# *McCULLOCH V. MARYLAND*: A MATTER OF MONEY SUPPLY*

*Joseph M. Lynch***

The reasons for the original existence of the United States Bank lay in Alexander Hamilton's desire for a convenient source of money supply. As the Secretary of the Treasury, Hamilton stated this openly in the report he sent to Congress in 1790 advocating the Bank's establishment.[1] Its continuance in 1811, the year when its original charter expired,[2] and its re-establishment in 1816 were justified on the same grounds.[3] The money the Bank supplied was of course its paper notes, based on the gold and silver it held and on its credit as reflected by the public's confidence in the soundness of its practices.[4]

That the power to regulate the nation's money supply should be found resident in the national legislature seems self-evident to us today. That such a power to regulate, including the power to issue paper money, should be by the Constitution fixed in Congress seems almost as evident. Therefore, the power to create a national bank as the proper instrument to achieve that end seems similarly evident. These powers could with great

---



** Professor of Law, Seton Hall University School of Law. A.B., St. Peters College 1948; LL.B., Harvard Law School 1951. I would like to thank my research assistants, David Skomba and Jacqueline Grindrod, for their unwearying help in preparing this article for publication.

[1] SECRETARY OF TREASURY'S REPORT ON A NATIONAL BANK, 1st Cong., 3d Sess., 1 ANNALS OF CONG. 2031 (1790), *reprinted in* 9 AMERICAN STATE PAPERS 67 (W. Lowrie & M. Clarke eds. 1832) [hereinafter AMERICAN STATE PAPERS] and 7 THE PAPERS OF ALEXANDER HAMILTON 305 (H. Syrett & J. Cooke eds. 1963) [hereinafter HAMILTON PAPERS].

[2] Congress granted the Bank's original charter in 1791. *See* Act of Feb. 25, 1791, ch. 10, § 3, 1 Stat. 191, 192. The original charter was set to expire on March 4, 1811. *Id.* In 1809, Secretary of the Treasury Gallatin advocated the rechartering of the Bank to Congress. *See* Secretary of Treasury's Report to the Senate, 10th Cong., 2d Sess., 19 ANNALS OF CONG. 456 (1809), *reprinted in* 10 AMERICAN STATE PAPERS, *supra* note 1, at 351, and LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES, 116 (M. Clarke & D. Hall eds. 1832) [hereinafter M. Clarke & D. Hall].

[3] *See* Secretary of Treasury's Report on the State of the Finances, 14th Cong., 1st Sess., 29 ANNALS OF CONG. 1602, 1639 (1815), *reprinted in* 11 AMERICAN STATE PAPERS, *supra* note 1, at 17.

[4] *See* Secretary of Treasury's Report on a National Bank, 1st Cong., 3d Sess., 1 ANNALS OF CONG. at 2032-35 (1790), *reprinted in* 9 AMERICAN STATE PAPERS, *supra* note 1, at 67-68 and 7 HAMILTON PAPERS, *supra* note 1, at 306-08.

plausibility be said to be based on the expressed power in Congress "to coin money, regulate the value thereof."[5] In fact, both Treasury Secretary Dallas and Congressman John C. Calhoun justified the re-establishment of the Bank in 1816 on just these grounds. Nevertheless, when the constitutionality of the establishment of a national bank was challenged in *McCulloch v. Maryland*,[6] these were not the grounds advanced on its behalf. Instead its counsel argued, as Hamilton had originally argued in 1791, that the Bank was conveniently incidental to a variety of expressed powers and consequently "necessary and proper."[7] They argued further that the Bank as a national instrument was by the constitutional implication of the supremacy clause immune from state taxation.[8]

The United States Supreme Court followed these arguments. Chief Justice John Marshall writing for the Court held that the Bank was a convenient means to proper ends and therefore "necessary and proper."[9] As an instrument of the national government it was immune from state taxation.[10]

Marshall's opinion is commonly regarded as his masterpiece.[11] With the instincts of a rhetorician, employing the technique of the free association of images, he persuaded his readers first as to the rightness of his result and then, their support secured, of the rightness of his reasons. Stirring their hearts and lulling their minds with his magnificent eloquence, he convinced

---

5 *See* U.S. CONST. art. I, § 8, para. 5.

6 17 U.S. (4 Wheat.) 316 (1819).

7 *See id.* at 324-26 (arguments of Mr. Webster); *id.* at 353-59 (arguments of Mr. Wirt); *id.* at 383-90 (arguments of Mr. Pinkney). Counsel for the Bank advocated a substantially greater breadth for the necessary and proper clause than that advanced by either Hamilton or Madison in THE FEDERALIST. *See generally* THE FEDERALIST No. 33, at 203-06 (A. Hamilton) (J. Cooke ed. 1961); THE FEDERALIST No. 44, at 302-06 (J. Madison) (J. Cooke ed. 1961).

8 *See McCulloch*, 17 U.S. (4 Wheat.) at 326-30 (argument of Mr. Webster); *id.* at 360-62 (argument of Mr. Wirt); *id.* at 390-400 (argument of Mr. Pinkney). Arguments relying upon the supremacy clause were advanced despite Hamilton's repeated assurances in THE FEDERALIST that the sovereign power of the state to tax was not in any way limited by the Constitution except as it specifically provided. *See* THE FEDERALIST No. 33, at 207-08 (A. Hamilton) (J. Cooke ed. 1931).

9 *See McCulloch*, 17 U.S. (4 Wheat.) at 413-14.

10 *See id.* at 425-31.

11 *E.g.*, Frankfurter, *John Marshall and The Judicial Function*, 69 HARV. L. REV. 217, 219 (1955) ("I should like to follow James Bradley Thayer in believing that the conception of the nation which Marshall derived from the Constitution and set forth in *M'Culloch v. Maryland*, is his greatest single judicial performance."); Plous and Baker, *McCulloch v. Maryland, Right Principle, Wrong Case*, 9 STAN. L. REV. 710 (1957). (*McCulloch v. Maryland* is "[o]ften considered the greatest of Chief Justice John Marshall's decisions.").

them of the necessity and the propriety of Union, federal supremacy and the second national bank. In the process he penned immortal words of constitutional lore, words which succeeding generations of judges and lawyers, professors and students are fond of wrenching from their context and appropriating to their own result-oriented conclusions.[12]

To appreciate John Marshall's masterpiece, we must understand the necessities that governed both the conclusions he had to reach and the difficulties he had to avoid or overcome. In the avoidance, if not the complete resolution, of these difficulties, the immortal words themselves were a necessary device. We should first, however, attend to the necessity of the result.

### 1. *The Necessity of the Result: The 1791 Charter*

From the start of his tenure as Secretary of the Treasury,[13] Hamilton pursued measures calculated to expand the nation's money supply. On September 22, 1789, eleven days after his appointment he issued a circular to the customs collectors, requesting that they accept the demand notes or thirty-day paper of the Bank of North America and the Bank of New York "in payment of the duties, as equivalent to Gold and Silver."[14] The Act of Congress of July 31, 1789 had required the payment of duties in gold and silver.[15] Characteristically, Hamilton gave this statute a liberal construction to accomplish his policy, to "facilitate remittances from the several States, without drawing away their Specie; an advantage in every view important."[16] In fact, a few days later, he indicated his desire to include the paper of the Massachusetts Bank. The paper of "the banks of North America and New York being always represented by a specie fund, I consider as equivalent to Gold and Silver," he wrote and, he believed, the

---

12 "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." *McCulloch*, 17 U.S. (4 Wheat.) at 421. Chief Justice Marshall's axiom has frequently come to stand for an elaborate defense of the ends justifying the means. But it should be remembered that this aphorism was employed in *McCulloch* to legitimatize governmental action, not to invalidate it.

13 Washington submitted to the Senate the nomination of, among others, Alexander Hamilton as Secretary of the Treasury of the United States. 5 HAMILTON PAPERS, *supra* note 1, at 365.

14 5 HAMILTON PAPERS, *supra* note 1, at 394.

15 Ch. 5, § 30, 1 Stat. 29, 45 (1789).

16 Treasury Department Circular from Alexander Hamilton to Customs Collectors (Sept. 22, 1789), *reprinted in* 5 HAMILTON PAPERS, *supra* note 1, at 394.

paper of the Massachusetts Bank was "on a similar footing."[17] In fact, as he was shortly told, the circulating paper of the Bank of North America seldom equaled half the sum of its specie.[18]

The following month, Hamilton wrote to William Bingham, the founder and a director of the Bank of North America, soliciting his views on the finances and debts of the United States.[19] The Government, Bingham responded, must assume the outstanding debt of the United States, and raise taxes to pay the interest and reduce the principle. But as an

> [i]ncrease of Taxes forces money out of its natural Circulation, as representing Industry & carries it into a new Channel . . . it becomes necessary for a Statesman, who has recourse to the Expedient of augmenting the revenue of the Society by Taxes, to endeavor, by all possible Means, to increase the Quality of Circulating Medium.[20]

Bingham suggested that this might be effected, "by turning a great Portion of the Gold & Silver of the Country into an active & productive Stock, by taking it imperceptibly out of Circulation, & Supplying the full Demand, by Substituting Paper to perform their functions, & become the dead Stock of the Community."[21] To accomplish this, the administration might derive advantages from the operations of a national bank whose capital stock, in view of the considerable demand on it for the purposes of circulation, should be extensive. The Government would give a sanction to its paper circulation by receiving it in revenue.[22]

Bingham merely confirmed what Hamilton himself had concluded almost ten years earlier in a letter to Robert Morris.[23] The central necessity of the country, he wrote then, was to "erect a mass of credit that will supply the defect of monied capitals and answer all the purposes of cash . . . ."[24] A scheme that would annihilate paper credit and force the country to depend completely on specie for

---

17 Letter from Alexander Hamilton to Benjamin Lincoln, Collector of Customs at Boston (Sept. 25, 1789), *reprinted in* 5 HAMILTON PAPERS, *supra* note 1, at 399.

18 *See* Letter from Thomas Willing of the Bank of North America to Alexander Hamilton (Oct. 1, 1789), *reprinted in* 5 HAMILTON PAPERS, *supra* note 1, at 418.

19 *See* Letter from Alexander Hamilton to William Bingham (Oct. 10, 1789), *reprinted in* 5 HAMILTON PAPERS, *supra* note 1, at 432-33.

20 *See* Letter from William Bingham to Alexander Hamilton (Nov. 25, 1789), *reprinted in* 5 HAMILTON PAPERS, *supra* note 1, at 551.

21 *Id.*

22 *Id.*

23 Letter from Alexander Hamilton to Robert Morris (Apr. 30, 1781), *reprinted in* 2 HAMILTON PAPERS, *supra* note 1, at 604.

24 *Id.* at 617.

commerce, revenues and government finance was, he added, "altogether visionary and in the attempt would be fatal. We have not a competent stock of specie in this country, either to answer the purposes of circulation in Trade, or to serve as a basis for revenue."[25] If paper money was destroyed, the economy would be reduced to barter, a method so inconvenient as to be destructive of commerce and industry. Furthermore, there would be insufficient specie available to pay half the annual public revenues.[26] On the contrary, "the health of a state particularly a commercial one depends on a due quantity and regular circulation of Cash, as much as the health of an animal body depends upon the due quantity and regular circulation of the blood."[27] A sound paper, however, had to be supported by specie and by private credit and the interest of monied men. It was only in the establishment of a national bank that these ingredients could be combined and a sound paper credit founded.[28]

In his report to Congress in December 1790, these were the essential ingredients of the proposal Hamilton made for the establishment of the United States Bank.[29] Following the outline of his argument to Morris and the recommendations of Bingham, he enumerated the principal advantages of a national bank. First, through the issuance of its paper, the Bank would quicken circulation and augment the active or productive stock of the country.[30] Second, by facilitating the massive formation of capital, it would help the government obtain loans, especially in sudden emergencies, as in time of war.[31] Third, by quickening circulation, more money would be

---

25 *Id.* at 619.

26 *Id.* Prior to the American Revolution, Hamilton estimated, the amount of cash in circulation was thirty million dollars, of which about eight million had been in specie. Since he considered the proper revenue of a state to be one-fourth of a nation's wealth, he concluded that the amount of revenue properly available to the states and nation to be about seven and a half million, less than the nation's available specie. *Id.* at 609.

27 *Id.* at 620.

28 *See id.*

29 *See supra* note 1 and accompanying text. For both the concept of a national bank and the details of his formulation, Hamilton relied heavily on European precedents, particularly on the Bank of England, and on European theory, particularly on Adam Smith's WEALTH OF NATIONS. *See* Introductory Note to SECRETARY OF TREASURY'S REPORT ON A NATIONAL BANK, 1st Cong., 3d Sess. (1790), *reprinted in* 7 HAMILTON PAPERS, *supra* note 1, at 236. Additionally Hamilton relied on American precedents, particularly in connection with the establishment of the Bank of North America. J. COOKE, ALEXANDER HAMILTON 88 (1982).

30 *See* SECRETARY OF TREASURY'S REPORT ON A NATIONAL BANK, 1st Cong., 3d Sess., 1 ANNALS OF CONGRESS at 2034 (1790), *reprinted in* AMERICAN STATE PAPERS, *supra* note 1, at 68 and 7 HAMILTON PAPERS, *supra* note 1, at 309. *See also supra* note 23 (for Letter from Alexander Hamilton to Robert Morris).

31 *See* SECRETARY OF TREASURY'S REPORT ON A NATIONAL BANK, 1st Cong., 3d

available to facilitate the growth of the nation's wealth and the payment of taxes.[32] Moreover, the Bank's extension of paper credit, in facilitating the growth of productivity, would increase exports. The resulting improvement in the balance of trade and foreign exchange rate would lead to an influx and therefore growth of specie.[33] Finally, since the settlement of the nation's interior districts tended to draw off money and the consequent scarcity of capital hampered the development of manufactures, an increase of capital would aid in the development of both the interior and manufactures.[34]

Some aid to circulation, Hamilton concluded, was necessary. How was it to be done? "The emitting of paper money by the authority of Government is wisely prohibited to the individual States, by the National Constitution; and the spirit of that prohibition ought not to be disregarded, by the Government of the United States."[35] While paper emissions under the general authority might have some advantages not applicable to state paper, "in great and trying emergencies, there is almost a moral certainty of its becoming mischievous."[36] Then in a forecast of present-day governmental policies, Hamilton continued:

> The stamping of paper is an operation so much easier than the laying of taxes, that a government, in the practice of paper emissions, would rarely fail, in any such emergency, to indulge itself too far in the employment of that resource to avoid, as much as possible, one less auspicious to present popularity. If it should not even be carried so far as to be rendered an absolute bubble, it would at least be likely to be extended to a degree which would occasion an inflated and artificial state of things, incompatible with the regular and prosperous course

---

Sess., 1 ANNALS OF CONGRESS at 2034 (1790), *reprinted in* 9 AMERICAN STATE PAPERS, *supra* note 1, at 68 and 7 HAMILTON PAPERS, *supra* note 1, at 309.

[32] *See* SECRETARY OF TREASURY'S REPORT ON A NATIONAL BANK, 1st Cong., 3d Sess., 1 ANNALS OF CONGRESS at 2034 (1790), *reprinted in* 9 AMERICAN STATE PAPERS, *supra* note 1, at 68 and 7 HAMILTON PAPERS, *supra* note 1, at 309.

[33] *See* SECRETARY OF TREASURY'S REPORT ON A NATIONAL BANK, 1st Cong., 3d Sess., 1 ANNALS OF CONGRESS at 2039-40 (1790), *reprinted in* 9 AMERICAN STATE PAPERS, *supra* note 1, at 70 and 7 HAMILTON PAPERS, *supra* note 1, at 316-17.

[34] SECRETARY OF TREASURY'S REPORT ON A NATIONAL BANK, 1st Cong., 3d Sess., 1 ANNALS OF CONGRESS at 2043 (1790), *reprinted in* 9 AMERICAN STATE PAPERS, *supra* note 1, at 71 and 7 HAMILTON PAPERS, *supra* note 1, at 320-21.

[35] SECRETARY OF TREASURY'S REPORT ON A NATIONAL BANK, 1st Cong., 3d Sess., 1 ANNALS OF CONGRESS at 2043 (1790), *reprinted in* 9 AMERICAN STATE PAPERS, *supra* note 1, at 71 and 7 HAMILTON PAPERS, *supra* note 1, at 321.

[36] SECRETARY OF TREASURY'S REPORT ON A NATIONAL BANK, 1st Cong., 3d Sess., 1 ANNALS OF CONGRESS at 2044 (1790), *reprinted in* 9 AMERICAN STATE PAPERS, *supra* note 1, at 71 and 7 HAMILTON PAPERS, *supra* note 1, at 322.

of the political economy.[37]

Deficit spending rather than taxation would be the funding prescription. Public paper, issued on the mere authority of the government, had no inherent standard to gauge the amount of paper necessary to satisfy the needs of circulation. Private paper payable in coin, on the other hand, would return to the Bank for redemption if more were to be issued than necessary.[38]

Other reasons influenced Hamilton against the issuance of a paper money by the national government. The monied interests were against it for the same reasons as Hamilton, and such opposition had influenced the Convention in the framing of the Constitution to limit the powers of Congress in monetary matters to "*coin* Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures."[39] A motion, modeled on the Articles of Confederation, to grant Congress the further authority "to emit bills of credit on the credit of the U[nited] States" had been introduced but defeated[40] for the very reason that if paper emissions were not prohibited, the monied interests would oppose the Constitution.[41] These individuals asserted that a governmental paper emission would destroy the public credit rather than enhance it.

Of course, it could be argued, as it was almost a century later, that the defeat of the proposal to authorize the emission of bills of credit was not conclusive as to the intent to specifically prohibit their emission.[42] But it appears it was so understood. It was an im-

---

37 SECRETARY OF TREASURY'S REPORT ON A NATIONAL BANK, 1st Cong., 3d Sess., 1 ANNALS OF CONGRESS at 2044 (1790), *reprinted in* 9 AMERICAN STATE PAPERS, *supra* note 1, at 71 and 7 HAMILTON PAPERS, *supra* note 1, at 322.

38 SECRETARY OF TREASURY'S REPORT ON A NATIONAL BANK, 1st Cong., 3d Sess., 1 ANNALS OF CONGRESS at 2044 (1790), *reprinted in* 9 AMERICAN STATE PAPERS, *supra* note 1, at 71 and 7 HAMILTON PAPERS, *supra* note 1, at 322.

39 U.S. CONST. art. I, § 8, para. 5 (emphasis added).

40 On August 16, 1787, a motion to strike "and emit bills on the credit of the United States" carried by a vote of 9-2. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 303, 308-09 (M. Farrand ed. 1911) [hereinafter FARRAND].

41 *Id.* at 309.

42 This argument was advanced by James B. Thayer in his article, *Legal Tender*, 1 HARV. L. REV. 73 (1887), based on his reading of Madison's notes on the motion, as follows:

> Mr. GOUVERNEUR MORRIS moved to strike out "and emit bills on the credit of the United States." If the United States had credit, such bills would be unnecessary; if they had not, unjust and useless.—Mr. BUTLER seconds the motion.—Mr. MADISON. Will it not be sufficient to prohibit the making them a *tender?* This will remove the temptation to emit them with unjust views; and promissory notes, in that shape, may in some emergencies be best.—Mr. GOUVERNEUR MORRIS. Striking out the words will leave room still for notes of a *responsible* minister, which will do all the good without the mischief. The moneyed interest will oppose

portant power and, as Mason observed in the debates, Congress

> the plan of government, if paper emissions be not prohibited.—Mr. GORHAM was for striking out without inserting any prohibition. If the words stand, they may suggest and lead to the measure.—Mr. MASON had doubts on the subject. Congress, he thought, would not have the power unless it were expressed. Though he had a mortal hatred to paper money, yet, as he could not foresee all emergencies, he was unwilling to tie the hands of the legislature. He observed that the late war could not have been carried on, had such a prohibition existed.—Mr. GORHAM. The power, as far as it will be necessary or safe, is involved in that of borrowing.—Mr. MERCER was a friend to paper money, though, in the present state and temper of America, he should neither propose nor approve of such a measure. He was consequently opposed to a prohibition of it altogether. It will stamp suspicion on the government, to deny it a discretion on this point. It was impolitic, also, to excite the opposition of all those who were friends to paper money. The people of property would be sure to be on the side of the plan, and it was impolitic to purchase their further attachment with the loss of the opposite class of citizens.—Mr. ELLSWORTH thought this a favorable moment to shut and bar the door against paper money. The mischiefs of the various experiments which had been made were now fresh in the public mind, and had excited the disgust of all the respectable part of America. By withholding the power from the new government, more friends of influence would be gained to it than by almost anything else. Paper money can in no case be necessary. Give the government credit, and other resources will offer. The power may do harm, never good.—Mr. RANDOLPH, notwithstanding his antipathy to paper money, could not agree to strike out the words, as he could not foresee all the occasions that might arise.—Mr. WILSON: It will have a most salutary influence on the credit of the United States to remove the possibility of paper money. This expedient can never succeed whilst its mischiefs are remembered; and as long as it can be resorted to it will be a bar to other resources.—Mr. BUTLER remarked that paper was a legal tender in no country in Europe. He was urgent for disarming the government of such a power.—Mr. MASON was still averse to tying the hands of the legislature *altogether*. If there was no example in Europe, as just remarked, it might be observed, on the other side, that there was none in which the government was restrained on this head.—Mr. READ thought the words, if not struck out, would be as alarming as the mark of the beast in Revelation.—Mr. LANGDON had rather reject the whole plan than retain the three words, "and emit bills."

Thayer, *supra*, at 76-77 (quoting 5 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 434-35 (J. Elliot 2d ed. 1836) [hereinafter ELLIOT'S DEBATES]).

The final vote on the motion for striking out the words "and emit bills" was as follows: New Hampshire, Massachusetts, Connecticut, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, Georgia, aye, 9; New Jersey, Maryland, no, 2. 2 FARRAND, *supra* note 40, at 310.

Virginia's affirmative vote

> was occasioned by the acquiescence of Mr. Madison who became satisfied that striking out the words would not disable the Gov[ernment] from the use of public notes as far as they could be safe & proper; & would only cut off the pretext for a *paper currency* and particularly for making the bills *a tender* either for public or private debts.

"would not have the power unless it were expressed."[43]

Madison wrote later, in his Notes to the debates, that he joined in the vote against the authorization, satisfied that it "would not disable the Govt from the use of public notes as far as they would be safe & proper; & would only cut off the pretext for a paper currency and particularly for making the bills a tender either for public or private debts."[44] That is to say, the Government would be free to issue paper notes as an incident to borrowing, provided they were in such denominations as to make them unsuitable for currency. Luther Martin, who against the majority favored the emission of a paper money in times of emergency, reported in his Address to the Maryland Legislature after the Convention that the vote against the power to emit bills of credit was a vote against the emission of a national paper money.[45] These reasons, the opposition of the mon-

---

*Editor's note to id.* at 310 (emphasis added).

From the fact that five of the eleven speakers in this debate, Madison, Mason, Gorham, Mercer and Randolph, had spoken as not in being favor of a complete prohibition of the emission of paper, Thayer argued in *Legal Tender* that "it is reasonable to suppose that a considerable number shared the opinion of Gorham, that striking out was not equivalent to prohibition." Thayer, *supra*, at 78. Silence, Thayer suggested, rather than outright prohibition, was the policy. In other words, the framers from the beginning artfully envisioned a policy of implied powers.

But this supposition runs counter to the view Mason expressed and others shared that Congress "would not have the power unless it were expressed." 2 FARRAND, *supra* note 40, at 309 (statement of Col. Mason). It runs counter to what Madison wrote as to his understanding of the motion: that while the Constitution would permit the national government to issue bills and notes as an incident to its power to borrow, it would not permit the government to employ these bills and notes as a paper currency. *See* Editor's note to *id.* at 310; *see also infra* text accompanying note 44. What was forbidden was the issuance of paper in small denominations suitable for ready circulation. Thayer's suggestion also runs counter to what Luther Martin publicly stated in his Address to the Legislature of Maryland after the Convention. *See infra* note 45; B. HAMMOND, BANKS AND POLITICS IN AMERICA 91-95 (1957); KNOX, UNITED STATES NOTES iv preface (1884). *See also infra* Appendix (discussing subsequent history of bills of credit as a national circulating medium).

[43] 2 FARRAND, *supra* note 40, at 309.

[44] *See* Editor's note to *id.* at 310.

[45] Address by Luther Martin to the Maryland State Legislature (Nov. 29, 1787) (reporting proceedings of Constitutional Convention), *reprinted in* 3 FARRAND, *supra* note 40, at 56-57. In pertinent part, Martin stated as follows:

> By our original articles of confederation, the Congress have a power to borrow money and emit bills of credit, on the credit of the United States; agreeable to which, was the *report* on *this* system as *made* by the *committee of detail*. When we came to this part of the report, a motion was made to strike out the words "to emit bills of credit." Against the motion we urged, that it would be improper to *deprive* the Congress of that *power*; that it would be a novelty unprecedented to establish a government which should not have such authority; that it was impossible to look forward into futurity so far as to decide, that events might not hap-

ied interests and the intent of the framers, led Hamilton to seek the alternative of creating a national bank which would do the job for the Government which it could not do for itself.

Was the alternative, the creation of a national bank constitutional? Hamilton in his report to Congress assumed that it was. The record of the Constitutional Convention beclouds Hamilton's assumptions. Late in the Convention, Madison, troubled by the history of the Continental Congress, made a motion to confer on Congress the power to grant corporate charters "where the interest of the U[nited] S[tates] might require [and] the . . . States may be in-

---

> pen, that should render the *exercise* of such a power *absolutely* necessary; and that we doubted, whether, if a war should take place, it would be *possible* for this country to *defend* itself, without having recourse to *paper credit*, in which case, there would be a *necessity* of becoming a *prey* to our *enemies*, or *violating* the *constitution* of our government; and that, considering the administration of the government would be principally in the hands of the wealthy, there could be little reason to fear an *abuse* of the *power* by an unnecessary or injurious exercise of it. But, Sir, a majority of the convention, being wise beyond every event, and being willing to risk any political evil, rather than admit the idea of a paper emission, in any *possible* event, refused to *trust* this authority to a government, to which they were *lavishing* the must [sic] *unlimited* powers of *taxation*, and to the *mercy* of which they were willing *blindly* to *trust* the *liberty* and *property* of the *citizens* of *every State* in the Union; and they *erased* that clause from the *system*.

*Id.* at 205-06.

But for a contrary position, see the statement of Charles Pinckney in the South Carolina ratifying debates. *See* Address by Charles Pinckney on the 10th Section of Article 1st of the Federal Constitution (May 20, 1788), *reprinted in* 4 ELLIOT'S DEBATES, *supra* note 42, at 333. While deprecating the issuance of state paper money and paper money in general, he maintained that "if paper should become necessary, the general government still possess the power of emitting it, and Continental paper, well funded, must ever answer the purpose better than state paper." 4 ELLIOT'S DEBATES, *supra* note 42, at 335. These remarks were made not in connection with a discussion of Congressional power under Article I, section 8, but in a discussion of the limitations on state power under Article I, section 10. The remarks seem calculated to reassure his listeners on the occasional federal use of paper emissions in time of necessity in order to gain their acceptance of the total prohibition of state emissions. His statement, however, when viewed in the light of the statements of Madison and Martin and the early contrary practice of the United States government before the Civil War, is not persuasive. The weight of the early authority runs the other way. Paper money in general was in dispute. *See id.* at 20, 169-70, 173 (statements made in North Carolina debates); 3 ELLIOT'S DEBATES, *supra* note 42, at 290-91 (statements made in Virginia debates).

Jackson Turner Main, in THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788 (1961), concluded that the Federalists, consisting of merchants and other town dwellers, farmers depending on major towns or producing for export, generally favored hard money and opposed paper, whereas with some exceptions, it was the subsistent farmer of the interior who favored paper. South Carolina planters, although Federalist, favored paper. *Id.* at 7. This would explain Pinckney's remarks quoted above.

competent."[46] On December 31, 1781, the Continental Congress had passed an ordinance establishing a banking corporation under the name of the President and Company of the Bank of North America,[47] whose purpose was to aid the government of the United States by its money and credit, to supply the loss of useless paper money and to help revive commerce. A week later Robert Morris, then serving as Superintendent of Finance under appointment of the Continental Congress,[48] sent copies of the ordinance to the governors of the thirteen states, recommending to the several states the passage of such laws as they might judge necessary to give the ordinance its full effect.[49] The recommendation was made because, as Madison, who also served in the Continental Congress, reported at the time, "the general opinion though with some exceptions was that the Confederation gave no such power and that the exercise of it would not bear the test of a forensic disquisition."[50] The Bank, however, he then added, supposed that a charter from Congress would give it "a dignity and preeminence in the public opinion."[51] While some members felt the bank's importance, others, he wrote, perceived the want of power to encharter it and an unwillingness to assume it.[52]

Madison concluded that:

> Some thing like a middle way produced an acquiescing rather than an affirmative vote. A charter of incorporation was granted, with a recommendation to the States to give it all the necessary validity within their respective jurisdictions. As this is a tacit admission of a defect of power I hope it will be an antidote against the poisonous tendency of precedents of usurpation.[53]

The Bank's directors, in consequence, sought a charter from the state of Pennsylvania, which in turn granted one in terms identical to that granted by Congress. The Bank accepted it as the authority

---

46 2 FARRAND, *supra* note 40, at 615 (statement of Mr. Madison). The motion was made on September 14, by way of amendment to a motion providing "for cutting canals where necessary."

47 *See* 21 JOURNALS OF THE CONTINENTAL CONGRESS 1186 (Dec. 31, 1781) (G. Hunt ed. 1912).

48 *See* HAMMOND, *supra* note 42, at 46-47.

49 *Id.* at 50.

50 Letter from James Madison to Edmund Pendleton (Jan. 8, 1782), *reprinted in* 6 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 289 (E. Burnett ed. 1933); *see* E. BURNETT, THE CONTINENTAL CONGRESS 515-16 (1941).

