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An Error and an Evil: The Strange History of Implied Commerce Powers

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AN ERROR AND AN EVIL: THE STRANGE HISTORY OF IMPLIED COMMERCE POWERS

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An underspecified doctrine of implied "reserved powers of the states" has been deployed through U.S. constitutional history to prevent the full application of McCulloch v. Maryland*'s concept of implied powers to the enumerated powers—in particular, the Commerce Clause. The primary rationales for these implied limitations on implied federal powers stem from two eighteenth and nineteenth century elements of American constitutionalism. First, the inability of pre-twentieth century judges to conceptualize a workable theory of concurrent federal and state power made it seem constitutionally necessary to limit the Commerce Clause and to refrain from applying the concept of implied powers to the Commerce Clause in order to preserve a substantial scope for state regulation. Second, because slavery so obviously fed into interstate and international trade, a robust application of implied powers to the Commerce Clause could naturally lead to a congressional power to "interfere with" the institution of slavery within the states. Antebellum judges and political leaders saw the implied limitation of such a power as an inescapable element of the constitutional bargain.*

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These twin supports of the implied limitation concept have been eliminated from American constitutional law, yet the concept persists, with potentially significant consequences. In National Federation of Independent Business v. Sebelius*, the 2012 Affordable Care Act case, for example, five Justices maintained that there is an implied limitation against regulating economic "inactivity." The justification offered for this is an abstract concept of federalism that is largely detached from the once powerful, but now defunct, principles of constitutional politics that sustained it.*

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> JUSTICE BREYER: So I'm focusing just on the Commerce Clause . . . [a]nd I look back into history, and I think if we look back into history, we see sometimes Congress can create commerce out of nothing. That's the national bank, which was created out of nothing to create other commerce out of nothing. I look back into history, and I see it seems pretty clear that if there are substantial effects on interstate commerce, Congress can act . . . .
>
> MR. CLEMENT: Well, Justice Breyer, let me start at the beginning of your question with *McCulloch*. *McCulloch* was not a commerce power case.[1]

> In exercising the authority conferred by [the Commerce Clause] of the Constitution, Congress is powerless to regulate anything which is not commerce . . . .
>
> —United States Supreme Court in *Carter v Carter Coal Co.*[2]

1. Transcript of Oral Argument at 62, 64, Dep't of Health & Human Servs. v. Florida, 567 U.S. 519 (2012) (No. 11-398).

2. 298 U.S. 238, 297 (1936).

INTRODUCTION

Much of American constitutional history is a 230-year debate about the scope of federal power to regulate interstate commerce. According to the conventional understanding, the Supreme Court narrowly defined interstate commerce to mean trade—buying and selling in interstate markets—plus interstate commercial travel and shipping. Then, starting in the year of our Constitution's sesquicentennial, 1937, the Court shifted ground and reinterpreted interstate commerce to mean, essentially, the U.S. economy.[3] This so-called "New Deal Settlement" was completed in 1942, in the Court's famous *Wickard v. Filburn*[4] decision, which redefined the commerce power by authorizing Congress to regulate intrastate activities that substantially affect interstate commerce.[5] Then, beginning with *United States v. Lopez*[6] in 1995, the Rehnquist and Roberts Courts launched a "federalism revival" that clarified the "substantial effects test"—or "trim[med]" it "at its edges"[7]—to refer to the regulation of *economic* matters, which must be *activities* rather than (somewhat absurdly) "inactivities."[8] Although the so-called "New Deal Settlement" and its broad interpretation of the commerce power remains largely intact, the five conservative Justices in *National Federation of Independent Business v. Sebelius*[9] (*NFIB*) in 2012 seemed to turn the clock back to at least 1938, if not 1936, when ruling that free-riding in the national health care market was not reachable as interstate commerce regulation.[10]

That holding strangely ignored *McCulloch v. Maryland*,[11] the foundational case to all participants in federalism debates since the early 1900s. Chief Justice Roberts, for example, purported to rely on *McCulloch* in providing the decisive fifth vote for the proposition that requiring uninsured people to buy health insurance violated the limits on the commerce power.[12] Yet *McCulloch*'s analysis of implied powers

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3. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).
4. 317 U.S. 111 (1942).
5. *Id.* at 124–25.
6. 514 U.S. 549 (1995).
7. Egelhoff v. Egelhoff, 532 U.S. 141, 160 (2001) (Breyer, J., dissenting).
8. *Lopez*, 514 U.S. at 558–59; *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 556–57 (2012).
9. 567 U.S. 519 (2012).
10. *Id.* at 588 (noting that the individual mandate cannot be upheld under the Commerce Clause); *id.* at 657 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).
11. 17 U.S. (4 Wheat.) 316 (1819).
12. *NFIB*, 567 U.S. at 560.

gives Congress broad authority to do things that are not *definitionally* authorized by the enumerated powers, so long as they are "conducive" or "plainly adapted" to the exercise of an enumerated power. Indeed, less than a decade before *NFIB*, in *Gonzales v. Raich*,[13] Justice Scalia made this very point: pursuant to *McCulloch*, Congress can regulate things that are neither *interstate* nor *commerce* in order to make the regulation of an interstate market more effective.[14] Scalia argued that criminalizing simple possession of marijuana was in that way a "necessary and proper" element of Congress's nationwide prohibition of a market for marijuana.[15] None of the other Justices bought into this analysis in *Raich*, and even Scalia refused to recognize his own argument seven years later in *NFIB*.[16]

These puzzling facts point to a larger mystery at the heart of American federalism. If *McCulloch* provides the definitive understanding of the Necessary and Proper Clause, the application of its doctrine to the Commerce Clause should have produced a set of constitutional understandings dramatically different from those that were maintained by the Supreme Court for the first 150 years of the Republic, and those that in vestigial form re-emerged in *NFIB*. An implied power, according to the prevailing understanding of *McCulloch*, is a power to regulate things that are not in themselves within the definition of an enumerated power, but whose regulation would be useful to implementing that enumerated power.[17] The range of things that fall within the *definition* of a concept is akin to the logical entailments of that concept. It is much narrower than the range of things that support or sustain that concept in a practical way. Implied powers partake of the latter relationship,

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13. 545 U.S. 1 (2005).

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

15. *Id.* at 34–35.

16. *Id.* at 33. *See generally NFIB*, 567 U.S. at 646–47 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (failing to frame the Necessary and Proper Clause as an issue in the case).

17. A significant and growing literature argues that the federal government is recognized to have important powers that are neither enumerated nor means to carry out those that are. *See, e.g.*, Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 CONST. COMMENT. 25 (2006); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045 (2014); Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576 (2014) [hereinafter Primus, *The Limits of Enumeration*]; David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573 (2017) [hereinafter Schwartz, *A Question Perpetually Arising*]. Arguably, *McCulloch* is best read as supporting this idea. *See* John Mikhail, McCulloch's *Strategic Ambiguity* (forthcoming 2019) (on file with author). That point, though important, is tangential to my argument here.

having the much broader and looser relatedness suggested by Marshall's terminology ("conducive," "convenient," "plainly adapted").[18]

During the Antebellum Period, applying *McCulloch* to the Commerce Clause would have meant an implied power to build and regulate interstate roads and to regulate or even abolish slave labor. In the post-Reconstruction era, implied commerce powers under *McCulloch* should have made clear that Congress had the power to regulate racially discriminatory intrastate economic transactions. And in the *Lochner*/early New Deal period, an acknowledgement of implied commerce powers should have recognized Congress's authority to regulate labor, manufacturing, mining, and agriculture. Yet all these claims of power were highly contested by constitutional interpreters and were blocked by the Supreme Court before 1937.

The Court's stubborn refusal to apply *McCulloch*'s conception of implied powers to the Commerce Clause has largely escaped notice, and it arguably made a difference in the outcome of *NFIB*. This Article argues that the Court's refusal stems from two eighteenth and nineteenth century elements of American constitutional thought that were eliminated long ago. One element was the inability of pre-twentieth century judges to conceptualize a broad and workable theory of concurrent federal and state power. To the nineteenth-century legal mind, most federal and state powers were to some degree, mutually exclusive. In a commercial nation, in which most human activities eventually channeled into the stream of commerce, it seemed constitutionally necessary to many jurists to limit the Commerce Clause and implied powers—and especially to refrain from applying the concept of implied powers to the Commerce Clause—in order to preserve a substantial scope for state regulation.

The other element was slavery. The most salient factor limiting implied commerce powers in the Antebellum Period was the belief that states had to maintain control over the legality of slavery within their borders. Because slavery was so obviously a commercial system that fed into interstate and international trade, a robust application of *McCulloch*'s doctrine of implied powers to the Commerce Clause would naturally lead to a congressional power to "interfere with" the institution of slavery within the states. Mainstream constitutional interpreters viewed the implied limitation of such a power as an inescapable element of the constitutional bargain by antebellum judges and political

18. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415, 421–22 (1819).

leaders.[19] Notwithstanding the Civil War and the Reconstruction amendments ending slavery and authorizing federal protection of freed slaves, the Court by the end of the nineteenth century, reverted to an implied limitation against federal control over race relations as it ratified southern states' "home rule" and Jim Crow regimes.[20]

These twin normative justifications for implied limitations on implied commerce powers fed into a robust doctrine of reserved state powers. Although mentioned in the Tenth Amendment, the idea of reserved sovereign powers of the states was itself an implication rather than an "enumeration" in our constitutional order, because its content is unspecified. What powers are reserved to the states? And what does "reserved" even mean in this context? Nineteenth century jurisprudence developed the idea that the power to regulate a specific, identifiable set of things was reserved to the states, and those things were identifiable by their connection to slavery: labor and the production of goods for trade (i.e., manufacturing, mining, and agriculture) made up the content of reserved powers. The meaning of "reserved to the states" meant off limits to federal regulation, and in particular, immunity from federal implied commerce regulation.

By the end of the 1960s, however, both of these twin supports of the implied limitation on implied commerce powers ceased to exist in American constitutional law. Acceptance of concurrent, overlapping regulatory powers of federal and state governments, coordinated by preemption doctrine, had become the prevailing constitutional idea, as had a federal commerce power to regulate intrastate race relations.

The idea that "reserved state powers" could defeat an assertion of implied commerce powers was definitively rejected, as expressed in the Court's famous New Deal statement in *United States v. Darby Lumber Co.*[21] There the Court said that the Tenth Amendment "states but a truism that all is retained which has not been surrendered."[22] Under this conception, reserved state powers consist of whatever is left after application of federal preemption doctrine. Yet, the concept of reserved state powers as something capable of defeating claims of implied commerce powers has made a partial comeback. The *Lopez-*

19. *See infra* Part IV.

20. *See* Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896) (upholding racial segregation laws for public facilities under the separate but equal doctrine), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

21. 312 U.S. 100 (1941).

22. *Id.* at 124.

Morrison-NFIB line of cases stands in tension with *Darby*'s "truism" principle by contending, in essence, that there must be some matters that the federal government cannot regulate, and thus, by implication, that there must be some content to the reserved powers of the states after all. In reaching this conclusion, the Rehnquist and Roberts Courts' conservatives claimed to rely on constitutional pedigree: "the principle that '[t]he Constitution created a Federal Government of limited powers,' while reserving a generalized police power to the States, is deeply ingrained in our constitutional history."[23] Yet that history, as this Article argues, is not one with which the Court should want to claim a continuity. It is a history built upon a conceptual error and a constitutional evil. The conceptual error is the nineteenth century Court's inability to conceive of a workable doctrine of concurrent power. The constitutional evil is the constitutional order's accommodation with slavery, and later Jim Crow, by leaving individual states to decide for themselves how best to regulate race relations.

Part I of this Article lays out the doctrinal puzzle. While paying deference to the idea that *McCulloch* provides the authoritative statement of the implied powers of Congress, the Court nevertheless continues to decide cases as though *McCulloch* did not apply to the Commerce Clause. Part II begins the historical inquiry into this puzzle. It shows how the standard federalism doctrines of limited enumerated powers and reserved state powers were historically connected to the constitutional error and evil: the failure to conceptualize concurrent federal-state powers and the accommodation of slavery.

Part III turns to the Marshall Court's classic statements of congressional power, *McCulloch* and *Gibbons v. Ogden*. This Part argues that these opinions themselves shied away from acknowledging implied commerce powers, largely because the error of concurrent powers and the evil of slavery accommodation shaped the Court's thinking. Part IV demonstrates that these jurisprudential concerns became more explicit in the Taney Court, which silently overruled *McCulloch* in order to resist federal commerce preemption and promote a vision of reserved state powers primarily intended to protect states' rights to maintain slavery. Part V carries the narrative from the *Lochner* era to the present. While the New Deal Court briefly embraced the idea of implied commerce powers, its more recent jurisprudence has partially revived the notion that implied commerce powers can be

23. United States v. Morrison, 529 U.S. 598, 618 n.8 (2000) (alteration in original).

defeated by an inchoate version of reserved state powers, in the form of a rule that there "must be something" that Congress cannot regulate.

This Article makes an important distinction in terminology by using the term "Commerce Clause" to refer to the language of the *enumerated power* to regulate commerce, while using the term "commerce power" to refer more broadly to express and implied commerce powers: whatever Congress can regulate under the Commerce Clause, including those implied powers that are "conducive" or "plainly adapted" to regulating commerce. Though the terms "Commerce Clause" and "commerce power" are normally used interchangeably in constitutional discourse, this is part of the problem: a tendency to gloss over the notion of powers implied under the Commerce Clause.

I. THE LIMITS OF IMPLIED COMMERCE POWERS

A. A Doctrinal Puzzle

In 2012, in *NFIB*, the Supreme Court came within a hair's breadth of striking down the Affordable Care Act, the most sweeping national health care legislation in nearly fifty years, and the painstakingly negotiated product of decades of often futile legislative effort.[24] The five conservative Justices concluded that Congress's commerce power does not include the power to regulate economic "inactivity" and, therefore, Congress lacked authority to mandate individuals purchase health insurance.[25] This health insurance purchase "individual mandate," widely recognized as the keystone to the entire statute, survived this constitutional challenge only because Chief Justice Roberts decided that it could be upheld as a tax, under Congress's taxing power.[26]

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24. Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, with a Flourish*, N.Y. TIMES (Mar. 23, 2010), http://www.nytimes.com/2010/03/24/health/policy/24health.html; *A History of Overhauling Health Care*, N.Y. TIMES, https://archive.nytimes.com/www.nytimes.com/interactive/2009/07/19/us/politics/20090717_HEALTH_TIMELINE.html (last visited Feb. 5, 2019).

25. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 556–67 (2012) (permitting Congress to anticipate future activity just to regulate it is not supported by Commerce Clause precedent); *see also id.* at 658 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (allowing Congress to regulate inactivity as commerce is to recognize an unlimited commerce power).

26. *Id.* at 588. The distinction is far from academic. Just as the taxing power rationale gave supporters of the law a second bite at the apple of constitutionality before the Court in 2012, it gave a Republican-controlled Congress a second bite at repealing this provision in 2017. *See* Juliet Eilperin & Carolyn Y. Johnson, *What's Next for the Affordable Care Act Now that Repeal has Failed?*, WASH. POST. (July 28, 2017),

Why couldn't Congress regulate a particular form of "economic inactivity" that was essential to its broad regulation of the health care market? The answer can't be simply what the conservative Justices told us: that "inactivity" is not "commerce."[27] After all, the concept of implied powers, established in *McCulloch*, tells us that Congress may assert a power not expressly granted—here, regulation of "inactivity"—that is convenient, plainly adapted, conducive, etc., to executing its enumerated powers (here, regulation of interstate commerce).[28] Simply holding that "inactivity" is not "commerce" merely tells us that regulating inactivity is not an exercise of the express power of regulating commerce. But implied powers do not depend on *definitions* of express powers. Rather, they flow from the practical relationship between the regulatory object and the express power.

Ironically, Justice Scalia made this very point a few years before *NFIB*, in his concurrence in *Gonzales v. Raich*.[29] The federal Controlled Substances Act[30] criminalizes, among many other things, the simple possession of marijuana.[31] If that is an "economic activity" at all, Scalia observed, it is certainly not an interstate one. Nor, as Scalia implied, was the home growing of a few marijuana plants for personal consumption.[32] Yet, the federal act could outlaw these things because:

> [W]here Congress has the authority to enact a regulation of interstate commerce, "it possesses every power needed to make that regulation effective." Although this power "to make . . . regulation effective" commonly overlaps with the authority to regulate economic activities that substantially affect interstate commerce, and may in some cases have been confused with that authority, the two are distinct. The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself "substantially affect" interstate commerce. Moreover, as [*Lopez*] suggests, Congress may regulate even noneconomic local activity if that regulation is a

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https://www.washingtonpost.com/national/health-science/whats-next-for-the-affordable-care-act-now-that-repeal-has-failed/2017/07/28/e209c7ce-70b5-11e7-9eac-d56bd5568db8_story.

27. *NFIB*, 567 U.S. at 658 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (explaining that "inactivity" cannot be regulated under the Commerce Clause because "[i]f all inactivity affecting commerce is commerce, commerce is everything").

28. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 418, 421 (1819).

29. Gonzales v. Raich, 545 U.S. 1, 38 (2005) (Scalia, J., concurring in the judgment).

30. 21 U.S.C. §§ 801–971 (2012).

31. *Id.* § 844(a), (c).

32. *Raich*, 545 U.S. at 40 (Scalia, J., concurring in the judgment).

> necessary part of a more general regulation of interstate commerce. The relevant question is simply whether the means chosen are "reasonably adapted" to the attainment of a legitimate end under the commerce power . . . .[33]
>
> [T]he Necessary and Proper Clause . . . empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation. *See McCulloch v. Maryland*, 4 Wheat. 316, 421–22 (1819).[34]

In sum, Congress could outlaw simple possession, home growing, and consumption of marijuana not because they were "economic activities," and therefore within the definition of commerce—note that Scalia would ridicule the idea that consumption of broccoli was "economic activity" in the *NFIB* case.[35] Rather, these things fell within Congress's implied commerce powers under *McCulloch* because their prohibition was plainly adapted to the regulation of an interstate black market in marijuana.

Chief Justice Roberts and the *NFIB* joint dissenters recognized the practical necessity of the individual mandate to regulating the markets for health care services; indeed, the joint dissenters argued that the entire statute must be struck down because it could not work without the individual mandate.[36] The joint dissenters, including Scalia himself, simply ignored Scalia's point in *Raich*. Roberts, for his part, tried to finesse this point by arguing, circularly, that however "necessary" the individual mandate was, it was not "proper" *because it was not within the definition of commerce*! Roberts argued, "[t]he individual mandate . . . vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power."[37] That is to say, the mandate impermissibly requires a purchase of health insurance in order to regulate it, as Roberts saw it. But the market for health services and insurance is undoubtedly commerce, and for Roberts to say that commercial activity is a "necessary predicate" for commerce power regulation is to limit commerce regulation to its definition and exclude implied powers. The five-Justice majority essentially argued that the *definition* of commerce, despite its breadth, is not broad enough to reach

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33. *Id.* at 36–37.

34. *Id.* at 39.

35. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 660 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting); Transcript of Oral Argument at 13–14, *id.* at 519, (No. 11-398) (quoting Justice Scalia's quip "therefore, you can make people buy broccoli").

36. *NFIB*, 567 U.S. at 691 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

37. *Id.*

inactivity.[38] The concept of implied commerce powers was given short shrift—or entirely ignored. The implication is that, perhaps because of its breadth, the Commerce Clause must be interpreted as though implied powers did not flow from it.

Thus, five Justices agreed that the doctrine of implied powers should not be applied to the Commerce Clause in *NFIB*. And in *Raich*, eight Justices ignored *McCulloch*, appearing to believe that the concept of implied commerce powers was irrelevant to their analysis.

It is easy to argue that the Commerce Clause is in some senses unique among the enumerated powers. It is now, hands down, the broadest regulatory power Congress has, and it has undoubtedly undergone the most transformative expansion in how our constitutional order interprets it. These features of the Commerce Clause are well known. What has flown beneath the radar is a kind of "Commerce Clause exceptionalism" with respect to *McCulloch* and implied powers. Those who fail or refuse to acknowledge implied commerce powers, such as the Justices in cases like *Raich* and *NFIB*, *don't explain their failure*.

B. The Return of Reserved State Powers

According to the Tenth Amendment, the reserved powers of the states are those powers "not delegated to the United States." Well-established constitutional doctrine holds that the "delegat[ion] to the United States" includes both enumerated and implied powers. "Reserved to the states" implies powers that are withheld from the United States. In an important sense, then, reserved state powers negatively express the limits on delegated, and particularly on implied, federal powers. As will be seen, the most historically important application of the concept of reserved state powers for more than a century was to impose implied limits on implied commerce powers.

Modern doctrine holds that the Tenth Amendment "states but a truism that all is retained which has not been surrendered."[39] This important statement means that reserved state powers do not have definite content, but rather represent an equation that states retain a residuum of powers determined to be "not delegated" to the United States. Given that implied powers are not a fixed quantum or fixed target, but arise due to circumstantial adaptations to regulatory

38. *See, e.g.*, *id.* at 658.
39. United States v. Darby, 312 U.S. 100, 124 (1941).

problems, reserved state powers also cannot be fixed as a pre-defined set of powers. *Darby*'s "truism" principle also means that reserved state powers cannot act as a logically independent limit on implied powers. Whether a claimed federal regulatory power can be implied depends on its being "necessary and proper" to executing an enumerated power, not on its avoidance of infringement on a purportedly reserved state power.

While claiming to adhere to *Darby*'s truism principle, the Rehnquist and Roberts Courts have walked it back somewhat. In *Lopez* and *Morrison*, the Court rejected assertions of federal commerce power largely on the contention that "the Constitution's enumeration of powers" requires the Court to "presuppose[] something not enumerated"—something consisting of the reserved powers of the states.[40] This strikingly context-distorting quotation from *Gibbons v. Ogden*[41] assumes a constitutional theory in which "there must be something" that Congress cannot regulate.[42] That something emerges only from time to time and circumstantially, but to the Rehnquist and Roberts Courts, its existence is needed to prove the limiting effect of the enumerated powers.[43]

Rather than acknowledging that "reserved state powers" are merely a truism, *Lopez* regresses to the premise that the reserved state powers have content. To be sure, that content is a sort of constitutional dark matter that is known to exist without being clearly identified. Richard Primus has referred to this premise as "the internal-limits canon," the idea that the federal government is denied a general police power.[44] Rather than relying on Primus's label, which gives the doctrine more of an air of dignity than it deserves, this Article refers to it as the "mustbesomething" rule.

