

MCCULLOCH V. MARYLAND,
SLAVERY, THE PREAMBLE, AND THE
SWEEPING CLAUSE

THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF *MCCULLOCH V. MARYLAND*. By David S. Schwartz.*
Oxford University Press. 2019. Pp. 328. \$34.95 (Cloth).

*John Mikhail*¹

INTRODUCTION

“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.”² This famous passage in *McCulloch v. Maryland* can be read in at least two different ways. On a narrow reading, the ends in question are Congress’s enumerated powers, and the means to which the passage refers are whatever incidental powers are given by the first half of the Necessary and Proper Clause (the “foregoing powers” provision) to carry those enumerated powers into execution.³ On a broad reading, these ends also include the six great objects of the Constitution stated in the Preamble, and

* Foley & Lardner Bascom Professor of Law, University of Wisconsin Law School.

1. Carroll Professor of Jurisprudence, Georgetown University Law Center. I wish to thank Jonathan Gienapp, Mark Killenbeck, Sanford Levinson, Maeva Marcus, James Oakes, Farah Peterson, Richard Primus, David Schwartz, Lawrence Solum, and William Treanor for their helpful conversations and encouragement. An early draft of some of these ideas was presented at a “Con Law Schmooze” held at the University of Wisconsin Law School, and a previous version of this essay appeared in an online symposium on *The Spirit of the Constitution*. See John Mikhail, *McCulloch, Slavery, and the Sweeping Clause*, BALKINIZATION (November 25, 2019), <https://balkin.blogspot.com/2019/11/mcculloch-fisher-and-sweeping-clause.html>.

2. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

3. See U.S. CONST., art. 1, §8 (“Congress shall have power To make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . .”).

the means to achieve these purposes include all of the express and implied powers to which the second half of the Necessary and Proper Clause (the “all other powers” provision, also known as “the Sweeping Clause”) refers.⁴

Modern courts and scholars have generally adopted the narrow reading. All of the opinions in *NFIB v. Sebelius*, for example, limit their attention to the foregoing powers provision and its connection to enumerated powers when considering the scope of the Necessary and Proper Clause.⁵ None of the Justices contemplates a broader use of *McCulloch*’s central holding, according to which the individual mandate could be justified simply as a necessary and proper means to promote the common good or general welfare of the United States. Likewise, most of Marshall’s leading biographers and commentators—for example, Beveridge, White, Smith, Newmeyer, Killenbeck, and Ellis—presuppose a narrow reading of the “Let the end be legitimate” passage.⁶ When discussing this passage and the ends “within the scope of the constitution” to which Marshall refers, none of these scholars pauses to consider whether these ends include the objects enumerated in the Preamble.

David Schwartz is a welcome exception to this pattern. In his fascinating new book, *The Spirit of the Constitution*, Schwartz highlights the fundamental ambiguity of the “let the end be legitimate” passage, in the course of making clear just how evasive and unsatisfying Marshall’s entire opinion in *McCulloch* really is. Most scholars recognize that Marshall’s text supports different and, at times, incompatible readings of implied powers, some

4. *Id.* (“Congress shall have power To make all laws which shall be necessary and proper for carrying into execution . . . all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”). On the distinction between the “foregoing powers” and “all other powers” provisions of the Necessary and Proper Clause, see generally John Mikhail, *The Necessary and Proper Clauses*, 102 *GEO. L. J.* 1045 (2014).

5. See, e.g., *NFIB v. Sebelius*, 567 U.S. 519, 537, 558–61 (2012) (Roberts, C.J.); *id.* at 599, 618–22 (Ginsburg, J.); *id.* at 653–55 (Scalia, Kennedy, Thomas, and Alito, JJ.); *id.* at 707–08 (Thomas, J.).

6. See, e.g., ALBERT J. BEVERIDGE, 4 *THE LIFE OF JOHN MARSHALL* 301 (1919); RICHARD E. ELLIS, *AGGRESSIVE NATIONALISM: MCCULLOCH V. MARYLAND AND THE FOUNDATION OF FEDERAL AUTHORITY IN THE YOUNG REPUBLIC* 98–99 (2007); MARK R. KILLENBECK, *MCCULLOCH V. MARYLAND: SECURING A NATION* 118–20 (2006); R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* 296–97 (2001); JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* 440–45 (1996); G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE*, 1815–35 at 542, 548–50 (1988).

breathtakingly wide and others cautiously narrow. With unrivaled depth, sophistication, and attention to detail, Schwartz hammers home this point like never before. Along the way, he places certain nationalist readings of *McCulloch* that have been ignored or minimized more squarely on the table, including two that are especially noteworthy: the early Federalist theory of implied powers rooted in the Preamble and Sweeping Clause, and a narrower, but still robust, conception of “implied commerce powers” given by the Commerce Clause and the foregoing powers provision.

