Now the doctrines laid down by Chief-Justice Marshall, and on which the courts have constantly since proceeded, may be summed up in two propositions.

1. Every power alleged to be vested in the National government, or any organ thereof, must be affirmatively shown to have been granted. There is no presumption in favour of the existence of a power; on the contrary, the burden of proof lies on those who assert its existence, to point out something in the Constitution which, either expressly or by necessary implication, confers it. Just as an agent, claiming to act on behalf of his principal, must make out by positive evidence that his principal gave him the authority he relies on; so Congress, or those who rely on one of its statutes, are bound to show that the people have authorized the legislature to pass the statute. The search for the power will be conducted in a spirit of strict exactitude, and if there be found in the Constitution nothing which directly or impliedly conveys it, then whatever the executive or legislature of the National government, or both of them together, may have done in the persuasion of its existence, must be deemed null and void, like the act of any other unauthorized agent.[1]

2. When once the grant of a power by the people to the National government has been established, that power will be construed broadly. The strictness applied in determining its existence gives place to liberality in supporting its application. The people — so Marshall and his successors have argued — when they confer a power, must be deemed to confer a wide discretion as to the means whereby it is to be used in their service. For their main object is that it should be used vigorously and wisely, which it cannot be if the choice of methods is narrowly restricted; and while the people may well be chary in delegating powers to their agents, they must be presumed, when they do grant these powers, to grant them with confidence in the

[1] For instance, several years ago a person summoned as a witness before a committee of the House of Representatives was imprisoned by order of the House for refusing to answer certain questions put to him. He sued the sergeant-at-arms for false imprisonment, and recovered damages, the Supreme court holding that as the Constitution could not be shown to have conferred on either House of Congress any power to punish for contempt, that power (though frequently theretofore exercised) did not exist, and the order of the House therefore constituted no defence for the sergeant's act (*Kilbourn* v. *Thompson*, 103 United States, 168).

agents' judgment, allowing all that freedom in using one means or another to attain the desired end which is needed to ensure success.[1] This, which would in any case be the common-sense view, is fortified by the language of the Constitution, which authorizes Congress "to make 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 or office thereof." The sovereignty of the National government, therefore, "though limited to specified objects, is plenary as to those objects"[2] and supreme in its sphere. Congress, which cannot go one step beyond the circle of action which the Constitution has traced for it, may within that circle choose any means which it deems apt for executing its powers, and is in its choice of means subject to no review by the courts in their function of interpreters, because the people have made their representatives the sole and absolute judges of the mode in which the granted powers shall be employed. This doctrine of implied powers, and the interpretation of the words "necessary and proper," were for many years a theme of bitter and incessant controversy among American lawyers and publicists.[3] The

[1] For instance, Congress having power to declare war, has power to prosecute it by all means necessary for success, and to acquire territory either by conquest or treaty. Having power to borrow money, Congress may, if it thinks fit, issue treasury notes, and may make them legal tender.

[2] See *Gibbons* v. *Ogden*, 9 Wheat. p. 1 *sqq.*, judgment of Marshall, C.-J.

[3] "The powers of the government are limited, and its limits are not to be transcended. But 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 adapted to that end, which are not prohibited but consistent with the letter and spirit of the Constitution, are constitutional." — Marshall, C.-J., in *M'Culloch* v. *Maryland* (4 Wheat. 316). This is really a working-out of one of the points of Hamilton's famous argument in favour of the constitutionality of a United States bank: "Every power vested in a government is in its nature sovereign, and includes by force of the term a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power, and which are not precluded by restrictions and exceptions specified in the Constitution." — *Works* (Lodge's ed.), vol. iii. p. 181.