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40. United States v. Morrison, 529 U.S. 598, 615, 616 n.7 (2000); United States v. Lopez, 514 U.S. 549, 567 (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824)).

41. 22 U.S. (9 Wheat.) 1 (1824).

42. *Id.* at 195. As Richard Primus explains, the quotation referred only to the enumeration in the Commerce Clause itself, not to the entirety of the Constitution's enumerated powers. Moreover, Chief Justice Marshall's point was not to stress limits on federal power, but to indicate that the delegation of a federal commerce power did not entirely wipe out the states' power to regulate their "purely internal" commerce. Richard Primus, *The* Gibbons *Fallacy*, 19 U. PA. J. CONST. L. 567, 586–87, 615 (2017).

43. Schwartz, *A Question Perpetually Arising*, *supra* note 17, at 587–90.

44. Primus, *The Limits of Enumeration*, *supra* note 17, at 578; *see also* Andrew Coan, *Implementing Enumeration*, 57 WM. & MARY L. REV. 1985, 1988 (2016).

II. RECAPTURING NINETEENTH CENTURY FEDERALISM

The reluctance to apply *McCulloch*'s doctrine of implied powers to the Commerce Clause did not crop up for the first time in the Rehnquist or Roberts Courts. Indeed, it is traceable to the Marshall Court, which itself went to some lengths to avoid embracing implied commerce powers—even in *McCulloch*. To see this, however, requires taking a detailed look at the historical context for antebellum constitutional opinions. The context involves the interaction of constitutional *law* and constitutional *politics*. The latter are primarily the debates over policies that tend to reflect the more fundamental differences over the nature of government and to settle into political party differences, though they are typically framed as arguments over constitutional principles.[45] But it need hardly be said that constitutional *law* and *politics* heavily influence one another, and that the two tend to converge around the articulation of constitutional principles.

A. Constitutional Law

The antebellum Supreme Court was repeatedly faced with two federalism questions: How extensive were the powers delegated to the national government, and what were the implications for state regulatory authority in fields overlapping with these delegations? These questions gave rise to two doctrinal problems: implied powers and concurrent powers. Implied powers created an interpretive fog around the edges of the enumerated powers, making their extent uncertain. "Concurrent powers" is my shorthand for the complex question: Does the Constitution's delegation of power to the federal government, or the exercise of a delegated power by legislation, preclude state legislation over the same objects? These two intertwined problems potentially arise with regard to any enumerated power, but they were particularly vexing in connection the Commerce Clause, that broadest of enumerated legislative powers. The problems were never satisfactorily solved by nineteenth century jurists.

1. Separate spheres: exclusive versus concurrent powers

The Antifederalists, who opposed ratification of the Constitution, and later the Jeffersonian Republicans, who dominated politics in the two decades following Jefferson's election to the presidency in 1800,

45. 1 HOWARD GILLMAN ET AL., AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT xxii (2d ed. 2013).

frequently expressed anxiety about expansive federal power leading inexorably to a "consolidated government."[46] By this, they meant a national government that exercised all legislative power. Modern constitutional scholars tend to understand this fear partially and ahistorically by viewing it through the prism of laissez faire and libertarian ideologies that emerged at the end of the nineteenth century.[47] Viewed that way, the fears of consolidated government should present a puzzle because federal regulation was comparatively sparse for much of the nineteenth century. The answer to this puzzle requires recognizing that resistance to expansive interpretations of federal power was motivated in large part, not by opposition to regulation as such, but the opposite.

Many constitutional interpreters feared that grants of power to the general government would be construed as exclusive, and thereby eliminate wide swaths of municipal laws governing health, safety, and commercial life.[48] As legal historian William Novak has shown, antebellum America was not characterized by laissez faire.[49] Notwithstanding the sparseness of federal regulation, American life was subject to dense regulatory regimes at the state and particularly the local level. Antebellum judges were concerned to maintain a "well-regulated society," characterized by dense networks of laws promoting the general welfare and regulating property and conduct.[50] These laws came to be known under the heading of state "police power" or "municipal legislation."[51] Many judges were deeply concerned by arguments that various constitutional grants of federal power excluded states from exercising similar powers, even in its "dormant" state"—that is, even in the absence of federal legislation.[52]

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46. *See, e.g.*, GERALD GUNTHER, JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 141 (1969).

47. *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 10, 20–21 (1993) (emphasizing connections between Jacksonian and later laissez-faire jurisprudence); *see also* William J. Novak, *The Myth of the "Weak" American State*, 113 AM. HIST. REV. 752, 753 (2008) (noting that in the nineteenth century, state legislatures were already heavily regulating the economy).

48. Primus, *The Limits of Enumeration*, *supra* note 17, at 595.

49. Novak, *supra* note 47, at 753.

50. WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 16–17 (1996).

51. *Id.* at 16; New York v. Miln, 36 U.S. (11 Pet.) 102, 139 (1837).

52. *See, e.g.*, Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252 (1829).

The Commerce Clause created the deepest concern. In 1812, the New York Court for the Correction of Errors decided *Livingston v. Van Ingen*,[53] a federal dormant commerce challenge to the Livingston-Fulton steamboat monopoly on the Hudson River that would be invalidated a decade later by the Supreme Court in *Gibbons*. The court upheld the monopoly, and the lead opinion by James Kent explained the rejection of dormant Commerce Clause exclusivity in these terms:

> Our turnpike roads, our toll-bridges, the exclusive grant to run stage waggons [sic], our laws relating to paupers from other states, our *Sunday* laws, our rights of ferriage over navigable rivers and lakes, our auction licenses, our licenses to retail spirituous liquors, the laws to restrain hawkers and pedlars [sic]; what are all these provisions but regulations of internal commerce, affecting as well the intercourse between the citizens of this and other states, as between our own citizens? So we also exercise, to a considerable degree, a concurrent power with congress in the regulation of external commerce. What are our inspection laws relative to the staple commodities of this state, which prohibit the exportation, except upon certain conditions, of flour, of salt provisions, of certain articles of lumber, and of pot and pearl ashes, but regulations of external commerce? Our health and quarantine laws, and the laws prohibiting the importation of slaves are striking examples of the same kind. So the act relative to the poor, which requires all masters of vessels coming from abroad to report and give security to the mayor of *New York*, that the passengers, being aliens, shall not become chargeable as paupers, and in case of default, making even the ship or vessel from which the alien shall be landed liable to seizure, is another and very important regulation affecting foreign commerce.
>
> Are we prepared to say, in the face of all these regulations, which form such a mass of evidence of the uniform construction of our powers, that a special privilege for the exclusive navigation by a steam-boat upon our waters, is void, because it may, by possibility, and in the course of events, interfere with the power granted to congress to regulate commerce? Nothing, in my opinion, would be more preposterous and extravagant. Which of our existing regulations may not equally interfere with the power of congress?[54]

More than a generation later, judicial doctrine had still not alleviated these fears. Justice Catron's concurring opinion in *The License Cases*[55] is illustrative. To hold the federal commerce power to be exclusive, he

53. 9 Johns. 507 (N.Y. 1812).
54. *Id.* at 580.
55. 46 U.S. (5 How.) 504 (1847).

warned, "would overthrow and annul entire codes of State legislation" and "expunge more State laws and city corporate regulations than Congress is likely to make in a century on the same subject."[56]

These fears might seem odd, since modern constitutional lawyers so easily accept the idea that the federal and state governments exercise concurrent powers. Coordination of overlapping federal and state jurisdiction is handled through preemption doctrine, which generally tolerates the simultaneous pursuit of non-conflicting policies by the two levels of government. To be sure, antebellum constitutionalists understood the potential for conflict between federal and state laws—hence, the Supremacy Clause—but this understanding entailed laws having regulatory effects on the same subject but coming from different sources of power. Kent articulated something close to the modern view of concurrent federal and state powers in 1812 in *Livingston*. "It does not follow," he wrote, "that because a given power is granted to congress, the states cannot exercise a similar power."[57] Unless denied powers by the U.S. Constitution in express terms, or by "necessary implication," states "may then go on in the exercise of the power until it comes practically in collision with the actual exercise of some congressional power."[58] In such a case, "the state authority will so far be controlled, but it will still be good in all those respects in which it does not absolutely contravene the provision of the paramount law."[59] But Kent was virtually alone in articulating this concept, and was 100 years ahead of his time. Far more typical was the view expressed by Justice Bushrod Washington, announcing the judgment of the Marshall Court in *Houston v. Moore*:[60] "I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time compatible with each other."[61]

Washington's constitutional mind-set, conceiving federal and state power as separate and non-overlapping spheres, can be seen in the nation's founding documents. The Tenth Amendment seems to assume this view in providing that "[t]he powers . . . reserved to the States" are those "not delegated to the United States by the

56. *Id.* at 607 (Catron, J., concurring).
57. *Livingston*, 9 Johns. at 574 (Kent, J.).
58. *Id.* at 576.
59. *Id.*
60. 18 U.S. (5 Wheat.) 1 (1820).
61. *Id.* at 23.

Constitution." Similarly, the Articles of Confederation declared that "[e]ach state retains . . . every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."[62] The implication that states "surrendered" powers that *were* delegated (or expressly delegated) to the national government was articulated with some frequency by constitutional lawyers and judges.[63] If a grant of power to the general government is a surrender of that power formerly held by the states, then it would be difficult to conceive how both governments could exercise it. Thus, nineteenth century constitutionalists widely believed that federal and state legislative powers were confined to "separate spheres" that were mutually exclusive.[64] The Constitution's grant of a power to the federal government created a strong presumption that states were precluded from exercising that same power concurrently.

This view of things meant that expansive interpretations of federal power could prove highly disruptive to the well-ordered society by replacing the dense fabric of state and local laws with sparse federal legislation or "dormant power." Keeping federal powers "few and defined" would, in a world of mutual exclusivity, be essential to preserving state authority to regulate.

The separate spheres concept was fraught with disagreement and conceptual confusion about the nature of exclusive and concurrent powers. The starting point for antebellum judges was typically Hamilton's Federalist No. 32, which states the federal power can be exclusive in three circumstances: an express excusive grant to Congress (e.g., governing the federal capital district), an express prohibition against the states (e.g., coining money) or a grant to Congress of a power

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62. ARTICLES OF CONFEDERATION of 1777, art. II.

63. *See, e.g.*, Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 452 (1827) (Thompson, J., dissenting) ("[T]he power of Congress to regulate commerce . . . was a power possessed by the States respectively before the adoption of the constitution, and . . . is to be viewed, therefore, as the surrender of a power antecedently possessed by the States."); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 325 (1816) ("[T]he 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."); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 435 (1793) ("[T]he *United States* have no claim to any authority but such *as the States have surrendered to them.*").

64. *See, e.g.*, South Carolina v. United States, 199 U.S. 437, 448 (1905) ("We have in this Republic, a dual system of government, National and state, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different."); Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950) (defining "dual federalism" in terms of separate spheres).

whose nature was not divisible between dual sovereigns.[65] But this explanation provided little real guidance, since the difficult cases all fall into the third category, and Hamilton begs the imponderable question of how to identify "indivisible" grants of power.

A further problem with the separate spheres concept was whether a federal grant of power, if exclusive, would be exclusive in its negative or dormant state—that is, by virtue of the grant per se, even in the absence of federal legislation. The Marshall Court struggled inconclusively with this issue. In *Sturges v. Crowninshield*,[66] decided two weeks before *McCulloch*, the Court unanimously rejected the claim that New York's bankruptcy law was barred by a dormant bankruptcy power.[67] While state bankruptcy laws might be "perhaps[] incompatible" with a uniform federal bankruptcy law, Congress had not yet enacted any such law, the Court ambiguously decided.[68] But other enumerated powers might still be exclusive in their dormant state.

The preclusive effect of federal legislation was also uncertain. Antebellum judges frequently spoke of "collision" and "conflict" between particular federal and state statutes. In such cases, the courts recognized, the Supremacy Clause meant that federal law would win the conflict.[69] But it was more often than not unclear whether the conflict arose from incompatible policies between the two laws or, instead, from a view that once Congress regulated, then any state law in the same regulatory space created a collision. In other words, antebellum Justices had not yet worked out the modern distinction between what we now call "conflict preemption" and "field preemption."[70]

Lacking a conflict/field preemption distinction, antebellum judges did not necessarily conceive of "concurrent" powers the way we do today. Modern doctrine recognizes that states have the power to regulate interstate commerce in a non-discriminatory manner that

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65. THE FEDERALIST NO. 32, at 199 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see, e.g.*, Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 318 (1851); Livingston v. Van Ingen, 9 Johns. 507, 576 (N.Y. 1812).

66. 17 U.S. (4 Wheat.) 122 (1819).

67. *Id.* at 196–97.

68. *Id.* at 194.

69. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210 (1824).

70. *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 801 (1994) (explaining that because there was so little federal legislation in the nineteenth century the initial cases of preemption norm arose after 1912); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 401–03 (3d ed. 2006) (explaining conflict and field preemption).

does not conflict with federal law or enter a field exclusively occupied by a federal statute.[71] Antebellum judges typically assumed that states had no power to regulate interstate commerce as such, but could effectively do so indirectly, by exercising so-called "police powers"—that is, by purporting to regulate health, safety, or morals.[72] In other words, nineteenth century "concurrent powers" could be recognized only insofar as the federal and state powers were deemed to come from different sources (police rather than commerce power) or to have different regulatory objectives (health or safety rather than trade).

The problem of exclusivity was further complicated by the concept of implied powers. Federal legislation under implied powers would broaden the potential of federal power to nullify state law under a conflict preemption approach. But for jurists who adopted a proto-field-preemption understanding of federal exclusivity, the implied powers would have the potential to extend federal exclusivity—not mere conflict preemption—far beyond the four corners of the enumerated powers.[73] For example, under a proto-field preemption approach, an implied power to create a national bank would occupy the field of banking and exclude states' power to charter banks.

2. The problem of implied powers

An axiom of American constitutionalism holds that the government of the United States is one of limited powers. Expressing the conventional view, Chief Justice Roberts wrote in 2012 that "rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers . . . The Constitution's express conferral of some powers makes clear that it does not grant others."[74] But that begs an important question: is the federal government strictly limited to those enumerated powers?

Despite its axiomatic quality, the idea of limited enumerated powers is highly problematic because it is difficult to implement and debatable as a matter of original intent.[75] Any enumeration or list of terms set out in a legal instrument—whether it be a statute, contract, will,

71. CHEMERINSKY, *supra* note 70, at 401–12.

72. *See, e.g.*, *Gibbons*, 22 U.S. (9 Wheat.) at 208; New York v. Miln, 36 U.S. (11 Pet.) 102, 132 (1837); *see infra* Part IV.

73. *See* Livingston v. Van Ingen, 9 Johns. 507, 576 (N.Y. 1812); *see also Gibbons*, 22 U.S. (9 Wheat.) at 47.

74. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 534 (2012).

75. *See* Schwartz, *A Question Perpetually Arising*, *supra* note 17, at 590–608.

corporate charter, or constitution—presents the interpretive question whether the list is meant to be exhaustive or illustrative. To interpret the list as exhaustive means to exclude what is not listed. This approach is captured by the interpretive canon *expressio unius est exclusio alterius*: "the expression of one [thing] is the exclusion of other[s]."[76] Some, but not all, lists or enumerations are meant to be interpreted this way. However, an opposing approach asks interpreters to imply the inclusion of items "of the same nature"—*ejusdem generis*, in the pertinent legal Latin phrase.[77] Contrary to the conventional view, the Constitution does not specify whether its enumeration of powers is meant to be exhaustive or illustrative.[78]

The Constitution's particular enumeration of powers defies a consistent application of the *expressio unius* principle. For example, Article I, section 8, and Article III, section 3, clause 2 authorize Congress to create criminal punishments for counterfeiting, piracy, and treason, respectively. Rigorous application of *expressio unius* should lead to the conclusion that Congress has no power to impose other criminal punishments. The enumerated power to create post offices would likewise imply that Congress cannot create other administrative departments or agencies. The enumerated power to call out the militia to "repel invasions" would suggest that the regular army could not be employed for that purpose. These results are absurd, of course, and doubtless not how the Constitution was meant to be interpreted; but that tends to undermine the exclusivity principle of enumerated powers.[79]

The exclusivity principle is likewise flouted by interpreting enumerated powers to imply similar powers of like magnitude or greater. Examples of this include implying a power to issue paper money from the enumerated power to coin money,[80] and implying a power to deport aliens from the enumerated power to "naturalize" foreigners into American citizenship.[81] These long-accepted national powers do not fit the model of limited enumerated powers.[82]

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76. WILLIAM N. ESKRIDGE JR., ET AL., STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES 1091 (2014).

77. *Id.* at 455.

78. *See id.* at 590–91.

79. *Id.* at 600–03.

80. U.S. CONST. art. I, § 8, cl. 5.

81. *Id.* cl. 4.

82. Schwartz, *A Question Perpetually Arising*, *supra* note 17, at 621–24 (listing the many unenumerated powers that have commonly been accepted as legitimate implied powers).

Constitutional history has muddied the waters on these questions. Many political leaders in the early Republic couched their constitutional arguments in terms of limited enumerated powers, either because their political agenda entailed limiting federal power or because they wished to sell a nationalist agenda to their stricter constructionist colleagues. After Jefferson's election in 1800, professions of limited enumerated powers were even more apt to predominate, and assertions of nationalism tended to be more encoded in those terms.[83] Yet the nation continued to work around the limits of rigorous enumerated powers doctrine from time to time, when the enumerated powers proved inconveniently narrow. As late as 1817, Jefferson recognized that the original public meaning of the Constitution's enumeration was contested. The tenet that Congress has only the power to provide for enumerated powers, and not for the general welfare "is almost the only landmark which now divides the federalists from the republicans."[84]

Further complicating the enumerated powers model is the problem of implied powers. An implied power is qualitatively different from an enumerated power. For example, there is no enumerated power to create courts outside of Article III, but courts martial are conducive or "plainly adapted" to enforcing the "Rules for the Government and Regulation of the land and naval Forces."[85] An implied power serves an enumerated power by authorizing legislative means that are not logically entailed in the enumerated power, and extends to subject matter that falls outside the definition of an enumerated power.[86] Thus, implied powers can reach unenumerated regulatory objects.

In a logical sense, implied powers are a virtually unavoidable feature of a written Constitution.[87] This unavoidability can be readily seen by

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83. 2 DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829 120–22, 258–78 (2001) [hereinafter CURRIE, THE JEFFERSONIANS].

84. Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817), *in* 12 THE PAPERS OF THOMAS JEFFERSON 71 (Julian P. Boyd ed., 1961).

85. U.S. CONST. art. I, § 8, cl. 14; *see* An Act for the Government of the Navy of the United States, 1 Stat. 709–10 (1799) (creating courts martial); 1 DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801 243 n.40 (1997) [hereinafter CURRIE, FEDERALIST PERIOD] (noting absence of constitutional objections to creating courts martial).

86. *See* Schwartz, *A Question Perpetually Arising*, *supra* note 17, at 609–11; *cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 409–11 (1819).

87. *See McCulloch*, 17 U.S. (4 Wheat.) at 407–10; Alexander Hamilton, *Final Version of An Opinion on the Constitutionality of an Act to Establish a National Bank*, *in* 8 THE PAPERS

trying to envision how the granted legislative powers could be executed without them. A tax on whiskey might be said to be a specific example, and thus a direct exercise, of the enumerated taxing power. But not all legislation can be so obviously a specific instance of the general category described as an enumerated power. Far from it. Once we move into the details of implementation, implied powers questions quickly emerge. How is the whiskey tax to be collected? The hiring of federal tax collectors may well be implicit in the power to "collect" taxes, but it is not simply a specific example of tax collection—it is easier and more logical to conceive it as an implied power than to characterize it as a direct implementation of the taxing power.

The logical necessity of implied powers was understood from the beginning of the Republic. Hamilton recognized this fact.[88] So did the Marshall Court in a now-obscure 1805 decision, *United States v. Fisher*.[89] The existence of implied powers was thus well established by the time Marshall explained in *McCulloch* that "[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 . . . ."[90] Therefore, while its "great outlines" and "important objects" will be stated expressly, the means to implement them must be "deduced."[91] Denying the existence of implied powers makes legislative implementation unduly difficult, if not logically impossible, as legislators and courts would become hopelessly bogged down in arid debates over whether, for example, the hiring of a tax collector was "directly" authorized by the taxing power.

Thus, even strict Jeffersonian enumerationists acknowledged the existence of implied powers.[92] But the existence of implied powers creates challenging interpretive and analytical problems when applied to the framework of limited enumerated powers. Since implied powers are by definition not enumerated, it becomes necessary to distinguish between permissible and impermissible implied powers: distinguishing

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OF ALEXANDER HAMILTON 97–98 (Harold C. Syrett & Jacob E. Cooke eds., 1965) [hereinafter *Opinion on Constitutionality*].

88. Hamilton, *Opinion on Constitutionality*, *supra* note 87, at 8–9.

89. 6 U.S. (2 Cranch) 358 (1805).

90. *McCulloch*, 17 U.S. (4 Wheat.) at 407.

91. *Id.*

92. *See id.* at 409 ("It is not denied, that the powers given to the government imply the ordinary means of execution.").

those that somehow do not disrupt the purportedly exclusive nature of the enumerated powers from those that do.

The Antifederalist wing of the Jeffersonian party argued that express legislative powers could be implemented by only those laws strictly necessary to exercising the express grant. They defined strict necessity as that without which the express power would be nugatory.[93] Aside from the rejection of this argument in *McCulloch*,[94] we can see that the argument tends to collapse in on itself logically. A tax on whiskey might be a direct implementation of the taxing power, and one could say the power to impose an excise on a commodity is strictly necessary for the exercise of the taxing power. But a power to tax whiskey is not strictly necessary because the taxing power could be exercised by taxing carriages or by customs duties.[95] Thus, the "strict necessity" test for implied powers creates a paradox. As Marshall recognized in *Fisher*, "Where various systems might be adopted for [a legislative] purpose, it might be said with respect to each, that it was not necessary because the end might be obtained by other means."[96]

The First and Second Banks of the United States themselves were stark reminders of the implied powers problem. Although private, the Banks were exemplars of a large federal administrative agency, sending branches into all of the states and making their impact felt broadly and deeply throughout U.S. economic life.[97] Despite *McCulloch*, the constitutionality of such an institution was never truly settled in the form of a broad national consensus.[98] Opposition to the re-charter of a national bank persisted until the issue fell off the national agenda, after Civil War financing demonstrated that such an institution could be done without.[99] To advocates of strict construction and states' rights, if an institution such as the Bank could be implied as a power of Congress, it would be hard to discern the limits of implied powers.[100]

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93. *See supra* note 40 and accompanying text.

