PAPERS

McCulloch v. Maryland and the Incoherence of Enumerationism

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ABSTRACT

The theory and jurisprudence of American federalism remains a muddle. The Supreme Court has never managed to settle three intertwined jurisprudential questions of federalism: (1) Can an effectual national government with implied powers be meaningfully limited to a set of enumerated powers? (2) Can the Tenth Amendment's concept of reserved state powers be presumptive, or meaningfully specified under a system of implied national powers? (3) Can the state governments meaningfully be called "sovereign" in either of the two distinct senses usually meant? The ideology of "enumerationism"—that the Constitution creates a national government of limited enumerated powers—answers these questions "yes."

But McCulloch v. Maryland *answered these questions "no" and is therefore at odds with enumerationism. A limiting enumeration is incompatible with* McCulloch*'s conception of a grant of implied powers necessary for an effective national government that can address national problems without reliance on the states.* McCulloch *clearly rejected the various versions of implied powers that were aimed at preserving a limiting enumeration. Moreover, as* McCulloch *makes clear, a system of implied national powers cannot be reconciled with "reserved" state powers having any definable content. Implied powers can grow and change with new circumstances and new legislative ideas, and therefore cannot be specified in advance, making it impossible to specify a "reserve" of state powers that excludes federal regulation. Finally,* McCulloch *recognized that federal supremacy necessarily makes the states "subordinate governments" that lack the power to block prima facie federal powers, whether express or implied.* McCulloch *thereby rejected the idea that state sovereignty is either a power to resist federal implied powers or a mirror image of a limiting enumeration of federal power.*

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TABLE OF CONTENTS

INTRODUCTION

The theory and jurisprudence of American federalism remains a muddle. The Supreme Court has never managed to settle three intertwined jurisprudential

questions of federalism. (1) Can an effectual national government with implied powers be meaningfully limited to a set of enumerated powers? (2) Can the Tenth Amendment's concept of reserved state powers be presumptive or meaningfully specified under a system of implied national powers? (3) Can the state governments meaningfully be called "sovereign" in either of the two distinct senses usually meant? These three questions are all answered "yes" under the ideology of "enumerationism"—that the Constitution creates a national government of limited enumerated powers.[1]

Strikingly, these three questions were addressed and answered "no" in *McCulloch v. Maryland*.[2] Although I continue to find that canonical opinion deeply ambiguous in many respects, and although the opinion itself acknowledges that questions regarding the scope of federal powers are and will be "perpetually arising," the core of the decision is clear enough. Congress has implied powers whose scope is limited only by the bounded reasonableness of congressional policy judgments, rather than by a compulsion to effectuate limits on the enumerated powers. States have no presumptive set of reserved powers, notwithstanding the Tenth Amendment. States, though "sovereign," are "subordinate governments" whose powers must yield to those powers "within [the national government's] sphere of action."[3] The federal "sphere" includes implied powers—hence, the states could not tax the Second Bank of the United States, whose creation resulted from the valid exercise of an implied power. By logical implication, state reserved powers cannot obstruct federal implied powers. And since implied powers by their very nature cannot be known or defined in advance, the content of state reserved powers cannot be known or defined either. Whatever state sovereignty means, it cannot mean overcoming implied federal powers. Therefore, we cannot fill Tenth Amendment reserved powers with known content. *McCulloch* prioritizes effectual national government over limited enumerated powers; enumerationism reverses that priority.

Though *McCulloch answered* these questions, it did not *settle* them. Despite its canonical status, *McCulloch* has not consistently been followed by the Supreme Court.[4] The Court buried and disregarded *McCulloch*'s core federalism holdings for more than a century. Not until 1941, in *United States v. Darby Lumber Co.*,[5] did a majority of the Court apply *McCulloch*'s principle of implied powers to the Commerce Clause. But the next year, in *Wickard v. Filburn* (1942),[6] the Court

1. I have argued that enumerationism is more aptly characterized as an ideology than a doctrine because it consists of a set of normative beliefs based on factual assumptions that do not hold true. Our constitutional order over time has worked around the idea of limited enumerated powers rather than applying meaningful limits. *See* David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism and the Limits of Enumerationism*, 59 Ariz. L. Rev. 573, 575–78 (2017).

2. 17 U.S. (4 Wheat.) 316 (1819).

3. *Id.* at 405, 427.

4. This is the thesis of my historical inquiry in David S. Schwartz, The Spirit of the Constitution: John Marshall and the 200-Year Odyssey of McCulloch v. Maryland (2019).

5. 312 U.S. 100 (1941).

6. 317 U.S. 111 (1942).

shifted away from *McCulloch*'s implied-powers approach by absorbing its deferential substantial effects test directly into a broad definition of interstate commerce. Since then, only one Supreme Court justice in one concurring opinion has recognized that *McCulloch* applies to the Commerce Clause—Justice Scalia in *Gonzales v. Raich* (2005).[7] Yet he and four other justices quickly forgot about implied commerce powers in *NFIB v. Sebelius* (2012).[8] Chief Justice Roberts's lead opinion misreads *McCulloch* in holding that Congress could not regulate "inactivity" under the Commerce Clause even though doing so was "conducive," "plainly adapted," and indeed *crucial* to the effective regulation of what was undisputedly an interstate commerce in health care.[9]

Had *McCulloch* been followed, we would never have had *Hammer v. Dagenhart* (1918)[10] or *Carter v. Carter Coal* (1936), [11] the two negative exemplars of *Lochner*-era commerce clause jurisprudence. In both cases, the Court struck down a federal regulation of something that was purportedly not commerce, even though it was nevertheless "conducive," "plainly adapted," and indeed crucial to regulating interstate commerce under the narrowest historical definition of commerce—the buying and selling of goods and services.[12] Applying *McCulloch* to the Commerce Clause would have required upholding these laws. Instead, the *Lochner*-era Court erred by ignoring *McCulloch*'s implied powers holding in Commerce Clause cases. As the *Carter Coal* Court summed up, "[i]n exercising the authority conferred by [the Commerce Clause], Congress is powerless to regulate anything which is not commerce."[13] But this statement is nonsensical under an implied powers regime, because an implied power is one that does not fit the definition of the enumerated power.

Although those *Lochner*-era decisions have long been repudiated, several leading New Originalists seek to revive them. Originalists disagree about many points of theory,[14] but whether their particular theory is "original methods," "good faith

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7. 545 U.S. 1, 33–42 (2005) (Scalia, J. concurring). *McCulloch* has been occasionally applied to other enumerated powers in this time frame. *See, e.g.*, United States v. Comstock, 560 U.S. 126 (2010) (applying *McCulloch* and the Necessary and Proper Clause to implied power to create criminal laws).

8. 567 U.S. 519 (2012).

9. *Id.* at 559–61.

10. 247 U.S. 251 (1918).

11. 298 U.S. 238 (1936).

12. *See, e.g.*, *Carter Coal*, 298 U.S. at 298 ("As used in the Constitution, the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade,' and includes transportation, purchase, sale, and exchange of commodities between the citizens of the different states."); United States v. Lopez, 514 U.S. 549, 585–86 (Thomas, J., concurring) ("At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes."); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001) (arguing that original meaning of "commerce" was "trade or exchange").

13. *Carter Coal*, 298 U.S. at 298.

14. *See* Lawrence Solum, *Originalism and Constitutional Construction*, 82 FORD. L. REV. 453, 456–57 (2013). Solum argues that all bona fide originalists agree on the two core claims of "fixation" and "constraint"— that original meaning is fixed as of some relevant time and is thereafter binding. *Id.* But even that agreement may be fraying with the "positivist turn" taken by some originalists to include "liquidation" in the hope of coping with the inconvenient fact of post-ratification settlements of

construction," or the "fiduciary Constitution," many and perhaps most New Originalists seem to agree that the late New Deal Supreme Court

> abandoned a long-standing originalist interpretation of the Constitution that limited the federal government to authority over interstate commercial matters, as opposed to manufacturing and agriculture. . . . Had the Court instead continued to follow the Constitution [an amendment would have been necessary].[15]

By asserting that *Lochner*-era decisions implemented an original understanding of the Constitution by withholding economic regulatory power from the federal government, New Originalists answer "yes" to the three federalism questions above: the national government is limited to its enumerated powers, the Tenth Amendment excludes defined regulatory subjects from federal power, and the federal and state governments are co-equal or "dual" sovereigns, each supreme in its respective "sphere."

In this article, I will argue that enumerationism is at odds with *McCulloch* and is theoretically incoherent if we accept that the Constitution creates an effectual national government with implied powers. By "effectual," I mean a national government that can address national problems without relying on the states.[16] The understanding of implied powers conventionally derived from *McCulloch* contradicts the notions of reserved state powers, state sovereignty, and even limited enumerated powers implicit in cases like *United States v. Lopez*,[17] *United States v. Morrison*,[18] and *NFIB v. Sebelius*.[19] *McCulloch*'s contradiction of cases like *Hammer* and *Carter Coal* is, of course, even more glaring. Proving that *Carter Coal*'s "long-standing . . . interpretation of the Constitution" is not "the original meaning" of the Constitution is a sprawling historical undertaking not well-suited to a symposium essay. Here, I will focus on what *McCulloch* said, and I will argue that Chief Justice Marshall answered "no" to all three federalism questions. A revival of *Carter Coal* entails a rejection of *McCulloch v. Maryland*. Even the

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constitutional disputes. *See, e.g.*, Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 Harv. J.L. & Pub. Pol'y 817, 821 (2015); William Baude, *Is Originalism Our Law*, 115 Colum. L. Rev. 2349 (2015); William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1 (2019).

15. John O. McGinnis & Michael B. Rappaport, Originalism and the Good Constitution, 90 (2013); *accord* Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 Geo. L.J. 1, 42–43 (2018) (arguing that New Deal commerce power cases were not "good faith" interpretations.).

16. All national problems? While I believe the normatively superior answer is "yes," to impose that definition here would beg the central question of this paper. Here, for the sake of argument, I am prepared to confine "national problems" to those that can fit reasonable definitions of the enumerated powers as well as those that the framers understood to fall within the purview of the national government—such as the power to "wage war." Accordingly, I will refer at times to national problems that arguably fall outside the enumerated powers when making points about the difficulties presented by enumerationism.

17. 514 U.S. 549 (1995).

18. 529 U.S. 598 (2000).

19. 567 U.S. 519 (2012).

seemingly less extreme arguments that states are "sovereign" entities with reserved regulatory powers, and that the federal government is meaningfully limited by its enumerated powers, likewise entail a rejection of *McCulloch*.[20]

In Parts I and II of this article, I argue that the answer to question 1 is "no." A limiting enumeration is incompatible with *McCulloch*'s conception of a grant of implied powers compatible with an effective national government. Part I argues that *McCulloch* did not embrace limited enumerated powers, despite paying lip service to the idea. *McCulloch*'s holding and the bulk of its suggestive language are incompatible with a limiting enumeration. Indeed, a limiting enumeration is quite possibly incompatible with any conception of implied powers that is not designed to render the national government ineffectual and dependent on the states.

Part II elaborates on this argument by differentiating seven competing conceptions of implied powers that have been advanced historically and occupy the conceptual space of implied powers. *McCulloch* clearly rejected the four versions of implied powers that were aimed at preserving a limiting enumeration.

In Part III, I argue that the answer to question 2 is "no." A system of implied national powers cannot be reconciled with "reserved" state powers having any definable content. Implied powers are different from enumerated powers and not mere specific cases of them. Because they can grow and change with new circumstances and new legislative ideas, implied powers cannot be specified in advance. This makes it impossible to specify a "reserve" of state powers that excludes federal regulation.

I further argue in Part III that the answer to question 3 is "no." The federal and state governments cannot meaningfully and simultaneously be called "sovereign." Enumerationists have at various times advanced two ideas of state sovereignty. One is that states have the power to resist or thwart federal implied powers. The other is that state sovereignty is a mirror image of a limiting enumeration of federal power. *McCulloch* implicitly or explicitly rejects both these notions. Despite calling Maryland a "sovereign" state at the outset, Marshall recognizes that federal supremacy under the Constitution necessarily makes the states "subordinate governments."[21] And *McCulloch*'s broad conception of implied powers, coupled with the Supremacy Clause, undermines a definition of state sovereignty dependent on a limiting enumeration.

I. *McCULLOCH* AND THE SELF-CONTRADICTION OF ENUMERATIONISM

Readers of *McCulloch* have always assumed it to be fully compatible with limited enumerated powers. After all, Marshall opens the discussion of governmental powers with the affirmation that "The government of the Union. . . . is acknowledged by all to be one of enumerated powers. The principle, that it can exercise

20. Or, at the very least, these arguments entail a reading of *McCulloch* that is so forced, blindered, and crabbed that it amounts to a rejection.

21. 17 U.S. at 427.

only the powers granted to it . . . is now universally admitted."[22] Enumerationists invariably cite this language to demonstrate Marshall's seal of approval on limited enumerated powers.[23] Thus, Chief Justice Roberts in *NFIB*: "The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government 'can exercise only the powers granted to it.' *McCulloch*."[24] Marshall's penchant for ambiguity virtually invites us to read *McCulloch* with powerful confirmation bias: if we are looking for an affirmation of enumerationism in *McCulloch*, we can find it. All we need to do is overlook the inconvenient fact of the case's holding. The Court upheld the power of Congress to charter a national bank, even though doing so entailed exercising "a great and important power, which is not evidently and necessarily involved in an express power"—this according to the Father of Enumerationism himself, James Madison, in the 1791 House debate over chartering the First Bank of the United States.[25]

How do we reconcile limited enumerated powers with implied powers and, particularly, with the capacious understanding of implied powers that embraces the creation of a national bank? The working assumption of modern constitutional law is that enumerated powers remain limited because *McCulloch* authorizes only those implied powers that are means to implementing the enumerated powers. Implied powers, or legislative "means," are deemed subordinate or merely "incidental" to the enumerated powers.[26] This subordination *somehow* confines implied powers within limits that keep the enumerated powers distinct and limited. The "somehow" in this understanding has been remarkably undertheorized.

I argue that any version of implied powers compatible with an independent and effectual national government—one that can address national problems without dependence on the states—is incompatible with a limiting enumeration. While *McCulloch* makes clear that the federal government is not dependent on the states, the case refrains from embracing limited enumerated powers. On the contrary, *McCulloch* subordinates the principle of limited enumerated powers to the principle of effectual national government.

A. McCulloch *and Enumerated Powers*

I begin with a closer look at the passage in *McCulloch* that is taken as Marshall's endorsement of limited enumerated powers. Note the key terms in bold:

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22. 17 U.S. at 404–05.
23. *See, e.g.*, Carter Coal, 298 U.S. at 291; Schwartz, *supra* note 4, at 58, 267 n.52.
24. NFIB, 567 U.S. at 534.
25. 2 Annals of Cong. 1899 (1791) (statement of Rep. Madison).
26. *See NFIB*, 567 U.S. at 560 ("Each of our prior cases upholding laws under [the Necessary and Proper] Clause involved exercises of authority derivative of, and in service to, a granted power.").

