READING 4
The Court and Congress

Constitutional Law for a Changing America

Institutional Powers and Constraints

11th Edition

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CHAPTER THREE

THE LEGISLATURE

ARTICLE I of the U.S. Constitution is its longest and most explicit. The founders spelled out in great detail the powers Congress did and did not have over its own operations and its authority to make laws. Reading through Article I, we might conclude that it could not be the source of much litigation. After all, given its specificity, how much room for interpretation could there be?

For cases involving Congress's authority over its internal affairs, this assumption would be accurate. The Supreme Court has heard relatively few cases touching on the first seven sections of Article I, which deal with the various qualifications for membership in Congress, the ability of the chambers to punish members, and certain privileges enjoyed by the members. On the relatively few of those on which the Court has ruled, it generally, though not always, has given the legislature wide latitude over its own business.

That assumption, however, is incorrect when we consider cases that deal directly with Congress's most basic power, the enactment of laws, and with its position in American government. Article I, Section 8, enumerates specifically the substantive areas in which Congress may legislate. But is it too specific, failing to foresee how congressional powers might need to be exercised in areas it does not cover? Section 8 provides Congress with the power to borrow and coin money, but not with the authority to print paper money for the payment of debts. Since 1792, congressional committees have held investigations and hearings, but no clause in Section 8 authorizes them to do so. In general, the Supreme Court has had to determine whether legislative action that is not explicitly covered in Article I falls within Congress's authority, and that is why the Court so often has examined statutes passed by Congress.

There is another reason. As we saw earlier, and as we shall see throughout this book, basic (and purposeful) tensions were built into the design of the government. Disputes occur between the branches of the federal government, between the federal government and the states, and between governments and individuals. Arising from the basic principles underlying the structure of government—federalism, the separation of powers, and checks and balances—these conflicts have provided the stuff of myriad legal disputes, and the Court has been right in the middle of many of them.

This reading examines how the justices have interpreted Article I of the Constitution. It is divided into two sections: the first provides a historical overview of Article I and the second looks at the sources and scope of its lawmaking power. We end with a discussion of a topic that has gen-erated considerable debate in recent years: constitutional deliberations within the federal legislature.

ARTICLE I: HISTORICAL OVERVIEW

Many issues led the colonists in America to rebel against England. An important one, sometimes neglected in treatments of the American Revolution, was the different ways the British and the colonists thought about legislative bodies such as Parliament. The British viewed legislatures as "deliberative bodies whose allegiance was to the nation rather than specific

constituencies."[2] Underlying this view is the notion of "virtual" representation: "since the *interests* of all British citizens were represented in Parliament, the *citizens* themselves did not need to be." Therefore, the British reasoned, it was unnecessary for the colonists to vote for members of Parliament because they were "virtually represented" within it. The Americans took quite a different stance. To them, legislators "were nothing more and nothing less than agents of their constituents." As John Adams wrote in 1776, the ideal legislature "should be in miniature an exact portrait of the people at large. It should think, feel, reason and act like them."

During the founding period, the American states created legislatures that reflected some of Adams's views of representation. Most states provided for short terms of office, with elections typically occurring every other year. They also mandated that legislatures have open sessions and publish their proceedings. Finally, many states actually gave their inhabitants the right to "instruct" their representatives on how to vote on certain issues. These and other measures were designed to keep legislators responsive to their constituents. Concerns about representation at the federal level also were present, as were suspicions about a national government that would be as powerful as England's. The unicameral Congress created by the Articles of Confederation had few important powers, and many of those it had it could not exercise without state compliance, which it seldom received.

The problems Congress and the nation faced under the Articles of Confederation made it clear to the delegates attending the Constitutional Convention of 1787 that a very different kind of legislature was necessary if the United States was to endure. But what form would that legislature take? And what powers would it have? These questions produced a great deal of discussion during the convention; in fact, debates over the structure and powers of Congress occupied more than half of the framers' time.

Structure and Composition of Congress

The Virginia Plan set the tone for the Constitutional Convention and became the backbone for Article I. Essentially, the plan called for a bicameral (two-house) legislature, with the number of representatives in each house apportioned on the basis of state population. Under this scheme, the lower house (now the House of Representatives) would be elected by the people; the upper house (the Senate) would be chosen by the lower house based on recommendations from state legislatures.

The framers dealt with two aspects of the Virginia Plan with relative ease. Almost all agreed on the need for a bicameral legislature. Accord on this point was not surprising: by 1787 only four states had one-house legislatures. The plan for selecting the upper house provoked more discussion. Some delegates thought that having the lower house elect the upper would make the Senate subservient to the House and upset the delicate checks-and-balances system. Instead, the delegates agreed that state legislatures should select the senators. (The Seventeenth Amendment to the Constitution, ratified in 1913, changed the method of selection; senators, like representatives, are now elected by the people.)