Schwartz focuses most of his attention on implied commerce powers (pp. 5–6, 22–23, 29–30). His treatment of this subject, and of Marshall’s ambivalence about taking full advantage of the power to pass all necessary and proper laws for regulating interstate commerce, is simply masterful. Schwartz’s careful analysis of the many subtle lines of constitutional argument flowing from *McCulloch* through *Gibbons*,⁷ *Miln*,⁸ *Cooley*,⁹ *Dewitt*,¹⁰ and the *Legal Tender Cases*,¹¹ along with the rest of the nineteenth-century commerce power canon (pp. 24–58, 59–83, 87–110, 142–55), is likewise brilliant and penetrating, and it has taught me a great deal that I did not know or fully appreciate about these cases. The same is true of his dazzling discussion of how implied commerce powers fared in the *Lochner*, New Deal, and Civil Rights eras, along with “the Long Conservative Court” led by Chief Justices Rehnquist and Roberts (pp. 177–93, 194–212, 213–36, 237–47). Finally, as if that weren’t enough, Schwartz also supplies a fresh new perspective on *McCulloch*’s relationship to the enforcement provisions of the Reconstruction Amendments (pp. 124–41, 230–36). All this makes the book invaluable reading for constitutional scholars, particularly those of us tasked with teaching *McCulloch* and its progeny to law students.

Although Schwartz’s focus on implied commerce powers makes sense from a modern doctrinal perspective, at the end of the day I am unconvinced that these powers, grounded in the Commerce Clause and the foregoing powers provision, are the best lens through which to understand the historical significance

7. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

8. *New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837).

9. *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299 (1852).

10. *United States v. Dewitt*, 76 U.S. (9 Wall.) 41 (1869).

11. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870).

of *McCulloch*. Arguably, a better framework is the other nationalist argument implicated by the “let the end be legitimate” passage—the original theory of implied powers, grounded in the Preamble and Sweeping Clause, which received perhaps its most significant early expression in congressional debates over slavery and the First Bank of the United States. The implied commerce powers story begins primarily in 1824 with *Gibbons*, and as Schwartz so helpfully recounts, it eventually comes to dominate the Supreme Court’s implied powers jurisprudence in cases like *Darby*,¹² *Wrightwood Dairy*,¹³ *Heart of Atlanta*,¹⁴ and *Raich*¹⁵ (pp. 217–23, 232–34, 242–47). *McCulloch* itself, however, is arguably not an enumerated powers/foregoing powers provision case at all. Rather, it is better understood as a case in which Marshall kept alive the older Federalist theory of implied powers, rooted primarily in the Preamble and the Sweeping Clause’s reference to “all other powers vested by this Constitution in the Government of the United States,”¹⁶ while nonetheless shrouding that theory in a certain amount of strategic ambiguity, and generally signaling that the Court would not permit implied powers to be used to threaten slavery.

To see why this alternative reading of *McCulloch* seems plausible, it helps to recall some key facts about Marshall and the historical background to his analysis of implied powers in that case. At least five key episodes in Marshall’s life stand out in this regard, all of which help to illuminate and reinforce Schwartz’s thesis that Marshall’s embrace of implied powers in *McCulloch* was more cautious than is commonly recognized. These episodes help to explain why Schwartz seems essentially correct to conclude that *McCulloch* “offered something to both nationalists and moderate Jeffersonian Republicans” in 1819 and “is simply too ambiguous to mandate a particular result in most contested cases about congressional power” today (pp. 58, 253). In what follows, I discuss each of these events in turn, before drawing some overarching lessons from Marshall’s encounters with implied powers before *McCulloch*.

-
12. *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).
 13. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942).
 14. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).
 15. *Gonzales v. Raich*, 545 U.S. 1 (2005).
 16. U.S. CONST., art. 1, §8.

RATIFICATION

A useful starting point is the Virginia ratifying convention, which Marshall attended as a delegate from Henrico County. Much could be said about how Virginians felt threatened by implied powers and how that fear manifested itself at this convention. For our purposes, the most important point to recognize about this topic is that, along with Edmund Randolph, George Nicholas, James Madison, and Francis Corbin, Marshall was a member of the five-member committee that drew up the “Form of Ratification” with which the Virginia convention adopted the Constitution. According to this carefully worded document, the convention declared that:

the powers granted under the Constitution being derived from the people of the United States may be resumed by them whensoever the same shall be perverted to their injury or oppression and that every power not granted thereby remains with them and at their will: that therefore no right of any denomination can be cancelled abridged restrained or modified by the Congress by the Senate or House of Representatives acting in any Capacity by the President or any Department or Officer of the United States except in those instances in which power is given by the Constitution for those purposes.¹⁷

