CONSTITUTIONAL LAW

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CONSTITUTIONAL LAW

Cases in Context

Fourth Edition

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To those whose vision of the Constitution
is not limited to that of the Supreme Court

To my wife, Beth — Randy Barnett

To Militza, Miriam, and Clara — Josh Blackman

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CHAPTER 2

Foundational Cases on Constitutional Structure: The Marshall Court

In February 1801, Federalist John Marshall was confirmed as Chief Justice. One month later, Democratic-Republican Thomas Jefferson took office as President, following the so-called Revolution of 1800. The stage was set for a showdown between the President (and his new Republican party) and the judiciary — the last branch of government that was still controlled by the Federalists. While the political nature of the dispute was very real, it should not be overestimated. Even after Jefferson had appointed a majority of the Justices, the Court continued to rule in ways displeasing to Jeffersonian Republicans.

The first three cases in this chapter concern what is today called the power of judicial review, whereby the Justices declare laws as unconstitutional: *Marbury v. Madison* (1803), *McCulloch v. Maryland* (1818), and *Gibbons v. Ogden* (1824). The fourth case, *Barron v. City of Baltimore* (1833), concerns whether the first ten amendments impose any limits on state powers. All four cases demonstrate how the Court has interpreted the scope of national power in our federal system. These four cases are considered fountainheads of contemporary constitutional law and are repeatedly cited by the Supreme Court. All literate lawyers must know what they are about.

A. THE JUDICIAL POWER

ASSIGNMENT 1

Article III of the Constitution begins:

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. . . . The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.

We start our study of judicial review with the question presented by *Marbury v. Madison*: does Article III give courts the power to declare laws unconstitutional? Chief Justice John Marshall answered the question affirmatively. Perhaps even more importantly, *Marbury* started the 200-year tradition of "grand" constitutional opinions. Through Marshall's concerted efforts, the Court abandoned the practice of each Justice issuing a separate opinion *seriatim*, which means "one after the other." In *Chisholm v. Georgia*, for example, there was no single majority opinion. Now, under Marshall's leadership, the Justices would join a single "opinion of the court," which was often written by the Chief Justice.

Marshall's opinion only hints at the bitter conflict that arose from the disputed presidential election of 1800. At the time, the President and Vice President did not run together on the same ticket. Instead, the candidate who received the most electoral votes became President, and the candidate with the second most votes became Vice President. For example, from 1796 to 1800, electoral runner-up Thomas Jefferson served as Vice President to his arch rival, President John Adams. This irregularity illustrates that the Framers of the Constitution were far from perfect in their constitutional design and foresight. The Twelfth Amendment, ratified in 1804, allowed the President and Vice President to run on a single ticket.

Four years later, in 1804, Burr shot and killed Hamilton in a duel on the shore of Weehawken, New Jersey. Both men boated there from New York, where dueling was illegal.

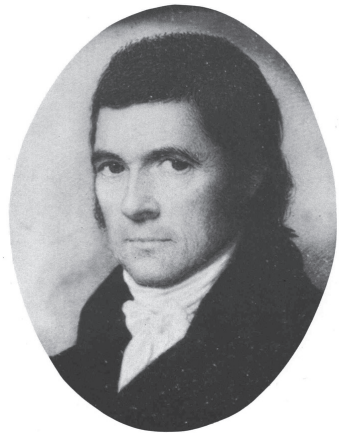
In the election of 1800, Jefferson's Republican party made the mistake of assigning the same number of electoral votes to Jefferson as it did to Aaron Burr of New York. The Constitution provided that a tie in the Electoral College would be resolved by the House of Representatives. In the House, each state would cast a single vote, regardless of its size. At the time, the House was still controlled by the outgoing "lame-duck" Federalist party.

Greatly fearing a Jefferson presidency, Federalists in the House supported Burr. There followed a deadlock that lasted from February 11th to 17th. In the end, Alexander Hamilton, who disliked Jefferson but despised his fellow New Yorker Burr — in part for reasons of Burr's personal character — shifted his support to Jefferson. Jefferson was elected President on the thirty-sixth ballot, a mere two weeks before Inauguration Day.

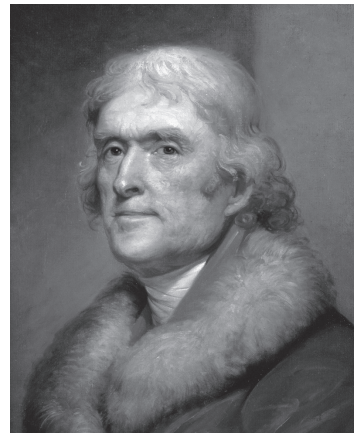
Following the election, but before Jefferson's inauguration, the Federalist Congress passed the Judiciary Act of 1801. The Act created a number of new judgeships to which outgoing President Adams nominated, and Congress confirmed, forty-two Federalist

supporters. They came to be known as the "midnight judges." William Marbury, for one, was nominated as a Justice of the Peace in the District of Columbia. The Act also reduced the number of Supreme Court Justices from six to five. John Marshall had himself been appointed Chief Justice on February 4th but continued to serve as Adams's secretary of state. It was in this capacity that Marshall, who was being assisted by his brother, inadvertently failed to deliver Marbury's commission that had been signed by Adams.

Marshall administered the oath of office to Jefferson on March 4th. Jefferson instructed James Madison, his new secretary of state, not to deliver the commissions that had been left behind by Marshall and his brother. As a result, Marbury never received his commission. In March 1802, the Congress was now controlled by the Jeffersonian Republicans. They repealed the Judiciary Act of 1801, and also eliminated the Supreme Court's 1802 term. The purpose was obvious: to prevent the Justices from hearing legal challenges from William Marbury and other midnight judges. The Repeal Act put the Court on notice that the Justices confronted Congress at their own peril.



Chief Justice John Marshall



Thomas Jefferson

STUDY GUIDE

1. In one of the most famous "jiu jitsu" maneuvers in legal history, Marshall is able both to assert the power of the Court to declare legislation unconstitutional AND to avoid the possibility that President Jefferson would ignore an adverse ruling by the Court. How does he accomplish this?
2. The *Marbury* case has become associated with the "power of judicial review," yet the opinion never uses that term. Like Hamilton in *Federalist No. 78*, Marshall employs the concept of judicial *duty* to follow the law of the superior as opposed to the subordinate authority. Is there a difference between the "power of judicial review" and the "judicial duty"? (*Hints:* Could judges properly refrain from doing their "duty" in

the same way they could refrain from exercising their "power"? Would such a duty likely have been specified in the constitutional text?)

3. On what ground does Marshall base the judicial duty to declare legislation unconstitutional? Text? History? First principles? Structure?
4. What distinction does Marshall draw between "political" questions and those involving "individual rights"? What presumption does he adopt when construing the meaning of express clauses in the Constitution?
5. Should Marshall have even been sitting on a case in which he was so intimately involved? (He personally failed to deliver Marbury's commission on time.) What conception of law might explain why this would not have been a completely unacceptable conflict of interest?

Marbury v. Madison

5 U.S. (1 Cranch) 137 (1803)

[In 1789, Congress enacted the first Judiciary Act. It established the inferior courts and defined their jurisdiction. Section 13 of the bill purported to define the jurisdiction of the Supreme Court:

> SEC. 13. . . . *The Supreme Court* shall also have *appellate jurisdiction* from the circuit courts and courts of the several states, in the cases herein after specially provided for; and *shall have power to issue* writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and *writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.*

In *Marbury*, the Court would decide whether the italicized portion of Section 13 was consistent with Article III, Section 2 of the Constitution, which provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution. . . . In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have *original Jurisdiction*. In all the other Cases before mentioned, the supreme Court shall have *appellate Jurisdiction*, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. — Eds.]

At the [Supreme Court's] December term 1801, William Marbury [and others] . . . moved the court for a rule to James Madison, secretary of state of the United States, to show cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the district of Columbia. This motion was supported by affidavits of the following facts: that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate for their advice and consent to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in due form were signed by the said president appointing them justices, &c. and that the seal of the United States was in due form affixed to the said commissions by the secretary of state [At the time, Marshall

was simultaneously serving as Secretary of State and Chief Justice. — Eds.]; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison as secretary of state of the United States at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given in answer to that inquiry, either by the secretary of state, or any officer in the department of state; that application has been made to the secretary of the senate for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate; whereupon a rule was made to show cause on the fourth day of this term. . . .

Mr. Chief Justice Marshall delivered the opinion of the court. . . .

In the order in which the court has viewed this subject, the following questions have been considered and decided:

1st. Has the applicant a right to the commission he demands?
2d. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
3d. If they do afford him a remedy, is it a *mandamus* issuing from this court?

The first object of inquiry is — 1st. Has the applicant a right to the commission he demands?

His right originates in an act of congress passed in February 1801, concerning the district of Columbia . . . [which] enacts, "that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace as the president of the United States shall, from time to time, think expedient, to continue in office for five years." It appears from the affidavits, that in compliance with this law, a commission for William Marbury as a justice of peace for the county of Washington was signed by John Adams, then president of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out. . . .

It [is] decidedly the opinion of the court, that when a commission has been signed by the president, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state. . . . To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry; which is, 2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. . . . The government of the United States has been emphatically termed a government of laws, and not of men.* It will certainly cease

* [The concept of *a government of laws, not of men*, was famously invoked by John Adams, who authored the Massachusetts Constitution of 1780. Section 30 ("The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."). — Eds.]

to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. . . .

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. . . .

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear, that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy. . . .

It is, then, the opinion of the Court, 1st. That by signing the commission of Mr. Marbury, the president of the United States appointed him a justice of peace for the county of Washington in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2dly. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be enquired whether, 3dly. He is entitled to the remedy for which he applies. This depends on

1st. The nature of the writ applied for, and,
2dly. The power of this court.

1st. The nature of the writ. . . .

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, "to do a particular thing therein specified, which appertains to his office and duty, and which the court has previously determined or at least supposes to be consonant to right and justice." . . .

These circumstances certainly concur in this case.

This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be enquired, Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the Supreme Court "to issue writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The Secretary of State, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and, consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that "the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction."

It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the Supreme Court, contains no negative or restrictive words, the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.

If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then

enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

To enable this court, then, to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and, therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that the courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions — a written constitution — would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the

construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares that "no bill of attainder or *ex post facto* law shall be passed." If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out* of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of *courts,* as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as _____, according to the best of my abilities and understanding, agreeably to the *constitution*, and laws of the United States." Why does a Judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.

The rule must be discharged.

