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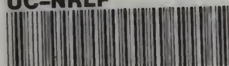

LECTURE

ON THE

IMPLIED POWERS OF THE CONSTITUTION,

DELIVERED BY SPECIAL REQUEST

TO

LAW SCHOOL OF GEORGETOWN UNIVERSITY,

IN WASHINGTON, D. C.,

ON

MONDAY EVENING, FEBRUARY 16, 1885,

BY

GEORGE TICKNOR CURTIS.

WASHINGTON:
RUFUS H. DARBY, PRINTER.
1885.

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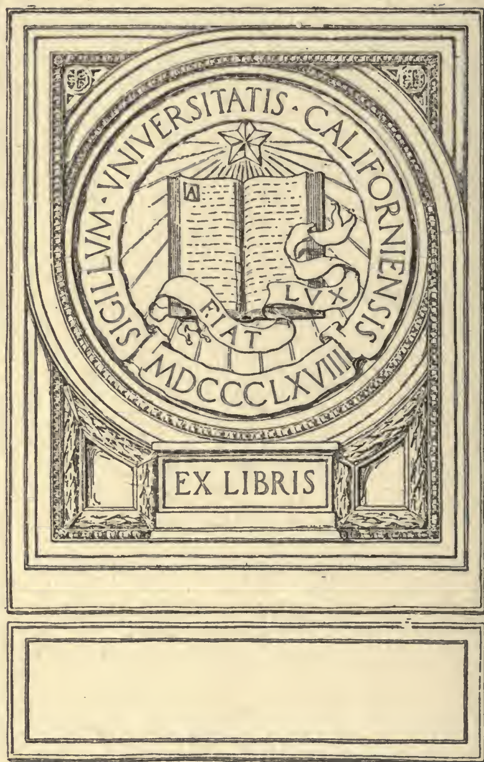
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GEORGETOWN UNIVERSITY, SCHOOL OF LAW,
OFFICE OF SECRETARY,
WASHINGTON, D. C., *February 19th*, 1885.

Hon. GEORGE TICKNOR CURTIS.

DEAR SIR: I am directed by the Faculty of the Law Department of Georgetown University to request of you the manuscript of your lecture on "The Implied Powers of the Constitution," with a view to its publication.

Very respectfully,

S. M. YEATMAN,
Secretary.

LECTURE.

We hear a great deal, and probably we shall continue to hear a great deal, about a liberal and a strict construction of the Constitution. You are engaged in a study of the Constitution preparatory to taking your places in active life as lawyers and citizens. It is of great importance for you, therefore, to know whether it is correct to regard the so-called strict construction as inadmissible because it is too narrow; whether the so-called liberal construction is always the safe one; and whether there is not a clear and well defined rule of interpretation, which should not be called either strict or liberal, in the sense of being harmful and injurious to the great objects for which this Constitution was created. And here let me advise you not to be governed by what is supposed to be the characteristic tendency of this or that political party, in forming your opinions about the Constitution of your country. You have something higher and better to do, in prosecuting the studies in which you are now engaged, than to accept the dogmas of a party because you or your friends may happen to act with it. What you have to do is to subject party dogmas to the proper tests of truth and sound reasoning, leaving the result to fall where it may, so far as all political parties are concerned.

Still there have been from the first two schools of interpretation, one of which has been characterized as liberal and the other as strict. Great names may be arrayed on either side. The two schools have mutually charged each other with very

wrong and very dangerous tendencies. But I have long believed that it is best to discard the epithets of strict and liberal, and to inquire into the true and sound method of interpretation, without characterizing it by either of these phrases. Nine men out of ten whom you hear talking glibly about the mode in which the Constitution should be construed, could not tell the meaning of the strict or the liberal construction on which they insist. The true method of interpretation can not be characterized or described by a phrase. It must be ascertained by certain fundamental rules, which are to be deduced from a careful study of the text, from the surrounding historical facts which show why the text was made as it was, and from the great leading purposes for which the Constitution was established. These sources of interpretation all point to certain conclusions, namely, that the Government of the United States is a limited government, with certain enumerated and described powers; that it is not a government of universal authority like many other governments; but that its authority is specific, confined to certain described subjects and relations, which the Constitution itself denominates its "powers," and to one or more of which powers all its acts must be referred.

The fundamental principle on which our Constitution is based is that all government derives its existence and authority from the people. Hence it can have no powers but such as the people choose to confer upon it. Its powers are grants made to it by the people. From the limited number and specific character of the powers conferred by the Constitution on the General Government—less than all the powers of sovereignty—it follows that the people of this country are a nation only for certain defined purposes and objects which concern them all alike. All other powers of government,

all other objects of government, are expressly reserved to the respective States or their people, by a provision which is a part of the Constitution itself.