> This government is acknowledged by all, to be one of **enumerated powers**. The principle, that it can exercise only **the powers granted** to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted. But the question respecting **the extent of the powers actually granted**, is perpetually arising, and will probably continue to arise, so long as our system shall exist.[27]

Consider Marshall's subtle movement from "enumerated" to "granted" to "actually granted." Enumerated and granted powers are not the same, especially given *McCulloch*'s conclusion that implied powers are actually granted. Note also how "limited" and "enumerated" do not appear in conjunction. Neither here nor elsewhere in the opinion does Marshall say that the government is *limited to its enumerated powers*. The limiting word "only" appears, not with "enumerated powers," but with "the powers granted." Debates over powers, says Marshall, do not concern the extent of the *enumerated* powers, but the extent of "the powers *actually granted*." If Marshall meant to state a clear agreement with the concept that the enumeration was inherently limiting, his language was exceedingly sloppy. I will return to this point below.

Undoubtedly, Marshall believed that a government of enumerated powers is not deprived of implied powers—that is the holding of the case. Nowhere in the opinion, however, does he say that implied powers are those necessary and proper to *specified enumerated* powers. On the contrary, he (famously) refrained from identifying a specific enumerated power from which the Bank is implied.[28] Instead, he derives the implied power to charter a Bank from the government's power over its "finances" and "fiscal operations," which are themselves implied powers.[29] This underscores that the powers "actually granted" are not limited to the enumerated powers.

Marshall continues the above passage:

> In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.
>
> If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though **limited in its powers**, is supreme within its sphere of action.[30]

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27. 17 U.S. at 405 (emphasis added).

28. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 80 (1997) ("Marshall never bothered to explain how the establishment of the Bank was necessary, proper, or even conducive to the execution of any of the powers expressly granted to Congress."); Gerard N. Magliocca, *A New Approach to Congressional Power: Revisiting the Legal Tender Cases*, 95 GEO. L.J. 119, 162 (2006); David S. Schwartz, *Misreading McCulloch v. Maryland*, 18 U. PA. J. CONS. L. 1, 57–58 (2015).

29. 17 U.S. at 422–23.

30. *Id*. at 405 (emphasis added).

Here, Marshall makes three significant points. First, he makes plain that the Constitution's enumeration of powers—even, presumably, with the additional gloss provided by the Tenth Amendment—does not create "separate spheres" of non-overlapping national and state governmental power. Instead, the powers granted to the national government come into conflict with those of the states, precisely because even exclusively national powers carry implied powers. These implied powers must be "brought into view" in order to see and resolve the conflict. Second, while Marshall identifies a federal "sphere of action," he says nothing—here or anywhere else in the opinion—about a state "sphere of action." The "sphere" suggests an area of jurisdictional supremacy, and there can be no such sphere for states, because implied (unenumerated) powers are necessarily supreme over prima facie reserved state powers. Third, the limits of the national government's powers are not marked out by an enumerated list but by a "sphere of action." Significantly, the words "enumerated" and "limited" are separated by an intervening paragraph, albeit only one sentence in length. Moreover, the phrase "limited powers" arises in a paragraph about federal supremacy, where the word "enumerated" drops out.

Thus, to the extent that enumerated powers give shape to this supreme federal sphere, they do not define its limits. Marshall continues:

> Although, among the enumerated powers of government, we do not find the word 'bank' or 'incorporation,' we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government.[31]

Marshall's references to specific enumerated powers in this passage give way to broader objects of government, which Marshall states with less precision than the Constitution's enumerated powers, where the word "industry" does not even appear. Marshall thereby implies that while enumerated powers may suggest the contours of the federal sphere, they do not precisely define it. If the enumerated taxing, borrowing, commerce, and "declar[ing] war" powers (note that the enumerated powers say "declare" but not "conduct") give the national government authority over war, national finance, "all the external relations," and much of the "industry of the nation," then the whole of the "limited" powers of the Union is greater than sum of its enumerated parts.

While Marshall gives another nod to enumerationism by suggesting that a power intended to be "distinct and independent, to be exercised in any case whatever" would be enumerated,[32] the implied powers of Congress form a "vast mass of incidental powers which must be involved in the constitution, if that instrument

31. 17 U.S. at 407.
32. *Id*. at 421–22.

be not a splendid bauble."[33] Most importantly, *McCulloch*'s conception of implied powers does not square with a limiting enumeration, as I will explain further in the next section.

B. The Implied Powers Problem

Our shallow understanding of limited enumerated powers results directly from our strikingly undertheorized concept of implied powers. For nearly a century, constitutional lawyers have assumed that *McCulloch* is the alpha and omega of implied powers theory.[34] But *McCulloch* provides only an underspecified theory of implied powers. It foregrounds only two alternatives—the Maryland "necessity" test and the Marshall approach—and thereby misleads us to believe that these were the only two alternatives.[35] This duality is a simplification. Moreover, *McCulloch* endorses a vague and ambiguous test embracing a range of possible formulations.

Implied powers pose a problem for enumerationism that goes away if we relax the limited enumerated powers constraint. If there is a difference between enumerated and implied powers, it must be that implied powers are those not definitionally entailed by the enumerated power. Put another way, "direct exercise" of an enumerated power without resort to implied powers is nothing more or less than a specific case of an enumerated power. Lawrence Solum gives the example of establishing a post office in Champaign, Illinois, as a "specific case" of the general power "to establish post offices" and therefore, a "direct exercise" of the Postal Clause.[36] Other illustrations might be a tax on imports as a specific case of the taxing power or a federal declaration establishing the metric system as a specific (unfortunately, hypothetical) case of the power to "fix the Standard of Weights and Measures."[37] Implied powers, by contrast, necessarily involve the power to do things that are not specific cases of the delegated power. Making it a crime to break open a mail bag or to evade the import tax by smuggling may well assist in effectuating the delegated power, but these are not specific instances of establishing a post office or raising a tax.

It might seem superficially possible to delegate an enumerated power with no implied powers, but that possibility quickly reveals itself as an illusion. Only when the power can be executed by a mere declaration can implied powers be dispensed with. Perhaps the power to "fix the standard of weights and measures" can be fully executed by a mere declaration placing the United States on the

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33. *Id*. at 420–21.

34. Perhaps I should say "for *only* a century," since *McCulloch* is two centuries old. For an account of *McCulloch*'s disappearance from and reappearance in Supreme Court jurisprudence and the Court's belated adoption of *McCulloch*'s theory of implied powers, see generally SCHWARTZ, *supra* note 4.

35. The *McCulloch* opinion alludes to two other theories, which I describe below as "the ordinary means" and "Madison's 'great powers' test." *See McCulloch*, 17 U.S. at 409, 411, 421–22. *See infra* sections II.A.3 & 4.

36. U.S. CONST. art. I, § 8, cl. 7; LAWRENCE B. SOLUM & ROBERT W. BENNETT, CONSTITUTIONAL ORIGINALISM: A DEBATE 149 (2011).

37. U.S. CONST. art. I, § 8, cl. 1, 5.

metric system—at least insofar as such a declaration produces voluntary compliance. But if it were necessary to coerce compliance—for example, to impose fines on retailers who continued to weigh out produce in pounds rather than kilograms—then implied powers would be needed to create such enforcement mechanisms.

In any event, the enumerated powers are uniformly understood to be enforceable, and enforcement invariably requires implied powers. Solum's example illustrates this. Post offices do not "establish" themselves, and the exercise of this power requires a number of subordinate powers of action implied in the grant of the enumerated power: obtaining a building, hiring a postmaster and clerks, etc. Likewise, the power to raise import taxes or to regulate commerce requires the power to hire tax collectors, compliance inspectors, or similar officers.

The problem stems in part from the inadequacies of language and in part from practical necessities that Madison observed in Federalist 37:

> Here, then, are three sources of vague and incorrect definitions: indistinctness of the object, imperfection of the organ of conception, inadequateness of the vehicle of ideas. Any one of these must produce a certain degree of obscurity. The convention, in delineating the boundary between the federal and State jurisdictions, must have experienced the full effect of them all.[38]

In a constitution, it is impossible to detail all the future requirements of action needed to implement a power and impossible to delegate authority in a written instruction without leaving some margin of discretion. These problems cannot be solved by definitional quibbling over whether the power to hire a postal clerk is express or implied in the Postal Clause. Gerrymandering the definition of "express" or "enumerated" powers at best papers over and fails to solve the practical difficulties of incompleteness and discretion.

More fundamentally, it seems practically and perhaps even logically impossible to delegate authority without any discretion. Instructions, by their nature, cover multifarious future specific cases. Discretion is the freedom to decide what to do in specific cases—in *McCulloch*'s language, to choose the means. That discretion inevitably increases as authorizations are made at higher levels of generality.[39] Hence, Marshall's pointed reminder in *McCulloch* "that it is a *constitution*

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38. The Federalist No. 37 (James Madison), at 229 (Clinton Rossiter ed. 1961). *See* Jonathan Gienapp, The Second Creation: Fixing the American Constitution in the Founding Era 75–163 (2018) (arguing that the Framers' recognition of these difficulties precluded them from viewing the Constitution as having a fixed meaning).

39. At the Chase Colloquium workshop, two different commenters on this paper offered parental directives as refutations of the necessity of discretion: a teenager is told to "drive directly to Costco," and a babysitter to put the child to bed at eight. The unspoken appeal to parental fears of young people behaving irresponsibly may or may not map onto strict constructionist fears of irresponsible central government, but they stack the deck rhetorically and are poor analogies to constitutional delegations of power. For one thing, the implicit argument is circular: the parental utterances are plainly directives intended to limit discretion, instead of or in addition to grants of power. With only a couple of

we are expounding," rather than a document partaking of "the prolixity of a legal code."[40]

Equally important, the means used to exercise that discretion in a specific case range further and further from the definition of the authorization—the grant of power—as we describe the legislative means at ever-lower levels of generality. As Jefferson famously quipped:

> Congress are authorised to defend the nation: ships are necessary for defence: copper is necessary for ships: mines necessary for copper: a company necessary to work mines: and who can distrust this reasoning who has ever played at 'this is the house that Jack built?' [U]nder such a process of filiation of necessities the sweeping [i.e., Necessary and Proper] clause makes clean work.[41]

Presumably, Jefferson meant this to show the absurdity of implied powers, but it instead shows the absurdity of delegating a power *without* substantial implied powers. The government in 1800 could not in fact defend the nation, let alone "provide and maintain a navy," without copper-bottomed ships. How, then, could it execute its powers without access to copper?[42] It is not at all absurd to think that the government should therefore be impliedly empowered to charter a copper-mining corporation, rather than have to import copper from potential enemy nations abroad. But as Jefferson observed, a power thus to obtain copper would represent an expansion—through "filiation"—of the relevant enumerated powers.

One might argue that express powers definitionally entail every subordinate act necessary to implement and enforce them. The argument might go that "a taxing power is meaningless without a power to hire tax collectors. Therefore, hiring tax collectors is within the definition of the taxing power (i.e., a specific instance of taxing)." Let's hold to one side the fact that no mainstream interpreter of the Constitution from the founding era to the *McCulloch* decision in 1819 made such an argument; it was always commonplace to refer to those subsidiary acts as incidental or implied powers.[43] The problem with this argument is that it conflates

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exceptions, the enumerated powers are not stated as limits on discretion in this way. Moreover, in contrast to a constitution, instructions to teens are given at very low levels of generality and carry a comparatively limited choice of means. Yet even these do not eliminate significant discretion. The babysitter may have been denied the discretion to let the child stay up until nine, but to get the child in bed by eight, should the babysitter read him a story, give him warm milk, or let him run himself tired?

40. 17 U.S. at 407.

41. Thomas Jefferson to Edward Livingston, (Apr. 30, 1800)*, reprinted by* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-31-02-0460 [https://perma.cc/7ZBL-DWQZ].

42. The practice of copper-sheathing the bottoms of wooden ship hulls to prevent their corrosion by saltwater and marine organisms became widespread during the American Revolution. *See* R. J.B. Knight, *The Introduction of Copper Sheathing into the Royal Navy, 1779-1786*, 59 THE MARINER'S MIRROR 299 (1973).

43. Thus, for example, counsel for Maryland argued, "The power of laying and collecting taxes *implies* the power of regulating the mode of assessment and collection, and of appointing revenue officers; but it does not imply the power of establishing a great banking corporation." *McCulloch*, 17 U.S. at 365 (argument of Jones) (emphasis added)*; see also* United States v. The William, No. 16,700,

semantic meaning with practical implementation or efficacy.[44] It may be inefficacious to grant a taxing power without a power to hire tax collectors, but it is not semantically meaningless or nonsensical. The express grant of an unenforceable power might logically (but impractically) mean that the federal government has the power only to declare policies, while relying for their implementation either on voluntary compliance or on the coercive powers of the states. Indeed, the Articles of Confederation functioned in just this way, as to taxation, raising troops, and other matters.[45] Those alternatives are not, of course, what the Constitution was designed to do: on the contrary, all agree that the Constitution was intended to create a national government with coercive enforcement powers to "act[] directly on the people"[46] without having to rely on state institutions to implement national policy wishes. But that intention does not change the nature of language or alter the semantic definition of "lay and collect taxes" to mean "hire customs officials."[47] For these reasons, even the strictest Jeffersonians acknowledged that there had to be some *implied* powers. Once we see that express powers cannot effectuate themselves without unexpressed powers, the very idea of limited enumerated powers becomes problematic. The enumeration presupposes unenumerated (implied) powers. It cannot function otherwise.

The conventional answer to the dilemma of a system of purportedly enumerated powers that includes unenumerated powers is to assume, wishfully, that the implied powers will remain somehow confined. It might be argued that the Necessary and Proper Clause functions as such a limitation rather than, as

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1808 U.S. Dist. LEXIS 5, 30–31 (D. Mass. 1808) (shipping, navigation, and fisheries regulation are "incidents to commerce"); Hampden Essays (Roane) in Gerald Gunther, John Marshall's Defense of *McCulloch v. Maryland* 114–15 (1969) (conceding in an editorial attack on *McCulloch* that enumerated powers "carry with them such additional powers as are fairly incidental to them") (hereinafter Gunther); Friend of the Constitution (Marshall), in *id.*, at 171–72 ("An 'incident,' Hampden tells us, 'is defined, in the common law, to be a thing appertaining to, or following another, as being more worthy or principal.'").