1. Evidence of the Meaning of the "Judicial Power"

The term "power of judicial review" is of recent vintage. It arose sometime in the twentieth century. Founding era sources referred instead to the judicial "duty" to "set aside," "negative," or "declare to be null and void" unconstitutional "laws" or "acts" of legislatures.[1] But, with this caveat, in what follows, we will nevertheless sometimes refer anachronistically to the "power of judicial review." Some scholars (including the late Alexander Bickel, a law professor at Yale) credit John Marshall's opinion in *Marbury* with inventing and establishing judicial review. Others (such as Stanford historian Jack Rakove) have argued that the founding generation assumed that the Court would have this power, and thus the decision to establish judicial review was in some sense inevitable. There is quite a bit of evidence that, at the time of the Constitution's adoption, the public meaning of the term "judicial power" included the duty to declare legislation unconstitutional if it conflicted with the Constitution.[2]

The Constitutional Convention

Several members of the Constitutional Convention explicitly assumed a judicial duty to declare unconstitutional laws void — even before they settled on the particular wording of the various clauses. Roger Sherman of Connecticut argued that a congressional power to negative (i.e., veto) state laws was "unnecessary, as the Courts of the States would not consider as valid any law contravening the Authority of the Union. . . ." James Madison of Virginia favored such a legislative veto because states "will accomplish their injurious objects before they can be . . . set aside by the National Tribunals." He then cited the example of Rhode Island, where "the Judges who refused to execute an unconstitutional law were displaced, and others substituted, by the Legislature. . . ." Gouverneur Morris of Pennsylvania argued that the legislative negative was unnecessary because "a law that ought to be negatived will be set aside in the Judiciary department." (*Gouverneur* was his first name, not an elected office.) There is no evidence that anyone at the Convention disputed the power of the judiciary to set aside unconstitutional laws passed by a state.

The Framers also agreed that federal judges would have the power to set aside unconstitutional legislation enacted by Congress. For example, the Framers debated whether federal judges should sit on the "council of revision." This body would have been empowered to revise laws enacted by Congress. In the course of this debate, several

[1] See Philip Hamburger, Law and Judicial Duty (2008).

[2] For additional authority, see John C. Yoo & Saikrishna Prakash, The Origins of Judicial Review, 70 U. Chi. L. Rev. 887 (2003).

delegates seemed to assume that federal judges had the inherent power to hold federal laws unconstitutional. For this reason, there was no need for judges to sit on the council. For example, Luther Martin of Maryland explained that judges can assess "the constitutionality of laws" and, if necessary, impose a "negative," when the laws "come before the Judges in their proper official character." Likewise, George Mason of Virginia observed that Judges "would have one negative" "in their expository capacity of Judges." In that role, they "could declare an unconstitutional law void." James Wilson of Pennsylvania favored the idea of the council, but conceded that there "was weight in this observation" that "the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights." Some scholars infer from the Convention's rejection of the proposed council of revision an intention that the judiciary should defer to legislative will. We find another more persuasive explanation: the Framers rejected the council of revision because it was assumed that federal judges already had a negative on unconstitutional legislation. There was no reason to create another body with a second negative. The assumption that judges possess the inherent power to declare legislation to be unconstitutional crops up in a variety of other contexts during the Convention. For example, Gouverneur Morris favored ratification of the Constitution by the people in convention because legislative ratification of the new Constitution was prohibited by the terms of the Articles of Confederation. "Legislative alterations not conformable to the federal compact, would clearly not be valid. The Judges would consider them as null & void." James Madison argued that a government under a federal Constitution, unlike a mere confederation among states, was binding law on judges: "A law violating a treaty ratified by a pre-existing law, might be respected by the Judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves, would be considered by the Judges as null & void." Hugh Williamson of North Carolina stated that an express prohibition on ex post facto laws by states "may do good here, because the Judges can take hold of it."

The fact that judicial review was accepted by virtually all members of the Constitutional Convention does not mean everyone liked this power. John Mercer of Maryland, for one, "disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void." Instead, he "thought laws ought to be well and cautiously made, and then to be uncontroulable." But Mercer's was a lone voice. Even John Dickinson of Delaware who "was strongly impressed with the remark of Mr. Mercer as to the power of the Judges to set aside the law," said he "was at the same time at a loss to know what expedient to substitute." Gouverneur Morris took issue with Mercer more sharply, stating that he could not agree that the judiciary "should be bound to say that a direct violation of the Constitution was law. A control over the legislature might have its inconveniences. But view the danger on the other side."

The principal criticism of judicial review was not its existence but its weakness. Some Framers were less than sanguine about the ability of courts to stand up for constitutional principle when necessary. James Wilson thought that Congress should have the power to declare state laws as unconstitutional because "[t]he firmness of Judges is not itself sufficient." Moreover, he argued — in words that assume a judicial power to declare "improper" laws unconstitutional — that it "would be better to prevent the passage of an improper law, than to declare it void when passed." Despite this concern, the Convention rejected a congressional negative on state laws, and voted down proposals

for the council of revision. Still, other structural constraints — including the doctrine of judicial review — remained to ensure that the state and national governments did not exceed their proper powers.

The Federalist

In *Federalist No. 78*, Alexander Hamilton authored the most well-known endorsement of the duty of judges to declare unconstitutional laws void. Consider the following excerpt of this essay, which is reproduced in full in Chapter 1:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.
>
> Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.
>
> There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

Ratification Conventions

The state ratification debates are replete with assertions of the duty to declare unconstitutional laws void. Supporters of the Constitution explained that courts would limit congressional power by setting aside unconstitutional laws. Speaking to the Pennsylvania Convention, James Wilson stated: "If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void; for the power of the Constitution predominates. Any thing, therefore, that shall be enacted by Congress contrary thereto, will not have the force of law." Wilson acknowledged the objection that judges could "be impeached, because they decide an act null and void, that was made in defiance of the Constitution." To this charge, Wilson replied, "What House of Representatives would dare to impeach, or Senate to commit, judges for the performance of their duty?" In the Virginia Convention, future–Chief Justice John Marshall openly asserted the judicial duty to declare unconstitutional laws to be void. He would later enunciate this principle in *Marbury*. If the government of the United States "were to make a law not warranted by any of the powers enumerated," said

Marshall, "it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void."

During the Connecticut ratification convention, Oliver Ellsworth articulated the clearest statement that equated the "judicial power" in the text of Article III with judicial duty to declare an unconstitutional law void. The future Chief Justice affirmed that this power extended to *both* federal and state statutes:

> This Constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and *the judicial power*, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the general government, the law is void; and upright, independent judges will declare it to be so.

William Davie of North Carolina likewise asserted that the federal judiciary had the power to set aside unconstitutional state laws. He stated that "every member will agree that the positive regulations ought to be carried into execution, and that the negative restrictions ought not to [be] disregarded or violated. Without a judiciary, the injunctions of the Constitution may be disobeyed, and the positive regulations neglected or contravened." He then argued that should states impose duties on imported goods, "the Constitution might be violated with impunity, if there were no power in the general government to correct and counteract such laws. This great object can only be safely and completely obtained by the instrumentality of the federal judiciary."

Even opponents of the Constitution conceded the existence of judicial power to declare unconstitutional laws void, though again some questioned its efficacy. In his statement to the legislature of Maryland, Luther Martin said: "Whether, therefore, any laws *or regulations* of the Congress, any acts of *its President or other officers*, are contrary to, or not warranted by, the Constitution, rests only with the judges, who are appointed by Congress, to determine; by whose determinations every state must *be bound*." In the Virginia ratification convention, Patrick Henry likewise suggested that the term "judiciary" embraced the power to declare laws unconstitutional:

> The honorable gentleman did our judiciary honor in saying that they had firmness to counteract the legislature in some cases. Yes, sir, our judges opposed the acts of the legislature. We have this landmark to guide us. They had fortitude to declare that *they were the judiciary*, and would oppose unconstitutional acts. Are you sure that your federal judiciary will act thus? Is that judiciary as well constructed, and as independent of the other branches, as our state judiciary? Where are your landmarks in this government? I will be bold to say you cannot find any in it. I take it as the highest encomium on this country, that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary. (Emphasis added.)

Also in Virginia, William Grayson, another opponent of the Constitution, observed that "[i]f the Congress cannot make a law against the Constitution, I apprehend they cannot make a law to abridge it. The judges are to defend it."

2. Judicial Review of State Statutes and State Supreme Court Decisions

In the years following *Marbury*, the Marshall Court went on to employ the doctrine of judicial review to declare state statutes unconstitutional. The Court also relied on that power to review and reverse decisions of state supreme courts.

In Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), the Court considered a state statute that repealed a previous sale of Indian property by a corrupt legislature to private speculators in return for bribes. In setting aside the state law, Chief Justice Marshall defended the "security of property" and "human rights" and denied that state legislatures can rightly be the judges in their own case when evaluating their claim of powers. Specifically, he relied on "certain great principles of justice" to reach the outcome in the case.

> If the Legislature of Georgia was not bound to submit its pretensions to those tribunals which are established for the security of property, and to decide on human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded. . . .
>
> The principle asserted is that one Legislature is competent to repeal any act which a former legislature was competent to pass, and that one legislature cannot abridge the powers of a succeeding legislature.
>
> The correctness of this principle, so far as respects general legislation, can never be controverted. But if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estate, and, if those estates may be seized by the sovereign authority, still that they originally vested is a fact, and cannot cease to be a fact.
>
> When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.
>
> It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found if the property of an individual, fairly and honestly acquired, may be seized without compensation?
>
> To the Legislature all legislative power is granted, but the question whether the act of transferring the property of an individual to the public be in the nature of the legislative power is well worthy of serious reflection.

Later in this opinion, Chief Justice Marshall obliquely offered his opinion that *Chisholm v. Georgia* was correctly decided, even though it arguably had been reversed by the Eleventh Amendment. Because he mentions neither the case nor amendment by name, this passage is sometimes overlooked.

> The Constitution, *as passed*, gave the courts of the United States jurisdiction in suits brought against individual States. A State, then, which violated its own contract was suable in the courts of the United States for that violation. Would it have been a defence in such a suit to say that the State had passed a law absolving itself from the contract? It is scarcely to be conceived that such a defence could be set up. And yet, if a State is neither restrained by the general principles of our political institutions nor by the words of the Constitution from impairing the obligation of its own contracts, such a defence would be a valid one. *This*

> *feature is no longer found in the Constitution*, but it aids in the construction of those clauses with which it was originally associated. (Emphases added.)

In Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), the Supreme Court asserted the power to review and reverse state supreme court decisions. Prior to *Martin*, it was unclear whether the Supreme Court of the United States even had jurisdiction over state court judgments. Justice Joseph Story's majority opinion, like those in previous cases we have read so far, relied on first principles and, in particular, first principles of sovereignty:

> The Constitution of the United States was ordained and established not by the States in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by "the people of the United States." There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary, to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be that the people had a right to prohibit to the States the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact, to make the powers of the State governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The Constitution was not, therefore, necessarily carved out of existing State sovereignties, nor a surrender of powers already existing in State institutions, for the powers of the States depend upon their own Constitutions, and the people of every State had the right to modify and restrain them according to their own views of the policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the State governments by their respective Constitutions remained unaltered and unimpaired except so far as they were granted to the Government of the United States. . . . The government, then, of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication.

But these express delegations of powers

> are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged. The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. . . . Hence its powers are expressed in general terms, leaving to the legislature from time to time to adopt its own means to effectuate legitimate objects and to mould and model the exercise of its powers as its own wisdom and the public interests, should require.*

Does this conception of federal sovereignty operate only on individuals, and not on the states? Justice Story answers no. It operates on both:

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* [In Chapter 3, we will study *Prigg v. Pennsylvania* (1842). In *Prigg*, the Court upheld the constitutionality of the Fugitive Slave Act of 1793. Challengers to that law claimed it was unconstitutional because Congress lacked an express power to enforce the Fugitive Slave Clause of Article IV. Justice Story, who wrote the majority opinion, again employed a very broad construction of implied powers. — Eds.]

