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Coin, Currency, and Constitution: Reconsidering the National Bank Precedent

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COIN, CURRENCY, AND CONSTITUTION: RECONSIDERING THE NATIONAL BANK PRECEDENT

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RECONSTRUCTING THE NATIONAL BANK CONTROVERSY: POLITICS AND LAW IN THE EARLY AMERICAN REPUBLIC. By *Eric Lomazoff*. Chicago and London: University of Chicago Press. 2018. Pp. x, 171. Cloth, $90; paper, $30.

INTRODUCTION

The constitutional debates surrounding the First and Second Banks of the United States generated the first major precedents regarding the scope of federal legislative powers. Their importance continues to resonate today, informing both practical questions like Congress's power to impose an individual health insurance mandate or structure a "Green New Deal," and theoretical questions such as the viability of the ideology of limited enumerated powers or the validity of originalism as an interpretive approach to constitutional questions.[1]

The 1791 debate over the First Bank—Alexander Hamilton's brainchild and a key element of his plan for national economic development—was the first episode to test the meaning and limits of implied federal powers under the Constitution's Necessary and Proper Clause. Three decades later, in 1819, the constitutional challenge to the Second Bank gave rise to Chief Justice Marshall's famous decision in *McCulloch v. Maryland*,[2] the Supreme Court's most significant early pronouncement on the scope of federal powers. The Bank controversy persisted as one of the most salient constitutional issues in American politics until it was eclipsed by the growing slavery controversy in the late 1840s.

Surprising as it may seem, no scholar prior to 2018 gave this fifty-five-year constitutional debate a full monograph-length treatment. Detailed stud-

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1. *See* David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573 (2017) (identifying "enumerationism" as an ideology).

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

ies of the National Bank debates were subsumed into biographies,[3] *longue durée* economic histories,[4] general political histories,[5] or Andrew Jackson studies.[6] Two book-length studies of the *McCulloch* litigation limited their discussion of post-1819 developments to epilogue-type treatment.[7]

Eric Lomazoff's[8] important new book, *Reconstructing the National Bank Controversy: Politics and Law in the Early American Republic*, is the first scholarly study that views the Bank controversy as a continuous fifty-five-year sequence of events. The Controversy encompassed at least six salient episodes in U.S. constitutional history, most of which Lomazoff covers in some detail. The great debate over Hamilton's original bank proposal was the first major episode (Chapter One), followed by the failed effort to renew the First Bank's charter in 1811 (Chapter Four). Then came Madison's call for a new national bank in late 1814, culminating in the charter of the Second Bank (Chapter Five). The *McCulloch* decision in 1819 qualifies as the fourth episode due to the importance of Marshall's opinion in the constitutional canon (Chapter Six). The fifth was the 1832 debate to renew the Second Bank's charter, ending with Andrew Jackson's famous veto of the Bank bill (pp. 146–55). Although far less famous, the sixth episode comprised President John Tyler's vetoes of two bills to charter a Third Bank in 1841 (pp. 159–60). After that, the prospect of rechartering a national bank was effectively dead, but related disputes about an implied federal power over the nation's currency continued for another ninety years, through the Legal Tender controversies between 1871 and 1884[9] to the Gold Clause Cases of 1935.[10]

Reconstructing the National Bank Controversy weaves together two strands of scholarship that have long been entirely separate. Past legal studies of the First and Second Banks have focused on the constitutional questions of implied powers and the Necessary and Proper Clause, without extensive

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3. *See, e.g.*, RON CHERNOW, ALEXANDER HAMILTON (2004); THOMAS PAYNE GOVAN, NICHOLAS BIDDLE: NATIONALIST AND PUBLIC BANKER, 1786–1844 (1959); JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON (Skyhorse Pub'g 2015) (1857).

4. *See, e.g.*, BRAY HAMMOND, BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR (1957); JAMES WILLARD HURST, A LEGAL HISTORY OF MONEY IN THE UNITED STATES, 1774–1970 (1973).

5. *See, e.g.*, DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848 (2007); STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM (1993).

6. *See, e.g.*, JON MEACHAM, AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE (2008); ROBERT V. REMINI, ANDREW JACKSON AND THE BANK WAR (1967).

7. RICHARD E. ELLIS, AGGRESSIVE NATIONALISM: *MCCULLOCH V. MARYLAND* AND THE FOUNDATION OF FEDERAL AUTHORITY IN THE YOUNG REPUBLIC 193–218 (2007); MARK R. KILLENBECK, *M'CULLOCH V. MARYLAND*: SECURING A NATION 159–90 (2006).

8. Associate Professor of Political Science, Villanova University.

9. Juilliard v. Greenman, 110 U.S. 421 (1884); Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871).

10. Norman v. Balt. & Ohio R.R. Co., 294 U.S. 240 (1935); Perry v. United States, 294 U.S. 330 (1935).

reference to the Bank's role in regulating national currency in the early U.S. economy. That latter issue has been the province of economic historians, whose interest in constitutional history and development has been glancing at best. By showing how the issues of banking and monetary policy shaped constitutional arguments, Lomazoff puts the constitutional and economic studies in conversation.

Lomazoff therefore fills a significant gap in the scholarship of American legal history and constitutional development. He meticulously documents how the First Bank gradually evolved from federal financier to national currency regulator, demonstrating that this shift in function became a crucial element in subsequent constitutional debates. While supporters of the First Bank based its constitutionality on Congress's broad implied powers to conduct its fiscal operations and to promote foreign and domestic commerce, Lomazoff shows that a broad Madisonian consensus, formed in 1816, held that chartering the Second Bank was constitutional because of a general federal power to regulate the nation's currency. Although Lomazoff at times overemphasizes the role of the Coinage Clause in this transformation, his book nevertheless powerfully demonstrates the ways in which political and economic circumstances shape constitutional arguments as much as, if not more than, the other way around. *Reconstructing the National Bank Controversy* strongly supports arguments that constitutional meaning is an evolutionary process, inconsistent with the premises of originalism, and that the doctrine of limited enumerated powers almost always gives way, in the end, to demands for national policy solutions.

