

ASPEN CASEBOOK SERIES

PROCESSES OF
CONSTITUTIONAL DECISIONMAKING
Cases and Materials

Seventh Edition

Paul Brest

Former Dean and Professor Emeritus (active)
Stanford Law School

Sanford Levinson

W. St. John Garwood & W. St. John Garwood, Jr.
Centennial Chair in Law
University of Texas Law School

Jack M. Balkin

Knight Professor of Constitutional Law
and the First Amendment
Yale Law School

Akhil Reed Amar

Sterling Professor of Law and Political Science
Yale Law School

Reva B. Siegel

Nicholas deB. Katzenbach Professor of Law
Yale Law School



Wolters Kluwer

monies given it; and its notes were made legal tender for the payment of government debts. Consider, though, that President Monroe's Secretary of the Treasury Crawford wrote to the new president of the bank in 1819 that "[t]he first duty of the Board [of Directors] is to the stockholders, the second is to the nation."²⁰ If this is correct, why regard the Bank of the United States as an instrument of the national government at all?

The dispute over the bank was not over, however. A number of states remained intensely hostile and enacted nearly annihilative taxes on the bank. It was in this context that *McCulloch v. Maryland* came before the Court.

IV. Judicial Examination of Congress's Authority to Create the Bank

Note on Reading and Editing Cases

The Supreme Court Justices' opinions in constitutional cases are often very long, and we have necessarily edited most of the cases in this book to focus the issues, to keep the book to a manageable length while covering a variety of issues, and to mitigate tedium. *McCulloch*, however, is unedited.

We suggest that you read Chief Justice Marshall's opinion through once to get a sense of its structure and arguments. Then read it again with a blue pencil (imaginary or real, depending on the projected resale value of this book), trying to omit as much superfluity as you can.

Our own experience as editors is that there is no better way to understand the substance and structure of a person's writing than to edit it. We also hope that you will gain some appreciation of the problems of editing an opinion — not, we hasten to add, so that you will appreciate our hard work, but so you will be skeptical about the relationship between any edited version and the original. Why, after all, do judges write such long opinions if much, if not most, of the language can be excised without any loss to understanding? Moreover, and perhaps paradoxically, it is only by reading an opinion in its entirety that you understand fully what is left out (as well as included) in a judicial opinion. You should note, for example, that Marshall offers no discussion at all of the corporate organization (and loyalties) of the bank. Do you agree that that is utterly irrelevant?

McCULLOCH v. MARYLAND

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

[In 1818, the Maryland Assembly enacted a law imposing an annual tax of \$15,000 on all banks or branches of banks in the state not chartered by the state legislature. The only bank that fit this description was the Bank of the United States, whose local cashier, J.W. McCulloch, refused to pay the tax. Maryland successfully sued McCulloch in its own courts to recover the statutory penalty for failure to comply with the statute.]

20. Quoted in Richard E. Ellis, *Aggressive Nationalism: McCulloch v. Maryland and the Foundation of Federal Authority in the Young Republic* 106-107 (2007).

MARSHALL, C.J.

[The First Question]

[1]^{¶1} 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. 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 operation of the government. 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.

[2] The first question made in the cause is, has Congress power to incorporate a bank?

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

[4]^{¶¶4-5} It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that

¶1 Marshall refers to Maryland as “a sovereign state.” What does this mean? *Is* Maryland a sovereign state? Wouldn’t a sovereign state have the ability to tax whomever it pleased? Would it have been more accurate to describe Maryland as a “once-sovereign”—i.e., prior to ratifying the Constitution—state? See, however, ¶21 below.

Marshall notes the freighted circumstances surrounding this decision, and that the controversy “must be decided peacefully” lest circumstances lead to “hostility of a still more serious nature” than merely hostile legislation. To what might he be referring?

Marshall suggests in the final sentence in this paragraph that the Constitution has “devolved” upon the Supreme Court “this important duty” to resolve the issue. Marshall supplies no evidence for this assertion. Is there any relevant constitutional text that he might have cited? Even if you think there is, does it devolve any such duty on the Supreme Court “alone”? Do Congress and the President—or for that matter, “We the People”—have any role to play in construing the Constitution’s meaning, and, in particular, the proper scope of national power?

¶¶4-5 One way of understanding ¶¶4-5 of *McCulloch* is as outlining, on the one hand, those circumstances in which courts (or other constitutional adjudicators) should be *deferential* to the decisions of ordinary political actors and, on the other, those in which courts should be sufficiently *suspicious* of those actors to engage in what contemporary jargon labels as “strict scrutiny” of their decisions. Consider, then, the following sets of oppositions suggested by the argument in these two paragraphs:

“bold and daring usurpation”	scrupulous adherence to what everybody accepts as constitutional duty
clear and unequivocal language	“doubtful question[s]” upon which “human reason might pause”
presence of a “great principle of liberty”	[mere] question of “the respective powers of those who are equally the representatives of the people”
legislation “pass[ed] unobserved”	passed after full debate
political officials are stupid or corrupt	officials are “as pure and as intelligent as this country can boast”

Is it not clear that one generally would support a greater measure of judicial “intervention” in (some combination) of the first column of circumstances than in the second? Similarly, is it not equally clear

a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

[5] The power now contested was exercised by the first Congress elected under the present constitution. The bill for incorporating the bank of the United States did not steal upon an unsuspecting legislature, and passed unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, 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 these circumstances was a bold and plain usurpation, to which the constitution gave no countenance.

[6] 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.

[7]^{¶7-11} In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and

that there appears to be little justification for such intervention in (some combination) of the second column? The obvious questions are twofold:

1. How does one establish criteria to identify when any given condition is met?
2. How many of the circumstances have to be met to trigger either "strict scrutiny" (and a high probability of judicial invalidation) as against a search only for what contemporary analysts call "minimum rationality" (and a high probability of judicial deference)? Less obvious, but no less important, is the question of judicial capacity to make any of the given inquiries. For example, how precisely do judges (or anyone else) decide how much debate is enough? And how formal must such a debate be? E.g., should formal "hearings" be required of controversial legislation or structured debate in the House and/or Senate, or is it enough if a lot of newspaper editorials are written and legislators with opposing views appear on various talk shows before a vote, without additional debate, in the legislature? Similarly, how does one decide whether a political leader has a "pure" or "intelligent" mind? Think only of our most recent Presidents. Even if we could agree on standards for assessing their purity or intelligence, does that have anything to do with assessing the constitutionality of actions taken under their claims of presidential powers granted by the Constitution? (Should you decide that courts ought not make such inquiries, does that entail that no one else should either?)

¶7-11 Why might "counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent states"? Note that eighteenth-century political theory allowed sovereignty to repose in only one entity. This, as the anti-Federalists urged during the ratification campaign, posed problems for the proposed constitution, under which two sovereignties operated simultaneously in the same jurisdiction and on the same persons. Perhaps this is why Marshall could refer seriously to Maryland as a "sovereign state," though it shared that sovereignty with the national government (which would, in any conflict, emerge victorious). The Federalists responded ingeniously by replacing a theory of "dual sovereignty" of both federal and state governments in favor of a new notion of singular "popular sovereignty," captured most memorably in the first words of the Preamble. See Gordon Wood, *The Creation of the American Republic, 1776-1787* ch. 13 (1969). One can perhaps best understand the placement of these paragraphs early in Marshall's opinion by reference to Professor

independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.

[8] It would be difficult to sustain this proposition. The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might “be submitted to a Convention of Delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification.” This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention. It is true, they assembled in their several States — and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

[9] From these Conventions the constitution derives its whole authority. The government proceeds directly from the people; is “ordained and established” in

H. Jefferson Powell’s point that a “maxim of political law” during the eighteenth century was that a sovereign can be deprived of any of its powers only by its express consent narrowly construed. Should the states — or the people of the states qua states — be deemed sovereign, the implication of this maxim was that the Constitution should be given “the most strict construction that the instrument will bear” in favor of the retention of power by these sovereigns. See Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 929-931 (1985) (quoting the Virginia lawyer St. George Tucker). Placement of sovereignty in the national people would still presumably call for “strict construction” against derogation of their rights, but the crucial point is that popular (as opposed to state) sovereignty deprives states of any special claim to having their ostensible rights privileged over the competing claims of the national government.

Marshall appears to offer three models for who was “sovereign”: (1) the people of each state, organized in some meaningful way state by state; (2) the state governments; and (3) the people of an undifferentiated whole called the United States. He is surely right that the state legislatures cannot be sovereign (see Article VII), but that, of course, leaves the other two possibilities. If one opts for the first, then would it follow that one should construe the sovereignty of the national government quite narrowly, as suggested above, as against a more capacious construction that might be legitimated by the third possibility? On what basis should one choose between them? Marshall does refer to “the people” in ¶¶7-11, but is this dispositive as to choosing (3) as against (1)? How, for example, does one understand his statement, “No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States.” See Martin S. Flaherty, *John Marshall, McCulloch v. Maryland, and “We the People”: Revisions in Need of Revising*, 43 Wm. & Mary L. Rev. 1339 (2002).

