The Expanding Universe of *McCulloch*'s Known Unknowns

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ABSTRACT

In this essay, I argue that over two hundred years after McCulloch v. Maryland *(1819) was decided, we actually have more unanswered questions about the case than ever before. I open the essay by presenting the conventional universe of* McCulloch*'s "known unknowns;" this list includes, but is surely not limited to, the question of why Chief Justice Marshall construed congressional power as broadly as he did in the case. I then explain why this conventional universe is too small. I draw heavily here upon my recent book,* Reconstructing the National Bank Controversy *(Chicago, 2018), which highlights the centrality of the Coinage Clause to the revival of the Bank of the United States in 1816. The heretofore unappreciated salience of this provision should lead us to ask, among other things, why Marshall and his peers proceeded to ignore it altogether in deciding* McCulloch. *I close the essay with an effort to catalogue an expanded universe of* McCulloch*'s "known unknowns," both as a descriptive exercise and as a guide for future scholars of the case.*

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INTRODUCTION

Those engaged in the enterprise of writing constitutional history—whether trained in law, history, or (in my case) political science—operate within a space

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containing three types of phenomena. We have (1) *known knowns*, or facts whose existence we recognize and whose content lay within our consciousness (e.g., we know that the fate of Obamacare's individual mandate was determined by the Supreme Court in *NFIB v. Sebelius* and that the Court held the mandate constitutional[1]). We also have—and I imagine that my Rumsfeldian approach here[2] is already obvious—(2) *known unknowns*, or facts whose existence we recognize but whose content currently lay outside our consciousness (e.g., we know that Chief Justice Roberts had a reason for ultimately voting to uphold the individual mandate in *Sebelius* after initially voting to strike it down, but we do not know with certainty what that reason was[3]). Finally, we have (3) *unknown unknowns*, or facts whose very existence—to say nothing of their content—lay outside our consciousness (e.g., imagine some future scholar unearthing Justice Ginsburg's private diary and learning, without an account of his reasoning, that Justice Scalia briefly but strongly considered voting to uphold the individual mandate following oral argument[4]).

If I have correctly described the epistemological space within which constitutional history is written, then three claims respecting the enterprise itself are in order. First, our principal objective is to shrink the universe of *known unknowns*, thereby expanding the universe of *known knowns*. Constitutional history at its best is able to do this. Second, constitutional historians cannot always achieve this objective. Sometimes, the best we can do is take a *known unknown*, proffer (on the basis of empirical evidence) an answer to its underlying question, "accept that we cannot know for certain if our answer[] [is] right[,]" and then report how certain we are of its accuracy.[5] Finally, even if some *known unknowns* ultimately evade conversion into *known knowns*—either because the best we can do is to reduce uncertainty about them or because our work reveals them to be truly unknowable—we assume that with respect to any given episode in our constitutional history, there will generally be a negative relationship between time and

1. 567 U.S. 519 (2012).

2. DONALD RUMSFELD, KNOWN AND UNKNOWN: A MEMOIR xiii (2011). To be clear, a self-characterization of my approach as "Rumsfeldian" should not be confused with a claim that Donald Rumsfeld actually invented this typology. As Lawrence B. Solum rightly noted while commenting on my draft, "this schema goes back to work in social psychology in the 1950s, [namely the] Johari window" created by Joseph Luft and Harry Ingham. *See* JOSEPH LUFT, GROUP PROCESSES: AN INTRODUCTION TO GROUP DYNAMICS 10–11 (1970).

3. On the initial report of Roberts switching his vote between the justices' private conference (March 2012) and the announcement of the Court's opinion (June 2012), see Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 2, 2012), available at https://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law/ [https://perma.cc/BR54-3CSD]. For an explanatory account that prioritizes Roberts' discomfort with both striking down an "entire law that had been approved through the democratic process" and doing so along perceived ideological lines, see JOAN BISPUKIC, THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS 238 (2019).

4. Imagine speculation immediately commencing that his reasoning probably mirrored his concurring opinion in *Gonzales v. Raich*, 545 U.S. 1 (2005).

5. Adrian Blau, *Uncertainty and the History of Ideas*, 50 HISTORY AND THEORY 358, 358 (2011). Blau's focus here is intellectual history, but I see no reason why his logic does not apply to constitutional history.

the size of the universe of *known unknowns*. In simpler terms, as time goes on, we expect to know more (and thus, be knowingly ignorant of less).

This has not been my experience with either *McCulloch v. Maryland*[6] or the broader controversy over a national bank of which it is a part. My experience has been marked less by answering the questions we knew existed (or converting *known unknowns* into *known knowns*) and more by learning things which introduce questions we did not know existed (or converting *unknown unknowns* into *known unknowns*). With respect to *McCulloch* in particular—an episode encompassing everything from the circumstances which brought a bank cashier and the State of Maryland to the Court down through the pseudonymous epistolary warfare which followed the decision's announcement[7]—I see the relationship between time and the size of its universe of *known unknowns* as positive. With apologies to its most recent students,[8] I submit that two hundred years in, we have more unanswered questions about the case than ever before.

This essay is designed to defend that claim, if for no other reason than to collate the list of *McCulloch*'s *known unknowns* for current and future students of constitutional history. It proceeds in three parts. First, I describe the conventional universe of *known unknowns* with respect to *McCulloch* (and I do largely limit myself here, *contra* Sandy Levinson's 2019 Chase Memorial Lecture, to its congressional power component[9]). This list includes, but is surely not limited to, perhaps the core unanswered question respecting *McCulloch*: Why, precisely, did Chief Justice John Marshall, writing for the Court, embrace an "aggressively nationalist" interpretation of congressional power?[10] Second, I explain why this list needs to expand. This includes an overview of the most salient findings from my own recent contribution to scholarship on *McCulloch* and the broader controversy over Congress's power to charter a national bank, *Reconstructing the National Bank Controversy: Politics and Law in the Early American Republic*.[11] My central claims here are that (1) a narrow justification for chartering a new Bank of the United States—one anchored to the Coinage Clause of Article I, Section Eight—was both embraced by the 14th Congress (1815–17) and at least recognized approvingly by President James Madison in his final annual message, and (2) the failure of that heretofore underappreciated justification to play any significant role in the *McCulloch* episode invites us to ask a number of new questions about the case, including (but not limited to) the reasons for its absence from both oral

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

7. JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND (Gerald Gunther ed. 1969).

8. MARK R. KILLENBECK, MCCULLOCH V. MARYLAND: SECURING A NATION (2006); RICHARD E. ELLIS, AGGRESSIVE NATIONALISM: MCCULLOCH V. MARYLAND AND THE FOUNDATION OF FEDERAL AUTHORITY IN THE YOUNG REPUBLIC (2007).

9. Sanford V. Levinson, *McCulloch* II: (the Oft-Ignored Twin) and Inherent Limits on 'Sovereign' Power, (October 2, 2019) (unpublished manuscript) (on file with the author).

10. For an important critique of this "conventional reading" of what Marshall did, see David S. Schwartz, *Misreading* McCulloch v. Maryland, 18 U. PA. J. CONST. L. 1 (2015).

11. ERIC LOMAZOFF, RECONSTRUCTING THE NATIONAL BANK CONTROVERSY: POLITICS AND LAW IN THE EARLY AMERICAN REPUBLIC (2018).

argument and Marshall's opinion. Finally, I describe the expanded universe of *McCulloch*'s *known unknowns* and proffer, where possible, both answers to its newest questions and honest estimates of my uncertainty with respect to those answers.[12]

I. OF ANCIENT VINTAGE: *MCCULLOCH*'S LONG-UNANSWERED QUESTIONS

No recognition of *McCulloch*'s importance to the historical development of American constitutionalism—and unlike Sandy, I consider it at best a *candidate* for the title of "richest and most important single opinion of the United States Supreme Court"[13]—should allow us to ignore that a number of important questions about it remain unresolved. Or, to put the matter somewhat differently, we can and should appreciate the ways in which John Marshall's opinion for the Court has been used and abused over the last two hundred years (as David Schwartz now comprehensively has[14]) without forgetting that much of what happened in 1819 remains unclear. Here, I briefly outline four of the brighter stars in this universe of *known unknowns*: (1) how the question of congressional power became part of *McCulloch*'s agenda before the Court, (2) why Maryland did not concede the constitutionality of a national bank at oral argument, (3) why Marshall's opinion for the Court embraced a capacious—at least as conventionally understood[15]—understanding of congressional power, and (4) why no Jefferson or Madison appointee to the Court dissented from Marshall's opinion.

(1) Two Issues, Not One: As Mark Killenbeck recently noted, "[v]irtually everyone understands that there were two issues posed" in *McCulloch*: Congress's power to charter the Bank of the United States, and Maryland's power to tax notes issued by the institution's branch in Baltimore.[16] How the first of these became part of the Court's agenda for oral argument has never been clear, however. The facts here are relatively straightforward. The state's tax went into effect in May 1818. One month later, the Maryland Court of Appeals—the state's court of last resort—upheld that tax against a Bank-initiated challenge that it violated the U.S. Constitution.[17] Because this state court decision implicated the meaning

12. GARY KING ET AL., DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 8–9 (1994) ("By definition, inference is an imperfect process[,]" and as such, a scholar who "fails to face the issue of uncertainty directly is either asserting that he or she knows everything perfectly or that he or she has no idea how certain or uncertain the [answers] are.").

13. Sanford V. Levinson, *A Close Reading of* McCulloch v. Maryland, HARVARD LAW SCHOOL COURSE CATALOG (2014), https://hls.harvard.edu/academics/curriculum/catalog/index.html?o=67026 [https://perma.cc/5S8L-NHG7] (last visited September 11, 2020).

14. DAVID S. SCHWARTZ, THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF MCCULLOCH V. MARYLAND (2019).

15. *See* KILLENBECK, *supra* note 8.

16. Mark R. Killenbeck, *All Banks in Like Manner Taxed? Maryland and the Second Bank of the United States*, 44 J. SUP. CT. HIST. 7, 7 (2019).

17. KILLENBECK, *supra* note 8, at 94–5.

of the Constitution, James M'Culloh[18]—cashier of the Baltimore branch—asked the U.S. Supreme Court to review it under Section 25 of the Judiciary Act of 1789. M'Culloh's invocation of Section 25 should have surprised no one at the time: its constitutionality was defended by the Court just two years earlier in *Martin v. Hunter's Lessee*.[19] The Court agreed to hear James M'Culloh's appeal in September 1818 and set oral argument for February 1819.[20]

The first lawyer to speak at that oral argument was former New Hampshire congressman Daniel Webster, who represented M'Culloh and the Bank. When Webster began his argument, however, he did so not by addressing the constitutionality of Maryland's tax, but by speaking to an antecedent issue: Congress's authority (or lack thereof) to charter the Bank of the United States in the first place. How the Bank's constitutionality became part of *McCulloch*'s agenda between September 1818 and February 1819 has never been fully resolved. Of course, the institution's lawyers (including, but not limited to, Webster) had little reason to raise the issue. Their interest was in securing the Bank's ability to operate without state interference. Voluntarily rendering the Bank vulnerable to claims that it could not legitimately operate at all would hardly have been consistent with that goal.[21] That leaves us with Maryland's lawyers or someone at the Court itself (i.e., one or more justices) raising the issue. If Maryland's motive for imposing the tax was punishing the Bank[22] as opposed to simply raising revenue[23] (a subject to be discussed below), then agenda-setting of this sort makes sense. But establishing a punitive motive for Maryland's tax would still be insufficient for dismissing an alternative possibility: that one or more justices, for reasons unknown, instructed both sides to address the congressional power question.