> It is a mistake to contend that the Constitution was not designed to operate upon States in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the States in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the States. Surely, when such essential portions of State sovereignty are taken away or prohibited to be exercised, it cannot be correctly asserted that the Constitution does not act upon the States. The language of the Constitution is also imperative upon the States as to the performance of many duties. It is imperative upon the State legislatures to make laws prescribing the time, places, and manner of holding elections for senators and representatives, and for electors of President and Vice-President. And in these as well as some other cases, Congress have a right to revise, amend, or supersede the laws which may be passed by State legislatures. When therefore the States are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the States are, in some respects, under the control of Congress, and in every case are, under the Constitution, bound by the paramount authority of the United States, it is certainly difficult to support the argument that the appellate power over the decisions of State courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States, and if they are found to be contrary to the Constitution, may declare them to be of no legal validity. Surely the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power. . . .

B. THE NECESSARY AND PROPER CLAUSE

ASSIGNMENT 2

In Chapter 1 we discussed how the constitutionality of a national bank was hotly disputed as early as the first Congress. Ultimately, President Washington agreed with Secretary of the Treasury Alexander Hamilton that Congress had the power to establish a bank. The first bank's charter expired in 1811. Five years later, Congress chartered the second bank, which gave rise to the constitutional challenge in *McCulloch v. Maryland*. Chief Justice Marshall's decision for the Court became the authoritative interpretation of the Necessary and Proper Clause, which grants Congress the power: "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." *McCulloch* contains perhaps the most quoted sentence of any Supreme Court opinion: "[W]e must never forget that it is *a constitution* we are expounding." What exactly does this sentence mean? Consider and reconsider this sentence as you proceed through the course.

McCulloch was not the first time that Marshall interpreted the meaning of the Necessary and Proper Clause. In United States v. Fisher, 6 U.S. (2 Cranch) 358 (1805), he wrote:

> In construing this clause it would be incorrect and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not *indispensably necessary* to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary because the end

might be obtained by other means. Congress must possess the choice of means, and must be empowered to use *any means which are in fact conducive* to the exercise of a power granted by the constitution. (Emphases added.)

STUDY GUIDE

1. Pay attention to the basis of Marshall's opinion. How much does he rely on "first principles"? On text? On history? On structure? On the consequences of adopting the alternative interpretation?
2. What exactly is Marshall's interpretation of the Necessary and Proper Clause? Is it unmodified from his earlier formulation in *Fisher*? How does it differ from that of James Madison? Is it identical to that of Alexander Hamilton? Is there any difference between Madison's interpretation (as reflected in his speech to Congress about the first bank in Chapter 1) and that of the State of Maryland?
3. Marshall concludes that the power to incorporate a bank is not "a great substantive and independent power which cannot be implied as incidental to other powers or used as a means of executing them." He draws this conclusion about whether a law is "proper" before considering if the bank was a "necessary" means to execute another enumerated power. The distinction between "principal" and "incidental" powers was a staple of founding era agency law. This distinction would lay dormant for nearly 200 years. But Chief Justice Roberts used it in *NFIB v. Sebelius* (2012) to justify his conclusion that, while the Affordable Care Act's individual purchase mandate may have been "necessary," it was not a "proper" exercise of Congress's commerce power. We will discuss that case in Chapter 4.
4. Does Marshall's interpretation amount to a blank check of authority to Congress? If not, what are the limits of Congress's powers under the clause?
5. Marshall discusses "the former proceedings of the nation" to support his conclusion. Given that the Supreme Court had never previously adjudicated this issue, of what relevance are past practices to the bank's constitutionality?
6. In Madison's famous bank speech, he listed powers that could not be implied without undermining the scheme of enumerated powers. How does this list compare with the list of implied powers offered by Marshall?

McCulloch v. Maryland*

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

[The charter of the first Bank of the United States, which was the object of the debate described in Chapter 1, was allowed by Congress to lapse in 1811. In April 1816, Congress

* [In Henry Wheaton's official report, the case is styled *M'Culloch v. The State of Maryland et al.* "[T]he upside down and backwards apostrophe ['] turns out to have been a routine way for eighteenth and early nineteenth century printers to recreate a lower case, superscript 'c' after the letter 'M.'" See Michael G. Collins, M'Culloch and the Turned Comma, 12 Green Bag 2d 265 (2009). — Eds.]

incorporated the second Bank of the United States. In 1818, the General Assembly of Maryland imposed a tax on all Maryland banks that the legislature did not charter. The Bank of the United States was organized in Pennsylvania, but operated a branch in Baltimore without any authorization by Maryland. John James, the original plaintiff, sued James William McCulloch, the bank's cashier. The complaint, filed on behalf of the State of Maryland, sought to collect back taxes from the Bank of the United States. The Maryland Court of Appeals ruled for the plaintiff. McCulloch appealed as the plaintiff in error (appellant). He argued that the Maryland law taxing the bank was unconstitutional. The defendant, now the State of Maryland, asserted that the bank itself was unconstitutional. — Eds.]

Mr. Chief Justice Marshall delivered the opinion of the Court.

In the case now to be determined, the defendant, a sovereign State, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that State. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty.

The first question made in the cause is, has Congress power to incorporate a bank?

It has been truly said that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived, that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

The power now contested was exercised by the first Congress elected under the present constitution. The bill for incorporating the bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the

embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance.

These observations belong to the cause; but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the constitution.

In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each State by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by Congress, and by the State legislatures, the instrument was submitted to the *people*. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several States — and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, ensure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity." The assent of the States, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.

It has been said, that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government, does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the states. The powers delegated to the state sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the state sovereignties were certainly competent. But when, "in order to form a more perfect union," it

was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. The government of the Union, then (whatever may be the influence of this fact on the case), is emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist.

In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this — that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, "this constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "anything in the constitution or laws of any state to the contrary notwithstanding."

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described.* Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people"; thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those

* [Article II of the Articles of Confederation (ratified in 1781) provided: "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation *expressly* delegated to the United States, in Congress assembled." (Emphasis added). — Eds.]

embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a *constitution* we are expounding.

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. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it 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. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the north should be transported to the south, that raised in the east, conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred, which would render these operations difficult, hazardous and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation.

On what foundation does this argument rest? On this alone: the power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of congress to pass other laws for the accomplishment of the same objects.

The government which has a right to do an act, and has imposed on it, the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and 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.

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign, with respect to the objects committed to the other. We cannot comprehend that train of reasoning, which would maintain, that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date. Some state constitutions were formed before, some since that of the United States. We cannot believe, that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same, as if they had been formed at the same time. Had they been formed at the same time, and had the people conferred on the general government the power contained in the constitution, and on the states the whole residuum of power, would it have been asserted, that the government of the Union was not sovereign, with respect to those objects which were intrusted to it, in relation to which its laws were declared to be supreme? If this could not have been asserted, we cannot well comprehend the process of reasoning which maintains, that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though appertaining to sovereignty, 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. No contributions are made to charity, for the sake of an 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. No city was ever built, with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No 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.

But the constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "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 thereof."

The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers. In support of this proposition, they have found it necessary to contend, that this clause was inserted for the purpose of conferring on congress the power of making laws. That, without it, doubts might be entertained, whether congress could exercise its powers in the form of legislation.

But could this be the object for which it was inserted? A government is created by the people, having legislative, executive and judicial powers. Its legislative powers are vested in a congress, which is to consist of a senate and house of representatives. Each house may determine the rule of its proceedings; and it is declared, that every bill which shall have passed both houses, shall, before it becomes a law, be presented to the president of the United States. The 7th section describes the course of proceedings, by which a bill shall become a law; and, then, the 8th section enumerates the powers of congress. Could it be necessary to say, that a legislature should exercise legislative powers, in the shape of legislation? After allowing each house to prescribe its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the convention, that an express power to make laws was necessary, to enable the legislature to make them? That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed, is drawn from that peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be *"necessary and proper"* for carrying them into execution. The word *"necessary"* is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we 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. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense.

Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive should be understood in a more mitigated sense — in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. This comment on the word is well illustrated by the passage cited at the bar, from the 20th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying "imposts, or duties on imports or exports, except what may be *absolutely* necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary," by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it.

The powers vested in congress may certainly be carried into execution, without prescribing an oath of office. The power to exact this security for the faithful performance of duty, is not given, nor is it indispensably necessary. The different departments may be established; taxes may be imposed and collected; armies and navies may be raised and maintained; and money may be borrowed, without requiring an oath of office. It might be argued, with as much plausibility as other incidental powers have been assailed, that the convention was not unmindful of this subject. The oath which might be exacted — that of fidelity to the constitution — is prescribed, and no other can be required. Yet, he would be charged with insanity, who should contend, that the

legislature might not superadd, to the oath directed by the constitution, such other oath of office as its wisdom might suggest.*

So, with respect to the whole penal code of the United States: whence arises the power to punish, in cases not prescribed by the constitution? All admit, that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of congress. The right to enforce the observance of law, by punishing its infraction, might be denied, with the more plausibility, because it is expressly given in some cases.

Congress is empowered "to provide for the punishment of counterfeiting the securities and current coin of the United States," and "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." The several powers of congress may exist, in a very imperfect state, to be sure, but they may exist and be carried into execution, although no punishment should be inflicted, in cases where the right to punish is not expressly given.

Take, for example, the power "to establish post-offices and post-roads." This power is executed, by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offences, is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it, without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the constitution, and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

If this limited construction of the word "necessary" must be abandoned, in order to punish, whence is derived the rule which would reinstate it, when the government would carry its powers into execution, by means not vindictive in their nature? If the word "necessary" means "needful," "requisite," "essential," "conducive to," in order to let in the power of punishment for the infraction of law; why is it not equally comprehensive,

* [Article VI reads, in part: "The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution." Marshall appears to be referring to Congress extending the Article VI oath beyond simply supporting the Constitution. — Eds.]

when required to authorize the use of means which facilitate the execution of the powers of government, without the infliction of punishment?

In ascertaining the sense in which the word "necessary" is used in this clause of the constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and proper to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the State of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is, to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation, not strained and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the State of Maryland, is founded on the intention of the convention, as manifested in the whole clause. To waste time and argument in proving that, without it, congress might carry its powers into execution, would be not much less idle, than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. 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. This clause, as construed by the State of Maryland, would abridge, and almost annihilate, this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy.

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. No reason has been, or can be assigned, for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. The framers of the constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and, after deep reflection, impress on the mind, another, they would rather have disguised the grant of power, than its limitation. If, then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these. "In carrying into execution the foregoing powers, and all others," &c., "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the rights of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. 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 a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that government from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find 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. Had it been intended to grant this power, as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But being 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. . . .

If a corporation may be employed, indiscriminately with other means, to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, Congress, justifying the measure by its necessity, transcended, perhaps, its powers, to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure. The time has passed away, when it can be necessary to enter into any discussion, in order to prove the importance of this instrument, as a means to effect the legitimate objects of the government.

But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is 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. This court disclaims all pretensions to such a power.

After this declaration, it can scarcely be necessary to say that the existence of State banks can have no possible influence on the question. No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution. But were it otherwise, the choice of means implies a right to choose a national bank in preference to State banks, and Congress alone can make the election.

After the most deliberate consideration, it is the unanimous and decided opinion of this Court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land. . . .

STUDY GUIDE *(to Part Two of the opinion)*

1. Assume that Marshall's basic premise is correct, and the power to tax is the power to destroy. Does that premise automatically lead to the conclusion that the state cannot impose a nondiscriminatory tax on the bank? Would such a nondiscrimination principle address Marshall's concern? If the Court adopted such a rule, would there be any clear standard as to what is or is not discriminatory? Does the absence of such a standard in the Constitution argue against adopting such a rule?
2. Does Marshall determine that the state has an impermissible purpose — destroying the bank? Or does he simply conclude that the tax could lead to that result? Although it would have been widely understood that destroying the bank was Maryland's purpose, how would the Court know that? Should the purpose matter?