Consider the August 7, 1787, draft of the Constitution, which had the following preamble:

We the people of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations [and the other 13 original States] do ordain, declare and establish the following Constitution or the Government of Ourselves and our Posterity.

Recall the preamble to the Articles of Confederation, which similarly mentioned each of the constituent states.

Does it matter that this was changed, for reasons that are wholly unclear, by the Committee on Style? What is the consequence for the “Unionist” argument of Article VII, which sets out the mode of ratification (or of Article V, which sets out the process by which the Constitution is amended)? How does Marshall respond to Maryland’s invocation of Article VII? Is the response satisfactory?

the name of the people; and is declared to be ordained, “in order to form a more perfect union, establish justice, ensure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity.” The assent of the States, in their sovereign capacity, is implied in calling a Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.

[10] It has been said, that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the States. The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the State sovereignties were certainly competent. But when, “in order to form a more perfect union,” it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.

[11] The government of the Union, then, (whatever may be the influence of this fact on the case), 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.

[12] ¶¹² This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

[13] In discussing these questions, the conflicting powers of the general and State governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

[14] 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,

¶¹² This paragraph is often quoted by opponents of what they regard as “overreaching” by the national government. A major question throughout this entire casebook is whether it genuinely restrains someone who shares the “consolidationist” or “nationalist” vision of the Constitution. It is common to describe the Constitution as establishing a national government of “limited and assigned powers.” Is it relevant that Marshall in this paragraph refers only to “assigned” powers, though, to be sure, the notion of “limited” powers emerges in ¶¶14, 15, and 38?

supremacy clause: Art. VI Const

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.

[15] 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, “any thing in the constitution or laws of any State to the contrary notwithstanding.”

[16]^{¶16} Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that every thing granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word “expressly,” and declares only that the powers “not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people”; thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, 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. Why else were some of the limitations, found in the ninth section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is *a constitution* we are expounding.

[17] Although, among the enumerated powers of government, we do not find the word “bank” or “incorporation,” we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and

enumerated powers of
Congress:
see Art. I sect. 8 U.S. Const.

¶16 Marshall is contrasting the Tenth Amendment with Article II of the Articles of Confederation, which provided: “Each state retains its sovereignty, freedom and independence, and every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States in Congress assembled.” Congress was given the opportunity to add the word “expressly” to the proposed text of the Tenth Amendment, but it was rejected. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), reproduced in Chapter 2 *infra*, Marshall wrote: “It cannot be presumed that any clause in the constitution is intended to be without effect: and therefore, such a construction is inadmissible, unless the words require it.” Does Marshall’s construction of the Tenth Amendment give it any effect? Could he properly have read “expressly” into the Tenth Amendment, and, if so, what difference should it make to the outcome of the case?

How does Marshall establish that Article I marks only the “great outlines” of congressional power, and what follows from the proposition? What is the argument based on Article I, §9? Why else might its limitations have been introduced?

support armies and navies. 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. Such an idea can never be advanced. 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 nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. 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? Can we adopt that construction, (unless the words imperiously require it), which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

[18] ¶¶18-21 It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation.

[19] On what foundation does this argument rest? On this alone: The power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged,

¶¶18-21 Counsel for Maryland conceded arguendo that “the powers given to the government imply the ordinary means of execution,” but contended that chartering a corporation was extraordinary. In England, only the Crown had the power to incorporate, and in early nineteenth-century America—before the advent of general state corporation laws—charters were regarded as quite special privileges, granted by legislatures on a case-by-case basis. How does Marshall meet Maryland’s argument that Congress would have the authority to issue charters only if Article I explicitly granted it? Marshall’s response consists in part of the assertion that those who contend that Congress may not employ a particular means in furtherance of an enumerated power have the burden of proof. Is this self-evident? Might one not draw the opposite conclusion from the nature of the federal system and the text of the Tenth Amendment?

there would be some difficulty in sustaining the authority of Congress to pass other laws for the accomplishment of the same objects.

[20] The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

[21] The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. We cannot comprehend that train of reasoning which would maintain, that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date. Some State constitutions were formed *before*, some *since* that of the United States. We cannot believe that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same as if they had been formed at the same time. Had they been formed at the same time, and had the people conferred on the general government the power contained in the constitution, and on the States the whole residuum of power, would it have been asserted that the government of the Union was not sovereign with respect to those objects which were entrusted to it, in relation to which its laws were declared to be supreme? If this could not have been asserted, we cannot well comprehend the process of reasoning which maintains, that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

[22] ¶¶22-26 But the constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred

¶¶22-26 Marshall begins by invoking the Necessary and Proper Clause as affirmative support for the exercise of congressional power but immediately turns to defend against Maryland's contention that the clause restricts that power. Marshall deals summarily with the argument that, but for the clause, Article I would not have vested Congress with any legislative authority, and then considers the argument that "necessary" restricts Congress to the "most direct and simple" means of implementing the enumerated powers.

on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof."

[23] The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

[24] In support of this proposition, they have found it necessary to contend, that this clause was inserted for the purpose of conferring on Congress the power of making laws. That, without it, doubts might be entertained, whether Congress could exercise its powers in the form of legislation.

[25] But could this be the object for which it was inserted? A government is created by the people, having legislative, executive, and judicial powers. Its legislative powers are vested in a Congress, which is to consist of a Senate and House of Representatives. Each house may determine the rule of its proceedings; and it is declared that every bill which shall have passed both houses, shall, before it becomes a law, be presented to the President of the United States. The 7th section describes the course of proceedings, by which a bill shall become a law; and, then, the 8th section enumerates the powers of Congress. Could it be necessary to say, that a legislature should exercise legislative powers, in the shape of legislation? After allowing each house to prescribe its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the Convention, that an express power to make laws was necessary to enable the legislature to make them? That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.

[26] But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary," is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

[27]^{¶27} Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We

^{¶27} Note the sources to which Marshall alludes to, though scarcely cites, to support his interpretation of "necessary." Should he have indicated which specific "approved authors" he was drawing on? Should he have turned to dictionaries? Had he looked at Samuel Johnson's Dictionary of the English Language (1755) he would have found the "rigorous" definition: "needful, indispensably requisite"; whereas the first American dictionary, Noah Webster's Compendious Dictionary of the English Language (1806), included "proper." Johnson was writing, of course, more than 30 years before the Philadelphia Convention, Webster almost 20 years afterward. Assuming one is interested in the most likely meaning of "necessary" in 1787, is either of these two dictionaries likely to be a more reliable source?

Incidentally, Marshall's sentence about the "character of human language" is quite similar to Madison's arguments set out in The Federalist No. 37, where he wrote that "no language is so copious as to supply words and phrases for every complex idea, or so correct so not to include many equivocally denoting different ideas." Thus, says Madison, we must adjust to the "unavoidable inaccuracy" of language, which he describes as a "cloudy medium."

think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense — in that sense which common usage justifies. The word “necessary” is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. This comment on the word is well illustrated, by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying “imposts, or duties on imports or exports, except what may be *absolutely* necessary for executing its inspection laws,” with that which authorizes Congress “to make all laws which shall be necessary and proper for carrying into execution” the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word “necessary,” by prefixing the word “absolutely.” This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

[28] ¶¶²⁸⁻³² Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. **This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end.** This provision is made in a **constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.** To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the **properties of a legal code.** It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to

¶¶²⁸⁻³² To support his “figurative” reading of the word, Marshall looks to the “subject, the context, [and] the intention of the person” using it. What is the argument of ¶²⁸? Does it have any force independent of the counterexamples that follow in ¶¶²⁹⁻³⁰? Is the argument by counterexample persuasive?

circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. The powers vested in Congress may certainly be carried into execution, without prescribing an oath of office. The power to exact this security for the faithful performance of duty, is not given, nor is it indispensably necessary. The different departments may be established; taxes may be imposed and collected; armies and navies may be raised and maintained; and money may be borrowed, without requiring an oath of office. It might be argued, with as much plausibility as other incidental powers have been assailed, that the Convention was not unmindful of this subject. The oath which might be exacted—that of fidelity to the constitution—is prescribed, and no other can be required. Yet, he would be charged with insanity who should contend, that the legislature might not add to the oath as directed by the constitution, such other oath of office as its wisdom might suggest.

[29] So, with respect to the whole penal code of the United States: whence arises the power to punish in cases not prescribed by the constitution? All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress. The right to enforce the observance of law, by punishing its infraction, might be denied with the more plausibility, because it is expressly given in some cases. Congress is empowered “to provide for the punishment of counterfeiting the securities and current coin of the United States,” and “to define and punish piracies and felonies committed on the high seas, and offences against the law of nations.” The several powers of Congress may exist, in a very imperfect state to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given.