I. THE RISE AND FALL OF THE FIRST BANK

A. *Hamilton's Bank*

Lomazoff begins with the 1791 Bank Debate in Congress. Supporters of the Bank relied on the now-established interpretation of the Necessary and Proper Clause as broadly permissive of implied powers (p. 19). Their opponents, Lomazoff argues, offered three versions of a narrow construction of the Necessary and Proper Clause. The first was the familiar Jeffersonian "strict" or "absolute" necessity test identified and rejected by Marshall in *McCulloch* (pp. 19–20). Second, some Bank opponents argued that a law could not be a necessary and proper means to implement a federal power if there were "one or more viable alternatives" to congressional action more congenial to states' rights (p. 20). This argument would eventually seize on the increasing existence of state-chartered banks as a state-friendly alternative to a national bank (Chapter Two). A third argument held that "necessary and proper" laws had to conform to usual or customary governmental practice, whereas a national bank was not, according to the Bank's opponents, the customary means of government tax collection or borrowing (p. 20). Lomazoff concludes that these opposition arguments were put forward in a fashion that "could be readily characterized as haphazard" (p. 27). His account thus aligns with Richard Primus's startling recent discovery that

Bank opponents jumped willy-nilly onto a bandwagon of constitutional objections only after James Madison concocted his own constitutional objections, hoping to block the Bank bill at the eleventh hour.[11]

Lomazoff at times suggests, somewhat self-contradictorily, that the three arguments were combined into systematic two- or three-part "tests" in which each element had to be met (pp. 20, 25–26). But a better reading of the debates, in my view, is that the various arguments were offered as alternatives or fallbacks. And Lomazoff's account would have been more complete had he included Madison's argument against the Bank, that a "great and important power" must be express and cannot be implied.[12] This "great powers" argument was a poor one as a matter of doctrine and logic, as it leaves the criterion for "greatness" utterly indeterminate and fails to make sense of constitutional precedents for implied powers as great as chartering a bank.[13] Significantly, it was not adopted by Madison's congressional allies. But it is an important argument if for no other reason than its association with Madison, and it has cropped up from time to time in implied powers controversies.[14]

B. *"Banco Mania" and the End of the First Bank*

After discussing the 1791 Bank Debate, Lomazoff's next three chapters trace major changes in the banking industry that created the primary context for the defeat of the First Bank recharter bill in 1811. Banking, as part of a nationwide financial system, was not well understood in 1791. When the First Bank was chartered, there were only three other banks in the entire United States, so experience with banks was limited (pp. 24, 36). Policymakers were unsure whether any major city or region could sustain more than one bank; competition was assumed to be a zero-sum game that would necessarily result in one bank driving its competitors out of existence by acquiring a critical mass of the other banks' notes and draining them of their specie reserves (p. 37). And banks were assumed to be Federalist institutions, favoring established coastal merchants over emerging entrepreneurs.[15]

During the First Bank's twenty-year charter, all that changed. States got into the game of "Banco mania," so that by 1811 there were some 100 state-chartered banks; Jeffersonians realized that state banks could serve the inter-

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11. Richard Primus, *"The Essential Characteristic": Enumerated Powers and the Bank of the United States*, 117 MICH. L. REV. 415, 445–54 (2018).

12. 2 ANNALS OF CONG. 1956 (1791).

13. *See* Schwartz, *supra* note 1, at 612–20.

14. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 534–35 (2012); Andrew Jackson, Veto Message (July 10, 1832), *in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139 (James D. Richardson ed., 1897) [hereinafter MPP]. For a discussion of how Jackson used the Madisonian argument in the Bank Veto Message, see David S. Schwartz, *Defying* McCulloch*? Jackson's Bank Veto Reconsidered*, 72 ARK. L. REV. 129 (2019).

15. *See* p. 37; David S. Schwartz, *Misreading* McCulloch v. Maryland, 18 U. PA. J. CONST. L. 1, 36 (2015).

ests of Republican business entrepreneurs; and experience now showed that competing banks could coexist in the same city or region (pp. 41–44, 47). Moreover, a nationwide banking system came into focus as it came to be understood that the First Bank could play a national-currency-regulating role. Because it accepted state banknotes and deposit credits in payment of federal taxes, the First Bank became the creditor of the state banks. Then, by demanding redemption of state banknotes in specie, the First Bank could drain (or could threaten to drain) the state banks' gold and silver reserves. This threat restrained the state banks' ability to issue commercial credit in the form of paper banknotes, whose total amounts had to bear some fixed relationship to the banks' specie reserves, thus allowing the National Bank to control state bank lending and the national money supply.[16]

As a result of these changed circumstances, Lomazoff shows, the constitutional arguments over the renewal of the First Bank's charter also changed. It is well known that charter renewal in 1811 was a closely divided question, the First Bank having made many enemies among the state bank constituency. Renewal failed by one vote in the House and in a tie-breaking vote in the Senate cast by Vice President George Clinton.[17] The conventional account maintains that the 1811 debates merely rehashed the 1791 arguments,[18] but Lomazoff shows that these debates were "more than a constitutional rerun" (p. 69). The dominant Republican Party membership could now argue that the First Bank failed one of their narrow tests for a necessary and proper law: the Bank was no longer "necessary" because the national government's fiscal operations could adequately be handled by the more than 100 state-chartered banks (pp. 76–79).

II. THE RISE AND FALL OF THE SECOND BANK

A. *The Currency Crisis of 1814–1816*

Lomazoff's argument culminates with the charter of the Second Bank of the United States, which was the legislative response to a national currency crisis following the War of 1812. Without the regulatory impact of the defunct First Bank, the number of state banks exploded to well over 200. Lomazoff puts the number at as many as 212 state banks by 1816 (p. 143), though it is worth nothing that leading policymakers at the time gave estimates as high as 260 to 300 state banks, with a proportional increase in capital and banknote circulation.[19] This profusion of paper money was highly inflation-

16. Pp. 51–63; HAMMOND, *supra* note 4, at 188–89, 198–99.

17. HAMMOND, *supra* note 4, at 210.

18. *See id.* at 214, 233.

19. John C. Calhoun, Speech of Feb. 26, 1816, *in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 630, 631 (M. St. Clair Clarke & D.A. Hall eds., 1832) [hereinafter LDH] (claiming 260 state banks, with "a capital" increasing from $400,000 to $80 million); Henry Clay, Speech of Mar. 9, 1816, *in* LDH, *supra* at 669, 670–71 (claiming "about three hundred" state banks). Albert Gallatin, Madison's erstwhile treasury secretary,

ary: it outpaced the volume of economic transactions, which were severely restricted by the war's damage to the nation's export and domestic coasting trade. Moreover, the British raids on Washington and Baltimore in August 1814 touched off a run on the banks, leading to a near-nationwide suspension of specie payments as state banks refused to redeem their notes in gold and silver coin (p. 96, Chapter Five). This suspension allowed the banks to reap windfall profits, but, for reasons Lomazoff explains, it also created massive disuniformity in the value of their banknotes: a dollar in circulating banknotes might be valued at anywhere from par to seventy-five cents (pp. 228–29). The Treasury had to accept discounted state banknotes in payment of taxes and had to pay U.S. military personnel in depreciated paper. Meanwhile, the federal government was reduced to financing the war by negotiating loans piecemeal with numerous smaller state banks on various terms, and in various locations, if the loans could be obtained at all (pp. 99–103). The War of 1812 thus created a government borrowing crisis and a national currency crisis, which led the Madison Administration to call for a new national bank. The borrowing crisis ended with the war, but the currency crisis did not, and Republican leaders by late 1815 viewed the Bank as the best remedy for nationwide currency disuniformity perpetuated by out-of-control state banks (p. 104).

