A New Approach to Congressional Power: Revisiting the *Legal Tender Cases*

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> [T]o make sure that powers should not be implied beyond those granted which might impair private rights, [the Framers] added the provision that "no person should be deprived of life or property without due process of law, nor should private property be taken without just compensation." Had the Constitution conferred upon Congress the express power to make treasury notes a legal tender . . . I should then no more be here contending that this prohibition . . . prevented the issue of such notes than I am contending that it prevents a declaration of war, the establishment of a system of bankruptcy, or the change of tariff. But it is exactly because the express power given in every one of these instances is wanting in this instance . . . that I assert against the implication of the legal tender provision the prohibition which the Constitution imposes.[1]

INTRODUCTION

The revival of judicial review over the scope of Congress's enumerated powers is summoning ghosts from constitutional law's oldest debate.[2] In a series of cases over the past decade, the Supreme Court has held that a federal statute regulating private conduct can be unconstitutional even if it does not run afoul of any prohibition on federal power.[3] While this line of authority seems

1. Knox v. Lee, 79 U.S. (12 Wall.) 457, 501 (1871) (argument of Mr. Potter).

2. This Article uses "implied" or "unenumerated" power to describe the outer bounds of the authority given to Congress. Those terms are sometimes contrasted with an "express power," which refers to an action at the core of an enumerated end (such as a declaration of war or a bankruptcy statute). The analysis presented in this piece applies only when the relationship between a federal law and an enumerated power is attenuated.

3. *See* United States v. Morrison, 529 U.S. 598, 627 (2000) (invalidating the civil remedy of the Violence Against Women Act (VAWA) for exceeding Congress's power under the Commerce Clause and Section Five of the Fourteenth Amendment); City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (striking down the Religious Freedom Restoration Act (RFRA), as applied to the states, for going beyond Congress's Section Five enforcement power); United States v. Lopez, 514 U.S. 549, 567 (1995) (holding that the Gun-Free School Zones Act could not be sustained under Congress's Commerce

capable of invalidating an array of laws, the recent decision in *Gonzales v. Raich*[4] casts doubt upon this doctrinal trend by upholding the Controlled Substances Act (CSA) as applied to home-grown marijuana used for medicinal purposes.[5]

Putting aside the substantive implications of *Raich*, the immediate fallout from the opinion is that the legal constraints on Congress's affirmative power are now quite muddled. In *United States v. Morrison*, detailed legislative findings on the commercial impact of gender-motivated violence were deemed inadequate to sustain the civil remedy provision in the Violence Against Women Act (VAWA).[6] By contrast, *Raich* upheld a prohibition on marijuana use by ill patients despite a lack of any findings that this kind of intrastate activity could substantially affect interstate commerce.[7] Likewise, in *United States v. Lopez* the Court held that having a gun—an item that often travels in interstate commerce—near a school was not economic activity and hence could not be regulated by Congress.[8] Yet in *Raich* the Court turned around and held that cultivating a plant for personal use—without using any implements that move in interstate commerce—is economic activity subject to federal control.[9] The common-law system has its charms, but reconciling the inconsistencies between these opinions is exasperating to say the least.

These contradictions are the result of a deep split within the legal elite about how the implied powers of Congress should be judged. One side says that courts should give virtually no scrutiny to a federal statute that falls outside of a constitutional prohibition.[10] From this perspective, the structure of the national

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Clause authority); *cf.* Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001) (reading the Clean Water Act narrowly to avoid constitutional problems under the Commerce Clause); Jones v. United States, 529 U.S. 848, 858–59 (2000) (interpreting the federal arson law to exclude private residences for the same reason).

4. 545 U.S. 1 (2005).

5. *See id.* at 33.

6. *Compare Morrison*, 529 U.S. at 614–15 (explaining that findings about the impact of gender-motivated violence on families could not support an inference of a substantial effect on interstate commerce), *with id.* at 628–36 (Souter, J., dissenting) (stating that the findings on the overall commercial impact of violence against women were overwhelming).

7. *Compare Raich*, 545 U.S. at 21 ("[T]he absence of particularized findings does not call into question Congress authority to legislate."), *with id.* at 54–55 (O'Connor, J., dissenting) ("If, as the Court claims, today's decision does not break with precedent, how can it be that voluminous findings, documenting extensive hearings about the specific topic of violence against women, did not pass constitutional muster in *Morrison*, while the CSA's abstract, unsubstantiated, generalized findings about controlled substances do?").

8. *Compare Lopez*, 514 U.S. at 560 (stating that prior Commerce Clause cases "involved economic activity in a way that the possession of a gun in a school zone does not"), *with id.* at 602 (Stevens, J., dissenting) ("Guns are both articles of commerce and articles that can be used to restrain commerce.").

9. *Compare Raich*, 545 U.S. at 25 (describing the activities regulated by the CSA as "quintessentially economic"), *with id.* at 50 (O'Connor, J., dissenting) ("[R]espondents have not come into possession by means of any commercial transaction; they have simply grown, in their own homes, marijuana for their own use, without acquiring, buying, selling, or bartering a thing of value.").

10. *See Lopez*, 514 U.S. at 618 (Breyer, J., dissenting) (stating that the Court need only "ask whether Congress could have had a *rational basis* for finding a significant (or substantial) connection between

government—particularly the equality of the states in the Senate—provides sufficient safeguards against congressional excess.[11] The other side asserts that due respect must be given to the principle that federal powers are enumerated, and this requires more rigorous review of a statute that lacks a close connection to a specific grant of authority, even though this creates "legal uncertainty."[12] Unfortunately, those holding this view do not agree on how that scrutiny should be applied. Thus, the result in a given case is hard to predict and seems to rely on a judicial balancing of federal and state interests that is a mystery to everyone else.

This Article bridges that divide by arguing that an exercise of implied power should receive heightened scrutiny only if it regulates a subject that is reasonably related to a concrete constitutional right.[13] Such an approach is deeply rooted in the Court's precedents, but that point is obscured by a basic misunderstanding of *M'Culloch v. Maryland*.[14] While Chief Justice Marshall's landmark decision is credited with creating the framework that governs the scope of federal power, the operative standard really comes from the *Legal Tender Cases* decided following the Civil War.[15] These three opinions, which addressed the question of whether Congress could require individuals and states to accept federal paper money ("greenbacks") as legal payment, are dismissed by many scholars.[16] Nevertheless, they discharged two critical functions that show how

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gun-related school violence and interstate commerce"); Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique,* Morrison*, and the Future of Federal Antidiscrimination Law*, 2000 SUP. CT. REV. 109, 118 ("Under the standard set forth by Chief Justice Marshall in *McCulloch v. Maryland*, Congress traditionally is accorded substantial discretion in choosing the means by which to pursue permissible legislative goals . . . .") (citation omitted).

11. *See Morrison*, 529 U.S. at 647 (Souter, J., dissenting) ("The defect, in essence, is the majority's rejection of the Founders' considered judgment that politics, not judicial review, should mediate between state and national interests . . . ."); *see also* Wickard v. Filburn, 317 U.S. 111, 120 (1942) ("[E]ffective restraints on [the commerce power's] exercise must proceed from political rather than from judicial processes.").

12. *Lopez*, 514 U.S. at 566; *see* David P. Currie, *RFRA*, 39 WM. & MARY L. REV. 637, 640 (1998) ("In demanding 'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,' the Court . . . set forth an attractive new test to serve notice that it would no longer blindly accept untenable congressional pretenses that a particular measure was 'appropriate' to enforce the Civil War amendments—or 'necessary and proper' to protect interstate or foreign commerce.") (citations omitted).

13. Nothing in this Article should be read as a challenge to Congress's power to enforce constitutional rights by appropriate legislation. The standard here applies only where an exercise of implied power might impair a concrete right. For the most part, the distinction between these situations is clear, though there are some exceptions. *See infra* note 290.

14. 17 U.S. (4 Wheat.) 316 (1819).

15. The first of the *Legal Tender Cases*, Hepburn v. Griswold, 5 U.S. (8 Wall.) 603 (1870), was overruled the following year by Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871). The third and final case, Juilliard v. Greenman, 110 U.S. 421 (1884), was decided a decade later. This Article builds on earlier work raising doubts about the influence of *M'Culloch*. *See* Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1128 (2001).

16. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 34–36 (1990) (attacking *Hepburn* as ill-advised judicial activism); ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 41–44 (Octagon Books 1979) (1941) (repudiating these cases and concluding that they were "[t]he first ominous rumble of

doctrine is often shaped by the interaction of courts and politics. First, the *Legal Tender Cases* were the tool that the Justices used to recall *M'Culloch* from the purgatory where that decision was sent by Jacksonian Democracy.[17] Few now recall that *M'Culloch* was largely ignored until the 1860s and was not read by the Supreme Court as a broad endorsement of federal power until the *Legal Tender Cases* made it so. Second, these decisions represent the Court's most sustained effort to examine the implied power question in the aftermath of the Fourteenth Amendment's redefinition of federalism. Thus, the *Legal Tender Cases* are much more relevant to the ongoing debate about how to strike the right balance between federal and state power than Marshall's initial effort in *M'Culloch*.[18]

The main insight that comes from examining the *Legal Tender Cases* is that each decision set forth a different framework for analyzing congressional power, even though all three addressed the same dispute.[19] In *Hepburn v. Griswold* (the first *Legal Tender Case*), the Court invalidated paper money because that exercise of unenumerated authority impaired, though did not violate, constitutional provisions protecting property and contract rights and did so without a sufficient justification.[20] A year later, in *Knox v. Lee* (the second *Legal Tender Case*), the Court reversed itself and held that creating greenbacks was a valid use of implied authority as a wartime exigency.[21] The last member of the trio, *Juilliard v. Greenman* (the third *Legal Tender Case*), upheld the use of paper money in peacetime and said that the entire issue was a "political

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what lay in the future" in the struggle between the New Deal and the Old Court); Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1448–49 (2001) (describing the *Legal Tender* decisions as purely political). One notable exception is Charles Fairman, who devoted a chapter to the cases in his section of the Oliver Wendell Holmes Devise. *See* 6 CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864–88, at 677–775 (1971); *see also* Kenneth W. Dam, *The* Legal Tender Cases, 1981 SUP. CT. REV. 367 (focusing on the financial details underlying the three cases).

17. *See Hepburn*, 75 U.S. (8 Wall.) at 614 (citing *M'Culloch*'s discussion of implied power for the first time since 1824); Andrew Jackson, Veto Message (July 10, 1832), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 576–91 (James D. Richardson ed., 1899) [hereinafter MESSAGES] (rejecting *M'Culloch*'s reasoning and hastening its demise); Gerard N. Magliocca, *Preemptive Opinions: The Secret History of* Worcester v. Georgia *and* Dred Scott, 63 U. PITT. L. REV. 487, 560–62 (2002) (discussing these developments).

18. In most instances, a decision on the scope of congressional authority is also a ruling on the breadth of state sovereignty. Accordingly, this Article treats the implied power and federalism issues as interchangeable.

19. This unusual conjunction, which saw the Justices address the same issue with different rationales in rapid succession, appears to have occurred only one other time—in the *Flag Salute Cases* following the New Deal. *See infra* text accompanying notes 171–75.

20. *See Hepburn*, 75 U.S. (8 Wall.) at 622–25; *see also* Edward S. Corwin, *The* Dred Scott *Decision, in the Light of Contemporary Legal Doctrines*, 17 AM. HIST. REV. 52, 66 (1911) (stating that *Hepburn* used the Due Process Clause "as a limitation upon the implied powers of Congress").

21. *See* Knox v. Lee, 79 U.S. (12 Wall.) 457, 544 (1871); *see also id.* at 541 ("It was at such a time and in such an emergency that the legal tender acts were passed."). This quick reversal of *Hepburn* is the main reason why the *Legal Tender Cases* are not in the constitutional canon, but that negative assessment is flawed. *See infra* notes 152–56 and accompanying text.

question" committed to Congress's sole discretion.[22] Despite their differences in result, all three cases relied on *M'Culloch* and each claimed that it was the best reading of Marshall's work.[23]

Recognizing the *Legal Tender Cases* as genuine interpretive milestones opens a way out of the current impasse on the breadth of federal authority by showing that there is another way to read the recent cases on implied power. Furthermore, the tests stated by the *Legal Tender Cases* exert a unifying force because they are applicable to any law that has an attenuated relationship to a power granted to Congress, and the same factors apply whether the Commerce Clause, Section Five of the Fourteenth Amendment, or some other clause is at issue. The history recounted here, though, also establishes that there is no "correct" test for implied power under all circumstances, because every generation of Americans assigns a different value to federalism. Over the years, the Court has used all three frameworks advanced in the *Legal Tender Cases* without settling on any one approach.[24] Nevertheless, there are compelling reasons to support the conclusion that the forgotten test of *Hepburn* is the best one for our time.

Part I removes *M'Culloch* from its pedestal by showing that the case was more cautious than is generally understood and was not accorded much weight for the first fifty years after it was decided. Part II explores *M'Culloch*'s rebirth during Reconstruction and looks at *Hepburn*'s attempt to refashion the test for implied power by blending legal tradition with new constitutional principles coming from the political branches. Part III examines the reversal of *Hepburn* and the use of an explicit balancing test for unenumerated authority in *Knox*. Part IV explains how the Court resolved the greenback issue in *Juilliard* by setting forth the highly deferential standard of review that prevailed following the New Deal. Part V analyzes the recent implied power decisions against the backdrop of the Reagan Revolution's renewed emphasis on federalism. Finally, Part VI assesses the merits of these three frameworks and gives a qualified endorsement to the *Hepburn* model.

I. *M'CULLOCH* RECONSIDERED

In *M'Culloch*, Chief Justice Marshall upheld the establishment of the Bank of the United States and declared that "where the law is not prohibited, and is

22. *See* Juilliard v. Greenman, 110 U.S. 421, 450 (1884).

23. *See id.* (quoting *M'Culloch*'s admonition about deference to Congress); *Knox*, 79 U.S. (12 Wall.) at 538–39; *id.* at 541 (asking "can it be maintained now that [wartime paper notes] were not for a legitimate end, or 'appropriate and adapted to that end,' in the language of Chief Justice Marshall?"); *Hepburn*, 75 U.S. (8 Wall.) at 622 (defending its methodology based on *M'Culloch*'s language that an implied power must be consistent with the "spirit of the Constitution").

24. *See* United States v. Darby, 312 U.S. 100, 115 (1941) (ushering in an era of total deference to congressional judgments on implied power consistent with the third *Legal Tender Case*); Champion v. Ames, 188 U.S. 321, 355–56 (1903) (affirming a ban on the interstate transport of lottery tickets to fight the "widespread pestilence of lotteries" consistent with the second *Legal Tender Case*); The Sinking-Fund Cases, 99 U.S. 700, 720–21 (1879) (upholding an amendment to a federal corporate charter as a valid exercise of implied power); *id.* at 736–37 (Strong, J., dissenting) (reading implied power narrowly in the presence of the Contracts Clause consistent with the first *Legal Tender Case*).

really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."[25] This Part examines how *M'Culloch* looked to its contemporaries. Viewed from that perspective, the decision was a relatively modest effort that relied heavily on the Bank's unique attributes to affirm its validity. Many lawyers during the antebellum era did not read the case as the broad endorsement of federal power that modern judges see. The Court's analysis, though, still went too far for supporters of Andrew Jackson. As a result, this landmark was effectively overruled and would not regain its authority until Reconstruction was in full swing.[26]

A. A FRESH LOOK AT THE CASE

Chief Justice Marshall cast such a powerful spell that *M'Culloch* has displaced the views of the Framers as the authoritative source on the scope of Congress's power.[27] Nevertheless, the opinion's fame has not generated a commensurate level of academic commentary on the decision that the Court actually reached.[28]

M'Culloch is now cited for the proposition that a federal statute is constitutional so long as there is a rational relationship between the means selected and an enumerated end.[29] That interpretation rests on two accurate observations about the case. The first is that there was no allegation made that the Bank abridged any constitutional right or involved a bar to federal action.[30] The other

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25. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

26. The discussion here focuses on *M'Culloch*'s analysis of congressional power and does not address the Court's explanation of why Maryland could not lawfully tax the Bank. *See id.* at 431 ("[T]he power to tax involves the power to destroy.").

27. *See* Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 814 (1996) ("*McCulloch* is . . . one of the handful of foundational decisions of the Supreme Court . . . . But [it] has the further (and even rarer) distinction of being treated as providing a full and complete interpretation of a particular clause of the Constitution. Analysis of the Necessary and Proper Clause has historically begun and ended with *McCulloch* . . . .").

28. In the 1950s, two scholars noted that "there has been remarkably little detailed analysis of the nature and context of the case—far less than some of Marshall's other far-reaching decisions such as *Marbury v. Madison* and *Gibbons v. Ogden*." Harold J. Plous & Gordon E. Baker, McCulloch v. Maryland, *Right Principle, Wrong Case*, 9 STAN. L. REV. 710, 710 (1957) (footnotes omitted).

29. *See, e.g.*, Norman v. Balt. & Ohio R.R. Co. (The Gold Clause Cases), 294 U.S. 240, 311 (1935) (explaining that *M'Culloch* tells courts to "inquire whether [Congress's] action is arbitrary or capricious, that is, whether it has a reasonable relation to a legitimate end"); United States v. Lue, 134 F.3d 79, 84 (2d Cir. 1998) (stating that the case "requires that the effectuating legislation bear a rational relationship to a permissible constitutional end"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 805 (3d ed. 2000) ("Chief Justice Marshall's standard for judging the scope of the implied power of Congress [is] permitting Congress to employ all means not prohibited by the Constitution and rationally related to ends within the compass of constitutionally enumerated national powers . . . .").