(2) Conceding Congressional Power: In his final monograph, a single-volume history of *McCulloch*, historian Richard E. Ellis argued that Maryland's tax on the national bank was not an effort to punish the institution for "commenc[ing] a rapid and heavy curtailment of [its] business" in July 1818.[24] The idea that the national bank's curtailment at best exacerbated, and at worst directly caused, the Panic of 1819—rendering the Bank vulnerable to punitive action by Maryland legislators—has long been, if not a staple, at least a periodic component of

18. On this spelling of the cashier's name, see *id.* at xi.

19. 14 U.S. (1 Wheat.) 304 (1816).

20. KILLENBECK, *supra* note 8, at 95.

21. For December 1818 correspondence between Webster and his co-counsel William Pinkney that also militates against this possibility, see LOMAZOFF, *supra* note 11, at 125.

22. This is the view adopted by KILLENBECK, *supra* note 16.

23. For a recent example of scholarship adopting this view, see ELLIS, *supra* note 8, at 68–69.

24. Langdon Cheves, *Exposition of the president of the bank to the stockholders*, *reprinted in Bank of the United States*, NILES WKLY. REG. (Balt.), Oct. 12, 1822, at 89; *see also* RALPH C. H. CATTERALL, THE SECOND BANK OF THE UNITED STATES 51 (1960).

McCulloch scholarship.[25] Ellis observed, with almost breathtaking simplicity, that Maryland's tax could not have represented punishment for the July 1818 curtailment: it had been enacted several months earlier, in February 1818.[26] Ellis went further, arguing that Maryland's tax did not reflect hostility *of any sort* toward the Bank. Rather, the tax was a simple revenue-raising measure designed to retire some of the debt incurred by Maryland during the recent conflict with Great Britain:

> The state had been unusually hard hit by the War of 1812. The unsuccessful defense of Washington, D.C., had fallen mainly on the Maryland militia, and it proved expensive, the cost being estimated at nearly a half million dollars. Although the federal government was expected to pay eventually for most of this, it was going to be a slow and difficult process to accumulate the necessary documentation. In addition, the federal government had its own financial problems during the years 1815-1817 and was in no hurry to deal with Maryland's claims. This left Maryland in dire financial straits. To meet its various financial obligations, the state levied a series of taxes on auction houses, state banking institutions, and other private corporations in order to raise money. This was the driving force behind Maryland's levying a [tax on the Baltimore branch of the national bank.[27]

If Ellis has correctly characterized the legislature's motive, then we need to ask why Maryland's lawyers did not immediately concede that Congress had the power to charter a national bank. After all, the Bank could not generate revenue for Maryland if John Marshall and his peers ruled that it had no right to operate in the first place. If revenue was the state's motive, then its lawyers had "a half million" reasons to legitimize a national bank, not question its constitutionality.[28]

Mark Killenbeck's aforementioned reminder that *McCulloch* posed two issues, rather than one, came in an article principally devoted to questioning Ellis's claim respecting the motive for Maryland's tax. He argues that the state's tax "was indeed a punitive measure directed at the Second Bank [of the United States]" rather than a simple revenue-raising device.[29] Two brief points seem warranted here. First, though I cannot engage here in a detailed review and assessment of Killenbeck's evidence, I would respectfully submit that his excellent article at best problematizes rather than wholly debunks Ellis's account of Maryland's motive, and thus invites further research.[30] Second, even if problematizing Ellis's

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25. *See, e.g.*, Gunther, *supra* note 7, at 3; Daniel A. Farber, *The Story of* McCulloch*: Banking on National Power*, 20 CONST. COMMENT. 679, 690 (2003); R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 294 (2007).

26. ELLIS, *supra* note 8, at 68.

27. *Id.* at 68–69.

28. This would also suggest that with respect to the previous *known unknown*, it was someone at the Supreme Court who added the congressional power question to the case agenda, as Maryland's lawyers would not have raised an issue that had the potential to undermine their client's interests.

29. KILLENBECK, *supra* note 16, at 10.

30. If nothing else, Killenbeck fails to consider the possibility of *mixed motives* on the part of Maryland's legislature (which may be where the empirical evidence points, on balance). Scholarly

account removes the need to ask why Maryland's lawyers failed to concede the congressional power question (since a state punitively taxing the Bank would presumably seek to undermine it further at oral argument), it would only do so by substituting a fresh *known unknown*: the true motive for Maryland's tax (with Ellis and Killenbeck offering but two possible answers). As such, what is at stake in Killenbeck's work (again, in a summary judgment that does not do him justice) is less the existence of a second *known unknown* and more its precise form.

(3) Capacious Understanding of Congressional Power: Arguably the "holy grail" of *McCulloch* scholarship would be knowledge of why John Marshall, writing on behalf of a unanimous Court, not only held that Congress had the power to charter a national bank but embraced such a capacious understanding of congressional power in the process. Despite the fact that the Court's answer to the congressional power question tends to be treated today "as if it rested on certain explicit constitutional clauses"[31]—namely the Necessary and Proper Clause—Marshall arguably resolved the question *before* he began to discuss the meaning of that provision in the twenty-first paragraph of his opinion.[32] As Charles L. Black, Jr. famously argued half a century ago, Marshall's "general reasoning"[33] with respect to congressional power—in particular his claim that a government "intrusted with such ample powers" as those listed in Article I, Section Eight "must also be intrusted with ample means for their execution"[34]—was designed to establish the constitutionality of a national bank *in advance* of any claims respecting the meaning of a particular provision.[35] Claims respecting the meaning of the Necessary and Proper Clause surely followed—claims partially grounded in what Akhil Amar would call an "intratextualist" effort to establish that Congress's chosen means need not be "absolutely necessary"[36]—and they have traditionally been construed as no less friendly to congressional power than Marshall's "general reasoning."[37]

The structure of Marshall's opinion for the Court is one thing. But why, exactly, did the chief justice and his colleagues reach the conclusions they did

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claims of mixed motivation in collective action are, of course, legion. For an especially salient example drawn from the Court's Lochner Era jurisprudence, see Chief Justice Taft's opinion for the Court in *Bailey v. Drexel Furniture Co.*, the child labor tax case: "Taxes are occasionally imposed in the discretion of the Legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive." 259 U.S. 20, 38 (1922).

31. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 23 (2012).

32. This paragraph, which appears at 17 U.S. (4 Wheat.) 316, 412 (1819), begins with "The counsel for the State of Maryland" and ends with "its powers in the form of legislation." I believe that designation of this paragraph as the twenty-first is consistent with the numbering scheme adopted in Levinson, *supra* note 9, but wish to clarify the relevant breakpoint in the event that it is not.

33. *McCulloch*, 17 U.S. at 411.

34. *Id.* at 408.

35. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 13–15 (1985).

36. *McCulloch*, 17 U.S. at 413–15; *see also* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 755, 755–58 (1999).

37. *But see* Schwartz, *supra* note 10.

with respect to congressional power? Discerning the motives of the seven men who decided *McCulloch* is a case study in judicial behavior. The words of Jeffrey Segal and Harold Spaeth, two pioneers in that field, are worth recalling with respect to case studies: "[T]he complexity of human behavior could occasion years of studying a particular decision and still not result in full comprehension. Given that individuals rarely understand their own decisions, it is immeasurably more difficult to fully understand the decisions of others."[38] That being said, we should at least be clear about what would be required to evaluate and judge between competing theories of judicial behavior here (in part because much of it is currently unavailable). For the sake of argument, let us restrict ourselves to two basic theories[39]: the justices reached their conclusions (1) on the basis of objective analysis of the Constitution's text, the intent of the Founding generation, and judicial precedent (the legal model); and (2) on the basis of their "ideological attitudes and values[,]" otherwise known as their politics (the attitudinal model).[40] Spaeth and Segal have spoken at length to the difficulties of assessing judicial fidelity to the plain meaning of the text or to the intent of the Founding generation.[41] Therefore, testing of the first theory would need to focus on the "extent to which justices who disagree[d] with a precedent" respecting the general scope of federal power "move[ed] *toward* that position" in *McCulloch*.[42] Unfortunately, only three of the justices who decided *McCulloch*—Marshall, Bushrod Washington, and William Johnson—were on the Court when it first spoke to the meaning of the Necessary and Proper Clause fourteen years earlier in *United States v. Fisher*.[43] Moreover, two of the three (Marshall and Johnson) embraced the same understanding of the word *necessary* in both cases, and the third (Washington) did not "address or dispute [the Court's] discussion of the constitutional question" in *Fisher*.[44] As such, it is virtually impossible to

38. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 45 (2002).

39. Imre Lakatos famously described the contest between rival theories and the available data as a "three-cornered fight." *Falsification and the Methodology of Scientific Research Programmes*, *in* CRITICISM AND THE GROWTH OF KNOWLEDGE 91, 115 (Imre Lakatos and Alan Musgrave eds., 1970).

40. SEGAL & SPAETH, *supra* note 38, at 48ff. and 86ff. For an important variant on the attitudinal model (i.e., the strategic or rational choice model) in which the simple expression of individual policy preferences is tempered by the need to (1) build winning coalitions at the Court and/or (2) interact effectively with other branches of the federal government, see LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998). For one (but surely not the only) critique of the "preoccupation of Supreme Court scholars with the attitudes and policy preferences of individual justices," see SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 1–12 (Cornell W. Clayton & Howard Gillman, eds., 1999).

41. SEGAL & SPAETH, *supra* note 38, at 53–75.

42. *Id.* at 292 (emphasis added).

43. 6 U.S. (2 Cranch) 358 (1805). On *Fisher* as the Court's "first effort to construe the Necessary and Proper Clause[,]" see Schwartz, *supra* note 14, at 26.

44. Mark R. Killenbeck, *William Johnson, the Dog That Did Not Bark?*, 62 VAND. L. REV. 407, 431 (2009). Justice Washington's role in *Fisher* warrants some explanation. He heard the case as a member of the federal circuit court that covered Pennsylvania, and consequently took "no part in the decision of this cause" at the Supreme Court. For Washington's language on this point, see 6 U.S. (2 Cranch) 358,

evaluate a legal explanation for judicial behavior in *McCulloch*. With respect to an attitudinal explanation, scholars have typically compared observed behavior (e.g., a justice's vote in a given case) with expected behavior (e.g., an estimate of his or her ideology derived from newspaper editorials that appeared post-nomination but pre-confirmation[45]). Because we have no estimates of ideology for pre-1937 nominees to the Court,[46] at present we cannot—as with the legal explanation—evaluate an attitudinal explanation for *McCulloch*. Unlike the legal explanation, however, time may ultimately render an attitudinal explanation testable.[47]

(4) Absence of Democratic-Republican Dissent: The final star in the conventional universe of *McCulloch*'s *known unknowns* that I wish to draw attention to is the absence of dissent among Marshall Court justices appointed by Democratic-Republican presidents. In February 1819, five of the seven justices on the Court—William Johnson, Brockholst Livingston, Thomas Todd, Gabriel Duvall, and Joseph Story—had been appointed by Democratic-Republican presidents, namely Thomas Jefferson and James Madison.[48] On the assumption—derived from the literature on "regime politics"[49]—that both of these presidents

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397 (1805). On his involvement in the case while "riding circuit," see Herbert A. Johnson, *Bushrod Washington*, 62 VAND. L. REV. 447, 483 (2009). Justice Washington's language notwithstanding, he appended a statement to Chief Justice Marshall's opinion for the Court, one that appears in the United States Reports. That statement—which Killenbeck twice characterizes as an "implicit dissent"—only quarreled with Chief Justice Marshall's statutory construction in *Fisher*, not his constitutional interpretation.

