



AMERICAN CONSTITUTIONALISM
 VOLUME I: STRUCTURES OF GOVERNMENT
 Howard Gillman • Mark A. Graber • Keith E. Whittington

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Supplementary Material

Chapter 4: The Early National Era – Powers of the National Government

House Report on Internal Improvements (1817)¹

The War of 1812 had a profound impact on American constitutionalism. The British sack of Washington, D.C., and other misadventures exposed the very limited capacities of the early American state. Concerned that Jeffersonian understandings of national power were insufficient, many prominent politicians after the peace treaty insisted that Congress needed greater authority. Some, most notably Presidents James Madison and James Monroe, thought that this authority probably required a constitutional amendment. Others, most notably Henry Clay and the young John C. Calhoun, claimed that Congress already had greater authority under the commerce clause and the general welfare clause of Article I. In particular, they proposed that Congress enact a national internal improvements program, using funds from the national bank to finance building major roads and canals. The proposal would build on the precedent of the Cumberland Road, which had been launched during the Jefferson administration and was to run from the Potomac to the Mississippi.

Many elected officials thought that President Madison's decision to approve the Bank also committed him to approving internal improvements. They were rudely surprised. On the last day of his presidency, Madison vetoed a bill providing federal funds for building roads and canals. His veto message suggested that while public opinion had sanctioned a national bank, he remained a strict constructionist.

The House of Representatives appointed a committee to respond to Madison's veto of the internal improvements bill. The committee was led by Henry St. George Tucker, a Republican from an influential Virginia family of judges and politicians. In the extended debate that followed, Tucker expressed exasperation with the charge that he and his allies

are deserting the great principles of the Republicans of 1798, and subverting the acknowledged rights of the States, by a construction too latitudinous. . . . In the construction of this Constitution, there is not, there cannot be, a system of orthodoxy. Agreeing, as we do, in principle, there must always be a variety of application. The instrument, conferring upon us incidental, as well as express powers, there must always be great differences of opinion, as to the "direct relationship," and "real necessity" of the accessory powers. Sir, with these things before your eyes, who shall pretend to say what is orthodoxy – what is heterodoxy? It is impossible. It remains to us to act according to our consciences, without attempting a conformity to any particular sect or persuasion.²

Tucker, a veteran of the War of 1812 and serving only his second term of office in the House, allied himself with other young insurgents such as Henry Clay and John Calhoun, who were willing to take a more vigorous view of federal power and what was necessary to avoid a repeat of the indignities that had befallen the United States in that war.

*With the exception of the Missouri Compromise, proposed national internal improvement programs were the major constitutional issue that excited Americans during the Monroe and Adams administrations. On several occasions, Congress passed bills authorizing roads and canals only to see those measures fall prey to presidential vetoes. Proponents insisted that, particularly with state approval, such policies were necessary incidents of the congressional power to raise armies and regulate interstate commerce. Note the way many themes in the committee report urging internal improvements would later be echoed by John Marshall in *McCulloch v. Maryland* (1819).*

¹ *Annals of Congress*, 15th Cong., 1st sess. (December 15, 1817), 453–460.

² *Annals of Congress*, 15th Cong., 1st sess. (March 13, 1818), 1323.



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.... [Y]our committee will attempt to show that Congress has the power-

1. To lay out, improve, and construct, post roads through the several States, with the assent of the respective State. And,
2. To open, construct, and improve, military roads through the several States, with the assent of the respective States.
3. To cut canals through the several States, with their assent, for promoting and giving security to internal commerce, and for the more safe and economical transportation of military stores &c., in time of war; leaving, in all these cases, the jurisdictional right over the soil in the respective states.

....

That Congress, with the assent of the States respectively, may construct and improve their post roads, under the power "to establish post offices and post roads," seems to be manifest, both from the nature of things and from analogous constructions of the Constitution. It has been contended, indeed, that the word *establish*, in this clause of the instrument, comprehends nothing more than a mere designation of post roads. But if this be true, the important powers conferred on the General Government, in relation to the Post Office, might be rendered in a great measure inefficient and impracticable. In some States a power is vested in the inferior tribunals or county courts, to discontinue roads at their discretion; a Post Road designated by Congress might thus be discontinued, to the great embarrassment of the Post Office establishment