But there is another truth of equal importance and equally undeniable. This is the supremacy of the Federal Constitution. It declares itself to be the supreme law of the land. Its supremacy means that to the full extent of its granted powers, the authority of the Constitution is perfect, incapable of being controlled by the State governments; and that when any conflict arises the State must give way. A mode of effecting a peaceful solution of all such conflicts is provided through the Supreme Federal Judiciary. But it is sometimes a matter for careful interpretation how far the authority of this Government extends, or what is the sphere of its constitutional operation. Hence arises the necessity for inquiring what are its implied powers, or powers which incidentally result from or are embraced in the express powers that are described in the text in general terms. This is the principal topic on which I propose to say something this evening.

I will, however, first advert to the unwritten history of opinion and belief concerning the nature of the Constitution. I call it an unwritten history, because, although the materials for it are ample, they have never yet been embodied in a connected and methodical narrative. I hope ere long to make an effort to do this. It is a part of our constitutional history that it is both very curious and very instructive. It bears directly upon that long conflict which finally culminated in a civil war; and it shows how completely the two opposite theories of the Constitution were matters of opinion and belief, about which men could and did honestly and conscientiously differ, whatever were the immediately excit-

ing causes which more or less influenced them. I now make a passing reference to the doctrine of State secession from the Union only for the purpose of saying that secession was supposed to be a constitutional right resulting from a certain view of the nature of the Constitution. This view was that the powers that had been ceded by a State to the Government of the Union could be revoked or withdrawn when the people of the State believed that their safety required it; and this was supposed to be the exercise of a constitutional right, and not an exercise of the right of revolution. Not very long ago I had in my possession the official copy of the Ordinance of Secession adopted by South Carolina in December, 1860, which was served upon President Buchanan, to give him formal notice that the State had withdrawn from the Union. The original bore the sign-manual of every member of the State convention. The copy served upon the President repeated the signatures, and the document was authenticated by the great seal of the State. It was a remarkable instrument, and was, I believe, the model of all the other secession ordinances. It purported to repeal all the acts of the State by which it had ratified and adopted the Constitution of the United States. Of course its theory was that the cession of political powers and jurisdiction which the State had made to the Federal Government was constitutionally revocable. On the other hand, the opposite theory was that the grant of those powers was irrevocable by any constitutional proceeding, and that in every constitutional sense the people of South Carolina were just as much bound to obey the laws of the United States after secession as they were before. This was the theory on which the war was waged by the Federal Government for the purpose of putting down all obstructions to the exercise of its proper

authority. This was the justification, and the only justification for the war; and it was a complete justification, although it was all the while nothing but the assertion of a matter of opinion and belief concerning the true nature of the Constitution. It might, and it did seem to intelligent and impartial foreigners who looked upon the terrible conflict, a very strange question to put to the arbitrament and decision of war; but there was no other arbitrament to which it could be submitted. With this issue thus submitted to a trial of strength, in the form of regular war, if the Southern arms had prevailed the right of State secession from the Union would have been forever established as a constitutional right. The Federal arms having prevailed, the right of State secession from the Union is forever negatived as a constitutional right. Men may entertain, as a matter of theory, whatever opinion about it their convictions lead them to entertain; but, as a right capable of being practically exercised, all Americans are now happily agreed that it is ended.

But this great event, the final negation of the constitutional right of secession, has not changed the character of the Constitution as a limited government. There has been, since the close of the civil war, through certain amendments of the Constitution, some further diminution of the State sovereignties, and some addition to the powers of the Federal Government, in matters to which I need not now specially refer. But it still remains true that this is a government of limited, specific and defined powers. The rules of interpretation to be applied to those powers are still the same. It is still true that all the powers of government which the Federal Constitution and its amendments do not embrace, belong to the States or their people. No sensible person

doubts this, although we do see now and then cropping out the idea that since the war the character of our mixed system of government is changed. It is not changed in a single iota, excepting in so far as the States have submitted to a few special diminutions of their own sovereignties, beyond what they had previously surrendered. We must still look to the same rules of interpretation of the Federal powers, although the number of those powers has been increased in a few particulars, and the State sovereignties have been to just the same extent diminished. For this reason I propose to speak to you of the fundamental rule of interpretation in judging of the extent and character of what are called the incidental or implied powers.