30. Maryland did argue that the Bank violated the Tenth Amendment, but there is no meaningful distinction between this claim and the argument that a statute exceeds the implied authority of Congress. *See M'Culloch*, 17 U.S. (4 Wheat.) at 374 (argument of Luther Martin) ("We insist, that the only safe rule is . . . the rule which the constitutional legislators themselves have prescribed, in the 10th

is that Marshall ultimately concluded that creating a Bank was a reasonable effort to carry out the authority granted to Congress.[31] The problem with this reading, however, is that it ignores other parts of *M'Culloch* that limited the holding by explaining that the Bank presented an especially compelling case for an exercise of implied power. In fact, Marshall based much of his argument on the principle that the Bank did not go beyond the enumerated authority because a corporation was always a means and never an end in itself.[32]

Let us therefore examine the details of the Court's discussion that the Bank, unlike other potential exercises of implied power, could not be confused with an end that was withheld from Congress by the Framers. The linchpin of *M'Culloch*'s analysis was that the grants of authority to Congress meant that it "must also be entrusted with ample means for their execution."[33] Thus, a central question in the case was whether the Bank was a means or an end. Marshall thought the answer was simple:

> The power of creating a corporation . . . is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. *It is never the end for which other powers are exercised, but a means by which other objects are accomplished.*[34]

To defend this assertion about the special character of corporations and banks, Marshall noted that "[n]o contributions are made to charity for the sake of an

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amendment, which is merely declaratory . . . ."); *see also* United States v. Darby, 312 U.S. 100, 124 (1941) ("The [Tenth] amendment states but a truism that all is retained which has not been surrendered."). Laws that regulate states *qua* states may be different because in that context the Court has suggested that the Tenth Amendment has independent force. *See* New York v. United States, 505 U.S. 144, 160–61 (1992).

31. *See M'Culloch*, 17 U.S. (4 Wheat.) at 422–23. Marshall was vague about which powers supported the incorporation of the Bank, but he referred to the taxing, borrowing, commerce, and war powers. *See id.* at 407, 416. Of course, a modern court would analyze the case under the Commerce Clause. After all, it is hard to think of anything more connected to commerce than a bank. The fact that Marshall did not see it this way belies the claim that his view of the commerce power was broad. *See* Wickard v. Filburn, 317 U.S. 111, 120 (1942) (stating that Gibbons v. Ogden, 22 U.S. 1 (1824), read the commerce power with "a breadth never yet exceeded"); *see also* United States v. Morrison, 529 U.S. 598, 641 (2000) (Breyer, J., dissenting) (repeating this myth). The *Legal Tender Cases* were also not viewed in commerce terms, even though money is clearly linked to the exchange of goods. The transformation of the Commerce Clause into a broad tool of federal authority actually happened much later. *See* Gerard N. Magliocca, *Constitutional False Positives and the Populist Moment*, 81 NOTRE DAME L. REV. 821, 840–45 (2006) (explaining that the growth of the Commerce Clause was caused by the Populist movement of the 1890s).

32. *See M'Culloch*, 17 U.S. (4 Wheat.) at 411.

33. *Id.* at 408; *see also id.* at 415 ("It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution.").

34. *Id.* at 411 (emphasis added). This language, like much of the analysis in *M'Culloch*, drew from Alexander Hamilton's report defending the first Bank law. *See* RON CHERNOW, ALEXANDER HAMILTON 352–55 (2004); J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 601.

incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education."[35] After listing another example, Marshall restated his conclusion that "a corporation is never used for its own sake, but for the purpose of effecting something else."[36]

From this premise, the Court reasoned that the omission of a specific power to create corporations was inconsequential and that the Bank did not upset the Framers' design. The Chief Justice wrote that there was "no reason to suppose that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this."[37] Since a corporation was "considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it."[38] As a result, Marshall concluded that "[n]o sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them."[39]

The dilemma for Marshall's contemporaries was that *M'Culloch* said little about how one should assess the scope of implied power when an act could be viewed as a means *or* as an end.[40] The Chief Justice's argument—that a bank was different from other potential exercises of unenumerated authority because a corporation could only be a means—was the predicate for the Court's maxim that Congress's decision to choose a particular means to carry out its powers should receive substantial deference.[41] Even if the Chief Justice's view of corporations was correct, though, almost no other congressional action can be classified as purely a means. Whether the topic is banning child labor, regulating domestic violence, or building bridges, a federal law can be labeled either as a means or as a "substantive and independent power" that must be enumerated according to Marshall's approach.[42] Accordingly, lawyers during the nineteenth

35. *M'Culloch*, 17 U.S. (4 Wheat.) at 411.

36. *Id.*

37. *Id.* at 421; *see also id.* at 407 (stating that a constitution should not "partake of the prolixity of a legal code").

38. *Id.* at 422.

39. *Id.* at 411 (following immediately upon the Court's statement that corporations were only a means and never an end).

40. To be fair, the Court did give other examples of valid implied powers. Marshall said that congressional action to prescribe criminal penalties for those who rob post offices or commit perjury in federal court were constitutional even in the absence of a specific enumeration because they supported the exercise of some enumerated end. *See id.* at 417. These examples, however, are not really helpful because there is no indication that even states' rights advocates thought these powers were denied to Congress.

41. *See id.* at 423 ("[T]he degree of its necessity, as has been very justly observed, is to be discussed in another place.").

42. *See* United States v. Morrison, 529 U.S. 598, 613 (2000) (concluding that the civil remedy of VAWA was not a valid means of regulating commerce); Hammer v. Dagenhart, 247 U.S. 251, 271–72 (1918) (holding that a law barring the interstate transport of goods made with child labor was an end and not a means); Hoke v. United States, 227 U.S. 308, 322–23 (1913) (reasoning that the White

century were unclear about how the holding should be applied.

Perhaps the most striking example of the gap between the way *M'Culloch* is read now and how the case was first interpreted comes from its most famous quote. Marshall's statement that "[l]et 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" is hailed as the classic explanation of the scope and flexibility of congressional power.[43] When the second *Legal Tender Case* was argued in 1870, however, the Attorney General told the Court that "[w]henever the extent of 'the auxiliary powers' of Congress is in controversy, *those who take the most restricted view*" relied on this canonical language.[44] That reading rested on the Chief Justice's assertion that acts must be "plainly adapted" to an enumerated end, which suggested that the scope of a genuine means was relatively narrow.[45]

Complicating the effort to extract guidance from *M'Culloch* is that the Court's analysis of how a bank fit on the means/ends spectrum is subject to criticism. Put simply, many people reject the notion that a corporation is just a tool to accomplish other objectives. Indeed, one of President Jackson's leading arguments against the Bank was that it was threatening popular liberty out of a desire to perpetuate its privileges.[46] In his view, the Bank was no longer just a means; it was acting as an end in itself. Senator Thomas Hart Benton, one of Jackson's leading supporters, wrote that "[e]xperience had shown such an

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Slavery Act was a commercial means similar to barring impure drugs from interstate traffic); *see also M'Culloch*, 17 U.S. (4 Wheat.) at 423 (explaining that the Court would invalidate a statute "should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government").

43. *M'Culloch*, 17 U.S. (4 Wheat.) at 421; *see* Katzenbach v. Morgan, 384 U.S. 641, 650 (1966) (calling the quote the "classic formulation"); United States v. Butler, 297 U.S. 1, 84 (1936) (Stone, J., dissenting) (stating that the quote is the "cardinal guide to constitutional exposition"); Gardbaum, *supra* note 27, at 814 (explaining that the quote is the "talismanic statement" about implied powers).

44. Knox v. Lee, 79 U.S. (12 Wall.) 457, 523 (1871) (emphasis added). The Attorney General was defending the legality of paper money, and thus there is no reason to think that he was misleading the Justices. If he thought that the language from *M'Culloch* was helpful, he would have said so.

45. *See id.* at 524. The Attorney General urged the Court to focus instead on an earlier Marshall opinion that said "'any means which are, in fact, conducive to the exercise of a power granted by the Constitution,'" are valid. *Id.* at 523 (argument of the Attorney General) (quoting United States v. Fisher, 6 U.S. (2 Cranch) 358, 395 (1805)). The problem is that *Fisher* involved a bankruptcy statute that was enacted pursuant to the express power. *See* 6 U.S. (2 Cranch) at 385 (assessing whether Congress could make the United States a priority creditor in a bankruptcy proceeding); *see also* U.S. CONST. art. I, § 8, cl. 4 (granting the power to establish "uniform laws on the subject of Bankruptcies throughout the United States"). Thus, this opinion also does not offer any real guidance on how courts should assess implied power.

46. *See* 3 ROBERT V. REMINI, ANDREW JACKSON AND THE COURSE OF AMERICAN DEMOCRACY, 1833–1845, at 98 (1984); *see also* Andrew Jackson, Removal of the Public Deposits (Sept. 18, 1833), *in* 3 MESSAGES, *supra* note 17, at 6 (documenting the expansion of loans from the Bank prior to the 1832 election and stating that "the leading object of this immense extension of its loans was to bring as large a portion of the people as possible under its power and influence, and . . . some of the largest sums were granted on very unusual terms to the conductors of the public press").

institution to be a political machine, adverse to free government, mingling in the elections and legislation of the country, corrupting the press; and exerting its influence in the only way known to the moneyed power—by corruption."[47] The claim that corporations are more interested in their own power than in serving the ends for which they are created is not confined to Jacksonian Democracy. Our history is full of political movements that have appealed to voters by attacking "organized wealth," "economic royalists," or some other corporate plutocracy.[48] Accordingly, *M'Culloch*'s idea that the Bank was lawful because firms can never be an end does not provide much help either.

Although Marshall's analysis was more circumspect than is generally acknowledged, he did establish one broad principle that would become a fixed point in constitutional reasoning. Before evaluating the arguments against the Bank, the Court stated that "those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception."[49] In other words, *M'Culloch* said that a federal statute based on an exercise of implied power was presumptively valid. And that was no mean achievement in an age when states' rights proponents argued that national action should be the exception and not the rule. Furthermore, every lawyer knows that where the burden of proof is allocated often determines the outcome of a case. Thus, it is not surprising that Marshall's foes were unhappy with the decision.[50]

The point of this revisionism is that *M'Culloch* does not define the metes and bounds of Congress's power in a way that really assists courts. By its own terms, the opinion says little about how the issue should be handled in the vast majority of cases where a federal law is a mix of means and ends. Though Chief Justice Marshall provided future generations with a clear statement of the Federalist constitutional vision, the sweep of his analysis is exaggerated.[51]

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47. 1 THOMAS HART BENTON, THIRTY YEARS' VIEW 225 (D. Appleton & Co. 1885); *see* ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON 59–61 (1945) (describing Benton's important role in the movement).

48. *See, e.g.*, 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 308–09 (1998) (quoting Franklin D. Roosevelt's speech at the 1936 Democratic Convention); LOUIS W. KOENIG, BRYAN 196–97 (1971) (quoting William Jennings Bryan's "Cross of Gold" speech at the 1896 Democratic Convention).

49. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 410 (1819); *see* Lochner v. New York, 198 U.S. 45, 68 (1905) (Harlan, J., dissenting) (citing *M'Culloch* for the proposition that "when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional").

50. For the best summary of the immediate reaction to *M'Culloch*, see generally JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 13–14 (Gerald Gunther ed., 1969) (describing the attack published in the *Richmond Enquirer* that has been erroneously attributed to Spencer Roane, and Marshall's response to those criticisms).

51. There is no denying that *M'Culloch* can be read consistently with the modern view of the case. Indeed, the third *Legal Tender Case* did exactly that. *See infra* text accompanying notes 184–88. The point is that Marshall's opinion, like any other, is open to more than one interpretation. Consequently, the various approaches advanced in the *Legal Tender Cases* were not the result of misreading

B. THE LOST OPINION

Moving beyond the four corners of Marshall's opinion, an even more serious flaw with the reverence given to *M'Culloch* is that the case was largely a hollow shell for the next fifty years. In fact, the Court did not cite the decision's discussion of implied power from 1824 until the first *Legal Tender Case* in 1870.[52] Marshall's reasoning was also ignored by the political branches, as Democratic Presidents routinely vetoed bills as unconstitutional when Congress sought to spend funds for ends that were not enumerated.[53] Thus, lawyers who faced implied power issues after the Civil War were stymied not only by *M'Culloch*'s opaque text, but by the fact that the case was more of a museum curiosity than a living legal force at the time.

The demise of *M'Culloch* was the direct result of Andrew Jackson's leadership of a political movement that displaced important elements of the Federalist regime. Benton said that "[i]t was not merely the bank which the democracy opposed, but the latitudinarian construction which would authorize it, and which would enable Congress to substitute its own will in other cases for the words of the constitution, and do what it pleased under the plea of 'necessary' . . . ."[54] The best way of summarizing the President's goal is that he wanted to overturn the presumption of validity stated by *M'Culloch* and require a closer fit between means and ends to sustain federal power. To see that idea in action, the place to begin is the Democrats' view of the Bank issue.

In his 1832 veto of the Bank recharter, Jackson laid out a detailed critique of Marshall's analysis.[55] The President's constitutional approach expressed deep skepticism about the implied power of Congress.[56] For example, he challenged *M'Culloch*'s view that the Constitution did not restrict the means that Congress

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M'Culloch. Instead, they reflect a genuine struggle by thoughtful people about how Marshall's decision should be construed.

52. Moreover, the only cite after 1819 was in another Bank case that rejected a request to overturn *M'Culloch*. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 860–61 (1824). The implied power portion of *M'Culloch* was cited by a dissent in the quintessential Jacksonian case, *Dred Scott v. Sandford*, but that just reinforces the fact that *M'Culloch* was not controlling authority during this era. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 542 (1857) (McLean, J., dissenting).

53. *See* James Buchanan, Veto Message (Feb. 24, 1859), *in* 5 MESSAGES, *supra* note 17, at 549 (citing *Dred Scott* in support of the view that creating land-grant colleges was not a power granted to Congress); Franklin Pierce, Veto Message (May 3, 1854), *in* 5 MESSAGES, *supra* note 17, at 251–52 (citing Jackson's Bank Veto in concluding that there was no federal authority to build hospitals for the insane); James K. Polk, Veto Message (Aug. 3, 1846), *in* 4 MESSAGES, *supra* note 17, at 460–66 (asserting that there was no federal power to construct intrastate roads).

54. 1 BENTON, *supra* note 47, at 225.

55. *See* Jackson, *supra* note 17, at 582–91.

56. *See id.* at 590 (stating that the Union's "true strength consists in leaving individuals and States as much as possible to themselves . . . not in binding the States more closely to the center, but leaving each to move unobstructed in its proper orbit"); *see also* Andrew Jackson, Veto Message (May 27, 1830), *in* 2 MESSAGES, *supra* note 17, at 487 (vetoing the Maysville Road as "an admonitory proof of the force of implication and the necessity of guarding the Constitution with sleepless vigilance against the authority of precedents which have not the sanction of its most plainly defined powers").

could select.[57] Jackson said that "[o]n two subjects only does the Constitution recognize in Congress the power to grant exclusive privileges or monopolies . . . . Out of this express delegation of power have grown our laws of patents and copyrights."[58] Article I, Section 8 specified that this means was authorized for those ends, and Jackson asserted that "[i]t is consistent with the fair rules of construction to conclude that such a power was not intended to be granted as a means of accomplishing any other end."[59] That logic oozes with bias against federal action; one can easily imagine Marshall using the same text as proof that Congress was given this means and that it was not specifically withheld elsewhere.[60]

Jackson also argued that the Bank was an inappropriate means because its delegated authority came without restrictions. Invoking the text of the Necessary and Proper Clause, Jackson stated that "[t]he Government is the only '*proper*' judge where its agents should reside and keep their offices . . . . It can not, therefore be '*necessary*' or '*proper*' to authorize the bank to locate branches where it pleases to perform the public service, without consulting the government, and contrary to its will."[61] Likewise, he questioned whether the Bank was a valid way for Congress to "coin money," contending that this "was conferred to be exercised by Congress itself, and not to be transferred to a corporation."[62] This was almost certainly the first time an elected official argued that there were

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57. *See supra* notes 36–39 and accompanying text.

58. Jackson, *supra* note 17, at 584. This comment was made in the context of a broader argument that the Bank was unlawful because its twenty-year charter restricted the discretion of a future Congress. Jackson said he was defending its institutional ability to select appropriate means by vetoing an attempt by one Congress to bind its successors. *See id.* ("On every other subject [besides patents and copyrights] which comes within the scope of Congressional power there is an ever-living discretion in the use of proper means, which can not be restricted or abolished . . . ."). Though this argument has force, Jackson's view would have made it impossible to charter a bank. If each Congress was required to renew the charter (every two years), the uncertainty created would cripple a bank's ability to attract investors or assure borrowers that their credit line would not suddenly disappear. Thus, Jackson's purported attempt to protect congressional flexibility had the effect of barring any Congress from choosing a bank.

59. *Id.*; *see* U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .").

60. *Cf.* G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 12 (Oxford University Press, Inc. 1988) (1976) (quoting Jefferson's statement that "[w]hen conversing with Marshall, I never admit anything. So sure as you admit any position to be good, no matter how remote from the conclusion he seeks to establish, you are gone.").

61. Jackson, *supra* note 17, at 585; *see* U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ."); *see also* 1 BENTON, *supra* note 47, at 252 ("The ground of [*M'Culloch*] was, that the bank was 'necessary' to the successful conducting of the 'fiscal operations' of the government; and that Congress was the judge of that necessity. Upon this ground the Maryland branch . . . was without the constitutional warrant which the Court required. Congress had given no judgment in favor of its necessity . . . the establishment of all other branches was referred to the judgment of the bank itself . . . .").