The third aspect of the Virginia Plan—the composition of the houses of Congress—generated some of the most acrimonious debates of the convention. As historians Alfred Kelly, Winfred Harbison, and Herman Belz put it,

> Would the constituent units be the states, represented equally by delegates chosen by state legislatures, as the small-state group desired? Or would the constituent element be the people of the United States . . . with representation in both chambers apportioned according to population, as the large-state group wished?[3]

On one level, the answer to this question implicated the straightforward motivation of self-interest. Naturally, the large states wanted both chambers to be based on population because they would send more representatives to the new Congress. The smaller states thought all states should have equal representation in both houses and regarded their plan as the only way to avoid tyranny by the majority. On another level, the issue of composition went to the core of the Philadelphia enterprise. The approach advocated by the small states would signify the importance of the states in the new system of government, while that put forth in the Virginia Plan would suggest that the federal government received its power

[2]We adopt the discussion in this paragraph from Daniel A. Farber and Suzanna Sherry, *A History of the American Constitution*, 2nd ed. (St. Paul, MN: Thomson/West, 2005), 153–157.

[3]Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, *The American Constitution: Its Origins and Development*, 7th ed. (New York: Norton, 1991), 90.

directly from the people rather than from the states and was truly independent of the states.

It is no wonder, then, that the delegates had so much trouble resolving this issue: it defined the basic character of the new government. In the end they took the course of action that characterized many of their decisions—they agreed to disagree. Specifically, the delegates reached a compromise under which the House of Representatives would be constituted on the basis of population, and the Senate would have two delegates from each state.

Reaching this compromise was crucial to the success of the convention. Without it, the delegates might have disbanded without framing a constitution. But because the founders split the difference between the demands of the small and large states, they never fully dealt with the critical underlying issue: Do the people or the states empower the federal government? We address the impact of this lingering question on the development of the country in Chapter 6. Here, we note that this question not only has been at the center of many disputes brought to the Supreme Court but also was a leading cause of the Civil War.

This compromise has also led to more specific controversies, centering on the very nature of representation. We know that in drafting Article I the framers agreed that representation in the House of Representatives would be based on population. Each state was allotted at least one representative, with additional seats based on the number of persons residing within the state's boundaries. The exact number of representatives per state was to be determined by a census of the population (beginning within three years of the First Congress and continuing at intervals of every ten years thereafter) and calculated by adding the number of "free persons" and "three-fifths of all other persons" (read: slaves). Passage of the Fourteenth Amendment changed this formula so that Black people would be fully counted, and in 1911 and again in 1929 Congress set the size of the House at 435 members, where it remains today. But even these steps did not end debates over representation. As late as 1992 the State of Montana sued, arguing that the formula Congress used to calculate representation unfairly denied it an additional representative.[4] Moreover, recall from the discussion of *Baker v. Carr* (1962) in Chapter 2 that as population shifts occurred within states in the middle of the twentieth century, some states redrew their congressional district lines. For most, the new maps meant creating greater parity for urban centers as citizens moved out of rural areas. Other states, however, ignored these shifts and refused to reapportion seats. Over time, their failure meant that within a given state it was possible for two districts with large differences in population each to elect one member to the House. Beginning with *Baker*, the Court heard a series of challenges to legislative malapportionment, eventually creating the "one person, one vote" principle, which holds that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[5]

With the articulation of this principle, the Court settled some controversies: so long as the one person, one vote principle is observed, the Supreme Court generally has allowed states freedom in constructing representational districts for members of the House of Representatives. But, as we noted in Chapter 2, other controversies arose with time, in particular regarding the extent to which states may or should take race into account when they reapportion their districts. According to some analysts, creating districts with high concentrations of historically underrepresented voters is the only way to increase the number of officeholders of color in Congress. Others, including some civil rights advocates, have criticized such efforts, arguing that they do not offer real opportunities for increased minority representation. Even if the numbers of representatives of color grew to approximate the proportions of their respective groups in the general population, the argument goes, these representatives would still be too small in number to have any real clout in the legislature. These critics claim that only through changes in representational and institutional rules can minorities achieve political influence at the national level.[6] What is beyond debate is that the House remains predominately white, even as the percentage of lawmakers identifying as Black, Hispanic, Asian/Pacific

[4]*Department of Commerce v. Montana* (1992).

[5]*Wesberry v. Sanders* (1964).

[6]The Court has wrestled with the constitutional propriety of states purposefully drawing legislative district lines to ensure representation for minorities. During the 1970s and 1980s the Court gave considerable leeway to state legislatures to take race into account. In the 1990s, however, the Court changed course sharply. In a series of cases, the justices ruled that the Constitution is violated when district lines are explainable only in terms of race and when racial factors clearly dominate more-traditional districting criteria. For a full discussion of this issue, see Lee Epstein, Kevin T. McGuire, and Thomas G. Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice*, 11th ed. (Thousand Oaks, CA: CQ Press, 2022), chap. 15.

Islander, or Native American has reached its highest level in history (close to 25 percent).[7]

Powers of Congress

With the possible exceptions of reapportionment and term limits for members of Congress, which we cover later in the chapter, Americans today rarely debate issues concerning the structure and composition of Congress: most of us simply accept the arrangements outlined in the Constitution. Instead, we tend to concern ourselves with what Congress does or does not do, with its ability to change our lives—sometimes dramatically—through the exercise of its lawmaking powers. Should Congress increase taxes? Provide aid for the homeless? Authorize military action? Such questions—not structural points—generate heated debate among Americans.