2. Whether the State of Maryland may, without violating the constitution, tax that branch? . . .

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. . . .

If we apply the principle for which the State of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the States.

If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States. . . .

The Court has bestowed on this subject its most deliberate consideration. The result is a conviction 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. John Marshall, "A Friend of the Constitution," *Alexandria Gazette*, June 30-July 15, 1819

Spencer Roane, a justice on the Virginia Supreme Court, published a vituperative attack on *McCulloch v. Maryland* under the pseudonym "Hampden." Marshall responded to this criticism, and others, in a series of newspaper essays: two in the *Philadelphia Union* using the pseudonym "A Friend to the Union," and nine in the *Alexandria Gazette* under the name "A Friend of the Constitution."* (Imagine if Chief Justice Roberts wrote an anonymous op-ed in the *New York Times* defending his opinion in a landmark case!)

In one of these essays, Marshall insisted that *McCulloch* did "not say that the word 'necessary' means whatever may be 'convenient' or 'useful.'" In support of this claim, he quoted the synonyms for "necessary" in an often overlooked passage of *McCulloch*: "If the word *'necessary' means 'needful,' 'requisite,' 'essential,' 'conducive to,'* in order to let in the power of punishment for the infraction of law; why is it not equally comprehensive, when required to authorize the use of means which facilitate the execution of the powers of government, without the infliction of punishment?"

STUDY GUIDE

1. Are you surprised that Marshall denies his opinion equated "necessary" with "convenient"? Does this denial suggest that Marshall came to think that part of his opinion was mistaken?
2. Does Marshall's defense add anything to our understanding of *McCulloch*? Remember this essay when we consider modern claims about *McCulloch*, and the meaning of the Necessary and Proper Clause.

* See John Marshall's Defense of McCulloch v. Maryland (Gerald Gunther ed., 1969).

. . . The zealous and persevering hostility with which the constitution was originally opposed, cannot be forgotten. The deep rooted and vindictive hate, which grew of unfounded jealousies, and was aggravated by defeat, though suspended for a time, seems never to have been appeased. The desire to strip the government of those effective powers, which enable it to accomplish the objects for which it was created; and, by construction, essentially to reintroduce that miserable confederation, whose incompetency to the preservation of our union . . . seems to have recovered all its activity. . . .

[The Constitution] is the act of a people, creating a government, without which they cannot exist as a people. The powers of this government are conferred for their own benefit, are essential to their own prosperity, and are to be exercised for their own good, by persons chosen for that purpose by themselves. The object of the instrument is not a single one which can be minutely described, with all its circumstances. The attempt to do so, would totally change its nature, and defeat its purpose. It is intended to be a general system for all future times, to be adapted by those who administer it, to all future occasions that may come within its own view. From its nature, such an instrument can describe only the great objects it is intended to accomplish, and state in general terms, the specific powers which are deemed necessary for those objects. To direct the manner in which these powers are to be exercised, the means by which the objects of government are to be effected, a legislature is granted. This would be totally useless, if its office and duty were performed in the constitution. This legislature is an emanation from the people themselves. It is a part chosen to represent the whole, and to mark, according to the judgment of the nation, its course, within those great outlines which are given in the constitution. . . .

[N]ot a syllable uttered by the court, applies to an enlargement of the powers of congress. The reasoning of the judges is opposed to that restricted construction which would embarrass congress, in the execution of its acknowledged powers; and maintains that such construction, if not required by the words of the instrument, ought not to be adopted of choice; but makes no allusion to a construction enlarging the grant beyond the meaning of its ends. . . .

The whole opinion of the court proceeds upon this basis, as a truth not to be controverted. The principal it labors to establish is, not that congress may select means beyond the limits of the constitution, but means within those limits. . . .

I say, without fear of contradiction, that the general principles maintained by the supreme court are, that the constitution may be construed as if the clause which has been so much discussed, had been entirely omitted. That the powers of congress are expressed in terms which, without its aid, enable and require the legislature to execute them, and of course, to take means for their execution. That the choice of these means devolve on the legislature, whose right, and whose duty it is, to adopt those which are most advantageous to the people, provided they be within the limits of the constitution. Their constitutionality depends on their being the natural, direct, and appropriate means, or the known and usual means, for the execution of a given power.

In no single instance does the court admit the unlimited power of congress to adopt any means whatever, and thus to pass the limits prescribed by the Constitution. Not only is the discretion claimed for the legislature in the selection of its means, always limited in terms, to such as are appropriate, but the court expressly says, "should congress under the pretext of executing its powers, pass laws for the accomplishment of objects, not

entrusted to the government, it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land."

2. James Madison, Letter to Judge Spencer Roane, September 2, 1819

In 1791, then-Representative James Madison strongly objected to the constitutionality of the first national bank. Then, in 1816, President Madison signed into law the second national bank. We might therefore expect him to have agreed with Marshall's opinion in *McCulloch* upholding that law. But he did not. In a letter to Justice Roane, Madison sharply criticized Marshall's constitutional reasoning.

STUDY GUIDE

1. How do the views expressed by Madison in this letter compare with those he offered as a congressman twenty-five years earlier?
2. Madison criticized the "general and abstract" form of Marshall's opinion, as well as the new practice of having a single opinion of the Court, rather than a series of "seriatim" opinions by each Justice explaining his vote. How do you think these two practices by the Court have affected its power?
3. Madison assumes that the judicial power includes "controul on the Legislative exercise of unconstitutional powers." Once again, see how the theory of sovereignty affects the analysis.
4. Madison also invokes the "legitimate" and "regular mode" of amending the Constitution and rejects the "constructive assumption of powers never meant to be granted." Did Madison reject what would today be called "living constitutionalism"?

Dear Sir

I have recd. your favor of the 22d Ult inclosing a copy of your observations on the Judgment of the Supreme Court of the U.S. in the case of M'Culloch agst. the State of Maryland. . . . It appears to me as it does to you that the occasion did not call for the general and abstract doctrine interwoven with the decision of the particular case. I have always supposed that the meaning of a law, and for a like reason, of a Constitution, so far as it depends on Judicial interpretation, was to result from a course of particular decisions, and not these from a previous and abstract comment on the subject. . . .

I could have wished also that the Judges had delivered their opinions seriatim. The case was of such magnitude, in the scope given to it, as to call, if any case could do so, for the views of the subject separately taken by them. This might either by the harmony of their reasoning have produced a greater conviction in the Public mind; or by its discordance have impaired the force of the precedent now ostensibly supported by a unanimous & perfect concurrence in every argument & dictum in the judgment pronounced.

But what is of most importance is the high sanction given to a latitude in expounding the Constitution which seems to break down the landmarks intended by a specification of the Powers of Congress, and to substitute for a definite connection between means and ends, a Legislative discretion as to the former to which no practical limit can be assigned. In the great system of Political Economy having for its general object the national welfare, everything is related immediately or remotely to every other thing; and consequently a Power over any one thing, if not limited by some obvious and precise affinity, may amount to a Power over every other. Ends & means may shift their character at the will & according to the ingenuity of the Legislative Body. What is an end in one case may be a means in another; nay in the same case, may be either an end or a means at the Legislative option. The British Parliament in collecting a revenue from the commerce of America found no difficulty in calling it either a tax for the regulation of trade, or a regulation of trade with a view to the tax, as it suited the argument or the policy of the moment.

Is there a Legislative power in fact, not expressly prohibited by the Constitution, which might not, according to the doctrine of the Court, be exercised as a means of carrying into effect some specified Power?

Does not the Court also relinquish by their doctrine, all controul on the Legislative exercise of unconstitutional powers? According to that doctrine, the expediency & constitutionality of means for carrying into effect a specified Power are convertible terms; and Congress are admitted to be Judges of the expediency. The Court certainly cannot be so; a question, the moment it assumes the character of mere expediency or policy, being evidently beyond the reach of Judicial cognizance.

It is true, the Court are disposed to retain a guardianship of the Constitution against legislative encroachments. "Should Congress," say they, "under the pretext of executing its Powers, pass laws for the accomplishment of objects not entrusted to the Government, it would become the painful duty of this Tribunal to say that such an act was not the law of the land." But suppose Congress should, as would doubtless happen, pass unconstitutional laws not to accomplish objects not specified in the Constitution, but the same laws as means expedient, convenient or conducive to the accomplishment of objects entrusted to the Government; by what handle could the Court take hold of the case? . . .

It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter; more especially those which divide legislation between the General & local Governments; and that it might require a regular course of practice to liquidate & settle the meaning of some of them. But it was anticipated I believe by few if any of the friends of the Constitution, that a rule of construction would be introduced as broad & as pliant as what has occurred. And those who recollect, and still more those who shared in what passed in the State Conventions, thro' which the people ratified the Constitution, with respect to the extent of the powers vested in Congress, cannot easily be persuaded that the avowal of such a rule would not have prevented its ratification. It has been the misfortune, if not the reproach, of other nations, that their Govts. have not been freely and deliberately established by themselves. It is the boast of ours that such has been its source and that it can be altered by the same authority only which established it. It is a further boast that a regular mode of making proper alterations has been providently inserted in the Constitution itself. It is anxiously

to be wished therefore, that no innovations may take place in other modes, one of which would be a constructive assumption of powers never meant to be granted. If the powers be deficient, the legitimate source of additional ones is always open, and ought to be resorted to.

Much of the error in expounding the Constitution has its origin in the use made of the species of sovereignty implied in the nature of Govt. The specified powers vested in Congress, it is said, are sovereign powers, and that as such they carry with them an unlimited discretion as to the means of executing them. It may surely be remarked that a limited Govt. may be limited in its sovereignty as well with respect to the means as to the objects of his powers; and that to give an extent to the former, superseding the limits to the latter, is in effect to convert a limited into an unlimited Govt. There is certainly a reasonable medium between expounding the Constitution with the strictness of a penal law, or other ordinary statute, and expounding it with a laxity which may vary its essential character, and encroach on the local sovereignties with wch. it was meant to be reconcilable. . . .

In establishing [the General] Govt. the people retained other Govts. capable of exercising such necessary and useful powers as were not to be exercised by the General Govt. No necessary presumption therefore arises from the importance of any particular power in itself, that it has been vested in that Govt. because tho' not vested there, it may exist elsewhere, and the exercise of it elsewhere might be preferred by those who alone had a right to make the distribution. . . .

3. James Madison, Letter to Charles J. Ingersoll, February 2, 1831

In 1790, Representative Madison strongly opposed the constitutionality of the national bank. But in 1816, President Madison signed into law the bill to reauthorize the bank. Did Madison change his constitutional views? In 1831, Madison addressed the "charge of inconsistency" in a letter to Charles J. Ingersoll. In this letter, Madison claimed to have followed "legislative precedents," which he analogized to "judicial precedents." The proper relationship between the original meaning of the text and the doctrine of judicial precedent — or *stare decisis* — remains a vexatious issue of constitutional law and theory.