B. *The Discovery of a National Currency Power*

As I read the relevant history, the 1816 constitutional arguments in support of chartering the Second Bank were at once more and less nationalistic than the Hamiltonian implied-powers argument that Marshall eventually adopted in *McCulloch*. For Hamilton in 1791, and Marshall in 1819, the Bank came within the expansive parameters of the Necessary and Proper Clause, which allowed Congress to select those means that were "conducive" or "plainly adapted" to exercising a granted power.[20] But in 1816, the Second Bank's supporters asserted a "paper money power," which could be grounded in three constitutional sources, "either alone or in combination: (1) a liberal construction of the Coinage Clause; (2) the Commerce Clause, since a uniform currency would facilitate interstate trade; or (3) an inherent or implied sovereign power to determine the nature of the nation's currency."[21] Option two was a nonstarter because implied commerce powers were anathema to Jefferson, Madison, and their followers.[22] That left options one and

estimated that state banks' capital had increased from $28 million to $68 million from 1811 to 1816. *See* HAMMOND, *supra* note 4, at 227.

20. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 417–18, 421 (1819); *see* Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1791), *in* 8 THE PAPERS OF ALEXANDER HAMILTON 97, 103–05 (Harold C. Syrett ed., 1965).

21. Schwartz, *supra* note 15, at 43.

22. *See* David S. Schwartz, *An Error and an Evil: The Strange History of Implied Commerce Powers*, 68 AM. U. L. REV. 927, 940–63 (2019).

three, which might have been palatable to Madisonians because they suggested that the Bank's constitutionality was contingent on the temporary currency crisis rather than a permanent feature of federal power. At the same time, the argument had a nationalistic edge because it seemed to acknowledge a broad power to regulate the nation's paper currency, which was inconsistent with a strict construction of the Coinage Clause.[23]

Lomazoff enriches and complicates this account by offering a different take on why Madisonians would accept the Bank's constitutionality. The Coinage Clause argument, even cast as a broad currency power, seemingly allowed Republican Bank supporters to downplay or deny reliance on a free-floating Hamiltonian interpretation of the Necessary and Proper Clause (p. 119). Here, Lomazoff draws an important constitutional distinction between "fiscal" and "monetary" powers. The national government's "fiscal powers" include collecting, depositing, and disbursing tax revenues, and perhaps borrowing, whereas its "monetary powers" comprise regulating the nation's currency (p. 97). The First Bank was grounded constitutionally on the argument that a bank conducting the government's "fiscal" operations (and its promotion of commerce) was justifiable only on a broad interpretation of the Necessary and Proper Clause, whereas "monetary powers" could be pegged specifically to the Coinage Clause.[24] Lomazoff argues: "We cannot understand the textual basis for the Bank's revival without acknowledging both the difference between fiscal and monetary policy *and* (just as importantly) the Republican regime's willingness to leverage that distinction for the sake of internal peace" (p. 98).

C. *Was There a "Compromise of 1816"?*

The "internal peace" refers to what Lomazoff claims was a "Compromise of 1816" between the nationalist and the strict-constructionist or "Old" Republicans within Madison's party (p. 97). Lomazoff argues that the Coinage Clause formula for the constitutionality of the Second Bank was a "novel constitutional argument . . . rooted in the desire of [Treasury Secretary Alexander] Dallas and other nationalist Republicans to win crucial support for their proposal *without* forcing party members with lingering anxieties over federal power to implicitly sanction a host of future lawmaking" under a broad view of implied powers (p. 112). Lomazoff claims that the nationalist Republicans' argument that a general currency power flowed directly from

23. *See* Schwartz, *supra* note 15, at 42–46.

24. *See* pp. 97–98. Bank supporters in 1791 also argued that the Bank was necessary and proper to regulate—that is, to promote—commerce, because the First Bank was expected to generate commercial credit. *See* Alexander Hamilton, *Final Version of the Second Report on the Further Provision Necessary for Establishing Public Credit (Report on a National Bank)* (Dec. 13, 1790), *in* 7 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 20, at 305, 305–10; HAMMOND, *supra* note 4, at 139. But this argument does not feature in Lomazoff's account.

the Coinage Clause represented a "carefully wrought constitutional compromise" that pacified "intracoalition tensions over federal power."[25]

Here, I think, Lomazoff pushes his argument a bit too far. He is surely right that Madisonians gravitated toward a constitutional argument based on the government's general power over the national currency, which relied in part on the Coinage Clause. But the evidence does not support his claim that there was either a "compromise" or a "carefully wrought" strategy to rely exclusively on the Coinage Clause so as to avoid reliance on the Necessary and Proper Clause. I say this for two reasons.

First, if Lomazoff means to suggest that there was an intentional effort by Bank supporters to win votes through the careful selection of a constitutionally moderate argument—either as the product of an actual deal between factions of Madison's Republican Party, or as a preemptive effort to assuage constitutional doubts—such a claim remains speculative. In support of this interesting hypothesis, Lomazoff points only to the ostensibly moderate Coinage Clause argument itself as circumstantial evidence that "[l]eading regime figures *responded*" to intracoalition worries about expansive federal powers by turning to the power to coin money.[26] But Lomazoff doesn't present direct evidence of an objection and response. It is equally plausible that the Coinage Clause argument was not a compromise view at all, but rather the most credible constitutional gloss on a broad and ephemeral consensus: the problem to be solved was the currency crisis, and the best way to solve it was by chartering the Second Bank. Further research would be needed to demonstrate that a compromise took place, by showing that leading nationalist Republicans either moderated their preferred arguments in the face of opposition or preemptively shaped their arguments to win votes. Was any member of Congress persuaded by the Coinage Clause argument to vote for the Bank? In the present state of research, all we know is that both support for and opposition to the Bank was bipartisan. The more than sixty "no" votes in the House and twelve in the Senate came from a coalition of Federalists who wanted to deny a policy win to the Republican majority and "Old Republican" strict constructionists seeking to promote the interest of state-chartered banks within their districts.[27] It is not clear that a compromise was either needed or possible.[28]

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25. *See* p. 123.

26. P. 119 (emphasis added).

27. HAMMOND, *supra* note 4, at 240.

28. *Id.* at 233, 239–40. Moreover, identifying a compromise requires a detailed analysis of the factions within the Republican Party, which consisted of more than nationalists and "Old Republicans." Mark Graber, the leading expert on antebellum party alignments in constitutional politics, explains that there were at least three groups of Republicans likely to support the Bank: "Jeffersonians who became reconciled to commercial policies by 1815, former Adams Federalists who increasingly saw the Democratic-Republican party as the better vehicle for their nationalistic and political ambitions, and westerners who were eager to gain national support for an extensive program of internal improvements." *See* Mark A. Graber, *Federalist or*

Second, even if Lomazoff's claim of a "compromise of 1816" refers only to the fact that Bank supporters articulated a middle-ground argument between Hamiltonian nationalism and states' rights strict constructionism, the Coinage Clause does not appear to have been "the textual anchor" for that argument (p. 97). Lomazoff finds evidence of a Coinage Clause textual anchor in speeches and writings of six individuals: President Madison and Treasury Secretary Dallas; Representatives Henry Clay and John C. Calhoun; and Senators William Bibb and William Wells. I believe Lomazoff misreads these materials.

