View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by UND Scholarly Commons (University of North Dakota)

North Dakota Law Review

Volume 44 | Number 3

Article 5

1968

The Liberty Amendment

Gerald J. Haga

Follow this and additional works at: https://commons.und.edu/ndlr

Part of the Law Commons

Recommended Citation

Haga, Gerald J. (1968) "The Liberty Amendment," *North Dakota Law Review*: Vol. 44 : No. 3 , Article 5.
Available at: https://commons.und.edu/ndlr/vol44/iss3/5

This Note is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.commons@library.und.edu.

NOTES

THE LIBERTY AMENDMENT

The Liberty Amendment is a proposal to amend the Constitution of the United States. The sponsors of the amendment have claimed, among other things, that the Liberty Amendment would require the sale of all businesses which the United States government is operating contrary to the provisions of the Constitution.[1] They estimate the number of such businesses at about 700.[2]

The sponsors have also stated that the amendment "will not change the spirit and intent of the original Constitution. It will merely clarify it, to give it force and effectiveness."[3]

It is the purpose of this note to determine whether or not the Liberty Amendment is likely to achieve its announced objective, i.e., the sale of about 700 government businesses.[4] It is proposed to do this by assuming that the Liberty Amendment has been ratified, pursuant to Article V of the United States Constitution, and that it will fall to the United States Supreme Court to interpret and construe the Liberty Amendment as litigation involving it arises.

This note will attempt to determine how the Supreme Court has construed the Constitution in regard to the power of the Federal Government to "engage" in the activity defined by the sponsors of the Liberty Amendment. Attention will then be turned to an examination of the accepted rules of constitutional construction which the Supreme Court would use in construing the effect of the Liberty Amendment. The note will conclude with an application of these rules of construction to the Liberty Amendment to determine whether or not its ratification will ultimately require the sale of some 700 governmental businesses. The historical position

---

1. LLOYD G. HERBSTREITH & GORDON VAN B. KING, ACTION FOR AMERICANS—THE LIBERTY AMENDMENT, (Los Angeles: Operation America, Inc.), (1965) at 66.
2. *Id.* at 9.
3. *Id.* at page facing inside front cover.
4. There are, of course, other issues raised by the Liberty Amendment. For instance: a question about the doctrine of national supremacy may be raised by the wording of section two of the Liberty Amendment. For the purposes of this note, however, investigation shall be limited to the question of whether the amendment will require the sale of some 700 government corporations.

of the Supreme Court on this subject, as developed in the first section of this note, will also be considered in reaching this conclusion.

At this point it may be appropriate to introduce the reader to the subject of this note: to-wit, the Liberty Amendment. It consists of four sections, and is as follows:

> Section 1.—The Government of the United States shall not engage in any business, professional, commercial, financial or industrial enterprise, except as specified in the Constitution.
>
> Section 2.—The constitution or laws of any State, or the laws of the United States, shall not be subject to the terms of any foreign or domestic agreement which would abrogate this amendment.
>
> Section 3.—The activities of the United States government which violate the intent and purpose of this amendment shall, within a period of three years from the date of the ratification of this amendment, be liquidated and the properties and facilities shall be sold.
>
> Section 4.—Three years after the ratification of this amendment the sixteenth article of amendments to the Constitution of the United States shall stand repealed and thereafter Congress shall not levy taxes on personal income, estates, and/or gifts.

HISTORICAL POSITION OF THE SUPREME COURT

The power of the Federal Government to engage in business activity was the subject of controversy before, during and after the ratification of the United States Constitution.[5] The first major case to deal with the problem was *McCulloch v. Maryland*,[6] and its solution remains valid.[7]

In *McCulloch*, Chief Justice Marshall set out the formula which has since been adopted as the test of constitutionality for congressional legislation:

> We think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adopted to that end, which are

5. Legal Tender Case, 110 U.S. 421, 440-44 (1884).
6. 17 U.S. (4 Wheat.) 159 (1819).
7. First National Bank v. Walker Bank, 385 U.S. 252, 256 (1966).