Judge Hare sums up the matter by saying, "Congress are sovereign as regards the objects and within the limits of the Constitution. It may use all proper and suitable means for carrying the powers conferred by the Constitu-

history of the United States is in a large measure a history of the arguments which sought to enlarge or restrict its import. One school of statesmen urged that a lax construction would practically leave the States at the mercy of the National government, and remove those checks on the latter which the Constitution was designed to create; while the very fact that some powers were specifically granted must be taken to import that those not specified were withheld, according to the old maxim *expressio unius exclusio alterius*, which Lord Bacon concisely explains by saying, "as exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated." It was replied by the opposite school that to limit the powers of the government to those expressly set forth in the Constitution would render that instrument unfit to serve the purposes of a growing and changing nation, and would, by leaving men no legal means of attaining necessary but originally uncontemplated aims, provoke revolution and work the destruction of the Constitution itself.[1]

This latter contention derived much support from the fact that there were certain powers that had not been mentioned in the Constitution, but which were so obviously incident to a national government that they must be deemed to be raised by implication.[2] For instance, the only offences which Congress is expressly empowered to punish are treason, the counterfeiting of the coin or securities of the government, and piracies and other offences against the law of nations. But it was very early held that the power to declare other acts to be offences against the United States, and punish them as such, existed as a necessary appendage to various general powers. So the

tion into effect. The means best suited at one time may be inadequate at another; hence the need for vesting a large discretion in Congress. . . . 'Necessary and proper' are therefore, as regards legislation, nearly if not quite synonymous, that being 'necessary' which is suited to the object and calculated to attain the end in view." — *American Constitutional Law*, p. 107.

[1] See the philosophical remarks of Story, J., in *Martin* v. *Hunter's Lessee* (1 Wheat. p. 304 *sqq.*).

[2] Stress was also laid on the fact that whereas the Articles of Confederation of 1781 contained (Art. ii.) the expression, "Each State retains every power and jurisdiction and right not expressly delegated to the United States in Congress assembled," the Constitution merely says (Amendment x.), "The powers not granted to the United States are reserved to the States respectively or to the people," omitting the word "expressly."

power to regulate commerce covered the power to punish offences obstructing commerce; the power to manage the post-office included the right to fix penalties on the theft of letters; and, in fact, a whole mass of criminal law grew up as a sanction to the civil laws which Congress had been directed to pass.

The three lines along which this development of the implied powers of the government has chiefly progressed, have been those marked out by the three express powers of taxing and borrowing money, of regulating commerce, and of carrying on war. Each has produced a progeny of subsidiary powers, some of which have in their turn been surrounded by an unexpected offspring. Thus from the taxing and borrowing powers there sprang the powers to charter a national bank and exempt its branches and its notes from taxation by a State (a serious restriction on State authority), to create a system of custom-houses and revenue cutters, to establish a tariff for the protection of native industry. Thus the regulation of commerce has been construed to include legislation regarding every kind of transportation of goods and passengers, whether from abroad or from one State to another, regarding navigation, maritime and internal pilotage, maritime contracts, etc., together with the control of all navigable waters not situate wholly within the limits of one State, the construction of all public works helpful to commerce between States or with foreign countries, the power to prohibit immigration, and finally a power to establish a railway commission and control all inter-State traffic.[1] The war power proved itself even more elastic. The executive and the majority in Congress found

[1] The case of *Gibbons* v. *Ogden* supplies an interesting illustration of the way in which this doctrine of implied powers works itself out. The State of New York had, in order to reward Fulton and Livingston for their services in introducing steamboats, passed a statute giving them an exclusive right of navigating the Hudson river with steamers. A case having arisen in which this statute was invoked, it was alleged that the statute was invalid, because inconsistent with an Act passed by Congress. The question followed, Was Congress entitled to pass an Act dealing with the navigation of the Hudson? and it was held that the power to regulate commerce granted to Congress by the Constitution implied a power to legislate for navigation on such rivers as the Hudson, and that Congress having exercised that power, the action of the States on the subject was necessarily excluded. By this decision a vast field of legislation was secured to Congress and closed to the States.

themselves during the War of Secession obliged to stretch this power to cover many acts trenching on the ordinary rights of the States and of individuals, till there ensued something which, fifty years earlier, would have been deemed to approach a suspension of constitutional guarantees in favour of the Federal government.

