

Judicial Review of Congress Before the Civil War

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INTRODUCTION

There is a standard story about the exercise of the power of judicial review by the U.S. Supreme Court before the Civil War. In this story, the Court was primarily focused on establishing the Constitution's, the federal government's, and the federal Judiciary's own supremacy over the states. It was a time for contracts, commerce, and the limitations on state power. Judicial review of Congress was exceptional and idiosyncratic. There was *Marbury v. Madison* in 1803, Chief Justice John Marshall's great maneuver to establish the power of judicial review,¹ and then there was *Dred Scott v. Sandford* in 1857, Chief Justice Roger Taney's great folly that attempted to impose a pro-slavery reading on the Constitution and instead became the Court's "self-inflicted wound,"² and there was little else.

The standard story is wrong. The U.S. Supreme Court was more active in

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1. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Marshall's "establishment" of judicial review in *Marbury* is commonplace. See, e.g., WILLIAM H. REHNQUIST, *THE SUPREME COURT* 99–100 (1987); JEAN EDWARD SMITH, *JOHN MARSHALL 2* (1996); G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835*, at 7 (1988).

2. See *Dred Scott v. Sandford*, 60 U.S. (1 How.) 393 (1856), *superseded by* U.S. CONST. amends. XIII, XIV. The "self-inflicted wound" characterization is that of Chief Justice Charles Evans Hughes. CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 50 (1928).

exercising its power to interpret the Constitution and limit the legislative authority of Congress than is conventionally recognized. *Marbury* and *Dred Scott* were the tips of the iceberg of federal judicial review, not the entire edifice. They were, to be sure, among the most politically contentious uses of that power by the Court during the early republic and, thus, historically memorable. But, the highlight reel is not the game itself.

Uncovering this early history of judicial review serves several purposes. First, and most basically, it corrects the historical record. Our conventional histories of judicial review and the behavior of the Supreme Court in the early republic have significant gaps, and various scholars are beginning to creatively reexamine this early history. This Article aims to help fill those gaps with a more complete account of early federal judicial review of Congress.³

Second, the Article illuminates how the power of judicial review was established within the national government. Current accounts of the political development of horizontal judicial review in the federal government are somewhat schizophrenic.⁴ On the one hand, current accounts emphasize a “big bang” theory of the establishment of judicial review, in which the wily Chief Justice John Marshall “created” or “established” the power of judicial review in the single case of *Marbury v. Madison*. On the other hand, current accounts suggest that the judicial power to check the other branches of the federal government went unused for two generations until the Court foolishly attempted to use the power to impose a pro-slavery settlement on the territory question and was repudiated at the polls in 1860.⁵

Neither aspect of such accounts is true. The power of judicial review developed gradually over the course of the first half of the nineteenth century, facilitating the goals of national political actors and consolidating the Court’s claim to be able to define the constitutional limits of congressional power. This Article advances recent efforts to understand how the power of judicial review has been politically constructed through the over-time, back-and-forth dialogue between the branches, rather than through one-time, unilateral doctrinal assertions by the Court.⁶ *Marbury* was not the big bang, and *Dred Scott* was not a bolt from the blue. The process of institutionalizing the power of judicial review

3. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES* 35–128 (2004); Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 *YALE L.J.* 502 (2006); Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 *VAND. L. REV.* 73 (2000); William Michael Treanor, *Judicial Review Before Marbury*, 58 *STAN. L. REV.* 455 (2005).

4. By “horizontal” judicial review, I mean judicial review of the coordinate branches of the government by the courts, which is in contrast to “vertical” judicial review in which the Court reviews the constitutionality of the actions of the state and local governments under the U.S. Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173–79 (1803) (limiting a provision of the Judiciary Act of 1789 as violating Article III of the U.S. Constitution), is an instance of horizontal judicial review. *Fletcher v. Peck*, 10 U.S. (1 Cranch) 87 (1810) (striking down a 1796 Georgia law repealing land grants as violating the contracts clause of the U.S. Constitution), is an instance of vertical judicial review.

5. See sources cited *supra* note 1.

6. See generally Mark A. Graber, *Constructing Judicial Review*, 8 *ANN. REV. POL. SCI.* 425 (2005).

could not be achieved in a day and could not be achieved by the unilateral dictate of the Court. Judicial review by the U.S. Supreme Court was routinized long before *Dred Scott*.

The occurrence of *Dred Scott* is explained not through conventional narratives, but through understanding the extent to which by the 1850s the federal courts had become a forum within which constitutional objections to federal legislation could be raised and resolved. *Dred Scott* was unusual in some dimensions. In that case, the Court ruled against congressional power in a high-profile and politically salient case, although this had not been its general pattern during this period. But the Court had established itself as an institution engaged in the task of constitutional interpretation and the enforcement of constitutional limitations against Congress. Although popular constitutionalists are surely right that political actors were deeply engaged in constitutional interpretation in the early republic, they are wrong to conclude that the Court had no role to play in that process.⁷

Finally, the Article contributes to the literature on American constitutional development and the empirical assessment of the countermajoritarian nature of judicial review as it has been exercised in practice. Normative constitutional theory is centrally concerned with the countermajoritarian or antidemocratic nature of judicial review, but there is a growing empirical literature that questions whether this is the best way to characterize how judicial review has been exercised in practice. The Supreme Court has often used the power of judicial review to advance rather than to obstruct the political projects of political leaders.⁸ More broadly, judicial review may fit into the general story of American political development as the Court contributes to the process of building and extending the institutions of the state and advancing political designs for economic development.⁹ Mark Graber's work has been particularly prominent in bringing these perspectives to bear in understanding the activities

7. Cf. KRAMER, *supra* note 3, at 150–51. See generally ROBERT LOWRY CLINTON, *MARBURY v. MADISON AND JUDICIAL REVIEW* (1989) (arguing that judicial review was sharply limited in the early republic, constrained primarily to defending the boundaries of the judicial power itself).

8. See generally KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* (2007); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001); Howard Gillman, *How Political Parties Can Use the Courts To Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511 (2002); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996); J. Mitchell Pickerill & Cornell W. Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 PERSP. ON POL. 233 (2004); Keith E. Whittington, *Congress Before the Lochner Court*, 85 B.U. L. REV. 821 (2005) [hereinafter Whittington, *Congress Before the Lochner Court*]; Keith E. Whittington, *“Interpose Your Friendly Hand”*: Political Supports for the Exercise of Judicial Review by the United States Supreme Court, 99 AM. POL. SCI. REV. 583 (2005) [hereinafter Whittington, *“Interpose Your Friendly Hand”*]. For more on the use of judicial review to advance political projects, see also sources cited *infra* note 10.

9. See generally PAUL FRYMER, *BLACK AND BLUE* (2008); Howard Gillman, *Reconnecting the Modern Supreme Court to the Historical Evolution of American Capitalism*, in *THE SUPREME COURT IN AMERICAN POLITICS* (Howard Gillman & Cornell Clayton eds., 1999); *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* (Ronald Kahn & Ken I. Kersch eds., 2006).

of the Marshall and Taney Courts.¹⁰ This Article complements his work in arguing that these perspectives are productive for understanding the full scope of horizontal judicial review during this period.

In arguing against ratification of the Constitution, the anti-Federalist Brutus predicted:

[The judges] will be able to extend the limits of the general government gradually, and by insensible degrees, and to accommodate themselves to the temper of the people. Their decisions on the meaning of the constitution will commonly take place in cases which arise between individuals, with which the public will not be generally acquainted; one adjudication will form a precedent to the next, and this to a following one. These cases will immediately affect individuals only; so that a series of determinations will probably take place before even the people will be informed of them. In the mean time all the art and address of those who wish for the change will be employed to make converts to their opinion.¹¹

Though Brutus may have overestimated the ultimate significance of the Judiciary to the process of constitutional drift and was too pessimistic about the immediate fate of the states in the proposed federal system, he foresaw important aspects of the dynamic by which judicial review of Congress would operate in the early republic. Decisions affecting the scope of congressional power under the Constitution did commonly come in apparently low-stake cases between individuals. Armed with the power “to determine . . . what the constitution means,”¹² the judges did sometimes refuse to “execute a law, which, in their judgment, opposes the constitution,”¹³ but, as Brutus expected, they generally upheld congressional power, often extending it “gradually” and in keeping with “the temper of the people.”¹⁴

Part I of this Article discusses the scope of the cases considered in this Article and the background of judicial review. Part II examines, in generally chronological order divided among Federalist, Jeffersonian, and Jacksonian periods, the cases in which the Supreme Court explicitly evaluated and applied constitutional limits on congressional authority when it was called upon to apply and implement federal statutes. Part III draws out broader implications of the

10. See Mark A. Graber, *Establishing Judicial Review? Schooner Peggy and the Early Marshall Court*, 51 POL. RES. Q. 221 (1998); Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 12 STUD. AM. POL. DEV. 229 (1998) [hereinafter Graber, *Federalist or Friends of Adams*]; Mark A. Graber, *The Jacksonian Origins of Chase Court Activism*, 25 J. SUP. CT. HIST. 17 (2000) [hereinafter Graber, *Jacksonian Origins*]; Mark A. Graber, *The Passive-Aggressive Virtues: Cohens v. Virginia and the Problematic Establishment of Judicial Review*, 12 CONST. COMMENT. 67 (1995) [hereinafter Graber, *Passive-Aggressive Virtues*].

11. Brutus, *Essay No. XV*, in 2 THE COMPLETE ANTI-FEDERALIST 437, 441 (Herbert J. Storing ed., 1981).

12. Brutus, *Essay No. XII*, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 11, at 422, 423.

13. *Id.*

14. Brutus, *supra* note 11, at 441.

Court's actions in these cases for our understanding of the early politics of judicial review.

I. BACKGROUND

Identifying the cases in which the Supreme Court exercises the power of judicial review is not a mechanical task. The Court itself does not identify cases as such and maintains no list of them, and reporting services are not reliable in or directly concerned with identifying such cases. In many instances, the Court's opinion will explicitly state that a statutory provision is valid or invalid under the Constitution, and the headnotes for the case will so report, but in many, perhaps most, cases the Court is not so explicit.¹⁵ Moreover, what "counts" as judicial review depends to some degree on the goals of the analysis. Over time, there have been three somewhat canonical catalogs of cases in which the U.S. Supreme Court has struck down, in whole or in part, provisions of federal law. In 1889, in recognition of the Court's first centennial, the Court's reporter John Bancroft Davis included an extended appendix to the 131st volume of the U.S. Reports with a variety of materials relating to the Court. The appendix included a list of cases in which the Court had struck down statutes as unconstitutional.¹⁶ In 1936, at the height of the struggle over the New Deal, the Legislative Reference Service of Congress produced a report on *Provisions of Federal Law Held Unconstitutional by the Supreme Court of the United States*.¹⁷ In 1952, Princeton constitutional scholar Edward S. Corwin completed for the Legislative Reference Service the first edition of *The Constitution of the United States—Analysis and Interpretation*, and included an appendix of acts of Congress held unconstitutional by the Supreme Court.¹⁸ The list that Corwin first assembled, as maintained by the Congressional Research Service, has now become the canonical catalog of cases in which the Supreme Court has invali-

15. Graber argues that the Court's rhetorical conventions on this have changed over time, leading us to underestimate the extent of judicial review activity in the early republic. See Mark A. Graber, *The New Fiction: Dred Scott and the Language of Judicial Authority*, 82 CHI.-KENT L. REV. 177, 181 (2007).

16. See 131 U.S. app. cxxxv (1889). The Davis list quickly became part of the scholarly and polemical controversy over *Marbury* and the origins of judicial review at the turn of the twentieth century. See BRINTON COXE, AN ESSAY ON JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION 7–23 (Philadelphia, Kay & Brother 1893) (reviewing the Davis list and arguing that it "should be the beginning, and not the end, of a new discussion of the relation of judicial power to unconstitutional legislation").

17. LEGISLATIVE REFERENCE SERV., PROVISIONS OF FEDERAL LAW HELD UNCONSTITUTIONAL BY THE SUPREME COURT OF THE UNITED STATES (1936). Several early twentieth century lists are cited there. See *id.* at 88 n.1.

18. LEGISLATIVE REFERENCE SERV., THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION, S. DOC. NO. 82-170, at 1241 (2d Sess. 1952) [hereinafter LEGISLATIVE REFERENCE SERV., S. DOC. NO. 82-170]. This volume was a radically revised version of an earlier document, LEGISLATIVE REFERENCE SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANNOTATED (1923). The earlier document included its own list of "Acts of Congress Declared Unconstitutional by the Supreme Court." *Id.* at 723. It listed forty-three cases, notably leaving out *Dred Scott*. *Id.*

dated federal law (the “CRS list”).¹⁹

There are limitations to the CRS list, however. Most notably, like the lists before it, the CRS list only includes invalidations.²⁰ There is no comparable list of cases in which the Court has upheld laws against constitutional challenge. This situation is not necessarily a surprise because it is usually the invalidations that create the greatest political controversy, and from the beginning, Congress has been interested in getting timely information on when the courts have found constitutional defects in federal statutes and refused to apply them.²¹ Analytically and politically, cases in which the Court explicitly considers the constitutional scope of congressional legislative authority and consciously and deliberately upholds federal policy against constitutional challenge are distinct from run-of-the-mill cases of statutory interpretation and are themselves exercises of the power of judicial review. Understanding how the power of judicial review developed over time and has been used politically by the Court requires placing the cases in which the Court has invalidated legislative provisions in context with cases in which they have upheld the application of legislation.

There is also reason to believe that the CRS list is underinclusive of cases that we would often want to examine as instances of judicial review. Significantly, Corwin initially included in his catalog cases in which the Court struck down a statute “as applied.”²² Subsequent editors separated and eventually dropped entirely from the CRS list those cases in which the statutes “were not held unconstitutional in their entirety and therefore inoperative,” but only their “application to specific factual situations . . . was held to be prohibited by the Constitution.”²³ As a consequence, there has been no systematic accounting of such cases in which the Court has refused to apply federal law on constitutional grounds.²⁴ It is also plausible that the CRS list overlooks other, more obscure cases where the exercise of judicial review is not as visible, and there is value in taking a fresh look at the sources rather than accepting received wisdom.²⁵

These possible omissions suggest the need to reconsider the instances in which the Court has exercised the power of judicial review. For this reason, the Judicial Review of Congress dataset (“JRC dataset”) was built from the ground up. The JRC dataset covers the Court’s entire history, and the cases considered

19. The revised edition is available at Constitution of the United States: Main Page, <http://www.gpoaccess.gov/constitution/index.html> (last visited Feb. 5, 2009).

20. LEGISLATIVE REFERENCE SERV., S. DOC. NO. 82-170, *supra* note 18, at 1241–54.

21. 2 ANNALS OF CONG. 557 (1792).

22. LEGISLATIVE REFERENCE SERV., S. DOC. NO. 82-170, *supra* note 18, at 1241–54.

23. See LEGISLATIVE RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION, S. DOC. NO. 88-39, at 1401 (1st Sess., rev. ed. 1964).

24. See Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 NW. U. L. REV. 296 (1993) (incorporating cases “influenced” by constitutional considerations); see also Keith E. Whittington & Tom S. Clark, *Ideology, Partisanship, and Judicial Review of Acts of Congress, 1789–2006* (Aug. 21, 2008) (unpublished manuscript, on file with author).

25. See Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 VAND. L. REV. 73 (2000) [hereinafter Graber, *Naked Land Transfers*]; Graber, *supra* note 15.

in this Article are drawn from it. To construct the dataset, a full text search of every U.S. Supreme Court opinion and accompanying notes was conducted with a set of keywords to gather an extremely wide set of potentially relevant cases that might raise constitutional issues about federal statutes. In particular, a set of keywords was identified that would call up *at least* every case on the CRS list *and also* cases of judicial invalidation of federal statutes that have been identified by subsequent scholars or referenced by the Court in its own opinions.²⁶ This search resulted in a list of roughly 9000 cases, and each was read to determine whether the legislative power of Congress under the Constitution was reviewed by the Court. This process yielded a total of 1260 cases, approximately fourteen percent of the cases returned from the search.

This dataset is concerned with cases in which the Justices explicitly considered a constitutional challenge to the scope of federal legislative authority and rendered a substantive judgment as to whether the case at hand fell within or without that authority. Although in principle every case creates the opportunity for the Court to exercise the power of judicial review, the Court relatively rarely takes the opportunity to define and enforce the constitutional limits on the national legislature's power.²⁷ The dataset is limited to Supreme Court review of federal legislation and, thus, ignores the more prevalent judicial review of the states and the non-trivial enforcement of constitutional rules against judges and executive branch officials.²⁸ It excludes cases in which the Court simply applies federal law without explicit constitutional deliberation, as well as the more difficult cases in which the Court notes the existence of a constitutional challenge but does not address it, explicitly disclaims answering it, or refuses to articulate a binding constitutional rule because the case is disposed of on jurisdictional or other unrelated grounds.²⁹ Also excluded are cases in which the

26. To do so, I performed a full text search of all Supreme Court opinions with various combinations of keywords that reflected federal legislation (for example, "Congress," "federal w/2 government," "national w/2 government," etc.) and constitutional review (for example, "constitution!," "unconstitution!," "invalid," "void," "no w/2 power," etc.) until no new additional cases could be located. I then read all the cases produced by this search. One benefit of a full text search is that it includes not only the judicial opinions themselves, but also the reporter's headnotes and syllabus and (for earlier periods) a transcription of the lawyers' arguments. A relevant term would frequently appear in one part of the text (such as the opinion itself) but not another (such as the headnotes). Although variations on "Congress" and "constitution!" capture most of the cases, a significant number (including some on the CRS list) escape such a search. Cases of certain types and from certain periods were particularly likely to escape the more basic keyword search, and the headnotes were a particularly unreliable guide to whether constitutional review had occurred prior to the twentieth century.

27. Of course, standard avoidance doctrines indicate that the Court *should* generally refuse such opportunities.

28. It also excludes judicial review of non-legislative actions by Congress, such as the constitutionality of treaty provisions or investigatory powers.

29. *See, e.g.,* *Lewellyn v. Frick*, 268 U.S. 238, 251 (1925) ("We do not propose to discuss the limits of the powers of Congress in cases like the present."); *Embry v. United States*, 100 U.S. 680, 684–85 (1879) ("We have had no difficulty in reaching the conclusion that the appellant is not entitled to recover. The important constitutional question [of whether Congress can restrict the president's power to remove an executive official] which has at times occupied the attention of the political department of

Court makes trivial references to Congress's constitutional authority to pass the law being applied or dismisses a constitutional challenge without elaboration because it was fully resolved in an earlier case.³⁰ Cases are included, however, even when the Court's opinion airily dismisses a constitutional challenge as easily resolved with minimal analysis if it is evident that the constitutional issue was in fact raised and contested by the parties in the case and/or that the Court later relied on that case for the constitutional proposition at issue. Cases are likewise included when Justices felt obliged to explain, expound upon, or further develop existing precedents, even when they assert that the issue is not new.

Cases are included as limiting congressional authority under the Constitution (as "invalidating or narrowing" a statute) whenever a constitutional proposition limiting the power of the national legislature is cited to disallow the application of a statute to the case at hand, even when the application of that hard constitutional constraint involves the creative "interpretation" of the statute's meaning rather than an explicit nullification of the statute. "Saving constructions" that have the effect of placing hard constraints on congressional power and severing the application in question from the scope of the statute in order to salvage its constitutionality are recognized as exercises of the Court's power of judicial review to limit Congress.³¹ Notably, they do not avoid the constitutional question. In contrast to Justice Brandeis's suggestion in *Ashwander v. Tennessee Valley Authority*, the Court in these cases "typically interpreted the Constitution in ways that settled potential statutory questions," rather than "interpreted statutes in ways that enabled Justices to avoid potential constitutional questions."³² Moreover, these cases do not necessarily "save" the statute from

the government ever since its organization, and which was brought to our attention in the argument, is not, as we think, involved."); *The Martha Washington*, 16 F. Cas. 871, 873 (D. Me. 1860) (No. 1513) ("Every question involving the constitutional power of the general government is important, and there can be scarcely any one more so than this. . . . Although this question must be decided, I think it cannot be in the present case, and the courts of the United States are not in the habit of volunteering their opinions when they are not called for.").

30. See, e.g., *City of Cleveland v. United States*, 323 U.S. 329, 333 (1945) ("Little need be said concerning the merits. . . . Congress may exempt property owned by the United States or its instrumentality from state taxation in furtherance of the purposes of the federal legislation. This is settled by such an array of authority that citation would seem unnecessary [but providing citations]."); *California v. United States*, 320 U.S. 577, 585–86 (1944) ("We have disposed of the only serious question raised. The numerous other questions call for only summary treatment. . . . [I]t is too late in the day to question the power of Congress under the Commerce Clause to regulate such an essential part of interstate and foreign trade as the activities and instrumentalities which were here authorized to be regulated by the Commission, whether they be the activities and instrumentalities of private persons or of public agencies." (citing *United States v. California*, 297 U.S. 175, 184, 185 (1936))).

31. On saving constructions, see generally Emily Sherwin, *Rules and Judicial Review*, 6 LEGAL THEORY 299 (2000); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997). On as-applied versus facial invalidations, see Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000).

32. Graber, *supra* note 15, at 187; cf. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

wholesale nullification because both litigants and Justices are, in the first instance, concerned with the application of the statute that is before the Court in the given case. There is no necessary challenge to the statutory provision as a whole or as it might be applied in other situations, and the Court does not necessarily vouchsafe the validity of the law as it might be applied in all future cases. It does not interpret the law so as to “uphold” it against a constitutional challenge in such cases. It rules out the effort to apply the law in the case before it as being beyond the constitutional authority of Congress, even as it indicates the possibility that the same statutory provision might have other applications that are constitutionally valid. The scope of the statute is narrowed on constitutional grounds in such cases, and congressional authority is circumscribed by judicial interpretation of the Constitution. Cases are excluded from the dataset, however, when the Court explicitly leaves the constitutional question open or leaves Congress with the power to overturn the Court’s constitutionally driven interpretive assumptions, as with constitutionally motivated “clear statement” rules.³³ It is, of course, the case that there are important differences between nullifying a statute, or even a statutory provision, in its entirety and adopting a saving construction that leaves the law in place and potentially available for some set of applications. Among those differences is the political consideration that it seems likely that voiding applications of statutes rather than voiding statutes themselves has the potential to temper the policy and political consequences and repercussions, whether good or ill, of a judicial decision enforcing constitutional limitations on the legislature.³⁴

In considering how the power of judicial review was exercised and developed, however, we should not overlook those cases in which the Court refrained from simply and explicitly declaring a constitutional provision void but nonetheless made use of its own authority to enforce constitutional limitations on Congress in the case before it. Justice Joseph Story captured a certain early nineteenth century sensibility when riding circuit in Massachusetts:

I have examined the subject thus far upon the supposition, that it depended altogether upon the acts of the legislature. But it takes a higher range, and involves the exposition of a great constitutional right. Whenever it becomes our duty to decide on the constitutionality of laws, sound discretion requires, that the court should not lightly presume an excess of power by the legislative

33. See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (“We . . . affirm that Congress may abrogate the States’ constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.”); *United States v. Bass*, 404 U.S. 336, 349 (1971) (“[W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. . . . [and therefore employ a] requirement of clear statement . . .”).

34. In the modern context, Congress responds far less often to as-applied invalidations of federal laws than to facial invalidations. J. MITCHELL PICKERILL, *CONSTITUTIONAL DELIBERATION IN CONGRESS* 46 (2004).

body; nor so construe the generality of words, as to extend them beyond its lawful authority, unless the conclusion be unavoidable.

....

