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AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 5: The Jacksonian Era – Federalism

Daniel Webster, **Speech on the Bank Veto** (1832)[1]

By the end of Andrew Jackson's first term as president, Daniel Webster was a powerful senator from Massachusetts and a bitter foe of the administration. He was also the leading constitutional lawyer among the National Republicans-cum-Whigs. In his arguments before the U.S. Supreme Court he had helped lead the Marshall Court to some of its most important decisions on behalf of national power and established property. Indeed, Webster had helped argue the McCulloch *case (1819), in which the Court had upheld the constitutional power of Congress to charter the second Bank and struck down Maryland's attempt to interfere with the operation of the Bank. Webster had since developed a close financial and political relationship with the Bank and its aggressive director, Nicholas Biddle. It was his job to provide the rebuttal to Jackson's Bank veto, and he supplied it the next day on the Senate floor. There was no question about whether the veto could be overridden in Congress. The Democrats had the votes to sustain the veto. Like Jackson's veto message, Webster's speech was for public consumption. The speech was published as a pamphlet and widely reprinted in newspapers as part of Henry Clay's doomed campaign to unseat Jackson as president in the 1832 election. Like Jackson in his veto message, Webster ranged widely in his speech. The veto message, Webster argued, not only asserts an incorrect view of congressional power and the operation of the necessary and proper clause, but it also challenged the supremacy of the courts as constitutional interpreters and threatened the "despotism" of the president's personal opinion of public policy and constitutional meaning trumping the views of Congress and the courts.*

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It is not to be doubted that the constitution gives the President the power which he has now exercised; but, while the power is admitted, the grounds upon which it has been exerted become fit subjects of examination. The constitution makes it the duty of Congress, in cases like this, to weigh the force of the President's objections to that measure, and to take a new vote upon the question.

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It is now certain that, without a change in our public councils, this bank will not be continued, nor will any other be established, which according to the general sense and language of mankind, can be entitled to the name. . . .

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Congress passed the bill, not as a bounty or a favor to the present stockholders, not to comply with any demand of right on their part, but to promote great public interests, for great public objects. . . . If a bank charter is not to be granted, because it may be profitable, either in a small or great degree, to the stockholders, no charter can be granted. The objection lies against all banks. Sir, the object aimed at by such institutions is to connect the public safety and convenience with private interests. It has been found by experience that banks are safest under private management, and that Government banks are among the most dangerous of all inventions. . . .

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. . . . He denies that the constitutionality of the bank is a settled question. If it be not, will it ever become so, or what disputed question can be settled? . . . .

. . . . [T]he question of the power of Congress to create such institutions has been contested in

[1] *Register of Debates*, 22nd Cong., 1st sess. (July 11, 1832), 1221-40.

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every manner known to our constitution and laws. The forms of the Government furnish no new mode in which to try this question. It has been discussed over and over again, in Congress: it has been argued and solemnly adjudged in the Supreme Court; every President, except the present, has considered it a settled question; many of the State Legislatures have instructed their Senators to vote for the bank; the tribunals of the States, in every instance, have supported its constitutionality; and beyond all doubt and dispute, the general public opinion of the country has at all times given, and does now give, its full sanction and approbation to the exercise of this power as being a constitutional power. There has been no opinion questioning the power, expressed or intimated, at any time, by either House of Congress, by any President, or by any respectable judicial tribunal. Now, sir, if this practice of near forty years, if these repeated exertions of the power, if this solemn adjudication of the Supreme Court, with the concurrence and approbation of public opinion, do not settle the question, how is any question ever to be settled, about which any one may choose to raise a doubt? The argument of the message, upon the congressional precedents, is either a bold and gross fallacy, or else it is an assertion without proofs, and against known facts. The message admits that, in 1791, Congress decided in favor of a bank; but it adds that another Congress, in 1811, decided against it. Now, if it be meant that, in 1811, Congress decided against the bank on constitutional ground, then the assertion is wholly incorrect, and against notorious facts. It is perfectly well known that many members in both Houses voted against the bank in 1811, who had no doubt at all of the constitutional power of Congress. . . .

. . . . The legislative precedents all assert and maintain the power; and these legislative precedents have been the law of the land for almost forty years. They settle the construction of the constitution, and sanction the exercise of the power in question so far as these ends can ever be accomplished by any legislative precedents whatever. But the President does not admit the authority of precedent. Sir, I have always found that those who habitually deny most vehemently the general force of precedent, and assert most strongly the supremacy of private opinion, are yet, of all men, most tenacious of that very authority of precedent whenever it happens to be in their favor. I beg leave to ask; sir, upon what ground, except that of precedent, and precedent alone, the President's friends have placed his power of removal from office.[2] No such power is given by the constitution in terms, nor anywhere intimated throughout the whole of it; no paragraph or clause of that instrument recognizes such a power. . . . [E]nlightened by what has passed under our observation, we now see that it is, of all powers, the most capable of flagrant abuse. . . .