> not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.[8]

The issue before the Court in *McCulloch* was the power of the Federal Government to incorporate a national bank. Mr. Chief Justice Marshall declared

> . . . [T]hat a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution.[9]

Marshall refuted the contention that the "Necessary and Proper" Clause of the Constitution was a restriction on the choice of means open to the Congress.[10] To the contrary, the Clause was a specific grant of power to use any reasonable means to achieve a legitimate end.[11]

> The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.[12]

The notion that the word "necessary," as used in the "Necessary and Proper" Clause, should be given a restricted meaning was also dispelled by Marshall. He pointed out that "[a] thing may be necessary, very necessary, absolutely or indispensably necessary."[13] Thus it followed, according to Marshall, that a word such as "necessary" was susceptible to several meanings. Marshall then directed attention to Article I, Section 10 of the Constitution, where the word "necessary" is preceded and modified by the word "absolutely."[14] This, according to Marshall, is how to give a restricted meaning to a word such as "necessary."[15] Since the draftsmen who saw fit to insert "absolutely" before "necessary" in Article I, Section 10, were the same draftsmen who omitted to modify "Necessary" in the "Necessary and Proper" Clause in a similar manner, Marshall concluded that the latter "necessary" was *not* to be understood in a restricted sense.[16]

The logic of *McCulloch v. Maryland,* since that time, has been

8. McCulloch v. Maryland, *supra* note 6, at 206.
9. *Id.* at 200.
10. *Id.* at 205.
11. *Id.*
12. *Id.* at 202.
13. *Id.* at 208.
14. *Id.*
15. *Id.* at 203-04.
16. *Id.* at 205.

implemented to uphold the power of the government to engage in various "business, professional, commercial, financial or industrial enterprises."[17]

Congress has been held to have authority to charter a railroad corporation[18] or a corporation to construct an interstate bridge[19] as instrumentalities for promoting commerce among the states.

In 1916, The Supreme Court expanded upon the scope of powers established by *McCulloch*, by allowing Congress to grant to national banks the power to act as a trustee.[20]

In the *First National Bank* case it was said that "[a]lthough the powers given were new, the principles involved in the right to confer them were long since considered and defined in adjudged cases."[21]

The Court went on to say

> . . . [T]hat although Congress was not expressly given the power to confer the charter [of a bank], authority to do so was to be implied as appropriate to carry out the powers expressly given.[22]

It was further decided that to recognize the existence of the implied power was not at all in conflict with Article I, Section 8, Clause 18 of the Constitution, which provides that Congress should have power ". . . [t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers."[23] The Court held, and in so doing affirmed a significant part of the holding in *McCulloch*,[24] that the

> . . . [P]rovision[s] did not confine the implied authority to things which were indispensibly necessary, but on the contrary gave legislative power to adopt every appropriate means to give effect to the powers expressly given.[25]

In 1920, the Supreme Court upheld the power of Congress to create Federal Land Banks and Joint Stock Banks.[26]

Congress has been held to have authority to create a corporation to manufacture aircraft[27] or merchant vessels[28] as incidents of the war power.

---

17. *See*: the reproduction of the Liberty Amendment as contained within the body of this note.
18. Pacific Railroad Removal Cases, 115 U.S. 2 (1885).
19. Luxton v. North River Bridge Co., 153 U.S. 525 (1894).
20. First National Bank v. Union Trust Co., 244 U.S. 416 (1917).
21. *Id.* at 418.
22. *Id.* at 419.
23. *Id.*
24. McCulloch v. Maryland, *supra* note 6, at 205.
25. First National Bank v. Union Trust Co., *supra* note 20, at 419.
26. Smith v. Kansas City Title Co., 255 U.S. 180 (1921).
27. Clallam County v. United States, 263 U.S. 341, 344 (1923).
28. Sloan Shipyards v. U.S. Fleet Corporation, 258 U.S. 522, 549 (1922).

In 1936, the Tennessee Valley Authority Act was upheld, granting to the Federal Government the power and right

> . . . [T]o dispose of the energy itself,—which is simply the mechanical energy. . . . susceptible of transmission,—and the right to acquire these transmission lines as a facility for disposing of that energy.[29]

The Court went on to explain:

> . . . [T]he Government rightly conceded at the bar, . . . that it was without constitutional authority to acquire or dispose of [electric] energy except as it comes into being in the operation of works constructed in the exercise of some power delegated to the United States.[30]

The creation of the Home Owners' Loan Corporation was assumed to be a constitutional exercise of the powers of the Federal Government.[31] This holding was supported in a later case[32] which added that

> Congress has not only the power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations thus validly authorized.[33]

By 1940 a strong rule of law had been developed. So strong, in fact, that state and lower federal courts had little trouble discerning it. The Supreme Court of Pennsylvania conceded as unquestioned the proposition that the ". . . [l]egislature alone [was] the judge of the necessity or expediency of means adopted to effect a legitimate object."[34] The Supreme Court of Massachusetts held that "[t]he legislature has a broad discretion in the selection of the means to be used in the exercise of an admitted power."[35] And a federal court, in *United States v. Siegel Bros.*, declared that "Congress may itself determine the means appropriate to [effectuate its] purpose and it is itself the judge of the means to be employed in exercising the power conferred upon it."[36]