62. Jackson, *supra* note 17, at 586; *see also* U.S. CONST. art. I, § 8, cl. 5 ("The Congress shall have Power . . . [t]o Coin Money, regulate the Value thereof, and of foreign Coin . . . .").

constitutional limits on Congress's ability to delegate its authority.[63] Once again, that hardly reflects a presumption of validity for implied power or a belief that Congress should be given flexibility in the means it selects.

Though Jackson's position was contested by many legal elites, his core belief that federal authority should not "be maintained or [the] Union preserved by invasions of the rights and powers of the several States" carried the nation in a series of electoral victories.[64] Announcing a plan to withdraw federal deposits from the Bank in 1833, he declared that "the President considers his reelection as a decision of the people against the Bank."[65] Over the next few years, Democrats implemented their constitutional vision by expanding the Court from seven to nine members and then filling (i.e., packing) these seats with supporters.[66] That was only possible, of course, because Jackson's movement won broad support for its legal program.[67]

In the wake of this popular tidal wave, the President's supporters openly proclaimed that *M'Culloch* was no longer good law. Delivering the eulogy with glee, Senator Benton wrote that:

> [E]xperience has invalidated the decision of the Supreme Court . . . . "[N]ecessary to carry into the effect the granted powers," was the decision of the court. Not so, the voice of experience. That has proved such an institution to be unnecessary . . . . [T]he decision itself vanishes—disappears—"like the baseless fabric of a vision, leaving not a wreck behind." But there will be a time hereafter for the celebration of this victory of the constitution over the Supreme Court . . . .[68]

All that remained was for someone to bring a test case that allowed the new Justices to turn Jacksonian dogma into doctrine.[69]

Only one of constitutional law's great accidents saved *M'Culloch* from being

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63. This argument would reappear in another major implied power debate a century later. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935) (concluding that the National Industrial Recovery Act's delegation of regulatory authority to trade associations was "unknown to our law, and . . . utterly inconsistent with the constitutional prerogatives and duties of Congress"). Jackson was not the first person to try out a nondelegation rationale. In fact, the lawyers for Maryland made this argument in *M'Culloch*. *See* Plous & Baker, *supra* note 28, at 721. Chief Justice Marshall, though, ignored the issue.

64. Jackson, *supra* note 17, at 590; *see also* Magliocca, *supra* note 17, at 548–50 (summarizing Jackson's political momentum, following the Bank Veto, in the 1832 elections).

65. Jackson, *supra* note 46, at 7.

66. *See* Act of March 3, 1837, ch. 34, 5 Stat. 176–77 ("An Act Supplementary to the act entitled 'An Act to Amend the Judicial System of the United States'"); Magliocca, *supra* note 17, at 553–58 (discussing the reform of the circuit system and Jackson's judicial picks).

67. *See* STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH 152–53 (Belknap Press 1997) (1993) (describing President Jackson and the Democratic party's victory in the 1834 midterm elections as "a triumph unheard of in modern times").

68. 1 BENTON, *supra* note 47, at 229.

69. *See* Magliocca, *supra* note 17, at 560–61 (describing Senator Benton's efforts to put together such a case).

overruled. When Jackson's political opponents captured control of the Presidency and of Congress in 1840, they called a special session to create a new Bank.[70] Democrats anticipated its passage as their chance to bring *M'Culloch* down, and one congressman rhetorically asked his colleagues "if a majority of [the Court's] members, was not of that school of politicians, who believed a Bank of the United States to be unconstitutional."[71] He observed that if "this question goes before the Supreme Court, and they take it up as an original question, what will be the result? I say to you wait—there is a lion in your path."[72] Before any litigation could begin, however, President William Henry Harrison died and was replaced by Vice President John Tyler, a states' rights Democrat who was put on the Whig ticket to provide balance.[73] Tyler proceeded to veto the Bank while reiterating Jackson's reasoning.[74] Since Harrison probably would have signed a Bank bill, his untimely death short-circuited the Taney Court's ability to issue an opinion overruling *M'Culloch* and denouncing Marshall's deviation from constitutional principles.[75] Another chance to overrule the case never came along because Democrats regained control of the political branches after 1840 and blocked any suspect legislation from being enacted.[76]

When the Justices did face implied power claims, they simply ignored *M'Culloch* and pursued the more skeptical analysis that Jackson insisted upon. In *Prigg v. Pennsylvania*,[77] the Court faced the question of whether the Fugitive Slave Act was constitutional notwithstanding the fact that there was no enumerated power to enact one.[78] While the decision upheld this exercise of implied authority, the Court did not cite *M'Culloch* and instead rested its conclusion on

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70. *See* NORMA LOIS PETERSON, THE PRESIDENCIES OF WILLIAM HENRY HARRISON & JOHN TYLER 37–39 (1989).

71. CONG. GLOBE, 27th Cong., 1st Sess. 299 (1841) (statement of Rep. Wise).

72. *Id.*

73. *See* PETERSON, *supra* note 70, at 19–20.

74. *See* John Tyler, Veto Messages (Aug. 16, 1841), *in* 4 MESSAGES, *supra* note 17, at 63–68; John Tyler, Veto Messages (Sept. 9, 1841), *in* 4 MESSAGES, *supra* note 17, at 68–72.

75. *See* William Henry Harrison, Inaugural Address (Mar. 4, 1841), *in* 4 MESSAGES, *supra* note 17, at 5–11 (setting forth his view that the President should defer to congressional judgment and use the veto power conservatively). Naturally, this involves some speculation, but in this instance it is well-founded because of the contemporary statements made about the prospects for a new Bank statute. *See* MERRILL D. PETERSON, THE GREAT TRIUMVIRATE: WEBSTER, CLAY, AND CALHOUN 306 (1987) (stating Senator Daniel Webster's view that "the Supreme Court, as presently composed, would probably find the act unconstitutional at the first opportunity").

76. *See* Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 VAND. L. REV. 73, 112 (2000); Klarman, *supra* note 15, at 1131. The more interesting question is whether Harrison's death harmed the development of constitutional law. That is not a comment on *M'Culloch*'s merits. Rather, if the case were overruled we would have a clearer picture of how constitutional change really occurs—through the overlapping contributions of multiple generations. *See* GERARD N. MAGLIOCCA, ONE TURN OF THE WHEEL: ANDREW JACKSON AND THE MODERN CONSTITUTION (forthcoming 2007) (exploring this model in depth).

77. 41 U.S. (16 Pet.) 539 (1842).

78. *See id.* at 618 ("[T]he argument comes to this, that although rights are exclusively secured by, or duties are exclusively imposed upon the national government, yet, unless the power to enforce these

the narrow ground that the Act was valid "to carry into effect rights expressly given, and duties expressly enjoined" by the Fugitive Slave Clause in Article IV, Section 2.[79] In other words, in *Prigg* the Justices unanimously concluded that there was a close fit between an enumerated right and the means chosen to protect that right. That tight connection, though, was not present in the Court's other major antebellum encounter with implied power—*Dred Scott v. Sandford*.[80] In voiding Congress's effort to bar slavery in the northern territories, the Court again disregarded *M'Culloch* and ruled that the Constitution guarded "against any inroads which the General Government might attempt, under the plea of implied or incidental powers."[81] Thus, in this era the evaluation of Congress's unenumerated power was in accord with Jacksonian tenets and at odds with the presumption of validity articulated by Chief Justice Marshall.[82]

In sum, *M'Culloch* did not exactly get rave reviews in its first fifty years. Indeed, if a symposium had been convened on the opinion's golden anniversary, the theme would likely have been "A Bold Failure." It was only in the fire of the *Legal Tender Cases* that the Court refashioned *M'Culloch* into a precedent that resembles its modern form.

II. *HEPBURN* AND THE STRUCTURAL APPROACH

This Part examines the method for analyzing the scope of implied authority set forth in the first *Legal Tender Case*, which this Article contends would be the one most appropriate for the present constitutional climate. Congress stretched federal power to its uttermost to wage the Civil War, and the use of paper money to finance military spending became a major controversy. The Supreme Court of the 1870s, however, faced a legal landscape that was as radically transformed by Lincoln's leadership of the Republicans as it had been by Jackson's leadership of the Democrats a generation earlier. In that context, the Court had to reconsider *M'Culloch* and find a way to integrate the recent past with the new orthodoxy.

A. THE LEGAL TENDER ACT OF 1862

Paper money was greeted with great hostility by constitutional lawyers until the 1860s. The Framers were opposed because they thought greenbacks created

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rights, or to execute these duties can be found among the express powers of legislation enumerated in the Constitution, they remain without any means of giving them effect . . . .").

79. *Id.* at 618–19; *see also* U.S. CONST. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall . . . be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

80. 60 U.S. (19 How.) 393 (1857); *see* Magliocca, *supra* note 17, at 582–83 (discussing the Court's treatment of implied power under the Territory Clause).

81. *Dred Scott*, 60 U.S. (19 How.) at 451. The Court's approach in analyzing this issue is examined more closely in Part II because of its similarity to *Hepburn*. *See infra* note 135 and accompanying text.

82. *See, e.g.*, James K. Polk, Veto Message (Aug. 3, 1846), *in* 4 MESSAGES, *supra* note 17, at 461 ("It is not enough that [the action] may be regarded by Congress as *convenient* or that its exercise would advance the public weal. It must be *necessary and proper* to the execution of the principal expressed power to which it is an incident . . . .").

inflation and constituted a wealth transfer from creditors to debtors that was inconsistent with property rights.[83] Jacksonian Democrats, by contrast, were against paper money because they thought it allowed the financial aristocracy to manipulate the economy.[84] Indeed, Jackson would probably be horrified to learn that his main claim to fame today is as the face of the twenty dollar bill.[85]

Notwithstanding these objections, the Civil War plunged the Union into a financial crisis that only paper money could solve. The problem was that there was not enough gold and silver to fund the armies in the field. Salmon P. Chase, the Treasury Secretary, tried to address this problem by borrowing on the open market.[86] When that proved inadequate, the only options were raising taxes or printing dollars backed by the credit of the United States.[87] Chase opposed financing the war exclusively through higher taxes, yet he had serious qualms about the legality of greenbacks.[88] Nevertheless, he supported a bill to create $100 million in fiat money (that is, paper that could not be redeemed for gold or silver).[89] The Secretary said that though he had "a great aversion to making anything but coin a legal tender in payment of debts . . . [i]t is . . . at present impossible, in consequence of the large expenditures entailed by the war, and the suspension of the banks, to procure sufficient coin for disbursements."[90]

In debating the Legal Tender Act, Congress gave some attention to the constitutional question. There was a consensus that paper money did not fall within the core of an enumerated end, and hence foes of the bill argued that it

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83. *See* THE FEDERALIST NO. 44, at 300 (James Madison) (Jacob E. Cooke ed., 1961) (lamenting "the pestilent effects of paper money"). Notably, the Framers focused their concern on whether the States could issue paper money; they said nothing about the federal government. *See id.* ("[I]t may be observed that the same reasons which shew [sic] the necessity of denying to the States the power of regulating coin, prove with equal force that they ought not be at liberty to substitute a paper medium in the place of coin."); *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 123 (2005) (observing that the Framers did not limit federal authority over the monetary system).

84. *See* 1 BENTON, *supra* note 47, at 187 ("Gold and silver is the best currency for a republic . . . and if I was going to establish a working man's party, it should be on the basis of hard money:—a hard money party against a paper party."); SCHLESINGER, *supra* note 47, at 120 ("[T]he working classes believed that they were regularly cheated by paper money.").

85. A striking illustration of Jackson's animus against paper money came in the Specie Circular, an executive order banning the use of state bank notes to purchase federal lands. *See* Andrew Jackson, Annual Message (Dec. 5, 1836), *in* 3 MESSAGES, *supra* note 17, at 249; *see also* Andrew Jackson, Farewell Address (Mar. 4, 1837) *in* 3 MESSAGES, *supra* note 17, at 301–03 (denouncing paper money).

86. *See* JOHN NIVEN, SALMON P. CHASE: A BIOGRAPHY 262–63 (1995); Ajit V. Pai, *Congress and the Constitution: The Legal Tender Act of 1862*, 77 OR. L. REV. 535, 538–40 (1998).

87. *See* Pai, *supra* note 86, at 540–41; *see also* NIVEN, *supra* note 86, at 267.

88. *See* NIVEN, *supra* note 86, at 270; *see also* Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 625 (1870) ("Some who were strongly averse to making government notes a legal tender felt themselves constrained to acquiesce in the views of the advocates of the measure. Not a few . . . have, since the return of peace, and under the influence of the calmer time, reconsidered their conclusions . . . ."), *overruled by* Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871).

89. *See* NIVEN, *supra* note 86, at 298; Pai, *supra* note 86, at 542.

90. Letter from the Secretary of the Treasury to the Committee of Ways and Means, *in* CONG. GLOBE, 37th Cong., 2d Sess. 618 (1862).

could not pass muster.[91] Relying on well-worn Jacksonian ideas, these critics denied that creating greenbacks was a means of executing a granted power and asserted that it was a forbidden end.[92] Supporters of the bill responded that a generous view of implied power was necessary to meet the emergency brought on by secession. They stressed that only states were barred from making "any Thing but gold and silver Coin a Tender in Payment of Debts," and argued that this suggested that Congress could do both.[93]

In support of the broader reading of implied power, a handful of Republicans began excavating *M'Culloch*.[94] Though their invocation of the case was tentative, during the next few years this revival gathered pace as reformers began building a new legal regime that expanded federal power and guaranteed basic rights.[95] Far from being ignored, the decision was now described as "the celebrated case of McCulloch v. The State of Maryland," and Republicans fell all over themselves to cite its analysis.[96] That new status was confirmed by all three Reconstruction Amendments, which gave Congress the power to enforce their provisions "by appropriate legislation."[97] There was agreement at the time that this was intended to place *M'Culloch*'s view of the Necessary and Proper Clause into the new constitutional text.[98] This renewed interest in Congress set

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91. *See, e.g.*, CONG. GLOBE, 37th Cong., 2d Sess. 797 (1862) (statement of Sen. Sumner) ("It is true that in the Constitution there are no words expressly giving to Congress the power to make Treasury notes a legal tender . . . .").

92. *See, e.g.*, CONG. GLOBE, 37th Cong., 2d Sess. 769 (1862) (statement of Sen. Collamer) (rejecting the view that fiat money was an appropriate means of executing the borrowing power because "[t]here never can be such a thing as an incidental power in Congress to do a thing where there is an express grant of power for the purpose").

93. U.S. CONST. art. I, § 10, cl. 1; *see* CONG. GLOBE, 37th Cong., 2d Sess. 798 (1862) (statement of Sen. Sumner) ("[W]ith all this ample knowledge [of paper money]—present certainly to the framers of the Constitution, if not to the people—no express words on this subject were introduced into the text of the Constitution, except with regard to the States.").

94. The excavating metaphor is suggested by a comment made during the debate. *See* CONG. GLOBE, 37th Cong., 2d Sess. 630 (1862) (statement of Rep. Morrill) (discussing the "contest of Old Hickory with that 'monster,' the old United States Bank, now buried below the lower red sandstone of geologists").

95. *See id.* at 526 (statement of Rep. Spaulding) (referring to the case by name in a speech introducing the bill); *see also id.* at 688 (statement of Rep. Stevens) (noting that the Supreme Court ruled that Congress had broad discretion over implied power); *id.* at 679–80 (statement of Rep. Kellogg) (reasoning by analogy to the Bank that paper money was lawful).

96. CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866) (statement of Rep. Wilson); *see, e.g.*, *id.* at 1836 (statement of Rep. Lawrence) (discussing the case in reference to the Civil Rights Act of 1866); *id.* at 1294 (statement of Rep. Shellabarger) (quoting Justice Story's treatise which invoked *M'Culloch*); *id.* at 768 (statement of Sen. Sumner) (citing the case to discuss the Civil Rights Act); *see also* Steven A. Engel, Note, *The* McCulloch *Theory of the Fourteenth Amendment:* City of Boerne v. Flores *and the Original Understanding of Section 5*, 109 YALE L.J. 115, 141–46 (1999) (surveying the legislative debate on the Amendment).

97. *See* U.S. CONST. amend. XV, § 2; *id.* amend. XIV, § 5; *id.* amend. XIII, § 2.

98. *See* CONG. GLOBE, 42d Cong., 2d Sess. 526 (1872) (statement of Sen. Thurman) ("This very language, 'appropriate legislation,' is taken from an opinion of Chief Justice Marshall in the case of *McCulloch vs. Maryland* . . . in which he makes the terms 'necessary legislation' and 'appropriate legislation' synonymous and convertible terms."); *see also* Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) ("[T]he *McCulloch v. Maryland* standard is the measure of what constitutes 'appropriate

the stage for the Justices' reconsideration of *M'Culloch* in the *Hepburn* case.

B. MULTIGENERATIONAL SYNTHESIS AND THE RESTORATION OF *M'CULLOCH*

The Supreme Court that heard argument on the constitutionality of the Legal Tender Act still bore the scars of its recent encounter with the Republican Congress. Only eight Justices, rather than the usual nine, were on the bench as a result of a Court-shrinking statute passed in 1866 to prevent President Andrew Johnson from making appointments who would be hostile to Reconstruction.[99] Moreover, the Chief Justice of this rump body was none other than Salmon P. Chase, who was elevated to the center chair by Abraham Lincoln.[100] In one of those great ironies of history, the man who developed the greenback policy now sat in judgment of his actions. Eclipsing this personal drama was the broader task facing the Court on how to craft an implied power standard that acknowledged the dramatic changes in federalism wrought by Reconstruction yet remained sensitive to the precedents set forth by the Framers and by Jacksonian Democracy.

