

Sec. 1—The Congress

Legislative Powers

edged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted.”³⁵

Early in the history of the Constitution, however, Alexander Hamilton asserted that the “executive power,” textually committed to the President, is not confined to those items expressly enumerated in Article II.³⁶ A similarly broad conception of “the judicial power of the United States,” as vested in the courts, is seen in Justice Brewer’s opinion for the Court in *Kansas v. Colorado*.³⁷ But, even the more narrowly worded delegation to Congress of “legislative powers herein granted” is severely strained by Chief Justice Marshall’s broad conception of some of these powers. In *McCulloch v. Maryland*, the Chief Justice asserted that “[t]he sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government”;³⁸ he characterizes “the power of making war, or levying taxes, or of regulating commerce” as “great substantive and independent power[s]”;³⁹ and he declares that the power conferred by the “necessary and proper” clause embraces all legislative “means which are appropriate” to carry out the legitimate ends of the Constitution, unless inconsistent “with the letter and spirit of the constitution.”⁴⁰

Nine years later, Marshall introduced what Story in his *Commentaries* labels the concept of “resulting powers,” which are those that “result from the whole mass of the powers of the National Government, and from the nature of political society, [rather] than [as] a consequence or incident of the powers specially enumerated.”⁴¹ Story references Marshall’s opinion in *American Ins. Co. v. Canter*,⁴² which states that “the constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.”⁴³ And from the

³⁵ 17 U.S. (4 Wheat.) 316, 405 (1819).

³⁶ See discussion under Article II, § 1, cl. 1, Executive Power: Theory of the Presidential Office, *infra*. This assertion has since found support from decisions of the Court.

³⁷ 206 U.S. 46, 82 (1907).

³⁸ 17 U.S. (4 Wheat.) at 407.

³⁹ 17 U.S. at 411.

⁴⁰ 17 U.S. at 421.

⁴¹ 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1256 (1833). See also *id.* at 1286 and 1330.

⁴² 26 U.S. (1 Pet.) 511 (1828).

⁴³ 26 U.S. at 542.