[30] Take, for example, the power “to establish post offices and post roads.” This power is executed by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the post road, from one post office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post office and post road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a Court of the United States, or of perjury in such Court. To punish these offences is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

[31] The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the constitution, and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

[32] If this limited construction of the word “necessary” must be abandoned in order to punish, whence is derived the rule which would reinstate it, when the government would carry its powers into execution by means not vindictive in their nature?

If the word “necessary” means “needful,” “requisite,” “essential,” “conducive to,” in order to let in the power of punishment for the infraction of law; why is it not equally comprehensive when required to authorize the use of means which facilitate the execution of the powers of government without the infliction of punishment?

[33] ¶³³ In ascertaining the sense in which the word “necessary” is used in this clause of the constitution, we may derive some aid from that with which it is associated. Congress shall have power “to make all laws which shall be necessary and proper to carry into execution” the powers of the government. If the word “necessary” was used in that strict and rigorous sense for which the counsel for the State of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not strained and compressed within the narrow limits for which gentlemen contend.

[34] ¶¶³⁴⁻³⁷ But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the State of Maryland, is founded on the intention of the Convention, as manifested in the whole clause. To waste time and argument in proving that, without it, Congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, Congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the State of Maryland, would abridge, and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons:

[35] 1st. The clause is placed among the powers of Congress, not among the limitations on those powers.

[36] 2nd. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been, or can be assigned for thus concealing an intention to narrow the discretion of the national legislature under words which purport to enlarge it. The framers of the constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and, after deep reflection, impress on the mind another, they would rather have disguised the grant of power, than its limitation. If, then, their intention had been, by this

¶³³ Is Marshall correct that “proper” would be superfluous if “necessary” were read in its rigorous sense? Might “proper” mean “not prohibited by Article I, §9”? Doesn’t Marshall’s interpretation of “necessary” make “proper” superfluous—at least unless “necessary” is given a somewhat restrictive meaning?

¶¶³⁴⁻³⁷ Paragraph 34 seems largely introductory to the perceptive argument of ¶¶³⁵⁻³⁶ based on the location and phraseology of the clause. But doesn’t it suggest an argument in Maryland’s favor that Marshall ought to meet: that if Congress would have broad ancillary powers without the clause, and a document should presumptively be read so as to make no clause superfluous, then the Necessary and Proper Clause must be designed to restrict congressional power? Is the response implicit in ¶³⁷ satisfactory?

clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these. "In carrying into execution the foregoing powers, and all others," &c. "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

[37] The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.

[38] ¶³⁸ We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. 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.

[39] That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that government from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it.

[40] The propriety of this remark would seem to be generally acknowledged by the universal acquiescence in the construction which has been uniformly put on the 3rd section of the 4th article of the constitution. The power to "make all needful rules and regulations respecting the territory or other property belonging to the United States," is not more comprehensive, than the power "to make all laws which shall be necessary and proper for carrying into execution" the powers of the government. Yet all admit the constitutionality of a territorial government, which is a corporate body.

[41] If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must

¶³⁸ This is one of the most quoted paragraphs in the American constitutional corpus. Would it be fair to paraphrase it as "Congress can do whatever it wants so long as it does not contravene an express and specific prohibition contained in this text"? Is this consistent with Marshall's acknowledgment in ¶¶14 and15 that the national government is one of limited and enumerated powers?

be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, Congress, justifying the measure by its necessity, transcended perhaps its power to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure. The time has passed away when it can be necessary to enter into any discussion in order to prove the importance of this instrument, as a means to effect the legitimate objects of the government.

[42]^{¶42} But, were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

[43] After this declaration, it can scarcely be necessary to say, that the existence of State banks can have no possible influence on the question. No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution. But were it otherwise, the choice of means implies a right to choose a national bank in preference to State banks, and Congress alone can make the election.

[44] After the most deliberate consideration, it is the unanimous and decided opinion of this Court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land.

[45] The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It would have been unwise to locate them in the charter, and it would be unnecessarily inconvenient to employ the legislative power in making those subordinate arrangements.

^{¶42} To some extent this paragraph is designed to reassure readers that Congress did not in fact have plenary power. What is a “pretext”? What kinds of inquiry would be necessary to demonstrate its existence?

The great duties of the bank are prescribed; those duties require branches; and the bank itself may, we think, be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

A. The Reaction to *McCulloch*

When *McCulloch* was decided in 1819, few persons of stature in the national political community genuinely disputed the desirability or, more to the point, constitutionality of the national bank. Yet Marshall's opinion stirred great controversy, for it went far beyond the specifics of the bank, first to portray an eloquent vision of a single nation, governed by a national government possessing broad powers, coupled with a Court willing to offer what could seem like almost complete deference to the decisions reached by Congress. During the months following the decision a number of critical essays appeared in the Richmond *Enquirer*.²¹

One author, writing under the pseudonym of Amphictyon, criticized the breadth of Marshall's opinion, especially with respect to the source of the government's power.²²

If the powers of the federal government are to be viewed as the grant of the people, without regard to the distinctive features of the states, then it would follow that if a majority of the whole sovereign population of the United States had ratified the constitution, it would immediately have been binding on the minority, although that minority should consist of every individual in one or more states. But we would know that such was not the case. Each state was an independent political society. The constitution was not binding on any state, even the smallest, without its own free and voluntary consent. . . . The respective states then in their sovereign capacity did delegate the federal government its powers, and in so doing were parties to the compact.

The source of the federal government's power had been a matter of controversy at least from the time of the ratification campaigns. In the Virginia ratifying convention, Patrick Henry, a staunch opponent of the new Constitution, demanded why the Preamble to the Constitution said "*We, the people*," instead of "*We the States*? States are the characteristics and the soul of a confederation. If the States be not the agents of this compact, it must be one great consolidated government of the people of all States."²³ A delegate responded that no one "but the people have a right to form government,"²⁴ to which Henry, referring to the fear that a "consolidated government" would ride roughshod over individual liberty, replied that "the principles of this system are extremely pernicious, impolitic, and dangerous."²⁵ Patrick Henry was expressing a belief, widely held in that and other times, that liberty depended on government by small political units subject to close citizen

21. See John Marshall's Defense of the Constitution (Gunther ed., 1969) (hereinafter cited as Gunther).

22. Id. at 56.

23. Quoted in Sources and Documents Illustrating the American Revolution, 1764-1788 and the Formation of the Federal Constitution 309 (Morison ed., 2d ed. 1965).

24. Id. at 315.

25. Id. at 321-322.

participation and control.²⁶ The new Constitution, by contrast, established a national government, having vastly greater powers than the Confederation and the authority over a large and expanding territory.²⁷

The most important argument regarding state sovereignty and the relevance thereof to constitutional interpretation was made at the very end of the eighteenth century in the Virginia and Kentucky Resolutions, written by Madison and Jefferson, respectively, that challenged the constitutionality of the Alien and Sedition Acts of 1798.²⁸ Jefferson had written in the Kentucky Resolution:²⁹

[T]he several states who formed [the Constitution], being sovereign and independent, have the unquestionable right to judge of its infraction, and . . . a nullification, by those sovereignties, of all unauthorized acts done under colour of that instrument, is the rightful remedy.

Amphictyon's essays on *McCulloch* reprinted much of Madison's Virginia Resolution, which similarly asserted that the states were "duty bound to interpose" their authority to arrest the evil of "deliberate, palpable, and dangerous exercise of other powers not granted by the said compact."³⁰

Jefferson's response to *McCulloch* can be garnered from an 1820 letter describing the national judiciary as:³¹

. . . the subtle core of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric. They are construing our Constitution from a coordination of general [i.e., national] and special [i.e., state] government to a general and supreme one alone. This will lay all things at their feet.

Returning to the notion of the Virginia Resolution, Jefferson suggested that the people of two-thirds of the states could, through resolutions of nullification,

26. See Hannah Arendt, *On Revolution* (1963); Gordon Wood, *Creation of the American Republic, 1776-1787* (1969).

27. In *The Federalist* No. 14, Madison argued that republican liberty could survive in an area as large as the United States. Recall, though, that the United States he was explicitly referring to was the original 13 states plus the Northwest Territory and other territory that was possessed by the states and would be ceded to the new United States. By 1819, though, it had more than doubled as a result of the Louisiana Purchase, and Marshall could casually refer to a "vast republic" stretching to the Pacific. Given that the 1803 Louisiana Purchase extended only into Montana, Marshall's statement is presumably based on the Adams-Onís Treaty of 1819 with Spain, by which Spain ceded to the United States all claims on the West Coast north of the 42nd parallel. See Frederick Merk, *The Oregon Question: Essays in Anglo-American Diplomacy & Politics* 37 (1967). Though this might have resolved certain tensions between Spain and the United States, it did nothing to resolve far more important conflicts in the area between the United States and Great Britain. That awaited the Webster-Ashburton Treaty of 1842, which recognized U.S. claims to the Oregon Territory. Does one's view of the Constitution depend on how large the United States is (or one thinks ought to be)? Assume, for example, that one believes that westward expansion is a bad idea, for whatever reason. Would one tend to read the Constitution differently from Marshall? Insofar as a national bank facilitates expansion, that might count as a reason against its constitutionality, at least if one is seriously committed to a notion of limited congressional power, rather than an argument in its favor. We shall return to the issue of constitutional implications of expansionism in Chapter 4.