44. Maintaining this distinction seems very important to at least some originalists. *See*, *e.g.*, Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 Const. Comm. 95, 96 (2010) (distinguishing discovery of semantic meaning of constitutional text from the process of legally implementing it); Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 Fla. L. Rev. 1551, 1562 (2012) ("*interpretative theory* and *adjudicative theory* are two different intellectual enterprises").

45. *See, e.g.*, George William Van Cleve, We Have Not a Government 52–57 (2017); Pauline Maier, Ratification: the People Debate the Constitution, 1787–1788, at 13, 16 (2010).

46. *McCulloch*, 17 U.S. at 404; *accord* The Federalist No. 23 (Alexander Hamilton) ("[W]e must abandon the vain project of legislating upon the States in their collective capacities; we must extend the laws of the federal government to the individual citizens of America").

47. This point is not altered by a claim that the "original public meaning" of "lay and collect taxes" entailed hiring customs officials. An originalist might argue that such was the understanding of the reasonable ratifier or whomever. But such an understanding is likely to have resulted from the belief that the power to lay and collect taxes necessarily carried the implied power to hire customs officials, and not from the semantic meaning of "collect taxes"—which in theory can be done by voluntary self-reporting and payment, as characterizes the present-day income tax system. In other words, to absorb implied powers into the "semantic meaning" of a granted power is a question-begging ploy. One might as well say that the power to charter a national bank is part of the original public (semantic) meaning of the Borrowing Clause.

Marshall accurately described it, a redundant description of the concept of implied powers.[48] This conventional answer assumes that so long as the implied powers are always subordinate to enumerated ones, we can preserve a truly limiting enumeration.

As I have argued elsewhere, the idea of "subordination" of implied powers—that implied powers are means in service of enumerated ends—has in practice been consistently violated from the early days of the Republic to the present.[49] But let's put that to one side. The conventional answer is *still* unsatisfying because it involves the premise, or at least the pretense, that even subordinate implied powers are somehow consistent with the fundamental principle of a limiting enumeration. But to be limiting, the enumerated powers must be interpreted as exhaustive, in accordance with the *expressio unius* canon of construction: the express inclusion of some items implies the exclusion of those not listed.[50] This does not work even as a textual matter, however, because the enumerated powers are stated at different levels of generality. A broad power to regulate interstate and foreign commerce is listed alongside such powers as the punishment of counterfeiting and the making of bankruptcy laws. To apply *expressio unius* to such a list places the general and specific terms in conflict, as the general terms carry implications that are contradicted by the negative implication of the specific terms.[51] For example, the enumeration of three criminal punishment powers (counterfeiting, piracy, and treason)[52] should preclude the power to punish crimes that are not enumerated, such as tax evasion or mail theft.

Some opponents of the bill to charter the First Bank of the United States in 1791 made just this form of argument. Implied powers as means to regulate commerce (such as chartering a bank), they argued, were precluded by the express grant of other commerce-regulating powers: to coin money, fix the standards of weights and measures, establish post offices, and make bankruptcy and patent

48. *See McCulloch*, 17 U.S. at 406–12 (explaining that implied powers are necessary to executing granted powers); *id.* at 411–12 (arguing that implied powers are confirmed by the Necessary and Proper Clause rather than "left . . . to general reasoning"); *id.* at 419–20 (arguing that the Necessary and Proper Clause is not a limitation on the granted powers).

49. Aside from deriving implied powers from "the nature of sovereignty," the subordination condition has frequently been violated in two overlapping ways. Through metonymic textual interpretation, the Supreme Court has embraced grants of power as authorizing similar non-subordinate powers: for example, the power to deport aliens is implied from the power to naturalize them. Through means-ends reversal, unenumerated ends are achieved through enumerated means: using the commerce power to regulate race relations through antidiscrimination laws or to regulate foreign relations through trade sanctions or embargoes. *See* Schwartz, *supra* note 1, at 621–24, 631–34, 636–38; *see also* Robert J. Reinstein, *The Aggregate and Implied Powers of the United States*, 69 AM. U. L. REV. 3, 3 (2019); Calvin H. Johnson, *The Dubious Enumerated Powers Doctrine*, 22 CONST. COMMENT. 25, 25 (2006).

50. Andrew Coan, *Implementing Enumeration*, 57 WM. & MARY L. REV. 1985, 1988 (2016); Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 636 (2014).

51. Schwartz, *supra* note 1, at 600–01.

52. U.S. CONST. art. I, § 8 cls. 6, 10; Art. III, § 3, cl. 1.

laws.[53] The *expressio unius* principle, as the argument went, made these means of commerce regulation exclusive.

The argument is absurd on its face. Textually, the argument makes the Commerce Clause redundant. In any event, no reasonable definition of commerce regulation could be limited to those few matters. Even Attorney General Edmund Randolph, while arguing that Hamilton's bank bill was unconstitutional on other grounds, flatly rejected this *expressio unius* argument in his February 1791 advice memorandum to President Washington. To accept the argument "that because some incidental powers are expressed, no others are admissible," Randolph argued, "would reduce the present Congress to the feebleness of the old one, which could exercise no powers, not expressly delegated."[54]

Given the unworkability of *expressio unius* treatment of the enumerated powers, it is hardly surprising that even uncontroversial and long-established implied powers conflict time and again with the *expressio unius* principle. The constitutionality of creating tax-evasion or mail-theft crimes, let alone that of the elaborate federal criminal code dating back to the First Congress, are not seriously questioned.[55]

It has long been supposed that placing the word "expressly" before "delegated" or "granted" would have been sufficient to exclude implied powers. By this understanding, there were no implied powers under the Articles of Confederation and there would have been none under the Constitution had the motion to add "expressly" to the proposed Tenth Amendment been adopted and ratified. Yet the discussion above suggests that this word would be ineffective to eliminate implied powers, which are always practically necessary. We have at least to take seriously the argument of James Wilson that the United States had implied powers, even under the Confederation.[56] It might be said that adding the word "expressly," though impossible to implement literally, would at least have

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53. U.S. CONST. art. I, § 8 cls. 4–8; *see* ERIC LOMAZOFF, RECONSTRUCTING THE NATIONAL BANK CONTROVERSY: POLITICS AND LAW IN THE EARLY AMERICAN REPUBLIC 19–27 (2018) (arguments in 1791 House debates). Luther Martin, one of the counsel for Maryland, advanced this position in the *McCulloch* oral argument:

> That the scheme of the framers of the constitution, intended to leave nothing to implication, will be evident, from the consideration, that many of the powers expressly given are only means to accomplish other powers expressly given. . . . The power of establishing corporations . . . . is not to be taken by implication, as a means of executing any or all of the powers expressly granted; because other means, not more important or more sovereign in their character, are expressly enumerated.

17 U.S. at 373–74 (argument of Martin).

54. Edmund Randolph, Additional Considerations on the Bank Bill, (Feb. 12 1791), *reprinted by* FOUNDERS ONLINE, NAT'L ARCHIVES https://founders.archives.gov/?q=Ancestor%3AGEWN-05-07-02-0200&s=1511311111&r=3 [https://perma.cc/3AEE-VET5].

55. Schwartz, *supra* note 1, at 642–43. Questions are occasionally raised about specific provisions, of course. *See, e.g.,* United States v. Lopez, 514 U.S. 549 (1995).

56. *See* JAMES WILSON, CONSIDERATIONS ON THE BANK OF NORTH AMERICA 10 (1785) ("The United States have *general* rights, *general* powers, and *general* obligations, not derived from any particular States, nor from all the particular states, taken separately; but resulting from the union of the *whole*.") (emphasis in original); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1049 (2014).

supplied an interpretive principle to construe implied powers as strictly as possible—by demanding a kind of strict scrutiny, admitting only those implied powers narrowly tailored to a compelling governmental interest. But even the inclusion of "expressly" would not have succeeded in banishing implied powers from the Constitution.

In sum, implied powers are an unavoidable feature of enumerated powers and thereby, make the concept of "limited enumerated powers"—if defined as a delegation of powers strictly limited to what is expressly written—an oxymoron. "Limited enumerated powers," as conventionally understood, is instead a concept with a huge exception: the government is limited to enumerated powers, except that it also has unenumerated powers to execute the enumerated ones. This exception, as I will argue, effectively engulfs the rule. The conventional assumption that implied powers can be confined in a way that does not expand the enumerated powers seems to depend on a practical, and perhaps even a logical, contradiction.

Various definitions of implied powers have been proposed in U.S. constitutional history in a vain effort to resolve that contradiction. Moreover, that effort was made in a context of constitutional debate over whether the enumeration should even, indeed, be construed as limiting.[57] Enumerationists in the antebellum era struggled amongst themselves with the internal contradiction in their own concept and struggled with their nationalist adversaries over specific policies. For example, was there an implied power to build roads and canals?[58] As a result, these debates have produced seven different theories of implied powers. To understand implied powers, it is crucial to disentangle these theories.

II. DISENTANGLING IMPLIED POWERS: SEVEN THEORIES

The idea of implied powers has been oversimplified in our conventional enumerationist account. Following the conventional reading of *McCulloch*, implied powers are frequently described as means that are conducive, well-adapted, or rationally related—but subordinate— to the enumerated powers. There is only one contrasting alternative in this conventional account: the strict Jeffersonian view espoused by Maryland and rejected in *McCulloch* that implied powers are those without which the granted power would be nullified or "nugatory." But a more precise schematization identifies seven possible theories of implied powers, ranging across a spectrum from narrow to broad legislative power. One could change the scheme to include more theories, perhaps, but these are the ones

57. Highly suggestive, albeit still early-stage historical research shows that the idea of a limiting enumeration was contested at the Founding. *See* Richard Primus, *"The Essential Characteristic": Enumerated Powers and the Bank of the United States,* 117 MICH. L. REV. 415 (2018); John Mikhail, *Fixing the Constitution's Implied Powers*, BALKINIZATION BLOG (Oct. 25, 2018, 9:00 AM) https://balkin.blogspot.com/2018/10/fixing-constitutions-implied-powers.html [https://perma.cc/UQ6T-47WB]; Mikhail, *supra* note 56; Reinstein, *supra* note 48.

58. *See* Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397, 400–01 (2015); SCHWARTZ, *supra* note 4, at 31–35.

actually articulated in historical debates over implied powers, and they occupy most or all of the logical space.[59]

A. The Rejected Theories

In *McCulloch*, Marshall focused his disapproval on a particular theory of implied powers advanced by Maryland's counsel, which we know as the "strict necessity" or "nugatory" test. Jefferson had advanced this same test in his memorandum to President Washington opposing the 1791 bill to charter the First Bank of the United States. But there are three other theories that were offered against a national bank at one time or another, and *McCulloch* expressly or impliedly rejected them all.

1. The Jeffersonian Strict Necessity or Nugatory Test

Jefferson and his strict-constructionist followers, aware that implied powers were unavoidable, formulated the "strict necessity" test to rein in implied powers to the maximum possible extent in the hope of maintaining a limiting enumeration of powers. In his 1791 memorandum urging President Washington to veto the bill to charter the First Bank of the United States, Jefferson argued that only those powers "strictly necessary" to implementing an enumerated power were constitutional. The test for strict necessity was that the granted power "would be nugatory" without the implied power.[60] Likewise, Maryland's counsel in the *McCulloch* argument asserted that the Necessary and Proper Clause restricted implied powers to those "indispensably necessary."[61] Various strict constructionists repeated this argument throughout the antebellum period.[62]

This proposed solution suffers from three fatal defects. First, taken literally, the strict necessity test has a tendency to collapse into the illusory idea of "no implied powers." A post office could in theory be run without a postmaster or without clerks. Likewise, import taxes—the chief source of federal revenue in the

59. Eric Lomazoff discerns four of these seven, the definitions that I discuss in sections A.1, A.2, A.3, and B.1, *infra*. *See* LOMAZOFF, *supra* note 53, at 19–27.

60. Thomas Jefferson, Opinion on the Constitutionality of a National Bank (Feb. 15, 1791), *reprinted by* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/?q=%20Author%3A%22Jefferson%2C%20Thomas%22%20Dates-From%3A1791-02-01%20Dates-To%3A1791-02-21&s=1511311111&r=4 [https://perma.cc/SH8B-8767].

61. 17 U.S. 316, 413 (1819) (summarizing Maryland's argument); *id.* at 367 (argument of Jones) (defining "necessary" as "indispensably requisite"); *id.* at 339 (argument of Hopkinson) (arguing that Bank's tax exemption is unconstitutional unless "indispensably necessary").

62. *See, e.g.*, James Monroe, *Views of the President of the United States on the Subject of Internal Improvements*, in 2 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 158 (James D. Richardson ed. 1898) (hereinafter "MPP") (defining implied powers as those "*absolutely* necessary to the accomplishment of the object of the grant"); *cf.* United States v. Marigold, 50 U.S. (9 How.) 560, 566–67 (1850) (arguing that the implied power to punish passing counterfeit coin was constitutional because, in its absence, the Counterfeiting Clause would be "rendered immediately vain and useless . . . wholly fruitless of every end it was designed to accomplish.").

early republic[63]—could in theory have been collected without hiring customs officers to collect them. Congress could have relied on a self-reporting system, as we do today with income taxes. The fact that these "options" would have resulted in poor postal service or revenue returns and great inefficiency does not make the hiring of postal clerks or customs officials strictly necessary: implementing an enumerated power badly is not the same as completely negating the enumerated power.

Second, the "strict necessity" test was almost certainly intended to render the powers of the national government practically ineffectual, or at least heavily dependent on the states, defeating the Constitution's purpose of creating a viable and strong national government that could function independently of the states. The strict necessity test implicitly sought to minimize the national government's impact or footprint relative to the states. This implication was made clear by the adjoined argument, advanced both in the congressional debates over the Second Bank and in *McCulloch*, that a national bank was unnecessary because its functions could be handled adequately (even if less efficiently) by state banks.[64] Even in situations where no state-based means would be available, "strictly necessary means" under Jefferson's definition imply those most basic or minimally adequate to the purpose and the least in cost, size, quality, or quantity. One might say, "no more (or no bigger, better, or more expensive) than strictly necessary." This is how Marshall understood the Jeffersonian strict necessity test, saying that it "excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple."[65] Under the strict necessity test, therefore, the national government would be limited to the smallest number of post offices required to have some sort of mail service and to the smallest number of customs officials required to collect the lowest amount of revenues needed to fund a federal government as small as possible to carry out its enumerated powers.