. . . As little reason could there be to imagine the legislature would voluntarily transcend its constitutional authority. The language must be very clear and precise, which would impose on the court the duty of declaring the solemn act of the legislature to be void. The court could never incline so to construe doubtful expressions, much less to seek astutely for hidden interpretations, which might darkly lead to such a result.³⁵

Story is not proposing that the courts reserve the constitutional question for the future or defer to legislative judgment on a contested constitutional point. The question is merely one of the form by which the courts will enforce the constitutional limitations on legislative authority. If the statute is “clear and precise,” then the courts may have to declare it void. If the statute is less clear, then the courts may be able to announce that the proposed application of the law would exceed the power of Congress and that such applications will be regarded as off limits. Such a strategy may allow the courts and others to continue to maintain that the legislature has not “voluntarily transcend[ed] its constitutional authority,” even as judges are enforcing constitutional limitations against the legislature and refusing to apply laws on constitutional grounds in the cases before them. As one antebellum commentator noted, “statutes are sometimes void,” but courts can sometimes bend statutes so “as not to infringe these [constitutional] principles,” on the assumption that legislatures would have intended that their acts be constitutional.³⁶ The laws may be unconstitutional as applied in that and related cases, but they are not void in their entirety, and, perhaps, the Legislature did not have such unconstitutional applications in mind when passing the statute. The political conflicts being created with the Legislature may or may not be less severe because the Judiciary chooses to exercise its power of enforcing constitutional limitations without declaring laws void, but it has an equivalent effect of signaling to litigants that the courts will engage in constitutional interpretation and free parties from the immediate burden of statutes that cannot be constitutionally justified.³⁷

There were sixty-two cases between 1789 and 1861 in which the U.S. Supreme Court substantively evaluated the constitutionality of a federal statu-

35. *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750). Senator Gouverneur Morris of New York went further in suggesting that judges would “never presume to believe, much less to declare, that you meant to violate the Constitution” and would simply misread even clear statutory commands so as to bring them into line with constitutional requirements. See Graber, *supra* note 15, at 185.

36. 1 JOEL PRENTISS BISHOP, *COMMENTARIES ON THE CRIMINAL LAW* 142 (Boston, Little, Brown, & Co. 1856).

37. See Graber, *Naked Land Transfers*, *supra* note 25, at 75–76.

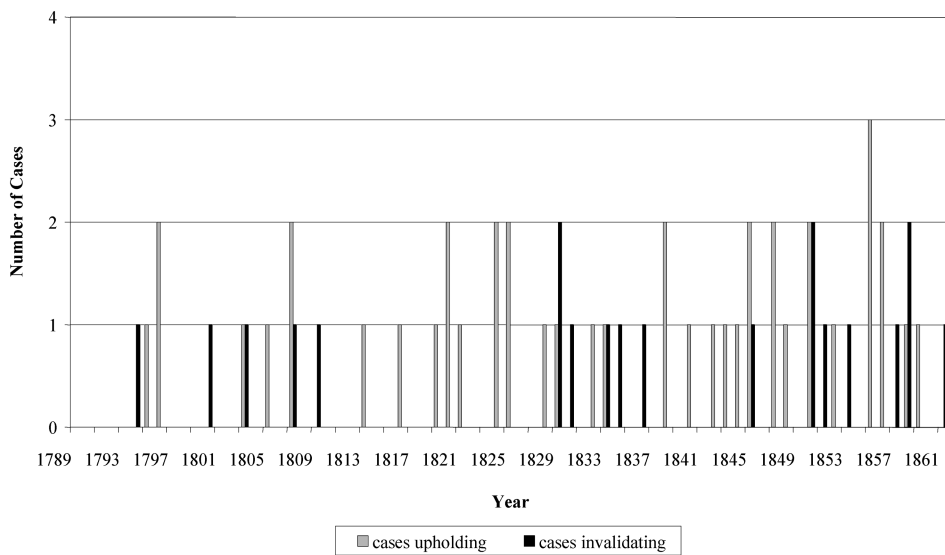


Figure 1. Cases of Judicial Review of Congress by the U.S. Supreme Court, 1789–1861

tory provision.³⁸ The Court struck down or imposed constitutional limitations on the applicable scope of the federal law at issue in thirty-two percent of those cases.³⁹ This is actually a somewhat higher percentage of invalidations in cases in which the Court resolved a constitutional challenge to congressional authority than is true for the Court's history as a whole (twenty-five percent). Defining and enforcing the scope of congressional authority was a routine part of the Court's business from early in the nineteenth century. The early Court, however, heard fewer constitutional cases involving the authority of Congress than did later Courts, and the cases in which the Court limited congressional power generally had lower political salience and substantive importance than has often been true in subsequent eras.⁴⁰ Judicial review did not occupy the same place in the constitutional system of the early nineteenth century as it does now, but the Court was busy laying the foundations for that practice and establishing its role as a forum for testing the limits of congressional powers.

Most of these cases involved either matters regarding the institution of the Judiciary itself or the boundary between the state and federal governments, and often both. But the Court's agenda in its first decades ranged beyond these core areas as well, including matters relating to the rights of individuals and executive-legislative relations.

As Figure 1 indicates, the Court heard and decided constitutional challenges

38. See Appendix, *infra*.

39. See *id.*

40. The Court's review of Congress at the turn of the twentieth century contrasts with the early Court's approach. See Whittington, *Congress Before the Lochner Court*, *supra* note 8.

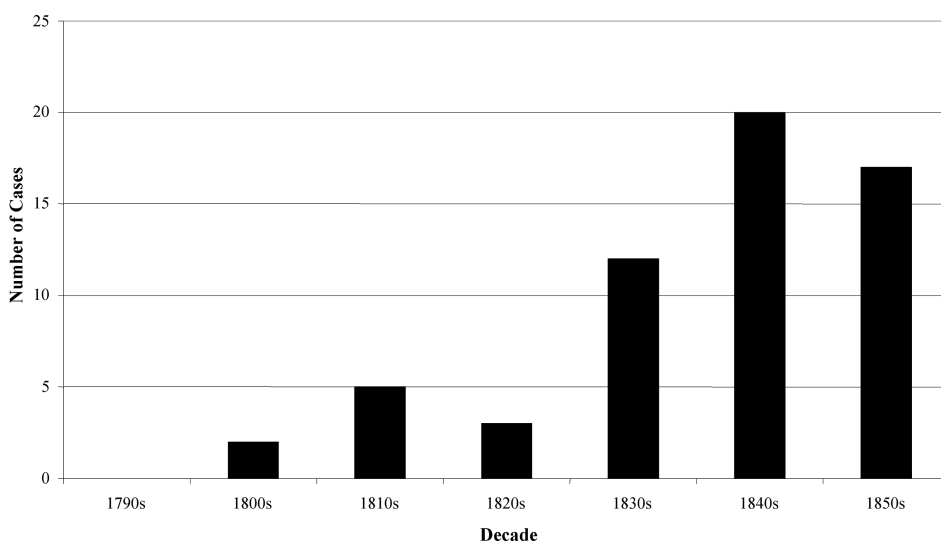


Figure 2. Cases of Judicial Review of Congress by Lower Federal Courts, 1789–1859

to federal legislation throughout the period, from its inception through secession. Instances of the Court invalidating or narrowing statutory provisions are interspersed with the Court upholding provisions. Even so, the pace of judicial review does increase over time. Prior to the 1820s, the Court, on average, decided less than one case per year reviewing the constitutionality of an application of a federal law, with a period of notable quiet in the 1810s. After that, however, the Court averaged a case per year, and more after the 1840s. The Court's invalidation and narrowing of statutes follows a similar pattern. At the beginning and the end of the period, the Court held unconstitutional applications of the law in a higher proportion of the cases that it considered than it did in the middle of the period; however, even in those years the Court upheld federal law more often than not. The Taney Court exercised the power of judicial review more often, but on the whole it was not proportionally more or less deferential than its predecessors.

A similar story is told in Figure 2, which reports the number of cases explicitly evaluating the constitutionality of a federal law in the federal circuit and district courts by decade. The record here is less comprehensive, not least because lower court decisions were less reliably reported in the early republic than Supreme Court opinions. It is also true that the same issue can generate multiple decisions in the lower courts as different judges in different circuits and different levels of the judiciary struggle with a question, so Figure 2 is not directly comparable to Figure 1. Two features of Figure 2 are particularly notable. First, reported cases of lower court review of federal legislation emerge quite early. Lawyers raised challenges to the constitutionality of applying federal law to their clients, and federal judges felt obliged to address those

challenges in formal opinions. The number of cases addressing such issues in the Jeffersonian period was small. These cases attempted to resolve questions ranging from the constitutionality of the Jeffersonian embargo,⁴¹ to the scope of congressional authority to grant patents,⁴² to the enlistment of minors in the U.S. Navy,⁴³ to the fugitive slave acts.⁴⁴ Second, the number of cases addressing constitutional challenges to federal law in the lower courts rose dramatically in the Jacksonian period. The lower courts were active across a range of issues during this period, but they found themselves entangled in relatively heated controversies over the constitutionality of the fugitive slave law⁴⁵ and bankruptcy law provisions.⁴⁶ Although federal judges in the lower courts almost always upheld congressional power in these cases, the federal Judiciary had spent two decades as a fairly active battleground over the constitutional limitations on Congress by the time of *Dred Scott*, including an active effort by antislavery advocates to draw the courts into antebellum slave politics.⁴⁷

The Supreme Court's review of the constitutionality of federal legislation came in the context of an early and expanding theory and practice of judicial review of state legislation. Judges in over thirty cases in the state and federal courts concluded that statutes before them were unconstitutional prior to the 1803 *Marbury* decision.⁴⁸ Judicial review in the states spread and grew over the course of the first decades of the early republic.⁴⁹ Influential political actors were supportive of a judicial power to restrict legislative power in the name of upholding constitutional constraints.⁵⁰ The U.S. Supreme Court soon became quite active in enforcing constitutional limits on the states, and this particular use of judicial review was both politically salient and valued by national political elites in the early republic.⁵¹ Nonetheless, the standard account is that

41. See *United States v. The William*, 28 F. Cas. 614 (D. Mass. 1808) (No. 16,700).

42. See *Evans v. Weiss*, 8 F. Cas. 888 (D. Penn. 1809) (No. 4572).

43. See *United States v. Bainbridge*, 24 F. Cas. 946 (D. Mass. 1816) (No. 14,497).

44. See *In re Susan*, 23 F. Cas. 444 (D. Ind. 1818) (No. 13,632).

45. See *Ex parte Robinson*, 20 F. Cas. 965 (C.C.S.D. Ohio 1856) (No. 11,934); *Miller v. McQuerry*, 17 F. Cas. 335 (C.C.D. Ohio 1853) (No. 9583); *Charge to the Grand Jury*, 30 F. Cas. 1007 (C.C.S.D.N.Y. 1851) (No. 18,261); *United States v. Hanway*, 26 F. Cas. 105 (C.C.E.D. Pa. 1851) (No. 15,299); *Vaughan v. Williams*, 28 F. Cas. 1115 (C.C.D. Ind. 1845) (No. 16,903); *Jones v. Vanzandt*, 13 F. Cas. 1047 (C.C.D. Ohio 1843) (No. 7502).

46. *In re Klein*, 14 F. Cas. 716 (C.C.D. Mo. 1843) (No. 7865); *In re Irwine*, 13 F. Cas. 125 (C.C.E.D. Pa. 1842) (No. 7086); *In re Klein*, 14 F. Cas. 719 (D. Mo. 1843) (No. 7866).

47. See, e.g., *United States v. Morris*, 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15,815); see also cases cited *supra* note 45; ROBERT M. COVER, *JUSTICE ACCUSED* 159–93 (1975).

48. Treanor, *supra* note 3, at 457–58.

49. See generally William E. Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790–1860*, 120 U. PA. L. REV. 1166 (1972); Jed Handelsman Shugerman, *The People's Courts: The Rise of Judicial Elections in America* (May 2008) (unpublished Ph.D. dissertation, Yale University) (on file with author).

50. See generally Mark A. Graber, *Establishing Judicial Review: Marbury and the Judicial Act of 1789*, 38 TULSA L. REV. 609 (2003); Matthew P. Harrington, *Judicial Review Before John Marshall*, 72 GEO. WASH. L. REV. 51 (2003).

51. WHITTINGTON, *supra* note 8, at 105–14.

the Supreme Court generally refrained from evaluating the constitutionality of the national legislature during this period. It is certainly the case that the Court began to review federal laws more frequently and to issue more politically salient invalidations after the Civil War, but the Court, litigants, and commentators understood throughout the early republic that the Court could and did enforce constitutional limitations against Congress.

II. JUDICIAL REVIEW OF CONGRESS

A. FEDERALIST ERA CASES

The U.S. Supreme Court was asked to consider the constitutional limits on congressional power to make legislation in a handful of cases in the 1790s, and the Court was willing to hear those challenges and pronounce the limits on congressional authority.⁵² Nearly all of these cases involved questions affecting the Judiciary itself—its powers and jurisdiction under the Constitution—but the Court was not limited to such cases and gave no indication that its power to interpret the Constitution and evaluate the constitutionality of federal laws as they might be applied in legal cases depended on whether the parties raised such issues. But in these early cases, the Justices did not provide much of an explanation or justification for their exercise of this power to interpret the Constitution and refused to apply laws in circumstances that they regarded as exceeding the constitutional authority of Congress. Constitutional issues simply arose and were disposed of in the course of ordinary litigation without special comment. The constitutional rulings, however, were not always prominent in the case or matters of substantial political significance. In no case in the Federalist era did the Court mount a frontal challenge to congressional policy. It either upheld congressional authority against the challenge of political opponents or it made marginal adjustments to statutes that left plenty of room for Congress to achieve its policy objectives. In doing so, the Court both built up the power of the national state and protected the independence and authority of the Judiciary within the state.

The first case in which the U.S. Supreme Court apparently resolved a constitutional question involving the legislative authority of Congress went unreported.⁵³ The Court concluded that the statutory provision at issue was constitutionally invalid and any actions taken under it were void.⁵⁴ The decision in *United States v. Yale Todd* was not unexpected, and the suit itself was an amicable one designed simply to get a legal resolution of the matter so that the government could get on with the matter of settling its accounts.

Yale Todd stands at the end of a series of decisions by the federal courts

52. See *infra* notes 53, 82, 99, 105 and accompanying text.

53. *United States v. Yale Todd* (1794), reported in *United States v. Ferreira*, 54 U.S. (1 How.) 40, 53 (1851).

54. *Id.*

involving the Invalid Pensions Act of 1792 and its 1793 revisions.⁵⁵ The Invalid Pensions Act established benefits for veterans who had been injured in service during the American Revolution and created a procedure by which those seeking to claim benefits were to apply to the federal circuit courts.⁵⁶ The circuit court judges would then investigate the claims and make a recommendation to the Secretary of War, who would confirm whether the injured individual had in fact served in the military and would decide whether to enter the claimant's name on the pension rolls.⁵⁷ The rolls would then be forwarded to Congress for action. The circuit judges, including the Supreme Court Justices serving in their respective circuits, decided that federal judges qua judges could not, consistent with the Constitution, perform this duty.⁵⁸ Most famously, the circuit court in Philadelphia refused to carry the Act into effect in *Hayburn's Case*, but declined to issue a decision and opinion in that case.⁵⁹ Instead, the judges and Justices voiced their constitutional objections to President George Washington in a formal letter, as other circuit courts had also done. There they observed that the "business directed by this act is not of a judicial nature. It forms no part of the power vested by the Constitution in the courts of the United States" and, under the Act, the decision of the circuit court judges could be "revised and controuled by the legislature, and by an officer in the executive department. Such revision and controul we deemed radically inconsistent with the independence of that judicial power which is vested in the courts."⁶⁰ Although the Philadelphia judges refused to process invalid cases, the circuit court judges in some circuits, including Connecticut, agreed to act in their private capacity as "commissioners."⁶¹ Perhaps rankled by press criticism that the "humane purposes of Congress" were being thwarted by the constitutional objections of well-fed judges who did not appreciate the condition of the "feeble, war-worn veteran," even Justice Iredell in the southern circuit reconciled himself to "doing invalid business out of Court."⁶² Attorney General

55. For an overview of the Invalid Pensions Acts cases, see 6 *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800*, at 33–45 (Maeva Marcus ed., 1998) [hereinafter *DOCUMENTARY HISTORY*]; 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 69–90 (rev. ed. 1926). See also Act of Mar. 23, 1792, ch. 11, 1 Stat. 243; Act of Feb. 28, 1793, ch. 17, 1 Stat. 324.

56. See *DOCUMENTARY HISTORY*, *supra* note 55, at 33.

57. *Id.*

58. The Justices of the Supreme Court met collectively in exercise of the original and appellate jurisdiction of the Court. They also sat individually with the various circuits, exercising the trial and appellate jurisdiction of those courts.

59. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

60. *Id.* at 411.

61. *Id.* at 410.

62. WARREN, *supra* note 55, at 76 ("The humane purposes of Congress in favor of the invalids are in some measure thwarted by the unconstitutional objections of the Judges." (quoting *GAZETTE OF THE U.S.*, May 9, 1792)); *id.* at 70 n.1 ("[I]t is nevertheless a melancholy truth that a few days fasting would kill not only a feeble, war-worn veteran, but even a hearty well-fed member of Congress" (quoting *NAT'L GAZETTE*, Apr. 12, 1792)); *id.* at 80 n.1 ("I have reconciled myself to the propriety of doing invalid business out of Court."). Iredell had written the President before any cases had presented

Edmund Randolph petitioned the Supreme Court to take action in *Hayburn's Case*, but the Court held the case over without issuing an opinion, giving time to Congress to revise the statute.⁶³ With the Justices united on the unconstitutionality of the original statutory provision and generally unwilling to implement the Act, Congress responded and modified the Act to remedy the constitutional objection.⁶⁴ The Supreme Court never took up the Attorney General's motion in *Hayburn's Case* and rendered a judgment.

In 1793, Congress repealed the offending provision of the 1792 Act but added a new provision preserving the validity of any rights that had been established under the old procedures. Because some of the circuit court judges had initially agreed to serve, in their private voluntary capacity, as pension "commissioners" and perform the tasks assigned to the circuit court judges, some petitioners did have claims processed under the 1792 Act, and Congress directed the Secretary of War and Attorney General "to take such measures as may be necessary to obtain an adjudication of the supreme court of the United States on the validity of any such rights claimed under the act."⁶⁵ By 1794, Attorney General William Bradford figured out how to get the issue before the Court. In 1792, Yale Todd had successfully petitioned the commissioners at the Circuit Court for the District of Connecticut to be added to the pension rolls.⁶⁶ In an "amicable action," the United States sought to recover the \$172.99 that Todd had received thus far from the government by virtue of his entry on the pension rolls under the 1792 statute.⁶⁷ Without a recorded opinion, the Court unanimously ruled in favor of the government's action, holding invalid the process by which Todd had established his right to the pension.⁶⁸ Although there is no reported opinion for the case, Chief Justice Taney drew the likely inference when placing it in the *U.S. Reports* decades later: "[T]he power proposed to be conferred on the Circuit Courts of the United States by the act of 1792 was not judicial power within the meaning of the Constitution, and was, therefore, unconstitutional, and could not lawfully be exercised by the courts."⁶⁹ Congress concluded the affair by enrolling those "unfortunate claimants," such as Todd, who had been "rejected solely for a defect in point of form, and . . . [are] again compelled to incur the expense of supporting their claims before another tribunal" on the

themselves, but questioned the validity of acting as a commissioner either in his official capacity or in his private capacity. *Hayburn's Case*, 2 U.S. (2 Dall.) at 413–14.

63. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). Hayburn himself petitioned Congress for relief, "the Court having refused to take cognizance of his case." 2 ANNALS OF CONG. 556 (1792).

64. See Act of Feb. 28, 1793, ch. 17, 1 Stat. 324.

65. *Proceedings of the United States House of Representatives, January 9, 1793*, in DOCUMENTARY HISTORY, *supra* note 55, at 376, 376.

66. *United States v. Yale Todd* (1794), reported in *United States v. Ferreira*, 54 U.S. (1 How.) 40, 53 (1851).

67. *Id.*

68. *Report of the Attorney General of the United States to the Secretary of War, February 17, 1794*, in DOCUMENTARY HISTORY, *supra* note 55, at 381, 381.

69. *Ferreira*, 54 U.S. (1 How.) at 53.

pension rolls.⁷⁰

There is little question that the Justices as a group regarded the Invalid Pensions Act of 1792 as unconstitutional and not legally binding on them as the judicial officers to whom the statutory provisions in question had been directed. The *American Daily Advertiser* reported that *Hayburn's Case* marked the “first instance in which a Court of Justice had declared a law of Congress to be unconstitutional,” the “novelty” of which produced quite a bit of unreported debate in Congress on how best to respond.⁷¹ The action of the circuit courts on the pension law led some emerging proto-Republican papers to hail the “wise and independent” members of the Judicial Branch in exercising their “noble prerogative” of “declaring an act of the present session of Congress[] unconstitutional” and to hope that those judges would next turn their attention to “any existing law of Congress which may be supposed to trench upon the constitutional rights of individuals or of States,” such as the National Bank bill recently adopted over the strong opposition of James Madison and Thomas Jefferson.⁷² Regardless of the “merits of the particular question,” the actions of the judges were pleasing to the Jeffersonians simply because they effectuated “another resource admitted by the Constitution for its own defense, and for the security of the rights which it guarantees to the several States and to individual citizens.”⁷³ Although some Federalists such as Fisher Ames complained that the pension law decisions, “generally censured as indiscreet and erroneous,” would only wind up emboldening the “States and their courts” who did not respect the “authority of Congress” enough as it was,⁷⁴ the judicial actions were readily accommodated.

Ultimately, it can only be inferred whether the grounds for the Court's holding in *Yale Todd* were the constitutional arguments elaborated by the Justices on circuit two years earlier because there is no record of an opinion in *Yale Todd* itself. Chief Justice Taney accepted that inference when he took note of the case.⁷⁵ *Hayburn's Case* and *Yale Todd* are the first two cases listed in the

70. *Report of a Committee of the United States House of Representatives, March 5, 1794*, in DOCUMENTARY HISTORY, *supra* note 55, at 382, 383. Maeva Marcus finds this to be evidence that the Court had ruled on statutory grounds in *Yale Todd*, *id.* at 43–45, but this seems hardly decisive. The legislators who were about to grant relief to invalid war veterans in 1794 had every reason to suggest that the delay and inconvenience suffered by those veterans was due to the judges who failed to follow the correct formality by signing themselves commissioners rather than due to the legislators themselves for passing an unconstitutional law. Moreover, the substantive point that the committee report sought to establish was that the petitioner had already been evaluated as satisfying all the material conditions for being entered on the pension rolls, even though his certificate was not valid on technical grounds that had nothing to do with the merits of his claim. Thus, it would be appropriate for Congress, acting prospectively, to overlook the formalities and act on the merits.

71. WARREN, *supra* note 55, at 72 (quoting AM. DAILY ADVERTISER, Apr. 16, 1792).

72. *Id.* at 73 (quoting NAT'L GAZETTE, Apr. 16, 1792).

73. *Id.* at 76 (quoting NAT'L GAZETTE, May 9, 1792).

74. 1 WORKS OF FISHER AMES 117 (Seth Ames ed., 2d ed. 1854).

75. *United States v. Yale Todd* (1792), reported in *United States v. Ferreira*, 54 U.S. (1 How.) 40, 53 (1852).

quasi-official table of cases holding federal statutes unconstitutional in the appendix to the 131st volume of the *U.S. Reports*.⁷⁶ Some later commentators, including Justice Samuel Miller and Solicitor General William Marshall Bullitt, readily integrated the two cases as standing for the same constitutional rule that Congress could not impose a nonjudicial duty on federal judges.⁷⁷ James Bradley Thayer, however, influentially dismissed as “inaccurate” the view that *Yale Todd* was decided on constitutional grounds, concluding instead that the case involved the statutory question of whether the circuit court judges could process the pension claims as “commissioners” (an office that was not mentioned in the statute), given their refusal to process them as judges.⁷⁸ Others have followed this interpretation, finding it plausible that the Court avoided the constitutional issue and resolved the case on the lesser statutory issue.⁷⁹ This interpretation would certainly be consistent with the pleadings, which asked whether “Said judges of S^d Circuit Court Sitting as Commissioners and not as a Circuit Court had power & Authority by virtue of S^d Act So to order and adjudge,” and the fact that the Attorney General later gave an opinion that pension claims processed by the district judge for Maine who had “conformed himself” to the act were still valid.⁸⁰ Ultimately, however, Todd’s claim could have been saved if the actions of the judges had been accepted either as “commissioners” (stretching the statute) or as circuit court judges (stretching the Constitution), and the Court would do neither. *Yale Todd* ruled out any constitutional application of these 1792 statutory provisions in the circuit courts.⁸¹ We cannot know what the Justices might have said from the bench in 1794, but the pension cases taken as a set made clear that the Justices were determined to assert the institutional autonomy of the courts and refuse on constitutional grounds to implement federal policies that would violate those foundational rules.