45. SEGAL & SPAETH, *supra* note 38, at 321 (these are known as Segal-Cover scores). *See* Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989); Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POLITICS 812 (1995).

46. *See* Jeffrey A. Segal, *Perceived Qualifications and Ideology of Supreme Court Nominees, 1937-2012*, https://www.stonybrook.edu/commcms/polisci/_professor_files/Segal/QualTable.pdf [https://perma.cc/SBL9-6D9R] (last visited Sept. 11, 2020).

47. On the ambition among leading students of judicial behavior to produce data on the Court that run all the way "back to [its] first reported decision, *Georgia v. Brailsford* (1792)," see THE SUPREME COURT DATABASE, http://supremecourtdatabase.org/about.php?s=2 [https://perma.cc/3V88-SPAW] (last visited Sept. 11, 2020).

48. Jefferson appointed Johnson (1804), Livingston (1806), and Todd (1807). Madison appointed Duvall and Story (both 1811). The remaining two had been appointed by Federalist John Adams: Washington (1798) and Marshall (1801). LOMAZOFF, *supra* note 11, at 135.

49. Often treated as commencing with Robert Dahl's famous 1957 conclusion that the Court is an institution that tends—with only periodic and short-lived exceptions—to support (or at least not hinder) the preferences of national majorities, the literature on regime politics calls attention to the fact that "political parties, interest groups, and other political actors will attempt to influence the decisions of the judiciary just as they do the decisions of legislatures or executive branch agencies." In the context of Supreme Court appointments, this means that "the values of the justices [on the Supreme Court will tend to] reflect the range of those views currently held by the other branches of government." MARK C. MILLER, JUDICIAL POLITICS IN THE UNITED STATES 198 (2015); *see also* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 279 (1957).

It is worth noting that the regime politics literature is not necessarily incompatible with the attitudinal model discussed above. Indeed, Howard Gillman and Cornell W. Clayton—scholars of regime politics who also embrace the broader proposition that a variety of "institutions" structure judicial behavior—suggest that "[t]here is no reason to take issue with the observation that Supreme Court justices act in ways that reflect who they are and what they believe." SUPREME COURT DECISION-MAKING, *supra* note

sought to appoint justices with a less capacious understanding of federal power than their Federalist peers, at least two questions arise. First, forget unanimity for just a moment—how was there even a majority on the Court for judging the Bank of the United States to be constitutional? Given the fact that both Jefferson (as Secretary of State[50]) and Madison (as a member of the House of Representatives from Virginia[51]) had strenuously opposed Alexander Hamilton's bank bill in 1791 on constitutional grounds, we might have expected each man as president—given the salience of the issue to the Early Republic's constitutional politics[52]—to impose something approaching an anti-bank litmus test on potential Court nominees. The end result of this process should have been a 5-2 majority *against* the constitutionality of a national bank.[53] It now appears clear that Madison's stance on the constitutionality of a national bank had softened no later than 1810, in time for his 1811 appointments of Duvall and Story.[54] As such, it is certainly plausible that the president consciously appointed two moderate or "nationalist" Democratic-Republicans[55] to the bench—men far less inclined than members of the party's conservative or "Old" wing to strike down questionable exercises of federal power.[56] Under this scenario, Duvall and Story—allied with Federalist justices John Marshall and Bushrod Washington—would have helped to produce

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40, at 3; *see also* Cornell W. Clayton & David A. May, *A Political Regimes Approach to the Analysis of Legal Decisions*," 32 POLITY 233 (1999); Howard Gillman, *Regime Politics, Jurisprudential Regimes, and Unenumerated Rights*, 9 U. PA. J. CONST. L. 107 (2006). If nothing else, and as Mark C. Miller's words earlier in this footnote imply, the regime politics literature can help us understand why justices with particular sets of policy preferences populate the Court at particular points in time.

On the advent of regime politics-themed research among legal scholars, see Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 LAW & SOC. INQUIRY 511 (2007).

50. Thomas Jefferson, *Opinion on the Constitutionality of a National Bank*, LILLIAN GOLDMAN LAW LIBRARY, https://avalon.law.yale.edu/18th_century/bank-tj.asp [https://perma.cc/5QMN-22FN] (last visited Nov. 4, 2020).

51. James Madison, *The Bank Bill, [8 February] 1791*, FOUNDERS ONLINE, NATIONAL ARCHIVES, https://founders.archives.gov/documents/Madison/01-13-02-0282 [https://perma.cc/5C9P-JSUX] (last visited Sept. 11, 2020).

52. HOWARD GILLMAN ET AL., AMERICAN CONSTITUTIONALISM, STRUCTURES OF GOVERNMENT 123 (2013) ("The debate over whether Congress could incorporate a national bank was the most important and sustained controversy in the early republic over how strictly constitutional powers should be construed.").

53. MARK GRABER, A NEW INTRODUCTION TO AMERICAN CONSTITUTIONALISM 9 (2013) ("[h]ad the Supreme Court in 1819 been staffed by a majority of states [*sic*] rights Republicans, the result in *McCulloch* would have been different.").

54. 5 IRVING BRANT, JAMES MADISON: THE PRESIDENT 269–70 (1956) (Madison "let it be known quietly that he regarded [the national bank's] unchallenged existence for twenty years as evidence of its constitutionality."; *see also* GARRY WILLS, JAMES MADISON 76 (2002) (suggesting that Madison in 1810"privately assured people that his arguments against the bank, though sound [in 1791], had been rendered inapplicable by long usage"); KILLENBECK, *supra* note 8, at 44.

55. RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 19–22 (1971).

56. *See* NORMAN K. RISJORD, THE OLD REPUBLICANS: SOUTHERN CONSERVATISM IN THE AGE OF JEFFERSON (1965).

a 4-3 majority in favor of congressional power to charter the Bank of the United States.

This leads directly to the second question, or the real *known unknown* here. Even if we can explain the existence of a majority in *McCulloch* for upholding Congress's ability to charter a national bank, the existence of unanimity on that question is far less explicable. Again, three men appointed to the Court by Thomas Jefferson—William Johnson, Brockholst Livingston, and Thomas Todd—participated in *McCulloch*. How is it that not one of them chose to dissent from the Court's ruling on the congressional power question? One possibility is that Marshall, "unquestionably one of the great legal reasoners of his time,"[57] simply "won over" Jefferson's appointees with the force of his reasoning with respect to congressional power.[58] Another possibility is that the chief justice, cognizant that he had one or more dissenters in his midst, persuaded those colleagues—as he had in the past and would do again in the future—to suppress their views for the sake of promoting the Court's "prestige and influence."[59] Several months after *McCulloch* had been handed down, former president Madison expressed frustration that no solution to this puzzle would be forthcoming:

> I could have wished also that the Judges had delivered their opinions seriatim. The case was of such magnitude in the scope given to it, as to call, if any case could do so, for the views of the subject individually taken by them. This might, either by the *harmony* of their reasoning, have produced greater conviction in the public mind; or by its *discordance*, have impaired the force of a precedent, now ostensibly supported by a unanimous and perfect concurrence in every argument & dictum contained in the judgment pronounced.[60]

II. RECONSTRUCTING THE ROAD TO *MCCULLOCH*

One thing that *Reconstructing the National Bank Controversy* does—though I hope not the only one[61]—is provide a revisionist account of the action between Alexander Hamilton's December 1790 proposal for a national bank[62] and President Andrew Jackson's July 1832 veto of a bill designed to extend the charter of one.[63] That account undermines two core aspects of the historiography

57. G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35 373 (1988).

58. MELVIN I. UROFSKY, DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE 49 (2017).

59. *Id*. at 45; *see also* WHITE, *supra* note 57, at 373.

60. Letter from James Madison to Spencer Roane, (Sept. 2, 1819), available at https://www.loc.gov/resource/mjm.19_0282_0284/?st=gallery [https://perma.cc/XPP4-AMG3].

61. LOMAZOFF, *supra* note 11, at 9–11.

62. ALEXANDER HAMILTON, U.S. TREASURY DEPARTMENT, FINAL VERSION OF THE SECOND REPORT ON THE FURTHER PROVISION NECESSARY FOR ESTABLISHING PUBLIC CREDIT (REPORT ON A NATIONAL BANK) (1790), available at https://founders.archives.gov/documents/Hamilton/01-07-02-0229-0003 [https://perma.cc/9FRZ-5RX8].

63. ANDREW JACKSON, BANK VETO (1832), available at https://millercenter.org/the-presidency/presidential-speeches/july-10-1832-bank-veto [https://perma.cc/BQ6G-2JZF].

surrounding this multi-act constitutional drama. The first is our tendency to see the institution of a national bank as static (i.e., as performing the same functions in Jackson's day as it did in Hamilton's). The second is our tendency to see the constitutional debate over that institution as static (i.e., as focused in 1832, as in 1819 and all the way back to 1791, on two rival interpretations of the Necessary and Proper Clause). It is unnecessary, for the purposes of sustaining a claim that my account raises new questions about *McCulloch* (i.e., converts some of its *unknown unknowns* into *known unknowns*), to review these scholarly tendencies in full detail. For my purposes here, it is only necessary to reconstruct the road that led to *McCulloch*, namely the sequence of events that produced the revival of a national bank in 1816.[64]

In thinking about the entire course of the national bank controversy, it strikes me that the period between 1812 (which marks the start of our second military conflict with Great Britain[65]) and 1816 (which marks the birth of the second Bank of the United States) has perhaps the lowest ratio of apt scholarly treatment to events of constitutional consequence.[66] Our conventional wisdom surrounding the 1812–1816 period might be summarized as follows:

> The 12th Congress declared war on Great Britain in June 1812. Without the ability to borrow money from the Bank of the United States—its charter had expired fifteen months earlier—Congress was forced to fund the conflict through loans from state banks. In January 1815, looking to provide more reliable funding for the war effort, the 13th Congress—led by Democratic-Republicans—passed a bill to charter a new national bank.[67] Few lawmakers had raised constitutional objections to the bill, a fact attributable to the trying fiscal circumstances, a widely-shared sense that the question had been settled by the existence of a national bank between 1791 and 1811, or some combination of the two. President Madison vetoed the bill on policy grounds, but in doing so, explicitly waived the question of congressional power in light of both (1) "repeated recognitions" across the branches of a national bank's constitutionality, and (2) "indications . . . of a concurrence of the general will of the nation[.]"[68] Active hostilities ended within weeks of Madison's veto, and with them, the heavy demands on the federal purse. Just over a year later, in April 1816, the 14th Congress—like its predecessor, led by Democratic-Republicans—passed a slightly different national bank bill. Madison signed it into law.[69]

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64. I treat *McCulloch* here as beginning with Maryland's decision to tax the national bank. This renders the fine background details provided by KILLENBECK and ELLIS (both *supra* note 8) part of the case itself and not the road to it.

65. DONALD R. HICKEY, THE WAR OF 1812: A FORGOTTEN CONFLICT (1989).

66. The decade between 1819 (when *McCulloch* was decided) and 1829 (when Andrew Jackson became president) does not strike me as a true competitor here, as little of constitutional significance — save perhaps the Marshall Court's affirmation of *McCulloch* in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) — took place.

