

not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitutions of the States.”⁴ Nevertheless, for approximately a century, from the death of Marshall until 1937, the Tenth Amendment was frequently invoked to curtail powers expressly granted to Congress, notably the powers to regulate commerce, to enforce the Fourteenth Amendment, and to lay and collect taxes.

In *McCulloch v. Maryland*,⁵ Marshall rejected the proffer of a Tenth Amendment objection and offered instead an expansive interpretation of the necessary and proper clause⁶ to counter the argument. The counsel for the State of Maryland cited fears of opponents of ratification of the Constitution about the possible swallowing up of states’ rights and referred to the Tenth Amendment to allay these apprehensions, all in support of his claim that the power to create corporations was reserved by that amendment to the states.⁷ Stressing the fact that the amendment, unlike the cognate section of the Articles of Confederation, omitted the word “expressly” as a qualification of granted powers, Marshall declared that its effect was to leave the question “whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend upon a fair construction of the whole instrument.”⁸

Effect of Provision on Federal Powers

Federal Taxing Power.—Not until after the Civil War was the idea that the reserved powers of the states comprise an independent qualification of otherwise constitutional acts of the Federal Government actually applied to nullify, in part, an act of Congress. This result was first reached in a tax case, *Collector v. Day*.⁹ Holding that a national income tax, in itself valid, could not be constitutionally levied upon the official salaries of state officers, Justice Nelson made the sweeping statement that “the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, ‘reserved,’ are as independent of the general government as that government within its sphere is independent of the States.”¹⁰

⁴ 2 ANNALS OF CONGRESS 1897 (1791).

⁵ 17 U.S. (4 Wheat.) 316 (1819).

⁶ See discussion under “Coefficient or Elastic Clause,” *supra*.

⁷ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 372 (1819) (argument of counsel).

⁸ 17 U.S. at 406. “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.” *United States v. Darby*, 312 U.S. 100, 124 (1941).

⁹ 78 U.S. (11 Wall.) 113 (1871).

¹⁰ 78 U.S. at 124.