Third, strict necessity is undermined by a self-defeating paradox at its heart. There will always be more than one means to implement a power. Should the federal government raise revenue by import taxes or internal excises, like a tax on whiskey or carriages? As Marshall pointed out in *United States v. Fisher*, "Where various systems might be adopted for [a legislative] purpose, it might be said with respect to each, that it was not necessary" under the strict necessity test "because the end might be obtained by other means."[66] The strict necessity test offers an argument against the constitutionality of *every* federal legislative proposal. The test, therefore, furthers the Jeffersonian intention to hamstring efforts at energetic national government by generating constitutional objections to

63. MAX M. EDLING, A HERCULES IN THE CRADLE: WAR, MONEY, AND THE AMERICAN STATE, 1783-1867, at 47, 241–44 (2014).

64. *See McCulloch*, 17 U.S. at 333 (argument of Hopkinson) (asserting "the competency of the State banks, to all the purposes and uses alleged as reasons for erecting that bank, in 1791"); *see also* LOMAZOFF, *supra* note 53, at 20 (summarizing this argument).

65. 17 U.S. at 413.

66. United States v. Fisher, 6 U.S. 358, 396 (1805).

ordinary legislation, thereby reproducing the legislative gridlock that hamstrung the Confederation Congress. Antifederalists, after all, purported to be content with the Articles of Confederation under which Congress, by 1786, had "reached stalemate on every major issue that [ ] confronted it since 1783."[67]

2. The Best Means Test

One might try to salvage the Jeffersonian strict-necessity test by limiting implied powers to the "best" means of implementing an enumerated power. This approach resembles applying "strict scrutiny," or at least its "narrow tailoring" requirement, to exercises of implied powers. The purpose of this approach would be to limit the discretion of Congress while perhaps freeing it from the obligation to always adopt the minimal means—depending on the criteria for "best." Opponents of the First Bank in the 1791 House debates used a version of this argument. A law could not be a necessary and proper means to implement a federal power if there were "one or more viable alternatives" to congressional action more congenial to states' rights.[68] Under this view, the "best" means were those that implemented the enumerated power while striking a purportedly optimal balance between federal and state interests.

But the goal of optimizing federal policy with states' rights is just one of many criteria of "best" means. And the more one allows room for debate over what criteria make a legislative choice the best, the more one undermines the purported limits of the enumeration. The problem is not only that there are many such criteria for the best, but also that the best legislative solution is debatable on any given criterion. Is the best policy for taxation the one that yields the most revenue or the one that achieves an optimal level in light of competing interests? And are the relevant interests those of individual taxpayers or states? Even if the criteria for the best were agreed upon, there is endless room for disagreement over whether those criteria have been optimized. A case can be made that virtually all legislation is the best that was feasible under the circumstances. Or the opposite: any piece of legislation could be deemed unconstitutional because there is at least one better alternative. Thus, the "best means" approach tends to diverge into two polar opposite extremes. Either the "best" criterion imposes no limit (best feasible) or else it collapses into the strict necessity test (least intrusive on state sovereignty), providing an argument against every legislative proposal on the ground that there is something better—making the "best" the "enemy of the good."

The "best means" approach to implied powers thus tends to constitutionalize otherwise ordinary politics by turning every perceived imperfection or suboptimal compromise of a proposed bill into a constitutional question. This, in turn, would have drawn the Supreme Court into a regular role as super-legislature or council of revision, judging every bill enacted into law. The Framers not only

67. GEORGE WILLIAM VAN CLEVE, WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION 248 (2017).

68. LOMAZOFF, *supra* note 53, at 20.

rejected such a council of revision (three times!)[69]—but they also recognized that perfection was not a requirement, or even a possibility, for lawmaking bodies. The Framers considered the final Constitution submitted to the states extremely imperfect; the strongest praise for its "best" quality came from Benjamin Franklin, who said "Thus I consent, Sir, to this Constitution because I expect no better, and because I am not sure, that it is not the best."[70] So much more so for ordinary legislation.

3. The Ordinary or Natural Means Test

In the 1791 House debates on the bank bill, many bank opponents argued that implied powers were limited to the "ordinary means" of implementing a power.[71] Hiring tax collectors is not strictly necessary to raising taxes and is arguably not the best means. It was, however, an "ordinary means," one that conformed to the usual or customary practices of governments, or at least such customary means not inconsistent with republicanism. Attorney General Edmund Randolph endorsed this approach in his memo to Washington arguing that the President should veto the bank bill as unconstitutional. Implied powers, Randolph wrote, "may be denominated the natural means of executing a power."[72]

There is, of course, considerable room to debate what legislation would qualify as "ordinary" or "natural" means. Opponents of the bank bill attacked the national bank as a replication of the pernicious Bank of England.[73] This argument presupposes that the Bank was precedented. In what sense, then, did a national bank violate an "ordinary" or "natural" criterion? Presumably, the answer is that a national bank was not natural to (consistent with) republicanism. This answer illustrates the problem with the ordinary means approach: it would tend to construe "ordinary" in contentious ways, perhaps forcing new federal practices to conform as much as possible to their Confederation precedents. The test thus reduces to a version of the "best means" approach in which "best" is construed as

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69. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 98, 140 (MAX FARRAND ED., 1911) (hereinafter "1 FARRAND"); 2 FARRAND at 80.

70. 2 FARRAND, *supra* note __, at 643; *accord id.* at 645–46 (speech of Hamilton) (urging every member to sign the proposed Constitution even though "[n]o man's ideas were more remote from the plan than his own"); 3 FARRAND, *supra* note at 131–36 (Madison to Jefferson, Oct. 24, 1787) (expressing dissatisfaction with rejection of national legislative veto and state voting equality in the Senate but endorsing Constitution overall).

71. LOMAZOFF, *supra* note 52, at 20.

72. EDMUND RANDOLPH, *Opinion on the Constitutionality of the Bank* (Feb. 12, 1791), FOUNDERS ONLINE, https://founders.archives.gov/?q=Ancestor%3AGEWN-05-07-02-0200&s=1511311111&r=2, [https://perma.cc/LF48-MRQL]; *accord* EDMUND RANDOLPH, *Additional Considerations on the Bank Bill* (Feb. 12, 1791), FOUNDERS ONLINE,https://founders.archives.gov/?q=Ancestor%3AGEWN-05-07-02-0200&s=1511311111&r=3, [https://perma.cc/3E4K-4LWG]. Marshall fleetingly alludes to this theory in *McCulloch*, seeming to lump it together with the Jeffersonian "nugatory" test: "It is not denied, that the powers given to the government imply the ordinary means of execution. . . . But it is denied that the government has its choice of means; or, that it may employ the most convenient means . . . ." 17 U.S. at 409.

73. *See* Primus, *supra* note 57, at 442–45, n.118, 133.

least intrusive on state sovereignty. By definition, requiring a means to be "ordinary," "usual," or "customary" tends to prevent innovation. Even straightforward exercises of enumerated powers could be subject to the objection that they were not customarily exercised by a national government in the American context since they were newly granted by the Constitution and represented departures from the Articles of Confederation. For example, a military draft or a trade embargo could be challenged under this approach. Even if ordinary means could be derived from practices of state or foreign governments, that would place the United States government in a laggard position, awaiting the time when innovations by other governments become the new normal.

The ordinary means approach seems highly incompatible with one of the few constitutional principles that commanded something close to a bipartisan consensus in the early republic: that the Constitution was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[74] For example, in a last-ditch effort to avoid military action against the seceded states, Lincoln proposed collecting import duties by stationing customs officials on ships offshore and intercepting merchant vessels bound for southern ports—hardly the ordinary means of collecting such duties, but a plausible response tailored to unforeseen circumstances.[75]

Though *McCulloch* did not identify "ordinary means" as distinct from the "strict necessity" test, it clearly rejected an ordinary means approach. Noting that at least some Bank opponents conceded "that the powers given to the government imply the ordinary means of execution," Marshall recognized that such an approach "denied that the government has its choice of means; or, that it may employ the most convenient means[.]"[76] Like the "strict necessity" test, the "ordinary means" test had to be rejected, as it would "have declared that the best means shall not be used," and would "impair the right of the legislature to exercise its best judgment."[77]

4. Madison's Great Powers Test

In the 1791 bank bill debate in the House, Virginia Congressman James Madison argued that no enumerated or implied powers could sustain the charter of a national bank.[78] Madison defined implied powers as those means "necessary to the end, and incident to the nature of the specified powers," and as the "appropriate, and as it were, technical means of executing those powers."[79] This

74. *McCulloch*, 17 U.S. at 415 (emphasis omitted). Jefferson's view favoring a new constitution every generation was somewhat eccentric.

75. *Did You Know. . . Customs in the Civil War Was A House Divided?*, U.S. Customs and Border Protection, https://www.cbp.gov/about/history/did-you-know/house-divided, [https://perma.cc/CXN2-QLRB].

76. 17 U.S. at 409.

77. *Id.* at 415, 420.

78. *See* 2 Annals of Cong., *supra* note 25, at 1896–1902 (1791); Primus, *supra* note 57, at 454–60.

79. 2 Annals, *supra* note 24, at 1898.

definition was probably intended to be broader than the tests of strict necessity, best means, and perhaps ordinary means. But it did not clearly supply an argument against the bank bill without a further proviso:

> In admitting or rejecting a constructive authority, not only the degree of its incidentality to an express authority is to [be] regarded, but the degree of its importance also; since on this will depend the probability or improbability of its being left to construction.[80]

Madison went on to draw attention to the haphazard quality of the enumeration of powers, which specified powers at widely differing levels of generality. Despite conceding that "It is not pretended that every insertion or omission in the constitution is the effect of systematic attention," he argued the contrary and turned the haphazardness of the enumeration into a virtue.[81] The presence of more specific enumerated powers alongside more general ones—the power to punish counterfeiting alongside the power to coin money; the power to call out the militia, and even the borrowing power, alongside the power to raise armies—were examples that "condemn the exercise of any power, particularly a great and important power, which is not evidently and necessarily involved in an express power."[82] With his renowned capacity for ingenious constitutional interpretation, Madison thus turned the sow's ear of a jumbled enumeration of powers into the silk purse of enumerationism. The concept of "limited and enumerated powers," Madison argued, was "[t]he essential characteristic" of the Constitution.[83] With this argument, Madison launched the debate over the nature and scope of implied powers that continues to this day.[84]

Madison's constitutional objection had an ad hoc quality, which was partially revealed in his failure to seriously discuss the Commerce Clause. In his first speech, on February 2, Madison omitted mention of the commerce power, discussing the taxing and borrowing powers as though those were the only ones having anything to do with a national bank charter.[85] Bank bill supporters pointed out that the scarcity of specie (gold and silver coin), acted as a drag on buying and selling transactions, whereas a national bank's notes could act as a supplementary circulating medium that would promote trade.[86] In his second speech on February

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80. *Id*. at 1896.
81. *Id*. at 1899.
82. *Id*.
83. *Id*. at 1898.
84. *See id*. at 1893–94; Primus, *supra* note 57, at 456–57.
85. *See* 2 ANNALS, *supra* note 24, at 1896 (Rep. Madison) (listing Taxing, Borrowing, and "Necessary and Proper" Clauses); *cf*. *id*. (showing that Madison's argument was raised at the eleventh hour).
86. *See id*. at 1903 (Rep. Ames) ("It seems to be conceded within doors and without, that a public bank would be useful to trade," and its "new capital will invigorate trade and manufactures"); *id*. at 1911–12 (Rep. Sedgewick) (arguing for commerce power); *id*. at 1946 (Rep. Gerry) ("objects of the [bank] bill" included "to benefit trade and industry in general").

9, Madison replied to the commerce power argument summarily and lamely: "but what has this bill to do with trade? Would any plain man suppose that this bill had any thing to do with trade?"[87] He is recorded as having said nothing else about the Commerce Clause.

It is worth noting that Madison's arguments convinced very few of his peers in Congress. A near two-thirds majority voted in favor of the Bank Bill, 39–20, and of the twenty "no" votes, most appeared to be based on narrower approaches to implied powers.[88] Madison may well have been entirely alone in his theory.

Nevertheless, if ensuring limits on the enumeration of powers is indeed the "essential characteristic" of the Constitution, Madison's great powers theory seems at least superficially plausible. Rather than focusing on definitional quarrels about the meaning of an enumerated power, or debating intangible points about whether a proposed law is close enough in nature to the enumerated power to qualify as "fairly incident" to it, Madison shifts the inquiry to consider (his contentious version of) the essential nature or spirit of the Constitution. Madison in effect proposes a new canon of construction that might be called *exclusio magnus*: the omission of a great power means its prohibition.

Though Madison presented his theory half-baked, does it hold up better if fully baked? It does seem to resolve the levels-of-generality problem by implying that the principle of *expressio unius* applies only to the "greatest" of the implied powers: taxing, commerce, war, and perhaps raising armies. Powers on that level cannot be implied, the argument would go, but lesser powers can. For example, Congress can exercise an implied power to criminalize mail-robbing or simple possession of marijuana notwithstanding the express grant of powers to punish counterfeiting, piracy, and treason. Those three enumerated federal crimes need not be construed under the *expressio unius* canon because they are not "great" powers; therefore, the comparable powers that they would have excluded under *expressio unius* are themselves not great powers, and would be permissible under Madison's *exclusio magnus* canon. The limits of enumerated powers thus apply only selectively, and the prohibition on unduly "important" implied powers stands as a free-floating exception to the general doctrine of implied powers.

But the theory does not work. Least of its problems is its free-floating quality: its poor fit with the text of the Constitution. It requires us to believe that a Constitution whose "essential characteristic" is "limited enumerated powers" would have jumbled great and not-great powers together without in any way signaling—either through express text or location—which enumerated powers are great enough to carry an *expressio unius* presumption and which are not. And it leaves the "essential" question of the constitutionality of particular implied

87. *Id.* at 1957 (Madison's Feb. 8 reply); *accord id.* at 1896 (Rep. Madison) (listing Taxing, Borrowing, and "Necessary and Proper" Clauses); *id.* at 1912 (Rep. Sedgewick) (arguing for commerce power).

88. *See* Lomazoff, *supra* note 53, at 19–27.

powers to a standardless debate over whether the power was "too important" to be left to implication.

More problematically, Madison's great powers theory is detached from its purported federalism rationale. The criterion of "greatness" is not particularly correlated to purported intrusions on "state sovereignty." If anything, the test leans in the opposite direction. Even if the greatness criterion might in theory have stopped a national bank, it would seem (again, in theory) not to prevent implied powers from expanding widely into regulation of small-scale, quotidian matters. Criminalizing simple possession of marijuana is hardly a great power, yet it intrudes greatly on state legislative choice. For many Antifederalists opposing ratification of the Constitution, the potential federal exercise of implied *great* powers was less of a concern than potential exercise of implied *small* powers—over local matters. Antifederalist Melancton Smith argued at the New York ratifying convention that the proposed national government would take over so much state and local regulation that state legislatures would have nothing left to do but "make laws for regulating the height of your fences and the repairing of your roads."[89] Taken at face value, the great powers theory permits significant intrusion on purported reserved state powers through regulation of the smaller stuff.[90]

At the same time, the great powers theory would hamstring the government in cases where no enumerated power provided for regulation of a national problem that lay beyond the capacity of the states to address. Here, Madison asks us to embrace what I will call his "lamentation principle" of the Constitution. In opposing the bank bill, Madison argued that gaps in the enumeration of powers, no matter how defective to the functioning of the national government, could not be made up by implied powers: "Had the power of making treaties, for example, been omitted, however necessary it might have been, the defect could only have been lamented, or supplied by an amendment of the Constitution."[91] As with the other enumerationist theories of implied powers, Madison's lamentation principle would relegate the government to poor alternatives—importing copper from potential foreign enemies rather than mining it domestically—or simply leaving problems unaddressed.