But before doing so let me direct your attention to a matter which seems almost to require some apology for alluding to it at all. We hear much nowadays about the so-called "general welfare clause" of the Constitution. The Constitution uses the words general welfare in just two places, and no more. In the preamble the promotion of the general welfare is one of the objects enumerated, along with five others, for which the people of the United States ordain and establish the Constitution. The wildest and most latitudinarian constructionist would hardly venture to tell an audience of intelligent law students that the preamble of the Constitution contains any grant of power. It simply asserts the grand objects which the people aim to secure by the Constitution; but as to the means by which they do secure these desirable objects we must look into the body of the Constitution and among its enumerated powers. Looking into the body of the instrument we come upon the 1st clause of the 8th section of article 1 of the Constitution, which contains the grant of the taxing power. Here the words general welfare

are used again; and, strange to say, there are persons who suppose that this clause contains a grant of authority to tax in order to promote the personal welfare of every man, woman and child in the United States! I shall merely counsel you to analyze the clause and see how strange this notion is. The clause grants to the Congress a power to tax the people for three special purposes: First, to pay the debts of the United States; second, to provide for the common defense of the United States; third, to provide for the general welfare of the United States. In every one of these special purposes for which the taxing power is to be exercised, "the United States" means the political corporation known as the United States, and not the individual inhabitants of the country. The debts that are to be paid are the debts of the Government; the common defense that is to be provided for is the defense of the Government in all those matters in which it has duties of defense to discharge for the whole country; the general welfare that is to be provided for is the well-being of the Government in all those matters of which it has special cognizance, and in respect to which its efficiency concerns the whole Union.* In the very next clause, which con-

* No other meaning can be assigned to the words "the United States" that would be consistent with the framework of the Constitution. If it had been intended to create a government with an unlimited power of taxation for the purpose of promoting any other welfare than the welfare or efficiency of the Government itself in the exercise of its specific powers, no enumeration or description of its powers would have been necessary. The taxing clause would have embraced an authority to legislate upon all possible subjects on which the levying of taxes would be needful to promote the well-being of the people of the United States. It is only by giving a uniform meaning to each of the three objects for which the taxing power is to be exercised, and by collating these objects with the defined and enumerated legislative powers which follow the taxing clause, that we can arrive at any consistent view of the welfare that is to be provided for by an exercise of the taxing power. As the source of an independent power, disconnected with the specific and enumerated legislative powers which follow it, the taxing clause would be in itself a creation of a government that would absorb every possible object that money could promote. Instead of legislating in the exercise of the described and enumerated legislative powers, and levying taxes to defray the expenses

tains the grant of power to borrow money on the credit of the United States, the "United States" is used in the same sense, meaning the government known as the United States. It is on the credit of the Government, not on the credit of individuals or of States, that Congress is authorized to borrow money.

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of the Government incurred for the special objects of those powers, it would only be necessary for Congress to lay and collect whatever taxes it might deem needful to promote the general welfare of the country, and to appropriate the money thus raised to any objects that could be considered as called for in the interest of the public good.

There is great force in the words "to provide for." The words are not "to promote the general welfare," as they are sometimes read. Congress is authorized to lay and collect taxes in order "to provide for" the "common defense and general welfare of the United States." The words "to provide for" are used many times in the Constitution, and they always have a meaning distinct from the term "to promote." In legal signification, "to provide for" means "to legislate for," to accomplish by direct enactment, as to provide for the punishment of counterfeiting the securities and current coin of the United States; to provide and maintain a navy; to provide for calling forth the militia; to provide for organizing, arming and disciplining the militia. "To promote," on the other hand, as used in the Constitution, is to secure an incidental effect. It signifies the main purpose to be accomplished by the exercise of a certain power of legislation; as "to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." There is another phrase used in the Constitution in the same sense as "to provide for;" this is "to establish;" as to "establish post-offices and post-roads," to "establish a uniform rule of naturalization." Still another phrase is "to constitute," as to "constitute tribunals inferior to the Supreme Court." In this use of the words "to establish" and "to constitute," there is a granted power to create, or to bring into legal existence. But "to provide for" a thing, although it has the same meaning as to create or bring into legal existence by legislation, is very different from the meaning of the phrase "to promote." The latter denotes an incidental object that is to be accomplished by the legislation. The former denotes the legislation itself. In the taxing clause two things are embraced. The first is the taxing power itself. The second comprehends the three objects for which the power is to be exercised and to which it is limited. The first of these is to obtain by legislation the means for paying the debts of the United States. The second is "to provide for the common defense of the United States." The third is "to provide for the general welfare of the United States." The "provision" that is to be made for each of these objects is a provision by the legislation which levies and collects the taxes.