28. 1 Stat. 566, 570, 577, 696. See pp. 91-104 *infra* for further discussion of the Acts.

29. *The Portable Jefferson* 286 (Peterson ed., 1975) (hereinafter Peterson).

30. Gunther, *supra* n.21, at 51. These arguments were later invoked by South Carolina in its efforts to nullify federal laws and in the justification for Southern secession in 1860-1861. See *The Nullification Era: A Documentary Record* (Freehling ed., 1967).

31. Dumas Malone, *6 Jefferson and His Time* 356 (1981) (letter to Thomas Ritchie).

overrule unconstitutional Supreme Court decisions. Only in this way could the principle be vindicated that the Constitution “is a compact of many independent powers, every single one of which claims an equal right to understand it, and to require its observance.”³² Writing under the name of Hampden in the *Richmond Enquirer*, Spencer Roane, Chief Justice of the Virginia Supreme Court, also responded to *McCulloch*. Among other arguments, he invoked Johnson’s Dictionary, “which is believed to be the best in the English language” to show that “necessary” was there defined as “needful” or “indispensably requisite.”³³ Roane’s arguments drew an admiring letter from Madison, who noted:³⁴

It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms and phrases necessarily used in such a charter; more especially those which divide legislation between the general and local governments; and that it might require a regular course of practice to liquidate and settle the meaning of some of them. But it was anticipated, I believe, by few, if any, of the friends of the Constitution, that a rule of construction would be introduced as broad and pliant as what has occurred. And those who recollect, and still more, those who shared in what passed in the State conventions, through which the people ratified the Constitution, with respect to the extent of the powers vested in Congress, cannot easily be persuaded that the avowal of such a rule would not have prevented its ratification.

Assume that Madison is correct that “shared” understandings in 1787 would have been appalled by the “extent of the powers vested in Congress” according to Marshall. So what? Does that suggest that the doctrinal understanding of congressional power established by Marshall’s opinion should be “overruled”? As you will see, *McCulloch* is a truly landmark precedent in American constitutional law, almost certainly cited more often than any other early case.

B. Marshall’s Methods of Constitutional Interpretation

Within *McCulloch* we can find almost all of the standard forms of constitutional argument that lawyers and judges use today. Philip Bobbitt has popularized the idea of “modalities” of constitutional argument. For purposes of this discussion, we will identify seven of them: (1) appeals to text (and rules for construction of texts), (2) constitutional structure, (3) prudence (or consequences), (4) purpose or intention, (5) judicial precedent, (6) past practice and inter-branch convention, and (7) national ethos and political tradition.³⁵

32. Merrill D. Peterson, *Thomas Jefferson and the New Nation* 994-995 (1970).

33. Gunther, *supra* n.21, at 133.

34. Letter of September 2, 1819, in 3 Farrand, *supra* n.3, at 435.

35. See generally Philip Bobbitt, *Constitutional Fate* (1982), an expanded version of *Constitutional Fate*, 58 Tex. L. Rev. 695 (1980); see also Bobbitt, *Constitutional Interpretation* (1991). Bobbitt’s list, which has been widely adopted, included only six modalities: text, structure, prudence, history, precedent and ethos. For a more expansive catalogue of styles of constitutional argument, see Jack M. Balkin, *The New Originalism and the Uses of History*, 82 Fordham L. Rev. 641, 659-661 (2013) (listing arguments from text, structure, purpose, consequences, judicial precedent, past practice and inter-branch convention, custom, natural law/natural rights, national ethos, political tradition, and honored authority).

The modalities are invaluable to constitutional argument because they make it easy to analyze problems and construct arguments about constitutional questions. The modalities offer a series of different perspectives on the Constitution. Faced with virtually any question of constitutional law, one can work through the standard forms of argument—what arguments can one make from the constitutional text, what arguments can one make from constitutional structure—and so on through the list. Students should learn to do this until it becomes second nature. Using the modalities allows students to always have something to say about a constitutional question, and to always have several pathways for analysis. More generally, the modalities offer multiple ways to think about what is at stake in a constitutional question; they give lawyers and judges multiple perspectives on how to think about the Constitution and how to formulate and solve constitutional problems.

1. *The text.* Marshall makes arguments from the language of the Tenth Amendment, and from the implications of Article I, §9. But textual arguments include more than just arguments about the meaning of particular words and phrases. Notice how Marshall points to the location of the Necessary and Proper Clause among Congress's *powers* in Article I, §8, rather than among the *limitations* of congressional power. In other words, he looks at the location of the Necessary and Proper Clause within the text as a whole, comparing it with other parts of the text.

Marshall also makes the famous statement that “it is *a constitution* we are expounding”? This is an argument about the *kind* of text a constitution is. What does he mean by this? What “constitutes” a “constitution,” as distinguished from, say, a statute?

In ¶16 Marshall contrasts the “great outlines” of Article I with “the prolixity of a legal code.” (See also Note: Uncertainties of Meaning, below.) In fact, some constitutions are very long and detailed, although the U.S. Constitution is not one of them. What follows from this fact?

2. *Structural argument: The theory and structure of the government established by the Constitution.* Structural arguments ask how a constitution is supposed to operate. In *Structure and Relationship in Constitutional Law* (1969), a famous book on structural argument, Professor Charles Black, Jr., argues that we should interpret the Constitution using “inference[s] from the structures and relationships created by the constitution.” He uses *McCulloch* as an example of how judges make structural arguments. Black points out that “Marshall does not place principal reliance on the [Necessary and Proper] clause as a ground of decision; . . . before he reaches it he has already decided, on the basis of far more general implications, that Congress possesses the power, not expressly named, of establishing a bank and chartering corporations; . . . he addresses himself to the necessary and proper clause only in response to counsel’s arguing its *restrictive* force.”³⁶ You will shortly see another powerful use of structural argument in the second part of *McCulloch*, which deals with Maryland’s power to tax the bank.

Does it follow from the nature of a federal constitution that the national legislative power should be construed expansively? Or, on the contrary, should one be zealous about limiting national power, lest it in effect swallow up state

36. Charles Black, *Structure and Relationship in Constitutional Law* 7, 14 (1969).

autonomy? For example, if the Constitution is a treaty like NATO, we should read its powers fairly narrowly to respect the sovereignty of the individual signatory states. But if it is the plan of a national government that represents the American people directly, we should read its provisions flexibly so that it can serve the public good. What features of the Constitution's text and design can one point to decide which characterization is correct? (Note that it might also be the case that neither of these characterizations is correct.)

How does Marshall believe the Constitution is supposed to work? How did Maryland think it should work? These are the classic questions in structural analysis. It is likely that our nation would be very different had Maryland's arguments prevailed. Thus the dispute between Marshall and his critics was about *which* conception of government structure was the right one for the United States.

This puts Marshall's conception of "*a constitution*" in a different light: It is not necessarily a uniquely correct interpretation but rather a desirable vision of the point of the Constitution and of the "national project" of the United States of America. Note that Marshall invokes the Preamble in ¶9 (another example of a textual argument—in this case in aid of a claim about constitutional structure). Recall that Edmund Randolph counseled against reliance on the Preamble for guidance as to constitutional meaning. What are the implications of Marshall's citation to the Preamble?

3. *Prudential argument: What are the likely consequences of a decision?* Where the text is unclear, constitutional interpreters often pay attention to the likely consequences of different interpretations. This practice is so commonplace that people might not even think of it as a distinctive form of argument. For example, in ¶17 Marshall speaks of "[t]he exigencies of the nation" and rejects a "construction of the constitution that would render" the performance of government functions "difficult, hazardous, and expensive." Why should this matter? Should the Constitution always be interpreted to facilitate the performance of governmental functions?

Recall paragraph ¶28, in which Marshall makes a similar comparison and notes that Article I is a provision "made in a constitution intended to endure for ages to come, and, consequently to be adapted to the various *crises* of human affairs." How does this shed light on the best interpretation of the Necessary and Proper Clause? (And how significant is it that it is the word "*crises*" that is italicized rather than "adapted"?)

You can see from these examples that arguments from consequences and arguments from structure are often connected. Marshall argues that the best structure is one that makes it easy for the federal government to act; Maryland argues that the best structure is the one that gives states the widest leeway to protect their local interests.

Arguments from consequences generally start from the assumption that the text is unclear, and that there is more than one way to read it; hence we should choose the interpretation that produces the best consequences, all other things being equal. If the text is clear, however, we cannot disregard it simply because we dislike the consequences. But the degree of clarity can be contested. If the consequences are very bad, interpreters might strain to conclude that the text is not clear. To what extent is it relevant that Article V makes it unusually difficult to amend the United States Constitution?

