and that it was meant to be more authoritative than what the Supreme Court says about it. If we did, *McCulloch* and its rank progeny would become controversial once again.

## Acknowledgments

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## Notes

1. *McCulloch v. Maryland*, 17 US 316 (1819).
2. Albert J. Beveridge, *The Life of John Marshall*, Vol. 4 (Boston, MA: Houghton Mifflin, 1919), 308. I am indebted to Kevin Walsh for calling my attention to this passage.
3. Felix Frankfurter, “John Marshall and the Judicial Function,” *Harvard Law Review* 69, no. 2 (December 1955): 219, <https://www.jstor.org/stable/pdf/1337866.pdf>.
4. Jack M. Balkin and Sanford Levinson, “The Canons of Constitutional Law,” *Harvard Law Review* 111, no. 1 (February 1998): 973, [https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1259&context=fss\\_papers](https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1259&context=fss_papers).
5. “The *McCulloch v. Maryland* standard is the measure of what constitutes ‘appropriate legislation’ under § 5 of the Fourteenth Amendment. Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.” *Katzenbach v. Morgan*, 384 US 641, 651 (1966).
6. The essays are collected in Gerald Gunther, ed., *John Marshall’s Defense of McCulloch v. Maryland* (Palo Alto, CA: Stanford University Press, 1969).
7. US Const. art. I, § 8, cl. 18. “The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”
8. James Madison, “Speech on the Bank Bill 2 February 1791,” Online Library of Liberty, Liberty Fund, <https://oll.libertyfund.org/pages/1791-madison-speech-on-the-bank-bill>.
9. In context, Madison was not claiming that events at the Constitutional Convention are relevant to the Constitution’s interpretation. See John O. McGinnis and Michael B. Rappaport, “Unifying Original Intent and Original Public Meaning,” *Northwestern*

*University Law Review* 113, no. 6 (2019): 1410–11, <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1379&context=nulr>.

10. Edmund Randolph, Letter to President George Washington, February 12, 1791.

11. Edmund Randolph, “Enclosure: Opinion on the Constitutionality of the Bank, 12 February 1791,” National Archives, Founders Online, <https://founders.archives.gov/documents/Washington/05-07-02-0200-0002>.

12. Randolph, “Enclosure: Opinion on the Constitutionality of the Bank, 12 February 1791.”

13. Thomas Jefferson, “Opinion on the Constitutionality of the Bill for Establishing a National Bank, 15 February 1791,” National Archives, Founders Online, <https://founders.archives.gov/documents/Jefferson/01-19-02-0051>.

14. See McGinnis and Rappaport, “Unifying Original Intent and Original Public Meaning,” 1409–12.

15. Jefferson, “Opinion on the Constitutionality of the Bill for Establishing a National Bank, 15 February 1791.”

16. Jefferson, “Opinion on the Constitutionality of the Bill for Establishing a National Bank, 15 February 1791.”

17. See Mark R. Killenbeck, *McCulloch v. Maryland: Securing a Nation* (Lawrence, KS: University Press of Kansas, 2006).

18. Alexander Hamilton, “Opinion as to the Constitutionality of the Bank of the United States: 1791,” Yale Law School, Avalon Project, [https://avalon.law.yale.edu/18th\\_century/bank-ah.asp](https://avalon.law.yale.edu/18th_century/bank-ah.asp).

19. Hamilton, “Opinion as to the Constitutionality of the Bank of the United States: 1791.”

20. Hamilton, “Opinion as to the Constitutionality of the Bank of the United States: 1791.”

21. Madison, “Speech on the Bank Bill 2 February 1791.”

22. See Killenbeck, *McCulloch v. Maryland*, 28.

23. James Madison, “Veto Message on the National Bank,” University of Virginia, Miller Center, January 30, 1815, <https://millercenter.org/the-presidency/presidential-speeches/january-30-1815-veto-message-national-bank>.

24. Madison, “Veto Message on the National Bank.”

25. See Richard E. Ellis, *Aggressive Nationalism: McCulloch v. Maryland and the Foundation of Federal Authority in the Young Republic* (Oxford, UK: Oxford University Press, 2007), 42; and Bray Hammond, *Banks and Politics in America: From the Revolution to the Civil War* (Princeton, NJ: Princeton University Press, 1957), 128.

26. See Ellis, *Aggressive Nationalism*, 42.

27. *United States v. Fisher*, 6 US 358 (1805).

28. US Const. art. I, § 8, cl. 4. “The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”

29. *United States v. Fisher*, 6 US 396 (1805).

30. In Chapter 3 of this volume, Christopher Wolfe endorses the *Fisher* formulation on the ground that “the judge has no legitimate power to evaluate how necessary or proper a means is.” Marshall himself took a different view in his anonymous defense of *McCulloch*: “The court may be mistaken in the ‘propriety and necessity’ of [the Bank].”

I do not think so; but others may honestly entertain this opinion.” Gunther, *John Marshall’s Defense of McCulloch v. Maryland*, 190.