51 Letter from James Madison to Edmund Pendleton (Jan. 8, 1782), *reprinted in* 6 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS, *supra* note 50, at 289.

52 *Id.* at 290.

53 *Id.*

under which its operations were to be conducted.[54] Similar laws were passed by the legislatures of New York[55] and Massachusetts.[56]

In light of this background, Madison at the Constitutional Convention asserted that if Congress were to have the power to charter a bank, a specific constitutional provision to that effect would be helpful. But opposition developed. It was termed "unnecessary," described as too controversial, offensive to banking interests in Philadelphia and New York, and generally suggestive of mercantile monopolies—and was therefore withdrawn.[57] Hamilton's assumption of the Bank's constitutionality was in the face of that history.

Hamilton, however, was not unmindful of the concerns raised in the debates at the Constitutional Convention. In organizing the Bank, he took care not to offend the monied interests. Under his plan, the Bank's capital stock would not exceed ten million dollars,[58] four-fifths of which would come from private subscriptions,[59] payment for which would be made one-fourth in gold and silver coin and three-fourths in continental debt securities assumed by the United States.[60] Payment in land was not acceptable because, unlike paper, it was not a liquid asset,[61] and moreover, no provision was made for the acceptance of state debt securities assumed by the United States. For these reasons, while the plan won support in the North, it alienated the South.

---

54 Act of March 17, 1787, ch. 82, 1787 Pa. Laws 249.

55 Act of April 11, 1782, ch. 35, 1782 N.Y. Laws 462.

56 Act of March 9, 1793, ch. 21, 1793 Mass. Acts 244.

57 2 FARRAND, *supra* note 40, at 615-16. Thomas Jefferson later reported that Justice Wilson, one of the framers from Pennsylvania, had said privately during the debates on the bank bill in the House in 1791 that the motion had been defeated for fear of the anti-bank party in Pennsylvania. 1 THE WRITINGS OF THOMAS JEFFERSON (P. Ford, ed. 1904) [hereinafter JEFFERSON WRITINGS]. In substance, it agrees with Madison's notes, that the motion was defeated, because it was considered too controversial. Jefferson also referred to this history as a further reason for rejecting the bill to establish the Bank in his opinion to President Washington. *See* Opinion Letter from Sec'y of State Thomas Jefferson to Pres. Washington (Feb. 15, 1791), M. Clarke & D. Hall, *supra* note 2, at 92.

58 *See* SECRETARY OF TREASURY'S REPORT ON A NATIONAL BANK, 1st Cong., 3d Sess., 1 ANNALS OF CONGRESS at 2053 (1790), *reprinted in* 9 AMERICAN STATE PAPERS, *supra* note 1, at 74 and 7 HAMILTON PAPERS, *supra* note 1, at 334.

59 *See* SECRETARY OF TREASURY'S REPORT ON A NATIONAL BANK, 1st Cong., 3d Sess., 1 ANNALS OF CONGRESS at 2056 (1790), *reprinted in* 9 AMERICAN STATE PAPERS, *supra* note 1, at 75 and 7 HAMILTON PAPERS, *supra* note 1, at 337.

60 *See* SECRETARY OF TREASURY'S REPORT ON A NATIONAL BANK, 1st Cong., 3d Sess., 1 ANNALS OF CONGRESS at 2053 (1790), *reprinted in* 9 AMERICAN STATE PAPERS, *supra* note 1, at 74 and 7 HAMILTON PAPERS, *supra* note 1, at 334.

61 *See* SECRETARY OF TREASURY'S REPORT ON A NATIONAL BANK, 1st Cong., 3d Sess., 1 ANNALS OF CONGRESS at 2050 (1790), *reprinted in* 9 AMERICAN STATE PAPERS, *supra* note 1, at 74 and 7 HAMILTON PAPERS, *supra* note 1, at 330.

At first Hamilton's bill had clear sailing. On December 23, 1790, the Senate moved to consider his report and prepare a bill.[62] Two weeks later the bill was reported.[63] The debates were in secret,[64] but we know from later comments in the House, that no constitutional objection was raised.[65] On January 20, 1791, the bill was passed and sent to the House.[66] There it quickly moved through committee, was reported and read for the third time on February 1.[67]

Upon the third reading, practical and policy objections were raised for the first time. As stated, while Hamilton's plan had provided for the partial payment of bank capital in the continental debt securities assumed by the United States, it had made no provision for the acceptance of state debt securities also assumed by the United States.[68] Assumption at par of both continental and state debt had been approved by statute the previous year over southern and western protest that it would reward speculators, mostly in the Northeast, who had bought up the debt certificates at a substantial discount before the introduction of the assumption bill.[69] It had carried due to a compromise over the establishment of the nation's capital in the Residence Act whereby the seat of government would be temporarily located in Philadelphia until 1800 and permanently on the Potomac thereafter.[70] The compromise, arranged by Hamilton and Jefferson, was secured by the shift of enough votes in the

---

62 2 ANNALS OF CONG. 1738-39 (1790).

63 *Id.* at 1741.

64 *See* M. Clarke & D. Hall, *supra* note 2, at 36.

65 *See generally* 2 ANNALS OF CONG. 1903-09 (1791) (statement of Rep. Ames). Ames complained that the bill was allowed to pass out of the Committee of the whole in the House in silence, and that the objections to the bill were first raised by its opponents in the debates themselves. *Id.* Thus, he stated, the bill's friends were obliged to reply to the objections "without premeditation." *Id.*

66 *Id.* at 1748.

67 *Id.* at 1891.

68 *See supra* text accompanying notes 58-61.

69 A considerable portion of all debt paper, in some states at least half, had passed into the hands of speculators. BEARD, ECONOMIC ORIGINS OF JEFFERSONIAN DEMOCRACY 133 (1936). As in the case of the bank bill, southern opposition in the House was led by Madison of Virginia, Stone of Maryland and Jackson of Georgia. *See infra* notes 79-81 and accompanying text. Opposition to assumption of debt was generally based on the windfall that speculators would reap, which seemed to work an injustice on the original holders who were, for the most part, revolutionary veterans. *See, e.g.*, 1 ANNALS OF CONG. 1162-63 (Gales ed., 1790) (statement of Rep. Jackson); 2 *id.* at 1173, 1225-26 (1790) (statement of Rep. Jackson); 2 *id.* at 1266, 1270-71 (statement of Rep. Madison); 2 *id.* at 1258-60 (statement of Rep. Stone).

For the statutes incorporating assumption of debt, see Act of August 4, 1790, ch. 34, 1 Stat. 138 (1790); Act of August 5, 1790, ch. 38, 1 Stat. 178 (1790).

70 Act of July 16, 1790, ch. 28, 1 Stat. 130 (1790).

House from Maryland and Virginia to assure the adoption of assumption.[71]

In the meantime, as Representative Stone of Maryland said, the greatest part of the continental debt had "travelled eastward of the Potomac."[72] If state debt were excluded from the formation of the Bank's capital, it would deprive the southern states "of the advantage that might have been given to the only paper they have."[73] The Treasury proposal would, as Madison put it, give "an undue preference to the holders of a particular denomination of the public debt" and, referring to the probable quick subscription of capital, a preference to those in or near Philadelphia, the seat of the government and the proposed seat of the Bank.[74] Jackson of Georgia had previously declared that the bill would benefit only the merchants in a small part of the country, meaning the Northeast, and would constitute a monopoly for the benefit of a private corporation.[75]

These arguments explain the reasons for the motion made on February 3, that the bill be recommitted "for the purpose of altering the time or manner of subscribing; so that the holders of State securities, assumed to be paid by the United States, may be on a footing with the holders of other securities, formerly called national securities."[76] The motion was defeated by a margin substantially the same as that which ultimately favored the passage of the bill.[77] From the final vote, it is known that the membership divided on regional lines, everyone from the North with one exception voting for the bill and almost everyone from the South voting against.[78] It seems a fair inference that had the motion for recommittal passed, southern opposition would have been withdrawn.

There was another practical reason underlying southern opposition. Besides selecting Philadelphia as the seat of the Bank,[79] the bill provided for a term of twenty years for the Bank's charter.[80] Southerners feared that the public, grown accustomed to the con-

---

71 *See* Editorial Note to Thomas Jefferson's Opinion on the Constitutionality of the Residence Bill, *reprinted in* 17 THE PAPERS OF THOMAS JEFFERSON 163 (J. Boyd ed. 1965).

72 2 ANNALS OF CONG. 1930 (1791) (statement of Rep. Stone).

73 *Id.* at 1930.

74 *Id.* at 1895 (statement of Rep. Madison).

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

76 M. Clarke & D. Hall, *supra* note 2, at 45.

77 *Id.* at 45. The vote on recommittal was thirty-eight against and twenty-one in favor. *Id.* The vote for passage of the bill was thirty-nine in favor and twenty against. *Id.* at 85.

78 *See id.* at 85.

79 Act of Feb. 25, 1791, ch. 10, 1 Stat. 192 §§ 1, 5 (1791).

80 *Id.* § 3.

centration of finance and government in Philadelphia, might not want them separated, leading later to a movement to undo the provisions of the Residence Act, requiring the transfer of the capital to the Potomac in 1800.[81] In the joint provisions for Philadelphia and for a charter of twenty years they suspected a northern plot. This suspicion was strengthened by the fact that at that time Hamilton's supporters in the Senate were blocking the consideration of a bill amending the Residence Act to change the boundaries of the territory bordering on the Potomac in minor, though necessary, respects.[82] Charges and countercharges were made. Northerners argued that southern opposition to the bank bill was implicated in its defense of the seat of the government. Stone answered that such charges "betray[ed] a consciousness of an attack."[83] If northerners believed "this scheme tends to break the faith of the Union pledged to the Potomac, it is no wonder they suppose we oppose it upon that ground."[84] Rumors abounded. Southern opposition would be dropped, it was reported, if the term of the Bank's charter were limited to ten instead of twenty years.[85] The change was not made and the debates continued, centering on the Constitution and ultimately on the meaning of "necessary and proper."

In the constitutional arguments, Madison took the lead for the South. The political power of the federal government he said, was "not a general grant, out of which particular powers are excepted; it [was] a grant of particular powers only, leaving the general mass in other hands. So it had been understood by its friends and its foes, and so it was to be interpreted."[86] Although he did not refer to it in express terms, his position was essentially based on the principle encapsulated in the soon-to-be-adopted tenth amendment that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[87]

Specifically, Madison argued that a power to grant charters of incorporation had been proposed at the Constitutional Convention

---

81 *See supra* text accompanying note 70.

82 *See* Editorial Note to 19 THE PAPERS OF THOMAS JEFFERSON 36 (J. Boyd ed. 1974).

83 2 ANNALS OF CONG. 1930 (1791) (statement of Rep. Stone). The remarks to which Stone was responding were apparently unreported.

84 *Id.*

85 *See* Editorial Note to 19 THE PAPERS OF THOMAS JEFFERSON, *supra* note 82, at 281.

86 2 ANNALS OF CONG. 1896 (1791) (statement of Rep. Madison).

87 U.S. CONST. amend. X.

and rejected.[88] More specifically, he said, the bill before the House did not lay within one of the expressed powers.[89] It was not an incident to the taxing power. It laid no tax whatsoever.[90] It was not an incident to the borrowing power. "It [did] not borrow a shilling."[91] It did not fall within the necessary and proper powers, because the clause was "merely declaratory of what would have resulted by unavoidable implication, as the appropriate . . . technical means of executing those powers."[92] The means must be more than merely conducive to or facilitating the end of a specified power. They must be necessary to the end and incident to the nature of the specific power. To argue otherwise would distort the basic constitutional intent of a national government of limited and expressed delegated powers.[93] A corporate bank was not such a necessary and proper means. The power to create it "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."[94]

The proponents of the bill, and later Hamilton in his opinion to President Washington on its constitutionality, took issue with this position in two respects. According to Hamilton, Congress could exercise not only the expressed powers but also such powers as a sovereign government must possess in order to effect its objects. These implied powers were as much delegated as the expressed powers.[95] In fact, he argued for the existence of a third set of pow-

88 2 ANNALS OF CONG. 1896 (1791) (statement of Rep. Madison).

89 *Id.*

90 *Id.*

91 *Id.* at 1897 (statement of Rep. Madison).

92 *Id.* at 1898 (statement of Rep. Madison).

93 *See id.*

94 *Id.* at 1900 (statement of Rep. Madison). Edmund Randolph and Thomas Jefferson, who were Attorney General and Secretary of State respectively in Washington's Cabinet, would repeat these arguments when they later gave their opinions to the President as to the constitutionality of the bill. *See generally* Opinion Letter from Edmund Randolph, United States Att'y Gen., to Pres. Washington (Feb. 12, 1791), *reprinted in* M. CLARK & D. HALL, *supra* note 2, at 86-89; Letter from Edmund Randolph, United States Att'y Gen., to Pres. Washington (Feb. 12, 1791), *reprinted in* M. CLARK & D. HALL, *supra* note 2, at 89-91; Opinion Letter from Thomas Jefferson, Sec'y of State, to Pres. Washington (Feb. 15, 1791), *reprinted in* M. CLARK & D. HALL, *supra* note 2, at 91-94. Jefferson explicitly referred to the proposed tenth amendment, then designated as the "12th Amendment." *Id.* at 91.

95 Opinion Letter From Sec'y of Treasury Alexander Hamilton to Pres. Washington (Feb. 23, 1791), *reprinted in* M. CLARKE & D. HALL, *supra* note 2, at 96. It was the argument that Justice Bradley would advance after the Civil War in his concurring opinion in the *Legal Tender Cases*:

Such being the character of the General government, it seems to be a

ers, "resulting" powers, flowing in consequence of the exercise of one of the expressed powers, as for example, the power of the United States to exercise supreme jurisdiction over conquered territory.[96]

Congress in the exercise of its implied powers, Hamilton continued, could do whatever was "necessary and proper," which meant merely "*needful, requisite, incidental, useful or conducive to*," and not "absolutely or indispensably" necessary. The latter construction, he maintained, was unduly restrictive.[97] To create a corporation as an instrument in the achievement of a specified power was an implied power.[98] Denying that the corporate status was of itself a separate and important substantive matter, Hamilton contended that the Bank was not invalid simply because it was a corporation.[99] Since its operations would be useful or conducive to the collection of taxes,[100] borrowing,[101] the advance of commerce[102] and the provision of an army and navy in time of sudden emergency,[103] its creation was an exercise of implied powers, incidental to the great objects of government, and therefore "necessary and proper."

From these arguments for and against the establishment of a national bank, two main issues emerged. First, whether the power to create a corporate bank required a specific expressed power? Sec-

---

> self-evident proposition that it is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions.

Knox v. Lee, 79 U.S. (12 Wall.) 457, 556 (Bradley, J., concurring). In any case, the government had the power to make its currency legal tender under the necessary and proper clause in order that it might carry on during the Civil War and "vindicat[e] its authority and existence." *Id.*

96 Opinion Letter From Sec'y of Treasury Alexander Hamilton to Pres. Washington (Feb. 23, 1791), *reprinted in* M. Clarke & D. Hall, *supra* note 2 at 96. This was in fact the theory Chief Justice Marshall followed in justifying in part the power of Congress to legislate in the Florida Territories acquired from Spain. American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828). *See also* Justice Strong's reliance on these powers in his opinion for the Court in the *Legal Tender Cases*: "Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power. Powers thus exercised are what are called by Judge Story in his Commentaries on the Constitution, resulting powers, arising from the aggregate powers of the government." Knox v. Lee, 79 U.S. (12 Wall.) 457, 535 (1870).

97 Opinion Letter From Sec'y of Treasury Alexander Hamilton to Pres. Washington (Feb. 23, 1791), *reprinted in* M. Clarke & D. Hall, *supra* note 2, at 97-98.

98 *Id.* at 97, 101-02.

99 *See id.* at 97.

100 *Id.* at 97, 105-06.

101 *Id.* at 105, 107-08.

102 *Id.* at 97, 105-06, 108-09.

103 *Id.* at 106, 109.

ond, whether the "necessary and proper" clause meant to confer on Congress the power to do what was "needful, requisite, incidental, useful or conductive to" or "absolutely or indispensably" necessary? In their arguments, Madison and Hamilton set forth opposing theories not only of constitutional power but also of the nature and status of the corporation.

As Gerard Henderson stated in "The Position of Foreign Corporations in American Constitutional Law",[104] there were at the time the Constitution was framed two divergent conceptions regarding corporations:

> The restrictive theory tends to emphasize the extraordinary character of the privileges with which the members of a corporation are endowed, and the high nature of the act of sovereignty by which their corporate franchise is conceded. The liberal theory looks upon a corporation rather as a normal business unit, and its legal personality as no more than a convenient mechanism of commerce and industry. Of the restrictive theory, the economic substratum may be said to be the jealousy of local interests, the fear of world competition. Of the liberal theory, the material basis is the growing internationalism of business, of trade, of investment.[105]

Traditionally, the corporation had been a monopoly, created by the Crown in a supreme act of sovereignty. To the American colonist, it connoted a great, largely uncontrolled, privileged trading company, like the East India Company.[106] This thinking affected the debates in the Constitutional Convention. The motions to enable Congress expressly to create corporations were, as stated above, opposed in part on grounds of monopoly and privilege.[107] Moreover, some of the states in ratifying the Constitution had appended adjurations against a Congressional power to create commercial corporations,[108] leading proponents of the bank bill to distinguish a banking corporation from that of the ordinary commercial corporation.[109] Hamilton, in opposing the traditional theory, relied on a newer order, one advocated by Adam Smith, of a free trade among the nations, and of a nation's wealth expanding by virtue of its trade. To expand a nation's trade, it was more appro-

---

104 G. HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW (1918).

105 *Id.* at 3 (footnote omitted).

106 *Id.* at 10-11.

107 *E.g.*, 2 FARRAND, *supra* note 40, at 615-16 (statements of Rep. King).

108 *See, e.g.*, 1 ELLIOT'S DEBATES, *supra* note 42, at 323 (Massachusetts); *id.* at 326 (New Hampshire); *id.* at 330 (New York); *id.* at 337 (Rhode Island).

109 *See* 2 ANNALS OF CONG. 1945-54 (1791) (statement of Rep. Gerry).

priate to think in terms of business units rather than single human persons and to render the corporation an ordinary business instrument. Therefore to create a corporation, it was not necessary that Congress possess an extraordinary power. The power should itself be ordinary, and where its exercise would be conducive to one of the expressed powers, it should be considered incidental to it or implied.[110]

The argument of Madison, Jefferson and Randolph against the creation of national corporations had rested on the then prevailing theories regarding the nature of a corporation. Their second argument, based on the "necessary and proper" clause, rested on their understanding that the federal government was limited under the Constitution as a matter of historical fact and that fact would shortly be commemorated in the tenth amendment. A construction of implied powers inconsistent with these limitations was in their view a distortion of the historical intent. Hamilton's response to that argument ignored history and focused on the nature of government: whatever a government is empowered to do, it may do by whatever means it deems expedient.

What did "necessary and proper" mean? An examination of what Hamilton and Madison had written just three years before in

---

110 *See, e.g.*, Opinion Letter from Sec'y of Treasury Alexander Hamilton to Pres. Washington (Feb. 23, 1791), *reprinted in* M. Clarke & D. Hall, *supra* note 2, at 95-112. In his discussion concerning the suitability of a corporation as an instrument of trade with a foreign country he stated:

> Suppose a new and unexplored branch of trade should present itself with some foreign country; suppose it was manifest that, to undertake it with advantage, required a union of the capitals of a number of individuals, and that those individuals would not be disposed to embark without an incorporation, as well to obviate the consequences of a private partnership, which makes every individual liable, in his whole estate, for the debts of the company, to their utmost extent, as for the more convenient management of the business; what reason can there be to doubt, that the national Government would have a constitutional right to institute and incorporate such a company? None.

*Id.* at 110-11.

The utility of the Hamiltonian view of corporations quickly became apparent in the succeeding decades as the number and variety of corporations chartered by the various states increased. The business of the United States being business, America became commercial first and corporate second. The eighteenth century constitutional scruples of Madison and the framers appeared out of date even by the time *McCulloch v. Maryland* was argued. By then the principal argument against the Bank was that it was not "necessary and proper." The force of the argument based on the uniqueness of its corporate nature had been largely lost by the widespread existence of energetically competing corporate state banks. *See infra* note 372-78 and accompanying text for a discussion of the ultimate vindication of the Hamiltonian view.

*The Federalist* impels the conclusion that they had there expounded a strict construction of the clause. Hamilton in writing his opinion to Washington in 1791 had to ignore these earlier positions, whereas Madison's argument in the House was entirely consistent with them.

In expounding the meaning of "necessary and proper" in *The Federalist*, Madison began by explaining why the Constitution had not "copied the second article of the existing confederation which would have prohibited the exercise of any power not *expressly* delegated."[111] Practically, he reasoned, that provision could not be literally observed. The Continental Congress had to have recourse to a doctrine of implied powers. Therefore, because the Congress established under the Constitution had more extensive powers, it had been considered advisable to provide for the exercise of implied powers by the added measure of the "necessary and proper" clause.[112] But notice how, in the final sentence of the following paragraph, he attempted to soothe the fears of his worried readers with the addition of the qualifying "indispensably" to the "necessary and proper" clause:

> Had the Convention taken the first method of adopting the second article of confederation; it is evident that the new Congress would be continually exposed as their predecessors have been, to the alternative of construing the term "*expressly*" with so much rigour as to disarm the government of all real authority whatever, or with so much latitude as to destroy altogether the force of the restriction. It would be easy to shew [sic] if it were necessary, that no important power, delegated by the articles of confederation, has been or can be executed by Congress, without recurring more or less to the doctrine of *construction* or *implication*. As the powers delegated under the new system are more extensive, the government which is to administer it would find itself still more distressed with the alternative of betraying the public interest by doing nothing; or of violating the Constitution by exercising powers, indispensably necessary and proper; but at the same time, not *expressly* granted.[113]

This was vintage Madison: patrician ambiguity declaring on the one hand a doctrine of implied powers actually written into the Constitution and suggesting thereby a grant of powers somewhat broader than the grant of the specified powers, but on the other, countersuggesting by the modifying "indispensably" a shadow of implica-

---

111 THE FEDERALIST No. 44, at 303 (J. Madison) (J. Cooke ed. 1961).

112 *See id.*

113 *Id.* at 303-04.

tion closer to noon than three o'clock. He continued in similar vein, arguing at greater length for the practical necessity of some modicum of implication, and then in counter-weighing terms that the modicum of implication had been limited to the "unavoidable":

> Had the 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 of 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.
>
> Had they 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 . . . .[114]

Having used the broad language that Hamilton would employ in his opinion to Washington in 1791[115] and Marshall in his opinion in *McCulloch*,[116] Madison in conclusion once again shifted direction and sounded the language of limited implication:

> Had the Constitution been silent on this head, there 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. Had this last method therefore been pursued by the Convention, every objection now urged against their plan, would remain in all its plausibility; and the real inconveniency would be incurred, of not removing a pretext which may be seized on critical occasions for drawing into question the essential powers of the Union.[117]

Madison's ambiguity, pointing at the same time in the opposite directions of liberal construction and implied powers, when read quickly, and of a stricter construction of "unavoidable implication," when read more carefully, was probably calculated. After all, Madison was not only the father of the Constitution, but a practicing

---

114 *Id.* at 304.

115 *See supra* notes 95-103 and accompanying text.

116 *See infra* notes 383-90 and accompanying text.

117 THE FEDERALIST No. 44, at 304-05 (J. Madison) (J. Cooke ed. 1961).

politician. His carefully constructed argument would furnish materials for both sides when in the future the meaning of the "necessary and proper" clause would be debated. Justifiably, advocates for the state of Maryland before the Court in *McCulloch* would point to the limiting phrases of "indispensably" and "unavoidable implication" and call for the strictest of constitutional constructions.[118] Modern day commentators, accustomed to the contemporary reality of a federal government operating with the broadest of unwritten powers, consider the unqualified sweeping passages of Madison's *Federalist* argument justification enough.

The temptation to calculated ambiguity had certainly been great. On the one hand there was the great desire to see the Constitution ratified. To this end *The Federalist* had been written. But the "necessary and proper" clause had been one of the great stumbling blocks. "Few parts of the Constitution have been assailed with more intemperance than this,"[119] he wrote. It had been called the "sweeping clause" and as such attacked in the state ratifying conventions.[120] Discreet disclaimers of its sweeping nature were in or-

---

118 *See* text *infra* accompanying notes 331-32.

119 THE FEDERALIST No. 44, at 303 (J. Madison) (J. Cooke ed. 1961).

120 Objections to the "necessary and proper" clause had been raised early in the ratifying process. In the Pennsylvania debates, James Wilson, one of the framers, disputed against the contention that by virtue of the clause "the powers of Congress were unlimited and undefined." Assuming the line that Hamilton took in THE FEDERALIST, Wilson replied that: "It is saying no more than that the powers we have already particularly given, shall be effectually carried into execution." 2 ELLIOT'S DEBATES, *supra* note 42, at 468 (Pennsylvania) (statement of Mr. Wilson). (For a review of Hamilton's position in THE FEDERALIST see *infra* notes 126-28 and accompanying text.) Later, Wilson asserted "that the powers are as minutely enumerated and defined as was possible, and . . . the general clause, against which so much exception is taken, is nothing more than what was necessary to render effectual the particular powers that are granted." 2 ELLIOT'S DEBATES, *supra* note 42, at 481 (Pennsylvania) (statement of Mr. Wilson). *See also* 2 *id.* at 531, 537-38 (statements of Mr. M'Kean) (defending the necessary and proper clause).

In Virginia, the following June, the opponents of the Constitution renewed the objections against the "necessary and proper" clause. George Mason, who was also a framer, contended that the powers of the new government should be confined to such as were only "absolutely necessary." 3 *id.* at 32 (Virginia) (statement of Mr. Mason). Patrick Henry warned first against the dangers of implied powers and the uncertain and ambiguous language of the Constitution. 3 *id.* at 167 (Virginia) (statement of Mr. Henry). Later, he argued more specifically against the dangers arising from the "necessary and proper" clause, which he called, "the sweeping clause." 3 *id.* at 437.

On the other hand, Randolph, again as one of the framers, attempted to assure his listeners of the clause's benignity:

> This formidable clause does not in the least increase the powers of Congress. It is only inserted for greater caution, and to prevent the possibility of encroaching upon the powers of Congress. No sophistry will be permitted to be used to explain away any of these powers; nor can they

der. Soothing reassurances of its harmlessness had to be given. But on the other hand Madison, believing in the necessity of implied

---

possibly assume any other power, but what is contained in the Constitution, without absolute usurpation.

3 *id.* at 206 (Virginia) (statement of Mr. Randolph). This of course was again a line borrowed from Hamilton's remarks in THE FEDERALIST, that the phrase meant nothing, but was added only out of an abundance of caution. *See infra* text accompanying note 121.

George Nicholas followed in a similar vein. The clause had been termed "the sweeping clause" and was being represented as "replete with great dangers." 3 ELLIOT'S DEBATES, *supra* note 42, at 245 (Virginia) (statement of Mr. Nicholas). But, he added:

> [T]he Constitution had enumerated all the powers which the general government should have, but did not say how they were to be exercised. It therefore, in this clause, tells how they shall be exercised. Does this give any new power? I say not. Suppose it had been inserted, at the end of every power, that they should have power to make laws to carry that power into execution; would this have increased their powers? If, therefore, it could not have increased their powers, if placed at the end of each power, it cannot increase them at the end of all. This clause only enables them to carry into execution the powers given to them, but gives them no additional power.

2 *id.* at 245-46. In other words again, as Hamilton had said in THE FEDERALIST and Wilson had said in the Pennsylvania debates, the clause was purely executory. Later in the Virginia Convention, Nicholas repeated the argument, adding it would be construed as such by the judiciary. 2 *id.* at 443.

Madison continued along the same lines:

> If that latitude of construction which he contends for were to take place with respect to the sweeping clause, there would be room for those horrors [described by Patrick Henry]. But it gives no supplementary power[.] It only enables them to execute the delegated powers. If the delegation of their powers be safe, no possible inconvenience can arise from this clause. It is at most but explanatory. For when any power is given, its delegation necessarily involves authority to make laws to execute it[.] Were it possible to delineate on paper all those particular cases and circumstances in which legislation by the general legislature would be necessary, and leave to the states all the other powers, I imagine no gentleman would object to it. But this is not within the limits of human capacity. The particular powers which are found necessary to be given are therefore delegated generally, and particular and minute specification is left to the legislature.

3 *id.* at 438-39 (Virginia) (statement of Mr. Madison). *See also* 3 *id.* at 455.

Mason replied that the sweeping clause might be used by Congress to limit the freedom of the press as necessary to provide for the general welfare and to preserve the peace against seditious writings. To prevent this he advocated the passage of an amendment to the Constitution, whereby it was provided that powers not expressly delegated to the United States be deemed reserved to the states. *See* 3 *id.* at 441-42 (Virginia) (statement of Mr. Madison). Henry and Grayson followed with similar arguments: There should be an express bill of rights limiting the powers of the federal government. A specific enumeration of the important rights preserved should be followed by a declaration "that every power and right not given up was retained by the states." 3 *id.* at 449 (Virginia) (statement of Mr. Grayson); *see* 3 *id.* at 445-49 (statement of Mr. Henry). From this it can be seen that the fears

powers, probably desired that the ratification of the Constitution be based on a public defense of the doctrine, such as he had given. Practically, ratification following such a defense would strengthen Congressional powers and afford a ready justification for their exercise.

Hamilton's writings in *The Federalist* went to greater lengths than Madison in limiting the extent of the "necessary and proper" clause. Linking that clause with the supremacy clause, he wrote:

---

generated by the language of the "necessary and proper" clause led to the advancement of the Bill of Rights, culminating in the tenth amendment.