Equally unusual, but for different reasons, is the case of *Penhallow v. Doane’s*

76. 131 U.S. app. ccxxxv (1888).

77. BENJAMIN VAUGHAN ABBOTT & AUSTIN ABBOTT, 1 A TREATISE UPON THE UNITED STATES COURTS, AND THEIR PRACTICE 191–92 (New York, Diosey & Co. 1869); WILLIAM MARSHALL BULLITT, THE SUPREME COURT OF THE UNITED STATES AND UNCONSTITUTIONAL LEGISLATION 7 (1924); HAMPTON L. CARSON, THE SUPREME COURT OF THE UNITED STATES: ITS HISTORY 627 (Philadelphia, John Y. Huber Co. 1891); CHARLES FAIRMAN, 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864–1888, at 52 (1971); SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 351–55 (New York, Banks & Bros. 1891); Wilfred J. Ritz, *United States v. Yale Todd (U.S. 1794)*, 15 WASH. & LEE L. REV. 220, 221 (1958).

78. 1 JAMES BRADLEY THAYER, CASES ON CONSTITUTIONAL LAW 105 n.1 (Cambridge, Charles W. Sever 1895).

79. COXE, *supra* note 16, at 13–14; DOCUMENTARY HISTORY, *supra* note 55, at 43–45; Charles Grove Haines, *The American Doctrine of Judicial Supremacy* 159–60 (1914); Max Farrand, *The First Hayburn Case, 1792*, 13 AM. HIST. REV. 281, 282–83 (1908); David Hunter Miller, *Some Early Cases in the Supreme Court of the United States*, 8 VA. L. REV. 108, 112–15 (1921).

80. *Proceedings of the Supreme Court, February 15, 1794*, in DOCUMENTARY HISTORY, *supra* note 55, at 377, 380; William Bradford, Jr., *to Henry Knox, June 2, 1794*, in DOCUMENTARY HISTORY, *supra* note 55, at 384, 384.

81. Treanor, *supra* note 3, at 537 n.423.

Administrators.⁸² This earliest case in which the Court *upheld* a constitutional power of Congress involved an act under the authority of the Articles of Confederation (and even before), not the U.S. Constitution. In 1780, the Confederation Congress had created a Court of Appeals in Cases of Capture which took over the jurisdiction previously exercised by the Commissioners of Appeals to hear appeals from state courts of admiralty.⁸³ At issue was the authority of Congress “to institute such a tribunal, with appellate jurisdiction in cases of prize,” to take an appeal from a case that originated in New Hampshire.⁸⁴ The New Hampshire courts had awarded a captured British ship to a group of New Hampshire citizens, but the federal Court of Appeals had reversed this ruling and given the prize to an out-of-state group.⁸⁵ Writing seriatim, the Justices in 1795 upheld congressional power in this regard. To Justice Paterson, the “powers of Congress [at that date] were revolutionary in their nature, arising out of events, adequate to every national emergency, and co-extensive with the object to be attained.”⁸⁶ This particular power “grows out of the nature of the thing” and met with “the approbation of the people.”⁸⁷ If New Hampshire objected, she could have withdrawn from the confederacy and gone her own way.⁸⁸ Justice Iredell thought this to be a more difficult case, not least because the arguments on behalf of Congress tended to suggest that “Congress had unlimited power to act at their discretion so far as the purposes of the war might require,” and Iredell was unwilling to take that approach.⁸⁹ The decisive principle for him was the uniform consent of the states to the powers exercised by Congress and the fact that the states at the time, including New Hampshire, had given their “express authority” to the exercise of this power in these cases.⁹⁰ Justice Blair chose to emphasize that the early Congress “acted in all respects like a body completely armed with all the powers of war,” and that “a single expression, used perhaps in a loose sense” in the Articles of Confederation, should not create an “inference so contrary to a known fact,” namely that the states did not truly “retain their sovereignties” prior to the ratification of the Articles (or the Constitution).⁹¹ Justice Cushing objected to Justice Blair’s interpretation, but thought the specific matter of prize cases had been settled by prior practice.⁹²

The Justices had no doubt that “constitutional points” of “great importance”

82. *Penhallow v. Doane’s Administrators*, 3 U.S. (3 Dall.) 54 (1795).

83. *Id.* at 62.

84. *Id.* at 80.

85. *Id.* at 62.

86. *Id.* at 80.

87. *Id.*

88. *See id.* at 82.

89. *Id.* at 92.

90. *Id.* at 95.

91. *Id.* at 111–12.

92. *Id.* at 117.

were at issue in the case.⁹³ The establishment of the Court of Appeals was a matter of substantial controversy during the war, as Congress was cross-pressured on one side by geostrategic concerns voiced by George Washington and foreign states to gain control over privateers and captures and, on the other side, by states that jealously guarded their own prerogatives to handle this profitable and emotional aspect of war.⁹⁴ The 1780 resolution was a compromise measure, creating a court with no real enforcement powers but that had nonetheless proved useful. The losing parties in such cases often carried on their political and legal battles for years, and, in the post-Confederation period, national government officials were particularly concerned with establishing the principle that foreign policy was a national domain, and the determination of such legal rights were firmly in the hands of the courts.⁹⁵ When New Hampshire sent a memorial to Congress asking it to intervene, it was sent to a committee until after *Penhallow* was decided, at which point James Madison reported that the entire subject was “wholly judicial” in character and had just received a “final decision by the Supreme Court of the United States,” precluding any further congressional inquiry in the matter.⁹⁶ Even so, justifying this exercise of congressional power was tricky, as the tensions among the justices evidenced. Later, National Republican commentators would pick up on the themes of Paterson’s opinion as early authority for a strong national union. In 1829, Nathan Dane added an appendix to his popular abridgment of American law that aimed to respond to what he saw as Jeffersonian heresies in the form of emerging doctrines of state nullification. The national government, he argued, was established first, “on *revolutionary* [sic] principles” and only afterwards were the state governments constituted in “*acknowledged subordination*.”⁹⁷ This essential narrative was embraced by others, including Joseph Story and James Kent.⁹⁸ But in the politics of the 1790s, those in the national government were not about to cast doubt on the appropriateness of national judicial control over maritime cases.

The next year, the Court upheld congressional authority in two more cases. *Hylton v. United States* was the first reported case of Supreme Court review of a

93. *Id.* at 79.

94. See THOMAS SERGEANT, CONSTITUTIONAL LAW 7–8 (Philadelphia, P.H. Nicklin & T. Johnson, 2d ed. 1830) (“[T]he legality of all captures on the high seas . . . might be implicated with foreign nations in the results of its administration, Congress had for this purpose a right of maintaining a control by appeal . . .”). See generally HENRY J. BOURGUIGNON, THE FIRST FEDERAL COURT (1977).

95. For a similar but more extended case, see Gary D. Rowe, *Constitutionalism in the Streets*, 78 S. CAL. L. REV. 401 (2005).

96. NO. 65: REMONSTRANCE OF NEW HAMPSHIRE AGAINST THE EXERCISE OF CERTAIN POWERS BY THE JUDICIARY OF THE UNITED STATES, FEB. 27, 1795, reprinted in 1 AMERICAN STATE PAPERS: MISCELLANEOUS 123 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales & Seaton 1834).

97. 9 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW app. i (Boston, Hilliard, Gray, Little & Wilkins 1829).

98. See 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 212 (New York, E.B. Clayton & James Van Norden, 3d ed. 1836); 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 138–54 (Boston, Charles C. Little & James Brown, 2d ed. 1851).

federal statute passed under the authority of the U.S. Constitution.⁹⁹ Moreover, it involved a contemporary case testing issues of national political interest. The pension cases were of political interest because of the power of judicial review that they were making evident and because of the popular sympathy for injured war veterans whose cases were being affected by the controversy, but the constitutional question of whether judges could be given such duties was not itself a matter of political debate, and its resolution did not impose serious obstacles to achieving the legislative policy aim. There were immediate financial interests at stake in *Penhallow*, but in the 1790s there was no serious political debate over federal power to resolve prize cases. *Hylton*, by contrast, was a partisan case, though one of mild importance.

When asked for the first time to enter into a partisan dispute over the scope of congressional power, the Court did not hesitate to side with Congress and uphold its taxation authority. Doing so both strengthened the hand of the government and its newly granted power to tax and kept the Judiciary out of potential disputes over tax policy. James Madison and the proto-Republicans in Congress objected to the adoption of a federal tax on carriages,¹⁰⁰ which happened to be owned primarily by Southern plantation owners. They argued that such a tax on personal property was a “direct tax” that the Constitution required be apportioned among the states by population. Despite such objections, the carriage tax passed as a stand-alone bill in a divided vote in 1794.¹⁰¹ In a friendly suit designed to win an opinion from the Court to settle the controversy, the Justices lent their support to the Federalist Administration.¹⁰² Though they admitted that the meaning of direct tax was obscure, and the Justices disagreed among themselves on what it might mean, they were willing to approve of the carriage tax. Reading the direct tax qualification to the federal taxing authority so broadly as to encompass the carriage tax, they argued, would be impractical and bring back the difficulties of collecting revenues from the state governments.¹⁰³ As promised, the Virginians ended their tax protest and took the particular issue of the carriage tax as settled, though, in the minds of the Jeffersonians, it remained a black mark against the Federalists and their

99. *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796).

100. 4 ANNALS OF CONG. 730 (1794); Letter from James Madison to Thomas Jefferson (June 1, 1794), in 6 THE WRITINGS OF JAMES MADISON, 1790–1802, at 217 (Gaillard Hunt ed., 1906).

101. Act of June 5, 1794, ch. 45, 1 Stat. 373 (repealed 1796).

102. Daniel Hylton stipulated to a tax bill of \$2,000 in order to “ascertain a constitutional point” on the understanding with the government that if he lost the suit he would only pay the amount he had actually been assessed—\$16. The larger amount was necessary to meet the jurisdictional requirements of the Supreme Court. The federal government also found a lawyer for Hylton when his original lawyer, the Jeffersonian firebrand John Taylor, resigned from the case once it became clear that carrying it forward to the Supreme Court would likely result in setting an unfavorable precedent. WARREN, *supra* note 55, at 147 n.1; Robert P. Frankel, Jr., *Before Marbury: Hylton v. United States and the Origins of Judicial Review*, 28 J. SUP. CT. HIST. 1 (2003).

103. *Hylton*, 3 U.S. (3 Dall.) at 173, 178, 181.

penchant for latitudinarian constructions.¹⁰⁴

The other case that year did not deal with a controversy arising from the legislature, but rather from the application of a federal law.¹⁰⁵ The Court upheld the use of admiralty courts for enforcing embargo statutes, limiting the right of jury trials for those accused of smuggling. In 1794, as part of the effort to keep the United States out of the European war, Congress extended its general arms embargo and made ships smuggling guns and materiel subject to forfeiture.¹⁰⁶ When a French privateer was caught running guns to the West Indies in violation of the embargo, the government launched forfeiture procedures against the schooner *La Vengeance*. The government won in district court, but the circuit court reversed on appeal.¹⁰⁷ Sitting in circuit, Justice Samuel Chase treated the case as one of admiralty jurisdiction, which meant that the district court's factual conclusions were subject to review, and he reversed the trial judge.¹⁰⁸ Providing little guidance, Congress had merely indicated that such forfeitures should be tried in the "proper" court, which should "hear and determine the cause according to the law."¹⁰⁹ Attorney General Charles Lee argued, however, that the embargo law was a criminal law regulating an offense that necessarily was done "part on land."¹¹⁰ As a consequence, there was a constitutional limitation imposed by the Sixth Amendment on the ability of Congress to authorize courts to exercise admiralty jurisdiction in such cases—the "judgment of the District Court is final."¹¹¹ The Supreme Court was unpersuaded, cutting off argument to briefly assert that "no jury was necessary" in such a case.¹¹² The violation of the embargo was "entirely a water transaction," and the forfeiture of the vessel was a civil action, not a criminal prosecution putting the life or freedom of a person at risk, and thus, the Constitution posed no obstacle to treating it as a matter of admiralty jurisdiction.¹¹³

Lee tried again as a private attorney a decade later when he made the constitutional claim more explicit. He had argued in *La Vengeance* that admiralty jurisdiction was defined by English law, and in *United States v. The Schooner Betsey and Charlotte* he upped the ante.¹¹⁴ Article III of the U.S. Constitution gave admiralty jurisdiction to the federal courts, and "Congress could not make cases of admiralty and maritime jurisdiction; and under that

104. 8 THE WRITINGS OF JAMES MADISON, *supra* note 100, at 405; 6 THE WRITINGS OF JAMES MADISON, *supra* note 100, at 353.

105. *See* *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297 (1796).

106. Act of May 22, 1794, ch. 33, 1 Stat. 369.

107. *La Vengeance*, 3 U.S. (3 Dall.) at 298.

108. *Id.*

109. Act of Aug. 4, 1790, ch. 35, 1 Stat. 176; *see also* Act of May 22, 1794, ch. 33, 1 Stat. 369, 370.

110. *La Vengeance*, 3 U.S. (3 Dall.) at 300.

111. *Id.* at 299, 300.

112. *Id.* at 301.

113. *Id.*

114. *United States v. The Schooner Betsey & Charlotte*, 8 U.S. (4 Cranch) 443 (1808).

clause of the constitution they could not give their courts jurisdiction of a case which was not of admiralty and maritime jurisdiction at the time of the adoption of the constitution.”¹¹⁵ Making a familiar originalist argument, he contended that the scope of admiralty jurisdiction was defined by the “understanding of the people of this country at that time,” and forfeiture proceedings could not constitutionally be pulled into that jurisdiction.¹¹⁶ In the case of *The Schooner Betsey and Charlotte*, the government had charged the owners with violating the Jeffersonian embargo against St. Domingo, and now it was the government that insisted that the enforcement of the embargo was a matter for admiralty courts and not for juries. Lee pleaded with the Court that *La Vengeance* “was not so fully argued as it might have been,” but Justice Chase cut him off: Even though the Attorney General’s argument in the earlier case “was no great thing, the Court took time and considered the case well.”¹¹⁷ Such important cases should not “be left to the caprice of juries.”¹¹⁸ In his brief opinion for the Court, Chief Justice Marshall noted that the constitutional issue of jury trials was the “only doubt which could arise But the case of the *Vengeance* settles the point.”¹¹⁹

At stake in *La Vengeance* and *The Schooner Betsey and Charlotte* were federal foreign policy and revenues, and the Court refused to allow these critical issues to fall under the sway of local juries who might well disagree with the direction of national policy on these matters. At this early stage, the Court was determined that the strengthened federal government created by the U.S. Constitution would not be held hostage to local prejudice on these matters as it had

115. *Id.* at 447.

116. *Id.*

117. *Id.* at 446 n.**.

118. *Id.* Chase generally had little patience with the requirement of jury trials. On Chase’s views of juries, see KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* 52–57 (1999).

119. *The Schooner Betsey & Charlotte*, 8 U.S. (4 Cranch) at 452. Despite this explicit constitutional argument, Thomas Sergeant in his influential constitutional law treatise used the cases to illustrate the logic of the congressional policy choice in a different statute. SERGEANT, *supra* note 94, at 205. By contrast, in his famed treatise, James Kent framed the cases in terms of constitutional law, observing that “[i]t is not in the power of congress to enlarge [admiralty] jurisdiction beyond what was understood and intended by it when the constitution was adopted, because it would be depriving the suitor of the right of trial by jury, which is secured to him by the constitution.” KENT, *supra* note 98, at 371. Kent was skeptical that the Court was correct to find this to be within the power of Congress: “[I]t may be a question, whether [Congress] had any right to declare them to be cases of admiralty jurisdiction, if they were not so by the law of the land when the constitution was made. The Constitution secures to the citizen trial by jury.” *Id.* at 375. But, Kent thought the Court could have saved Congress and itself from this error through a different interpretation of the “rather ambiguous” Judiciary Act of 1789 and simply insisted that Congress had never authorized the courts to exercise admiralty jurisdiction in such cases. *Id.* John Marshall later observed the constitutional dimension of these cases, while distinguishing them from a case in which “the only question” was “not what was the constitutional authority of Congress, but how far it had been exercised; not what was the extent of the admiralty and maritime jurisdiction granted in the constitution, but how far it had been conferred by Congress upon any particular Court of the Union.” *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 109 (1820).

been under the Articles of Confederation.¹²⁰ The cases had an immediate payoff for the Jefferson Administration, as Congress would shortly pass the first of the general Embargo Acts, which were immensely unpopular but could be enforced in significant measure in admiralty courts without potentially obstructionist juries.¹²¹

In 1800, three years before *Marbury*, the Supreme Court under Chief Justice Oliver Ellsworth invalidated an aspect of the Judiciary Act of 1789 for the first time.¹²² The Court under John Marshall would later reaffirm and elaborate on that decision.¹²³ The Judiciary Act of 1789 defined the jurisdiction of the federal circuit courts, including, in section 11, as

all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; *or an alien is a party*, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.¹²⁴

Although this section of the Judiciary Act generally tracked—with limitations—the diversity jurisdiction given to the federal courts in Article III of the U.S. Constitution, its reference to “an alien” as a party did not match any language in the Constitution’s jurisdictional grant.¹²⁵ When the British merchant Higginson filed suit in federal court against Mossman, the executor of an estate, to collect an old debt, the citizenship of Mossman was not established in the record.¹²⁶ On the face of the record, it was established that an alien (Higginson) was a party, but nothing else.¹²⁷ As Higginson’s lawyers pointed out, this showing was sufficient under the Judiciary Act. Mossman’s lawyer objected that Congress “cannot amplify, or alter” the provisions of the Constitution by statute and that the “constitution no where gives jurisdiction . . . in suits between alien and alien.”¹²⁸ The Court agreed, recognizing that the Judiciary Act could not be applied in a manner inconsistent with the Constitution. The “legislative power of conferring jurisdiction on the federal Courts, is . . . confined to suits *between citizens and foreigners*”; the Court would only allow suits when it was estab-

120. This is a theme that Justice Joseph Story particularly emphasized in the cases arising out of *La Vengeance*. 3 STORY, *supra* note 98, at 530–32.

121. See Douglas Lamar Jones, “*The Caprice of Juries*”: *The Enforcement of the Jeffersonian Embargo in Massachusetts*, 24 AM. J. LEGAL HIST. 307, 315–19 (1980). In 1808, the Federalist-appointed District Court Judge John Davis upheld the power of Congress to impose a general embargo. *United States v. The William*, 28 F. Cas. 614, 622–23 (D. Mass. 1808) (No. 16,700).

122. See *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800).

123. See *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809).

124. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78 (emphasis added).

125. “The judicial Power shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.” U.S. CONST. art. III, § 2.

126. *Mossman*, 4 U.S. (4 Dall.) at 12–13.

127. See *id.*

128. *Id.* at 13.

lished that at least one party was a citizen, the text of the Judiciary Act notwithstanding.¹²⁹

Nearly a decade later, former Attorney General Charles Lee represented a British subject attempting to bring suit against merchants “late of the district of Maryland” on the contention that this was a sufficient jurisdictional basis under section 11 of the Judiciary Act.¹³⁰ Chief Justice Marshall dismissed the case with a brief opinion: “Turn to the article of the constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the constitution. . . . The court said the objection was fatal.”¹³¹ Again, in 1829, the Court was asked to accept a case under this provision of the Judiciary Act, and again the Court was obliged to explain that the statute had to be interpreted and applied “in conformity to the constitution of the United States,” which meant that a case could not be entertained in the federal courts “unless a citizen be the adverse party,” requiring the Court to reverse the decision of the circuit court for want of jurisdiction.¹³² In the latter cases, the Supreme Court set anew the text of the law against the text of the Constitution and found the statute to be lacking, without reference to the earlier decision in *Mossman*.

Early commentators recognized the implications of the Court’s actions in these cases. Treatise writers at the time understood the constitutional significance of these cases, which placed the statute “in subordination to the constitution.”¹³³ Congress had, “in legislating upon this subject” of the jurisdiction of federal courts, in “a very few instances, inadvertently transcended the limits imposed by the constitution,” and in such cases the Supreme Court had refused to implement the law as Congress had written it.¹³⁴ As one writer observed, “The inferior federal courts possess no powers whatever except those included in the terms of statutes passed in pursuance of the Constitution. . . . If the power be statutory, it is still a nullity if it transcends the scope of the constitutional

129. *Id.* at 14.

130. *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 303 (1809) (emphasis omitted).

131. *Id.* at 304.

132. *Jackson v. Twentyman*, 27 U.S. (2 Pet.) 136, 136 (1829).

133. 1 FRANCIS J. TROUBAT & WILLIAM W. HALY, *THE PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS IN THE SUPREME COURT OF PENNSYLVANIA* 91 (Philadelphia, R.H. Small 1837); see also BENJAMIN VAUGHAN ABBOTT, 2 *A TREATISE UPON THE UNITED STATES COURTS AND THEIR PRACTICE* 54 (New York, Diossy & Co. 1871) (“For section 11 of the Judiciary Act of September 24, 1789,—giving jurisdiction where an alien is a party,—must be construed in connection with and in conformity to the Constitution of the United States.”); 3 JOHN BOUVIER, *INSTITUTES OF AMERICAN LAW* 107 (Philadelphia, Childs & Peterson 1858) (“[T]hese general words must be restricted by the provisions in the constitution . . . ; the statute cannot extend jurisdiction beyond the limits of the constitution.”); ALFRED CONKLING, *A TREATISE ON THE ORGANIZATION, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES* 64 (Albany, Wm. & A. Gould & Co. 1831) (“[I]t is declared in unqualified terms by the judicial act that the circuit courts shall have original cognizance of all civil suits where an *alien* is a *party*; yet . . . it is held that the jurisdiction of these courts . . . is limited by the constitution to the cases therein specified; and that it does not extend to suits *between aliens*.”); SERGEANT, *supra* note 94, at 115 (“[T]hese general words must be restricted by the constitution . . . and the statute cannot extend the jurisdiction beyond the limits of the constitution.”).

134. CONKLING, *supra* note 133, at 66.

grant.”¹³⁵ In light of such constitutional concerns, lawyers were advised that it was essential that the citizenship of at least one of the parties be clearly established in the record; otherwise, the federal courts would be obliged to decline jurisdiction over the case.¹³⁶ In the opening of his 1827 *Digest of the Laws of the United States*, Thomas Gordon observed that “[a]n act of congress, contrary to the constitution of the United States, is void—and courts of justice are bound so to declare it, or to modify the law according to the constitution, if the case admit such modification.”¹³⁷ His authorities for this proposition included both *Mossman* and *Hodgson*.¹³⁸ Judges likewise noted the judicial review quality of *Mossman* and its successors. On circuit, Justice Samuel Nelson observed that, “from its language,” the Judiciary Act was “defective in respect to the jurisdiction conferred upon the circuit courts.”¹³⁹ Nelson glossed over the difficulty by assuming that “the meaning intended by congress” was what was required by the Constitution rather than what the language of the statute actually said, and the courts were required to construe the statute “in connection with the provision of the constitution,” citing *Jackson v. Twentyman* as support.¹⁴⁰ Other judges were less delicate. They simply pointed out that the “language of the judiciary act . . . must be restrained within the terms of the constitution.”¹⁴¹ The Constitution is, after all, “the superior law” and courts and litigants were obliged to look further than the statute itself to determine the

135. JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 517 (New York, Hurd & Houghton 1868).

136. ABBOTT, *supra* note 133, at 54; SERGEANT, *supra* note 94, at 115; TROUBAT & HALY, *supra* note 133, at 91. These commentators included former Justice Benjamin Curtis. See BENJAMIN ROBBINS CURTIS, JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES 111–12 (Boston, Little, Brown, & Co. 1880). Notably, Kent states the rule as: “if it appeared on record that one party was an alien, it must likewise appear affirmatively that the other party was a citizen,” but does not explain the rationale for why the Court “confined” the statutory grant of jurisdiction. KENT, *supra* note 98, at 344. By the end of the nineteenth century, by which time the 1789 statutory provision had been displaced, former Attorney General Augustus Garland in his treatise on federal courts simply asserted that the language of the Judiciary Act of 1789 was “also the language of the Constitution on the same subject,” and that *neither* allowed cases in which both parties were aliens. 1 A.H. GARLAND & ROBERT RALSTON, A TREATISE ON THE CONSTITUTION AND JURISDICTION OF THE UNITED STATES COURTS 177 (Philadelphia, T. & J.W. Johnson & Co. 1898) (emphasis added). Dennis Mahoney points to Kent to support the claim that early observers did not view *Hodgson* as a constitutional decision, but he overlooks others who clearly did. See Dennis J. Mahoney, *A Historical Note on Hodgson v. Bowerbank*, 49 U. CHI. L. REV. 725, 737 (1982).