I have noticed that in the Alphabetical Analysis, given in Hickey's edition of the Constitution (a very useful manual), the words "general welfare" are indexed as follows:
"GENERAL WELFARE.—The Constitution established to promote the general welfare."* *
—"*Preamble.*"

"GENERAL WELFARE.—Congress shall have power to provide for the general welfare.* *
—"*Art.* 1, *Sec.* 8, *cl.* 1."

While this mode of indexing preserves the distinction between "to promote" and

Now look at the stupendous communism that is wrapped up in the taxing power, on the supposition that it includes a power to tax for the promotion of the welfare of individuals. There is no limit to the taxing power, excepting that duties, imposts and excises must be uniform throughout the United States. All the property in the country may be taxed without limit for the legitimate objects of taxation. If one of those legitimate objects is the welfare of individuals, or masses, or classes, or of the whole people, the two Houses of Congress and any President acting together can divide up all the property in the country upon the plea that a general division will promote the general welfare. By this process this Government could devour itself, and there would be nothing left for it to subsist upon. But it happens that one of the grand purposes for which this Government was established was the protection of property, and its Constitution contains guarantees designed for the protection of property that are more remarkable and efficient than any that exist under most of the other governments in the world.

"to provide for," the omission from the last reference of the words "the United States," would lead a cursory reader, consulting the index, to infer that Congress has power to provide for the general welfare of the country, or of the people of the country. With this idea in his mind, if he should turn to the taxing clause, to which he is referred, he would be apt to draw a very erroneous inference. It is not the general welfare of the country or of the people of the country, that Congress is authorized to provide for by an exercise of the taxing power; it is the general welfare of "the United States" which means the political corporation or government known as the United States.

As I have criticised Hickey's Alphabetical Analysis in one place, it is but fair to add that in another place it gives the qualifying words "the United States," as follows:

"UNITED STATES.—Congress shall have power to provide for the common defense and general welfare of the United States. * * * —*Art.* 8, *Sec.* 1. *cl.* 1."

But even this mode of statement or analysis is incorrect. The taxing clause does not say that Congress shall have power to provide for the common defense and general welfare of the United States. It says that Congress shall have a power to lay and collect taxes, duties, imposts, and excises, in order to obtain means to pay the debts of the United States, and to make provision for the common defense and general welfare of the Government. This welfare is its efficiency, in point of pecuniary means, for the exercise of all the specific powers which follow the grant of the taxing power.

At the same time the Constitution contains guarantees of personal rights that are as strong and efficient as those afforded to the rights of property. But I will detain you no longer upon this very singular notion of the general welfare, excepting to remark that there are now large establishments in this Government, on which great sums are expended every year, and which rest on no better constitutional foundation than this strange idea of "the general welfare clause." Some of these establishments can not be referred to any specific power of the Constitution; they do not result by any rational rule of interpretation from any one or more of the admitted powers of the Government. There are other establishments which do result from some one or more of the express powers of the Constitution. There are systems of Federal legislation which can, and there are systems which can not, be referred to some of the powers of the Constitution, as implied in, and resulting from, those powers when measured by the true rule of interpretation. There are other systems of legislation which flow from the fact that the Government of the United States is a great landed proprietor; a capacity which is to be distinguished from its powers of political sovereignty. I am now considering the latter, and I wish to give you what I believe to be the true rule for interpreting them.

If you take the express powers of the Constitution, the first thing that will strike you will be that they are described in general, but appropriate terms. There are seventeen specific powers of legislation granted to the Congress in the 8th section of article 1. Take any one of them—the power to borrow money on the credit of the United States; or the power to regulate commerce with foreign nations, and among the several States and with the Indian tribes; or the

power to establish post-offices and post-roads; or the power to raise and support armies; or the power to provide and maintain a navy, and so on. From the language in which each of the specific legislative powers is described, you will perceive that the details of the mode of its exercise are not given, as, indeed, they could not be well given in such an instrument as a written constitution. Again, the executive power, which is vested in the President, is simply described as the executive power, and how that power is to be exercised is not mentioned. So, too, of the judicial power; the tribunals in which it is or may be vested, and the subjects to which it is to extend are mentioned, but the details of its exercise are not mentioned. In the process of framing the Constitution, when it had been determined in what language the powers of the three great departments, the legislative, the executive and the judicial, should be couched, it was apparent that the filling up of the outline must be left to legislation. Here again the details of the legislation could not be foreseen, and therefore they could not be given in the Constitution itself. In each of the express and granted powers, there must, from the very nature of government or political sovereignty, be many things implied, as part and parcel of each specific power. How then was this matter to be left? Was it to be left to implication, or was there to be a rule of determination given in the Constitution itself, which would forever remain as the measure of these incidental, undescribed and resulting powers, which all were agreed must be included in the general terms that embraced the scope and nature of all the express and enumerated powers of the Constitution? The framers of the Constitution decided that such a rule must be laid down, and accordingly they ended the enumeration of the legislative

powers by a clause which gave to the Congress authority "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 officer thereof."

