

DOCUMENT A

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

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

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

DOCUMENT B

An Old Whig (1787)

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

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

- 1. State in your own words the main concerns of the author of this passage.**

DOCUMENT C

Brutus #1 (1787)

[T]he legislature of the United States are vested with the great and uncontrollable powers, of laying and collecting taxes, duties, imposts, and excises. ...And are by this clause invested with the power of making all laws, *proper and necessary*, for carrying all these into execution; and they may so exercise this power as entirely to annihilate all the state governments, and reduce this country to one single government.

[I]t is a truth confirmed by the unerring experience of ages, that every man, and every body of men, invested with power, are ever disposed to increase it, and to acquire a superiority over every thing that stands in their way. This disposition, which is implanted in human nature, will operate in the federal legislature to lessen and ultimately to subvert the state authority, and having such advantages, will most certainly succeed, if the federal government succeeds at all.

- 1. According to Brutus, what governments are in danger?**
- 2. What observation does Brutus make about human nature?**
- 3. What does Brutus say will necessarily happen if the federal government is to succeed at all? Why?**

DOCUMENT D

Federalist #33 by Alexander Hamilton (1788)

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

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

- 1. According to Hamilton, why are these two clauses not cause for concern?**
- 2. What must the people do if the government becomes tyrannical?**

DOCUMENT E

Federalist #39 by James Madison (1788)

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

- 1. According to Madison , the government established by the Constitution has “an indefinite supremacy over all persons and things” as long as what?**
- 2. What does Madison say is the role of the tribunal (the Supreme Court) in deciding questions between the federal and state governments?**

DOCUMENT F

Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (1791)

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

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

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

- 1. Name at least two main reasons that Jefferson gave for *not* interpreting the powers of Congress broadly.**

DOCUMENT G

Memorandum #1: Edmund Randolph to George Washington (1791)

February 12, 1791

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

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

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

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

- 1. According to Randolph’s reasoning, how should the word, “necessary” be defined?**
- 2. In your own words, explain Randolph’s view that “The phrase, ‘and proper,’ if it has any meaning, does not enlarge the powers of Congress, but rather restricts them.”**

DOCUMENT H

Alexander Hamilton's Opinion on the National Bank (1791)

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

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

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

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

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

- ___ Implied powers "are as effectually delegated as" the expressed powers.
- ___ Certain expressed powers are related to establishment of a national bank.
- ___ Implied powers are inherent in the definition of government: "To deny the power of the government to add these ingredients to the plan, would be to refine away all government."
- ___ We must determine whether there is a natural relation between the national bank and one or more of the lawful purposes of government.

***McCulloch v. Maryland (1819)***

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

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

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

We think so for the following reasons:

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

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

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

That the power to tax involves the power to destroy [is a proposition] not to be denied...

The Court has [determined] that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared.

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

- 1. How did Chief Justice John Marshall interpret the following clauses of the Constitution in the unanimous opinion in *McCulloch v. Maryland*: Commerce Clause, the Necessary and Proper Clause, and the Supremacy Clause?**
- 2. Did the opinion in this case align more with the reasoning of Hamilton, Jefferson, or Randolph?**

DOCUMENT J

Jackson's Veto Message, July 10, 1832

To the Senate.

...It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I can not assent. ...

The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. ... The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve. ...

I understand them to have decided that inasmuch as a bank is an appropriate means for carrying into effect the enumerated powers of the General Government, therefore the law incorporating it is in accordance with that provision of the Constitution which declares that Congress shall have power "to make all laws which shall be necessary and proper for carrying those powers into execution." Having satisfied themselves that the word "necessary" in the Constitution means "needful," "requisite," "essential," "conducive to," and that "a bank" is a convenient, a useful, and essential instrument in the prosecution of the Government's "fiscal operations," they conclude that to "use one must be within the discretion of Congress " ...

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

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

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

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

Handout B: Page 11

1. What are the main objections that President Jackson raised against the National Bank?

DOCUMENT K

King Andrew the First cartoon, 1833



1. Why was Jackson attacked as a tyrant in this cartoon?
2. Was Jackson trying to expand or limit the role of the national government?

DOCUMENT L

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

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

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

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

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

- 1. How does this ruling interpret the Necessary and Proper Clause?**
- 2. Who or what should be the one to do the “adapting” of the Constitution Chief Justice Marshall referred to 200 years ago?**

DOCUMENT M

U.S. v. Comstock (2010), Dissenting Opinion

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

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

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

I respectfully dissent

- 1. On what basis does the dissenting opinion disagree with the majority’s interpretation of the Necessary and Proper clause?**

DIRECTIONS

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

KEY QUESTION

To what extent does the Necessary and Proper Clause grant a new power to Congress? What does “Proper” mean?