The most pertinent fact about this convoluted language is that it implies that all of the powers delegated by the Constitution are vested directly in Congress, the President, or other Departments or Officers of the United States. The likely purpose of this enumeration was to counteract the dangerous provision of the Sweeping Clause that had caused Randolph and George Mason so much anxiety in Philadelphia and had prevented them and Elbridge Gerry from signing the Constitution in the first place: namely, its reference to “other powers” vested in the Government of the United States itself, over and above the powers vested in Congress or other Departments or Officers of the federal government. By liquidating the troubling ambiguity of this clause, Randolph informed the convention, the “Form of Ratification” would enable Virginians to consider “every exercise

17. The Virginia Form of Ratification (June 26, 1788), *reprinted in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1546 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler & Charles H. Schoenleber eds., 1993) (hereafter “DHRC”). On the composition of the committee that produced this document, see *id.* at 1541.

of a power not expressly delegated”¹⁸ by the Constitution to be a violation of its terms. Laying the predicate for what eventually became the compact theory of the Constitution, Nicholas went further and explained that Randolph’s idea would justify a contractual understanding of ratification:

Mr. Nicholas contended that the language of the proposed ratification would secure everything which Gentlemen desired, as it declared that all the powers vested in the Constitution were derived from the people, and might be resumed by them whensoever they should be perverted to their injury and oppression; and that every power not granted thereby, remained at their will, no danger whatever could arise. For says he, these expressions will become part of the contract. The Constitution cannot be binding on Virginia, but with these conditions. If thirteen individuals are about to make a contract, and one agrees to it, but at the same time declares that he understands its meaning, signification, and intent, to be, what the words of the contract plainly and obviously denote; that it is not to be construed so as to impose any supplementary condition upon him, and that he is to be exonerated from it, whensoever any such imposition shall be attempted—I ask whether in this case, these conditions on which he assented to it, would not be binding on the other twelve? In like manner these conditions will be binding on Congress. They can exercise no power that is not *expressly* granted to them.¹⁹

The implied power that Randolph, Nicholas, and other Virginians feared most, of course, was the power to abolish slavery. Despite Randolph’s and Madison’s protests to the contrary, Mason and Patrick Henry had made abundantly clear during the Virginia convention that the Constitution as it was actually written and plausibly interpreted did not adequately guard against this perceived danger. The same realization and felt need to protect slavery against the threat of implied powers had led the South Carolina convention to adopt the Constitution on the understanding that “no Section or paragraph of the said Constitution warrants a Construction that the states do not retain every power not *expressly* relinquished by them and vested in the General Government of the Union.”²⁰ Virginia’s “Form of

18. Speech of Edmund Randolph (June 21, 1788), reprinted in 10 DHRC, *supra* note 17.

19. Speech of George Nicholas (June 24, 1788), reprinted in 10 DHRC, *supra* note 17. (emphasis added).

20. Amendments Proposed by the South Carolina Convention (May 23, 1788),

Ratification” was superficially different than, but functionally equivalent to, South Carolina’s stipulation, since it, too, effectively declared that the federal government consisted of only expressly delegated powers.

AMENDMENTS

Like most insiders who played a leading role at the Virginia convention, Marshall presumably knew all of this. He also knew what happened next: although Virginia and South Carolina ratified the Constitution with these stipulations, their respective efforts to amend the Constitution in the First Congress to codify these limits on implied government powers were spectacular failures. South Carolina’s effort was explicit and direct: to add the word “expressly” to the future Tenth Amendment so that, like the Articles of Confederation, the Constitution would declare that all powers not “expressly delegated” to the United States were reserved to the States.²¹ Led by Madison, Virginia’s primary strategy was subtle and indirect: to oppose adding the red-flag word “expressly,” but to incorporate the essence of Virginia’s Form of Ratification into the text of the Constitution, so that the Constitution would first affirm that all powers delegated by it are given directly to Congress or other Departments or Officers of the United States, and thereafter declare that “the powers not delegated by the Constitution . . . are reserved to the States.”²² Madison’s clever attempt to limit implied powers in this two-step fashion without using the controversial “expressly delegated” formula was defeated when the prefatory language to his new seventh Article, which declared that all of the powers granted by the Constitution “are appropriated to the departments to which

reprinted in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 15* (1991) (Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Bickford eds., 1991) (hereafter “*South Carolina Amendments*”) (emphasis added).