It is not necessary for me to detain you with the controversies which sprang up from the first about the meaning of the terms "necessary and proper," as applied to the laws which Congress is thus authorized to enact, because the clause itself carries in its own language the meaning of these terms. The laws are not to be all such laws as the Congress may in its discretion deem necessary and proper; nor are they to be only such laws as are indispensably necessary to the exercise of a specific power, and without which the power must remain dormant. They are to be laws which are necessary and proper for *carrying into execution* the various specific powers of the Government or some one of its branches, which powers are vested in the Government or in one of its branches by the Constitution. That is to say, the law by which a specific power of the Constitution is to be exercised must bear the relation of means to an end; must be appropriate as a means to the attainment of the object of the specific power; or in other words, it must *execute* the power, and not be something which bears only a remote, fanciful, indirect, or incomplete relation to that power. Now the elements which go to make up an incidental or implied power, such as Congress can constitutionally resort to, were laid down by Chief-Justice Marshall and his associates on the bench of the Supreme Court more than sixty-five years ago, in a construction of this clause of the Constitution, which all men of all parties profess still to be guided by, but which is often nowadays mistaken. The elements are of a three-fold character: one of

them is a negative quality, the two others are positive qualities. The negative quality is that the law must not be one that is prohibited by the Constitution. There are numerous prohibitory clauses which impose positive restraints upon the legislative authority, and a law which should violate one of these would be unconstitutional, even if it should be one that is constantly resorted to by other governments. Here you perceive that while our Constitution has made grants of certain specific powers of government, it has narrowed the scope of these powers by excluding from them certain modes in which they could be exercised if these restraints were not imposed. But this is not all. Not only must a law of this Government be one that is not prohibited by the Constitution, but it must have two positive qualities as well. First, the means or instrumentality chosen for the execution of an acknowledged power of the Constitution must be plainly adapted to that end; the meaning of which is that it must execute the power. Finally, the law must be consistent with both the letter and the spirit of the Constitution; the meaning of which is that it must accord with every positive provision of the Constitution, and with its general intent and purpose. This is one great branch of the rule of interpretation of the implied powers of legislation.

There is another branch of this comprehensive rule. When you look into the clause which defines the scope of the legislative powers, you find that it assumes a certain range of legislative discretion. While this discretion is limited by the requirements which I have just mentioned, there are a variety of means or instrumentalities, within those limits, in regard to which Congress can exercise a choice, by employing one or another. It has become customary to call this question of what means or instrumentalities, within certain

limits, Congress may resort to a "political question." The meaning of this is that the necessity or expediency of resorting to one means or instrumentality rather than to another, when both possess the requisite qualities, is a question of legislative discretion. Of this question Congress is the judge, and the final judge. But the question whether the particular means or instrumentality which Congress decides to employ, possesses the qualities and characteristics defined by the rule of interpretation, whether it bears the defined relations to the execution of one of the known specific powers of the Constitution, is not a political question, and is not committed to the final decision of Congress. It is a judicial question; and although Congress in enacting the law, decides this question for itself, and in the first instance, it is for the judicial power to decide it finally. It was to determine this judicial question that the judicial power was created and was given cognizance of all cases arising under the Constitution.

Let me now give some illustrations of this great rule of interpretation. There is a power to make war. A particular military engine, although it did not exist when the Constitution was established, may be employed as a means of making war, because it directly executes the power of carrying on war. It has all the requisite qualities and characteristics of the constitutional relation of means to an end, and whether it shall be employed is a mere matter of legislative discretion, or, as is said, it is a political question. Again, there is a power to collect and distribute revenue, and a power to borrow money. A national bank may be created by Congress, not because the creation of banks is an incident of general sovereignty, or because other governments create banks, but because a bank is an instrument that will directly execute the specific power to borrow money or the

specific power to collect and distribute revenue. It has all the qualities and capacities required for an exercise of one or more of the specific powers of the Constitution, and whether it shall be employed is a matter of legislative discretion. There is a power to establish post-offices and post-roads. Whether the mails shall be carried by railway or by stage coach, is a matter of legislative discretion and choice. Whether one or the other means is used, the means chosen directly executes the power. But when you come to the employment of a means which, although not expressly prohibited in the Constitution, does not execute the power which it professes to execute—does not bear the requisite relation to that power, and is not in accord with both the letter and the spirit of the Constitution—it is not within the constitutional range of the legislative choice; and whether it is or is not within that range, is, as a final question, a question for the judicial power.