The Supreme Court has withstood the attack that the Tenth Amendment to the Constitution limited the aforementioned power, stating that

---

29. Ashwander v. Valley Authority, 297 U.S. 288, 290 (1936).
30. *Id.* at 340.
31. Graves v. New York ex rel O'Keefe, 306 U.S. 21 (1939).
32. Pittman v. Home Owners' Loan Corporation, 308 U.S. 21 (1939).
33. *Id.* at 32-33; *See*: McCulloch v. Maryland, *supra* note 6, at 208; where it is stated that, "A power to create implies a power to preserve."
34. Commonweatlh v. Stofchek, 322 Pa. 513, 518, 185 A. 840, 845 (1936).
35. Slome v. Godley, 304 Mass. 187, 191, 23 N.E.2d 133, 137 (1939).
36. United States v. Siegel Bros., 52 F.Supp. 238, 240 (8th Cir., 1943).

> From the beginning and for many years the [10th] 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 is appropriate and plainly adopted to the permitted end.[37]

The *Darby* case overruled an earlier case, *Hammer v. Dagenhart*,[38] which represented one of the few efforts to reverse the trend established in *McCulloch*. In *Hammer* the Court went so far as to do what the drafters of the Tenth Amendment refused to do, and inserted the word "expressly" before "delegated."[39]

Between the years of 1937 and 1941 the Court, however, returned to the philosophy of *McCulloch v. Maryland*. In addition to the cases already cited, the Court sustained as constitutional the Agricultural Adjustment Act of 1938,[40] the Social Security Act,[41] and the National Labor Relations Act.[42]

In 1956, the Supreme Court again upheld the principle of *McCulloch v. Maryland*.[43] In so doing the Court looked back to the ratification of the Constitution itself to find support for its position.

> Every view we may take of the subject, as candid inquirers after the truth, will serve to convince us, that it is both unwise and dangerous to deny the federal government an unconfined authority, as to all those objects which are intrusted to its management. . . . A government, the Constitution of which renders it unfit to be trusted with all the powers which a free people ought to delegate to any government, would be an unsafe and improper depository of the national interest. Wherever these can with propriety be confided, the coincident powers may safely accompany them.[44]

As late as 1962 the Supreme Court has upheld the power of the Federal Government to incorporate a bank.[45]

And in 1965, the Court again upheld that power, stating:

> There has long been opposition to the exercise of federal power in the banking field. Indeed, President Jefferson was opposed to the creation of the first Bank of the United States and President Jackson vetoed the Act of Congress extending the charter of the Second Bank of the United States. However, the authority of Congress to act in the field was

---

37. United States v. Darby, 312 U.S. 100, 124 (1941).
38. 247 U.S. 251 (1918).
39. *Id.* at 275: "And to them and to the people the powers not expressly delegated to the National Government are reserved."
40. Wickard v. Filburn, 317 U.S. 111 (1942).
41. Steward Machine Co. v. Davis, 301 U.S. 548 (1937).
42. Labor Board v. Jones & Laughlin, 301 U.S. 1 (1937).
43. Reid v. Covert, 354 U.S. 1, 21 (1957).
44. *Id.* at 69.
45. Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963).

> resolved in the landmark case of *McCulloch v. Maryland.* There Chief Justice Marshall, while admitting that it does not appear that a bank was in the contemplation of the Framers of the Constitution, held that a national bank could be chartered under the implied powers of Congress as an instrumentality of the Federal Government to implement its fiscal powers. The paramount power of the Congress [to create] national banks has, therefore, been settled for almost a century and a half.[46]

There can be little doubt that the overwhelming weight of judicial authority, since the ratification of the Constitution to the present time, rests with the proposition that Congress has all the authority which it needs to engage in the activity which the sponsors of the Liberty Amendment seek to prohibit. The Supreme Court, by weight of both precedent and personal inclination, is committed to this interpretation of the Constitution. It will take an effective mandate to wrench the Court from that course which has been followed for nearly 150 years.

RULES OF CONSTITUTIONAL CONSTRUCTION

Attention is now directed to an examination of those rules of constitutional construction which, in all probability, will be applied to the Liberty Amendment. There can be little doubt that it will fall to the Supreme Court to construe and interpret the Liberty Amendment, should it be ratified.[47] It is admitted that where the meaning of the Constitution is plain and clear, there is no room for judicial construction.[48] From this proposition it follows that if a particular provision is ambiguous or vague, then the Supreme Court has all the authority it needs to construe the provision and determine its application, or lack of it, to the Congressional act in question. This would seem to be a rather simple point until it is realized that it is the Supreme Court itself which decides whether or not the particular Constitutional provision is ambiguous or clear. If the Supreme Court is not disposed toward the goals of the sponsors of the Liberty Amendment, would it be boundless speculation to assume that the Court will consider the amendment vague and proceed to construe it?

