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"Health Laws of Every Description": John Marshall's Ruling on a Federal Health Care Law

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Federalism & Separation of Powers

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By Robert G. Natelson & David B. Kopel***

Introduction

If John Marshall, the greatest of Chief Justices, were to hear a challenge to the constitutionality of the Patient Protection and Affordable Care Act of 2010, how would he rule? Would the nationalist justice who, according to the New Deal Supreme Court, "described the Federal commerce power with a breadth never yet exceeded,"[1] agree that federal control of health care was within that power?

In the fictional opinion below, Marshall rules on the constitutionality of a bill similar to the Patient Protection and Affordable Care Act. In the opinion, the "plaintiff in error" is the government and the "defendants in error" are the original plaintiffs who challenged the law.

We constructed this opinion chiefly from direct quotation and paraphrases of Marshall's own words, as expressed in his judicial pronouncements, his newspaper articles, and his speeches at the Virginia ratifying convention. Besides quotations and paraphrases, the remainder of the "opinion" below consists of connecting matter and direct deductions from Marshall's words. We have tried to ensure that nothing is taken unfairly out of context. To aid the reader we have added asterisks dividing topics.

The endnotes are ours rather than "Marshall's." They provide the sources for the more important quotations and paraphrases, and they supplement the text with explanations. Our study of the full text of Marshall's works revealed him to be a far more restrained justice, who relied far more on established authority, than the caricature drawn by case book editors and law professors whose expurgated versions of his opinions depict him as an activist in the cause of federal power. One striking illustration is the treatment afforded Marshall's own statement on whether health laws are proper subjects of the commerce power. The statement has been cited with approval by other Supreme Court justices at least twenty times,[2] yet often is overlooked in discussions of his jurisprudence. It appears below.

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Mr Chief Justice MARSHALL delivered the opinion of the Court.

ERROR to the District Courts of Virginia and Florida.

The defendants in error consist both of sovereign states and of citizens of various states.[3] The plaintiff in error is an officer of the United States. Those defendants in error which are states complain of invasions of their reserved powers; the citizen defendants in error complain of duties imposed on them by the Health Care Act. After a hearing on the cause, the district courts granted summary judgment to the states and the citizens.

It would be tedious to go through all the terms of the Act.[4] It is enough to say that it purports to new model[5] the business of health insurance, as well as the conduct of persons, states, and corporations providing or paying for medical and surgical services. It also requires that individuals purchase policies of health insurance. The law in question, in every point of view in which it can be placed, is of the deepest interest.[6]

The plaintiffs assert that the Act exceeds the powers of Congress as enumerated in the constitution, and is therefore void. In the order in which the Court has viewed this subject, the following questions are presented.

1st. Has Congress the power to adopt this legislation under its power to "provide for . . . the general Welfare?"

2d. Has Congress the power to adopt this legislation as an exercise of its power to "regulate Commerce . . . among the several States?"

3d. Has Congress the power to adopt this legislation as an exercise of its power to pass laws "necessary and proper" for the regulation of commerce among the several states?

Although, we think, these questions are not of much difficulty, this Court can be insensible neither to their magnitude nor their delicacy. The people have adopted a written constitution, and outlined and defined the limits of congressional authority, and whether the law is within that authority must be decided peacefully, or remain a source of hostility; and if it is to be so decided, by this tribunal alone can the decision be made.[7] On the supreme court of the United States has the constitution of our country devolved the duty of so construing it as to preserve the true intent and meaning of the instrument.[8]

* * * *

1st. This government is acknowledged by all, to be one of enumerated powers,[9] and if Congress has authority to adopt this Act, it must be by reason of one of those enumerated. Counsel for the plaintiff in error maintains that Congress has authority to enact this legislation under the 1st clause of the 8th section of the first article, granting Congress power to "provide for .

. . the general Welfare."[10] Counsel for the defendants in error very justly observe, however, that the power granted therein is not to "provide for the general welfare," but only to tax for such purposes.