In 1787 the situation was reversed. The framers argued over the makeup of the legislature but generally agreed about the particular powers it would have. This consensus probably reflected their experience under the Articles of Confederation: severe economic problems due in no small part, as the framers knew, to "congressional impotence."[8]

To correct these problems, Article I, Section 8, lists seventeen specific powers the delegates gave to Congress—six of which relate to the economy. Consider the problem of funding the government. Under the Articles of Confederation the legislature could not collect taxes from the people; instead, it had to rely on the less-than-dependable states to collect and forward taxes (from 1781 through 1783, the legislature requested $10 million from the states but received less than $1.5 million). In response, the first power given to Congress in the newly minted Constitution was to "lay and collect taxes." In addition to the six specific powers dealing with economic issues, Section 8 gives Congress some authority over foreign relations, the military, and internal matters such as the establishment of post offices.

The framers obviously agreed that Congress should have these powers, but two others provoked controversy. The first concerned a proposal in the Virginia Plan to give Congress veto authority over state legislation. This idea had the strong support of James Madison, who argued, "[T]he propensity of the States to pursue their particular interests in opposition to the general interest . . . will continue to disturb the system, unless effectually controuled." Madison and others who supported the veto proposal were once again reacting to the problems with the Articles of Confederation. Because the federal government lacked coercive power over the states, cooperation among them was virtually nonexistent. They engaged in practices that hurt one another economically and, in general, acted more like thirteen separate countries than a union or even a confederation. But the majority of delegates thought that a congressional veto would "disgust all the States." Accordingly, they compromised with Article VI, the supremacy clause, which made the Constitution, U.S. laws, and treaties "the supreme law of the land," binding all judges in all the states to follow them.

The second source of controversy was over this question: Would Congress be able to exercise powers that were not listed in Article I, Section 8, or was it limited to those explicitly enumerated? Some analysts would argue that the last clause of Article I, Section 8, the necessary and proper clause, addressed this question by granting Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." But is that interpretation correct? Even after they agreed on the wording of that clause (with little debate), the delegates continued to debate the issue. Delegate James McHenry of Maryland wrote about a conversation that occurred on September 6: "Spoke to Gov. Morris Fitzsimmons . . . to insert a power . . . enabling the legislature to erect piers for protection of shipping in winter. . . . Mr. Gov.: thinks it may be done under the words of [Article I]—'and provide for the common defense and general welfare.'"[9] In other words, Fitzsimmons was arguing that one of Congress's enumerated powers (to provide for the common defense and general welfare) implied the power to erect piers. Under this argument, then, Congress could assert powers connected to, but beyond, those that were enumerated.

Because questions concerning the sources of congressional power and the role of the necessary and proper clause in particular are central to an understanding of the role Congress plays in American society, we shall return to them. At this point, however, we consider the Court's interpretation of the first parts of Article I, which lay out the structure of Congress and its authority over its own affairs.

[7]Pew Research Center, "Racial, Ethnic Diversity Increases Yet Again with the 117th Congress," January 28, 2021, https://www.pewresearch.org/fact-tank/2021/01/28/racial-ethnic-diversity-increases-yet-again-with-the-117th-congress/.

[8]Farber and Sherry, *A History of the American Constitution*, 189.

[9]Quoted in ibid., 199.

LEGISLATIVE POWERS: SOURCES AND SCOPE

Section 8 of Article I contains a virtual laundry list of Congress's powers. These enumerated powers, covered in seventeen clauses, establish congressional authority to regulate commerce, to lay and collect taxes, to establish post offices, and so forth.

These enumerated powers *qua* powers pose few constitutional problems. Because the Constitution names them, Congress clearly possesses them. It is when Congress exercises these powers that questions can emerge. Some questions hinge on how to define the power—for example, Congress has the power to "regulate commerce among the states," but what does "commerce" mean? Other questions focus on whether congressional use of an enumerated power violates other constitutional provisions—say, the First Amendment or, more relevant to this volume, structures underlying the Constitution, such as the separation of powers system or federalism.

But what of other sources of legislative authority? For example, does the legislative branch have powers beyond those explicitly specified in the Constitution? Even though the framers may have left this question unaddressed, the Court has answered it affirmatively. As Table 3-4 shows, the Court has suggested that Congress possesses implied and inherent powers in addition to those explicitly mentioned in Article I. The Court has also acknowledged that Congress has the power to enforce certain constitutional amendments but that this power stems from language in the Constitution—though in specific amendments, not in Article I, Section 8. For example, the Thirteenth Amendment, which outlaws slavery, says that "Congress shall have power to enforce this article by appropriate legislation." In this section, we examine the cases in which the Court has delineated and interpreted these powers.

(In this course, we cover enumerated and implied powers.)

Keep reading-->

Table 3-4 Sources of Congressional Power

Power[a]	Defined	Illustration
Enumerated powers	Those that the Constitution expressly grants	Article I, Section 8. Includes the powers to borrow money, raise armies, and regulate commerce among the states.
Implied powers	Those that may be inferred from power expressly granted	Article I, Section 8, Clauses 2–17, in conjunction with Clause 18, the necessary and proper clause. For example, the enumerated power of raising and supporting armies leads to the implied power of operating a draft.
Amendment-enforcing powers	Those contained in some constitutional amendments that provide Congress with the ability to enforce them	Amendments 13, 14, and 15, for example, state that Congress shall have the power to enforce the article by "appropriate legislation."
Inherent powers	Those that do not depend on constitutional grants but grow out of national sovereignty	Foreign affairs. The national government would have foreign affairs powers even if the Constitution were silent, because these are powers that all nations have under international law. For example, the federal government can issue orders prohibiting U.S. businesses from selling arms to particular nations.