94. *McCulloch*, 17 U.S. (4 Wheat.) at 413–14.

95. Schwartz, *A Question Perpetually Arising*, *supra* note 17, at 610.

96. United States v. Fisher, 6 U.S. (2 Cranch) 358, 396 (1805).

97. *See generally McCulloch*, 17 U.S. (4 Wheat.) at 424; EDWARD S. KAPLAN, THE BANK OF THE UNITED STATES AND THE AMERICAN ECONOMY 57 (1999).

98. David S. Schwartz, *Misreading* McCulloch v. Maryland, 18 U. PA. J. CONST. L. 1, 15 (2015) [hereinafter Schwartz, *Misreading* McCulloch].

99. *See* KAPLAN, *supra* note 97, at 134, 143 (noting that in April 1834, the House of Representatives voted against rechartering the Bank, sealing its fate).

100. *See, e.g.*, James Madison, *Speech to the House of Representatives in Opposition to the Bank Bill*, *in* 13 THE PAPERS OF JAMES MADISON 375–76 (Charles F. Hobson et al. eds., 1981) ("If Congress could incorporate a Bank, . . . Congress might even establish

3. The Commerce Clause

Article I, section 8, clause 3 of the Constitution empowers Congress "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[101] These sixteen words, known as "the Commerce Clause," form what has become the Constitution's broadest grant of regulatory power to the federal government. With few exceptions, a general antebellum consensus acknowledged that Congress should have plenary power to regulate relations, commercial and otherwise, with foreign governments. But sharp controversies arose over the breadth of Congress's power to regulate commerce "among the several states"—*interstate* commerce.

Today, well-established Supreme Court doctrine construes the power to regulate interstate commerce as an authorization for Congress to regulate all economic activity having a significant aggregate *effect* on the interstate economy.[102] In 1819, however, the scope of the Commerce Clause was uncertain, and considerably narrower. Many interpreters of the Constitution deemed "interstate commerce" as restricted to actual buying-and-selling transactions that crossed state lines.[103] It was widely agreed that the commerce power included a federal power to regulate navigation, but it was not certain whether this was an implied power or instead fell within the definition of commerce itself.[104] Either way, commerce was defined so narrowly as to exclude categories of economic activities such as manufacturing and agriculture: even if the activities in question required purchases of tools and supplies that moved interstate, and produced goods for interstate markets, they were typically viewed as taking place in between buying and selling transactions, and therefore not in

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religious teachers in every parish, and pay them out of the Treasury of the United States."); *see also* Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, *in* THE PAPERS OF THOMAS JEFFERSON 276 (Julian P. Boyd & Ruth W. Lester eds., 1974) ("To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.").

101. U.S. CONST. art. I, § 8, cl. 3.

102. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 559–60 (1995) (explaining substantial effects test).

103. *See, e.g.*, Howard Gillman, *More on the Origins of the Fuller Court's Jurisprudence: Reexamining the Scope of Federal Power over Commerce and Manufacturing in Nineteenth-Century Constitutional Law*, 49 POL. RES. Q. 415, 423–24 (1996).

104. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209 (1824) (holding that Congress' power to regulate interstate commerce encompasses the power to regulate navigation).

themselves commerce.[105] Strict constructionists went so far as to argue that even interstate and international transportation of people (as opposed to goods) was not commerce.[106]

A fairly broad antebellum consensus maintained that interstate commerce under the Articles of Confederation was hampered by discriminatory regulations, taxes, and the lack of a uniform currency. Merchants in states lacking ports for foreign commerce had to pay tribute to those that did, through which their foreign imports had to pass.[107] As Madison put it, "New Jersey, placed between Philadelphia and New York, was likened to a cask tapped at both ends; and North Carolina, between Virginia and South Carolina, to a patient bleeding at both arms."[108] To address these problems, the new Constitution prohibited states from laying tonnage duties and using import and export taxes as a source of revenue. Additionally, it authorized Congress to regulate foreign and interstate commerce.[109] Some constitutional interpreters, including Daniel Webster, viewed this history as strong support for a dormant commerce power.[110] To these interpreters, the Commerce Clause was intended to create a domestic free trade zone, unencumbered by state protectionism.[111] This could be accomplished by striking down state laws under a dormant Commerce Clause, without the necessity—or even the desirability—of active congressional intervention.[112]

At the same time, the potential breadth of the federal commerce power did not go unnoticed. For example, advocates of a national bank argued that a federal power to charter such a bank could be

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105. *See* Gillman, *supra* note 103, at 423–24.

106. *See, e.g.*, The Passenger Cases, 48 U.S. (7 How.) 283, 474 (1849) (Taney, C.J., dissenting).

107. BRAY HAMMOND, BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 89 (1957).

108. *Id.*

109. U.S. CONST. art. I, § 8, cl. 4; art. I, § 10, cls. 2–3.

110. *See, e.g.*, 11 DANIEL WEBSTER, THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 14, 18–19 (1903) (contending in *Gibbons* that Congress had exclusive power over commercial regulations, but states maintained the power to enact regulations that were more akin to regulations of police and only incidentally affected commerce).

111. *See* George L. Haskins, *John Marshall and the Commerce Clause of the Constitution*, 104 U. PA. L. REV. 23, 26–28 (1955).

112. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209 (1824) (commerce regulation "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"); *id.* at 18 ("All useful regulation does not consist in restraint; and that which Congress sees fit to leave free, is a part of its regulation, as much as the rest.").

implied from the Commerce Clause.[113] More generally, as Webster observed in his oral argument in *Gibbons*: "Almost all the business and intercourse of life may be connected, incidentally, more or less, with *commercial regulations*."[114] Recognition of this fact could give extensive implied legislative powers to Congress, or equally extensive exclusive effect on state laws.

B. Constitutional Politics

Constitutional law has never existed as an autonomous thing; rather, it is a set of abstractions that mediate and negotiate the forces of constitutional politics. The two most contested issues in the antebellum era were slavery and the "American System." The latter was an economic development program that included proposals for internal improvements, a national bank, and tariffs.[115] Advocates of the American System believed that congressional power over these things could be implied from the Commerce Clause.[116] But a broad commerce power could be construed to preempt state laws permitting or prohibiting slavery. And the antennae of sensitive pro-slavery constitutionalists picked up alarming signals from *McCulloch*'s notion of implied powers.[117] In sum, the scope of the commerce power, and the problem of concurrent powers, brooded over the constitutional politics of the latter half of the Marshall Court era, when both *McCulloch* and *Gibbons* were decided.

1. Slavery

Under the antebellum Constitution, the institution of slavery had three constitutionally relevant aspects: the slave trade, the state's internal policies governing slavery and race, and the extension of slavery to new territories and states.

The international slave trade carried the stink of a violation of international law and was unpopular even with slave states that, like

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113. *See infra* text accompanying notes 187–190.

114. *Gibbons*, 22 U.S. (9 Wheat.) at 9–10.

115. CURRIE, THE JEFFERSONIANS, *supra* note 83, at 250–51.

116. Schwartz, *Misreading* McCulloch, *supra* note 98, at 48–49.

117. *See, e.g.*, JOHN TAYLOR, CONSTRUCTION CONSTRUED, AND CONSTITUTIONS VINDICATED 294–300 (1820) (connecting *McCulloch*, the Bank, and implied powers with the movement to prohibit slavery in new states); Spencer Roane, *Hampden Essays III*, Richmond Enquirer, June 18, 1819, *reprinted in* GUNTHER, *supra* note 46, at 129 (criticizing *McCulloch* for authorizing "the representatives of Connecticut in [C]ongress . . . to make laws, on the subject of our negro population").

Virginia, saw themselves as having a large stake in interstate importation of slaves.[118] A broad consensus to ban the importation of slaves from abroad existed in 1787 to such an extent that South Carolina and Georgia had to bargain (albeit not very hard) for a twenty-year moratorium on a congressional prohibition of that odious trade.[119] This was set forth in the Constitution's "Migration or Importation" Clause.[120] Congress acted promptly against the foreign slave trade, even to regulate it short of a ban prior to 1808. President Jefferson's annual message to Congress in December 1806 included a pointed reminder of the January 1, 1808 expiration of the constitutional prohibition, and, in March 1807, nine months before the ban would expire, Congress made it a crime, effective January 1, 1808, "to import or bring into the United States or the territories thereof from any foreign kingdom, place, or country, any negro, mulatto, or person of colour, with intent to hold, sell, or dispose of such [person] . . . as a slave, to be held to service or labour."[121]

The Migration or Importation Clause's delay of a slave-importation ban implies that Congress would otherwise have the power to impose one: that is, the Framers understood importing slaves to be "Commerce with foreign Nations."[122] This understanding was amply confirmed by federal navigation restrictions on slave trading. In 1794, Congress passed a law that made it illegal to fit out any ship for the importation of slaves, prohibited ships sailing from U.S. ports from slave trafficking abroad, and strictly regulated the size of ships transporting slaves in the coasting trade.[123] If the international slave trade was understood to be foreign commerce, then the buying and selling slaves, like any other buying or selling, was commerce. By extension of this principle to interstate commerce, the *interstate* slave trade could be regulated or prohibited by Congress under the Commerce Clause.

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118. *See* DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY 28 (Ward M. McAfee ed., 2001).

119. *Id.* at 33–37.

120. U.S. CONST. art. I, § 9, cl. 1 (proclaiming that while Congress shall not prohibit the migrating or importing of "Persons" within the States before 1808, Congress may impose a maximum importation tax of ten dollars for each "Person").

121. Prohibition on Slave Importations Act of 1807, Pub. L. No. 9-22, 2 Stat. 426 (1807); 16 ANNALS OF CONG. 11–15 (1806).

122. *See, e.g.*, DAVID L. LIGHTNER, SLAVERY AND THE COMMERCE POWER: HOW THE STRUGGLE AGAINST THE INTERSTATE SLAVE TRADE LED TO THE CIVIL WAR 17–19 (2006).

123. *See, e.g.*, Slave Trade Act of 1794, Pub. L. No. 3-11, 1 Stat. 347, 347–49 (1794).

What other regulation of slavery might be authorized under an interstate commerce power? Even if one defines commerce as limited to the buying and selling of goods, the relationship between slavery and commerce is direct and obvious. In theory, Congress could have regulated commerce in the narrowest sense—provided the "rule" for the buying and selling of goods—by prohibiting the interstate buying and selling of slave-made goods. Even though Congress did not enact such a law on this pattern until the Child Labor Act of 1916,[124] it seems highly unlikely that such a law was beyond the imagination of the antebellum legal mind.

Whatever disagreements may have existed over specific applications, the consensus opinion in the early nineteenth century recognized that the Interstate Commerce Clause was designed to empower Congress to maintain a level playing field for interstate trade.[125] Some interpreters would have limited this to the prohibition of state protectionism, but it did not escape notice that plantation-based slave labor offered certain competitive advantages in agricultural production over freehold agriculture. That awareness, far more than human rights consciousness, fueled the engine of anti-slavery politics in the antebellum era.[126]

Yet mainstream antebellum constitutional thought did not reason abstractly from a commerce power to develop theories of how slavery might be regulated—or abolished—under the Commerce Clause. Abolitionists made limited forays in this direction, but abolitionism was a fringe movement with little political clout.[127] More typically, antebellum constitutionalists reasoned in the other direction: starting from the bedrock assumption that slavery was a decision to be made in the first instance by state governments, the commerce power had to be interpreted accordingly.[128] Thus, a 1794 petition to Congress by Pennsylvania abolitionists, led by Benjamin Franklin, was rebuffed with a House resolution stating that "Congress have no authority to interfere in the emancipation of slaves, or in the treatment of them within any of

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124. Pub. L. No. 64-249, 39 Stat. 675 (1916). The Supreme Court struck down this law in Hammer v. Dagenhart, 247 U.S. 251, 276–77 (1918).

125. Even the pro-slavery Taney Court believed this. *See, e.g.*, Veazie v. Moor, 55 U.S. (14 How.) 568, 574 (1852).

126. JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 54–55 (1988).

127. *Id.* at 61; *see also* LIGHTNER, *supra* note 122, at 38.

128. *See infra* Section V.A.; *cf.* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 611 (1842) (describing the fugitive slave clause as "so vital to the preservation of [the slave states'] domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed").

the States; it remaining with the several States alone to provide any regulations therein, which humanity and true policy may require."[129]

Most antebellum constitutional interpreters took for granted that the "purely internal" buying and selling of slaves within a state fell outside the enumerated commerce power. The same could be said for slave labor. To preserve this understanding required limiting the definition of commerce and the extent of powers that could be implied from the Commerce Clause. Thus, for example, Jefferson and other shame-faced slaveholders fretted continually that liberal construction of congressional powers would permit the regulation of "agriculture."[130] If we assume that Jefferson's inability to distinguish yeoman farmers from plantation slaveholders was merely deluded rather than disingenuous—a huge benefit of the doubt—then his concern to prevent Congress from regulating agriculture can be read as an anxiety that Congress would act to shift wealth from that sector into manufacturing.[131] But at least some of Jefferson's admirers undoubtedly used "agriculture" as a code word for plantation-based slavery, while others were explicit in their concern for the rights of slaveholders.[132]

The doctrine that slavery was a "municipal" matter within the reserved powers of the states was not simply a southern doctrine. Abolitionism was not a dominant view in most northern states, yet all the states wanted to retain their powers to regulate race more broadly.[133] Southern states enacted slave codes, which stripped slaves of rights and imposed draconian behavioral restrictions on them.[134] Northern states, to be sure, enacted laws to keep slaves out and to resist cooperating with slave catchers who were pursuing alleged runaways into free states under the 1793 Fugitive Slave Act.[135] But some northern states also enacted

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129. 2 ANNALS OF CONG. 1472–74 (1790) (Joseph Gales ed., 1834).

130. *See, e.g.*, 31 ANNALS OF CONG. 1139–40 (1818) (statement of Rep. Smyth) ("If reasons like these will justify the exercise of power, then Congress may regulate agriculture . . .").

131. *Cf.* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 164–65 (William Peden ed., 1982) (admiring the yeoman farmer by professing "[t]hose who labour in the earth are the chosen people of God, if ever he had a chosen people, whose breasts he has made his peculiar deposit for substantial and genuine virtue" yet distancing the benefits of manufacturing by writing "for the general operations of manufacture, let our work-shops remain in Europe").

132. FEHRENBACHER, *supra* note 118, at 214–15.

133. *See id.* at 28, 214–16.

134. *See* WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, & ILLUSTRATIVE FACTS 9–11 (1853) (discussing codes from South Carolina, Louisiana, Kentucky, and Maryland).

135. Act of February 12, 1793, 1 Stat. 302 (1793); FEHRENBACHER, *supra* note 118, at 214–17.

laws that restricted the rights of free blacks.[136] The cultural, and in slave states legal, presumption that a black person was a slave meant that a black person not enslaved required an extra identifying adjective "free" to be known in the language, and had no rights by default, as white persons did, but rather only those rights enacted in positive law.[137] Northern states increasingly viewed national power as a threat to their own municipal institutions since the national government tended to be solicitous to slaveholding interests.[138]

The understanding of slavery as a reserved state power was so strong that it stunted the development of a doctrine of federal power over the interstate slave trade. Although abolitionists advanced such a doctrine in the 1830s and 1840s, the idea never attracted more than fringe support in Congress, and thus never found its way into law.[139] When the Supreme Court finally reached this issue in the 1840s, the Justices endorsed what amounted to a slavery exception to the Commerce Clause.[140] Although explicit discussion of a commerce power over the interstate slave trade came later, it is nevertheless likely that in 1819 this question too may have been a source of some anxiety in constitutional politics.

The question of Congress's power to prohibit slavery in the territories proved to be the most contentious question in antebellum slavery politics and ultimately the primary dispute leading to southern secession and the Civil War.[141] Opposition to the expansion of slavery into the territories was far broader in northern states than abolitionism. Many who were quite happy to make common cause with southerners on most political issues, and to tolerate slavery within the states where it existed, were opposed to its territorial expansion. The idea that new territories and states should be reserved for free white labor, free from the burden of economic competition with slave agriculture and status competition with the social pretensions of slave owners, was compatible with the most virulent white racism.[142]

By 1819, two features of the question of slavery in the territories had become obvious facts of American politics. First, if slavery were permitted

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136. *See* LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860 66–69 (1961).

137. Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1856) (holding that under the Constitution, African Americans "had no rights which the white man was bound to respect").

138. *See* LITWACK, *supra* note 136, at 5.

139. *See* LIGHTNER, *supra* note 122, at 90–112.

140. *See infra* Section V.A.

141. *See* MCPHERSON, *supra* note 126, at 52–58.

142. *Id.* at 52–55.

to take root during the settlement phase of a territory, that territory would apply for statehood under the aegis of a pro-slavery state constitution and would be admitted as a slave state.[143] Second, slave states were disproportionately represented in national politics. Not only was each new state entitled to two Senators despite the relatively small populations of new states, but slaveholding representation was further enhanced in the House and the electoral college by the "three-fifths clause," the Constitution's "federal formula" which counted slaves as three-fifths of a person for purposes of determining population-based electoral representation.[144] Accordingly, there were high political stakes involved in the question of Congress's power to prohibit slavery in the territories.

The territorial question had not generated extensive controversy prior to 1819. But when Missouri applied to Congress for statehood in December 1818 with a pro-slavery constitution, its admission would upset the existing balance of eleven slave and eleven free states, thereby creating a majority of slave states for the first time since New Jersey abolished slavery in 1804.[145] To prevent this, Representative Tallmadge of New York introduced an amendment to the Missouri admission bill in February 1819 to condition Missouri's entry into the Union on its abolishing slavery in its state constitution.[146] This touched off an intense national debate that was not resolved until the Missouri Compromise of 1820. The basic features of the Missouri Compromise provided that Missouri would be admitted as a slave state, but that slavery would be prohibited in the remainder of the Louisiana territory north of the 36° 30′ latitude line. In addition, the district of Maine, ceded by Massachusetts, would be admitted as a free state, preserving the balance in the Senate between slave and free states.[147]

The Missouri debate opened just a few days before oral argument in *McCulloch*. The floor debate in the Senate was going on literally right above the Justices' heads in late February and early March 1819—the

143. DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848 137 (2007); *see also* MCPHERSON, *supra* note 126, at 52 ("Of the congressmen who spoke on [slavery spreading], more than half expressed confidence (if southern) or fear (if northern) that slavery would go into the new territories if allowed to do so.").

144. *See* U.S. CONST. art. I, § 2, cl. 3.

145. HOWE, *supra* note 143, at 147–54.

146. 32 ANNALS OF CONG. 1166 (1819).

147. An Act for the Admission of the state of Maine into the Union, 1 Stat. 544 (1820); *see also* HOWE, *supra* note 143, at 119–20. Missouri itself was an exception to this compromise line, since that latitude represented the state's southern boundary. *Id.*

Supreme Courtroom's ceiling was the Senate's floor.[148] Plainly, the Justices must have been aware of this debate when they decided *McCulloch*. Did it influence the decision? The most immediately relevant constitutional provisions to the Missouri debate were only tangentially relevant to *McCulloch*.[149] But, the question of implied commerce powers might have been seen as having implications for a congressional power to regulate slavery.

2. Internal improvements

At least as dominant as the slavery question in antebellum constitutional politics was a long-running debate over "internal improvements." This term covered what we now call "infrastructure." In the nineteenth century internal improvements involved the building or maintenance of roads, canals, bridges, navigable waterways, navigation facilities; and, later in the century, railroads and telegraphs.[150] Internal improvements formed a key element of the American System, a broad program for national economic development that also included a national bank and protective tariffs. The American System was advocated by constitutional nationalists, most notably Henry Clay, congressman and later Senator from Kentucky, and was opposed by defenders of states' rights.[151] While internal improvements projects raised policy questions—such as feasibility, economic justification, and fairness in their distribution of benefits—they were often debated as the constitutional question of whether the federal government had the power to engage in the projects.[152]

A state's power to improve its internal infrastructure was undoubted, and states undertook many such projects—the Erie Canal being the

148. *See The Old Supreme Court Chamber: 1810–1860*, SENATE, https://www.senate.gov/artandhistory/art/resources/pdf/Old_Supreme_Court.pdf (last visited Feb. 5, 2019).

149. The Missouri debate centered on the Territories and New States clauses. *See* U.S. CONST. art. IV, § 3, cl. 1 ("New states may be admitted by the Congress into this Union."); *id.* cl. 2 (granting Congress the power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"); *see also* CURRIE, THE JEFFERSONIANS, *supra* note 83, at 235–45. Application of these clauses did not raise issues of implied powers or the scope of the Necessary and Proper Clause.

150. Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397, 400, 433 (2015).

151. *See* CURRIE, THE JEFFERSONIANS, *supra* note 83, at 250; HOWE, *supra* note 143, at 202–84; LaCroix, *supra* note 150, at 400.

152. CURRIE, THE JEFFERSONIANS, *supra* note 83, at 258–59.

most famous example.[153] But state-managed internal improvements were not enough for American System proponents. States often lacked the money to pursue ambitious internal improvement projects. Sometimes they lacked the self-interest. For example, a road through a state or a canal connecting navigable waterways might disproportionately benefit the terminal points of the route without significantly benefiting the states in between. States dominated by elite plantation-owners were often reluctant to raise tax revenues to improve the commercial opportunities for smallholding farmers or local merchants.[154] Thus, advocates of internal improvements had good reasons to believe that federal involvement was essential to make up for state lassitude in pursuing infrastructure projects.

Despite the clear connection between internal improvements and various enumerated powers, particularly the commerce power, the federal power over internal improvements remained highly contested throughout the antebellum period.[155] Opponents of internal improvements legislation tended to make strict constructionist arguments against implied powers and in favor of narrow constructions of granted powers.[156] The power to establish post roads was not a power to build them, they argued, but merely a power to designate existing roads and reserve the right to traverse them.[157] Further, the power "to regulate commerce" meant only a power to "prescribe the manner, terms, and conditions, on which that commerce should be carried on," not a power to *promote* commerce.[158] Under this crabbed view, Congress had no peacetime power to build roads, and the war powers could not justify building roads when there was no war on.[159] Both

153. *See* Veazie v. Moor, 55 U.S. (14 How.) 568, 573–75 (1852) (affirming state police power over internal improvements); BRIAN PHILLIPS MURPHY, BUILDING THE EMPIRE STATE: POLITICAL ECONOMY IN THE EARLY REPUBLIC 161–62 (2015) (describing the importance of the Erie Canal).

