The most common view of the Commerce Clause during the Founding era was that the Clause gave Congress the authority to regulate interstate movement and trade in goods and services.

The Commerce Clause

The Commerce Clause gives Congress the power to regulate “Commerce …. among the several states,” as well as with foreign nations and Indian tribes. While there was some disagreement over its interpretation during the Founding era, the most common view at that time was that the Clause gave Congress the authority to regulate interstate movement and trade in goods and services. In the famous 1824 case of *Gibbons v. Ogden*, the Supreme Court interpreted the Clause broadly enough to allow Congress to regulate interstate steamboat routes. Chief Justice John Marshall’s opinion noted that the Clause gives Congress “plenary” power to regulate any “commerce which concerns more states than one.” But he also emphasized that federal power under the Clause does not extend to many types of economic legislation. The latter include “[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State.” Although these sorts of laws “may have
a remote and considerable influence on commerce,” they are not themselves regulations of interstate trade, and therefore did not come within the scope of the Commerce Clause.

In the nineteenth and early twentieth centuries, the Supreme Court continued to enforce a relatively narrow interpretation of the Commerce Clause. It denied Congress the power to regulate activities such as agriculture and manufacturing, which had an impact on interstate trade, but were not themselves interstate commerce.

Critics of the Court increasingly argued that the Commerce Clause should be interpreted more broadly, in order to permit federal regulation of various economic activities that they believed to be essential in a modern, integrated economy. The crisis of the Great Depression reinforced these criticisms. Many believed that the Depression had arisen because of insufficient federal regulation of the economy.

In the early 1930s, Congress began to enact a wide range of new economic regulations that tested the limits of the Court’s Commerce Clause jurisprudence. Defenders of the new laws claimed that they were needed to deal with the economic crisis, and that allegedly antiquated legal categories should not stand in their way. As President Franklin D. Roosevelt famously put it, modern economic legislation should not be constrained by a “horse-and-buggy definition of interstate commerce.”

At first, the Supreme Court struck down many of the new laws. In its unanimous decision in Schechter Poultry Corp. v. United States (1935), the Court invalidated the National Industrial Recovery Act. The NIRA – probably the most sweeping economic regulation in American history - had established cartel-like wage and price controls over almost the entire nonagricultural economy of the United States. It was based on the theory – since rejected by most modern economists – that the Depression was caused by “overproduction” that had driven prices too low, and that prosperity would return if the federal government could increase producer income by raising prices to a higher level. The Court’s rejection of the NIRA and several other prominent New Deal laws led to a major political confrontation between the president and Congress on one hand and the judiciary on the other.

By 1937, however, the Supreme Court largely abandoned its opposition to most New Deal measures and began to interpret the Commerce Clause more broadly. Scholars differ on the extent to which this “switch in time” was caused by political pressure on the Court brought to bear by President Roosevelt’s plan to “pack” the Court by appointing new justices willing to uphold his policies.
In 1942, a Court by then largely composed of Roosevelt appointees, decided *Wickard v. Filburn*, a sweeping ruling that set the seal on the New Deal transformation of Commerce Clause doctrine. In *Wickard*, the Court concluded that Congress could use the Commerce Clause to restrict the amount of wheat that farmers can grow, even in a case where the wheat in question never crossed state lines and was never sold in any market. According to the Court, Congress could restrict such wheat production because doing so had an impact on interstate commerce in wheat. A farmer forbidden to grow his or her own wheat is more likely to purchase additional wheat in interstate commerce. By artificially restricting the production of wheat, Congress hoped to increase its price, and thereby raise the sagging profits of farmers around the country.

The Depression-era cases illuminate the real-world stakes of constitutional federalism issues. Defenders of the challenged New Deal laws argued that they were essential to alleviating an economic crisis that left millions in poverty and unemployed. Opponents argued that much of the new legislation actually made the crisis worse. For example, NIRA raised prices and may have increased unemployment, while the wheat law at issue in *Wickard* raised the price of food at a time when many workers were already having trouble making ends meet. To this day, specialists continue to debate whether the New Deal-era increases in federal power created more benefit than harm.