Henry Clay's lengthy remarks on the constitutionality of the Bank bill placed primary reliance not on the Coinage Clause but on the Necessary and Proper Clause. Clay had opposed recharter of the First Bank in 1811, arguing that the Bank was not "necessary" under the Necessary and Proper Clause because state banks were adequate to supply the national government's borrowing and fiscal needs—its "treasury operations."[29] But circumstances in 1816 were different, Clay now explained, because the Second Bank was proposed as a remedy for the currency crisis. State banks were now effectively "emitting the actual currency of the United States" and thus "in fact exercising what had been considered at all times and in all countries, one of the highest attributes of sovereignty—the regulation of the current medium of the country."[30] Moreover, the state banks "were no longer competent to assist the treasury, in either of the great operations of collection, deposit, or distribution of the public revenues."[31] Thus, for Clay, the Second Bank was necessary and proper for both its fiscal and its monetary functions. The Necessary and Proper Clause, Clay explained, "vests in Congress all powers necessary to give effect to the enumerated powers; all that may be necessary to put into motion and activity the machine of government which it constructs."[32] Clay purported to be agnostic about the constitutional test of necessity: "With regard to the degree of necessity, various rules have been, at different times[] laid down; but, perhaps, at last, there is no other than a sound and honest judgment exercised, under the checks and control which belong to the constitution and to the people."[33] A new national bank was "not only necessary, but indispensably necessary" to remedy the currency crisis.[34] Thus, to the extent that Clay felt it important to address the constitutional concerns of Bank opponents or fence-sitters, he did so by suggesting

Friends of Adams: The Marshall Court and Party Politics, 12 STUD. AM. POL. DEV. 229, 232 (1998).

29. Clay, *supra* note 19, at 670. Lomazoff calls it "the first great flip-flop in American politics." P. 115. Flip-flop it no doubt was, but in calling it the "first," Lomazoff buys into the views of apologists who explain away Madison's slightly earlier, equally great bank flip-flop.

30. Clay, *supra* note 19, at 671.

31. *Id.*

32. *Id.* at 670 (emphasis omitted).

33. *Id.* (emphasis omitted).

34. *Id.* at 671.

that the Bank bill would not necessarily set a precedent undermining the narrow "indispensable necessity" interpretation of the Necessary and Proper Clause.

Only after making this Necessary and Proper Clause argument—one not expressly tethered to any specific enumerated power—did Clay turn to "other provisions of the constitution, but little noticed . . . in Congress in 1811" that would support the Bank bill.[35] Here Clay referred to the Coinage Clause, not as a "textual anchor," but in conjunction with the Article I, Section 10 restrictions of the states' monetary powers. *These provisions together* raised "the plain *inference* . . . that the subject of the general currency was intended to be submitted exclusively to the General Government."[36] Thus, even Clay's Coinage Clause argument relied on implied powers rather than avoiding them. If there was a coordinated compromise strategy—or even a widely shared intuition—to rely exclusively or primarily on the Coinage Clause and eschew the Necessary and Proper Clause, it would be strange that Clay, who was Speaker of the House in 1816, should have wandered so far off message.

The same can be said about Georgia Senator William Bibb, the chair of the Senate committee that reported out the Bank bill. Bibb did not mention the Coinage Clause, but rather spoke in terms of a broad power to "regulat[e] . . . the general currency of the country," which was a necessary and proper means for "the attainment of [the Constitution's] great objects."[37] These "leading objects which produced the Constitution" were "[t]o enable the Government to fulfill its engagements to the public creditors, to restore confidence among the citizens of the country in regard to pecuniary transactions, to prevent anything but gold and silver from being a legal tender, [and] to maintain the obligation of contracts."[38] Bibb's only reference to coinage was an allusion to the Constitution's prohibition on states issuing paper money.[39]

Even the arguments that expressly relied on the Coinage Clause were alloyed by the suggestion that Congress had an implied general currency power extending to paper money. Treasury Secretary Dallas, in his December 6, 1815 report to Congress, referred collectively to "the power to coin money," the prohibition against states "to emit bills of credit," and the national government's *implied* "constitutional authority to emit bills of credit."[40] Based on these provisions *together*, "[t]he constitutional and legal foundation of the monetary system of the United States[] is thus distinctly seen; and the power

35. *Id.*

36. *Id.* at 671–72 (emphasis added).

37. William Bibb, Summary of Speech of Mar. 22, 1816, *in* LDH, *supra* note 19, at 685, 685.

38. *Id.*

39. *Id.*; U.S. CONST. art. I, § 10 ("No State shall . . . make any Thing but gold and silver Coin a Tender in Payment of Debts.").

40. Alexander Dallas, Proposition of Mr. Dallas, Relating to the National Circulating Medium, Dec. 6, 1815, *in* LDH, *supra* note 19, at 609, 610.

of the Federal Government to institute and regulate it . . . must . . . be deemed an exclusive power."[41]

John C. Calhoun, who chaired the House Committee that reported the Bank bill, came closest to a Coinage Clause–anchored argument when he introduced the bill in a February 26, 1816 floor speech. The Constitution gave Congress the power "in express terms, to regulate the currency of the United States," he argued.[42] Yet he seemed to be aware that this was a stretch; he also cited the prohibition on state-issued bills of credit and referred broadly to "the principles of the federal constitution" by which "the money of the United States was intended to be placed entirely under the control of Congress."[43] He ultimately concluded that "[t]he right of making money" is "an attribute of sovereign power" as opposed to a clause-bound delegation.[44]

Lomazoff also relies on a speech by William Wells, a Federalist senator from Delaware, who *opposed* the Bank bill and appears to have strategically characterized the Republican position as based on a direct application of the Coinage Clause (p. 116). Wells's point that the Coinage Clause could not be read as an express grant of a power to create a national bank is undoubtedly correct, but as evidence of what the Republicans were arguing, it should be taken with a grain of salt. I have found only one other speech by a Republican Bank supporter that arguably relies solely or primarily on the Coinage Clause, that of Virginia Senator James Barbour, which Lomazoff does not cite.[45]

President Madison, arguably the leading constitutional thinker of his age, might well have been expected to make the Coinage Clause argument if he believed it offered a viable constitutional compromise position. Instead, he remained coy about the constitutional basis for the Bank. In vetoing an earlier bank bill in January 1815 on policy grounds (primarily because the proposed bank was not required to make loans to the government), Madison famously "waiv[ed] the question" of Congress's constitutional authority to charter a bank.[46] Constitutional objections were "precluded . . . by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation."[47] This was a blatant dodge. Even the nationalist John

41. *Id.*

42. John C. Calhoun, Summary of Speech of Feb. 26, 1816, *in* LDH, *supra* note 19, at 630, 631.

43. *Id.*

44. *Id.* at 632.