154. *See* Aaron R. Hall, *Reframing the Fathers' Constitution: The Centralized State and Centrality of Slavery in the Confederate Constitutional Order*, 83 J. S. HIST. 255, 267 (2017).

155. Schwartz, *Misreading* McCulloch, *supra* note 98, at 47–50.

156. CURRIE, THE JEFFERSONIANS, *supra* note 83, at 258–59.

157. James Monroe, *Views of the President of the United States on the Subject of Internal Improvements*, *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897 144, 155–57 (James D. Richardson ed., 1897).

158. CURRIE, THE JEFFERSONIANS, *supra* note 83, at 263; *see also* Searight v. Stokes, 44 U.S. (3 How.) 151, 180 (1845) (Daniel, J., dissenting); *id.* at 166 (majority opinion) (declining to decide whether Congress has a power to build post roads); Monroe, *supra* note 157, at 155–57; Gillman, *supra* note 105, at 422–23.

159. CURRIE, THE JEFFERSONIANS, *supra* note 83, at 263–64, 272–73.

Presidents Madison, prior to *McCulloch*, and Monroe after it, issued controversial vetoes of major internal improvements bills on such grounds.[160]

Nationalist proponents of the American System generally argued that the constitutional authorization for Congress to undertake internal improvements projects was implied by the commerce, postal, or war powers. From the first Congress, the federal government had built and maintained a nationwide system of aids to navigation, creating a legislative precedent for internal improvements under the commerce power, which was widely held to embrace navigation.[161] This precedent also weighed in favor of a liberal construction of commerce power to extend to *facilitating* commerce.[162]

The internal improvements debate did not occur in isolation, but within a fabric of constitutional hopes and anxieties that included slavery and a concern that federal powers might constitutionally exclude parallel state powers, and thereby negate swaths of state police regulation. Many legal thinkers viewed a power over internal improvements as a threat to the states' internal regulatory system in general, and its regulation of slavery in particular.[163] The building of a federal road could quite literally make an inroad into state jurisdiction. Interestingly, many states' rights advocates viewed overland internal improvements as more threatening than those confined to shores and waterways. As late as the 1870s, the Supreme Court continued to draw this distinction. In upholding congressional authority in a case that "relates to transportation on the navigable waters of the United States," the Justices were "not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation."[164]

No case directly ruling on the constitutionality of internal improvements ever came before the Marshall Court. But between the Court's decisions in *McCulloch* (1819) and *Gibbons* (1824), an important

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160. Madison vetoed the Bonus Bill on March 3, 1817, his last day in office. *See* Monroe, *supra* note 157, at 584; *see also* LaCroix, *supra* note 150, at 412 (describing President Madison's veto as a "forceful refutation" of congressional plans to maintain discrete funds for internal improvements). President Monroe vetoed the Cumberland Road bill in 1822. *See infra* notes 165–170 and accompanying text (explaining the reasoning for vetoing the Cumberland Road bill).

161. CURRIE, FEDERALIST PERIOD, *supra* note 85, at 69–70.

162. Arguing against a narrow construction of "regulate" in the commerce clause, Representative Daniel Sheffey of Virginia asserted that "the word 'regulate'" means "an entire control over the subject in all its relations." CURRIE, THE JEFFERSONIANS, *supra* note 83, at 262.

163. *See id.*; LIGHTNER, *supra* note 122, at 57; *see also infra* Section V.A.

164. The Daniel Ball, 77 U.S. (11 Wall.) 557, 565–66 (1870).

episode occurred in the constitutional history of internal improvements, one that reveals that Marshall and his colleagues were ambivalent on this question. At best, they took a cautious view toward internal improvements and did not believe that Congress had the power to build roads and canals as part of an implied power to regulate or promote commerce.

In May 1822, President Monroe vetoed the Cumberland Road Tollgate bill,[165] a major piece of internal improvements legislation. The Cumberland (or National) Road was one of the largest internal improvement projects undertaken in the nation's first half-century. Started during the Jefferson administration, this multi-year federal project contemplated an interstate highway from Maryland to Ohio.[166] In the early 1800s, this would have been as big a deal as the transcontinental railroad in the mid-nineteenth century, or the interstate highway system in the mid-twentieth century. The Cumberland Road was still incomplete by 1822, and its completed sections were in serious need of repair. Congress passed a bill to erect tollgates on the Cumberland Road and use the tolls to preserve and repair the road. An additional provision of the bill would make it a federal crime to evade the duty to pay the tolls.[167] Though the federal government's supervision would be a novelty, the use of tollgates for road revenues was long established on public and private roads within the states.

In an unusual step, Monroe supplemented his veto message by issuing a 29,000 word pamphlet explaining his views.[168] Monroe's main objection was that a power to build and regulate a federal road, by cutting across dry land, implied a "system of internal improvement," requiring a constellation of powers that he believed Congress did not have.[169] These powers extended beyond merely charting and constructing the road, to include also the powers to condemn the underlying land; to build tollgates or houses and collect tolls; and to assert federal criminal jurisdiction over the road (to protect the road from toll evasion, wanton infliction of damage, and presumably robbery of passengers).[170] Without naming the case, Monroe flagrantly disregarded *McCulloch*'s formulation regarding implied powers and the Necessary and Proper Clause: "Whatever is absolutely necessary to

165. CURRIE, THE JEFFERSONIANS, *supra* note 83, at 279.
166. *Id.* at 114.
167. *Id.* at 279.
168. *See* Monroe, *supra* note 157, at 144.
169. *Id.* at 159.
170. *Id.* at 155–56.

the accomplishment of the object of the grant [of power to Congress], though not specified, may fairly be considered as included in it. Beyond this the doctrine of incidental power cannot be carried."[171] *McCulloch* had expressly rejected the "absolutely necessary" interpretation of implied powers under the Necessary and Proper Clause.[172] President Monroe went on to offer stingy interpretations of enumerated powers, rejecting the war, postal, territories, and commerce powers as grounds from which a road-building or internal improvements power could be implied.[173] He asserted an extreme states' rights interpretation of the Commerce Clause, arguing that it authorized Congress to regulate interstate commerce only incidentally to regulating foreign commerce.[174]

Nevertheless, Monroe wanted federal participation in some sort of road-building program.[175] Presiding over a period of virtual single party rule by Jeffersonian Republicans, now known as the "Era of Good Feelings," Monroe was not inattentive to the aspirations of American System proponents within the nationalist wing of his party. He thus offered a compromise solution. The federal government could pay for roads and other internal improvements under the spending power, so long as those projects served "great national" rather than "strictly local" purposes; the federal government simply could not regulate the roads thus built.[176] This position eventually became Jacksonian orthodoxy, embraced by President Jackson and the Taney Court.[177]

III. *MCCULLOCH*, *GIBBONS* AND THE NON-EMERGENCE OF IMPLIED COMMERCE POWERS

Since the early decades of the twentieth century, constitutional scholars have taken for granted that *McCulloch* and *Gibbons*, the Marshall Court's "two great nationalism decisions," establish the constitutional foundation for the broad legislative powers that Congress has enjoyed since 1937. This interpretation, while containing elements of truth, overlooks significant cross-currents and ambiguities that must be examined to understand the

171. *Id.* at 158.
172. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414, 419 (1819).
173. Monroe, *supra* note 157, at 157–62.
174. *Id.* at 162.
175. *See id.* at 167, 176–77 ("Good roads and canals will promote many very important national purposes.").
176. *Id.* at 167.
177. *See* Searight v. Stokes, 44 U.S. (3 How.) 151, 179 (1845); HOWE, *supra* note 143, at 360–66 (noting Jackson's frequent approval of internal improvements spending projects).

long-running judicial resistance to implied commerce powers. Read in the context of antebellum constitutional law and politics, *McCulloch* and *Gibbons* are more ambiguous with respect to national powers than the conventional interpretation acknowledges. To see this requires examining two questions that have not been answered, or indeed even asked, by students of the Marshall Court. First, why didn't *McCulloch* uphold the Second Bank of the United States as an exercise of an implied power to regulate commerce? Second, why didn't *Gibbons* refer to *McCulloch* or even suggest that regulation of navigation was a power implied from the Commerce Clause rather than an element of the definition of commerce itself? As will be seen, the most plausible answer is that the Marshall Court, probably consciously, shied away from embracing the full reach of *McCulloch* in the form of implied commerce powers.

A. McCulloch v. Maryland

Marshall's opinion in *McCulloch* is well known to everyone with a legal education.[178] The Court unanimously struck down a Maryland law that attempted to tax the operations of the Second Bank of the United States.[179] The second part of the two-part opinion held that states could not tax federal instrumentalities, here a private-public corporation chartered by Congress to help carry out the federal government's fiscal operations.[180] Since everyone involved in the case assumed that the Bank's quasi-governmental character depended on Congress's power to charter the bank, the constitutionality of the charter was treated as a threshold question in the opinion's first part.[181] After observing that the constitutionality of the Bank had been settled by longstanding legislative practice and acceptance by the political branches, Marshall's opinion went on to offer an independent, confirmatory analysis. Since the power to incorporate a bank was not expressly granted, Marshall had to inquire whether a Bank could be chartered under Congress's implied powers.[182] These implied powers encompassed unwritten means to execute the enumerated powers and are necessary to the constitutional order, Marshall argued, because a constitution cannot specify in detail all the different legislative ways

178. *See* J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 987 (1998) (identifying *McCulloch* as "that most canonical of constitutional cases").
179. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819).
180. *Id.* at 435.
181. *Id.* at 401–25.
182. *Id.* at 405–08.

and means to carry out its granted powers. Nor can implied powers be limited to those without which an expressly granted power would be nugatory; rather, Congress must have discretion to choose among any means convenient or plainly adapted to implementing the granted power.[183] Reading the Constitution in the narrower sense would undermine its adaptability to unforeseen crises and its ability to endure over time.[184] These principles are implicit in the nature of the Constitution, Marshall asserted, and for good measure they are confirmed by the Necessary and Proper Clause. That clause was not intended by the framers to narrow the granted powers, but to confirm the existence of implied powers.[185]

Marshall ultimately concluded that the Bank is constitutional because "it is a convenient, a useful, and essential instrument" in conducting the national government's "fiscal operations."[186] He did not say it was necessary and proper to Congress's power to regulate interstate commerce. This omission, in light of the available arguments, is striking.

1. The National Bank and implied commerce power

The constitutionality of the 1791 bill proposing to charter the First Bank of the United States was debated extensively in Congress and in President Washington's cabinet. Among the arguments for constitutionality, which included references to the taxing, borrowing, and war powers, supporters of the Bank argued that the bank was warranted by implied commerce powers.[187] The existence of such powers had been acknowledged from earlier legislation taxing and regulating navigation and constructing lighthouses.[188] The bill was approved by Congress, and President Washington asked his cabinet—Secretary of State Jefferson, Attorney General Randolph, and Treasury Secretary Hamilton—to advise him on its constitutionality.[189] Jefferson and Randolph argued that it was unconstitutional;[190] but, Hamilton convinced Washington otherwise. Among other points, Hamilton argued that the power to charter a national bank was also implied from the commerce clause, having "a

183. *Id.* at 407–08.
184. *Id.* at 415.
185. *Id.* at 418–20.
186. *Id.* at 422; *see also* Schwartz, *Misreading* McCulloch, *supra* note 98, at 15–16.
187. CURRIE, THE FEDERALIST PERIOD, *supra* note 85, at 79.
188. *Id.*
189. 4 JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 393–95 (rev. ed. 1926).
190. *Opinion on Constitutionality*, *supra* note 87, at 126–27.

natural relation to the regulation of trade between the States."[191] The bank's activities are "to be regarded as a regulation of trade" by providing "facilities to circulation and a convenient medium of exchange [and] alienation" and by promoting economic development.[192]

By the time *McCulloch* was argued in the Supreme Court, these arguments were well known to Marshall and his colleagues. Marshall researched the debates in both Congress and Washington's cabinet when writing his *Life of George Washington*, published in four volumes between 1804 and 1807.[193] He described these sources in detail, observing that the Bank's proponents had argued, among other things that "[i]n all commercial countries [banks] had been resorted to as an instrument of great efficacy *in mercantile transactions*[.]"[194]

At the *McCulloch* oral argument, the lawyers for both sides paid significant attention to the Commerce Clause as a potential basis for decision.[195] All three of the Bank's counsel argued that chartering a bank was an appropriate means of regulating interstate and foreign commerce.[196] According to William Pinkney, the Bank's lead counsel, the Bank had "a close connection with the power of regulating foreign commerce, and that between the different States" by "provid[ing] a circulating medium, by which that commerce can be more conveniently carried on, and exchanges may be facilitated."[197] For the Bank's opponents, acknowledging an implied power to regulate commerce through a national bank charter would lead to a parade of commerce-regulation horribles. Walter Jones for Maryland warned that only measures "indispensably necessary" to commerce regulation could be implied under the Commerce Clause, lest a broader view of implied powers be construed to authorize the establishment of "an East or a West India company, with the exclusive privilege of trading with those parts of the world[.]"[198] Worse, if Congress could incorporate a bank to regulate commerce, it could "create corporations for the purpose of constructing roads and canals; a power to construct which has been also lately discovered among other secrets of the constitution, developed by

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191. *Id.* at 126.
192. *Id.* at 126–27.
193. MARSHALL, *supra* note 189, at 392–94.
194. *Id.* at 392 (emphasis added).
195. *See* Schwartz, *Misreading* McCulloch, *supra* note 98, at 54–55.
196. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 325 (1819) (argument of Webster); *id.* at 353–54 (argument of Wirt); *id.* at 385–86, 388–89 (argument of Pinkney).
197. *Id.* at 389.
198. *Id.* at 365, 367.

this dangerous doctrine of implied powers."[199] But, Pinkney responded that congressional precedent had rejected the "indispensably necessary" standard for implied powers under the Commerce Clause: "light houses, beacons, buoys, and public piers, have all been established under the general power to regulate commerce."[200] Because "they are not indispensably necessary to commerce," the precedent demonstrated a congressional understanding that implied powers extended beyond the narrow confines of indispensably necessary measures.[201]

2. Avoiding the Commerce Clause in McCulloch

Among *McCulloch*'s more intriguing and perplexing features is Marshall's caginess about actually identifying one or more enumerated powers from which the power to incorporate a bank can be implied. Throughout the opinion, Marshall refers to several enumerated powers, but on closer inspection, one sees that none of these were identified as the textual source for an implied power to incorporate a bank. In the end, Marshall upheld the Bank as "a convenient, a useful, and essential instrument in the prosecution of [the national government's] fiscal operations," cutting off further explanation with the assertion that a longstanding consensus of financially-inclined "statesmen" made it unnecessary "to enter into any discussion" of the point.[202] Marshall mentioned the Commerce Clause (indeed, the word "commerce") only twice in the entire opinion.[203] In both instances, Marshall was making a general point about the nature of implied powers rather than identifying which enumerated powers were the basis for an implied power to incorporate a bank.[204]

Marshall's evasiveness has largely, though not entirely, escaped notice. In a pseudonymous editorial attack on *McCulloch*, written in late spring 1819, Spencer Roane charged that "[the Bank's] friends have not yet agreed upon the particular power to which it is to be attached!"[205] A handful of modern scholars have echoed this observation. Historian David Currie, for instance, expressed exasperation that "Marshall never bothered to explain how the

199. *Id.* at 368.
200. *Id.* at 385.
201. *Id.* at 385–86.
202. *Id.* at 422–23.
203. *Id.* at 407, 411.
204. *Id.* at 407–09, 411; *see* Schwartz, *Misreading* McCulloch, *supra* note 98, at 60–61.
205. GUNTHER, *supra* note 46, at 133.

establishment of the Bank was necessary, proper, or even conducive to the execution of any of the powers expressly granted to Congress."[206]

The most obvious way to ground the Bank in the enumerated powers would have been to rely on the Commerce Clause. Marshall could have cited the Commerce Clause either by itself or as a first among equals in a list of powers from which a bank-chartering power could have been implied. Not only were the arguments clearly laid out for Marshall by the advocates, but they were also obvious from a historical record with which he was thoroughly familiar.

B. Gibbons v. Ogden

Gibbons v. Ogden is conventionally understood as the other of Marshall's two great affirmative nationalism cases. But like *McCulloch*, *Gibbons* is only somewhat nationalistic in its leaning, and through a combination of Marshallian caginess, limited willingness to commit himself, and incompletely worked-out doctrinal thinking, *Gibbons* contains important ambiguities.

1. The Gibbons *Litigation*

The litigation in *Gibbons* arose out of more than a decade of legal wrangling over the rights to operate steam-powered vessels on the Hudson River. Steamboat technology, by enabling travel against the current of navigable rivers, the main interstate highways in the early nineteenth century, held the potential to revolutionize interstate commerce and offered potentially enormous profits to holders of state-issued monopolies like the partnership of Robert Livingston and Robert Fulton.[207] Livingston, a statesman with great political influence in New York, and Fulton, an engineer who had made advances in steamboat technology, had won such a monopoly from the New York legislature. After losing a legal battle challenging the monopoly, Aaron Ogden purchased a license from the Livingston-Fulton partnership to operate a lucrative steamboat passenger service between New York City and Elizabethtown, New Jersey. Thomas Gibbons, a former partner of Ogden's who was now feuding with him, began running his own steamboats on that route, and Ogden sued to enjoin Gibbons from continuing to do so.[208] The chancery court issued the injunction, and the

206. CURRIE, THE FEDERALIST PERIOD, *supra* note 85, at 80.

207. *See* HERBERT A. JOHNSON, GIBBONS V. OGDEN: JOHN MARSHALL, STEAMBOATS, AND THE COMMERCE CLAUSE 28 (2010); Primus, *The Limits of Enumeration*, *supra* note 17, at 579–82.

208. JOHNSON, *supra* note 207, at 28–29.

decision was upheld in the chancery appellate court by the renowned Chancellor James Kent.[209] The U.S. Supreme Court reversed.[210]

On behalf of Gibbons, Daniel Webster and U.S. Attorney General William Wirt made a two-pronged argument. First, the power to regulate navigation fell within an exclusive federal commerce power—the dormant Commerce Clause. Federal exclusivity made it unconstitutional for a state to regulate any aspect of navigation, such as issuing the steamboat monopoly.[211] Second, Gibbons was in possession of a federal license to engage in the coasting trade, pursuant to a 1793 statute entitled, "An act for enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries, and for regulating the same" (Coastal Act).[212] The prima facie purpose of the license was to identify American-owned vessels, which were entitled to lower tonnage and import duties than foreign-owned ones.[213] But, Gibbons' lawyers argued that the federal license gave its holder a federal right to engage in coastal navigation. As such, the state monopoly conflicted with the federal license and was therefore void under the Supremacy Clause.[214]

Significantly, Ogden's lawyer, Thomas Oakley, did not challenge Congress's commerce power to enact the coasting license law. Rather, he argued that the power to regulate navigation was an *implied* commerce power, and that "[a]ll *implied* powers are, of course, concurrent," because to hold otherwise "would deprive the States almost entirely of sovereignty, as these implied powers must inevitably be very numerous, and must embrace a wide field of legislation."[215] In other words, the broad potential scope of implied powers would, if deemed exclusive, preempt an unacceptably wide swath of state laws. The state therefore had to be deemed to hold the concurrent power to regulate navigation, notwithstanding the Commerce Clause. Nor did the coasting law conflict with the state's concurrent power to regulate navigation because Congress did not intend that the license convey a general freedom from state regulation when plying navigable waterways. Oakley was probably right on this point: the Coasting Act

209. *See id.* at 27–37; Primus, *The Limits of Enumeration*, *supra* note 17, at 579–82.
210. Primus, *The Limits of Enumeration*, *supra* note 17, at 581.
211. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 10 (1824).
212. *Id.* at 2; *see also* 1 Stat. 305 (1793).
213. *Gibbons*, 22 U.S. (9 Wheat.) at 22; 1 Stat. 305, 307–08.
214. *Gibbons*, 22 U.S. (9 Wheat.) at 25–27.
215. *Id.*

had been widely understood to exempt U.S. license-holders from "tonnage" duties imposed on foreign vessels, rather than to create a nationwide free-navigation zone. Chancellor Kent had endorsed that limited interpretation of the Coasting Act in the lower court.[216]

But Marshall struck down the New York steamboat monopoly by adopting Gibbons' strained interpretation of the coasting license as a free navigation permit. He might have done so by rejecting Oakley's contention that all implied powers are concurrent, such that the exercise of a federal power over nautical traffic was field preemptive. Or, he could have simply pointed out that a federal free trade license conflicted with a state monopoly grant. Marshall could have reached either of these analytical pathways by asserting, with little discussion, that a power to regulate navigation was necessary and proper to the regulation of trade—that is, an implied commerce power. Instead, Marshall deemed it important to hold that navigation was not an *implied* commerce power, but rather was entailed by the *definition* of commerce:

> [C]ounsel for the appellee would limit [commerce regulation] 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. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.[217]

This language supplies the core of *Gibbons*' famous holding, and post-New Deal courts and commentators have interpreted this passage as committing American constitutional law to a broad construction of the Commerce Clause.[218] It is noteworthy that the language misleadingly implies that Ogden's lawyers argued that Congress lacked the commerce power to regulate navigation. But that was not true: recall that Oakley

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216. Primus, *The Limits of Enumeration*, *supra* note 17, at 608.

217. *Gibbons*, 22 U.S. (9 Wheat.) at 189–90.

218. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 120 (1942) (*Gibbons* "described the federal commerce power with a breadth never yet exceeded"); Primus, *The Limits of Enumeration*, *supra* note 17, at 614.

merely asserted that congressional control over navigation was an implied, rather than express power; that exercises of implied federal powers were not per se exclusive; and that the Coastal Act did not conflict with the steamboat monopoly.

Although the case was ultimately decided on statutory grounds, the core of both sides' arguments focused on whether the Commerce Clause in its dormant state precluded the New York law.[219] Marshall discussed this argument at length and seemed ready to adopt it, but, ultimately relied on a statutory preemption analysis arising out of the Coasting Act, which would have been unnecessary under a commerce exclusivity disposition.[220] Scholars have debated for decades why Marshall flirted so extensively with commerce exclusivity only to veer away at the last moment.[221] This puzzle is wrapped in the (unnoticed) enigma of Marshall's decision to ignore *McCulloch* and implied commerce powers.

