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## Defying McCulloch? Jackson's Bank Veto Reconsidered

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# Defying *McCulloch*? Jackson’s Bank Veto Reconsidered

by David S. Schwartz\*

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## INTRODUCTION

On July 10, 1832, President Andrew Jackson issued the most famous and controversial veto in United States history.<sup>1</sup> The bill in question was “to modify and continue” the 1816 “act to incorporate the subscribers to the Bank of the United States.”<sup>2</sup> This was to recharter of the Second Bank of the United States whose constitutionality was famously upheld in *McCulloch v. Maryland*.<sup>3</sup> The bill was passed by Congress and presented to Jackson on July 4.<sup>4</sup> Six days later, Jackson vetoed the bill. Jackson’s veto mortally wounded the Second Bank, which would forever close its doors four years later at the expiration of its original 20-year charter in 1836. The veto launched Jackson’s 1832 presidential campaign, symbolized his boldness – the Bank’s supporters believed the veto would be sufficiently unpopular as to cost Jackson the election – and created the

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1. DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848 379 (2007) (describing Jackson’s veto as the “most important Presidential veto in American history”); Arthur M. Schlesinger, *An Impressive Mandate and the Meaning of Jacksonianism*, in ANDREW JACKSON: A PROFILE 133 (Charles Sellers ed. 1971) (the Bank Veto “burst like a thunderclap over the nation”).

2. President Andrew Jackson, *Veto Message* (July 10, 1832), 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 1139 (James D. Richardson ed. 1898) [hereinafter Jackson, “Veto Message”].

3. 17 U.S. 316 (1819).

4. Jackson, “Veto Message”, *supra* note 2, at 1139.

signature issue of his second term, as he dismantled the Bank's role as financier to the federal government.<sup>5</sup>

In addition to its place as a standout moment in U.S. political history, legal scholars and historians have also viewed the Bank Veto as a watershed in constitutional history. It is taken to be a monumental rejection of judicial supremacy, in which the President defied the Supreme Court's constitutional ruling and asserted the right of the president to interpret the Constitution independently. Constitutional scholars view the Bank Veto as the archetypal statement of "departmentalism," the view that each branch of the government has the power and duty to interpret the Constitution for itself.<sup>6</sup> The defiance of the Supreme Court, according to convention, was manifested by Jackson's rejection of Chief Justice John Marshall's opinion in *McCulloch*. To sum up the conventional account: Marshall said the Bank was constitutional; Jackson said that Bank was unconstitutional.

Departmentalism can come in several forms, however, some of them more defiant than others. The conventional account at times seems to characterize the Bank Veto as what I will call "defiant departmentalism" – not just arriving at a different conclusion than the Supreme Court, but repudiating the Court's conclusion and defying its judgment. That extreme characterization of the Bank Veto is plainly wrong, as more recent revisionist accounts have pointed out. In *McCulloch*, the Supreme Court said only that chartering a national bank was constitutionally permissible. The case did not, and could not, say that a national bank was constitutionally *compelled*. *McCulloch* necessarily, and unsurprisingly leaves discretionary space on policy grounds to reject a national bank. Jackson's Bank Veto shows that *McCulloch* also left space to object to a national bank on constitutional grounds without contradicting anything in Marshall's opinion. By leaving the "degree of necessity" to congressional determination, *McCulloch* allows legislators – and the President, who acts in a legislative capacity when considering

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5. See HOWE, *supra* note 1, at 379-82; GERARD N. MAGLIOCCA, ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES 51-52 (2007); ROBERT V. REMINI, ANDREW JACKSON AND THE BANK WAR 106-07 (1967).

6. See, e.g., KEITH WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 61 (2007) (asserting that Jackson's veto "was challenging legislative supremacy as well as judicial supremacy").

whether to sign a bill into law – to decide that a legislative proposal is unconstitutional for reasons not necessarily discussed by the Supreme Court.<sup>7</sup> Viewed this way, Jackson’s Bank Veto is more accurately viewed as something much milder than defiant departmentalism – I will call it role-appropriate departmentalism.

Both the conventional and the revisionist accounts are partly right and partly wrong. The conventional account comports with the political history of the Bank Veto, but it virtually ignores most of the text of Jackson’s 8,100-word Bank Veto Message. Despite its actual language, which as we shall see is surprisingly measured and non-confrontational toward the Supreme Court, the Bank Veto Message was viewed by many political actors then and later as a precedent for defiant departmentalism. As demonstrated by the revisionists, the conventional account ignores the fact that Jackson, both in practice and in the words of the Bank Veto Message, claimed the right of independent constitutional interpretation only when acting in his *legislative* capacity.

The revisionists have corrected this error by showing how a presidential veto can disagree with a constitutional ruling of the Supreme Court without defying the Court. In so doing, the revisionists account for some of the otherwise inexplicable language in which the Bank Veto Message carefully works around *McCulloch* rather than defying it. Yet the revisionist account leaves us scratching our heads as to why Jackson would include a departmentalist claim, however briefly, while at the same time treating *McCulloch* with surprising deference.

In this article, I argue that both accounts are radically incomplete. The Bank Veto Message was ghost-written in large part by two future Supreme Court justices: Secretary of the Navy Levi Woodbury and Attorney General Roger B. Taney. With this important fact in mind, we can see the Bank Veto Message as a lawyerly document that can be read as a *doctrinal* text, much like a judicial opinion. Doing so yields a new perspective. I argue that Jackson’s Bank Veto Message *as a legal text* is a road map for an impending Taney Court jurisprudence of states’ rights, a jurisprudence that does not defy, but subtly undermines *McCulloch*’s conception of implied federal powers without overruling *McCulloch*.

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7. See *McCulloch*, 17 U.S. at 423.

## I. BACKGROUND

### A. THE FIRST AND SECOND BANKS OF THE UNITED STATES

The debate over a national bank was arguably the most significant and long-running constitutional controversy in antebellum America other than the debate over slavery. The controversy dated back to Alexander Hamilton's 1791 proposal to charter the original Bank of the United States as part of his package of national economic development proposals. The bank bill was enacted by Congress over the constitutional objections of Madison in Congress, and signed into law by President Washington over the objections of Thomas Jefferson and Edmund Randolph in the cabinet, on the strength of Hamilton's eleventh-hour memorandum.<sup>8</sup> In his biography of Washington, published in 1807, John Marshall wrote that the original Bank debate "made a deep impression on many members of the legislature, and contributed, not inconsiderably, to the complete organization of those distinct and visible parties, which, in their long and dubious conflict for power, have since shaken the United States to their centre."<sup>9</sup>

By most accounts, the First Bank fulfilled its intended functions effectively over the next 20 years, acting as fiscal agent and financier to the national government, and operating branches in several cities. But by the time its charter neared its end in 1811, the Bank had also made political enemies. Aside from its indelible association with the Federalists, the First Bank also tended to play a restraining central-bank role on the credit practices of the increasing numbers of state banks. The bill to renew its charter was defeated by a single vote in both the House and Senate, and the First Bank closed its doors forever in February 1811.<sup>10</sup>

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8. David S. Schwartz, *Misreading McCulloch v. Maryland*, 18 U. PENN. J. CON. L. 1, 27-38 (2015).

9. JOHN MARSHALL, *THE LIFE OF GEORGE WASHINGTON* 354 (Robert Faulkner & Paul Carrese ed., 2000).

10. Schwartz, *supra* note 8, at 27-38.

The financial embarrassments to the government of trying to conduct the war of 1812, and the economic uncertainty generated by a disuniform national currency dominated by state banknotes, prompted calls in 1815 for Congress to charter a second national bank. The leading advocate of a new national bank was the erstwhile bank opponent, now president, James Madison. A bill chartering the Second Bank of the United States was signed into law by Madison on April 10, 1816. Like its predecessor, the Second Bank was a private corporation, with five of its 25 directors to be federal appointees, and 20% of the Bank's stock to be owned by the federal government.<sup>11</sup> Promptly establishing branch offices in sixteen states, the Second Bank made political enemies by aggressively competing with state-chartered private banks for commercial lending business. Some state legislatures, seeking to improve their state banks' competitive position, imposed taxes on the Bank's operations. At the same time, the Bank found itself overextended by its aggressive lending, and began calling in many of its loans as the economy entered a downturn in 1818, contributing to the Panic of 1819, the nation's first major depression. The public perception of the Bank turned sour.<sup>12</sup>

*McCulloch v. Maryland* involved a constitutional challenge by the Second Bank's branch in Baltimore to a Maryland tax designed to raise the Second Bank's cost of issuing loans and thereby disadvantage it relative to Maryland's own state-chartered banks.<sup>13</sup> On March 6, 1819, Chief Justice John Marshall issued an opinion that has come to be regarded as one of the most important constitutional decisions ever rendered by the Supreme Court.<sup>14</sup> The decision upheld the constitutionality of the Second Bank and struck down the Maryland tax. Marshall observed that the constitutionality of the bank had been settled by longstanding legislative precedent and acceptance by the political

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11. BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 244 (1957); RICHARD E. ELLIS, *AGGRESSIVE NATIONALISM: MCCULLOCH V. MARYLAND AND THE FOUNDATION OF FEDERAL AUTHORITY IN THE YOUNG REPUBLIC* 42 (2007).