. . . . Hitherto it has been thought that the final decision of constitutional questions belonged to the supreme judicial tribunal. The very nature of free Government, it has been supposed, enjoins this; and our constitution, moreover, has been understood as to provide, clearly and expressly. It is true that each branch of the Legislature has an undoubted right, in the exercise of its functions, to consider the constitutionality of a law proposed to be passed. This is naturally a part of its duty, and neither branch can be compelled to pass any law, or do any other act, which it deems to be beyond the reach of its constitutional power. The President has the same right when a bill is presented for his approval; for he is doubtless, bound to consider, in all cases, whether such bill be compatible with the constitution, and whether he can approve it consistently with his oath of office. But when a law has been passed by Congress and approved by the President, it is now no longer in the power, either of the same President, or his successors, to say whether the law is constitutional or not. He is not at liberty to disregard it; he is not at liberty to feel or to affect "constitutional scruples," and to sit in judgment himself on the validity of a statute of the Government, and to nullify it if he so chooses. After a law has passed through all the requisite forms; after it has received the requisite legislative sanctions and the Executive approval, the question of its constitutional then becomes a judicial question, and a judicial question alone. . . .

. . . . The President may say a law is unconstitutional, but he is not the judge. Who is to decide that question? The judiciary, alone, possesses this unquestionable and hitherto unquestioned right. The judiciary is the constitutional tribunal of appeal, for the citizens, against both Congress and the Executive,

[2] Webster is here referring to unilateral removal of executive officers by the president as part of the Democrat's "spoils" or patronage system by which they systematically removed John Quincy Adams' appointments from executive branch offices when Jackson assumed power and rewarded his own supporters with his appointments. The removal power would become newly controversial after the 1832 election during the during the Bank deposit removal dispute.

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in regard to the constitutional of laws. It has this jurisdiction expressly conferred upon it; and when it has decided the question, its judgment must, from the very nature of all judgments that are final, and from which there is no appeal, be conclusive. . . . If we depart from the observance of these salutary principles, the Executive power becomes at once purely despotic; for the President, if the principle and the reasoning of the message be sound, may either execute, or not execute, the laws of the land, according to his sovereign pleasure. He may refuse to put into execution one law, pronounced valid by all the branches of the Government, and yet execute another, which may have been, by constitutional authority, pronounced void. . . .

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By the constitution, Congress is authorized to pass all laws "necessary and proper" for carrying its own legislative powers into effect. Congress has deemed a bank to be "necessary and proper" for these purposes, and it has, therefore, established a bank. But although the law has been passed, and the bank established, and the constitutional validity of its charter solemnly adjudged, yet the President pronounces it unconstitutional , because some of the powers bestowed on the bank are, in his opinion, not necessary and proper. It would appear that powers which, in 1791 and 1816, in the time of Washington, and in the time of Madison, were deemed, "necessary and proper," are no longer so to be regarded, and therefore the bank is unconstitutional. It has really come to this, that the constitutionality of the bank is to depend upon the opinion which one particular man may form of the utility or necessity of some of the clauses of its charter. If that individual chooses to think that a particular power contained in the charter is not necessary to the proper constitution of the bank, then the act is unconstitutional.

Hitherto it has always been supposed that the question was of a different nature. It has been thought that the policy of granting a particular charter may be materially dependent on the structure, and organization, and powers of the proposed institution. But its general constitutionality has never been understood to turn on such points. This would be making its constitutionality depend on subordinate questions, on questions of expediency, and questions of detail, upon that which one man may think necessary, and another may not. If the constitutional questions were made to hinge on matters of this kind, how could it ever be decided? All would depend on conjecture, on the complexional feeling, on the prejudices, on the passions of individuals; or more or less practical skill, or correct judgment, in regard to banking operations, among those who should be the judges; on the impulse of momentary interest, party objects, or personal purposes. . . .

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. . . . It is true, indeed, that the message pretty plainly intimates that the President should have been first consulted, and that he should have had the framing of the bill, but we are not yet accustomed to that order of things. . . . But supposing, sir, that our accustomed forms and our republican principles are still to be followed, and a law creating a bank is, like all other laws, to originate in Congress, and that the President has nothing to do with it till it is presented for his approval, then it is clear that the powers and duties of a proposed bank, and all the terms and conditions annexed to it, must, in the first place, be settled by Congress. This power, if constitutional at all, is only constitutional in the hands of Congress. . . . Sir, in considering the authority of Congress to invest the bank with the particular powers granted to it, the inquiry is not, and cannot be, how appropriate these powers are, but whether they be at all appropriate; whether they come within the range of a just and honest discretion; whether Congress may fairly esteem them to be necessary. The question is not, are they the fittest means, the best means, or whether the bank might not be established without them; but the question is, are they such as Congress, *bona fide*, may have regarded as appropriate to the end. If any other rule were to be adopted, nothing could ever be settled. A law would be constitutional today and unconstitutional tomorrow. Its constitutionality would altogether depend upon individual opinion, on a matter of mere expediency. . . .

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