Source: Adapted from Sue Davis and J. W. Peltason, Corwin and Peltason's *Understanding the Constitution*, 16th ed. (Belmont, CA: Wadsworth, 2004), 126.

[a]Some analysts suggest that Congress also possesses resulting powers (those that result when several enumerated powers are added together) and inherited powers (those that Congress inherited from the British Parliament, such as the power to investigate).

As you read the next cases, keep in mind not only the sources of legislative power but also its scope. What limits has the Court placed on Congress and, more important, why? What pressures have been brought to bear on the justices in making their decisions?

Enumerated and Implied Powers

The Constitution's specific list of congressional powers leaves no doubt that Congress possesses these "enumerated" powers. In *Gibbons v. Ogden* (1824), when the Court was asked to interpret one of its powers, the power to regulate interstate commerce, Chief Justice John Marshall said,

> The words [of the Constitution] are, "Congress shall have power to regulate commerce with foreign nations, and among the several States. . . ." The subject to be regulated is commerce, and our constitution being . . . *one of enumeration, and not of definition*, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word [our italics].

In these two sentences, Marshall asserted that Congress indeed has the enumerated power to regulate commerce but that the Court needed to define what that power entails. This point is important because the fact that a power is written into the Constitution does not necessarily make the Court's task easier: often it must define how Congress can and cannot make use of that power, as we just suggested. Equally important, recall, is that Congress exercise its powers in ways that do not violate other constitutional provisions or doctrines.

In the chapters to come we consider these two issues as they relate to Congress's enumerated powers to regulate commerce and to tax, among others. Suffice it to say for now that virtually no debate ever occurs over whether, in fact, Congress has the powers contained in Article I, Section 8.

Necessary and Proper Clause. The question that does deserve attention is whether Congress has more powers, or was intended to have more powers, than those specifically granted. And if so, how broad should they be? Those who look to the plain language of the Constitution or to the intent of the framers find few concrete

answers, although both camps would point to the same clause. Article I, Section 8, Clause 18, provides that Congress shall have the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Called by various names—the necessary and proper clause, the elastic clause, the sweeping clause—this provision was the subject of heated debate early in the nation's history. Many affiliated with the Federalist Party, which favored a strong national government, argued for a loose construction of the clause; in their view, the framers inserted it into the Constitution to provide Congress with some "flexibility." In other words, Congress could exercise powers beyond those listed in the Constitution: those that were "necessary and proper" for implementing legislative activity. The Jeffersonians asserted the need for a strict interpretation of the clause; in their view, it constricted rather than expanded congressional powers. That is, under the necessary and proper clause Congress could exercise only that power necessary to carry out its enumerated functions.

Which view would the Supreme Court adopt? Would it interpret the necessary and proper clause strictly or loosely? This was one of two major questions at the core of *McCulloch v. Maryland* (1819),[17] which many scholars consider the Court's most important explication of congressional powers. As you read this case, consider not only the Court's holding but also the language and logic of *McCulloch*. Why is it regarded as such a landmark decision?

McCulloch v. Maryland

17 U.S. (4 Wheat.) 316 (1819)
http://caselaw.findlaw.com/us-supreme-court/17/316.html
Vote: 6 (Duvall, Johnson, Livingston, Marshall, Story, Washington)
0

OPINION OF THE COURT: ***Marshall***

NOT PARTICIPATING: ***Todd***

FACTS:

Although Americans take for granted the power of the federal government to operate a banking system—today called the Federal Reserve System—in the late eighteenth and early nineteenth centuries this topic was a political battleground. The first sign of controversy appeared in 1791 when George Washington's secretary of the Treasury, Alexander Hamilton, asked Congress to adopt a comprehensive economic plan for the new nation. Among the proposals was the creation of a Bank of the United States, which would receive deposits, disburse funds, and make loans; Congress responded with a bill authorizing the first federal bank.

When the bill arrived at President Washington's desk, however, he did not sign it immediately. He wanted to ascertain whether in fact Congress could create a bank, since it lacked explicit constitutional authority to do so. To this end he asked Hamilton, Secretary of State Thomas Jefferson, and Attorney General Edmund Randolph for their opinions on the bank's constitutionality.

Box 3-3 presents excerpts of Hamilton's and Jefferson's responses. We offer them not only because the two men reached different conclusions—Hamilton argued that the bank was constitutional, Jefferson that it was not—but also because the arguments represent the classic competing theories of congressional power. As historian Melvin I. Urofsky puts it, "Where Jefferson . . . argued that Congress could only do what the Constitution expressly permitted it do, Hamilton claims that Congress could do everything except what the Constitution specifically forbade."[18] The debates may also suggest the limits of originalism as a method of constitutional interpretation. Does it seem odd that just four years after the writing of the Constitution, two of the nation's foremost leaders could have such different views? In his argument, Hamilton, in fact, noted that there was a "conflicting recollection" of a convention debate highly relevant to the bank issue.[19] In the end, Hamilton persuaded the president to sign the bill. Congress then created the First Bank of the United States in 1791 and granted it a twenty-year charter.