Note that there are at least two different types of prudential arguments. The broader category concerns whether a given interpretation—and the doctrine,

rule, or result it produces—would have good consequences or bad. The second, narrower category concerns whether allowing *this particular decisionmaker* (e.g., the courts, the executive, the legislature, the states, the federal government) to decide the question in a particular way would have good consequences or bad. In particular, a very familiar question in constitution law is whether having a court decide the question would be a good use of judicial resources, or would tend to serve or undermine the role of the judiciary in protecting legal and constitutional values in the long run.

Judges are often concerned with how their decisions, even if otherwise justified, will play in the political arena. They may be concerned that taking up a controversial question, or offering a broad or ambitious reading of the Constitution, even if correct, will provoke a backlash from the other branches of government or from the public generally, and in the long run this will have worse consequences for the constitutional system than if courts had avoided taking up the issue directly for the moment, deferred to the political branches, or offered a narrow or limited ruling. Prudential considerations sometimes counsel not deciding a case at all, or deciding it only on technical or procedural grounds unrelated to the substantive issues at stake. Alexander Bickel famously called these practices the “passive virtues.”³⁷ Years later Cass Sunstein argued that judges should often be “minimalist”; they should decide constitutional questions as narrowly as possible or should use formulas that leave future questions undecided.³⁸ As you will see in this course, prudential considerations are never very far away from judicial practice, because constitutional questions often involve some of the most politically heated issues of their time. Are such prudential considerations consistent with the duty of courts to act in a principled fashion? Gerald Gunther famously quipped that Bickel insisted that courts be 100 percent principled 20 percent of the time.³⁹ On the other hand, is prudence necessary to keep a rule of law system going over time? (We will return to this question in the next chapter in the discussion of *Marbury v. Madison*.)

The role of institutional prudence in decisionmaking means that there may be a gap between the best interpretation of the Constitution and the most reasonable thing for a particular actor (such as a judge) to do in interpreting the Constitution. To what extent should people in different positions—citizens, legal academics, lower court judges, Supreme Court Justices, members of the executive branch, and individual members of Congress—treat questions of constitutional interpretation differently because of their distinctive roles?

4. *Appeals to purpose or intentions.* Arguments from purpose can appeal to the particular intentions or understandings of specific individuals or groups of individuals. Examples are arguments from *legislative history*. But often arguments from purpose *attribute* purposes to the text or derive purposes from the text—that is, we reason from the language used and the issues that the language addresses to figure out the likely purposes of a provision.

37. Alexander M. Bickel, *The Supreme Court 1960 Term: Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40 (1961).

38. Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999).

39. Gerald Gunther, *The Subtle Vices of the “Passive Virtues”: A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1, 3 (1964).

Recall Marshall's discussion of the purposes of the Tenth Amendment. What kinds of argument about purpose is he making? Is he appealing to subjective intentions or to the purposes of the amendment given its language and placement in the Constitution? In arguing against the First Bank, Jefferson noted that the Philadelphia Convention had rejected a proposal to authorize Congress to charter certain corporations. Marshall does not mention this. This may not be simply because it would not have helped his argument: **Judicial references to legislative history were rare and usually frowned on in eighteenth-century Anglo-American jurisprudence.** It was much more commonplace to infer purpose from the text. In any event, what importance *should* we place on the purposes or intentions behind the adoption (or rejection) of particular texts? Is Marshall's argument regarding the (limited) scope of the Tenth Amendment enhanced by the knowledge that proposals in both the House of Representatives and the Senate to add the word "expressly" before "delegated" were rejected?⁴⁰

Bobbitt called arguments from intentions "historical" arguments. But it is important to recognize that not all arguments that use history are arguments from purpose or intentions. In fact, one can use history in each modality of constitutional argument; one simply uses it differently.⁴¹

In *McCulloch*, for example, Marshall uses history in multiple ways. First, he refers to the purposes of the framers of the Philadelphia Convention — which is an argument from purpose or intention. Second, he refers to the history of the adoption of the bank itself under the Washington Administration — which is an argument from past practice. Third, he uses history to show that the failure to have a national bank during the War of 1812 "exposed" the national government to "embarrassments" — which is an argument from consequences.

It is commonplace to associate historical arguments with originalist arguments — that is, arguments about what the Constitution's framers or adopters intended and/or would have understood the Constitution to mean. But the different modalities of argument suggest that history can be useful for many different purposes in interpreting a Constitution.

To be sure, one might use history to discover the purposes or meanings of the adopters of the text. But one might also use history to study how the Constitution functions in practice, the likely consequences of certain interpretations, the growth and development of political traditions, the emergence of conventions of practice, or how later generations understood the nation's constitutional commitments.

Still another way to use history, as we shall see throughout this course, is to argue that we should learn from mistakes or injustices that occurred in the past and that we should interpret the document in the present to avoid making similar errors of judgment. These are arguments from political tradition or ethos.

5. ***Past practice and inter-branch convention.*** Although Marshall cites no judicial decisions, he nonetheless invokes as precedent the incorporation by Congress in 1791 of the First Bank to support the constitutionality of the 1816 decision to incorporate the Second Bank. And we have seen that Madison justified signing the bill

40. See Neil H. Cogan, ed., *The Complete Bill of Rights: The Drafts, Debates, Sources, & Origins* 665 (House), 667 (Senate) (1997).

41. On this point, see Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *Fordham L. Rev.* 641 (2013).

establishing the Second Bank by reference to “repeated recognitions, under varied circumstances, of the validity of such an institution,” even though he had denounced the validity of the 1791 incorporation. Why are arguments from past practice relevant to the contemporary meaning of the Constitution? If people have already spent some time thinking about problems, we should defer to their considered judgments. But what if their decisions arose in the context of heated political disagreements or emergencies? In the alternative, one might argue that past practice establishes a convention that should govern later actors. Why should previous Presidents and/or Congresses be able to bind later ones?

6. *Judicial Precedent.* *Judicial precedents, which constitute the lion’s share of most law school casebooks, are absent in McCulloch; Marshall only discusses previous decisions by nonjudicial actors. That is to be expected; very few cases had been decided by the 1810s, and many of Marshall’s opinions concern issues of first impression.* Generally speaking, as a field of law fills up with judicial precedents, both lawyers and judges rely on them increasingly in their arguments. And, of course, lower courts rely almost exclusively on previous decisions by the Supreme Court and federal circuit courts.

Within the class of judicial precedents, courts might conceivably look not only to their own decisions, but to the decisions of state courts, and, perhaps more controversially, to the decisions of courts in other countries. Precedents from state courts and courts of other nations are not binding on the Supreme Court; at most they may provide persuasive arguments. However, the U.S. Supreme Court, like many other courts in the United States and the United Kingdom, often speaks as if it is bound by its own previous decisions, whether or not they are “persuasive.”

Why should the Supreme Court follow its precedents? One reason is that if past judges have thought hard about a problem, later courts should *defer to their judgment*. But this does not explain why courts should follow precedents that are concededly unwise and unjust. A second reason is *fidelity to the rule of law*. But common law courts expand, contract, and distinguish precedents all the time, which begs the question of whether it is really the same law that is being applied later on. A third reason is that following precedent lends *order and stability* to legal argument. Richard Fallon, for example, has written that “a good legal system requires reasonable stability; . . . while decisions that are severely misguided or dysfunctional surely may be overruled, continuity is presumptively desirable with respect to the rest; . . . it would overwhelm the Court and country alike to require the Justices to rethink every constitutional question in every case on the bare, unmediated authority of constitutional text, structure, and original history.”⁴² But again this is merely a defeasible preference; as Fallon himself notes, courts are willing to sacrifice stability and settlement if there are good enough reasons. Consider one of Justice Holmes’s most famous statements, given in a speech on The Path of the Law to the students and faculty of Boston University Law School in 1897: *“It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”*

42. Richard Fallon, *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. Rev. 570, 585 (2001).

Note as well that there is an important difference between common law precedent and constitutional precedents; while common law precedents can be overturned by statute, constitutional precedents cannot.⁴³

7. *National ethos and political tradition.* A seventh kind of constitutional argument looks to the meaning of the American political tradition; it asks whether a proposed interpretation is faithful to the meaning or destiny of the country, its deepest commitments, or some important aspect of national character. Bobbitt calls these arguments “ethical,” because they concern national ethos. The character of a nation and its commitments sometimes are elucidated by what has happened in the past. Therefore in interpreting the Constitution, people often make arguments about the traditions of the American people and the meaning of the key events in American history. (Examples are appeals to the American Revolution, the Civil War, the New Deal, or the Civil Rights Movement.) Therefore these might be also called arguments from the American political tradition.