But Madison's lamentation principle was made to be evaded. A pointed example of such evasion arose during Madison's presidency, when devalued state bank notes inundated the nation in the aftermath of the War of 1812. President Madison acknowledged that the lack of a uniform national currency was a crisis attributable to the absence of a national bank (the First Bank's charter having

89. *See* New York Convention Debates (June 25, 1788), *in* 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, 1877, 1880 (John P. Kaminski et al. eds., 2008).

90. On the other hand, to define the "greatness" criterion by the extent of the intrusion into local matters would be to save Madison from himself by re-making his theory into something he didn't mean: a pro-state-sovereignty version of the "best means" theory discussed above. Clearly, Madison was not arguing that regulating the height of fence posts was a great power.

91. 2 ANNALS, *supra* note 24, at 1900–01.

been non-renewed in 1811). He further acknowledged that states could not solve the problem—but had indeed contributed to it—by chartering numerous underregulated state banks. Rather than "lamenting" the absence of an express power to charter the bank or proposing a constitutional amendment, Madison asked Congress to charter a second Bank of the United States, contending that the historical precedent of the First Bank amounted to a constitutional construction filling the enumerated power gap.[92]

Madison's great powers theory makes a limiting enumeration an end in itself. Its detachment from a state-sovereignty justification suggests that it is not a well-tailored means to the end of federalism. And its lamentation principle requires that we must, at least at times, prioritize a limiting enumeration over the effective functioning of the government—sometimes relying on the states to solve a national problem, sometimes lamenting the absence of any governmental power to do so. This is an arguable position, to be sure, and was indeed argued by many, but it is also a highly contestable one and was indeed contested by many. The Constitution's language does not exclude this reading, but it does not mandate it either. And as president, Madison could not bring himself to follow his own great powers theory.

Finally, the indeterminacy of the "great powers" criterion deserves further comment. It might be said that "greatness" is no less determinate than, say, "compelling interest" or other standards that populate constitutional law. Yet, it cannot be denied that a great powers standard produces results too random to be helpful in drawing any sort of systematic federal-state power "balance." Madison argued that chartering a national bank was an impermissible implied great power. If he was right about that, then *McCulloch* is wrong. If, on the other hand, a federal institution as great as the national bank was constitutional, then it is hard to see the merit in the claim that requiring a person to buy health insurance is an impermissible exercise of an implied great power.[93] In so claiming, Chief Justice Roberts in *NFIB* expressly cited Madison's great powers theory. If Roberts is right that a health-insurance-purchase mandate is such a striking intrusion on liberty as to constitute the exercise of a great power, then it is hard to see why putting someone in federal prison for possessing marijuana—a far greater intrusion on liberty—is *not* an implied great power. Surely a military draft is an implied great power that should be denied to the federal government if we were bound by

92. *See* Lomazoff, *supra* note 53, at 103–04; David S. Schwartz, *Coin, Currency, and Constitution: Reconsidering the National Bank Precedent*, 118 Mich. L. Rev. 1005, 1010 (2020). Rather than candidly admit that Madison was wrong about his 1791 constitutional objections, his defenders point to the fact that President Madison "waived" these constitutional objections. James Madison, *Veto Message*, 2 MPP, at 555–57. But Madison's insistence on having it both ways is an unconvincing cop-out. It cannot be true both that Congress lacked an implied power to charter the Bank, and that it could constitutionally obtain this power through "liquidation" of constitutional meaning—that is, construction by historical practice—rather than through Madison's own "lament-and-amend" process. *See* David S. Schwartz, *Madison's Waiver: Can Constitutional Liquidation be Liquidated?*, 72 Stan. L. Rev. Online 17, 21–23 (2019).

93. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S 519, 561 (2012).

Madison's theory.[94] William Baude argues that eminent domain is an implied great power that likewise should be denied, because it operates as a kind of tax and is therefore akin to the taxing power.[95] If that is the test for greatness, then any federal labor law is an implied great power, since it operates as a kind of tax on employers. And so on.

In short, Madison's great powers theory operates as a constitutional sniper. Rather than creating a frontier between permissible federal and reserved state powers, it picks off federal legislative targets of opportunity. It reminds us that we have a government of limited enumerated powers when, at rare and unexpected moments, a federal law is shot dead, seemingly at random from an unseen direction.

McCulloch rejected Madison's theory, though perhaps somewhat ambiguously. "The power of creating a corporation," Marshall argued, "is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers."[96] Marshall seemed to imply the converse, that a "distinct and independent" power "to be exercised in any case whatever" would have to be enumerated.[97] Rather than an adoption of Madison's argument, however, this was merely Marshall's polite bow to the views of the recently retired President. While Marshall echoed some of Madison's words, he neutralized Madison's test by subsuming "greatness and importance" into a functional definition that focused on whether the power was "independent"—an end in itself, rather than a means to an end. The Second Bank of the United States has to be considered the largest federally-created institution in the antebellum era; by 1819, it was well known to be the primary currency regulator of the nation, in addition to performing the national government's fiscal operations.[98] The Second Bank was nothing if not "great" and "important," but it was nevertheless constitutional. According to Marshall, an implied power could be constitutionally exercised, however great, important, and substantive, so long as it was intended to implement any of the "great objects"[99] of the national government, rather than to be a legislative end in itself. Significantly, too, Marshall's use of the phrase "great objects" was not necessarily in reference to the enumerated powers; he may have been intentionally

94. *See* Roger B. Taney, *Thoughts on the Conscription Law of the United States* (unpublished legal opinion, 1863), *reprinted in* MARTIN ANDERSON, THE MILITARY DRAFT: SELECTED READINGS ON CONSCRIPTION 207, 213 (1982) (quotation omitted) (noting that "because the militia was plainly understood as an organization based on compulsory military service . . . 'the plain and specific provisions [of the Constitution] in regard to the militia' nullified any implied power to raise armies by conscription"); *see also* Schwartz, *supra* note 1, at 611.

95. *See* William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L. J. 1738, 1757 (2013) ("[P]erhaps the fact that taxation is enumerated but eminent domain is not is because the federal government has the former power but not the latter.").

96. 17 U.S. 316, 411 (1819).

97. *Id*. at 422.

98. *See* LOMAZOFF, *supra* note 59, at 51–68; Schwartz, *supra* note 93, at 1010.

99. 17 U.S. at 418.

ambiguous in using a phrase that could encompass the objects in the preamble—as argued by the Bank's counsel.[100] *McCulloch*'s affirmation of the Bank's constitutionality was decidedly, if implicitly, a rejection of Madison's great powers theory.

B. Three Interpretations of McCulloch*'s Theory of Implied Powers*

1. The Rational Basis Test

Conventional doctrine tells us, and interprets *McCulloch* as telling us, that implied powers are those that are conducive or plainly adapted to implementing the enumerated powers.[101] This test has often been formulated as one of "rational relationship" or "rational basis." This suggests the level of deference due to the legislative judgment about whether the implied power is close enough to an enumerated power. It also negates the claim that implied powers require a more direct or essential connection than a merely "rational" one.[102]

On the surface, this test seems reconcilable with enumerationism on the assumption that implied powers are subordinate to enumerated powers and thus, do not expand them. But that is untrue for two reasons. First the rational relationship test makes abundantly clear that implied powers need not fall within the definition of enumerated powers. Congress has the power to do things, like chartering a bank, that venture far outside the definitions of the enumerated powers, in order to serve the regulatory purposes conveyed by the enumerated powers. In this way, implied powers do expand enumerated powers, rendering the border between granted national powers and reserved state powers contingent on the implied powers actually exercised by Congress. Randolph made this point to President Washington in his unsuccessful argument against the bank: "let it be propounded as an eternal question to those, who build new powers on [the Necessary and Proper] clause, whether the latitude of construction which they arrogate, will not terminate in an unlimited power in Congress?"[103]

Second, the levels-of-generality problem means that enumerated powers at lower levels of generality than, say, taxing, commerce, and war, are simply not reliable guides to distinguish national from local powers. The test of rational

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100. *See id.* at 381, 384–85 (argument of William Pinkney).

101. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) ("Thus the *McCulloch v. Maryland* standard . . . authoriz[es] Congress to exercise its discretion in determining whether and what legislation is needed.").

102. *See, e.g.,* United States v. Comstock, 560 U.S. 126, 133–35 (2010). In *Comstock*, however, Justice Kennedy mused that rational basis in the implied powers context was a different animal from rational basis in the Due Process and Equal Protection context and suggested that their similar treatment should be revisited. *See id.* at 150–52 (Kennedy, J., concurring in judgment). But it is hard to see why this reconsideration is needed, or how, as Kennedy asserted, there is a difference between a "tangible link to commerce"—whatever that means—and a "mere conceivable rational relation" between the regulation and commerce. *Id.* at 52 (Kennedy, J., concurring in judgment).

103. Edmund Randolph, *Enclosure: Opinion on the Constitutionality of the Bank* (Feb. 12, 1791), *reprinted by* Founders Online, Nat'l Archives (Nov. 5, 2020), https://founders.archives.gov/?q=Ancestor%3AGEWN/ancestor/GEWN-05-07-02-0200&s=1511311111&r=2, [https://perma.cc/WJT7-4D6K].

relationship to a broad power like commerce regulation adds potential numbers of implied powers far in excess of the handful of enumerated powers. This makes it difficult to sustain the idea that the enumerated powers were meant to be limiting. If the enumerated powers had contained a long list of permissible legislative means on the same level of generality as "establish[ing] . . . post roads,"[104] perhaps we could say that the omission of an enumerated power to build other roads meant to deny that power to the federal government. But only a small number of powers are enumerated at that level. The paucity of specific-level enumerated powers relative to the "vast mass of incidental powers"[105] that may be necessary to execute the broader enumerated powers prevents us from asserting with any certainty that, for example, general road-building must be excluded from the permissible means of executing the more general power to regulate commerce. The limited list of enumerated powers signals the inappropriateness of a limiting enumerated-powers interpretation.

2. Structure, Synergy, or Sovereignty

The conventional *McCulloch* test of "rational relationship" is not the broadest construction of implied powers. A broader conception of implied powers augments this test with powers implied from other implied—not enumerated—powers. Despite occasional protestations (Madison's bank bill speech, for example) and ceremonial incantations to the contrary (*McCulloch*'s nod to enumerated powers), our constitutional order has repeatedly acted on the assumption that "the government of the United States" has implied powers in addition to those expressly delegated to Congress. Moreover, as John Mikhail has shown, Congress can implement those powers through the "all other powers" provisions of the Necessary and Proper Clause.[106] That Clause, by its terms, is not limited to "the foregoing powers" of the Article I, section 8 enumeration.[107] That is to say, the implied powers of the United States carry with them other implied powers.

There is evidence in *McCulloch* that Marshall favored this idea. Recall Marshall's unwillingness to identify a specific enumerated power from which the power to charter a Bank was implied.[108] It is plausible to interpret this unwillingness as a signal that powers could be implied from sources other than the enumerated powers. Indeed, Marshall further suggested that "the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other," must "depend on *a fair construction of the whole instrument*"[109]—not simply on a construction of a particular enumerated power. And, as Mikhail

104. U.S. Const. art. I, §8, cl. 7.
105. *Id.* at 421.
106. *See* Mikhail, *supra* note 56, at 1121–28.
107. *See id.* at 1058–71.
108. *See supra*, text accompanying notes 28–29.
109. 17 U.S. at 406 (emphasis added).

observes, Marshall made a point of identifying implied powers as "the necessary means, for the execution of the powers *conferred on the government*," not simply those expressly delegated to Congress.[110]

A handful of scholars, including myself, have laid out detailed lists of implied powers of the United States that are not subordinate to the enumerated powers of Congress.[111] Recall Madison's argument that "no power therefore not enumerated, could be inferred from the general nature of government" and that an omitted power "however necessary it might have been . . . could only have been lamented, or supplied by an amendment of the Constitution."[112] Madison slyly neglected to mention that the Framers had "omitted" an enumerated power to "make war." But Madison knew this: indeed, he was to blame for the omission. The Committee of Detail's draft constitution included an enumerated power to "*make* war."[113] Suggesting that the power to "make" war was better left to the executive, Madison moved to amend this clause to read "*declare* war."[114] The Convention approved Madison's motion on that understanding, but the "make war" power was never reinserted somewhere else in the Constitution's text. Nevertheless, by 1791 the United States had already "made war" on several Indian tribes and would continue to make war several more times in Madison's lifetime. Madison himself would lead the nation into war in 1812 without ever amending the Constitution to include an express "make war" power or "lamenting" its absence.

The same can be said of the foreign affairs example Madison raised in his 1791 bank bill speech. The Constitution omits various specific foreign affairs powers that have been exercised throughout history, though not enumerated. For example, Washington's 1793 neutrality proclamation was neither a treaty nor anything else found in the enumerated powers. Likewise, a power to threaten wars, impose embargoes, or declare the Monroe Doctrine involve assertions of unenumerated powers. A general power "to conduct foreign affairs" could easily have been enumerated and would have covered all these things; that fact that no such general power was enumerated has never been taken to mean that the power was withheld from the national government. Similar points might be made about several other now-settled powers.[115]

Where do these powers come from? National leaders have asserted several sources of implied powers, which the Supreme Court has at one time or another embraced and never rejected. The power to exclude or deport aliens is but one example of an unenumerated power recognized as an implied power of sover

110. 17 U.S. at 411–12 (emphasis added). *See also* Mikhail, *supra* note 56, at 1061–62, 1067, 1102.

111. *See* Schwartz, *supra* note 1, at 624–45; Reinstein, *supra* note 48, at 11–31; Robert J. Kaczorowski, *Inherent National Sovereignty Constitutionalism: An Original Understanding of the U.S. Constitution*, 101 Minn. L. Rev. 699, 770–782 (2016); Johnson, *supra* note 48, at 72–87.

112. 2 Annals *supra* note 25 at 1900–01.

113. 2 Farrand, *supra* note 69, at 168 (emphasis added).

114. 2 Farrand, *supra* note 69, at 318–20 (emphasis added).