12. MARK R. KILLENBECK, *M'CCULLOCH V. MARYLAND: SECURING A NATION* 64-72 (2006).

13. Mark R. Killenbeck, *All Banks in Like Manner Taxed? Maryland and the Second Bank of the United States*, 2 J. SUP. CT. HIST. 44 (forthcoming 2019).

14. Schwartz, *supra* note 8, at 3, 8-9.

branches.<sup>15</sup> Marshall agreed with these precedents that Congress had the implied power to charter a bank. He rejected the Jeffersonian strict-constructionist argument that implied powers are limited to those without which a granted power would be nugatory. Instead, Marshall concluded, Congress must have discretion to choose among any means convenient or well-adapted to implement the government's granted powers.<sup>16</sup> The Necessary and Proper Clause confirmed this principle, authorizing legislative "means" that are "conducive" – not "absolutely or indispensably necessary" to the "legitimate ends" of the government.<sup>17</sup> The Bank, Marshall concluded, was "a convenient, a useful, and essential instrument" in conducting the national government's "fiscal operations."<sup>18</sup>

Having decided that the Second Bank was constitutional, the *McCulloch* opinion turned to the question of whether Maryland could tax it. The essence of federal supremacy is to remove all obstacles to federal government action within its sphere, and state taxation was a potential obstacle.<sup>19</sup> The power to tax is a power to regulate and even destroy what is taxed, limited only by the political wishes of constituents. For that reason, the states' sovereign power of taxation extends only to powers that can be conferred by the state's own constituents. States cannot tax operations of the federal government, because a part cannot control the whole.<sup>20</sup>

*McCulloch* was a controversial decision, widely approved by supporters of national economic development and sharply criticized by states' rights advocates.<sup>21</sup> The Court turned aside a renewed attack on the Second Bank in *Osborn v. Bank of the United States* (1824),<sup>22</sup> in which the state of Ohio argued that it was entitled to tax the Second Bank's non-governmental business.<sup>23</sup> While the Second Bank successfully played a central banking role throughout the 1820s under the leadership of its

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15. *McCulloch*, 17 U.S. at 401-02.

16. *Id.* at 406-10.

17. *Id.* at 411-15, 418-20.

18. *McCulloch*, 17 U.S. at 422.

19. *Id.* at 427-28.

20. *Id.* at 427-28, 431-32.

21. See Schwartz, *supra* note 8, at 57-58.

22. 22 U.S. 738 (1824).

23. *Id.* at 739-41.

President, Nicholas Biddle, opposition to the Bank coalesced around the presidency of Andrew Jackson, one of its fiercest critics.<sup>24</sup>

## B. THE BANK RECHARTER BILL AND VETO

Although the Second Bank had not been an issue in the 1828 presidential campaign, Andrew Jackson's hostility toward it became increasingly evident during his first term in office. In his first annual message to Congress in 1829, Jackson questioned whether the Bank's charter should be renewed when it expired in 1836. In his second annual message, he proposed to strip the Second Bank of "the influence which makes that bank formidable," perhaps by incorporating it into the Treasury. Although his proposals gained no traction in Congress, his opposition to the Second Bank, which he called "the Monster," was sufficiently clear to create a quandary for its president, Nicholas Biddle, once it became known that Jackson would seek re-election. Biddle had been advised that the Second Bank was sufficiently popular to secure passage of a recharter bill in Congress. He calculated that the Bank's popularity would make Jackson reluctant to veto a recharter bill in an election year; once re-elected, Jackson would be much more likely to indulge his anti-bank prejudice and veto a recharter bill. Henry Clay, the National Republican candidate for president in 1832, believed that a recharter bill in 1832 would place Jackson in a bind: either Jackson would yield to the perceived popularity of the Bank, or he would veto the bank bill and face the electoral consequences. With encouragement from National Republicans, Biddle applied to Congress for an early recharter of the Bank, in January 1832. A recharter bill was reported out by the House Ways and Means Committee in February and eventually passed by Congress and submitted to Jackson on July 4, 1832.<sup>25</sup>

On July 10, Jackson issued his famous Bank Veto Message.<sup>26</sup> This 8,100-word, 48-paragraph statement of reasons

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24. HOWE, *supra* note 1, at 378; REMINI, *supra* note 5, at 47; ERIC LOMAZOFF, RECONSTRUCTING THE NATIONAL BANK CONTROVERSY: POLITICS AND LAW IN THE EARLY AMERICAN REPUBLIC 142-46 (2018).

25. HOWE, *supra* note 1, at 376-79.

26. Jackson, "Veto Message", *supra* note 2.

for the veto was the work of several of Jackson's advisors and cabinet members. Undoubtedly, Jackson was attempting to reach multiple constituencies, including both his populist base and moderate bank supporters in his own party. The message included both policy and constitutional objections to the bill, along with red-meat populist attacks on special interests and foreigners, and some ambiguous generalities about presidential power that can indeed be read as defiant departmentalism. But the departmentalism was largely aimed at Congress: Jackson was keen to assert the president's independent constitutional role in deciding the wisdom of legislation. Historical precedent suggested that presidential vetoes should be exercised only on constitutional, and not policy grounds. Jackson is noted for pushing the veto power into the realm of policy discretion, but in 1832, he apparently remained uncertain about his right to do this. Instead, he produced a hybrid based on both policy and constitutional objections. Thus, the message also included numerous constitutional objections to the bill, but these may have been motivated less by a defiant intention to rebuff the Supreme Court than by reticence to aggressively assert the president's power to issue a purely policy-based veto. Indeed, the constitutional arguments were presented in a subtle and lawyerly fashion, as if intended to be read as a legal brief asking the Supreme Court to distinguish *McCulloch* rather than overrule it. At no time did the message actually state that *McCulloch* was wrongly decided.

We can plausibly speculate that the political features of the veto message were written by Jackson's political advisors, his nephew and private secretary, Andrew Jackson Donelson, and Amos Kendall, who functioned informally as Jackson's chief of staff and most influential advisor.<sup>27</sup> After Kendall wrote a first draft, Jackson sent for Taney to come down to Washington from Annapolis to revise it. Over the next three days, Taney worked with Donelson and Levi Woodbury on revisions, while Jackson "passed in and out of the room, listening to the different parts, weighing the various suggestions, and directing what should be inserted or altered."<sup>28</sup> Thus, the Bank Veto Message contained

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27. Mark Renfred Cheatham, A JACKSON MAN: AMOS KENDALL AND THE RISE OF AMERICAN DEMOCRACY (REVIEW), 25 J. EARLY REPUBLIC 146-48 (2005).

28. Schlesinger, *supra* note 1, at 133.

substantial input from two future Supreme Court Justices. Taney would be appointed Chief Justice, to succeed John Marshall, in 1836. Woodbury, after cabinet service in both the Jackson and Van Buren administrations, would be appointed Associate Justice to succeed Joseph Story, in 1845. The legal sophistication of these two men undoubtedly exceeded that of Kendall, who became a career newspaper editor after only a very brief legal practice.<sup>29</sup>

## II. THE CONVENTIONAL ACCOUNT AND ITS CRITICS

### A. THE CONVENTIONAL ACCOUNT

The conventional account maintains that Jackson's Bank Veto defied the Supreme Court by rejecting *McCulloch's* reasoning and result. The Supreme Court had said that the Second Bank was constitutional. Jackson said it wasn't. But for a few details, end of story. Though this describes the conventional account with a broad brush, conventional wisdoms are most readily found in broad brush accounts. A conventional account may begin as a detailed narrative, but what makes it conventional is the very fact of its frequent, shorthand repetition. These repetitions, which may be little more than a sentence or the framing of a related point, generate and replicate a useful sort of short-form knowledge. One doesn't have to read the Bank Veto Message every time one wants to make a point about presidential vetoes, or party politics or economy in antebellum America. But once the conventional narrative takes over, it displaces a careful reading of the original source, even for those who wish to make a point about how to interpret the Veto Message itself.