In this respect, *Hepburn* was an example of a recurring interpretive problem called multigenerational synthesis.[101] While courts are charged with reconciling traditional concepts with new circumstances, that job becomes more challenging in the wake of a major reform by the political branches. Sometimes these changes come through a constitutional amendment, and sometimes from a dramatic shift in judicial personnel. No matter what form these marching orders take, though, the Justices are called upon to blend new principles with legal tradition. Robert H. Jackson explained that in these instances the Court is really weighing the claims of the current political generation against those of past generations.[102] In *The Struggle for Judicial Supremacy*, Jackson said that "[t]he judiciary is . . . the check of a preceding generation on the present one; a check of conservative legal philosophy upon a dynamic people, and nearly always the check of a rejected regime on the one in being."[103] With this concept in mind, the judicial role is best understood as weaving different strands of our experience into a coherent whole—a multigenerational synthesis. Reconstruction called for this interpretive exercise with respect to implied power because the equilibrium between the federal and state governments was being radically redefined at the time.[104]

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legislation' under § 5 of the Fourteenth Amendment."); United States v. Rhodes, 27 F. Cas. 785, 791 (C.C.D. Ky. 1866) (No. 16,151) ("In *McCullough v. Maryland*, Chief Justice Marshall used the phrase 'appropriate' as the equivalent and exponent of 'necessary and proper' in the preceding paragraph.") (citation omitted).

99. *See* JACKSON, *supra* note 16, at 41; 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 501 (Fred B. Rothman & Co. 1987) (1937).

100. *See* NIVEN, *supra* note 86, at 374.

101. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 88 (1991) (coining this term).

102. *See* JACKSON, *supra* note 16, at 315.

103. *Id.*

104. *See, e.g.*, Knox v. Lee, 79 U.S. (12 Wall.) 457, 555 (1871) (Bradley, J., concurring) ("The doctrine so long contended for, that the Federal Union was a mere compact of States, and that the

Naturally, there are many ways to achieve this task depending on the force of the relevant precedents and the degree to which they clash with a new movement's principles. In some cases, the Court just overrules cases that are in opposition to the core principles of the new generation while reviving others that are friendly to these views.[105] The Taney Court resolved this tension by ignoring Federalist opinions such as *M'Culloch* without overruling them.[106] One point that is clear, though, is that courts usually try to present their synthetic activity as consistent with past practice.[107] Judges are reluctant to admit that they are adjusting precedent because continuity is critical to judicial authority.[108]

Chief Justice Chase began addressing these challenges in *Hepburn* by reformulating first principles. The case involved a promissory note issued prior to the enactment of the Legal Tender Act.[109] When the note fell due after paper money was in circulation, its holder refused to accept these dollars and claimed that he was owed payment in gold or silver.[110] The Court laid down the rule of decision as "acts of Congress must be regarded as constitutional, unless clearly shown to be otherwise."[111] In other words, Chase embraced Marshall's idea that the burden of persuasion in implied power cases rested with the party attacking the law.[112] Nevertheless, the Court said that "[n]o department of the government has any other powers than those thus delegated to it by the people."[113] While it was not required "to show a particular and express grant," the Chief Justice said that "the extension of power by implication was regarded with some apprehension by the wise men who framed, and by the intelligent citizens who adopted, the Constitution."[114]

With these parameters in place, the Court restored *M'Culloch* as an authorita-

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States, if they chose, might annul or disregard the acts of the National legislature, or might secede from the Union at their pleasure, and that the General government had no power to coerce them into submission to the Constitution, should be regarded as definitely and forever overthrown. This has been finally effected by the National power, as it had often been before, by overwhelming argument.").

105. *See, e.g.*, United States v. Darby, 312 U.S. 100, 115–17 (1941) (relying on the "powerful and now classic dissent of Mr. Justice Holmes" in overruling Hammer v. Dagenhart, 247 U.S. 251 (1918), and upholding the Fair Labor Standards Act); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (abolishing federal common law in diversity cases by citing a Holmes dissent as authority).

106. *See supra* notes 77–81 and accompanying text.

107. For an example of this, see *infra* notes 118–21 and accompanying text.

108. *See, e.g.*, GARRY WILLS, CERTAIN TRUMPETS: THE CALL OF LEADERS 132 (1994) (explaining that courts fit Max Weber's model of traditional authority); *infra* notes 116–21, 196–99, 230–31 and accompanying text.

109. *See* Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 606 (1870), *overruled by* Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871).

110. *Id.* at 612.

111. *Id.* at 610. In the opening part of the opinion, the majority rejected the argument that the Legal Tender Act could be construed as not applying to contracts made prior to its enactment. *See id.* at 607–10.

112. *See supra* notes 49–50 and accompanying text.

113. *Hepburn*, 75 U.S. (8 Wall.) at 611.

114. *Id.* at 613.

tive reference point by citing its implied power discussion for the first time in half a century. Chase wrote that "[t]he rule for determining whether a legislative enactment can be supported as an exercise of an implied power was stated by Chief Justice Marshall, speaking for the whole court, in the case of *McCullough v. The State of Maryland* . . . ."[115] He added that "the statement then made has ever since been accepted as a correct exposition of the Constitution," and "must be taken then as finally settled, so far as judicial decisions can settle anything . . . ."[116] The dissenters in *Hepburn* also agreed that *M'Culloch* was the proper baseline.[117] As a result, the Justices were unanimous in holding that a principled synthesis of Reconstruction with legal tradition required that Jackson's view of *M'Culloch* be repudiated.

This profound turning point in our jurisprudence has not received the attention it deserves largely because of the Court's artful construction. In the passages just quoted, Chase gave the impression that he was just restating an uncontroversial proposition of law by citing *M'Culloch*.[118] That is the import of his aphorism that the rule set forth by Marshall was always accepted as correct.[119] Yet the history of *M'Culloch* from 1819 to 1870 undercuts this claim. Of course, from another point of view Chase was stating the truth because the Taney Court never explicitly criticized Marshall's opinion. This omission gave the Justices the opening they needed to present *Hepburn* as the extension of an unbroken chain of precedent. There is, however, a hint of the sleight-of-hand at work in the Court's claim that *M'Culloch* is "finally settled, so far as judicial decisions can settle anything . . . ."[120] In this phrase, there is a suggestion that Marshall's view was not always accepted because "finally settled" implies that the issue was once in doubt. Likewise, the Court's emphasis on the ability of judicial decisions to settle these points looks like a reference to the political forces that buried and then revived *M'Culloch*. These signals were clear at the time, but they now fly below the legal radar because the *Hepburn* Court made no mention of the Jacksonian interregnum.[121]

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115. *Id.* at 614 (footnote omitted).

116. *Id.* at 614–15.

117. *See id.* at 635 (Miller, J., dissenting) (relying on "the construction of Chief Justice Marshall and the full court over which he presided, a construction which has never to this day been overruled or questioned in this court").

118. This performance is similar to the more famous one given by Chase a year earlier in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869). In that case, the Chief Justice held that a jurisdiction-stripping statute was valid by glossing over the fact that Congress intended to prevent the Court from hearing any challenge to military Reconstruction in the South, not just the challenge brought under the specific habeas corpus statute that was repealed. *See id.* at 513–15.

119. *See supra* text accompanying note 116.

120. *Hepburn*, 75 U.S. (8 Wall.) at 615.

121. Reinforcing this reading of *Hepburn* as a sophisticated synthesis of Reconstruction with prior constitutional generations is that a similar action took place at the same time for Marshall's landmark opinion in *Worcester v. Georgia*, 31 U.S. 515 (1832). *See* Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875, 912–14 (2003). That opinion on Cherokee rights was also smothered by Jackson and ignored by the Taney Court. And *Worcester*, like *M'Culloch*, was

Accordingly, the first *Legal Tender Case* was the vehicle that rescued *M'Culloch* from oblivion and set it into the constitutional firmament. With this unanimous act, the Justices took the first step toward integrating the principles of Reconstruction with the claims of precedent.

C. READING IMPLIED POWER THROUGH SPECIFIC PROHIBITIONS

Under the modern view of *M'Culloch*, the rest of Chase's opinion should have been limited to finding a rational basis for the Legal Tender Act. Since the Chief Justice developed the policy himself, there can be little doubt that he found his own actions rational. Yet the Court did not analyze the case in this fashion. Instead, Chase said that *M'Culloch* supported the conclusion that making paper money legal tender exceeded Congress's authority.[122] In reaching this result, the Court advanced an implied power test that deferred to legislative judgments on means and ends unless the statute was operating in the vicinity of a prohibition on governmental power.[123]

The Court began its assessment of *M'Culloch* by focusing on how valid means should be separated from prohibited ends. Responding to the view "that the power to make United States notes a legal tender in payment of all debts is a means appropriate and plainly adapted to the execution of the power to carry on war, of the power to regulate commerce, and of the power to borrow money," Chase declared that this "proves too much."[124] According to the Chief Justice, that analysis would carry "the doctrine of implied powers very far beyond any extent hitherto given to it" and "convert the government, which the people ordained as a government of limited powers, into a government of unlimited powers."[125] Put another way, the Court took the view that while Reconstruction diminished the constitutional vitality of states' rights through its rejection of secession and imposition of military rule on the South, that idea still required judges to scrutinize at least some congressional claims that a particular implied power was a means for which "the legislature has unrestricted choice."[126]

The Chief Justice next sought guidance from *M'Culloch* and from other constitutional provisions to ascertain the scope of this review. In the opinion's central passage, the Court stated that:

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used by Republicans as a reference point for the Fourteenth Amendment. *See id.* at 914–24, 943–65. It should therefore come as no surprise that in the same year *Hepburn* was decided the Senate Judiciary Committee revived *Worcester* in a report on the relationship between the Fourteenth Amendment and Native Americans. *See* S. REP. NO. 41-268, at 7 (1870) (asserting that *Worcester* was "the unquestioned law of the court to-day" and ignoring the contrary cases decided during the previous thirty years); Magliocca, *supra*, at 952–53.

122. *See Hepburn*, 75 U.S. (8 Wall.) at 622–24.

123. The discussion in the text does not examine the dissent in *Hepburn*, because the arguments made there were repeated at greater length in the majority opinion of the second *Legal Tender Case*. *See generally infra* Part III.

124. *Hepburn*, 75 U.S. (8 Wall.) at 616–17.

125. *Id.* at 617–18.

126. *See id.* at 618.

> [T]here is another view, which seems to us decisive, to whatever express power the supposed implied power in question may be referred. In the rule stated by Chief Justice Marshall, the words appropriate, plainly adapted, really calculated, are qualified by the limitation that the means must be . . . consistent with the letter and spirit of the Constitution.[127]

Chase concluded that the critical language from *M'Culloch* was that an implied power must adhere to the "spirit" of the Constitution. He therefore framed the issue as "whether making bills of credit a legal tender, to the extent indicated, is consistent with the spirit of the Constitution."[128] For the Court, this spirit was not some free-floating concept. Instead, it was defined by the privileges guaranteed elsewhere in the text. In this case, the Chief Justice said the Contracts, Takings, and Due Process Clauses indicated what the constitutional spirit required.[129]

Thus, the Court ruled that the Legal Tender Act must receive rigorous scrutiny because it was an implied power that impaired, though did not violate, property and contract rights. Chase conceded that greenbacks did not invade the Contracts Clause because that provision bound only the States.[130] Likewise, the Takings Clause was not infringed because paper money did not involve a use of eminent domain.[131] Nevertheless, the Court said that both provisions counseled against recognizing an implied power to create greenbacks and make them legal tender. The Chief Justice held that "a law not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution."[132]

With respect to the Due Process Clause, *Hepburn* was ambiguous on whether paper money violated its terms or whether the provision was being used as a tool to construe the scope of implied power. There is some language suggesting that Chase thought the clause embodied a substantive right that was "a direct prohibition of the legislation which we have been considering."[133] The Court ended its analysis by stating that greenbacks did not meet the *M'Culloch* test, were inconsistent with the spirit of the Constitution, and were prohibited by the Constitution.[134] One could read the last phrase as a holding that the statute violated due process, as dicta on that point, or as a term of art emphasizing that the law was not supported by a power granted to Congress. In resolving this issue, it is worth noting that neither the dissent in *Hepburn* nor the opinions in the second *Legal Tender Case* interpreted Chase's discussion as a declaration

127. *Id.* at 622.
128. *Id.*
129. *See id.* at 623–24.
130. *See id.* at 623.
131. *See id.* at 623–24.
132. *Id.* at 623.
133. *Id.* at 624.
134. *See id.* at 625.

that paper money actually violated due process.[135]

Having decided that the Legal Tender Act required a more searching inquiry than other exercises of implied power, the Court held that the federal interest in greenbacks was not substantial enough to overcome the burden they placed on civil liberties. First, Chase explained that the Legal Tender Act was inflationary and that it was unclear whether the policy furthered the Union's ability to pay for the Civil War.[136] Though he conceded that "it may be said that the depreciation will be less to him who takes them from the government, if the government will pledge to him its power to compel his creditors to receive them at par in payments," he answered that "[t]his is, as we have seen, by no means certain."[137] In any event, the Court concluded that "there is abundant evidence, that whatever benefit is possible from that compulsion to some individuals or to the government, is far more than outweighed by the losses of property . . . and the long train of evils which flow from the use of irredeemable paper money."[138] The merits of this assessment, which contradicted Chase's view as Treasury Secretary, would be reexamined in *Knox*.

D. *HEPBURN*'S LASTING LEGACY

The interpretive method pioneered in *Hepburn* and *Dred Scott* has been used in some, though not most, implied power cases decided since 1870. This test not only rings true with *M'Culloch*'s "spirit" language, as Chase observed, but is also consistent with its result.[139] Since there was no assertion that the National Bank touched on any constitutional right, under the *Hepburn* test that exercise

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135. *See id.* at 637–38 (Miller, J., dissenting) (construing the due process issue as part of Chase's "spirit" argument); *see also* Knox v. Lee, 79 U.S. (12 Wall.) 457, 544 (1871) ("It is not claimed that any express prohibition exists, but it is insisted that the spirit of the Constitution was violated by the enactment."); *id.* at 551 (rejecting "the argument pressed upon us that the legal tender acts were prohibited by the spirit of the fifth amendment, which forbids taking private property for public use without just compensation or due process of law"). Chase's dissent in *Knox* did not clarify matters. Again he said that the Legal Tender Act "does violate an express prohibition of the Constitution." *Id.* at 579 (Chase, C.J., dissenting). In the next breath, however, he explained that the creation of paper money raised a due process issue only because the asserted power was implied and that an act based on an express power would not pose a problem. *See id.* at 580.

The opaqueness of Chase's due process argument mirrored, probably unintentionally, the analysis in *Dred Scott*. That case also used the Due Process Clause as an interpretive benchmark and found that Congress did not have the power to bar slavery in the territories. The Court said that "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law." Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1857). As in *Hepburn*, the Court in *Dred Scott* did not say that a statute banning slavery in the northern territories violated due process, but rather that the Clause supported a narrow reading of Congress's implied power.

136. *See Hepburn*, 75 U.S. (8 Wall.) at 619, 621 (stating that if the policy added "nothing to the utility of the notes, it cannot be upheld as a means to the end in furtherance of which the notes are issued").

137. *Id.* at 621.

138. *Id.*

139. *See supra* notes 127–29 and accompanying text.

of unenumerated power was perfectly valid.[140]

Though the cases that used *Hepburn*'s model are not explored in detail here, one advantage of acknowledging this test is that it explains an otherwise odd fact about the Court's implied authority decisions. In many of these cases, the Justices strained to find an alternative ground for their judgment based on a textual prohibition.[141] While this could be the result of a lack of agreement on a theory of the case, the frequency of this behavior suggests that the Court is really giving exercises of implied power intermediate scrutiny when they have some impact on a constitutional right.[142] The problem, as was true in *Hepburn*, is that this approach leads to confusion about whether the prohibition is being used as a hermeneutic device or as an independent basis for decision. In other words, these opinions can be read as holding either that an Act directly invaded a forbidden zone or that it exceeded the implied power of Congress because it implicated a textual right without a substantial justification.

Another advantage of putting a spotlight on *Hepburn* is that it sheds new light on footnote four of *United States v. Carolene Products Co*.[143] In that case, the Court stated that:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.[144]

Most scholars read this section of the footnote as a self-evident statement that a

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140. *See supra* note 30 and accompanying text.

141. *See* Carter v. Carter Coal Co., 298 U.S. 238, 309–11 (1936) (striking down the Bituminous Coal Conservation Act as exceeding the grant in the Commerce Clause and violating the Fifth Amendment); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542, 550 (1935) (holding that the National Industrial Recovery Act went beyond the power given by the Commerce Clause and was an unconstitutional delegation of authority); *id*. at 538 (citing Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935), which placed the nondelegation doctrine within the Due Process Clause); R.R. Ret. Bd. v. Alton, 295 U.S. 330, 362 (1935) (finding the Railroad Retirement Act "invalid because several of its inseparable provisions contravene the due process of law clause . . . . [and are] not in purpose or effect a regulation of interstate commerce within the meaning of the Constitution"); Hammer v. Dagenhart, 247 U.S. 251, 276 (1918) ("Thus the act in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend."); Adair v. United States, 208 U.S. 161, 180 (1908) ("[T]he statute under which the defendant was convicted must be held to be repugnant to the Fifth Amendment and as not embraced by nor within the power of Congress to regulate interstate commerce . . . .").

142. Intermediate scrutiny is the appropriate term because the Court has adopted the *M'Culloch* standard that all congressional legislation under its implied powers must be presumed constitutional. As a result, it would be difficult to characterize the Court's review in this context as strict scrutiny. Nevertheless, the review undertaken pursuant to the *Hepburn* framework is clearly not restricted to finding a rational basis for legislation.