You will next ask how you are to know that a law, or any provision of a law, is not in accord with the letter or the spirit of the Constitution? The answer to this question is very simple. If there is any clause of the Constitution with which the law is inconsistent, with which it comes in contact, with which it is not in harmony, the law is not in accord with the letter of the Constitution If the law is inconsistent with any of the great purposes for which the Constitution was established it does not accord with the spirit of the Constitution. An apt illustration of this is the law which makes the promissory notes of the Government a legal tender for private debts. There is a provision of the Constitution, a part of its letter, which confers on Congress the exclusive power of coining money, and regulating its value. Those who deny the power of Congress to make paper money a

legal tender for private debts, can with good reason say that it is not reconcilable with the coinage power, because that power was established for the purpose of having a metallic standard and measure of values to operate everywhere throughout the country, whereas the value of paper money is a thing that no legislation can fix. All the laws that can be enacted cannot control the laws of trade, which are beyond the reach of legislation. If the condition of things at any time makes a piece of paper stamped as a dollar of less value than the gold standard, all the legislation in the world cannot make it of equal value. Again, the Constitution was established to secure justice, protect the rights of property, and give to our possessions a value that should be measured by the standard recognized throughout the commercial world. This is the spirit of the Constitution in relation to property and contracts, and those who deny the right of Congress to make Government paper a legal tender in private contracts, can with truth say that such a law is not in accord with the spirit of the Constitution, any more than it is with its letter. I repeat, it is not enough that a law which selects and professes to make a particular means an execution of some granted power of the Government, is not expressly prohibited in the Constitution. It is not enough that it is a law which other governments make, whose powers of legislation and government are unlimited. It must be a law which *this* Government can make, and therefore it must have in addition to the negative quality of not being prohibited in the Constitution, two other positive qualities, namely, that the means or instrumentalities which it professes to employ for executing a specific power of the Constitution must really execute it, and must also be consistent with both the letter and the spirit of the Constitution.

I use again as an illustration of this great rule the power to borrow money on the credit of the United States. Beyond all doubt Congress can adopt any legislation by which this power can be executed; that is to say, it can issue any forms of bonds, bills or notes, to be given to any person from whom money is to be borrowed. But when to such paper obligations or acknowledgments of public debt there is added the quality of being a compulsory legal tender in the payment of debts between private individuals, you perceive that a question instantly arises whether Congress has power to compel me as a creditor to receive from my debtor, as full value for my debt, a promissory note of the Government which the Government has given to *its* creditor, from whom *it* has borrowed money in a transaction with which I had nothing to do, when that note may have a market value below the gold standard of value. The argument that the issue of such legal-tender paper currency will facilitate the borrowing of money by the Government, does not satisfy the measure of the legislative powers. It could be said of a law which made Government notes compulsory payments for theater tickets, or for supplies of provisions, that it would facilitate the borrowing of money by the Government, for such a currency might be sought for by persons who had money to lend to the Government, especially if they could get it at a round discount. This idea of facilitating the borrowing of money by the Government, by making its promissory notes a legal tender for private debts, no matter what may be their depreciation, does not fulfill the great rule of interpretation of the implied powers; first, because it does not execute the Government's power of borrowing money, inasmuch as the transaction by which the Government borrows money on its note is, to use a legal phrase, *res inter alios acta*, and you

or I, as a private creditor of a private debtor, have nothing to do with it; secondly, because no human ingenuity can make it consistent with the letter or the spirit of the Constitution to compel me to discharge the full face of a debt, measured by the gold standard of value, for a promissory note of the Government, which some one or more of *its* creditors has been content to take, and which, when tendered to me, may be of less value than the gold standard.