Randolph then admitted he had reservations concerning the clause. Departing from what he said earlier, that the clause did "not in the least increase the powers of Congress," he now said that the construction advanced by Madison and Nicholas was too "narrow," but he countered that that advanced by its opponents was too "extravagant." 3 *id.* at 463 (Virginia) (statement of Gov. Randolph). He put forward his own thesis, one which would be adopted during the debates on the bank bill in 1791 by Rep. Sedgwick in the House, and later by Marshall in his opinion in *McCulloch v. Maryland*. *See infra* note 383 and accompanying text.

Randolph argued:

> A constitution differs from a law; for a law only embraces one thing, but a constitution embraces a number of things, and is to have a more liberal construction. . . . The American constitutions are singular, and their construction ought to be liberal. On this principle, what should be said of the clause under consideration? (*the sweeping clause.*) If incidental powers be those only which are necessary for the principal thing, the clause would be superfluous.

3 ELLIOT'S DEBATES, *supra* note 42, at 463 (Virginia) (statement of Gov. Randolph).

But, Randolph added, the scope of incidental powers must not be so limited: "The principle of incidental powers extends to all parts of the [constitutional] system." If you then say that the President has incidental powers, you would reduce it to tautology. I cannot conceive that the fair interpretation of these words is as the honorable member says." 3 *id.* But the adversaries of the clause were equally extravagant in their construction.

In truth, Governor Randolph concluded,

> the clause is ambiguous, and . . . that ambiguity may injure the states. My fear is, that it will, by gradual accessions, gather to a dangerous length. This is my apprehension, and I disdain to disown it. I will praise it where it deserves it, and censure it where it appears defective.

3 *id.* at 470. Nevertheless, he would support the clause with its defects because he would support the Constitution with all its defects. *See* 3 *id.* at 470-71. The solution lay in later amendment.

Later Randolph as Attorney General, when passing on the constitutionality of the Bank bill, abandoned his own thesis for the position taken by Madison in THE FEDERALIST, of incidental powers narrowly constrained by absolute necessity and unavoidable implication. *See supra* note 94 and accompanying text.

Also noteworthy were the delegates comments during the New York ratifying debates, where it was argued that the powers granted under the "necessary and proper" clause were practically illimitable and as such a dangerous threat to state constitutions, particularly when considered in relation to the taxing clause and the provision for the common defense and the general welfare. *See* 2 ELLIOT'S DEBATES, *supra* note 42, at 330-41 (statements of Messrs. Williams & Smith).

> These two clauses have been the sources of much virulent invective and petulant declamation against the proposed constitution, they have been held up to the people, in all the exaggerated colours of misrepresentation, as the pernicious engines by which their local governments were to be destroyed and their liberties exterminated—as the hideous monster whose devouring jaws would spare neither sex nor age, nor high nor low, nor sacred nor profane; and yet strange as it may appear, after all this clamour, to those who may not have happened to contemplate them in the same light, it may be affirmed with perfect confidence, that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of constituting a Foederal Government, and vesting it with certain specified powers.[121]

He continued in this vein:

> What is a power, but the ability or faculty of doing a thing? What is the ability to do a thing but the power of employing the *means* necessary to its execution? What is a LEGISLATIVE power but a power of making LAWS? What are the *means* to execute a LEGISLATIVE power but LAWS? What is the power of laying and collecting taxes but a *legislative power*, or a power of *making laws*, to lay and collect taxes? What are the proper means of executing such a power but *necessary* and *proper* laws?[122]

He gave as an example:

> [A] power to lay and collect taxes must be a power to pass all laws *necessary* and *proper* for the execution of that power; and what does the unfortunate and calumniated provision in question do more than declare the same truth; to wit, that the national legislature to whom the power of laying and collecting taxes had been previously given, might in the execution of that power pass all laws *necessary* and *proper* to carry it into effect?[123]

This process, he added, would lead to the same result in the case of all the other powers declared in the Constitution. It was expressly to execute those powers, "that the sweeping clause, as it has been affectedly called, authorises the national legislature to pass

---

121 THE FEDERALIST No. 33, at 204 (A. Hamilton) (J. Cooke ed. 1961).

122 *Id.* at 204-05.

123 *Id.* at 205. *See also supra* note 120 (discussing Wilson's statements in the Pennsylvania ratifying debates and those of Nicholas in the Virginia debates).

all *necessary* and *proper* laws."[124]

In other words, the necessary and proper clause explained the obvious: "The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless."[125] To answer the question of why then the clause was introduced, Hamilton replied: "to leave nothing to construction[!]"[126] Finally, he wrote: "The propriety of a law in a constitutional light, must always be determined by the nature of the powers upon which it is founded."[127]

Three years later, however, in his 1791 opinion to Washington, Hamilton abandoned his *Federalist* position and wrote instead:

> The whole turn of the clause containing it, indicates that it was the intent of the convention, by that clause, to give a liberal latitude to the exercise of the specified powers. The expressions have a peculiar comprehensiveness. . . . To understand the word as the Secretary of State [Jefferson] does, would be to depart from its obvious and popular sense, and to give it a *restrictive* operation; an idea never before entertained. It would be to give it the same force as if the word *absolutely*, or indispensably, had been prefixed to it.[128]

We may conclude that Hamilton regarded his former position in *The Federalist* as campaign oratory, serviceable for the moment to get the Constitution ratified. Nevertheless, these *Federalist* words of Hamilton, campaign oratory or whatever, and of Madison, ambiguous talk or straight talk, would be quoted to Marshall in the oral arguments in *McCulloch v. Maryland*,[129] and would confront that great jurist with the difficulties of overcoming the arguments based

---

124 THE FEDERALIST No. 33, at 205 (A. Hamilton) (J. Cooke ed. 1961). *See also supra* note 120 (quoting initial statements of Randolph in the Virginia debates).

125 THE FEDERALIST No. 33, at 205 (A. Hamilton) (J. Cooke ed. 1961).

126 *Id.* at 206.

127 *Id.*

128 Opinion Letter of Sec'y of Treasury Alexander Hamilton to Pres. Washington (Feb. 23, 1791), *reprinted in* M. Clarke & D. Hall, *supra* note 2, at 98. Jefferson in his opinion to Washington had assumed Hamilton's previously held position with respect to the interpretation of the necessary and proper clause. *See* Opinion Letter of Sec'y of State Thomas Jefferson to Pres. Washington (Feb. 15, 1791), *reprinted in* M. Clarke & D. Hall, *supra* note 2, at 92-93.

129 *See* 17 U.S. (4 Wheat.) at 362, 372 (references to extracts from THE FEDERALIST in the arguments of Luther Martin). By that time Madison would be in agreement with Hamilton, that the Bank was constitutional. *See infra* notes 277-78 and accompanying text.

Even then a politician's life was easier than a judge's. While judges are expected to be reasonable, consistent, faithful to history and legislative and constitutional intent, politicians are permitted to be, if not faithless and irrational, at least inconsistent and supple enough to do the work of the moment.

on "tautology or redundancy," and "indispensably necessary" and "unavoidable implication."

To return to the central issue, was the authorization of the United States Bank truly an exercise of a "necessary and proper" power? If we accept Madison's position in *The Federalist* that a necessary power was one either "indispensably necessary"[130] or having resulted by unavoidable implication, as a requisite means to the execution of a general power,[131] the authority to create the Bank was in either case doubtful. If we accept Hamilton's position in *The Federalist* that the phrase "necessary and proper," meant little, was "chargeable with tautology or redundancy," and left "nothing to construction,"[132] clearly the Bank was unauthorized. If, however, we accept Hamilton's position in his opinion to Washington, that "necessary" meant merely incidental to or conducive to the realization of an expressed power,[133] clearly the Bank was "necessary."

Even if the Bank was necessary, however, was it "proper"? What did that word mean? If one were to have applied the test fashioned by Hamilton in *The Federalist*,[134] one should have asked whether the operations of a bank essentially partook of the nature of the powers upon which it was purportedly founded: tax collection, borrowing, the regulation of commerce and the provision for an army and a navy.[135] Madison during the debates had referred to this test in passing: the "necessary and proper" clause limits the means to those "necessary to the end, and incident to the nature of the specified powers."[136] Beyond denying that the operations of the Bank pertained to tax collection or borrowing,[137] he did not, however, pursue this argument further. Randolph, in his opinion to Washington, regarded the phrase "and proper" as without independent meaning: it was, he wrote, "among the surplusage which as often proceeds from inattention as caution."[138]

Hamilton on the other hand, in his opinion to Washington purporting to show the Bank's propriety, wrote that there was "a natural and obvious relation between the institution of a bank, and the

---

130 *See supra* text accompanying note 113.

131 *See supra* text accompanying note 117.

132 *See supra* notes 125 & 126 and accompanying text.

133 *See supra* text accompanying note 97.

134 *See supra* text accompanying note 127.

135 *See supra* text accompanying notes 100-03.

136 2 ANNALS OF CONG. 1898 (1791) (statement of Rep. Madison).

137 *See id.* at 1896-97.

138 Opinion Letter of Att'y Gen. Edmund Randolph to Pres. Washington (Feb. 12, 1791), *reprinted in* M. Clarke & D. Hall, *supra* note 2, at 89.

objects of several of the enumerated powers of the Government."[139] First, he referred to the relation of the Bank to the collection of taxes. The designation of the money or thing in which taxes were to be paid was both a proper and necessary exercise of collecting them. Congress had already designated gold and silver. Not without precedent, it could have designated payment in the commodities upon which the duties were laid or it could have designated their payment in state paper money, state bank bills or in United States Treasury bills.[140] This, he said, was indisputable. But was it? In view of the constitutional proscription against the issuance of state paper money,[141] would it have been constitutional for Congress to give validity to this outlawed currency by accepting it in payment of bills owed to the federal government? This seemed hardly in keeping with the intent of the framers and seemed at odds with the constitutional provision.

Hamilton went further. The United States Government could have issued its own demand bills and set aside a special fund in the Treasury for the purpose of paying these bills "in order to support their credit, and give them a ready circulation."[142] The constitutionality of this as well, he said, was indisputable. Such a Treasury operation would in effect be a bank: "A deposite [sic] of coin or other property, as a fund for *circulating a credit* upon it, which is to answer the purpose of money."[143] But could the United States have adopted a plan which led to the circulation of paper money? Granted such Treasury bills did not constitute legal tender, did they not nevertheless constitute the issuance of a federal paper money suitable for circulation, which the framers had specifically rejected?[144] Did not this rejection limit the government's power to borrow to the issuance of bills and notes in such amounts as to make them unsuitable for purposes of circulation? The intent of the Convention had been to confine the circulating medium to gold and silver. Hamilton's plan was to evade that intention by providing for the circulation of a paper medium by a bank, which for the most part

---

139 Opinion Letter of Sec'y of Treasury Alexander Hamilton to Pres. Washington (Feb. 23, 1791), *reprinted in* M. Clarke & D. Hall, *supra* note 2, at 105.

140 *Id.* at 106. Hamilton failed to mention the fact that despite the designation by Congress of gold and silver as the acceptable medium of payment, he had, on taking office, ordered the collection of duty payments in state bank paper. *See supra* text accompanying notes 13-17.

141 U.S. CONST. art. I, § 10, cl. 1. *See also supra* note 35 and accompanying text.

142 Opinion Letter of Sec'y of Treasury Alexander Hamilton to Pres. Washington (Feb. 23, 1791), *reprinted in* M. Clarke & D. Hall, *supra* note 2, at 106.

143 *Id.*

144 *See supra* notes 39-45 and accompanying text.

was privately owned. A federal private bank would be better than a state private bank, he had said in his original report on the Bank, which was true. If paper money was to flourish, it was better that it should be federal paper money.[145]

Hamilton next argued to Washington: "A bank has a direct relation to the power of borrowing money, because it is a usual, and, in sudden emergencies, an essential instrument, in the obtaining of loans to Government."[146] This was related to the provision for raising armies and navies. Practically speaking, however, "[b]orrowing money presupposes the accumulation of a fund to be lent."[147] Without banks, such accumulations usually do not exist. Therefore, in order for the government to borrow, it must create the conditions under which banks can exist.[148] This, of course, was an argument based on the sheerest expediency. He did not add the obvious: that unless the banks were authorized to undertake the forbidden business of issuing a circulating paper money, they would not organize; and that therefore, as a quid pro quo for the availability of this private capital in time of need, the banks must be allowed the quasi-monopolistic privilege of creating money. Nor did he add that the loans themselves would also be in the form of paper money, which through government expenditure would circulate into the stream of commerce. By this device, the government would also evade the spirit of the Constitution. The paper money it would accept and circulate would not be its own, but that of its creature, the private United States Bank.

Thirdly, he argued:

> [A] bank has, also, a natural relation to the regulation of trade between the States, in so far as it is conducive to the creation of a convenient medium of exchange between them, and to the keeping up a full circulation, by preventing the frequent displacement of the metals in reciprocal remittances. Money is the very hinge on which commerce turns. And this does not mean, merely gold and silver; many other things have served the purpose, with different degrees of utility. Paper has been

---

145 *See* Secretary of Treasury's Report on a National Bank, 1st Cong., 3d Sess., 1 ANNALS OF CONG. 2044 (1790), *reprinted in* 9 AMERICAN STATE PAPERS, *supra* note 1, at 71-72, and 7 HAMILTON PAPERS, *supra* note 1, at 322-23. For a discussion of Hamilton's preference for federally-issued paper money, see *supra* notes 35-38 and accompanying text.

146 Opinion Letter of Sec'y of Treasury Alexander Hamilton to Pres. Washington (Feb. 23, 1791), *reprinted in* M. Clarke & D. Hall, *supra* note 2, at 107.

147 *Id.* at 108.

148 *See id.*

extensively employed.[149]

Circulation and exchange could not be solely restricted to coin, he added, because the whole or almost all of it might be carried out of the country.[150]

In other words, some form of paper money was a practical monetary and economic necessity and therefore, Hamilton argued, a practical governmental necessity. He need hardly have added that if it was a practical governmental necessity, it was a constitutional necessity. He had already given his opinion on that subject in the *The Federalist*:

> [N]ations pay little regard to rules and maxims calculated in their very nature to run counter to the necessities of society. Wise politicians will be cautious about fettering the government with restrictions, that cannot be observed; because they know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence, which ought to be maintained in the breasts of rulers towards the constitution of a country, and forms a precedent for other breaches, where the same plea of necessity does not exist at all, or is less urgent and palpable.[151]

Necessity, therefore, would overcome impropriety. In constitutional terms, whatever was "necessary" was also "proper." Madison had echoed these thoughts in *The Federalist* when he wrote, justifying the Continental Congress's administration of the Western Territory without the least color of constitutional authority under the Articles of Confederation: "[T]hey could not have done otherwise. The public interest, the necessity of the case, imposed upon them the task of overleaping their constitutional limits. But is not the fact an alarming proof of the danger resulting from a government which does not possess regular powers commensurate to its objects?"[152] For both Madison and Hamilton, therefore, as expressed in *The Federalist*, necessity was the ultimate governmental element overcoming impropriety. Again, what was necessary was both "necessary and proper."

What was necessary in Hamilton's mind in 1791 was some form of a national paper currency as a convenient source of money sup-

---

149 *Id.*

150 *Id.* Finally, in his closing remarks he emphasized the "*very essential* advantage to trade in general . . . to the existence of a bank circulation, equal, in the public estimation, to gold and silver." *Id.* at 112. It prevented hoarding of specie and facilitated the ready payment of taxes. *Id.*

151 THE FEDERALIST No. 25, at 163 (A. Hamilton) (J. Cooke ed. 1961).

152 THE FEDERALIST No. 38, at 249 (J. Madison) (J. Cooke ed. 1961).

ply. The national government, however, could not very well issue it, because the monied interests would oppose the issuance of government paper money. State paper was expressly forbidden. State bank paper, though in existence, was hard to control and did not suit the requirements of a national uniform currency. Therefore, as Bingham had recommended,[153] a national bank paper currency was necessary. To issue this currency, the creation of a national bank was also necessary. The essential characteristic of such a bank would be, beyond the mere collection and deposit of money, the lending and circulation of its paper.

Obviously the authorization of such a power was not appropriate to Congress' power to coin money and regulate its value and the value of foreign coins, because as the word "coin" suggests, the framers had provided only for a metallic currency. To justify a bank and its paper currency, recourse had to be made to a variety of powers. Or as Henry Clay would put it, when arguing against the constitutionality of the Bank, during the 1811 debates to renew the Bank's original charter:

> This vagrant power to erect a bank, after having wandered throughout the whole Constitution in quest of some congenial spot whereupon to fasten, has been at length located . . . on [the] provision, . . . to lay and collect taxes, [etc.] . . . The sagacious Secretary of the Treasury in 1791 pursued the wisest course—he ha[d] taken shelter behind general, high sounding, and imposing terms. He has declared, in the preamble to the act establishing the bank, that it will be very conducive to the successful conducting of the national finances; will tend to give facility to the obtaining of loans, and will be productive of considerable advantage to trade and industry in general.[154]

The justification was flimsy and if challenged was transparently bare. It was a makeshift providing for an alternate national paper currency, despite the Constitution. Significantly, it was not attacked on that direct ground, but on the populist grounds that the authorization of a corporate, monopolistic money-making privileged bank was not expressly delegated. The debates, never once descending to the specific question of whether a national bank with powers to create a uniform circulating paper money was valid, swirled instead around the most abstract of questions: whether the "necessary and proper" clause meant, irrespective of circumstance, "indispensably

---

153 *See supra* notes 19-22 and accompanying text.

154 22 ANNALS OF CONG. 211 (1811) (statement of Rep. Clay).

necessary" or "needful, requisite, incidental or conducive to an expressly delegated power."

For a variety of practical reasons, the Bank's proponents and opponents preferred to keep the debate in the abstract. For its proponents, it was a matter of forensic tactic. It was clearly preferable to join issue on what was essentially a generic and therefore necessarily imprecise issue, thereby avoiding the joinder on the more damaging, specific issue of whether the creation of a paper-issuing bank would violate a constitutional prohibition against the issuance of paper money. Moreover, on a practical level, as one Bank proponent observed during the debates,[155] and as Madison's private correspondence indicates,[156] the people were not concerned. (As with most politicians, if the people are not concerned, they are not concerned.) For the Bank's opponents, it was a matter of political strategy. Madison may have been genuinely concerned about the force of doctrinal precedence. In the Continental Congress he had been anxious about the propriety of the chartering of the Bank of North America[157] and in the Constitutional Convention it was he who had made the lost motion to confer upon Congress the specific power to grant corporate charters.[158] But it is doubtful that such anxieties moved the rest of his party. Indeed on the theoretical level, Jefferson, an opponent of the Bank had on prior occasions followed the doctrine of implied powers,[159] as he would in the future.[160]

Realistically Madison's constitutional arguments represented the formal defense behind which his party could advance and protect its practical interests. First, it wished to provide for the acceptance of state paper, as well as continental paper, in satisfaction of the Bank's capital subscription requirements.[161] Second, it wished to insure that the national capital be permanently established on the Potomac.[162] In the end, Hamilton and the North had the votes for

---

155 *See* 2 ANNALS OF CONG. at 1914 (1791) (statement of Rep. Lawrence).

156 *See* Letter from Edward Carrington to James Madison (Feb. 26, 1791), *reprinted in* 13 THE PAPERS OF JAMES MADISON 398 (C. Hobson & R. Rutland eds. 1981); Letter from Richard Bland Lee to James Madison (Apr. 17, 1791), *reprinted in* 14 *id.* at 6 (1983); Letter from Edward Carrington to James Madison (Apr. 20, 1791), *reprinted in* 14 *id.* at 10.

157 *See supra* notes 47-53 and accompanying text.

158 *See supra* notes 46 and 57 and accompanying text.

159 *See* 17 THE PAPERS OF THOMAS JEFFERSON, *supra* note 71, at 195-97 (Jefferson's opinion on the constitutionality of the Residence Bill, justifying the permanent location of the seat of government on the Potomac).

160 *See* Act of Oct. 31, 1803, ch. 1, 2 Stat. 245 (authorizing Jefferson to effect the Louisiana Purchase).

161 *See supra* text accompanying notes 73-74.

162 *See supra* notes 70, 81-84 and accompanying text.

the Bank bill. It passed and was submitted to Washington for his signature.[163]

Washington, however, shared southern concerns. For national reasons, he had supported the initial decision to establish the capital permanently on the Potomac, and, it has been suggested, was one of the prime movers of the bill amending the Residence Act.[164] Perhaps not coincidentally then, on February 25th, the day Hamilton's supporters in the Senate dropped their opposition to consideration of the amendment to the Residence Act, Washington signed the Bank bill into law.[165] The following day the Senate approved the Residence Act amendment and it passed the House without recorded debate.[166] The measures for the Bank in Philadelphia and the capital on the Potomac, it has been argued, were interrelated: Washington with the assistance of Hamilton, bridged the differences of North and South in the national interest.[167]

### 2. *The Non-necessity of the Result: The Expiration of the Bank in 1811*

One would think that when the Republicans swept to power in 1801 the United States Bank would have been in trouble. With Thomas Jefferson as President and James Madison as Secretary of State, it would seem as though the Bank would have had no friends in high places and that the war unto death waged against it some thirty years later by President Andrew Jackson would shortly have been initiated. This was not to be the case. To the crucial position of Secretary of the Treasury, Jefferson appointed Albert Gallatin and Gallatin strongly approved the Bank's operations and favored its rechartering upon its expiration in 1811.[168]

Gallatin was neither an ordinary cabinet minister nor an ordinary Republican. Coming to the House of Representatives in 1795, he had assumed Republican leadership in the House almost at once, supplanting Madison.[169] His source of power, ac-

---

163 M. Clarke & D. Hall, *supra* note 2, at 85 (Feb. 4, 1794).

164 *See* 19 THE PAPERS OF THOMAS JEFFERSON, *supra* note 82, at 26.

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

166 *See* 1 ANNALS OF CONG. 2024, 2026. It was signed into law by Washington: Act of Mar. 3, 1791, ch. 17, 1 Stat. 214.

167 *See* 19 THE PAPERS OF THOMAS JEFFERSON, *supra* note 82 at 36-40 (discussing the inter-relationship between the Bank Bill and the Residence Act). The situation was complicated by a supplement to the Bank Bill, which the southerners threatened to kill by delay. *Id.* at 39.

168 *See infra* note 179.

169 ADAMS, LIFE OF ALBERT GALLATIN 154-55 (1880) [hereinafter ADAMS, GALLATIN].

cording to Henry Adams, "lay in [his] courage, honesty of purpose, and thoroughness of study."[170]

In the House, the principal issues to which Gallatin devoted himself related to constitutional construction and finance. The constitutional issues were the usurpation of power by the national government in general and, more particularly, by its executive branch. The prior chartering of the United States Bank, however, did not strike him as a substantial constitutional issue.[171] Nor as a member of the House was he concerned with its practical operations. Instead he had applied himself to the government's fiscal matters. Finding the Republicans in the House completely unprepared and unorganized in these affairs, he applied himself to their study and through his subsequent complete mastery of the subject occupied the field almost exclusively. He became the Republican spokesman on finance, succeeded in organizing the appointment of the first House Ways and Means Committee, and formulated Republican fiscal policy.[172] Spending having had until then exceeded revenue, he proposed economy. Since economy could not be sensibly affected otherwise, he proposed the necessity of specific appropriations. These appropriations demanded due knowledge of the subject: accordingly, he demanded reports from the executive departments as a check on prodigality. As a measure necessary to limit spending to income, he proposed the postponement of an efficient navy until the payment of the national debt.[173] In short, almost the entire corpus of Jeffersonian economic and fiscal policy originated with Gallatin. He was Jefferson's Hamilton.[174]

With this background in mind, it was natural that when the Republicans and Jefferson finally captured the executive branch of government in 1801, Jefferson should appoint Gallatin his Secretary of the Treasury. In the Treasury, Gallatin assumed the

---

170 *Id.* at 154.

171 *See id.* at 156-57. Prior to going to Congress, Gallatin had served in the Pennsylvania House of Assembly, where he had been instrumental in the state legislature's adoption of a law chartering the Bank of Pennsylvania which had a relationship to the state similar to that of the Bank of the United States and the United States government. *Id.* at 43. As representative of the western farmers of that state, he was moreover, aware of the need for an adequate money supply. His constituents had suffered severely from the need to raise cash in order to pay the federal excise tax laid on whiskey in 1791. Their economy being based on barter, Gallatin had remonstrated against the adoption of the federal law, while serving in the Pennsylvania Assembly. *Id.* at 45-46.

172 ADAMS, GALLATIN, *supra* note 169, at 157.

173 *Id.*

174 *Id.* at 268.

lead for the administration's fiscal policies.[175] He persuaded Jefferson, despite the latter's vehement contrary opinion, to accept on practical grounds the establishment of a branch of the United States Bank at New Orleans. Brushing aside the President's constitutional and political protestations, Gallatin argued:

> I am extremely anxious to see a bank at New Orleans; considering the distance of that place, our own security and even that of the collector will be eminently promoted, and the transmission of moneys arising both from the impost and sales of land in the Mississippi Territory would without it be a very difficult and sometimes dangerous operation. Against this there are none but political objections, and those will lose much of their force when the little injury they can do us and the dependence in which they are on government are duly estimated.[176]

Jefferson yielded and Gallatin procured from the Republican Congress an act authorizing the establishment of the New Orleans branch.[177]

With the change of administrations, in 1809, Gallatin continued as Secretary of the Treasury under Madison.[178] In that capacity he soon had to deal with the pressing problem of the United States Bank whose charter was to expire on March 4, 1811. Toward the close of the 1808-09 legislative session he sent a report to the Senate strongly representing the advantages to be derived from the Bank.[179] First, the Bank provided a safekeeping of public monies, thereby affording one of the best securities against delinquencies. Second, at its own risk and expense, it transmitted public monies over the extensive territory of the Union. Third, it afforded a safe and easy collection of the revenues. Fourth, it had theretofore been eminently useful in advancing loans which, under different circumstances, were necessary.[180] It was true, he added, many of these services could be supplied by the numerous banks now established by the several states, but not with the same facility and to the same extent. Moreover, the Bank's superior capital afforded the greater security against possible losses and a greater resource with respect to loans. Finally, it was not appropriate that the national govern-

---

175 *See id.* at 267-71.

176 *Id.* at 321-22.

177 *Id.* at 322. *See* Act of Mar. 23, 1804, ch. 32, 2 Stat. 274.

178 ADAMS, GALLATIN, *supra* note 169, at 392. Madison had originally intended to appoint Gallatin as Secretary of State but a determined opposition to this nomination in the Senate prevented this. *Id.* at 390-92.

179 *See* Secretary of Treasury's Report to Congress, 11th Cong., 1st Sess., 19 ANNALS OF CONG. 456-61 (1809).

180 *Id.* at 458-59.

ment should "in respect to its own operations, be entirely dependent on institutions over which it has no control whatever."[181] This was especially important in times of emergency,[182] he added, with a prescient assessment of the country's difficulties in the approaching war with Great Britain.

In the following session of Congress, the appropriate House committee, in accordance with Gallatin's suggestion, reported a bill extending the Bank's charter with certain modifications.[183] Federalists were in favor, but old Republicans opposed. The bill went off without action to the next Congress,[184] when it was reintroduced and at last considered. In the meantime, opposition from local interests had been mounted against it. Newly chartered state banks, hoping to succeed to the profits of the expiring United States Bank, importuned various state legislatures to instruct their United States Senators to vote against renewal. The legislatures in Massachusetts, Pennsylvania, Maryland, Virginia and Kentucky fell into line.[185] Petty and personal arguments were used: The Bank's stock was owned largely by Englishmen and its profits should accrue to Americans; the Bank was owned by Federalists and in their hands constituted a monarchical "engine of despotism."[186] Finally, against Gallatin personally, it was argued off the record that a vote against the Bank was a vote of no confidence in him and his fiscal policies of economy in spending. His enemies desired to drive him from office.[187]

During the debates, constitutional arguments for and against the bill were advanced in both houses. In the House, Burwell of Virginia led the attack against the Bank, relying on the old Madisonian argument that a corporate bank was not within the delegated powers and since not "absolutely necessary" was not within the reach of the "necessary and proper" clause.[188] Congressman Porter of New York, relying on the tenth amendment and inveighing against the justification of the Bank as within the various powers of tax collecting, borrowing, commerce and defense, countered that: "The very circumstance of referring this right to many different

---

181 *Id.* at 459.

182 *Id.*

183 Bill to Renew the Charter of 1791 Establishing a National Bank, 11th Cong., 1st Sess., *reprinted in* M. Clarke and D. Hall, *supra* note 2, at 122-32.

184 *See* ADAMS GALLATIN, *supra* note 169, at 417.

185 *See* 5 ADAMS, HISTORY OF THE UNITED STATES OF AMERICA 327-28 (1921).

186 5 *id.* at 329.

187 *Id.*

188 22 ANNALS OF CONG. 585 (1811) (statement of Rep. Burwell).

heads of authority is, in itself, conclusive evidence, that it has no very direct relation to any of them."[189] The doctrine of implied or constructive powers, he said, was the doctrine of general expediency, which once established would warrant Congress in the enactment of any law not expressly prohibited by the Constitution. The constitutionality of the Bank thereby "is not made to depend on the peculiar applicability of the measure to any particular power . . . but . . . on its 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."[190]

The arguments against the Bank were further refined. Congressman Wright used Hamilton's words in *The Federalist* against him: that the declaration in the "necessary and proper" clause though "chargeable with tautology or redundancy, is at least perfectly harmless."[191] Wright observed:

> Here we find one of the framers of this instrument, when defending this article, called the "sweeping clause," from the charge of its being used to extend the powers of Congress, or to embrace other than the specific powers, himself confining it to the express powers, and indeed declaring that it gave no power, was a mere tautology.[192]

On the other side, Representative Fisk from New York made the familiar arguments based on implied powers and added a new one: that the constitutionality of the Bank was assured by prescription, that is, accepted practice. The Congress of 1791 had enacted the bill. A Republican Congress had in coming to power acquiesced in its validity by laws in 1804 and 1807, extending the operations of the Bank to New Orleans and classifying the counterfeiting of its notes a capital offense.[193] Prescription was one of the grounds upon which Marshall would, in 1819, base his approval of the Bank in *McCulloch v. Maryland*.[194] It was also the ground on which Madison would rely in proposing the recharter and signing the bill which eventually effected it in 1816.[195] The argument, however, did not

---

189 *Id.* at 634 (statement of Rep. Porter).