67. MATTHEW ST. CLAIR CLARKE & DAVID A. HALL, LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES: INCLUDING THE ORIGINAL BANK OF NORTH AMERICA 585–93 (1832).

68. *Id.* at 594.

69. LOMAZOFF *supra* note 11, at 94–95.

A number of casebooks in American constitutional law, whether designed for undergraduates in political science courses or law school students, embrace some version of this account.[70] Its flaws, however, are multiple and cumulatively far from trivial. For one thing, the conventional wisdom calls attention to one of the war's economic hardships (the federal government's *fiscal* struggle to fund the conflict) while effectively suppressing a second (the sudden Fall 1814 breakdown in the nation's *monetary* order, which led to widespread price inflation and endured long past the arrival of peace). For another—and here the distinction between things fiscal and monetary matters anew—the narrative falsely implies that the policy rationale for the failed mid-war effort to charter a new national bank (improving the federal government's fiscal situation) was *also* the policy rationale for the successful postwar effort. In reality, members of the Congress that began two months following the Battle of New Orleans viewed legislation for reviving the Bank of the United States as a means for restoring and maintaining the nationwide circulation of specie and specie-backed paper currency (i.e., as a means for solving a monetary problem). Finally, the standard account carries a second false implication, namely that the political branches had resolved the constitutional status of a national bank during the war, and thus, the question of congressional power lacked salience in the postwar proceedings. In truth, the end of the armed conflict with Great Britain generated fresh constitutional concerns among some Democratic-Republican lawmakers. This led a number of party leaders to respond by leveraging a past development—the gradual acquisition of monetary power by the Bank of the United States between 1791 and 1811—to generate a novel and narrow claim respecting congressional power designed to allay those concerns.

This section of the essay is designed to jettison this traditional narrative respecting the 1812–1816 period in favor of a two-part alternative that can be constructed from the findings of legal scholars, political and economic historians, and political scientists.[71] In this vein, it is worth confirming what the previous sentence implies: most of the discrete components of my alternative narrative are not new.[72] What is new, I would respectfully submit, is their *collation* in a manner

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70. *See, e.g.*, GILLMAN, *supra* note 52, at 125; DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS, STRUGGLES FOR POWER AND GOVERNMENTAL ACCOUNTABILITY 548 (9th ed. 2014); LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: A SHORT COURSE 105 (6th ed. 2015).

I should note that while the 4th edition of PROCESSES OF CONSTITUTIONAL DECISIONMAKING also belongs on this list, the 7th edition does not; Sandy and his co-editors thought well enough of my claims to integrate them into the newest edition of their casebook. *Compare* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 16–17 (4th ed. 2000), *with* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 37–38 (7th ed. 2018).

71. LOMAZOFF, *supra* note 11, at 95–98.

72. *See, e.g.*, BRAY HAMMOND, BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 227–50 (1957); EDWIN J. PERKINS, AMERICAN PUBLIC FINANCE AND FINANCIAL SERVICES, 1700–1815 324–48 (1994); SUSAN HOFFMANN, POLITICS AND BANKING: IDEAS, PUBLIC POLICY, AND THE CREATION OF FINANCIAL INSTITUTIONS 45–49 (2001); DAVID P. CURRIE, THE CONSTITUTION IN

that reveals the heretofore unappreciated constitutional richness of the early-to-mid-1810s. The final section of the essay will survey the questions about *McCulloch* that arise in light of my account.

1. May 1812 to January 1815: Funding a War

We often study a war in order to understand its causes[73] or to dissect its campaigns by land or at sea,[74] but less often to appreciate how one or more of the participants *funded* it.[75] With respect to the United States in the War of 1812, the answer to this question changed over time. Congress was initially determined to finance the conflict through the sale of long-term securities that paid six percent interest. Because a national bank was not available to purchase any of those bonds—Congress declined a charter extension for the Bank of the United States in March 1811 and forced it to shutter its doors—the Treasury Department's hope was that state banks and individual investors would easily pick up the slack. This hope was immediately dashed. The department's very first effort to raise funds for the war—an $11 million bond offering in May 1812—ran into trouble, as just $6.12 million was initially offered by investors. An August 1812 reopening of the subscription books raised a fair bit of the remaining $4.88 million—$3.54 million, to be precise—but the Treasury was ultimately forced to sell short-term securities (i.e., one-year Treasury notes) at a lower rate of interest in order to cover the residual $1.34 million.[76] Just as importantly, all of this was an unfortunate harbinger of things to come.

When Congress approved a new round of borrowing in early 1813, it abandoned the pretense of funding the war entirely through the sale of long-term securities, authorizing $16 million to be raised in that manner, but an additional $5 million through the sale of short-term Treasury notes. It is a good thing that Congress anticipated another round of trouble, because that is precisely what it got. In fact, the initial commitments to the $16 million loan were so poor—just $3.96 million—that the Treasury expressed a willingness to receive offers for the residual $12.04 million *below par*. When most of these remaining securities were sold to the wealthy trio of Stephen Girard, David Parish, and John Jacob Astor at the price of 88—that is, $88 for a bond with a face value of $100—it pushed the effective interest rate for wartime borrowing from six percent to 6.8 percent.

Congress: The Jeffersonians, 1801–1829 254–58 (2001); KILLENBECK, *supra* note 8, 53–63; ELLIS, *supra* note 8, 37–41.

73. *See* HICKEY, *supra* note 65, at 5–28; *see also* JON LATIMER, 1812: WAR WITH AMERICA 13–34 (2007).

74. *See* ROBERT S. QUIMBY, THE U.S. ARMY IN THE WAR OF 1812: AN OPERATIONAL AND COMMAND STUDY, 2 vols. (1997); *see also* WILLIAM S. DUDLEY AND MICHAEL J. CRAWFORD, THE NAVAL WAR OF 1812: A DOCUMENTARY HISTORY, 3 vols. (1985–2002).

75. That being said, the most recent treatments — both excellent — belong to PERKINS, *supra* note 72, at 324–48 and MAX M. EDLING, A HERCULES IN THE CRADLE: WAR, MONEY, THE AMERICAN STATE, 1783-1867 108–44 (2014).

76. LOMAZOFF, *supra* note 11, 99–100.

Congress authorized an additional $7.5 million in long-term borrowing in August of that same year, but this time around, the Treasury's advertisement of the bond sale openly assumed that no offers at the price of 100 were forthcoming; it simply solicited bids (at some discount from par value) from "any person or persons, body or bodies corporate, who may offer . . . to loan [money] to the United States[.]"[77] The securities were ultimately sold at the price of $88.25 per $100 bond, a slight improvement over the previous sale but still at an elevated effective rate of interest.[78]

The nation's economic woes mounted in 1814, both in degree and in kind. The year began with the military situation looking quite grim: "Canada was still in British hands, the British fleet had invaded American waters, and the tide of the war appeared to be turning against the United States."[79] Moreover, this sad state of affairs had a measurable impact on the federal government's finances. William Jones, the acting Treasury Secretary—Albert Gallatin had been sent to Europe by President Madison to seek peace with the British[80]—authored a report suggesting that an additional $29.4 million (approximately) in borrowing would be required to fund the year's expenses.[81] In response, Congress approved $35 million in new borrowing: $10 million in short-term Treasury notes on March 4 and $25 million in long-term securities on March 24. Part of the rationale for lawmakers approving $35 million in borrowing (as opposed to just $29.4 million) was no doubt a collective sense, born of recent experience, that the six percent bonds would sell below par and thus raise less than $25 million. The response of investors to the prevailing state of military affairs rendered them right, and then some. The details here are byzantine,[82] but the upshot is that by late August, millions of dollars' worth of long-term securities had been sold not at 88.25 or even 88, but at just *80*.[83] This pushed the effective interest rate for wartime borrowing, already elevated, up to 7.5 percent. As one newspaper editor in Vermont remarked within days of the sale's conclusion, "money grows fearce."[84]

Under normal circumstances, the 13th Congress—whose second session had ended in April 1814 or soon after its approval of $35 million in new borrowing—would have met for its third and final session in December of that year. On August 8, however, President Madison—who did not need the full results of

77. 2 *American State Papers, Finance, Doc. No. 403*, 651–62, esp. Statement Ga (1814), LIBRARY OF CONGRESS, https://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=010/llsp010.db&Page=651[https://perma.cc/7CC2-HJAA].

78. LOMAZOFF, *supra* note 11, 100–01.

79. HICKEY, *supra* note 65, at 159.

80. THOMAS K. MCGRAW, THE FOUNDERS AND FINANCE: HOW HAMILTON, GALLATIN, AND OTHER IMMIGRANTS FORGED A NEW ECONOMY 306–09 (2012).

81. *Doc. No. 403, supra* note 77, at 652.

82. LOMAZOFF, *supra* note 11, at 102–03.

83. It is also important to note that the Treasury was only able to sell $12.93 million in long-term securities, not the full $25 million. A $10 million tranche was offered and sold in late April and early May, and an additional $2.93 million was sold in late August from a $6 million offering. *Id*. at 102–03, 203 n.51.

84. WASHINGTONIAN, Aug. 29, 1814.

efforts to sell these new securities to infer that raised funds would prove inadequate to the "wants of the Treasury"[85]—exercised his Article II, Section 3 authority to convene federal lawmakers "on extraordinary Occasions[.]" That is, he called members of both chambers back to Washington for a special session of Congress that would begin on September 19. For Madison, enhancing the federal government's ability to fund the war—whether by raising taxes or by chartering a new national bank—was the session's clear *raison d'être*. Before members of Congress could reassemble, however, two events of cardinal importance occurred. First, on August 24, British troops infamously sacked the nation's capital, setting fire to the White House, the Capitol building, and the Treasury Department (to name but a few prominent targets).[86] Second, within a few days of the British assault—and some economic historians have posited a cause-and-effect relationship here[87]—most state banks south and west of New England suspended the on-demand payment of specie for their circulating banknotes and checks. Perhaps the most important consequence of this development was the immediate depreciation of their paper, which consumers experienced in the form of price inflation. As the author of one editorial would later complain, "[a]ll men who have regular stated prices for their labor, all salarymen, all who live on income, are obliged to live at an expense of fifteen per cent. greater than they would do, if the banks paid specie for their notes."[88] All of this meant that by the time members of Congress reconvened, the nation's economic woes were no longer restricted to the government's struggle to finance the war. Madison's new Treasury secretary, Alexander J. Dallas, reported to Congress in mid-October that "[t]he condition of the circulating medium of the country, present[ed] *another* copious source of mischief and embarrassment."[89]

For now, let us put a pin in the nation's sudden onset monetary disorder. I say that not because the subject is undeserving of our attention—indeed, I return to it below—but because that is precisely what members of the 13th Congress did in late 1814. In short, they chose to focus their attention on what Secretary Dallas might have called the *first* "copious source of mischief and embarrassment": the fact that "the fiscal operations of the Government" were currently "labor[ing]

85. James Madison, Sixth Annual Message (Sept. 20, 1814), https://millercenter.org/the-presidency/presidential-speeches/september-20-1814-sixth-annual-message [https://perma.cc/LLP2-2VUA] (last visited Nov. 5, 2020).

86. *See* CAROLE L. HERRICK, AUGUST 24, 1814: WASHINGTON IN FLAMES (2005); ANTHONY PITCH, THE BURNING OF WASHINGTON: THE BRITISH INVASION OF 1814 (1998).