21. See Articles of Confederation of 1781, art. II (“Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”); *South Carolina Amendments*, *supra* note 20. Limiting Congress to expressly delegated powers in order to protect slavery was a clear and consistent objective of South Carolina politicians during this period. See Mikhail, *supra* note 4, at 1064, 1092–96, 1129; John Mikhail, *Fixing Implied Constitutional Powers in the Founding Era*, 34 *CONST. COMMENT.* 507, 508–09, 515–17 (2019).

22. *Amendment X: Reservation of Powers Clause*, in *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* 663 (Neil H. Cogan ed., 1997) (Proposal by Madison in the House of Representatives, June 8, 1789).

they are respectively distributed,” was first revised in committee and then struck altogether.²³ Later, two Connecticut delegates, Roger Sherman and Oliver Ellsworth, each inserted a version of the phrase “to the [Government of the] United States” after “delegated by the Constitution” in Madison’s original proposal.²⁴ Their likely purpose in doing so was to preserve the implied national and corporate powers delegated by the Constitution to the United States.

At this point in time, Sherman, Ellsworth, and most of the other Federalists in the First Congress probably agreed with James Wilson that, for many purposes, the United States should be considered “one undivided, independent nation,”²⁵ which possessed all of the powers of any other nation; with John Jay, who observed that the Constitution vested the federal government “with sufficient powers for all general and national purposes;”²⁶ and with Madison himself, who candidly admitted when he proposed his amendments that, because of the Sweeping Clause, the Government of the United States possessed the implied power to achieve “every purpose for which the Government was established.”²⁷ Unlike Madison, however, Wilson, Jay, Sherman, Ellsworth, and other Northern Federalists were not obsessed by the prospect of abolition or other regulations of domestic slavery. Most of them understood that the Constitution vested the United States with implied national and corporate powers, and they wanted to preserve the full extent of those powers in order to ensure that the Constitution would endure and could adapt to what Marshall would later call “the various *crises* of human affairs.”²⁸

23. *Id.* at 663–64.

24. *Id.* at 666 (recording Sherman’s motion in the House to add “to the United States” after “delegated” to the language of Madison’s original proposal); *id.* at 668 (noting Ellsworth’s instruction to do likewise in the Senate). For further discussion of this drafting history, see John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implication, and Implied Powers*, 101 VA. L. REV. 1063, 1090–91 (2015).

25. James Wilson, *Considerations on the Bank of North America*, in 1 COLLECTED WORKS OF JAMES WILSON 60, 66 (Kermit L. Hall & Mark David Hall eds., 2007).

26. THE FEDERALIST NO. 3, at 13 (John Jay) (Jacob E. Cooke ed., 1961).

27. The Congressional Register (June 8, 1789), in CREATING THE BILL OF RIGHTS, *supra* note 20, at 82 (statement of Mr. Madison).

28. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

ABOLITION

Despite his admiration for Alexander Hamilton, Marshall was not a “High” Federalist, but a Virginia Federalist—a “defensive nationalist,” in Schwartz’s apt characterization, rather than an “aggressive” one (pp. 7, 16–23).²⁹ Like virtually all elite Virginians whose wealth rested on human bondage, Marshall probably did not believe, or at any rate would not countenance the idea, that Congress could abolish slavery.³⁰ Nonetheless, Marshall was keenly aware of what one might call the “slavery syllogism” that lurked just below the surface of any full-throated appeal to implied government powers, whether rooted in the Preamble and Sweeping Clause (and perhaps also the General Welfare Clause) or, alternatively, as necessary incidents to the United States’ status as a sovereign nation or legal corporation. Stripped down to its essentials, that argument ran as follows:

- (1) Congress may choose any appropriate means to fulfill any legitimate constitutional end.
- (2) The purposes listed in the Preamble and General Welfare Clause are legitimate constitutional ends.
- (3) Therefore, Congress can pass laws to promote the general welfare.
- (4) If Congress can pass laws to promote the general welfare, then it can abolish slavery.

The particular appeal to the general welfare in this argument was common at the founding, but non-essential, because a similar argument could be, and sometimes was, framed using other constitutional ends, such as providing for the common defense or securing the blessings of liberty. Regardless, the standard Southern rebuttal to this argument was pointed and forceful:

- (5) Congress cannot abolish slavery.

29. As Schwartz notes, the “aggressive nationalism” thesis is the prevailing interpretation of Marshall, the label for which derives from Richard Ellis. See ELLIS, *supra* note 6.

30. Until recently, Marshall’s extensive slaveholding and its likely impact on his jurisprudence had not received much attention from scholars. Fortunately, Paul Finkelman has now rectified this notable omission. See PAUL FINKELMAN, *SUPREME INJUSTICE: SLAVERY IN THE NATION’S HIGHEST COURT* (2018). For further discussion, see Charles F. Hobson, Book Review, 43 J. SUP. CT. HIST. 363 (2018); Michael S. Lewis, *Confronting a Monument: The Great Chief Justice in an Age of Historical Reckoning*, 17 U.N.H.L. REV. 315 (2019).