The subsequent part of the section is mere surplusage, entirely without meaning, if the interpretation proffered by the government is to be the construction.[11] 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.[12]

The object of language is to communicate the intention of him who speaks, and the great duty of a judge who construes an instrument, is to find the intention of its makers.[13] All instruments are to be construed fairly, so as to give effect to their intention; intention is the most sacred rule of interpretation.[14] For the constitution, the intention sought is not that of the framers; the instrument, when it came from their hands, was a mere proposal.[15] The makers of the constitution were the people, acting through their delegates at the ratifying conventions in the several states. From these conventions, the constitution derives its whole authority,[16] and it is by the ratifiers' intention that it must be construed.

In determining intention, great weight has always been attached, and very rightly attached, to contemporaneous exposition.[17] 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.[18] It will not be forgotten that among the fears held by opponents of the constitution was that this provision might be construed as counsel for the plaintiff in error would have us construe it, whilst the friends of the constitution represented that the clause "provide for the General Welfare" was but a limit on the taxing power.[19] That the constitution would not have been adopted had the former construction been generally believed and the latter generally rejected, must be universally admitted.

It is, perhaps, appropriate to observe further, the very same latitudinous construction advanced by the counsel for the government was urged by Mr. Justice Story in the case of Brown v. United States,[20] and rejected by every other justice on this Court.

* * * *

2d. Has Congress the power to adopt this legislation as an exercise of its power to "regulate Commerce . . . among the several States?"

Jacob defines "commerce" in the edition of his great law dictionary published almost exactly contemporaneously with the ratification, as "Traffick, trade, or merchandizing in buying and selling of goods," distinguishing the term from "trade" only in that "commerce" relates to trade across jurisdictional lines.[21] This is the fair and usual import of the word. That import does not comprehend the business of health insurance, and certainly excludes the ordinary occupations of physicians, apothecaries, and hospitals.

The counsel for the government, however, draws our attention to this Court's decision in the case of Gibbons v. Ogden,[22] in which we said that "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse."[23] He thus contends that the Act is an exercise of congressional power to regulate commerce, because the term "commerce" sometimes is employed to refer not merely to mercantile trade, but to all intercourse; and that McCulloch v. Maryland stands for the proposition that words in a constitution should be interpreted in a *liberal sense*.[24] From this, he concludes that Congress may regulate all intercourse among men, or at least such as affects more than one state.

This is too extravagant to be maintained.[25] If by the term "liberal sense" is intended an extension of the grant beyond the fair and usual import of the words, the principle is not to be found in the opinions of this Court.[26] In McCulloch v. Maryland, we rejected a restrictive interpretation of the constitution, but emphatically did not adopt the "liberal sense" contended for by counsel for the plaintiff in error.[27] There is certainly a medium between the restricted sense which confines the meaning of words to narrower limits than the common understanding of the world affixes to them, and that extended sense which would stretch them beyond their obvious import. There is a fair construction which gives to language the sense in which it is used, and interprets an instrument according to its true intention. It is this medium, this fair construction that this Court has taken for its guide.[28]

As for the language of the case of Gibbons v. Ogden, it is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. The general expressions in Gibbons v. Ogden must be understood with the limitations which are given to them in that opinion; limitations which in no degree affect the decision in that case, or the tenor of its reasoning.[29]

In the construction of constitutions, one should not, in the absence of compelling evidence to the contrary, adopt an enlarged construction, which would extend words beyond their natural and obvious import.[30] Gibbons v. Ogden was a cause in which this court was called upon to determine whether navigation was comprehended within the natural and obvious import of the word "commerce." We determined that it was. But nothing suggested that the constitution's use of the word goes beyond that ordinary use.

On the contrary, this Court in that same case concluded that the word did not comprehend even the closely-connected realm of inspection laws. The Court stated its opinion of such laws in these words: that 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."[31]

A more direct statement than this could hardly be made, and in the very case relied upon so ably by Counsel for the plaintiff in error: "Health laws of every description" are not within the power of Congress to regulate commerce among the several states; they are part of that great mass of legislation reserved to the states.