137. THOMAS F. GORDON, A DIGEST OF THE LAWS OF THE UNITED STATES 1 (Philadelphia 1827).

138. *Id.*

139. *Prentiss v. Brennan*, 19 F. Cas. 1278, 1279 (C.C.N.D.N.Y. 1851) (No. 11,385).

140. *Id.* See also *Florence Sewing Mach. Co. v. Grover & Baker Sewing Mach. Co.*, 110 Mass. 70, 80–81 (1872) (“[W]e think such a construction would make it conflict with the Constitution of the United States, and therefore must presume that such was not the intention with which the act was framed; or if it was so, then the intention must be held to be ineffectual. . . . In applying the statute, its general terms are made to conform to narrower limits of the judicial powers as established by the constitutional provisions.”).

141. *Hinckley v. Byrne*, 12 F. Cas. 194, 195–96 (C.C.D. Cal. 1867) (No. 6510).

legitimate jurisdiction of the federal courts.¹⁴²

There is so little information about the legislative history of the Judiciary Act of 1789 that it is hard to say whether this jurisdictional provision was the result of a drafting error or a conscious choice on the part of Congress.¹⁴³ Bad draftsmanship on the part of its principal sponsor, future Chief Justice Oliver Ellsworth, is certainly likely. Soon-to-be Attorney General Edmund Randolph complained that the jurisdictional provisions of the statute were “inartificially, untechnically and confusedly worded” and wondered why Ellsworth had not simply repeated the language of the Constitution itself.¹⁴⁴ In any case, although the more pressing issue was the relatively limited scope of authority that the legislature had given to the lower federal courts, the Court was not going to allow Congress to expand by mere statute the jurisdiction of the federal courts beyond the constitutional limits.¹⁴⁵ Congress brought the text into conformity with judicial practice by simply adopting the constitutional language when overhauling the judiciary statute in 1875.¹⁴⁶

By the end of the Federalist era, the Supreme Court had already been repeatedly asked to evaluate the constitutional limits of the legislative authority of Congress and to consider whether the apparent demands of a statute could trump the alleged requirements of the Constitution in court. Moreover, the Justices had already shown twice that they were unwilling to enforce the terms of a statute in a case before them if doing so would exceed the constitutional authority of Congress as the Justices understood it. In none of these cases, however, did the Court provide an elaborate explanation of the power of judicial review of the type that had been offered by Justice Patterson sitting in circuit¹⁴⁷ or the judges of the Virginia high court.¹⁴⁸ And in those cases in which the substantive constitutional issue in dispute was most politically controversial, the Justices upheld legislative authority. Where the Justices balked, in the pension cases and alien jurisdiction cases, the constitutional difficulty was either easily resolved or far from any substantive congressional concern, or both. Congress

142. *Piquignot v. Pa. R.R. Co.*, 57 U.S. (16 How.) 104, 106 (1853); see also *Cissel v. McDonald*, 5 F. Cas. 717, 718 (C.C.S.D.N.Y. 1879) (No. 2729).

143. The Court did find a constitutionally acceptable exertion of jurisdiction in a case involving two foreigners in *Mason v. Blaireau*, 6 U.S. (2 Cranch) 240, 264 (1804), in which the Court held that admiralty jurisdiction could be exercised in a case in which both parties are aliens and consent to the suit.

144. Letter from Edmund Randolph to James Madison (June 30, 1789), in 12 THE PAPERS OF JAMES MADISON 273, 274 (Charles F. Hobson & Robert A. Rutland eds., 1979). Randolph also anticipated the result: “Will the courts be bound by any definition of authority, which the constitution does not in their opinion warrant?” *Id.*

145. On the compromised nature of the Judiciary Act of 1789, see Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?*, in ORIGINS OF THE FEDERAL JUDICIARY (Maeva Marcus ed., 1992); Justin Crowe, *Building the Judiciary* (Nov. 2007) (unpublished Ph.D. dissertation, Princeton University) (on file with author).

146. See Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.

147. *Vanhome’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (1795).

148. *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20 (1788).

cared about taxing carriages and handling prize cases; it did not care about suits between two aliens. The Court upheld congressional authority when it mattered, but it also insisted that Congress could not extend the workload of the Justices beyond constitutionally prescribed limits. If the pension cases made High Federalists such as Fisher Ames nervous, they were soon mollified by the carriage tax case, and Federalists were soon lauding the federal courts as the only proper place for resolving contested constitutional issues in the midst of the Sedition Act controversy.¹⁴⁹

B. JEFFERSONIAN ERA CASES

After the elections of 1800, there were heightened tensions between the Marshall Court and some Jeffersonians in the state and national governments. Immediately upon seizing power, the Jeffersonians were distrustful of the federal courts that the Federalists had so obviously packed with their own supporters and that had served on the front lines of Federalist suppression of Jeffersonian publishers during the Sedition Act controversy. Some Jeffersonians, such as Judge Spencer Roane of Virginia and Thomas Jefferson himself, nursed that distrust for years. The Marshall Court soon began to hear constitutional challenges to Jeffersonian as well as Federalist legislation, and sometimes invalidated or narrowed statutory provisions on constitutional grounds, and yet the Court posed no significant obstacles to Congress during the Jeffersonian era. It was during this period that the Court itself first offered an elaborate explanation for the power of judicial review and made strong claims for the judicial authority to interpret the Constitution. The Court used the power to interpret the scope of congressional legislative authority primarily to endorse what Congress had done and elaborate on the expansive powers that were at the national legislature's command. When it found that Congress had exceeded its authority, as with the later alien jurisdiction cases already noted,¹⁵⁰ the consequences for Jeffersonian policies and congressional power were modest at best.

Little needs to be said about *Marbury v. Madison* given its familiarity.¹⁵¹ It is sufficient to note for present purposes that William Marbury's motion likewise raised a question relating to the power of Congress to alter the duties of federal judges, in this case by arguably expanding the original jurisdiction of the U.S. Supreme Court to hear such a case. Chief Justice John Marshall, writing for the Court, of course demurred. To the extent that Congress, via the Judiciary Act of 1789, sought to give authority to the Supreme Court that "appear[ed] not to be warranted by the constitution . . . it bec[ame] necessary to enquire whether a

149. On Federalists, the Sedition Act, and the Judiciary, see WHITTINGTON, *supra* note 8, at 233–48.

150. *Jackson v. Twentyman*, 27 U.S. (2 Pet.) 136 (1829); *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809).

151. Among the voluminous literature, see WILLIAM E. NELSON, *MARBURY V. MADISON* (2000); Mark A. Graber, *The Problematic Establishment of Judicial Review*, in *THE SUPREME COURT IN AMERICAN POLITICS*, *supra* note 9, at 20; James M. O'Fallon, *Marbury*, 44 *STAN. L. REV.* 219 (1992); William A. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 *DUKE L.J.* 1.

jurisdiction, so conferred, can be exercised.”¹⁵² The Court’s answer was “no, it could not.” Such a purported act could not “become the law of the land” to be implemented by the courts.¹⁵³ *Marbury* was the sixth case in which the Court substantively reviewed the constitutionality of federal legislation and the third in which it refused to apply a statutory provision in a manner that was inconsistent with the Constitution.

The textual conflict between the Judiciary Act of 1789 and the Constitution was less clear in *Marbury* than it had been in *Mossman*, and there is no more reason to think that the Court was obstructing the intentions of Congress when ruling out the jurisdictional provision in the former case than in the latter case. Unlike *Marbury*, however, *Mossman* did effectively rewrite the statute to salvage a class of constitutionally viable cases without requiring legislative action. Cases in which a citizen sued an alien could still move forward under the statutory provision providing federal jurisdiction for cases in which “an alien is a party,” even if cases involving two aliens could not. *Marbury* emphasizes the idea that an “act of the legislature, repugnant to the constitution, is void,”¹⁵⁴ rather than the idea that the act must be applied “in conformity to the constitution,”¹⁵⁵ but the effect was comparable. Section 13 of the Judiciary Act described the original and appellate jurisdiction of the Supreme Court and concluded simply by granting the “power to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.”¹⁵⁶ The Court in *Marbury* denied that this provision could confer original jurisdiction where the Court did not otherwise have it. A class of possible, if unlikely, applications of the statute were constitutionally prohibited. But there remained a class of constitutionally permissible applications for this statutory provision, which Congress made explicit when it revised the relevant passage of the Judiciary Act.¹⁵⁷

Marbury was also distinctive in providing a defense of the power of judicial review that the earlier Supreme Court cases had not. In doing so, Marshall “wrote as if the question had never arisen before,”¹⁵⁸ even though the “issue of judicial review was by no means new.”¹⁵⁹ Although the *Marbury* Court’s actions in exercising the power of judicial review may not have been particularly distinctive, John Marshall’s argument on behalf of the power of judicial review would become a reference point for later debates over whether such a

152. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

153. *Id.*

154. *Id.* at 177.

155. *Jackson*, 27 U.S. (2 Pet.) at 136.

156. Act of Sept. 24, 1789, ch. 20, § 13, 1 Stat. 73, 81.

157. See Act of Mar. 3, 1911, ch. 231, § 234, 36 Stat. 1087, 1156.

158. DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 70 (1985).

159. *Id.* at 69.

power could be justified. In arguing about or teaching the theory of judicial review, the opinions in *Hylton* or *Mossman* are not especially interesting. Marshall's opinion in *Marbury* is.

Two points arising out of the revisionist literature on *Marbury* are worth noting.¹⁶⁰ First, it is not apparent that the exercise of judicial review in *Marbury* was itself controversial, politically salient, or contrary to the preferences of other powerful political actors. By reading the mandamus provision of the Judiciary Act as unconstitutionally expanding the original jurisdiction of the Supreme Court, Marshall was able to issue a jurisdictional ruling about which there were no strong feelings in order to avoid issuing an order about which there were. Voiding the mandamus provision allowed Marshall to avoid having to decide whether to issue a mandamus to the Jefferson administration—a writ that likely would have been ignored had it been issued. Jeffersonians objected to Marshall's tongue-lashing of the administration over the treatment of William Marbury, but they did not object to his claim of the authority to review the constitutionality of federal laws or to the fate of this statutory provision.¹⁶¹

Second, although *Marbury* is now celebrated for establishing the power of judicial review, it occupied a less exalted place in the nineteenth century. Contemporaries did not treat *Marbury* as doing something new or especially important in developing the power of judicial review. The Court rarely cited *Marbury* for the principle of judicial review until the twentieth century.¹⁶² The organized bar and legal scholars consciously canonized *Marbury* and John Marshall in the early twentieth century as part of an effort to secure support for the power of judicial review in the *Lochner* era.¹⁶³ Earlier in the nineteenth century, *Marbury* was likely, at most, to be included as one case among others that took note of the principle that the judiciary could enforce constitutional limitations on legislatures.¹⁶⁴ In the early case of *United States v. The William*, for example, in which District Judge John Davis upheld the Jeffersonian embargo against constitutional challenge, he relegated *Marbury* to a two-sentence footnote and focused his attention on cases such as *Hayburn's* and *Hylton* in order to illuminate the conditions under which the courts might declare a law unconstitutional.¹⁶⁵

The Court's decision in *Marbury*—that its original jurisdiction could not be

160. See generally CLINTON, *supra* note 7; KRAMER, *supra* note 3; NELSON, *supra* note 151; Graber, *Passive-Aggressive Virtues*, *supra* note 10; Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions*, 87 VA. L. REV. 1111, 1113–26 (2001); Treanor, *supra* note 3.

161. See WARREN, *supra* note 55, at 243–57 (describing reaction of Jeffersonian papers to *Marbury*).

162. CLINTON, *supra* note 7, at 116–27.

163. See Davison M. Douglas, *The Rhetorical Uses of Marbury v. Madison: The Emergence of a "Great Case"*, 38 WAKE FOREST L. REV. 375, 386–87 (2003).

164. See, e.g., THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 46–47 (Boston, Little, Brown, & Co., 3d ed. 1874); E. FITCH SMITH, COMMENTARIES ON STATUTE AND CONSTITUTIONAL LAW AND STATUTORY AND CONSTITUTIONAL CONSTRUCTION 570–73 (Albany, Gould, Banks, & Gould 1848).

165. *United States v. The William*, 28 F. Cas. 614, 617–18 n.1 (D. Mass. 1808) (No. 16,700).

“expanded” to include mandamus cases—had potentially troubling implications, which the Court soon smoothed over. In *Ex parte Bollman*, the Court reminded all concerned “that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States.”¹⁶⁶ The Jefferson Administration had taken no position on the question raised here, whether habeas corpus petitions fell within the Court’s original jurisdiction under the Constitution and thus ran afoul of the recent precedent of *Marbury*. Happily, Marshall thought not. The writ of habeas corpus could be distinguished from the writ of mandamus because habeas petitions necessarily involved a possible “revision of a decision of an inferior court, by which a citizen has been committed to jail.”¹⁶⁷ It fell within the appellate jurisdiction, a constitutionally permissible outcome. *Marbury* would not be read to impede the Court from receiving that important stream of cases.

Of at least equal political significance to *Marbury* was the Court’s decision the next week in *Stuart v. Laird*.¹⁶⁸ Again, when facing a confrontation with the Jefferson Administration, the Court ducked. In *Marbury*, ducking a confrontation involved striking down a statutory provision of little political interest. In *Stuart*, ducking meant at least partly upholding congressional authority to take hotly contested actions (while avoiding saying anything about the deeper issues raised by the legislation). The case arose out of the Jeffersonian repeal of the Judiciary Act of 1801, one of the last acts of the lame-duck Federalists after their loss in the elections of 1800.¹⁶⁹ The Judiciary Act of 1801¹⁷⁰ (which had set up a new layer of separate circuit courts and expanded the jurisdiction of the federal courts) had outraged the Jeffersonians, who saw it as saddling the nation with a host of life-tenured patronage appointments who might make mischief from their new positions.¹⁷¹ The repeal eliminated those circuit courts and dismissed the newly appointed judges who had held those offices.¹⁷² Former Attorney General Charles Lee again argued the case. Citing James Madison on the importance of judicial tenure during good behavior and contending that the repeal deprived the courts of “all their power and jurisdiction” and displaced “judges who have been guilty of no misbehavior in their offices,” Lee contended that the repeal act was an unconstitutional assault on the Judiciary.¹⁷³ The Court largely ignored this generalized complaint about the repeal because it was the right of the parties litigating in the federal courts that was at stake in *Stuart*, not the right of the judges hoping to hear such cases. In reviewing this

166. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807).

167. *Id.* at 101.

168. *See Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803).

169. *See generally* BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS* (2005); RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS* (1971).

170. Judiciary Act of 1801, ch. 4, 2 Stat. 89.

171. *See* ELLIS, *supra* note 169, at 36–68.

172. Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.

173. *Stuart*, 5 U.S. (1 Cranch) at 303.

more modest issue, the Court observed that there were “no words in the constitution to prohibit or restrain the exercise of the legislative power” to rearrange the courts and transfer cases among them.¹⁷⁴ With respect to the rights of the parties bringing cases in the federal Judiciary, there was nothing unconstitutional about requiring litigants to present their cases to the circuit courts as they were constituted by the Judiciary Act of 1789, as opposed to those that were briefly constituted by the Judiciary Act of 1801. Lee wanted to try the broader political and constitutional issues implicated by the repeal, but John Laird’s legal rights and ability to enforce his judgment in federal court were fully satisfied if Congress could successfully transfer his case from one court to another. Focusing on this issue made it relatively easy for the Marshall Court to dodge the political and constitutional challenges looming in the background. Unusually, the Chief Justice allowed someone else, William Paterson, to write the opinion in this critical case.¹⁷⁵ It was the Court’s decision to go along with the Jeffersonian revolution in *Stuart*, far more than the Court’s impotent carping in *Marbury*, that was the important episode of judicial review arising from the electoral transition.

Only two years later, the Court again agreed to review the constitutionality of a federal law, for the first time considering the scope and meaning of the constitutional enumeration of powers. In *United States v. Fisher*,¹⁷⁶ involving Federalist-era statutory provisions giving the federal government priority over other claimants in the settlement of debts in a case of bankruptcy, Chief Justice Marshall previewed the argument that would later garner far more attention in *McCulloch v. Maryland*. Such provisions were common in federal law, and Jefferson’s U.S. Attorney had no difficulty finding constitutional authority for them. He did not shy away from judicial review, but embraced it: “The constitution is the supreme law of the land, and not only this court, but every court in the union is bound to decide the question of constitutionality.”¹⁷⁷ But, U.S. Attorney Alexander Dallas cited *Hylton* for the proposition that “[i]f the question be doubtful the court will presume that the legislature has not exceeded its powers” and would refrain from deciding that an act was “unconstitutional.”¹⁷⁸ Following the U.S. Attorney’s lead, Marshall began by switching the emphasis from what he had recently said in *Marbury* (a case not cited by either counsel or the Court): “To the general observations made on this subject, it will only be observed, that as the court can never be unmindful of the solemn duty imposed on the judicial department when a claim is supported by an act which conflicts with the constitution, so the court can never be unmindful of its duty to obey laws which are authorized by that instrument.”¹⁷⁹ The question at hand

174. *Id.* at 309.

175. *See id.* at 308.

176. *United States v. Fisher*, 6 U.S. (2 Cranch) 358 (1805).

177. *Id.* at 384.

178. *Id.*

179. *Id.* at 396.

was whether the preference was “necessary and proper to carry into execution the powers vested by the constitution in the government of the United States.”¹⁸⁰ Prominent Philadelphia Federalist Jared Ingersoll argued that a general power to give the United States priority in the collection of debts was neither necessary to the execution of any particular power nor proper in a government that respected the rights of other contracting parties.¹⁸¹ On this, Marshall thought:

[I]t would be incorrect and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. . . . Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of power granted by the constitution.¹⁸²

Who could deny that giving the government priority in collecting on debts owed to itself would facilitate the government’s ability “to pay the debt of the union,” and—ignoring Ingersoll’s concern that these statutory provisions interfered with previously contracted property rights—this was not a tool anywhere barred to the federal government?¹⁸³ Case closed. Without the nationalist trappings and with a slightly less worked out formulation, Marshall laid out in *Fisher* the core of his views on the Necessary and Proper Clause that he would later repeat in *McCulloch*. The purpose and effect were the same. The Court upheld the specific policy currently favored by the Republican Administration and the broad scope of congressional discretion in making policy and building the capacity of the national state, while sheltering the Judiciary from having to render judgments on the necessity or propriety of the policy choices made by the Legislature. Meanwhile, the Jeffersonian and Federalist lawyers had switched sides, with the former favorably citing the carriage tax case and the latter arguing for a narrow reading of the Necessary and Proper Clause.

The Court considered only a handful of constitutional challenges to the application of federal laws on due process grounds prior to the Civil War. The first such case¹⁸⁴ is particularly idiosyncratic but also hearkens back to the most basic justifications for the judicial nullification of statutory provisions.¹⁸⁵ In 1798, Congress sought to protect its creation, the Bank of the United States, by making it a federal crime to circulate fraudulent bank notes. In defining the crime, however, the statute stated that no one can represent as true a “false, altered, forged or counterfeited bill or note issued by order of the president . . .

180. *Id.*

181. *Id.* at 379.

182. *Id.* at 396.

183. *Id.*

184. *See* *United States v. Cantril*, 8 U.S. (4 Cranch) 167 (1807).

185. *See* *Dr. Bonham’s Case*, (1610) 77 Eng. Rep. 646, 652 (K.B.) (“[W]hen an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it . . .”).

and signed by the president.”¹⁸⁶ Read literally, the law only applied to notes that were both “counterfeit” *and also* issued and signed by the president of the Bank of the United States. Zebulon Cantril was indicted and convicted in Georgia for attempting to pass off a “forged and counterfeit paper . . . purporting to be a bank bill of the United States for ten dollars.”¹⁸⁷ The defense moved to have the verdict quashed on the grounds that the indictment was not sufficient to meet the statutory definition of the crime (after all, the purported bank bill had not actually been signed by the president of the Bank) and, moreover, that the statute that Cantril had been convicted of violating was “inconsistent, repugnant, and therefore void.”¹⁸⁸ The circuit court was divided on the issue and certified the question for the Supreme Court’s review.¹⁸⁹ Marshall’s opinion was not reported in detail but agreed with the motion and directed the lower court to arrest the judgment.¹⁹⁰ The Court could have readily looked past the literal terms of the statute and interpreted it to mean what Congress clearly intended, but it chose instead to assert that the Judiciary could hold such a statute void for repugnancy.¹⁹¹ Although repugnancy can be understood as a canon of statutory interpretation,¹⁹² later courts have recognized that in the American context it has constitutional implications. A repugnant statute fails to give adequate notice of legal obligations or adequate guidance for its consistent application.¹⁹³

186. Act of June 27, 1798, ch. 61, 1 Stat. 573.

187. *Cantril*, 8 U.S. (4 Cranch) at 167 (emphasis omitted).

188. *Id.* at 168.

189. *Id.* at 167.

190. *Id.* at 168.

191. The Court later chose to take the interpretive approach with a different fraud statute that similarly left out the word “purport.” *United States v. Howell*, 78 U.S. (11 Wall.) 432, 435 (1870).

192. In his antebellum legal treatise, for example, Joel Prentiss Bishop offered *Cantril* as an example of a repugnancy doctrine, illustrating his argument that there are “other limits to the legislative power, besides those which are expressly laid down in the constitutions of the United States.” BISHOP, *supra* note 36, at 53, 55–56 & n.5. *Cantril* differs significantly from other cases that Bishop cites, however. *See, e.g.*, JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES 42 & n.3 (Boston, Little, Brown, & Co., 2d ed. 1883); *Albertson v. State*, 2 N.W. 742, 748 (Neb. 1879) (“[T]he well-known rule applies, that where there is an irreconcilable conflict between different sections in parts of the same statute the last words stand, and those in conflict therewith are, so far as there is a conflict, repealed.”). The report on the case is slight, and it was also taken to stand for the proposition that the courts could not proceed on defective indictments. *See, e.g.*, 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 173 (Springfield, G. & C. Merriam, 3d Am. ed. 1836).

193. Thus, the Pennsylvania Supreme Court cited *Cantril* as authority for the proposition that such impractical statutory provisions were “unconstitutional” and “nugatory and void,” *Hall v. Bank of the U.S.*, 6 Whart. 585, 596 (Pa. 1840), while Joseph Story on circuit extended its logic to include cases when the “words in the act are too vague,” *United States v. La Coste*, 26 F. Cas. 826, 829 (C.C.D. Mass. 1820) (No. 15,548). *See also* Opinion by the Justices, 30 So. 2d 14, 17 (Ala. 1947) (void “where the statute is so incomplete, so conflicting or so vague and indefinite, that the statute cannot be executed and the court is unable by the application of law and accepted rules of construction to determine what the legislature intended”). The Ohio Supreme Court distinguished its own fraud statute as “not very skillfully drawn” but one that had been “understood and enforced by all our courts” from the “legislative blunder” voided by the Court in *Cantril*. *Mackey v. State*, 3 Ohio St. 362, 365 (1854); *see also* *Hand v. Stapleton*, 33 So. 689, 692 (Ala. 1903) (“[N]o ground for striking down and nullifying [the statute] . . . where the intention of the Legislature and its real purposes can be effectuated . . .”).