190 *Id.* at 645 (statement of Rep. Porter).

191 *Id.* at 677 (statement of Rep. Wright) (citation omitted). *See also supra* note 130 and accompanying text.

192 22 ANNALS OF CONG. 677 (1811) (statement of Rep. Wright).

193 *See id.* at 604-05 (statement of Rep. Fisk). For the act creating the Bank at New Orleans, see *supra* note 177 and accompanying text. For the act denominating counterfeiting a capital offense, see Act of Apr. 10, 1816, ch. 44, § 18, 3 Stat. 275.

194 *See* 17 U.S. (4 Wheat.) 316, 401-02 (1819).

195 *See* Letter from James Madison to Charles J. Ingersoll (June 25, 1831), *reprinted in* M. Clarke & D. Hall, *supra* note 2, at 778-80.

pass unchallenged. Congressman Porter, in response to Fisk, termed the doctrine fatal to the principles of a written constitution. In effect, he argued, as Chief Justice Taney would in *Dred Scott*,[196] that the meaning of the Constitution could never be determined by practice.[197] The text was always a *tabula rasa*.

There were then competing schools and competing rules of constitutional interpretation. Those arguing against a specific federal power—here the establishment of a federal bank—would customarily contend that its legitimacy could only be tested by reference to the constitutional text, thus largely rendering the "necessary and proper" clause a surplusage. While those arguing in favor of the specific federal power would point beyond the text to basic governmental principles or to the very practical considerations that made of the power's exercise a basic governmental and practical necessity, and to infer from such necessity that it was constitutionally "necessary and proper." Against the pejorative imputation of a doctrine of implied powers, the latter school would contend that the strict restriction of "necessary and proper" to the realm of the "absolutely necessary" was itself a matter of implication.[198]

To justify the Bank, Representative Nicholson, of the broad constructionist school, attempted to link the clause with a fundamental principle underlying the entire federal system:

> In the federative system . . . the rule to be observed in the distribution of its powers, between the Confederated States and the Federal head, is . . . this: Can any particular power, which is about to be vested somewhere, be exercised in local and separate districts or States, consistently with the safety and good of the whole? If it can, it ought of course to be exercised by the respective State governments. All other powers, which cannot be thus confided, consistently with the safety and good of the whole, ought to belong to the General

---

196 *See* Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 432 (1856) (discussing the authority of Congress to legislate in the Louisiana Territory). The power could not, despite the authority of American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 542 (1828), be ascribed to the power in Article IV, section 3, para. 2, to "make all needful rules and regulations respecting the territory." It must rest only on the latter alternative put forth in that opinion, on "the inevitable consequence of the right to acquire territory." 26 U.S. (1 Pet.) at 543. Taney's tactic was to deny legitimacy to any construction of a written text of the Constitution based on accepted practice. The alternate construction, based on an implied power, could then more easily be subjected to an elaborate construction of the written text of the "due process" clause.

197 22 ANNALS OF CONG. 642-43 (1811) (statement of Rep. Porter).

198 *Id.* at 668-69 (statement of Rep. Alston).

Government.[199]

The Constitution did not exactly conform to this rule. But, Nicholson thought, the power under consideration, the establishment of the national banking system, did. He considered it "necessary" for government revenues, borrowing and the general welfare.[200] For Nicholson, what was necessarily a matter for the national government was as a matter of constitutional principle, a matter for the national government under the "necessary and proper" clause.[201] This was somewhat procrustean, but the Bank did after all require a constitutional bed. While the Nicholson argument may have been wanting in finesse, it had made the essential point. Only the national government could effectively provide a banking system. This was so, because banks emitted bills of credit, which in turn constituted paper money and the effective circulating medium.

Part of the debates centered on the subject of paper money. A constitutional justification for its existence was attempted. Representative Alston made the most prophetic statement. From the provision in Article I, section 10, prohibiting the states from emitting bills of credit or making anything but gold and silver a tender in payment of debts, he inferred a national power to issue paper money and to make anything besides gold and silver a legal tender, including bank paper. From this he further inferred the power to create a bank.[202] This was far in anticipation of the eventual *Legal Tender Cases*,[203] albeit by a somewhat different textual route.

---

199 *Id.* at 763 (statement of Rep. Nicholson). This is analogous to the test eventually adopted by the Court for the distribution of powers between the states and the federal government to regulate interstate commerce. *See* Cooley v. Port of Philadelphia Bd. of Wardens, 53 U.S. (12 How.) 299 (1851). There was one important difference: The Constitution expressly provided for the federal regulation of interstate commerce. It unfortunately had not provided for a national paper currency system. *See generally* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819). Writing for the Court, Chief Justice Marshall stated: "Whenever the terms in which a power is granted to Congress, or the nature of the power, required that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it." *Id.* at 193.

200 22 ANNALS OF CONG. 764-65 (1811) (statement of Rep. Nicholson).

201 *See id.* at 769-79.

202 *Id.* at 670-71 (statement of Rep. Alston).

203 *See* Knox v. Lee, 79 U.S. (12 Wall.) 457 (1870). Justice Strong, writing for the Court, placed Congress' power to make paper money a legal tender in time of war in the "necessary and proper" clause, as incidental to both the power to maintain an army and navy and the power to preserve the government itself during war and rebellion, and therefore was not contrary to the Constitution. *See id.* at 540-47. Thirteen years later, the Court held further that Congress also had the power to make paper money a legal tender in time of peace, placing it in the power to borrow and, incidentally, to issue a currency in whatever form deemed appropriate; in the powers to coin and regulate the value of coined money, collect taxes, pay debts and

As plausible as Alston's argument was, it did not jibe with the framers' intent as it was generally understood. The framers did not want paper money at all.[204] But by 1811, almost everyone outside a narrow Virginia circle did. As Representative Garland maintained there was not enough gold and silver in circulation to pay the government's revenues. There had to be paper money; it could not be state paper money. Therefore it had to be national.[205] Representative Wright, however, took issue with Alston's position. Bank notes were not bills of credit, and therefore as a matter of constitutional law they did not fall within the prohibition against state bills of credit. If they were, neither the states nor the national government could indirectly create them.[206] In 1831, Madison would privately agree with Wright, writing that the prohibition against state bills of credit had not been intended to reach state bank notes. The framers had not foreseen the proliferation of state banks and state bank notes, nor their substitution as a circulation medium for gold and silver. If they had, he added, it was questionable whether they "would have ventured to guard against it by an additional provision."[207] The Constitution already "had so many obstacles to encounter."[208]

Representative Barry, returning to the principal question, whether the creation of the Bank was "necessary and proper," put aside the question of the Bank's necessity, and concentrated on its propriety:

> The incidental power to be exercised must not only be necessary, but . . . must [also] be appropriate, and confined to the end in view. If . . . it involves the exercise of a power that tends to create a distinct and substantive thing, which, in its important operations, is entirely distinct from, and independent of the power to the execution of which it was designed as a mean; it would most certainly be improper. Such an exercise . . . would . . . be usurpation, and the end proposed becomes a mere pretence for the unwarrantable assumption of power.[209]

---

provide for the common defense and general welfare of the United States; and in the prohibition directed against a state currency in Article I, § 10, and therefore in the "necessary and proper" clause. Juilliard v. Greenman, 110 U.S. 421, 449-50 (1883).

204 *See supra* notes 39-45 and accompanying text.

205 *See* 22 ANNALS OF CONG. 756-58 (1811) (statement of Rep. Garland).

206 *Id.* at 677 (statement of Rep. Alston).

207 Letter from James Madison to Charles J. Ingersoll (Feb. 2, 1831), *reprinted in* M. Clarke & D. Hall, *supra* note 2, at 778.

208 *Id.*

209 22 ANNALS OF CONG. 696 (1811) (statement of Rep. Barry).

Barry then touched on the Bank's Achilles heel:

> To enable [the government] to collect taxes, offices of deposite [sic] . . . would be sufficient. But instead of confining the incidental power to be employed to the object it is designed to accomplish, you introduce a new system of policy, that has no more conne[ction] with the management of the revenue than it has with the power to borrow money on the credit of the United States, with the power to regulate commerce with foreign nations among the States, and with the Indian tribes, or than it has with the power to raise and support armies, or provide and maintain a navy.[210]

Instead, he continued, a private and privileged society of individuals set themselves up, and entering into the business of moneymaking, emit notes that become a medium of circulation and form "a new species of capital."[211]

Having made the crucial argument, Barry proceeded to vitiate it, by claiming that the states could adequately provide for the nation's banking and credit necessities.[212] Something had to give. If the constitutionality of the Bank were measured by the test of a "necessary" relation to an expressly delegated power and if "necessary" meant, as Madison said in *The Federalist*, "indispensably necessary,"[213] or simply executory, as Hamilton said in *The Federalist*,[214] the Bank was not "necessary." Additionally, if its constitutionality were measured by the test of a "proper" relation to an expressly delegated power, and "proper" must be determined, as Hamilton also had said in *The Federalist*, "by the nature of the powers upon which it is founded,"[215] or as Barry had said in the debates, by "the end in view,"[216] the Bank was not proper. If, on the other hand, state bank paper money were allowed to flourish, the states would effectively determine the quantity and quality of the paper money circulating through the nation, even though the individual states could not constitutionally coin money or emit bills of credit. Perhaps the federal government could control this somewhat by refusing to accept paper not adequately supported by specie, but even this would be a compromise to paper money. To carry out strictly the framers' intent, the national government would have to insist on

---

210 *Id.* at 697.

211 *Id.*

212 *Id.*

213 *See supra* note 113 and accompanying text.

214 *See supra* note 122 and accompanying text.

215 *See supra* note 127 and accompanying text.

216 *See supra* note 209 and accompanying text.

payment only in gold and silver, regardless of the monetary consequences.

Crawford of Georgia, who was the proponent of the bill in the Senate, addressed these anomalies during the Senate debates:

> A rational analysis of the Constitution will refute in the most demonstrative manner this idea of its perfection. This analysis may excite unpleasant sensation; it may assail honest prejudices; for there can be no doubt that honest prejudices frequently exist, and are many times perfectly innocent. But when these prejudices tend to destroy even the object of their affection, it is essentially necessary that they should be eradicated. In the present case, if there be any who, under the conviction that the Constitution is perfect, are disposed to give it a construction that will render it wholly imbecile, the public welfare requires that the veil should be rent, and that its imperfection should be disclosed to public view.[217]

He would therefore support the bill on much the same grounds Hamilton had advanced in 1791. Senator Lloyd, who supported Senator Crawford, put this argument in a different way:

> It is impossible for the ingenuity of man to devise any written system of Government, which, after the lapse of time, extension of empire, or change of circumstances, shall be able to carry its own provisions into operation—hence, sir, the indispensable necessity of implied or resulting powers, and hence the provision in the Constitution that the Government should exercise such additional powers as were necessary to carry those that had been delegated into effect. Sir, if this country goes on increasing and extending, in the ratio it has done, it is not impossible that hereafter, to provide for all the new cases that may arise under this new state of things, the defined powers may prove only a text, and the implied or resulting powers may furnish the sermon to it.[218]

Nevertheless, later in the debates, Crawford did offer a constitutional exegesis of his own, in an attempt to show that the Constitution could, if seen in a certain light, appear to be perfect. The Constitution gave Congress the power to coin money and regulate its value, while forbidding the states to coin money or emit bills of credit, because the national interest required that the coin of the nation be uniform as to specie and value. Bills of credit were the representation of coin or money and had in fact become the real currency of the nation, usurping the place of coin. Therefore, Con-

---

217 22 ANNALS OF CONG. 134 (1811) (statement of Rep. Crawford).
218 *Id.* at 158 (statement of Sen. Lloyd).

gress must have the power of regulating this currency as well. Necessarily this power included the power to create a bank which would issue this representative of money.[219]

This was an elliptical argument. What Crawford probably had in mind was that the United States Bank through its discounting practices would tend to control the quantity and thereby the quality of state bank paper and thereby, on behalf of the national government, establish control over the currency. It was a portent of later developments. Strictly speaking, it was beyond the framers' intent, as we have seen. They had not envisioned a state bank paper currency, but Crawford's argument molded a present reality to the overall intent: that the national government should control the national currency.

Crawford anticipated a second problem: a state tax on the stock of the national bank. Such stock he regarded as national property and, by inference, as immune from state taxation as federal forts, magazines, arsenals, dock-yards and other needful buildings.[220] He reasoned that "the right of the States to tax bank stock is inconsistent with the right of Congress to create a bank. That the right of taxation destroys the right to create, because the States, by immoderate taxation, could drive the bank out of their limits."[221]

Crawford was familiar with this problem. In *Bank of United States v. Deveaux*,[222] Georgia, his home state, had laid such a tax on the Savannah branch of the first United States Bank during the last days of its charter.[223] When the Bank had refused to pay the tax, Georgia officials had entered its Savannah branch and taken away enough of its silver to satisfy payment.[224] An action was filed in the federal circuit court in Georgia against the state officials for trespass.[225] In their complaint, the plaintiffs designated themselves as "The President, Directors and Company, of the Bank of the United States,"

---

219 *Id.* at 341-42 (statement of Rep. Crawford).

220 *Id.* at 342. Crawford was apparently relying on the provisions of Article I, section 8, para. 17: "To exercise exclusive . . . Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." U.S. CONST. art. I, § 8, para 17. The weakness in this analogy is that under this section, the consent of the state to the purchase of lands and the placement of federal pockets within the state is presumed, whereas under the proposed bill the property of the United States Bank would be located within a state without its consent.

221 22 ANNALS OF CONG. 342 (1811) (statement of Rep. Crawford).

222 9 U.S. (5 Cranch) 61 (1809).

223 *See id.* at 63 (statement of Bank's counsel).

224 *Id.*

225 *Id.*

established by act of Congress.[226] Alleging themselves citizens of Pennsylvania, and the defendants citizens of Georgia, the plaintiffs based their action in part on diversity and in part on a provision in the statute establishing the Bank and conferring upon it the capacity to sue and be sued.[227] The trial court dismissed for lack of subject matter jurisdiction.[228]

On appeal, the Supreme Court reversed, holding that the enchartering statute had not intended to confer systematic federal jurisdiction in every case involving the Bank; that, nonetheless, a corporate claim could be brought routinely in federal court by and in the name of the corporation, provided there was some other basis for federal jurisdiction such as diversity of citizenship of the parties; and that since in that case the real parties in interest were the individual shareholders who came into court under the corporate name, the federal court should, in the case of a corporate claim, look to the citizenship of the corporation's stockholders to determine diversity.[229] The Court did not accept the argument advanced in a companion case, *Hope Insurance Co. v. Boardman*,[230] that for diversity purposes a corporation could be considered to have a citizenship of its own, which would be deemed to be the state of its incorporation.[231] Instead it remanded the cause to the trial court for further proceedings, to determine whether the suit was one between citizens of different states.[232] This ruling, however, left the Bank to the dubious remedy of an action in the courts of the state which had already seized its assets. For in *Strawbridge v. Curtiss*,[233] the Court had earlier held that for diversity purposes in claims involving joint interests the citizenship of all plaintiffs had to be diverse from that of all defendants. It followed therefore that the federal courts could not assume diversity jurisdiction of corporate litigation in which any stockholder was a citizen of the same state as any adversary. This requirement, as applied to corporations, was fatal to the Bank's case

---

226 *Id.* at 62 (emphasis omitted).

227 *Id.* at 71-72. Counsel argued that the Bank's capacity deriving from the law creating the Bank arose thereby under the laws of the United States and that consequently the federal courts had jurisdiction of any case in which the Bank was a party by virtue of the clause in Article III of the Constitution conferring federal jurisdiction in cases "arising under" federal law. *Id.*

228 *Id.* at 63.

229 *Id.* at 84-92.

230 9 U.S. (5 Cranch) 57 (1809).

231 *Id.* at 60-61. The argument was advanced by John Quincy Adams. *See id.* (argument of Mr. Adams).

232 *Deveaux*, 9 U.S. (5 Cranch) at 92.

233 7 U.S. (3 Cranch) 267, 267-68 (1806).

in *Deveaux*, because some of its stockholders were citizens of Georgia.[234] Crawford's remarks, made in support of the Bank's claim in that case, foreshadowed the second part of the controversial decision in *McCulloch*, in which the Court considered the validity of the Maryland state tax on the Bank's branch located in Maryland.[235]

But Crawford was ahead of his time. The profits accruing to a state banking system from which the national bank had been eliminated were evident. The dangers resulting from such a system without the regulatory control of the national bank had not as yet been experienced and were therefore remote. Many in Congress lived in the past remembering, as Representative Findley put it, the rise in party spirit stemming from the manner in which the capital stock of the original bank had been subscribed.[236] Old Republicans could not forget how the Federalists had benefited and remembering the past would concentrate on the rigors of "necessary and proper."

In the Senate, Pope tried in vain to move Republicans with the reminder that Jefferson's policy of commercial non-intercourse with warring European powers and his Louisiana Purchase could not

---

234 *Deveaux*, 9 U.S. (5 Cranch) at 77.

235 *See McCulloch*, 17 U.S. (4 Wheat.) at 390. It should be added that following the adoption of the 1816 statute rechartering the Bank, the Court in Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), held that the statute authorizing the Bank, inter alia, to sue and be sued in all state courts of "competent jurisdiction, and in any Circuit Court of the United States," had intended to confer upon the federal circuit courts jurisdiction in any case in which the Bank was a proper party, and that therefore it could entertain a trespass action brought by the Bank against officials of the State of Ohio irrespective of diversity. *Osborn* 22 U.S. (9 Wheat.) at 817. It further held that federal jurisdiction in that case arose thereby under the laws of the United States. *Id.* at 817-21. *See also* Bank of the United States v. Planters' Bank, 22 U.S. (9 Wheat.) 904 (1824). By this ingenious use of the "arising under" jurisdiction, originally advanced by counsel for the Bank in *Deveaux*, the Court had overcome the rigors of the diversity test for a federal corporation as established in *Deveaux* and *Strawbridge*. The decisions in *Osborn* and *Planters' Bank*, however, did not help state corporations. And since more and more business in the 19th century came to be done by corporations, this meant that much commercial litigation remained closed to the federal courts. This situation persisted until the Court under Taney, in Louisville, Cincinnati & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497 (1844), in a dubious exercise of statutory construction read a recently enacted amendment affecting diversity jurisdiction as changing the requirements of *Deveaux* concerning the "citizenship" of state corporations. *Id.* at 556-59. Thereafter the citizenship of a corporate party was not determined by reference to the citizenship of its stockholders, but by reference to the state of its incorporation. For further discussion of this issue, see Rundle v. Delaware & Raritan Canal Co., 55 U.S. (14 How.) 80 (1852); and Marshall v. Baltimore & Ohio R.R., 57 U.S. (16 How.) 314 (1854).

236 22 ANNALS OF CONG. 705 (1811) (statement of Sen. Findley). *See supra* text accompanying note 78.

have been approved without the doctrine of implied powers.[237] Taylor, addressing the meaning of necessity, attempted to persuade his colleagues that "necessary and proper" did not mean "necessity" in the philosophic sense, used by Hobbes, Hutchinson, and Hume: a substantive necessity, synonymous to fate, "co-existent with the Deity itself, not prospective nor discretionary, bending in one way, and in one way only."[238] "Necessary" in the Constitution, he concluded, meant what Hamilton had said it meant in 1791. It was a term used in a technical and legal sense, governed by expediency, not by fate. Pickering repeated the argument in slightly different terms: "[W]hatever the public good requires to be done, is necessary and proper to be done. It is a moral, not an absolute necessity."[239] This was akin to the arguments advanced by Hamilton and Madison elsewhere in *The Federalist*: a people expects its government to do what is necessary; and a government must do what is necessary to keep the confidence of its people.[240] To Pickering, the Bank was required for the good of the country. Therefore, it was a political necessity. It had to be done. It had to be "necessary and proper." The details of relating the subject to a specified power had to be disregarded. For Pickering, the Bank was more than merely expedient, it was nigh onto fate.

But it was really not in point in 1811 to revive simply and without much emendation the arguments of 1791. Hamilton had initially created a national bank to provide a national paper currency so as to expand the nation's money supply and with it the nation's trade, the nation's wealth and its wherewithal to pay its taxes, and the national government's ability to spend and thereby provide for the general welfare. The economy, the revenues and government services could not have grown as they had without the centralizing functions of a national bank to control the money supply. The Bank had been conducive to all these things and it had worked. Now, in 1811, the Bank's adversaries wanted to put the Bank back in the bottle and cork it up with the seal of strict construction. But the Bank was no longer merely conducive to sound money, trade, the revenue and government spending. It was practically essential. Once established, it was thereafter necessary and proper.

Nevertheless, the House on January 24, 1811 voted sixty-five to sixty-four to postpone indefinitely the further consideration of the

---

237 *See id.* at 230-31 (statement of Sen. Pope).

238 *Id.* at 296 (statement of Sen. Taylor).

239 *Id.* at 309 (statement of Sen. Pickering).

240 *See supra* notes 151-55 and accompanying text.

rechartering bill.[241] On February 20, the Senate voted seventeen to seventeen on a motion to effectively kill the bill.[242] Vice President Clinton, who, in 1808, had desired the Presidency[243] and who as Vice President was a decided opponent of Madison's administration,[244] broke the tie by voting to kill.[245] The power to create corporations, he said, was not expressly granted: "[I]t [was] a high attribute of sovereignty and in its nature not accessorial or derivative by implication, but primary and independent."[246] With these words from Madison's past, he struck a blow against Madison's present. The bill died, and the Bank died with it.

### 3. *Once Again the Necessity of the Result: The Rechartering of 1816*

Without the Bank, the country fell into financial paralysis within three years. Even before its dissolution, financial conditions had not been auspicious. There had been an international shortage of credit. The supply of gold and silver in the country had been insufficient to sustain the banknotes in circulation, including that of the United States Bank.[247] In 1789, when Hamilton had sought to encourage the growth of the money supply by ordering the payment of duties in bank notes, American banking practice had required that the total dollar amount of the bank notes issued be less than the dollar amount held by a bank in gold and silver.[248] By 1814, sound banking practice tolerated up to three dollars in bank paper for every dollar held in specie.[249] But by then, with the country at war with Britain, banks in the middle, southern and western states had in circulation about forty million in paper with only seven to eight million in specie to support it, and this unfavorable ratio was becoming worse.[250] In the absence of a national financial institution capable of establishing a uniform monetary system and circulating medium, gold

241 22 ANNALS OF CONG. 826 (1811).
242 *Id.* at 346.
243 SPAULDING, HIS EXCELLENCY GEORGE CLINTON 288-93 (1938).
244 *Id.* at 296-98.
245 *See* 22 ANNALS OF CONG. 346-47 (1811) (statement of Vice Pres. Clinton).
246 *Id.* at 346.
247 *See id.* at 783-85 (statement of Rep. Tallmadge).
248 *See supra* note 18 and accompanying text. There was also some authority that a ratio of two to three, or indeed five to one was permissible. *See* 7 HAMILTON PAPERS, *supra* note 1, at 253 introductory note.
249 7 ADAMS, *supra* note 185, at 388-89.
250 7 *id.* at 388. In Massachusetts, however, the situation was reversed: While its banks held seven million in gold and silver, their bank paper totaled less than three million. *Id.*

and silver became of necessity the standard of value, and state bank paper became valued by the amount of specie it possessed.

The amount of specie held by a state bank reflected the health of the economy of the region in which the state was located. Gold and silver followed the balance of regional trade. During the war years and those immediately preceding, the balance of regional trade greatly favored New England and greatly disfavored the West and the South. Prior to the war, American shipping had come to a halt, stopped by the embargo laws of the Jefferson and Madison administrations. The war with Great Britain had brought the British blockades and the closing of American ports. New England, having lived off shipping and trade, at first suffered the most. But since the embargoes had also cut off British manufactures, Yankee capital, in need of an outlet, seized the opportunity to invest in manufacture and supplied the Union with goods at prices of its own fixing. As early as 1810, gold and silver began to flow toward Boston from the rest of the country in purchase of these goods. With the outbreak of war, the British blockade furthered this movement. The southern and western states, unable to send their crops to market in New England, sent all the specie they had. By 1814, New England held half the nation's gold and silver.[251] New England's support for the war was therefore crucial. Its loans to the United States either in specie or in its heavily-supported state bank notes would have enabled the government to purchase its manufactures and wage the war with greater facility. However, New England hated the war as much as it hated the embargo. Instead of providing full support to the national government, the New England merchants traded with the British, and lent them gold and silver to the detriment of the United States Treasury.[252]

By August 1814, the nation's finances were in a critical condition. When on August 24, the British captured and burned Washington, financial panic ensued. By September 1, the banks of Baltimore, Philadelphia and New York suspended payment in specie.[253] Only the banks in New England would redeem their own paper in gold and silver. Elsewhere the currency consisted entirely of the irredeemable bills and notes of state banks. Boston consequently set the rate of exchange. Until the blockade could be lifted and domestic products sold abroad or in New

---

251 7 *id.* at 387-88.

252 7 *id.* at 387-89.

253 8 *id.* at 214.

England in exchange for specie, payments in specie could not be resumed.[254] The country was in the hands of New England.

In these circumstances the United States government was no better off. The Treasury's vaults had become drained of specie, and its notes sold at a discount in New England and used instead of specie in payment of its revenues. Elsewhere its revenues were paid in irredeemable state bank notes. Any attempts to use them in any great quantity to pay the Treasury's debts in New York or New England, would soon render them worthless.[255] In the absence of a national currency, the government was forced to leave most of its revenues unused in the states in which they were collected. Moreover, the government was compelled to admit that in the states where it desired to spend its money it had not the wherewithal to pay. Finally, on November 9, 1814, the Treasury formally notified its creditors that it could not pay the interest on its principal debt. The United States of America was in default.[256]

The remedy to this situation clearly lay in the establishment of a national currency, which would enable the Treasury to collect its revenues in a circulating medium that everyone would accept for the payment of its debts. The obstacles, practical, political and constitutional, were so formidable as to make this then impossible. Gold and silver were considered the only completely valid currency. But the Treasury did not have the species to circulate, and New England, which had, would not lend them. Practically, therefore, resort to some sort of national paper currency would once again have to be made.

Once again, however, the Constitution with its bias against paper money stood in the way. Madison, it will be recalled, in his Notes to the Convention, had considered that while the framers had disapproved of a national paper in small denominations readily passable in ordinary currency, they had approved of bills in large denominations.[257] Jefferson, apparently aware of this distinction, suggested an elaborate scheme whereby the Treasury would issue notes in large denominations for the larger purposes of circulation and introduce a metallic money for smaller purposes. State banks would be induced or forced to withdraw their

---

254 *Id.*

255 7 *id.* at 215.

256 *See* Letter from Alexander Dallas to William Lowndes (Nov. 27, 1814), *reprinted in* 10 AMERICAN STATE PAPERS, *supra* note 1, at 872-73.

257 *See* 2 FARRAND, *supra* note 40, at 309.

paper. The Congress would raise new taxes specifically to pay off the Treasury notes and on their credit the notes would float.[258]

Alexander Dallas, Madison's then Secretary of the Treasury, rejected this plan as impractical and politically impossible. State banks would not withdraw their notes. And Congress, responsive to state bank pressure, would not legislate them out of existence. In competition with state bank notes, new Treasury notes would float at a discount of at least twenty percent which, coupled with the interest they would bear, would further depress the government. To overcome these difficulties, Congress would have to require the government's creditors to accept Treasury notes as legal tender. The constitutional and practical objections to that plan were at least equally formidable.[259]

Representative John Eppes, chairman of the House Ways and Means Committee, also objected to Jefferson's scheme: he would not attempt either to drive out state bank paper or to require the acceptance of Treasury notes as legal tender. Instead he advanced a scheme of his own, involving the issuance of notes in small denominations payable in interest-bearing bonds, the redemption of which would be made from the proceeds of stiffly increased taxation.[260] Jefferson dismissed Eppes' plan as impractical, noting that the South did not have the money to pay the new taxes.[261] Treasury Secretary Dallas also opposed it for the reasons he disapproved of Jefferson's plan. The new notes, like the existing Treasury notes, would sell at a discount while bearing interest and thus further depress the Treasury.

Dallas opted instead for a national bank, whose notes would be accepted not by compulsion but on faith in its credit, capital and prudential management.[262] Eppes and his Virginia bloc opposed it on the same constitutional grounds advanced three years earlier.[263] The Federalists, formerly supporters of the Bank, now

---

258 Letter from Thomas Jefferson to Thomas Cooper (Sept. 10, 1814), *reprinted in* 14 JEFFERSON WRITINGS, *supra* note 57, at 179, 189-90.

259 *See* Letter from Alexander Dallas to John W. Eppes (Oct. 17, 1814), *reprinted in* 10 AMERICAN STATE PAPERS, *supra* note 1, at 866-69.

260 J.W. EPPES, CHAIRMAN, COMMITTEE OF WAYS AND MEANS, REPORT TO THE HOUSE OF REPRESENTATIVES, 13th Cong., 3d Sess. (Oct. 14, 1814), *reprinted in* 10 AMERICAN STATE PAPERS, *supra* note 2, at 854. *See also* 8 ADAMS, *supra* note 185, at 247-48.

261 Letter from Thomas Jefferson to James Monroe (Oct. 16, 1842), *reprinted in* 14 JEFFERSON WRITINGS, *supra* note 57, at 207, 208. *See also* 3 ADAMS, *supra* note 185, at 248.