Among one-sentence summaries of the Bank Veto Message, the following are typical: Jackson's veto message was an "attack on the constitutionality of the bank and on *McCulloch*."<sup>30</sup> It was a "striking declaration of independence from the other branches of government" in which Jackson "gave no deference to the views

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29. *Id.*

30. Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist And Normative Arguments For Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311, 325 (2005).

of . . . the Supreme Court.”<sup>31</sup> *McCulloch* was “functionally overruled by the electorate’s vindication of Jackson’s bank veto.”<sup>32</sup>

To some extent, the conventional account comes from historians who do not normally emphasize doctrinal readings of legal texts. The Bank Veto “maintain[ed] a strict construction of the Constitution against an activist Supreme Court,” in the words of Daniel Walker Howe.<sup>33</sup> “In spite of Marshall’s repeated Supreme Court decisions, Jackson rehashed arguments against the constitutionality of the Bank, taking the position that the executive and legislative branches were not bound by the judiciary and could judge constitutional questions for themselves.”<sup>34</sup> The great Jackson biographer Robert Remini likewise read the Bank Veto Message as a statement of defiant departmentalism, and a direct repudiation of *McCulloch*. Jackson “noted that the Supreme Court in the case *McCulloch vs. Maryland* had judged the Bank constitutional. ‘To this conclusion I can not assent,’ announced Jackson.”<sup>35</sup> This is a misquotation: Jackson withheld his assent from the conclusion that the Supreme Court had *settled* the question in all its aspects, and he took pains to argue that the Court had not fully considered all the constitutional issues. Jackson biographer Jon Meacham recognizes this latter point yet still places the Veto in the defiant-departmentalist narrative: “Jackson had made it clear that he interpreted the Court’s ruling in *McCulloch v. Maryland* . . . as inconclusive. But he also had made it clear that it hardly mattered—that he was bound to interpret the laws as he understood them regardless of what the Court said.”<sup>36</sup>

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31. John Yoo, *Judicial Supremacy Has Its Limits*, 20 TEX. REV. L. & POL. 1, 15 (2015).

32. Gerald Leonard, *Party as a “Political Safeguard of Federalism”*: *Martin Van Buren and the Constitutional Theory of Party Politics*, 54 RUTGERS L. REV. 221, 277 (2001).

33. HOWE, *supra* note 1, at 381.

34. *Id.* at 379-80.

35. ROBERT V. REMINI, *THE LIFE OF ANDREW JACKSON* 151 (1988); *see also id.* (“In effect what Jackson said was that no member of the tripartite government can escape his responsibility to consider the constitutionality of all bills and act as his knowledge and good judgment dictate.”) Elsewhere, Remini recognizes, as the revisionists do, that Jackson’s claim was limited to his legislative role. See 2 ROBERT V. REMINI, *ANDREW JACKSON AND THE COURSE OF AMERICAN FREEDOM, 1822-1832*, at 367-68 (1998).

36. JON MEACHAM, *AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE* 211 (2008).

Constitutional scholars have fed the narrative too. The conventional narrative has been congenial to scholars espousing popular constitutionalism, as well as to legal and political science scholars writing in the “constitutional development” vein. Thus, for example, Mark Graber concludes that “Jackson challenged judicial authority to determine the constitutional status of the national bank.”<sup>37</sup> Gerard Magliocca reads the Bank Veto Message as “a detailed critique of Marshall’s analysis” in *McCulloch*, in which Jackson “expressed deep skepticism about the implied power of Congress.”<sup>38</sup> Jackson, writes Keith Whittington, “rejected both Chief Justice John Marshall’s specific constitutional reasoning and the Court’s authority to bind the other departments to its particular understanding of constitutional requirements.”<sup>39</sup> Whittington believes that defiant departmentalism was logically entailed by Jackson’s decision to veto the bank bill.<sup>40</sup>

The focus of these writers is typically on non-judicial interpreters of the Constitution, and the constitutional meaning created by what they call constitutional politics. They have therefore overlooked the extent to which the Bank Veto Message is a remarkable *doctrinal* statement, and not simply a political act with constitutional implications. This has caused them to neglect the Bank Veto Message’s lawyerly effort to distinguish *McCulloch* and accept its major doctrinal holdings about things other than the Bank. Indeed, the conventional account tends to be vague about exactly what aspects of *McCulloch* Jackson was disagreeing with. Conventionalists mistakenly assume that by disagreeing with *McCulloch* on the bottom-line constitutionality of the Bank, Jackson repudiated every aspect of Marshall’s decision.

A popular idea among constitutional development theorists is to read Jackson’s Bank Veto as a prelude to a judicial overruling of *McCulloch* that would occur once the Court became

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37. Mark Graber, *Popular Constitutionalism, Judicial Supremacy, And The Complete Lincoln-Douglas Debates*, 81 CHI.-KENT L. REV. 923, 931 (2006).

38. Gerard N. Magliocca, *A New Approach to Congressional Power: Revisiting the Legal Tender Cases*, 95 GEO. L.J. 119, 130 (2006).

39. WHITTINGTON, *supra* note 6, at 59.

40. *Id.* (“In order to veto the bank bill, Jackson would have to reject the Court’s authority to settle the constitutional issue.”); *id.* at 60 (“The rejection of judicial supremacy was a necessary step in Jackson’s argument”).

fully Jacksonian. According to this theory, the 1840 election of pro-Bank Whig majorities to Congress and a pro-Bank Whig president, William Henry Harrison, should have produced a Third Bank of the United States. The Taney Court, these scholars have argued, was primed to overrule *McCulloch* as soon as a case challenging the Third Bank reached the Court. But Harrison died just one month into his presidency, and his successor, the states'-rights-oriented John Tyler, vetoed the two bank charter bills passed by Congress. It is said that this historical accident saved *McCulloch* from oblivion.<sup>41</sup> As I will argue, this view, too, is probably wrong.

## B. THE REVISIONIST ACCOUNT

A revisionist view has been generated by lawyers and legal historians, who have read the Bank Veto Message somewhat more closely. The primary insight of the revisionist accounts has been to highlight the structure of the legal problem. By holding that the Constitution permits Congress to charter a national bank, the Supreme Court manifestly did not say that chartering a national bank was constitutionally compelled. The national government is always free to use less than all of its powers.<sup>42</sup>

Jackson's disagreement with *McCulloch*'s conclusion about the constitutionality of the Bank thus does not logically entail a rejection of judicial supremacy. As G. Edward White summarized, Jackson's constitutional authority to veto the Bank recharter bill "was a function of his Article I veto power, not of his unofficial or official status as a constitutional interpreter."<sup>43</sup> The Veto Message thus "could be boiled down to the proposition that when the president acts in a 'legislative capacity' by vetoing Congressional legislation, the Supreme Court cannot control his

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41. 1 HOWARD GILLMAN, MARK A. GRABER, KEITH E. WHITTINGTON, *AMERICAN CONSTITUTIONALISM* 200 (2d ed. 2017) (presidential vetoes of bank bills "presidential vetoes explain why the Supreme Court during the Jacksonian Era did not reconsider the Marshall Court's decision in *McCulloch*"); Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 *VAND. L. REV.* 73, 112 (2000); Magliocca, *supra* note 38, at 130.

42. See G. Edward White, *The Constitutional Journey of Marbury v. Madison*, 89 *VA. L. REV.* 1463, 1496 (2003); Kermit Roosevelt, III, *Polyphonic Stare Decisis: Listening to Non-Article III Actors*, 83 *NOTRE DAME L. REV.* 1303, 1326-27 (2008). Trevor W. Morrison, *Constitutional Alarmism*, 124 *HARV. L. REV.* 1688, 1697 (2011).