STUDY GUIDE

1. Are you persuaded by Madison's reconciliation of his two different stances in 1791 and 1816? What exactly does he see as the role of precedential practice in establishing constitutional meaning? On his view, can precedent trump or supersede the text?
2. If the Constitution is the "law to the legislature," why does the legislature get to decide the meaning of the Constitution through Congress's own practices? Does this power make Congress a judge in its own case?

. . . The charge of inconsistency between my objection to the constitutionality of such a bank in 1791, and my assent in 1817, turns on the question, how far legislative precedents, expounding the Constitution, ought to guide succeeding legislatures, and to overrule individual opinions. . . . The case in question has its true analogy in the obligation arising from judicial expositions of the law on succeeding judges; the constitution being a law to the legislator, as the law is a rule of decision to the judge.

And why are judicial precedents, when formed on due discussion and consideration, and deliberately sanctioned by reviews and repetitions, regarded as of binding influence, or rather of authoritative force, in settling the meaning of a law? It must be answered: 1st. Because it is a reasonable and established axiom, that the good of society requires that the rules of conduct of its members should be certain and known, which would not be the case, if any judge, disregarding the decisions of his predecessors, should vary the rule of law according to his individual interpretation of it. . . . 2d. Because an exposition of the law publicly made, and repeatedly confirmed by the constituted authority, carries with it, by fair inference, the sanction of those who, having made the law through their legislative organ, appear under such circumstances to have determined its meaning through their judiciary organ.

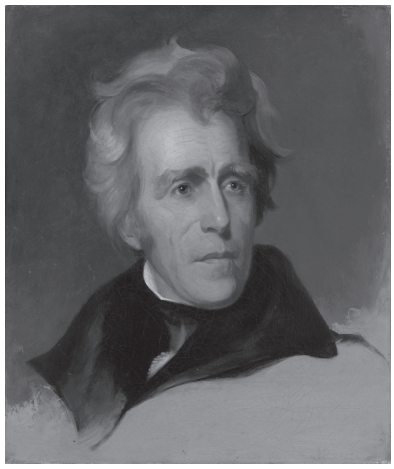
Can it be of less consequence that the meaning of a constitution should be fixed and known, than that the meaning of a law should be so? Can indeed a law be fixed in its meaning and operation, unless the constitution be so? On the contrary, if a particular legislature, differing in the construction of the constitution, from a series of preceding constructions, proceed to act on that difference, they not only introduce uncertainty and instability in the constitution, but in the laws themselves; inasmuch as all laws preceding the new construction and inconsistent with it, are not only annulled for the future, but virtually pronounced nullities from the beginning.

But it is said that the legislator, having sworn to support the constitution, must support it in his own construction of it, however different from that put on it by his predecessors, or whatever be the consequences of the construction. And is not the judge under the same oath to support the law? Yet has it ever been supposed that he was required, or at liberty to disregard all precedents, however solemnly repeated and regularly observed; and, by giving effect to his own abstract and individual opinions, to disturb the established course of practice in the business of the community? Has the wisest and most conscientious judge ever scrupled to acquiesce in decisions in which he has been overruled by the mature opinions of the majority of his colleagues, and subsequently to conform himself thereto, as to authoritative expositions of the law? And is it not reasonable that the same view of the official oath should be taken by a legislator, acting under the constitution, which is his guide, as is taken by a judge, acting under the law, which is his?

There is in fact and in common understanding, a necessity of regarding a course of practice, as above characterized, in the light of a legal rule of interpreting a law; and there is a like necessity of considering it a constitutional rule of interpreting a constitution. . . .

It was in conformity with the view here taken of the respect due to deliberate and reiterated precedents, that the Bank of the United States, though on the original question held to be unconstitutional, received the executive signature in the year 1817. The act originally establishing a bank had undergone ample discussions in its passage through the several branches of the government. It had been carried into execution throughout

a period of twenty years with annual legislative recognitions; in one instance indeed, with a positive ramification of it into a new state; and with the entire acquiescence of all the local authorities, as well as of the nation at large, to all of which may be added, a decreasing prospect of any change in the public opinion adverse to the constitutionality of such an institution. A veto from the executive under these circumstances, with an admission of the expediency, and almost necessity of the measure, would have been a defiance of all the obligations derived from a course of precedents amounting to the requisite evidence of the national judgment and intention. . . .



President Andrew Jackson

4. Andrew Jackson, Veto Message, July 10, 1832

In July 1832, President Andrew Jackson vetoed a bill reauthorizing the charter of the second bank. Following the long-standing practice, Jackson sent a message to Congress explaining the reasons for his veto. Notwithstanding *McCulloch v. Maryland*, Jackson believed the bank was unconstitutional. Jackson's veto message has also become famous because of his reference to "the rich and powerful."

STUDY GUIDE

1. How does Jackson respond to the argument, endorsed by Madison, that precedent established the constitutionality of the bank? Does he dispute Marshall's interpretation of the Necessary and Proper Clause in *McCulloch*? Can his stance be reconciled with that decision?
2. What is Jackson's view about the supremacy of the Supreme Court's interpretations of the Constitution? Is the President bound by decisions of the Supreme Court? Can the President make an independent judgment about the necessity of a law, when deciding whether to veto it?
3. What does Jackson see as the problem of "the rich and powerful"? What is his solution to this problem?

To the Senate:

The bill "to modify and continue" the act entitled "An act to incorporate the subscribers to the Bank of the United States" was presented to me on the 4th July instant. Having considered it with that solemn regard to the principles of the Constitution which the day was calculated to inspire, and come to the conclusion that it ought not to become a law, I herewith return it to the Senate, in which it originated, with my objections. . . .

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. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled. So far from this being the case on this subject, an argument against the bank might be based on precedent. One Congress, in 1791, decided in favor of a bank; another, in 1811, decided against it. One Congress, in 1815, decided against a bank; another, in 1816, decided in its favor. Prior to the present Congress, therefore, the precedents drawn from that source were equal. If we resort to the States, the expressions of legislative, judicial, and executive opinions against the bank have been probably to those in its favor as 4 to 1. There is nothing in precedent, therefore, which, if its authority were admitted, ought to weigh in favor of the act before me.

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. 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. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. 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.

But in the case relied upon the Supreme Court have not decided that all the features of this corporation are compatible with the Constitution. It is true that the court have said that the law incorporating the bank is a constitutional exercise of power by Congress; but taking into view the whole opinion of the court and the reasoning by which they have come to that conclusion, 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

Historians doubt that President Jackson wrote his famous veto message himself. Some scholars claim that it was authored by Roger Taney, who served as Jackson's attorney general, and would go on to serve as Chief Justice. Indeed, Taney later claimed that he wrote it. However, stronger evidence suggests that the veto message was initially drafted by Amos Kendall, a Kentucky newspaperman whom Jackson had rewarded with a position in the Treasury Department.*

* See Lynn L. Marshall, The Authorship of Jackson's Bank Veto Message, 50 Miss. Valley Hist. Rev. 466 (1963).

that to "use one must be within the discretion of Congress" and that "the act to incorporate the Bank of the United States is a law made in pursuance of the Constitution"; "but," say they, *"where the law is not prohibited and is really calculated to effect any of the objects intrusted 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."*

The principle here affirmed is that the "degree of its necessity," involving all the details of a banking institution, is a question exclusively for legislative consideration. A bank is constitutional, but it is the province of the Legislature to determine whether this or that particular power, privilege, or exemption is "necessary and proper" to enable the bank to discharge its duties to the Government, and from their decision there is no appeal to the courts of justice. 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.

Without commenting on the general principle affirmed by the Supreme Court, let us examine the details of this act in accordance with the rule of legislative action which they have laid down. It will be found that many 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 can not be *necessary* to the character of the bank as a fiscal agent of the Government that its private business should be exempted from that taxation to which all the State banks are liable, nor can I conceive it *"proper"* that the substantive and most essential powers reserved by the States shall be thus attacked and annihilated as a means of executing the powers delegated to the General Government. It may be safely assumed that none of those sages who had an agency in forming or adopting our Constitution ever imagined that any portion of the taxing power of the States not prohibited to them nor delegated to Congress was to be swept away and annihilated as a means of executing certain powers delegated to Congress.

If our power over means is so absolute that the Supreme Court will not call in question the constitutionality of an act of Congress the subject of which "is not prohibited, and is really calculated to effect any of the objects intrusted to the Government," although, as in the case before me, it takes away powers expressly granted to Congress and rights scrupulously reserved to the States, it becomes us to proceed in our legislation with the utmost caution. . . . We may not pass an act prohibiting the States to tax the banking business carried on within their limits, but we may, as a means of executing our powers over other objects, place that business in the hands of our agents and then declare it exempt from State taxation in their hands. Thus may our own powers and the rights of the States, which we can not directly curtail or invade, be frittered away and extinguished in the use of means employed by us to execute other powers. That a bank of the United States, competent to all the duties which may be required by the Government, might be so organized as not to infringe on our own delegated powers or the reserved rights of the

States I do not entertain a doubt. Had the Executive been called upon to furnish the project of such an institution, the duty would have been cheerfully performed. In the absence of such a call it was obviously proper that he should confine himself to pointing out those prominent features in the act presented which in his opinion make it incompatible with the Constitution and sound policy. . . .

It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes. Distinctions in society will always exist under every just government. Equality of talents, of education, or of wealth can not be produced by human institutions. In the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law; but when the laws undertake to add to these natural and just advantages artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful, the humble members of society — the farmers, mechanics, and laborers — who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their Government. 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. . . .

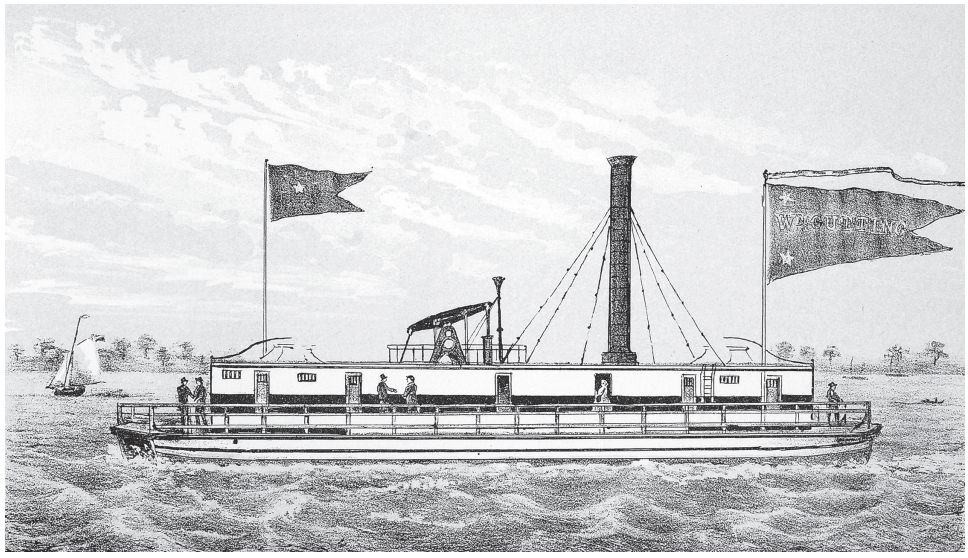
Experience should teach us wisdom. Most of the difficulties our Government now encounters and most of the dangers which impend over our Union have sprung from an abandonment of the legitimate objects of Government by our national legislation, and the adoption of such principles as are embodied in this act. Many of our rich men have not been content with equal protection and equal benefits, but have besought us to make them richer by act of Congress. By attempting to gratify their desires we have in the results of our legislation arrayed section against section, interest against interest, and man against man, in a fearful commotion which threatens to shake the foundations of our Union. It is time to pause in our career to review our principles, and if possible revive that devoted patriotism and spirit of compromise which distinguished the sages of the Revolution and the fathers of our Union. If we can not at once, in justice to interests vested under improvident legislation, make our Government what it ought to be, we can at least take a stand against all new grants of monopolies and exclusive privileges, against any prostitution of our Government to the advancement of the few at the expense of the many, and in favor of compromise and gradual reform in our code of laws and system of political economy.