45. Yet even Barbour describes "the power of regulating the coin" as "this great attribute of sovereignty" which should not "be surrendered by this Government to the authority of the State Legislatures." James Barbour, Summary of Speech of Mar. 22, 1816, *in* LDH, *supra* note 19, at 687, 689.

46. James Madison, Veto Message (Jan. 30, 1815), *in* 2 MPP, *supra* note 14, at 540, 540.

47. *Id.*

Marshall conceded in *McCulloch* that a history of legislative and executive acceptance of the Bank could not, by itself, constitutionalize "a bold and daring usurpation" of power by Congress.[48] There had to be some underlying constitutional basis for the Bank—Madison simply declined to say what he thought it was.

More tellingly, in his December 1815 annual message, Madison stated that "a national bank will merit consideration" if state banks proved unable to provide sound paper money during the "temporary" "absence of the precious metals."[49] (That condition had already been met—the next day, Dallas's Treasury report asserted that state banks had indeed failed in that respect.[50]) Madison asserted further that restoring "the benefits of an uniform national currency" was "essential" to the soundness of "the receipts and expenditures of a permanent peace establishment."[51] To Madison, it seems, a national bank charter was an implied power twice removed: a desirable means of exercising the *implied* power over currency. This is no Coinage Clause argument, but a vague hint that a currency power was necessary and proper to the taxing and spending powers.[52]

We can only speculate as to why Madison refused to commit himself to any argument for the constitutionality of a new national bank. Perhaps he recognized that the Coinage Clause did not credibly authorize the creation of a bank without either an extremely liberal construction or a recognition of a broad implied power. It is likely that neither option sat well with him and that he preferred to leave it to his treasury secretary and congressional leaders to cobble together some sort of constitutional justification. Cobble together they did, and the result was a muddle of the Coinage Clause, the monetary clauses together, the Necessary and Proper Clause, and an implied power of sovereignty.

The Coinage Clause thus did make a significant appearance in the 1816 constitutional arguments about the Bank, but it was less a textual "anchor" than a textual "hook." The distinction is important. It is one thing to argue that a currency power is expressly granted by (or even implied from) the Coinage Clause (the "anchor"), and quite another to argue that the Coinage Clause suggests the existence of a related but broader power than minting and valuing coins (the "hook"), particularly when the suggestion pulls in other textual provisions.

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48. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819).

49. James Madison, Seventh Annual Message (Dec. 5, 1815), *in* 2 MPP, *supra* note 14, at 547, 550–51.

50. Dallas, *supra* note 40, at 610–12.

51. Madison, *supra* note 49, at 550.

52. In his final annual message, on December 3, 1816, Madison referred again to an "exclusive[]" constitutional power vested in Congress "of creating and regulating a currency" "of equal value, credit, and use wherever it may circulate." James Madison, Eighth Annual Message (Dec. 3, 1816), *in* 2 MPP, *supra* note 14, at 558, 563–64. The Bank was "an important auxiliary" to that power. *Id.* at 564. Once again, Madison failed to reference the Coinage Clause—or any constitutional text, for that matter.

To his credit, Lomazoff has not cherry-picked his evidence. He quotes most of the language I have cited above, and our disagreement is one of interpretation. Where Lomazoff errs, in my view, is to treat references to an implied general currency power as though they were references to the Coinage Clause. By treating the two as the same, Lomazoff assumes what he is trying to prove.

My disagreement with Lomazoff's finding of a "Compromise of 1816" is more than a quibble, but it does not detract from the great value of his larger insight. By 1816, a Madisonian consensus had emerged that the Second Bank was constitutional as a means to regulate the nation's currency. That consensus grew out of a combination of the First Bank's currency-regulating function, the postwar currency crisis, and the Madisonian antipathy to broad implied powers (pp. 51–63). To be sure, the connection between the Bank and currency regulation requires application of an implied power—the Bank was a means to that end—and a general currency power itself was not expressly delegated by the Constitution. Nevertheless, Madisonians for the most part downplayed or ignored the logically necessary reliance on the Necessary and Proper Clause. What Lomazoff makes clear is that of the few Madisonian leaders who went on record in the 1816 debates, most (with the notable exception of Clay) refrained from relying on the Hamiltonian arguments of 1791 and 1811 that would be embraced three years later in *McCulloch*. Constitutional scholars have indeed largely ignored the different arguments advanced in 1816 in support of the Second Bank. Lomazoff's insight is thus a major contribution to scholarship on the Bank controversy even without demonstrating that the consensus was the product of a conscious historical moment of "compromise."

D. *A "Compromise of 1830"?*

In a chapter entitled "A Tale of Two Clauses," Lomazoff discusses how both the Coinage and Necessary and Proper Clauses were in play during the "Bank War" of Jackson's presidency (p. 140). The Bank debates during Andrew Jackson's first presidential term may offer a more promising basis to argue that the Coinage Clause argument held some significant purchase.

Although Jackson's actions against the Bank really began with his veto of the Second Bank recharter bill in 1832,[53] Jackson threw down a rhetorical gauntlet in his first annual message in December 1829. There he announced his reservations about legislation to renew the Second Bank's charter, which was due to expire in 1836. "Both the constitutionality and the expediency of the law creating this bank are well questioned by a large portion of our fellow-citizens," Jackson asserted, "and it must be admitted by all that it has

53. Following the famous Bank veto, Jackson dismantled the Second Bank by withdrawing the federal treasury deposits from it before its charter expired in 1836. *See* HOWE, *supra* note 5, at 411.

failed in the great end of establishing a uniform and sound currency."[54] This statement prompted the House Ways and Means Committee, under the chairmanship of George McDuffie of South Carolina, to issue a report in April 1830 strongly reaffirming the constitutionality of the Bank even though five of the Committee's seven members—including McDuffie—were Jacksonian Democrats.[55] The report first argued that legislative and judicial precedent, which the Founding Fathers assented to and erstwhile partisan opponents later agreed to, conclusively settled the constitutional question.[56] But, it continued, even "viewing the constitutionality of the bank as an original question, the arguments in its favor are, at least, as strong as those against it."[57] First and foremost among these arguments was that "the Bank of the United States is a 'necessary and proper,' or, in other words, a natural and appropriate means of executing" the federal government's taxing, spending, and borrowing powers.[58]