- (6) Therefore, Congress may not pass laws to promote the general welfare.
- (7) Therefore, Congress may not choose any appropriate means to fulfill any legitimate constitutional end.

Throughout the early Republic, most of Virginia’s leading constitutionalists—Madison, Jefferson, Randolph, Tucker, Roane, Taylor, and others—were relentlessly alert to the argument laid out in (1)–(4) and fiercely committed to its refutation in (5)–(7). They wanted (5) to be apodictic, but at least some of them knew deep down that it was not even true, at least on a natural and plausible reading of the Constitution. Madison and Randolph, for example, knew that the chief draftsmen of the Constitution—James Wilson and Gouverneur Morris—embraced (1)–(2), drafted the Preamble and Sweeping Clause to reinforce the ability of the government to fulfill its purposes, and did not oppose the conclusions that followed in (3)–(4). For example, they knew that Morris swore in Philadelphia that he “never would concur in upholding domestic slavery,”³¹ and that Wilson told the Pennsylvania ratifying convention that Congress would soon “have power to exterminate slavery from within our borders”³² so that “the rights of mankind will be acknowledged and established throughout the union.”³³

When Patrick Henry invoked the slavery syllogism in order to defeat the Constitution at the Virginia ratifying convention, Randolph and Madison were alarmed and tried to persuade the convention that Henry was mistaken. Their arguments, however, were weak and ineffective. For example, Randolph argued that a prohibition on abolition could be inferred directly from the Fugitive Slave Clause,³⁴ and Madison resorted to quibbling over whether abolition would, in fact, promote the general welfare.³⁵ Madison then retreated further by shifting gears and asking why

31. Speech of Gouverneur Morris (August 8, 1787), in 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 221 (Max Farrand ed., 1911) (hereafter *FARRAND’S RECORDS*).

32. James Wilson, *Remarks in the Pennsylvania Convention to Ratify the Constitution of the United States, 1787* (Dec. 4, 1787), in 1 *COLLECTED WORKS OF JAMES WILSON*, *supra* note 25, at 241.

33. *Id.*

34. Speech of Edmund Randolph, *Convention Debates* (June 24, 1788), in 10 *DHRC*, *supra* note 17, at 1483–84.

35. Speech of James Madison, *Convention Debates* (June 24, 1788), in 10 *DHRC*, *supra* note 17, at 1503.

northern congressmen would even contemplate measures that would strip slaveholders of their property and “alienate the affections of, five-thirteenths of the Union.”³⁶ “Why was nothing of this sort aimed at before?” Madison asked. “I believe such an idea never entered into any American breast.”³⁷

Northern breasts felt differently about slavery, of course, as Madison and other Virginians quickly discovered, even if they did not fully realize it before. In February 1790, only a few months after Madison’s failed attempt to restrict implied government powers by incorporating the crux of Virginia’s Form of Ratification into the text of the Constitution, a series of antislavery petitions were presented to the First Congress by Quakers in New York and Pennsylvania and by the Pennsylvania Abolition Society (PAS). The last and most far-reaching of these memorials, submitted by the PAS and signed by Benjamin Franklin, drew upon the slavery syllogism and the government’s implied power to “promot[e] the Welfare & secur[e] the blessings of liberty to the people of the United States”³⁸ to call for the abolition of slavery.

Marshall does not discuss Franklin’s dramatic use of this Preamble-based argument or any other aspect of the 1790 abolition petitions in his five-volume biography of George Washington, despite devoting many pages to other legislative proceedings taking place at that time.³⁹ Likewise, there do not appear to be any references to these events in Marshall’s collected papers.⁴⁰ It seems inconceivable that Marshall was not aware of Franklin’s explosive appeal to the slavery syllogism in the First Congress, however, and plausible to assume that it influenced his attitudes toward the implied powers of the United States. Schwartz briefly discusses Franklin’s abolition petition, but he

36. *Id.*

37. *Id.*

38. 2 ANNALS OF CONG. 1197 (1834). Notably, the petition appealed to a mixture of ideological sources, including natural rights, Christianity, and “the political creed of Americans” (i.e., the Declaration of Independence), as well as the Constitution, in calling on Congress to “countenance the restoration of liberty to these unhappy men, who alone, in this land of freedom, are degraded into perpetual bondage” and “step to the very verge of the power vested in you for discouraging every species of traffic in the persons of our fellow-men.” *Id.* at 1198.