87. For an early claim to this effect, see JOHN JAY KNOX, A HISTORY OF BANKING IN THE UNITED STATES 485 (1900) ("During 1814 the British army directed its operations against the Middle and Southern States especially. . . . Such alarm was occasioned that the banks suspended and had their specie conveyed to places of safety."). For a more recent version of the same claim, see HAMMOND, *supra* note 72, at 227. For cites to three competing explanations for the suspensions, see LOMAZOFF, *supra* note 11, at 203 n.57.

88. Burent Gardiner, *Current Money*, RHODE-ISLAND AM., Aug. 25, 1815.

89. 2 *American State Papers, Finance, Doc. No. 425,* 866 (emphasis added) (1814), LIBRARY OF CONGRESS, https://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=010/llsp010.db&Page=866 [https://perma.cc/UZ9P-B6F2].

with extreme inconvenience."[90] His report openly acknowledged that continuing to prosecute the war would require "a supply of treasure . . . beyond any amount which it would be politic, even if it were practicable, to raise by an immediate and constant imposition of taxes."[91] Because "the public credit [was] at this juncture so depressed," Dallas also saw yet another round of bond sales as a veritable nonstarter.[92] This left him to recommend a measure designed to both stimulate the demand for existing bonds and (more importantly) supply the federal government with some much-needed funding: the creation of a new national bank, one to be capitalized in large part with recently-issued long-term securities.[93]

It is worth appreciating the significance of Dallas's recommendation. The new Treasury secretary was proposing, on behalf of a Democratic-Republican president who was one of the main constitutional critics of the 1791 national bank bill, to revive that institution. Moreover, the Madison administration was proposing it to a Congress controlled by fellow Democratic-Republicans who nursed either healthy skepticism toward, or direct antagonism to, the vigorous exercise of congressional power. The October 1814 report (and its aftermath) also generates two questions: First, did Secretary Dallas speak to the constitutionality of a national bank, and if so, how did he justify a prospective congressional decision to charter one? Second, when members of the 13th Congress passed a national bank bill in January 1815,[94] how did *they* understand the constitutionality of their action?

The answer to the first of these questions is straightforward: Secretary Dallas spoke to the constitutionality of a national bank in his October 1814 report and, in doing so, anticipated the arguments that Madison would deploy in his veto message three and a half months later.[95] He opened this portion of the report by acknowledging that simple avoidance of the constitutional issue was not going to work: "It would be presumptuous to conjecture that the sentiments which actuated the [constitutional] opposition have passed away[.]"[96] Dallas then proceeded to offer a two-pronged argument for why a national bank's constitutionality ought to be considered as settled in the affirmative:

> When, therefore, we have marked the existence of a national bank for a period of twenty years, with all the sanctions of the legislative, executive, and judicial authorities; when we have seen the dissolution of one institution, and heard a loud and continued call for the establishment of another; . . . can it be deemed a violation of the right of private opinion, to consider the constitutionality of a national bank, as a question forever settled and at rest?[97]

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90. *Id*.
91. *Id*.
92. *Id*.
93. *Id*. at 867.
94. For the full text of this bill, see CLARKE & HALL, *supra* note 67, at 585–93.
95. *Id*. at 594.
96. *Doc. No. 425, supra* note 89, at 868.
97. *Id*. at 869.

Discerning an answer to the second question—how Democratic-Republicans within the 13th Congress who were sympathetic to the administration's national bank proposal understood its constitutionality—will take a bit more work. Part of the difficulty here lies in the paucity of direct evidence: few Democratic-Republican supporters of the proposal, including those with past misgivings respecting the Bank of the United States, spoke to the question of congressional power in late 1814 or early 1815. And this surely disappointed the most conservative members of their party. John Clopton, an "Old" Democratic-Republican with longstanding doubts respecting a national bank's constitutionality, confessed on the House floor that he would "have been glad if some gentleman who patronizes this scheme, would have presented to us his views of the authority which he conceives the constitution has given to pass such a bill as this."[98]

One obvious possibility here is that Democratic-Republican supporters of the Madison administration's proposal also embraced its constitutional logic. They too, this argument goes, saw past practice and prevailing public opinion as settling the constitutional question. But Keith Whittington has suggested another possibility, one tethered less to the idea that (1) federal officials accepted a settlement *despite* the fact that it failed to align with their best understanding of the Constitution, and more to the idea that (2) those same officials updated their beliefs about what the Constitution actually meant. He has argued that the War of 1812 "persuaded many Jeffersonians of the necessity of a bank, at least within that immediate context . . . circumstances [had] changed, rendering [the institution] 'necessary and proper' where it might once have been merely expedient."[99] While, as noted above, there is little direct evidence that permits us to intelligently choose between these possibilities, there is some indirect evidence that points in the direction of Whittington's claim. That evidence comes, however, from the next sequence of events in my alternative account of the 1812–1816 period.

2. February 1815 to April 1816: Restoring the Currency

Careful readers will note that little about the first part of my revisionist narrative, save its discussion of specie payment suspensions and their resulting price inflation as compounding the nation's wartime economic woes, actually "revises" the conventional wisdom surrounding this period: *We declared war. We had difficulty funding that war. Democratic-Republicans tried to address these fiscal woes by passing wartime legislation for a new national bank. Because many in the party—including both members of Congress and the president himself—previously opposed such legislation on constitutional grounds, they faced the challenge of justifying their seeming reversals.* Again, these are all components

98. CLARKE & HALL, *supra* note 67, at 550.

99. Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1295 (2009); *see also* KEITH E. WHITTINGTON, REPUGNANT LAWS: JUDICIAL REVIEW OF CONGRESS FROM THE FOUNDING TO THE PRESENT 94 (2019).

of the traditional narrative. So, why the need for a revisionist account at all? In short, the *remaining* elements of that narrative, namely its assumptions that (1) the postwar 14th Congress—again controlled by Democratic-Republicans — unthinkingly passed a new national bank bill, and (2) President Madison unthinkingly signed the same in April 1816. Both are faulty and need to be overturned; doing so will help to pave a new road to *McCulloch*.

James Madison's veto of a national bank bill in late January 1815 led to frenzied efforts within the increasingly lame-duck 13th Congress—it was set to end little more than a month later, on March 3rd—to produce a revised bill acceptable to the president.[100] After all, despite the nation's much-improved military situation (Brevet Major General Andrew Jackson had recently led the United States to victory in the Battle of New Orleans[101]), the war with Great Britain was hardly over. And once the 13th Congress ended, there would be no opportunity to provide fresh congressional support for the war effort until December, when the 14th Congress would hold its first session. On February 17th, however, the House of Representatives abruptly tabled a revised national bank bill that it was considering. This was not because Treasury Secretary Dallas discovered some novel way to fund the war; it was because the conflict-concluding Treaty of Ghent reached the nation's capital and was ratified by the Senate.[102]

By removing the primary source of federal expenditures since mid-1812, peace did much to alleviate the government's fiscal distress. Following closely on the heels of peace was a new commercial agreement between the United States and Great Britain, one that produced the resumption of transatlantic trade between the nations and its crucial concomitant: customs revenue. In short, not only were the federal government's expenditures lower, but its revenue was higher.[103] About a year following Senate ratification of the Treaty of Ghent, Democratic-Republican congressman Erastus Root of New York would report that during the conflict, "the credit of the Government was weak, now it is strong."[104]

Peace did precious little, however, to alleviate the other source of the nation's economic suffering: monetary disorder. And there was a popular expectation that it would. Economic historian Edwin Perkins has noted that most Americans were willing to endure specie payment suspensions and their attending price inflation during the war,[105] but expected that peace would bring a quick restoration of the monetary *status quo ante*.[106] On this point, consider a May 1815 editorial from

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100. CLARKE & HALL, *supra* note 67, at 596–607.

101. ROBERT V. REMINI, THE BATTLE OF NEW ORLEANS: ANDREW JACKSON AND AMERICA'S FIRST MILITARY VICTORY 136 (2001).

102. CLARKE & HALL, *supra* note 67, at 607–08; *see also* DONALD R. HICKEY, THE WAR OF 1812: A SHORT HISTORY 131 (2012).

103. PERKINS, *supra* note 72, at 346 ("[M]ilitary expenditures were dwindling[,] and customs revenues were generating substantial income for government coffers.").

104. CLARKE & HALL, *supra* note 67, at 660.

105. One cannot help but think here of Justice Black's contention in *Korematsu v. United States* that "hardships are part of war, and war is an aggregation of hardships." 323 U.S. 214, 219 (1944).

106. PERKINS, *supra* note 72, at 341.

the New Haven-based *Connecticut Journal* in which the author expressed "belie[f] and trust, that the banks will soon resume their accustomed payments in specie."[107] By early August, however—nearly six months removed from the war's close—no relief was in sight. The Trenton-based *True American* carried a report early that month that "[c]omplaints prevail very generally thro' the country" regarding the continued refusal of state banks "to pay specie for [their] notes. There is no doubt that this refusal produces very serious inconvenience; and that it is very desirable the payment of specie should be resumed by the banks[.]"[108]

For my purposes here, the cause of this state bank intransigence is less important than how the Madison administration and the 14th Congress proposed to deal with it. With respect to the former, the operative term was "profits." Whereas prior to the war the commitment of state banks to pay specie for their notes and checks forced these institutions to limit demand liabilities to some multiple of their hard assets, the wartime suspension of specie convertibility allowed them to lend *without* regard for their gold and silver holdings. More money being lent, of course, meant more interest being paid. A young John C. Calhoun, representing South Carolina in the House, would subsequently remark that the basic instinct of state banks was "[g]ain, gain; nothing but gain: and they would not willingly relinquish their gain from the present state of things, which was profitable to them, acting as they did without restraint, and without hazard."[109] The question of what was to be done about all of this was answered by President Madison in his December 1815 annual message, which coincided with the opening of the first session of the 14th Congress. The President suggested that if "the operation of the State banks can not produce" the resumption of specie payments—that is, if those institutions would not voluntarily restore the payment of gold and silver—then a national bank bill would "merit consideration."[110] Just three days later, Secretary Dallas—apparently proceeding on the assumption that voluntary resumption was not forthcoming—submitted a report to Congress that both outlined the administration's national bank proposal and cited "restor[ation of] the national currency of gold and silver" as its primary rationale.[111]

If nothing else, these late 1815 statements from the President and his Treasury secretary help to clarify that while the mid-war effort to charter a new national bank was driven by a *fiscal* problem, its postwar counterpart grew from *monetary* stress. That by itself supplies an important amendment to the traditional narrative. But it also begs a larger question: why was a *national bank* seen as a viable solution to this particular policy problem? The short answer here—and interested

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107. *On Banks*, CONN. J., May 1, 1815.

108. TRUE AM., 3 Aug. 3, 1815.

109. CLARKE & HALL, *supra* note 67, at 633.

110. James Madison, Seventh Annual Message (Dec. 5, 1815), https://millercenter.org/the-presidency/presidential-speeches/december-5-1815-seventh-annual-message [https://perma.cc/NA9G-LQGE].