Congress had corrected the statutory error even before the Court handed down its order,¹⁹⁴ so the immediate effect of the decision was limited to freeing Cantril.

The Marshall Court also heard the earliest cases challenging the unconstitutional delegation of legislative power. In each case, the Court upheld the challenged provision as not crossing the line into a prohibited delegation. The alleged excessive delegation of national legislative power was to a range of different institutions across the several cases: the Executive, the Judiciary, and the states. First to be challenged was the Non-Intercourse Act of 1810. In 1809, Congress repealed the comprehensive and much-hated Jeffersonian trade embargo that banned all commercial shipping to and from American ports and replaced it with the Non-Intercourse Act, which barred trade only with warring England and France and only until they altered their policies toward neutral American shipping. The 1809 act expired at the end of the congressional session, but Congress revived it with the 1810 act.¹⁹⁵ The revival was conditioned, however, on a presidential finding and proclamation that each country to which it was to be applied had not yet altered its policies.¹⁹⁶ When the brig *Aurora* was caught importing goods from Liverpool in violation of the 1810 Act, her lawyer Joseph Ingersoll asked a basic question: “Whoever heard of a conditional penal law[?] . . . Congress could not transfer the legislative power to the President. To make the revival of a law depend upon the President’s proclamation, is to give to that proclamation the force of a law.”¹⁹⁷ Writing for the Court in 1813, Justice William Johnson did not bother to examine the constitutional question in detail. He simply informed the parties that the Justices could “see no sufficient reason, why the legislature should not exercise its discretion in reviving the act . . . either expressly or conditionally, as their judgment should direct.”¹⁹⁸ Next to be challenged on non-delegation grounds were the anti-piracy statutes of 1790 and 1819.¹⁹⁹ Daniel Webster argued in an 1820 case that Congress had not bothered to define the crime of “piracy” and was “not at liberty to leave it to be ascertained by judicial interpretation.”²⁰⁰ Justice Story would not play along. Writing for the Court, he stated that Webster took “too narrow of a view of the language of the constitution” in giving Congress the power “to define and punish piracies.”²⁰¹ Congress was as free to use “a term of a known and determinate meaning” as it was to use “an express enumeration of all the particulars included in that term.”²⁰² The Court knew

194. See Act of Feb. 24, 1807, ch. 20, 2 Stat. 423.

195. See Act of May 1, 1810, ch. 39, 2 Stat. 605; Act of Mar. 1, 1809, ch. 24, 2 Stat. 528.

196. Act of May 1, 1810, ch. 39, § 4, 2 Stat. 605, 606.

197. *Aurora v. United States*, 11 U.S. (7 Cranch) 382, 386 (1813).

198. *Id.* at 388.

199. Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14; Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112, 113–14.

200. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 156–57 (1820).

201. *Id.* at 158.

202. *Id.* at 159.

what Congress meant by piracy. It had not delegated an amorphous legislative power to the courts.²⁰³

Five years later, the Court turned back two final nondelegation challenges. First was an objection that the Judiciary Act of 1789 had unconstitutionally delegated legislative power to the states.²⁰⁴ The Act required that “the laws of the several states,” except where otherwise provided, “shall be regarded as rules of decision in trials at common law, in the courts of the United States.”²⁰⁵ Chief Justice Marshall was unconcerned. Congress could not compel state officers to take any actions,²⁰⁶ but “Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself,” and piggybacking on the judicial procedures the states had already put in operation was only prudent.²⁰⁷ Likewise, Congress could delegate the details of the judicial process to the judges themselves. Such judicial processes were merely “ministerial,” not truly “legislative,” and Congress could delegate such matters as it thought “expedient.”²⁰⁸ The Court was not going to tie up the legislative process by requiring Congress to specify all the details of federal policy. Congress could make use of the flexibility and expertise of others, from presidents to judges to state legislatures, to better accomplish national goals. The Marshall Court repeatedly considered nondelegation challenges to Federalist and Jeffersonian statutes, but consistently supported the decisions that Congress had made about how to use its legislative power.

The Court also upheld congressional grants of authority to the federal Judiciary vis-à-vis the states against constitutional challenge. Most famously and significantly, the Court validated the constitutionality of Section 25 of the Judiciary Act of 1789,²⁰⁹ which allowed the U.S. Supreme Court to hear appeals from the state courts. Especially as radicals in Virginia began to question the constitutionality of this basic feature of the judicial architecture that the First Congress had put in place, the Court sought both to reaffirm congressional authority to empower the Court in this way and to silence complaints about the system Congress had created.²¹⁰ Justice Story took the first crack at the issue in *Martin v. Hunter's Lessee*.²¹¹ In insisting that the Court could exercise appellate jurisdiction over Judge Spencer Roane's Virginia Court of Appeals, Story emphasized that “there is nothing in the constitution which restrains or limits”

203. *Id.*

204. *See* *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825).

205. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92.

206. *Wayman*, 23 U.S. (10 Wheat.) at 40–41.

207. *Id.* at 43.

208. *Bank of the U.S. v. Halstead*, 23 U.S. (10 Wheat.) 51, 61 (1825).

209. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73.

210. *See* Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 15–23 (1913) (describing renewed criticism of the constitutionality of Section 25).

211. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

the power of Congress to designate the federal appellate jurisdiction.²¹² “[I]t is plain that the framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction,”²¹³ and the Supreme Court could readily review the actions of the state judicial tribunals when exercising that federal jurisdiction.²¹⁴ John Marshall had his turn in *Cohens v. Virginia*,²¹⁵ when the Court again chided the Virginia Court of Appeals. Marshall looked on with disbelief at arguments that suggested,

that the constitution of the United States has provided no tribunal for the final construction of itself . . . but that this power may be exercised in the last resort by the Courts of every State in the Union. That the constitution . . . may receive as many constructions as there are States; and that this is not a mischief, or, if a mischief, is irremediable.²¹⁶

But “[n]o government ought to be so defective in its organization, as not to contain within itself the means of securing the execution of its own laws,” and

[t]here is certainly nothing in the circumstances under which our constitution was formed; nothing in the history of the times, which would justify the opinion that the confidence reposed in the States was so implicit as to leave in them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the Union.²¹⁷

Chief Justice Roger Taney would come to the same conclusion in *Ableman v. Booth*.²¹⁸ Although Judge Roane was apoplectic at the Supreme Court’s treatment of the state courts through its Section 25 jurisdiction and continued to argue that Section 25 was unconstitutional, mainstream Jeffersonians in the national government were not convinced. There was a simple expedient available to the states’ rights advocates, but proposals for legislative repeal of this statutory provision during the Jeffersonian and Jacksonian era went nowhere.²¹⁹

In addition to recognizing federal judicial authority *over* the states, the Court also recognized a power in Congress to extend that authority *into* the states. The Marshall Court upheld the authority of Congress to confer federal jurisdiction over cases involving the Bank of the United States.²²⁰ The judicial power was

212. *Id.* at 338.

213. *Id.* at 340.

214. *See id.*

215. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

216. *Id.* at 377.

217. *Id.* at 387–88.

218. *See Ableman v. Booth*, 62 U.S. (21 How.) 506, 516–18 (1858).

219. TIMOTHY S. HUEBNER, *THE SOUTHERN JUDICIAL TRADITION* 32–39 (1999) (discussing Roane’s attack on Section 25 and drift out of the national mainstream); Warren, *supra* note 210, at 25–30 (chronicling defeat of legislative proposals to repeal Section 25).

220. *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 823, 828 (1824).

“co-extensive” with the legislative power, and Congress could direct that its instruments be able to sue and be sued in federal courts.²²¹ Moreover, it was sufficient if the Bank as a party always created cases “under” federal law, even if the substance of the dispute raised other legal issues that were not particularly federal.²²²

Three years after handing a defeat to the states’ right champion Judge Roane in *Martin*, the Court returned to the question of enumerated powers in *McCulloch*.²²³ The case is sufficiently familiar that little time will be spent on it here. When Maryland’s tax on the Bank of the United States came under constitutional challenge, Marshall got his chance to elaborate on themes that he had first developed in *Fisher* but in a much more politically consequential case.²²⁴ The Court struck down Maryland’s tax as an unconstitutional interference with an instrument of federal policy,²²⁵ while upholding the congressional authority to charter a bank as an appropriate means for fulfilling the constitutional responsibilities of the federal government.²²⁶

Three points should be noted about *McCulloch*. The first is that *McCulloch* was an emphatic assertion of judicial authority to resolve contested constitutional issues. Although in the post-New Deal context, *McCulloch* is often taken to stand for “judicial deference to the plausible interpretive acts of Congress,”²²⁷ Marshall was insistent that the range of legislative policy discretion was to be exercised within constitutional bounds that were to be established and enforced by the Court.²²⁸ Given the contentious interests involved and the history of tensions, Marshall asserted, if the Bank issue were to be decided peacefully, “by this tribunal alone can the decision be made. On the supreme court of the United States has the constitution of our country devolved this important duty.”²²⁹ Politicians should debate the best method for financing the government, but the Court was the best and paramount forum for determining the constitutionality of what Congress had done.²³⁰

Second, the Court was able to make such an assertion of interpretive authority because it could count on the support of political leaders. By 1819, the

221. *Id.* at 808, 828.

222. *Id.* at 823.

223. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

224. See generally RICHARD E. ELLIS, *AGGRESSIVE NATIONALISM* (2007); MARK R. KILLENBECK, *MCCULLOCH V. MARYLAND: SECURING A NATION* (2006).

225. *McCulloch*, 17 U.S. (4 Wheat.) at 436.

226. *Id.* at 424.

227. Steven A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115, 118 (1999).

228. On the limits of congressional authority laid out in *McCulloch*, see A.I.L. Campbell, “It is a Constitution We Are Expounding”: Chief Justice Marshall and the “Necessary and Proper” Clause, 12 J. LEGAL HIST. 190 (1991); Howard Gillman, *The Struggle over Marshall and the Politics of Constitutional History*, 47 POL. RES. Q. 877 (1994).

229. *McCulloch*, 17 U.S. (4 Wheat.) at 401.

230. On this theme, see Keith E. Whittington, *The Road Not Taken: Dred Scott, Judicial Authority, and Political Questions*, 63 J. POL. 365 (2001).

power of Congress to charter a Bank was no longer controversial. Madison and Jefferson had sharply challenged the constitutionality of the charter of the first Bank in 1791,²³¹ and the Republican Party in the 1790s took the Bank to be a prime example of the Federalists' willingness to ignore constitutional restraints. But the War of 1812 had persuaded many Jeffersonians of the necessity of a bank, at least within that immediate context, and Madison as President signed the charter for the Second Bank.²³² Not only had the circumstances changed, rendering a Bank "necessary and proper" where it might once have been merely expedient, but, Madison argued, the Bank controversy had been settled by precedent.²³³ Over the course of nearly a quarter century, the "general will of the nation" had shown its acceptance of the validity of the Bank.²³⁴ The Jeffersonian Attorney General William Wirt defended the constitutionality of the Bank in the *McCulloch* case during the Monroe Administration. The behavior of the Bank branches in the states was locally controversial, but, in 1819, the charge that the power to incorporate the Bank was beyond the constitutional competence of Congress was the territory of extremists and a fallback position for the states trying to defend their anti-Bank policies. In upholding the congressional power to charter a Bank, the Marshall Court was simply endorsing the reigning political consensus.²³⁵ Moreover, Maryland was well chosen as the test case for the Court for there was relatively little hostility to the Bank in that state and acquiescence to a judicial decision was assured.²³⁶ Marshall exploited the opportunity to reemphasize his views on the Necessary and Proper Clause and the broad scope of national authority, while giving short shrift to some of the more refined issues that were actually of concern to Maryland.²³⁷

Third, Marshall's opinion explaining his view of why the Bank was constitutional was immediately controversial with the Jeffersonians, and the Bank itself would become controversial again when Andrew Jackson reopened the issue a decade later. As a result, the *McCulloch* decision went with the political grain and received broad support, but the *McCulloch* opinion offering a broad interpretation of the Necessary and Proper Clause fell on deaf ears and had little influence in the pre-Civil War period. Jefferson, Madison and Roane all complained that Marshall's opinion had gone far beyond what was necessary to uphold the Bank and had "stricken off" the constitutional limits on Congress.²³⁸ The Jeffersonians turned to "sound arguments" directed "to Congress & to their

231. See ELLIS, *supra* note 169, at 34–35.

232. *Id.* at 41.

233. James Madison, *Veto Message, January 30, 1815*, in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 540, 540 (James D. Richardson ed., New York, Bureau of Nat'l Literature, Inc. 1897).

234. *Id.*

235. See Graber, *Federalist or Friends of Adams*, *supra* note 10, at 256.

236. ELLIS, *supra* note 224, at 67–74.

237. See *id.* at 100–01.

238. Whittington, *supra* note 230, at 373–74.

Constituents” to bury *McCulloch*.²³⁹ Both the Jeffersonians and the Jacksonians elaborated a narrower reading of the Necessary and Proper Clause as constitutional orthodoxy.²⁴⁰ In political practice, *McCulloch* was a dead letter. Once a majority of Jacksonian Justices joined the Court, it was widely believed that all that was needed for the Court to formally reverse *McCulloch* was an appropriate case.²⁴¹ With strict constructionists controlling the flow of legislation through Congress, however, such a case never arose.²⁴² As a result, *McCulloch* remained on the books to be cited and revived by nationalists after the Civil War.²⁴³

The Taney Court was likely hostile to the broad view of enumerated powers sketched out by Marshall, but only one minor case raising such issues came before the later Court, and the necessity and propriety of the federal law in that case could not have been more straightforward.²⁴⁴ The states’ rights devotee Justice Peter Daniel wrote the unanimous opinion for the Taney Court upholding federal power in *United States v. Marigold*.²⁴⁵ Peter Marigold had been convicted of the federal crime of passing counterfeit coins “brought into the United States, from a foreign place.”²⁴⁶ At least since the passage of the Jeffersonian embargo, Daniel thought the question of whether the federal government could prohibit the importation of certain goods as part of its power to regulate international trade had been closed.²⁴⁷ Moreover, the power to ban counterfeit coins was a necessary incident of the congressional power to coin money, a power that “would be useless” if Congress could not protect what it had created.²⁴⁸ *Marigold* gave no occasion to reconsider *McCulloch*, and Daniel somewhat grudgingly admitted that the Court could not “withhold” from Congress a power “necessary to the execution of expressly granted powers, and to the fulfillment of clear and well-defined duties.”²⁴⁹

As in *McCulloch*, the Court was sometimes called upon to uphold the constitutional validity of federal action as part of its inquiry into the constitutionality of a conflicting state action. *McCulloch* was the less common instance of such a conflict, which more routinely occurred in the context of federal authority to regulate commerce. Thus, in overturning New York’s steamship monopoly in *Gibbons v. Ogden*, the Court also had to consider briefly whether federal authority to license ships could extend so far as the navigation of interstate waterways.²⁵⁰ The Constitution “contains an enumeration of powers expressly

239. 9 THE WRITINGS OF JAMES MADISON 59 (Gaillard Hunt ed., 1910).

240. See Whittington, *supra* note 230, at 372–73, 375.

241. Cf. Graber, *Jacksonian Origins*, *supra* note 10.

242. *Id.* at 26–28.

243. *Id.* at 28.

244. On the hostility of the Taney Court Justices to *McCulloch*, see *id.* at 26–27.

245. *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850).

246. *Id.* at 560.

247. *Id.* at 566–67.

248. *Id.* at 567.

249. *Id.* at 568.

250. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

granted by the people to their government. It has been said, that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule?"²⁵¹ Marshall thought not, and likewise thought it obvious that the congressional power to regulate interstate commerce "comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States, or with the Indian tribes.'"²⁵² Federal licenses, as applied to the navigation of this waterway, were constitutional.²⁵³ Having established that, Justice Story could likewise find for the Court that Congress could regulate the salvage of shipwrecks above the high water line, so as to effectuate its power to protect commercial waterways and avoid factual entanglements over whether particular items were scavenged from above or below the high water line.²⁵⁴ This larger provision likewise provided support, bolstered by federal responsibility for foreign affairs, for the exclusive authority of the federal government to regulate trade with Indian tribes.²⁵⁵

In the year between *McCulloch* and *Cohens*, the Court was asked to review two unrelated statutes, the newly enacted anti-piracy law already noted and a somewhat older tax on the residents of the District of Columbia.²⁵⁶ In *Loughborough v. Blake*, the Marshall Court considered whether "Congress [has] a right to impose a direct tax on the District of Columbia?"²⁵⁷ The case raised questions about both the constitutional restriction on direct taxes (that they be apportioned "among the several states" by population) and the "great principle which was asserted in our revolution, that representation is inseparable from taxation."²⁵⁸ Marshall dismissed the first objection with the assertion that direct taxes could be imposed elsewhere than in the states so long as they adhered to the principle of proportionality.²⁵⁹ More difficult was the second objection, but Marshall escaped it as well. The problem of taxation without representation during the colonial period derived from the lack of "common feelings" between Britain and the North American colonies, but it was "too obvious not to present itself to the minds of all" that those who chose to live in the District of Columbia had "voluntarily relinquished the right of representation, and ha[d] adopted the whole body of Congress for its legitimate government."²⁶⁰ A legislative representative for the District "might be more congenial to the spirit of our institutions,"

251. *Id.* at 187.

252. *Id.* at 197. In acting on the case, the Court was following the invitation of the Monroe Administration. Whittington, "Interpose Your Friendly Hand," *supra* note 8, at 587.

253. *Gibbons*, 22 U.S. (9 Wheat.) at 197.

254. *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 78 (1838).

255. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 558–59 (1832).

256. On the anti-piracy statute, see *supra* notes 199–203 and accompanying text.

257. *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 318 (1820).

258. *Id.* at 319–20, 324.

259. *Id.* at 323.

260. *Id.* at 324.

but its absence did not exempt its inhabitants “from equal taxation” by the “ordinary revenue system.”²⁶¹

In 1829, the Court heard the first of a series of cases involving problems associated with land grants and raising issues for the constitutional authority of Congress.²⁶² The complexity of sorting out land grants in the early nineteenth century occupied a substantial part of the Court’s agenda during the late Marshall and early Taney periods. When the cases raised questions about constitutional limitations on Congress, they most often implicated issues of property rights. In them, the principles the Court had enunciated in *Fletcher v. Peck*, in which the Court had stretched the contracts clause to prevent Georgia from retracting vested property rights, were given further application against the federal government.²⁶³

261. *Id.* at 324–25.

262. *See* Reynolds v. M^r Arthur, 27 U.S. (2 Pet.) 417 (1829).

263. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 122 (1810); *see also* Graber, *Naked Land Transfers*, *supra* note 25. Graber argues that the Court frequently voided land grants on constitutional grounds when Congress seemed to give away the same parcel of land twice but simply adopted rhetorical devices to hide what the Court was doing. Graber, *supra* note 15, at 189, 205 & n.125. The situation seems more complicated. As Graber observes, there were many statutory grants of land that were voided by the courts. *See id.* at 205 & n.125. Indeed, the Judiciary had the task of determining vested property rights in the face of constitutional objections arising from, for example, the passing of retrospective legislation that took away or transferred such rights. *See* 3 Op. Att’y Gen. 427, 431 (1839); THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 323–24 (1880); THEODORE SEDGWICK, *A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW* 451–52 (New York, John S. Voorhies 1857); WILLIAM P. WADE, *A TREATISE ON THE OPERATION AND CONSTRUCTION OF RETROACTIVE LAWS* 41–42 (1880); FRANCIS WHARTON, *COMMENTARIES ON LAW* 648 (Philadelphia, Kay & Brother 1884). But, there were other options. Statutory interpretation was one approach. When Congress authorized various kinds of sales over wide areas of land with various reservations in several statutes, potential conflicts over land patents could reasonably be resolved without appeal to constitutional principles. *See* Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 517–18 (1839); Soulard v. Clark, 19 Mo. 570, 582 (1854); 11 Op. Att’y Gen. 490, 495–96 (1866). When Congress confirmed land claims, it acted in something like a judicial capacity in evaluating adverse claimants. If it issued multiple confirmations for the same tract of land, the same rules that courts used to evaluate other cases of conflicting, contested, or incomplete titles to property could be applied to sort out the documents produced by Congress. Chouteau v. Eckhart, 43 U.S. (2 How.) 344, 375–76 (1844) (“[T]he federal government, being unable to confirm the same land to two adverse claimants, must then, to some extent, determine between the conflicting titles. Each claimant depends upon the justice or comity of the present government; and when the government exercises its powers and confirms the land to one, it must necessarily be considered in a court of law the paramount and better title.”); MacKay v. Dillon, 7 Mo. 7, 13 (1841) (“[W]hen the government exercises its powers, and confirms the land to one, it must necessarily be to the extinction of any mere inchoate title in the other. The oldest confirmation, like the oldest patent, must prevail . . .”). Courts and commentators often evaluated conflicting land patents not on constitutional principles constraining sovereigns but on standard legal and equitable principles defining when property had been conveyed and to whom. *See* Polk’s Lessee v. Wendell, 18 U.S. (5 Wheat.) 293, 308 (1820) (“On general principles, it is incontestable, that a grantee can convey on more than he possesses.”); Polk’s Lessee v. Wendal, 13 U.S. (9 Cranch) 87, 99 (1815) (“[T]here are cases in which a grant is absolutely void; as where the state has no title to the thing granted; or where the officer had no authority to issue the grant. In such cases, the validity of the grant is necessarily exammable [sic] at law.”); Groom v. Hill, 9 Mo. 323, 326 (1845) (“The United States in this particular, is like any other land proprietor; and if A. give a deed for a piece of land to B. to-day, and to-morrow convey the same land to C. it would hardly be contended in an action of ejectment, brought by B. against C., that A.’s action in granting the land to C.

The first such case in which the Court invalidated a federal grant while invoking constitutional concerns arose from the earliest land grants.²⁶⁴ The central concern was whether Congress could legislatively determine the meaning of a territorial cession so as to affect vested property rights. Duncan M'Arthur claimed a military land warrant from the state of Virginia in recognition of his service during the Revolutionary War.²⁶⁵ The patent was issued in 1812 for land in the state of Ohio but that had been reserved for that purpose by Virginia when it had ceded the Northwest Territory to the federal government in 1784.²⁶⁶ John Reynolds had purchased an overlapping parcel of land that had been originally sold by the federal government in 1813.²⁶⁷ The problem arose in part because the United States and the Virginia governments disagreed about the precise boundary of the state's reserved lands,²⁶⁸ and the federal government had once sold the same parcel of land a decade earlier but the original purchaser had defaulted on that contract.²⁶⁹ M'Arthur sued in the Ohio courts to have Reynolds ejected from the land, and the state courts had agreed, rejecting Reynolds' claim under federal law.²⁷⁰ On appeal, the U.S. Supreme Court affirmed the judgment of the state court.²⁷¹ The most direct constitutional issue arose from an 1818 statute by which Congress had declared that an 1802 surveyor's line would be "considered and held to be" the true boundary of the Virginia military reserve "until otherwise directed by law," despite the fact that Virginia had disputed this line and earlier acts of Congress on the subject had

could at all invalidate the title of B."); *Gurno v. A. & N. Janis*, 6 Mo. 330, 335 (1840) ("[T]he rule at law is the same as that in equity, which is, that he who is first in point of time, is best in right."); 3 Op. Att'y Gen. 720 (1841); 3 Op. Att'y Gen. 697, 699 (1841) ("The sale was to be treated as null and void, as it clearly was on general principles, because there was nothing to be sold—no subject-matter of a contract of sale . . ."). Some suggested that British legal practice might be adequate to cover such cases. 1 Op. Att'y Gen. 159 (1807) ("[U]se and object of a patent is to complete and render perfect a title to lands, being the formal instrument established for that purpose. But if the title of the United States to the same lands has been parted with by patent . . . it must be extremely obvious that the patent cannot operate."); 1 Op. Att'y Gen. 300 (1819) (noting that the "the holder of a location may institute a suit in chancery for the purpose of rescinding a patent which has been improperly granted to another"); *Mancius v. Lawton*, 10 Johns. 23 (N.Y. Sup. Ct. 1813) (noting the "settled English course" that "[l]etters patent . . . can only be avoided in chancery, by a writ of *scire facias* sued out on the part of the government, or by some individual prosecuting in its name"); 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 260 ("Where the crown has unadvisedly granted anything by letters patent, which ought not to be granted . . . the remedy to repeal the patent is by writ of *scire facias* in chancery."). If the second grant was understood as an attempted act of annulment of an earlier grant, then constitutional limits on retroactive legislation might certainly apply to void the second grant. If the second grant was understood to be a mistake or a simple attempt to sell property to which the seller did not have a valid title, then nonconstitutional principles were adequate to cover the case and void the second grant.