The McDuffie Report kept this discussion relatively brief, "as this view of the question has been fully unfolded in former discussions, familiar to the House," and then turned "to another of the powers of the Federal Government, but slightly adverted to in former discussions of the subject."[59] Here, the report gave the Coinage Clause argument a much fuller development than it had received in 1816. Because "bank notes could only be maintained in circulation by being the true representative of the precious metals" (i.e., fully redeemable for specie), it followed that " 'Coin' was regarded, at the period of framing the constitution, as synonymous with 'currency.' "[60] Therefore, the Coinage Clause "was evidently intended to invest Congress with the power of regulating the circulating medium."[61] Further, "[n]o principle of sound construction will justify a rigid adherence to the letter, in opposition to the plain intention of the clause."[62] The report then argued that the Coinage Clause was analogous to the power "to establish post roads."[63] "[C]an it be doubted," the report asked, "that Congress has the power to establish a canal or a river, as a post route . . . ?"[64] But even if it were conceded that the

54. Andrew Jackson, First Annual Message (Dec. 8, 1829), *in* 3 MPP, *supra* note 14, at 1005, 1025.

55. P. 148; George McDuffie, Report of the Committee of Ways and Means, Apr. 13, 1830, *in* LDH, *supra* note 19, at 735, 735–41. The McDuffie Report presents a remarkably accurate, bipartisan account of the Bank controversy to that time and is essential reading for any student of the subject.

56. McDuffie, *supra* note 55, at 735–38.

57. *Id.* at 738.

58. *Id.* at 739.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

Coinage Clause "does not, in its terms, give Congress the power of regulating" paper money, "the power of regulating any substituted currency . . . [may] be fairly claimed as an incidental power—as an essential means of carrying into effect the plain intention" of the Coinage Clause.[65]

In contrast to the sparse and vague references to the Coinage Clause in 1816, the McDuffie Report articulated a clear and specific argument for sustaining the Second Bank's constitutionality under the Coinage Clause alone. In laying out a menu of arguments for the Bank's constitutionality, the McDuffie Report might be an acknowledgement that at least some Jacksonian congressmen wanted a purportedly clause-bound option to vote for the Second Bank recharter. I do not mean to say that there probably was a compromise of 1830, but only that the circumstantial evidence for such a compromise seems stronger at that time than in 1816. To prove such a compromise, it would still be important to look for corroborating evidence in congressional voting behavior or elsewhere.

Whether or not there was a constitutional compromise, Jackson felt the need to shut down the Coinage Clause argument in his 1832 Bank Veto Message. Jackson observed that "[i]t is maintained by some that the bank is a means of executing the constitutional power 'to coin money and regulate the value thereof.' "[66] Jackson, though, construed this clause as permitting Congress to "establish[] a mint" and to regulate the value of coin, "the only currency known to the Constitution," and expressed doubt that Congress has "other power to regulate the currency."[67] Jackson (or, perhaps more accurately, his ghostwriter, the future Chief Justice Roger Taney) was unwilling to accept the idea that the Coinage Clause could authorize a national bank in light of the Necessary and Proper Clause, which he treated as a limitation on the enumerated powers.[68] Even assuming a currency-regulating power could be implied from the Coinage Clause, delegating that power to a private corporation was "neither necessary nor proper."[69]

III. RETHINKING *MCCULLOCH V. MARYLAND*

Lomazoff's thesis that a Madisonian consensus rested the Second Bank's constitutionality on a general federal currency power requires constitutional scholars to rethink the historical understanding of *McCulloch v. Maryland*.[70] As Lomazoff points out, *McCulloch* did not mention the Coinage Clause or a general currency power as a basis for sustaining the constitutionality of the Bank (pp. 122–23). Why not?

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65. *Id.* at 740.

66. Jackson, *supra* note 14, at 1149.

67. *Id.*

68. R.R. SHERMAN, THE U.S. SUPREME COURT: THE FIRST HUNDRED YEARS ch. 7 (2003).

69. *Id.* Lomazoff suggests that this argument in Jackson's Bank veto may be a forerunner of the nondelegation doctrine that would emerge in the twentieth century. P. 5.

70. 17 U.S. (4 Wheat.) 316 (1819).

The Coinage Clause and the problem of currency regulation received passing mention in the *McCulloch* oral arguments.[71] (It was not entirely overlooked, as Lomazoff seems to suggest (pp. 127–28).) William Pinkney, the Bank's lead counsel and a representative for Maryland who in 1816 had voted for the Bank bill,[72] listed the power "to coin money, and regulate *the circulating medium*" when ticking off a long list of enumerated powers.[73] The Coinage Clause, of course, refers to regulating the value "of current coin," whereas "circulating medium" is a broader term encompassing paper money or banknotes. This is the only suggestion in the *McCulloch* oral argument that Congress had the power to charter a bank under the Coinage Clause. Daniel Webster, also representing the Bank, argued that a national bank was justified as an implied commerce power for "the regulation of the actual currency, as being a part of the trade and exchange between the States."[74] On the other side, Walter Jones argued that the Coinage Clause suggested an implied "power of establishing a mint," but not a bank.[75] Joseph Hopkinson argued that state banks were adequate to the task of creating "a circulating cur-currency" which, he suggested further, was a power reserved to the states.[76]

None of these points were expressly acknowledged in *McCulloch*. Marshall famously avoided identifying any enumerated power as the constitutional source of the implied power to charter a bank. Instead, he upheld the Bank as "a convenient, a useful, and essential instrument" in conducting the national government's "fiscal operations."[77] Marshall made two elliptical references to the postwar currency crisis and the Madisonian Republican change of heart. At the outset, Marshall observed that the financial "embarrassments" following the rejection of the First Bank's recharter "convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law."[78] At the end of his analysis of the Second Bank's constitutionality, Marshall observed that "statesmen of the first class, whose previous opinions against [the Bank] had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation."[79] Modern readers would probably miss the fact, which Lomazoff's book makes clear, that "embarrassments"

71. 17 U.S. at 385–86.

72. Vote of Mar. 14, 1816, *in* LDH, *supra* note 19, at 681, 681–82.

73. *McCulloch*, 17 U.S. at 381–82 (emphasis added). Pinkney also folded a suggested federal "authority to coin money, and to guard the purity of the circulating medium" under the Counterfeiting Clause. *Id.* at 385.

74. *Id.* at 325 (argument of Webster).

75. *Id.* at 365 (argument of Jones).

76. *Id.* at 333 (argument of Hopkinson); *see also id.* at 337 (referencing the historical ability of states to charter "trading association[s]" to "make a currency and trade on [their] credit, raising capitals for individuals").

77. *Id.* at 422.

78. *Id.* at 402.

79. *Id.* at 422–23.

and "exigencies" were the borrowing and currency crises of 1814–1816, and that "statesmen" were primarily the great bank flip-floppers Madison and Clay. In making these observations, Marshall was merely pointing out that a political consensus supported the Bank, rather than adopting the consensus reasoning about a federal currency power.