It is, further, 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.[32] In the case of Gibbons v. Ogden, this Court identified plain exceptions in the 9th section of the first article pertaining to navigation, exceptions tending to show that navigation was comprehended within commerce. No similar exceptions exist for health laws.

Nor could it have been otherwise. Contemporaneous exposition of the constitution also made certain that health laws, like other matters of internal police, were reserved to the exclusive power of the states and people.[33] This determination was confirmed by the Ninth and Tenth articles of amendment, and is binding on this Court.

* * * *

3d. Is the Act constitutional under the 18th clause of the 8th section of the first article as a law "necessary and proper for carrying into Execution" the power over commerce?

Among the enumerated powers, we do not find that of issuing health laws. There is, however, no phrase in the constitution which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described.[34] The constitution's grants of authority carry with them all those incidental powers which are necessary to its complete and effectual execution.[35] In the absence of instruction to the contrary, the words are so construed as to comprehend more than is clearly expressed, in order to give full effect to the manifest intention of the parties.[36]

Nor has the constitution left this rule of construction 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 other granted powers[37]—in our jurisprudence the word "necessary" frequently signifying incidence.[38] This insertion did not enlarge powers previously given, but was included only *ex abundante cautela*,[39] in a desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution.[40]

Congress manifestly relied on this clause in passing the Act, for its language recites that the requirement that individuals purchase insurance "affects" commerce among the states. This presents the question, whether the particular power which is the subject of contest, has been delegated to the one government, or prohibited to the other. The answer depends on a fair construction, a construction that seeks the intention of the makers, that is to say the ratifiers, of the constitution.[41]

To aid in ascertaining that intention, the common law lays down the distinguishing traits of an incidental power. To be incident to a given or principal power, a power outside the strict language of the given power[42] must be the natural, direct, and appropriate means, or the known and usual means, for the execution of the given power.[43]

If such is the known and usual (customary) means, the power may be incident if convenient, or useful, or essential.[44] The word "convenient," however, has not the latitude some place upon it; although Jacob does not define the word, if Johnson be authority, it means "Fit; suitable; proper; well-adapted."[45]

If not a known and usual means, it must be the natural, direct, and appropriate means. The term "appropriate" likewise does not bear the latitudinous meaning some give it; Johnson informs us that it signifies "peculiar," "consigned to some particular use or person,"—"belonging peculiarly."[46] In the phrase of Bacon's *Abridgment*, the incident must be one without which the principal would labor under "great prejudice."[47]

The common law further requires that to be incidental a power must be, in the phrase of my Lord Coke[48] and other writers,[49] less "worthy"—that is to say of lesser dignity, comprehending less—than the principal power.[50]

This Court, therefore, held incorporation to be an incidental power in the case of McCulloch v. Maryland. The establishment of a bank was customary among nations exercising the great powers the constitution gives to Congress; at the time of the legislation authorizing the second Bank of the United States, it was widely held to be necessary.[51] We adverted in McCulloch v. Maryland to the fact that incorporation of a bank was "not of higher dignity" but rather of "inferior importance" to the great substantive and independent 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. Had incorporation also been a substantive and independent power, that it were incidental could never be admitted.

Counsel for the plaintiff in error has observed that health insurance "affects" commerce among the several states. That it does so cannot be denied. So also do many other rules and activities: agriculture, manufactures, the law of descents, publick discussion, and the exercise of our holy religion.[52] The close connection between commerce and such other activities was a prominent feature in the publick debate when the constitution was depending before the people.[53] Its enlightened friends laid much stress upon the fact that granting a power to Congress to regulate trade could improve other divisions of American life. But they also avowed that a law affecting contracts, or claims, between citizens of the same state would go beyond the delegated powers and would be considered by the judges as an infringement of the Constitution which they are to guard, who would declare it void.[54]

It will be recalled that our office is to apply the constitution according to the intention of its makers, and

whilst the constitution was in contention no political dreamer was ever wild enough to think that the power to regulate trade alone, or to pass laws "necessary and proper" to do so, would enable Congress to govern those other divisions of life. Indeed, the friends of the constitution frequently emphasized that the activities above recited, and others, were certainly outside the federal compass.