After *Wickard*, many observers believed that there were no longer any meaningful limits on Congress’ powers under the Commerce Clause. Over fifty years passed before the next Supreme Court decision striking down a federal law because it exceeded congressional authority under the Clause. In *United States v. Lopez* (1995), the Court struck down a federal law banning gun possession near a school zone. It reasoned that this law was not authorized by the Commerce Clause because it did not regulate any kind of “economic activity.” In *United States v. Morrison* (2000), the Court used the same reasoning to invalidate a law allowing victims of gender-motivated violence to sue their attackers in federal court.

Those who hoped that *Lopez* would lead to strong judicial enforcement of limits on federal power were dealt a major setback by the Court’s 2005 decision in *Gonzales v. Raich*. In that case, the Court ruled that the Commerce Clause allowed Congress to forbid the growth and possession of medical marijuana even if the marijuana in question was not produced by a commercial enterprise, had never crossed state lines, and had not been sold in any market even within a single state. The majority reasoned that marijuana possession and production can be regulated because it is an “economic activity,” which it defined as any activity involving the “the production, distribution, and consumption of commodities.” Few if any activities fall outside this broad definition.

However, *Raich* arguably still left open the possibility that Congress’ authority might not extend far enough to cover regulations that were not targeted at any activity at all, but instead forced individual citizens to engage in activities that they would otherwise have avoided. This was the main issue at stake in the individual health insurance mandate decided by the Court in June 2012. That important case, *NFIB v. Sebelius*, is addressed in a separate essay in this volume *Federalism and the Health Care Case* (p. 57).
The Necessary and Proper Clause

The Necessary and Proper Clause gives Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States.” It is not a free-standing grant of power, but rather was intended to give Congress the power to enact laws needed to “carry into execution” the various powers granted to the federal government by other parts of the Constitution.

The wording of the Clause suggests that a law authorized by it must meet two separate requirements: it must be “necessary” to the execution of some power granted to the federal government, and also “proper.” Since at least the 1790s, debate has raged over the meaning of these two terms. In the early republic, debate over the interpretation of the Clause focused on the constitutionality or lack thereof of the First Bank of the United States. When the Bank was first proposed in 1790, James Madison and Thomas Jefferson argued that its establishment was not authorized by the Necessary and Proper Clause because the word “necessary” should be interpreted to include only such measures as are truly essential to the implementation of other federal powers. By contrast, Secretary of the Treasury Alexander Hamilton defended the Bank, arguing that “necessary” should be interpreted to include any law that is “useful” or “convenient.” The issue of the constitutionality of the Bank did not reach the Supreme Court until 1819, when the justices decided the case of *McCulloch v. Maryland.* In a famous opinion by Chief Justice Marshall, the Court unanimously upheld the constitutionality of the Bank and endorsed Hamilton’s interpretation of “necessary.” At the same time, however, Marshall noted that his reasoning was not a blank check for assertions of federal power. The Clause, he wrote, authorized only such laws as promote “legitimate” ends that are “within the scope of the constitution,” and use “means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution.”

*McCulloch’s* broad definition of “necessary” did not win universal acceptance. Critics of federal power such as President Andrew Jackson did not accept Marshall’s reasoning. In an 1832 message accompanying his veto of a bill reauthorizing the Bank, Jackson made clear his disagreements with *McCulloch.*

Despite this continuing controversy, the Court has repeatedly endorsed Marshall and Hamilton’s broad definition of “necessary,” most recently in *United States v. Comstock* (2010) where it emphasized that any measure qualifies as “necessary” under the Clause if it is “rationally related” to the implementation of some other federal power.

The Court has been far less clear in its interpretation of the word “proper.” Hamilton, Madison, and other Founders all agreed that propriety imposed restrictions separate from those of necessity. A measure that is “necessary” might still be declared unconstitutional on the grounds that it is not “proper.” The Court has also ruled in several cases that these are two distinct requirements. But it has never provided anything approaching a complete definition of “proper.” In the recent *Comstock* case, the Court was again unclear in its interpretation of “proper,” even as it reiterated its endorsement of a broad definition of “necessary.”
There is considerable disagreement over the issue among academic commentators. Among the more widely accepted interpretations of the term is the idea that a “proper” law at the very least cannot be justified by a rationale that would give Congress virtually unlimited authority. As Madison put it in a 1791 speech, “[w]hatever meaning this clause may have, none can be admitted that would give an unlimited discretion to Congress.” The interpretation of “proper” played a key role in the 2012 health insurance mandate case, *NFIB v. Sebelius*.