43. White, *supra* note 42, at 1497.

conduct. That proposition arguably says nothing about which institution is the superior interpreter in ‘ordinary’ cases testing the constitutionality of legislative or executive acts.”<sup>44</sup> More pithily, White concluded, “*Marbury* was not an effort to say that before passing legislation Congress or the president needed to check with the Supreme Court.”<sup>45</sup>

Viewed this way, Jackson’s Bank Veto was not an instance of *defiant departmentalism*.<sup>46</sup> Consider, in contrast, the actions of President Lincoln and the Civil War and Reconstruction Congresses. Between 1858 and 1862, Lincoln argued for departmentalism on behalf of both political branches, and with Congress, acted on those arguments. In his debates against Stephen Douglas in the 1858 Illinois Senate campaign, Lincoln repeatedly expressed opposition to the *Dred Scott* decision, arguing that it was not binding as a general constitutional rule on the other branches of government.<sup>47</sup> He even cited Jackson’s Bank Veto to argue the legitimacy of politically overruling a Supreme Court decision, as he proposed to do with *Dred Scott*.<sup>48</sup> Lincoln crystalized his theory of departmentalism in his First Inaugural address in March 1861.

I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect

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44. *Id.*

45. *Id.* at 1496.

46. See Lawrence G. Sager, *Courting Disaster*, 73 *FORDHAM L. REV.* 1361, 1366 (2005) (distinguishing aggressive “alpha” departmentalism from milder “beta” departmentalism).

47. Abraham Lincoln, First Debate, at Ottawa, Aug. 21, 1858; Fifth Debate, at Galesburg, Oct. 7, 1858; Sixth Debate, at Quincy, Oct. 13, 1858, in 3 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 28, 232, 278 (1955) [hereinafter “COLLECTED WORKS”].

48. “Will you not graciously allow us to do with the *Dred Scott* decision precisely as you did with the Bank decision?” Abraham Lincoln, Speech at Springfield, July 17, 1858, 2 *COLLECTED WORKS*, *supra* note 47, at 519.

following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.<sup>49</sup>

In contrast to Jackson's presidency, the Lincoln administration and Congress acted on these defiant departmentalist ideas. Repudiating *Dred Scott's* holding that free black people could not be citizens of the United States, Secretary of State William Seward ordered his department to issue passports to free blacks.<sup>50</sup> The Civil War Congress overruled *Dred Scott* directly by banning slavery in the territories by statute in 1862.<sup>51</sup> And in 1866, two years before the Fourteenth Amendment overruled *Dred Scott's* holding on citizenship, the Reconstruction Congress provided in the Civil Rights Act of 1866, that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."<sup>52</sup> These actions directly defied a holding of the Supreme Court. Jackson's Bank Veto did not.

A more troubling instance of executive defiance of the judiciary was Lincoln's reaction to Taney's decision in *Ex Parte Merryman* (1861). Sitting as circuit judge, Taney ruled that the military detention of John Merryman, an alleged pro-secession

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49. Abraham Lincoln, *First Inaugural Address*, in 4 COLLECTED WORKS, *supra* note 47, at 268.

50. BARRY E. FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 120 (2009).

51. An Act to Secure Freedom to all Persons within the Territories of the United States ch. 111., 12 Stat. 432 (1862).

52. An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication, ch. 31, § 1, 14 Stat. 27 (1866).

saboteur, was unconstitutional because the President had no authority to suspend habeas corpus without congressional action.<sup>53</sup> Taney had the opinion delivered to the White House; Lincoln simply ignored it.<sup>54</sup>

### C. APPRAISAL

My argument is not a Hegelian synthesis that harmonizes an initial conventional “thesis” and a revisionist “antithesis.” Rather, my aim is to offer a supplement and partial correction to both readings, in the form of a doctrinal overlay. The revisionist account is successful in demonstrating the error in the conventional account: the mistaken premise that rejecting *McCulloch* was a necessary step in Jackson’s argument. The revisionists also tend to read the Bank Veto Message somewhat more closely than the conventionalists, emphasizing that Jackson offered a series of particular objections to the Bank. Yet the revisionists also have a way of missing the big picture.

The conventional account may have read the political history well, but it reads the document poorly. The conventional reading is right that the Bank Veto Message was a rejection of *McCulloch*, but for the wrong reasons. The Bank Veto Message manifestly did not signal an intention to overrule *McCulloch*. It did not reject the conclusions that implied powers are those “conducive” to executing the express powers of the government, that Congress had an implied power to charter a national bank of some sort, and that the operations of the federal government cannot be taxed by the states. Instead, the Veto Message subtly undermined *McCulloch* by taking a series of small but cumulatively devastating doctrinal bites out of it, like the sharks that successively attacked Santiago’s marlin in Hemingway’s *The Old Man and the Sea*.

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53. Ex parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861).

54. JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 288 (1988).

### III. A CLOSE READING OF THE BANK VETO MESSAGE

#### A. INTRODUCTION AND POLICY ARGUMENTS

Given the Bank Veto's reputation as a repudiation of the Supreme Court's decision in *McCulloch*, it is curious that Jackson does not even mention *the Supreme Court's* decision upholding the Bank until nearly halfway through the forty-seven-paragraph, 8,100-word essay.<sup>55</sup> Indeed, he barely mentions the Constitution in this segment. His opening paragraph makes a fling at the pro-Bank majority in Congress, which forwarded the Bank bill on July 4 as a sort of political publicity stunt. Jackson deftly turned this around: "Having considered [the bill] with that solemn regard to the principles of the Constitution which the day was calculated to inspire," Jackson concluded that the bill "ought not to become a law."<sup>56</sup> In his only mention of a constitutional principle in the first section of the Veto Message, Jackson actually embraces Marshall's interpretation of the Necessary and Proper Clause. "A bank of the United States," Jackson said, "is in many respects convenient for the Government and useful to the people."<sup>57</sup> Jackson "entertain[ed] this opinion," but was "deeply impressed with the belief that *some* of the powers and privileges possessed by the existing bank are unauthorized by the Constitution" and are left uncorrected by the recharter bill.<sup>58</sup>

Despite the constitutional gloss, Jackson devoted the next seventeen paragraphs to an exposition of three policy arguments against the Bank. First, he argued that the secondary market in the Bank's stock, which was expected to produce stock sales above par, would result in windfall profits to a small number of the "richest class" of citizens and to numerous foreign owners.<sup>59</sup> Because this provision goes against "justice and good policy," Jackson argued, it alone gave "ample reasons why [the bill] should not become a law."<sup>60</sup> Jackson then objected to the

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55. Jackson, "Veto Message", *supra* note 2, at 1144.

56. *Id.* at 1139.

57. *Id.*

58. *Id.* (emphasis added).

59. *Id.* at 1140.

60. *Id.* at 1141.

“odious” provision privileging state banks to redeem Second Bank notes at any branch, while “a merchant, mechanic, or other private citizen” could do so only at the St. Louis branch, which would unfairly force such individuals in most cases to sell their Second Bank notes at a discount.<sup>61</sup> Finally, Jackson offered a complex argument against aspects of the bill that facilitated foreign ownership of Bank stock. While he concluded that this feature of the Bank Bill made the bank a “danger to our liberty and independence,” he did not say it was unconstitutional.<sup>62</sup> On the contrary, he concluded by saying, “If we must have a bank with private stockholders, every consideration of *sound policy* and every *impulse of American feeling* admonishes that it should be purely American.”<sup>63</sup>

## B. THE DEPARTMENTALIST WINDOW-DRESSING

After 19 paragraphs and 3,100 words, Jackson finally advanced the constitutional argument that has captured the attention of contemporary and subsequent readers of the Bank Veto Message, and which has fueled the conventional account.

In paragraph 20, Jackson claimed to rebut the argument by “advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court.”<sup>64</sup> Some readers, such as Larry Kramer, have misinterpreted that sentence as an attack on *McCulloch*, but it should be parsed with care.<sup>65</sup> For starters, notice how Jackson treats “precedent and . . . the decision of the Supreme Court” as distinct things. As Gerard Magliocca has observed, the thrust of Jackson’s argument here was first and foremost, to challenge the force of *legislative* precedent.<sup>66</sup> But the challenge is more limited than the conventional account acknowledges. Jackson recognizes the binding force of legislative precedent “where the acquiescence of the people and the States can be considered as

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61. *Id.*

62. *Id.* at 1144.

63. *Id.* (emphasis added).

64. *Id.*

65. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 189 (2004).