Nevertheless, the bank controversy did not disappear. As we illustrate in Figure 3-1, which superimposes the bank's history (and that of its successor) on concurrent political and economic events, it is clear why the bank remained in the spotlight. Chiefly it became a symbol of the loose-construction, nationally oriented Federalist Party, which had lost considerable power from its heyday in the 1790s. Indeed, at the close of the eighteenth century, a strict-construction approach to congressional power was among the primary ideas endorsed by the Federalists' competitors, the Jeffersonian Republicans. Even though the bank had done an able job, to no one's surprise the Republican Congress refused to renew its charter in 1811.

[17]The other question involved federalism. See Chapter 6.

[18]Melvin I. Urofsky, *Supreme Decisions: Great Constitutional Cases and Their Impact* (Boulder, CO: Westview Press, 2012), 19.

[19]The framers rejected a proposal that would have allowed Congress to establish corporations in part because of the possibility that Congress would create banks. See Jethro K. Lieberman, *Milestones!* (St. Paul, MN: West, 1976), 19. Still, Hamilton argued that debate was unclear.

BOX 3-3

Jefferson and Hamilton on the Bank of the United States

Opinion on the Constitutionality of a National Bank (1791)

Thomas Jefferson

To take a single step beyond the boundaries . . . specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.

The incorporation of a bank, and other powers assumed by this bill have not, in my opinion, been delegated to the U.S. by the Constitution.

I. They are not among the powers specially enumerated, for these are
   1. A power to lay taxes for the purpose of paying the debts of the U.S. But no debt is paid by this bill, nor any tax laid. . . .
   2. "To borrow money." But this bill neither borrows money, nor ensures the borrowing of it. . . .
   3. To "regulate commerce with foreign nations, and among the states, and with the Indian tribes." To erect a bank, and to regulate commerce, are very different acts. . . . "

II. Nor are they within either of the general phrases, which are the two following.
   1. To lay taxes to provide for the general welfare of the U.S." that is to say "to lay taxes for the purpose of providing for the general welfare." For the laying of taxes is the power and the general welfare the purpose for which the power is to be exercised. They are not to lay taxes . . . for any purpose they please; but only to pay the debts or provide for the welfare of the Union. In like manner they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose. . . .
   2. The second general phrase is "to make all laws necessary and proper for carrying into execution the enumerated powers." But they can all be carried into execution without a bank. A bank therefore is not necessary, and consequently not authorised by this phrase.

It has been much urged that a bank will give great facility, or convenience in the collection of taxes. Suppose this were true: yet the constitution allows only the means which are "necessary" not those which are merely "convenient" for effecting the enumerated powers. If such a latitude of construction be allowed to this phrase as to give any non-enumerated power, it will go to every one, for there is no one which ingenuity may not torture into a convenience, in some way or other, to some one of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one phrase as before observed. Therefore it was that the constitution restrained them to the necessary means, that is to say, to those means without which the grant of the power would be nugatory.

Opinion as to the Constitutionality of the Bank of the United States (1791)

Alexander Hamilton

[It seems to me] [t]hat every power vested in a government is in its nature sovereign, and includes, by force of the term, a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power, and which are not precluded by restrictions and exceptions specified in the Constitution, or not immoral, or not contrary to the essential ends of political society. . . .

This general and indisputable principle puts at once an end to the abstract question, whether the United States have power to erect a corporation. . . . [I]t is unquestionably incident to sovereign power to erect corporations, and consequently to that of the United States, in relation to the objects intrusted to the management of the government. . . .

It is not denied that there are implied [as] well as express powers, and that the . . . implied powers are to be considered as delegated equally with express ones. Then it follows, that as a power of erecting a

corporation may as well be implied as any other thing, it may as well be employed as an instrument or mean of carrying into execution any of the specified powers, as any other instrument or mean whatever. The only question must be . . . whether the mean to be employed or in this instance, the corporation to be erected, has a natural relation to any of the acknowledged objects or lawful ends of the government. Thus a corporation may not be erected by Congress for superintending the police of the city of Philadelphia, because they are not authorized to regulate the police of that city. But one may be erected in relation to the collection of taxes, or to the trade with foreign countries, or to the trade between the States, or with the Indian tribes; because it is the province of the federal government to regulate those objects, and because it is incident to a general sovereign or legislative power to regulate a thing, to employ all the means which relate to its regulation to the best and greatest advantage. . . .

To this mode of reasoning respecting the right of employing all the means requisite to the execution of the specified powers of the government, it is objected, that none but necessary and proper means are to be employed; and the Secretary of State maintains, that no means are to be considered as necessary but those without which the grant of the power would be nugatory. . . .

It is essential to the being of the national government, that so erroneous a conception of the meaning of the word necessary should be exploded. Necessary often means no more than needful, requisite, incidental, useful, or conducive to. It is a common mode of expression to say, that it is necessary for a government or a person to do this or that thing, when nothing more is intended or understood, than that the interests of the government or person require, or will be promoted by, the doing of this or that thing.

The imagination can be at no loss for exemplifications of the use of the word in this sense. And it is the true one in which it is to be understood as used in the Constitution. The whole turn of the clause containing it indicates, that it was the intent of the Convention, by that clause, to give a liberal latitude to the exercise of the specified powers. The expressions have peculiar comprehensiveness. They are thought to make all laws necessary and proper for carrying into execution the foregoing powers. . . .

To understand the word as the Secretary of State does, would be to depart from its obvious and popular sense, and to give it a restrictive operation, an idea never before entertained. It would be to give it the same force as if the word absolutely or indispensably had been prefixed to it.