I have now done my duty to my country. If sustained by my fellow citizens, I shall be grateful and happy; if not, I shall find in the motives which impel me ample grounds for contentment and peace. In the difficulties which surround us and the dangers which threaten our institutions there is cause for neither dismay nor alarm. For relief and deliverance let us firmly rely on that kind Providence which I am sure watches with peculiar care over the destinies of our Republic, and on the intelligence and wisdom of our countrymen. Through *His* abundant goodness and *their* patriotic devotion our liberty and Union will be preserved.

C. THE COMMERCE CLAUSE

ASSIGNMENT 3

The Necessary and Proper Clause gives Congress the power to execute the "foregoing" powers that are "enumerated" in Article I, Section 8. The enumerated power most commonly combined with the Necessary and Proper Clause to justify national regulations is often the power of Congress "[t]o regulate commerce . . . among the several States." The fountainhead of Commerce Clause interpretation remains Chief Justice Marshall's opinion in *Gibbons v. Ogden*. *Gibbons* is another grand statement of the Federalists' theory of federalism and what it means to be a government of limited and enumerated powers.



Steamboat, circa 1824

STUDY GUIDE

1. How does Marshall define the terms of the Commerce Clause? Does his interpretation affirm or undermine the idea of limited and enumerated powers? Under his interpretation what, if anything, is outside the power of Congress to reach? What does he see as the relationship between the powers of Congress and those of the states?
2. Marshall wrote in *Gibbons*: "But this limitation on the means which may be used, is not extended to the [enumerated] powers which are conferred"? This sentence refers to the Necessary and Proper Clause. Does it conflict with Marshall's analysis in *McCulloch* where he concluded that had "the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect"? Did Marshall reconsider the captiousness of his reasoning in *McCulloch*?

3. Can Marshall's "pretext" language in *McCulloch* be reconciled with his statement in *Gibbons* that "the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, [and] the power over commerce . . . is vested in Congress as absolutely as it would be in a single government"? Later courts would use the statement from *Gibbons* to undermine the statement from *McCulloch*.
4. Justice Johnson wrote a concurrence in which he emphasized the "objects" or purposes for which a measure is enacted. Should such purposes be used as a way to assess whether a legislature has the power to enact a law?
5. What does Marshall's discussion of inspection laws, and Justice Johnson's discussion of health laws, imply about the limits of Congress's power under the Commerce Clause?

Gibbons v. Ogden

22 U.S. (9 Wheat.) 1 (1824)

[The Legislature of the State of New York granted Robert R. Livingston and Robert Fulton exclusive rights to operate steamboats within the state for thirty years, beginning in 1808. The rights were assigned to Aaron Ogden, the original plaintiff. Thomas Gibbons violated this monopoly by operating two steamboats that traveled between New York and New Jersey. Citing the New York law, Ogden sued to halt Gibbons's steamboats. Gibbons countered that the New York law was unconstitutional, because it interfered with a federal law that licensed his ships. The New York courts upheld the state law, and enjoined Gibbons's operation. Gibbons appealed to the United States Supreme Court. — Eds.]

Mr. Chief Justice Marshall delivered the opinion of the Court, and, after stating the case, proceeded as follows.

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains, are repugnant to the constitution and laws of the United States.

They are said to be repugnant —

1st. To that clause in the constitution which authorizes Congress to regulate commerce. . . .

As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these States, anterior to its formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a Legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean, by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the object for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded. As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the grantee; but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connexion with the purposes for which they were conferred.

The words are, "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more — it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. . . .

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce," to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.

If the opinion that "commerce," as the word is used in the constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself.

It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power, that which was not granted — that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

The 9th section of the 1st article declares, that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one State, be obliged to enter, clear, or pay duties, in another." These words have a direct reference to navigation. . . .

The universally acknowledged power of the government to impose embargoes, must also be considered as showing, that all America is united in that construction which comprehends navigation in the word commerce. . . . When Congress imposed that embargo which, for a time, engaged the attention of every man in the United States, the avowed object of the law was, the protection of commerce, and the avoiding of war. By its friends and its enemies it was treated as a commercial, not as a war measure. . . . They did, indeed, contest the constitutionality of the act, but, on a principle which admits the construction for which the appellant contends. They denied that the particular law in question was made in pursuance of the constitution, not because the power could not act directly on vessels, but because a perpetual embargo was the annihilation, and not the regulation of commerce. . . .

The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation, is as expressly granted, as if that term had been added to the word "commerce."

To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes."

It has, we believe, been universally admitted, that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term.

If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied, is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.

This principle is, if possible, still more clear, when applied to commerce "among the several States." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other States lie between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining States, commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce

among the States must, of necessity, be commerce with the States. In the regulation of trade with the Indian tribes, the action of the law, especially when the constitution was made, was chiefly within a State. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States. . . .

We are now arrived at the inquiry — What is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness, that . . . the States may severally exercise the same power, within their respective jurisdictions. In support of this argument, it is said, that they possessed it as an inseparable attribute of sovereignty, before the formation of the constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description. . . .

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the State. . . . But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised by the States, are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, &c. to pay the debts, and provide for the common defence and general welfare of the United States. This does not

interfere with the power of the States to tax for the support of their own governments; nor is the exercise of that power by the States, an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

In discussing the question, whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry, because it has been exercised, and the regulations which Congress deemed it proper to make, are now in full operation. The sole question is, can a State regulate commerce with foreign nations and among the States, while Congress is regulating it?

The counsel for the respondent answer this question in the affirmative, and rely very much on the restrictions in the 10th section, as supporting their opinion. They say, very truly, that limitations of a power, furnish a strong argument in favour of the existence of that power, and that the section which prohibits the States from laying duties on imports or exports, proves that this power might have been exercised, had it not been expressly forbidden; and, consequently, that any other commercial regulation, not expressly forbidden, to which the original power of the State was competent, may still be made.

That this restriction shows the opinion of the Convention, that a State might impose duties on exports and imports, if not expressly forbidden, will be conceded; but that it follows as a consequence, from this concession, that a State may regulate commerce with foreign nations and among the States, cannot be admitted.

We must first determine whether the act of laying "duties or imposts on imports or exports," is considered in the constitution as a branch of the taxing power, or of the power to regulate commerce. We think it very clear, that it is considered as a branch of the taxing power. It is so treated in the first clause of the 8th section: "Congress shall have power to lay and collect taxes, duties, imposts, and excises"; and, before commerce is mentioned, the rule by which the exercise of this power must be governed, is declared. It is, that all duties, imposts, and excises, shall be uniform. In a separate clause of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power, not before conferred. The constitution, then, considers these powers as substantive, and distinct from each other; and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the States on that subject; and they might, consequently, have exercised it by levying duties on imports or exports, had the constitution contained no prohibition on this subject. This prohibition, then, is an exception from the acknowledged power of the States to levy taxes, not from the questionable power to regulate commerce. . . .

These restrictions, then, are on the taxing power, not on that to regulate commerce; and presuppose the existence of that which they restrain, not of that which they do not purport to restrain.

But, the inspection laws are said to be regulations of commerce, and are certainly recognised in the constitution, as being passed in the exercise of a power remaining with the States.

That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws, is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.

No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious, that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the States, may use means that may also be employed by a State, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the State. If Congress license vessels to sail from one port to another, in the same State, the act is supposed to be, necessarily, incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a State, or to act directly on its system of police. So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the State, and may be executed by the same means. All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous State governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers, would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other. . . .

The act passed in 1803, prohibiting the importation of slaves into any State which shall itself prohibit their importation, implies, it is said, an admission that the States possessed the power to exclude or admit them; from which it is inferred, that they possess the same power with respect to other articles. . . . But it is obvious, that the power of the

States over this subject, previous to the year 1808, constitutes an exception to the power of Congress to regulate commerce, and the exception is expressed in such words, as to manifest clearly the intention to continue the pre-existing right of the States to admit or exclude, for a limited period. . . .

It has been contended by the counsel for the appellant, that, as the word "to regulate" implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

There is great force in this argument, and the Court is not satisfied that it has been refuted. . . .

In argument . . . it has been contended that, if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other like equal opposing powers.

But the framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to, the laws of Congress made in pursuance of the Constitution or some treaty made under the authority of the United States. In every such case, the act of Congress or the treaty is supreme, and the law of the State, though enacted in the exercise of powers not controverted, must yield to it. . . .

Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union, are to be contracted by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding, as to obscure principles, which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and when sustained, to make them the tests of the arguments to be examined.

Mr. Justice Johnson . . .

The "power to regulate commerce," here meant to be granted, was that power to regulate commerce which previously existed in the States. But what was that power? . . . When speaking of the power of Congress over navigation, I do not regard it as a power incidental to that of regulating commerce; I consider it as the thing itself; inseparable from it as vital motion is from vital existence.

Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labour, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation. Ship building, the carrying trade, and propagation of seamen, are such vital agents of commercial prosperity, that the nation which could not legislate over these subjects, would not possess power to regulate commerce. . . .

It is no objection to the existence of distinct, substantive powers, that, in their application, they bear upon the same subject. The same bale of goods, the same cask of provisions, or the same ship, that may be the subject of commercial regulation, may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated, are no more intended as regulations on commerce, than the laws which permit their importation, are intended to innoculate the community with disease. Their different purposes mark the distinction between the powers brought into action; and while frankly exercised, they can produce no serious collision. . . .

Wherever the powers of the respective governments are frankly exercised, with a distinct view to the ends of such powers, they may act upon the same object, or use the same means, and yet the powers be kept perfectly distinct. A resort to the same means, therefore, is no argument to prove the identity of their respective powers. . . .

1. Evidence of the Original Meaning of the Word "Commerce"

Gibbons raises the question about the meaning of the word "commerce" as used in the Commerce Clause. "Commerce" might be limited to the activities of trading, exchanging, or transporting people and things. These activities are distinctly different from a different class of activities: producing the things to be traded, exchanged, or transported. Such a narrow usage would have excluded, for example, agriculture, manufacturing, and other methods of production from the scope of congressional regulations. Alternatively, "commerce" might be interpreted expansively to refer to any gainful activity.[1]

The use of the term "commerce" in the drafting and ratification process was remarkably uniform, however. Indeed, there appears to be not a single example from the reports of these proceedings that unambiguously used a broad meaning of "commerce." And there are many instances where the context makes clear that the speaker intended the narrow meaning. As we will see in Chapter 4, when the Supreme Court expanded its construction of federal power in cases involving economic regulations, it did so by stressing the Necessary and Proper Clause rather than by expanding the meaning of the term "commerce" itself.

[1] See Robert J. Pushaw, Jr. & Grant S. Nelson, A Critique of the Narrow Interpretation of the Commerce Clause, 96 Nw. U. L. Rev. 695 (2002) (contending that the term "commerce" in the Commerce Clause meant gainful activity). Jack Balkin has proposed that "commerce" in the Commerce Clause be read even more broadly to mean "interaction" between persons. See Jack M. Balkin, Commerce, 109 Mich. L. Rev. 1 (2010). For a reply, see Randy E. Barnett, Jack Balkin's Interaction Theory of "Commerce," 2012 U. Ill. L. Rev. 623.