115. *See* Schwartz, *supra* note 1, at 624–45.

eignty.[116] Elsewhere, the Constitution negates or limits powers that are not enumerated or derivable from an enumerated power, suggesting that such powers would have been implied from a source other than the enumerated powers. The prohibition against granting titles of nobility is one example; the restriction on suspending habeas corpus and the "just compensation" requirement for takings are two others.[117] The Habeas Suspension Clause and the Takings Clause are not naturally read as express grants of power: we only read them this way to confirm our enumerationist bias. Arguments from synergy—reading multiple constitutional provisions to imply a power greater than the sum of the parts—have been used to justify the power to acquire territories and to issue paper money as legal tender.[118] "Structural postulates" have been urged in support of various implied powers on the ground that a particular power must be possessed by some level of government but cannot be properly exercised by the states—such as the power to deport aliens or to issue legal-tender paper money.[119] If structural postulates together with a dollop of constitutional "spirit" can produce an unenumerated *limit* on federal power, such as the anti-commandeering rule,[120] why can't structural postulates also supply a basis to imply federal powers? No neutral principle—neutral as between federal and state power, that is—can explain this particular asymmetry. To answer that structural postulates cannot imply federal powers because we have a government of limited enumerated powers is merely circular.

The complaint in the Scalia-Thomas concurrence in *United States v. Comstock* (2010),[121] that it is somehow improper to recognize implied powers necessary

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116. *See* Arizona v. United States, 567 U.S. 387, 394–96 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens" including the power to determine "specified categories of aliens who may not be admitted to the United States" and to "remove[specified aliens] from the United States.") (citations omitted); Fong Yue Ting v. United States, 149 U.S. 698, 722 (1893) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution.") (quoting Ping v. United States, 130 U.S. 581, 609 (1889)).

117. See U.S. CONST. art. I, § 9, cls. 2, 8; U.S. CONST. amend. V.

118. Schwartz, *supra* note 1, at 620–22, 638–40.

119. Thus, in *The Legal Tender Cases*, the Court reasoned:

> Some powers that usually belong to sovereignties were extinguished, but their extinguishment was not left to inference. In most cases, if not in all, when it was intended that governmental powers, commonly acknowledged as such, should cease to exist, both in the States and in the Federal government, it was expressly denied to both, as well to the United States as to the individual States. And generally, when one of such powers was expressly denied to the States only, it was for the purpose of rendering the Federal power more complete and exclusive.

The Legal Tender Cases, 79 U.S. 457, 545–46 (1871); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 704–06 (1893) (inferring deportation power in part from denial of implied sovereign power to the states).

120. *See* Printz v. United States, 521 U.S. 898, 918 (1997) ("essential postulate[s]" of "the structure of the Constitution").

121. 560 U.S. 126, 168 (2010) (Thomas, J., joined by Scalia, J., dissenting) ("The Necessary and Proper Clause does not provide Congress with authority to enact any law simply because it furthers *other laws* Congress has enacted in the exercise of its incidental authority") (emphasis in original).

and proper to executing other implied powers, is a mere contrivance. Such implied powers are recognized frequently and without objection. Any description of an implied power can be structured either to multiply or reduce the number of intervening inferential steps—and thereby increase or lessen the apparent distance from the enumerated powers. Consider this passage from *United States v. O'Brien* (1968),[122] the case upholding a federal law criminalizing the burning of draft cards. For ease of reference, I insert a bracketed number identifying each inferential step from one implied power to the next:

> The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. **[1]** The power of Congress to classify and conscript manpower for military service is 'beyond question." **[2]** Pursuant to this power, Congress may establish a system of registration for individuals liable for training and service, and **[3]** may require such individuals within reason to cooperate in the registration system. **[4]** The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And **[5]** legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.[123]

"And who," as Jefferson would say, "can distrust this reasoning who has ever played at 'this is the house that Jack built?'" Yet *O'Brien*'s five-step inferential process from raising armies to criminalizing draft-card-burning hardly seems like an abuse of the Necessary and Proper Clause. Perhaps we can smooth things over by eliding the analysis into a single step: the power to prohibit draft card burning is implied from the power to raise armies. A more pointed counter-example to the Scalia-Thomas position would have been President Madison's acknowledgment that chartering the Second Bank of the United States was a necessary and proper means of exercising the *implied power* over the nation's paper currency.[124]

3. A General Welfare Power

Finally, implied powers might be all those encompassed by the words of amended Resolution 6 of the Virginia Plan, which served as the original template for the powers of Congress at the Philadelphia Convention:

> Resolved, that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to

122. 391 U.S. 367 (1968).

123. *Id*. at 377–78 (internal citations omitted; numbering added for emphasis).

124. In his December 5, 1815 annual message, Madison stated that "a national bank will merit consideration" to restore "the benefits of an uniform national currency," which in turn was "essential" to the soundness of "the receipts and expenditures" of a peacetime federal government—presumably, referring to the Taxing-and-Spending Clause. President James Madison, Seventh Annual Message (Dec. 5, 1815), *in* 2 MPP, at 550–51.

> legislate in all cases *for the general interests of the union, and also* in those to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.[125]

This delegation reflects a limited power. Rather than limiting national power by an enumeration, however, it does so in general terms by a requirement that national legislative power be directed toward national ("general") interests. Implied powers under this view include not only those necessary and proper to implementing and enforcing ("carrying into execution") the enumerated powers, but also any unenumerated powers that are reasonably necessary to implement national policies.

This general welfare interpretation treats the enumeration of powers, not as limiting, but as illustrative of the kinds of powers necessary to legislate for the general welfare. As Jack Balkin and others have argued, the enumerated powers should or at least can properly be read "not to displace [Resolution 6] but to enact it."[126] The purpose of enumerating powers was not to imply that all unenumerated subject matter was "reserved to the states," but rather to implement the command to grant "the Legislative Rights vested in Congress by the Confederation," as well as to preempt later debates over whether certain other important powers, such as raising taxes and regulating commerce, were properly to be deemed "in the general interests of the union."[127]

C. Sum-up

Disentangling these different versions of implied powers helps illustrate *McCulloch*'s incompatibility with enumerationism. All four of the versions of implied powers rejected by *McCulloch* attempted to limit the implied powers within bounds that might be reconcilable with a limiting enumeration. The first two versions (strict necessity and best means) do not even appear to be good faith interpretations of the Constitution but are instead efforts to undermine the efficacy of the national government. The ordinary means argument, though less restrictive, still tilts heavily toward state sovereignty: it resolves doubts against federal power and would likely use the Articles of Confederation as a benchmark for "ordinary" and "natural." Madison's "great powers" theory does a poor job of preserving state reserved powers. Rather than confining implied powers in a way that conforms to enumerationism, it merely offers to hamstring federal legislative initiatives in an occasional and unsystematic fashion.

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125. This is the final version of Resolution 6, approved by the Convention following the amendment moved by Gunning Bedford of Delaware which added the italicized language to the original version. Compare 2 FARRAND, *supra* note 69, at 21, 26 (Bedford amendment version), with 1 FARRAND, *supra* note 69, at 21 (original version).

126. Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 11 (2010); *see* Mikhail, *supra* note 56, at 1083–86; Johnson, *supra* note 48, at 46–48; Schwartz, *supra* note 1, at 604–05.

127. 2 FARRAND, supra note 69, at 21.

The "structure-synergy-sovereignty" and "general welfare" theories of implied powers are plainly inconsistent with a limiting enumeration. If the idea of limited enumerated powers has any meaning at all, it is that the government of the United States lacks general powers—even the limited general powers of Resolution 6—or powers that can be implied from sovereignty, synergy, or structure.

McCulloch is most closely associated in conventional doctrine with the rational basis approach to implied powers, but ambiguities of the opinion suggest that Marshall strategically hinted at "implication from sovereignty" and even left the door open to the "general welfare" version. The key passage on enumerated powers, quoted above—"This government . . . . can exercise only the powers granted to it"—can plausibly be read to support the interpretation of *McCulloch* argued by John Mikhail: that Marshall viewed implied powers as those necessary and proper to executing the powers *of the United States*, which combined enumerated and implied sovereign powers.[128] As we have seen, Marshall made a point of saying that implied powers can be derived from "a fair construction of the whole instrument."[129]

To be sure, the broader interpretation I am suggesting is hard to square, at least at first blush, with the opening statement that "This government is acknowledged by all to be one of enumerated powers." But if, by that statement, Marshall meant that the enumeration was limiting, the rest of the passage following that statement, as discussed above, is either sloppy and imprecise or sly and strategic. We are limited to educated guessing as to which it is, but I am inclined to believe the latter. Marshall was writing at a moment when the Jeffersonian revolution had been entrenched by almost nineteen years of Virginia Republican presidents through three administrations and Republican majorities in both Houses of Congress. By 1819, the Federalist party had virtually disappeared; James Monroe had been elected in 1816 with 83% of the electoral votes, winning all but three New England states. All but one of Marshall's colleagues had been appointed by Jefferson or Madison. It is unsurprising that Marshall would refrain from making a blunt challenge to the by-then-dominant ideology of limited enumerated powers in this climate, particularly given his strong preference for unanimity on the Court. And it is consistent with his reputation for Marshallean tactics that he would make a sly challenge. In the "enumerated powers" passage, Marshall placed "limited" and "enumerated" in separate sentences as if to acknowledge that the enumeration was undeniably present in the text yet was not the sum-total of national powers. *McCulloch* does not even rule out the possibility of a non-limiting, illustrative enumeration consistent with a general welfare power. It appears that some of Marshall's contemporary critics read the decision this way.[130]

128. John Mikhail, *McCulloch's Strategic Ambiguity: the View from Fisher* 6-8 (unpublished manuscript on file with author).

129. 17 U.S. at 406.

130. Roane, *supra* note 43, at 107 (*McCulloch* threatens "to give a carte blanche to our federal rulers, and to obliterate the state governments, forever, from our political system"); *id*. at 110 (*McCulloch* is "a judicial coup de main: to give a general letter of attorney to the future legislators of the Union").

Merely keeping this door ajar in the 1819 political environment is an impressive feat of judicial legerdemain.

III. *McCULLOCH*, RESERVED STATE POWERS, AND STATE SOVEREIGNTY

A. Implied Powers and Reserved State Powers as Inversely Related

Even under the conventional view, which tries to merge limited enumerated powers with *McCulloch*'s interpretation of implied powers, there is no room for presumptively "reserved" state powers: that is, a set of identifiable powers exclusively held by the states and denied to the federal government. Under the conventional interpretation of *McCulloch*, implied powers are those plainly adapted to exercising the enumerated powers. Implied powers (1) are different from enumerated powers and not mere specific cases of them; and (2) cannot be specified in advance, since they can grow and change with new circumstances and new legislative ideas. Therefore, implied powers have an inverse relationship with reserved state powers. By the terms of the Tenth Amendment, the more implied powers are exercised by the federal government, the fewer powers are "reserved" exclusively to the states. The insight in *United States v. Darby Lumber Co.* (1941) that the Tenth Amendment "states but a truism,"[131] is often itself reduced to a truism. But I think it one of the most penetrating insights in the United States Reports. In making this point, then-Justice Stone recognized something that had been disregarded, overlooked, or obtusely misunderstood by every justice before and many since: that because implied powers have no presumptive subject matter limits, the states have no presumptive subject-matters of legislation reserved to them. For example, Madison, Randolph, and other opponents of the Bank of the United States argued that banking regulation was a reserved state power.[132] But if regulating banks is conducive to regulating interstate trade (i.e., commerce), then Congress can regulate banking, even though such a power is not "commerce" and is not itself enumerated. Congress can even preempt state laws in doing so.[133] Banking regulation is thus not "reserved" to the states despite its absence from the Constitution's enumeration, and any concurrent power to regulate banking is left to the states at federal government sufferance.

Madison, when speaking with relative candor rather than political opportunism, expressed "doubts concerning [the] practicability" of "an enumeration and definition" of national legislative power.[134] Similarly, at the Constitutional

131. United States v. Darby Lumber Co., 312 U.S. 100, 124 (1941).

132. *See* 2 ANNALS, at 1897 (Rep. Madison) ("The proposed Bank. . . . would directly interfere with the rights of the States to prohibit as well as to establish Banks"); *id.* at 1917 (Rep. Jackson) (bank bill would "interfere with" the states' "power of instituting banks.").

133. *See, e.g.*, Watters v. Wachovia Bank, N.A., 550 U.S. 1, 10–12 (2007) (National Bank Act preemption).

134. 2 FARRAND, *supra* note 70, at 31. Madison was relatively candid here because he had nothing to gain by expressing doubts about limited enumerated powers. Doing so brought him into direct conflict with his Virginia colleague Edmund Randolph and perhaps also with the South Carolina delegation. Id., at 25; 1 FARRAND, *supra* note 69at 53. In contrast, his later ambiguous statements of enumerationism in

Convention, Madison insisted that his pet proposal for a national legislative veto must be authorized "in all cases" (i.e., without enumerating the legislative veto powers) because attempting to differentiate national from state and local legislative concerns would be "a fresh source of contention between the two authorities."[135] This general inability to distinguish national from local concerns through enumeration was due in part to the imperfections of constitution-making and the limits of language he lamented in Federalist 37, but due most of all to the "indistinctness of the object" of "delineating the boundary between the federal and State jurisdictions."[136] It is most likely that, for Madison as for us, this indistinctness lay in the unspecified nature of implied powers. Because implied powers are unspecified, state reserved powers cannot be defined in general terms, as "whatever is not enumerated." Such a definition fails to account for implied powers. In sum, because enumerated powers necessarily include implied powers, even a purportedly limiting enumeration cannot protect any definite space for reserved state powers.

The great irony is that to limit federal power in any specified way—to identify subject matter that is off limits to federal regulation—it is not the federal powers themselves that must be enumerated, but the reserved *state* powers. Such an enumeration was not, of course, written into the original Constitution or its amendments, including the Tenth Amendment. The failure to enumerate reserved state powers, in a constitutional regime of implied federal powers, is itself further evidence that the Framers, on the whole, did not intend to create an unambiguously limiting enumeration.

One can find numerous assertions in the ratification debates and in the early Congress's debates to the effect that a particular object or policy proposal fell outside the powers of Congress, which were to be limited, enumerated, and strictly construed. But these arguments were always necessarily stipulative—they did not follow from clear constitutional text or consensus constitutional principles. One can also find plenty of founding era references to specific topics reserved to state control. But these simply further my point: reserved state powers, to be effective, had to be enumerated precisely because the necessity of implied powers meant that the powers of Congress could never be fully enumerated.

