Blunders of the Supreme Court of the United States

Part 2

The second blunder of the Supreme Court of the Supreme Court of the United States is in the case of *McCulloch v. State of Maryland* (17 U.S. 316, 1819). The blunder occurs at pages 411 thru 413:

". . . To [Congress'] enumeration of powers is added that of making 'all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof.'

The counsel for the State of Maryland have urged various arguments, to prove that this clause, though, in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

In support of this proposition, they have found it necessary to contend, that this clause was inserted for the purpose of conferring on Congress the power of making laws. That, without it, doubts might be entertained, whether Congress could exercise its powers in the form of legislation.

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

too self-evident to have been questioned." McCulloch v. State of Maryland: 17 U.S. 316, 411 thru 413 (1819).

http://books.google.com/books?id=TW4DAAAAQAAJ&pg=PA411#v=onepage&q=&f=false

Before continuing, the author wishes to state that this opinion was written by Chief Justice John Marshall. It is unfortunate he made a mistake, since his character and reputation was that he was honest man. He would not be happy with himself making a mistake, since he value the truth highly. With that said.

"The Government of the United States (therefore) is one of delegated, limited and enumerated powers. *United States v. Harris*, 106 U.S. 629, 635" State of Kansas v. State of Colorado: 206 U.S. 46, at 87 (1907). **[Footnote 1]**

http://books.google.com/books?id=AW4UAAAAYAAJ&pg=PA87#v=onepage&q=&f=false

And to carry out these exclusive and concurrent powers, the United States was given the power "to make laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof. Article 1, Section 18, Constitution of the United States of America."

http://www.archives.gov/exhibits/charters/constitution_transcript.html

Commenting on this provision, Alexander Hamilton wrote in Federalist Paper #33:

"(3rd para) What is a power, but the ability or faculty of doing a thing? What is the ability to do a thing, but the power of employing the means necessary to its execution? What is a legislative power, but a power of making laws? What are the means to execute a legislative power but laws? What is the power of laying and collecting taxes, but a legislative power, or a power of making laws to lay and collect taxes? What are the proper means of executing such a power but necessary and proper laws? This simple train of inquiry furnishes us at once with a test by which to judge of the true nature of the clause . . . . . It conducts us to this palpable truth, that a power to lay and collect taxes must be a power to pass all laws necessary and proper for the execution of that power; and what does [this] provision in question do more than declare the same truth, to wit, that the national legislature to whom the power of laying and collecting taxes had been previously given, might, in the execution of that power, pass all laws necessary and proper to carry it into effect? . .

. [T]he same process will lead to the same result, in relation to all other powers declared in the Constitution. ***And it is expressly to execute these powers that the sweeping clause, as it has been affectedly called, authorizes the national legislature to pass all necessary and proper laws***.

(2nd para) . . . [I]t may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same, if [the] clause was entirely obliterated as if [it] were repeated in every article. [It] is only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government and vesting it with certain specified powers.

(5th para) . . . Who is to judge of ***the necessity and propriety of the laws to be passed for executing the powers of the Union***? I answer, first, that this question arises as well and as fully upon the simple grant of those powers as upon the declaratory clause; and I answer, in the second place, that the national government, like every other, must judge, in the first instance, of the proper exercise of its powers, and its constituents in the last."

http://www.foundingfathers.info/federalistpapers/fed33.htm

Therefore, under the Constitution, Congress is one of delegated, limited and enumerated powers. The "necessary and proper" clause adds nothing to the powers of Congress, but rather gives Congress the authority to make laws for executing the powers given to it.

Thus, Congress was not given implied powers by this clause.

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Footnotes:

1. ". . . [T]he proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with ***the doctrine that this is a government of enumerated powers***. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by

the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination, the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act. It reads:

> 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.'

The argument of counsel ignores the principal factor in this article, to-wit, 'the people.' Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it – 'we the people of the United States,' not the people of one State, but the people of all the States, and Article X reserves to the people of all the States the powers not delegated to the United States. The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States. ***The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and, after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated***. State of Kansas v. State of Colorado: 206 U.S. 46, 89 thru 90 (1907).

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