143. 304 U.S. 144 (1938).

144. *Id.* at 152 n.4.

statute should be voided when it violates a constitutional right.[145] Another way of approaching this passage, though, is that a federal law resting on an implied power should receive a narrower presumption of validity when it implicates a specific textual prohibition. The New Deal Court that wrote footnote four did not end up reading the scope of enumerated power this way, but this approach developed only after other cases that drew their inspiration from the third *Legal Tender Case*.[146]

In sum, *Hepburn* established a fixed point in legal reasoning while opening up another set of issues that will never be settled. The revival of *M'Culloch* was a big step, but it was Chief Justice Chase, not Chief Justice Marshall, who gave the law a way to determine where the reach of Congress ends by holding that an exercise of implied power should receive searching scrutiny only when it impacts a concrete constitutional right. Within a year, however, Chase was in dissent as the Court took up paper money again and set forth another vision.

III. *KNOX* AND THE DUAL-SOVEREIGNTY BALANCING TEST

This Part reviews the second *Legal Tender Case*, which held that paper money was valid because the federal interest underlying the policy outweighed any contrary state interests. While the Court's decision in *Knox* reaffirmed that *M'Culloch* stated the controlling standard, the Justices offered a new way to integrate Reconstruction with the constitutional past.[147] In one sense, *Knox* was more supportive of implied power because it upheld the Legal Tender Act. On the other hand, *Knox* laid the groundwork for more intrusive judicial review of congressional action.

A. TUMULT IN THE COURT

Before examining the *Knox* opinion, the first question that should arouse some curiosity is why the Court came to a different result so soon after *Hepburn*. The most obvious answer is that two new Justices were on the bench by 1871. In the midst of the *Hepburn* deliberations, Justice Grier announced his retirement.[148] And with a Republican, Ulysses S. Grant, in the White House, Congress repealed the statute that left the *Hepburn* Court with only eight members and returned the magic number to nine.[149] President Grant therefore had two appointments and, ironically, he announced his choices on the same

145. *See, e.g.*, BORK, *supra* note 16, at 59 ("That there should be any presumption of constitutionality for legislation that on its face is prohibited by a provision of the Constitution seems decidedly odd.").

146. *See infra* notes 189–93 and accompanying text.

147. *See* Knox v. Lee, 79 U.S. (12 Wall.) 457, 539 (1871) ("[B]oth the majority and minority of the court [in *Hepburn*] concurred in accepting the doctrines of *McCulloch v. Maryland* as sound expositions of the Constitution, though disagreeing in their application.").

148. *See* JACKSON, *supra* note 16, at 42; 2 WARREN, *supra* note 99, at 504.

149. *See* JACKSON, *supra* note 16, at 42; 2 WARREN, *supra* note 99, at 501.

day that *Hepburn* came down.[150] Shortly after these two nominees were confirmed, Attorney General Akerman moved for argument in a set of cases that challenged paper money in contracts made after the Legal Tender Act was enacted.[151]

The Court's decision to grant this request and overrule *Hepburn* is often attacked as a political act contrary to the rule of law.[152] *Harper's Weekly* wrote at the time that *Knox* showed that "[e]ven the Supreme Bench is not free from the soliciting whispers of political ambition."[153] Charles Fairman said that "[t]he Court's authority as expositor of the Constitution was seriously impaired by this unfortunate business."[154] Even Charles Evans Hughes, who was Chief Justice during the confrontation between the Old Court and the New Deal, stated that "[t]here can be no doubt that the reopening of the case was a serious mistake and the overruling in such a short time, and by one vote, of the previous decision shook popular respect for the Court."[155] This suspicion that the second *Legal Tender Case* was driven solely by a change in the Court's personnel has left a lasting stain on the decision.

These criticisms are not without force, but on balance they are misplaced because they ignore the unsettled environment that the Court confronted after Reconstruction. From a doctrinal perspective, revisiting the paper money issue might have been appropriate because *Hepburn* limited its holding to contracts formed before the Legal Tender Act was enacted.[156] The consolidated cases in *Knox* involved contracts postdating the Act and therefore raised less serious reliance interests for property and contract rights.[157] More broadly, the Court cannot be expected to reach a stable multigenerational synthesis in its first try. There is an element of trial and error that must take its course during challenging times. Let us put the doubts about the integrity of *Knox* aside for the moment and focus on its holding before returning to the question of whether the Court was engaged in genuine interpretation or pure politics.

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150. *See* NIVEN, *supra* note 86, at 439; 2 WARREN, *supra* note 99, at 516. The timing of these events leads some to suggest that Grant had advance word about *Hepburn* and made his selections with the purpose of overturning the case. That claim, however, is without merit. *See* 2 WARREN, *supra* note 99, at 517–19.

151. *See* JACKSON, *supra* note 16, at 43.

152. *See Knox*, 79 U.S. (12 Wall.) at 463 (containing the Court's order to hear arguments as to whether the Legal Tender Act was constitutional); *id.* at 553 (overruling "so much of what was decided in *Hepburn v. Griswold*, as ruled the acts [of Congress] unwarranted by the Constitution so far as they apply to contracts made before their enactment") (footnote omitted).

153. FAIRMAN, *supra* note 16, at 766.

154. *Id.* at 678. For a thoughtful discussion on what the politics of *Knox* revealed about the status of judicial review at this time, see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 43–63 (2002).

155. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 52 (Garden City Publishing Co. 1936) (1928).

156. *See* Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 626 (1870), *overruled by* Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871). Though in fairness, the distinction between prospective and retrospective application did not have any real impact on the analysis in *Knox*.

157. *See Knox*, 79 U.S. (12 Wall.) at 529–30.

B. A WARTIME OPINION

In response to the Attorney General's plea to reverse *Hepburn*, the Court obliged by advancing a different set of first principles.[158] In a dramatic opening paragraph, *Knox* stated that "[i]f it be held by this court that Congress has no constitutional power, under any circumstances, or in any emergency, to make treasury notes a legal tender . . . the government is without those means of self-preservation which, all must admit, may, in certain contingencies, become indispensable . . . ."[159] Thus, "[i]t is impossible to know what [Congress's] non-enumerated powers are, and what is their nature and extent, without considering the purposes they were intended to subserve."[160] From this premise, the Court reasoned that "[i]t is not to be denied that acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times."[161]

In essence, *Knox* concluded that the scope of implied authority should be assessed by examining whether the federal interest supporting a law outweighed any infringement on state sovereignty.[162] This line of thought traces its lineage to a portion of *M'Culloch* that *Hepburn* ignored, which said that the Constitution was "intended to endure for ages to come, and consequently to be adapted to various *crises* of human affairs."[163] In contrast to *Hepburn*'s more formalistic reading of *M'Culloch*, *Knox* said that the implied power test should be entirely functional.[164] *Knox* also resonated with the result in *M'Culloch*, for a reasonable person could say that the

158. The arguments of counsel are worth examining briefly because they provide a window on how the titans of the Bar saw the implied power issue at this time. Earlier, Attorney General Akerman was heard pointing the Court away from *M'Culloch*'s "let the end be" passage because he thought that represented the narrowest possible construction of congressional authority. *See supra* notes 1, 44–45 and accompanying text. Meanwhile, counsel for the parties attacking paper currency conceded *M'Culloch*'s validity, even though he said that "the appropriateness of the bank as a fiscal agent to enable the government to borrow money, collect taxes, and the like, *although not now so apparent*, seems at the time of the decision . . . to have been generally conceded." *Knox*, 79 U.S. (12 Wall.) at 490 n.39 (emphasis added). He told the Court to heed Marshall's admonition that a "substantive and independent power" could not be a valid means. *See id.* at 470–74.

159. *Id.* at 529.

160. *Id.* at 533.

161. *Id.* at 540.

162. *See id.* at 543 ("[W]hen a statute has proved effective in the execution of powers confessedly existing, it is not too much to say that it must have had some appropriateness to the execution of those powers.").

163. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819); *see* Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 631 (1870) (Miller, J., dissenting) (stating that this language "seems to be almost prophetic" for the crisis of the Civil War), *overruled by Knox*, 79 U.S. (12 Wall.) 457.

164. One could also reach the *Knox* balancing test by reading Marshall's "spirit" language in a broader way. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 585 (1985) (O'Connor, J., dissenting) (citing that passage from *M'Culloch* and concluding that "[t]he *spirit* of the Tenth Amendment, of course, is that the States will retain their integrity in a system in which the laws of the United States are nevertheless supreme . . . . [Therefore] the means by which national power is exercised must take into account concerns for state autonomy").

value of the Bank outweighed its intrusion into state authority.[165]

With that background in place, paper money presented an easy issue because the policy came at a time of maximum peril and saved the Union.[166] The Justices rested their conclusion in *Knox* on the idea that the Legal Tender Act was appropriate in wartime even if it might not be valid in peacetime. Indeed, the Court stressed that it had to take into account the dire situation facing Congress in 1862.[167] After all, at that point:

> [A] civil war was then raging which seriously threatened the overthrow of the government and the destruction of the Constitution itself. . . . The necessity was immediate and pressing. The army was unpaid. . . . [This] threatened loss of confidence in the ability of the government to maintain its continued existence. . . .[168]

The Court wondered whether it could be "maintained now that [greenbacks] were not for a legitimate end, or 'appropriate and adapted to that end,' in the language of Chief Justice Marshall?"[169] The new Republican majority said no.[170] What *Knox* left unanswered, however, was how implied power should be read once peace broke out. That issue would be taken up a decade later by *Juilliard*—the third *Legal Tender Case*.

C. TAINTED NO MORE

With this deeper understanding of what *Knox* said, the case now appears in a more favorable light as an act of interpretation rather than as a crude attempt to achieve a specific result. Perhaps the most convincing argument on this point comes from comparing the case to its modern counterpart—*West Virginia Board of Education v. Barnette*.[171] Following the upheaval of the New Deal and the onset of World War II, the Court took up the question of whether a state could require school children to recite the Pledge of Allegiance. In *Minersville School*

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165. *See Knox*, 79 U.S. (12 Wall.) at 537 (citing *M'Culloch*); *id.* at 559–60 (Bradley, J., concurring) (comparing the Legal Tender Act with the National Bank). This is not as obvious as is the case for the relationship between *Hepburn* and *M'Culloch*. *See supra* text accompanying notes 139–40.

166. By contrast, the impact of paper money upon state autonomy was almost nonexistent. Perhaps the only argument that could be made in this respect is that by making greenbacks legal tender, Congress was prescribing a rule of decision for state courts in contract cases. That preemption of state law, though, could hardly be called a substantial intrusion.

167. *See Knox*, 79 U.S. (12 Wall.) at 541 (rejecting the argument that Congress's judgment should be questioned "after the lapse of nine years, and when the emergency has passed"); *id.* at 536 (implying that the case arose in the context of a "trying emergency"); *id.* at 567 (Bradley, J., concurring) (stating that the power to issue fiat money is "not to be resorted to except upon extraordinary and pressing occasions, such as war or other public exigencies of great gravity and importance . . .").

168. *Id.* at 540–41.

169. *Id.* at 541. Needless to say, the Court did not accept the central contention of *Hepburn* that paper money violated the spirit of the Contracts and Due Process Clauses, though it did address those arguments. *See id.* at 544–52.

170. *See id.* at 541; *see also supra* notes 148–51 and accompanying text.

171. 319 U.S. 624 (1943).

District v. Gobitis[172] (the first *Flag Salute Case*), the Court said that "[t]he ultimate foundation of a free society is the binding tie of cohesive sentiment" and held that New Deal principles of activist government and the need for patriotic unity outweighed any past commitments to freedom of conscience.[173] Three years later, however, the Court overruled *Gobitis* and held that mandating the Pledge for students was unconstitutional.[174] In *Barnette* (the second *Flag Salute Case*), the majority laid out the interpretive problem: "We must transplant [the Bill of Rights] to a soil in which the laissez-faire concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls."[175]

Thus, the *Flag Salute Cases* and the *Legal Tender Cases* raised the same interpretive problem—how should constitutional traditions be harmonized with a new set of contrary principles that have a popular mandate? In both instances, the Court had understandable trouble in reaching a satisfactory answer and needed more than one case to craft a stable equilibrium. Yet nobody considers *Barnette* a lawless or political decision even though it reconsidered and overturned *Gobitis* so quickly. Instead, *Barnette* is hailed as one the Court's greatest opinions. *Knox* deserves a similar degree of respect. In constitutional time, *Knox* sits in the same position as *Barnette*, as is suggested by calling one the "second *Legal Tender Case*" and the other the "second *Flag Salute Case*." The principal difference was that *Knox* grappled with Reconstruction and the Civil War while *Barnette* responded to the New Deal and World War II. Thus, the view that *Knox* was a political act is incorrect.

The reversal of *Hepburn* clearly represented a mid-course correction in the Court's thinking about how to balance the new emphasis on national authority with prior precedent. In a sense, the Justices now held that nationalism should trump Jackson's more limited understanding of federal authority. On the other hand, the test in *Knox* gave judges more power over legislative decisions than

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172. 310 U.S. 586 (1940), *overruled by Barnette*, 319 U.S. 624.

173. *Id.* at 596–97. This Article straddles the issue of whether the New Deal or World War II was behind the legal instability that influenced the *Flag Salute Cases*. One answer is that after *Gobitis* was decided the United States entered the war and the Justices became uneasy with the coercion that the salute imposed, along with the fact that the old style of saluting the Flag looked like a Nazi salute. *See* RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 198–99 (1999). Another answer is that the Court was having a hard time determining the proper limits of state power in the wake of a popular movement that stressed the virtue of activist government, which is suggested by the opinion in *Barnette*.

Both arguments have merit, and I am not persuaded that either one provides the entire answer. The point is that these events, separately or together, threw constitutional law into turmoil and required the Court to engage in a new multigenerational synthesis.

174. *See Barnette*, 319 U.S. at 642. This reversal occurred because of a change in the Court's membership and because some Justices changed their minds. *See* Jones v. City of Opelika, 316 U.S. 584, 623–24 (1942) (Black, Douglas, and Murphy, JJ., dissenting) ("Since we joined in the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it was also wrongly decided.").

175. *Barnette*, 319 U.S. at 640.

Hepburn did. After all, the *Hepburn* test gives heightened scrutiny only to laws that are reasonably related to a specific constitutional right, but the *Knox* standard applies to every federal statute not based on an express power.[176] That point must be weighed in considering which approach is more appropriate for our time.

D. THE LEGACY OF PURE BALANCING

Since 1871, the Court has also used the test in the second *Legal Tender Case* to resolve implied power claims.[177] In some instances the Justices explicitly say that they are engaged in a balancing act.[178] At other times, the inquiry gets channeled through formal categories that assess whether the regulated activity is "local" or "national," has a "direct" or "indirect" impact on an enumerated end, or is "commercial" rather than "non-commercial."[179] These formulae should not obscure the functional nature of the inquiry into whether the federal interest supporting a given statute is strong enough to overcome the reserved rights of

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176. A question that arises here is why a more nationalist Court would read *M'Culloch* in such a potentially pro-federalism direction. One explanation is that the Court considered its approach in *Knox* more deferential to Congress because *Hepburn*'s weighing of the relevant interests was so skewed. By voiding an emergency law that did not violate any textual prohibitions, *Hepburn* strongly suggested that any exercise of implied power that touched on one of these rights would be invalid. After all, if winning the Civil War did not create a federal interest strong enough to support that kind of measure, it is hard to imagine any interest that would be strong enough. Given a choice between the alternatives of no implied authority over these subjects or some authority, the Justices may have thought that some was preferable even if that ended up authorizing judicial review over a broader class of federal actions. Of course, the Court could have just stuck with the *Hepburn* test and reversed its conclusion about paper money, but that might have looked even more political than what the Justices ended up doing.

177. *See, e.g.*, United States v. Butler, 297 U.S. 1, 64 (1936) (voiding a regulatory tax on agricultural production because that was "a purely local activity" that did not justify federal intrusion); Houston, E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342, 354 (1914) (holding that Congress can regulate intrastate railroad rates because "[t]he use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention"); Champion v. Ames, 188 U.S. 321, 355–56 (1903) (upholding a ban on the interstate transport of lottery tickets to fight the "widespread pestilence of lotteries"); The Civil Rights Cases, 109 U.S. 3, 24 (1883) ("[T]he act of a mere individual, the owner of the inn, the public conveyance, or place of amusement, refusing the accommodation . . . inflict[s] an ordinary civil injury, properly cognizable by the laws of the State[s], and presumably subject to redress by those laws until the contrary appears[.]").

178. *See* City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (establishing the "congruence and proportionality" test for federal action under Section Five of the Fourteenth Amendment); Katzenbach v. Morgan, 384 U.S. 641, 653 (1966) ("It was well within congressional authority [under the Fourteenth Amendment] to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement."); *cf.* New York v. United States, 505 U.S. 144, 177 (1992) (explaining that in some Tenth Amendment cases the Court has "stated that it will evaluate the strength of federal interests in light of the degree to which such laws would prevent the state from functioning as a sovereign").

179. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (describing the local/national distinction); United States v. E.C. Knight Co., 156 U.S. 1, 16–17 (1895) (reading the term "commerce" in the Sherman Antitrust Act narrowly based on the indirect/direct line of inquiry); *see also* United States v. Lopez, 514 U.S. 549, 608 (1995) (Souter, J., dissenting) ("The distinction between what is patently commercial and what is not looks much like the old distinction between what directly affects commerce and what touches it only indirectly.").

the states on that issue. There are some actions that are metaphysically local, direct, or economic, but most of the time these are labels that have no content and serve as a justification for a judicial conclusion about the importance of the underlying activity that Congress is seeking to regulate.[180] While that description may provoke skepticism, the point is established with somewhat greater force when the analysis turns to the Rehnquist Court's work.[181]

In sum, the second *Legal Tender Case* rejected the result in *Hepburn* through a functional reading of *M'Culloch* that should carry a strong appeal for states' rights proponents and pragmatists alike by assessing implied authority through an open-ended balancing test. Even after two encounters with the High Court, however, the paper money issue was still alive and well.