Eventually, the idea of enumerating state reserved powers became embodied in constitutional law through judicial interpretation: labor, agriculture, manufacturing, mining, and other productive activities were held to be reserved to the states. Strangely, once these arguments became dominant in post-Reconstruction jurisprudence, they were often framed as following directly from the limited definition of commerce—these activities were not in themselves the buying and

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the Federalist Papers and his clear ones in his 1791 Bank opposition speech, were efforts at persuasion to a specific political outcome. *See* 2 Annals, at 1897-1901 (Rep. Madison); The Federalist No. 45 (James Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined").

135. 1 Farrand, supra note 69, at 165 (Madison speech).

136. The Federalist No. 37 (James Madison); *see* Gienapp, *supra* note 38, at 112–15.

selling of goods, or the transportation of goods or people—as if *McCulloch* and implied powers had no application to the Commerce Clause.[137]

B. The Smashed Atom of State Sovereignty

State sovereignty hovers at or near the center of the reserved state powers doctrine of enumerationism. This was made clear in *Carter Coal*:

> While the states are not sovereign in the true sense of that term, but only quasi-sovereign, yet in respect of all powers reserved to them they are supreme—"as independent of the general government as that government within its sphere is independent of the States." And since every addition to the national legislative power to some extent detracts from or invades the power of the states, it is of vital moment that, in order to preserve the fixed balance intended by the Constitution, the powers of the general government be not so extended as to embrace any not within the express terms of the several grants or the implications necessarily to be drawn therefrom.[138]

Here we see the confused idea, which undergirds the Tenth Amendment and dominated the Supreme Court for 100 years, that federal legislative power *necessarily excludes* state legislative power and thereby, leads inexorably to state destruction. "The danger" of "the federal government . . . taking over the powers of the states," warned the *Carter Coal* Court is that it will "find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain."[139] As in *Carter Coal*, this idea has often been expressed as an attack on state sovereignty.

In Justice Anthony Kennedy's well-known metaphor, "Federalism was our Nation's own discovery. The framers split the atom of sovereignty."[140] The metaphor, catchy and quotable as it is, invites us to be as mindless about sovereignty as Kennedy was in making up the phrase. The metaphor implies that the Framers divided sovereignty between federal and state governments not only with scientific precision, but also in a way that avoided overlap. Those suggestions are ludicrous. One need read only a few pages of *Farrand's Records* to see that the Framers had no clear theory about the interrelationship between federal and state sovereignty and that they lacked a consensus even about whether the states were

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137. SCHWARTZ, *supra* note 4, at 168–69, 191–92, 198–204.

138. Carter v. Carter Coal Co., 298 U.S. 238, 294–95 (internal citation omitted).

139. *Id.* at 295–96. *See also* Hammer v. Dagenhart, 247 U.S. 251, 274 (holding that the Child Labor Act would "destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution"); David S. Schwartz, *An Error and an Evil: the Strange History of Implied Commerce Powers*, 68 AM. U. L. REV. 927, 998, 1003–06 (2019).

140. United States Term Limits v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). *See* Mark R. Killenbeck, *The Physics of Federalism*, 51 U. KAN. L. REV. 1 (2002) (arguing that Kennedy's metaphor is misplaced in both its scientific and legal aspects).

sovereign.[141] Every law graduate who has studied preemption and the Dormant Commerce Clause knows that the legislative authority of the federal and state governments is a doctrinal mishmash of exclusive and concurrent powers that has varied considerably over time.

In a recent essay, Sanford Levinson expresses well-warranted surprise at how little rigorous analysis has been applied to the concept of state sovereignty by present-day constitutional scholars and courts, despite the fact that its meaning has been so contested throughout constitutional history.[142] Ignoring political theory, or simply oblivious to it, the Supreme Court has developed a constitutional doctrine of state sovereignty that is confused and ad hoc, such that states are sovereign "for some purposes" but not others.[143] Levinson may be right that "sovereignty talk" in constitutional law is too confused to be helpful. Nevertheless, the term is bandied about too frequently to avoid some effort to make sense of it.

The idea that the Constitution created "an indestructible union composed of indestructible states"[144] is not wrong. But that notion simply tells us that the Supreme Court could strike down a federal statute that, for example, eliminated the fifty state boundaries and replaced them with twelve regional districts. We would not think it unreasonable for the Court to imply such a limitation from the requirement of state consent to depriving any state of its two Senators. Maybe the various references to states also suggest "structural postulates" that tell us that a state can decide where to locate its own capital[145] and perhaps even that its

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141. The debates from June 16 to June 21, 1787, following the introduction of the New Jersey Plan are replete with disagreements on these matters together with ideas in an evolutionary stage that were inconsistent with later notions of neatly divided sovereignty. Madison, for example, seemed to suggest that retaining state governments at all was little more than an administrative convenience to ensure proper handling of local regulatory matters; legislative power should be divided, not because the national government would "abuse" its power, but rather because it "could not extend its care to all the minute objects which fall under the cognizance of the local jurisdictions." Otherwise, the states could be abolished and "the people would not be less free as members of one great Republic than as members of thirteen small ones." 1 Farrand *supra* note 69 at 357 (speech of Madison).

For differing views on whether the states were sovereign, *see id*. at 323 (speech of Rufus King) ("the states are not sovereign in the sense contended for by some" because "they did not possess the peculiar features of sovereignty"); *id*. at 324 (speech of James Wilson) (colonies became independent states "not Individually but Unitedly"); *id*., (speech of Luther Martin) ("separation from G.B. placed the 13 States in a state of nature towards each other"); *id*. at 161 (draft speech of Mason) (questioning whether states "always had been as now substantially and in reality distinct, sovereign and independent").

142. Sanford Levinson, *The Confusing Language of McCulloch v. Maryland: Did Marshall Really Know What He Was Doing (or Meant)?*, 72 Ark. L. Rev. 7, 8–9 (2019).

143. *See Carter Coal*, 298 U.S. at 294 (referring to states as "quasi sovereign"); 130 U.S. 581, Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1870 (2016) ("Truth be told, however, 'sovereignty' in this context does not bear its ordinary meaning."). Marshall contributed mightily to confused sovereignty talk. *See* Levinson, *infra* note ,143, at 8–9. *See also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 414 (1821) ("These States are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate.").

144. Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869).

145. *See* Coyle v. Smith, 221 U.S. 559 (1911); Printz v. United States, 521 U.S. 898 (1997).

legislatures and executive officials should not be "commandeered."[146] But state "indestructibility" does not necessarily tell us that the Court can strike down legislation based on an alarmist, exaggerated hunch that permitting such a law would place the United States on a long slippery slope that would inevitably "obliterate the distinction between what is national and what is local and create a completely centralized government."[147]

The idea of state indestructibility remains untested as a judicial doctrine of last resort because the continued existence of states is so entrenched in history, tradition, and longstanding public opinion—and so convenient for national policymakers—that an attempt to put the question to the test is inconceivable. If our metric of state sovereignty is the power of states to make and administer their own laws, then states are today as "sovereign" as ever. This is true, despite the fact that since 1941 at least, the federal government has had the power to regulate all aspects of economic life and, if it chooses, to preempt all state laws on any federal subject of legislation. Clearly the pre-1941 reserved state powers system is not essential to state sovereignty, because that system has been dismantled and replaced by a concurrent powers/preemption regime—and yet, the states endure.

The problem with state sovereignty as a concept is that our use of it almost invariably commits the fallacy of "persuasive definition."[148] The fallacy arises when the proponent takes a multifaceted term and then, relying on a widely shared definition, subtly shifts that definition to a more contested one. Suppose, for example, we all agree that the university music department should teach "music," rather than other performing arts. I then say that rap music is not "music" because it is not tuneful. Next, I argue that you are compelled by your initial commitment (the music department should teach only "music") to agree with me that the university music department should therefore exclude rap from its music curriculum. A similar move happens with state sovereignty, though in most cases it might be unintentional, rather than strategic. States are "sovereign" in the unexceptionable sense that they have governmental powers and that their continued existence is guaranteed both by practical necessity and by constitutional law. But state sovereigntists go on to argue that, of course, sovereignty entails the power to govern *without external restraint* (though a republican form of government may impose internal restraints through organic state constitutional law). To have *this* form of sovereignty means that states must have some regulatory areas entirely free from federal control. Because federal

146. *See* Printz v. United States, 521 U.S. 898, 918 (1997) (finding anti-commandeering principle in the "essential postulates[s]" "of the structure of the Constitution").

147. United States v. Lopez, 514 U.S. 549, 566–67 (1995) (striking down Gun Free School Zones Act); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring) (striking down NRA fair competition codes).

148. *See* Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025, 1077-78, 1081–83 (2010) (defining the fallacy and suggesting that some originalists make this type of move when arguing that our agreement that judges should "interpret" the Constitution entails a commitment to originalism, because interpretation necessarily means the discernment of original meaning).

legislative power is supreme and preemptive, it must be limited, so this argument goes, or else states have no such sovereignty. This is the best case for the "split atom": states retain a sphere in which, as *Carter Coal* put it, they are "supreme" and not subject to federal regulation.

But nothing in the Constitution gives states supremacy over any regulatory matters. Given the plain meaning of the Supremacy Clause and the wide scope of acknowledged federal powers, the best understanding of state sovereignty might be the version implicit in the "political safeguards" theory of federalism. Under this view, states are constitutionally "indestructible," insofar as they may not be abolished, suffer changes to their borders, or lose their voting equality in the Senate without their consent.[149] But otherwise, their regulatory power is a question of pragmatic devolution. The national political process protects "federalism" because it will always be practical to devolve a hefty chunk of policy matters to the states.[150] This reality, too, contributes substantially to our persistent persuasive definition fallacy of state sovereignty. It is convenient for national leaders to extol states' sovereign powers on matters "best left" to the states for pragmatic, rather than constitutional sovereignty reasons. In some cases, state or local governments can handle a policy matter more efficiently than the federal government. In others, it is convenient to say that sovereignty doctrine *requires* state resolution of a particular political hot potato (e.g., abortion, same-sex marriage, the death penalty). But these devolutions are not constitutional commands.

We need not unpeel the onion of sovereignty to understand the confused state of U.S. state sovereignty discourse for present purposes. Instead, I will identify two misconceived ideas of sovereignty that have been dominant, or at least vampirically persistent, in U.S. constitutional discourse (we kill them off, but like vampires, they keep coming back). The key point is that both versions of sovereignty conflict with even the conventional understanding of *McCulloch* and implied powers.

1. State Sovereignty as a Power of Resistance

The strong form of state sovereignty takes seriously the notion of sovereignty as the power to govern without external restraint. Under this view, sovereignty is a power to resist encroachments on the power to govern. Extreme states' righters always clung to this notion of state sovereignty in some form. In essence, they argued that presumptive state powers could defeat the federal exercise of presumptively granted powers: even unexercised or theoretical state "reserved" or "internal police" powers would suffice to defeat the federal claim. This version of

149. *See* U.S. Const. art IV, §3 cl.1 (guaranteeing state borders); art. V (prohibiting deprivation of a state of "equal suffrage in the Senate" without its consent).

150. I put "federalism" in scare quotes to reflect that that term, too, is obscured by the same persuasive definition fallacy. The "political safeguards" debate reached a dead end because the safeguards advocates implicitly defined federalism to embrace a pragmatic devolution theory of state sovereignty, while opponents assumed that federalism entailed one of the two "vampire" theories discussed above.

state sovereignty was nearly explicit in the Virginia and Kentucky Resolutions of 1798, in so-called compact theory, and in the theories of nullification and secession.

Sovereignty-as-resistance never became the official view in the United States, just as Christian fundamentalism has not turned the United States into a theocracy. But like Christian fundamentalism in the modern GOP, resistance sovereignty was a powerful element in a sometimes-governing political coalition, the Jeffersonian-Republican/Jacksonian-Democratic parties. Like Christian fundamentalism, the idea of state resistance sovereignty had to be fed, appeased, and given prominence in the party's political agenda, even if not entirely yielded to.

So long as Marshall remained Chief Justice, the Supreme Court resisted the resistance theory of state sovereignty. But the Taney Court attempted to force the square peg of resistance sovereignty into the round hole of the U.S. Constitution by holding that states had a power of self-defense by which they could resist even federal laws that fell within the federal government's prima facie granted powers. In *New York v. Miln* (1837),[151] the Taney Court's first opportunity to decide a major federalism issue, the Court upheld a New York law that required ships landing in New York Harbor to register all foreign or interstate passengers and post a bond to defray the costs of maintaining or removing impoverished immigrants. The Court rejected both dormant commerce and preemption challenges to the law by characterizing it as a "police" regulation safeguarding the state against "the moral pestilence of paupers, vagabonds, and possibly convicts."[152] The state had "not only the right, but the bounden and solemn duty . . . to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends[.]" When it came to "all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police . . . the authority of a state is *complete, unqualified, and exclusive*."[153] In short, the Taney Court suggested not only that state police powers carried implied powers to regulate subject matter expressly granted to Congress, but also that state sovereignty could defeat implied federal powers that intruded on a state's "complete, unqualified, and exclusive" internal police power.

The Taney Court's theory of state sovereignty-as-resistance stood *McCulloch*'s conception of federal supremacy on its head. Rather than acknowledging federal implied powers that could make inroads into purported state reserved powers, the states had implied sovereign powers that could make inroads into federal enumerated powers. A consensus emerged on the Taney Court that the concept of reserved state powers "has its foundation in the sacred law of self-defense, which no power granted to Congress can restrain or annul."[154] The

151. 36 U.S. 102 (1837).
152. *Id.* at 132, 142.
153. *Id.* at 139 (emphasis added).
154. The Passenger Cases, 48 U.S. (7 How.) 283, 457 (1849) (Grier, J.).

doctrine of state self-defense was something of a euphemism. It was driven by the Taney Court's determination to put up constitutional law barriers to federal restriction of slavery in states where it existed (even though no such regulation was forthcoming from a federal government dominated by the slave power). Eventually, the Taney Court would extend this barrier into the territories as the Court tried to constitutionalize the solution to slaveholders' anxiety that slavery had to expand or die. The Taney Court also sought to "originalize" this slavery-driven version of sovereignty. In *Prigg v. Pennsylvania* (1842)[155] and *Dred Scott v. Sandford* (1857)[156] the Court argued that the Constitution must be given a pro-slavery construction in every case because the slave states would never have agreed to a Constitution that did not carry a generalized pro-slavery presumption.[157]

In contrast to the enumerated powers, which the Founders may have intended to be illustrative of a general welfare legislative power, there is no persuasive evidence that the Constitution's enumerated slavery compromises were illustrative of a general principle of pro-slavery constitutional interpretation. Yet for the Taney Court, the federal government was merely the first among co-equal sovereigns, and its role was limited to foreign relations, maintaining interstate free trade on navigable rivers, and protecting slavery. The Supremacy Clause functioned only to override state laws and actions contrary to this limited role. Otherwise, states held the power to resist federal law. Adopting a territorial conception of sovereignty-as-resistance, the Taney Court maintained that the federal government could enter the states only with permission.[158] This view of constitutional law, however, bore little resemblance to any but the most prismatically skewed vision of the Founders' Constitution.