The question of whether the Liberty Amendment is actually ambiguous is a debatable one. It is, however, the impression of this writer that the Court will have little difficulty in finding the Amendment ambiguous. There are several reasons for this.

---

46. First National Bank v. Walker Bank, *supra* note 7, at 256.
47. U.S. CONST. ART. III, §§ 1-2; Cooper v. Aaron, 358 U.S. 1, 18 (1958); Marbury v. Madison, 5 U.S. (1 Cranch) 87 (1803).
48. United States v. Sprague, 282 U.S. 716, 731 (1931).

First, the amendment sets up a prohibitive rule and then provides for exceptions to the prohibition. The amendment, however, fails to explain or to set out just what these exceptions might be.[49] Therefore, every time a case comes before the Court, with the plaintiff alleging that the governmental activity comes within the scope of the amendment, it will be necessary for the Court to examine the Constitution as a whole to see whether the activity falls within the exceptions provided.

Another factor which makes the amendment ambiguous, is that it will allow "enterprise" which is "specified" in the Constitution. To be specified means to be "[p]recisely formulated or restricted; definite; explicit; of an exact or particular nature."[50] Nowhere, however, does the Constitution "specify" in a "precise" or "explicit" manner *any* "business, professional, commercial, financial or industrial enterprise." The sponsors cannot be understood to have made an allowance for certain exceptions unless they understood that there would, in fact, be some. Even if there were any businesses specified in the Constitution, might it not be contended that the "Necessary and Proper" Clause and Article IV, Section 3 of the Constitution were included within this "specification"?

Nonetheless, there exists real doubt as to the actual meaning of the word "specified," as well as the scope of the section as a whole. The Court would need far less than this to justify its construction of the amendment. The sponsors of the Liberty Amendment cannot be pleased with this result. Given the inclination of the Court, as established earlier in this note, it must be a matter of concern to the sponsors to realize that the amendment's language is not as precise as it might have been.

While the attitudes of various Justices often differ, it can be fairly stated that the Court is committed to a liberal construction of the Constitution, as opposed to a conservative, or strict, approach.[51] This rule of construction is dictated (in fact, demanded) by the very nature of the Constitution itself:

> Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.[52]

This liberal approach extends to a determination of the con-

49. The Liberty Amendment, *supra* note 1 at 65, "except as specified . . . ." The amendment is reproduced in full within this note.

50. BLACK'S LAW DICTIONARY, 4th ed. (1957) at 1571.

51. Fairbanks v. United States, 181 U.S. 283, 287 (1901); Legal Tender Case, 110 U.S. 421, 444 (1884); Martin v. Hunter, 14 U.S. (1 Wheat.) 141, 151 (1816).

52. McCulloch v. Maryland, *supra* note 6, at 200.

tent and scope of federal powers. It has been stated that powers conferred upon the federal government are to be taken as impliedly granted and should not be strictly construed.[54] Those powers should be interpreted as carrying with them authority to exercise those powers and to pass acts which may be reasonably necessary to carry them into full execution.[54]

A liberal interpretation is to be applied to isolated words and phrases also.[55] Perhaps the Supreme Court said it best when it stated:

> It [the word] is found in the Constitution, and ordinarily words in such an instrument do not receive a narrow, contracted meaning, but are presumed to have been used in a broad sense, with a view of covering all contingencies.[56]

There is a presumption in favor of the constitutionality of a legislative act, and the act will be held unconstitutional only if its invalidity is clear.[57] If it is at all possible, the Court will construe a statute to bring it within the law of the Constitution.[58]

When an amendment and a provision in the original Constitution openly and plainly conflict with each other, the amendment must control, under the rule that the last expression of the lawmaker's will prevail over an earlier expression.[59] This rule is ameliorated, however, by the holding in *Griffin's Case*, in construing Section three of the Fourteenth Amendment.