Why Marshall did not adopt that Madisonian consensus reasoning remains a matter of further scholarly inquiry, as Lomazoff rightly observes (p. 139). Here, Lomazoff concludes that we can say little more than that the Court adopted a "departmentalist" stance, asserting its right to decide the constitutional question independently of the political debate.[80] Lomazoff's point about departmentalism is an insightful one, but there is more we can say, albeit speculatively, about Marshall's motivation.

One possibility is that Marshall did not want to get drawn into accepting the argument that the Bank's constitutionality depended on the existence of an ephemeral crisis. Madison's December 1815 annual message calling on Congress to enact a bank bill seemed to suggest such a view. Although Marshall argued that the Constitution had to be interpreted flexibly to adapt to "crises of human affairs,"[81] he likely believed in Hamilton's view that "[t]he expediency of exercising a particular power, at a particular time, must indeed depend on circumstances; but the constitutional right of exercising it must be uniform and invariable—the same today as tomorrow."[82]

Lomazoff's argument implies a second possibility: ignoring the Coinage Clause was part and parcel of Marshall's willful refusal to link the Bank's constitutional foundation to any specific enumerated powers. The motivation for Marshall's refusal remains ambiguous. On the one hand, Marshall may have believed that naming specific enumerated powers would unduly limit federal powers. *McCulloch* can be read—and perhaps is better read—as implicitly endorsing a view that the federal government has implied powers that need not be subordinate to specific enumerated powers.[83] Here it is

80. Pp. 128–38. Much of Lomazoff's discussion at this point addresses an intramural debate within political science between "partisan," "attitudinal," and "legal" models of judicial behavior. Pp. 135–38. I find this discussion, though interesting, to be less illuminating than the rest of Lomazoff's account, because it is based on two assumptions I have already questioned. First, I am not convinced that the Madison Administration relied narrowly on the Coinage Clause rather than on a broader and more amorphous currency-regulating power. Second, I see no evidence that the Madison Administration was offering the currency-power argument as more than a constitutional gloss on an ephemeral policy matter—no evidence that it wanted this particular constitutional understanding about the Bank cemented permanently into constitutional law. Based on this second assumption, Lomazoff takes it as given that the administration of Madison's successor, Monroe, should have had a litigation position before the Supreme Court in *McCulloch*, that the Bank's lawyers would represent that position, and that the Marshall Court would be sensitive to it. But none of these are givens.

81. *McCulloch*, 17 U.S. at 410 (emphasis omitted).

82. Hamilton, *supra* note 20, at 102.

83. *See* DAVID S. SCHWARTZ, THE SPIRIT OF THE CONSTITUTION ch. 3 (2019); John Mikhail, *McCulloch*'s Strategic Ambiguity: The View from *Fisher* (Nov. 2018) (unpublished manuscript) (on file with the *Michigan Law Review*). This reading of *McCulloch* aligns Marshall's

worth noting that Marshall did not list the Coinage Clause, or even a general currency power, among "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."[84] And if, as Lomazoff contends, Madisonian Republicans viewed the fiscal-powers justification for the Bank as necessarily based on an undesirably broad interpretation of the Necessary and Proper Clause, then Marshall's choice to rely on "fiscal operations" rather than the Coinage Clause or monetary powers may have been meant as a nationalist finger in the eye of moderate Republicans.

Conversely, Marshall may have wanted to avoid the Coinage Clause argument because he saw it as inextricably intertwined with an implied sovereign power to regulate the nation's currency—a view that may also explain Madison's reticence about it. Marshall might have disagreed with such a view (doubtful), or he might have thought such a view lacked sufficient consensus to justify embracing it as a constitutional principle (more likely).[85] Or there may have been disagreement on the Court. Whatever the reason, Marshall eschewed the constitutional justifications offered in the 1816 debates and instead reached back to the 1791 arguments of Hamilton and his Federalist allies in Congress.

IV. THE CURRENCY POWER, ENUMERATIONISM, AND ORIGINALISM

The Constitution does not expressly grant the federal government a general power to regulate or establish a uniform national currency. This fact was recognized throughout the fifty-five-year constitutional controversy over a national bank. Despite this lack of an express textual grant, Madisonian Republicans achieved a consensus—one just broad enough to pass the Bank bill—that there was such a power in the Constitution and that, further, the constitutionality of a national bank could be sustained as incidental to that power. Although Lomazoff's particular claim about a Compromise of 1816 has not fully convinced me, he persuasively establishes the broader and more important point that the Madisonian Bank consensus was framed in a way that downplayed the Necessary and Proper Clause and the idea of implied powers. By tracing these complicated and evolving debates over the

views with a significant and growing literature arguing that the federal government is recognized to have important unenumerated powers that are not means to carry out any enumerated powers. *See, e.g.*, Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 CONST. COMMENT. 25 (2005); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045 (2014); Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576 (2014); Schwartz, *supra* note 1; Robert J. Reinstein, *The Implied Powers of the United States* (Temple Univ. Legal Studies Research Paper Series, Research Paper No. 2019-11, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3334119 [https://perma.cc/T54A-8S4Y].

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

85. On Marshall's tendency to avoid constitutionalizing interpretations lacking sufficient consensus, see William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 898, 933 (1978), and Schwartz, *supra* note 15, at 10, 21, 93.

Bank, *Reconstructing the National Bank Controversy* raises important difficulties for two related approaches to constitutional interpretation: enumerationism and originalism.

A. *The Bank Controversy and Enumerationism*

As I have argued elsewhere, *enumerationism*—the idea of limited enumerated federal powers—is more ideology than doctrine, because its conclusions do not follow logically from its premises and it has been avoided through interpretive work-arounds throughout U.S. constitutional history.[86] The Bank controversy offers a major precedent demonstrating "false enumerationism": the crafting of arguments supporting broad, implied federal powers by strained textual interpretations of express grants of power.[87] False enumerationism relies on four overlapping techniques to avoid treating the enumerated powers as an exhaustive list. "Metonymy" treats an enumerated power as an example of a broader set of similar or related powers; "synergy" construes multiple constitutional clauses to imply a power greater than the sum of its parts; "sovereignty" infers a power from the nature of sovereign government; and "means-ends reversal" treats an enumerated power as a subordinate means to some other implied power.[88] The first three of these techniques were relied on in the Bank controversy.