I have adverted to the true rule for the interpretation of the implied powers, and to the particular application of it to the legal-tender paper question, because this is beyond all comparison the most important question of our time. It matters not who is responsible for the original enactment, or the re-enactment of this legal-tender provision. There are men in all parties who believe it to be constitutionally right, and men who believe it to be constitutionally wrong. What you are most concerned in is to see what is to become of property, of the value of property, if Congress possesses the power that has been attributed to it, and that it has exercised. The power that has been attributed to it, and that it has exercised, is not confined to any particular state of public affairs, because it is claimed that Congress can judge for itself when the public interest requires the issue of a legal-tender paper currency. So that it is only necessary at any time to elect a majority of members of both Houses of Congress, who for any reason whatever will favor the issue of any amount of such currency, and to have a President who agrees with them, and the man who counts his treasure by millions, and the day-laborer who buys his food with the currency which he may be compelled to take for his wages, or the farmer who must take that currency for his crops, are alike involved in an enormous confiscation, which results

from displacing the gold standard and measure of values. It is useless to set up, as a barrier, any confidence that we may feel in the wisdom of our legislators. Their wisdom may lead them to do very unwise things. The only safe barrier is the wisdom that is embodied in the Constitution, and what that is, is to be learned by a sound interpretation of the implied powers.

I could employ many other illustrations of the rule of interpretation, in which every one would concur, because there has been as yet no legislation which has entered into the politics of parties, in the exercise of other constitutional powers. For example, take the power to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The laws which regulate the granting of patents and copyrights, and which provide a judicial remedy for infringements, are strictly in execution of the power to secure such property. But now suppose that Congress should enact a law limiting the price at which an inventor should be allowed to sell his invention or an author to sell his book. Would any one say that this would be anything but a usurpation? Would any one pretend that such a law bore any sort of relation to the constitutional power, or was in any sense an execution of it?

Take the power to regulate commerce among the several States. This is rather in the nature of a police power. It is a power to protect persons and property in transit from one State to another, to prevent obstructions to free intercourse by State legislation, to prevent State taxation of property or persons passing from one State to another, and to prevent the establishment by the States of any exclusive right of land or water carriage from one State to another. Laws of the

United States which effect these objects are direct executions of the commercial power of the Federal Government. But now suppose that Congress should enact a law regulating the price to be charged by a vendor of merchandise dwelling in one State which is to be delivered to a vendee dwelling in another State, or a law prescribing what charge should be made for drawing a bill of exchange at New Orleans on New York, or a law limiting the freight or passage money to be charged by a carrier of merchandise or passengers from Chicago to Baltimore. Would either of these be a regulation of inter-state commerce? Would either of them be a law bearing the requisite relation to the commercial power? Would either of them *execute* that power?

Let me again advise you in studying such questions as these not to be deterred from the prosecution of truth by the outcry of "strict construction." It will not help you in the least to inquire what is the proper phrase to apply to the method of interpretation, whether it should be called liberal or strict. Neither is it of any sort of consequence to you how this or that political party habitually construes the Constitution. I take it that you do not attend a law-school for the purpose of learning what party you had better join. The study of the Constitution in which you are engaged will not be much promoted by consulting the "platforms" of parties or the professed sentiments of politicians. Go to other sources. Go to the judicial interpretations of the Constitution, from the beginning of the Government to the present day, and extracting from them the sound rule which marks the boundaries of the Federal powers, form your opinions and beliefs by that rule, and let others class you as strict or as liberal constructionists without the smallest care on your part about either phrase. You will find that what is called a liberal

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construction is sometimes right and sometimes wrong. You will find the same thing to be true of what is called a strict construction. The rule laid down by Chief-Justice Marshall and his brethren is broad enough to give this Government all the scope that it ever ought to claim, and strict enough to prevent it from encroaching on the rights of States or of individuals. So long as it shall be observed this Government cannot go wrong. When it is departed from this Government will wander from its sphere, and although it may dazzle the beholders and excite their admiration and gratify their love of power, it will dislocate the whole political system that was established by our fathers and made consistent with liberty.

Let me give you one other counsel. Do not allow yourselves to be disturbed by that other outcry which seeks to bring reproach or disfavor upon the doctrine of State-rights. The abnormal assertion of the right of secession from the Union, as a constitutional right of the States, which is now happily eliminated from their constitutional rights, should never prevent you from seeing that our political system does embrace and uphold State-rights which are as unquestionable and positive as are the rights and powers of this Government. Consider for one moment what would have happened if, at the time of the establishment of this Constitution, all the elements of political power and government had been fused into one mass; had been concentered and concentrated into the hands of one central authority; that the people of the States had not interposed by the tenth amendment and declared that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Give the freest scope to your imaginations, and imagine, if you