262 *See supra* note 259. *See also* 8 ADAMS, *supra* note 185, at 249.

263 *See* 8 ADAMS, *supra* note 185, at 250.

opposed it on financial and political grounds. Financially, as proposed, a bank which, by virtue of its incorporation, had limited liability and whose capital would in almost nine-tenths part consist of existing depreciated governmental debt, was insolvent from its inception and was therefore a fraud upon its creditors. Politically, Federalist New England had no desire to come to the aid of a Republican war. Dallas' plan collapsed.[264]

Finally, Daniel Webster proposed on behalf of the Federalists another alternative: a bank with one-fourth of its capital in specie and the balance in government securities, but without power to suspend payment in specie, and without obligation to loan more than two-fifths of its capital to the government.[265] Webster's plan passed the Congress on January 20, 1815, but was vetoed by Madison.[266] Until the end of the war, Madison said, specie would flow out of the bank not into it. Under such circumstances, the Bank's ability to issue notes would be so limited as not to provide a national circulating medium, and its ability to make loans to the government so limited as to render its benefit to the government incommensurable with the grant of a monopoly.[267] Madison and Dallas thereby determined that a non-redeemable national paper currency was the only workable circulating medium for the duration of the war. In this regard, they went well beyond Hamilton's more conservative scheme, of a national paper currency convertible into specie on demand, into the realm of a pure national paper money.

The country seemed on the verge of collapse. While Congress had been debating Webster's bill, New England, in session in the Hartford Convention from December 15, 1814, through January 5, 1815, had contemplated confederation and secession.[268] On January 5, the Convention recessed, awaiting the outcome of the battle of New Orleans, fully expecting its fall and with it a climate of despair auspicious to the advancement of its plans.[269] New Orleans, however, did not fall. On February 4, five days after Madison's veto of the bank bill, Washington heard the

---

264 *Id.*

265 28 ANNALS OF CONG. 178 (1815) (statement of Sen. Webster).

266 Veto Message from Pres. Madison to the Senate of United States (Jan. 30, 1815), *reprinted in* 2 MESSAGES AND PAPERS OF THE PRESIDENTS 540-42 (J. Richardson ed. 1897).

267 *Id.* at 542.

268 8 ADAMS, *supra* note 185, at 292-309.

269 *See id.* at 309.

news of General Jackson's victory.[270] On February 13, news reached Washington of the signing of the peace treaty at Ghent.[271] Peace had unexpectedly saved the country from collapse.

The effect of peace on the economy was dramatic. The blockade and the embargo were lifted. Successive crops of southern cotton previously confined to port were shipped to Britain in exchange for a flood of British gold, silver and manufactures. The South quickly became the wealthiest region in the country. New England manufacturers, ruined by British imports, laid off their workers, New England banks lost their specie, and the region as a whole lost its prosperity.[272]

In these changed economic and financial circumstances, the South and the Republicans in Congress listened with sympathy to Madison's annual message of December 5, 1815.[273] The resumption of trade had improved the condition of the public revenue and maintained the credit of the United States, he wrote. But a more prudent management of the government's finances suggested further monetary changes. He added:

> It is, however, essential to every modification of the finances that the benefits of an uniform national currency should be restored to the community. The absence of the precious metals will, it is believed, be a temporary evil, but, until they can again be rendered the general medium of exchange it devolves on the wisdom of Congress to provide a substitute which shall equally engage the confidence and accommodate the wants of the citizens throughout the Union. If the operation of the State banks can not produce this result, the probable operation of a national bank will merit consideration; and if neither of these expedients be deemed effectual it may become necessary to ascertain the terms upon which the notes of the Government (no longer required as an instrument of credit) shall be issued upon motives of general policy as a common medium of circulation.[274]

The necessities of war had driven Madison, in disregard of any constitutional inhibition, to the ultimate pragmatic monetary policy

---

270 9 ADAMS, *supra* note 185, at 57.

271 *Id.* at 58. The treaty had actually been signed on December 24, 1814. *Id.* at 52.

272 *See id.* at 91-96.

273 President Madison's Seventh Annual Message to the Senate and House of Representatives (Dec. 5, 1815), *reprinted in* 2 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 266, at 547-54.

274 *Id.* at 550-51.

of a non-redeemable national circulating paper money. Prior to that, in the message accompanying his veto of Webster's bank bill in 1815, he had already abandoned his constitutional opposition to the national incorporation of a bank. Before stating his reasons for the veto, Madison had adverted to "the question of the constitutional authority of the Legislature to establish an incorporated bank," and considered it "as being precluded in [his] 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."[275] This was the theory of prescription advanced by Representative Fisk in the House debates of 1811.[276] With Madison's adoption, it achieved the status of a constitutional doctrine.[277]

Undoubtedly the pressures of practicality and necessity, as well

---

275 *Id.* at 540.

276 *See supra* note 193 and accompanying text.

277 Years later, in 1831, during the controversy surrounding the renewal of the United States Bank charter, Madison reflected at length on this doctrine, comparing it to the doctrine of stare decisis governing judicial decisions. The reasons for it, he wrote, lay first, in

> the good of society . . . that the rules of conduct of its members should be certain and known, which would not be the case if any judge, disregarding the decisions of his predecessors, should vary the rule of law according to his individual interpretation of it . . . . [Second,] because an exposition of the law, publicly made, and repeatedly confirmed by the constituted authority, carried with it, by fair inference, the sanction of those who, having made the law through their legislative organ, appear, under such circumstances, to have determined its meaning through their judiciary organ.

Letter from James Madison to Charles J. Ingersoll (June 25, 1831), *reprinted in* M. Clarke & D. Hall, *supra* note 2, at 778-79.

It was even more important, he added, to apply this doctrine to the Constitution than to an ordinary law since it was more necessary that the meaning of the Constitution be fixed and known than that of an ordinary law. Otherwise,

> if a particular legislature, differing in the construction of the constitution, from a series of preceding constructions, proceed to act on that difference, they not only introduce uncertainty and instability on the constitution, but in the laws themselves; inasmuch as all laws preceding the new construction, and inconsistent with it, are not only annulled for the future, but virtually pronounced nullities from the beginning.

*Id.* at 779.

There might be an exception to this rule, Madison continued. Nevertheless, even

> the most ardent theorist . . . will find it impossible to adhere to, and act officially upon, his solitary opinions as to the meaning of the law or constitution, in opposition to a construction reduced to practice, during a reasonable period of time; more especially where no prospect existed of a change of construction by the public or its agent.

as the requirements of certainty and stability, induced Madison in 1815 to abandon his constitutional stand against the incorporation of a national bank. As Henry Clay explained these pressures to his Kentucky constituents, three hundred state banks were emitting the country's actual currency, in paper. In effect, they were exercising "one of the highest attributes of sovereignty—the regulation of the current [monetary] medium."[278] But by then, Representative Clay continued, this paper was obstructing the works of the Treasury:

> [I]t would accumulate where it was not wanted, and could not be used where it was wanted for the purposes of Government, without a ruinous and arbitrary brokerage. Every man who paid or received from the Government, paid or received as much less than he ought to have done, as was the difference between the medium in which the payment was effected and specie. Taxes were no longer uniform. In New England, where specie payments have not been suspended, the people were called upon to pay larger contributions than where they were suspended. In Kentucky, as much more was paid by the people in their taxes, than was paid, for example, in the State of Ohio, as Kentucky paper was worth more than Ohio paper.[279]

---

*Id.* at 780. To do otherwise would constitute an "individual prerogative" without limit to its exercise. *Id.*

Prescription was a doctrine which did not appeal to Andrew Jackson or to his Secretary of the Treasury, Roger B. Taney, or, when the time came to write *Dred Scott*, to Chief Justice Roger B. Taney. *See* Veto Message from President A. Jackson to the Senate (July 10, 1832) *reprinted in* 3 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 266, at 1144-45; *see also* B. HAMMOND, BANKS AND POLITICS IN AMERICA, *supra* note 42 at 326-29 (for a recapitulation of the Jacksonian assault on the second United States Bank). For a discussion of Taney's participation in the veto, see C. SWISHER, ROGER B. TANEY 185-97 (1935). For Taney's views on prescription in *Dred Scott*, see *supra* note 196 and accompanying text. But prescription was one of the cornerstones of the Court during Marshall's tenure. Justice Paterson relied on it in Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803) (upholding the validity of the act amending the judicial system and appointing the Justices of the Supreme Court as judges of the circuit courts of appeal). Justice Story relied on it in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (holding that the constitutionality of the appellate jurisdiction in the Supreme Court over judgments of state courts involving federal questions was assumed by the First Congress in 1789, and in practice by the various state courts thereafter); and Justice Marshall in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (holding that Congress' power to regulate commerce included navigation, relying on the early adoption of acts affecting navigation); and of course in *McCulloch*, 17 U.S. (4 Wheat.) at 401-02. In the beginning, past legislative practice was an important guide to the judicial construction of the Constitution. Madison's defense in 1831, was the most able exposition of this doctrine.

278 29 ANNALS OF CONG. 1192 (1816) (statement of Rep. Clay).

279 *Id.* at 1192-93.

Clay admitted that in 1811 he had said that a national bank was not "necessary."[280] Now he was of the opinion that it was "indispensably necessary."[281] Such a bank was the only practical method whereby Congress could recover control of the general currency. That general currency, then consisting of state bank paper, was effectively under the control of the eighteen several states. Neither Congress nor the country was ready to apply "a remedy directly acting upon the banks, and their paper."[282] In other words, Congress, subject to the pressures of state bank interest, would not tax state bank paper out of circulation. For these reasons, it had to tolerate the banks and their paper, but while tolerating them, bring them under national control. The national bank would be the instrument whereby, through the gradual renewal of specie payments, the quantity of state bank paper would in time be reduced and its quality improved. The paper of the United States Bank would in the meantime afford a uniform standard.[283]

It was left to Secretary Dallas in his report to Congress on December 6, 1815, to place the establishment of the Bank on the constitutional authority of the United States to emit bills of credit.[284] Departing from Hamilton's argument of "necessary and proper," Dallas argued that the grant of a specific power in Congress to coin money and to regulate the value of coin in circulation included by "necessary implication from positive provisions" a generic power to emit bills of credit.[285] Disregarding Hamilton's convoluted artifices, Dallas boldly asserted that the power of the federal government to institute and regulate a national monetary system, "whether the circulating medium consist of coin or of bills of credit, must, in its general policy, as well as in the terms of its investment, be deemed an exclusive power."[286]

> The basis for this extension of federal power was practical:
>
> [A] system depending upon the agency of precious metals will be affected by the various circumstances which diminish their quantity, or deteriorate their quality. The coin of a State sometimes vanishes under the influence of political alarms; sometimes in consequence of the explosion of mercantile

---

280 *See id.* at 1191-92.
281 *Id.* at 1193.
282 *Id.* at 1194.
283 *Id.*
284 Secretary of Treasury's Report on the State of the Finances, 14th Cong., 1st Sess., 29 ANNALS OF CONG. 1602, 1639 (1815) *reprinted in*, 11 AMERICAN STATE PAPERS, *supra* note 1, at 17.
285 *Id.*
286 *Id.* at 18.

> speculations, and sometimes by the drain of an unfavorable course of trade.[287]

But, he added, translating practicality into terms of constitutional authority, "whenever the emergency occurs that demands a change of system it seems necessarily to follow that the authority, which was alone competent to establish the national coin, is alone competent to create a national substitute."[288]

In effect, Dallas argued that necessity required the establishment of a national monetary system, of whatever medium. In fact, he continued, while the coin of the United States had ceased to be the circulating medium, Congress had provided for no substitute.[289] The Secretary noted that when in the preceding year the state banks west and south of New England had suspended payment of coin for their notes, their action had had the immediate effect of suspending the only legal currency. By this act state-created banks had been able to circulate a paper medium subject to many of the practical inconveniences of the bills of credit which under the Constitution the states themselves were forbidden to emit. While it was true, he said, that wartime conditions made the suspension of specie necessary, its continuance in time of peace was an evil, which the states individually were unable to remedy. Consequently, he argued that "a recurrence to the national authority [was] indispensable for the restoration of a national currency."[290] He regarded the establishment of a national bank "as the best, and, perhaps, the only adequate resource" for supplying a circulating medium of equal use and value in every state.[291] By its resources and example the national bank "will conciliate, aid, and lead the State banks, in all that is necessary for the restoration of credit, public and private . . . and to restore the currency of the national coin."[292]

In response to Secretary Dallas' report, John C. Calhoun, chairman of a select committee of the House, on January 8, 1816, introduced a bill to reincorporate the United States Bank in terms similar to those contained in its 1791 charter.[293] Speaking in support of the bill, Calhoun stated that he would not discuss "the power of Congress to grant bank charters, nor [entertain discussion of] whether

---

287 *Id.*

288 *Id.*

289 *Id.*

290 *Id.*

291 *Id.* at 19.

292 *Id.*

293 *See* Bill to Incorporate the Subscribers to the Bank of the United States, 14th Cong., 1st Sess., 29 ANNALS OF CONG. 494 (1816).

the general tendency of banks was favorable . . . to the liberty and prosperity of the country; nor . . . whether a National Bank would be favorable to the operations of the Government."[294] Those were the issues which had greatly moved the House in 1791 and 1811, but Calhoun now regarded their discussion a waste of time. By 1816, the existence of banks and their ultimate relation with the commerce and industry of the nation was so complete as to make this inquiry irrelevant. Nor did he think it debatable that a national bank would aid the administration of the finances of the national government.[295]

Rather, Calhoun would examine the state of the nation's currencies, its disorders and the causes for those disorders. The power to regulate the circulating medium was in express terms given to Congress. But, he maintained, that power was not in its hands. The power was exercised by state banks which were not constitutionally responsible for its management. Gold and silver had entirely disappeared. Paper money was the only money, and that money was beyond the control of Congress. The Constitution, he reasoned, had not prohibited the creation of state banks, because at the time the Constitution was framed banks were little known, and it was then the universal opinion that their notes always represented gold and silver and could not be multiplied beyond the demands of the country. The creation of the present banking system was not foreseen: the multiplication of banks from one to two hundred sixty, from a total capital fund of $400,000 to $80,000,000, and the departure from a punctuality in redeeming a limited number of bills in specie to the issuance of bills "*ad infinitum*, in violation of their contract, without a dollar in their vaults."[296] By a kind of undercurrent, Calhoun continued, "the power of Congress to regulate the money of the country had caved in, and upon its ruin had sprung up those institutions which now exercised the right of making money . . . in the United States."[297] This "great and wonderful" change, he commented ironically, had returned the country to the days of the Revolution, in which every state had issued bills of credit of various value, yet employable as legal tender.[298]

The state banks were in effect paper machines. No coin in fact circulated. Indeed, they had issued more money than they could possibly redeem. From 1811, the time of the dissolution of the first United States Bank, to 1816, the amount of paper in circulation had

294 29 ANNALS OF CONG. 1060 (1816) (statement of Rep. Calhoun).
295 *Id.*
296 *Id.* at 1061.
297 *Id.* at 1062.
298 *Id.*

increased from eighty or ninety million to two hundred million until the paper had come to be derisively called "trash or rags."[299] The state banks could cure the excess but would not because of the gains they would have to forego. Resumption of specie payment would cost them, and they would only do so if they were constrained. In an argument similar to Henry Clay's,[300] Calhoun concluded that a national bank itself paying specie would influence the state banks to do the same by its example.[301]

Calhoun's state of the currency speech gave factual support to Secretary Dallas' contention that Congress had the constitutional power to create a national bank as a means of gaining some governmental control over the currency. It was not the most direct form of control, but considering the countervailing pressures exerted by the state banks, it was, as Clay had said, the best measure that Congress could enact. In this way it could best repair the deficiency caused by the framers' failure to make an adequate provision for the national currency.

Because of these circumstances, the constitutionality of the bill was largely taken for granted.[302] There were no long debates on the evils of corporations or the limits of "necessary and proper." The national bank was a practical necessity and subsequent debate turned on the details of the bill and whether its underlying policy was sound. Webster, as Congressman from New Hampshire, who would later defend the constitutionality of the Bank before the Supreme Court in *McCulloch*, opposed its creation on the grounds that the paper money the Bank would introduce in circulation represented a departure from the framers', and Hamilton's, hard-money principles. The evil was the issuance of paper currency in greater sums than could be redeemed in gold or silver. The bank by virtue of its limited powers could not remedy the evil. Its bills, based on specie, would necessarily be short-term and local in circulation, and so could not affect the profligate circulation of irredeemable state bank notes. Therefore, Webster announced that he would vote against it. The true remedy lay in a resolution he would propose: that the Treasury accept in payment of its revenues only redeemable bank notes. Thus constrained, state banks would quickly constrict

---

299 *Id.* (emphasis omitted).

300 *See supra* notes 278-83 and accompanying text.

301 29 ANNALS OF CONG. 1062-64 (1816) (statement of Rep. Calhoun).

302 *See, e.g.*, 29 ANNALS OF CONG. 258 (1816) (statement of Sen. Wells) (questioning not the authority of Congress to incorporate a bank, but the extent of that authority).

their paper to conform.[303] Despite the opposition of Webster and many Federalists, however, Calhoun's bill passed the House on March 14, 1816, by a vote of eighty to seventy-one.[304] It was sent to the Senate, where after some desultory debate, it was passed on April 3, by a vote of twenty-two to twelve.[305] A week later, Madison signed it into law.[306] The second Bank of the United States would open its doors for business on January 7, 1817.[307]

But the Bank was after all not the only means by which Congress was to assert control over the currency. Webster, faithful to the argument he made during the debates, introduced a joint resolution requiring that after February 20, 1817, payments to the United States be either in specie, notes of the Treasury or of the United States Bank, or of such state banks as would on demand redeem them in specie.[308] This resolution was adopted in April 1816.[309] Its impact was varied among the different regions. The banks of New England had never suspended payment and the banks from the South and West, which during the war had been bereft of specie, had by 1816 a sufficient supply and were ready to resume payment on demand.[310] Indeed, without support from areas where specie was readily available, Webster's resolution could not have passed. The banks in the Middle Atlantic States which were then overextended, however, held back. Eventually, pressured by the Treasury to comply, and aided by the newly organized United States Bank, they too met the February 20 deadline.[311] State banks which were short of specie received short-term loans from the United States Bank to help them meet balances due from other money markets. Officially, all state banks had resumed payment in specie, but in reality, there was still a premium paid for gold and silver and a discount on some state bank notes.[312] Treasury bills were restored to par.[313] The national currency was restored, although the achievement was less the Bank's and more that of the new Secretary of the

303 *See id.* at 1091-94 (statement of Rep. Webster).

304 *Id.* at 1219.

305 *Id.* at 280-81.

306 *See* Act of Apr. 10, 1816, ch. 44, 3 Stat. 266, 277.

307 HAMMOND, BANKS AND POLITICS IN AMERICA, *supra* note 42, at 246.

308 Resolution on Collection of Revenue, 14th Cong., 1st Sess., 29 ANNALS OF CONG. 1440 (1816).

309 The House adopted this resolution on Apr. 26, 1816, *id.* 1450-51, as did the Senate on April 29, 1816, *id.* at 371.

310 9 ADAMS, *supra* note 185, at 128-29.

311 *Id.* at 129-32.

312 HAMMOND, BANKS AND POLITICS IN AMERICA, *supra* note 42, at 248.

313 9 ADAMS, *supra* note 185, at 127-28.

Treasury, the former Senator from Georgia, William H. Crawford. Only through his persistent coaxing and cajoling of state banks could the mischief resulting from the expiration of the first United States Bank be gradually undone.[314]

4. *The "Necessity and Propriety" of the Results:* McCulloch v. Maryland

a. *The Background of the Case*

The Bank once organized did not live happily ever after. In fact it was poorly organized. The post-war period was initially a time of rapid expansion of trade and credit. Those who could gain ready access to credit could quickly make their fortune. The Bank, a ready target for easy credit, fell into the resourceful hands of a group of Baltimore schemers who through manipulation of its stock elected their man, a Philadelphia merchant named William Jones, its president, and through him controlled its policies. Under Jones, stockholders were permitted to pay for their stock with little or no gold or silver, and the various Bank's branches were allowed a free and unsupervised operation.[315] Consequently, the Bank opened with less than a third of the specie the enabling statute contemplated.[316] And in Baltimore, the unsupervised officers advanced themselves loans without collateral.[317]

1817 was a year of broad optimism and prosperity. Trade was active. The Bank, under the control of the Baltimore adventurers followed the mood of the country and did what a central bank should not do: make easy credit easier by the expansion of credit on generous terms. In 1818, the general overextension of credit inevitably led to default, widespread contraction of bank credit, recession and finally panic and depression. The Bank, instead of doing what a central bank should do in times of general contraction—become the lender of last resort—accelerated the depression by calling in its loans. Having begun its operations in 1817, with insufficient gold and silver, despite the statutory plan, it had by October 1818, almost none. To protect itself against the disgrace of suspending payment in specie, its directors de-

314 HAMMOND, BANKS AND POLITICS IN AMERICA, *supra* note 42, at 249-50.
315 *See id.* at 254-61.
316 *Id.* at 253-54. It has been estimated the Bank should have received from its stockholders seven million dollars in coin instead of the two million it actually did receive. *Id.* at 254.
317 *Id.* at 261.

cided to contract credit and accumulate specie.[318] In January 1819, it ousted Jones and replaced him with the conservative and honest Langdon Cheves of South Carolina, who ordered further loan calls or the actual underlying collateral security.[319]

The effect on the frontier states was devastating. The Bank's branches in Kentucky, Ohio and Tennessee had liberally extended loans for land settlement and farming with the land itself, at prosperity's heightened value, as collateral. When the Philadelphia headquarters demanded payment in specie for the installments due, landowners in great numbers went into default. In Cincinnati, men left their families and went into the backwoods to raise food. In the East, factories closed, unemployment spread and thousands became insolvent and went to debtors' prison. Soup kitchens were set up in Baltimore, Philadelphia and New York as the country for the first time encountered urban pauperism.[320]

Hatred sprang up against banks in general, and against the United States Bank in particular. Its existence once again became a political issue, the issue of its constitutionality was once again revived. In February 1818, when times were still good, the State of Maryland had imposed a tax of $15,000 a year on all banks or bank branches within the state not chartered by the state legislature.[321] In 1819, when times were bad, five other states, Kentucky,[322] Tennessee,[323] Ohio,[324] North Carolina[325] and Georgia[326] adopted similar statutes and other states contemplated following.[327] The Baltimore branch of the United States Bank refused to pay the Maryland tax and was sued in the name of McCulloch, its cashier. It lost in the state courts and appealed to the Supreme Court.[328] By the time of its argument in February 1819, the question of the repeal of its charter was mooted in

---

318 *Id.* at 258.

319 *See id.* at 259.

320 *See* Rezneck, *The Depression of 1819-1822, A Social History*, 39 AM. HIST. REV. 30-33 (1934); R. CATTERALL, THE SECOND BANK OF THE UNITED STATES 61-64 (1903).

321 HAMMOND, BANKS AND POLITICS IN AMERICA, *supra* note 42, at 263; 1817 Md. Laws 174.

322 *See* Act of Jan. 28, 1819, ch. 343, 1819 Ky. Acts 637.

323 *See* Act of Nov. 22, 1817, ch. 131, 1817 Tenn. Pub. Acts 138.

324 *See* Act of Feb. 8, 1819, ch. 83, 1819 Ohio Laws 190.

325 *See* Act of 1818, ch. 7, 1818 N.C. Sess. Laws 18.

326 *See* Act of Dec. 19, 1817, 1817 Ga. Laws 47.

327 R. CATTERALL, *supra* note 320, at 64-65.

328 *McCulloch*, 17 U.S. (4 Wheat.) at 317.

the House. A bill to repeal lost by a heavy majority,[329] but the pall of the Bank's unpopularity lay over the nation's capitol. After Congress adjourned in early March, the Court quickly came to a decision.[330] Two issues were involved: first, whether the Bank was validly created; second, whether, even if the Bank were constitutionally created, a state government had the power to tax it.

b. *The argument: "Necessary and Proper."*

On appeal before the Supreme Court, counsel for Maryland had reverted to the old arguments of 1791 and 1811: that the powers of the national government were limited to the expressed powers and to the incidental powers of indispensable necessity, so as to deny effect to "necessary and proper" as a "sweeping clause" and to carry out instead the intent of the tenth amendment. Luther Martin, as Attorney General from Maryland, with his venerable status as constitutional framer, read extracts from *The Federalist* and from the debates of the ratifying conventions of Virginia and New York to show that the contemporaneous exposition of the Constitution by its framers and those favoring its adoption was wholly at odds with a liberal construction of "necessary and proper."[331] The Court was reminded that the Hamilton of 1788, in opposition to the Hamilton of 1791, had stated in *The Federalist* that the clause was but a harmless bit of "redundancy or tautology." It was reminded that the Madison of 1788, in opposition to the Madison of 1814 and 1816, had also regarded "necessary" as meaning "indispensably necessary," affording such limited powers in government as should accrue by "unavoidable implication." It was reminded that the tenth amendment had been adopted to calm the fears aroused by the specter of a "sweeping clause," and that the authority of establishing corporations was one of the great sovereign powers of government.[332]

Walter Jones for Maryland followed the arguments of 1811, "that the [C]onstitution was formed and adopted, not by the people of the United States at large, but by the people of the respec-

329 *See* 34 ANNALS OF CONG. 1406, 1409 (1819).

330 Congress adjourned on March 3, 1819. *See* 33 ANNALS OF CONG. 288 (1819); 34 ANNALS OF CONG. 1444 (1819) (House of Representatives). The Supreme Court's decision was delivered on March 6, 1819. 1 WARREN, THE SUPREME COURT IN HISTORY 510 (1926).

331 17 U.S. (4 Wheat.) at 372 (argument of L. Martin).

332 *See id.* at 374.

tive states;" that the Constitution was "therefore, a compact between the states, and [that] all the powers . . . not expressly relinquished by it are reserved to the states;"[333] and that the Bank to be valid must be both necessary and *proper*—it must be in its nature fit and adapted to the accomplishment of the desired end.[334] The Bank, he concluded, was really a business corporation licensed to make loans, print money and make money and therefore not proper.[335] But having said this, he weakened his argument by concluding that the business of banking was a matter left to the states,[336] thereby flying in the face of the constitutional provision for the Congressional coinage and regulation of money.

Joseph Hopkinson, also for Maryland, argued for the permanent necessity of a subject of Congressional legislation. Since in 1819 the state banks could accomplish the augmentation of a paper circulation, make loans to the national government in times of emergency and collect state taxes, the establishment of a national bank was not permanently necessary and therefore not "necessary and proper."[337] Both Jones and Hopkinson assumed the constitutional legitimacy and propriety of a national fiscal system based on the issuance of state paper.

In response, counsel for the Bank joined issue with Maryland and followed the arguments advanced by Hamilton in 1791, that the creation of the Bank was an exercise of power conducive to the purposes of the various enumerated powers of tax collection, borrowing, commerce, property and defense, and consequently was provided for under the "necessary and proper" clause.[338] They did not follow the Dallas-Calhoun argument of 1816 that the national bank was a ready instrument whereby the national government could gain control over the nation's currency which by then largely consisted of state bank paper.[339] Perhaps the Bank's subsequent mismanagement of the national credit had rendered that argument incongruous. Or perhaps, more importantly, the presence of Luther Martin made it impossible. Martin, as a framer, knew perfectly well that the framers intended a total

---

333 *Id.* at 363 (argument of W. Jones).

334 *Id.* at 367.

335 *See id.* at 366-67.

336 *Id.* at 368.

337 *See id.* at 333 (argument of Mr. Hopkinson).

338 *See supra* note 7 and accompanying text.

339 *See supra* notes 284-301 and accompanying text.

prohibition of paper money, state and federal.[340] The Dallas-Calhoun argument, inferring from the provision enabling Congress to coin money and regulate its value a generic intent enabling it to regulate paper money as well, would dissolve in the acid of Martin's memory.[341] Perhaps, because of Martin, neither side wished to inquire too closely into the paper-money aspects of the case. They had to confine themselves in the matter of the constitutional text to the pros and cons of the "necessary and proper" clause.

Counsel for the Bank, nevertheless, did not consider Hamilton's arguments their principal arguments. This was after all 1819, and not 1791 or even 1811. They elected to begin on the very practical note of the Bank's long establishment. Daniel Webster opened his remarks on that note: "[I]t might have been hoped that it [the matter of the Bank's constitutionality] was not now to be considered as an open question."[342] The first Congress and nearly each succeeding Congress had legislated on the presumption of power. The executive branch had acted on it. The courts of law had acted on it. "[I]t would seem almost too late to call it in question, unless its repugnancy with the constitution were plain and manifest."[343] William Pinkney echoed this approach.[344] In their mouths, the question of "necessary and proper" seemed stale and profitless. William Wirt, following Webster, dwelt on the embarrassment suffered by the country and the national government in relying on state banks during the recent war.[345] The cumulative effects of these arguments was that the Bank was, as a matter of practical fact, necessary and that the arguments of Maryland regarding "necessary and proper" were remote and impractical. Besides which, everyone in Washington knew that the Bank was necessary in order to control the national paper money supply. The Court knew it. Therefore counsel to the Bank formally argued the meaning of "necessary and proper" in the constitutional text, knowing that "necessary" would have to include the Bank's necessity.[346]

---

340 *See supra* notes 39-45 and accompanying text.

341 *See supra* notes 284-301 and accompanying text.

342 *McCulloch*, 17 U.S. (4 Wheat.) at 322 (argument of Mr. Webster).

343 *Id.* at 323.

344 *See id.* at 378-81 (argument of Mr. Pinkney). Pinkney, not to be confused with the Pinkneys of South Carolina, was from Maryland.

345 *See id.* at 354.