When *McCulloch* was decided, the American nation was still relatively new. The only arguments from tradition available concerned the Revolution and, before that, the political traditions of Great Britain. Hence Marshall's arguments about the character of the nation tend to be forward-looking—he asks what kind of nation the United States is and will become. As time goes on, interpreters have many ways of invoking tradition and the meaning of key events in articulating national commitments.

Arguments about national ethos and political tradition are often narrative or historical in character, and are often continuous with the other forms of constitutional argument, particularly arguments from structure, purpose, and past practice. Note that in ¶17 Marshall justifies the need for a flexible constitution on the grounds that “[t]hroughout 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. . . . Is that construction of the constitution to be preferred which would render these operations difficult, hazardous, and expensive?” At first this looks like a simple argument about good and bad consequences. But it actually rests on a deeper set of assumptions about the nature of the American nation—as well as its eventual future.⁴⁴

It is particularly telling that Marshall chooses to ascribe borders to the United States much larger than those actually existing in 1819, when *McCulloch* was written. In Marshall's narrative—one that would be retold countless times under the more familiar name of “Manifest Destiny”—the United States was to become a great country, not only in spirit but also in resources and size; and great countries need constitutions that give them the flexibility to grow and attain their promised greatness.

As Lewis Henry LaRue has pointed out, it is this familiar narrative of America's destiny, as much as anything else, that underpins and justifies the expansive constitutional interpretation of national power in *McCulloch*. The narrative is not

43. For theoretical discussions of constitutional precedent, see Michael Gerhardt, *The Power of Precedent* (2011); Randy J. Kozel, *Settled versus Right: A Theory of Precedent* (2017).

44. J.M. Balkin and Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963 (1998). For theories of narrative argument in constitutional law, see J.M. Balkin, *The Declaration and the Promise of a Democratic Culture*, 4 Widener L. Symp. J. 167 (1999); Lewis Henry LaRue, *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority* (1995).

everything, but it is surely something. If we told a different story—a Jeffersonian story of a tranquil land of agrarian farmers who hoped to avoid the corruptions of ambition and avarice characteristic of European monarchies, who sought merely to live their lives in peace and harmony in small, close-knit communities—we might well imagine that it *should* be “difficult, hazardous, and expensive” for the national government to gather revenues, raise armies, sweep across the Continent, and conquer all in its path. If we told a story that opposed the depravity and overreaching of grasping monarchs and their prime ministers to the simple virtues of a self-reliant republican citizenry, we might even more want to nip in the bud any potential mechanisms of national aggrandizement.

8. *Using the modalities.* We have identified seven standard kinds of arguments that lawyers employ in arguing about the Constitution. The list of modalities is by no means closed: We have not mentioned, for example, arguments from natural law and natural rights, which were quite important in the eighteenth and nineteenth centuries. And often there can be more than one way to classify a particular argument. That is as it should be: the study of modalities of argument is not about memorizing a set of rigid formulas but about learning, in practical terms, how to analyze problems and persuade other people about what the Constitution means.

In any case, the seven types of argument detailed above are the ones constitutional lawyers most frequently use. When you face a novel constitutional question, it helps to have them at your fingertips. You will find that simply by working through the modalities and coming up with the best arguments pro and con for each modality, you will learn a great deal about the Constitution, and you will improve your skills as a legal advocate.

Note: Uncertainties of Meaning

The language of a provision in a written document is often susceptible of more than one meaning; it can be ambiguous, vague, or figurative.⁴⁵

1. Ambiguity

A word or expression is ambiguous if it admits of two or more *rather different* meanings. Ambiguity is often desirable in literature; it is essential to puns. But (as distinguished from vagueness) it is usually undesirable in legal documents.

Language is pervasively ambiguous, but even a very general understanding of the purpose of a provision resolves most serious ambiguities. Imagine, for example, that you receive a note suggesting that you meet by “the bank” at noon. Especially if you have just read *McCulloch*, you might immediately think that this refers to a financial services institution, though there might still be confusion as to which among several “banks” is the proposed venue. If, on the other hand, you are an avid angler, as is

45. See generally William Alston, *Philosophy of Language*, ch. 5 (1964); William Empson, *Seven Types of Ambiguity* (2d ed. 1947); Willard Van Orman Quine, *Word and Object*, ch. 4 (1960); I.A. Richards, *The Philosophy of Rhetoric* (1936); E. Allan Farnsworth, “Meaning” in the Law of Contracts, 76 *Yale L.J.* 939 (1967); Friedrich Waismann, *Analytic-Synthetic V*, 13 *Analysis* 1 (1952).

your correspondent, then “the bank” clearly refers, at least for you, to the fishing spot that both of you regularly convene at, and it would be a clear mistake to go instead to the First National Bank. Many theorists would argue that language always requires some understanding of the likely purposes of actual speakers or writers. As an experiment, glance at some sections of the Constitution and try to understand their meanings while consciously avoiding considering their purposes. Consider, for example, Article II, §1, cl. 5: “No person except a natural born Citizen . . . shall be eligible to the Office of President. . . .” Is the meaning of “natural born citizen” inherently clear? What might the phrase mean in a revised constitution of Scotland drafted by Macbeth (had he survived)?⁴⁶

What does the phrase mean in our Constitution, and how do you know? Consider the phrase in its full context: “No person except a natural born Citizen or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President. . . .” What does this contribute to clarifying its meaning, and how? Consider the case of Texas Senator Ted Cruz, who ran for president in 2016. Cruz was born in Calgary, Canada, to an American mother and a Cuban father. A federal statute treats Cruz as a birthright citizen because his mother, an American citizen, had spent at least five years after her fourteenth birthday within the United States. Can Congress, by statute, settle the question of who is a “natural born” citizen under the meaning of the Constitution? If Congress may not, does this mean that anyone born in Puerto Rico, whose citizenship depends on the 1917 Jones Act, is ineligible to become President? These are, we assure you, not the only examples of gaps and ambiguities to be found in the text of the Constitution.

2. Vagueness

Whereas ambiguous meanings tend to differ discretely, as with the two discrete meanings of “bank,” vagueness involves marginal indefiniteness in the meaning and application of words, as would be the case if there are multiple financial institutions and there is no a priori reason to think that “bank” refers to one rather than another.⁴⁷

Thus, “middle-aged” is vague, for it is not clear whether a person aged 40 or a person aged 59 is middle-aged. Of course there are uncontroversial areas of application and

46. Recall the second apparition's assurance in *Macbeth*, Act IV, scene i:

Be bloody, bold, and resolute; laugh to scorn
The power of man, for none of woman born Shall harm Macbeth.

and Macbeth's ensuing confidence and his subsequent downfall (Act V, scene vii):

Macbeth: Let fall thy blade on vulnerable crests;
I bear a charmed life, which must not yield
To one of woman born.

Macduff: Despair thy charm;
And let the Angel, whom thou still hast serv'd
Tell thee, Macduff was from his mother's womb
Untimely ripp'd.

47. William Alston, *Vagueness*, in 8 *Encyclopedia of Philosophy* 218 (Edwards ed., 1967).

nonapplication. At age 5 or 80 one is clearly not middle-aged, and at age 45 one clearly is. [Would this be true even if standard life expectancy increases, as some predict, to 150 years? Even if a 45-year-old in 2015 is clearly “middle-aged,” will that necessarily be true of a 45-year-old in 2115?] But on either side of the area of clear application there are indefinitely bounded areas of uncertainty. . . . [T]here is no definite answer to the question, Is a person aged 40 middle-aged? . . . Our inability [to give an answer] is not the result of lack of information about such things as blood pressure and metabolic rate. No additional information would settle the matter, except indirectly by leading us to tighten up the meaning of the word. The indeterminacy is due to an aspect of the meaning of the term rather than to the current state of our knowledge.

Not only abstract concepts but ordinary (nonproper) nouns naming physical objects and intangible things are usually vague — and incurably so. For many things are defined by the confluence of a number of attributes (a, b, c, . . . n), and one can never fully describe the combinations of attributes necessary or sufficient for proper application of the noun to particular things:⁴⁸

Consider the term “lemon,” for example. Lemons normally have certain characteristics: a yellow color when ripe, skin of a certain thickness with a waxy texture, ovoid shape, acid taste, a size and hardness that falls within a certain range, and so on. If an object has all these properties, it is definitely a lemon. It might happen that in a particular region of the world, due to atomic fallout, lemon trees started producing fruit of a pinkish color and with a sweet taste, but having all the other characteristics of ordinary lemons. These fruits would doubtless still be lemons: pink lemons or sweet pink lemons. A thing cannot lack all, or even very many, of the typical lemon properties, and still be a lemon; but there is no one property, or group of two or three properties, which an object must have to be properly called a lemon. It must simply have some combination of the cluster or properties which lemons typically have.