> Of two constructions, either of which is warranted by the words of an amendment of a public act, that is to be preferred which harmonizes the amendment with the general terms and spirit of the Act amended. This principle forbids a construction of the amendment, not clearly required by its terms, which will bring it into conflict or disaccord with the other provisions of the Constitution.[60]

It has also been urged that, wherever possible, repugnant provisions should be reconciled and construed to give effect to both.[61]

When construing an amendment, the Court cannot and will not close its eyes to the rest of the Constitution. The Constitution, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal

53. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 83 (1824).
54. Fairbanks v. United States, *supra* note 51, at 288.
55. Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 79 (1868).
56. Matter of Strauss, 197 U.S. 324, 330 (1905).
57. Green v. Frazier, 253 U.S. 233, 239 (1920).
58. Miller v. United States, 78 U.S. (11 Wall.) 268 (1870).
59. Shick v. United States, 195 U.S. 65, 68 (1904).
60. In Re Griffin, 11 F. Cas. 7, 25 (1869).
61. Cohens v. Virginia, 19 U.S. (6 Wheat.) 120, 176 (1821).

validity.[62] It must be construed as a whole—by its four corners as by comparing a clause with other parts and construing them together.[63]

> There is no sounder rule of interpretation than that which requires us to look at the whole of the instrument, before we determine a question of construction of any particular part; and this rule is of the utmost importance, when applied to an instrument, the object of which was to create a government for a great country, working harmoniously and efficiently through its several executive, legislative, and judicial departments.[64]

It cannot be presumed that any clause is intended to be without effect.[65]

The construction should be, when required, a practical one. "The Constitution was formed for practical purposes, and a construction that defeats the very object of the grant of power cannot be the true one."[66]

The Court is concerned only with the constitutionality of legislation, and not with its motives, policy or wisdom[67] or with its concurrence with the natural justice, fundamental principles of government, or spirit of the Constitution.[68]

In construing an amendment, the Supreme Court will have only a limited interest in the intent or purpose of the framers. This source has been held to be useful and illuminating, but never controlling or binding upon the court.[69] As Justice Holmes said, in construing the Tenth Amendment's scope:

> The case before us must be considered in the light of our whole experience and not merely in that of what was a hundred years ago . . . . We must consider what this country has become in deciding what that amendment has reserved.[70]

That opinion is still regarded highly, as evidenced by an assertion contained in a recent law review article:

> The image of light suggests most clearly how history should be used (in construing the Constitution). It is neither pro-

62. Prout v. Starr, 188 U.S. 537, 543 (1903).
63. United States v. Morris, 26 F. Cas. 1323, 1332 (1840).
64. *Id.; accord,* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 159, 209 (1819).
65. Marbury v. Madison, *supra* note 47, at 109.
66. Power of the President to Fill Vacancies, 2 OP. ATTY. GEN. 525 (1832). The opinions of the U. S. Attorney General are not, of course, binding upon the Supreme Court The opinion is offered here only as a suggestion as to a possible rule the Court might invoke in reaching a decision.
67. Watson v. Buck, 313 U.S. 387, 403 (1941).
68. Jacobson v. Massachusetts, 197 U.S. 11 (1905).
69. Legal Tender Case, *supra* note 51.
70. Missouri v. Holland, 252 U.S. 416, 433-34 (1920).

> logue on the one hand, nor director of the drama on the other; rather, history is a spotlight, always available to illumine, but not to blind. History does not provide the answers to the problems of today; it merely helps to frame the questions.[71]

There are strong reasons for not making the specific intent, as espoused by the framers, binding upon the Court in future interpretations. For example, the Federalists occupied much the same position in relation to the Constitution, as the present sponsors of the Liberty Amendment hold in relation to their amendment. A South Carolina judge expressed the lack of wisdom in being bound by what such groups had to say about the Constitution and its amendments:

> . . . able as were the authors of the work referred to [The Federalist Papers], their opinions cannot be received as authority in judicial investigations. The purpose of that work was to reconcile a divided community to the adoption of the Constitution; and in accomplishing this object, it can hardly be denied that they sometimes exaggerated its advantages, and spread over the objectionable features the gloss of plausible construction.[72]

The Constitution must be given a reasonable interpretation, according to the import of its terms,[73] and not differently from its obvious or necessarily implied sense.[74]

Constitutional grants of power must be construed to further the object and purpose of said grant.[75]

The Constitution was drafted in such a way as to be able to withstand the changes of time and history, and to adapt itself to those changes. Therefore, any construction of it must be done in the knowledge that it was intended to provide for future needs, whether the specific language of the document recognized these needs or not.[76]

As Justice Story stated in *Martin v. Hunter*:

> The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter . . . to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution . . . . Hence, its powers are expressed in general terms, leaving to the legislature, from

71. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. OF CHI. L. REV. 502, at 532-33 (1964).
72. State v. McBride, 24 S.C. 168, 172 (1839).
73. Martin v. Hunter, *supra* note 51.
74. Gibbons v. Ogden, *supra* note 53.
75. Maxwell v. Dow, 176 U.S. 581, 602 (1900).
76. United States v. Classic, 313 U.S. 299, 316 (1941).