2. Avoiding implied powers (1): navigation is commerce

Marshall introduced the famous "commerce is . . . intercourse" passage quoted above with this language: "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."[222] Subsequent commentators have overlooked the self-contradiction in this curious passage: according to Marshall, commerce can't be defined—so, he says, let's define it. What "was aptly said at the bar" was Daniel Webster's argument that:

> It was in vain to look for a precise and exact *definition* of the powers of Congress, on several subjects. The constitution did not undertake the task of making such exact definitions. In conferring powers, it proceeded in the way of *enumeration*, stating the powers conferred, one after another, in few words; and, where the power was general, or complex in its nature, the extent of the grant must necessarily be judged of, and limited, by its object, and by the nature of the power.[223]

Webster expressly asked the Court not to define commerce, but to find it exclusive in any case in which a state law affected the uniformity

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219. *See* Norman R. Williams, Gibbons, 79 N.Y.U. L. REV. 1398, 1415 (2004) (arguing that statutory argument was a throw-in by counsel).

220. *Id.* at 209–21.

221. *See, e.g.*, FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE 16–17 (1937); Williams, *supra* note 219, *passim.*

222. *Gibbons*, 22 U.S. (9 Wheat.) at 189.

223. WEBSTER, *supra* note 110, at 10–11.

of interstate trade.[224] The purpose of the Commerce Clause, and indeed an overriding purpose of meeting in convention to draft the new Constitution, Webster argued, was to get rid of the "divers restrictions" by which states sought commercial advantage over one another, and institute "an uniform and general system."[225] These purposes, "[f]rom the very nature of the case," could only be maintained by an exclusive federal commerce power.[226] The "very object" of the Commerce Clause was "to take away" concurrent state power to regulate interstate commerce.[227] Because "monopolies of trade and navigation" created disuniform commercial regulation, the power to grant them "should not be considered as still retained by the state."[228] In sum, Webster argued, because commerce regulation potentially "cover[ed] a vast field of legislation," it was better not to define commerce but rather to apply exclusivity to any commerce-related matter where federal control could operate "with more advantage" to "the public good."[229]

It is more than curious that Marshall treated navigation as a matter of *the definition* of commerce, rather than as an implied power under the Commerce Clause. While perhaps not universal, it was certainly common for founding era writers to refer to "commerce" and "navigation" as distinct things.[230] Similarly, while some members of Congress appeared to view navigation as a regulation of commerce per se, it was also commonplace to view the regulation of navigation as *incidental to* the regulation of commerce.[231] Indeed, navigation regulation was held up time and again as a leading and uncontroversial illustration of the constitutional existence of implied powers. Hamilton and members of Congress arguing for the constitutionality of the first Bank had cited federal laws erecting "lighthouses, beacons, buoys" and other navigation

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224. *Id.* at 10–14.
225. *Id.* at 11, 13.
226. *Id.* at 13.
227. *Id.* at 13–14.
228. *Id.* at 14.
229. *Id.* at 14, 17.
230. For example, John Adams, writing to his wife Abigail, expressed the hope in 1780 that his sons would be free from the burden of studying "Politicks and War" in order to study "Mathematicks and Philosophy, Geography, natural History, Naval Architecture, navigation, Commerce and Agriculture." Letter from John Adams to Abigail Adams (May 12, 1780), *in* 3 ADAMS FAMILY CORRESPONDENCE 342 (L.H. Butterfield & Marc Friedlaender eds., 1973).
231. Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 125–30 (2001).

aids as legislative precedent for an implied power pursuant to the Commerce Clause.[232] These legislative precedents were referred to repeatedly both inside and outside Congress.[233] Marshall and his judicial colleague, William Johnson, both issued circuit court opinions identifying navigation as an implied commerce power. Four years before *Gibbons*, in *The Wilson v. United States*,[234] Marshall had concluded that:

> From the adoption of the constitution, till this time, the universal sense of America has been, that the word "commerce," as used in that instrument, is to be considered a generic term, comprehending navigation, *or, that a control over navigation is necessarily incidental to the power to regulate commerce.*[235]

In *Elkison v. Deliesseline* (1823),[236] Johnson stated that "the navigation of ships has always been held, by all nations, *to appertain* to commercial regulations."[237] The word "appertain" refers to implied powers.[238] The view that a federal power to regulate navigation could be *implied* under the commerce power was so well-established by 1824 that counsel for Ogden had to concede in the *Gibbons* oral argument that "laws regulating light houses, buoys, &c. are all exercises of the implied powers derived from that of regulating commerce."[239]

Gibbons, then, presented Marshall with the opportunity not only to reaffirm and build on *McCulloch*, but to endorse the idea of implied

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232. *See supra* notes 187–192 and accompanying text.

233. As summarized in an 1808 district court decision, the term "commerce" in the Constitution:

> does not necessarily include shipping or navigation; much less does it include the fisheries. Yet it never has been contended, that they are not the proper objects of national regulation; and several acts of congress have been made respecting them. It may be replied, that these are incidents to commerce, and intimately connected with it; and that congress, in legislating respecting them, act under the authority, given them by the constitution, to make all laws necessary and proper, for carrying into execution the enumerated powers.

United States v. The William, 28 F. Cas. 614, 621 (D. Mass. 1808) (No. 16,700).

234. 30 F. Cas. 239, 243 (C.C.D. Va. 1820) (No. 17,846).

235. *Id.* (emphasis added).

236. 8 F. Cas. 493 (C.C.D.S.C. 1823).

237. *Id.* at 495 (emphasis added).

238. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 418 (1819) ("[T]he power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers."); *A Friend of the Constitution*, *in* GUNTHER, *supra* note 46, 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.'").

239. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 117 (1824).

commerce powers, with its hugely expansive potential for federal legislative power. But, Marshall not only declined to cite *McCulloch* in his *Gibbons* opinion; at times he wrote as if its implied powers holding did not even exist. After his initial assertion that "commerce" means "commercial intercourse," Marshall argued that the term *must* include navigation, because "[i]f 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*."[240] This assertion makes no sense—indeed, is plainly wrong—according to *McCulloch*'s understanding of implied powers. Under *McCulloch*, the absence of a "direct" (read, enumerated) power should not negate an *implied* power over navigation.

Marshall seemed to bend over backwards to view navigation regulation as "direct" commerce regulation rather than an implied commerce power. He claimed to find further proof that commerce includes navigation in the 1807 Embargo Act.[241] That act implemented President Jefferson's foreign policy of economic retaliation against Britain's practice of stopping U.S. merchant ships and impressing American sailors into British naval service. "By its friends and its enemies," Marshall argued, the Embargo Act "was treated as a commercial, not as a war measure."[242] But this passage only demonstrates that commerce regulation *implies*—rather than definitionally *includes*—a power over navigation. An embargo is a prohibition of trade: it forbids U.S. ships to carry trade goods to the target nation, prohibits the target nation ships from landing in U.S. ports, and authorizes the seizure of target nation ships in American territorial waters. Such navigation regulations are auxiliary means to prevent the trading of goods with the foreign nation. A power to impose an embargo merely *implies* a power over navigation.

One might argue that an implied powers approach would have been narrower than the definitional approach adopted by Marshall. Before *Gibbons*, this argument would go, implied powers would be constrained by the narrow "trade-only" understanding of commerce; after *Gibbons*, implied powers can be attached to a broader base of a "trade-plus-navigation" definition of commerce. But consider how the *Gibbons* opinion might have read if Marshall *had* built on *McCulloch* rather than treating the issue as "one of definition" of the term "commerce." The

240. *Id.* at 190.

241. Embargo Act of 1807, 2 Stat. 451, 451–52 (1807), *repealed by* Act of January 9, 1808, 2 Stat. 453 (1808); *Gibbons*, 22 U.S. (9 Wheat.) at 190–93.

242. *Gibbons*, 22 U.S. (9 Wheat.) at 192.

following hypothetical revision of *Gibbons*' key language (indicated in bold and strikeouts) illustrates my point:

> 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~~ **is vain** 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 **unduly** restrict a general ~~term~~ **delegation of power**, applicable to many objects, to one of its ~~significations~~ **applications**. Commerce, undoubtedly, is traffic, but ~~it~~ **the power of Congress to regulate commerce** is something **much** more~~: it is intercourse~~. **As this Court said in the case of *McCulloch v. The State of Maryland*, the legislative powers of the government extend to all legislative means, "which are appropriate, which are plainly adapted" to executing the enumerated powers; in this case, the power to regulate trade among the states or with foreign nations or Indian tribes**. ~~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.~~ **As was aptly said at the bar, "[a]lmost all the business and intercourse of life may be connected, incidentally, more or less, with commercial regulations."**[243] **Whatever else may be comprehended by "that vast mass of incidental powers which must be involved in" the regulation of commerce, *see McCulloch*, those incidental powers over commerce undoubtedly include the power to regulate navigation**. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation . . . .

By applying *McCulloch*'s analysis of implied powers to the Commerce Clause in *Gibbons*, Marshall could have thrown the door open to a wide array of legislative means deemed by Congress to be "appropriate" and "plainly adapted" to the regulation of interstate trade. This could extend to internal improvements, and the regulation of agriculture, manufactures, and slavery. And that was precisely the problem. Applying *McCulloch* to the Commerce Clause was too expansive for Marshall. But by instead making the question turn on the definition of commerce, *Gibbons* in effect, suggested that each assertion of regulatory power onto a new object other than navigation (internal improvements, agriculture, slavery) would require a new definitional battle over the meaning of commerce. It is far easier to say that

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243. This statement is taken from Webster's argument. *Id.* at 9–10.

building roads is "plainly adapted" to regulating commerce than that roadbuilding *is* commerce. At oral argument, Webster asserted that road-building might be incidental to, but was not in itself, commerce regulation.[244] *McCulloch*'s implied powers analysis is based on a much looser concept of relatedness than the addition of dictionary meanings to a word or phrase. Moreover, Marshall in effect shifted the decision from a deferentially-reviewed congressional determination of "appropriate" or "plainly adapted" means to a rigorous judicial determination of the definition of a word in the Constitution.

3. Avoiding implied powers (2): reaching "into the interior"

The question of implied powers arises not only in the relationship between commerce and navigation, but also in the relationship between *inter*state and *intra*state commerce. The Commerce Clause enumerates three federal commerce powers: over commerce (1) "with foreign Nations," (2) "among the several States," and (3) "with the Indian Tribes."[245] After noting this constitutional text, Marshall says:

> 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.[246]

This raised a factual problem regarding the steamboat monopoly. New York claimed that the Hudson River was an entirely New York waterway, so that most of the route controlled by the monopoly was intrastate. Its interstate element occurred only at the New Jersey ferry terminal.[247] Looked at one way, the monopoly regulated intrastate commerce and only incidentally touched on interstate commerce, and one possible resolution would have been to let the monopoly stand as far as it concerned service entirely within New York. But, the Court wanted to embrace Webster's argument that intrastate sections of navigable waterways could not be separated from the system of free interstate navigation, which therefore had to be kept free even from intrastate obstructions. "Every district has a right to participate in

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244. *Id.* at 20 ("[G]enerally speaking, roads, and bridges, and ferries, though, of course, they affect commerce and intercourse, do not obtain that importance and elevation, as to be deemed *commercial regulations*.").

245. U.S. CONST. art. I, § 8, cl. 3.

246. *Gibbons*, 22 U.S. (9 Wheat.) at 194–95.

247. Primus, *The Limits of Enumeration*, *supra* note 17, at 584 n.77, 597.

[interstate commerce]. 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."[248] Thus, Marshall had to say that federal commerce power could reach at least some intrastate commerce.

In making this point, Marshall wrote two key passages whose ambiguity charted the divergent course of Commerce Clause jurisprudence for the next two centuries. The first defined the Constitution's phrase "commerce . . . among the several States."[249] Marshall began with the crucial assertion that "Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior."[250] But, he immediately shifted to defining the concept by negative implication from reserved state powers:

> 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 completely internal commerce of a State, then, may be considered as reserved for the State itself.[251]

On one hand, this passage suggests broadening federal powers, and the Court 120 years later would turn this language into the substantial effects test.[252] On the other hand, the rhetorical emphasis is on *restriction* of the federal power; note, too, the backhanded reference to *McCulloch* in the negative form of the words "convenient" and "necessary."

In the second key passage, Marshall argued at length that the state's power to inspect out-of-state trade goods did not demonstrate a state power to regulate interstate commerce. State inspection laws were a leading example 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

248. *Gibbons*, 22 U.S. (9 Wheat.) at 195.
249. *Id.* at 193.
250. *Id.* at 194.
251. *Id.* at 194–95.
252. *See* Wickard v. Filburn, 317 U.S. 111, 123–24 (1942).

> 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.[253]

Marshall hints that these are not utterly beyond the reach of Congress:

> 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.[254]

Here, Marshall reaffirmed the existence of implied powers in a general way, albeit in the course of reaffirming the reserved powers of the states. He also hints that implied powers can be applied to the Commerce Clause. But the application of this principle is relatively narrow. He continues:

> 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.[255]

Marshall's general hints about implied commerce powers can be read in a manner limited to the two main points Marshall was here attempting to make. First, Marshall reasserted that commerce regulation can cross state lines. Note that here he merely hinted, slyly, that Congress had the power to regulate port-to-port intrastate navigation, and did not clearly make that part of *Gibbons*' holding. He left that to follow-up litigation in the New York courts.[256] Second, Marshall affirmed the concept of separate regulatory spheres: the fact

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253. *Gibbons*, 22 U.S. (9 Wheat.) at 203.

254. *Id.* at 203–04.

255. *Id.* at 204.

256. *See* N. River Steam Boat Co. v. Livingston, 3 Cow. 713, 732–33 (N.Y. 1825); Primus, *The Limits of Enumeration*, *supra* note 17, at 616.

that the federal and state governments may use legislative means resembling one another's powers does not prove that they possess one another's powers concurrently. A significant implication of this passage is the notion that states have incidental powers to engage in what looks like commerce (or other federal) regulation—an idea that the Taney Court would make much of, as we shall see.

Significantly, nothing in this passage or elsewhere broadens the substance of what may be regulated as an implied commerce power beyond commerce itself—trade and, after *Gibbons*, navigation. Marshall's suggestion that federal commerce regulations may follow trade goods or navigation across state lines into the interior of a state does not necessarily suggest that Congress may, under its commerce power, build roads or regulate slavery. To be sure, one could exploit *Gibbons*' suggestion that commercial intercourse is commerce and argue that such intercourse includes commercial traffic on roads. But, objections to such an analogy would be easy to make: antebellum constitutional thought viewed exercises of power on dry land as different from those on water. Webster seemed to know his audience, perhaps from the Court's unwillingness to embrace a power over internal improvements in *McCulloch*. In arguing *Gibbons*, he worked assiduously to avoid proving too much, carefully distinguishing between navigation, an acceptable commercial power, and internal improvements, a controversial one. While arguing that "[i]t is a common principle, that arms of the sea, including navigable rivers, belong to the sovereign" as part of commerce regulation, Webster conceded that the commerce power did not authorize Congress to "establish ferries, turnpikes, bridges, &c. and provide for all this detail of interior legislation."[257] Marshall embraced this distinction, revealing a conservative edge to the definitional approach. He asserted, quite accurately, that "[a]ll America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation."[258] Navigation seems to have been unique in its national character. This distinction would encourage a future Court to reject novel or contested definitions of commerce; it certainly cuts against readings of *Gibbons* that suggest the case offered leading, rather than lagging,

257. *Gibbons*, 22 U.S. (9 Wheat.) at 19, 22.
258. *Id.* at 190.

interpretations of congressional power.[259] However much it may have encouraged later Congresses to push the boundaries of its powers, *Gibbons also* invited later Courts to refuse to extend the definition of commerce beyond trade-plus-navigation. In fact, the latter is exactly what happened over the next century.

4. Separate spheres: commerce exclusivity and reserved powers

It is well known that Marshall's opinion in *Gibbons* did not resolve the question of whether the commerce power was exclusive. Famously, Marshall recited Webster's exclusivity argument at great length only to stop short of implementing it. He concluded "[t]here is great force in this argument, and the Court is not satisfied that it has been refuted."[260] There, the exclusivity discussion ends, and Marshall at that point shifted to inquire whether the steamboat monopoly grant "come[s] into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him."[261] This inquiry, spanning the next twelve pages of the opinion, concluded that the federal coasting license law does indeed collide with the steamboat monopoly.[262] Johnson, chagrined by this (in his view) cop-out, wrote separately to concur in the judgment, but upon the "materially different" ground of Commerce Clause exclusivity. "If there was any one object riding over every other in the adoption of the [C]onstitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."[263] Thus, even if "the licensing act was repealed tomorrow," Gibbons' right to run his steamboat route irrespective of the New York monopoly grant "would be as strong as it is under this license."[264]

Why would Marshall flirt so extensively with a broad negative commerce argument only to veer away sharply and rely on a statutory preemption argument? For nearly two centuries, this feature of *Gibbons* has puzzled courts and commentators, some of whom simply decided to misread *Gibbons* as though the Court had in fact held that federal

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259. *See* Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1144 (2001) (asserting that "nationalist decisions such as *McCulloch* and *Gibbons*" expressed "the Court's broad invitation [to Congress] to exercise national power").

260. *Gibbons*, 22 U.S. (9 Wheat.) at 209.

261. *Id.* at 210.

262. *Id.* at 210–22.

263. *Id.* at 231 (Johnson, J., concurring in the judgment).

264. *Id.* at 231–32.

commerce power was exclusive.[265] Felix Frankfurter's reading, though perceptive, was more of a description than an explanation: Marshall's attraction to "the opportunities presented by the [C]ommerce [C]lause to restrain local legislatures from hampering the free play of commerce among the states" was tempered by his "hardheaded" and "pragmatic" "empiricism in not tying the Court to rigid formulas for accomplishing such restrictions."[266] Frankfurter went on to suggest that this made Marshall indecisive or "confused" between his two choices.[267]

Marshall was both less and more confused than Frankfurter suggested. In general, Marshall preferred to rely on interpreting federal statutes rather than constitutional provisions to dispose of difficult federal-state power conflicts.[268] This was consistent with Marshall's penchant for avoiding the appearance of judicial activism. Significantly, a dormant commerce "power" is really a power of the Court. By definition, it relies on the Commerce Clause itself in the absence of legislation, and can only be enforced by judicial decision. *Gibbons* fits the pattern of Marshall's decisions described by legal historian William Nelson, in which Marshall deferred contested policy matters to the political branches while issuing constitutional interpretations on consensus principles.[269] In *Gibbons*, Marshall constitutionalized the broad consensus supporting national control over navigable waterways by making navigation part of the definition of commerce. But when it came to the potentially volatile question of choosing that policy, he attributed to Congress the choice to make navigation free and to disempower state legislatures from granting nautical monopolies.[270] Marshall's extended flirtation with dormant commerce exclusivity was not confused, but strategically layered. It showed states' rights advocates that Marshall could have decided the case in a more far-reaching and intrusive way. Relying on the statutory

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265. *See, e.g.*, New York v. Miln, 36 U.S. (11 Pet.) 102, 158 (1837) (Story, J., dissenting) (construing *Gibbons* as holding the federal commerce power to be exclusive).

266. FRANKFURTER, *supra* note 221, at 14.

267. *Id.* at 16–17.

268. For other examples of Chief Justice Marshall using this technique, see Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 447–48 (1827); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 442–47 (1821); The Wilson v. United States, 30 F. Cas. 239, 243 (C.C.D. Va. 1820) (No. 17,846).

269. William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 898, 933 (1978); *see also* Williams, *supra* note 219, at 1474–75 (arguing that Marshall relied on the statute to signal that Congress should take the leading role in coordinating interstate commercial regulation).

270. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 230–32 (1824).

ground, Marshall nevertheless left the threat of exclusivity hanging, while reassuringly refraining from using it.

A second, stronger reason for Marshall to veer away from Commerce Clause exclusivity was his uncertainty about its doctrinal logic and implications. He was understandably reluctant to endorse a doctrine that the dormant commerce power excluded all state police power laws affecting interstate commerce. The problem was that many, if not most exercises of state police powers did have such an effect. A general theory of commerce power exclusivity would therefore raise vexed questions about invalidating the reserved powers of the states to regulate health, safety, morals—and race. Marshall had not worked out a general exclusivity theory that could invalidate selected state police powers while preserving others so as to avoid explosive controversies. Neither had Webster, who urged, somewhat confusedly, that the commerce power, though exclusive, was a power "to give the general rule" from which exceptions would be recognized through "a most reasonable construction" of the Constitution "as necessary to the just power of the States" in cases "where the States can operate with more advantage to the community."[271] Nor had any other judges solved this problem, nor would they, so long as jurists were fixed on the idea that the federal government and states occupied separate spheres of legislative power that differed by subject matter. The Court's nineteenth century solution, reached nearly thirty years after *Gibbons*, was to take dormant commerce exclusivity challenges on a case-by-case basis.[272] The Court's twentieth century solution was to make concurrent powers the rule and exclusivity the exception, not based on subject matter, but only when state laws discriminated against commerce from other states or unduly burdened its interstate passage.[273]

Marshall could not shake the separate spheres idea, as demonstrated by his confused and ultimately unpersuasive argument that states lacked a power to regulate interstate commerce.[274] He went to great lengths to explain that police power laws were different from commercial regulations, even claiming that identical federal and state laws inspecting the quality of trade goods were fundamentally different

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271. *Id.* at 16–17, 20.

272. *See, e.g.*, Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 319–20 (1851) ("We decide the precise questions before us . . . applicable to this particular subject in the state in which the legislation of Congress has left it.").

273. *See generally* CHEMERINSKY, *supra* note 70, at 435–40, 455–57 (analyzing the progression of commerce clause exclusivity into the 20th century).

274. *Gibbons*, 22 U.S. (9 Wheat.) at 197–201.

because they came from different sources: the federal law came from the commerce power and the state law from the police power.[275] But that is a mere tautology. Compounding the problem was Marshall's inability to reconcile this claim with his repeated acknowledgment that states had the power to regulate their "completely internal" commerce.