346 There was precedent for this reading. In United States v. Fisher, 6 U.S. (2 Cranch) 358 (1805), the Court had justified under the "necessary and proper" clause the grant of a priority in state insolvency proceedings in favor of the United

c. *The Argument: The Power of the State to Tax the Bank*

Maryland's second argument was equally supported in *The Federalist*: that even if the Bank were constitutionally created, a state government had the power to tax it. Pursuing the line of reasoning Hamilton had employed in *The Federalist*, Maryland argued (from the specific provision in Article I, section 10 of the Constitution, prohibiting a state tax on imports or exports, and

---

States against the insolvent's private creditors. The creditors had challenged the creation of the priority as the exercise of a nondelegated power. In response, the government had not tried to justify its creation under the power "to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. Instead it had argued that the priority was for the purpose of protecting revenue. The government had the expressed power to borrow money and to collect a revenue for its repayment. The protection of the revenue was an incident to its collection and the grant of a bankruptcy priority was an incident to its preservation and therefore "necessary and proper." *Fisher*, 6 U.S. (2 Cranch) at 384. The creditors had argued that "necessary" meant "indispensably necessary." *Id.* at 396. The government's priority was not indispensably necessary. The revenue would survive, although without it, it might suffer occasional losses.

Strictly speaking, the government's argument was not in point, because the priority it asserted was not in aid of revenue collection, but of a governmental transaction unrelated to revenue collection. Nevertheless Justice Marshall, in his opinion for the Court, followed the government's argument. The statute had been adopted as a "necessary and proper" exercise of power. The government had to pay its debt and therefore had the right to take those precautions which would render its financial transactions safe. The priority was a means properly intended to effect that object. *Id.* The Justice wrote:

> In construing this clause it would be incorrect and would produce endless difficulties, if the opinion should be maintained that no law was authorised which was not indispensably necessary to give effect to a specified power.
>
> Where various systems might be adopted for that purpose it might be said with respect to each, that it was not necessary because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution.

*Id.*

In other words, the "endless difficulties" for the government flowing from *Fisher's* position outweighed the textual deficiencies of the government's position. If the government did not have the power, it would not work. (Literally it would work, but not in the ordinary sense of the word, meaning to work well.) The Constitution therefore would not work. Since this was unacceptable, reasoning backwards from the desired result that both Constitution and government would have to work, "necessary and proper" must stop producing difficulties and mean what the government said. It must mean helpful or conducive to one of the specified powers or to the general needs of the government created to exercise those powers.

Counsel for the United States Bank, considering the circumstances underlying the authorization of its charter in 1816, could rely on that reading of "necessary and proper." Without it the government could not work, the Constitution could not work. "Necessary and proper" had to be shaped by the pressure of practical circumstance.

from the absence of any other specific limitation on state taxation to a constitutional intent) that the states retain, in the words of Hamilton, "an independent and uncontroullable [sic] authority to raise revenue to any extent of which they may stand in need by every kind of taxation except duties on imports and exports."[347] In fact, Hamilton had gone further and in his usual decisive manner had asserted without qualification that a federal law "abrogating or preventing the collection of a tax laid by the authority of a State (unless upon imports and exports) would not be the supreme law of the land, but an usurpation of power not granted by the [C]onstitution."[348]

Maryland advanced other arguments. The thing taxed was bank stock, an item commonly the subject of taxation. The stock was property and as such subject to tax irrespective of its ownership by the United States. Bank stock should be distinguished from federal forts, magazines and the like, which are immune from taxation, because they are located in a state only with the state's consent.[349] Finally, the authority of the United States to tax state banks suggested a reciprocal authority in the states to tax a national bank.[350]

Once again Maryland apparently had history and constitutional intent on its side. Once again the practical implications of its argument were disturbing. In the climate of existing opinion, the legislatures of the southern and western states, representing the dispossessed or hard-pressed land interests, would, if allowed, tax the Bank to death. The Bank would have to withdraw its branches from those states and lose its control over the national currency.

The practical consequences flowing from the state's position led counsel for the Bank to ignore the argument from *The Federalist* and to summon up a countervailing principle, discerned in the implications of the supremacy clause. The Constitution, they argued, had respected the power of state governments to be sure,

---

347 THE FEDERALIST NO. 33, *supra* note 7, at 208. Martin in his argument on the states' taxing power also relied on the reports of the debates in the state ratifying conventions, including the report of Marshall's speech in the Virginia convention in which he closely followed Hamilton's argument from *The Federalist*. On hearing his own words read back to him, the Chief Justice was reported to have taken a deep breath. *See* WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 4 THE OLIVER WENDELL HOLMES DEVISE, HISTORY OF THE UNITED STATES SUPREME COURT 239 (1988).

348 *Id.*

349 17 U.S. (4 Wheat.) at 342 (argument of J. Hopkinson).

350 *Id.* at 350-52.

but it had also made provision for federal power. The people, Webster said, had established a complex system of divided sovereignty. From the fact of divided sovereignty, it had been easy to foresee that questions of competing power would arise between these governments. For this reason, it had been "of great moment" to determine upon what principle these questions of competing power would be decided and who would decide them. The determining principle was the principle of federal supremacy contained in the supremacy clause: federal laws passed pursuant to the Constitution should control inconsistent state laws and state constitutions. "The ultimate power" of applying this principle and deciding these questions rested in the Supreme Court of the United States.[351]

Having thus posited the principle of the supremacy clause as the Constitution's paramount provision and as its cardinal rule of interpretation, Webster proceeded to apply it to the determination of the case. The Maryland tax was inconsistent with the free operations of the Bank and was therefore invalid. If the state could tax, it could tax without limitation and without discretion. And an "unlimited power to tax involves, necessarily, a power to destroy."[352] Moreover, the United States must have property located in the states free of state taxation. Just as a state could not tax proceedings in the federal courts, so it could not tax a national bank.[353]

Pinkney pushed this argument further. Whatever the United States had a right to do, it could do free of a contrary state action. Just as impliedly under the Constitution the army, navy and the national treasury, as well as the federal courts, were immune from state taxation—a single state could by a tax destroy them—so then necessarily the United States Bank was immune. There was a manifest repugnancy between the power of Maryland to tax and the power of Congress to preserve the Bank.[354]

To summarize the arguments on the second issue of the appeal, counsel for Maryland had argued from a specific prohibition of state taxes on imports and exports to an implied general constitutional intention to allow the states the power to impose any other tax, and relied for support on the imposing authority of Hamilton in *The Federalist*. In reply, the Bank had argued, from

---

351 *Id.* at 326-27 (argument of D. Webster).

352 *Id.* at 327.

353 *Id.* at 328.

354 *See id.* at 396 (argument of W. Pinkney).

the supremacy clause, for the presence in the Constitution of a paramount principle, overcoming any other constitutional principle, whereby the operations of the federal government were systematically immunized from state action; and from the application of that principle to the present case, an implied constitutional provision prohibiting all state taxation of the national government's property, including that of the stock of the United States Bank.

On the first issue of the appeal, Maryland had argued from the Constitution a paramount principle memorialized in the tenth amendment, supported again by the authority of both Hamilton and Madison in *The Federalist*, that the national government was strictly limited to the execution of its delegated powers and only to such incidental powers as might be "indispensably necessary" by "unavoidable implication." And the Bank had argued from established practice and considerations of practicality for a broader range of implied powers necessary to meet the ends of government, as covered by the "necessary and proper" clause. On both questions, the Bank, unable to point to specific provisions in support of its position, relied on constitutional implications in the face of the contrary authority of *The Federalist*. But the weight of practicality and the national necessity lay in its favor. The written provisions of the Constitution had to be construed in the light of the underlying practicality and necessity, regardless of *The Federalist*. Marshall would have to find a way.

5. *The Opinion*

a. The Power to Create the Bank

Viewed in its essential terms, *McCulloch v. Maryland* was not an ordinary case, not even an ordinary constitutional case. Both sides knew very well that the framers had misconceived the role that paper money necessarily had to play in the economy of the country. The framers' way had simply not worked and a different way had grown by trial and error, largely through state authority. The wartime experiences had revealed the necessity of a controlling national participation. Pragmatism had required that this participation be constituted in the form of a national bank. Now three years later, the state of Maryland intended to limit its effectiveness or tax it out of existence and, when challenged, asserted before the Court that its action was founded on the terms of the written Constitution and that the federal action was not. It was an argument based on a version of the Constitution that could

not work but, because it had a certain historical authenticity, had the ring of plausibility and, for a rural constituency which disliked national control, a popular appeal. In practical terms, as Andrew Jackson would prove, it could win votes, elect a President and overturn the established order of national government. It would, when successful, distort past history, make hash out of Madison's argument based on prescription, and, as Van Buren would discover leave the national currency disastrously uncontrolled, invite speculation, an overexpansion of credit, inflation and subsequent panic and depression.[355] It would make of the central government a holding company for western and southern

---

[355] For a recapitulation of the Jacksonian policies that led to this cycle, see HAMMOND, BANKS AND POLITICS IN AMERICA, *supra* note 42, at 412. First Jackson, gratified by nis reelection in 1832, following his veto earlier that year of the bill to recharter the United States Bank, decided upon a strategy calculated to destroy its influence prior to its expiration in 1836. In December 1833, he suggested to Congress the sale of the government's stock in the Bank and the removal of the government's deposits from it. *Id.* When the House rejected these suggestions, Jackson was determined on the removals anyway. When McLane, Secretary of the Treasury, opposed the removals, he was made Secretary of State and was replaced with William J. Duane. When eventually Duane also opposed the removals, he was dismissed and replaced in September 1833, with the Attorney General Roger B. Taney who faithfully carried out the removals and placed them in certain "pet" state banks. *Id.* at 417-20, 456. As a result, from that time on the United States Bank no longer functioned as a regulator of the currency. On the contrary, it began extending its credit at a rate substantially greater than that recognized as sound practice in the commercial center banks. *Id.* at 438-39. From 1834 through 1836, the number of state banks grew nearly by half, and with it the expansion of credit, speculation, the price of commodities and land and the nation's trade deficit. *See id.* at 452-53, 494.

Jackson, in the summer of 1836, attempting to thwart land speculation, ordered the issuance of his "specie circular," directing government land agents to accept only gold and silver in payment for the purchase of public lands. The result was to impound specie in the West, where the land sales were. At the same time, under another administration measure requiring the distribution of surplus federal revenues among the states according to population, specie was required mainly in the East, where most of the population was located. *See id.* at 454-58. The specie circulation and the revenue distribution therefore worked at cross-purposes, and produced an absurd disorder: "[m]illions upon millions of coin were in *transitu* in every direction and consequently withdrawn from useful employment. Specie was going up and down the same river to and from the South and North and the East and West at the same time." *Id.* at 456 (footnote omitted).

Not coincidently, the Bank of England discovering that its specie resources were failing rapidly, directed its Liverpool agent to reject the paper of certain commercial houses having American connections. *Id.* at 457. The British stopped buying and lending and expected payment of their debts. A crisis soon followed. Demand for cotton contracted and cotton prices fell, leading to business failures in New Orleans and New York in March 1837. Business fell off drastically. *Id.* at 459. In May 1837, a run on the banks for gold and silver ensued and on May 10, the American banks began to suspend payment in specie. *Id.* at 466. The Panic of 1837 had started only two months after Van Buren had taken office.

landowners, as the southern Democrats after Van Buren would ensure.[356] In those terms, the abstract arguments of "necessary and proper" did not make lawyer's sense, but they did make political sense. *McCulloch v. Maryland* was a political forum for a political movement to be born and a political leader yet to be named. It might be Spencer Roane, then Chief Justice of the Virginia Court of Appeals. It might be a man from the West. It was a case and movement in search of a constituency and an available candidate.

Only if viewed in these terms does Marshall's opinion for the Court make sense. Realizing the inchoate underlying forces and the threat they represented to national sovereignty, Marshall quickly moved to the defense of the national government, and like an advocate for the United States wrote an opinion which from its opening sentence to its final conclusion revealed a consistent bias in favor of the national position.

In his opening sentence Marshall subtly set the tone of his entire opinion by down-grading the status of the several states and exalting the status of the national government, and by depreciating the position of the state of Maryland and appreciating the position of the United States Bank. He began this way: "In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff on his part, contests the validity of an act which has been passed by the legislature of that state."[357] Maryland, it will be noted, he had referred to in the lower case, as: "a sovereign state;" the national government in the upper case, as "the Union." The Court understood the symbolic value of upper and lower case.[358]

---

356 For an excellent study of the influence of regional politics on the national government before the Civil War and especially of the crucial role played by the South in using its swing votes in the struggle between East and West for power and to influence Presidential elections and thereby national policy, see C. WILTSE, JOHN C. CALHOUN: NULLIFIER, 1829-1839 343 (1949); *see generally* C. WILTSE, JOHN C. CALHOUN: SECTIONALIST, 1840-1850 (1951).

357 17 U.S. (4 Wheat.) at 400.

358 Some years later, after Marshall's death and after Jackson had appointed to the Court men reflecting his more pronounced states' rights convictions, the Court reversed the Marshall practice, customarily referring to the individual states in the upper case, as "the sovereign State," and to the national government, not as "the Union," which suggests a governmental entity separate and apart from the several states, but as "the United States," suggesting an agent of limited powers acting in behalf of the all-powerful principal states. *See, e.g.*, Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 139 (1837) ("[I]t is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness and prosperity of its people

This statement subtly characterized the position of the parties as well: "obligation" and "law," suggested binding authority, "denies," the odor of impious defiance; while "the validity of an act . . . by the legislature of that state," suggested the naked assertion of state power without the color of law. He continued in similar vein:

> The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government.[359]

The Union having star billing was "the government," the states as supporting cast were "the members."

Having set the stage, Marshall alluded to the political pressures felt by the Court in deciding these questions and the dangers of federal and state conflict. Instead of avoiding these pressures, he explicitly brought them to the fore and made of them a necessity for peaceful solution, a solution which, picking up on Webster's suggestion, could only come from the Court.[360] In short swift words he suggested the Court's peculiar function. Without it, constitutional disputes over the proper allocation of federal and state power could quickly escalate into civil war. In the place of violence, judicial supremacy was a political necessity. Both the federal and the state governments needed the Court:

> No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty.[361]

This majestic assumption and assertion of exclusive jurisdiction in cases involving the competing claims of state and federal govern-

---

and to provide for its general welfare . . . .") In that opinion, the national government was consistently referred to as that of "The United States." As noted in G. DUNNE, MONETARY DECISIONS OF THE SUPREME COURT 48 n.37 (1960): "Up to the Civil War and for a short time subsequently 'the United States' is frequently followed in treaties and other like documents by the third person plural; thereafter it is usually followed by the third person singular."

359 *McCulloch*, 17 U.S. (4 Wheat.) at 400.

360 *Id.* at 400-01.

361 *Id.*

ment was, though simple and direct in terms, nevertheless an important moment in the history of the Court and its crucial power of judicial review. Both assumption and assertion were made easy by the fact that the State of Maryland had, in not challenging the Court's jurisdiction, conceded it. Again, the presence of Luther Martin was a significant factor. Martin knew that by the supremacy clause in Article VI, as much as by the language of Article III, the framers had intended that the Court should be the instrument whereby such state laws as were inconsistent with federal laws, treaties and the Constitution could be set aside. Originally the framers had provided for the invalidation of such state laws by Congress. It had been Martin himself who had instead proposed the supremacy clause as the more suitable alternative, thereby providing for a judicial rather than a Congressional involvement in the business of invalidation.[362]

Fortunately for the Court, Martin had also been of counsel in the landmark case of *Fletcher v. Peck*,[363] where the Court had for the first time assumed and asserted a power of judicial review over a state law for the purpose of passing on its validity under the Constitution.[364] Martin, who in effect represented Georgia's position in that case, had not challenged the Court's power of judicial review, but confined his argument to the merits.[365] *McCulloch* represented a more important extension of the power asserted in *Fletcher*. In *Fletcher*, no question of federal legislative power had been involved and state legislative power had been challenged as in conflict with a specific prohibition of the Constitution's contract clause. In *McCulloch*, however, federal legislation was involved and its exercise challenged on substantial textual grounds. Moreover, state legislation was challenged, not under a specific constitutional prohibition, but under the necessities of the challenged federal legislation and the general implications of the supremacy clause.

In both *Fletcher* and *McCulloch* then, Marshall and the Court

362 The sixth resolution of the Virginia plan had proposed that Congress be empowered to "negative all laws passed by the several States, contravening in the opinion of the national legislature, the articles of union." 2 FARRAND, *supra* note 40, at 21-22. Eventually, on July 17th, this resolution was considered and defeated. *Id.* at 22, 28. Instead, immediately thereafter, Luther Martin proposed the resolution embodying the supremacy clause. It was adopted unanimously. *Id.* at 22, 28-29.

363 10 U.S. (6 Cranch) 87 (1810). The Court there held that a Georgia statute rescinding a prior land grant was invalid under the contract clause. *See generally* Lynch, *Fletcher v. Peck: The Nature of the Contract Clause*, 13 SETON HALL L. REV. 1 (1982).

364 *See Fletcher*, 10 U.S. (6 Cranch) at 130-39.

365 *See id.* at 115, 124-25 (argument of Mr. Martin).

were lucky that the presence of Luther Martin[366] insured the absence of a challenge to the judicial power of the Court. Such challenges, as would later develop, would be mounted offstage, in the press, where Marshall would respond in kind.[367] In the meantime,

---

366 On the other hand, Martin's presence meant the Bank could not advance the Dallas-Calhoun argument of a supposed generic intent that Congress assume the control over all forms of currency, paper as well as coin. *See supra* notes 284-301 and accompanying text.

367 Later Spencer Roane, writing under the pseudonym "Hampden," as part of a wide-ranging newspaper attack on the opinion as a whole, would attack Marshall's assertion of the Court's exclusive jurisdiction as without express support in the Constitution. *See* Letter from "Hampden" (S. Roane) to The Richmond Enquirer (June 22, 1819) *reprinted in* JOHN MARSHALL'S DEFENSE OF *McCulloch v. Maryland* 152 (G. Gunther ed. 1969) [hereinafter GUNTHER, DEFENSE]. *See also infra* text accompanying note 425. Marshall's position was untenable, Roane said, when considered in light of the fact that the right denied was that of a sovereign state, one of the contracting parties to the Constitution, and that the tribunal denying the right was but a deputy or department of another contracting party. He argued in addition, that since the general government was interested in the case, the Court as a department of that government was disqualified to decide a matter which he said was its own cause. The better course, he implicitly suggested, was to have referred the matter to an impartial arbiter for determination. Letter from "Hampden" (S. Roane) to the Richmond Enquirer (June 22, 1819) *reprinted in* GUNTHER, DEFENSE, *supra*. The course followed by the Court, he concluded, might work to change the Constitution, entirely destroy the state authorities and lead to the national government's easy and complete triumph over the liberties of the people. Letter from "Hampden" (S. Roane) to The Richmond Enquirer (June 22, 1819) *reprinted in* GUNTHER, DEFENSE, *supra*, at 154.

Thereafter Marshall, writing under the pseudonym "A Friend of the Constitution," responded in kind. The alternative to the peaceful execution of federal laws by the judiciary was either resistance with impunity or enforcement by the sword, involving perhaps a civil war. Letter from "A Friend of the Constitution" (J. Marshall) to The Alexandria Gazette (July 15, 1819) *reprinted in* GUNTHER, DEFENSE, *supra*, at 208. Moreover, recourse to arbitration was spurious. The parties might not agree. The arbitrator might not be competent or, worse, might judge according to considerations of policy and intrigue rather than principles of right, and by aiding the weaker party "foment divisions, animate discord, and finally produce dismemberment[.]" Letter from "A Friend of the Constitution" (J. Marshall) to The Alexandria Gazette (July 15, 1819) *reprinted in* GUNTHER, DEFENSE, *supra*, at 208. Moreover, the United States created by the Constitution was not a league. It was a government. Letter From "A Friend of the Constitution" (J. Marshall) to the Alexandria Gazette (July 9, 1819), *reprinted in* GUNTHER, DEFENSE, *supra*, at 199. Nor was the Constitution a compact. There were no parties. The government of the United States could "not be a party to the instrument by which it was created." Letter From "A Friend of the Constitution" (J. Marshall) to The Alexandria Gazette (July 14, 1819), *reprinted in* GUNTHER, DEFENSE, *supra*, at 203. Nor were the states parties, because the acts leading to the Constitution's adoption were that of the people themselves, assembling in their respective states. Finally, the judiciary was not the deputy or department of Congress. In deciding a judicial question the judicial power was the government of the United States. Letter from "A Friend of the Constitution" (J. Marshall) to The Alexandria Gazette (July 15, 1819), *reprinted in* GUNTHER, DEFENSE, *supra*, at 210. When someone challenged the authority of the United States and one of its laws, proceedings for its enforcement were started. As

unencumbered with the jurisdictional issue, he could at once proceed to the merits and the first question of the appeal: whether Congress had the power to incorporate a bank. At once he adopted the practical argument from prescription, first raised in the House debates in 1811,[368] then by Madison in his message vetoing the bill to recharter the bank in 1815,[369] and by Webster at the outset of his oral presentation in *McCulloch*.[370] In fact, Marshall closely followed Webster's language: "It has been truly said that this can scarcely be

---

a matter of plain common sense, the question must be referred to a court for settlement or remain forever suspended. To that end agents had to be furnished. And who were more suited for this function than the judges? Letter from "A Friend of the Constitution" (J. Marshall) to The Alexandria Gazette (July 15, 1819), *reprinted in* GUNTHER, DEFENSE, *supra* at 211.

But before examining the question, Marshall ironically expressed his surprise that the argument had not occurred to counsel for Maryland, since with ingenuity they had made every other argument "on which a decent self-respect would permit them to insist." Letter from "A Friend of the Constitution (J. Marshall) to The Alexandria Gazette (July 15, 1819), *reprinted in* GUNTHER, DEFENSE, *supra*, at 201. In other words, Maryland understood that it was the framers' intent to provide for a federal judicial review of such state proceedings as were inconsistent with federal laws, treaties and the Constitution, and that such intent had been embodied in the supremacy clause of Article VI and in Article III. Luther Martin knew this because it was he who at the Convention introduced the supremacy clause and moved its adoption in lieu of another provision advanced by Charles Pinckney and Madison that would have placed in Congress the power to negative all state laws inconsistent with federal laws, treaties and the Constitution. *See supra* note 361 and accompanying text.

Justification of Marshall's reasoning may be found in Hamilton's writings:

> [T]here ought always to be a constitutional method of giving efficacy to constitutional provisions. What for instance would avail restrictions on the authority of the state legislatures, without some constitutional mode of enforcing the observance of them? The states, by the plan of the convention are prohibited from doing a variety of things; some of which are incompatible with the interests of the Union, and others with the principles of good government . . . . No man of sense will believe that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the state laws, or an authority in the federal courts to over-rule such as might be in manifest contravention of the articles of Union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former, and I presume will be most agreeable to the states.

THE FEDERALIST No. 80, at 535 (A. Hamilton) (J. Cooke ed. 1961).

Essentially, Roane was continuing the controversy he had opened with the Court, following its decision in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), and which he would later continue following its decision in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

368 *See supra* notes 191-97 and accompanying text.

369 *See supra* notes 275-77 and accompanying text.

370 *See supra* notes 341-42 and accompanying text.

considered as an open question . . . ."[371] The legitimacy of the Bank had been early and finally established in practice. It did not concern the great principles of liberty, but the adjustment of the respective powers of those governments which are equally the representatives of the people, upon which an immense property had already been advanced.[372] He referred to the wartime difficulties which Wirt had mentioned.[373] Not only was the act authorizing the first bank widely debated, Marshall wrote, but the embarrassments consequent upon the expiration of its charter

> convinced those who were most prejudiced against the measure of its necessity and induced the passage of the present law. It would require no ordinary share of intrepidity to assert that a measure adopted under those circumstances was a bold and plain usurpation, to which the constitution gave no countenance.[374]

In other words, the Bank was more than established. It was a practical, working "necessity." In this necessity, lying outside the text of the written Constitution, the words of the text were construed.

Of course, the theory argued by Maryland, was quite different. The words must mean now what they meant in the beginning. "Necessity" and "circumstances" after the fact are immaterial. But judges are more than technical exegetes. They are an integral part of government. Whatever the words might have meant "then," they cannot be allowed to mean that now, if it would seriously impair the work the government must do. The meaning must bend, the words grow more elastic, and if possible, be found to have meant the same all along. If the Court must adjust the respective powers of the state and federal governments, the necessity of circumstances, not the limits of constitutional text, must be the standard for its adjustment. Theory must be stated or restated to fit the facts, so that it is the Constitution which seems to control, whereas in reality it is more controlled than controlling. As Marshall said, immediately after referring to the practical necessity of "circumstances": "These observations belong to the cause; but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the constitution."[375] Happily, of course, theory did accord with the necessity disclosed in the facts.

---

371 *McCulloch*, 17 U.S. (4 Wheat.) at 401. *Cf. supra* text accompanying note 341.

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

373 For Wirt's recounting of the embarrassments growing out of the War, see *supra* note 345 and accompanying text.

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

375 17 U.S. (4 Wheat.) at 402.

Then Marshall, having told all men of sense that it could not very well be otherwise, turned next to the Constitution and, facing Maryland's argument of limited expressed powers granted by sovereign independent states, bounded beyond it in one leap. This being a political case, he would match politics with politics and take his case to the people. The Constitution came not from the states, he wrote, but from the people of the states in convention assembled. Therefore, the government of the Union "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 themselves and to their posterity.' "[376] The conclusion followed: "The government of the Union . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."[377]

Of course this was really not so much legal as political theorizing. It was a view of the government with which the South could not agree. For John Taylor, the future southern spokesman for states' rights, the powers of the federal government under the Constitution were no more than what the states had said they were. In Taylor's opinion, the meaning of the Constitution was for the states to decide, and not for the Court which, more dangerously than Congress and in the name of the people, skillfully and endlessly assumed a supreme command position.[378] The operative provisions of the Constitution provided its correct meaning, not the preamble quoted by Marshall. That was oratory to be limited by the executory language.[379]

There was a profound difference between the theories of Marshall and Taylor. Marshall's was based on political reality, in support of a government in place and working, whose representatives had been elected and reelected. Taylor attacked this theory of government with its direct links to the electorate and argued instead for a national government answerable to state legislatures which would decide whether the federal government had acted within its proper sphere of limits. Taylor would deny the operations of the elective process in the name of a more proper, legal constitutionalism. Such a theory, however learnedly supported by historical and philosophi-

376 *Id.* at 403-04 (quoting U.S. CONST. preamble).
377 *Id.* at 404-05.
378 J. TAYLOR, CONSTRUCTION CONSTRUED AND CONSTITUTIONS VINDICATED 158-59 (1970).
379 *See id.* at 164-65.

cal arguments, was both profoundly anti-democratic and oblivious of the history of the country since the Constitution had been adopted.[380] It was a theory doomed to decline and defeat.

Having occupied the higher ground on the purely political question, whether the states or the people were the ultimate source of national authority, Marshall now moved in this highly political case to the legal question, whether the creation of the Bank was within the enumerated powers of the national government. The Bank's position rested on tentative ground. Congress was of course limited in its actions to the enumerated powers, and obviously the creation of the Bank was not the exercise of an expressed power, but, at best, of implied or incidental powers. Before entering upon a

---

380 Taylor had a selective historical memory. He ignored the immense accretions of national powers implicit in the purchase of Louisiana and the embargo against American shipping undertaken by his friend, Thomas Jefferson, and concentrated instead on the accretion of power implicit in the creation of national bank. He also ignored the fact that in 1816, the year the Bank was rechartered, its constitutionality had almost universally been conceded.

Moreover, he was impractical. Marshall, by largely leaving the selection of means under the "necessary and proper" clause to Congress, had converted the question largely into one wholly political or non-justiciable. The Court many years later in not passing on the constitutionality of a law making the government's paper money legal tender in time of peace under the "necessary and proper" clause completed the process, holding the question entirely political and non-justiciable:

> The question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or of the inadequacy of the supply of gold and silver coin to furnish the currency needed for the uses of the government and of the people, that it is, as a matter of fact, wise and expedient to resort to this means, is a political question, to be determined by Congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts.

Juilliard v. Greenman, 110 U.S. (6 Wheat.) 421, 450 (1884).

*See also* Letter from J. Madison to Spencer Roane (May 6, 1821), *reprinted in* 9 HUNT, THE WRITINGS OF JAMES MADISON 55 (1910) (response to a letter from Roane criticizing the Court's decision in *Cohens v. Virginia*). The states, Madison wrote, had less to fear for their reserved sovereignties from a

> latitude of Jurisdiction assumed by the Judicial Power of the U.S. . . . than . . . [from] the National Legislature; . . .[whose] encroachments . . . are more to be apprehended from impulses given to it by a majority of the States seduced by expected advantages, than from the love of Power in the Body itself . . . .
>
> Such is the plastic faculty of Legislation, that notwithstanding the firm tenure which judges have on their offices, they can by various regulations be kept or reduced within the paths of duty; more especially with the aid of their amenability to the Legislative tribunal in the form of impeachment. It is not probable that the Supreme Court would long be indulged in a career of usurpation opposed to the decided opinions & policy of the Legislature.

*Id.* at 57-58.

discussion of these powers, Marshall again sought the advantage of higher ground. Ascending to the pinnacle of the Constitution, he claimed the protective authority of the supremacy clause, its paramount provision. As though the state were challenging not the power of the national government to act, but the duty of the state to observe a validly enacted law, Marshall wrote:

> If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it by saying, "this Constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states shall take the oath of fidelity to it.
>
> The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "anything in the constitution or laws of any state to the contrary notwithstanding."[381]

It was stirring language, the effect of which was calculated to induce the reader to acknowledge that the Union occupied the higher ground, the individual states the lower. Left to be demonstrated was that in creating the Bank the government of the Union had not stepped down from the higher ground. To resolve that, Marshall would resort to "a fair construction of the whole instru-

---

[381] 17 U.S. (4 Wheat.) at 405-06. Compare what Hamilton wrote:

> If it would be necessary to bring proof to a proposition so clear, as that which affirms that the powers of the Federal Government, as to its objects, are sovereign, there is a clause of its constitution which would be decisive: it is that which declares, that the constitution, and the laws of the United States made in pursuance of it, and all treaties made, or which shall be made, under their authority, shall be the *supreme law of the land*. The power which can create the supreme law of the land, in any case, is doubtless sovereign as to such case.