31. Marshall’s use of the word “now” indicates that the Constitution had previously been interpreted differently by at least some people. Recent scholarship suggests that there was significant early support for the view that Congress possesses inherent legislative powers that are independent of those enumerated in the Constitution. See John Mikhail, “The Necessary and Proper Clauses,” *Georgetown Law Journal* 102, no. 1 (April 2014): 1045–132, <https://georgetownlawjournal.org/articles/89/necessary-proper-clauses/pdf>; and Richard Primus, “‘The Essential Characteristic’: Enumerated Powers and the Bank of the United States,” *Michigan Law Review* 117, no. 1 (December 2018): 415–97, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3197330](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3197330). I disagree with that interpretation of the Constitution, and *McCulloch* unequivocally rejects it as well: “This Government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted.” *McCulloch v. Maryland*, 17 US 316, 405 (1819).

32. *McCulloch v. Maryland*, 17 US 316, 401 (1819).

33. *McCulloch v. Maryland*, 17 US 316, 402 (1819).

34. *McCulloch v. Maryland*, 17 US 316, 409–19 (1819).

35. *McCulloch v. Maryland*, 17 US 316, 421 (1819).

36. *McCulloch v. Maryland*, 17 US 316, 419, 420 (1819).

37. *McCulloch v. Maryland*, 17 US 316, 423 (1819).

38. *McCulloch v. Maryland*, 17 US 316, 407 (1819).

39. Abram Shulsky’s chapter in this volume points to some elements that might have gone into such a justification.

40. David S. Schwartz, “Misreading *McCulloch v. Maryland*,” *University of Pennsylvania Journal of Constitutional Law* 18, no. 1 (October 2015): 62, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2572408](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2572408).

41. Schwartz, “Misreading *McCulloch v. Maryland*.”

42. *McCulloch v. Maryland*, 17 US 316, 401–02 (1819).

43. *McCulloch v. Maryland*, 17 US 316, 402 (1819).

44. In Chapter 6 of this volume, Adam White joins Schwartz in treating *McCulloch* as an exercise of judicial statesmanship. But canny tactics are not synonymous with prudence, and they cannot be justified without reference to the worth of their aims and effects. Whatever Marshall’s aims may have been, the ultimate effect of his political maneuvering has been to help destroy the fundamental structure of the government established by the Constitution. Whether or not the Supreme Court’s judicially manufactured constitution is better than the one it replaced, the legitimate way to make such alterations is through the procedures set out in Article V. Marshall himself recognized this elementary point when he observed, “The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional.” Gunther, *John Marshall’s Defense of McCulloch v. Maryland*, 190–91. Many among his legions of intense admirers do not share this view.

45. James Madison, Letter to Spencer Roane, September 2, 1819.

46. Madison did not find it necessary to provide a citation to Article V. Two centuries after *McCulloch*, I am not so sure that one can safely dispense with this formality.

47. At one point, Marshall argues that the states never had, and thus need not surrender, a right to tax the means by which the federal government executes its powers. Whatever the merits of this argument, Marshall immediately said that he was “waiving this theory for the present,” and he never returned to it. I find the theory unpersuasive, but it hardly matters since Marshall himself treated it as obiter dicta. See *McCulloch v. Maryland*, 17 US 316, 430 (1819).

48. “It is of the very essence of 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.” See *McCulloch v. Maryland*, 17 US 316, 427 (1819). Objects over which the sovereign power of a state does not extend are “upon the soundest principles, exempt from taxation.” *McCulloch v. Maryland*, 17 US 316, 429 (1819). An attempt to tax “the means employed by the Government of the Union, in pursuance of the Constitution, is itself an abuse because it is the usurpation of a power which the people of a single State cannot give.” *McCulloch v. Maryland*, 17 US 316, 420 (1819). “The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government.” *McCulloch v. Maryland*, 17 US 316, 436 (1819). “A tax on the operation of an instrument employed by the Government of the Union to carry its powers into execution . . . must be unconstitutional.” *McCulloch v. Maryland*, 17 US 316, 436–37 (1819).

49. Accordingly, and in light of their context, the quotations in the previous note might be interpreted (though with great difficulty) to mean little more than that the states lack an absolute right (which Congress may not override) to impose a tax on federal operations.

50. For example, Marshall refers in general to the Constitution’s power to restrain a state from imposing a tax “as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union.” *McCulloch v. Maryland*, 17 US 316, 425 (1819). He also refers to the federal government’s “incidental privilege of exempting its own measures from State taxation.” *McCulloch v. Maryland*, 17 US 316, 434 (1819).

51. US Const., art. VI, cl. 2.

52. See “A supplement to the act entitled, an act to incorporate a company to make a turnpike road leading to Cumberland, and for the extension of the charters of the several banks in the city of Baltimore, and for other purposes,” January 27, 1814; and “An act to impose a Tax on all Banks or Branches thereof in the State of Maryland not chartered by the Legislature,” February 11, 1818.