Some provisions of the Constitution are quite precise: Article II, §1, cl. 5 requires that the President be at least 35 years old rather than at least “middle-aged,” though the term “35 years old” could become ambiguous if there were real dispute about which calendar system to adopt, e.g., lunar or solar, as the metric for determining years of life. Many other provisions are quite vague: What is the “*Commerce . . . among the several States*” that Article I, §8, cl. 3 empowers Congress to regulate? And some provisions, such as the Fourth Amendment’s prohibition of “*unreasonable searches and seizures*,” seem designedly vague.

3. Nonliteral Usage

Article I, §8, cl. 8 empowers Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Does “writings” include anything besides letters inscribed on a surface? Does it include inscriptions by means other than hand (by printing or photo process), inscriptions of things

48. George Pitcher, *The Philosophy of Wittgenstein* 221 (1964) (borrowing an example from Michael Scriven). See also Alston, *supra* n.47, at 94-95 (1964); Fredrich Waismann, *Verifiability*, in *Logic and Language-First Series* (Flew ed., 1952).

other than letters (maps, charts, drawings), three-dimensional objects (sculptures, casseroles, automobiles), things not created by humans (driftwood), things not visually perceptible (the contents of phonograph records), ideas (the one-way toll bridge), intangible creations (theater productions, television broadcasts), and systems (computer programs, accounting systems)?⁴⁹

The word "writings" is, to be sure, vague. But the questions posed in the previous paragraph do not involve vagueness so much as they do the literalness with which the word should be read. The Oxford English Dictionary defines the "literal" meaning of a word as its "relatively primary sense . . . as distinguished from any metaphorical or merely suggested meaning." True metaphors are rare in legal documents, but other kinds of nonliteral, or figurative, usage are very common. Interpreters are frequently called upon to determine how literally or figuratively to understand a term or, to put it another way, how narrowly or broadly to define the concept that the term represents. Does the Copyright Clause protect only "graphic" works, does it protect only "tangible" works, or does it protect all "expressions of intellectual creation"? It seems obvious that the proper scope of the concept represented by a term depends on the context in which, and the purpose for which, the term is used.

We recur so often to the inherent indeterminacy of language that it is important to emphasize that its indeterminacy is not unlimited; the very concept of "interpretation" implies that the interpreter is not free to stipulate the meanings of the terms he is interpreting. The reason for this is suggested by Wittgenstein's insightful analogy between language and a game. As Gilbert Ryle put it:⁵⁰

The significance of an expression and the powers or functions in chess of a pawn, a knight or the queen have much in common. To know what the knight can and cannot do, one must know the rules of chess, as well as be familiar with various kinds of chess situations which may arise. . . . Similarly to know what an expression means is to know how it may and may not be employed.

Language is a social practice. Just as a player who stipulates that his knight may move forward one square at a time is not playing chess, someone who stipulates that a word or expression shall mean something without regard to its accepted usage is not engaging in ordinary conversation. The classic example of difficulties that emerge when linguistic conventions are ignored is Humpty Dumpty's attempt to persuade Alice that unbirthdays are better than birthdays:⁵¹

"[T]here are three hundred and sixty-four days when you might get unbirthday presents."

"Certainly," said Alice.

"And only *one* for birthday presents, you know. There's glory for you!"

"I don't know what you mean by 'glory,'" Alice said.

Humpty Dumpty smiled contemptuously. "Of course you don't till I tell you. I meant 'there's a nice knock-down argument for you!'"

49. See generally 1 Melville Nimmer, Copyright §8 (1973).

50. Gilbert Ryle, The Theory of Meaning, in *British Philosophy in the Mid-Century* 255 (Mace ed., 1957).

51. Lewis Carroll, *Through the Looking Glass*, ch. 6 (1865).

“But ‘glory’ doesn’t mean ‘a nice knock-down argument,’” Alice objected.

“When *I* use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean neither more nor less.”

“The question is,” said Alice, “whether you *can* make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master that’s all.”

As noted earlier, Professor Levinson has distinguished between the Constitutions of “Conversation” and “Settlement.” Though the Constitution of Conversation requires wrestling with the many issues of interpretation raised above, the Constitution of Settlement usually poses fewer interpretive problems, and ordinarily does not require any systematic theory of interpretation. Thus, save for extremely exotic hypotheticals, the date of a newly elected President’s inauguration or the number of senators representing Wyoming (or California) is crystal clear (which may be one reason why constitutional law casebooks spend so little time discussing these issues).

V. *The States’ Power to Tax the Bank of the United States*

Marshall devotes considerable time to demonstrating that Congress had the power to incorporate the Second Bank of the United States. Yet that discussion did not resolve the central issue before the Court: whether it was constitutional for “Maryland, a sovereign state,” to use its taxing power in effect to drive the bank out of Maryland. We now return to Marshall’s opinion concerning this second question:

McCULLOCH v. MARYLAND

[The Second Question]

[46] It being the opinion of the Court, that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire

[47] 2. Whether the State of Maryland may, without violating the constitution, tax that branch?

[48] That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The States are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded — if it may restrain a State from the exercise of its taxing power on imports and exports; the same paramount character would seem to restrain, as it certainly may restrain, a State from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

[49] On this ground the counsel for the bank place its claim to be exempted from the power of a State to tax its operations. There is no express provision for the case, but the claim has been sustained on 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.

[50] This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve. 2nd. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

[51] These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has been denied; and, both in maintaining the affirmative and the negative, a splendor of eloquence, and strength of argument, seldom, if ever, surpassed, have been displayed.

[52] The power of Congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable.

[53] That the power of taxing it by the States may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. 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.

[54] The argument on the part of the State of Maryland, is, not that the States may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the constitution leaves them this right in the confidence that they will not abuse it.

[55] Before we proceed to examine this argument, and to subject it to the test of the constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the States. It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may chuse to carry it. The only security against the abuse of this power, is found in

no taxation without
representation

the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.

[56] The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a State to tax them sustained by the same theory. Those means are not given by the people of a particular State, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the States. They are given by all, for the benefit of all—and upon theory, should be subjected to that government only which belongs to all.

[57] It may be objected to this definition, that the power of taxation is not confined to the people and property of a State. It may be exercised upon every object brought within its jurisdiction.

[58] This is true. But to what source do we trace this right? It is obvious, that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

[59] The sovereignty of a State extends to every thing which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them.

[60] If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to 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. The attempt to use it on the means employed by the government of the Union, in pursuance of the

constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give.

[61] We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise.

[62] But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised by the respective States, consistently with a fair construction of the constitution?

[63] That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word CONFIDENCE. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

[64] But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.

[65] If we apply the principle for which the State of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the States.

[66] If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States.

[67] Gentlemen say, they do not claim the right to extend State taxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it. They contend that the power of taxation has no other limit than is found in the 10th section of the 1st article of the constitution; that, with respect to every thing else, the power of the States is supreme, and admits of no control. If this be true, the distinction between property and other subjects to which the power of taxation is applicable, is merely arbitrary, and can never be

sustained. This is not all. If the controlling power of the States be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is not confined to taxation. That is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the States to tax the means employed by the general government be conceded the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

[68] In the course of the argument, the Federalist has been quoted; and the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the constitution. No tribute can be paid to them which exceeds their merit; but 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; and, to understand the argument, we must examine the proposition it maintains, and the objections against which it is directed. The subject of those numbers, from which passages have been cited, is the unlimited power of taxation which is vested in the general government. The objection to this unlimited power, which the argument seeks to remove, is stated with fullness and clearness. It is, "that an indefinite power of taxation in the latter (the government of the Union) might, and probably would, in time, deprive the former (the government of the States) of the means of providing for their own necessities; and would subject them entirely to the mercy of the national legislature. As the laws of the Union are to become the supreme law of the land; as it is to have power to pass all laws that may be necessary for carrying into execution the authorities with which it is proposed to vest it; the national government might at any time abolish the taxes imposed for State objects, upon the pretence of an interference with its own. It might allege a necessity for doing this, in order to give efficacy to the national revenues; and thus all the resources of taxation might, by degrees, become the subjects of federal monopoly, to the entire exclusion and destruction of the State governments."

[69] The objections to the constitution which are noticed in these numbers, were to the undefined power of the government to tax, not to the incidental privilege of exempting its own measures from State taxation. The consequences apprehended from this undefined power were, that it would absorb all the objects of taxation, "to the exclusion and destruction of the State governments." The arguments of the Federalist are intended to prove the fallacy of these apprehensions; not to prove that the government was incapable of executing any of its powers, without exposing the means it employed to the embarrassments of State taxation. Arguments urged against these objections, and these apprehensions, are to be understood as relating to the points they mean to prove. Had the authors of those excellent essays been asked, whether they contended for that construction of the constitution, which would place within the reach of the States those measures which the government might adopt for the execution of its powers; no man, who has read their instructive pages, will hesitate to admit, that their answer must have been in the negative.

[70] It has also been insisted, that, as the power of taxation in the general and State governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the States, will equally sustain the right of the States to tax banks chartered by the general government.