> time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require.[77]

Where a prohibition or limitation is placed upon the power of Congress, the same rule of liberal construction as in grants of power should be applied, and the prohibition or limitation should be enforced in its spirit and to its entirety.[78]

It is a rule of Constitutional construction that no word or clause can be rejected as superfluous or unmeaning, but that each must be given its due force and appropriate meaning.[79]

Where any particular word, or sentence, is obscure or of doubtful meaning, taken by itself, its obscurity may be removed by comparing it with the words and sentences with which it stands connected.[80] Marshall, in his opinion in *McCulloch*, expressed it this way:

> Almost all compositions contain words which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies.[81]

The exceptions to a power mark its extent,[82] and an exception of any particular case presupposes that those which are not excepted are embraced within the grant or prohibition.[83]

There are more, somewhat subtle, tests. An unofficial doctrine adopted by the court is the rational nexus test.[84] This doctrine calls for a presumption of constitutionality of legislation provided a rational nexus can be found to exist between the challenged legislation and a particular grant of constitutional power. The doctrine is so strong that it has been said:

> If the presumption of constitutionality is not conclusive it is nevertheless so strong as to carry the day for constitutionality in ninety-nine cases out of a hundred.[85]

A final general rule is that there is a desire to accommodate the potential desires of those who ratified the amendment, not

---

77. Martin v. Hunter, *supra* note 51, at 151.
78. Fairbanks v. United States, *supra* note 51.
79. Wright v. United States, 302 U.S. 583, 588 (1938).
80. Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 464, 511 (1838).
81. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 159, 203 (1819).
82. Gibbons v. Ogden, *supra* note 53.
83. Township of Pine Grove v. Talcott, 86 U.S. (19 Wall.) 666, 676 (1873).
84. Strong, *Trends in Supreme Court Interpretation of Constitution and Statute*, 6 WAYNE L. REV. 285, 302 (1960).
85. *Id.*

just those who framed it. It has been said that not only is there grave danger of an unacceptable (and unworkable) system coming from an 'intent' search, but such an investigation is really incomplete unless it takes into account the intent of the ratifiers as well as the drafters.[86]

There are a number of specific rules, laid down by the Supreme Court, in dealing with the specific question of the scope of Federal power under the Constitution to engage in "business" activity. So it was said in *McCulloch*:

> Can we adopt that construction (unless the words imperiously require it), which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise, by withholding a choice of means?[87]

That guideline was affirmed in 1916, when the Supreme Court felt compelled to say:

> The rule of constitutional interpretation announced in *McCulloch v. Maryland*; that that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant, has been so universally applied that it suffices merely to state it.[88]

In 1956, the Court once again indicated support for the rule of constitutional construction set out in *McCulloch*, stating that the Necessary and Proper Clause is to be read with *all* the powers of Congress.[89]

As late as 1965, in *Katzenbach v. Morgan*, [90] the Court felt compelled to affirm the simple test of constitutionality framed by Chief Justice Marshall.

All is not black for the sponsors of the Liberty Amendment, however. Even in the test set out in *McCulloch* it is possible to find a potential loophole. The test says that "[l]et the end be legitimate . . . *which are not prohibited*. . . ."[91] It would be the position, presumably, of the Liberty Amendment sponsors that their amendment is just such a prohibition.

Marshall goes on to say that

> "[I]f, indeed, such be the mandate of the Constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may

86. United States v. Freight Association, 166 U.S. 290, 318 (1897).
87. McCulloch v. Maryland, *supra* note 81, at 200.
88. Marshall v. Gordon, 243 U.S. 521, 537 (1917).
89. Reid v. Covert, 354 U.S. 1, 21-22 (1957).
90. 384 U.S. 641 (1966).
91. McCulloch v. Maryland, *supra* note 81, at 206.

> be executed; nor does it prohibit the creation of a corporation. . . ."

Marshall points out that quite to the contrary

> . . . [T]here is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described.[93]

It has to be admitted that the Liberty Amendment attempts to fill this gap, the question is whether it does it adequately.

Perhaps at this point it might be appropriate to summarize the rules of constitutional construction developed on the preceding pages.