Opinion Letter of Sec'y of Treasury Alexander Hamilton to Pres. Washington (Feb. 23, 1791), *reprinted in* M. Clarke & D. Hall, *supra* note 2, at 96.

ment."[382] With stirring language hard upon stirring language, he read the Constitution as a great provider:

> 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 a prolixity of a legal code, and could scarcely be embraced by the human mind. . . . Its 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. 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. . . . In considering this question, then, we must never forget that it is a constitution we are expounding.[383]

These were the familiar arguments of 1791 and 1811,[384] but from Marshall's pen they rolled with majestic eloquence across the mountains and valleys of constitutional argument, and sweeping aside the low-lying considerations of the states' rights advocates, revealed in triumphant outline the lofty design of the Constitution, whose true exposition was the task of Marshall and the Court. There in the Constitution, could be found the great powers of the national government, the powers "to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war;

---

382 17 U.S. (4 Wheat.) at 406.

383 *Id.* at 407.

384 For example, refer to the speech of Rep. Sedgwick of Massachusetts on February 4, 1791:

> [T]he Constitution had expressly declared the ends of Legislation; but in almost every instance had left the means to the . . . Legislature. From the nature of things this must ever be the case; for otherwise the Constitution must contain not only all the necessary laws under the existing circumstances of the community, but also a code so extensive as to adapt itself to all future possible contingencies.

2 ANNALS OF CONG. 1912 (Feb. 4, 1791) (statement of Rep. Sedgwick).

Indeed, Marshall's words were but a recast of Madison's own words in explaining the "necessary and proper" clause:

> Had the 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 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 . . . .

THE FEDERALIST No. 44, at 304 (J. Madison) (J. Cooke ed. 1961). *See also supra* note 120 (discussing Randolph's remarks in the Virginia ratifying debates); *McCulloch*, 17 U.S. (4 Wheat.) at 384-85 (argument of Mr. Pinkney).

and to raise and support armies and navies."[385] Marshall proceeded to swathe Hamilton's original argument, that the operation of the Bank was conducive to these varied powers, in his wonderful constitutional rhetoric:

> The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. . . . But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nations so vitally depends [sic], must also be entrusted with ample means for their execution. . . . It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous, and expensive?[386]

Marshall with his happy images of sword and purse and marching armies was referring to the unhappy experiences of the recent war. With his graphic evocation of the nation's expanse, he was appealing to pride in the Union and to the incipient spirit of Manifest Destiny. He continued in this elevated style: vast operations turned on the details of execution. Great powers require workable methods. The choice of the appropriate details and methods, including among them the power to create a corporation, was for Congress. He dismissed the notion that the creation of a corporation was a special attribute of sovereignty.[387] Moreover, the right of Congress to employ the necessary means for the execution of the general powers had not been left to general reasoning. The Constitution had specifically provided for it in the "necessary and proper"

---

385 *McCulloch*, 17 U.S. (4 Wheat.) at 407.

386 *Id.* at 407-08.

387 *Id.* at 410-11. Here Marshall essentially followed Hamilton's reasoning. *See supra* notes 97-99 and accompanying text. *See also supra* notes 294-95 and accompanying text (for Calhoun's comments in 1816, that objections to Congress' power to create a corporation were not worthy of discussion).

clause.[388]

Hamilton's argument in *The Federalist*, that the clause was tautological or redundant, Marshall dismissed out of hand because such an interpretation would render the language itself without purpose.[389] He did not refer to Hamilton or *The Federalist* by name. Madison's argument in *The Federalist*, that the word, "necessary," limited the power to pass laws for the execution of the express powers only to such as were indispensable, Marshall further rejected as not in accordance with common usage. Again, he did not refer to Madison or *The Federalist* by name.[390] Rightly to construe the clause, it was appropriate once again to lift up one's eyes and consider that:

> The subject is the execution of those great powers on which the welfare of a nation essentially depends. . . . This provision is made in a constitution intended to endure for ages to come. . . . 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.[391]

Again we can discern in his elevated discourse the lofty design of the Constitution: the provision for the great powers of government for a great country and for the supreme authority in that government to act intelligently and with flexibility. Then having directed our vision to these commanding heights, he concluded: "If we apply this principle of construction [that of indispensable necessity] to any of the powers of the government, we shall find it so pernicious in its operations that we shall be compelled to discard it."[392] In these conclusive terms, he rejected the apparently imposing authority of *The Federalist*, without so much as mentioning it. Nevertheless, he continued in six additional pages to demonstrate why the words, "necessary and proper," could not mean what Hamilton and Madison had originally said they meant,[393] and concluded again with his other magnificent peroration: "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

---

388 *McCulloch*, 17 U.S. (4 Wheat.) at 411-12.

389 *See McCulloch*, 17 U.S. (4 Wheat.) at 412-13. *See supra* notes 122-26 and accompanying text (discussing Hamilton's interpretation of the "necessary and proper" clause).

390 *McCulloch*, 17 U.S. (4 Wheat.) at 413. *See supra* notes 113-17 and accompanying text (discussing Madison's interpretation of the necessary and proper clause).

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

392 *Id.* at 416.

393 *Id.* at 416-21.

prohibited, but consist with the letter and spirit of the constitution, are constitutional."[394] Whereupon in four additional pages, he held again that a corporation was a proper means for Congress to employ in the execution of its powers.[395] Then after briefly adverting to the existence of state banks, Marshall concluded that Congress might prefer a national bank to state banks and held that the act to create the national bank was consequently valid.[396]

In writing his opinion, Marshall had followed the outlines and issues of oral argument. Maryland had only in passing raised the issue of the Bank's propriety; that is, conceding arguendo that it was necessary, was its creation "proper?" It had been content merely to controvert the meaning of "necessary" as an abstract question, devoid of circumstance, and had not drawn into question the relation of the Bank's lending operations to the various powers of government. The Bank in response had made its stand first on practical grounds. Long-established practice and the wartime history had revealed its necessity to the nation and government. Then linking the practical necessities of the nation and government to the words of the Constitution, the Bank had proceeded to join issue with Maryland and argue in the abstract for a broad construction of the "necessary and proper" clause. Taken as a whole, its argument suggested something akin to what Hamilton had elsewhere written in *The Federalist*, but which had not been mentioned in *McCulloch* either in the oral arguments or in the opinion. "[N]ations," he wrote, "pay little regard to rules and maxims calculated in their very nature to run counter to the necessities of society. Wise politicians will be cautious about fettering the government with restrictions, that cannot be observed . . . ."[397] The consequent alternatives were either a feeble government, which unable to provide for its constituents' necessities would lose their respect, or a government, which compelled by the necessities, breached the Constitution, such breaches of necessity leading to constitutional irreverence and in time to breaches of non-necessity. To prevent either of these unacceptable alternatives, the Constitution should have been written to provide for these broad powers of government and should be so construed by the Court.

Marshall followed the Bank's argument. The Bank was long established in practice and the wartime experiences had revealed its

394 *Id.* at 421.
395 *Id.* at 421-24.
396 *Id.* at 424.
397 THE FEDERALIST No. 25, at 163 (A. Hamilton) (J. Cooke ed. 1961).

necessity. The written text of the Constitution was accordingly read in the light of these unwritten considerations of practicality and necessity. Judicial review became as much an exercise in the unwritten as in the written and the Court more the master of the Constitution than its servant. Only in this way would the Constitution work. The length and breadth of words had to depend on the exigency of circumstance and not vice versa. The meaning of "necessary and proper" was therefore not abstract but inherently related to the practical. As Marshall later wrote, what was impracticable was erroneous.[398] Happily, ignoring the authority of *The Federalist*, it was not too difficult, as a matter of usage, to construe "necessary and proper" as meaning "needful or conducive to" the general powers.

The argument worked so long as it was not connected; so long as no nexus was made between the money-lending, paper-making functions for which the Bank was created and the general powers of the government conducive to which its creation was generally attributed. Connected, the government was guilty of the forbidden breach of necessity: creating an instrument of national control over the nation's money supply, which consisted largely of constitutionally prohibited paper. Unconnected, the argument enabled Congress to provide for the needs of the country. Naturally, the Bank had not attempted the connection. Its argument intentionally contained a missing link, the absence of which Maryland forbore to mention.

Marshall, constrained by the same practicalities, did not mention the missing link either. "Necessary and proper" meant "needful or conducive to" one of the general powers. The Bank was therefore necessary and proper because its operations were needful or conducive to the various, mentioned powers. In form, the Court held only that Congress, in creating the Bank, had exercised a power incidental to the ends of the various expressed general powers. In substance, by its failure to insist on a demonstrated link between means and ends, the Court had held that Congress had the power to do whatever was incidental to, and by implication, whatever was necessary for, the good of the country. "Necessary

398 In his letter under the pseudonym of "A Friend to the Union," in response to the pseudonymous attack by Amphictyon on the Court's reasoning in *McCulloch*, Marshall, after analyzing the argument that "necessary" in the "necessary and proper" clause meant "indispensably necessary," concluded that: "The rule . . . laid down by Amphyction [sic] is an impracticable, and consequently an erroneous rule." Letter From "A Friend to the Union" (J. Marshall) to the Philadelphia Union (Apr. 24, 1819), *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 95.

and proper" meant more than counsel had formally argued for and more than the opinion of the Court had disclosed.

b. The Power of the State to Tax the Bank

Having held the Bank "necessary and proper," Marshall then turned to the question of whether a state could constitutionally tax a branch of the Bank located in that state. He noted the express constitutional prohibition in Article I, section 10 against state duties on imports or exports,[399] upon which Maryland had relied. But instead of considering the Maryland argument, Marshall proceeded almost at once to a discussion of the supremacy clause. It was, he wrote, a principle of "paramount character [which] would seem to restrain . . . a state from such other exercise of this power [to tax], as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union."[400] It followed that a "law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used."[401] In other words, the supremacy principle contained an implied repealer.

Marshall disregarded the authority of *The Federalist*, which had deduced from the presence of the specific prohibition against a tax on imports and duties and the absence of any other specific prohibition, a general constitutional intent to leave the state power to tax untrammelled.[402] He focused instead on the Bank's claim and, in highly figurative language, concluded that the tax was vitiated by a "principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds."[403] Once again, Marshall, with the instincts of a rhetorician, enwrapped the controlling principle of his argument in the striking and graceful flow of literary dress, and with rhythms and imagery appealing both to the inner ear and the outward eye, beguiled his reader to the willing acceptance of his major prem-

399 U.S. CONST. art. I, § 10, cl. 2. This clause provides in pertinent part: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . . ." *Id.*

400 *McCulloch*, 17 U.S. (4 Wheat.) at 425.

401 *Id.* at 425-26. Marshall's reasoning followed Webster's argument. *See supra* notes 351-53 and accompanying text.

402 This was the substance of Maryland's arguments, *see supra* notes 347-48 and accompanying text.

403 *McCulloch*, 17 U.S. (4 Wheat.) at 426.

ise, from which in imperious logic he could sweep to his desired conclusion. Marshall was more than a logician and a jurist, he was a consummate artist.

His major premise was the paramountcy of federal supremacy under the Constitution and under such laws as the federal government enacted pursuant to it. From this, he rapidly deduced further corollaries. First, the power to create implies a power to preserve. Second, placing the power to destroy in different hands is incompatible with the power to create and preserve. Third, such incompatibility mandates that that power must control which is supreme and not yield to the power over which it is supreme. Applying these corollaries to the case at hand, Marshall concluded that the power of Congress to create the Bank included the power to preserve it; that the power of the states to tax the Bank might destroy it and was thus incompatible with the national power to create and preserve it; and that such a power in the state to tax was incompatible with the legitimate operations of the supreme national government.[404] He concluded with a reversion to the supremacy clause and a consideration of the implications of supremacy: "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."[405]

Then, as if aware that it might be objected that nothing he had written had been expressed in the Constitution and that he had gone beyond the written text into the realm of unwritten implication, he formally asserted the necessity of constitutional construction by implication: "This effect [of the supremacy principle] 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."[406]

Again this seemed to run counter to what Hamilton had written in *The Federalist*. During the ratifying process, he asserted, critics of the Constitution had suggested that the

> power [of the Court] of construing the laws according to the *spirit* of the constitution, will enable that court to mould [sic] them into whatever shape it may think proper; especially as its decision will not be in any manner subject to the revision or

404 *Id.* at 426-27.
405 *Id.* at 427.
406 *Id.*

> correction of the legislative body. This is [a power] unprecedented as it is dangerous.[407]

In response, Hamilton had characterized this suggestion as "altogether made up of false reasoning upon misconceived fact."[408] He assured his readers that "there is not a syllable in the plan under consideration, which *directly* empowers the national courts to construe the laws according to the spirit of the constitution, or which gives them any greater latitude in this respect, than may be claimed by the courts of every state."[409]

Hamilton's response may be faulted for containing a negative pregnant, a form of pleading defective at common law. His denial of a *direct* empowerment failed to negate and consequently had the effect of admitting an indirect empowerment. But such a nice distinction, surreptitiously conceding to the Court a dangerous power, would convict Hamilton of an intentionally misleading pleading. It would be preferable to accept his denial at face value. The Court would not have the power of construction according to the spirit, or at most such power as would be limited to the case of an "evident opposition" between laws and Constitution.[410]

If this was Hamilton's meaning, Marshall disagreed. According to Marshall, the Court would construe the Constitution liberally according to its spirit. The power of liberal construction would include not only the power to wrest from words, such as "necessary and proper," a meaning broad enough to suit the exigencies of the case, but the power to perceive in words a principle of preeminent weight and bearing, in the consequence of which all other constitutional words and phrases would have to yield. In the case of the supremacy clause, the power of judicial review was as broad as the requirements of the national government, and the construction of the written Constitution was as broad as the unwritten implications of those requirements.

Marshall, having through this method of necessary implication established the superiority of the federal position under the Constitution and having thereby overrun the state's position, turned aside and in a mopping-up exercise finally considered the arguments for Maryland and deftly disposed of them. State taxation, he conceded, might be so limited as not to destroy but, he asserted, as a matter of political principle the powers of Congress given by the people of the

---

407 THE FEDERALIST No. 81, at 542 (A. Hamilton) (J. Cooke ed. 1961).

408 *Id.* at 543.

409 *Id.*

410 *See id.*

entire United States could not be subject to the sovereignty of a single state. This principle preserved the Court from "the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power."[411] In other words, the issue was non-justiciable, and since non-justiciable, the operations of the national government must be protected and held in principle to be immune from state taxation.[412]

Moreover, Marshall continued, adopting the Bank's argument, if a state could tax the property of the United States in the Bank, as Maryland claimed, and its power to tax had no other limit than that specifically prohibited in Article I, section 10, then it could, if it wished, tax the federal mint, mails and courts. There was no limiting principle by which to distinguish the cases. But if this were so, the supremacy clause was an "empty and unmeaning declamation."[413]

Marshall considered the argument from *The Federalist* and while acknowledging its authority declined to follow it. In general terms, he said, that "in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained."[414] *The Federalist* then would not be controlling authority. The Court retained an independent judgment. It, and not *The Federalist*, was the judge of what the Constitution had intended to say. Marshall had not made that point in the preceding part of the opinion where he had come to the conclusion that the arguments of *The Federalist* concerning the "necessary and proper" clause were incorrect and had to be disregarded. Here he did not disregard their views concerning the unlimited power of state taxation but distinguished them. *The Federalist* argument was directed against the objections of an unlimited power of taxation vested in

411 *McCulloch*, 17 U.S. (4 Wheat.) at 430. The Court, of course, has long since changed its position with regard to state taxation of interstate commerce and has at times entered upon this "perplexing inquiry." *See, e.g.*, Exxon Corp. v. Wisconsin Dep't of Revenue, 447 U.S. 207 (1980); Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 U.S. 425 (1980); Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978); Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) (all relating to the power of a state to impose a net income tax on income derived from interstate commerce). But as to state taxation, the legal incidence of which falls on the federal government, see Memphis Bank & Trust Co. v. Garner, 459 U.S. 392 (1983) (invalidating a Tennessee tax on earnings of banks doing business in the state, including income derived from federal obligations but excluding income derived from obligations of Tennessee or of its political subdivisions).

412 *See McCulloch*, 17 U.S. (4 Wheat.) at 432-33.

413 *Id.* at 433.

414 *Id.*

the federal government, he wrote, and not to the incidental privilege of exempting its own measures from state taxation. It was intended to allay the fears that federal taxation would involve the exclusion of state taxation and the destruction of state governments.[415]

Marshall did not mention, however, that Hamilton in his eagerness to appease state apprehensions had written in absolute terms: "the individual States should possess an independent and uncontroulable [sic] authority to raise their own revenues for the supply of their wants. And . . . I affirm that (with the sole exception of duties on imports and exports) they would under the plan of the Convention retain that authority in the most absolute and unqualified sense . . . ."[416] By his opinion, Marshall had limited Hamilton's absolute: the not so absolute power of the state to tax was limited by the implication of the supremacy clause.

The ultimate meaning of the Constitution then lay beyond the written text in its unwritten implications. Counsel for the Bank understood this, in arguing the unwritten implications in the supremacy clause of a paramount principle, bearing within it certain necessary corollaries of decisive application. They had so argued because practicality and necessity so compelled it. Without such an argument the Bank would have been destroyed, the national government's control over the currency undone and the nation, left to the vagaries of competing state currencies, driven once again to financial chaos. For the same reasons, the argument had to prevail.

The primary importance of *McCulloch* lies in this assertion and in these conclusions. Implicit in them is the declaration that all constitutional texts are not created equal. Since the supremacy clause and the principle it contained are paramount, all other clauses in the Constitution and all other principles implicit in those clauses had to be construed in their light. The various extensions and application of the other clauses would have to be qualified accordingly, despite any contrary opinion in *The Federalist* and possibly, in the absence of any specific contrary provision, despite the intent of the framers themselves. The Constitution was more than a collection of written provisions and more than a collection of underlying purposes. As drafted by the framers, it possessed a grand design, a predominant purpose: the creation of a national government, invested with broad powers, intended in their exercise to be supreme. The maintenance of that grand design, the effectuation of that predominant

---

415 *See id.* at 433-35.

416 THE FEDERALIST No. 32, at 199 (A. Hamilton) (J. Cooke ed. 1971).

purpose was the paramount principle. The supremacy clause, read as the embodiment of this paramount principle, would in due time tend to the systematic curtailment of state power.[417]

Since all constitutional texts were not created equal, the breadth and depth of these texts were to be measured in the light of unwritten principle. In the construction of the supremacy principle, judicial review was, as in the construction of "necessary and proper," more an exercise in the unwritten than in the written. Again, as with "necessary and proper," the Court was more the master of the unwritten Constitution than its servant. Paradoxically, only in this fashion could the Constitution work.

It is the genius of Marshall that he understood all this, could overcome the deficiencies of literal text, omissions of the framers and damaging statements in *The Federalist*, and could with lofty language corresponding to the lofty design and purpose of the Constitution, skillfully and magnificently implement it. Substantively, his defense of national power in the first part of his opinion and of its exception from the operations of state power in the second part are the cornerstones of constitutional law. His opinion in *McCulloch v. Maryland*, both in form and in substance, is a masterpiece.

### 6. *Judicial Duty, Honor and Truth: The Necessity of a National Money Supply.*

Neither the Bank nor the Court nor its opinion in *McCulloch* lived happily ever after. The Bank was already in trouble before the decision in *McCulloch*. One week after the decision was rendered, its troubles multiplied in the public disclosures of the deep losses sustained in its Maryland branch. Its Baltimore cashier, J.W. McCulloch of *McCulloch* fame, was revealed as a colossal embezzler.[418] The discredit of the United States Bank was almost complete.

Opposition to both the Bank and to *McCulloch* was widespread. Newspapers in Kentucky, Pennsylvania, New Jersey, Ten-

---

417 Implicitly foreshadowed in this reading were the future opinions in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (upholding the constitutionality of section 25 of the Judiciary Act of 1781, ch. 20, 1 Stat. 85-87, as it applied to appeals to the Court from judgments of state courts in criminal cases); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (striking down another state tax on the United States Bank); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) and Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827) (both construing a federal licensing statute in such a way as to control the facts of the case and in light of the supremacy clause invalidate a state monopoly statute).

418 HAMMOND, *supra* note 42, at 261-63.

nessee, Georgia, Mississippi and Ohio came out against federal encroachment of states rights and state sovereignty.[419] Despite *McCulloch*, Ohio contemplated the collection of a recently imposed tax in the sum of $50,000 on the Ohio branches of the United States Bank. In Kentucky, litigation enjoining the collection of a similar tax was pending in federal court.[420]

In Virginia, the birthplace of Presidents, steps were taken to wrest from the controversy a substantial profit and to further both the political and the financial interests of a closely related group known as the Richmond Junto. Thomas Ritchie, one of the Junto's members, published the *Richmond Enquirer*.[421] A second, his cousin Dr. John Brockenbrough, was president of Richmond's Bank of Virginia, which had a history of attempting monopolistic control of all banking in the state of Virginia.[422] A third, Brockenbrough's brother William, was a state judge;[423] a fourth was Ritchie's uncle,[424] Spencer Roane, Chief Justice of the Virginia Court of Appeals, and his perennial candidate for the office of the President of the United States.[425] Shortly after the decision in *McCulloch* was announced, the *Enquirer* began publication of a series of sharply polemical essays directed against the manner of its decision, the scope of its discussion, its rationale, the Court itself (for its assumption of jurisdiction) and by innuendo the writer of the opinion. The essays appearing under the pseudonyms of Amphictyon and Hampden were probably the products of Judge Brockenbrough and Chief Justice Roane respectively.[426]

Though legal in form, the essays were laced with frequent allusions to the dangers to states' rights, state sovereignty and

---

419 C. WARREN, THE SUPREME COURT, *supra* note 330, at 519.

420 *Id.* at 526.

421 AMBLER, THOMAS RITCHIE 19 (1913).

422 *Id.* at 27-28.

423 Born in 1778, William Brockenbrough was appointed judge of the general court in 1809, and justice of the Supreme Court of Appeals in 1834, where he served until his death in 1838. 2 TYLER, ENCYCLOPEDIA OF VIRGINIA BIOGRAPHY 64-65 (1915). For the relation of the Brockenbroughs, see HAYDEN, VIRGINIA GENEALOGIES 110 (1966).

424 AMBLER, *supra* note 421, at 27.

425 *Id.* at 87. Roane was also Jefferson's candidate. Jefferson urged Roane to run as Vice-President under William Crawford at the end of Monroe's term with a view to his eventually succeeding Crawford as President, but Roane died in 1822. 2 TYLER, *supra* note 423, at 61-62.

426 These essays are reprinted in GUNTHER, DEFENSE, *supra* note 367, at 52-77, 106-54. *See also id.* at 1 (for the attribution of these essays as the work of Judge Brockenbrough and Chief Justice Roane).

individual liberties occasioned by the troubles of 1798 and 1799, and the Alien and Sedition laws of the Federalists.[427] The selection of pen names revealed their purpose. Amphictyon and Hampden, proverbial protectors and defenders of the people's liberties against despotism,[428] would in 1819 remind their readers of the dangers to Virginia's liberties from Alexander Hamilton, to whom were attributed the Alien and Sedition laws of 1798,[429] and the creation of the United States Bank in 1791, and whose characteristic modus operandi had been the "necessary and proper" clause. And just as the Federalist judges of that day had upheld the constitutionality of the Alien and Sedition laws,[430] so they had upheld the validity of the United States Bank.

In substance the attacks were really against President Monroe and those in Congress who had supported the Bank. For practical reasons, however, the attack had to focus on the Court, and particularly on Marshall, the conspicuous Federalist holdover, who in *McCulloch* had chosen to follow the rationale prescribed by Hamilton in 1791 of an implied liberal power in Congress to establish the means necessary to effectuate the permitted purposes. Marshall, as the prominent Federalist in the picture, was the obvious fall guy and the rest of the justices, the unwitting dupes who went along with his opinion. That Monroe understood the significance of these attacks is suggested by the support given *McCulloch* in the *National Intelligencer*,[431] his quasi-

427 *See, e.g.*, Letter from "Amphictyon" (W. Brockenbrough) to The Richmond Enquirer (Mar. 30, 1819) *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 56-69; Letter from "Hampden" (S. Roane) to The Richmond Enquirer (June 11, 1819), *reprinted in* GUNTHER, DEFENSE, *supra* note 367 at 108-14; Letter From "Hampden" (S. Roane) to The Richmond Enquirer (June 22, 1819), *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 153-54.

428 Amphictyon is a play on the Greek word, Amphictyony, a group of states sharing and protecting a common center, as in the Amphictyonic League or confederacy, protecting the Temple of Apollo at Delphi. *See* Address of Hamilton to the New York Legislature (June 20, 1788) (concerning the Amphictyonic confederacy) *reprinted in* 2 ELLIOT'S DEBATES, *supra* note 42, at 234. "The council which managed the affairs of this league possessed powers of a similar complexion to those of our present Congress. The same feeble mode of legislation in the head, and the same power of resistance in the members, prevailed. When a requisition was made, it rarely met a compliance; and a civil war was the consequence." *Id.* To Virginians, Amphictyon connoted a confederacy rather than a Union.

John Hampden (1594-1643) was a parliamentary leader, famous for his opposition to Charles I over a levy for ship money. 2 ENCYCLOPEDIA BRITTANICA 43 (1972).

429 Act of June 25, 1798, ch. 58, 1 Stat. 570; Act of July 6, 1798, ch. 66, 1 Stat. 577.

430 1 WARREN, *supra* note 330, at 165-67.

431 *Id.* at 511-12.

official newspaper in Washington. Monroe, seeking reelection the following year, had to guard his flanks against this dangerous movement of his fellow Virginians.[432]

At the same time, Marshall, who was not without political instincts of his own, sprang to his own defense in a series of newspaper essays published under the pseudonyms of "A Friend to the Union" and "A Friend of the Constitution."[433] At once he was plain to call a candidate a candidate. The decision in *McCulloch*, he wrote, "has been seized as a fair occasion for once more agitating the publick [sic] mind, and reviving those unfounded jealousies by whose blind aid ambition climbs the ladder of power."[434] The Court and not the executive and legislative branches had been singled out for attack because the latter were elected by the people, were popular, possessed great power and patronage, and, had they been attacked, would have been zealously defended.[435] He added:

> But the Judges of the Supreme Court, separated from the people by the tenure of office, by age, and by the nature of their duties, are viewed with respect, unmingled with affection, or interest. They possess neither power nor patronage. They have no sops to give; and every coffeehouse furnished a Cerberus, hoping some reward for that watchfulness which his bark proclaims; and restrained by no apprehension that any can be stimulated by personal considerations to expose the injustice of his attacks. We ought not, therefore, to be surprised if it should be deemed criminal in the judicial department to sustain a measure, which was adopted by the legislature, and by the executive with impunity. Hostility to the Union, must cease to be guided by its usual skill, when it fails to select the weakest department as that through which a breach may be effected.[436]

Marshall defended his opinion in *McCulloch* against the criticism that it was unanimous.[437] Amphictyon had written that the occasion

---

[432] Significantly, Ritchie disapproved of Monroe's agreement to the Missouri Compromise in 1820, an agreement which Monroe had to make in order to get reelected. The sacrifice, Ritchie said, was too great. AMBLER, RITCHIE, *supra* note 421, at 79.

[433] These essays are GUNTHER, DEFENSE, *supra* note 367, at 78-105; Letter from "A Friend of the Constitution" (J. Marshall) to The Alexandria Gazette (June 30, 1819) *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 155-214.

[434] *See* Letter from "A Friend of the Union" (J. Marshall) to the Philadelphia Union (Apr. 24, 1819) *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 78.

[435] *Id.*

[436] *Id., reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 78-79.

[437] *See id., reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 79.

had called for *seriatim* opinions,[438] that the opinion of the Court, though able, had maintained certain doctrines contrary to the principles theretofore "advocated by the republican party in this country."[439] Marshall in reply stated it was unanimous because it *was* unanimous and to suggest otherwise impugned the character of the Justices of the Court who sat by in silence while the opinion was read.[440] Moreover, four of them, "in addition to being eminent lawyers [had] the still greater advantage of being sound republicans," selected by Jefferson and Madison.[441] Against Amphictyon's charge that the opinion had, in discussing the source of the national government's authority, whether from the states or from the people, needlessly involved itself in dictum which was erroneous and dangerous to the sovereignty of the states and to the freedom of their people,[442] Marshall replied that the issue, having been introduced in the case by Maryland, required an answer.[443] Moreover, Marshall added, the failure to mention that betrayed an "'eagerness to censure . . . stronger than his sense of justice, who will criminate a court for noticing an argument advanced by eminent counsel, as one of leading importance in the cause."[444] He proceeded to refute the charge that the opinion in this respect was erroneous.[445]

A third charge lay in the impropriety of the rationale based on the "necessary and proper" clause. Once again, Amphictyon rehashed the controversies of 1791 and 1811.[446] Hampden followed at even greater length, flavoring his rehash with even stronger doses of anti-judicial political diatribe.[447] Adopting the rationale of "necessary and proper," he maintained, had constituted "a judicial *coup de main*: to give a *general* letter of attorney to the future legislatures of the union: . . . That man must be a deplorable idiot who does not see that there is no earthly difference between an

---

438 Letter from "Amphictyon" (W. Brockenbrough) to The Richmond Enquirer (Mar. 30, 1819), *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 53.

439 *Id.*, *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 54.