2. State Sovereignty as a Reflection of Enumerationism

Another version of state sovereignty views it as a reflection, or the other side of the coin, of limited enumerated powers. This is a weaker assertion than sovereignty-as-resistance. After the Civil War, mainstream constitutional thinkers recognized that sovereignty-as-resistance was inextricably connected with secession and, therefore, no longer tenable. The late-nineteenth-century Supreme Court issued frequent pronouncements that the federal government could exercise regulatory power over "every foot of American soil."[159] Yet this was far from the

155. 41 U.S. 439 (1842).

156. 60 U.S. 393 (1857).

157. SCHWARTZ, SPIRIT, *supra* note 4, at 94–109; Schwartz, *Error and an Evil*, *supra* note 139, at 988–97.

158. *See* Searight v. Stokes, 44 U.S. 151 (1845); SCHWARTZ, *supra* note 4, at 99–101.

159. Ex parte Siebold, 100 U.S. 371, 394–95 (1880); *accord* Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1, 11 (1878) (U.S. government "operates upon every foot of territory under its jurisdiction.").

conventional version of history, in which antebellum states' rights theory was "swept aside by the great impulse of national feeling born of the Civil War."[160]

Instead, the Supreme Court turned the persuasive definition fallacy about state sovereignty into constitutional doctrine. That fallacy, recall, is that because states have both governmental powers and guaranteed existence, they are "sovereign"; and because states are "sovereign," federal implied powers must be limited. Believing that race relations constituted one of those regulatory areas best left to the states, the Court gave the newly-ratified Fourteenth Amendment a narrow scope, extending it to narrowly defined "civil rights" of contract, jury service, and (purported) protection from racially motivated violence, but excluding "political rights" and "social rights." The motivations of the Justices call for further scholarly inquiry. My intuition is that most of them believed that it was unseemly for the Supreme Court to state that black Americans were socially inferior to whites, even though that was their shared foundational belief; and that black equality was too bound up in their minds with military reconstruction, which they came around to oppose. This attitude produced the *Slaughter-house Cases* (1873)[161] and later, the *Civil Rights Cases* (1883).[162]

But as early as 1870, several justices also began to see limitations on federal power as a means to the newly emerging end of laissez-faire economics. In the 1870-71 challenges to the 1862 Legal Tender Act, *Hepburn v. Griswold* (1870)[163] and the *Legal Tender Cases* (1871),[164] Chief Justice Chase began to outline a "spirit" of the Constitution emanating from the Contracts and Due Process Clauses that prohibited the government from passing economic regulation with redistributive effects—in those cases, from creditors to debtors.[165]

This version of state sovereignty was no longer about state self-defense or state power of resistance. Indeed, it was not about state sovereignty at all, for it would soon emerge that the states' regulatory power over economic life was itself sharply restricted—by the Fourteenth Amendment Due Process Clause. Instead, the post-Reconstruction version of purported state sovereignty was an effort to impose a hard version of enumerationism. This would devolve race relations to the states and promote laissez-faire by preventing federal regulation of the nation's economy. Jefferson and his followers had often spoken of agriculture and "manufactures" as reserved to the states, for two purposes: (1) protecting slavery and (2) resisting national policies that might favor manufacturing at the expense of agriculture. When it came to implementing these ideas in constitutional doctrine, the Taney Court created a protective state sphere defined in the general terms of "internal police powers." After the Civil War, the Court

160. Steffel v. Thompson, 415 U.S. 454, 462 n.13 (1974); SCHWARTZ, *supra* note 4, at 151–54.
161. 83 U.S. 36 (1873).
162. 109 U.S. 3 (1883).
163. 75 U.S. 603 (1870).
164. 79 U.S. 457, 570–71 (1871) (Chase, C.J., dissenting).
165. SCHWARTZ, *supra* note 4, at 145–46.

continued to speak of state police powers, but as a sphere that bumped up against Due Process Clause limits, rather than federal regulatory powers.[166]

To reconstruct this version of state sovereignty, the Court enumerated reserved state powers over labor and production: agriculture, mining, and manufacturing were areas the federal government could not regulate. The Court typically spoke of these in sovereignty terms of "separate spheres" of mutually exclusive federal and state power. "While the states are not sovereign in the true sense of that term, but only *quasi*-sovereign," the *Carter Coal* Court said, "in respect of all powers reserved to them they are supreme—'as independent of the general government as that government within its sphere is independent of the States.'"[167]

Hence was born the "must-be-something rule" in American constitutional law—the idea that there must be something the federal government cannot regulate if the doctrine of limited enumerated powers is to have operative effect.[168] Until 1941, the Court treated that "something" as a set of defined subject matter that could not be reached by Congress, even with its implied powers. For example, the power to regulate interstate commerce should have included a power to prohibit particular items from being bought or sold in interstate commerce, even under a narrow definition of commerce as buying and selling. Prohibiting production of such items (child-made goods, for example) could easily be shown to be conducive to preventing their introduction into, or impact on, interstate commerce. But by striking down laws like the Child Labor Act in *Hammer*, the Court deployed reserved state powers as a technique to limit implied commerce powers. [169] It did not even matter that the power supposedly "reserved" to the states was one beyond the states' capacity to exercise. The *Lochner*-era Court thus prioritized enumerationism over effectual national government and embraced Madison's "lamentation principle," asserting that the incapacity of the states to effectively regulate a problem had no bearing on the interpretation of the powers of Congress.[170] In that way, the Court created what Franklin Roosevelt labeled a "No Man's Land of final futility" in which "there is no legal power anywhere" to address certain pressing national problems.[171]

C. Sovereignty and Reserved Powers in *McCulloch*

McCulloch rejects both of the versions of sovereignty discussed above: the power of resistance and the reflection of enumerationsim. True, Marshall's

166. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 53 (1905).

167. *See, e.g.*, *Carter Coal*, 298 U.S. at 294 (quoting Collector v. Day, 78 U.S. 113, 124 (1871)).

168. Schwartz, *supra* note 139, at 1011–13.

169. Hammer v. Dagenhart, 247 U.S. 251, 274 (1918).

170. *Carter Coal*, 298 U.S. at 291–92 ("The proposition, often advanced and as often discredited, that the power of the federal government inherently extends to purposes affecting the nation as a whole with which the states severally cannot deal . . . [has] never been accepted but always definitely rejected by this court."); Hammer v. Dagenhart, 247 U.S. 251, 273 (1918) ("The Commerce Clause was not intended to give to Congress a general authority" to "prevent possible unfair competition" among businesses within the states.).

171. *See infra* note 39 and accompanying text.

conception of sovereignty in *McCulloch* has gone almost entirely unexplored by scholars, despite the fact that the opinion uses the word "sovereign" or "sovereignty" thirty-four times and raises the matter of state sovereignty against federal supremacy in its very first sentence: "In the case now to be determined, the defendant, a *sovereign* State, denies the obligation of a law enacted by the legislature of the Union."[172] And as Levinson explains, *McCulloch*'s discussion of sovereignty reflects some of the confusion endemic to American constitutional thought. According to Levinson, the concept of sovereignty in revolutionary and founding-era American discourse underwent ambiguous transformations from the monarchical to the republican context. Important constitutionalists in the founding era contested the notion that the states were in fact sovereign, as illustrated by the Jay and Wilson opinions in *Chisholm v. Georgia* (1793).[173] Politically influential theorists often distinguished "sovereignty" from "government," an idea that might have had particular purchase for an American republicanism that viewed "the people" as a collective sovereign who created federal and state governments by delegating powers to them. Levinson persuasively concludes that Marshall's use of "sovereignty" in *McCulloch* was shifting and confused and that it stands in need of further scholarly inquiry.[174]

I think it likely that at least some of Marshall's confusion about state sovereignty stemmed from his apparent inability to reconcile the notion that some powers, like taxation in *McCulloch*, could be concurrent, while others, like commerce regulation, seemingly could not. (*Seemingly*: Marshall was wrong about that, and less perceptive than his contemporary, James Kent.[175]) But it is plausible that, at the same time, some of the apparent confusion was strategic. Marshall was writing in an environment where the dominant governing party was reacting against the Framers' Constitution by favoring more robust versions of state sovereignty than seem compatible with the Supremacy Clause. *McCulloch*'s lack of clarity about state sovereignty may have contributed to the distorted ideas of federalism that became entrenched during the Taney Court and that would later morph into post-Reconstruction "dual federalism" or "dual sovereignty." The idea of "separate spheres" of federal and state sovereignty would be embraced in attenuated (and at times, knee-jerk) fashion by the Rehnquist and Roberts Courts.[176]

Nevertheless, whatever Marshall's confusion or strategic punch-pulling, he made it clear enough that federal supremacy means that states are "subordinate"

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172. 17 U.S. at 400; *see* Levinson, *supra* note 143, at 21.

173. 2 U.S. 419 (1793).

174. Levinson, *supra* note 142, at 8–21.

175. *See* Schwartz, *supra* note 139, at 940–46 (explaining that Kent understood the concept of concurrent powers whereas Marshall and his brethren seemed not to).

176. *See, e.g.*, Murphy v. NCAA, 138 S. Ct. 1461, 1475 (2018) ("[B]oth the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of 'dual sovereignty.'"); *Printz*, 521 U.S. at 921 ("This separation of the two spheres is one of the Constitution's structural protections of liberty.").

governments. To view matters otherwise would validate sovereignty ideas of Antifederalists and others who would construe the Constitution "essentially to reinstate that miserable confederation."[177] Kennedy's atom-splitting metaphor implies that federal and state sovereignty were each sub-atomic particles, which always happen to be rendered as spheres in physics book drawings. But Marshall rejected this implication because he acknowledged only a *federal* "sphere," and not a state one. "If any one proposition could command the universal assent of mankind," Marshall wrote, "it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action."[178] Later he argued that the state's power of taxation—the quintessential power of any conception of sovereignty—"is subordinate to, and may be controlled by the constitution of the United States."

> How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain.[179]

In other words, implied state powers and structural postulates could not, Marshall said, be read into the Constitution if they create obstacles to prima facie federal powers—whether express or, as in the case of the Second Bank, implied. Whatever else Marshall may have meant by sovereignty, it is clear that "sovereign" states are *subordinate* governments which have no power to obstruct action in the federal "sphere." Significantly, though Marshall spoke of a national government sphere, he never described states as having a "sphere" of action. *McCulloch* thus recognizes that, whatever state sovereignty means, it cannot empower states to obstruct exercises of implied federal powers—not even through the states' power of taxation, that most sovereign of all powers.[180]

Marshall quite plausibly based this on the idea of federal supremacy. Federal action is limited to a "sphere," and whether that sphere is defined by a general welfare legislative power or enumerated powers that carry implied powers extending beyond the textual enumeration, the edges of that sphere are not determined by the edges of a state sphere of action, for there is no state sphere of action. If *McCulloch* is right, then "dual sovereignty" and "separate spheres" are wrong. If *McCulloch* is right, then *United States v. Darby*

177. Friend of the Constitution (Marshall) essay, in Gunther, *supra* note 43, at 155.
178. 17 U.S. at 405.
179. 17 U.S. at 427.
180. Levinson, *supra* note 143, at 22.

Lumber Co. was right: state "reserved" powers in the sense that they are reserved from national powers (combining express and implied powers) are "but a truism."[181] A "sphere of action" for states cannot be defined, so long as implied powers are defined in *McCulloch*'s "rational relation" version (let alone, the two broader versions). Implied powers that are reasonably necessary to executing enumerated powers cannot be predicted in advance but depend on circumstances that may arise and new ideas for effective legislation. Hence, the question of the extent of the federal sphere is "perpetually arising."

In *The Spirit of the Constitution*, I argued that Marshall did not relentlessly pursue his own logic of implied powers in *McCulloch*; far from it, he pushed implied powers into a closet, insofar as he shrank from the full implications of recognizing implied commerce powers.[182] Yet, the logic of implied powers in *McCulloch* was clear enough, and on the related concept of federal supremacy and its incompatibility with reserved state powers, *McCulloch* self-evidently came down on the side of federal supremacy.

CONCLUSION

American federalism remains a muddle because it clings to a fruitless effort to merge two irreconcilable sets of ideas. On the one hand, the Constitution is properly understood to create an effectual national government with both enumerated and implied powers. Armed with these powers, the federal government can address national problems without either depending on the states, "lamenting" the omission of an applicable express power, or resorting in every instance to the cumbersome and uncertain amendment process. On the other hand, enumerationism clings to the ideological trident of limited enumerated powers, reserved state powers with defined substantive content, and state sovereignty that blocks some set of implied federal powers whose definition eludes us.

The Marshall Court in *McCulloch* made an attempt of sorts to resolve the muddle. Written in a political climate dominated for two decades by the enumerationist regimes of Jefferson, Madison, and Monroe, the Court paid lip service to enumerationism. Yet at the same time, *McCulloch* went as far as it reasonably could in that political climate toward rejecting enumerationism. Marshall's decision embraced a scope of implied powers that could not be squared with a limiting enumeration. The principle for determining implied powers was based on "a fair construction of the whole instrument" in light of the Constitution's purposes "to avoid [the] embarrassments" of the Confederation government.[183] This principle prioritized effectual national government over the principles of a limiting enumeration or robust reserved state powers. States were "subordinate governments," and

181. And not even a "truism with attitude." Gary Lawson, *A Truism with Attitude: the Tenth Amendment In Constitutional Context*, 83 NOTRE DAME L. REV. 469 (2008).

182. SCHWARTZ, *supra* note 4, at 59–83.

183. *McCulloch*, 17 U.S. at 407.

state sovereignty, whatever it was for the Marshall Court, did not entail a power to rebuff implied federal powers.

McCulloch did not vanquish enumerationism, of course. Had the opinion tried to do so forthrightly, without any enumerationist veneer, it would likely have been overruled by the Taney Court. Given *McCulloch*'s ambiguities, the Taney Court was able simply to disregard it. Starting with *Miln*, the Taney Court enshrined doctrines of state sovereignty and state self-defense that laid the foundation for the robust, content-specific notion of reserved state powers that dominated constitutional jurisprudence until the New Deal.[184] Thus, the purportedly originalist view that the federal government cannot regulate employment and production as implied commerce powers did not take root until some fifty years after ratification. This should at least raise significant doubts for originalists on that score. And those who wish to remain on intimate terms with both Madison and Marshall on "the essential characteristic" of the Constitution may have to realize that they are trying to have it both ways.

184. *See* Schwartz, *supra* note 4, at 93-110.