What we have here is a complex and sometimes contradictory set of rules which the Court may or may not follow. In general, it can be said that the Court will give the Constitution a liberal interpretation with a strong presumption of constitutionality when dealing with Congressional acts. An amendment is said to take precedence over a provision of the original Constitution with which it conflicts, but the Court will do everything it can to harmonize the conflicting parts so that both may be deemed as valid. The Court will not read just an isolated amendment during the process of interpretation, but will read the Constitution as a whole, giving effect to each and every clause. When seeking the meaning of a particular amendment or clause, the Court will listen to extrinsic evidence, such as the intent and purpose of the framers, but will not be bound by it. The Court is obligated to give the Constitution a reasonable interpretation, not one different from its obvious meaning. But that obvious meaning may differ from year to year, as the Constitution is framed to meet the demands of changing times. The Court must give effect to a prohibition upon Congress, but it must also construe the Constitution to allow Congress to efficiently carry out those powers expressly granted. Words should be construed in a mitigated sense, not in a harsh manner, and where a word is vague, its meaning should be determined by examining the context in which it is used. Where there are exceptions to a power, those exceptions mark the limits of that power. But if there is a "rational nexus" between an expressed grant of power and certain Congressional activity, the activity is to be impliedly granted. In seeking out the intent of those who framed the Constitution, the possible intent or purpose of those who ratified it must also be considered.

---

92. *Id.* at 200.
93. *Id.* at 199.

APPLICATION OF RULES TO THE AMENDMENT

The most crucial stages of this note are the application of the foregoing rules of construction to the Liberty Amendment, consideration of the amendment in the light of the pre-disposition of the Court for the granting of the powers in question, and from this a determination of whether the amendment will achieve the main objective envisioned by its sponsors, i.e., the sale of some 700 government corporations.

Perhaps the most serious problem which the amendment faces or would face, is in the use of the word "specified." As pointed out earlier, the Constitution does not "specify" *any* business activity as the lawful object of Congressional action. To this are applied several rules of construction. First, no word or phrase is to be understood as without meaning. Therefore, the word "except" in the first section of the amendment[94] must be given meaning and understood to be purposeful. Therefore, there must be exceptions to this prohibition. But if the exceptions are to be specified, and "specified" is given the meaning assigned to it by BLACK'S LAW DICTIONARY, none will be found in the Constitution. Since that result will not be tolerated, the Court will assume that "specified" has a less restricted meaning. Aiding in this finding will be the rule that words are to be taken in a less restricted sense than possible, that they are to be understood in a mitigated sense.

As can be seen, the Court now has the door open to give its own interpretation to the word "specified." It may well be that the Court will find that it means that Congress may engage in that business activity which is implied by those express grants of power found in the Constitution.

Here another rule of construction works against the amendment—that the Constitution must be read as a whole. The Court may find that the requirement of specificity is satisfied when the object of the power is expressly granted. This finding would be reinforced by the rule that when there is a grant of power to Congress, the Constitution must be construed liberally to effectuate the obvious ends of that grant. This is similar to the "rational nexus" test developed by the Court in dealing with a similar problem. That test would look to see if a particular instance of governmental business activity were related to an express grant of Constitutional power to Congress (such as the power over fiscal affairs in relation to the incorporation of a national bank.)

The sponsors cannot find too much satisfaction in the knowledge that the Court will find the intent of the framers "illuminating."

94. *See*: the reproduction of the Liberty Amendment within this note.

True, they write a great deal in their literature about the required sale of some 700 government corporations. But they drew back from this absolute statement in the draft of the amendment. And in the main statement of intent[95] it was declared that the amendment will not change the spirit and intent of the original Constitution. It will ". . . merely clarify it, to give it force and effectiveness."[96] In other words, the sponsors are not seeking to amend the Constitution; they merely want to call to the attention of the Court what they feel is the proper interpretation of the document. And for this interpretation they refer back to the original intent of the framers. Is there any guarantee that the Court, with a second look at the intent of the framers, will find anything different, after nearly 150 years of consideration?

The rule which demands that the court consider not only what is obviously the intent and purpose of the framers, but also take into consideration what *may* have been the intent of the ratifiers (that is, the mass of voters which voted for it), also works against the amendment. Since the sponsors did not see fit to attach a list of the 700 government corporations to the amendment, it is possible that they feared that the amendment would fail unless they withdrew from the all-encompassing position set out in their pamphlets. This tactic can be compared with those of the Federalists, who were just as active in seeking support for the Constitution itself. And we have already seen that the Court, for just that reason, tends to view the written declarations of the Federalists with reservation when construing the Constitution. Would it be too bold to assume that this would be the fate of the multitudinous literature of the Liberty Amendment sponsors?

The rule which sets up a presumption of constitutionality does not help the sponsors' cause. This places the burden on them of proving the unconstitutional status of a particular Congressional act. It is generally accepted that this tactical position is not to be desired. Given the inclination of the Court beforehand on the subject, and the vagueness of the amendment itself, the sponsors are faced with a difficult job of convincing the Court that the particular act is unconstitutional.

