

THE CHOICE BETWEEN MADISON AND FDR

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This exchange is about three clauses that have often been used by the courts since the New Deal to expand federal power: the Commerce Clause, the Necessary and Proper Clause, and the Taxation Clause, from which the spending power has (at least until today) been construed. This Essay addresses the originalist interpretation of the Necessary and Proper Clause.

Now, because I have not studied the matter closely, I am not going to comment on the spending power. I have always been attracted, though, to Madison's view that there is no freestanding spending power, but only a power to spend what is necessary and properly incident to the enumerated powers. Madison did not believe that the spending power grew out of the taxation power, but instead that all exercises of the spending power had to be incident to the other enumerated powers.¹ I am not, however, going to make the argument for this position here.

Nor am I going to spend much time discussing the original meaning of the Commerce Clause. In my book, *Restoring the Lost Constitution*,² I identified every use of the word "commerce" in the Constitutional Convention, the ratification debates, and the Federalist Papers.³ In a separate study, I examined the over 1,500 times the word "commerce" appeared in the *Philadelphia Gazette* between 1728 and 1800.⁴ In all of these appearances of the word "commerce," I could not find one clear example where the term was used to apply more broadly than the meaning identified by

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1. See, e.g., THE FEDERALIST NO. 41, at 264–65 (James Madison) (Robert Scigliano ed., 2000) (rejecting the proposition that "the power 'to lay and collect taxes' . . . amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defence or general welfare").

2. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

3. See *id.* at 278–89.

4. See *id.* at 289–91.

Justice Thomas in his concurring opinion in *Lopez*,⁵ in which he maintained that the word “commerce” refers to the trade and exchange of goods, along with the process of trading and exchanging, including transportation.⁶

The January 13, 1790 issue of the *Pennsylvania Gazette* included a representative use of the word “commerce” at the Founding:

Agriculture, manufacturers and commerce are acknowledged to be the three great sources of wealth in any state. By the first [agriculture] 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 [manufacturers], all the arts, manual and mechanic; . . . by the third [commerce], the whole extent of navigation with foreign countries.⁷

So this is how one source distinguished agriculture, manufacturing, and commerce; a very common trilogy that was repeatedly invoked.

For an originalist, direct evidence of the actual use of a word is the most important source of the word’s meaning. It is more important than referring to the “broader context.” Appealing to the “larger context” or the “underlying principles” of the text is the means by which some today are able to turn the words “black” into “white” and “up” into “down.”

Now, it may come as some surprise to you to learn that even the New Deal Supreme Court never formally broadened the meaning of the term “commerce” in any of its cases. Instead, it relied on an expanded interpretation of the Necessary and Proper Clause to enlarge the powers of the national government. The New Deal Supreme Court never redefined the word “commerce.” There is no case in which it said, “oh no, commerce means more today than it used to mean.” Instead the Court expanded the use of the Necessary and Proper Clause to

5. *United States v. Lopez*, 514 U.S. 549 (1995).

6. *Id.* at 585 (Thomas, J., concurring) (“At the time the original Constitution was ratified, ‘commerce’ consisted of selling, buying, and bartering, as well as transporting for these purposes.”).

7. BARNETT, *supra* note 2, at 274.

reach activity that it admitted was *not* commerce but which it was necessary and proper to reach anyway.⁸

Thus, this Essay focuses on the Necessary and Proper Clause. Now, unfortunately, because the Necessary and Proper Clause uses a term of art, you cannot find its original meaning by examining how the word “necessary” or the word “proper” was commonly used, the way you can when you are looking for a term like “commerce.” You really do need to examine the context in which this phrase was introduced into the Constitution, and how it was explained to the public when it was criticized by the Anti-Federalists as conveying the kind of sweeping and unlimited powers to Congress that Professor Michael Paulsen has claimed for it,⁹ and that Justice Scalia described in his concurring opinion in *Raich*.¹⁰

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The Necessary and Proper Clause was added to the Constitution by the Committee of Detail without any previous discussion by the Constitutional Convention. Nor was it the subject of any debate from its initial proposal to the Convention’s final adoption of the Constitution. The likely reason why the Necessary and Proper Clause received no attention from the Convention became clear during the ratification convention debates, as did the Clause’s public meaning.