The regulation of health within the several states is neither customary to the regulation of mercantile trade in goods across state lines, nor necessary to preserve mercantile regulations from great prejudice. It is also a subject at least as substantive and independent, and as "worthy," as the regulation of commerce among the states. It cannot be incidental thereto.

Counsel for the plaintiff in error cites the case of Gibbons v. Ogden as justifying, as necessary and proper, the federal regulation of navigation and of commerce wholly within states, so long as those matters "affect" other states. In that case navigation was found to be proper subject of regulation because the natural and ordinary import of "commerce" comprehended navigation, not because navigation was incidental to commerce.[55] We further observed that commerce was outside congressional competence if "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."[56] We did not hold that mere effect was sufficient to justify regulation; and if we had, the law of incidents would have dictated that the wording extend only to local *commerce*, not to activities of a completely different character. *Accessorius sequitur naturam sui principalis*.[57]

There is a further reason for concluding that the regulation of health and health insurance be outside the power of Congress. In the case of McCulloch v. Maryland this Court stated, "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."[58] Thus, for a power to be incidental to the express powers given to Congress, the end must be legitimate—that is to say, it must be within the scope of the constitution. Our review of the Act in question discovers[59] no suggestion that it was truly adopted for the regulation of commerce, nor for any other end within the competence of Congress. It was adopted to "protect patients" and to regulate health care and health insurance. That appears on the face of the Act, and we are compelled therefrom to conclude that the contention that the Act was designed truly to regulate commerce is mere pretext. As we further observed in McCulloch v. Maryland, "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 intrusted 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."[60]

An additional contention, apparently crafted for purposes of this litigation, that the penalties imposed upon those who do not purchase insurance are taxes rather than penalties, is equally pretextual. Those exactions are penalties alone: That this is the understanding of the government, is apparent from the whole tenor of its conduct.[61]

* * * *

The people made the constitution, and only the people can unmake it. It is the creature of their will, and lives only by their will.[62] The Court is cognizant of the honourable motives of those within the federal government who adopted this law. But the supreme and irresistible power to make or to unmake the constitution, resides only in the whole body of the people; not in any sub-division of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it.[63] In this case, those charged with that duty serve on this Court, and it is emphatically the province and duty of the judicial department to say what the law is.[64]

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. If this Court were to sustain a legislative act contrary to the constitution, then it would subvert the very foundation of all written constitutions.[65] This is emphatically true in a case of this kind, when the legislative act involves not a doubtful question, one on which human reason may pause, but is a bold and daring[66] usurpation, in which the great principles of liberty are vitally concerned.[67]

After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the Health Care Act is outside the powers of Congress as defined in the constitution, and void.

It is adjudged and ordered, the judgments of the district courts be affirmed, with direction to enter judgment for the defendants in error.

Endnotes

1 Wickard v. Filburn, 317 U.S. 111, 120 (1942).

2 The most recent quotation is in *United States v. Lopez*, 514 U.S. 549, 594 (1995) (Thomas, J., concurring). Before that, the most recent citation was in *Nebbia v. New York*, 291 U.S. 502, 510 (1934) (Roberts, J.) (majority opinion, upholding the regulation in question).

3 At the time of the Marshall Court, a case such as this would have come to the Court as a request that the Court issue a writ of error. Such a request was *not* a continuation of the old case, but the commencement of a new case. Thus, in the cases below, states such as Florida and Virginia would have been the plaintiffs, and an officer of the United States would have been the defendant. Since the plaintiffs won in the district court, then in the appeal, the United States is the "plaintiff in error" and the states are the "defendants in error."

4 For the phrasing, see John Marshall's Defense of *McCulloch v. Maryland* 99 (Gerald Gunther ed. 1969) [hereinafter Marshall, Defense]. This book collects Marshall's anonymous newspaper essays, which he wrote shortly after *McCulloch* was decided. The essays prompted Professor Gunther to comment, "Clearly these essays give cause to be more guarded in invoking *McCulloch* to support views of congressional power now thought necessary." *Id.*, at 20.