53. See John Thom Holdsworth and Davis R. Dewey, *The First and Second Banks of the United States* (Washington, DC: National Monetary Commission, 1910).

54. See Ellis, *Aggressive Nationalism*, 71.

55. Ellis, *Aggressive Nationalism*, 72.

56. Ellis, *Aggressive Nationalism*, 71.

57. *Arizona v. United States*, 567 US 387, 407–10 (2012), for example, invoked the doctrine of obstacle preemption when it forbade a state to arrest illegal aliens on the basis

of probable cause that they committed a public offense for which the aliens are removable from the United States under federal law. The Court so held notwithstanding that the federal government is required to take custody of criminal aliens and federal law specifically contemplates that states will cooperate in “the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.” See *Arizona v. United States*, 567 US 387, 426–27 (2012) (Scalia, J., dissenting); 567 US 387, 437–38 (2012) (Thomas, J., dissenting); and 567 US 387, 454–59 (2012) (Alito, J., dissenting).

58. *McCulloch v. Maryland*, 17 US 316, 436–37 (1819).

59. In Chapter 3 of this volume, Christopher Wolfe argues that Congress alone may decide questions that arise under the necessary and proper clause because judges are unfit to make decisions that involve questions of degree. But he thinks that courts are permitted to decide which taxes states may impose on federal instrumentalities: “Putting the onus [on Congress to make those decisions] seems unnecessary and not the ordinary implication of ‘supremacy.’” The logic of this argument escapes me.

60. Jackson, “Veto Message on the National Bank.”

61. *McCulloch v. Maryland*, 17 US 316, 405 (1819).

62. The Court has not selected them all. In *Home Building & Loan Association v. Blaisdell*, 290 US 398 (1934), for example, the Court refused to enforce the Constitution’s prohibition against state laws “impairing the Obligation of Contracts.” US Const., art. I, § 10, cl. 1. In response to a devastating dissent joined by four justices, the majority opinion said: “If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.” *Home Building & Loan Association v. Blaisdell*, 290 US 398, 442–43 (1934).

63. The Court’s first major harvest of judicially planted individual rights arose from controversies over slavery. See *Prigg v. Pennsylvania*, 41 US 539, 312–13 (1842), which purported to recognize a constitutional right of private slave catchers to abduct black residents in free states without proof that the captured people were fugitive slaves; and *Scott v. Sanford*, 60 US 393, 450 (1857), which purported to recognize a constitutional right of slaveholders to bring their peculiar form of property into federal territories, where Congress had outlawed slavery. Since that time, Supreme Court justices have conjured innumerable new individual rights from their own luxuriant imaginations.

64. US Const., art. I, § 8, cl. 3. “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

65. *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 US 58 (1937).

66. *United States v. Darby*, 312 US 100 (1941).

67. *Heart of Atlanta Motel v. United States*, 379 US 241 (1964); *Katzbach v. McClung*, 379 US 294 (1964); and *Daniel v. Paul*, 395 US 298 (1969).

68. *Wickard v. Filburn*, 317 US 111 (1942).

69. *Perez v. United States*, 402 US 146 (1971).

70. *United States v. Lopez*, 514 US 549 (1995).

71. *United States v. Morrison*, 529 US 598 (2000).

72. *United States v. Dorsey*, 418 F.3d 1038 (9th Cir. 2005); and *United States v. Danks*, 221 F.3d 1037 (8th Cir. 1999), cert. denied, 528 US 1091 (2000).



73. Compare with *United States v. Alderman*, 565 F.3d 641 (9th Cir. 2009), holding that the sale of body armor in interstate commerce creates a sufficient nexus between possession of body armor and commerce to allow for federal regulation under the commerce clause. The Supreme Court refused to review this decision over a dissent filed by Justice Thomas (and joined by Justice Scalia). *Milner v. Department of Navy*, 562 US 1163 (2011).

74. See *United States v. Lopez*, 514 US 549, 567 (1995), noting that there was “no indication that [the defendant] had recently moved in interstate commerce.”

75. *United States v. Lopez*, 514 US 549, 561 (1995).

76. *Gonzales v. Raich*, 545 US 1 (2005).

77. *National Federation of Independent Business v. Sebelius*, 567 US 519 (2012).

78. Roberts acknowledged that the only reason to interpret the mandate-plus-penalty as a voluntarily incurred tax was to avoid holding it unconstitutional. *National Federation of Independent Business v. Sebelius*, 567 US 519, 2594 (2012). He also dismissed an objection that this would be a direct tax and thus subject to the constitutional requirement of apportionment. US Const., art. I, § 2, cl. 3. Oddly, Roberts suggested that the question was settled by an absence of prior precedents treating this unprecedented imposition as a direct tax. *National Federation of Independent Business v. Sebelius*, 567 US 519, 2598 (2012).

79. *McCulloch v. Maryland*, 17 US 316, 405 (1819).

80. *McCulloch v. Maryland*, 17 US 316, 407 (1819).