264. *Reynolds*, 27 U.S. (2 Pet.) at 417.

265. *Id.* at 417.

266. *Id.* at 417–18.

267. *Id.* at 417.

268. *Id.* at 418.

269. *Id.* at 417.

270. *Id.* at 424.

271. *Id.* at 441.

left the issue somewhat open.²⁷² The land in question was on the federal side of that disputed boundary, and Reynolds argued that the law had the effect of voiding Virginia's putative sale of the land.²⁷³ Attorney General William Wirt intervened on the side of Reynolds, but was indisposed at the time of the oral arguments and unable to participate.²⁷⁴

The Court refused to give the 1818 law the "retrospective operation"²⁷⁵ desired by Reynolds and the federal government. To do so would be to allow Congress "to look back to titles already acquired" and to unilaterally "declare by a law" what the terms of the Virginia cession meant.²⁷⁶ Such a retroactive law would "adjudicate in the form of legislation. It would be the exercise of a judicial, not of a legislative power."²⁷⁷ If taken as a legislative act, it would deny the vested property rights of M'Arthur. If taken as a judicial act, it would encroach on the judicial power to interpret the law. Neither was constitutionally permissible, and so the act had to be read as prospective only and irrelevant for Reynolds. The Court also noted that "[t]here is undoubtedly much force in the argument suggested at the bar" that Congress had neither retrospective nor prospective power over the land in question once Ohio had been admitted to statehood, but "it is unnecessary to pursue this inquiry" because Reynolds' claim had already been defeated on the retrospective operations grounds.²⁷⁸ That federalism issue would become central to future cases.²⁷⁹ The case obviously raised concerns on separation-of-powers, due process, and federalism grounds, as well as property grounds, but as we shall see, it is similar to other cases that relate to how Congress could deal with property that from a judicial perspective had vested in an individual. Despite the government's effort to give retrospective effect to the legislative determination of property holdings, *Reynolds* foreshadowed the judicial determination in numerous courts that such laws could not constitutionally extend to interfere with vested rights.²⁸⁰

A second case, decided four years later, involved a lawsuit arising from Spanish grants in the Florida territory.²⁸¹ Here, the concern was with the procedural protections that Congress had put in place for recognizing valid titles in land.²⁸² Don Juan Percheman, a Spanish military officer, claimed two thousand acres in Florida under an 1815 grant from the Spanish governor, four years

272. Act of April 11, 1818, ch. 67, § 3, 3 Stat. 423, 424.

273. *Reynolds*, 27 U.S. (2 Pet.) at 419.

274. *Id.* at 423.

275. *Id.* at 435.

276. *Id.*

277. *Id.*

278. *Id.* at 435–36.

279. See *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845); *New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836).

280. WILLIAM G. MYER, *VESTED RIGHTS* 18 (St. Louis, Gilbert Book Co. 1891).

281. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 53 (1833).

282. *Id.* at 56.

before the treaty transferring the territory to the United States.²⁸³ The treaty included a provision protecting the private titles to lands in the ceded territories, but Chief Justice Marshall disclaimed any reliance on that provision because the “whole civilized world” knew that “cession of a territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes only what belongs to him.”²⁸⁴ The difficulty was in determining who owned what property in the ceded territory. Following the terms of the treaty, the federal government set up a process (over time, several processes) to “ratif[y] and confirm[]” the grants that had been issued under Spanish authority.²⁸⁵ An 1822 statute “for ascertaining claims and titles to land within the territory of Florida” supplemented and extended several earlier statutes and provided for a board of commissioners to examine land claims and recommend to Congress those that should be ratified as valid.²⁸⁶ Congress established a small window for filing claims with the commissioners, and any claims that missed the deadline would “be deemed and held to be void and of none effect.”²⁸⁷ By 1830, Congress had confirmed all claims that had been approved by the commissioners under the 1822 and subsequent acts,²⁸⁸ but had also declared that the courts only had jurisdiction to hear disputes over the conclusions of the commissioners in cases involving over 3500 acres, and only then for a limited time before being “forever barred” from any action “in any court whatever.”²⁸⁹ The congressional preference when absorbing such foreign territories, rarely realized in practice, was to reach a final determination on the legal claims of existing titleholders as quickly as possible in order to keep squatters at bay and clear the way for a more regular system of land sales and settlement.²⁹⁰ Refusing fraudulent claims was a higher priority than validating legitimate claims, and the cumbersome work of the commissioners led many of the original claimants to sell out to speculators, who in turn lobbied for more generous terms from Congress.²⁹¹ Percheman’s claim had been rejected by the commissioners, and it did not

283. *Id.* at 51, 56–57.

284. *Id.* at 87. W.W. Willoughby later observed that passages like that quoted above in *Percheman* were,

strong language, but there is no suggestion that it does not lie within the legal power of the new government (subject, of course, to the limitations of its own constitutional laws) to act as it might seem fit with regard to the private as well as to the public rights of the inhabitants of annexed territories.

WESTEL W. WILLOUGHBY, *THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW* 333 (1924). It was the limitation of constitutional law that Marshall was determined to impose.

285. *Percheman*, 32 U.S. at 69.

286. Act of May 8, 1822, ch. 129, §§ 1, 4, 3 Stat. 709, 717.

287. *Id.*

288. See Act of May 23, 1823, ch. 71, § 1, 4 Stat. 286, 286–87.

289. Act of May 26, 1830, ch. 106, §§ 1, 4, 4 Stat. 405, 405–06.

290. PAYSON JACKSON TREAT, *THE NATIONAL LAND SYSTEM, 1785–1820*, at 228–29 (William S. Hein & Co. 2003) (1910).

291. Harry L. Coles, Jr., *Applicability of the Public Land System to Louisiana*, 43 MISS. VALLEY HIST. REV. 39, 51–53 (1956).

amount to enough acres to qualify for a judicial hearing under the law.²⁹² Nonetheless, the trial court had accepted the case and rejected the federal government's claim to the land.²⁹³

Before the Supreme Court, Percheman's counsel emphasized that his right to the land had vested long before the treaty transferring the territory, and, thus, Congress was not "competent" to authorize "any tribunal under its authority to invalidate such a title."²⁹⁴ The congressional responsibility was to respect Percheman's title to the land, not question it and certainly not nullify it. Attorney General Roger Taney claimed the land in question for the United States, emphasizing the lengths to which Congress had gone over the prior eleven years to give a "final settlement of land claims in Florida"²⁹⁵ and that the only body appointed by Congress to arbitrate Percheman's claim had heard and rejected it.²⁹⁶ The Marshall Court would have none of it. Despite the apparent language of the treaty and the subsequent acts of Congress implementing it, the Court could not accept that "the security to private property"²⁹⁷ was contingent on "some future legislative act."²⁹⁸ Vested property rights could not constitutionally be left to the discretion of Congress, and that fundamental principle "must enter into our construction of the acts of congress on the subject."²⁹⁹ With that principle in view, "[i]t is impossible to suppose that congress intended to forfeit real titles" for failure of parties to comply with the ramshackle procedures established by these statutes.³⁰⁰ "Is it possible that congress could design to submit the validity of titles, which were 'valid under the Spanish government, or by the law of nations,' to the determinations of these commissioners?"³⁰¹ Perish the thought. "The commissioners do not appear to have proceeded with open doors, deriving aid from the argument of counsel, as is the usage of a judicial tribunal,"³⁰² and their mode of appointment and the procedures for filing claims militated against taking them to be "a court exercising judicial power and deciding finally on titles."³⁰³ The federal government could not divest Percheman of his property in such a manner, and the Court affirmed the ruling of the trial court and upheld Percheman's claim against the government.

Despite Percheman's success, the government won more often than it lost such cases. Two cases mirrored the land claims disputes just reviewed. In 1829,

292. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 57 (1833).

293. *Id.* at 59.

294. *Id.* at 63.

295. Act of May 26, 1830, ch. 106, 4 Stat. 405.

296. *Percheman*, 32 U.S. (7 Pet.) at 60.

297. *Id.* at 88.

298. *Id.* at 89.

299. *Id.* at 89.

300. *Id.* at 90.

301. *Id.* at 90, 91.

302. *Id.* at 92.

303. *Id.* at 90; see also George C. Whatley & Sylvia Cook, *The East Florida Land Commission: A Study in Frustration*, 50 FLA. HIST. Q. 39, 41-46 (1971) (describing the problems with the land commissioner system).

Daniel Webster brought a case to the Court on behalf of plaintiffs, whose title to land just east of the Mississippi River derived from a Spanish grant made in 1804, seeking to eject the defendant who was actually in possession of the land.³⁰⁴ The defendant argued that the United States, not Spain, was in lawful possession of that territory after the Louisiana Purchase, and, thus, the act of the Spanish governor could create no legal right that the United States was obliged to respect.³⁰⁵ The act forming the Louisiana territory in 1804 had asserted that any grants made by Spain in the disputed territory “under whatsoever authority transacted, or pretended” were “from the beginning, null, void, and of no effect in law or equity.”³⁰⁶ After the United States acquired the Florida territory (and “West Florida”) from Spain, it continued to assert this view and argued that it was consistent with the language of the Florida treaty.³⁰⁷ In this instance, the Court was unprepared to defend vested property rights against the federal government.

In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. . . . The judiciary is not the department of government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, *according to those principles which the political departments of the nation have established*. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous. . . . We think then, however individual judges might construe the treaty . . . it is the province of the Court to conform its decisions to the will of the legislature, if that will has been clearly expressed.³⁰⁸

The treaty did not say that “those grants are hereby confirmed”; it said merely that valid Spanish grants would be confirmed and ratified. Congress had created a procedure for doing so: the land commissions that the Court would encounter again in *United States v. Percheman*. In *Foster*, the Court deferred to those commissions. The “Court is not at liberty to disregard the existing laws on the subject,”³⁰⁹ and the plaintiffs had not had their claims confirmed by the commissions.³¹⁰ “Congress has reserved to itself the supervision of the titles,” and it had not given a blanket jurisdiction to the federal courts to vindicate such

304. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 254, 256.

305. *Id.* at 255. The Court had previously taken the opportunity in a case arriving by appeal from the territorial courts in Florida to announce, a quarter century after the Louisiana Purchase that, yes, the “government possesses the power of acquiring territory.” *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828).

306. Act of Mar. 26, 1804, ch. 38, § 14, 2 Stat. 283, 288.

307. *Foster*, 27 U.S. (2 Pet.) at 310.

308. *Id.* at 253, 307 (emphasis added).

309. *Id.* at 315.

310. *Id.* at 290.

titles.³¹¹

One might have thought that the result in *Foster* would have been decisive in *Percheman* four years later, but by the time of the latter case, the Court claimed to have discovered that the Spanish-language version of the treaty provided a different perspective on the agreement, that the Spanish titles “*shall remain ratified and confirmed.*”³¹² This reading was consistent with the “usages of the civilized world,” and it would now “enter into our construction of the acts of congress on the subject,” leading to a different result.³¹³ Percheman’s attorneys put before the Court not only the Spanish language of the treaty but also an extensive record of the negotiations behind these provisions, which suggested that Secretary of State John Quincy Adams had meant to exclude only a very small set of Spanish grants from American recognition.³¹⁴ The *Foster* litigation involved land next to the Mississippi and of critical concern to the United States from the Louisiana Purchase onward. By contrast, Percheman’s land was deep in the Florida territory, and if the Jackson Administration could successfully oust him, then few Spanish titles would be secure from political influence. Normal constitutional protections for property rights would come into effect there.³¹⁵

At the same time that the Court was beginning to struggle with the constitutional protection of vested property rights in the land grant cases, it also heard cases involving the application of federal statutes that the Supreme Court found interfered with the constitutional right to a jury trial. The first arose out of a congressional act importing the civil procedures of the Louisiana state courts into the federal courts.³¹⁶ The Louisiana legal system, with its civil law inheritance, was unique within the United States, including a statutory provision that allowed appellate courts to review the factual record heard in the trial courts.³¹⁷ Such a proceeding would not be allowed “in any court of the United States, sitting in any other state in the union than Louisiana,” but the federal statute seemed to require it in cases arising out of Louisiana.³¹⁸ The Court balked. “The trial by jury is justly dear to the American people,” and the Seventh Amendment to the Constitution required it in all federal suits “which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. . . . The only modes known to the common law to re-examine such facts, are the granting of a new trial”³¹⁹ In dissent, Justice McLean argued that in Louisiana, “the principles of the common law are not

311. *Id.* at 316.

312. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88 (1833) (emphasis added).

313. *Id.* at 89.

314. *Id.* at 73–74.

315. As Chief Justice, Roger Taney endorsed this reconciliation of the two cases. *Garcia v. Lee*, 37 U.S. (12 Pet.) 511, 519–22 (1838).

316. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830).

317. *Id.* at 441.

318. *Id.* at 446.

319. *Id.* at 446–48.

recognized They have a system peculiar to themselves.”³²⁰ Congress was appropriately adapting “the principles of government to the moral and social condition of the governed” by directing the federal courts to follow the local law in this matter.³²¹ In effect, “[t]his is not a suit at common law, and therefore does not come strictly within the provision of [the Seventh Amendment].”³²² Justice Story, for the majority, disagreed. Directing the federal courts to depart from common law forms in civil suits arising from Louisiana would “involve a violation, however unintentional, of the constitution.”³²³ Congress did not have the authority to “create so important an alteration in the laws of the United States, securing the trial by jury,” and as a result “it would not be competent for this court to reverse the judgment for any error in the verdict of the jury at the trial.”³²⁴ The courts should proceed as if there were an implicit exception in the federal statute for Louisiana state proceedings that were at odds with the requirements of the Constitution.³²⁵

Four years later, the Court took the same approach to a different statutory requirement.³²⁶ Under the Duty Act of 1799,³²⁷ it was “the duty of the court” to grant judgment on suits filed by the government to collect unpaid custom duties from a posted bond.³²⁸ If the defendant were to then swear that there was an error in the calculation of the duties owed, then “if the court be satisfied, that a continuance until the next succeeding term, is necessary for the attainment of justice, and not otherwise, a continuance may be granted until the next succeeding term and no longer.”³²⁹ When the U.S. Attorney brought suit against Anson Phelps and his associates to collect unpaid duties of \$1,678.70, the defendants objected that their goods had been misclassified by the customs officers and that they should owe only \$331.07.³³⁰ After receiving a continuance until the next term, the defendants admitted that they still were not prepared to prove their case because they needed the testimony of a witness in Liverpool and moved for another continuance.³³¹ The United States objected, and, as the Attorney General argued to the Supreme Court, the “imperative command of the law”

320. *Id.* at 450 (McLean, J., dissenting).

321. *Id.* at 451–52.

322. *Id.* at 454.

323. *Id.* at 436 (majority opinion).

324. *Id.* at 448–49.

325. *Id.* As one prominent commentator readily summarized, “Congress cannot constitutionally confer upon the Supreme Court authority to grant a new trial by a re-examination of the facts once tried by a jury, except to redress errors of law.” 1 GEORGE TICKNOR CURTIS, COMMENTARIES ON THE JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES 132 (Philadelphia, T. & J.W. Johnson 1854). The statute extending federal jurisdiction over Louisiana had incautiously done so, and to that extent was defective.

326. *See* *United States v. Phelps*, 33 U.S. (8 Pet.) 700 (1834).

327. Act of Mar. 2, 1799, ch. 22, § 65, 1 Stat. 627.

328. *Id.* at 677.

329. *Id.*

330. *Phelps*, 33 U.S. (8 Pet.) at 700–01.

331. *Id.* at 701.

required the court to enter a judgment for the government at that point in the proceedings (the trial court had granted the defendants' motion).³³² Although Chief Justice Marshall recognized, in a brief opinion for the Court, that the law was designed to secure "the prompt collection of duties," an "opportunity to obtain evidence . . . according to the circumstances of the case, must be given."³³³ A reported interjection of Justice McLean, and the arguments of counsel, made the basis for that conclusion more apparent: "[C]ongress had exercised a power beyond the authority given by the constitution. It would be depriving the party of his right to a trial by jury."³³⁴ Again, a constitutionally necessary exception had to be read into the federal statute.

The Court upheld objections to congressional actions affecting the remedies available to parties in litigation. When Congress supplemented the powers of judges in the territorial courts of Arkansas, it had the effect of opening new avenues of appeal for some litigants.³³⁵ When it was objected that the retroactive application of the law to affect pre-existing cases was effectively an exercise of the judicial power by Congress, overturning settled judgments and destabilizing vested rights, the Court disagreed.³³⁶ The law provided "new remedies" but did not otherwise "affect the right" of parties in any existing case.³³⁷ It "organizes a tribunal with powers to entertain judicial proceedings," but it was not itself an exercise of judicial power.³³⁸ Such effects were commonplace and unobjectionable.³³⁹

The Jeffersonian era saw a wider array of cases involving challenges to the constitutionality of federal laws. The Court was repeatedly called upon to consider the legitimate scope of congressional authority and validity of applications of the law, and it regularly evaluated the limits of congressional power and whether the Legislature could have constitutionally authorized the legal actions that the courts were being asked to undertake. Most often, the Marshall Court upheld congressional authority against those challenges, sometimes seizing the opportunity to expound on the expansive nature of federal authority under the Constitution in cases such as *Martin*, *McCulloch*, and *Gibbons*. In doing so, the Court sometimes articulated views of the Constitution that went beyond what Jeffersonian leaders might have preferred, but the core decision to uphold congressional power was always consistent with the preferences of the political

332. *Id.*

333. *Id.* at 703.

334. *Id.* at 702. Digests and treatises citing the 1799 law and its successors subsequently took note of the requirement that, in fact, where necessary to gather evidence to mount a real defense, "a continuance must be given" despite the statute. 2 ROBERT DESTY, A MANUAL OF PRACTICE IN THE COURTS OF THE UNITED STATES 1194 (San Francisco, Bancroft-Whitney Co., 9th ed. 1899); see also ABBOTT, *supra* note 133, at 140; CONKLING, *supra* note 133, at 215 & n.(a).

335. *Sampeyreac v. United States*, 32 U.S. (7 Pet.) 222, 222 (1833).

336. *Id.*

337. *Id.* at 240.

338. *Id.* at 239.

339. *Id.* at 240.

leaders of the time, and the “overbroad” interpretation of federal power was easily countered politically.³⁴⁰ The Court could declare that there were no valid constitutional objections to a more aggressive use of congressional powers to regulate and develop the economy, but that did not stop Jeffersonian leaders from taking a more cautious approach and using the legislative and electoral process to keep Congress within narrower bounds. The Marshall Court may have been a cheerleader for a bolder national government, but it was not an obstruction to Jeffersonian policies.

But the Court did also recognize limits on congressional power. *Marbury* would eventually become the most famous example from this period, and in some ways it was distinctive.³⁴¹ But it was not alone. It was distinctive in part because the Court offered an elaborate explanation of its own power and when it should be used. It was distinctive in part because the invalidation of a statutory provision in *Marbury* came in the context of a high profile and politically salient case, though the statutory provision and constitutional issue were not themselves high profile or politically salient. It was distinctive in part because the provision rejected in *Marbury* was voided in its entirety.³⁴² However, more common than invalidations like *Marbury* were cases like *Parsons*, in which the Justices articulated and enforced constitutional limits on Congress, narrowing the scope of statutory provisions and disallowing applications desired by the government and private parties.³⁴³ The Court carved out constitutionally necessary exceptions to statutes, ruling out apparent legislative directives that exceeded congressional authority while allowing other applications to move forward. In doing so, the Court may have asserted that the constitutional defect in the statute was inadvertent or unintended by Congress, but the Justices did not hesitate to lay down the constitutional rule and truncate or carve up the statute as necessary to remove the defective aspects of the law and render them “ineffectual,” to borrow the language of the mid-century Massachusetts Supreme Court.³⁴⁴

C. JACKSONIAN ERA CASES

The Jacksonian era marked a transition not only between the political coalitions that controlled the elected branches but also between the Justices who dominated the bench. The Jacksonians who dominated politics in the antebellum era brought with them elements of Jeffersonian ideology, but had their own sets of concerns as well and were critical of the National Republicans who were particularly supportive of a more active national state. They also brought with them their own set of conflicts with the Marshall Court and its doctrines, and the

340. See *supra* notes 209–219, 223–244, 250–253 and accompanying text.

341. See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

342. See *id.* at 176–77.

343. See *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830).

344. See *Florence Sewing Mach. Co. v. Grover & Baker Sewing Mach. Co.*, 110 Mass. 70, 80 (1872).

Democrats were often thought to be hostile to courts and judicial review generally.³⁴⁵ The Marshall Court was on its way out, however, and by the end of Andrew Jackson's term of office had been replaced by the Taney Court staffed with Jacksonian Justices. As Figure 1 indicates, the Taney Court not only continued to review the constitutionality of federal laws, but it did so more frequently than had the Marshall Court, and it often found that the language and attempted applications of federal statutory provisions exceeded the constitutional authority of Congress. As had the Marshall Court, the Taney Court heard a diverse set of challenges to a wide range of laws, both of recent vintage and old. But like its predecessors, the Taney Court did not create significant obstacles to the policies strongly favored by dominant political actors at the time. The Taney Court protected property rights and defended federalism in ways anticipated by its predecessor, but in doing so, it generally facilitated the commitments and broader goals of Jacksonian political leaders.

Like the Marshall Court, the Taney Court was willing to uphold restrictions on the jurisdiction of the federal courts. An 1839 statute required customs collectors to deposit all revenue, including that collected under protest, directly in the federal Treasury, without waiting for a judicial resolution of the dispute, so that it might be appropriated as needed.³⁴⁶ The Secretary of Treasury was then responsible for repaying overcharges. The effect of the change, according to Justice Daniel, was to preclude lawsuits against the customs collectors to recover overcharges.³⁴⁷ Over vigorous dissents from Story and McLean, the majority of the Court upheld the legislative maneuver as a constitutionally valid assertion of sovereign immunity.³⁴⁸ The Taney Court also upheld the original Judiciary Act's restriction of the diversity jurisdiction of the circuit courts.³⁴⁹ The Constitution left to the discretion of Congress the jurisdiction to be vested in the inferior courts, and Congress could choose to vest in them less than the Constitution would allow.³⁵⁰ Moreover, the Court elaborated on the validity of the political departments determining the national boundary between the United States and Spain, precluding judicial review of legislative decisions affecting legal rights on this subject.³⁵¹ Additionally, it upheld the finality of the judgment of surveyors of waterfront lots under an 1811 act relating to the Louisiana Territory;³⁵² judicial jurisdiction over disputes arising from such surveys was not constitutionally required.³⁵³ It found that courts-martial, existing outside the

345. See WHITTINGTON, *supra* note 8, at 59, 248–52.

346. Act of Mar. 3, 1839, ch. 82, § 2, 5 Stat. 339, 348–49.

347. Cary v. Curtis, 44 U.S. (3 How.) 236, 241–42 (1845).

348. See *id.* at 245–46. Congress responded with a new statute explicitly giving taxpayers the right to sue customs collectors. See Jerry Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568, 1678 (2008).