5 *New model*: The contemporaneous phrase for "reform."

6 *Interest:* Marshall usually used this word in its Latinate meaning of "importance."

7 This language mirrors that used in *McCulloch v. Maryland*, 17 U.S. (4

Wheat.) 316, 400-401 (1819) (Marshall, C.J.) ("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.").

8 *McCulloch,* 17 U.S. at 401 ("On the supreme court of the United States has the constitution of our country devolved this important duty."); Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 393 (1821) (Marshall, C.J.) ("What, then, becomes the duty of the Court? . . . We must endeavor so to construe them as to preserve the true intent and meaning of the instrument.").

9 *McCulloch*, 17 U.S. at 405 ("This government is acknowledged by all, to be one of enumerated powers.").

10 U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.").

11 Marbury v Madison, 5 U.S. (1 Cranch) 137, 174 (1803) (Marshall, C.J.) ("The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction.").

12 *Id.* ("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.").

13 *Cf.* Marshall, Defense, *supra* note 4, at 168-69 ("The object of language is to communicate the intention of him who speaks, and the great duty of a judge who construes an instrument, is to find the intention of its makers.").

14 *Id.*, at 167; *see also id.* at 166 ("[P]arts are to be understood according to the intention of the parties, and shall be construed liberally, or restrictively, as may best promote the objects for which they were made.").

15 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403 (1819) (Marshall, C.J.) ("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.").

16 *Id.* ("[T]he 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. . . . From these conventions, the constitution derives its whole authority.").

17 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418 (1821) (Marshall, C.J.) ("Great weight has always been attached, and very rightly attached, to contemporaneous exposition.").

18 Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833) (Marshall, C.J.) ("[T]he 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.").

19 For this history, see Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. Kan. L. Rev. 1 (2003) (reproducing ratification-era statements from Federalists, including James Madison, that the "general Welfare" phrase granted no power, and specific representations from Federalists such as Noah Webster, David Ramsey, Henry Lee, and George Nicholas that it served merely as a limit on the taxing power).

20 12 U.S. (8 Cranch) 110 (1814) (Marshall, C.J.). For Story's argument in dissent, see *id*. at 150-51.

21 Giles Jacob, A New-Law Dictionary (10th ed. 1783) [hereinafter Jacob, Dictionary]. Jacob's law dictionary was probably the most popular in America. *See, e.g.*, William Hamilton Bryson, Census of Law Books in Colonial Virginia 57 (1978) (listing numerous holdings). Earlier editions of Jacob's *Dictionary* had defined "commerce" even more restrictively.

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

23 *Id.* at 189.

24 *Cf.* Marshall, Defense, *supra* note 4, at 92 (rejecting interpretation in a "liberal sense" if this means "beyond the fair and usual import of the words.").

25 Marbury v Madison, 5 U.S. (1 Cranch) 137, 179 (1803) (Marshall, C.J.) ("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."). Marshall uses the Latinate meaning of "extravagant," with a meaning akin to "wandering afield."

26 Marshall, Defense, *supra* note 4, at 92 ("If by the term "liberal sense" is intended an extension of the grant beyond the fair and usual import of the words, the principle is not to be found in the opinion we are examining.").

27 *Id.*

28 *Id.* ("There is certainly a medium between that restricted sense which confines the meaning of words to narrower limits than the common understanding of the world affixes to them, and that extended sense which would stretch them beyond their obvious import. . . . There is a fair construction which gives to language the sense in which it is used, and interprets an instrument according to its true intention. It is this medium, this fair construction that the Supreme Court has taken for its guide.").

29 *Cf.* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821) (Marshall, C.J.) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."). Marshall was discussing *Marbury* dicta in particular, but he was also expressing a "maxim" that should apply to "every opinion."

30 *Cf.* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188 (1824).