**The Spending Clause**

The Spending Clause gives Congress the power to impose taxes to “pay the Debts and provide for the common Defence and general Welfare of the United States.”  

The Clause seems to give Congress the authority to raise and spend tax revenue for three distinct purposes: providing for the common defense, paying the debts of the federal government, and promoting the “general welfare.” The meaning of this last phrase – often called the “General Welfare Clause” – has been the cause of repeated controversy. James Madison argued that the power to spend for the general welfare only gave Congress the authority to spend money for the purpose of implementing Congress’ other enumerated powers. By contrast, Alexander Hamilton claimed that the General Welfare Clause created a separate and distinct power to spend money for general purposes. However, he did not contend that Congress could spend money for any purpose it liked. Rather, it could only do so for purposes that are “general, not local.” During the nineteenth and early twentieth centuries, the Supreme Court never clearly resolved the dispute over the meaning of “general welfare.” Outside the courts, however, presidents such as James Madison, James Buchanan, and Grover Cleveland vetoed federal spending bills that allocated money for local construction projects on the grounds that such expenditures were not for the “general welfare,” but instead merely benefited local interests.

During the 1930s, Congress enacted a wide range of new spending programs transferring money to the states for the purpose of trying to combat the effects of the Great Depression. In a series of cases addressing constitutional challenges to these programs, the Court first endorsed Hamilton’s broad interpretation of “general welfare” in preference to Madison’s narrow one, and then went even further than Hamilton envisioned – concluding that the “general welfare” includes almost any purpose so defined by Congress. This effectively jettisoned Hamilton’s distinction between spending for “general” and “local” projects. As a result, Congress has been able to allocate funds for a variety of local “porkbarrel” projects, such as the notorious “Bridge to Nowhere,” an extremely expensive federally financed bridge that served only a handful of people in an isolated part of Alaska.

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James Madison argued that the power to spend for the general welfare only gave Congress the authority to spend money for the purpose of implementing Congress’ other enumerated powers.

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2 The Clause is often also referred to as the Tax Clause or the Taxing and Spending Clause.
Although the post-1930s Supreme Court has been unwilling to impose restrictions on the purposes for which Congress spends money, it has enforced some conditions on federal grants to state governments. Such grants have grown enormously since the 1930s, currently encompassing over 25% of all state government spending. Nearly all federal grants to state governments come with conditions that state officials must meet if they are to qualify for the money.

In *South Dakota v. Dole* (1987), the Supreme Court upheld a federal law denying 5% of federal highway funds to states that refused to enact a law raising their drinking age to 21 (a measure the federal government claimed was related to promoting highway safety). The Court ruled that Spending Clause measures must meet four requirements in order to be constitutional. They must 1) promote the “general welfare,” 2) be “related” to a federal interest, 3) be clear and unambiguous, and 4) not violate any other part of the Constitution. The first requirement means little in practice because the Court defers to Congress in deciding what promotes the “general welfare”; the second has always been applied very deferentially; and the fourth is largely redundant – a spending bill that violated some unrelated part of the Constitution would be invalidated even without it. However, the Supreme Court has strongly enforced the requirement that conditions attached to federal grants to state governments must be clear, and has sometimes refused to enforce conditions that are excessively vague.

*Dole* also noted that a spending condition may be unconstitutional if it is so onerous as to be “coercive.” Unfortunately, the Court did not explain what it meant by this phrase, and did not do so in later decisions until 2012. So far, lower courts have struck down very few spending conditions on this basis.

The issue of coercion is important to the future of American federalism because states are increasingly dependent on the federal government for much of their funding. This enables Congress to use federal grants as leverage to force dissenting states to conform to the views of the national majority.

The Court began to clarify the meaning of “coercion” in its decision addressing the constitutionality of spending conditions attached to the Affordable Care Act of 2010. The Court struck down a provision of the Act that would have stripped states of all their Medicaid funds (which fund health care for the poor) unless they agree to greatly expand program eligibility to millions of additional people, including those with incomes up to 33% above the poverty line. Since Medicaid was established in 1965, most states have become heavily dependent on Medicaid funding.