66. Gerard N. Magliocca, *Veto! The Jacksonian Revolution in Constitutional Law*, 78 NEB. L. REV. 205, 222 (1999) (emphasis added).

well settled.”<sup>67</sup> But Jackson then purported to fight the historical question of pro-Bank precedent to a draw, noting that while two legislative sessions approved a national bank (1791 and 1816), two rejected it (1811 and 1815), and state legislative judgments tended to run against the Bank.<sup>68</sup> Whether Jackson read the history correctly is immaterial: the point is that he did not baldly assert a presidential prerogative to disregard well-established legislative precedent, but instead argued that the precedent in question was not well-established.

To be sure, Marshall in *McCulloch* concluded that legislative precedent strongly favored the Bank.<sup>69</sup> Whether Jackson’s interpretation on this point was better or worse than Marshall’s, his factual disagreement with the Supreme Court on how to read extra-judicial historical precedent is hardly an earth-shaking challenge to the Supreme Court.

Paragraph 21 of the Bank Veto Message offers the strongest statement of departmentalism.

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive *when acting in their legislative capacities*, but

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67. Jackson, “Veto Message”, *supra* note 2, at 1144-45.

68. *Id.* at 1145.

69. *McCulloch*, 17 U.S. at 401.

to have only such influence as the force of their reasoning may deserve.<sup>70</sup>

If we take it in isolation and soften our focus, this paragraph seems to justify the conventional view, that Jackson was girding his loins to defy *McCulloch*. But that requires that we ignore the italicized language (italicized by me). On its face, this passage does not assert a blanket authority to defy or ignore judicial decisions, such as Lincoln's disregard of *Merryman*. As the revisionists correctly point out, Jackson's declaration of independence from the Supreme Court is limited to the president's exercise of his legislative function under the veto clause.

Moreover, reading the paragraph in context diminishes its force considerably. To begin with, the entire statement is rendered hypothetical. The condition implied by its opening qualifier, "If," was not met, in Jackson's view, because *McCulloch* did not cover the whole ground: "But in the case relied upon the Supreme Court [has] not decided that all the features of this corporation are compatible with the Constitution."<sup>71</sup> Jackson went on to frame his objections as though they were consistent with *McCulloch*'s primary holdings regarding implied powers: that Congress has implied powers, that "necessary" means "conducive to," and that the degree of necessity is a question for legislative judgment.<sup>72</sup>

The strength of the departmentalist language is further weakened by the non-defiant structure of the problem (as noted above) that *McCulloch* could not, and did not, *compel* Congress to charter a Bank having particular features, or any Bank, but merely ruled that the Constitution permitted Congress to do so. The opinion left subsequent congresses perfectly free to decide not to exercise their full powers. Even if subsequent congresses were to base a refusal to charter a bank on a narrower view of constitutional powers than Marshall's, such legislative interpretations were not foreclosed by *McCulloch*, since they fit comfortably within *McCulloch*'s framework of ultimate

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70. Jackson, "Veto Message", *supra* note 2, at 1145 (emphasis added).

71. *Id.*

72. *Id.* at 1145-46.

legislative discretion on the necessity question. Jackson took this very tack, and simply asserted the President's right, under the veto clause, to exercise this judgment himself. Jackson's language could be read expansively to say that the President and Congress have the power to defy constitutional limits imposed by the Supreme Court, but the Bank Veto Message in practice did not do this. In the context of vetoing the bank bill, this passage can also be read to say merely that Congress and the president have the right to self-limit their powers to something less than the Supreme Court would allow. The broader implications of the departmentalism paragraph, had they been found in a judicial opinion, would be denigrated as obiter dicta.

In paragraphs 22 through 24, Jackson summarized a broad holding of *McCulloch* with surprising accuracy and fidelity:

Having satisfied themselves that the word "necessary" in the Constitution means "needful," "requisite," "essential," "conducive to," and that "a bank" is a convenient, a useful, and essential instrument in the prosecution of the Government's "fiscal operations," they conclude that to "use one must be within the discretion of Congress" and that "the act to incorporate the Bank of the United States is a law made in pursuance of the Constitution[.]"<sup>73</sup>

While purporting to accept the *McCulloch* ruling only for the sake of argument, ("Without commenting on the general principle affirmed by the Supreme Court . . ."), Jackson proceeded to endorse the principle affirmed in *McCulloch* that

the "degree of its necessity," involving all the details of a banking institution, is a question exclusively for legislative consideration. A bank is constitutional, but it is the province of the Legislature to determine whether this or that particular power, privilege, or exemption is "necessary and proper" to enable the bank to discharge its duties to the Government, and from their decision there is no appeal to the courts of justice.<sup>74</sup>

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73. *Id.*

74. *Id.* at 1146 (emphasis added).

Here, the revisionists have read the Veto Message better than the conventionalists. Jackson asserted a well-precedented constitutional argument about the president's legislative role. The president has the right and duty under the Veto Clause to make an independent judgment about the constitutionality of a bill presented to him. The precedent for this is no less than Washington's consideration of the original bank bill in 1791.<sup>75</sup> Neither Hamilton nor anyone else at the time argued that Washington was bound by the congressional determination that the original bank bill was constitutional; on the contrary, all assumed that Washington should consider the bill's constitutionality.<sup>76</sup> True, there was no judicial precedent on the books at that time. But as Jackson rightly pointed out, *McCulloch* leaves judgments about necessity to the legislative process. Jackson merely asserted the claim that the Constitution makes the president part of that process. Nothing in *McCulloch* suggests that the Court's judgment on the constitutionality of the Bank is more binding on a presidential veto decision than Congress's judgment was on Washington.

### C. THE CONSTITUTIONAL OBJECTIONS

Only at this point, about halfway through, did the Bank Veto Message finally proceed to Jackson's constitutional objections to the Bank bill itself. The most notable feature of these constitutional objections is the length to which Jackson went to frame them as *consistent with McCulloch*. Jackson purported to "examine the details" of the Bank Bill "in accordance with the rule of legislative action" which *McCulloch* "laid down."<sup>77</sup> In doing so, he did not overtly challenge any of *McCulloch*'s three doctrinal principles: that Congress has implied powers to enact legislative means that are "conducive" to implementing the

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75. Letter from George Washington to Alexander Hamilton, Nat'l Archives (Feb. 16, 1791), <https://founders.archives.gov/documents/Hamilton/01-08-02-0047> [<https://perma.cc/WDB9-XL75>].

76. Sec'y of Treasury Alexander Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 23, 1791), <https://founders.archives.gov/?q=Ancestor%3AARHN-01-08-02-0060&s=1511311111&r=3> [<https://perma.cc/RTA4-E2DQ>].

77. Jackson, "Veto Message", *supra* note 2, at 1146.

government's express powers;<sup>78</sup> that federal law is supreme over state law;<sup>79</sup> and that states cannot tax the operations of the federal government.<sup>80</sup> In fact, paragraphs 24 through 35 reflect a careful and lawyerly effort to distinguish rather than repudiate *McCulloch*. Jackson began by stating that *McCulloch* had “not decided that all the features of this corporation are compatible with the Constitution.”<sup>81</sup> That is partly true. *McCulloch* held that Congress could charter a private banking corporation to carry out the government's “fiscal operations” as an implied power.<sup>82</sup> In theory, one could argue that by doing so, the Court approved the constitutionality of every specific feature of the Second Bank. But in practice, that is not how judicial precedent works: a subsequent Court, including the Marshall Court, would always have considered itself free to review the constitutionality of particular aspects of the corporate charter that were not expressly argued and considered in the original case.

Jackson offered constitutional objections to three features of the Bank bill: the monopoly charter, foreign share ownership, and the Bank's private character.

*The Monopoly Charter.* Jackson made two constitutional objections to the Bank's monopoly privileges. First, he argued that the grant of a monopoly ceded Congress's implied powers to charter other banks to conduct governmental fiscal affairs.<sup>83</sup> Since most legislative choices entail foregoing the power to

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78. *McCulloch*, 17 U.S. at 415. A significant and growing literature argues that the federal government is recognized to have important powers that are neither enumerated nor means to carry out those that are. See, e.g., David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 573-74 (2017) [hereinafter Schwartz, *A Question Perpetually Arising*]; Robert J. Reinstein, *The Implied Powers of the United States* (article draft on file with author); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1047 (2014); Richard Primus, *The Limits of Enumeration*, 124 YALE. L.J. 576, 578 (2014); Calvin H. Johnson, *The Dubious Enumerated Powers Doctrine*, 22 CONST. COMMENT. 25, 25-26 (2005). Arguably, *McCulloch* is best read as supporting this idea. See John Mikhail, *McCulloch's Strategic Ambiguity* (article draft on file with author); DAVID S. SCHWARTZ, *THE SPIRIT OF THE CONSTITUTION*, chapter 3 (forthcoming 2019). I will cabin that point to avoid a controversy tangential to my argument here.