111. 3 *American State Papers, Finance, Doc. No. 454*, 1-32 (1815), LIBRARY OF CONGRESS, https://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=011/llsp011.db&Page=1 [https://perma.cc/A2F7-KPR6].

readers are invited to consult a much longer treatment[112]—is institutional change. Though Alexander Hamilton's December 1790 national bank proposal was crafted with only fiscal purposes in mind—he viewed it as "an Institution of primary importance to the prosperous administration of the Finances"[113]—the flesh-and-blood Bank of the United States gradually developed the capacity to regulate its state-chartered peers between 1791 and 1811. By "regulate," I mean the following: if officers of the national bank believed that one or more state banks engaged (through their lending) in a problematic expansion of the money supply, those same officers could work to induce a remedial contraction in the same by presenting collected state banknotes and checks for redemption in specie. The evidence is clear that officers of the Bank of the United States engaged in behavior of this sort—which one prominent economist has labeled "positive monetary control"[114]—no later than October 1795.[115]

Before returning to the postwar efforts of the Madison administration to address the nation's monetary woes, three points respecting the evolution of the Bank of the United States between 1791 and 1811 warrant mention. First, over time, the institution's officers increasingly saw state bank regulation as a crucial component of their mission. In 1807, for example, former U.S. Senator George Cabot—a member of the board of directors for the national bank's Boston branch—responded to criticism of its conduct toward local banks by suggesting that:

> what is alledged [*sic*] as a most culpable part of our conduct we have consider'd as our best claim to praise.—We are charged with doing injury to other Banks by draining them of their specie and retaining it by the limitation of our [loans]. Now is there any man who does not see that there is a sacrifice of our profit to the public safety?—if every Bank were to efface its credit in the unbounded manner that some do or to the extent that most of them do, the community wou'd. . .be inundated with a flood of paper.[116]

Second, change in the suite of services offered by the Bank of the United States was hardly lost on the members of the 11th Congress, who considered extending its charter in the spring of 1811 (but ultimately elected not to). Most observations respecting the institution's emergence as a monetary power addressed the desirability of this development, not its constitutionality.[117] In this

112. Eric Lomazoff, *Turning (Into) "The Great Regulating Wheel" : The Conversion of the Bank of the United States, 1791–1811*, 26 STUD. AM. POL. DEV. 1 (2012).

113. HAMILTON, *supra* note 62, at 575.

114. RICHARD H. TIMBERLAKE, JR., MONETARY POLICY IN THE UNITED STATES: AN INTELLECTUAL AND INSTITUTIONAL HISTORY 4 (1993).

115. LOMAZOFF, *supra* note 11, at 60–63.

116. Letter from Senator George Cabot, U.S. Congress, to Representative Josiah Quincy III, U.S. Congress (Jan. 9, 1807) (on file with the Columbia University Rare Book and Manuscript Library, James O. Wettereau Research Papers [hereinafter JOW]).

117. The principal exception in 1811 was Henry Clay, then a Democratic-Republican senator from Kentucky; *see* LOMAZOFF, *supra* note 11, at 91–92. I address Clay's constitutional critique of the national bank's evolution—and his conspicuous about-face in 1816—below.

vein, charter extension advocates spoke to the virtue of state banks "hav[ing] a common parent to regulate their affairs."[118] Unsurprisingly, federal lawmakers opposed to re-chartering the Bank of the United States took a less sanguine view of the institution's newfound regulatory might; one stressed its ability "to prey upon the other banks whenever it pleased."[119] Finally, the failure of the 11th Congress to extend the national bank's charter had one simple consequence for state banks: the "Great Regulating Wheel" of their banking industry *went away*.[120] Insofar as the Bank of the United States helped to restrain the impulse of state banks toward overexpansion of the money supply, its restraining influence was now gone.

Let us return now to Washington in late 1815. Again, the principal economic problem of the immediate postwar period was a monetary one, namely the refusal of state banks to restore the payment of specie on demand for their notes and checks. Continuing to lend without regard to hard assets was surely a profitable business—Mathew Carey, one of the Early Republic's most prolific commentators on political economy, wrote during this period of the state banks' "great harvest of large dividends"[121]—but it also kept the nation's money supply artificially expanded and thereby extended Americans' painful experience with price inflation. The Madison administration's proposed cure for this monetary disease was born of what James Barbour, a Democratic-Republican senator from Virginia, would call the "lessons of experience":[122] if the late Bank of the United States had contributed to the nationwide maintenance of specie payments by curbing the excesses of state banks, then a revived institution could presumably facilitate both (1) the resumption of specie payments and (2) their maintenance going forward.

For my purposes here, the major question facing the Madison administration in pushing its peacetime national bank project was how to justify that project *constitutionally*. Its answer, subsequently embraced by leading Democratic-Republicans within the 14th Congress, sheds light on a question previously raised: why members of the 13th Congress chose to support the administration's proposal for a wartime national bank. If skeptical Democratic-Republicans had adopted Secretary Dallas and President Madison's thinking—that the Bank's constitutional status was settled by

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118. CLARKE & HALL, *supra* note 67, at 188 (quoting Rep. Benjamin Pickman, a Federalist from Massachusetts).

119. *Id.* at 317 (quoting Rep. Michael Leib, a Democratic-Republican from Pennsylvania).

120. Letter from Thomas Willing, former pres., First Bank of the U.S., to John Sergeant, future Rep., U.S. Congress (Dec. 19, 1815), *reprinted in* Documentary History of the First Bank of the United States (unpublished manuscript) (on file with JOW, *supra* note 116). Willing was the first president of the First Bank of the United States, serving from 1791 until 1807 before resigning due to a stroke. On Willing, see Robert E. Wright, *Thomas Willing (1731-1821): Philadelphia Financier and Forgotten Founding Father*, 63 PA. HIST.: J. MID-ATLANTIC STUD. 525 (1996).

121. MATHEW CAREY, ESSAYS ON BANKING 159 (1816). On Carey more generally, see Edward C. Carter II, *The Birth of a Political Economist: Matthew Carey and the Recharter Fight of 1810-1811*, 3 PA. HIST.: J. MID-ATLANTIC STUD. 274 (1966).

122. CLARKE & HALL, *supra* note 67, at 688.

past practice and current public opinion—then there would have been no significant engagement with the congressional power question. This was not the case, as members of both the Madison administration and the 14th Congress advanced a novel constitutional argument justifying the peacetime national bank: the Coinage Clause of Article I, Section Eight.

Secretary Dallas made it clear that the constitutional politics of national banking in peacetime would be distinct from its wartime counterpart. The report that he submitted to the 14th Congress on December 8, 1815 did not contain his wartime claim that the constitutional question was "forever settled and at rest."[123] Instead, the Treasury secretary boldly went where no federal official had gone before and suggested that Congress could charter a new national bank pursuant to its Article I power to "coin Money, regulate the Value thereof."[124] He justified this argument in four steps. First, the Second Congress had exercised this power by passing the Coinage Act of 1792, which designated gold and silver coins as the "lawful money of the United States." Second, down through August 1814, the nation's banks had circulated notes and checks that were convertible upon demand into specie, which meant that gold and silver continued, technically speaking, to be the "circulating medium of exchange[.]" Third, insofar as those same institutions had subsequently begun circulating—and were still circulating, in late 1815—*inconvertible* banknotes and checks, their paper had "supersede[d] the only legal currency of the nation." Finally, if a revived Bank of the United States could restore and maintain the circulation of specie nationwide, then the bill chartering it would redeem the efforts of the Second Congress to "coin money."[125]

Democratic-Republicans in Congress justified the bill that grew from Dallas's report on the same constitutional grounds. The aforementioned John C. Calhoun, who chaired the newly formed House Select Committee on a Uniform National Currency, introduced a bill in early 1816 that was "substantially what Dallas had recommended[.]"[126] He defended it with reference to the power "given to Congress by [the Constitution], in express terms, to regulate the currency of the United States." Calhoun argued that while giving a "steadiness and fixed value" to the nation's currency had been the intent of the "framers of the constitution . . . in giving Congress the power 'to coin money, regulate the value thereof, and of foreign coin,'" their objective had been undercut by the recent "extraordinary revolution in the currency of the country."[127] For Calhoun, a national bank represented a means for redeeming the Framers' intent with respect to the Coinage Clause. Meanwhile, Speaker of the House Henry Clay's effort to legitimize the

123. *Doc. No. 425*, *supra* note 89, at 869.

124. *Doc. No. 454*, *supra* note 111, at 17.

125. *Id.* at 17–18. For a slightly expanded version of this logic, see LOMAZOFF, *supra* note 11, at 113.

126. Robert W. Keyes III, The Formation of the Second Bank of the United States, 1811–1817 91 (1975) (unpublished Ph.D dissertation, University of Delaware). For the text of the committee's bill, see CLARKE & HALL, *supra* note 67, 621–30.

127. CLARKE & HALL, *supra* note 67, 631.

national bank bill was complicated by the fact that he had criticized the 1811 bill to extend the charter of the Bank of the United States on constitutional grounds. As a senator from Kentucky in the 11th Congress (yes, Clay entered the House and became Speaker *after* serving in the Senate), he had argued that the evolution of the Bank of the United States into a regulator of state-chartered institutions was constitutionally problematic:

> It is mockery, worse than usurpation, to establish [a national bank] for a lawful object, and then extend it to other objects, which are not lawful. . . . A bank is made for the ostensible purpose of aiding in the collection of the revenue, and whilst it is engaged in this . . . it is made to diffuse itself throughout society, and to influence all the great operations of credit, circulation, and commerce.[128]

Five years later, Clay acknowledged, in the first great flip-flop of American political history—and one that would dog him for the rest of his political career[129]—the error of his ways. There were, he suggested, "provisions of the constitution, but little noticed, if noticed at all, [during] the discussions in Congress in 1811" that spoke to the question of congressional power. "That instrument[,]" Clay added, "confers upon Congress the power to coin money, and to regulate the value of foreign coins."[130] The inference he drew here—both from the Coinage Clause and several other provisions[131]— was that "the subject of the general currency was intended to be submitted exclusively to the General Government." While state bank behavior was currently frustrating the Framers' intent, a national bank bill would allow Congress to "recover the control which it had lost, over the general currency."[132]

President Madison also invoked the Coinage Clause in discussing the constitutional basis for the postwar national bank bill. He signed the bill to revive the Bank of the United States in mid-April 1816, and six months later—in his eighth and final annual message to Congress—stated:

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128. *Id*. at 355.

129. Robert V. Remini, *Henry Clay: Statesman for the Union* (New York: W.W. Norton, 1991): 68, 141, 227, 467, 516, and 614.

130. CLARKE & HALL, *supra* note 67, 671–72.

131. David Schwartz has critiqued my claim that the Coinage Clause was "the textual anchor" (*supra* note 11, at 97) for the peacetime national bank bill, arguing that it rested upon the Coinage Clause "*in conjunction with* the Article I, section 10 restrictions of the states' monetary powers." David S. Schwartz, *Coin, Currency, and Constitution: Reconsidering the National Bank Precedent*, 118 MICH. L. REV. 1005, 1014 (2020) (emphasis added). I take Schwartz's point here, but insofar as we generally justify exercises of congressional power with reference to one or more provisions that *positively* authorize federal lawmaking (e.g., those in Article I, Section Eight, or the enforcement provisions in various constitutional amendments ratified since 1865), the documentary record from late 1815 and early 1816 points toward one and only one textual provision: the Coinage Clause.

132. CLARKE & HALL, *supra* note 67, 672.

> [I]t is essential that the nation should possess a currency of equal value, credit, and use wherever it may circulate. The Constitution has intrusted Congress exclusively with the power of creating and regulating a currency of that description, and the measures which were taken during the last session in execution of the power give every promise of success.[133]

Though Madison acknowledged the Coinage Cause as the 14th Congress's basis for passing the national bank bill, I am not entirely convinced that he personally embraced it as the best account of Congress's authority to act as it did. I argue elsewhere that there is competing evidence that points in the direction of ongoing personal adherence to his January 1815 claim that the constitutional question had been settled by past practice and current public opinion.[134] That being said, Madison's words underscore the fact that the constitutional politics of national banking had clearly changed since the Treaty of Ghent.