In its closely-divided decision in *NFIB v. Sebelius*, the Court invalidated claims that the Affordable Care Act’s individual mandate provision is constitutional under the Commerce Clause, and the Necessary and Proper Clause, but upheld the requirement that people buy health care insurance under the Tax Clause. Continued controversy surrounding the Court’s decision in this case reflects the fact that constitutional federalism remains a divisive issue for both the Supreme Court and American society as a whole.
MCCULLOCH V. MARYLAND (1819)

DIRECTIONS

Read the Case Background and Key Question. Then analyze the Documents provided. Finally, answer the Key Question in a well-organized essay that incorporates your interpretations of the Documents as well as your own knowledge of history.

CONSTITUTIONAL PRINCIPLES

Federalism
Limited government

Case Background

The Necessary and Proper Clause gives Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States.” It is not a free-standing grant of power, but rather was intended to give Congress the power to enact laws needed to “carry into execution” the various powers granted to the federal government by other parts of the Constitution.

The wording of the Clause suggests that a law authorized by it must meet two separate requirements: it must be “necessary” to the execution of some power granted to the federal government, and also “proper.” Since at least the 1790s, debate has raged over the meaning of these two terms. In the early republic, debate over the interpretation of the Clause focused on the constitutionality or lack thereof of the First Bank of the United States. When the Bank was first proposed in 1790, James Madison and Thomas Jefferson argued that its establishment was not authorized by the Necessary and Proper Clause because the word “necessary” should be interpreted to include only such measures as are truly essential to the implementation of other federal powers. By contrast, Secretary of the Treasury Alexander Hamilton defended the Bank, arguing that “necessary” should be interpreted to include any law that is “useful” or “convenient.” The issue of the constitutionality of the Bank did not reach the Supreme Court until 1819, when the justices decided the case of McCulloch v. Maryland.

While the Supreme Court has addressed the meaning of the word, “necessary” in a number of cases over time, it has focused far less attention to the meaning of “proper.” Controversy over both terms continues.
DOCUMENT A

United States Constitution, Article 1, Section 8, Clause 18 (1787)

The Congress shall have Power ...To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

1. Underline the most important words and phrases in this passage and put them in your own words

DOCUMENT B

An Old Whig (1787)

My object is to consider that undefined, unbounded and immense power which is comprised in the following clause: "And, to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States; or in any department or offices [officer] thereof." Under such a clause as this can anything be said to be reserved and kept back from Congress? ...Besides the powers already mentioned, other powers may be assumed hereafter as contained by implication in this constitution. The Congress shall judge of what is necessary and proper in all these cases and in all other cases — in short in all cases whatsoever.

Where then is the restraint? How are Congress bound down to the powers expressly given? What is reserved or can be reserved?

1. State in your own words the main concerns of the author of this passage.
According to Brutus, what governments are in danger?

What observation does Brutus make about human nature?

What does Brutus say will necessarily happen if the federal government is to succeed at all? Why?
**Federalist #33 by Alexander Hamilton (1788)**

These two clauses [the “necessary and proper clause” and the “supremacy clause”] have been the sources of much virulent invective and petulant declamation against the proposed constitution, they have been held up to the people, in all the exaggerated colours of misrepresentation, as the pernicious engines by which their local governments were to be destroyed and their liberties exterminated — as the hideous monster whose devouring jaws would spare neither sex nor age, nor high nor low, nor sacred nor profane; and yet strange as it may appear, after all this clamour, to those who may not have happened to contemplate them in the same light, it may be affirmed with perfect confidence, that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article....

If the Federal Government should overpass the just bounds of its authority, and make a tyrannical use of its powers; the people whose creature it is must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution, as the exigency may suggest and prudence justify. The propriety of a law in a constitutional light, must always be determined by the nature of the powers upon which it is founded.

1. According to Hamilton, why are these two clauses not cause for concern?

2. What must the people do if the government becomes tyrannical?
Federalist #39 by James Madison (1788)

But if the government be national with regard to the operation of its powers, it changes its aspect again when we contemplate it in relation to the extent of its powers. The idea of a national government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. ...In this relation, then, the proposed government cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects. It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality....

1. According to Madison, the government established by the Constitution has “an indefinite supremacy over all persons and things” as long as what?

2. What does Madison say is the role of the tribunal (the Supreme Court) in deciding questions between the federal and state governments?
Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (1791)

I consider the foundation of the Constitution as laid on this ground that “all powers not delegated to the U.S. by the Constitution, not prohibited by it to the states, are reserved to the states or to the people” [Tenth Amendment]. To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.