79. *McCulloch*, 17 U.S. at 405-06, 424, 426.

80. *Id.* at 436.

81. Jackson, “Veto Message”, *supra* note 2, at 1145.

82. *McCulloch*, 17 U.S. at 422.

83. Jackson, “Veto Message”, *supra* note 2, at 1147.

implement other means not chosen, at least temporarily, the argument is specious, if not nonsensical.

A slightly more plausible objection to the monopoly grant was Jackson's argument based on the Patent and Copyright Clause. Congress's enumerated power to grant "exclusive right" to "authors and inventors," Jackson argued, implied a lack of power to grant exclusive rights to others for purposes other than "[t]o promote the progress of science and useful arts."<sup>84</sup> This rigid *expressio unius* interpretation of an express power grant stands in some tension with *McCulloch*, as we will see.

*Foreign shareholding.* Jackson reprised his policy argument against the Bank Bill's encouragement of foreign shareholding through exemption from state and national taxes, this time suggesting that the provisions were unconstitutional because they were not "necessary and proper" to the Bank's functioning.<sup>85</sup> Also unnecessary and improper was the grant to the Bank of a power to acquire property, which was based on another *expressio unius* argument: the power to purchase lands for "forts, [etc.] . . . and other needful buildings" impliedly denied Congress the power to purchase lands for other purposes, Jackson argued.<sup>86</sup>

*Private Character.* Jackson objected to the Bank's private character, in two respects. First, "the principle laid down by the Supreme Court" in *McCulloch* could not support an implied power to create a Bank for purposes other than executing the government's delegated powers; therefore, Congress could not empower the Bank to engage in private, for-profit activities.<sup>87</sup> Second, in a kind of antecedent to the twentieth-century non-delegation doctrine, Jackson argued that it was unconstitutional for Congress to delegate to a private corporation the power to decide where to locate branches or to exercise a power to regulate currency which *might* be impliedly granted to Congress – Jackson did not commit himself on this point – by the Coinage Clause.<sup>88</sup> Some centrist Jeffersonian and Jacksonian supporters of the Bank

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84. *Id.* (quoting U.S. CONST. art. I, § 8, cl. 8).

85. *Id.* at 1147-48.

86. *Id.* (quoting U.S. CONST. art. I, § 8, cl. 17).

87. Jackson, "Veto Message", *supra* note 2, at 1147-48.

88. *Id.* at 1149-50 (emphasis added). Jackson said, "if [Congress] have other power to regulate currency," it must "be exercised by themselves, and not . . . transferred to a corporation." *Id.* See also U.S. CONST. Art. I, § 8, cl. 5 (granting power "to coin money and regulate the value thereof").

had relied on the Coinage Clause as a relatively narrow alternative to the Necessary and Proper Clause as a constitutional basis. Jackson's argument is noteworthy as an attempt to foreclose that argument and force his supporters to back him up in his fight against the Bank.<sup>89</sup>

These arguments have a double character. On the one hand, they can be read as avoiding any overt challenge to *McCulloch*. Arguably, they are not constitutional arguments at all. To Jackson, the same qualities that caused these features to fail his version of the "necessary and proper" test also made them bad policy. If we take seriously the idea that the "degree of necessity" of legislative means is a question of legislative judgment, then all of these arguments could have been framed as policy arguments (as indeed, some of them were) to the same effect as his purportedly constitutional arguments. Even if we view the arguments as constitutional, it remains the case that Jackson tried to pitch them as though *McCulloch* had left the various questions open, thereby seeming to avoid a direct repudiation of the Supreme Court's decision.

On the other hand, Jackson's constitutional objections to the Bank's monopoly privileges and private character stand in tension with *McCulloch*. To begin with, not all of these questions were in fact left open by the Marshall Court. *McCulloch* had expressly affirmed the constitutionality of delegating branch location decisions to the Bank, and had implicitly approved the use of a private corporation to conduct public business.<sup>90</sup> The latter issue became manifest in *Osborn*, where the Court reasoned that the Bank's for-profit activities were necessary and proper to making the Bank a viable concern that would have the capacity to act as the government's fiscal agent and primary lender.<sup>91</sup> Jackson's objections to these conclusions contradict *McCulloch* and *Osborn*. Writ large, Jackson could be seen as sketching out a broad constitutional principle against privatization of

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89. LOMAZOFF, *supra* note 24, at 141-42.

90. *McCulloch*, 17 U.S. at 424. ("The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional.")

91. 22 U.S. at 861 (the Bank cannot "effect its object unless it be endowed with that faculty of lending and dealing in money, which is conferred by its charter").

governmental functions.<sup>92</sup> This indeed repudiates a major, albeit unelaborated premise of *McCulloch*.

Further, Jackson's arguments against the monopoly charter based on the Patent-Copyright and Needful Buildings Clauses suggest the outline of a narrowing construction that could be imposed on *McCulloch*'s conception of implied powers. Under this argument, selected enumerated powers would be interpreted pursuant to a rigorous application of the *expressio unius* canon to restrict the powers that could be implied under other enumerated powers. For instance, the issuance of paper money might be conducive to regulating interstate commerce under *McCulloch*, but it would be barred by the Coinage Clause, which authorizes the minting of metallic currency without mentioning paper money. This strict *expressio unius* approach to implied powers was never embraced by the Supreme Court, and indeed it is unsustainable, though Taney (the Veto Message's primary ghostwriter) would later resort to it privately in an unpublished opinion arguing that the Civil War military draft was unconstitutional.<sup>93</sup>

Curiously, Jackson does not boldly embrace these conflicts and tensions with *McCulloch*. Contrary to Daniel Walker Howe's suggestion, nowhere does Jackson "rehash[] arguments against the constitutionality of the Bank,"<sup>94</sup> if by that is meant the arguments of Jefferson in cabinet and the Bank's challengers before the bar in *McCulloch*. Jackson does not employ Jefferson's argument that implied powers extend only to those means that are "absolutely necessary," without which the express

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92. See MARVIN MEYERS, *THE JACKSONIAN PERSUASION: POLITICS AND BELIEF* 6-7, 12-17 (1957).

93. Military conscription is necessary and proper to the power to raise armies, see U.S. CONST. art. I, § 8, cl. 12, but Taney argued that such an implied power violated the militia clauses, which he construed as providing the only constitutionally recognized compulsory form of military service. Roger B. Taney, *Thoughts on the Conscription Law of the United States* (1863), in MARTIN ANDERSON, *THE MILITARY DRAFT: SELECTED READINGS ON CONSCRIPTION*, 207, 213 (1982). The *expressio unius* approach necessarily cherry-picks its limitations, making it unprincipled as well as unsustainable. The constitutional order has always, and necessarily, recognized implied powers that violate *expressio unius*. For example, Congress has always been acknowledged to have an implied power to enforce any of its enumerated powers with criminal sanctions, despite the fact that the Constitution enumerates powers to create three specific criminal laws for counterfeiting, piracy, and treason. U.S. CONST., art. I, § 8, cl. 6, 10; art. III, § 3, cl. 2. See Schwartz, *A Question Perpetually Arising*, *supra* note 78, at 601-03.

94. HOWE, *supra* note 1, at 379-80.

powers would be rendered “nugatory.”<sup>95</sup> Again, Jackson accepts Marshall’s broader definition of “necessary and proper.” Nor does Jackson reject or offer “a detailed critique” of “Marshall’s specific constitutional reasoning.”<sup>96</sup> By framing the arguments as addressing constitutional questions left open by the Supreme Court, Jackson pushed his disagreements with *McCulloch* under the table and deprived his departmentalism of most of its force.

#### IV. THE BANK VETO AS A TANEY COURT ROADMAP

The First and Second Banks of the United States, though hugely important, represented a single policy initiative. The United States was able to thrive without a national bank, and constitutional law eventually embraced an expansive vision of federal legislative authority without a national bank standing as a constant reminder. *McCulloch v. Maryland* has come to be understood as landmark case, not because the Bank was an enduring institution – it was not – but because the decision’s expansive implications for implied federal powers came to be realized.

In this sense, the Bank Veto Message did not directly defy *McCulloch*, but it contained the seeds of a jurisprudence that would undermine *McCulloch* for the next century. The aspect of the Veto Message that did this is subtle and has tended to escape notice.