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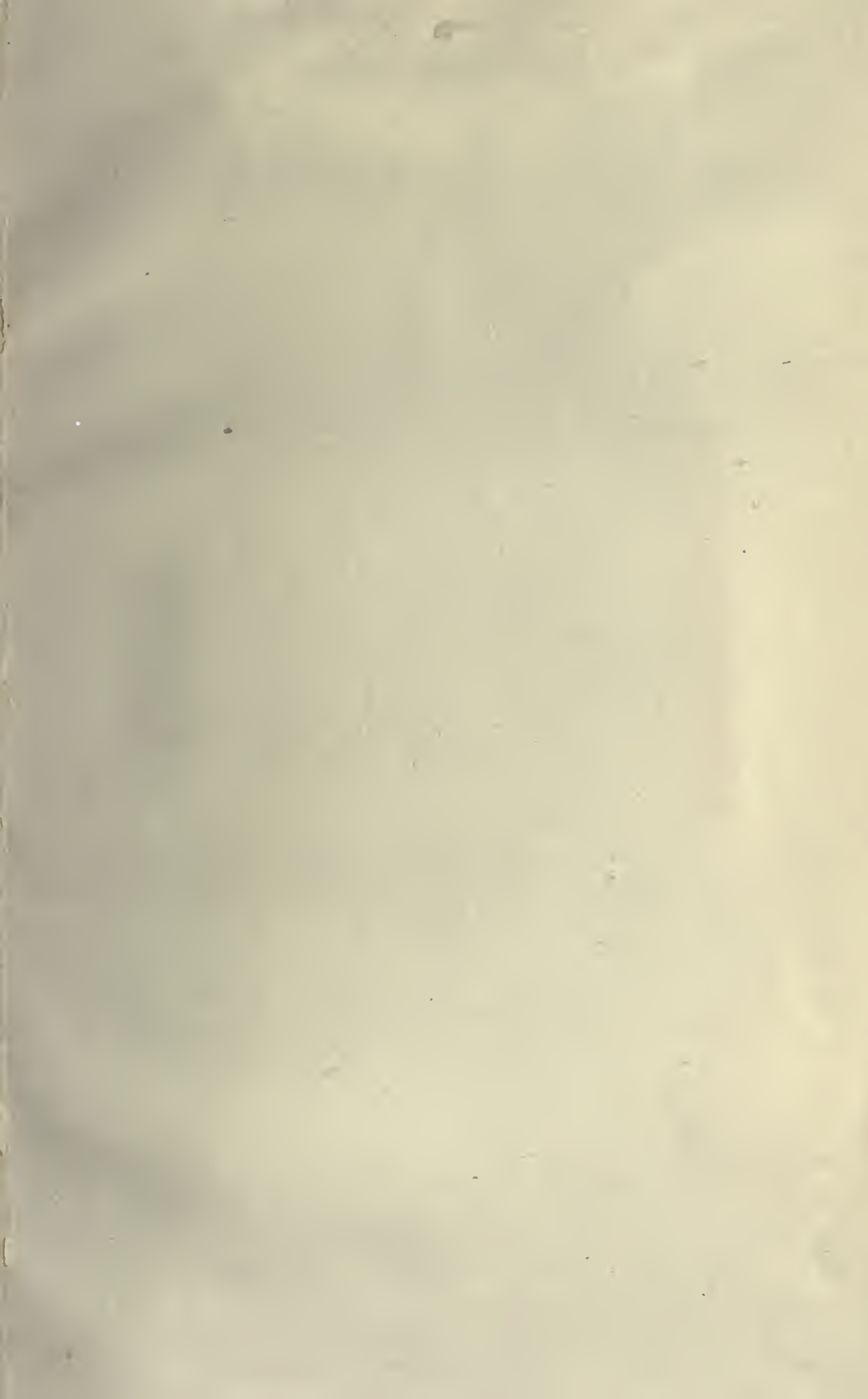
can, whether we could have carried our civilization from ocean to ocean if the sovereignties of the States had not been thus protected; whether the central power could have wisely and safely legislated for all the objects of social life, if the State sovereignties had not been thus preserved; whether the absorption of all the powers of government into one central authority would not have ended in a despotism that would at last have been broken down by its own feebleness. The truth is, that our mixed system of separate States and a limited central government, the States holding and exercising each for itself and within itself all the powers of government which it has not, through this Constitution, ceded to the United States, or which the Constitution has not expressly prohibited, has enabled us to attain to a degree of civilization, of happiness and renown to which no other system could have conducted us. We can preserve this system only by taking care that each of the two kinds of government confines itself to the sphere marked out for it.



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