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

They are not to do anything they please to provide for the general welfare. ...[G]iving a distinct and independent power to do any act they please which may be good for the Union, would render all the preceding and subsequent enumerations of power completely useless. It would reduce the whole instrument to a single phrase that of instituting a Congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would be also a power to do whatever evil they please and this can never be permitted.

1. Name at least two main reasons that Jefferson gave for not interpreting the powers of Congress broadly.
Memorandum #1: Edmund Randolph to George Washington (1791)

February 12, 1791

The Attorney General of the United States in obedience to the order of the President of the United States, has had under consideration the bill, entitled “An Act to incorporate the Subscribers to the Bank of the United States,” and reports on it, in point of constitutionality, as follows...

The general qualities of the federal government, independent of the Constitution and the specified powers, being thus insufficient to uphold the incorporation of a bank, we come to the last enquiry, which has been already anticipated, whether it [a National Bank] be sanctified by the power to make all laws which shall be necessary and proper for carrying into execution the powers vested by the Constitution. To be necessary is to be incidental, or in other words may be denominated the natural means of executing a power.

The phrase, “and proper,” if it has any meaning, does not enlarge the powers of Congress, but rather restricts them. For no power is to be assumed under the general clause but such as is not only necessary but proper, or perhaps expedient also. ...However, let it be propounded as an eternal question to those who build new powers on this clause, whether the latitude of construction which they arrogate will not terminate in an unlimited power in Congress?

In every aspect therefore under which the attorney general can view the act, so far as it incorporates the Bank, he is bound to declare his opinion to be against its constitutionality.

1. According to Randolph’s reasoning, how should the word, “necessary” be defined?

2. In your own words, explain Randolph’s view that “The phrase, ‘and proper,’ if it has any meaning, does not enlarge the powers of Congress, but rather restricts them.”
Alexander Hamilton’s Opinion on the National Bank (1791)

It is not denied that there are implied well as express powers, and that the former are as effectually delegated as the latter....

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

To establish such a right, it remains to show the relation of such an institution to one or more of the specified powers of the government. Accordingly it is affirmed, that it has a relation more or less direct to the power of collecting taxes; to that of borrowing money; to that of regulating trade between the states; and to those of raising, supporting & maintaining fleets & armies....

The constitutionality of all this would not admit of a question, and yet it would amount to the institution of a bank, with a view to the more convenient collection of taxes. ... To deny the power of the government to add these ingredients to the plan, would be to refine away all government.

1. Below are paraphrases of steps that Hamilton followed in order to reason that creation of the first national bank was a constitutional exercise of the power of Congress. Number them in the correct order to follow Hamilton’s reasoning.

   ___ Implied powers “are as effectually delegated as” the expressed powers.

   ___ Certain expressed powers are related to establishment of a national bank.

   ___ Implied powers are inherent in the definition of government: “To deny the power of the government to add these ingredients to the plan, would be to refine away all government.”

   ___ We must determine whether there is a natural relation between the national bank and one or more of the lawful purposes of government.
McCulloch v. Maryland (1819)

Although, among the enumerated powers of Government, we do not find the word “bank” or “incorporation,” we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation are entrusted to its Government. ... [I]t may with great reason be contended that a Government entrusted with such ample powers, on the due execution of which the happiness and prosperity of the Nation so vitally depends, must also be entrusted with ample means for their execution. ...

Does [the word, “necessary”] always import an absolute physical necessity...? We think it does not. ...[W]e find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable....

[It is clear] that any means adapted to the end, any means which tended directly to the execution of the Constitutional powers of the Government, were in themselves Constitutional. ...

We think so for the following reasons:

1st. The clause is placed among the powers of Congress, not among the limitations on those powers.

2d. Its terms purport to enlarge, not to diminish, the powers vested in the Government. It purports to be an additional power, not a restriction on those already granted. ...

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

That the power to tax involves the power to destroy [is a proposition] not to be denied...
The Court has [determined] that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared.

We are unanimously of opinion that the law passed by the Legislature of Maryland, imposing a tax on the Bank of the United States is unconstitutional and void.

1. How did Chief Justice John Marshall interpret the following clauses of the Constitution in the unanimous opinion in McCulloch v. Maryland: Commerce Clause, the Necessary and Proper Clause, and the Supremacy Clause?