And I want to close this subsection (and section more broadly) by speaking to that fact. Earlier I suggested that if Democratic-Republican lawmakers who harbored doubts respecting Congress' power to charter a national bank had supported the wartime effort to do so because they viewed the issue as settled, then the postwar shift of leading party members toward a novel constitutional argument makes little sense; why not continue to argue that the issue was settled? The fact that Democratic-Republicans *did* gravitate toward the Coinage Clause argument following the War of 1812 forces us to consider alternative accounts of what transpired within the 13th Congress. And to recall, Keith Whittington has offered one: some Democratic-Republican lawmakers came to see a national bank as "Necessary and Proper," at least within the context of the war.[135] This account, I would submit, is far easier to reconcile with what we see in the postwar period. If the fiscal pressure of the war rendered a national bank "necessary" rather than just "expedient," then the cessation of hostilities—in the minds of those same lawmakers—improved the financial picture enough to render a national bank's necessity again a doubtful question. Otherwise put, relatively conservative Democratic-Republicans were willing to go along with a wartime national bank, but subsequently balked at the prospect of supporting a comparable bill in peacetime. Winning the support of these lawmakers for the postwar bill thus required a narrower constitutional claim, one that blessed a peacetime national bank *without* running the risk of sanctioning a host of future federal lawmaking. The Coinage Clause argument advanced by leading Democratic-Republicans fit the bill here. One notable aspect of the postwar push to charter a national bank was the relative absence of claims respecting the meaning of the Necessary and Proper Clause. Whether this meant that Congress was (1) directly

133. James Madison, Eighth Annual Message (Dec. 3, 1816), https://millercenter.org/the-presidency/presidential-speeches/december-3-1816-eighth-annual-message [https://perma.cc/7XPT-LXR3].

134. Eric Lomazoff, The Developing Mind of the Founder? James Madison and the National Bank Question, 1791–1831, (unpublished paper) (on file with the author).

135. Whittington, *supra* note 99, REPUGNANT LAWS, 94.

exercising its power to "coin Money, regulate the Value thereof," or that (2) a national bank was indisputably "necessary" for its exercise, was never made entirely clear.[136] It is clear, however, that the Coinage Clause argument offered Democratic-Republicans a means for securing a national bank's services without engendering yet another round of debate among party members over the legitimate scope of federal power under the Constitution.

III. OF RECENT VINTAGE: *MCCULLOCH*'S NEW *KNOWN UNKNOWNS*

I turn now to the "ripple effects" of our revised understanding of the 1812–1816 period. Replacing our conventional narrative of the national bank's revival (the effort grew from fiscal struggles during the war and proceeded on the premise that the constitutional question had been settled) with a revisionist account (the postwar endurance of monetary turmoil was the problem to be solved, and the constitutional dimension of the solution was the Coinage Clause) works to generate new questions about what transpired in *McCulloch v. Maryland*. Otherwise put, the revised political and constitutional backstory of the second Bank of the United States has the effect of transforming a number of *McCulloch*'s *unknown unknowns* into *known unknowns*, thereby expanding the universe of the latter. The new *known unknowns* include: (5) whether the justices who decided *McCulloch* were aware of the role of the Coinage Clause in the revival of a national bank; (6) why Congress's power to "coin Money, regulate the Value thereof" was not mentioned during oral argument; (7) why the Court elected to frame congressional power to charter a national bank as broadly as it did, as opposed to the narrower foundation offered by the Coinage Clause; and (8) why Chief Justice Marshall, defending *McCulloch* in April 1819, appeared to dare his critics to raise precisely the sort of narrow claim on behalf of congressional power that the Coinage Clause offered.

(5) *Judicial Knowledge of the Coinage Clause Argument:* If the Coinage Clause was central to the April 1816 rebirth of the Bank of the United States but found no mention in Marshall's opinion in *McCulloch* three years later, then it makes sense to ask whether the justices were aware of the role that it had played in postwar constitutional politics. If the answer to that question is a simple "no," then we can liken much of my revisionist account to a tree that fell in the constitutional forest without anyone wearing black robes around to hear it. Members of the political branches embraced one understanding of a national bank's constitutionality, members of the judicial branch embraced another, and there is little to do but acknowledge this fact. If, by contrast, the justices were cognizant of the novel constitutional claim advanced on behalf of a national bank, then we need to ask why they ultimately opted for Marshall's "sweeping

136. Henry Clay's aforementioned 1816 speech comes closest to the latter, as David Schwartz has helpfully pointed out; the Speaker of the House argued that a national bank appeared to him "'not only necessary, but indispensably necessary' . . . to remedy the currency crisis." Schwartz, *supra* note 131, at 1013. For the passage from Clay's speech, see CLARKE & HALL, *supra* note 67, 671.

affirmation of federal powers" over "establish[ing] the Bank's constitutionality on [the] narrow, specific grounds" advanced by leading Democratic-Republicans.[137]

I explore this choice-of-reasoning question below because I am ultimately skeptical that the justices were completely unaware of the Coinage Clause argument. To be fair, I have found no mention of it in either John Marshall's published correspondence[138] or any source pertaining to the other six justices. However, it seems that collective ignorance here would entail meeting a difficult set of conditions. The first is that none of them read Secretary Dallas's follow-up to the President's December 1815 annual message, namely the lengthy report in which Congress's power to "coin Money, regulate the Value thereof" was first proposed as a textual anchor for a national bank.[139] I will happily concede this condition and invite readers to insert here their favorite one-liner about unread reports from bureaucrats.[140] The second is that no justice consulted, either in preparing for oral argument or in deciding *McCulloch*, the record of congressional debate from three years earlier. This strikes me as a tougher sell, in part because Marshall's opinion for the Court explicitly refers to the events which "induced the passage of the present law." A tougher sell, but not an impossible one: Marshall falsely suggests in that same paragraph that the Bank of the United States was revived because (1) the "Government" was "exposed" to certain "embarrassments" following the institution's demise in 1811, and (2) these "embarrassments . . . convinced those who were most prejudiced against [a national bank] of its necessity."[141] That is to say, in lieu of actually consulting the congressional record, the justices may have made the erroneous assumption that the 14th Congress chartered the second Bank of the United States in order to right the federal government's fiscal ship. The third and final condition for collective ignorance of the Coinage Clause argument strikes me as the least plausible: no justice read President Madison's final annual message, which included an explicit reference to Congress' recent "execution of [its] power" to "creat[e] and regulat[e]" a "currency of equal value, credit, and use wherever it may circulate."[142] Even if no one on the Court read Dallas' report or consulted the record of congressional debate, I assume that one or more justices did read the functional equivalent of Madison's final State of the Union address.

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137. Hammond, *supra* note 72, at 265.

138. In this vein, see what is *not* mentioned anywhere in *The Papers of John Marshall*, vol. VIII: CORRESPONDENCE, PAPERS, AND SELECTED JUDICIAL OPINIONS, MARCH 1814–1819 (Charles F. Hobson ed., 1995).

139. *Doc. No. 454, supra* note 111, at 1–32.

140. In examining Dallas' statistics-heavy report, I am tempted to speculate that the justices, *if* they ignored it, did so on the premise that it was presumptively "too many damn pages for any man to understand" (to borrow Thomas Jefferson's words from *Hamilton: An American Musical* about an older Treasury report). Lin-Manuel Miranda, "Cabinet Battle #1," *Hamilton: An American Musical* (New York: Atlantic Records, 2015): MP3.

141. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 402 (1819) (emphasis added).

142. Madison, *supra* note 133.

(6) *Absence at Oral Argument*: Not only did *someone* add the congressional power question to the Court's agenda in *McCulloch*—our first *known unknown*—but much of the oral argument between February 22 and March 3, 1819 addressed that particular aspect of the case. Moreover, the argument offered by counsel for the Bank of the United States—Daniel Webster, Attorney General William Wirt, and former Attorney General William Pinkney—relied exclusively on a claim that the institution was "necessary" for exercising the federal government's fiscal powers; it made no mention of the Coinage Clause or the role that provision had played in the postwar effort to restore monetary order. To put the matter in perhaps starker relief, the national bank's counsel did not even offer Congress' power to "coin Money, regulate the Value thereof" as a *fallback* argument in the event that the justices failed to embrace their understanding of the Necessary and Proper Clause. Why, then, did lawyers for the Bank of the United States ignore the constitutional argument that underwrote the institution's rebirth just three years earlier?

In this particular instance, collective ignorance of the Coinage Clause argument among Bank counsel is not a viable explanation. Daniel Webster served in the 14th Congress as a Federalist representing New Hampshire in the House. Unless the future Massachusetts senator was absent for both Chairman Calhoun's speech introducing the national bank bill in the House and Speaker Clay's dramatic about-face in the same chamber—and I find this scenario rather implausible—he was familiar with claims respecting the Coinage Clause *qua* textual anchor. As such—and setting aside the question of whether Webster alerted his co-counsel to these claims—we still need an explanation for his complete non-employment of them. Perhaps the story is simply that Webster considered the Coinage Clause argument to be weak (i.e., that it could *not* anchor a national bank bill). At least one Federalist within the 14th Congress—Senator William Wells of Delaware—in fact complained that the provision only entitled Congress to "make a metallic money[,]" not regulate "what is called the currency of the country."[143] Personal disagreement with the Coinage Clause argument, however, would hardly remove Webster's fiduciary responsibility to his client. In other words, if Webster had a choice between (1) claiming that a national bank was "necessary" for exercising Congress' fiscal powers, and (2) claiming that a national bank was "necessary" for exercising Congress' fiscal powers *with the fallback position that the institution represented a means for coining money and regulating its value*, then he had a professional obligation to choose the latter. Because he did not, we must either accept this account of Webster's behavior and judge him for it or search anew for an explanation of what he failed to say in *McCulloch*.

(7) *Choice of Judicial Reasoning:* If one or more of the justices were cognizant of the Coinage Clause argument—and, as already noted, I suspect they were—

143. CLARKE & HALL, *supra* note 67, 696.

then we should ask why they resolved the congressional power question in *McCulloch* as they did. Otherwise put, why did John Marshall and his peers choose to resolve the constitutionality of a national bank by reference to (1) "general reasoning" and a permissive, federalism-threatening interpretation of the Necessary and Proper Clause, as opposed to (2) much narrower (and thus federalism-friendly) reasoning focused on Congress' power to "coin Money, [and] regulate the Value thereof?" Actually, there may be a third option as well. *If* all seven of the justices genuinely believed that the Bank of the United States was constitutional,[144] then given the aforementioned composition of the Court—two Federalists and five Democratic-Republicans, with perhaps two of the latter set hailing from the Party's moderate or "nationalist" wing—we could also have seen (3) some justices embrace Marshall's multi-prong, power-expanding reasoning while others concurred on the basis of the narrower Coinage Clause argument. The question here might also be posed anew by collapsing the second and third options and simply asking why the judicial branch rejected the constitutional thinking of the political branches from late 1815 and early 1816.