349. See Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850).

350. See *id.* at 448–49.

351. See Garcia v. Lee, 37 U.S. (12 Pet.) 511, 522 (1838).

352. Act of Mar. 3, 1811, ch. 47, 2 Stat. 666.

353. See Haydel v. Dufresne, 58 U.S. (17 How.) 23, 29–30 (1854).

context of Article III, were constitutionally valid.³⁵⁴ On the other hand, Congress could provide for appeals from land commissioners established for the California Territory to district courts, so long as it was “regarded as an original proceeding,” a “transfer” rather than a true “appeal.”³⁵⁵

The Taney Court also heard challenges to federal statutes that were said to interfere with judicial processes, and, like the Marshall Court, the Jacksonian Court upheld congressional actions against such challenges. Somewhat difficult was an act of Congress that declared designated bridges crossing the Ohio River to be “lawful structures in their present position and elevation, and shall be so held and taken to be, anything in any law or laws of the United States to the contrary notwithstanding.”³⁵⁶ The declaration followed a Supreme Court determination that the bridges were obstructions to navigation on the river and had to be removed or altered.³⁵⁷ The Court admitted that Congress could not “annul the judgment of the court already rendered,” and congressional action would have been unavailing had the remedy in the case “been an action at law, and a judgment rendered in favor of the plaintiff for damages.”³⁵⁸ But, the primary aspect of the Court’s earlier judgment was “a continuing decree” “directing the abatement of the obstruction.”³⁵⁹ Once Congress, exercising its power to regulate interstate commerce, rendered the bridge “no longer an unlawful obstruction” then “it is quite plain the decree of the court cannot be enforced.”³⁶⁰ There was no longer an interference with any public right and nothing more for the Court to do in the case, and the congressional action did not interfere with or supplant the judicial power to adjudicate the case.³⁶¹

The Court also approved a reorganization of the Treasury Department that authorized auditors to issue “distress warrants” that would impose a lien on the property of debtors to the Treasury.³⁶² Justice Curtis argued that the initial question, whether this was an exercise of a “judicial” power by an executive officer, could best be answered by examining whether this procedure denied an individual of “his liberty and property, ‘without due process of law’; and, therefore, is in conflict with the fifth article of the amendments of the constitution.”³⁶³ Curtis concluded that such procedures were, in fact, commonplace in both state and federal law, and antecedent British law as well:

354. See *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 82 (1857).

355. *United States v. Ritchie*, 58 U.S. (17 How.) 525, 533–34 (1854). *Ritchie* cut against the grain of the Taney Court decisions by requiring a system of de novo review of administrative actions, whereas the Taney Court generally leaned toward giving the Executive branch greater autonomy from judicial oversight. Mashaw, *supra* note 348, at 1680–81.

356. Act of Aug. 31, 1852, ch. 111, § 6, 10 Stat. 110, 112.

357. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 626–27 (1851).

358. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431–32 (1855).

359. *Id.* at 431.

360. *Id.* at 432.

361. *Id.*

362. *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855).

363. *Id.* at 275.

This legislative construction of the constitution, commencing so early in the government, when the first occasion for this manner of proceeding arose, continued throughout its existence, and repeatedly acted on by the judiciary and the executive, is entitled to no inconsiderable weight upon the question whether the proceeding adopted by it was 'due process of law.'³⁶⁴

The Taney Court was also willing to give the federal government room to exercise discretion when operating within the states. The Court had little difficulty turning back a constitutional challenge to the federal government leasing, rather than selling, mining lands that the government owned within the states despite local policy against the maintenance of such a "body of tenantry."³⁶⁵ The federal government had long been understood to retain public lands that it did not explicitly transfer to the states,³⁶⁶ and the mode of "disposal must be left to the discretion of Congress" under the federal power "to dispose of . . . property, belonging to the United States."³⁶⁷ In *Searight v. Stokes*, Justice Daniel insisted, in dissent, on denying a congressional "power to construct roads, [j]or any other description of what have been called internal improvements, within the limits of the states."³⁶⁸ The other Justices, including Chief Justice Taney writing for the majority, were forced to deny "that the constitutional power of the general government to construct" the Cumberland Road is involved "in the case before us; nor is this court called upon to express any opinion upon that subject."³⁶⁹ Perhaps Congress did not have the power to construct the road in the first place as strict constructionists within the Democratic Party had long contended, but it surely *did* have the authority, in the Jackson Administration in which Taney had served, to appropriate a sum to repair the road and to commit it to the states on the condition that the United States "shall not thereafter be subject to any expense for repairing said road."³⁷⁰ There was no "just ground for questioning the power of Congress" to take that action to prevent "this important line of communication" from falling "into utter ruin."³⁷¹ Having accepted that condition during the Jackson Administration, Pennsylvania could not now charge federal mail carriers tolls for use of the road. The majority of the Taney Court was not interested in unearthing the old debates over the constitutionality of internal improvements so long as it could get by with validating the compromise that had been worked out during the Jackson presidency, and making Pennsylvania live up to that bargain.

Three times before secession the Supreme Court heard cases involving the constitutionality of federal laws under the Fugitive Slave Clause, and each time

364. *Id.* at 279–80.

365. *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 533 (1840).

366. *See id.* at 538.

367. *Id.* at 537–38.

368. *Searight v. Stokes*, 44 U.S. (3 How.) 151, 180 (1845) (Daniel, J., dissenting).

369. *Id.* at 166 (majority opinion).

370. *Id.* at 173.

371. *Id.* at 166.

the Court upheld the statutory arrangement. First, and most elaborately, Justice Story considered the claim that the Fugitive Slave Act of 1793 “is unconstitutional, because it does not fall within the scope of any of the enumerated powers of legislation confided to that body; and therefore, it is void.”³⁷² Story thought the Act “clearly constitutional in all its leading provisions,” with the possible exception of the provision directing state governors to act.³⁷³ Congress had the necessary authority to pass laws not only to carry out its own enumerated powers but also “to carry into effect rights expressly given, and duties expressly enjoined” in the Constitution.³⁷⁴ Second, in 1847, the Court took the time to rehearse Story’s argument at length and reaffirm the power of Congress “to do justice” to the requirements and to “fulfil[I] the duty incumbent on us towards all the members of the Union” that were embodied in the “compromises of the constitution” as it existed in regard to slavery.³⁷⁵ Third, in 1859, the Court lent its authority to the deeply controversial Fugitive Slave Act of 1850.³⁷⁶ Without offering any reasons for its opinion, the Taney Court nonetheless thought it “proper to say that, in the judgment of this court, the act of Congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States.”³⁷⁷ State resistance to the enforcement of that law should therefore immediately cease.

Jacksonian dominance of the political arena meant that the Taney Court was rarely called on to evaluate the constitutionality of the Whig program. The most constitutionally dubious legislation, from a Democratic perspective, was blocked by presidential vetoes and political mobilization. There is reason to believe that a Jacksonian Court would have reversed *McCulloch* and struck down a renewed Bank, given a chance.³⁷⁸ But in the cases that most implicated partisan divisions, the Taney Court upheld federal power as it had been exercised by the Whig Congress. The majority in *Searight v. Stokes* carefully limited the question in the case to whether the federal government could spend funds to maintain a road used by the postal service—a position that the Jacksonians had come to accept—and avoided the more ideologically contested question of whether the government could construct such roads in the first place.³⁷⁹ That basic question of the constitutionally proper use of federal appropriations for internal improvements and the general welfare was left to congressional debate

372. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 618 (1842).

373. *Id.* at 622. This provision was not at issue in *Prigg* but was later struck down in *Dennison. Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 107–08 (1860), *overruled in part by Puerto Rico v. Branstad*, 438 U.S. 219 (1978).

374. *Prigg*, 41 U.S. (16 Pet.) at 618–19.

375. *Jones v. Van Zandt*, 46 U.S. (5 How.) 215, 230 (1847).

376. *See Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858).

377. *Id.* at 526.

378. *See* Mark A. Graber, *The Jacksonian Makings of the Taney Court* 36 (Dec. 22, 2008), *available at* <http://ssrn.com/abstract=842184> (unpublished manuscript); *see also* GERARD N. MAJLIUCCA, ANDREW JACKSON AND THE CONSTITUTION 71–73, 124–25 (2007).

379. *See Searight v. Stokes*, 44 U.S. (3 How.) 151, 166 (1845).

and presidential vetoes.³⁸⁰ The Whig-backed Bankruptcy Act of 1841, responding to the fallout from the financial panic of 1837, altered the British rule of bankruptcy by allowing debtors to initiate bankruptcy proceedings to shield themselves from creditors.³⁸¹ It was soon assailed as not meeting the constitutional definition of a “bankruptcy” law—which was asserted to follow from the British practice regnant at the time of the founding—and instead being a reviled debtor-relief law. Some judges embraced this argument, including a Democratic federal district court judge and some state court judges, and refused to enforce the law in such cases.³⁸² By a procedural quirk, however, the majority of the Justices concluded that there was no way to bring a case regarding the bankruptcy law before the Supreme Court (Catron dissented from this jurisdictional determination). In lieu of a formal opinion, however, the Court ordered that an “opinion delivered by Judge Catron in his judicial district” while he was riding circuit, *In re Klein*, be published in the *United States Reports* as “being of general interest.”³⁸³ Catron’s opinion in *In re Klein* was a vigorous defense of the constitutionality of the bankruptcy law—a defense Catron repeated in his published dissent to the jurisdictional holding in the same volume.³⁸⁴ The logic of applying the Contracts Clause to the states and empowering Congress via the Bankruptcy Clause was not to create a general prohibition on debtor relief but to ensure that states could not exploit out-of-state creditors and that the proper accommodation of the interests of debtors and creditors would be decided in Congress, where “the entire people are equally represented, and have the power to protect themselves against hasty and mistaken legislation.”³⁸⁵ The Bankruptcy Act, with its innovative provision for debtor-initiated proceedings, reflected that national policy accommodation. Nonetheless, the new Democratic majority repealed the Bankruptcy Act less than a month after the Court issued its opinion, so there was little opportunity for the lower courts to respond to the Court’s unorthodox action.³⁸⁶ The next term, Catron admitted that the Court’s approach had been “extra-judicial,” but he agreed with his brethren that “a more imposing application, requiring an opinion, could not have been presented.”³⁸⁷ The Court had meant the judges to get the message that the law was constitutionally valid and to fall in line.

Between *Foster* and *Percheman*, the Court changed its approach to thinking about the rights conveyed by the Spanish cession. The Court likewise altered its thinking about the 1836 act granting federal relief to William Pollard’s heirs over the course of the Mobile litigation. William Pollard had received a land

380. See Graber, *Jacksonian Origins*, *supra* note 10, at 27; Whittington, *supra* note 230, at 371–72.

381. See Bankruptcy Act of 1841, ch. 9, 5 Stat. 440.

382. See EDWARD J. BALLEISEN, *NAVIGATING FAILURE* 109, 128 (2001).

383. *In re Klein*, reported in *Nelson v. Carland*, 42 U.S. (1 How.) 265, 277 (1843).

384. See *id.* at 266–77 (Catron, J., dissenting).

385. *Id.* at 280 (appended case).

386. An Act to Repeal the Bankruptcy Act, ch. 82, 5 Stat. 614.

387. *Ex parte Christy*, 44 U.S. (3 How.) 292, 323 (1845).

grant from the Spanish government in 1809 for a lot of riverfront land in what would become Mobile, Alabama.³⁸⁸ Spain's authority over that territory was contested by the United States, which believed that it was part of the Louisiana Purchase, but, as the defendant in *Files* argued, when the United States did gain clear possession of it (along with additional land in Florida) by treaty in February 1819 it pledged that all proper grants would "be ratified and confirmed" and held valid in accord with Spanish law.³⁸⁹ In December 1819, Congress admitted Alabama into the Union as a state.³⁹⁰ Some years later, the Supreme Court held that, for the territory that had been disputed with Spain, confirmation of the validity of title was not automatic but required positive action by Congress (as if it had indeed belonged to the United States all along).³⁹¹ Even though Pollard's claim to the land had been rejected by the commissioners that Congress had put in place to investigate such claims, Congress, at the request of Pollard's heirs, confirmed the claim by private act in 1836.³⁹² In the earlier case, the Alabama trial court had refused to instruct the jury that the 1836 Act settled the matter of the Pollard grant and, instead, had instructed the jury that it could conclude that the congressional act was void.³⁹³ The U.S. Supreme Court found this instruction to be in error.³⁹⁴ Writing for a unanimous Court in *Pollard's Lessee v. Files*, Justice Catron argued that Congress had properly confirmed Pollard's claim, which the Court here characterized as pending and awaiting validation in the land office, and, therefore, had predated an 1824 statute waiving all federal interest in riverfront lots that had not been "sold or confirmed to individuals . . . and to which no equitable title exists."³⁹⁵ Claims tracing to the 1824 Act could not extend to the Pollard property, and, therefore, the 1836 Act could not interfere with any preexisting property rights.³⁹⁶ Against claims of competing property rights, the relief act was constitutional.³⁹⁷

388. See *Pollard's Lessee v. Files*, 43 U.S. (2 How.) 591, 592 (1844).

389. *Id.* at 596–97.

390. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 308 (1829).

391. *Id.* at 314–15.

392. *Pollard's Lessee*, 43 U.S. (2 How.) at 594.

393. See *id.* at 596–97.

394. See *id.* at 607.

395. *Id.* at 593.

396. See *id.* at 605–06.

397. Catron also wrote the Court's opinion in the final constitutional case arising from the Spanish cession. Both French and Spanish authorities had granted land with "no definite boundaries" in the Louisiana Territory before it was taken over by the United States. *West v. Cochran*, 58 U.S. (17 How.) 403, 413 (1854). Possession of such grants could not be taken until a survey was completed, and some "unlocated claims" awaiting legal surveys that would distinguish them from the public domain still remained at the time of the Louisiana Purchase. *Id.* The courts could do nothing "with these incipient claims," and so, claimants were necessarily reliant on congressional action. *Id.* at 414. In 1807, Congress established land commissioners to order the necessary surveys and adjudicate such claims. In these claims, the statute provided that the conclusion of the commissioners would be final, but a claimant objected that Congress could not constitutionally shield this determination from judicial review. The Court demurred. In the case of "vague grants . . . title attached to no land," and there were

The federalism problem with the relief act was still to be brought to the Court's attention. The actual occupants of the land (not Pollard or his heirs) had extended it through landfill some distance into the "flowed land" of the Mobile River.³⁹⁸ Under the 1836 Act of Congress, Pollard's heirs claimed this land that had been under the high-water mark of the river.³⁹⁹ But, the Court concluded that after Alabama was admitted to statehood in 1819, "to Alabama [and not the federal government] belong the navigable waters, and soils under them."⁴⁰⁰ In *Pollard v. Hagan*, over Justice Catron's dissent, the Court determined that in the 1836 Act, Congress had exceeded its authority to dispose of land within the states.⁴⁰¹ The Constitution afforded Congress no authority to grant the land in question after that date, and the 1836 Act was therefore void as it applied to the filled land.⁴⁰² Once Alabama passed into statehood, Congress could no longer claim ownership over the land, and it could not exercise a power of eminent domain within the states for the purpose of disposing of land.⁴⁰³ This holding echoed the finding of the Court in *Mayor of New Orleans v. United States*, which similarly concluded that the United States could not constitutionally retain the quay in New Orleans when it made Louisiana a state.⁴⁰⁴ *Pollard* gave judicial articulation to the "equal footing" doctrine, that the new states of the west were admitted to the Union with the same rights and authority as the original states.⁴⁰⁵ Congress had no greater authority over land and waterways in the new states than in the old. In *Pollard*, the manipulation came in a private act attempting to dispose of property.⁴⁰⁶ But, the decision had broad implications for statutes that originated in the territorial period or the statehood enabling acts. Most notably, state courts had treated provisions of the Northwest Ordinance and state enabling acts requiring free navigations of rivers as still binding after statehood, and similar questions could be raised about provisions regarding slavery or religious liberty in the states.⁴⁰⁷ After *Pollard*, it was no longer obvious that such congressional statutes could be as binding on a state "as its

no independent facts for "a court of justice [to] ascertain." *Id.* at 416. Congress had complete discretion to dispose of such cases, and there was no constitutional infirmity with the procedures set up in the 1807 Act.

398. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 233 (1845).

399. *See id.* at 220.

400. *Id.* at 227.

401. *See id.* at 224–25.

402. *See id.* The Court reaffirmed without substantive elaboration that constitutional conclusion in *Doe v. Beebe*, 54 U.S. (13 How.) 25, 26 (1851), and *Pollard v. Kibbe*, 50 U.S. (9 How.) 471, 478 (1850).

403. *Pollard*, 44 U.S. (9 How.) at 230; *see also* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 526 (Boston, Little, Brown, & Co. 1868).

404. *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 737 (1836).

405. *Pollard*, 44 U.S. (9 How.) at 224.

406. *Id.* at 213.

407. Editorial Note, *Recent Decisions*, 1 W. JURIST 166, 166–68 (1867).

own constitution.”⁴⁰⁸

Withers v. Buckley raised similar concerns for the Court.⁴⁰⁹ When Congress admitted Mississippi as a state in 1817, it included a provision in the authorizing act that the Mississippi River and all “navigable rivers and waters leading into the same” would be “common highways, and forever free” to both the residents of the state and the citizens of the United States.⁴¹⁰ When the state of Mississippi built a canal that redirected water flows and cut off water access to the Mississippi River from the plantation of David Withers, Withers sued, relying in part on the congressional act as prohibiting interference with his use of the “common highway.”⁴¹¹ The Supreme Court first distinguished the waterway used by Withers from “navigable rivers and waters,” but did not rely on this claim of statutory interpretation.⁴¹² The decisive point, according to the Court, was the fact that an act of Congress “could have no effect to restrict the new State in any of its necessary attributes as an independent sovereign Government” or “inhibit or diminish its perfect equality with the other members of the Confederacy with which it was to be associated.”⁴¹³ Congress did not have the constitutional authority to

forbid . . . the power of improving the interior of that State, by means either of roads or canals, or by regulating rivers within its territorial limits, although a plan of improvement to be adopted might embrace or affect the course or the flow of rivers situated within the interior of the State.⁴¹⁴

Mississippi’s canal did not violate the Constitution or laws of the United States because Congress had no constitutional authority to interfere with Mississippi’s discretion in this matter.⁴¹⁵ Such decisions did not stop Congress from using its statehood enabling acts (and comparable bills) to make declarations about what the future states could “never” do, but it was now widely understood as it had not been before that such declarations had no legal force. They were symbolic and hortatory. The courts would not enforce the supremacy of federal law in such cases.⁴¹⁶

408. *Id.* at 167; see also *Permoli v. Municipality No. 1 of New Orleans*, 44 U.S. (3 How.) 589 (1845); LOUIS HOUCK, A TREATISE ON THE LAW OF NAVIGABLE RIVERS, § 123, at 81 (Boston, Little, Brown, & Co. 1868).

409. *Withers v. Buckley*, 61 U.S. (20 How.) 84 (1857).

410. *Id.* at 88.

411. *Id.*

412. *Id.* at 92.

413. *Id.*

414. *Id.* at 93.

415. *Id.* at 92–93.

416. See 1 ROGER FOSTER, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 53, at 331 (1895) (“These statutes are inoperative upon the power of those States to amend their constitutions.”). See generally JOHN M. GOULD, A TREATISE ON THE LAW OF WATERS 95 (1900) (explaining that new states have the same “rights, sovereignty, and jurisdiction” to navigable waters as older states, and neither Congress nor Federal courts could prevent states from obstructing the navigation of a river).

The Court had already determined before *Withers* that Congress could not use its separate power to regulate interstate commerce to interfere with improvements that the state might make to internal waterways.⁴¹⁷ Maine had granted a twenty-year monopoly on steamship operations on a section of the Penobscot River in payment for William and Daniel Moor clearing the river of obstructions, deepening its channel, and building any necessary canals to make it fully navigable.⁴¹⁸ Samuel Veazie, a steamship operator with a federal coasting license of the same sort that had allowed Thomas Gibbons to break up Aaron Ogden's exclusive state license to operate on the New York border, similarly tried to trump Maine's restrictive law.⁴¹⁹ The Maine Supreme Judicial Court was not persuaded, and the Taney Court emphatically agreed.⁴²⁰ The Constitution's grant of authority to Congress to regulate commerce "can never be applied to transactions wholly internal . . . or to a polity and laws whose ends and purposes and operations are restricted to the territory and soil and jurisdiction of such community."⁴²¹ Such an expansive understanding of congressional authority would not only "paralyze every effort at internal improvements by the several States," but it would also be a "pretension as far reaching as . . . [to] control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries and the mines and furnaces of the country."⁴²² To allow the coastal license to reach matters "essentially local in their nature and extent"⁴²³ would be "an abuse wholly beyond the object and power of the government granting it."⁴²⁴ If the federal power to regulate commerce on the waterways between states had been upheld in *Gibbons*, extending the implications of a rather innocuous federal statute, it was rejected in *Veazie*, limiting its scope.

The Taney Court did uphold its own property claim against the federal government in *Lytle v. Arkansas*.⁴²⁵ In 1830 (supplemented by an act of 1832), Congress gave the occupants of cultivated public lands in the Arkansas territory the preemption right to purchase the land and gain valid title to it.⁴²⁶ In 1832, Congress gave the territorial governor of Arkansas the authority to select a thousand acres of land adjoining Little Rock, initially for the construction of public buildings but later for sale to private individuals to fund public buildings.⁴²⁷ Acting under this authority, the governor selected and sold a parcel of

417. See *Veazie v. Moor*, 55 U.S. (14 How.) 568 (1852); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

418. *Veazie*, 55 U.S. (14 How.) at 572.

419. See *id.* at 573.

420. *Id.* at 575.

421. *Id.* at 573-74.

422. *Id.* at 574.

423. *Id.*

424. *Id.* at 575.

425. *Lytle v. Arkansas*, 50 U.S. (9 How.) 314 (1850).

426. *Id.* at 315, 318.

427. *Id.* at 318.

land that had been previously claimed by settlers under the preemption act but not yet validated by the land office (and never would be).⁴²⁸ Whereas the settlers challenged “the competency of the United States to thus appropriate the land in controversy,” the government contended that Congress was free to redirect the land to other purposes at any time regardless of the preemption rights of the settlers.⁴²⁹ The state supreme court had ruled against the preemption rights of the settlers, but a closely divided U.S. Supreme Court disagreed.⁴³⁰ The dissent, led by Justice Catron, rejected the settlers’ claims as too tenuous and ultimately as adverse to the public interest.⁴³¹ If such preemption rights were upheld, the act granting land to the governor “would have been without value, as the whole grant might have been defeated by occupant claims, and the seat of government transferred to private owners.”⁴³² Indeed, all sorts of reservations of federal land by the President for “public use,” whether reserved for public works, lead mines, or ship timber, would be defeated by the nebulous and overly expansive preemption rights of local “villager[s].”⁴³³ Better for the Court to defer to the “accumulated intelligence and experience of those engaged in administering the Department of Public Lands” than tie the government’s hands with weakly grounded property rights.⁴³⁴ For the majority, which Chief Justice Taney joined, the “claim of a preemption is not that shadowy right which by some it is considered to be.”⁴³⁵ “National feeling”⁴³⁶ favored the “adventurous pioneer,” and his rights could not simply be shoved aside.⁴³⁷ The land claimed by the settlers had to be excluded from the land granted to the governor; the second grant was, to that extent, void.⁴³⁸ To do otherwise would be to allow Congress “to impair vested rights.”⁴³⁹

In a series of cases in the late 1840s and early 1850s, the Taney Court also extended the admiralty jurisdiction of the federal courts into the interior of the country, removing cases from state jurisdiction and placing them under federal authority.⁴⁴⁰ The Judiciary Act of 1789 conveyed the constitutional grant of admiralty jurisdiction to the federal courts, and, in each case, the Court and the parties were explicit that there were constitutional objections to reading the

428. *Id.* at 329–30.

429. *Id.* at 325–26.

430. *See id.* at 335.

431. *Id.* app. at 666–69 (Catron, J., dissenting).

432. *Id.* app. at 669.

433. *Id.* app. at 669–70.

434. *Id.* app. at 670.

435. *Id.* at 333 (majority opinion).

436. *Id.* at 334.

437. *Id.* at 333.

438. *Id.* at 333–34.

439. *Id.* at 335.