31 *Id.* at 203 (emphasis added). This language from *Gibbons* has been ignored by advocates of unlimited federal power.

32 *Id.* at 191 ("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.").

33 Marshall alludes here to the fact that Federalist spokesmen for the Constitution explicitly listed for the public certain subjects that, if the Constitution were adopted, would be reserved exclusively to the states. Marshall himself had been among these expositors. *See*, *e.g.*, Robert G. Natelson, *The Enumerated Powers of States*, 3 Nev. L.J. 469 (2003) [hereinafter Natelson, *Enumerated*]. Several Federalists mentioned social services (care for the poor) as reserved to the states, *id.* at 486 n.111, and at the Virginia ratifying convention (where Marshall was a Federalist spokesmen), even Patrick Henry, the leader of the convention's Anti-Federalists, conceded that "[t]ak[ing] care of the poor" would remain a state responsibility. *Id.* at 477 n.51.

34 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819) (Marshall, C.J.) ("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.").

35 *Cf.* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 429 (1821) (Marshall, C.J.) (A constitutional power "carries with it all those incidental powers which are necessary to its complete and effectual execution.").

36 Marshall, Defense, *supra* note 4, at 169 ("[T]he words are so construed as to comprehend more than is clearly expressed, in order to give full effect to the manifest intention of the parties.").

37 *McCulloch*, 17 U.S. at 411 ("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.'").

38 On the then-prevailing doctrine of incidental powers, often incorporated in documents by the word "necessary," see generally Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in Gary Lawson, Geoffrey P. Miller, Robert G. Natelson & Guy I. Seidman, The Origins of the

Necessary and Proper Clause 60-68 (2010).

39 Literally: "in overflowing caution." For an example of counsel using this term in an argument before C.J. Marshall, see Bank of Hamilton v. Dudley's Lessee, 27 U.S. 492, 502 (1827) ("*ex abundante cautela*").

40 Marshall, Defense, *supra* note 4, at 176 ("The third & last proposition of Hampden is, 'that the insertion of the words *necessary and proper* in the last part of the 8th section of the 1st article, did not enlarge powers previously given, but were inserted only through abundant caution.' To the declaration that I do not mean to controvert this proposition, I will only add the following extract from the opinion of the supreme court.").

For additional acknowledgment that the Necessary and Proper Clause was a recital only, and did not grant additional power, see *id.* at 97, 186.

41 Marshall, Defense, *supra* note 4, at 168-69 ("The object of language is to communicate the intention of him who speaks, and the great duty of a judge who construes an instrument, is to find the intention of its makers."). Note again that Marshall's rule of construction was "fair" (intent-based) interpretation, rather than either restrictive or "extravagant" construction.

42 Marshall distinguished between means within an express power and means outside the strict meaning of the express power. Only the latter kind of means could be an incident. Marshall, Defense, *supra* note 4, at 162, 172. During the Founding Era, the interpretation of different clauses took account of this distinction. Robert G. Natelson, The Origins of the Necessary and Proper Clause 70-78 (2010) (distinguishing between "Express-Power Discretion Clauses" and "Further-Powers Clauses").

43 Marshall, Defense, *supra* note 4, at 186 ("Their constitutionality depends on their being the natural, direct, and appropriate means, or the known and usual means, for the execution of the given power.").

44 *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413 (1819) (Marshall, C.J.) ("[W]e find that it frequently imports no more than that one thing is convenient, or useful, or essential to another.").

45 "Johnson" refers to Samuel Johnson, A Dictionary of the English Language (multiple editions). Marshall cited it repeatedly in Marshall, Defense, *supra* note 4. Although Johnson's work is sometimes idiosyncratic, and must be compared with other dictionaries for consistency, it was Marshall's favorite dictionary, and other contemporaneous definitions of "convenient" were not greatly different. *E.g.*, Thomas Sheridan, A Complete Dictionary of the English Language (1789) (unpaginated) [hereinafter Sheridan, Dictionary] (defining "convenient" as "Fit, suitable, proper").