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Taking these principles for our guide, it may be asked it, under the narrow rules of construction contended for, the right of transporting the mails would not be held entirely at the will of the States respectively; on the other hand, if the United States have the privilege of establishing post roads, and are under the corresponding obligation of transporting the mails, is it not essential to the performance of this duty and to the enjoyment of this power, that they should have the right (with the assent of the respective States) to throw bridges over deep and rapid streams, to remove embarrassing and dangerous obstructions in the roads which they have the privilege of using, to level mountains which impede the velocity of transportation, and to render passable the morasses which intersect the road to various parts of the Union? Can it be supposed, that the Convention, in conferring the power and imposing the duty of transporting the mail (in its nature a matter of national concern,) intended to vest in Congress the mere authority to designate roads over which it should be carried? Can it be denied, that the right to render a road passable is "necessary" to the enjoyment of the privilege of transporting the mail; or can it be denied that such improvement, with the assent of the States, is proper? And, if "necessary and proper," is it not justified as an incidental power?

It is indeed from the operation of the word, "necessary and proper," in the clause of the Constitution, which grants necessary powers, that the "assent of the respective States" is conceived to be a pre-requisite to the improvement even of post roads. For, however "necessary" such improvement might be, it might be questioned how far an interference with the state jurisdiction over its soil, against its will, might be "proper." . . .

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2. Your committee conceive that the General Government has the power of making and operating military roads with the assent of the respective States, with a view to the common defense of the nation.

The power of opening a road during actual hostilities, for the purpose of transporting military stores, and marching troops to points that are menaced, has never yet been called in question. In truth, without such a power, the United States must fall a prey foreign enemies; so that it seems fair to assume, that, whenever a military road becomes necessary for the national safety, it is in the power of the General Government to construct it. . . .

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Among the most conspicuous of the analogies afforded by acts of Congress, is the establishment of the Cumberland Road This road has been constructed under the authority of the United States, with their funds, and through several of the States, with their assent. It has received the sanction of several distinct representative bodies, and two Presidents of the United States. In short, if precedent alone



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were wanting, this act would furnish it.

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3. As to canals. It will not be necessary to recapitulate the arguments already used on the subject of roads, some of which will be found strongly applicable to canals

It is true that the wants of the Union cannot confer power under the Constitution; but they may justly be touched upon as affording aid in its construction. They must have clearly foreseen, and must have been supposed to be provided for. If the power to carry on war implies "the necessary and proper" means of conducting it to a safe and proper issue, and if, without the use of these means, the burdens, and the privations, and the miseries of war, are to be infinitely increased, and its issue (always doubtful) rendered yet more precarious and unprosperous, are we not justified in presuming those means to have been contemplated as being vested in the General Government? Are we not justified in asserting that "necessary" power--the power of constructing roads and canals--at least with the assent of the States?

If your committee have not erred in attributing to Congress a Constitutional power to make roads and canals, either as an original or accessory power, it would seem that no doubt could remain of the right of applying our revenues to these purposes. If, indeed, the power was denied to the General Government of constructing roads and canals themselves, a question might still arise, whether it had not power to appropriate part of the revenue "to aid in the construction of roads and canals by the States."

There is perhaps no part of the Constitution more unlimited than that which relates to the application of the revenues which are to be raised under its authority. That power is given "lay and collect taxes to pay the debts and provide for the common defense and general welfare of the United States;" and though it be really admitted, that, as this clause is only intended to designate the objects for which revenue is to be raised, it cannot be construed to extend the specified powers of Congress, yet it would be difficult to reconcile either the generality of the expression or the course of administration under it, with the idea that Congress has not a discretionary power over its expenditures, limited by their application "to the common defense and general welfare."

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Nor, is there any danger that such power will be abused, while the vigor of representative responsibility remains unimpaired. It is on this principle that the framers of the Constitution mainly relied for protection of the public purse. In was a safe reliance. It was manifest that there was no other subject on which representative responsibility would be so great. On the other hand, while this principle is calculated to prevent abuses in the appropriation of public money, it was equally necessary to get an extensive discretion to the legislative body in the disposition of the revenues; since no human foresight could discern, nor human industry enumerate, the infinite variety of purposes to which the public money might advantageously and legitimately be applied. The attempt would have been to *legislate*, not frame a *Constitution*; to foresee and provide specifically for the wants of future generations, not to frame a rule of conduct for the legislative body. . . .

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