In the ratification debates, opponents of the Constitution pointed to this clause as evidence that the national government had virtually unlimited and undefined powers. In other words, the Anti-Federalists said, “Look, we object to this Constitution because it is going to lead to the very kind of powers that Professor Paulsen told you the federal government has.”¹¹ In the New

8. See, e.g., *United States v. Wrightwood Dairy*, 315 U.S. 110, 121 (1942) (“We conclude that the national power to regulate the price of milk moving interstate . . . extends to such control over intrastate transactions . . . as is *necessary and appropriate* to make the regulations of the interstate commerce effective.” (emphasis added)).

9. See Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL’Y 991, 995–96 (2008).

10. See *Gonzales v. Raich*, 545 U.S. 1, 34–35 (2005) (Scalia, J., concurring) (“Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.”).

11. See Paulsen, *supra* note 9, at 992–93.

York ratifying convention, for example, Anti-Federalist John Williams contended that “[i]t is perhaps utterly impossible fully to define this power.”¹² For this reason, “[w]hatever they judge necessary for the proper administration of the powers lodged in them, they may execute without any check or impediment.”¹³

Federalist supporters of the Constitution repeatedly denied the charge that all discretion over the scope of its own powers effectively resided in Congress. They insisted that the Necessary and Proper Clause was not an additional freestanding grant of power but merely made explicit what was already implicit in the grant of each enumerated power. As explained by George Nicholas in the Virginia ratifying convention, “the Constitution had enumerated all the powers which the general government should have, but did not say how they were to be exercised. It therefore, in this clause, tells how they shall be exercised.”¹⁴ Like other Federalists, Nicholas denied that this clause gave “any new power [to Congress].”¹⁵ “Suppose,” he reasoned,

it had been inserted, at the end of every power, that they should have power to make laws to carry that power into execution; would this have increased their powers? If, therefore, it could not have increased their powers, if placed at the end of each power, it cannot increase them at the end of all.¹⁶

In short, “[the C]ause only enables [the Congress] to carry into execution the powers given to them. It gives them no additional power.”¹⁷

James Madison, in Virginia, added his voice to the chorus, when he said, “the sweeping clause . . . only extended to the enumerated powers. Should Congress attempt to extend it to any power not enumerated, it would not be warranted by the clause.”¹⁸ Also in Virginia, Edmund Pendleton, President of the

12. 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 331 (Jonathan Elliot ed., Ayer Co. Publishers 1987) (1836).

13. *Id.* at 338.

14. 3 DEBATES, *supra* note 12, at 245.

15. *Id.* at 245–46.

16. *Id.*

17. *Id.* at 246.

18. *Id.* at 455.

Convention, insisted that this clause did not go “a single step beyond the delegated powers.”¹⁹ If Congress were

about to pass a law in consequence of this clause, they must pursue some of the delegated powers, but can by no means depart from them or arrogate any new powers; for the plain language of the clause is, to give them power to pass laws in order to give effect to the delegated powers.²⁰

The same point was made in the North Carolina convention. In Pennsylvania, James Wilson explained that this clause “is saying no more than that the powers we have already particularly given, shall be effectually carried into execution.”²¹ And Thomas McKean insisted that “it gives to Congress no further powers than those already enumerated.”²²

So here, then, is the likely explanation for the lack of debate surrounding the Clause at the Philadelphia Convention. If the power to make law was already thought to be implicit in the enumerated power scheme, it is not surprising that the Clause would provoke no discussion at the Convention. Unfortunately, most interpreters today, including many originalists, go no further in their investigation of the original meaning of the Necessary and Proper Clause than Chief Justice Marshall’s opinion in *McCulloch v. Maryland*,²³ written in 1819, some thirty years after the ratification of the Constitution.

In *McCulloch*, Marshall upheld the constitutionality of the Second National Bank of the United States.²⁴ The bill establishing the second Bank had been signed into law by President James Madison, a man who had, as a Representative in the First Congress, strongly objected to the constitutionality of the First National Bank on the ground that it exceeded the enumerated powers of Congress. Here is what Madison said in his speech to Congress:

Whatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress. Its meaning must, according to the natural and obvious force of the terms and the contexts, be limited to the means *necessary* to the *end*, and *incident* to the *nature* of the specified powers.

19. *Id.* at 441.

20. *Id.*

21. 2 DEBATES, *supra* note 12, at 468.

22. *Id.* at 537.

23. 17 U.S. (4 Wheat.) 316 (1819).