The rule that the Court must construe the Constitution to give effect to all of its parts works against the Liberty Amendment. While the amendment itself seems to impose a prohibition on the Congress, the "Necessary and Proper" Clause gives an unmistakable grant of power, as does Article IV, Section three of the Con-

95. LLOYD G. HERBSTREITH & GORDON VAN B. KING, ACTION FOR AMERICANS—THE LIBERTY AMENDMENT, (Los Angeles: Operation America, Inc.), (1965) at page facing inside front cover.
96. *Id.*

stitution. When all elements are read together, the result has to be a mitigation of the effects of the amendment since all the grand designs of the Constitution depend for their operation on the "Necessary and Proper" Clause and others previously mentioned.

This is not to say that nothing works in favor of the Amendment. As was pointed out, Marshall, in his opinion in *McCulloch*, seemed to imply that if such activity were in fact prohibited, his only course would be to obey. He made much of the fact that, although the Constitution did not make specific provision for allowing Congress to engage in business activity, neither did it prohibit it or enumerate in which types of activity Congress could engage.

Also, there is the general rule that any part of the Constitution must be given its reasonable meaning, and not one different from its obvious meaning. This would seem to act as a restraint on the Court, but enthusiasm is tempered when it is remembered that the Court will likely find the amendment anything but obvious in its meaning. This rule, while not working against the amendment, would seem to be of limited help to it.

The sponsors have also included in the amendment, in Section 3,[97] the admonition that any activity which violates the "intent and purpose"[98] of the amendment henceforth cease. It also refers, in extrinsic material,[99] to the spirit of the Constitution, claiming the amendment seeks a return to the original spirit of the document. But there is a rule of constitutional construction which cautions the Court from considering motives, policy or wisdom of legislation, or with its concurrence with natural justice, fundamental principles of government, or the spirit of the Constitution.[100] The sponsors profess to be concerned only with the constitutionality of the legislation. Therefore, for the sponsors to state that certain activity violates the spirit of the Constitution means little to the Court.

In summary, this writer can find little in an application of the rules of construction to the Liberty Amendment to encourage the sponsors of that document.

CONCLUSIONS

This writer can reach no other conclusion than this: that the Liberty Amendment will fail to achieve the primary objective for which it was drafted, that being the required sale of some 700 government corporations. This is not to say that it will not meet with some measure of success. From time to time, the Court will

---

97. *Id.* at 67.
98. *See*: the reproduction of the Liberty Amendment within the earlier portions of this note.
99. *Supra* note 95.
100. Watson v. Buck, *supra* note 67; Jacobson v. Massachusetts, *supra* note 68.

be confronted with a case of Congressional activity so far removed from a reasonable exercise of implied authority, that it will have no choice but to strike it down. But these cases will be few and far between.

Among the various reasons advanced during the course of this note for the failure of the Liberty Amendment, there are four which seem to do the most damage.

First, the use of the word "specified" in section one of the amendment is a grave error. It raises speculation as to whether the drafters of the amendment have ever given the Constitution a serious reading.

Second, the allowance for "exceptions" set up in section one, in light of the probability that the sponsors do not consider any to exist. It certainly would be difficult to force the sale of nearly 700 government businesses if exceptions were to exist, since that list seems to be a pretty complete summary of governmental activity.

Thirdly, the sponsors of the amendment weaken their position greatly by extrinsic statements in their literature, not the least of which is their assertion that they really don't intend to change the Constitution at all, but seek only to point out to the Supreme Court what they consider to be the correct interpretation of it. Most attorneys with any experience at all are aware of the consequences of attempting to lecture the Court on what the law is.

Finally, the sponsors of the Liberty Amendment just don't seem to realize what they are up against. The condition which they apparently oppose—the size and scope of governmental activity—is the product of the free will of the American people over the span of nearly 200 years. Every step has been debated, fought over, considered and reconsidered, passed and repealed and passed again. In short, the end result of nearly 200 years of existence under that form of government established by the ratification of the Constitution. All this the sponsors of the Liberty Amendment propose to sweep away with one fell swoop of their amendment. Rarely has history seen such ambitious plans for such an inept document.

The puzzle thickens when it is realized that a much simpler solution is available. If the sponsors of the Liberty Amendment could ever muster that massive electoral support needed to enact an amendment to the Constitution of the United States, could it not be assumed that they could also muster the votes necessary to win a congressional election and hence control Congress? With this done, would it not be a simple matter to repeal that legislation which gives life to the governmental business activity which so rankles them? This writer would think so. Yet the sponsors seem

intent on ridding this country of its alleged evils via the grand device of a constitutional amendment. It would seem that the good ship Liberty Amendment is destined to flounder on the rocks of judicial review.

GERALD J. HAGA