##### A. UNDERMINING MCCULLOCH

The key passage, which has largely escaped the attention of conventionalists and revisionists alike, comes at paragraphs 38 to 40 and involved the question of state taxes. Once again, rather than directly defying *McCulloch*, Jackson purported to agree with it. *McCulloch*’s second holding, after affirming the constitutionality of the Bank, was that Maryland could not tax the bank. “The principle is conceded,” Jackson wrote, “that the

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95. See Letter from Thomas Jefferson to George Washington (Feb. 15 1791), reprinted in 6 THE WORKS OF THOMAS JEFFERSON, 197-04, (Paul L. Ford ed., 1904) (emphasis added).

96. Magliocca, *supra* note 38, at 130; WHITTINGTON, *supra* note 6, at 59.

States can not rightfully tax the operations of the General Government.”<sup>97</sup> But this tax exemption, Jackson maintained, could not extend to the Bank’s private, for-profit operations, as opposed to its direct services to the federal government.<sup>98</sup> *McCulloch* did not address this distinction; *Osborn* did, and there, Marshall found the private and public functions of the Bank to be, if not inseparable, then at least sufficiently intertwined to make all of the Second Bank’s operations exempt from state taxes.<sup>99</sup> While this passage defies *Osborn* and, indirectly, *McCulloch*, the defiance is muted as with the other objections to the Bank Bill, since Jackson framed this “private” element of the tax exemption as “not . . . necessary.”<sup>100</sup>

It is the next paragraph, elaborating on the objection to a state tax exemption, that is the most momentous in the entire Veto Message. Jackson argued that implied powers are not “so absolute” that they may “take[] away . . . rights scrupulously [granted] to the [s]tates.”<sup>101</sup> If the Supreme Court will not impose limits on implied powers, then “it becomes us to proceed in our legislation with the utmost caution” where an implied power intrudes on reserved state powers.<sup>102</sup>

Though not directly, our own powers and the rights of the States may be indirectly legislated away in the use of means to execute substantive powers. We may not enact that Congress shall not have the power of exclusive legislation over the District of Columbia, but we may pledge the faith of the United States that as a means of executing other powers it shall not be exercised for twenty years or forever. We may not pass an act prohibiting the States to tax the banking business carried on within their limits, but we may, as a means of executing our powers over other objects, place that business in the hands of our agents and then declare it exempt from State taxation in their hands. Thus may our own powers and the rights of the States, which we can not directly

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97. *Id.* at 1150.

98. *Id.*

99. *Osborn*, 22 U.S. at 859-71.

100. Jackson, “Veto Message”, *supra* note 2, at 1151 (emphasis in original).

101. *Id.*

102. *Id.*

curtail or invade, be frittered away and extinguished in the use of means employed by us to execute other powers.<sup>103</sup>

Let us put aside the argument that Congress was unconstitutionally frittering away its own powers. This was merely a blind, or a rhetorical, trick for Jackson to tweak his nationalist opponents in Congress. As noted, virtually any legislative choice precludes alternatives for at least a time, and it is absurd to say that Congress is powerless to choose one means because doing so foregoes another. The real point of this passage is the one about implied powers and states' reserved powers. To the nineteenth-century legal mind, an express delegation of power to the national government normally meant a denial of that power to the states.<sup>104</sup> Jackson's real objection was that "the rights of the States may be indirectly legislated away in the use of *means to execute* [federal] substantive powers" – implied powers, as explained by *McCulloch*.<sup>105</sup> To Jackson, and perhaps more importantly, to Roger Taney, his legally sophisticated ghost-writer, the reserved powers of the states imposed an implied limitation on the reach of implied powers under *McCulloch*.

## B. THE FATE OF MCCULLOCH IN THE TANEY COURT

Three years almost to the day after the Bank Veto Message, on July 6, 1835, John Marshall died. Roger Taney was confirmed as Chief Justice on March 28, 1836 and served until his death in 1864.<sup>106</sup>

*McCulloch* was never overruled by the Taney Court. Some conventionalists have argued that *McCulloch* was saved from that

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103. *Id.* at 1152.

104. David S. Schwartz, *An Error and an Evil: the Strange History of Implied Commerce Powers*, 68 AM. U. L. REV. 927, 940-46 (2019). *See, e.g.*, *Ableman v. Booth*, 62 U.S. 506, 506 (1859) (stating "[t]he sovereignty of the United States and of a State are distinct and independent of each other within their respective spheres of action").

105. Jackson, "Veto Message", *supra* note 2, at 1152; *McCulloch*, 17 U.S. at 405-08 (emphasis added).

106. 2 DAVID G. SAVAGE, *GUIDE TO THE U.S. SUPREME COURT* 939 (4th ed. 2004).

fate only because Jacksonian presidents vetoed every congressional attempt to recharter a national bank, preventing a new national bank challenge from reaching the Court. This argument is wrong on two counts. First, *McCulloch*'s doctrine extended beyond the Bank, to the matter of implied congressional powers in general. The Taney Court did not need a bank case to overrule *McCulloch* – any implied powers case would do. And many implied powers cases did reach the Court in the Taney era.<sup>107</sup> The Taney Court flirted with the narrow Jeffersonian formulation of implied powers as limited to those “absolutely necessary,” but never clearly embraced it.<sup>108</sup>

Second, the Taney Court showed no inclination to overrule any Marshall Court precedent, though it disagreed with many. The Taney Court never overruled a single Supreme Court decision in its 28 years, and in case after case, the Taney Court simply distinguished or ignored disfavored Marshall Court precedents.<sup>109</sup> There is little or no evidence that the Taney Court was inclined to overrule *McCulloch* in particular.<sup>110</sup>

Instead, the Taney Court was determined to ignore and erode *McCulloch*. The Bank Veto Message supplied the road map, and the Court wasted little time in following it. In Taney's first full term, the Court issued its opinion in *New York v. Miln* (1837).<sup>111</sup> There, the Taney Court first laid out its theory of the

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107. See, e.g., *United States v. Coombs*, 37 U.S. 72 (1838) (implied power to regulate salvage from shipwrecks above the tide line); *United States v. Marigold*, 50 U.S. 560 (1850) (implied power to punish the crime of uttering); *Fox v. Ohio*, 46 U.S. 410 (1847) (same); *Prigg v. Pennsylvania*, 41 U.S. 539 (1842) (implied power to enforce Fugitive Slave Clause); *Dred Scott v. Sanford*, 60 U.S. 393 (1857) (implied power to govern territories); *United States v. Gratiot*, 39 U.S. 526 (1840) (same); *Searight v. Stokes*, 44 U.S. 151 (1845) (implied power to contract for mail delivery service); *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443 (1851) (implied power to confer admiralty jurisdiction).

108. See *Marigold*, 50 U.S. at 567 (upholding implied power to punish the passing, as opposed to making, of counterfeit coin because failure to do so would have rendered the coinage power “immediately vain and useless,” and left “the government . . . disabled and impotent to the only means of securing the objects in contemplation.”) (emphasis added).

109. See, e.g., *Briscoe v. Bank of Kentucky*, 36 U.S. 257 (1837) (eroding *Craig v. Missouri*, 29 U.S. 410 (1830)); *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837) (undermining *Dartmouth College v. Woodward*, 17 U.S. 518 (1819)); *Veazie v. Moor*, 55 U.S. 568 (1853) (narrowing *Gibbons v. Ogden*, 22 U.S. 1 (1824)).

110. Those espousing the contrary view rely heavily on the fulminations of Senator Thomas Hart Benton, who never sat on the Court. See Magliocca, *supra* note 38, at 130-32 (citing Benton's statements attacking *McCulloch*).