In several other passages, Marshall contradicted himself by writing as if an exclusive federal commerce power is incompatible with *any* state regulation of commerce. This in part stemmed from his tendency to lapse into an imprecision, not atypical of both antebellum and modern judges, to describe the federal power as a power over "commerce" without the "foreign" or "interstate" qualification. "We are now arrived at the inquiry," Marshall wrote, "What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce [sic] is to be governed."[276] More tellingly, he never offered a single example of "completely internal" state commerce regulation. On the contrary, whenever he discussed specific types of state laws that are not precluded by the federal commerce power, he took pains to show that they were properly characterized as police and not commerce regulations. For example, while conceding "[t]hat [state] inspection laws may have a remote and considerable influence on commerce," Marshall vehemently denied "that a power to regulate commerce is the source from which the right to pass them is derived[.]"[277]

These difficulties bring us back to Marshall's choice not to treat navigation as an implied power. He was uncertain about the exclusive effect of federal statutes. To hold that an express constitutional grant of federal power could make such an inroad was contentious enough; to hold that *implied* powers could do so would have raised a difficult question. Could an implied power be field-preemptive in the same way that at least some enumerated powers were? Johnson's circuit opinion in *Elkison* answered yes.[278] In the *Gibbons* hearing, counsel for the steamboat monopoly argued no: "All *implied* powers are, of course, concurrent," Oakley contended, because to hold otherwise "would deprive the States almost entirely of sovereignty, as these implied powers must inevitably be very numerous, and must embrace a wide

275. *Id.* at 203–04.
276. *Id.* at 196.
277. *Id.* at 203.
278. Elkison v. Deliesseline, 8 F. Cas. 493, 495 (C.C.D.S.C. 1823) (No. 4,366) ("But the right of the general government to regulate commerce with the sister states and foreign nations is a paramount and exclusive right; and this conclusion we arrive at, whether we examine it with reference to the words of the constitution, or the nature of the grant.").

field of legislation."[279] In other words, clever lawyers might challenge state laws by arguing that as-yet-unexercised implied powers excluded state laws. This might, as Chancellor Kent had argued in *Livingston*, leave state legislatures guessing about what laws might be excluded.[280] Even if one's theory were that implied powers could be invoked only where Congress had legislated, there remained disagreement or confusion about the preemptive effect of statutes: Did they occupy an entire field or only displace conflicting state laws? Note, too that that distinction would not have been clear in the antebellum era. Marshall muddied these waters further by interpreting federal licensing statutes as creating nationwide free trade rights, which essentially rendered the distinction between field and conflict preemption moot.[281] By making navigation an element of a definition of the word commerce in the Constitution, Marshall sidestepped these problems.

5. The limits of Gibbons

It would be silly to argue that Marshall shrank the reach of the Commerce Clause in *Gibbons*. But there is a broad middle ground between that conclusion and the open-ended expansion of the commerce power with which Marshall's opinion has been credited. As he did in *McCulloch*, Marshall took a middle ground with studied ambiguity. He offered hints and phrases that readers could, and eventually did, construe as suggesting the substantial effects test by which the modern Commerce Clause has been interpreted as something approaching a power to legislate for the general welfare. At the same time, *Gibbons* is chock-full of language suggesting more limited interpretations. The opinion can be read to confine implied commerce powers to the idea that commerce regulation narrowly construed as buying, selling, or transportation, can reach only as far as seemingly intrastate commercial practices that affect interstate commerce. That is to say, implied powers could not reach things that were not deemed "commerce." This is how *Gibbons* was understood in the *Lochner* era.[282] And the opinion can even be understood to mean that state laws can be immunized from commerce regulation if they are

279. *Gibbons*, 22 U.S. (9 Wheat.) at 37. While there is some support in *Gibbons* for such a distinction between express and implied powers, Marshall does not clarify whether federal statutes enacted under implied commerce powers would be field-preemptive.

280. 9 Johns. 507, 576 (N.Y. 1812) ("Such a doctrine would be constantly taxing our sagacity, to see whether the law might not contravene some future regulation of commerce . . . .").

281. *Gibbons*, 22 U.S. (9 Wheat.) at 221.

282. *See infra* Section V.A.

properly characterized as police power laws. This is how the Taney Court understood *Gibbons*, as discussed in the next section. Indeed, a sign of the limits of *Gibbons*' nationalism, or at least its profound ambiguity, is its favorable reception in the Jacksonian-dominated Taney Court. While ignoring or even flouting *McCulloch*, Taney Court Justices celebrated *Gibbons* as the leading case and authoritative interpretation of the Commerce Clause.[283] The Taney Court's comfort with *Gibbons* supports the notion that the case could easily be read to fit into a jurisprudence of moderate unionism that tilted toward state sovereignty.

IV. IMPLIED COMMERCE POWERS IN THE TANEY COURT

The Taney Court decided four major cases between 1837 and 1852 that struggled with the tension between the Commerce Clause and reserved state powers. The four cases are unified by a single theme—the power of states to keep out undesirable persons or things—and driven by an overriding concern to sustain the power of states to regulate race and slavery, without interference from the federal commerce power.

In *New York v. Miln*,[284] the Court upheld a New York law that required ships entering the port of New York to submit written information about disembarking passengers and post a bond to cover the potential costs to the city of hosting paupers or diseased persons.[285] Following *Miln*, the Court upheld state laws barring slave importation, in *Groves v. Slaughter*,[286] and regulating liquor sales, in *The License Cases*,[287] but struck down a state tax on interstate and foreign passenger arrivals, in *The Passenger Cases*.[288] These cases reflected continuing internal disagreement and doctrinal uncertainty. The three post-*Miln* cases showed the Taney Court at its most perplexed, producing nineteen separate opinions. Before *Cooley v. Board of Wardens*,[289] the Justices were unable to reach consensus on the proper analysis to determine when a state law was claimed to violate the federal commerce power.[290] Yet

283. *Gibbons*' primary holdings were cited seventeen times in support of the judgment in Taney Court decisions. *McCulloch* was cited was cited only once for a proposition relating to implied powers. *See* United States v. Gratiot, 39 U.S. 526, 537 (1840).

284. 36 U.S. (11 Pet.) 102 (1837).

285. *Id.* at 130–31.

286. 40 U.S. (15 Pet.) 449, 504 (1841).

287. 46 U.S. (5 How.) 504, 573 (1847).

288. 48 U.S. (7 How.) 283 (1849).

289. 53 U.S. (12 How.) 299 (1851).

290. *See* The License Cases, 46 U.S. (5 How.) at 573 (Taney, C.J., concurring) (noting the disagreement amongst the Justices regarding the underlying principles

only *The Passenger Cases* produced sharp disagreement over the result, when the Justices divided 5–4 in deciding to nullify municipal taxes on arriving immigrants in the ports of New York and Boston.[291] When it came to the primacy of the states' core reserved powers, particularly the power to control slavery and race matters, the Taney Court Justices showed remarkable consensus. This consensus entailed a rejection of *McCulloch*'s idea of implied powers, at least in Commerce Clause cases.

A. Limiting Gibbons*: Federal Power versus State Police Power*

The issue in each case was whether the federal commerce power, either in its dormant state or in light of a federal statute or treaty, nullified a state law exercising the state's "police power." The 1837 decision in *Miln* established a pattern for how the Taney Court would approach these cases. *Miln* involved a challenge to a New York law that required the master or owner of any ship landing in New York harbor to submit a written report providing the name, birthplace, residence, age and occupation of all foreign or interstate passengers, and to post a bond for the costs of maintenance or removal of impoverished immigrants.[292] The law plainly regulated navigation, which was commerce under *Gibbons*, and indeed Congress had already imposed similar regulations on arriving immigrants.[293] But, the Court, over the lone dissent of Justice Story, upheld the law on the ground that it was a "police" regulation designed to aid the state's ability to "guard against" "the moral pestilence of paupers, vagabonds, and possibly convicts" by controlling immigration.[294] The Court tried half-heartedly to emphasize the law's intrastate aim of regulating passengers *after* debarkation, when they had merged with the residents of New York

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governing the case); Felix Frankfurter, *Taney and the Commerce Clause*, 49 HARV. L. REV. 1286, 1288 (1936) (explaining the divergent views between Taney and other members of the court over Chief Justice Marshall's interpretation of the Commerce Clause); *see also* Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 432 (2008) (citing 5 CARL B. SWISHER, THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836–64 388 (1974) ("In three of the four [Dormant Commerce Clause Doctrine] cases decided by the Taney Court, so many Justices spoke for themselves alone that 'whether majority or minority . . . [t]he opinions . . . were so diverse that attempts to summarize could only confuse.'")).

291. 48 U.S. (7 How.) at 392, 409–10 (McLean, J., dissenting).

292. New York v. Miln, 36 U.S. (11 Pet.) 102, 130–31 (1837).

293. *Id.* at 138; *see* Steerage Act of 1819, 3 Stat. 488 (1819).

294. *Miln*, 36 U.S. (11 Pet.) at 142.

and come within its jurisdiction.[295] The New York law, according to Justice Barbour's majority opinion, was as much a matter of the "acknowledged and undisputed jurisdiction for every purpose of internal regulation" as was the state's power to prosecute a foreign sailor committing a crime on the streets of New York while his ship was in port.[296] Having characterized the law as an internal police law rather than a regulation of commerce, and thus "the exercise of a power which rightfully belonged to the states," the Court asserted that it was unnecessary to consider "whether the power to regulate commerce, be or be not exclusive of the states."[297] But this was unconvincing: regulating passengers at the point of debarkation plainly regulated the preceding journey.

While none of the opinions in the Taney Court's commerce decisions cited *McCulloch* on implied powers or federal supremacy, they virtually all treated *Gibbons* as the leading case for construing the Commerce Clause.[298] But they construed *Gibbons* with a significant twist. In *Gibbons*, Marshall had made a point of asserting that state laws incidentally affecting commerce—quarantine and inspection laws, for example—did not prove the existence of a concurrent state power to regulate interstate and foreign commerce because the laws came from a different source: namely, police powers.[299] In *Miln*, and thereafter, the Court turned this notion on its head: because the law came from a different source (police powers), it did not by definition primarily involve commerce.[300]

Miln thus created a template in which the Court would uphold state laws, irrespective of their effect on foreign or interstate commerce, if the laws could plausibly be characterized as police regulations. In *The License Cases*, where the Court reviewed state laws that required a license to sell liquor and regulated the amount to be sold, it was difficult to characterize the regulations as non-commercial.[301] While some of the Justices in that case's six separate opinions emphasized that the laws regulated purely intrastate buying and selling, the

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295. *Id.* at 138–39 ("[W]hen they have ceased to have any [connection] with the ship, and when, therefore, they have ceased to be *passengers*; we are satisfied that acts of congress . . . can . . . be said to come into conflict with the law of a state . . . .").

296. *Id.* at 135, 140.

297. *Id.* at 132.

298. The Taney Court consensus was that Congress was properly placed in charge of maintaining equal access of all United States citizens to the nation's navigable waterways. *See* Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 454 (1851).

299. *See* Gibbons v. Ogden, 22 U.S. (9. Wheat.) 1, 204 (1824).

300. *Miln*, 36 U.S. (11 Pet.) at 102, 132.

301. The License Cases, 46 U.S. (5 How.) 504, 576–77 (1847).

dominant factor was captured by Justice Grier: "the true question presented by these cases, and one which I am not disposed to evade, is, whether the States have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism, and crime."[302] That is to say, upholding the state law required emphasizing its purpose as regulating health, safety, or morals. As Taney put it "disease, pestilence, and pauperism are not subjects of commerce."[303]

B. Reversing McCulloch*: the Idea of State Self-Defense*

Taney Court Justices could hardly obscure the fact that the state laws in all of these cases had a significant effect on foreign or interstate commerce, which should have brought them within the ambit of federal power under *Gibbons* and *McCulloch*. It was here that the Taney Court developed a doctrine that put *McCulloch* in reverse. Justice Barbour, a states' rights firebrand from Virginia, led the way with his opinion in *Miln*. Borrowing language from *McCulloch*, Barbour asserted that when a state acts within

> the legitimate scope of its power as to the end to be attained, it may use whatsoever means, being appropriate to that end, it may think fit; although they may be the same, or so nearly the same, as scarcely to be distinguishable from those adopted by congress acting under a different power . . . .[304]

To be sure, "in the event of collision, the law of the state must yield."[305] But in the absence of such collision—and the Court found none here in *Miln*—the state had "not only the right, but the bounden and solemn duty . . . to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, *which it may deem to be conducive to these ends*."[306] When it came to "all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, . . . the authority of a state is *complete, unqualified, and exclusive*."[307]

This reserved powers manifesto reversed *McCulloch* in two respects. First, it suggested that the states' reserved powers could defeat at least

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302. *Id.* at 631 (Grier, J., concurring).
303. *Id.* at 576–77 (Taney, C.J.).
304. *Miln*, 36 U.S. (11 Pet.) at 137.
305. *Id.*
306. *Id.* at 139 (emphasis added).
307. *Id.* (emphasis added).

some plausible claims of implied powers under *McCulloch*. An implied power is one that is not expressly granted to Congress, and thus presumptively reserved to the states, except to the extent it is conducive to executing an enumerated power. But Barbour said that state police powers are "exclusive."[308] More moderate Taney Court Justices subsequently agreed, in language negating *McCulloch*, that a state's internal trade was "beyond the reach of Congress."[309] Despite differences of opinion on the Court regarding Commerce Clause exclusivity and federal power over immigration, no justice—not even Justice Story—appears to have dissented from this robust description of reserved state powers.[310]

Pushing beyond that, Taney Court Justices argued that state police powers carry implied powers that may extend into the ambit of the federal commerce power. In *Miln*, the New York passenger-report law was not in itself a regulation of foreign paupers entering the state, but a regulation of navigation used as means to that end.[311] So long as the end was legitimate—within state police powers—states could use legislative means that were indistinguishable from commerce regulation.[312] Likewise, in *The Passenger Cases*, Chief Justice Taney argued that regulating passengers generally was necessary and proper to the state's reserved power to exclude "any person, or class of persons, whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens," notwithstanding its incidental effect on foreign commerce.[313] This was truly *McCulloch* in reverse.

A broad Taney Court consensus held that the concept of reserved state powers "has its foundation in the sacred law of self-defence, which no power granted to Congress can restrain or annul."[314] Justice

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308. *Id.*

309. The License Cases, 46 U.S. (5 How.) 504, 608 (1847) (Catron, J.) ("[T]he police power of the States was reserved to the States, and that it is beyond the reach of Congress . . . ."); *id.* at 620 (Woodbury, J.) ("[T]he subject of buying and selling within a State is one . . . exclusively belonging to the power of the State . . . .").

310. Story's lone dissent in *Miln* focused on commerce exclusivity; it did not take on the majority's discussion of reserved powers though he undoubtedly disagreed with it. *Miln*, 36 U.S. (11 Pet.) at 158 (Story, J., dissenting).

311. *Id.* at 130 (describing the regulation as applying to master or commanders arriving at a New York port).

312. *Id.* at 133 ("[W]e hold that both the end and the means here used, are within the competency of the states . . . ."); *id.* at 137 (explaining that state police power laws are constitutional even if the execution of such laws resembles federal legislative means).

313. 48 U.S. (7 How.) 283, 466 (1849) (Taney, C.J., dissenting).

314. *Id.* at 457 (Grier, J.).

Barbour's assertion in *Miln* that reserved powers were "complete, unqualified, and exclusive" was not simply the ranting of a states'-rights firebrand. Justice John McLean, a Whig from Ohio appointed to the Court as a bipartisan maneuver by President Jackson, was the Taney Court's most sustained and die-hard proponent of exclusive federal commerce power. McLean contended that that the commerce power was exclusive because "A concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impracticable in action. It involves a moral and physical impossibility."[315] Yet this strict and formalistic notion of exclusive federal commerce power was a double-edged sword, with a sharp states' rights edge, for McLean, too, embraced a strong version of reserved state powers, linking police powers with an ultimate state sovereign power of self-preservation:

> Every thing prejudicial to the health or morals of a city may be removed. Merchandise from a port where a contagious disease prevails, being liable to communicate the disease, may be excluded; and, in extreme cases, it may be thrown into the sea. This comes in direct conflict with the regulation of commerce; and yet no one doubts the local power. It is a power essential to self-preservation, and exists, necessarily, in every organized community . . . .
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> From the explosive nature of gunpowder, a city may exclude it. Now this is an article of commerce, and is not known to carry infectious disease; yet, to guard against a contingent injury, a city may prohibit its introduction. These exceptions are always implied in commercial regulations, where the general government is admitted to have the exclusive power. They are not regulations of commerce, but acts of self-preservation. And although they affect commerce to some extent, yet such effect is the result of the exercise of an undoubted power in the State.[316]

Thus, although, "[a] concurrent power in the States to regulate commerce is an anomaly," McLean asserted,

> It does not follow, as is often said, with little accuracy, that, when a State law shall conflict with an act of Congress, the former must yield. On the contrary, except in certain cases named in the Federal Constitution, this is never correct when the act of the State is strictly within its powers.[317]

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315. The Passenger Cases, 48 U.S. (7 How.) at 399 (McLean, J., concurring).
316. The License Cases, 46 U.S. (5 How.) at 589–90 (McLean, J., concurring).
317. The Passenger Cases, 48 U.S. (7 How.) at 396–97 (McLean, J., concurring).

It is hard to see where *McCulloch* and federal implied powers fit into this scheme, yet McLean seems to make room for *state* implied powers to regulate in ways that incidentally affect commerce. "[W]hen a conflict occurs, the inquiry must necessarily be, which is the paramount law? And that must depend upon the supremacy of the power by which it was enacted."[318] Federal laws merely incidental to enumerated powers may well have to give way to such core interests.

This notion that conflicts between federal and state law might be resolved in favor of the states—contrary to *McCulloch* and *Gibbons*—commanded a consensus on the Taney Court. Justice Daniel, Barbour's successor as states'-rights advocate from Virginia, put it this way: "Every power delegated to the federal government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation."[319] How this idea would be harmonized with the Supremacy Clause, the Taney Court never worked out. In *The License Cases* (1847), Justice Grier, a judicial moderate from Pennsylvania, offered a suggestion:

> Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed, that every law for the restraint and punishment of crime, for the preservation of the public peace, health, and morals, must come within this category.
>
> As subjects of legislation, they are from their very nature of primary importance; they lie at the foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience, or luxury, to recede, when they come in conflict or collision, "*salus populi suprema lex*."
>
> If the right to control these subjects be "complete, unqualified, and exclusive" in the State legislatures, no regulations of secondary importance can supersede or restrain their operations, on any ground of prerogative or supremacy. The exigencies of the social compact require that such laws be executed before and above all others.[320]

This suggestion that courts weigh the relative importance of federal laws against state police power laws seems at first blush to undermine the principle of federal supremacy. But it can be harmonized with the Supremacy Clause if it is understood "only" as subverting *McCulloch*. If

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318. The License Cases, 46 U.S. (5 How.) at 588 (McLean, J., concurring).
319. *Id.* at 613 (Daniels, J., dissenting).
320. *Id.* at 631–32 (Grier, J., concurring).

federal laws of "lesser importance" are viewed as implied powers—that is, federal regulatory inroads into reserved powers that are well-adapted or convenient to executing enumerated powers—then Grier's opinion is consistent with, and indeed expresses, what the Taney Court was trying to say about temperance and immigration laws, as well as slavery, and concurrent powers: that federal implied powers must give way to conflicting state police powers of greater importance. Grier captures the thrust of these cases in a general principle.

C. Avoiding Commerce Exclusivity to Protect Slavery

Taney Court Justices were far more concerned with practical outcomes than with doctrinal consistency. The first practical concern was to preserve state police power regulation in general. The practical policy standing behind the doctrine of commerce exclusivity was one of nationwide domestic free trade. Story's *Miln* dissent embraced the free trade theory of commerce power, in which "the regulation of a subject . . . produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that upon which it has operated."[321] But replacing the dense web of state and municipal health, safety, and morals laws with a federal regime of sparse regulation could disorder society. Justice Catron expressed this anxiety in *The License Cases*, arguing that Commerce Clause exclusivity "would overthrow and annul entire codes of State legislation" and "expunge more State laws and city corporate regulations than Congress is likely to make in a century on the same subject."[322]

The majority on the Taney Court may have deemed it unnecessary to create a consistent principle of Commerce Clause exclusivity, so long as the Court consistently maintained state control over slavery and race. For it was this concern over slavery that primarily drove the reverse-*McCulloch* doctrine of implied reserved state powers. This became crystal clear in *Groves v. Slaughter* (1841), which raised the connection between interstate commerce exclusivity and slavery in the starkest possible fashion.[323] *Groves* involved a suit by a slave-trader to collect on promissory notes he had received for slaves sold on credit to Mississippi residents. The debtors claimed that the promissory notes were void because the sales violated a Mississippi constitutional

321. New York v. Miln, 36 U.S. (11 Pet.) 102, 158 (1837).
322. The License Cases, 46 U.S. (5 How.) at 607 (Catron, J., concurring).
323. Groves v. Slaughter, 40 U.S. (15 Pet.) 449, 495–96 (1841).

amendment that prohibited the commercial importation of slaves.[324] This ban on interstate slave sales was by no means an anti-slavery law, but rather a discriminatory commercial measure designed to bolster Mississippi's internal slave market.[325] Daniel Webster and Henry Clay, representing the slave dealer, advanced the irrefutable argument that the Mississippi provision thus represented the very type of protectionism that the dormant Commerce Clause was designed to eliminate.[326] But to nullify the Mississippi law by applying dormant commerce exclusivity, as Webster and Clay urged, would be to recognize that the interstate slave trade was within the regulatory power of Congress under the Commerce Clause. This would raise serious concerns, both for slave exporting states like Virginia and for free states. The former would fear a congressional ban on the interstate slave trade, while the latter would worry that their laws against slave importation would be deemed unconstitutional.

The majority opinion avoided all federal constitutional issues by deciding that the Mississippi constitutional provision banning interstate slave sales was not self-enforcing—that is, it was ineffective in the absence of implementing legislation, of which there was none.[327] This eliminated the debtors' defense, leaving the notes valid and enforceable. But Justice Baldwin apparently could not bring himself to join this artful dodge. In a separate concurrence in the judgment, he argued that slaves were articles of commerce, that the Commerce Clause was exclusive, and that therefore the Mississippi law was invalid, making the notes enforceable.[328] This bit of dissension apparently moved the other Justices to state their views on the constitutional

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324. *Id.* at 455–56.

325. *See id.* at 484 (noting the Mississippi legislature's addition of penalties to the constitutional amendment banning the importation of slaves for sale was intended to prevent capital outflows); *id.* at 487 ("Mississippi has not abandoned the introduction of slaves . . . . The only change which has been made is, that instead of the slave trade by strangers, the planter buys the slaves he requires, and carries them into the state for his own use."); Paul Finkelman, *John McLean: Moderate Abolitionist and Supreme Court Politician*, 62 VAND. L. REV. 519, 553 (2009) (explaining that while Mississippi residents could travel to other states to purchase slaves, restricting the importation of slaves for sale would prevent capital outflows form the state).