Such a construction would beget endless uncertainty and embarrassment. The cases must be palpable and extreme, in which it could be pronounced, with certainty, that a measure was absolutely necessary, or one, without which, the exercise of a given power would be nugatory. There are few measures of any government which would stand so severe a test. . . .

The only question is, whether [the government] has a right to [create the bank], in order to enable it the more effectually to accomplish ends which are in themselves lawful.

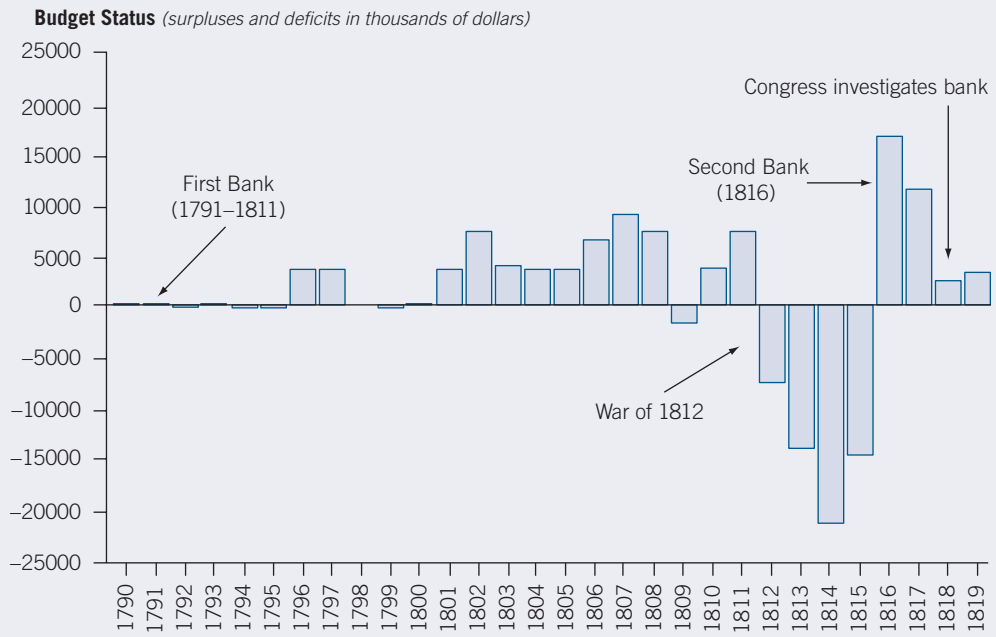
[A bank relates] to the power of collecting taxes, to that of borrowing money, to that of regulating trade between the States, and to those of raising and maintaining fleets and armies. To the two former the relation may be said to be immediate; . . . and that it is clearly within the provision which authorizes the making of all needful rules and regulations.

Source: Yale Law School, Lillian Goldman Law Library, The Avalon Project, http://avalon.law.yale.edu/18th_century/bank-ah.asp.

After the War of 1812, it became apparent even to the Republicans that Congress should recharter the bank. During the war the lack of a national bank for purposes of borrowing money and transferring funds became a source of embarrassment to the administration. Moreover, with the absence of a federal bank, state-chartered institutions flooded the market with worthless notes, contributing to economic problems throughout the country. Amid renewed controversy and cries for strict constructionism, Congress in 1816 created the Second Bank of the United States, granting it a twenty-year charter and $35 million in capital (about $603 million today).

Some scholars have suggested that a challenge to the new bank was inevitable, primarily because the Supreme Court had never decided whether the first bank was constitutional. It is possible, however, that litigation would not have materialized had the second bank performed as well as its predecessor did, but it did not. It flourished during the postwar economic boom, mainly because it was fiscally aggressive and encouraged speculative investing. These practices caught up to bank officials when, in 1818, in anticipation of a recession, they began calling in the bank's outstanding loans. As a result, they caused overextended banks to fail throughout the

Figure 3-1 The History of the First and Second Banks of the United States



Source: Data from U.S. Department of Commerce, *Historical Statistics of the United States* (Washington, DC: U.S. Bureau of the Census, 1975), 1104.

South and West. To make matters worse, accusations of fraud and embezzlement were rampant in several of the bank's eighteen branches, particularly in Maryland, Pennsylvania, and Virginia. Among those most seriously implicated was James McCulloch, the cashier of the Baltimore branch bank and its main lobbyist in Washington. According to some accounts, his illegal financial schemes had cost the branch more than $1 million.

In response to these allegations, Congress began to hold hearings on the bank, and some states reacted by attempting to regulate branches located within their borders. Maryland mandated that branches of the bank in the state pay either a 2 percent tax on all banknotes or a fee of $15,000. When a state official came to collect from the Baltimore branch, McCulloch refused to pay and, by refusing, set the stage for a monumental confrontation between the United States and Maryland on not one but two major issues. The first involved the bank itself: whether Congress, in the absence of an explicit constitutional authorization, has the power to charter the bank (the subject of the excerpt below). The second question—whether the state exceeded its powers by seeking to tax a federal entity—we take up in Chapter 6, on federalism.

By the time the case reached the Supreme Court, it was clear that something significant was going to happen. The Court reporter noted that *McCulloch* involved "a constitutional question of great importance." The justices waived their rule that permitted only two attorneys per side "and allowed three each."[20] Oral arguments took nine days.