111. 36 U.S. 102 (1837).

relationship between implied powers and state reserved powers, and its similarities to the Bank Veto are striking.<sup>112</sup>

*Miln* involved a challenge to a New York law that required ships landing in New York harbor to report identifying information on all foreign or interstate passengers, and to post a bond to cover the costs of maintenance or removal of impoverished immigrants.<sup>113</sup> The law plainly regulated interstate and foreign commerce. Congress had previously imposed similar regulations on arriving immigrants, and *Gibbons v. Ogden* (1824) had suggested that states could not regulate interstate and foreign passenger navigation, which was commerce, at least where Congress had regulated it.<sup>114</sup> But the *Miln* Court upheld the law on the ground that it was a “police” regulation designed to aid the state’s ability to control immigration so as to “guard against” “the moral pestilence of paupers, vagabonds, and possibly convicts.”<sup>115</sup> The Court characterized the law as an internal police law rather than a regulation of commerce, and thus “the exercise of a power which rightfully belonged to the states.”<sup>116</sup>

*Miln* demonstrated that the Taney Court would uphold state laws that could plausibly be characterized as police regulations, irrespective of their effect on foreign or interstate commerce. But more than that, *Miln* developed a doctrine that effectively undermined *McCulloch*. Written by the states’-rights firebrand, Justice Phillip Barbour of Virginia, *Miln* asserted that when a state acts within “the legitimate scope of its power as to the end to be attained, it may use whatsoever means, being appropriate to that end, it may think fit; although they may be the same, or so nearly the same, as scarcely to be distinguishable from those adopted by congress acting under a different power[.]”<sup>117</sup> In the absence of a direct “collision” with federal law—and the Court found none here—the state had “not only the right, but the bounden and solemn duty. . .to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, *which it may deem to be*

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112. *Id.* at 137-38.

113. *Id.* at 130-31.

114. 22 U.S. at 203-204.

115. 36 U.S. at 142.

116. *Id.* at 132.

117. *Id.* at 137.

*conducive to these ends[.]*”<sup>118</sup> When it came to “all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, . . . the authority of a state is *complete, unqualified, and exclusive*.”<sup>119</sup>

*Miln* was a reserved-powers manifesto, and it reversed *McCulloch* in two respects. First, it suggested that the states’ reserved powers could defeat at least some plausible claims of implied powers under *McCulloch*. Barbour said that state police powers are “exclusive,” suggesting that such a regulatory subject-matter was off limits to assertions of implied federal powers.<sup>120</sup> Second, *Miln* indicated that state police powers carry implied powers that may extend into the ambit of the federal commerce power. The New York statute, by imposing reporting obligations on entering ships, did not directly regulate the entry of foreign paupers into the state, but instead regulated *navigation* as a means to that end.<sup>121</sup> *Miln* therefore suggested that if the end was legitimate—within state police powers—states could use legislative means that were indistinguishable from commerce regulation.<sup>122</sup> *Miln* largely nullified *McCulloch*’s primary holding about implied powers, and reversed its thrust by acknowledging the implied powers of states to regulate in areas expressly delegated to the Union.

The *Miln* Court consisted of six states’-rights-oriented justices plus Justice Joseph Story, the lone dissenter.<sup>123</sup> Five of the majority justices were Jackson appointees,<sup>124</sup> and Barbour, the opinion’s author, had been confirmed by the Senate the same day as Taney.<sup>125</sup> Whether or not Taney directly influenced Barbour’s analysis in the *Miln* case itself, it should hardly be surprising that the opinion espoused Jacksonian constitutional thinking.

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118. *Id.* at 139 (emphasis added).

119. *Id.* (emphasis added).

120. *Miln*, 36 U.S. at 139.

121. *See id.* at 142-43.

122. *Id.* at 133 (“we hold that both the end and the means here used, are within the competency of the states”); *id.* at 137 (state police power laws are constitutional “[a]lthough the means used in their execution may sometimes approach [federal legislative means], so nearly as to be confounded”).

123. David P. Currie, *The Constitution in the Supreme Court: Contracts and Commerce, 1836-1864*, 1983 DUKE L. J. 471, 472, 477 (1983).

124. *Id.* at 472.

125. *Id.* at 475; THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 466 (Michael I. Urofsky ed., 1994).

Read retrospectively in light of *Miln*, the brief but pivotal passage about legislative means and states' rights in Jackson's Bank Veto Message lays out a road map for undermining, but not openly defying, *McCulloch*. Attorney General Taney was a sophisticated lawyer. It is plausible to suppose that by 1832 he was already envisioning a post-Marshall Supreme Court. Why damage the prestige and authority of a Court that would soon be packed with Jacksonian justices espousing a new Jacksonian jurisprudence? Taney thus may have intentionally exercised a moderating influence on the Bank Veto Message's departmentalism. There was no need to defy *McCulloch* when it could be subtly undermined without undermining the prestige of the Court. That was certainly the tack taken by the Taney Court, which did not overrule a single judicial precedent, choosing instead to reinterpret, distinguish or ignore the Marshall Court decisions it found uncongenial. If these suppositions are correct, the claim by conventionalists that the Taney Court was primed to overrule *McCulloch* is wrong.

## CONCLUSION

In its aftermath, Jackson's Bank Veto Message acquired a double-character. The text of the document pursued a subtle doctrinal dispute with *McCulloch*, undermining Marshall's great decision without confronting it directly. Viewed this way, the Bank Veto Message reads less like a departmentalist manifesto than like a judicial opinion that erodes, but declines to overrule, a disfavored precedent. So viewed, the document belongs as much to the mind and will of Roger Taney as it does to that of Andrew Jackson.

Yet Taney's masterly subtlety seems to have been utterly lost on Bank Veto Message's audience. Politicians and journalists of the day uniformly read it as a blunt and brash assault on the authority of the Supreme Court and as a rejection of *McCulloch*. And the Democratic Party made a broad reading of the Veto Message an article of faith, resolving in five successive party platforms from 1840 through 1856 that Congress had no

power to charter a national bank.<sup>126</sup> This defiant-departmentalist reading of the Bank Veto Message may have been strategic, at least on the part of Whig opponents of Jackson who had an incentive to enlist the prestige of the Court in its largely congressional opposition to “King Andrew.”

The defiant-departmentalist reading of the Bank Veto Message received perhaps its biggest boost from Abraham Lincoln. In his senate campaign against Stephen Douglas, Lincoln relied heavily on Jackson’s Bank Veto as precedent for his departmentalist opposition to *Dred Scott*.

You remember we once had a national bank. Some man owed the bank a debt, he was sued and sought to avoid payment, on the ground that the bank was unconstitutional. The case went to the Supreme Court, and then it was decided that the bank was constitutional. The whole Democratic party revolted against that decision. General Jackson himself asserted that he, as President, would not be bound to hold a national bank to be constitutional, even though the court had decided it to be so. He fell in precisely with the view of Mr. Jefferson, and acted upon it under his official oath, in vetoing a charter for a national bank. The declaration that Congress does not possess this constitutional power to charter a bank, has gone into the Democratic platforms, at their national conventions, and was brought forward and reaffirmed in their last convention at Cincinnati. They have contended for that declaration, in the very teeth of the Supreme Court, for more than a quarter of a century. In fact, they have reduced the decision to an absolute nullity.<sup>127</sup>

For Lincoln – let us ignore his misstatement of the facts of *McCulloch* – the Jacksonian precedent offered an ironic edge to his dispute with the Jacksonian Democrat Douglas and a powerful bi-partisan cast to the case against *Dred Scott*.

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126. *National Political Party Platforms*, THE AMERICAN PRESIDENCY PROJECT (all referenced platforms are accessible at the following links), <https://www.presidency.ucsb.edu/documents/presidential-documents-archive-guidebook/national-political-party-platforms> [https://perma.cc/9ETK-UWK8] (last visited Feb. 18, 2019).

127. ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 419-20 (Roy P. Basler ed. 1946).

The actual words of a text do not necessarily hold a monopoly over the text's meaning. The readers of a text – and with a text like the Bank Veto Message, perhaps “constituents” is a better word – have the right to interpret it carefully, or freely; or to privilege a misreading as the authoritative meaning. Lawyers and citizens who say that *Brown v. Board of Education*<sup>128</sup> overruled *Plessy v. Ferguson*<sup>129</sup> and held that all racial segregation violated equal protection of the laws are not wrong, even though the text of the *Brown* opinion refrained from overruling *Plessy* and purported to apply only to public schools. There, too, the lawyerly effort to maintain subtle distinctions seems to have been utterly lost on the public constituency. In this sense, the conventional account of the Bank Veto Message is not wrong.

But while the conventionalists read the history of the Bank Veto Message well, they read the text badly. And in doing so, they miss important meanings and signals intended to be sent by important constitutional actors. In particular, Roger Taney, the Veto Message's ghost writer, may have tried to signal that Jacksonian legalists had a plan to undermine *McCulloch v. Maryland* without overruling it, and thereby maintain the prestige of a Supreme Court that would take a notably states'-rights turn.

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128. 347 U.S. 483, 494-95 (1954).

129. 163 U.S. 537 (1896).