IV. *JUILLIARD* AND POLITICAL QUESTIONS

This Part discusses the third *Legal Tender Case*, which finally settled matters by holding that the decision to create greenbacks was a nonjusticiable political question. While this reasoning was unusual in its day, *Juilliard* set forth the modern reading of *M'Culloch* under which courts just defer to congressional judgments about the scope of its implied authority. As a result, the expansion of federal power following the New Deal rests more on the work of Justice Gray, the author of *Juilliard*, than with Chief Justice Marshall.

A. GREENBACKS IN PEACETIME

Clever lawyers realized that *Knox* left open the question of whether paper money would be valid once the wartime crisis ended. When a party to a contract denominated in dollars demanded gold coin, the Justices were forced to address the issue again.[182] The foes of paper money sought to limit *Knox* as a wartime measure caused by "the patriotic sentiment of the period . . . [which] turned the scales of justice" and argued that "as necessity creates the rule, so it limits its duration."[183] In rejecting this argument, *Juilliard* proclaimed that "[n]o question of the scope and extent of the implied powers of Congress under the Constitu-

180. Thus, the criticism that the cases striking down federal action with this analysis are wrongly decided because they are "highly formalistic" is misleading. *See Lopez*, 514 U.S. at 605 (Souter, J., dissenting). The reason those decisions strike the wrong chord for modern observers is that they assign a lower functional value to the federal interest in economic regulation.

I do not mean to suggest that the Justices are deceiving us when they say they are engaged in one of these categorical analyses. Rather, the point is that a judge's view of the relative importance of the competing federal and state interests is often a deciding factor in his or her assessment of that formal question.

181. *See infra* Part V.B.

182. For a time, it appeared that the political branches would resolve the issue themselves. Concerned about the inflationary effect of greenbacks, Congress passed the Resumption Act in 1875 and ordered the Treasury to redeem the notes in gold and then destroy them. *See* Juilliard v. Greenman, 110 U.S. 421, 435–37 (1884). In 1878, however, Congress reversed itself and instructed the Secretary to keep paper in circulation while still allowing citizens to redeem notes for gold. *See id.* at 437.

183. FAIRMAN, *supra* note 16, at 773–74.

tion can be satisfactorily discussed without repeating much of the reasoning of Chief Justice Marshall in the great judgment in *McCulloch v. Maryland* . . . ."[184] Though it turned over much of the same ground turned in the first two decisions, *Juilliard* reached this startling conclusion:

> Such being our conclusion in matter of law, the question whether at any particular time, in war or in peace, the exigency is such . . . that it is, as matter of fact, wise and expedient to resort to this means, is a political question, to be determined by Congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts.[185]

And just like that, one of the most contentious constitutional debates of the nineteenth century came to an end.

The enigma of this holding is that the *Juilliard* Court did not explain why the political question doctrine should apply to greenbacks. The Justices did extol the merits of paper currency, which implied that the policy could pass muster under a balancing test in peacetime. But it was quite a leap from that conclusion to a ruling that this exercise of implied power did not call for any scrutiny at all. That gap is more glaring given that the political question concept was never applied to an exercise of implied power prior to *Juilliard*.[186] Indeed, the only authority cited by the Court for its novel approach was *M'Culloch*. Bringing our story full circle, the third *Legal Tender Case* closed with Marshall's maxim that inquiring "into the degree of [an implied power's] necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."[187]

In sum, *Juilliard* gave the broadest possible construction to *M'Culloch* by simply collapsing its distinction between ends and means.[188] Once the Court said that federal laws were a means to execute an enumerated end because Congress said so, Marshall's opinion did stand for the proposition that these judgments should not be questioned unless a textual prohibition was violated. With this holding, the Justices provided a preview of a world where federalism would have almost no independent status in the unenumerated power context.

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184. *Juilliard*, 110 U.S. at 438.

185. *Id.* at 450.

186. In *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), the Court declared that most judgments pursuant to the Guarantee Clause were nonjusticiable. *Id.* at 42. But that involved an express right rather than an implied power. *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

187. *Juilliard*, 110 U.S. at 450; *see supra* note 25 and accompanying text. The practical reason for the Court's holding was that without it there would have been an unending series of challenges to paper money as conditions evolved.

188. It goes without saying that *Juilliard*'s reasoning is also in accord with *M'Culloch*'s result, since Marshall did end up deferring to Congress's judgment about the Bank.

B. THE NEW DEAL CONSENSUS

The marker laid down by the third *Legal Tender Case* became a central pillar of New Deal jurisprudence. While it is well known that the Court largely abandoned its scrutiny of implied authority after the "switch-in-time" of 1937, what is less understood is that the fulcrum for this change was *M'Culloch*, as construed by *Juilliard*, rather than a reinterpretation of Congress's substantive power.[189] In *United States v. Darby*,[190] Chief Justice Stone relied on *M'Culloch* in holding that the commerce power "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end . . . ."[191] And in the great companion case to *Darby*, *Wickard v. Filburn*,[192] the Court drew a logical conclusion from this holding, which was that "effective restraints on . . . exercise (of the commerce power) must proceed from political rather than from judicial processes."[193]

Darby and *Wickard* were acts of multigenerational synthesis analogous to *Hepburn* and *Knox*. Chief Justice Stone harmonized the demands of his political era with constitutional tradition by pretending that *Juilliard*'s view of *M'Culloch* was the only possible reading of that case. While this assertion was misleading, it did emulate Chief Justice Chase's equally specious claim in *Hepburn* that *M'Culloch* was never questioned before 1870.[194] Both statements are examples of the art of weaving shifts in judicial or political sentiment into a legitimate whole by creating a narrative that is as linear as possible.[195] As we shall see, the same process of mythmaking was at the core of the Rehnquist Court's recent federalism cases.[196]

Franklin D. Roosevelt mobilized such great support for the New Deal that it took forty years before the Court bothered to offer a normative justification for its deference to Congress. It was probably no coincidence that this justification, in *Garcia v. San Antonio Metropolitan Transit Authority*,[197] came as the Reagan

189. *See* Gardbaum, *supra* note 27, at 807 (explaining that the "New Deal Court's own constitutional justification for its radical expansion of the scope of federal power over commerce was that the congressional measures in question were valid exercises of the power granted by the Necessary and Proper Clause and were not direct exercises of the power to regulate commerce"); *see also* Gonzales v. Raich, 545 U.S. 1, 34 (2005) (Scalia, J., concurring) ("Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce . . . derives from the Necessary and Proper Clause.").

190. 312 U.S. 100 (1941).

191. *Id.* at 118; *see id.* at 118–19 (citing M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)); *see also* United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942) (restating this point).

192. 317 U.S. 111 (1942).

193. *Id.* at 120 (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)).

194. *See supra* notes 118–21 and accompanying text.

195. *See supra* notes 101–08 and accompanying text.

196. *See infra* notes 227–29 and accompanying text.

197. 469 U.S. 528, 555–56 (1985) (holding that the Fair Labor Standards Act could be applied to a state transit authority).

Revolution was in the midst of a sharp attack on New Deal premises.[198] *Garcia* denied that the courts should be in the business of enforcing federalism limits because "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."[199] Any rule to the contrary "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."[200] Justice Powell countered that the *Juilliard* view of *M'Culloch* renders the enumerated power doctrine a dead letter and that "[o]ne can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process."[201] Justice O'Connor added that "this Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States."[202] This debate in *Garcia* set the stage for the divide over implied power that now commands the attention of the legal community.

Accordingly, the third *Legal Tender Case* invented the modern reading of *M'Culloch* that federalism should not be judicially enforced in the implied power context. Though that view was a renegade prior to the New Deal, *Juilliard* stated the dominant approach to unenumerated authority after 1937. In the last ten years, however, that standard has been challenged by *Knox* and *Hepburn*, its two competitors.

V. ENUMERATED AUTHORITY IN REAGAN'S SHADOW

This Part assesses the Reagan Revolution's impact on the Court's choice between the three models articulated in the *Legal Tender Cases*. Like Jackson, Lincoln, and Roosevelt before him, Ronald Reagan led a political movement that sought to transform settled constitutional principles.[203] At the core of Reagan's challenge was his view that the federal government was too powerful and that states' rights were not getting due recognition in Congress or the courts.[204] That position achieved political success, and courts are still memorial-

198. *See infra* notes 206–15 and accompanying text.

199. *Garcia*, 469 U.S. at 552. Though *Garcia* involved federal regulation of a state agency rather than private conduct, the opinion does a fine job of fleshing out the implications of the third *Legal Tender Case*.

200. *Id.* at 546; *see infra* text accompanying note 265.

201. *Garcia*, 469 U.S. at 565 n.8 (Powell, J., dissenting).

202. *Id.* at 581 (O'Connor, J., dissenting).

203. *See, e.g.*, SKOWRONEK, *supra* note 67, at 411 ("Whatever the limits of the Reagan reconstruction, no president in recent years has so radically altered the terms in which prior governmental commitments are now dealt with or the conditions under which previously established interests are served.").

204. *See* Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 367 (2003) (calling congressional power and federalism a "centerpiece of the Reagan agenda").

izing Reagan's views through fresh doctrine.[205] In that effort, though, they have uncritically adopted the *Knox* balancing test as the best means to scrutinize implied power.

A. THE REAGAN REVOLUTION AND THE SCOPE OF FEDERALISM

President Reagan's oratory was the battering ram that shattered the New Deal consensus on unenumerated power. In his first Inaugural Address, Reagan began his constitutional analysis by adding a new twist on *M'Culloch*'s language about the need for government to adapt to the "various *crises* of human affairs" when he told television viewers that "[i]n this present crisis, government is not the solution to our problem; government is the problem."[206] He then offered this summary of his main legal goal:

> It is my intention to curb the size and influence of the Federal establishment and to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people. All of us need to be reminded that the Federal Government did not create the States; the States created the Federal Government.[207]

In addition to placing federalism front and center in his first statement as President, Reagan repeatedly stressed this theme in public. For example, in an appearance before the National Conference of State Legislatures, the President asserted that "[t]his Nation has never fully debated the fact that over the past 40 years, federalism—one of the underlying principles of our Constitution—has nearly disappeared as a guiding force in American politics and government."[208] That neglect was at an end, Reagan told his audience, as he would "restore the constitutional symmetry between the central Government and the States."[209]

These words were backed by action. Reagan issued an executive order stating that "[f]ederal action limiting the policymaking discretion of the States should be taken only where constitutional authority for the action is clear and certain."[210] The order explained that "authority for Federal action is clear and certain only when authority for the action may be found in a specific provision

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205. *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1076 (2001) ("[I]f you don't like what the Court is doing now, you (or your parents) shouldn't have voted for Ronald Reagan.").

206. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819); Ronald Reagan, Inaugural Address, 1981 PUB. PAPERS 1, 1 (Jan 20, 1981); *see also supra* text accompanying note 163.

207. Reagan, *supra* note 206, at 2.

208. Ronald Reagan, Remarks in Atlanta, Georgia, at the Annual Convention of the National Conference of State Legislatures, 1981 PUB. PAPERS 679, 680 (July 30, 1981).

209. *Id.* at 683.

210. Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (Oct. 26, 1987), *repealed by* Exec. Order No. 13,132, 3 C.F.R. 206 (1999), *reprinted in* 5 U.S.C. § 601 (2000). Although President Clinton modified this order, at least one scholar has concluded that the new version "does not differ substantially from President Reagan's." John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 923 (2001).

of the Constitution, there is no provision in the Constitution prohibiting Federal action, and the action does not encroach upon authority reserved to the States."[211] When the issue was in doubt, the order stated that "the presumption of sovereignty should rest with the individual States."[212] Dawn Johnsen has recently focused attention on work from Reagan's Justice Department that offered a critique of New Deal precedents on federal power.[213] In its *Guidelines on Constitutional Litigation*, the Office of Legal Policy argued that *Wickard* was wrong and backed then-Justice Rehnquist's narrower view of the Commerce Clause.[214] Likewise, the *Guidelines* attacked the Court's reading of the enforcement clauses in the Reconstruction Amendments and declared that the recent precedents were inconsistent with Reagan's views.[215]

While the clear statement of these views was useful, the more critical development was that Reagan Republicans carried the country along in a series of elections during the 1980s and 1990s.[216] These victories had two consequences. First, Reagan and George H.W. Bush filled the federal courts with new judges who could reshape doctrine on issues related to federalism. Second, this shift of opinion on federalism was the predicate for a series of major laws passed by a Republican Congress and signed by President Clinton. Leading the charge was the Antiterrorism and Effective Death Penalty Act, which sharply curtailed the ability of federal courts to review state judgments through the writ of habeas corpus.[217] That was accompanied by the Prison Litigation Reform Act, which did the same thing for federal review of state prison practices.[218] Finally, there was welfare reform, which repealed Aid to Families with Dependent Children and gave states broad power over welfare policy.[219] These codifications of states' rights are not ephemeral changes that can be reversed by

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211. Exec. Order No. 12,612, *supra* note 210.

212. *Id.*

213. *See* Johnsen, *supra* note 204, at 385–86; *see also* DOMESTIC POLICY COUNCIL, WORKING GROUP ON FEDERALISM, A REPORT ON THE STATUS OF FEDERALISM IN AMERICA 51 (1986) ("The Supreme Court . . . has been a necessary partner in the process [of dismantling federalism], either by ratifying actions taken by the other two branches or by interpreting the Constitution so as to place limitations on the States' authority not expressed in the Constitution.").

214. *See* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION 48–54 (1988); Johnsen, *supra* note 204, at 392–93.

215. *See* OFFICE OF LEGAL POLICY, *supra* note 214, at 56–59; Johnsen, *supra* note 204, at 395–96.

216. The discussion here is limited to Reagan's success in promoting states' rights. Other aspects of the Reagan agenda were not as well received. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (reaffirming the central holding of Roe v. Wade, 410 U.S. 113 (1973)).

217. *See* 28 U.S.C. § 2254(d) (2000) (stating that habeas corpus shall not be granted unless the state ruling "was contrary to, or involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented at the State court proceeding").

218. *See* 18 U.S.C. § 3626(a)(1) (2000) (stating that a federal "court shall not grant or approve any prospective relief [for state prisoners] unless the court finds that such relief is narrowly drawn, extends no further than is necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right").

219. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

a single election; they instead reflect a basic change in attitudes that is more durable.[220]

Reagan's constitutional program and his ability to mobilize political support mirrored the success of Andrew Jackson. Just as Jackson packed the Court to ensure that states' rights would be enshrined in legal doctrine, Reagan put great emphasis on appointing like-minded jurists who would do the same.[221]

B. THE COURT CARRIES THE BALL FORWARD

Though federalism started making its judicial mark in the early 1990s, the watershed event was *United States v. Lopez*.[222] This Section makes two new points about the case. First, a close reading of the opinion shows that, like *Hepburn* and *Darby*, *Lopez* blended the views of a new popular movement with precedent in a way that did as little violence as possible to our constitutional narrative. Second, the Court's rationale for invalidating the Gun-Free School Zones Act relied on a *Knox*-like balancing test that judged an exercise of implied power by assessing the competing federal and state interests at stake.

1. *Lopez* as an Interpretive Synthesis

Lopez harmonized the Reagan Revolution with legal tradition by turning the Commerce Clause into a source of authority over only economic matters, in contrast to the New Deal's more expansive view that the Clause granted a general police power. In another act of multigenerational synthesis, Chief Justice Rehnquist began by writing that "[w]e start with first principles," and by quoting *M'Culloch* for the proposition that "[t]he [federal] government is acknowledged by all to be one of enumerated powers."[223] The Chief Justice then stressed that the New Deal decisions stated that there was some outer bound to Congress's implied authority.[224] And in a critical part of the opinion, the Court observed that even the broadest of these rulings "involved economic activity in a way that the possession of a gun in a school zone does not."[225] Likewise, Justice Kennedy's concurrence noted that "unlike the earlier cases to come before the Court here neither the actors nor their conduct has a commer-

220. This is not to say that the renewed interest in federalism is permanent. The Reagan Revolution will someday be supplanted by another constitutional generation, which will force legal elites to consider anew the questions surrounding implied power.

221. *See* Johnsen, *supra* note 204, at 397–98; *supra* note 66 and accompanying text.

222. 514 U.S. 549 (1995). The textual discussion passes over another major federalism initiative from the Court: the cases extending Eleventh Amendment immunity to the States. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996).

223. *Lopez*, 514 U.S. at 552; *id.* at 566 (quoting M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819)).

224. *See id.* at 553–58; *see also* Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968) ("Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.").

225. *Lopez*, 514 U.S. at 560.

cial character, and neither the purposes nor the design of the statute have an evident commercial nexus."[226] Though Rehnquist conceded that determining "whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty," he responded that "[a]ny possible benefit from eliminating this 'legal uncertainty' would be at the expense of the Constitution's system of enumerated powers."[227]

What leaps from these passages is the parallel between *Lopez*'s use of precedent and *Hepburn*'s treatment of *M'Culloch*. A key point in *Lopez* was that the Court had never upheld a federal law regulating noncommercial intrastate conduct unless it was an essential part of a broader regulation of economic activity.[228] It is fair to say that Chief Justice Rehnquist's statement on this point was as true as Chief Justice Stone's assumption in *Darby* that the *Juilliard* view of *M'Culloch* was the only one, or Chief Justice Chase's suggestion in *Hepburn* that *M'Culloch* was valid prior to 1870. Put another way, all three are false. They are false because while they correctly reflect what the Court said, they are not accurate statements of the law as their respective contemporaries understood it. Any sensible lawyer during the Jacksonian era would have known that *M'Culloch* was not controlling concrete decisions even though it was never directly criticized by the Court.[229] Similarly, had a lawyer in 1970 argued that Congress's authority over private conduct was limited in a noneconomic context, all he would have gotten was a good laugh.