39. See generally JOHN MARSHALL, 4 THE LIFE OF GEORGE WASHINGTON, 264–403 (Philadelphia, C.P. Wayne 1805) (hereafter, MARSHALL, LIFE OF WASHINGTON).

40. See generally THE PAPERS OF JOHN MARSHALL (Herbert A. Johnson, Charles T. Cullen & Charles Hobson eds., 1974–2006) (12 Volumes).

does so exclusively in the context of the commerce power (pp. 35–36). The Preamble and Sweeping Clause, however, are a more revealing lens through which to consider this petition and its potential impact on Marshall.

THE BANK

In the course of writing his *Life of Washington*, Marshall became intimately familiar not only with the opinions on the bank written by Jefferson, Randolph, and Hamilton, to which he had special access, but also with the public debates over the bank in the First Congress, including the broad appeals to implied powers made by its main advocates, such as Fisher Ames, Elias Boudinot, Elbridge Gerry, John Lawrence, Theodore Sedgwick, William L. Smith, and John Vining (all of whom Marshall lists by name in his biography).⁴¹ As his carefully worded summary of these debates in *Life of Washington* makes clear, Marshall understood that a key difference between opponents of the bank like Madison, on the one hand, and its leading supporters, on the other, was the precise part of the Necessary and Proper Clause on which they focused their attention. According to Marshall, Madison and his allies emphasized the foregoing powers provision and its connection to the “specified” powers of Congress.⁴² By contrast, the bank’s supporters focused primarily on the Sweeping Clause and its reference to “the powers vested in the government [of the United States].”⁴³ They also argued that “incidental as well as

41. MARSHALL, *LIFE OF WASHINGTON*, *supra* note 39, at 295. Because Bushrod Washington gave Marshall access to George Washington’s papers to write this biography, Marshall was one of the few early Americans acquainted with the bank opinions by Jefferson, Randolph, and Hamilton. In fact, his discussion of these opinions was apparently “the first account of these important documents to appear in print.” SMITH, *supra* note 6, at 635. For the same reason, it seems likely that Marshall was familiar with the Committee of Detail and Committee of Style drafts of the Constitution that remained in George Washington’s possession after the convention. Commentators have generally overlooked this fact when considering Marshall’s approach to interpreting the Constitution, but it probably had a significant impact on him and may even have influenced his judicial opinions. Indeed, there are some passages of the latter that bear a striking resemblance to parts of these earlier drafts. Compare, e.g., Committee of Detail Draft, in 2 FARRAND’S RECORDS, *supra* note 31, at 177 (“The Government shall consist of supreme legislative, executive, and judicial powers. The legislative power shall be vested in a Congress . . .”), with McCulloch, *supra* note 2, at 412 (“A Government is created by the people, having legislative, executive and judicial powers. Its legislative powers are vested in a Congress . . .”).

42. MARSHALL, *supra* note 39, at 295.

43. *Id.* at 296.

express powers must necessarily belong to every government.”⁴⁴

Marshall’s summary of these floor debates is accurate and revealing as far as it goes, but it leaves much to be desired. In fact, a surprising number of Hamilton’s allies in Congress relied upon the Preamble to justify the power to charter a national bank. For example, in one particularly important argument, from which Hamilton—and also Marshall—may have later drawn, Ames maintained that Congress was authorized to promote “the end[s] for which the constitution was adopted.”⁴⁵ Ames then elaborated this principle by explaining that the powers delegated to the United States should be construed to promote “the good of society, and the ends for which the government was adopted, without impairing the rights of any man, or the powers of any State.”⁴⁶ Likewise, several members of Congress relied upon the Constitution’s reference to “other powers” vested in the United States or upon the government’s implied national or corporate powers more generally. Furthermore, the vote in the House on the bank bill (39–20) was lopsided and sectional: 34 out of 35 members from the eight states above the Mason-Dixon Line voted in favor of the bill, while 19 out of 24 members from the five Southern states (including every delegate from Virginia) voted against it.⁴⁷ Marshall could have made all of this clear, but he did not—and neither does Schwartz in his short summary of these debates (pp. 39–40). Nevertheless, all of these facts, and Marshall’s apparent decision to avoid discussing them in his *Life of Washington*, seem critical to understanding his attitudes to implied powers and what he intended his opinion in *McCulloch* to accomplish.

UNITED STATES V. FISHER

Consider, finally, Marshall’s first Necessary and Proper Clause case, *United States v. Fisher* (1805), which Schwartz discusses briefly in several chapters of *The Spirit of the Constitution* (pp. 11, 26, 165). The main constitutional question in this case was whether Congress could assign the United States an

44. *Id.*

45. Speech of Fisher Ames (February 3, 1791), in 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, MARCH 4, 1789–MARCH 3, 1791, at 393 (William C. diGiacomantonio et al. eds., 1995).