Just as the question of why the justices embraced such a capacious understanding of congressional power—that is, our third *known unknown*—strikes me as the "holy grail" of traditional *McCulloch* scholarship, the question of why they eschewed the Coinage Clause argument strikes me as the "holy grail" of research that might follow in the wake of revising the constitutional history of the 1812–1816 period. And just as students of judicial behavior should (if the necessary data are available) evaluate competing explanations for the Court's decision to interpret the word *necessary* as it did, they should do the same with respect to rival accounts of the justices' decision to avoid the narrow answer to the congressional power question that the Madison administration and the 14th Congress furnished. In this vein, it is important to acknowledge one final (and unfortunate) analogue between these studies of judicial behavior. Just as it is (1) virtually impossible to test a legal explanation for the Court's understanding of the Necessary and Proper Clause (no member of the Court in 1819 dissented in a prior case involving the meaning of that provision) and (2) currently impossible to evaluate an attitudinal explanation for the same (we lack ideology estimates for pre-1937 justices), any prospective study of why the justices focused on some textual provisions but not others runs up against similar difficulties: there is (1a) no viable way to evaluate a legal explanation for it (we cannot establish, a priori, which constitutional provisions can and cannot anchor a national bank), and (2a) at present no means for testing an attitudinal account (owing to the lack of pre-1937 ideology estimates).

(8) *A Dare From "A Friend":* A revisionist account of constitutional politics in the mid-1810s strikes me as raising one final fresh question about *McCulloch*. It does so by inviting us to take a new look at some old words. Between March 30

144. On the challenges inherent in maintaining this position, see *McCulloch*'s fourth *known unknown supra* Part I(4).

and April 28 of 1819, Virginia state Judge William Brockenbrough[145] and Chief Justice Marshall pseudonymously debated the merits of the Supreme Court's decision in *McCulloch*, with the former writing as "Amphictyon" in Richmond's *Enquirer* and the latter as "A Friend to the Union" in Philadelphia's *Union*.[146] In the second of Marshall's two essays responding to Brockenbrough, the Chief Justice focused on the fact that his opponent criticized the Court's reasoning only with respect to congressional power, not with respect to its conclusion that the Bank of the United States was constitutional:

> I have confined my observations to the reasoning of the Supreme Court [in *McCulloch*], and have taken no notice of the conclusion drawn from it, because the essays [of Amphyction] I am reviewing make no objections to the latter, but denounce the former as false and dangerous. I think, on the contrary, I hazard nothing when I assert that the reasoning is less doubtful than the conclusion. I myself concur in the conclusion; but I do not fear contradiction from any fair minded and intelligent man when I say that the principles laid down by the court for the construction of the constitution may all be sound, and yet the act for incorporating the Bank be unconstitutional. But if the act be constitutional, the principles laid down by the court must be sound. *I defy Amphyction, I defy any man, to furnish an argument which shall, at the same time, prove the Bank to be constitutional, and the reasoning of the court to be erroneous.*[147]

I place emphasis on the final sentence in this passage because its language appears newly provocative against the backdrop of the national bank's 1816 rebirth. The claim that Congress could revive the Bank of the United States pursuant to its power to "coin Money, regulate the Value thereof" was attractive to leading Democratic-Republicans precisely *because* it satisfied Marshall's twin conditions: it permitted more conservative lawmakers within the party to declare that a national bank was constitutional, and to do so without having to embrace a capacious understanding of federal power more generally. If the Chief Justice was cognizant of the Coinage Clause argument, why on Earth did he effectively dare one of *McCulloch*'s critics to bring it up?

There are at least two possible explanations for Marshall's functional dare, with one far more likely than the other. The first and (to me, at least) less likely possibility is that the Chief Justice had a veritable "death wish" for his opinion in *McCulloch*, or something akin to an unconscious desire to sabotage his own understanding of congressional power. This account would posit that Marshall, perhaps sensing that a more restrictive interpretation of the Necessary and Proper Clause was likely to prevail—politically and/or judicially—in the long term, sought to hasten the downfall of his own interpretation by implying that it was

145. JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 13. (Gerald Gunther ed. 1969).
146. *Id*. at 52–105.
147. *Id*. at 103 (emphasis added).

the only means by which to sustain a national bank (inviting defenders of the Coinage Clause argument to respond). There is no empirical basis for dismissing this possibility out of hand, though it is worth acknowledging that this account of judicial behavior lies several psychoanalytic steps beyond G. Edward White's contention that early life experiences condition performance on the bench.[148] The second possibility, which demands little psychoanalysis and is wholly consistent with what Richard E. Ellis calls Marshall's "aggressive nationalism,"[149] is that the Chief Justice was actually spoiling for a fight over the meaning of the Coinage Clause. That is to say, if Marshall had anything approaching a "death wish" here, it was for the Democratic-Republicans' novel constitutional argument, not his *McCulloch* opinion. In this vein, recall that neither Daniel Webster nor his co-counsel for the Bank mentioned Congress' power to "coin Money, regulate the Value thereof" in their oral arguments. While this omission did not preclude judicial commentary on the provision,[150] Marshall did not mention it in the Court's opinion, and thus, his views as to its meaning were unknown as of April 1819. Moreover, given that at least one Federalist—the aforementioned Senator Wells of Delaware—was already on record as suggesting that the Coinage Clause only permitted Congress to "make a metallic money[,]" it is not difficult to imagine the Chief Justice pouncing on any response to his effective dare that explicitly invoked that provision.

IV. CONCLUSION

It would be easy enough to conclude this essay by simply summarizing its main themes: the existence of certain *known unknowns* pertaining to the *McCulloch* case, the need to revise our traditional account of how the institution at issue in it (the second Bank of the United States) emerged in the mid-1810s, and the manner in which a revisionist account of these events generates more questions about what happened at the Supreme Court in early 1819, not fewer. But there is frankly no need to heap additional attention on the trees of this story; it is the forest that now requires at least a cursory look. In short, what broader lessons about *McCulloch*—if any—emerge from this Essay?

There is a broader lesson here, at least for me, but I would not call it an encouraging one. As Mark Graber has noted, the "inherited wisdom"—that he has attempted to debunk—is that the Marshall Court was the "judicial auxiliary of the Federalist Party."[151] According to this wisdom, its major decisions—including, of course, *McCulloch*—appear to "line[] up with the [Federalist Party] or point of view."[152] For those inclined to view the action this way, *McCulloch* featured a

148. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES (3d ed. 2007).

149. ELLIS, *supra* note 8.

150. See *McCulloch*'s seventh *known unknown supra* Part III(7).

151. Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 12 STUD. AM. POL. DEV. 229, 230 (1998).

152. *Id.* (quoting Charles Grove Haines).

Federalist lawyer (Daniel Webster) defending a broad interpretation of congressional power under the Necessary and Proper Clause—a position the first Treasury secretary, Federalist Alexander Hamilton, adopted in a prior dispute over Congress's power (or lack thereof) to charter a national bank. Moreover, Webster made this argument to a Federalist Chief Justice (John Marshall), who immediately used it as part of his rationale for holding the second Bank of the United States to be constitutional. All told, one could imagine sins far worse than cynically reading *McCulloch* less as the objective resolution of a difficult question about congressional power and more as a successful Federalist effort to render constitutional law hospitable to the party's nation-building impulses, both in 1819 and going forward.[153]

There are surely problems with this reading of *McCulloch*. For one thing, there is nothing intrinsically nefarious about a Federalist lawyer offering a constitutional claim that a Federalist judge subsequently accepts. For another—and Graber speaks to this point—it is difficult to identify the Court that decided *McCulloch* with the Federalist Party when a full five of its seven members were Democratic-Republicans.[154] There are still more problems, but enough about the Federalist Party. Let us talk about the Democratic-Republicans for a moment.

One of the things that we learn from revising the constitutional history of the 1812–1816 period is that leading Democratic-Republicans developed an alternative to the Federalist (that is to say, the Hamiltonian) account of congressional power to charter a national bank. Because their alternative entailed a claim about the meaning of a specific Article I, Section Eight power—Congress' authority to "coin Money, regulate the Value thereof"—its implications for federal power more broadly were far less expansive than those associated with the Federalist account, which focused on the final—and most general—power listed in that section. Moreover, the prevalence of this narrower justification for a national bank during the postwar period—it was offered by the Democratic-Republican Treasury secretary, rearticulated by the Democratic-Republican speaker of the House and the chairman of its Select Committee on a Uniform National Currency, and publicly recognized by the Democratic-Republican president of the United States—suggests that leading Federalists were aware of it. Reinforcing this point is the fact that at least one Federalist within the 14th Congress actually took the time to critique it.

Why does it matter that, come 1819, Federalists and Democratic-Republicans seemed to agree that a national bank was constitutional, but had rival accounts as to why that was so? In short, because it works to generate fresh cynicism—at least for this scholar—about what really occurred in *McCulloch*. Consider just a few of the *known unknowns* I outlined in this Essay. Let us start with the first: *someone*

153. Without ascribing this reading of *McCulloch* to either man, I borrow the idea of John Marshall "not just creating [constitutional] doctrine but building a nation" from Kenneth Karst, by way of David Schwartz. Schwartz, *supra* note 10, at 13 (quoting Karst).

154. Graber, *supra* note 151, at 232.

added the congressional power question to the Court's agenda, but we do not know who. Richard E. Ellis suggests that "[i]t is doubtful that anyone else but Chief Justice Marshall had the stature, the influence, or the power to operate behind the scenes to channel a case as important as this one in a particular direction."[155] But why would Marshall add the question of a national bank's constitutionality to the case agenda if the two major political parties of the day actually *agreed* on its answer? Now consider the sixth *known unknown*: Daniel Webster's failure to mention the Coinage Clause argument in his presentation to the Court *despite* the fact that doing so would have provided his client with a veritable fallback claim. This omission was professionally irresponsible on Webster's part, and we need to ask why he failed to cite every constitutional provision potentially helpful to his client. Finally, consider the eighth and final *known unknown*: that the Chief Justice appeared to dare critics of his *McCulloch* opinion to raise the Coinage Clause argument. If it is far more likely that Marshall was spoiling for a fight over the meaning of the phrase "coin Money, regulate the Value thereof" than unconsciously seeking to sabotage his claims respecting the meaning of the word *necessary*, then we need to ask what was at stake in that fight.

I would respectfully submit that all of these questions are much easier to answer if we assume that Daniel Webster and John Marshall sought, at every turn, to promote the Federalist understanding of a national bank's constitutionality and to suppress (or, if necessary, face and squarely reject) the Democratic-Republican understanding of it. Marshall placed the congressional power question on the Court's agenda in order to facilitate a functional choice between the two. Webster purposefully spoke as if the justices had but one path to declaring a national bank constitutional. The Chief Justice took that path and then dared anyone to suggest that there had been another way. In short, all of these questions are much easier to answer if we assume that *McCulloch* was less about law and more about partisan politics.

To be clear, I do not enjoy this particular view of the forest. I think that the Court got the meaning of the Necessary and Proper Clause right in *McCulloch*, less on the basis of any point that John Marshall cribbed from Alexander Hamilton's 1791 memorandum to President George Washington[156] and more on the basis of his intratextualist[157] claim that if the phrase "absolutely necessary" appears elsewhere in the Constitution, then the word *necessary* at the end of Article I, Section Eight simply cannot mean "absolutely necessary." I am just no longer certain that the Chief Justice and his peers were talking about the Necessary and Proper Clause—at all, frankly, but certainly to the exclusion of the Coinage Clause—for the right reasons.

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155. ELLIS, *supra* note 8, at 76.

156. ALEXANDER HAMILTON, OPINION AS TO THE CONSTITUTIONALITY OF THE BANK OF THE UNITED STATES (1791), available at https://avalon.law.yale.edu/18th_century/bank-ah.asp [https://perma.cc/Z3RY-VZXY].

157. Amar, *supra* note 36.