

Sec. 1—The Congress

Legislative Powers

power to acquire territory, Marshall continues, arises, as “the inevitable consequence,” the right to govern it.⁴⁴

Subsequently, the Court has repeatedly ascribed powers to the National Government on grounds that ill accord with the doctrine of enumerated powers: the power to legislate in effectuation of the “rights expressly given, and duties expressly enjoined” by the Constitution;⁴⁵ the power to impart to the paper currency of the government the quality of legal tender in the payment of debts;⁴⁶ the power to acquire territory by discovery;⁴⁷ the power to legislate for the Indian tribes wherever situated in the United States;⁴⁸ the power to exclude and deport aliens;⁴⁹ and to require that those who are admitted be registered and fingerprinted;⁵⁰ and finally the complete powers of sovereignty, both those of war and peace, in the conduct of foreign relations. Thus, in *United States v. Curtiss-Wright Export Corp.*,⁵¹ decided in 1936, Justice Sutherland asserted the dichotomy of domestic and foreign powers, with the former limited under the enumerated powers doctrine and the latter virtually free of any such restraint. That doctrine has been the source of much scholarly and judicial controversy, but although limited, it has not been repudiated.

Yet as Justice Sutherland pointed out, these holdings do not directly affect “the internal affairs” of the nation, but instead relate principally to its peripheral relations. The most serious inroads on the doctrine of enumerated powers are, in fact, those that have taken place under cover of the other doctrines. These would include the vast expansion in recent years of the national legislative power under the authority to regulate interstate commerce and the power to provide for the expenditure of the national revenues. Still, some of the groundwork for these later doctrinal developments can be seen in Justice Marshall’s language, as quoted above from *McCulloch*.

⁴⁴ 26 U.S. at 543.

⁴⁵ *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 616, 618–19 (1842).

⁴⁶ *Juilliard v. Greenman*, 110 U.S. 421, 449–450 (1884). See also Justice Bradley’s concurring opinion in *Knox v. Lee*, 79 U.S. (12 Wall.) 457, 565 (1871).

⁴⁷ *United States v. Jones*, 109 U.S. 513 (1883).

⁴⁸ *United States v. Kagama*, 118 U.S. 375 (1886).

⁴⁹ *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

⁵⁰ *Hines v. Davidowitz*, 312 U.S. 52 (1941).

⁵¹ 299 U.S. 304 (1936).