440 Letter from "A Friend to the Union" to the Philadelphia Union (Apr. 24, 1819), *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 80-81.

441 *Id.*, *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 81-82.

442 *See* Letter from "Amphictyon" (W. Brockenbrough) to The Richmond Enquirer (Mar. 30, 1819), *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 55-57.

443 *See* Letter from "A Friend to the Union" to the Philadelphia Union (Apr. 24, 1819), *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 83-84.

444 *Id.*, *reprinted in* GUNTHER DEFENSE, *supra* note 367, at 84.

445 *Id.*

446 *See* Letter from "Amphictyon" (W. Brockenbrough) to The Richmond Enquirer (Apr. 2, 1819) *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 64-76.

447 Letter from "Hampden" (S. Roane) to The Richmond Enquirer (June 11, 1819), *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 110-38.

*unlimited* grant of power, and a grant limited in its terms, but accompanied with *unlimited* means of carrying it into execution."[448] He himself would not be "over-awed by the parasites of a government gigantic in itself."[449] Finally, as though his cousins and friends had not for years enjoyed oligarchic, if not monopolistic, control of state banking in Virginia, he called upon his fellow citizens to rouse themselves from the apathy and torpor: "Instead of that noble and magnanimous spirit which achieved our independence, and has often preserved us since, we are sodden in the *luxuries* of banking. A money-loving, funding, stock-jobbing spirit has taken foothold among us. We are almost prepared to sell our liberties, for 'a mess of pottage.' "[450]

Then in a clever ploy, both Amphictyon and Hampden attempted to drive a wedge between the political branches and the Court. Both were willing to acquiesce in the result reached in *McCulloch*: that of the constitutionality of the statute creating the Bank. It was the principles of 1791 against which they railed.[451] As Hampden put it, there was "a great difference . . . between *particular* infractions of the constitution, and declaratory doctrines having the effect to change the constitution."[452] In other words, it was all the fault of the Court. It should have written an opinion somewhat along the lines of Madison's veto message of 1815: that the constitutionality of the Bank had been established by prescription, if not by the text itself.[453]

Fingered as the fall guy, Marshall went to equally great lengths in defending his reliance on "necessary and proper." He too repeated the old arguments of 1791 and 1811,[454] finally concluding that in any event the Constitution could be construed in the same

---

448 *Id.*, *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 110 (footnote omitted). (Note Hampden's use of the lower case for "union.") *See also supra* note 357 and accompanying text.

449 Letter from "Hampden" (S. Roane) to The Richmond Enquirer (June 11, 1819), *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 112.

450 *Id.*, *reprinted in* GUNTHER, DEFENSE, *supra* note 367, (quoting *Genesis* 25:34) (footnotes omitted).

451 Letter from "Amphictyon" (W. Brockenbrough) to The Richmond Enquirer (Apr. 2, 1819), *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 72; Letter from "Hampden" (S. Roane) to The Richmond Enquirer (June 11, 1819), *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 135.

452 Letter from "Hampden" (S. Roane) to the Richmond Enquirer (June 11, 1819), *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 135.

453 Letter from "Amphictyon" (W. Brockenbrough) to The Richmond Enquirer (Apr. 2, 1819), *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 73. *See supra* notes 275 & 277 and accompanying text.

454 Letter from "Hampden" (S. Roane) to The Richmond Enquirer (June 11, 1819), *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 93-103; Letter from "A

way even "if the clause which has been so much discussed, had been entirely omitted."[455]

Then having addressed the issue on the merits, he proceeded to defend the opinion against the suggestion that it should not have attempted any rationale based on the text. He questioned whether a reasoning based merely on past practice would have satisfied the public.[456] And, he added, if as the opinion stated the Court was " 'unanimously and decidedly of opinion that the law is constitutional,' would it comport with [the judges'] honour, with their duty, or with truth, to insinuate an opinion that Congress had violated the constitution?"[457] That of course was a rhetorical question which expected a negative answer. Since this was so, "it was incumbent on [the judges] to state their real opinion and their reasons for it."[458] This they had done and, if read with fairness, what they had done would be approved.[459] On that dismissive note he ended his discussion.

But was the opinion in *McCulloch* concerned with "the truth" of the Bank's validity under the Constitution? A close reading of the debates of 1791, 1811 and 1816, indicates that in neither the opinion, nor in the letters of Amphictyon and Hampden, nor in the replies of a Friend of the Union and of the Constitution, did the whole truth emerge. A statement of the whole truth must have included the practical necessity for a national control over the nation's paper money. But the letters of Amphictyon and Hampden were political attacks and Richmond state bankers and their relatives and friends had a vested interest in not alluding to the necessity or, if alluding to it, denying it. Marshall in his letters mounted a political defense and in the thrust and counterthrust of political polemic the cause of truth and nothing but the truth was an inevitable casualty. And with Luther Martin participating in *McCulloch*, the Bank could not in its argument have alluded to this practical necessity nor could the Court in its opinion. In truth, the Court in publishing the opinion had been faced with three exceedingly disagreeable alternatives.

First, in the name of duty, honor and truth, it could have held

---

Friend of the Constitution" (J. Marshall) to The Alexandria Gazette (July 1, 1819), *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 161-91.

455 Letter from "A Friend of the Constitution" (J. Marshall) to The Alexandria Gazette (July 1, 1819), *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 186.

456 Letter from "Hampden" (S. Roane) to The Richmond Enquirer (June 11, 1819), *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 105.

457 *Id.*

458 *Id.*

459 *Id.*

the statute unconstitutional as an indirect attempt to impose upon the country a forbidden paper money, and thereby thrown the country back upon the financial chaos of 1811. Failing the improbable prompt adoption of an enabling constitutional amendment, a repetition of the 1815 financial paralysis of the United States Government was foreseeable. If this was the Court's duty, it is doubtful that fidelity to duty would have gathered to it honor. Instead the doleful consequences attendant upon such a decision would have, in rather quick order, been laid at its feet. *McCulloch v. Maryland* would have become in the history of American Constitutional Law, the Court's first "self-inflicted wound."[460]

The second alternative was to have upheld the constitutionality of the statute and, adopting the suggestions of Amphictyon and Hampden, rely on the argument from prescription and some vague formula, such as the fear of "endless difficulties,"[461] had the case been decided the other way. But could this have worked in *McCulloch*? The case was a cause celebre. Even before the opinion the Bank was a very unpopular institution. Any opinion upholding it was bound to suffer from unpopularity—its reasoning picked to pieces. It would have been regarded as, in effect, convicting both the Congress and the President of unconstitutional acts and the Court itself of being an accessory to constitutional violations after the fact. Honor and duty would hardly lie in that course.

The third alternative was to do what it did do, that is, uphold the constitutionality of the statute, despite the lack of specific constitutional provision for it, on the ground that the Constitution, despite this lack, nevertheless provided for it. Was not this the path that duty prompted them to follow, the path that would enable the national government to gain control of the nation's paper money supply? This was the only feasible path, as Clay had told his Kentucky constituents in 1816, whereby the United States Government could in the future avoid the financial chaos of the war years.[462] It

---

460 The phrase is from Chief Justice Hughes: "In three notable instances the Court has suffered severely from self-inflicted wounds." C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 50 (1928). The first in its decision in Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856). The second by the manner of its decisions in the Legal Tender Cases, Knox v. Lee, 79 U.S. (12 Wall.) 457 (1870); Julliard v. Greenman, 110 U.S. 421 (1878); and in finally the income tax case, Pollock v. Farmers Loan & Trust Co., 157 U.S. 429, *on petition for reh'g*, 158 U.S. 601 (1895).

461 United States v. Fisher, 6 U.S. (2 Cranch) 358, 396 (1805). This was the phrase used by Chief Justice Marshall in justifying the constitutionality of a provision of the Bankruptcy Act under the "necessary and proper" clause. *See also supra* note 345 (discussing *Fisher*).

462 *See supra* notes 281-83 and accompanying text.

was the only way, as Calhoun had demonstrated, whereby the Congress could stem the flow of excessive state bank paper, which the Constitution had most certainly intended to prohibit.[463] If, again because of Luther Martin, it could not be argued in *McCulloch* what Dallas and Calhoun had argued in 1816, that the specific congressional power to coin money and regulate its value implied a generic intent to enable Congress to regulate paper money,[464] and if a constitutional amendment to supply the deficiency was extremely unlikely, was it not the duty of the Court, in order to promote the prosperity of the country, to cover the deficiencies of constitutional provision under the broad cloak of the "necessary and proper" clause? As Marshall wrote elsewhere in his letters of defense, the judges through tenure are perfectly independent and impartial: "They have no personal interest in aggrandizing the legislative power. Their paramount interest is the public prosperity, in which is involved their own and that of their families."[465]

Ultimately then, the Constitution was construed in the light of the paramount interest in the public prosperity. This and not the bare words of the text guided the Court. The Justices in deciding what the Constitution meant were not mere exegetes of the written word. They were the government and as such committed to the common good. From this it followed that in the broadest sense it was the constitutional duty of the Justices to uphold the constitutionality of the Bank. What was impracticable in consequence was erroneous in concept.[466] They stood between the text and reality and monitored the text to accord with reality. Doing their duty in this manner, honor eventually followed in the testimonials heaped upon their Chief Justice and upon his opinion in *McCulloch*, and by implication upon his associates for unanimously following his lead.

As to truth, it must be remembered that like the good and the beautiful, it was placed by Aquinas among the transcendentals.[467] Just as there are for instance many kinds of beauty, there are many kinds of truths. Perhaps, in his opinion in *McCulloch* and in his letters of defense, the great Chief Justice did not tell the whole truth:

---

463 *See supra* notes 297-301 and accompanying text.

464 *See supra* notes 285-88, 297-301 and accompanying text.

465 Letter from "A Friend of the Constitution" (J. Marshall) to the Alexandria Gazette (July 15, 1789) *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 212.

466 Or as Marshall put it: "The rule then laid down by Amphyction [sic] is an impracticable, and consequently an erroneous rule." Letter from "A Friend to the Union" (J. Marshall) to the Philadelphia Union (Apr. 28, 1819), *reprinted in* GUNTHER, DEFENSE, *supra* note 367, at 95.

467 *See* MARITAIN, CREATIVE INTUITION IN ART AND POETRY 162-63 (1952). *Cf.* 4 AQUINAS, SUMMA THEOLOGICA, pt. Ia, q.16 (Blackfriars ed. 1964).

that if, as Hamilton said, societies will go where necessity leads them and in so doing break the rules and maxims that would hinder its pursuit, then prudence requires a Constitution sufficiently supple to accommodate that necessity. It is incumbent upon the Court, where the people have approved the resort to necessity and where individual liberty is not involved, to find in the Constitution the unwritten principle upon which this necessity can be accommodated.

Then after a time, some of the truth did emerge. The state of Ohio, which had, effective September 15, 1819, laid a tax of $50,000 on each office of the United States Bank operating in the state, moved to the collection through its Auditor, Ralph Osborn. Since there were two bank offices in Ohio, the sum due was $100,000.[468] On September 17, 1819, Osborn's employee entered the Bank's offices at Chilicothe by force, took from it the sum of $100,000 in specie and bank notes in payment of the taxes due, and delivered it to the state treasurer.[469] The Bank filed a complaint in the federal circuit court in Ohio seeking an injunction against the further enforcement of the state statute by Osborn and other state officials and a return of the money taken from the Bank.[470] The trial court found for the Bank and the state officers took an appeal to the Court.[471]

Appellants contended, among other things, that Ohio had a right to tax the Bank. The Bank, they said, was an entirely private concern, its capital private property, its business a private trade and its object private profit.[472] Therefore it was subject to a tax on its business. The form of its business structure, corporate instead of individual, did not provide it with an immunity.[473] While it was true that it did perform services for the national government, it was not a public corporation and the tax was based not on those services but on the property by which it did its private business and made its private profit.[474] In this light, they requested that the Court reconsider its holding in *McCulloch*, that the Bank was immune from state taxation.[475]

Marshall for the Court quickly declined to revise that holding.

---

468 Osborn v. United States Bank, 22 U.S. (9 Wheat.) 738, 740-41 (1824). There were two branch offices, the one at Chilicothe, the other at Cincinnati. *Id.* at 795.

469 *Id.* at 741-42.

470 Actually the Bank had filed its complaint before the entry, alleging a threat to enter. After the entry and conversion, the Bank amended its complaint to state these facts and amended its demand for relief accordingly. *Id.* at 741.

471 *Id.* at 743-44.

472 *Id.* at 766-67.

473 *Id.* at 784.

474 *Id.* at 785-95.

475 *Id.* at 765.

The Bank was not a private corporation; since it was created for public and national purposes, it was a public corporation. While it "trad[ed] with individuals for its own advantage," it was "the great instrument by which the fiscal operations of the government are effected,"[476] and as such was "necessary and proper." Unless endowed with the faculty of the lending and dealing in money, which it did for its own advantage, it could not carry on the fiscal operations of government. If it could not, then the "faculty [was] necessary to the legitimate operations of government" and was therefore constitutional.[477]

Putting it that way, however, was making the tail wag the dog. The Bank had not been established to lend and trade money and thereby to make a profit in order to serve the government by handling its money. It was established so that by lending and trading money it could create a sound national paper currency redeemable in specie. Marshall finally alluded to this somewhat obliquely, in writing:

> The operations of the Bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the government are conducted. They are, therefore, inseparably connected with those transactions.[478]

Later he wrote: "The currency which it circulates, by means of its trade with individuals, is believed to make it a more fit instrument for the purposes of the government, than it could otherwise be . . . ."[479]

Justice Johnson stated this proposition more directly. He agreed with the Court on the merits, that the state could not tax the Bank.[480] The Bank, he wrote, had become "the functionary that col-

---

476 *Id.* at 860.

477 *Id.* at 861.

478 *Id.* at 863.

479 *Id.* at 864.

480 *See id.* at 871-72. Justice Johnson dissented, however, from the Court's other holding, that the federal court had jurisdiction to try the case. *Id.* at 901 (Johnson, J., dissenting). The Court held that the enchartering statute in authorizing the Bank to sue in the federal circuit courts had conferred jurisdiction on such courts to entertain any suit brought by the Bank. *Id.* at 817-28. Moreover, it was a constitutional grant of jurisdiction, "arising under . . . the laws of the United States." *Id.* at 819. Johnson disagreed: The statute had not so intended, and had not meant to depart from the holding in *United States v. Deveaux*, limiting the Bank's access to federal courts to cases involving a complete diversity of citizenship, of all its stockholders from the citizenship of all adverse parties. *Id.* at 876-84 (Johnson, J., dissenting); *see supra* notes 222-24 and accompanying text. And, Johnson continued,

lects, the depository that holds, the vehicle that transports, the guard that protects, and the agent that distributes and pays away, the millions that pass annually through the national treasury," and does so at a loss to itself "without expense to the government," indeed after paying a large bonus to the government.[481]

But, he added, if this were all that it did, the laws in which it originated and the suit which was before the Court would never have existed. The termination of the former bank had led to a rage for the multiplication of state banks, which "soon inundated the country with a new description of bills of credit, against which it was obvious that the provisions of the constitution opposed no adequate inhibition."[482]

Johnson at long last made the essential point:

> A specie-paying Bank, with an overwhelming capital, and the whole aid of the government deposits, presented the only resource to which the government could resort, to restore that power over the currency of the country, which the framers of the constitution evidently intended to give to Congress alone. But this necessarily involved a restraint upon individual cupidity, and the exercise of State power; and, in the nature of things, it was hardly possible for the mighty effort necessary to put down an evil spread so wide, and arrived to such maturity, to be made without embodying against it an immense moneyed combination, which could not fail of making its influence to be felt, wherever its claimances could reach or its industry and wealth be brought to operate.[483]

The Bank was therefore essentially created for purposes of currency control. Through its issuance of a paper money redeemable in specie the Bank would create a national paper currency and by its discount practices in trade would establish a control over the paper currency of the state banks, decrease its quantity and improve its quality, thereby integrating it into a national paper currency system all redeemable in specie. Basically this is how Clay had described the functions of the Bank, its necessity and the reasons for its constitutionality in his address to his Kentucky constituents in 1816.[484] It was an argument which overlooked the constitutional inability of the government itself to create paper and forbore from the necessity of

---

had it intended to confer jurisdiction, as the majority held, it would have been unconstitutional. *Id.* at 884-85 (Johnson, J., dissenting).

481 *Id.* at 872 (Johnson, J., dissenting).

482 *Id.* at 873 (Johnson, J., dissenting).

483 *Id.* (Johnson, J., dissenting).

484 *See supra* notes 278-83 and accompanying text.

arguing that the specific power to coin money implied a generic power to regulate the currency. It remained on the level of the practical and, while asserting the government's power to control the currency, neglected to cite a supporting constitutional text. Perhaps not coincidently, Luther Martin did not participate in the oral argument in *Osborn*, but Henry Clay did, for the Bank.[485]

Not the whole truth, but something of the truth had emerged. The Bank was not so much a depository institution as one suited for the control of the money supply. For that purpose, Hamilton had created it in the first place and Dallas, Calhoun and Clay recreated it in the second place. For that reason, Maryland and Ohio had taxed it. For that reason, *McCulloch* and *Osborn* had been litigated. For that reason it had been upheld. It was certainly necessary. Its propriety and constitutionality had to follow.

---

485 *Osborn*, 22 U.S. (9 Wheat.) at 795.

## APPENDIX

The practical necessities of the government for money and of the country for a circulating medium drove successive Congresses and presidential administrations toward a more flexible fiscal system. Following the expiration of the Charter of the United States Bank in 1811, Congress in 1812, faced with the need to finance the cost of the war with Britain without the resources of the Bank, authorized for the first time the issuance of one-year, interest-bearing notes in anticipation of its revenues as an incident to borrowing.[1] The authorization was repeated in 1813.[2] While the statutes had not specified, notes in denominations of $100 were the lowest offered. But in 1814, because of wartime difficulties restricting the circulation of money and the availability of money for loans, Congress authorized for the first time the issuance of notes in denominations smaller than $100, albeit bearing interest: twenty dollar notes were issued.[3] In the following term of Congress, a fourth issuance was authorized.[4] But despite the authorization for issuance in small denominations, these notes did not suit the purposes of a circulating medium. Since they contained a provision that their holders could exchange them in sums of not less than $100 for certificates of federal indebtedness bearing interest at seven percent, they were quickly accumulated and converted, passing out of circulation.[5] To prevent a facile conversion, the fifth wartime act provided, in part, for the issuance of small Treasury notes, under $100, without interest and payable to the bearer but convertible into seven percent debt certificates after December 15, 1815, and for Treasury notes of $100 and over, payable to order on endorsement, at five and two-fifth's percent interest.[6] In fact, notes were issued in denominations of $3, $5, $10, $20 and $50. While these could be considered a circulating paper medium, since they contained a significant interest-bearing feature, they too could be said to possess the characteristics of note-paper thereby constituting an incident to borrowing.

Following the expiration of the charter of the Second United States Bank, the nation's circulation medium was once again

---

1 Act of June 30, 1812, ch. 111, 2 Stat. 766; KNOX, UNITED STATES NOTES 21-26 (1884).

2 Act of Feb. 25, 1813, ch. 27, 2 Stat. 801; KNOX, *supra* note 1, at 21-26.

3 *See* Act of Mar. 4, 1814, ch. 18, 3 Stat. 100; KNOX, *supra* note 1, at 29-30.

4 Act of Feb. 14, 1815, ch. 56, 3 Stat. 213.

5 *Id.*, 3 Stat. at 214; KNOX, *supra* note 1, at 37-38.

6 Act of Feb. 14, 1815, ch. 56, 3 Stat. 213-14; KNOX, *supra* note 1, at 37.

thrown into disarray and once again the government was led by the necessity of deficit financing to the issuance of Treasury notes.[7] In this case, the Van Buren administration frankly desired the authorization of some notes for circulating purposes. When the Congress authorized the Treasury to issue short-term notes at interest not exceeding six percent, it issued nine million in notes, four million at the annual rate of 5 percent, three at 2 percent and two at the nominal annual rate of one mill per cent.[8] This was repeated in 1838, in 1839, and again in 1840,[9] over the protest of the Whigs in Congress that all notes must bear interest of not less than two percent and be negotiable.[10] The purpose of the threshold was to prevent their circulation as money, and to avoid an unconstitutional evasion of the prohibition against bills of credit.[11]

In 1843, the Tyler Administration again issued a small amount of Treasury notes, in denominations of $50 payable in one year and bearing a nominal annual interest rate of one mill. percent, but this authority was again challenged by Congress as unconstitutional.[12] Thereafter no other issuance of paper money was attempted until the Civil War, although interest-bearing Treasury notes were issued during the Mexican War.[13] Despite this history, Chief Justice Chase in *Veazie Bank v. Fenno*,[14] stated that it had been

> settled by the uniform practice of the government and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit. . . . [I]t is enough to say, that there can be no question of the power of government to emit them . . . to make them a currency, uniform in value and description, and convenient and useful for circulation. These powers, until recently, were only partially and occasionally exercised. Lately, however, they have been called into full activ-

---

7 KNOX, UNITED STATES NOTES, *supra* note 1, at 20.

8 Act of Oct. 12, 1837, ch. 2, 5 Stat. 201; KNOX, *supra*, note 1, at 42. In doing so, the Van Buren administration followed the counsel of Calhoun, who in Congress had expressed his views in favor of a paper currency, and voted for a proposal that the notes bear no interest whatsoever. 14 CONG. DEB. 62, 75 (1837); *see also* LOVE, FEDERAL FINANCING 61 (1931).

9 Act of May 21, 1838, ch. 82, 5 Stat. 222; Act of Mar. 2, 1839, ch. 37, 5 Stat. 323; Act of Mar. 31, 1840, ch. 5, 5 Stat. 201. In each Act the rate of interest was left to the discretion of the Treasury Department.

10 KNOX, *supra* note 1, at 45.

11 *Id.* at 46.

12 *Id.* at 52-61.

13 *Id.* at 63-79.

14 75 U.S. (8 Wall.) 533 (1870).

> ity, and Congress has undertaken to supply a currency for the entire country.[15]

Chase was referring to the then recent circulation of greenbacks during the Civil War. He did not, however, attempt to show how the emission of bills of credit had become a "settled uniform practice," nor did he cite the "repeated decisions" by which the settlement had come about. In fact, there had been no judicial decisions. The wartime governmental practice under Madison had been carefully structured so that the notes, by reason of their conversion to interest-bearing debt, would not constitute bills of credit. The peacetime practice under Van Buren had been challenged on constitutional grounds and discontinued. And the practice under Tyler had been minimal, even more vigorously challenged, and discontinued. If any, these were the exceptions which proved the rule.

Later, Chase, in his majority opinion in *Hepburn v. Griswold*,[16] apparently realizing that his naked assertion in *Veazie Bank* required some justification, referred to the power to emit bills of credit as incidental to other powers,[17] and still later, in his dissenting opinion in the *Legal Tender Cases*, as "an exercise of the power to borrow money."[18] "[I]ts power over the currency was incidental to that power [to emit bills of credit] and the power to regulate commerce."[19]

This was confusion more confounded. The issuance of bearer instruments, having no definite date for payment and without interest is not the normal evidence of indebtedness for loans and cannot therefore be regarded as a normal incident to borrowing. And while an adequate money supply undoubtedly is conducive to commerce and promotes it, as Hamilton wrote in his report of 1790, advocating the establishment of a national bank, it is not, in the ordinary sense, the subject of commerce. Rather it is the medium by which commerce, literally the exchange of merchandise, transpires. The framers knew the difference between commerce and currency, and borrowing and currency. They confronted the requirements of currency in the coinage clause and, as Luther Martin and James Madison said, they decided against paper money.

In order to sustain Chase's opinion, we should be prepared to assault Madison directly and say that regardless of what he wrote in

---

15 *Id.* at 548.

16 75 U.S. (8 Wall.) 603 (1870).

17 *Id.* at 617.

18 Knox v. Lee, 79 U.S. (12 Wall.) 457, 574 (1870) (Chase, C.J., dissenting).

19 *Id.* at 574-75 (Chase, C.J., dissenting).

his Notes regarding Gouverneur Morris' motion, he did not know what he was writing about. We should also be prepared to assault Luther Martin and dismiss his Address to the Maryland Legislature as a phillipic against the ratification of the Constitution, thereby implying his statements regarding paper money were made out of whole cloth. Instead, we should look at the debates themselves, look at the Constitution which does not expressly prohibit the issuance of paper, bear in mind that the issuance of paper is under some circumstances a matter of national necessity, and the control over the national currency ordinarily a matter within the national sovereignty and argue, therefore, that the Constitution must provide for the power to issue paper. This in effect is what Justice Bradley did in his concurring opinion in the *Legal Tender Cases*.[20] He concluded:

> The views of particular members or the course of proceedings in the Convention cannot control the fair meaning and general scope of the Constitution as it was finally framed and now stands. It is a finished document, complete in itself, and to be interpreted in the light of history and of the circumstances of the period in which it was framed.[21]

Bradley's was a very selective reading of history. He argued from the colonial practice, and that of the Congress and states during the Revolution, that it was an "*historical fact* that when the Constitution was adopted, the employment of bills of credit [as currency] was deemed a legitimate means of meeting the exigencies of a regularly constituted government."[22] He did not mention the adverse effects of the widespread use of paper in the Revolution and the consequent change in American opinion. Thus, the experience of the colonies had been good, that of the states during the Revolution had been bad.[23] As Madison wrote:

> The loss which America has sustained since the peace, from the pestilent effects of paper money, on necessary confidence between man and man; on the necessary confidence in the public councils; on the industry and morals of the people, and on the character of Republican Government, constitutes an enormous debt against the States chargeable with this unadvised measure, which must long remain unsatisfied; or rather an accumulation of guilt, which can be expiated no otherwise than by a voluntary sacrifice on the altar of justice, of the power which has been the instrument of it. In addition to

---

[20] *Id.* at 554 (Bradley, J., concurring).

[21] *Id.* at 560 (Bradley, J., concurring).

[22] *Id.* at 558 (Bradley, J., concurring).

[23] *See* B. HAMMOND, BANKS AND POLITICS IN AMERICA 100 (1957).

> these persuasive considerations, it may be observed that the same reasons which shew the necessity of denying to the States the power of regulating coin, prove with equal force that they ought not to be at liberty to substitute a paper medium in the place of coin.[24]

Moreover the colonial practice of issuing paper money had also been severely criticized by Adam Smith as "a scheme of fraudulent debtors to cheat their creditors."[25] As Smith explained, and as Hamilton advocated in proposing the Bank, paper was feasible only when issued by a bank and subject to redemption for the gold and silver held in its vaults. Since paper money represented gold and silver, the amount of paper in circulation, Smith counseled, should be such as to satisfy public confidence in its ability to pay specie on demand.[26] The Bank of America had in 1790 limited the dollar amount of its paper in circulation to less than the amount of specie it held. Hamilton advocated that the proposed United States Bank go beyond this, allowing a ratio of two or three dollars in paper to one in specie.[27] Smith tolerated, in certain cases, a ratio of five to one.[28] Bradley's reading of the currency clause then was wholly anachronistic. It was a reading entirely contrary to the circumstances of the period in which it was framed. Of course, as uttered in the *Legal Tender Cases*, it was a necessary step in the final assault against the argument, based on the authority of Madison's Notes, that the power of Congress to make its paper currency a legal tender, was unconstitutional, even in time of war.[29]

This assault was completed in *Juilliard v. Greenman*,[30] in which the Court, going beyond the holding in the *Legal Tender Cases*, that Congress has the power to make its paper currency legal tender in time of war, held that Congress possessed such power in time of peace. Justice Gray, for the Court, was puzzled as to why Madison in his Notes to the debates "thought that striking out the words 'and emit bills' would leave the power to emit bills, and deny the power to make them a tender in payment of debts."[31] The Justice and the Court apparently overlooked the distinction between the emission

---

24 THE FEDERALIST No. 44, at 300 (J. Madison) (J. Cooke ed. 1961).

25 1 A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 326 (R. Campbell, A. Skinner & W. Todd eds. 1976) (1st ed. 1776).

26 *Id.* at 389.

27 Secretary of Treasury's Report to the House of Representatives, *reprinted in* 7 THE PAPERS OF ALEXANDER HAMILTON 307 (H. Syrette & J. Cooke eds. 1963).

28 1 A. SMITH, *supra* note 25, at 296-97.

29 *See* Knox v. Lee, 79 U.S. (12 Wall.) 457 (1870).

30 110 U.S. 421 (1884).

31 *Id.* at 443.

of interest-bearing bills in large denominations unfit for currency, as the ordinary incident of borrowing, and the emission of interest-free notes in small denominations intended for circulation and currency. But secure in its oversight, the opinion could march to its conclusion that Madison must have been in error regarding the power to make paper a legal tender. The Court went on to hold that since this power was not expressly prohibited, it was included in the borrowing power.[32] And in view of the other powers, to tax, to pay debts, provide for the common defense and the general welfare, and to coin money; and in view of the additional powers of Congress, as incidental to the foregoing powers, to emit bills of credit, to charter national banks and provide a national currency in coin, bills and notes, it was "necessary and proper" that Congress make its currency a legal tender. The question of circumstance, whether it was necessary and proper in war or in peace, was not justiciable, but a question wholly within the purview of Congress.[33] Madison, it could with truth be said, was just one more casualty of the Civil War.

In sum, to justify legal tender, both Gray in *Juilliard*, and Bradley in concurrence in the *Legal Tender Cases* had to dispose of Madison's commentary on bills of credit, and in the process had to justify the emission of a national paper currency, contrary to the intent of the framers.[34]

---

[32] *Id.* at 448.

[33] *Id.* at 449-50.

[34] *See* Editor's note to 1 KENT'S COMMENTARIES 254 (O. Holmes, ed., 12 ed. 1873). *See also* Letter from O. Holmes to the Editors of the American Law Review, 4 AM. L. REV. 768 (1870) (restating Holmes' views).