46. *Id.*

47. See generally 2 ANNALS OF CONG., *supra* note 38, at 1960.

absolute priority over the States and all other creditors in bankruptcy proceedings. Arguing that it could not, one of Fisher's lawyers, Jared Ingersoll, asked:

Under what clause of the constitution is such a power given to congress? Is it under the general power to make all laws necessary and proper for carrying into execution the particular powers specified? If so, where is the necessity or where is the propriety of such a provision, and to the exercise of what other power is it necessary?⁴⁸

Responding to this challenge on behalf of the federal government, the United States Attorney, Alexander Dallas replied:

Congress have duties and powers expressly given, and a right to make all laws necessary to enable them to perform those duties, and to exercise those powers. They have a power to borrow money, and it is their duty to provide for its payment. For this purpose, they must raise a revenue, and, to protect that revenue from frauds, a power is necessary to claim a priority of payment.⁴⁹

In sum, Dallas presented the Court with a narrow foundation for upholding the law based upon the enumerated power to borrow money, along with a second reason, rooted in the "duty" of Congress to repay the national debt. Notably, Marshall declined to accept Dallas' first offer. Instead, he seized upon Dallas' second idea, reformulated it, and upheld the law on this broader basis.

Marshall's legal analysis unfolded in four main steps. First, he explained that law at issue was grounded in the legislative authority given to Congress by the Necessary and Proper Clause, which, unlike both Ingersoll and Dallas, Marshall paraphrased in its broadest possible terms by invoking the Sweeping Clause rather than the narrower language of the foregoing powers provision:

It is claimed under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the constitution in the government of the United States, or in any department or officer thereof.⁵⁰

48. *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 379 (1805).

49. *Id.* at 384.

50. *Id.* at 396.

Second, Marshall supplied a gloss on this language that rejected both tenets of the standard Jeffersonian construction of the foregoing powers provision that Ingersoll had tacitly invoked: “indispensably necessary” means and “specified” ends. Instead of this unduly restrictive formula, Marshall offered a more flexible characterization of the government’s implied powers:

In construing this clause [i.e., the Sweeping Clause] it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary because the end might be obtained by other means. Congress must possess the choice of means and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution.⁵¹

In considering this passage, many commentators, including Schwartz (p. 26), focus on the first part of Marshall’s formula, correctly noting that it anticipates his influential argument in *McCulloch* that “necessary” does not mean “absolutely” or “indispensably” necessary, but something more akin to “conducive to.”⁵² Equally important and perhaps more so, however, is the fact that Marshall quietly restated and enlarged the scope of powers or “ends” carried into effect by the Sweeping Clause. According to Marshall, these need not be “specified” powers. Instead, they must be powers “granted by the constitution.”

Third, drawing upon this more flexible formula, Marshall clarified that the power carried into effect by the Sweeping Clause in *Fisher* was not an enumerated power at all, but rather the government’s implied power to pay the debts of the United States. Marshall wrote:

The government is to pay the debt of the union, and must be authorized to use the means which appear to itself most eligible to effect that object. It has consequently a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe.⁵³

Finally, Marshall responded to the objection that recognizing

51. *Id.*

52. *See, e.g.,* BEVERIDGE, *supra* note 6, at 163; SMITH, *supra* note 6, at 349.

53. *Fisher*, 6 U.S. at 396.

an absolute preference for the United States against all other creditors was an unjustified assertion of a royal prerogative that would unfairly interfere with state sovereignty and analogous state laws by pointing to the Supremacy Clause:

This claim of priority on the part of the United States will, it has been said, interfere with the right of the state sovereignties respecting the dignity of debts, and will defeat the measures they have a right to adopt to secure themselves against delinquencies on the part of their own revenue officers.

But this is an objection to the constitution itself. The mischief suggested, so far as it can really happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of congress extends.⁵⁴

Although most commentators have focused their attention on other matters, the most significant step in Marshall's analysis is arguably the third one. The main lesson it teaches us is that the Sweeping Clause can be used to carry into effect implied powers as well as enumerated ones. Among other things, *Fisher* stands for the proposition that Congress can choose any appropriate means to pay the national debt, not just laws that carry into effect the enumerated power to levy taxes. Because of the nature of the power in question, *Fisher* also reveals that the implied powers encompassed by the Sweeping Clause can include robust substantive powers, which extend beyond even the prerogatives of the British crown.⁵⁵ As such, *Fisher* not only conflicts with the conventional modern interpretation of the General Welfare Clause in cases such as *United States v. Butler*.⁵⁶ It also serves as a striking counterexample to the most recent enumerationist account of the Necessary and Proper Clause, the so-called "great powers" theory, which limits Congress to the incidental authority to carry into effect the enumerated powers and "does not license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated."⁵⁷

54. *Id.* at 396–97.