These situations demonstrate an undeniable, if often overlooked, aspect of constitutional law: there are occasions when a political movement is too strong for its own good. Sometimes a party changes the consensus on first principles so much that it sees no pressing need to preserve that work in a constitutional amendment or in a Supreme Court opinion. That may sound like an extraordinary statement, but consider that after Jackson's triumph Thomas Hart Benton was pretty blasé about when *M'Culloch* would be overruled, because "there will be a time hereafter for the celebration of this victory of the constitution over the Supreme Court."[230] That response was mistaken from a Jacksonian point of view, but it was not foolish.[231] Lawyers do not raise claims if they think courts will not give them the time of day. Thus, it is often not worth the effort for a constitutional movement to spell out the full scope of its principles, as long as sympathetic judges will be there to protect them anyway. This myopia (or pragmatism) is what enables the Court to adjust doctrine when a new generation

226. *Id.* at 580 (Kennedy, J., concurring).
227. *Id.* at 566 (majority opinion).
228. *Id.* at 561.
229. *See supra* text accompanying notes 68–82.
230. *See supra* note 68 and accompanying text.
231. This mistake does not mean that the law would have ended up in a different place if *M'Culloch* had been overruled. The Reconstruction Court might have restored the case just as the New Deal Justices wiped out precedents that stood in their way. Nevertheless, that task is more difficult, due to stare decisis concerns, than the tactic of pretending that the cases were vital all along.

achieves power. That is what occurred in *Hepburn* and *Darby*, and it is also the untold story of *Lopez*.

2. The *Knox* Test Restored

The other relevant point about *Lopez* is that it interpreted the Reagan Revolution by using a *Knox*-style balancing test to protect states' rights. Though the Court rested its analysis on a commercial/noncommercial distinction, there was plenty of language indicating that this boundary was given content through an evaluation of the asserted federal interest in comparison to the reserved rights of the states. The revival of the second *Legal Tender Case* as the interpretive baseline was even more evident in the cases following *Lopez*.

One indication that *Lopez* embraced the *Knox* approach is that both the majority's opinion and Justice Kennedy's concurrence stressed that the Gun-Free School Zones Act was problematic because it invaded areas of traditional state concern. Chief Justice Rehnquist said that if the Act were upheld, it would be "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."[232] Later, the Chief Justice repeated that the dissent's characterization of the Government's argument was "equally applicable, if not more so, to subjects such as family law and direct regulation of education."[233] Justice Kennedy was more direct, explaining that the Act was flawed because "it is well established that education is a traditional concern of the States."[234] He then said that "[i]n these circumstances, we have a particular duty to ensure that the federal-state balance is not destroyed."[235] The difficulty with these descriptions of traditional state concerns, however, is that they have nothing to do with whether a federal law is commercial in nature.[236] Accordingly, this reinforces the point that all of the formal standards for assessing implied power are really just functional balancing tests in disguise.[237]

The Act voided in *Lopez* flunked the Court's balancing test not only because the state interest in autonomy with respect to education was strong, but also because the federal interest in this particular gun regulation was weak. For instance, the Court quoted with approval President George H.W. Bush's signing

232. *Lopez*, 514 U.S. at 564.

233. *Id.* at 565.

234. *Id.* at 580 (Kennedy, J., concurring); *see id.* at 583 (stating that the Act works "in an area to which States lay claim by right of history and expertise").

235. *Id.* at 581.

236. Justice Kennedy suggested at one point that "areas of traditional state concern" could be equivalent to noncommercial interests, *see id.* at 577, but this argument is not persuasive. Viewed at a greater level of generality, education and family law are easily characterized as commercial. In any event, gun regulation can easily be viewed as commercial. *See id.* at 602 (Stevens, J., dissenting). Accordingly, it seems that the traditional state concerns, rather than the commercial/noncommercial distinction, drove the conclusion in *Lopez*. The idea that the presence of guns could itself be a reason for reading implied power narrowly in *Lopez* is explored below. *See infra* notes 286–87 and accompanying text.

237. *See supra* notes 178–80 and accompanying text.

statement, which said that the Act "overrides legitimate State firearms laws with a new and unnecessary Federal law."[238] Justice Kennedy added that "the reserved powers of the States are sufficient to enact those measures" and that forty states already banned gun possession near a school.[239] An inescapable implication of this statement was that there was no need for a federal law because so many states had taken action. Combine this weak federal interest with the presence of a special area of state concern, and the result under a *Knox*-like test is a denial of the implied power.

3. The Legacy of *Lopez*

Any lingering doubts about the resurrection of the *Knox* method were dispelled in the Court's next major enumerated authority case, *City of Boerne v. Flores*.[240] In voiding Congress's effort to revise free exercise jurisprudence with the Religious Freedom Restoration Act (RFRA), the Justices held that the Act exceeded the power granted by Section Five of the Fourteenth Amendment.[241] The result in *Boerne* turned on an explicit balancing standard that examined whether there was "congruence and proportionality" between the means chosen by Congress and the enumerated end.[242] That test was fashioned, in part, due to concern about protecting the states from the encroachment of federal power.[243] In extending the *Knox* model, the Court engaged in another multigenerational synthesis, which began with a citation to *M'Culloch* and ran through all of the Section Five precedents.[244] Again the result was a narrowing of Congress's power, though in this case it only involved a disavowal of dicta suggesting that Section Five gave Congress the right to redefine constitutional guarantees.[245]

The preference for balancing continued in *United States v. Morrison*,[246]

238. *Lopez*, 514 U.S. at 561 n.3.

239. *Id.* at 581 (Kennedy, J., concurring).

240. 521 U.S. 507 (1997).

241. *See id.* at 536; *see also id.* at 512–16 (describing Employment Division v. Smith, 494 U.S. 872 (1990), and congressional concerns about the case that led to the passage of RFRA). For a perspective on *Smith* that looks at its relationship to the original understanding of the Fourteenth Amendment, see Magliocca, *supra* note 121, at 953–60.

242. *Boerne*, 521 U.S. at 520 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."); *see also id.* at 530 ("There must be a congruence between the means used and the ends to be achieved."); *id.* at 532 (stating that the Act "is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior").

243. *See id.* at 536 (stating that RFRA upset "the federal balance"). Another concern that influenced the balancing test here was the separation of powers, for the statute sought to overturn a holding of the Court on the standard of review applied to the Free Exercise Clause. *See id.*

244. *See id.* at 516 (citing M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819), for the idea that federal powers are enumerated); *id.* at 517–29 (laying out a comprehensive analysis of Section Five and its jurisprudence).

245. *See id.* at 528.

246. 529 U.S. 598 (2000).

where the Court invalidated the civil remedy of the VAWA.[247] *Morrison* followed *Lopez* in reasoning that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity" and concluded that the provision could not be upheld under the Commerce Clause.[248] Yet Chief Justice Rehnquist's opinion also stated that the Act improperly invaded states' interests because "the suppression of [violent crime] has always been the prime object of the States' police power."[249] The Court stressed that the rationale for upholding this use of implied authority would apply "to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant."[250] Once again, the majority based its analysis on the federal and state interests at stake.

The Justices have not invalidated every federal law based on implied power since *Lopez*, but even when challenges are rejected the Court is still largely using a balancing test. For instance, when a federal statute creating supplemental jurisdiction was attacked on the ground that its tolling rule for pendent state claims exceeded Congress's authority, the Justices unanimously disagreed because the balance tipped more in favor of national action.[251] Citing *M'Culloch* for the idea that an implied power is valid if it is "conducive to the due administration of justice," the Court set forth a series of reasons why this tolling rule was vital for the management of federal dockets.[252] Thus, even this group of Justices will uphold a law that goes beyond the core of an enumerated end if they conclude that the federalism tradeoff is appropriate.

The most recent example of this is *Gonzales v. Raich*,[253] in which the Court upheld a federal prohibition on home-grown marijuana for medicinal purposes. In finding this exercise of attenuated commerce power valid, the Court noted that Congress may reach intrastate conduct that is an essential part of a broader regulation of economic activity.[254] The division between the majority and the dissenters turned on how essential the control of home-grown medicinal mari-

247. *See id.* at 601–02; *id.* at 637 (Souter, J., dissenting) ("The Act would have passed muster at any time between *Wickard* in 1942 and *Lopez* in 1995 . . . .").

248. *Id.* at 613 (majority opinion). The Court also held that the Act was not valid under Section Five of the Fourteenth Amendment both because it was directed at private conduct and also because it did not survive under the *Boerne* balancing test. *See id.* at 619–27.

249. *Id.* at 615.

250. *Id.* at 615–16.

251. *See* Jinks v. Richmond County, 538 U.S. 456, 461 (2003) (upholding the validity of 28 U.S.C. § 1367(d)).

252. *Id.* at 462; *see id.* at 462–64.

253. 545 U.S. 1 (2005).

254. *See id.* at 17 ("Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."); *see also* Lopez v. United States, 514 U.S. 549, 561 (1995) (stating that the Gun-Free School Zones Act was not an essential part of a broader regulatory scheme); Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968) (stating that when a "general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence").

juana was for the federal scheme.[255] For Justice Stevens, it was "readily apparent" that exempting this class of drugs would increase their supply in the market, in part because "unscrupulous physicians" would prescribe marijuana for recreational use.[256] When respondents claimed that state law could address this defect, the *Raich* majority answered that "[t]he notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition . . . ."[257] By contrast, Justice O'Connor wrote in dissent that there was no proof to support the Court's view of the importance of home-grown medicinal marijuana on the recreational drug market.[258] Moreover, she said that the states had a powerful countervailing interest in their traditional police power to "protect the health, safety, and welfare of their citizens."[259] No matter how one views the outcome in *Raich*, the framework being applied to analyze the frontiers of congressional power still flows from *Knox*.

In sum, the Reagan Revolution left a deep impression on the doctrine governing implied authority. The debate within the Court shifted from the question of whether judicial review should be applied at all to the question of how that review should be undertaken. Thus far, the Court has applied a version of the *Knox* balancing test by default, but that choice must be questioned in light of the reasoning set forth in the three *Legal Tender Cases*.

VI. BACK TO THE FUTURE

This Part asks what the *Legal Tender Cases* might tell us about how the Court should analyze the scope of unenumerated power today. It concludes that the *Hepburn* standard, which gives a use of implied authority intermediate scrutiny

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255. *See Raich*, 545 U.S. at 41–42 (Scalia, J., concurring) ("At bottom, respondents' state-sovereignty argument reduces to the contention that federal regulation of the activities . . . is not sufficiently necessary to be 'necessary and proper' to Congress's regulation of the interstate market.").

256. *Id.* at 30–31 (majority opinion). The majority in *Raich* said that Congress needed only a rational basis for its conclusion that the CSA should have no exceptions. *See id.* at 22. Justice Scalia's concurring opinion did not clearly state the standard of review, though at one point he said that Congress could "reasonably conclude" that its regulatory scheme would be undercut if an exception were made. *See id.* at 41–42 (Scalia, J., concurring).

Read broadly, *Raich* could herald a return toward the deferential approach pioneered by the third *Legal Tender Case*. That interpretation, though, has two significant problems. First, notwithstanding the efforts of respondents' counsel, it is very difficult to distinguish *Raich* from *Wickard*. *See id.* at 17–20 (majority opinion). And since *Lopez* and *Morrison* reaffirmed *Wickard*, a more plausible reading of *Raich* is that when the Court uses a balancing test, it is still assigning a greater functional value to Congress's economic choices. Second, the broad reading of *Raich* assumes that Justice Kennedy—the silent member of the majority—will stick with the same position in the next implied power case, which is no sure bet.

257. *Id.* at 30.

258. *See id.* at 53 (O'Connor, J., dissenting) ("There is simply no evidence that homegrown medical marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market—or otherwise to threaten the CSA regime.").

259. *Id.* at 42; *see id.* at 48 (stating that "fundamental structural concerns about dual sovereignty animate our Commerce Clause cases").

when it regulates conduct that is reasonably related to a constitutional prohibition, is the best approach. That assessment rests on the legal process advantages of this test and on the political context in which the Justices operate. The discussion ends by showing how the *Hepburn* framework would affect the results reached in the recent implied power cases.

A. LESSONS FROM THE *LEGAL TENDER CASES*

The first step in determining which implied power standard is the most appropriate for this era is to ascertain what general principles can be extracted from the account presented thus far. With respect to that question, two points are clear. First, there is no test for unenumerated authority that is authoritative under all circumstances. Neither the Framers nor Chief Justice Marshall ever set forth a clear principle, as the discussion of *M'Culloch* makes plain.[260] Nor is there a coherent answer that emerges from other cases addressing the question, which have used three different interpretive tests over the years. Accordingly, both originalists and doctrinalists must look elsewhere to develop a persuasive answer for this problem.

The second lesson is that the threshold question of whether judicial review should apply at all to exercises of implied power is an issue of politics rather than law.[261] One reason why the precedents in this area fluctuate so much is that the question of how to construe enumerated authority is really a stalking horse for the more basic choice about how power should be allocated between the national government and the states. Different generations of Americans have reached and will continue to reach different judgments on that issue depending on the circumstances that they face. Once the myth of *M'Culloch*'s preeminence is stripped away, that is precisely what the history of implied power suggests. Jurisprudential nuances cannot explain the wide swings in the doctrine that followed the rise of Jacksonian Democracy, Reconstruction, the New Deal, and the Reagan era. Nor should they, because doctrine is incapable of telling us how robust states' rights should be.[262] Put simply, courts tend to march to the music played by the political branches in deciding whether judicial review should

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260. *See supra* Part I.A.

261. Some argue that there is a textual basis for the conclusion that robust judicial review applies to implied power because the word "proper" in the Necessary and Proper Clause implies that laws clashing with other constitutional principles are suspect. *See* Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 773 (1997); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297 (1993); *cf.* Printz v. United States, 521 U.S. 898, 923–24 (1997) (advancing this view in a Tenth Amendment case).

262. Some might object that under the *Juilliard* test states' rights can be as strong as the electorate wants, and hence it is wrong to equate the existence of judicial review over implied power with the strength of federalism. To some extent that is true, but the problem is that a decision not to enforce the limits on enumerated authority as a constitutional norm in the courts does assign a lower value to that concept as compared to a principle like separation of powers. A decision to treat congressional judgments about its implied power as a political question is not neutral; it instead represents a normative judgment on the role of federalism in the constitutional structure.

apply in this realm.

The relationship between the Supreme Court's current stance and the Reagan Revolution confirms this assertion. By now, it should be clear that the Justices responsible for the recent implied power cases did not pluck the idea of applying more rigorous scrutiny out of thin air. Instead, they are following the direction set out by the movement that President Reagan led, which won strong popular support for its views on federalism. The dissenters on the Court, most of whom did not back the Reagan Revolution, naturally dispute this claim, but at least for the foreseeable future their views do not command enough support to warrant further discussion.

Since the Court is now committed to a judicial role for enforcing limits on Congress's power, the issue is which doctrinal test—*Knox* or *Hepburn*—embodies the better approach.[263] Legal reasoning can answer this question, because the essence of a dispute about how courts should act (rather than whether they should act) is doctrinal in nature. Resolving that problem in a thoughtful fashion requires a review of the legal process benefits of each test and a comparison of their traits with the landscape established by the political branches.

B. *KNOX* AND *HEPBURN* COMPARED

Let us begin by examining the substantive and legal process benefits of the *Knox* standard. Though *Knox* upheld the Legal Tender Act, its approach is actually the best one for *M'Culloch* supporters who seek the widest possible berth for states' rights. That is both its strength and its weakness. While *Knox* shares with *Hepburn* the idea that the scope of implied power is judicially enforceable, *Knox* sweeps more broadly in holding that every such law can be subject to heightened scrutiny. This results from rejecting the idea that concrete prohibitions alone should control the inquiry. Thus, those who believe that federalism should block federal action in areas beyond the specific rights in the Constitution would probably tend to support *Knox*. In a way, this method of reading unenumerated authority is analogous to the criticism of a strict construction view of individual rights: that the items enumerated centuries ago are simply inadequate to guide courts now. Needless to say, not everyone who agrees that judicial review applies to Congress's implied authority would say that the scrutiny should be so sweeping.

Another potential advantage of the *Knox* method is that it is "pragmatic," which in modern parlance almost always sounds better than being "formalist." More than perhaps any other case in the canon, *Knox* self-consciously concluded that the creation of paper money was constitutional because of its necessity, and that the scope of Congress's power should be read based on the

263. At this point, one might rightly object that there is no such thing as a "better" test because the Court has never settled on one. There is certainly no universal approach to the problem, but in a given era and depending on the surrounding context, one standard could be more appropriate than another.

importance of its action to the national interest.[264] By contrast, pragmatists would probably view *Hepburn* as a prime example of formalism run wild, as the Court literally held that winning the Civil War was less significant than the emanations of certain textual rights. By choosing a test that explicitly weighs the competing federal and state interests, judges might reach results that are more rational and more consistent with the goals of federalism.