326. *Groves*, 40 U.S. (15 Pet.) at 495 ("If the right in states recognising slavery exists to prohibit trading in them, it will allow non-intercourse between the states of the Union by legislative enactments of the states; and will authorize retaliation. This is negatived by the decision of this Court in *Gibbons v. Ogden* . . . .").

327. *Groves*, 40 U.S. (15 Pet.) at 501–03.

328. *Id.* at 513, 517 (Baldwin, J., concurring).

questions they intended to avoid. McLean, like Baldwin, argued that the Commerce Clause was exclusive, but differed on whether it covered the interstate slave trade.[329] McLean said no. Taney said the exclusivity issue had been left open in *Miln*, the last word on the subject.[330] Story, Thompson, Wayne, and McKinley issued a joint one-sentence statement that they "concurred with the majority of the Court" that the Commerce Clause "did not interfere with the provision of the constitution of the state of Mississippi, which relates to the introduction of slaves as merchandise, or for sale."[331]

Thus, six of seven participating Justices in *Groves* agreed that the power to regulate slave trading within a state's borders was reserved to the states, even if the trading crossed state lines.[332] Chief Justice Taney paid lip service to federal supremacy by allowing that "[n]o one, I believe, doubts the controlling power of Congress in this respect; nor their right to abrogate and annul any and every regulation of commerce made by a state."[333] Yet in almost the same breath, he also asserted,

> [T]he power over this subject [slavery] is exclusively with the several states; and each of them has a right to decide for itself, whether it will or will not allow persons of this description [slaves] to be brought within its limits, . . . and the action of the several states upon this subject, cannot be controlled by Congress, either by virtue of its power to regulate commerce, or by virtue of any other power conferred by the Constitution of the United States.[334]

While some of the Justices seemed to view slavery as *sui generis*—as though there were a slavery exception to the Commerce Clause—others appeared to view slavery as merely a particularly strong form of reserved power, in a conception of reserved powers that could fend off other forms of federal regulation as well.

Slavery loomed in the background whenever the Court reviewed a state law aimed at protecting the inhabitants of the state from a perceived external evil. The connection between slavery and

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329. *Id.* at 505 (McLean, J., concurring).

330. *Id.* at 509 (Taney, C.J., concurring).

331. *Id.* at 510 (Story, Thompson, Wayne & McKinley, JJ., concurring). Story and McKinley apparently believed that the Mississippi constitutional ban on interstate slave sales was self-enforcing: they issued a one-sentence dissent stating that they would have held the notes void. *Id.* at 517 (McKinley, J., concurring).

332. Barbour had died, and Catron missed the argument due to illness. *Id.* Based on their records, however, both of these Southerners would have agreed with their brethren on this point.

333. *Id.* at 509 (Taney, C.J., dissenting).

334. *Id.* at 508.

immigration was built into the Constitution by the Migration or Importation Clause, as well as by the fear that admitting free blacks into southern states would stir up slave insurrections.[335] Thus, in *The Passenger Cases*, Chief Justice Taney emphatically asserted the state's power to exclude "any person, or class of persons, whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens," notwithstanding its incidental effect on foreign commerce.[336] Justice Grier was more explicit, linking the state's power "to repel from her shores lunatics, idiots, criminals, or paupers, which any foreign country, or even one of her sister States, might endeavour to thrust upon her" with "the right of any State, whose domestic security might be endangered by the admission of free negroes, to exclude them from her borders."[337] Even liquor sales raised the slavery question for the Taney Court Justices. In *The License Cases*, Justice Woodbury, Story's successor from Massachusetts, likened the temperance laws at issue to those regulating slaves and immigrants:

> It is the undoubted and reserved power of every State here, as a political body, to decide, independent of any provisions made by Congress, though subject not to conflict with any of them when rightful, who shall compose its population, who become its residents, who its citizens, who enjoy the privileges of its laws, and be entitled to their protection and favor, and what kind of property and business it will tolerate and protect. And no one government, or its agents or navigators, possess any right to make another State, against its consent, a penitentiary, or hospital, or poor-house farm for its wretched outcasts, or a receptacle for its poisons to health, and instruments of gambling and debauchery. Indeed, this court has deliberately said,—'We entertain no doubt whatsoever, that the States, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds, and paupers.'[338]

In *The Passenger Cases*, the dissenters were undoubtedly concerned in part with a general *salus populi* principle that a state must be able to protect itself from the side effects of immigration. There was substance

335. LIGHTNER, *supra* note 122, at 82–84.

336. The Passenger Cases, 48 U.S. (7 How.) 283, 466 (1849) (Taney, C.J., dissenting).

337. *Id.* at 457 (Grier, J., concurring).

338. The License Cases, 46 U.S. (5 How.) 554, 629 (1847) (Woodbury, J., concurring in the judgment) (quoting Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 542–43 (1842)).

behind Taney's claim that "the public history of the times" demonstrated "that a fearful amount of disease and pauperism is daily brought to our shores in emigrant ships," thereby threatening public health and the state treasury.[339] But it is also clear that the prime concern was to maintain state control over slavery. The majority's reasoning, Taney argued, meant that "the emancipated slaves of the West Indies have at this hour the absolute right to reside, hire houses, and traffic and trade throughout the Southern States, in spite of any State law to the contrary; inevitably producing the most serious discontent, and ultimately leading to the most painful consequences."[340] This state power was deemed necessary by dissenters both to prohibit the migration or importation of slaves into free states, and to prohibit the migration of free blacks into both slave and free states.[341] So strong was the consensus that slavery-regulation was a reserved state power that it transcended other jurisprudential disagreements. Abolitionist opinion was not represented on the antebellum Supreme Court.

More abstract doctrinal questions were left unresolved. The Taney Court finally reached a compromise on commerce exclusivity in *Cooley* where the Court upheld a municipal pilotage law that required ships arriving at Philadelphia to hire local pilots to steer them into port.[342] Municipal pilot laws were unquestionably regulations of navigation and hence of commerce; but, a 7–2 majority rejected across-the-board Commerce Clause exclusivity, once and for all. Instead, the Court would determine exclusivity on a case-by-case basis.[343] Pilotage laws were quintessentially in the latter category, according to the Court.[344] Under *Cooley*'s regime, commerce exclusivity would be selective, and was left hypothetical: the Court expressly declined to state opinions about "what other subjects, under the commercial power, are within the exclusive

339. The Passenger Cases, 48 U.S. (7 How.) at 467–68 (Taney, C.J., dissenting).

340. *Id.* at 474.

341. *See id.*; *id.* at 508 (Daniel, J., dissenting) (contending that the majority's construction of the trade treaty constitutes an "invasion of [states'] domestic security" by permitting "British subjects to land within the territory of any of the States cargoes of negroes from Jamaica, Hayti, or Africa"); *id.* at 525–26 (Woodbury, J., dissenting) (asserting the right of states to exclude "slaves, or, what is still more common in America, in Free States as well as Slave States, exclude colored emigrants, though free").

342. Cooley v. Bd. of Wardens, 53 U.S. (7 How.) 299, 320 (1851).

343. "[T]he power to regulate commerce," Justice Curtis wrote for the Court, "embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule," and others better suited to diverse local regulation. *Id.* at 319.

344. *Id.*

control of Congress, or may be regulated by the States in the absence of all congressional legislation[.]"[345] Nor did the Court clarify whether federal exclusivity required the presence of federal statutes, or whether "collisions" between federal and state law depended on actually conflicting objectives.

In the end, doctrinal consistency in abstract principles regarding commerce exclusivity was far less important to the Justices than preserving reserved state powers in general and control over slavery in particular. The sharpest disagreement in the Taney Court's commerce power decisions came in *The Passenger Cases*, where the Justices divided five-to-four in striking down the municipal taxes on immigrants. The majority held that a manifest federal policy in favor of open immigration nullified restrictive state immigration laws that were not especially targeted toward "paupers, vagabonds, or fugitives from justice[.]"[346] All nine Justices understood that recognizing a federal power over immigration, whether under the commerce or treaty powers, could, in theory, pose a threat to state slavery regulations. The difference came down to the dissenters' view that a federal immigration power placed state slave regulation on a slippery slope to unconstitutionality, and the majority's view that slavery would be sustained because the Court's unanimously supported state control of that issue, no matter what. As Justice Wayne, who voted to strike down the state law, put it, "[t]he exercise of constitutional power by the United States, or the consequences of its exercise, are not to be concluded by the summary logic of ifs and syllogisms."[347] The dissenters' fear that "the United States may introduce into the Southern States emancipated negroes from the West Indies and elsewhere" was unfounded because the Court would always interpret the Constitution so as not "to dissolve, or even disquiet, the fundamental organization of either of the States"—that is, to preserve slavery.[348]

V. THE EVOLUTION OF MODERN DOCTRINE

Antebellum Commerce Clause doctrine developed a robust theory of state reserved powers in the context of negative Commerce Clause cases to protect the scope of state regulation and to preserve state control over slavery. In the post-bellum and later *Lochner* eras, the

345. *Id.* at 320.
346. The Passenger Cases, 48 U.S. (7 How.) 283, 410, 426–27 (1849) (Wayne, J., concurring).
347. *Id.* at 429 (Wayne, J., concurring).
348. *Id.* at 428.

Supreme Court "imported" the antebellum doctrine into cases testing the limits of Congress's affirmative commerce power. That is to say, they used the antebellum theory of state reserved powers to limit federal statutes, rather than to preserve state laws against dormant Commerce Clause challenges.

This aspect of the development of Commerce Clause doctrine has been observed by twentieth and twenty–first century Supreme Court opinions and commentators.[349] But two important features of this transition have not been fully explored or have been entirely overlooked. First, consider the frequent *Lochner* era trope that, absent strong judicial protection of reserved state powers, the regulatory powers of the states would be "destroyed."[350] While always an exaggeration, this assertion may have had at least an element of truth under a nineteenth-century exclusive-powers world view in which a grant of power to the federal government meant a denial of that power to the states. But that element of truth would disappear from a concurrent-powers regime.

Second, even when the Court did finally begin to apply *McCulloch* to the Commerce Clause at the turn of the twentieth century, it permitted only incidental regulation of intrastate *commerce*, not incidental regulation of *intrastate non-commercial* activities that *affected* commerce. This was the mirror image of Taney Court cases asserting that state police powers were not commerce regulations, and therefore not precluded by Commerce Clause exclusivity, even though they incidentally affected commerce. The *Lochner* era Court turned this around to say that intrastate subjects of reserved powers were not commerce *and thus could not be regulated under the commerce power* even though they affected interstate commerce.

A. Implied Commerce Powers in the Lochner *Era*

Lochner era Commerce Clause jurisprudence, which can be dated from the Court's decisions in *United States v. E.C. Knight Co.*[351] in 1895

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349. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 553–54 (1995); GILLMAN, *supra* note 47, at 20–21 (arguing that *Lochner* era jurisprudence was fundamentally "Jacksonian"); Primus, *The Limits of Enumeration*, *supra* note 17, at 590–95 (arguing that *Lochner*-era jurisprudence maintained the narrow ante-bellum interpretation of the Commerce Clause that had originated to limit exclusivity).

350. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 295–96 (1936); Hammer v. Dagenhart, 247 U.S. 251, 276 (1918). Modern Court conservatives cling to this hyperbole. *See Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) ("We have a particular duty to ensure that the federal-state balance is not destroyed.").

351. 156 U.S. 1 (1895).

to *Carter v. Carter Coal Co.*[352] in 1936, is infamous for its crabbed construction of the federal government's commerce power.[353] This jurisprudence can be understood as perpetuating a continuous theme: a refusal to extend implied commerce powers beyond the incidental regulation of intrastate commerce. The motivations underlying this jurisprudence have been variously interpreted as the interjection of laissez faire economics into constitutional law or as a vestigial holdover of Jacksonian jurisprudence—with its excessive respect for reserved state powers and its antipathy to class legislation. Either way—and there is probably an element of truth in both interpretations—the Court's hostility to implied commerce powers in this period is undeniable.

While the post-Reconstruction Supreme Court reversed the Taney Court's rejection of a federal internal improvements power, it did so without relying on *McCulloch* or a doctrine of implied commerce powers. Instead, it simply analyzed internal improvements as interstate commerce itself, in the form of transportation and communications.[354] The main jurisprudential shift, undoubtedly influenced by reformed ideas of national sovereignty in the wake of the Civil War, was to emphasize the regulatory power of the national government over "every foot" of United States soil.[355]

But the post-Reconstruction Court continued to adhere to the Taney Court's idea that some matters were reserved to the states so as to impliedly block implied federal powers. One such matter was the regulation of private race relations. In *The Civil Rights Cases*,[356] the Court struck down the 1875 Civil Rights Act,[357] which prohibited race

352. 298 U.S. 238 (1936).

353. *See, e.g.*, Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 25–26 (1991). *See generally* CHEMERINSKY, *supra* note 70, at 252–59 (describing *Lochner*-era jurisprudence).

354. *See* California v. Cent. Pac. R.R. Co., 127 U.S. 1, 44–45 (1888) (upholding the federal power to charter interstate railroad companies); Pensacola Tel. Co. v. W. Union Tel. Co., 96 U.S. (6 Otto) 1, 10 (1877) (upholding a federal statute overriding state monopolies over telegraph lines).

355. *In re* Neagle, 135 U.S. 1, 27 (1890) ("The corporate government established by the Constitution is a nation, absolutely sovereign over every foot of soil and over every person within the national territory and within the sphere of action assigned to it."); *Ex parte* Siebold, 100 U.S. (10 Otto) 371, 395 (1880) ("[T]he government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it."); *Pensacola Tel. Co.*, 96 U.S. (6 Otto) at 10 ("The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction.").

356. 109 U.S. 3 (1883).

357. *Id.* at 26.

discrimination by privately owned hotels, restaurants, and places of public amusement.[358] The 8–1 majority rejected Justice Harlan's dissenting view that Congress's power to enforce the Equal Protection Clause created an implied power to prohibit private discrimination, under *McCulloch* and the section 5 authorization of "appropriate legislation."[359] To the majority, which did not acknowledge *McCulloch*, Congress had no implied power to cover the case, either under the Fourteenth Amendment or the Commerce Clause.[360] The buying and selling of services could easily have been deemed commerce, as a matter of language and logic, and multistate discrimination in these transactions would be deemed to affect more states than one in the twentieth century.[361] But, the Court in 1883 flatly stated "[o]f course, no one will contend that the power to pass [the law] was contained in the Constitution before the adoption of the last three amendments."[362] That is to say, it was somehow obvious to the Court that the Commerce Clause could not authorize the law. Yet, at the same time, the Court in this era recognized a federal commerce power over race relations on interstate transportation.[363]

Thanks in large part to Justice John Marshall Harlan, whose admiration for his judicial namesake seems to have induced him to an effort to revive *McCulloch* as an important precedent, the Court began to rely on *McCulloch* increasingly around the turn of the twentieth century to extend the reach of the commerce power.[364] Revisionist

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358. *Id.* at 9.

359. *Id.* at 51–52 (Harlan, J., dissenting).

360. *Id.* at 18 (majority opinion).

361. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964); Katzenbach v. McClung, 379 U.S. 294, 302 (1964).

362. The Civil Rights Cases, 109 U.S. at 10.

363. *See id.* at 19 (reserving the question of whether Congress could prohibit private discrimination on interstate transportation facilities under the Commerce Clause). It happens, however, that the decisions always applied to preserve segregated transportation facilities. *See* Chiles v. Chesapeake & Ohio Ry. Co., 218 U.S. 71, 77 (1910) (permitting railroads to impose racial segregation on interstate passengers absent contrary legislation by Congress); Chesapeake & Ohio Ry. Co. v. Kentucky, 179 U.S. 388, 394 (1900) (upholding Kentucky law that required railroad companies to provide separate seating for black and white passengers); Louisville, New Orleans & Tex. Ry. Co. v. Mississippi, 133 U.S. 587, 592 (1890) (rejecting dormant commerce clause challenge to Mississippi law requiring segregated railroad cars); Hall v. DeCuir, 95 U.S. (5 Otto) 485, 490 (1877) (striking down a Louisiana ban on racial segregation of passengers as an interference with interstate commerce).

364. *See, e.g.*, Lottery Case, 188 U.S. 321, 355 (1903); *In re* Debs, 158 U.S. 564, 578 (1895); Interstate Commerce Comm'n v. Brimson, 154 U.S. 447, 472 (1894). *See generally* DAVID S.

legal historians have plausibly questioned characterizations of the *Lochner* era as a monolithic jurisprudential period marked by a laissez faire judicial philosophy and the consistent striking down of federal economic regulation.[365] Viewed in granular detail, the Court's record can appear mixed in the 1895–1936 period; some variation was undoubtedly explained by shifting Court majorities, while even some more conservative Justices acknowledged at least some federal regulatory power over commerce.[366]

Yet that revisionism tends to miss the forest for the trees. The conventional account better captures the big-picture reality that the conception of implied commerce powers before 1937 remained highly restricted.[367] The Court was far more consistent than otherwise in its approach to the commerce power. The power to regulate things that were not strictly "interstate commerce" was limited to *intra*state commerce. Thus, for example, the Court recognized that Congress could regulate intrastate railroad rates where necessary to effectuate interstate rate regulation.[368] Congress could not regulate such intrastate activities as manufacturing or employment pursuant to the federal antitrust laws, but those laws could reach intrastate price fixing for goods in a national market.[369] And Congress could regulate interstate trade and intercourse to promote health, safety, or morals.[370] In some of these cases, the Court cited *McCulloch* and discussed implied

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SCHWARTZ, THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF *MCCULLOCH V. MARYLAND* (forthcoming 2019) (book manuscript on file with author).

365. David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 2, 4 (2003).

366. *See id.* at 10–12.

367. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 299 (1936); Hammer v. Dagenhart, 247 U.S. 251, 276–77 (1918), *overruled by* United States v. Darby, 312 U.S. 100, 116–17 (1941).

368. *See, e.g.*, Houston E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342, 351 (1914); The Minnesota Rate Cases, 230 U.S. 352, 399 (1913).

369. *Compare* United States v. E.C. Knight Co., 156 U.S. 1, 17 (1895), *with* Stafford v. Wallace, 258 U.S. 495, 518–19 (1922); Swift & Co. v. United States, 196 U.S. 375, 401 (1905); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 248 (1899).

370. *See* Hoke & Economides v. United States, 227 U.S. 308, 321–22 (1913) (upholding the regulation of lottery sales); Hipolite Egg Co. v. United States, 220 U.S. 45, 58 (1911) (upholding the federal regulation of adulterated products); McCray v. United States, 195 U.S. 27, 63–64 (1904) (upholding the regulation of oleomargarine); Lottery Case, 188 U.S. 321, 357 (1903) (upholding the federal regulations of "morals" of citizens).

powers;[371] in others, it did not.[372] But the Court was consistent in recognizing only two legitimate ends of implied commerce power: to regulate intrastate *commerce* or to exercise a "national police power" over the health, safety, or morals aspects of interstate trade. Employment could be regulated only when the employees were directly engaged in interstate transportation.[373] The commerce power extended only to trade-or-transport activities or to matters "directly related" to such activities. The direct/indirect effects test that emerged in this period boiled down to little more than an acknowledgment that intrastate trade-or-transport activities could be regulated if they had interstate effects. But intrastate activities that fell outside the traditional definition of commerce—buying, selling, and transportation—could not be regulated. The Court consistently held this position throughout the *Lochner* era, as marked by the era's three anti-canonical cases: *E.C. Knight* in 1895, *Hammer v. Dagenhart*[374] in 1918, and *Carter Coal*[375] in 1936. Each case held that employment and the production of goods were intrastate activities whose regulation was reserved to the states, and therefore off limits to the commerce power.[376] The commerce power jurisprudence of this era is summed up by a single arresting sentence in *Carter Coal*: "In exercising the authority conferred by [the Commerce Clause] of the Constitution," the Court said, "Congress is powerless to regulate anything which is not commerce . . ."[377]

Critics argued then and now that these cases were based on incoherent distinctions, or were at odds with other precedents, or both.[378] The criticisms are largely true, and they get no argument here. Yet the critics understate how much the *Lochner*-era cases were thematically unified by adhering to the Taney Court's conception of reserved state powers under the Tenth Amendment. The *Lochner*-era Courts continued to view production and employment as immune from

371. *Hipolite Egg Co.*, 220 U.S. at 58; *McCray*, 195 U.S. at 63.
372. *Hoke & Economides*, 227 U.S. at 323; *Lottery Case*, 188 U.S. at 357–58.
373. Second Employers' Liability Cases, 223 U.S. 1, 51–52 (1912).
374. Hammer v. Dagenhart, 247 U.S. 251, 276–77 (1918).
375. Carter v. Carter Coal Co., 298 U.S. 238, 299 (1936).
376. *Id.*; *Hammer*, 247 U.S. at 272; United States v. E.C. Knight Co., 156 U.S. a1, 12 (1895).
377. *Carter*, 298 U.S. at 297.
378. *See, e.g.*, *E.C. Knight Co.*, 156 U.S. at 21–22 (Harlan, J., dissenting); Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 711–12 (1996); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1229–36 (1986); Robert J. Pushaw, Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 NW. U. L. REV. 695, 707 (2002).

implied commerce powers. What appeared inconsistent was the acknowledgment that Congress could exercise police powers over health, safety, and morals by regulating the interstate flow of goods, but could not regulate production or employment by the same legislative technique.[379] Yet that could be explained as a concession by the Court of a limited inroad into reserved state powers: Congress was in effect granted a limited police power, concurrent with the states, to regulate health, safety, or morals through the regulation of interstate trade.

B. From Exclusivity to Preemption

The Taney Court established a robust theory of reserved state powers that blunted the reach of implied commerce powers, in order to protect state regulation from excessive dormant commerce preclusion, and to maintain state control over slavery. In the post-Reconstruction era, the Court continued to apply a fairly robust theory of reserved state powers, even as one of the main conceptual supports for this theory evaporated. Specifically, the concern that broad commerce powers would nullify great swaths of state law was neutralized by doctrinal changes around the beginning of the twentieth century.