The McDuffie Report offered a metonymic interpretation of the Coinage Clause in support of renewal of the Second Bank's charter. A strict interpretation of the Coinage Clause maintained that that delegated power was restricted to issuing and regulating metallic currency. Coin meant metal, not paper money. And although the Clause does not specify the permissible metals, those were undoubtedly gold and silver. Senator Wells made this objection to the Coinage Clause argument, which he strategically and misleadingly attributed to Republican supporters of the Second Bank bill in 1816 (pp. 112, 116), and Jackson offered this interpretation of the Coinage Clause in his 1832 Bank Veto Message.[89] This argument also formed the basis of the constitutional challenges to the Legal Tender Acts of 1862 and 1878, which made paper treasury notes a legal tender for private debts.[90]

The Bank debaters obviously knew the difference between chartering a national bank and establishing a national mint for the production of coins. They also knew that the National Bank regulated the volume of paper currency, not the weight or metallic content of gold and silver coins. Coin and paper money are interconnected, of course: banknotes of state-chartered banks functioned as currency and stated their face value in terms of dollars. Their value fluctuated relative to gold coin, and the convertibility of paper

86. Schwartz, *supra* note 1, at 577–78, 581–82.

87. *Id.* at 582–84.

88. *Id.* at 621–24.

89. *See supra* text accompanying note 66.

90. Schwartz, *supra* note 1, at 639–40.

banknotes into gold coin meant that the value of gold coin could be expressed as a function of paper. But the First and Second Banks' regulation of current coin was at best indirect and inferential. Inferential steps between an enumerated power and a regulatory measure are filled by the doctrine of implied powers. That was as true and well known in the early 1800s as it is today. A Coinage Clause justification for the National Bank may have been presented under a thin veneer of an enumerated powers argument, but it was undeniably an implied powers argument. An argument for a general currency power was even less amenable to an enumerated powers argument.

The Madisonian consensus in 1816 instead gravitated toward two other enumeration-avoiding techniques, synergy and sovereignty. Treasury Secretary Dallas offered a synergistic argument stemming from multiple constitutional clauses, including but not limited to the Coinage Clause, which distributed money powers between the national government and the states.[91] These powers tilted heavily toward the federal government and implied an exclusive federal currency power. Sovereignty arguments—that sovereign nations normally have the power to regulate their national currency—were advanced by Hamilton in 1791 and by Calhoun, Clay, and perhaps Bibb in 1816. The McDuffie Report in 1830 developed a metonymy argument, in which the word "coin" was taken to signify the broader category of which it was an example: currency.

It is also important to note how small a role the Commerce Clause played in the Bank controversy. Hamilton in 1791, and the Bank's advocates in the *McCulloch* oral argument, pointed out that a national bank was conducive to promoting commerce by providing sound banknotes and promoting public and private credit.[92] But Madisonian Republicans were loath to recognize implied commerce powers, and this argument was swept under the rug—even by the Marshall Court.[93] Regardless, by identifying the Madisonian consensus on a general currency power, Lomazoff points us toward a major precedent in which Madison's party of strict constitutional construction determinedly worked around the supposed limits of enumerated powers.

B. *The Bank Controversy and Originalism*

Originalism represents a family of interpretive theories—a large and contentious family—that share a belief that the Constitution's meaning became fixed in or around the Founding era and that these fixed meanings should dictate our interpretations today. Most originalists oppose the idea of

91. *See* p. 113.

92. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 325 (1819) (argument of Webster); Hamilton, *supra* note 20, at 126–27; Hamilton, *supra* note 24, at 308–09.

93. Schwartz, *supra* note 22, at 940–63.

a "living" Constitution whose interpretation, within some constraints, evolves over time.[94]

The Bank controversy presents a major problem for originalism. Unless they believe that a national bank was unconstitutional, originalists, who are generally enumerationists,[95] have to explain how a national bank is consistent with limited enumerated powers. "Original public meaning" originalists have to agree either that "coin" meant "currency, including paper money," to the ratifiers of the Constitution, or that a more general currency power was impliedly delegated to the federal government through provisions other than the Coinage Clause. If they adopt the second interpretation, then the Coinage Clause cannot be given an enumerationist, *expressio unius* interpretation (which would exclude a power over paper money), and Madison was wrong in 1791 when he argued that "a great and important power, which is not evidently and necessarily involved in an express power" could not be implied.[96] If they adopt the first (coin means currency) interpretation, then they must argue that Madison was mistaken in 1815–1816 when he embraced the Second Bank's constitutionality on the ground that a national bank *became* constitutional through its acceptance over time rather than through an original textual grant of power. In 1831, Madison wrote to the House Ways and Means Committee to explain away his about-face on the constitutionality of a national bank. The 1814–1816 currency crisis, he explained, "was not foreseen; and if it had been apprehended, it is questionable whether the constitution of the United States, which had so many obstacles to encounter, would have ventured to guard against it by an additional provision."[97] In other words, a national bank was not originally constitutional in Madison's view.

Madison (not Henry Clay) was the first and greatest flip-flopper on the constitutionality of the Bank, and Madison's effort to explain away his changed views illustrates a problem for "positivist originalists" who argue that the Constitution's meaning becomes fixed at some indefinite-but-early point when "liquidated" by constitutional precedent.[98] When does it become

94. *See, e.g.*, Andrew Coan, *The Foundations of Constitutional Theory*, 2017 WIS. L. REV. 833, 862–63, 868–69 (explaining different strands of originalism); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 6–9 (2015).

95. *See, e.g.*, GARY LAWSON & GUY SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017); Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183 (2003); William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1745–55 (2013); Kurt T. Lash, *The Sum of All Delegated Power: A Response to Richard Primus,* The Limits of Enumeration, 124 YALE L.J.F. 180 (2014).

96. 2 ANNALS OF CONG. 1899 (1791).

97. Letter from James Madison to C.J. Ingersoll, Feb. 2, 1831, in LDH, *supra* note 19, at 778, 778.

98. *See generally* William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817 (2015).

liquidated, why must liquidation occur early, and why can't changed circumstances change a previously liquidated understanding? As Madison explained in 1831, he was willing to give a post hoc, expansive interpretation to federal powers to address an unforeseen national problem that was not and could not have been provided for by the original Constitution. This shows Madison flip-flopping even on his view that the Constitution must have a fixed meaning.[99] For positivist originalists, who have bravely attempted to weave Madison's stray remarks into a theory of constitutional interpretation, the Bank precedent presents a circle that is very hard to square.

CONCLUSION

Lomazoff's *Reconstructing the National Bank Controversy* is an important and valuable addition to the literature on the fifty-five-year constitutional debate over a national bank. Among its other contributions, Lomazoff's account offers new evidence that many antebellum partisans of limited enumerated powers—mainstream Jeffersonian Republicans, Jacksonian Democrats, and even James Madison himself—were quite happy to work around enumerated powers in order to meet the political demands and objectives of the moment. This lends support to the idea that enumerationism was never, in practice, the original meaning of the Constitution.

99. *See* JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 322, 327–32 (2018) (arguing that Madison came to embrace the idea of a fixed Constitution only toward the end of the First Congress, in 1791, after previously viewing the Constitution's meaning as fluid).