Both sides were ably represented. Some commentators praise Daniel Webster's oratory for the federal government's side as extraordinary, and we enumerate some of his claims below. But it was former attorney general and U.S. senator William Pinkney with whom the Court was most taken. Justice Joseph Story said later, "I never, in my whole life, heard a greater speech."[21] Even so, the gist of his arguments (and those of his colleagues) was familiar stuff; Pinkney largely reiterated Hamilton's original defense of the bank, particularly his interpretation of the necessary and proper clause.

[20]Quoted in Fred W. Friendly and Martha J. H. Elliot, *The Constitution: That Delicate Balance* (New York: Random House, 1984), 256.

[21]Quoted in Lieberman, *Milestones!*, 122.

Maryland's legal representation may have appeared less astute. According to one account, "it has been rumored" that one of the state's lawyers, Attorney General Luther Martin, "was drunk when he made his two-day-long argument. If he was, it apparently did not affect his acuity." For his side, he reiterated parts of Jefferson's argument against the bank, added claims on states' rights, and read some of the speeches John Marshall had delivered at the Virginia convention.[22] Another attorney for the state, Joseph Hopkinson, took a somewhat different tack. He argued that the bank might have been useful when it was first created but that it was no longer necessary given the existence of many other financial institutions.

ARGUMENTS:

For the plaintiff in error, James McCulloch:

- The question of whether Congress constitutionally possesses the power to incorporate a bank arose after the adoption of the Constitution and was settled in the First Congress after extensive discussion. Arguments in the bank's favor were presented, with force, by Secretary of the Treasury Alexander Hamilton in his report to the president of the United States.
- Many of those who initially doubted the existence of the power to create the bank now view it as a settled question. Because all the branches of government have been operating under the assumption that the bank is constitutional, it would seem almost too late to call it into question unless its repugnancy with the Constitution were plain.
- The bank's constitutionality is beyond dispute. Congress is authorized to pass all laws "necessary and proper" to carry into execution the powers conferred on it. These words, "necessary" and "proper," should be considered as synonymous. Necessary powers must mean such powers as are suitable and fitted to the object, the best and most useful in relation to the end proposed.
- A bank is a proper and suitable instrument to assist the operations of the government: in the collection and disbursement of revenue; in the occasional anticipations of taxes and imposts; and in the regulation of the actual currency, as being a part of the trade and exchange between the states.

For the defendant in error, State of Maryland et al.:

- The question of whether Congress has the constitutional power to incorporate the bank of the United States has, for many years, been the subject of debate. Simply because the bank has existed for a long time does not mean that the subject is closed.
- It is agreed that no such power is expressly granted by the Constitution. It has been obtained by implication and asserted to exist, not of and by itself, but as an appendage to other granted powers, as necessary to carry them into execution. If the bank is not "necessary and proper" for this purpose, it has no foundation in our Constitution, and can have no support in this Court.
- A power, growing out of a necessity that may not be permanent, may also not be permanent. It relates to circumstances that change, in a state of things that may exist at one period and not at another. The argument might have been perfectly good, to show the necessity of a bank in 1791, and entirely fail now, when so many facilities for financial transactions abound, which did not exist then.

CHIEF JUSTICE MARSHALL DELIVERED THE OPINION OF THE COURT.

The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty.

The first question . . . is, has Congress power to incorporate a bank? . . .

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

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. [*Authors' note:* Under Article II of the Articles of Confederation, "Each state retains its sovereignty, freedom and independence, and every Power,

[22]Farber and Sherry, *A History of the American Constitution*, 357.

Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."] Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people;" thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. . . . A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of a prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a constitution we are expounding.

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 entrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution, by withholding the most appropriate means.

Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the north should be transported to the south, that raised in the east, conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred, which would render these operations difficult, hazardous and expensive? Can we adopt that construction (unless the words imperiously require it), which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise, by withholding a choice of means?

It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied, that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation. On what foundation does this argument rest? On this alone: the power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on congress. This is true. But all legislative powers appertain to sovereignty.

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. . . . The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war or levying taxes or of regulating commerce, a great substantive and independent power which cannot be implied as incidental to other powers or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. . . . The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is therefore perceived why it may not pass as incidental to those powers which are expressly given if it be a direct mode of executing them.

But the constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the government to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof."

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

The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong that one thing, to which another may be termed necessary,

cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. . . . Almost all compositions contain words which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction that many words which import something excessive should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison, and is often connected with other words which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. The comment on the word is well illustrated by the passage cited at the bar from the 10th section of the 1st article of the Constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying "imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the General Government without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary," by prefixing the word "absolutely." This word, then, like others, is used in various senses, and, in its construction, the subject, the context, the intention of the person using them are all to be taken into view.

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

So, with respect to the whole penal code of the United States: whence arises the power to punish, in cases not prescribed by the constitution? All admit, that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of congress. . . .

Take, for example, the power 'to establish post-offices and post- roads.' This power is executed, by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. . . .

The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the constitution, and from our laws. . . .

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

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. . . .

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing the importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, Congress, justifying the measure by its necessity, transcended perhaps its powers to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure. The time has passed away when it can be necessary to enter into any discussion in order to prove the importance of this instrument, as a means to effect the legitimate objects of the government.