In the early 1900s, the Court subtly shifted from a predominantly negative commerce to a preemption approach for coordinating state and federal regulation of commerce.[380] Increasingly, the Court analyzed challenges to state statutes affecting interstate commerce by considering whether a federal statute, rather than the inherently preclusive effect of the Commerce Clause, displaced the state law.[381] This was at least in part an effect of the increasing number and scope of federal statutes. As Congress began to regulate more under the commerce clause in the late nineteenth century, challengers to state laws began to make arguments resembling present day statutory field preemption arguments.[382] By 1912, the Court had begun inquiring into the preemptive intent of the statutes in question. In *Savage v. Jones*,[383] for example, the Court stated that:

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379. *Compare Hammer*, 247 U.S. at 272, *with* Hoke & Economides v. United States, 227 U.S. 308, 321–22 (1913); Hipolite Egg Co. v. United States, 220 U.S. 45, 58 (1911); McCray v. United States, 195 U.S. 27, 63–64 (1904); Lottery Case, 188 U.S. 321, 355 (1903).

380. *See, e.g.*, Savage v. Jones, 225 U.S. 501, 533 (1912).

381. *See, e.g.*, *id.*

382. *See, e.g.*, Mo., Kan. & Tex. Ry. Co. v. Haber, 169 U.S. 613, 638–39 (1898) (rejecting a field-preemption-type argument that state prohibition on importing diseased cattle was preempted by the 1891 Animal Industry Act).

383. 225 U.S. 501 (1912).

> the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.[384]

The cause and timing of the shift from negative commerce to preemption analysis warrants further inquiry from legal historians. What is clear is that the Court made no announcement of a doctrinal shift, tending instead to obscure the shift by purporting to apply older negative commerce cases as if they were statutory preemption cases.[385]

The result of these developments was quiet but significant. The leading Commerce Clause decisions that affected the revolution in Commerce Clause jurisprudence between 1937 and 1942, discussed in the next sections, did not address the concurrent powers problem because, by 1937, it was no longer a problem. It is not coincidental that modern preemption doctrine is generally traced to a case decided in this era.[386]

C. Implied Commerce Powers and the New Deal Turnaround

The hallmark of the New Deal's almost legendary transformation of U.S. constitutional law was the Court's recognition of the idea that Congress could regulate intrastate matters that were not traditional buying-selling-transporting commerce. This recognition did not occur all at once. *NLRB v. Jones & Laughlin Steel Corp.*[387] famously marked the turning point between the Court's pre- and post-New Deal jurisprudence. There the Court upheld the Wagner National Labor Relations Act of 1935,[388] and took the first step on a path by which it

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384. *Id.* at 533; *accord* Napier v. Atl. Coast Line R.R. Co., 272 U.S. 605, 612–13 (1926); *see also* McDermott v. Wisconsin, 228 U.S. 115, 135–37 (1913) (finding that state labeling law conflicted with the federal Food and Drug Act).

385. In *Savage* itself, the Court offered as an "abundant illustration" of its statutory intent approach a string of cases upholding state statutes against dormant commerce clause challenges—that is, claims that the state law violated the exclusivity of the Constitution's grant of federal commerce power rather than a particular federal statute. *See Savage*, 225 U.S. at 533–34; *see also Napier*, 272 U.S. at 611 (mis-citing Reid v. Colorado, 187 U.S. 137 (1902), a dormant commerce case, as though it were a statutory preemption case).

386. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 873 (2000) (citing Hines v. Davidowitz, 312 U.S. 52 (1941), as the leading case for "well-established preemption principles").

387. 301 U.S. 1 (1937).

388. *Id.* at 30 (explaining that the NLRA guarantees employees the ability to organize, unionize, and engage in collective bargaining).

would thereafter uphold all New Deal legislation and all Commerce Clause legislation for the next sixty years.[389] Momentous a shift as it was, *Jones & Laughlin* retained a good deal of pre-1937 jurisprudential baggage, which the Court would not jettison until four years later, when a majority of the Court were Roosevelt appointees.[390] Compared to *Darby* and *Wickard*, *Jones & Laughlin* is a sort of halfway house between the discredited late *Lochner*-era cases like *Carter Coal*, and modern Commerce Clause doctrine.[391]

Jones & Laughlin receives undue precedential respect because it came out the right way. This is unfortunate, since it was chock-full of crabbed phrases from soon-to-be repudiated decisions. Chief among these is the old saw from Justice Cardozo's concurrence in *A.L.A. Schechter Poultry Corp. v. United States*,[392] that failing to enforce strict limits on the commerce power would "obliterate the distinction between what is national and what is local and create a completely centralized government."[393] This language would later be plucked out and deployed by the Rehnquist and Roberts Courts when striving to reimpose limits on the commerce power.[394] Yet, Cardozo's *Schechter* quotation was in fact said in service of doctrinal claims that are no longer good law. Among others, the *Jones & Laughlin* opinion continued to recognize that the Tenth Amendment supported a concept of reserved state powers that commerce regulation could not "invad[e]."[395] And *Jones & Laughlin* further asserted that, if the NLRA had attempted to reach beyond "matters which directly affect"

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389. KENNETH R. THOMAS, CONG. RESEARCH SERV., RL32844, THE POWER TO REGULATE COMMERCE: LIMITS ON CONGRESSIONAL POWER 1, 5 (2014).

390. In January 1940, Justice Frank Murphy became the fifth Supreme Court justice nominated by President Roosevelt to be confirmed to the Court. The other Justices are Hugo Black (1937), Stanley Reed (1938), Felix Frankfurter (1939), and William Douglas (1939). *See Supreme Court Nominations: 1789–Present*, SENATE, https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm (last visited Feb. 5, 2019).

391. *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 208–09 (1998) (arguing that the *Jones & Laughlin* case was not revolutionary).

392. 295 U.S. 495 (1935).

393. *Id.* at 554 (Cardozo, J., concurring *quoted in* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937); *see also id.* at 30 (failure to enforce strict limits on the commerce power will "destroy the distinction . . . between what is national and what is local in the activities of commerce [that] is vital to the maintenance of our federal system").

394. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012); United States v. Morrison, 529 U.S. 598, 608 (2000); United States v. Lopez, 514 U.S. 549, 555 (1995).

395. *Jones & Laughlin*, 301 U.S. at 29–30.

commerce, "the Act would necessarily fall."[396] This "direct effects" test was authoritatively rejected in *Darby* and *Wickard*.[397]

Not surprisingly, *Jones & Laughlin* maintained the longstanding practice of declining to apply *McCulloch*'s broad conception of implied powers to the Commerce Clause. The Court flirted but briefly with the idea of implied commerce powers, noting that "the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement.'"[398] But then the opinion quickly reins in that statement by clarifying that intrastate activities can be regulated only "if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions."[399] Tellingly, the sources cited for these assertions were not *McCulloch* or even *Gibbons*, but rather cases like *Schechter Poultry* and *The Daniel Ball* (1871) (the source of the "protection and advancement" quote),[400] the latter authored by states' rights hardliner Justice Stephen Field. In marked contrast to *Jones & Laughlin*, *McCulloch* did not limit implied powers to those having a "close and substantial relation" to the primary power.[401]

D. The Real New Deal Transformation: Breaking Down Reserved State Powers

In 1941 and 1942, the Court decided three cases that, unlike *Jones & Laughlin*, really ushered in modern commerce power doctrine: *United States v. Darby Lumber Co.*, *United States v. Wrightwood Dairy Co.*,[402] and *Wickard v. Filburn*. Though the cases tend to be lumped together, there is a subtle but important difference between the first two opinions, by Harlan Fisk Stone, and the third opinion by Robert Jackson.

In *Darby,* the Court upheld the application of the federal Fair Labor Standards Act of 1938 (FLSA) to a lumber company that sold its products on the interstate market.[403] The law included minimum wage

396. *Id.* at 29–31 ("It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power.").

397. *See* Wickard v. Filburn, 317 U.S. 111, 119–20 (1942); United States v. Darby, 312 U.S. 100, 119, 123–24 (1941).

398. *Jones & Laughlin*, 301 U.S. at 36–37.

399. *Id.* at 37.

400. 77 U.S. (10 Wall.) 557 (1870).

401. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404 (1819).

402. 315 U.S. 110 (1942).

403. *Darby*, 312 U.S. 100, 125–26 (1941).

and maximum hours provisions, as well as a prohibition on interstate shipment of goods produced in violation of the act.[404] Justice Stone's opinion for a unanimous Court explicitly overruled *Hammer v. Dagenhart*, and impliedly disapproved all prior precedents holding that employment and productive activities, such as manufacturing, were local regulatory matters reserved to the states and, therefore, outside the reach of the commerce power.[405] The Court reached that conclusion by applying *McCulloch* to the Commerce Clause:

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce . . . .[406]
>
> Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities.[407]

Federal "*control of intrastate activities*" was henceforth no longer limited to intrastate commerce strictly construed as buying, selling, and transporting. Rather, the means to effectuate federal commerce regulation could extend to the direct "suppression" of manufacturing in violation of the labor standards.[408] Significantly, the Court began its legal analysis by stating that "*While manufacture is not of itself interstate commerce*, the shipment of manufactured goods interstate is such commerce[.]"[409] Early twentieth century precedents had applied *McCulloch* only to enable Congress to regulate intrastate *commerce* as an adjunct to its interstate commerce regulation. In marked contrast, *Darby* for the first time acknowledged an implied commerce power to regulate interstate things that were concededly *not commerce*.

This assertion amounted to an attack on the traditional Tenth Amendment conception of reserved powers as including set categories

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404. *Id.* at 109–10.

405. *Id.* at 116–17 ("*Hammer v. Dagenhart* . . . should be and now is overruled."); *id.* at 123 ("So far as *Carter v. Carter Coal Co* . . . . is inconsistent with this conclusion, its doctrine is limited[.]").

406. *Id.* at 118–19 (citing McCulloch v. Maryland, 17 (4 Wheat.) 316, 421 (1819)).

407. *Id.* at 121.

408. *Id.* at 122.

409. *Id.* at 113 (emphasis added).

of things that could not be reached by federal regulation—again, such as employment and production. Stone made this explicit by announcing that the Court's conclusion was "unaffected by the Tenth Amendment . . . [which] states but a truism that all is retained which has not been surrendered."[410]

This pithy sentence represented a tectonic shift in federalism doctrine. No longer would the Tenth Amendment be viewed as a repository of defined subject matter immune from federal regulation regardless of the requirements of interstate commerce regulation. "From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end," said Stone.[411] This is questionable history. In citing *McCulloch* at the end of this passage, Stone perceived the conflict between a robust theory of implied federal powers and a robust theory of reserved state powers. And he resolved the conflict in favor of federal power. He dismissed "[w]hatever doubts may have arisen of the soundness of that conclusion" as mere recent developments that "have been put to rest" since 1937.[412]

Wrightwood Dairy, decided the next year, is far less known and anthologized than *Darby* and *Wickard*; but, it is comparably important in establishing the new doctrine. In upholding a federal law establishing milk price supports, *Wrightwood Dairy* extended the commerce power principles of *Darby*, which had involved a company that shipped its products interstate, to a local dairy that did no interstate business. Stone (now Chief Justice) noted that the factual record showed that interstate milk prices, which could concededly be regulated under the commerce power, tended to be pulled down by "the unregulated sale of the intrastate milk."[413] Because Congress could reasonably conclude that it needed to regulate intrastate milk prices as part of regulating the interstate market, it could do so under its commerce power. Here, the Court laid out two alternate formulations of the doctrine that underlay its ruling, the first based on *McCulloch* and implied powers.

> Congress plainly has power to regulate the price of milk distributed through the medium of interstate commerce . . . . and it possesses

410. *Id.* at 123–24.
411. *Id.*
412. *Id.*
413. United States v. Wrightwood Dairy Co., 315 U.S. 110, 120 (1942).

> every power needed to make that regulation effective. The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.[414]

The second is based on *Gibbons*' definitional approach.

> The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution . . . . It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.[415]

One might be tempted to say that these tests are the same. True, both allow Congress to regulate things that are not themselves either interstate or commerce. But there is a difference.[416]

The *McCulloch* formulation uses interstate "effects" as a placeholder for the means-ends connection set out in *McCulloch* for implied powers. This approach applies *McCulloch*'s implied powers framework to Congress's commerce powers just as it would apply to any other enumerated power. It positions Congress to exercise its discretion to determine whether a particular regulation is "conducive" or "plainly adapted" to exercising its power to regulate interstate commerce.

The *Gibbons* formulation, of course, is recognizable as the modern "substantial effects" test. It rolls the regulation of intrastate matters into the definition of the federal commerce power. That is to say, it purports to interpret the Commerce Clause itself as authorizing Congress to regulate intrastate matters that substantially affect interstate commerce. Unlike the *McCulloch* approach, which would apply the Necessary and Proper Clause to the Commerce Clause to produce implied commerce powers, the *Gibbons* definitional formula relies on interpretive doctrine overlaid on the Commerce Clause itself. More importantly, the substitution of a substantiality requirement for

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414. *Id.* at 118–19.

415. *Id.* at 119.

416. *See* Gonzales v. Raich, 545 U.S. 1, 33–35 (2005) (Scalia, J., concurring in the judgment) (asserting there is a difference); Primus, *The Limits of Enumeration*, *supra* note 17, at 592–93 (noting the difference but implying it may not matter practically).

McCulloch's more lenient and deferential formula of "conduciveness"—with the degree of conduciveness left to the discretion of Congress—suggests a more inquisitive judicial role and is thus potentially more limiting.

In *Wickard*, issued nine months after *Wrightwood Dairy*, the Court famously rejected a challenge to wheat-production quotas under the 1938 Agricultural Adjustment Act[417] and upheld application of the Act to a relatively small plot of wheat intended for use on the farmstead rather than for sale on the open market.[418] Although often described (somewhat exaggeratedly) as the most far-reaching application of the commerce power,[419] *Wickard* is merely an incremental extension of *Wrightwood Dairy*, which applied the commerce power to purely intrastate selling. In *Wickard*, the Court simply made good on its assertion in *Wrightwood Dairy* that the commerce power could be extended to intrastate activities that were not in themselves commerce.[420] The *Wickard* Court announced the "aggregation" principle, under which, the court measures the substantial effects of an intrastate activity on interstate commerce by viewing the activity in the aggregate, as a class of activities.[421] But this principle was implicit in *Wrightwood Dairy*, where the regulation was upheld against a single local dairy producer.[422] And, of course, the aggregation principle is hardly novel, as it is implicit in all laws that regulate individual instances of behavior to control the aggregate effects of that behavior.

Indeed, in a crucial sense, *Wickard* was not as broad in its doctrinal implications as *Wrightwood Dairy* because it failed to apply *McCulloch* to the Commerce Clause, and therefore did not establish a clear recognition of implied commerce powers.[423] Jackson's opinion cites *McCulloch* just once, in a footnote, for the proposition that conflicting economic interests underlying a regulatory scheme "are wisely left

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417. Wickard v. Filburn, 317 U.S. 111, 128–29 (1942).

418. *Id.*

419. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 560 (1995) (*Wickard* "is perhaps the most far reaching example of Commerce Clause authority over intrastate activity"); Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2643 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (characterizing Wickard as "the ne plus ultra of expansive Commerce Clause jurisprudence").

420. *Wickard*, 317 U.S. at 124–25; *see* United States v. Wrightwood Dairy Co., 315 U.S. 110, 116 (1942).

421. *Wickard*, 317 U.S. at 127–28.

422. *See Wrightwood Dairy Co.*, 315 U.S. at 116.

423. *Wickard*, 317 U.S. at 128–29.

under our system to resolution by the Congress."[424] The citation is unexplained and seems inapt. Instead, Jackson relies heavily on *Gibbons*, where "Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded."[425] In other words, for Jackson, the *Gibbons* definitional approach was sufficient to cover the case: the substantial effects test was built into the proper interpretation of the Commerce Clause and required no reference to implied powers. The government had defended the statute as an exercise of implied commerce powers, relying heavily on *McCulloch* and not once citing *Gibbons*.[426] But Jackson does not mention implied powers in the opinion, and barely refers to the Necessary and Proper Clause.[427]

E. Rethinking the Lopez *"Mustbesomething" Rule*

1. NFIB *redux*

Since *Wickard*, the *Gibbons*-definitional approach to construing the federal commerce power has predominated over the *McCulloch*-implied-powers approach. Hornbook Commerce Clause doctrine features the "substantial effects test" rather than asking whether a regulation of intrastate matters is conducive or plainly adapted to effectuating the regulation of interstate commerce. In most cases, the distinction is academic. In *NFIB*, it may have made a difference.

To be sure, there is a certain naiveté in suggesting that doctrine dictates the results of close or highly-contested constitutional cases. The five conservative Justices in *NFIB* had sufficient motivation, whether in judicial philosophy or political preference, to mold the doctrine to reach a particular result. But the definitional approach facilitated the Justices' rather forced argument that "inactivity" cannot be regulated as commerce, while the *McCulloch* approach would have made for a harder sell.

The winning argument on the Commerce Clause issue in *NFIB* stemmed from the wording of the substantial effects test that dated back to *Darby*. The post-New Deal Court consistently spoke of the commerce power as extending to regulation of intrastate "activities" of one sort or

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424. *Id.* at 129 n.29.

425. *Id.* at 120.

426. Brief for the Appellants on Reargument at 43–45, Wickard v. Filburn, 317 U.S. 111 (1942) (No. 59).

427. Justice Jackson mentions the Necessary and Proper Clause just twice, once to summarize the government's argument and a second time, in passing, in an historical summary of Commerce Clause jurisprudence. *Wickard*, 317 U.S. at 119, 121.

another.[428] The Court's meaning should have been clear: as in the manner of implied powers, Congress can regulate things that *are not* interstate commerce if doing so is necessary and proper to regulating something that *is* interstate commerce. There is no constitutional basis for insisting that those non-commercial things constitute "action" rather than "inaction." Linguistically, it is clear that the word "activities" in the New Deal cases was a mere placeholder, and that the Court could as well have said "matters" or "subjects" or "things" to the same effect. Had it done so, the almost absurd fussiness of the activity/inactivity distinction in *NFIB* would have been more plainly exposed. Instead, by making the inquiry "one of definition," to quote Marshall's original phrase, the *Gibbons* approach gave the *NFIB* conservatives cover to ask whether sitting out of the health insurance market fell within the definition of "activity" and therefore of "commerce."

The insistence on a rigorous adherence to the meaning of "activity" would have been harder to sustain rhetorically under *McCulloch*'s implied powers approach. As made clear by Justice Scalia's concurrence in *Raich*, the extent of Congress's implied commerce powers does not turn on the definitions of words, but on the practical relationship between a specific element of a regulation and the effectiveness of the greater regulatory whole.[429] In *Raich*, it was the relationship between home-growing and simple possession of marijuana, on the one hand, and the effectiveness of a ban on interstate distribution of marijuana, on the other.[430] In *NFIB*, it was the relationship between individual decisions to opt out of the health insurance market and the viability of that market as a whole. But the substantial effects test derives from the *Gibbons* definitional approach to commerce regulation; this makes it superficially more defensible to ask whether the proposed regulation of intrastate matters fits the definition of "commerce power." As noted above, there was really no plausible way to argue that the individual mandate was not "conducive" to regulating the interstate health insurance market. Professor Randy Barnett quipped that Justice Scalia "would not even have to break a sweat" to distinguish away his *McCulloch*-based concurrence in *Raich* in

428. *See id.* at 119–20; United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942); United States v. Darby, 312 U.S. 100, 119–20 (1941).

429. Gonzalez v. Raich, 545 U.S. 1, 37 (2005) (Scalia, J., concurring in the judgment).

430. *Id.* at 29–32 (majority opinion).

order to rule against the individual mandate in *NFIB*.[431] Scalia may not have broken a sweat in joining the joint dissent in *NFIB*, but that's only because he simply ignored his opinion in *Raich*, rather than doing the untenable intellectual heavy-lifting of distinguishing it.

2. Normative justification for a "mustbesomething rule"

The refusal of five Justices in *NFIB* to embrace the full extent of implied commerce powers lacks the normative justifications that motivated nineteenth century Justices. Since the mid-twentieth century, our jurisprudence has abandoned the idea that race relations are best regulated at the state level—a change that was long overdue. And the broad acceptance of concurrent federal and state power to regulate commerce long ago rendered the dire concerns over Commerce Clause exclusivity a non-issue.

The normative justifications for reserved state powers doctrine are based on a conceptual error and a constitutional evil, and thus can't serve as valid justifications in our constitutional order. The error was the inability to conceive of concurrent federal and state commerce powers. The constitutional evil was the accommodation of slavery and later Jim Crow by leaving individual states to decide for themselves how best to regulate race relations.

This is not to say that restoring content to reserved powers of the states—for instance, the activity/inactivity distinction relied upon by the five conservatives in *NFIB*—lacks a normative basis. Defenders of the distinction, including the Justices themselves, claim that imposing ad hoc definitional limits on implied commerce powers promotes liberty, in an anti-regulatory libertarian sense. Whether that is true as a factual matter, or justified as a constitutional doctrine, is debatable. What is clear, however, is that that justification lacks the historical pedigree that is sometimes claimed for it. Laissez faire or libertarian constitutionalism was not the driving force behind reserved state powers and their limitation on implied commerce powers for most of the nineteenth century.

CONCLUSION

The United States has always been a commercial nation, and this fact was a driving force behind the grant of a federal commerce power and

431. Randy Barnett, *Understanding Justice Scalia's Concurring Opinion in* Raich, VOLOKH CONSPIRACY (Mar. 9, 2012, 4:13 PM), http://volokh.com/2012/03/09/understanding-justice-scalias-concurring-opinion-in-raich.

indeed behind the calling of the Philadelphia Constitutional Convention itself. Constitutional thinkers seem to have known, as Daniel Webster observed, that "[a]lmost all the business and intercourse of life may be connected, incidentally, more or less, with commercial regulations."[432] The judicial recognition of implied powers in *McCulloch* thus held enormous potential for the expansion of federal regulatory power in the form of implied commerce powers. But this expansion was delayed by more than a century due to anxieties about its potential to eliminate swaths of state and municipal laws under the nineteenth century concept of exclusive federal commerce power. Above all, nineteenth and early twentieth century Justices seemed concerned to maintain reserved state powers as a bulwark against implied commerce powers in order to preserve the states' powers to regulate slavery and, after its abolition, to impose racial segregation.

The two pillars underlying the Court's century of resistance to applying *McCulloch* to the Commerce Clause to find implied commerce powers—concern about commerce clause exclusivity and state control over race relations—are long gone. Yet the decision of the five Court conservatives in *NFIB* to exclude the health insurance mandate from the federal commerce power reflects the vestigial continuation of this resistance. The normative justification for a contemporary limit on implied commerce powers, a libertarian constitutionalism, is a relatively recent arrival on the scene. Its adherents must fight their battle for constitutional interpretive preference without claiming longstanding historical roots.

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432. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 9–10 (1824).