2. Did the opinion in this case align more with the reasoning of Hamilton, Jefferson, or Randolph?
Jackson’s Veto Message, July 10, 1832

To the Senate.

...It is maintained by the 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. To this conclusion I can not assent ...

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. ... 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 to have only such influence as the force of their reasoning may deserve.

I understand them to have decided that inasmuch as a bank is an appropriate means for carrying into effect the enumerated powers of the General Government, therefore the law incorporating it is in accordance with that provision of the Constitution which declares that Congress shall have power “to make all laws which shall be necessary and proper for carrying those powers into execution.” 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” ...

...Under the decision of the Supreme Court, therefore, it is the exclusive province of Congress and the President to decide whether the particular features of this act are necessary and proper in order to enable the bank to perform conveniently and efficiently the public duties assigned to it as a fiscal agent, and therefore constitutional, or unnecessary and improper, and therefore unconstitutional.

... [M]any of the powers and privileges conferred on it can not be supposed necessary for the purpose for which it is proposed to be created, and are not, therefore, means necessary to attain the end in view, and consequently not justified by the Constitution.

It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes. .... There are no necessary evils in government. Its evils exist only in its abuses. If it would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing. In the act before me there seems to be a wide and unnecessary departure from these just principles.

Most of the difficulties our Government now encounters and most of the dangers which impend over our Union have sprung from an abandonment of the legitimate objects of Government by our national legislation, and the adoption of such principles as are embodied in this act.

1. What are the main objections that President Jackson raised against the National Bank?
1. Why was Jackson attacked as a tyrant in this cartoon?

2. Was Jackson trying to expand or limit the role of the national government?


**U.S. v. Comstock (2010), Majority Opinion**

The Necessary and Proper Clause grants Congress broad authority to enact federal legislation. Nearly 200 years ago, ...Chief Justice Marshall emphasized that the word “necessary” does not mean “absolutely necessary.” ...

Congress has the implied power to criminalize any conduct that might interfere with the exercise of an enumerated power... we must reject [the]argument that the Necessary and Proper Clause permits no more than a single step between an enumerated power and an Act of Congress....

To be sure, as we have previously acknowledged, the Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government’s role.

The Framers demonstrated considerable foresight in drafting a Constitution capable of such resilience through time. As Chief Justice Marshall observed nearly 200 years ago, the Necessary and Proper Clause is part of “a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.”

1. **How does this ruling interpret the Necessary and Proper Clause?**

2. **Who or what should be the one to do the “adapting” of the Constitution Chief Justice Marshall referred to 200 years ago?**
U.S. v. Comstock (2010), Dissenting Opinion

The Constitution plainly sets forth the “few and defined” powers that Congress may exercise. Article I “vest[s]” in Congress “[a]ll legislative Powers herein granted,” §1, and carefully enumerates those powers in §8. The final clause of §8, the Necessary and Proper Clause, authorizes Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” Art. I, §8, cl. 18. As the Clause’s placement at the end of §8 indicates, the “foregoing Powers” are those granted to Congress in the preceding clauses of that section. The “other Powers” to which the Clause refers are those “vested” in Congress and the other branches by other specific provisions of the Constitution.

...Congress lacks authority to legislate if the objective is anything other than “carrying into Execution” one or more of the Federal Government’s enumerated powers.

This limitation was of utmost importance to the Framers....Referring to the “powers declared in the Constitution,” Alexander Hamilton noted that “it is expressly to execute these powers that the sweeping clause ... authorizes the national legislature to pass all necessary and proper laws.” James Madison echoed this view, stating that “the sweeping clause ... only extend[s] to the enumerated powers.” Statements by delegates to the state ratification conventions indicate that this understanding was widely held by the founding generation....

I respectfully dissent

1. On what basis does the dissenting opinion disagree with the majority’s interpretation of the Necessary and Proper clause?
For each case listed on the table below, assign a score on a scale of 1 – 10, showing to what extent federal power changed.

1819
McCulloch v. Maryland

1824
Gibbons v. Ogden

1935
Schechter v. U.S.

1936
U.S. v. Butler

1942
Wickard v. Filburn

1987
South Dakota v. Dole

1995
U.S. v. Lopez

2000
U.S. v. Morrison

2005
Gonzales v. Raich

2010
U.S. v. Comstock