[71] But the two cases are not on the same reason. The people of all the States have created the general government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But, when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole — between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.

[72] But if the full application of this argument could be admitted, it might bring into question the right of Congress to tax the State banks, and could not prove the right of the States to tax the Bank of the United States.

[73] The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

[74] We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

[75] This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

Discussion

1. *Marshall's interpretive strategy.* Outline Marshall's argument in the second part of *McCulloch*. Which of the methods of constitutional interpretation discussed does Marshall employ?

2. *Possible alternative holdings.* Under the principles announced in the first part of the opinion, Congress could surely have enacted legislation immunizing the Bank of the United States from the Maryland tax. Why does it not suffice, as a constitutional matter, to place such a decision in the hands of Congress? Are you persuaded that the Constitution, by its own force, prohibits the tax? Is Congress estopped from "consenting" to Maryland's tax, or can one read *McCulloch* as basically a form of injunctive relief preventing the collection of the tax unless and until Congress exercises its authority to determine whether national interests compel depriving Maryland of its power to tax? Presumably, the failure of Congress affirmatively to consent to such taxation would leave *McCulloch's* prohibition in place.

Is it constitutionally relevant that the Maryland tax by its terms fell only on banks not chartered by the state? Only the Bank of the United States fit that category. Could (or should) Marshall have assumed for the sake of argument that a tax on *all* banks could be upheld as applied to the national bank, but nonetheless invalidated this tax on the ground that it discriminated against the Bank of the United States? Consider in this context the final paragraph of Marshall's opinion. If some of the bank's functions and property, but not others, are constitutionally immune from state taxation, how can one determine which ones are immune?

3. *Questions of degree.* In the first part of the opinion Marshall writes that, if the Court concludes that the bank is "appropriate," then "the degree of its necessity is to be discussed in another place," apparently referring to Congress. Does the force of this statement depend on what one means by "necessity"? If Marshall were a senator or representative, how do you suppose he would approach the question of the bank's "degree of necessity"—as a constitutional question or a political issue? Compare Hamilton's argument for the First Bank, *supra*. (What is the difference between "constitutional" and "political" in this context?) If the "degree of necessity" remains a constitutional question even after "appropriateness" has been determined, why shouldn't the Court, as well as Congress, address it?

With respect to Marshall's "rhetorical absolute"⁵² in the second part of *McCulloch*, is it true that "the power to tax is the power to destroy," or is this just a "seductive cliché"?⁵³ Consider in this context Justice Holmes's statement, "Taxes are what we pay for civilized society."⁵⁴ Might not both statements be true? Might excessive taxation indeed be destructive, even as the lack of sufficient taxation would threaten the maintenance of "civilized society"? If this is the case, then who—or what institution—should be charged with deciding whether the line between sufficiency and excess has been crossed? How does Marshall's reference to "the perplexing inquiry, so unfit for the judiciary department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of power" help us to answer this last question?

To the extent that Marshall might be said to base his own "rhetorical absolute" on a purely institutional consideration based on the Court's self-perceived inability to make judgments of degree, does this justify depriving the states of a legitimate power? Justice Holmes, dissenting in *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223 (1928), observed: "In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the States had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogether." (Holmes went on to write, "The power to tax is not the power to destroy while this Court sits.") What do you think Holmes meant by this? Is it that the Court possesses a truly "legal" conception of what the limits of taxation are, or, rather, that its members will apply their own sense of basically prudential judgment when a state is going "too far" in imposing taxes? If you adopt this latter view, does this give added weight to the view that Congress should have the ability to consent to state taxation even if the Court has earlier viewed such taxation as unconstitutional because too onerous?

52. *New York v. United States*, 326 U.S. 572, 576 (1946) (Frankfurter, J.).

53. *Graves v. O'Keefe*, 306 U.S. 466, 489 (1939) (Frankfurter, J., concurring).

54. *Compania General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (dissenting).

In approaching the cases in the following chapter, consider the hypothesis that “legal” analysis for Marshall consists of *categorizing* activities and other things, whereas “political” decisionmaking consists of weighing the costs and benefits of a proposed course of action, and that, notwithstanding the emergence of an instrumental conception of law, Marshall perceived a clear distinction between law and policymaking.

4. *Federal immunities today.* Litigation continues today on the ability of states to tax or to regulate federal instrumentalities. See, e.g., *Department of Employment v. United States*, 385 U.S. 355 (1966), unanimously holding that the American National Red Cross is an instrumentality of the United States, immune from a state unemployment compensation tax, and that Congress has not waived its immunity. In *Jefferson County, Alabama v. Acker*, 527 U.S. 423 (1999), the Court considered a suit brought by U.S. federal judges protesting a Jefferson County occupational tax on persons working within the county not otherwise required to pay a license fee under state law. Because the judges hold court within the county, the county attempted to collect the tax. “[T]he judges maintain that they are shielded from payment of the tax by the intergovernmental tax immunity doctrine, while the county urges that the doctrine does not apply unless the tax discriminates against an officeholder because of the source of his pay or compensation.” The Court, through Justice Ginsburg, ruled in favor of the county:

The county’s Ordinance lays no “demands directly on the Federal Government,” *United States v. New Mexico*, 455 U.S. 720, 735 (1982); it is, and operates as, a tax on employees’ compensation. The Public Salary Tax Act [passed by Congress] allows a State and its taxing authorities to tax the pay federal employees receive “if the taxation does not discriminate against the [federal] employee because of the source of the pay or compensation.” 4 U.S.C. §111. We hold that Jefferson County’s tax falls within that allowance. . . . In practice, Jefferson County’s license tax serves a revenue-raising, not a regulatory, purpose. Jefferson County neither issues licenses to taxpayers, nor in any way regulates them in the performance of their duties based on their status as license taxpayers.

Justices Breyer and O’Connor dissented, largely on the basis of the many exceptions to paying the tax found in the Jefferson County ordinance.

As Justice Ginsburg suggests, states have far less power to *regulate* federal instrumentalities than to levy (nondiscriminatory) taxes against federal officials. A taste of the difficulties provided in regard to state regulation is provided by *Johnson v. Maryland*, 254 U.S. 51 (1920), which held that, in the absence of any federal regulation on the subject, a Post Office employee driving a government vehicle on official business was not required to possess a state driver’s license. Citing *McCulloch*, Justice Holmes wrote:

It seems to us that the immunity of instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed.

Holmes cautioned, however, that “an employee of the United States does not secure a general immunity from state law while acting in the course of his employment” and suggested that “when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets.” What is the basis for this distinction?

VI. *Ohio Dissents*

Marshall spoke clearly and unequivocally in *McCulloch*: Congress could charter the bank and Maryland could not tax it. So consider the fact that within five years, the Court “was forced, in effect, if not in name, to rehear many of the issues it had tried to settle in *McCulloch*.”⁵⁵ The explanation is simple: Whatever Marshall might have written, the state of Ohio was not persuaded, and it chose to act according to its own reading of its “sovereign” powers. Like Maryland, it had chosen in 1817 to tax the Bank of the United States, which had a branch in Chillicothe, Ohio. Among the rationales offered for the legitimacy of the tax by its supporters was that the Second Bank “was not merely a government instrument.” Thus, as one of them put it, “when we raise the curtain we find [the bank] composed of an association of members, half encircling the globe, . . . where the funds of the stranger, the alien and American, are mingled in one common mass.” Thus, argued the committee passing the tax, the Chillicothe branch was “as subject to a tax as any corporate body could be, if acting under the authority of the state.”⁵⁶

Theoretical arguments about the status of the bank were replaced, by the time of the 1818 elections in Ohio, by intense public antagonism to the bank, due in part to a downturn in the local economy. The leading legislator described Ohio as being “at the mercy of stockjobbers and Brokers, mostly foreign agents without moral or social feelings of any kind.”⁵⁷ The legislature passed a bill requiring that each branch of the Second Bank pay a levy of \$50,000 to Ohio. “[T]he auditor of Ohio was authorized to appoint someone to forcibly collect the tax from the assets of the bank’s branches” should it not otherwise comply with the state’s demand.⁵⁸

McCulloch was then decided. It was not received favorably by Ohio’s leaders. Governor Brown refused even to call the legislature into special session to discuss the implications of Marshall’s decision. Instead, he proclaimed that “Ohio should take a lead in all lawful resistance to any violation of the reserved state sovereignty.” It did not matter that that violation issued from a “judicial construction [whose acceptance] would be a death blow to our Union; or to our free government, or both.”⁵⁹

The state auditor, one Ralph Osborne, enforced Ohio’s law by hiring agents to forcibly enter the Chillicothe branch of the Second Bank. They were described as having acted “in a ruffian-like manner, jumped over the counter, took and held forcible possession of the vault.” They then took \$120,425 from said vault, which

55. Ellis, *supra* n.20, at 143.

56. *Id.* at 145.

57. *Id.* at 150.

58. *Id.* at 151.

59. *Id.* at 152.