Turning this observation on its head, the *Knox* framework is also open to the same attack that is made against pragmatic interpretive theories: namely, that a balancing framework is "a thinly veiled rationalization for judicial supervision of a policy judgment that our system of government reserves to Congress."[265] There is an inevitable tradeoff between the equitable character of *Knox*'s reach and the mischief that can result when judges act without clear guidance. In this context, pragmatism assumes that judges are in a better position than legislators to judge whether federal action is important enough to override traditional state interests. Naturally, the pragmatic view is not without its critics.[266] Yet attacks based on the thought that courts are acting without any significant constraints apply with greater force against a balancing test than against the *Hepburn* test.

By contrast, *Hepburn* poured content into *M'Culloch* by holding that judicial scrutiny over implied authority is limited to a few discrete categories. From a theoretical standpoint, the *Hepburn* approach is best understood as a structural technique—an effort to read the Constitution holistically. This rebuts the objection that the Court is second guessing Congress's policy judgments without any textual guidance. Indeed, the main advantage of *Hepburn* is that it clearly delineates when congressional action will receive no real scrutiny (when no constitutional right is involved) and when it will get rigorous scrutiny (when such a right is implicated). That is at odds with the *Knox* test, which maximizes interbranch conflict by giving courts the right to question any exercise of power that is not expressly listed in the Constitution.

Furthermore, the *Hepburn* standard allows the Justices to move past the stale debate that has been ongoing since *Lopez*. In that case, the Court said that safeguarding the principle of enumerated power required legal uncertainty in adjudicating when Congress exceeded its constitutional authority.[267] Likewise, the dissenters argued that the majority's approach was unworkable because implied power claims could not be judged without engaging in ad hoc assessments that are inherently unpredictable.[268] Both arguments are wrong. *Hepburn* shows that there is a way to enforce the boundaries that is more amenable to predictable analysis. Adopting the *Hepburn* formula does not erase judicial

264. *See supra* notes 159–60 and accompanying text.

265. Nat'l League of Cities v. Usery, 426 U.S. 833, 876 (1976) (Brennan, J., dissenting).

266. *See supra* notes 10–12 and accompanying text.

267. *See supra* text accompanying note 227.

268. *See* United States v. Lopez, 514 U.S. 549, 608 (1995) (Souter, J., dissenting) (expressing concern that the Court's analysis "portend[s] a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago").

discretion, as that is impossible as long as judges are given a role in enforcing federalism. Instead, the framework restricts that discretion to areas where courts have more institutional competence.[269] After all, asking judges to weigh the justification for a federal act against the burden that act places on a concrete right falls well within the normal work of courts. The difference between that issue and an assessment of whether a law violates a constitutional right is only a matter of degree.

A powerful analogy for the *Hepburn* standard can be found in Justice Jackson's concurrence in the *Steel Seizure Cases*, which assessed the scope of the President's implied power.[270] In that context, the relevant structural principle is separation of powers rather than federalism, but the underlying question is the same: how should courts police the boundary between rival power centers?[271] Justice Jackson's answer was that implied presidential power should be read in conjunction with any statutory text that is in the vicinity.[272] He said that "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb," as compared to cases in which Congress did not act.[273] In those instances when the President acts in the presence of a statutory prohibition, the implied power "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[274] The same principle should apply when Congress acts to alter the federalism balance in an area touched by a specific constitutional prohibition.

Finally, the *Hepburn* test gives judges a way to avoid constitutional questions if they wish. Instead of having to address a claim that a federal law violates the Bill of Rights, a court can just conclude that Congress lacked the necessary

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269. This test remains coherent, though, only if courts are restricted to reading implied power through the lens of *specific* constitutional prohibitions. If vague principles such as federalism in general are considered, then the analysis starts looking like *Knox*. The best definition of specific rights is enumerated rights, *see* Adamson v. California, 332 U.S. 46, 68–92 (1947) (Black, J., dissenting), but one should not exclude the possibility that there are some unenumerated rights that are specific enough. For example, one could say that a federal law banning partial-birth abortion is vulnerable under the *Hepburn* test without reaching the question under *Roe v. Wade*. *See generally* David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously:* Lopez *and the Partial-Birth Abortion Ban Act*, 30 CONN. L. REV. 59 (1997) (making a similar argument).

270. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring); *see also* Dames & Moore v. Regan, 453 U.S. 654, 668–69 (1981) (relying on Justice Jackson's formulation).

271. Just as there is a valid argument that courts should completely defer to Congress's judgments on implied power, there is a related contention that judges should refrain from intervening in separation of powers disputes and simply let the political branches fight it out. It is interesting that the Court treats this norm of judicial restraint with far less respect when the President and Congress collide over domestic policy than when Congress and the states are at loggerheads.

272. *See Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring) (dividing exercises of presidential authority into three categories based on the presence or absence of congressional action).

273. *Id.* at 637; *see id.* ("When the President acts in absence of either a congressional grant or denial of authority . . . there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.").

274. *Id.* at 638.

justification to exercise its implied authority.[275] Granted, this does not allow a court to avoid constitutional issues entirely, but the resulting precedent is more limited because it does not bar the states from taking an identical action.[276] That type of decision would not prevent Congress from achieving the same goal by gathering additional evidence or by presenting an alternative basis for a new law. Thus, the *Hepburn* approach can be described as a "second look" doctrine that allows courts to enter into a dialogue with Congress and to promote deliberation by forcing multiple legislative majorities to approve a statute that intrudes into a controversial realm.[277]

Nevertheless, the formula articulated in *Hepburn* is not above criticism. One obvious problem is the normative basis of its interpretation of federalism. Choosing individual rights as the benchmark for analysis invites at least three objections. First, the concept that the states should have more freedom than Congress to legislate in these sensitive areas may be in tension with the intent of the Fourteenth Amendment's Framers to incorporate the Bill of Rights against the states.[278] Second, *Hepburn* does not reserve any exclusive area of authority to the states as some advocates of federalism prefer.[279] Third, that standard offers no protection for many areas of policy, such as education or family law, where local control can provide powerful benefits. On the other hand, a focus on individual rights to measure implied power does resonate with the original understanding that federalism is supposed to promote individual freedom.[280] Though the Court sometimes acts in the name of states' rights when the link to

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275. *See* Barnett, *supra* note 261, at 747 (discussing *Lopez* and stating that "by enforcing this limitation on the scope of federal power . . . the Court never had to address the question of whether this statute violated the Second Amendment").

276. Staying the hand of Congress on these delicate questions also allows the Court to observe the collective judgment of the states on where the boundary should be. This information is often used in Eighth Amendment cases as a way of assessing contemporary standards of decency. *See, e.g.*, Atkins v. Va., 536 U.S. 304, 314–16 (2002) (invalidating the execution of mentally retarded criminals based on evidence of state trends).

277. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 17–19 (1982) (outlining the rationale for a "second look"); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 110–98 (2d ed. 1986) (describing the "passive virtues" of the Supreme Court).

278. *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 163–214 (1998) (analyzing the text and history of the Fourteenth Amendment); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 26–170 (1986) (same); CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (statement of Rep. Bingham) (describing incorporation as a purpose of Section One of the Fourteenth Amendment).

The *Hepburn* standard can be compared to the idea that the Bill of Rights should not be applied jot-for-jot to the States. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 678 (2002) (Thomas, J., concurring) ("[I]n the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government."). The difference is that the *Hepburn* test provides a higher minimum level of protection.

279. *But see* Gardbaum, *supra* note 27, at 798 (disputing the widespread bias that the existence of areas of exclusive state power is a necessary condition of constitutional federalism).

280. *See, e.g.*, THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961) ("[T]he power surrendered by the people, is first divided between two distinct governments . . . . Hence a double security arises to the rights of the people.").

personal rights is tenuous, its usual position is that the objective of federalism is "to ensure the protection of our fundamental liberties."[281] In a sense, *Hepburn*'s view of *M'Culloch* takes the most direct path toward that goal.

Accordingly, from a legal process perspective *Hepburn* states a more manageable and sophisticated test than *Knox*, but that is not enough to establish that the *Hepburn* standard is the right one. If legal process superiority were all that mattered, then *Hepburn* would always be better. And this cannot be true given the spread of the precedents over time, which is another way of saying that the difference between *Hepburn* and *Knox* is substantive as well as procedural.[282] One test enforces a stronger version of states' rights than the other, and this difference must be addressed. It would appear that *Knox* is the more appropriate method when the background political judgment about the need to protect federalism has broad support. Under that scenario, there is a good reason to think that an interpretation of the popular will should protect areas that do not involve constitutional rights. By contrast, *Hepburn* looks better when the political judgment for federalism is less sweeping but still powerful enough to compel judicial review over implied power in the first place.

To see how the contemporary political universe shapes the choice between *Hepburn* and *Knox*, we need to consider the scope of the federalism principles bound up with the Reagan Revolution. It is hard to ignore the fact that Reagan's push for states' rights, while successful in changing the constitutional dynamic, did not return the law to the federalism that prevailed before 1937. For instance, the conservative movement has not rolled back New Deal initiatives regulating the national economy.[283] *Lopez* itself holds that all economic statutes based on implied power are valid, even though this was not true before the New Deal.[284] As Justice Souter said in *Morrison*, "[a]lthough we sense the presence of *Carter Coal*, *Schechter*, and *Usery* once again, the majority embraces them only at arm's-length. . . . [C]ases overruled since 1937 are not quite revived."[285] While there was a significant change in the legal atmospherics, the recent federalism revival has not involved a broad revision of traditional principles. The limited application of the recent implied power cases, after a decade on the books, confirms this point.

Given the relatively modest scope of the new federalism in Congress and on

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281. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (internal quotation marks omitted); *see* New York v. United States, 505 U.S. 144, 181 (1992) ("[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself . . . .").

282. In fact, the best standard from a legal process perspective is the *Juilliard* test, which requires courts to do nothing. *See generally* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (taking this position). The reason that this method is not always used, of course, is that its substantive reach is not always in accord with the dominant constitutional ethos.

283. *See supra* notes 217–19 and accompanying text.

284. For a recent unanimous application of this rule, see Sabri v. United States, 541 U.S. 600, 608 (2004) (upholding the federal bribery statute against a challenge under the Commerce and Spending Clauses).

285. United States v. Morrison, 529 U.S. 598, 654 (2000) (Souter, J., dissenting).

the bench, it is not, to borrow a phrase, "congruent and proportional" to enforce that principle through the broad and indiscriminate *Knox* test. Put another way, there is no compelling interpretive reason to choose this standard. At present, both political and legal process considerations lead to the conclusion that the more cautious *Hepburn* test is a better fit. The problem, then, is that the Court's recent cases have used the wrong approach. Fortunately, however, most of the holdings in these cases are still consistent with the *Hepburn* standard.

C. RECASTING THE RECENT PRECEDENTS

While moving from a *Knox* balancing test to the *Hepburn* structural method would mark a significant change, the results of the new enumerated power decisions would not change much. *Lopez* and *Boerne* can be sustained under the *Hepburn* test because in both cases the implied power implicated a concrete constitutional right. Similarly, the recent holding in *Raich* can be sustained because no such right was present. In fact, the only recent Supreme Court case that would be disturbed by changing the doctrinal test is *Morrison*, which voided a statute that did not implicate any specific prohibitions at all.

Lopez was driven by the Court's assessment of the competing federal and state interests at stake, but another explanation of the holding is that it was about guns. Guns are no ordinary subject for federal regulation under *Hepburn* because the Constitution secures a right to bear arms.[286] While there is a split on whether that text guarantees an individual right of gun ownership, *Hepburn* requires only that the regulated conduct be reasonably related to a concrete right for heightened scrutiny to apply.[287] This does not mean that using the *Hepburn* standard for the law struck down in *Lopez* mandates the result that the Court reached. Rather, the point is that the holding can be sustained because guns fall within one category that *Hepburn* marks out for special attention. As a result, substituting the *Hepburn* test for the *Knox* test need not affect the result in *Lopez*.

An identical observation can be made about *Boerne* because that case involved a federal attempt to regulate the treatment of religious practices in a manner that implicated the Establishment Clause. RFRA provided that a generally applicable criminal law could not impose a substantial burden on religious practices unless: (1) there was a compelling governmental interest in the regulation and (2) the regulation was the least restrictive means of furthering

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286. U.S. CONST. amend. II. ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

287. *Compare* United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001) (reading the text and history of the Second Amendment to protect an individual right to own guns), *with* Hickman v. Block, 81 F.3d 98, 102 (9th Cir. 1996) (rejecting that view in favor of a collective rights interpretation related only to militia service). The fact that only a reasonably plausible claim involving a constitutional prohibition is necessary under *Hepburn* might lead the Court to take a more active role in defining these rights because declining this invitation would create more restraints on congressional power.

that interest.[288] In his concurring opinion in *Boerne*, Justice Stevens argued that "the Religious Freedom Restoration Act . . . is a 'law respecting an establishment of religion' that violates the First Amendment to the Constitution" because the statute "provided the Church with a legal weapon that no atheist or agnostic can obtain."[289] Thus, this exercise of implied power also touched upon a substantive area that the *Hepburn* standard holds is not subject to federal regulation without a particularly persuasive justification. Once again, this does not mean that the Court was required by that standard to void RFRA.[290] Adopting the *Hepburn* approach in lieu of *Knox*, though, does not undermine *Boerne*'s holding either.

Nor is the *Raich* case disturbed by switching tests, though the analysis here is more complicated. Obviously, there is no basis for limiting Congress's power on the ground that there is a general right to use marijuana. The claim in *Raich*, however, is more nuanced, for it asks whether citizens who are in severe pain or seriously ill have a substantive due process right to use the drug. Thus, under *Hepburn* the threshold question is whether this raises a reasonable claim that the federal action is related to a specific constitutional right.[291] The answer is probably no. Not only is there no holding supporting such a right, but there is not even dicta suggesting that a right to use a drug might exist.[292] The lack of support for this assertion is suggested by the fact that in the district court, which is the only court to adjudicate the due process claim thus far, the *Raich* litigants could muster only the Ninth Amendment as support.[293] Thus, under the *Hepburn* framework, the courts should simply defer to Congress's judgment on drugs.

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288. *See* City of Boerne v. Flores, 521 U.S. 507, 515–16 (1997).

289. *Id.* at 537 (Stevens, J., concurring).

290. Given that Congress does have the power to enforce constitutional rights by appropriate legislation, the Religion Clauses of the First Amendment present a special problem for the *Hepburn* test because almost any action taken to protect free exercise rights can be described as a threat to the Establishment Clause and vice versa. It is probably the case, therefore, that under *Hepburn* every exercise of implied power involving religion must receive intermediate scrutiny.

291. In this respect, applying the *Hepburn* standard answers the most powerful point of *Raich*, which is that the logic of the dissents would necessarily place home-grown marijuana used for recreational purposes beyond Congress's reach. *See* Gonzales v. Raich, 545 U.S. 1, 28 (2005). Nevertheless, recreational and medicinal uses can be split apart if the question is whether the implied power bears a relationship to other constitutional rights.

292. The closest suggestion is in Justice Stevens's concurring opinion in a prior case involving the CSA, but he was discussing a statutory issue (whether the CSA could be read to contain a medical necessity defense for ill patients) rather than a constitutional issue. *See* United States v. Oakland Cannabis Buyers' Co-op, 532 U.S. 483, 501 (2001) (stating that this presented a difficult question).

293. *See Raich*, 545 U.S. at 33 (noting that the due process claim was not reached by the Court of Appeals); *see also* Raich v. Ashcroft, 248 F. Supp. 2d 918, 927–28 (N.D. Cal. 2003) (rejecting the due process claim in short order). Raich is now back before the Ninth Circuit litigating this claim.

Admittedly, it is a somewhat close question whether Raich's due process claim is plausible enough to trigger heightened review under *Hepburn*. It is precisely this sort of ambiguity, however, that makes me skeptical about using anything other than enumerated or clearly established unenumerated rights for purposes of this analysis. *See supra* note 269. Even if my conclusion on the merits of the due process claim is off base, however, the result in *Raich* could still be sustained under intermediate scrutiny review.

By contrast, *Morrison* comes out the other way when the *Hepburn* framework is applied. There is no credible argument that the civil remedy of VAWA implicated any specific constitutional prohibition. Thus, the Court should have deferred to Congress's judgment that the statute was within its unenumerated authority. Putting aside the merits of that result, the simplicity of the analysis is an example of the practical advantage of using this test instead of the *Knox* model. Not only does *Morrison* come out differently under *Hepburn*, the case is not even close.

Thus, the new cases on implied power do not rise and fall together as the current debate suggests. One can reject the Court's rationale without rejecting all of its holdings. The *Hepburn* test not only acts as a bridge between the extremes of abandoning judicial review and giving every act of implied power unbounded scrutiny, but it can also span the divide between opposing views on the results of the recent decisions.

CONCLUSION

Just as a bank would be useless without money, *M'Culloch* would be hollow without the *Legal Tender Cases*. Each of those three decisions offered a distinct vision of how the unrestricted means that Congress may choose should be distinguished from the ends that are forbidden. *Hepburn* argued that implied power should be read in conjunction with constitutional rights. *Knox* said that the best solution involved balancing the need for federal action against the sovereignty of the states. *Juilliard* contended that courts should have no role at all in assessing the scope of enumerated authority. In examining the Court's struggle to pick between these models, this analysis caught glimpses of larger forces—forces that are always moving and forcing the Justices to reconcile the competing claims of the American experience.

Nevertheless, each generation must decide for itself how best to balance the need for vigorous federal action with the demands of federalism. While the paper money trilogy provides a set of guiding principles, the choice among them is ours. This Article contends that the approach in *Hepburn* is the best synthesis of the political, textual, and jurisprudential elements that shape the current legal world. Though long overshadowed by *M'Culloch*, the first *Legal Tender Case* provides a template that can be used to forge a new consensus on implied power.