STUDY GUIDE

1. Assume that the original meaning of the term "commerce" was limited to the trade, exchange, and movement of people and things, but excluded productive activities such as agriculture and manufacturing. Would this interpretation necessarily limit the scope of Congress's powers under Marshall's interpretation of the Necessary and Proper Clause in *McCulloch*?
2. What is the relationship between the Necessary and Proper Clause and the enumerated powers that precede it in Article I, Section 8? We will return to these questions repeatedly as we consider the materials that concern the structure of government established by the Constitution.

Contemporary Dictionaries

To get a sense of the original meaning of a term, it is useful to begin with dictionaries from the relevant period of time. The Oxford English Dictionary gives the etymology of "commerce" as "with merchandise": "com 'with'; merci 'merchandise.'"[2] The 1785 edition of Samuel Johnson's Dictionary of the English Language defines "commerce" as "1. Intercourse; exchange of one thing for another; interchange of any thing; trade; traffick." In contrast, "manufacture" is defined as "1. The practice of making any piece of workmanship. 2. Any thing made by art." "Agriculture" is defined as "[t]he art of cultivating the ground; tillage; husbandry, as distinct from pasturage." Johnson then defines "intercourse" as "1. Commerce; exchange" and "2. Communication: followed by with."

It is not at all clear that the meaning of "intercourse" — especially when that term is not "followed by with" — was itself much broader than trade, exchange, or transportation. All of these synonyms convey the general idea that "commerce" involves the activity of moving people and things from one place to another, as distinct from the production of the things to be moved. Even today, the phrase "intellectual intercourse" involves the exchange, movement, or "communication" of ideas from one person to another. When a person develops an idea in his mind or in his writings, he is not engaged in "intellectual intercourse" until he communicates that idea to others.

If Johnson's definitions were accurate, commerce referred predominantly to exchange, trade, transportation, and communication, as distinct from the agricultural or manufacturing production of those things that are subsequently traded, transported, or communicated. Johnson's definition of "commerce" is borne out by other dictionaries of the time.[3] But dictionaries are only a starting point. This usage also dominates discussions during the drafting and adoption of the Constitution.

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[2] Oxford English Dictionary 552 (2d ed. 1989).

[3] See, e.g., Nathan Bailey, An Universal Etymological English Dictionary, 26th ed. (Edinburgh: Neill & Co., 1789) ("trade or traffic"); T. Sheridan, A Complete Dictionary of the English Language 585-586, 6th ed. (Philadelphia: W. Young, Mills & Son, 1796) ("Exchange of one thing for another; trade, traffick").

The Constitutional Convention

In Madison's notes on the Constitutional Convention, the term "commerce" appears thirty-four times in the speeches of the delegates. Eight of these entries are unambiguous references to commerce with foreign nations, which can consist only of trade or transportation. In every other instance, the terms "trade" or "exchange" could be substituted for the term "commerce" with the apparent meaning of the statement preserved. In no instance is the term "commerce" clearly used to refer to "any gainful activity" or anything broader than trade or movement. One congressional power proposed by Madison, but not ultimately adopted, suggests that the delegates shared the limited meaning of "commerce" described in Johnson's dictionary. Madison proposed to grant Congress the power "[t]o establish public institutions, rewards, and immunities for the promotion of agriculture, commerce, trades and manufactures."[4] This proposal strongly indicates that the members understood the term "commerce" to mean trade or exchange, as distinct from the productive processes that made the things to be traded.

The Federalist

In several of his contributions to *The Federalist*, Alexander Hamilton repeatedly recognized the commonplace distinction between commerce, or trade, and production. In *Federalist No. 11*, he also explained the purpose of the Commerce Clause, a purpose entirely consistent with the prevailing "core" meaning of the term "commerce":

> An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished and will acquire additional motion and vigor from a free circulation of the commodities of every part. Commercial enterprise will have much greater scope from the diversity in the productions of different States.

Just as our veins move our blood throughout our bodies, so too does commerce circulate or move "the productions" of different states "between the States themselves" and "to foreign markets." (Our veins do not make our blood.)

In *Federalist No. 12*, he referred to the "rivalship," now silenced, "between agriculture and commerce," while in *Federalist No. 17*, he distinguished between the power to regulate such national matters as commerce and "the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation." In *Federalist No. 21*, Hamilton maintained that causes of the wealth of nations were of "an infinite variety," including "[s]ituation, soil, climate, the nature of the productions, the nature of the government, the genius of the citizens, the degree of information they possess, the state of commerce, of arts, of industry." In *Federalist No. 35*, he asked, "Will not the merchant understand and be disposed to cultivate, as far as may be proper, the interests of the mechanic and manufacturing arts to which his commerce is so nearly allied?" Once again, the occupation of merchant is distinguished from the occupation of a mechanic or a manufacturer.

[4] The term "trades" connotes crafts and other types of trades, not trade or exchange.

In none of the sixty-three appearances of the term "commerce" in *The Federalist* is it ever used to refer unambiguously to any activity beyond trade, exchange, or transportation. Later, Hamilton's usage did not change. As Secretary of the Treasury, his official opinion to President Washington advocating a broad congressional power to incorporate a national bank (that appears in Chapter 1) repeatedly referred to Congress's power under the Commerce Clause as the power to regulate the "trade between the States."

Ratification Conventions

In the state ratification conventions, speakers uniformly used the term "commerce" as a synonym for trade or exchange, including shipping — and did not include agriculture, manufacturing, or other business (apart from shipping or navigation, which are forms of transportation).

In the records of the Massachusetts convention, the word "commerce" is used nineteen times — every use consistent with it meaning trade, mostly of the foreign type. There is no use of commerce that clearly indicates a broader meaning. The most explicit distinction was made by Thomas Dawes, a prominent revolutionary and legislator, who began his discussion on the importance of the national taxation powers, "We have suffered for want of such authority in the federal head. This will be evident if we take a short view of our agriculture, commerce, and manufactures." He then expounded at some length, giving separate attention to each of these activities and the beneficial effect the Constitution would have on them. Under the heading of "commerce," he referred to "our own domestic traffic that passes from state to state" — another reference to movement.

In the New York convention, Alexander Hamilton repeatedly made the clearest distinction between commerce and other economic or gainful activity. As part of a lengthy speech, he observed: "The Southern States possess certain staples, — tobacco, rice, indigo, &c., — which must be capital objects in treaties of commerce with foreign nations." The same distinction is implicit in his denial that the regulation of commerce was outside the competency of a central government: "What are the objects of the government? Commerce, taxation, &c. In order to comprehend the interests of commerce, is it necessary to know how wheat is raised, and in what proportion it is produced in one district and in another? By no means." Later, in defending the power of direct taxation, Hamilton predicted that in its absence, the "general government . . . will push imposts [on our commerce] to an extreme." As a result, "[o]ur neighbors, not possessed of our advantages for commerce and agriculture, will become manufacturers: their property will, in a great measure, be vested in the commodities of their own productions; but a small proportion will be in trade or in lands. Thus, on the gentleman's scheme, they will be almost free from burdens, while we shall be loaded with them."

In the report of the Pennsylvania ratification convention, all eight uses of the term are consistent with the narrow meaning of "commerce"; none clearly uses a broader meaning. The most revealing comment is made by James Wilson, who was a delegate to the Constitutional Convention:

> Suppose we reject this system of government; what will be the consequence? Let the farmer say, he whose produce remains unasked for; nor can he find a single market for its consumption, though his fields are blessed with luxuriant abundance. Let the manufacturer, and let the mechanic, say; they can feel, and tell their feelings. Go along the warves of Philadelphia, and observe the melancholy silence that reigns. . . . Let the merchants tell you what is our commerce.

For Wilson, "merchants" engage in "commerce." Farmers and manufacturers do not engage in "commerce," when they grow food or make things for sale. And the lack of commerce can be observed along the silent "warves of Philadelphia."

In the North Carolina debates, "commerce" is mentioned eighteen times. As elsewhere, there are no clear uses of it in any sense broader than trade, exchange, or transportation. There are, however, few clear examples of its use in the narrow sense in speeches by William Davie. Davie defined the "general objects of the union" to be "1st, to protect us against foreign invasion; 2nd, to defend us against internal commotions and insurrections; 3rd, to promote the commerce, agriculture, and manufactures, of America." Later, he explained why the regulation of commerce, though distinct from agriculture and manufacturing, promoted them: "Commerce, sir, is the nurse of both. The merchant furnishes the planter with such articles as he cannot manufacture himself, and finds him a market for his produce. Agriculture cannot flourish if commerce languishes; they are mutually dependent on each other." The activities of agriculture and commerce are clearly not the same.

In the reports of the South Carolina Convention, the word "commerce" is used twenty-six times. Charles Pinckney — a delegate to the Constitutional Convention — equated "the regulation of commerce" and mere "privileges with regard to shipping," when he asked, "If our government is to be founded on equal compact, what inducement can [the Eastern states] possibly have to be united with us, if we do not grant them some privileges with regard to their shipping?" For Pinckney, shipping or transporting goods was at the core of "commerce."

Virginia's convention, which had seventy-four mentions of "commerce," wins the prize for the most. Here, as elsewhere, there is not a single instance of "commerce" being used unambiguously in the broader sense. To the contrary, the most striking evidence is the dominance of a conception of commerce that is even narrower than "trade" or "exchange" — also manifested by Pinckney's reference in the South Carolina debates to "privileges with regard to shipping." In Virginia, at least seventeen references link "commerce" in some way to ports, shipping, navigation, or the "carrying trades."

In other words, on these occasions, the term "commerce" is limited to conveying or transporting the articles of trade. Common as was such usage, "commerce" was not used solely to refer to shipping in Virginia. Other usages of the sort seen elsewhere appear here as well. Edmund Pendleton, for instance, viewed "commerce" as the means by which "the people may have an opportunity of disposing of their crops at market, and of procuring such supplies as they may be in want of." So synonymous was "commerce" with "trade" that William Grayson worried that "the whole commerce of the United States may be exclusively carried on by merchants residing within the seat of government," referring to what became the District of Columbia.

Professor Barnett performed a survey of every use of "commerce" in the *Pennsylvania Gazette* from 1728 to 1800; the term appeared 1,594 times.[5] The earliest, in 1728, referred to "commerce" as "the Affairs of Merchandize." One of the latest, in 1798, referred to a caricature in which the messenger god Mercury was used to signify commerce. A 1787 entry defined the term explicitly: "[B]y commerce I mean the exports as well as the imports of

[5] See Randy E. Barnett, New Evidence of the Original Meaning of the Commerce Clause, 55 Ark. L. Rev. 865 (2003).

a country. . . ." A 1773 entry notes the existence of "the Royal College of Physicians, and the Society for the Encouragement of Arts, Manufactures and Commerce."