24. *Id.*

The clause is in fact merely declaratory of what would have resulted by unavoidable implication, as the appropriate, and as it were, technical means of executing those powers. In this sense it had been explained by the friends of the constitution, and ratified by the state conventions. The essential characteristics of the government, as composed of limited and enumerated powers, would be destroyed: If instead of direct and incidental means, any means could be used, which in the language of the preamble to the bill, 'might be conceived to be conducive to the successful conducting of the finances; or might be *conceived to tend to give facility* to the obtaining of loans.'²⁵

He then went on to say:

Mark the reasoning on which the validity of the bill depends. To borrow money is made the *end* and the accumulation of capitals, *implied* as the *means*. The accumulation of capitals is then the *end*, and a bank *implied* as the *means*. The bank is then the *end*, and a charter of incorporation, a monopoly, capital punishments, &c. implied as the *means*. If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.²⁶

This was Representative Madison's reason for opposing the first Bank. Yet as President, decades later, he signed the bill approving the second Bank. Did this mean he had abandoned his earlier restrictive reading of "necessary and proper"?

Although Madison eventually came to be persuaded, by practice, that a national bank is incident enough to the enumerated powers to be constitutional, he nevertheless strongly objected to the opinion in *McCulloch*, in which Chief Justice Marshall famously equated the term "necessary" with mere convenience:

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.²⁷

Madison both acknowledged the supposedly modern insight that the national economy is interconnected and rejected this in-

25. JAMES MADISON, WRITINGS 484–85 (Jack N. Rakove ed., 1999).

26. *Id.* at 486.

27. *Id.* at 734.

terconnection as a basis for a latitudinarian interpretation of “necessary”:

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.²⁸

He then concluded with his real objection: “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 for carrying into effect some specified Power?”²⁹

And it was not just Madison who was displeased with *McCulloch*. The popular outcry against *McCulloch* was so great that Chief Justice Marshall himself felt moved to defend his decision in an essay he published anonymously under the name “A Friend of the Constitution.”³⁰ Imagine if former Chief Justice Rehnquist had been so vilified for a judicial opinion he had written that he published anonymous op-eds in the *Wall Street Journal* defending the opinion. But that is exactly what John Marshall did.

Here is a part of what Chief Justice Marshall said in defense of *McCulloch*, which shows that even he denied that *McCulloch* meant what it later came to be interpreted to mean:

In no single instance does the Court admit the unlimited power of congress to adopt any measure 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 also 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.”³¹

That is Chief Justice Marshall, not me, interpreting *McCulloch v. Maryland*.

28. *Id.*

29. *Id.*

30. *Essays from the Alexandria Gazette: John Marshall, “A Friend of the Constitution,”* 21 STAN. L. REV. 456 (1969).

31. *Id.* at 478–79.

So, who was right? Madison or Marshall? In an article on the original meaning of the Necessary and Proper Clause,³² I contended that the difference between Democratic-Republicans, such as Madison and Jefferson, and Federalists, such as Hamilton and Marshall, was far less significant than it appears today. On the one hand, both sides insisted that a law be “plainly adapted” to an enumerated power, or what we today call a degree of “means-ends fit.” On the other hand, both sides rejected the idea that “necessary” means “indispensably requisite,” the meaning urged upon the *McCulloch* Court by the State of Maryland and properly rejected by Chief Justice Marshall. Madison had much earlier rejected “indispensably requisite” as the proper interpretation of “necessary” on the ground that it would make federal governance nearly impossible.

The primary problem with reading *McCulloch* and other Marshall opinions, like *Gibbons v. Ogden*,³³ is seeing past the gloss placed on these decisions by defenders of the Supreme Court’s expansive interpretation of national powers to uphold President Roosevelt’s New Deal program. The loose reading of these Marshall Court opinions was advanced so the New Deal Court’s jurisprudence could be characterized as a “restoration” of original meaning, rather than the constitutional revolution that even most progressive scholars today would readily admit it was. The challenge for those who accept originalism is to distinguish between the Madisonian and the Rooseveltian interpretations of federal power, especially when the government invokes the Necessary and Proper Clause.

Consider the medical cannabis case of *Gonzalez v. Raich*,³⁴ which I argued in the Supreme Court. In his dissenting opinion, Justice Thomas adopted a Madisonian interpretation:

The Necessary and Proper Clause is not a warrant to Congress to enact any law that bears some conceivable connection to the exercise of an enumerated power. Nor is it, however, a command to Congress to enact only laws which are absolutely indispensable to the exercise of an enumerated power.

32. Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. LAW 183 (2003).

33. 22 U.S. (9 Wheat.) 1 (1824).

34. 545 U.S. 1 (2005).

... To act under the Necessary and Proper Clause, then, Congress must select a means that is 'appropriate' and 'plainly adapted' to executing an enumerated power; and the means cannot be otherwise prohibited by the Constitution. The means cannot be inconsistent 'with the letter and spirit of the [C]onstitution.'³⁵

....

In sum, neither in enacting the [Controlled Substance Act] nor in defending its application to respondents has the Government offered any obvious reason why banning medical marijuana use is necessary to stem the tide of interstate drug trafficking. Congress' goal of curtailing the interstate drug trade would not plainly be thwarted if it could not apply the CSA to patients like Monson and Raich. That is, unless Congress' aim is really to exercise police power of the sort reserved to the states in order to eliminate even the intrastate possession and use of marijuana.³⁶

I think we all know that is exactly what Congress was trying to accomplish; it was not trying just to limit interstate commerce. It was trying to use its power over interstate commerce to exert a police power over purely local conduct of a sort that is reserved to the States. In short, the Congress is trying to override the inherent constraints on its powers that result from a federal system of government. As Justice Thomas wrote:

Even assuming the CSA's ban on locally cultivated and consumed marijuana is "necessary," that does not mean it is also "proper."

....

Even if Congress may regulate purely intrastate activity when essential to exercising some enumerated power, . . . [it] may not use its incidental authority to subvert basic principles of federalism and dual sovereignty.³⁷

In *Raich*, Justice Thomas did not deny that the enumerated powers of Congress are supreme where they are inconsistent with the exercise of the state police power. Rather, he claimed that, under the Necessary and Proper Clause, it is an improper extension of those enumerated powers to *imply* other powers that

35. *Id.* at 59–60.

36. *Id.* at 64 (Thomas, J., dissenting).

37. *Id.* at 64–65.

interfere with the fundamental principles of federalism and dual sovereignty. In *Raich*, the Court upheld an implied power to reach wholly intrastate, noneconomic activity even when it severely interfered with the police power of states to promote the health of its citizens (and also to regulate the practice of medicine).

Now, contrast Justice Thomas's dissent with Justice Scalia's concurring opinion in *Raich*, in which he adopted a Rooseveltian interpretation of the Necessary and Proper Clause:

Lopez and *Morrison* affirm that Congress may not regulate "purely local" activities within the States based solely on the attenuated effect that such activity may have in the interstate market. But those decisions do not declare noneconomic intrastate activities to be categorically beyond the reach of the Federal Government. Neither case involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation To dismiss this distinction as "superficial and formalistic" is to misunderstand the nature of the Necessary and Proper Clause, which empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation.³⁸

What renders Justice Scalia's interpretation of the Necessary and Proper Clause "Rooseveltian" is his extreme deference to the decision of Congress as to whether it really is essential to a larger regulatory scheme for the legislation it passes to reach wholly intrastate, noneconomic activities that, traditionally, have been included within the police power of individual states. Like Madison, the dissenters in *Raich* required some showing of a means-ends fit. Like the New Deal Court, Justice Scalia left the question of means-ends fit entirely up to Congress. And also like the New Deal Court, he denied that this interference with the traditional police powers of states is an improper construction of implied federal power.

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The remarkably successful coalition that is the Federalist Society stands today at a crossroad. In one direction is a continuing Madisonian commitment to originalism, according to which the powers of the national government are limited, and these textual limits are enforceable by courts. Just as the courts are restrained from changing the meaning of the Constitution, so too is Congress.

38. *Id.* at 38–39 (Scalia, J., concurring in the judgment) (citations omitted).

In the other direction is a Rooseveltian commitment to judicial restraint *above all else*, a restraint that is justified by distorting original meaning, by creating some insurmountable burden of proof before legislation can be overturned, or by claiming that it is too late to revisit New Deal era “super-precedents.”³⁹ Take your pick. Perhaps a jurisprudence of complete and total judicial restraint, paired with unlimited national power, provides a better world than a jurisprudence of a written constitution with limited and enumerated national powers. But if that is the road that the members of the Federalist Society choose to take, then I suggest we change the silhouette in our banner from that of James Madison to that of FDR.

39. See Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Super-Precedent: A Reply to Farber and Gerhard*, 90 MINN. L. REV. 1232 (2006).