The courts have occasionally gone even further afield, and have professed to deduce certain powers of the legislature from the sovereignty inherent in the National government. In its last decision on the legal tender question, a majority of the Supreme court seems to have placed upon this ground, though with special reference to the section enabling Congress to borrow money, its affirmance of that competence of Congress to declare paper money a legal tender for debts, which the earlier decision of 1871 had referred to the war power. This position evoked a controversy of wide scope, for the question what sovereignty involves belongs as much to political as to legal science, and may be pushed to great lengths upon considerations with which law proper has little to do.

The above-mentioned instances of development have been worked out by the courts of law. But others are due to the action of the executive, or of the executive and Congress conjointly. Thus, in 1803, President Jefferson negotiated and completed the purchase of Louisiana, the whole vast possessions of France beyond the Mississippi. He believed himself to be exceeding any powers which the Constitution conferred; and desired to have an amendment to it passed, in order to validate his act. But Congress and the people did not share his scruples, and the approval of the legislature was deemed sufficient ratification for a step of transcendent importance, which no provision of the Constitution bore upon. In 1807 and 1808 Congress laid, by two statutes, an embargo on all shipping in United States ports, thereby practically destroying the lucrative carrying trade of the New England States. Some of these States declared the Act unconstitutional, arguing that a power to regulate commerce was not a power to annihilate it, and their courts held it to be void. Congress, however, persisted for a year, and the Act, on which the Supreme court never formally pronounced, has been generally deemed within the Constitution, though Justice Story (who had warmly opposed it when he sat in Congress) remarks that it went to the extreme verge. More startling, and more far-reaching in their consequences, were the assumptions of Federal authority made during the War of Secession by the executive and confirmed, some expressly, some tacitly, by Congress and the people.[1] It was only a few of these that came before the courts, and the courts, in some instances, disapproved them. But the executive continued to exert this extraordinary authority. Appeals made to the letter of the Constitution by the minority were discredited by the fact that they were made by persons sympathizing with the Secessionists who were seeking to destroy it. So many extreme things were done under the pressure of necessity that something less than these extreme things came to be accepted as a reasonable and moderate compromise.[2]

The best way to give an adequate notion of the extent to which the outlines of the Constitution have been filled up by interpretation and construction, would be to take some of its more important sections and enumerate the decisions upon them and the doctrines established by those decisions. This process would, however, be irksome to any but a legal reader, and the legal reader may do it more agreeably for himself by consulting one of the annotated editions of the Constitution. He will there find that upon some provisions such as Art. i. § 8 (powers of Congress), Art. i. § 10 (powers denied to the States), Art. iii. § 2 (extent of judicial power), there has sprung up a perfect forest of judicial constructions, working

[1] See Judge Cooley's *History of Michigan*, p. 353. The same eminent authority observes to me: "The President suspended the writ of *habeas corpus*. The courts held this action unconstitutional (it was subsequently confirmed by Congress), but he did not at once deem it safe to obey their judgment. Military commissioners, with the approval of the War Department and the President, condemned men to punishment for treason, but the courts released them, holding that the guaranties of liberty in the Constitution were as obligatory in war as in peace, and should be obeyed by all citizens, and all departments, and officers of government (*Milligan's case*, 4 Wall. 1). The courts held closely to the Constitution, but as happens in every civil war, a great many wrongs were done in the exercise of the war power for which no redress, or none that was adequate, could possibly be had." *Inter arma silent leges* must be always to some extent true, even under a Constitution like that of the United States.

[2] Such as the suspension of the writ of *habeas corpus*, the emancipation of the slaves of persons aiding in the rebellion, the suspension of the statute of limitations, the practical extinction of State banks by increased taxation laid on them under the general taxing power.