55. *See, e.g., id.* at 370–73, 378–80; *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 420.

56. *See United States v. Butler*, 297 U.S. 1, 64 (1936) (Roberts, J.) (explaining that the "true construction" of the General Welfare Clause "undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare").

57. *NFIB v. Sebelius*, 567 U.S. 519, 559 (2012) (Roberts, C.J.).

Madison first popularized this enumerationist reading of the Necessary and Proper Clause in his arguments against the first Bank of the United States, which he later reinforced in his celebrated Report of 1800 and his presidential veto of the bonus bill in 1817.⁵⁸ Chief Justice Chase advanced a similar doctrine in *Hepburn v. Griswold*⁵⁹ and the *Legal Tender Cases*,⁶⁰ as did Chief Justice Roberts in *Sebelius*. Yet this cramped understanding of implied powers is at variance with the theory of implied powers deployed by Marshall in *Fisher*. Unlike Madison, Chase, and Roberts, Marshall does not assume in *Fisher* that the Sweeping Clause is limited to executing “express powers” or “powers enumerated in the Constitution.” Nor does he utilize the “great powers” theory on which he is alleged to have relied in *McCulloch*. On the contrary, Marshall’s opinion in *Fisher* illustrates why those conceptions of implied powers are too limited.

CONCLUSION

What lessons should one draw from Marshall’s encounters with implied powers before *McCulloch*? Opinions will vary, but my own view is that they support Schwartz’s thesis that *McCulloch*’s embrace of implied powers was deliberately ambiguous. Marshall could have written: “Let the *power* be legitimate, let it be *enumerated* in the Constitution, and all means which are appropriate, which are plainly adapted to that *power*, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” That is essentially how John Taylor conveniently suggested the “let the end be legitimate” passage should be interpreted in *Construction Construed and Constitutions Vindicated*, explaining: “By ‘ends’ the court seems to understand expressed powers, and by ‘means’ the execution of those expressed powers.”⁶¹ Conversely, Marshall could have made clear that crucial phrases in his *McCulloch* decision such as “[ends] within the scope of the Constitution” or “objects

58. See James Madison, *The Report of 1800*, in 17 THE PAPERS OF JAMES MADISON 303, 303–51 (David B. Mattern et al. eds., 1991); James Madison, *Veto Message* (March 3, 1817), in 2 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 569, 569–70 (James D. Richardson ed., 1897).

59. 75 U.S. 603 (1870).

60. 79 U.S. 457 (1871).

61. JOHN TAYLOR, *CONSTRUCTION CONSTRUED AND CONSTITUTIONS VINDICATED* 176 (Richmon, Shepherd & Pollard 1820).

entrusted to the government” were meant to include the ends or objects of the Constitution declared in the Preamble and the General Welfare Clause. As Schwartz reminds us (p. 55), that is evidently what William Pinkney invited the Court to do when he quoted the Preamble in the most soaring moment of his famous oral argument in *McCulloch*—an argument Joseph Story later described as the greatest speech he had ever heard.⁶²

The fact that Marshall did neither of these things, but rather crafted this passage and other key parts of his opinion in a strategically ambiguous fashion, makes *McCulloch* fun to teach, easy to cite, but, in the final analysis, an uncertain basis on which to resolve our deepest questions about implied powers. In a delightful twist, Schwartz concludes his marvelously detailed study of “the 200-year Odyssey of *McCulloch v. Maryland*” by encouraging us to spend *less* time with *McCulloch* and more time with the founding-era precedent of which it was “merely a pale echo”—Hamilton’s opinion in support of the first Bank of the United States (p. 254). I am inclined to agree with Schwartz about this, but I would extend his point even further. Ultimately, *Fisher* and the earliest debates over ratification, amendments, abolition, and the Bank of the United States may also be a more appropriate means for clarifying how the Preamble and Sweeping Clause were originally understood.

62. See 1 LIFE AND LETTERS OF JOSEPH STORY, 325 (William W. Story ed., Boston, Charles C. Little & James Brown 1851) (“Mr. Pinkney rose on Monday to conclude the argument; he spoke all that day and yesterday, and will probably conclude today. I never, in my whole life, heard a greater speech . . . His language, his style, his figures, his arguments, were most brilliant and sparkling . . . All the cobwebs of sophistry and metaphysics about State rights and State sovereignty he brushed away with a mighty besom.”).