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

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

As we can see, Marshall adopted Hamilton's reasoning and the government's claims about the proper interpretation of the necessary and proper clause: "necessary" does not mean absolutely necessary or essential, as Jefferson argued, but rather convenient or useful, as Hamilton believed. Some even believed Marshall's opinion was a virtual transcript of the oral arguments presented by the federal attorneys. Given that Marshall issued *McCulloch* just three days after the case had been presented, it is more likely, as others suspect, that he had written the opinion the previous summer.

How did the public respond? Despite the Court's opinion upholding the bank, sentiment was decidedly against the cashier, James McCulloch *(see Box 3-4)*. As for Marshall's opinion? Immediate reaction was interesting in that it focused less on the portion of the opinion we have dealt with here—congressional powers—and more on the federalism dimension, which we take up in Chapter 6. Nevertheless, the long-term effect of Marshall's interpretation of the necessary and proper clause has been significant: Congress now exercises many powers not named in the Constitution but implied by it. In this way *McCulloch* is a landmark decision and one that might very well have accomplished Marshall's stated objective: to allow the Constitution "to endure for ages to come."

Before turning to one of those powers—the power to investigate—it is worth considering how contemporary justices interpret Marshall's version of congressional authority under the necessary and proper clause. First, virtually all justices continue the Hamilton-Marshall tradition of defining "necessary" not as *absolutely* necessary but as convenient, useful, or beneficial to the exercise of congressional authority.

Second, the Court usually (but not always) is deferential to congressional determination that a law is "necessary." But it also has acknowledged that Congress's power is not unlimited, just as Marshall did. Recall the Chief's words:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

The Court continues to use this means-ends approach but in a more specific form than Marshall put it. In recent cases the justices have asked "whether the law constitutes a means that is rationally related [or rea-sonably adapted] to the implementation of a constitu-tionally enumerated power." ***United States v. Comstock*** (2010) provides an example.

We'll discuss *Comstock* in class.

BOX 3-4

Aftermath . . . James McCulloch and the Second National Bank

JOHN MARSHALL'S opinion for a unanimous Court in *McCulloch v. Maryland* (1819) resolved the constitutional questions surrounding the Second Bank of the United States. The decision, however, did not diminish the strong public sentiment against Baltimore branch cashier James McCulloch (also known as M'Culloch or McCulloh), who had been accused of engaging with others in corruption and unchecked financial speculation. Negative newspaper articles and a congressional investigation into the affairs of the national bank led to claims that large amounts of money were unaccounted for or mishandled. On March 6, 1819, the same day the Court handed down the *McCulloch* decision, Langdon Cheves was installed as the new president of the national bank. Two months later Cheves relieved McCulloch of his duties, claiming that the Baltimore branch cashier had defrauded the bank of $1,671,221.87.

In July 1819 McCulloch, former branch president James Buchanan, and Baltimore businessman George Williams were indicted for conspiracy to defraud the bank of an amount exceeding $1.5 million. The indictment, instigated by Maryland attorney general Luther Martin, accused the defendants of "wickedly devising, contriving and intending, falsely, unlawfully, fraudulently, craftily and unjustly, and by indirect means, to cheat and impoverish" the bank. One observer at the time labeled the three "destroyers of widows and orphans." Among other schemes, the three accused men had operated a company that speculated in the bank's stock and were in a position to manipulate its value to their own advantage.

In April 1821 the trial court dismissed the charges on the ground that conspiracy to commit fraud was not a crime under common law or one specified by Maryland statute. Later that year, however, the Maryland Court of Appeals reversed, ordering a full trial on the charges. All along the three defendants argued that they might have committed certain indiscretions but that the bank's losses were the result of bad economic times rather than any criminal acts. In March 1823, McCulloch and Buchanan were found not guilty and the charges against Williams were dismissed.

Following his acquittal, James McCulloch began rebuilding his life and reputation. In 1825 he was elected to the state legislature representing Baltimore County, and the next year his legislative colleagues selected him to be Speaker of the Maryland House of Delegates. He was also active as a lobbyist for the city and county of Baltimore as well as for the Chesapeake and Ohio Canal Company. Ironically, McCulloch even served a term as director of the Maryland Penitentiary. In 1842 the Senate confirmed President John Tyler's nomination of McCulloch to be the first comptroller of the United States Treasury, a post he held for seven years. McCulloch died in 1861.

The Second Bank of the United States continued to do business after the *McCulloch* decision. In 1832 President Andrew Jackson, a fierce opponent of the bank, vetoed a congressional act extending the bank's charter. When its charter expired in 1836, the bank became a private institution under the laws of Pennsylvania. But it did not prosper. In 1839 it temporarily suspended payment on its obligations and then unsuccessfully fought a two-year battle for survival. Its assets were liquidated in 1841. From 1836 until 1913, when the Federal Reserve System was created, the United States operated without an effective central bank.

Sources: Bray Hammond, "Jackson, Biddle, and the Bank of the United States," *Journal of Economic History* 7 (May 1947): 1–23; Mark R. Killenbeck, *M'Culloch v. Maryland: Securing a Nation* (Lawrence: University Press of Kansas, 2006); Melvin I. Urofsky, *Supreme Decisions: Great Constitutional Cases and Their Impact* (Boulder, CO: Westview Press, 2012).