46 Marshall, Defense, *supra* note 4, at 106. Johnson defined "peculiar" as "appropriate; belonging to anyone with exclusion of others. 2. Not common to other things. 3. Particular, single." Clearly Marshall's use of "appropriate" was far narrower than sometimes thought today. *Cf.* Sheridan, Dictionary, *supra* note 45 (defining "appropriate" as "peculiar, consigned to some particular").

47 3 Matthew Bacon, A New Abridgement of the Law *406 (1786). For an example of Marshall's use of Bacon's then-popular compilation, see Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 409 (1821) (Marshall, C.J.). Bacon's *Abridgement* has been cited in fifty-five Supreme Court cases, most recently in *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Eight of those cases were during Marshall's tenure.

48 1 Edward Coke, Institutes of the Lawes of England *151b (1628). For Marshall's use of the phrase "my Lord Coke," see *Cohens*, 19 U.S. at 409.

49 *E.g.*, Jacob, Dictionary, *supra* note 21 (unpaginated) (defining "incident" as "a thing necessarily depending upon, and appertaining thereto, or following another that is more worthy or principal.").

50 For Marshall's endorsement of this test, see Marshall, Defense, *supra* note 4, at 171:

> An "incident," Hampden tells us, "is defined, in the common law, to be a thing appertaining to, or following another, as being more worthy or principal"; and is defined by Johnson, to be means falling in beside the main design. In his second proposition, he considers "an incident as an additional power." I am content with these definitions.

51 Marshall, Defense, *supra* note 4, at 190.

52 These were among the subjects represented during the ratification debates as being outside the federal sphere. Natelson, *Enumerated, supra* note 33. For Marshall's use of the term "our holy religion" to describe Christianity, see *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 634 (1819).

53 Natelson, *Enumerated*, *supra* note 33, at 490-92.

54 3 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 553 (5 vols.; 1941 ed. republished in 2 vols.) (2d ed. 1836), quoting Marshall at the Virginia ratifying convention as stating:

> Has the government of the United States power to make laws on every subject? Does he understand it so? Can they make laws affecting the mode of transferring property, or contracts, or claims, between citizens of the same state? Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, 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.

55 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 190 (1824) ("All America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation.").

56 *Id.* at 194.

57 The accessory (here, the incident) follows the nature of its principal. This maxim, was used by Marshall in a different context in *United States v. Burr*, 25 F. Cas. 55, 177 (C.C. Va. 1807).

58 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

59 *Discovers* = discloses. *See, e.g.*, Sheridan, Dictionary, *supra* note 45 (unpaginated) (defining "discover" primarily as "To disclose, to bring to light").

60 17 U.S. at 423. Marshall is again following Coke here: "*privilegia quae re vera sunt in praejudicium reipublicae, magis tamen speciosa habent frontispicia, et boni publici praetextum, quam bonae et legales concessiones, sed praetextu liciti non debet admitti illicitum*." ("privileges that really are prejudicial to the state rather have handsome outside appearances and a *pretext* as being for the general good—as if they were good and legal grants; but an impermissible thing should not be permitted on a permissible pretext.") Case of Monopolies (K.B. 1602) 11 Co. Rep. 84b, 88b; 77 Eng. Rep. 1260, 1266.

61 Marbury v Madison, 5 U.S. (1 Cranch) 137, 161 (1803) (Marshall, C.J.) ("That this is the understanding of the government, is apparent from the whole tenor of its conduct.").

62 *Cf.* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 389 (1821) (Marshall, C.J.) ("The people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will.").

63 *Id.* ("But this supreme and irresistible power to make or to unmake, resides only in the whole body of the people; not in any sub-division of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it.").

64 *Marbury*, 5 U.S. at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."). This rather obvious statement follows, as Marshall's readers would have understood, from the Latin root of "juris-diction"—the "saying of the law."

65 *Cf. id.* at 176 ("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 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?").

66 "Bold and daring" do not have the positive connotations for Marshall that they acquired in later usage. *See infra* note 67.

67 *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403 (1819) ("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 . . . ought not to be lightly disregarded.").