The term "commerce" was routinely used to refer to navigation or shipping. These references are of particular relevance to *Gibbons v. Ogden*. Indeed, the term "commerce" was so closely identified with navigation that ninety-nine of the references were to ships named *Commerce*. This passage from January 13, 1790 makes clear how commerce was distinguished from agriculture and manufacturing; commerce is defined in terms of navigation:

> Agriculture, manufacturers and commerce are acknowledged to be the three great sources of wealth in any state. By the first we are to understand not only tillage, but whatever regards the improvement of the earth; as the breeding of cattle, the raising of trees, plants and all vegetables that may contribute to the real use of man; the opening and working of mines, whether of metals, stones, or mineral drugs; by the second, all the arts, manual or mechanic; by the third, the whole extent of navigation with foreign countries.

All these findings confirm Madison's observation, made late in his life, that "[i]f, in citing the Constitution, the word trade was put in the place of commerce, the word foreign made it synonymous with commerce. Trade and commerce are, in fact, used indiscriminately, both in books and in conversation." These findings also confirm the correctness of *Gibbons v. Ogden*.

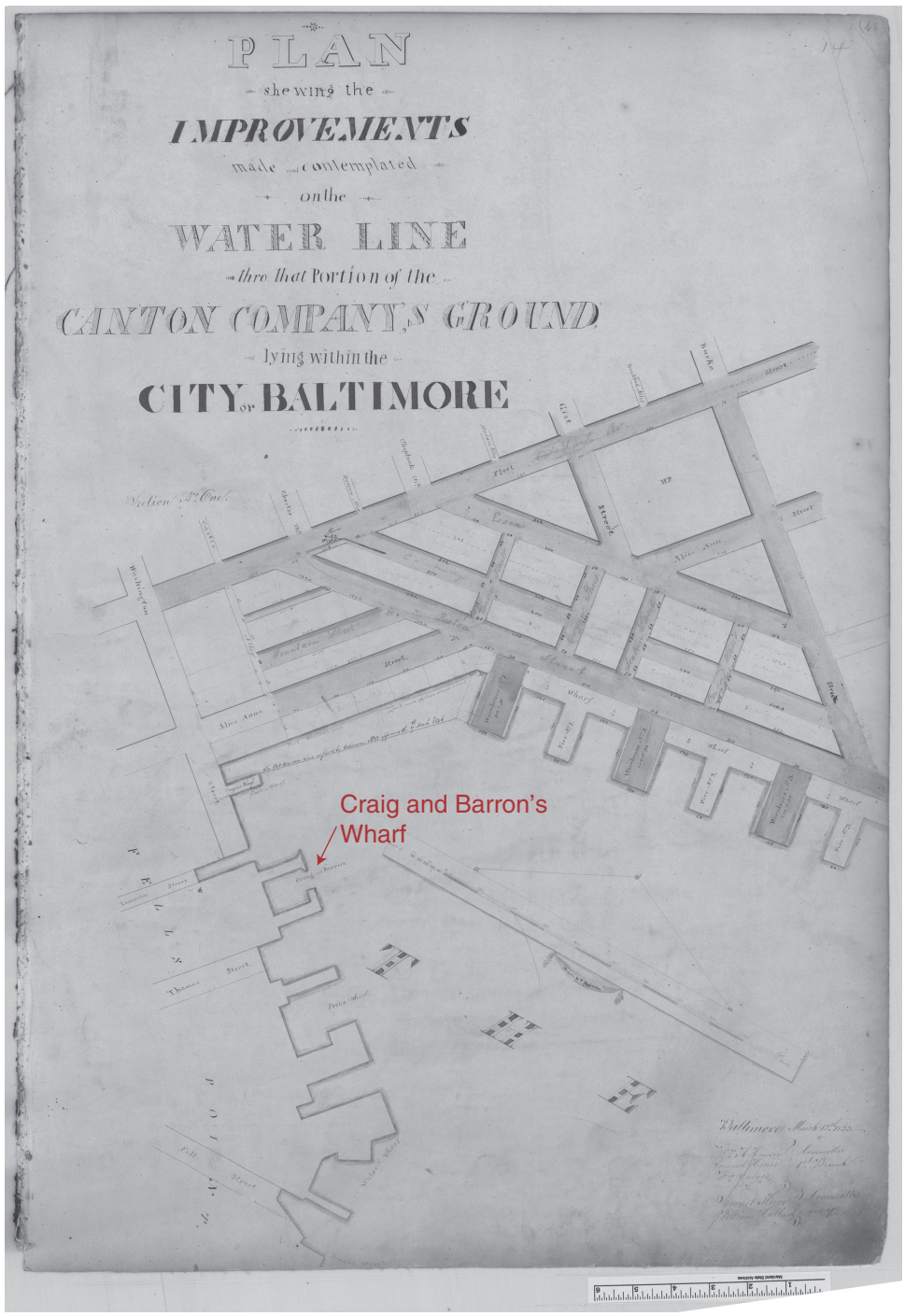
D. DID THE "BILL OF RIGHTS" APPLY TO THE STATES?

ASSIGNMENT 4

Today most people take for granted that state governments must respect the rights protected by the first eight amendments to the Constitution. But this understanding only developed after the adoption of the Fourteenth Amendment in 1868. In *Barron v. Baltimore*, Chief Justice Marshall described what became the settled pre–Fourteenth Amendment view of how and why the rights in the first eight amendments did *not* apply to the states. Reading *Barron* in its entirety is essential to understanding the objectives of the Republicans in the Thirty-ninth Congress who drafted the Fourteenth Amendment, in part, to reverse Marshall's opinion. In this respect, *Barron* is to the Fourteenth Amendment what *Chisholm v. Georgia* is to the Eleventh Amendment. The reasoning of *Barron* is also crucial to appreciating both the need for, and the controversy surrounding, the so-called incorporation doctrine — developed in the twentieth century — by which selected *portions* of these rights were "incorporated" into the Fourteenth Amendment and applied to the states.

In *Barron*, Chief Justice Marshall does not refer to the first ten amendments as "the Bill of Rights." Instead, he repeatedly refers to them as "these amendments." The first ten amendments did not come to be known as "the Bill of Rights" until the twentieth century. Of course, the term "bill of rights" was well known at the Founding. Marshall refers to Article I, Section 9 as "having enumerated, in the nature of a bill of rights,

the limitations intended to be imposed on the powers of the general government." But Marshall's reference to a relatively obscure portion of the Constitution as a "bill of rights" makes it all the more striking that he does *not* use "the Bill of Rights" as a label for the first ten amendments.



John Barron's Wharf in Baltimore from Bouldin Atlas (1833)

STUDY GUIDE

1. Marshall concludes that the first ten amendments only limit federal power. Does he ground this limitation in the Constitution's text? In its historical origins? In the problems that were supposed to be addressed by the amendments? Do any of the first ten amendments specify which level of government they apply to?
2. Is Marshall's opinion supported by Madison's initial proposal to Congress for amendments (Chapter 1)? (*Hint:* The support comes from one of his proposals that was rejected by Congress.)
3. Can you see how Marshall's theory of the rights in the first ten amendments derives from his views of sovereignty, and will undercut the later claim of a right of states to secede from the Union?

Barron v. City of Baltimore

32 U.S. (7 Pet.) 243 (1833)

[John Barron owned a profitable wharf in the Baltimore harbor. During street construction, the City of Baltimore diverted the flow of streams, which created mounds of sand and earth near his wharf. As a result, the water became too shallow for most vessels to dock. Barron sued the mayor of Baltimore for damages. He claimed that the City's actions constituted a "taking" of private property for public use without just compensation under the Fifth Amendment. — Eds.*]

One of the lawyers for the City of Baltimore was future Chief Justice Roger Taney.

Mr. Chief Justice Marshall, delivered the opinion of the court.

The judgment brought up by this writ of error having been rendered by the court of a state, this tribunal can exercise no jurisdiction over it, unless it be shown to come within the provisions of the 25th section of the judiciary act.† The plaintiff in error contends, that it comes within that clause in the fifth amendment to the constitution, which inhibits the taking of private property for public use, without just compensation. He insists,

* Chapter 22 will discuss the concept of a "regulatory taking," whereby a government regulation does not physically take someone's property, but diminishes its value. The Supreme Court did not recognize this concept until the early twentieth century. Here, Barron may have made one of the first regulatory taking arguments before the Supreme Court.

† [Section 25 of the Judiciary Act of 1789 provides, in part: "That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision . . . where is drawn in question the construction of any clause of the constitution . . . may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error . . . in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court . . . ." — Eds.]

that this amendment being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a state, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented is, we think, of great importance, but not of much difficulty. The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions, they have imposed such restrictions on their respective governments, as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.

The counsel for the plaintiff in error insists, that the constitution was intended to secure the people of the several states against the undue exercise of power by their respective state governments; as well as against that which might be attempted by their general government. In support of this argument he relies on the inhibitions contained in the tenth section of the first article. We think, that section affords a strong, if not a conclusive, argument in support of the opinion already indicated by the court. The preceding section contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the general government. Some of them use language applicable only to congress; others are expressed in general terms. The third clause, for example, declares, that "no bill of attainder or ex post facto law shall be passed." No language can be more general; yet the demonstration is complete, that it applies solely to the government of the United States. In addition to the general arguments furnished by the instrument itself, some of which have been already suggested, the succeeding section, the avowed purpose of which is to restrain state legislation, contains in terms the very prohibition. It declares, that "no state shall pass any bill of attainder or ex post facto law." This provision, then, of the ninth section, however comprehensive its language, contains no restriction on state legislation.

The ninth section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the general government, the tenth proceeds to enumerate those which were to operate on the state legislatures. These restrictions are brought together in the same section, and are by express words applied to the states. "No state shall enter into any treaty," &c. Perceiving, that in a constitution framed by the people of the United States, for the government of all, no limitation of the action of government on the people would apply to the state government, unless expressed in terms, the restrictions contained in the tenth section are in direct words so applied to the states.

It is worthy of remark, too, that these inhibitions generally restrain state legislation on subjects intrusted to the general government, or in which the people of all the states feel an interest. A state is forbidden to enter into any treaty, alliance or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the constitution. To grant letters of marque and reprisal, would lead directly to war; the power of declaring which is expressly given to congress. To coin money is also the exercise of a power conferred on congress. It would be tedious to recapitulate the several limitations on the powers of the states which are contained in this section. They will be found, generally, to restrain state legislation on subjects intrusted to the government of the Union, in which the citizens of all the states are interested. In these alone, were the whole people concerned. The question of their application to states is not left to construction. It is averred in positive words.

If the original constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the state; if, in every inhibition intended to act on state power, words are employed, which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course, in framing the amendments, before that departure can be assumed. We search in vain for that reason.

Had the people of the several states, or any of them, required changes in their constitutions; had they required additional safe-guards to liberty from the apprehended encroachments of their particular governments; the remedy was in their own hands, and could have been applied by themselves. A convention could have been assembled by the discontented state, and the required improvements could have been made by itself. The unwieldy and cumbrous machinery of procuring a recommendation from two-thirds of congress, and the assent of three-fourths of their sister states, could never have occurred to any human being, as a mode of doing that which might be effected by the state itself. Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention. Had congress engaged in the extraordinary occupation of improving the constitutions of the several states, by affording the people additional protection from the exercise of power by their own governments, in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained, that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government — not against those of the local governments. In compliance with a sentiment thus generally expressed, to quiet fears thus extensively

entertained, amendments were proposed by the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.

We are of opinion, that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use, without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states. We are, therefore, of opinion, that there is no repugnancy between the several acts of the general assembly of Maryland, given in evidence by the defendants at the trial of this cause, in the court of that state, and the constitution of the United States. This court, therefore, has no jurisdiction of the cause, and it is dismissed.