440. *See, e.g.,* Propeller Genesee Chief v. Fitzhugh (*The Genesee Chief*), 53 U.S. (12 How.) 443 (1851), *overruled by* Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 253 (1972); N.J. Steam Navigation Co. v. Merchants’ Bank of Boston, 47 U.S. (6 How.) 344 (1848) (plurality opinion); Waring v. Clarke, 46 U.S. (5 How.) 441 (1847).

federal law as endowing the federal courts with admiralty jurisdiction to hear them. A suit in admiralty was filed in a Louisiana district court for damages from a collision between two ships in the Mississippi River well north of the port of New Orleans.⁴⁴¹ The respondent protested that the constitutional scope of the admiralty jurisdiction was tied to the English rule that admiralty extended only to where the tide ebbs and flows. Congress could not authorize the courts to reach further upriver than that.⁴⁴² Justice Wayne, for a divided Court, firmly rejected this view: “We think we may very safely say, such interpretations of any grant in the constitution, or limitations upon such grants, according to any English legislation or judicial rule, cannot be permitted. At most, they furnish only analogies to aid us in our constitutional expositions.”⁴⁴³ To do more “would be a denial to Congress of all legislation upon the subject. It would make, for all time to come, without an amendment of the constitution, that unalterable by any legislation of ours, which can at any time be changed by the Parliament of England”⁴⁴⁴ The understanding that had developed in North America by the time of the founding, he argued, included a more expansive scope for admiralty and all of that jurisdiction was meant to be transferred to the federal courts.⁴⁴⁵ Besides, a more expansive rule than might have been appropriate for a small island was “more congenial with our geographical condition[]” and the nature of the mighty Mississippi.⁴⁴⁶

The Court elaborated in a separate case that “the question has become settled”⁴⁴⁷ by “the practical construction that has been given to the Constitution”⁴⁴⁸ that “a more enlarged”⁴⁴⁹ admiralty jurisdiction was now accepted whatever “the true construction” of the original constitutional grant might have been.⁴⁵⁰ Federal admiralty jurisdiction could, therefore, reach a carrying contract for goods that were to be borne part of the way on water but “land-locked the whole way[]” (and ultimately were lost in a ship-board fire).⁴⁵¹

Finally, in 1851, Chief Justice Taney wrote for the Court in considering the 1845 statutory extension of federal admiralty jurisdiction over the Great Lakes.⁴⁵²

441. *Waring*, 46 U.S. (5 How.) at 451.

442. *Id.* at 451–52.

443. *Id.* at 458–59.

444. *Id.* at 457.

445. *Id.* at 457–58.

446. *Id.* at 463.

447. *N.J. Steam Navigation Co. v. Merchants' Bank of Boston*, 47 U.S. (6 How.) 344, 386 (1848) (plurality opinion).

448. *Id.* at 389.

449. *Id.* at 408 (Daniel, J., dissenting).

450. *Id.* at 386 (plurality opinion).

451. *Id.* at 356. In conferring admiralty jurisdiction to federal courts over the Great Lakes, Congress limited it to ships moving between different states and territories. In *Allen v. Newberry*, 62 U.S. (2 How.) 244, 247 (1859), the Court reemphasized its view from those earlier cases that such a “limitation of the jurisdiction” was merely declaratory of the constitutional requirement, which was binding “independently of any act of Congress.”

452. *Propeller Genesee Chief v. Fitzhugh* (*The Genesee Chief*), 53 U.S. (12 How.) 443 (1851), *overruled by* *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 253 (1972).

Although Taney thought the Commerce Clause might give the federal government partial authority over shipping in the lakes, the statute at hand did not fit the bill and would be unconstitutional on those grounds.⁴⁵³ Taney likewise called attention to the geographical differences between England and the United States. “These lakes are in truth inland seas,”⁴⁵⁴ and “[c]ertainly it was not the intention of the framers of the Constitution” to deny to those citizens who live near the lakes the benefits enjoyed by those citizens who lived near the Atlantic Ocean.⁴⁵⁵ In England, “tide-water and navigable water are synonymous terms,”⁴⁵⁶ and that might have been true of the original thirteen states as well, but it was no longer true. The Constitution should not be read to impose “purely artificial and arbitrary as well as unjust” distinctions when it could be read otherwise.⁴⁵⁷

The Taney Court proved to be quite open to this extension of federal power, but drew the constitutional line in *People’s Ferry Co. v. Beers*.⁴⁵⁸ Attempting to collect on an unpaid debt for labor and materials used in constructing a ferry boat, Beers and Warner made use of the Judiciary Act’s grant of admiralty jurisdiction to file suit in federal court.⁴⁵⁹ The district court allowed the suit to proceed under the “more enlarged” “rules and principles of the admiralty law” that were in place in the United States (compared to the more restrictive English rules, from which the Supreme Court had previously departed).⁴⁶⁰ The Supreme Court disagreed, however, finding that the “question presented involves a contest between the State and Federal Governments” and noting that the “latter has no power or jurisdiction beyond what the Constitution confers.”⁴⁶¹ The congressional grant of jurisdiction had to be limited by the meaning of the constitutional authorization as it was understood at the time of the founding, “for what was meant by it then, it must mean now; what was reserved to the States, to be regulated by their own institutions, cannot be rightfully infringed by the General Government.”⁴⁶² A contract “made on land, to be performed on land,” could not be brought under federal authority.⁴⁶³ As contemporary commentators noted, the courts were relatively expansive when it came to congressional authority to vest admiralty jurisdiction over locality, but relatively restrictive over the subject matter of contracts.⁴⁶⁴

Congressional authority within newly formed states was at issue in two cases

453. *Id.* at 451–52.

454. *Id.* at 453.

455. *Id.* at 454.

456. *Id.* at 455.

457. *Id.* at 457.

458. *People’s Ferry Co. v. Beers*, 61 U.S. (20 How.) 393 (1857).

459. *Id.* at 399.

460. *Id.* at 400.

461. *Id.* at 401.

462. *Id.* at 401.

463. *Id.* at 402.

464. See W.D. DABNEY, *OUTLINES OF FEDERAL JURISDICTION AND LAW PROCEDURE*, § 8, at 20 (Virginia, Geo. W. Olivier 1897); 3 SIMON GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE*, § 384, at 424 & n.1 (Boston, Little, Brown, & Co., 6th ed. 1860).

that both involved the Appellate Jurisdiction Act of 1847 and the transition from territory to statehood. Federalism concerns imposed constitutional limits on how Congress could treat such states. In 1845, Florida was admitted as a state. After Florida's admission to statehood, Congress created a federal district court for the state,⁴⁶⁵ but no judge was appointed to fill the seat for over a year.⁴⁶⁶ In the meantime, the territorial court that had been erected in Florida in 1828 continued to hear and decide cases that fell within federal jurisdiction (the Florida state courts had assumed cases of local jurisdiction). No provision had been made at the time of statehood to transfer the cases still pending in the territorial court to the federal district court. In 1847, Congress tried to rectify the situation by providing that any case still pending in the territorial court would be transferred to the district court and that any ruling that had been made by the territorial court after statehood could be appealed to the U.S. Supreme Court.⁴⁶⁷ When, weeks after the admission of Florida as a state, Joseph Porter sued Hiram Benner and others in the territorial court for recovery of the value of the supplies that he had provided to a ship docked in Key West under the admiralty jurisdiction of the federal courts, Benner denied that the territorial court had jurisdiction over the case.⁴⁶⁸ Nonetheless, the territorial judge ruled in favor of Porter, and upon appeal the U.S. Supreme Court annulled the actions of the territorial court.⁴⁶⁹ In doing so, the Court concluded that the 1847 statute could not salvage the jurisdiction of the territorial courts.⁴⁷⁰ Congress could not constitutionally extend the life of any part of the territorial government once the territory had been converted into a state.⁴⁷¹

A variation on this problem arose after Wisconsin was admitted to statehood in May 1848. When admitting Wisconsin, Congress did provide for the transfer of any pending cases that fell under federal jurisdiction from the territorial court to the federal district court.⁴⁷² The case of *McNulty v. Batty* originated in the territorial court as a suit to recover a debt, normally a matter of state law.⁴⁷³ An appeal from the territorial supreme court to the U.S. Supreme Court was pending at the time of the transition to statehood.⁴⁷⁴ In February 1848, Congress had extended the 1847 appellate jurisdiction law to all territories (not just Florida) with the understanding that the U.S. Supreme Court would retain

465. Act of Feb. 22, 1847, ch. 17, § 1, 9 Stat. 128, 129.

466. *Benner v. Porter*, 50 U.S. (9 How.) 235, 244 (1850).

467. Act of Feb. 22, 1847, ch. 17, § 5, 9 Stat. at 128, 129–30.

468. *Benner*, 50 U.S. (9 How.) 244.

469. *Id.* at 247.

470. *Id.* at 245–46.

471. *Id.* at 247. The Supreme Court had previously indicated that, without further action by Congress, it could not accept for review cases from a defunct territorial court whose records were now in the safekeeping of a clerk without the power to act as a court. *Hunt v. Palao*, 45 U.S. (4 How.) 589, 589–91 (1846).

472. See Act of Feb. 22, 1848, ch. 12, § 2, 9 Stat. 211, 212.

473. *McNulty v. Batty*, 51 U.S. (10 How.) 72, 72 (1850).

474. *Id.* at 77–78.

jurisdiction of appeals from the territorial courts pending at the time of statehood.⁴⁷⁵ The Supreme Court refused to accept jurisdiction in the *McNulty* case, however.⁴⁷⁶ Congress could not constitutionally authorize the Supreme Court to hear cases that did not otherwise fall within federal jurisdiction once their territorial status fell away.⁴⁷⁷ Moreover, the newly formed district court could not be given jurisdiction to receive any order that the Supreme Court might enter in such a case because the district court could not otherwise hear such a local case.⁴⁷⁸ The case came to rest in whatever condition it was in at the time of Wisconsin's admission into statehood, and Congress did not have the constitutional authority to extend its life.⁴⁷⁹ After such "embarrassment" over the question of federal jurisdiction and the transition of statehood, Congress adopted a new scheme in future statehood enabling acts that passed constitutional muster.⁴⁸⁰

Finally, the problem of federal regulation of slavery made an appearance in two cases framed in part by issues of states' rights. The most familiar is *Dred Scott v. Sandford*, striking down a provision of the Missouri Compromise that sought to exclude slavery from some of the federal territories.⁴⁸¹ As the Court construed the issue, the congressional ban on slavery in a territory raised two difficulties. First, it was inconsistent with the

principle upon which our Governments rest, and upon which alone they continue to exist, [that the United States] is the union of States, sovereign and independent within their own limits in their internal and domestic concerns, and bound together as one people by a General Government, possessing certain enumerated and restricted powers.⁴⁸²

Congress could not "obtain and hold colonies and dependent territories, over which they might legislate without restriction" and hold true to those principles.⁴⁸³ In dealing with the territories, Congress was obliged to promote "the interests of the *whole* people of the Union"⁴⁸⁴ when disposing of or regulating

475. Act of Feb. 15, 1848, ch. 10, § 2, 9 Stat. at 211, 212.

476. *McNulty*, 51 U.S. (10 How.) at 80.

477. *Id.*

478. *Id.* at 79.

479. *Id.* at 79–80. *McNulty* is complicated by the fact that the 1848 extension of the 1847 Appellate Jurisdiction Act did not make explicit reference to cases of this type on the apparent assumption that no additional action "was necessary to preserve or give effect to the jurisdiction of the court over it." *Id.* at 80. The Court's opinion makes clear that the result was the same whether jurisdiction is understood to have failed because the implied jurisdiction created by the statute was inadequate or because Congress did not have authority to provide jurisdiction in the case whether it did so implicitly or explicitly. The statute was not fixable under the Constitution. *Id.*

480. ABBOTT & ABBOTT, *supra* note 77, at 279.

481. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), *superseded by* U.S. CONST. amend. XIII, XIV.

482. *Id.* at 447–48.

483. *Id.* at 448.

484. *Id.* (emphasis added).

the “property held in common by the confederated States.”⁴⁸⁵ Second, Congress was also barred from “assum[ing] discretionary or despotic powers which the Constitution has denied to it,”⁴⁸⁶ and this would include the power to discriminate against “the right of property of the master in a slave,” a right recognized in the Constitution, while respecting other forms of property that were similarly situated.⁴⁸⁷ Both federalism principles and individual property rights precluded the federal government from emancipating slaves that came within the territories.

After some initial hesitation, the Justices determined that the “distracting question” of the slavery in the territories “*must* ultimately be decided by the Supreme Court.”⁴⁸⁸ They made a bid to do so with *Dred Scott*. They had previously intervened to bolster congressional authority to pass fugitive slave legislation.⁴⁸⁹ Those decisions might not have ended antislavery agitation, but they lent support to nationalist politicians who sought to reconcile the competing pressures.⁴⁹⁰ As John Marshall had been in the *McCulloch* case before the Court, the majority in *Dred Scott* was convinced that the Court alone could bring political peace and quash the dangerous antislavery agitation that was rending the political system and the nation. To a much greater degree than Marshall in the Bank case, however, the *Dred Scott* Court had the support of the political establishment behind this idea that their intervention was necessary. The Marshall Court had done what Jeffersonian leaders wanted in striking down the state obstructions to the Bank of the United States, but there was no raging controversy over the power of Congress to charter the Bank. By contrast, there was no more contested issue in the late antebellum era than the question of slavery in the territories, and mainstream political leaders were desperate for the Court to step in. Congressional and party leaders had repeatedly tried to duck the issue and invite judicial resolution from the late 1840s until *Dred Scott*.⁴⁹¹ As the perennial Whig presidential candidate Henry Clay declared in 1850, “Now, what ought to be done more satisfactory to both sides of the question . . . [than] to leave the question of slavery or no slavery to be decided by the only competent authority that can definitely settle it forever, the authority of the Supreme Court of the United States?”⁴⁹² Democratic President James Buchanan likewise used his inaugural address on the eve of the *Dred Scott* decision to urge the citizenry to recognize that the slavery question was “a judicial question,

485. *Id.* at 441.

486. *Id.* at 449.

487. *Id.* at 451.

488. CONG. GLOBE, 30th Cong., 1st Sess. 950 (1848) (statement of Sen. Clayton); 10 JAMES BUCHANAN, THE WORKS OF JAMES BUCHANAN 106 (1910) (quoting letter of Catron, J.).

489. See *supra* text accompanying notes 372–377.

490. See WHITTINGTON, *supra* note 8, at 179–80.

491. See WHITTINGTON, *supra* note 8, at 246–56; Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 46–50 (1993); Wallace Mendelson, *Dred Scott's Case—Reconsidered*, 38 MINN. L. REV. 16 (1953).

492. CONG. GLOBE, 31st Cong., 1st Sess. 1155 (1850).

which legitimately belongs to the Supreme Court of the United States,” “to suppress this agitation,” set aside all “differences of opinion,” and “cheerfully submit” in the judicial resolution, whatever it might be.⁴⁹³ Sectional agitators, whether from the North or the South, were more reluctant to leave things in the hands of the Justices, but party leaders who hoped to build or sustain national coalitions were willing to take their chances with whatever the Court might do.⁴⁹⁴ Moreover, given the Southern tilt to antebellum politics, a pro-slavery outcome would hardly have been unwelcome or inconsistent with dominant interests, and the 1856 election that brought Buchanan to the White House was taken by many political observers to be a mandate for pro-slavery politics.⁴⁹⁵ The Court was invited to intervene in the slavery issue, but it was not directly pressured to rule in a particular way. The Justices took up the invitation as they had done before. In this case, they used the available freedom to strike down a defunct statutory provision rather than uphold a current one.

A different constitutional problem arose in Ohio in the midst of the secession crisis. The Fugitive Slave Act of 1793 ordered that “it shall be the duty of the Executive authority of the State” to arrest and render up fugitives.⁴⁹⁶ The statutory language seemed plain; it asserted a federal “power to command and to coerce obedience” of state government officials under the authority of carrying out the obligations of the Constitution’s fugitive slave clause. But, Chief Justice Taney argued,

we think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time . . . and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State.⁴⁹⁷

This provision of the Fugitive Slave Act was not constitutionally enforceable against the Governor of Ohio who refused to arrest or extradite Willis Lago, a free black who had been indicted in Kentucky for aiding the escape of slaves in that state. This was not a crime that Ohio was prepared to recognize in 1861, the Governor concluded, nor was the incoming Lincoln Administration likely to disagree with that assessment. This refusal was a matter of interstate comity, the Taney Court concluded, and Congress could not intervene to commandeer the officials of the Ohio state government. Justices and commentators had long

493. BUCHANAN, *supra* note 488, at 106 (quoting letter of Catron, J.).

494. WHITTINGTON, *supra* note 8, at 251–54.

495. Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 415–16 (1998); Mendelson, *supra* note 491, at 24.

496. Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302.

497. *Ex parte Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861), *overruled in part* by *Puerto Rico v. Branstad*, 438 U.S. 219 (1987).

suggested that this would be the outcome if the provision were ever brought to a constitutional test.⁴⁹⁸ The language of statutory “duty” was exclusively used by the early Congress to express commands to inferior officers, and there is little reason to imagine that the Fugitive Slave Act of 1793 was any different in its design, though the duties imposed were not always ministerial and readily subject to a writ of mandamus.⁴⁹⁹ The Court did not void the entire statutory scheme by which governors might satisfy their own constitutional obligation to deliver up fugitives; only the enforceable duty. The congressional declaration that governors *should* turn over fugitives without delay was still an important message that the Court endorsed. Moreover, the statute had originally been written to empower state executives who were looking for procedures to follow when extraditing fugitives but who had been denied any guidance or authority by their own state legislatures.⁵⁰⁰ The law could still serve these functions, even if Congress could not commandeer the state governor.⁵⁰¹

The Jacksonian era saw an increased level of judicial review of the legislative authority of Congress by both the Supreme Court and the lower federal courts. Constitutional arguments over the scope of congressional power and appeals to the courts to enforce constitutional limits against Congress had become common in the federal courts. Moreover, the subject of those disputes had become more coherent. Although many of the constitutional claims addressed by the Court were idiosyncratic, there was substantial repetition as well. Antislavery advocates had raised numerous objections (without success) to congressional power to enforce or facilitate slavery in the lower courts and in the Supreme Court, and the federal courts were a clear battlefield in the slavery debates well before *Dred Scott*. But the Court was called upon again and again to address questions regarding such issues as the equality and status of the new states after their territorial status had ended and the scope of federal authority over the waterways. As it had earlier in its history, the Court usually upheld the constitutional authority of Congress against challenges. Even when the Jacksonian

498. See, e.g., *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 622 (1842); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW § 32 n.c (New York, K.B. Clayton, 4th ed. 1840) (“I do not know of any power under the authority of the United States by which he could be coerced to perform the duty. Perhaps the act of congress may be considered as prescribing a duty, the performance of which it cannot enforce.”).

499. See, e.g., Act of Apr. 14, 1792, ch. 24, § 4, 1 Stat. 254, 256 (“[I]t shall be the duty of the consuls and vice-consuls of the United States, to give receipts for all fees which they shall receive”); Act of Feb. 20, 1792, ch. 7, § 6, 1 Stat. 232, 234 (“[I]t shall be the duty of the Postmaster General, to give public notice in one or more of the newspapers”); Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65 (“[I]t shall be the duty of the Secretary of the Treasury to digest and prepare plans for the improvement and management of the revenue”); Act of Sept. 1, 1789, ch. 11, § 28, 1 Stat. 55, 63 (“[I]t shall be the duty of such collector or surveyor to grant a permit to land or unload such cargo”).

500. See Paul Finkelman, *The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793*, 56 J. S. HIST. 397, 406–08 (1990).

501. DAVID RORER, *AMERICAN INTER-STATE LAW* 220 (Chicago, Callaghan & Co. 1879) (noting that it is “a moral” duty to extradite fugitives); SAMUEL T. SPEAR, *THE LAW OF EXTRADITION* 291 (Albany, Weed, Parsons & Co. 1879) (noting that there is “no question as to the validity of the law for this purpose” of stating when governors should act on their own constitutional duty to extradite fugitives).

Court might have been expected to weigh in against Congress in more ideological or partisan cases involving internal improvements or the Whig bankruptcy legislation, it instead deferred. In other cases, such as the admiralty decisions, the Court was willing to read vaguely worded grants broadly and emphasize the scope of federal and congressional authority. But like the earlier Courts, the Taney Court also read constitutionally mandated exceptions into statutes and narrowed the scope of statutes, refusing to apply laws beyond the scope of congressional authority to direct the courts. *Dred Scott* was not distinctive for enforcing constitutional constraints against Congress. It was distinctive for simply voiding a statutory provision in its entirety, and doing so in a highly politically salient case.

III. IMPLICATIONS

The practice of reviewing the constitutionality of federal legislation and its applications developed gradually over the course of the first decades of the republic. That practice did not consist of a single case inventing the power of judicial review and another—decades later—shockingly making use of it. Throughout the early republic, the Supreme Court was routinely asked to resolve constitutional questions involving the scope of the legislative authority of Congress and to enforce constitutional limits against that coordinate branch of the national government. The Court readily encouraged litigants to raise such issues, for it expressed little doubt about its own responsibility to evaluate the constitutionality of the legal actions that it was being asked to take in the cases that came before it and to refuse to apply federal statutes in ways that would exceed congressional authority. Although those constitutional challenges usually resulted in the Court giving its approval to federal policy, the Court established itself as a forum within which constitutional arguments could be raised and adjudicated. The Court rarely showed much self-consciousness about exercising its own authority to evaluate the constitutionality of federal legislation, and it did not often articulate a standard of review that emphasized an especially high standard of deference to Congress on constitutional issues.

As Figure 1 indicates, the Court heard and decided constitutional challenges to federal legislation throughout the period, from its inception through secession. Instances of the Court invalidating or narrowing statutory provisions are interspersed with the Court upholding provisions. Even so, the pace of judicial review does increase over time. Prior to the 1820s, the Court, on average, decided less than one case per year reviewing the constitutionality of an application of a federal law, with a period of notable quiet in the 1810s. After that, however, the Court averaged a case per year, and more after the 1840s. The Court's invalidation and narrowing of statutes follows a similar pattern. At the beginning and the end of the period, the Court held unconstitutional applications of the law in a higher proportion of the cases that it considered than it did in the middle of the period, but even in those years, the Court upheld federal law more often than not. The Taney Court exercised the power of judicial

review more often, but on the whole it was not proportionally more or less deferential than its predecessors.

The increasing constitutional caseload of the later Court partly reflects a more active Congress passing more statutes that could potentially come up for review, but it also reflects a growing and more active government and society that created disputes raising new constitutional questions about old statutes. Constitutional challenges were often slow to develop. The median time between the passage of these statutory provisions and their evaluation in the Court during this period was over thirteen years. Test cases designed to question the validity of a newly passed statute, as with the carriage tax case, were relatively rare.⁵⁰² More often, constitutional questions arose in the context of normal litigation, as federal law was implemented and applied in the course of ordinary business.⁵⁰³ At times, a given constitutional issue simply did not squarely arise until sometime after a statute was passed. There had long been doubts about the constitutionality of federal imposition of a “duty” on state governors in the Fugitive Slave Act, but it was not until a governor refused to comply with the terms of the act that the question reached the Court in *Dennison*.⁵⁰⁴ The constitutional issues could be secondary to the main objects of the statute or not obvious on the face of the statute until applied in some particular circumstance or raised by suitably motivated individuals.⁵⁰⁵ The courts had no difficulty pushing custom disputes toward quick resolution, as the statute required, until the *Phelps* case highlighted the tension with due process requirements, and the scope of congressional authority to give federal courts jurisdiction over the nation’s waterways via admiralty jurisdiction only became apparent through a lengthy common law process of considering new cases testing the boundaries of established rules.⁵⁰⁶

When refusing to apply federal laws on constitutional grounds, the Court used a mix of techniques. The Court sometimes simply invalidated a statutory

502. See, e.g., ELLIS, *supra* note 224 (discussing *McCulloch v. Maryland*); Frankel, *supra* note 102, at 2 (discussing *Hylton v. United States*).

503. The Pollard litigation provides an example, where different attorneys brought various claims forward to state and federal courts in an effort to win a rich prize. Edward W. Faith, *Great Law Suits Affecting Mobile*, 1 ALA. LAWYER 320 (1940).

504. See *supra* text accompanying note 374 (discussing *Prigg v. Pennsylvania*).

505. See, e.g., *New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 737 (1836) (holding that reservation of federal property from Louisiana exceeds federal authority when applied to wharves); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 449 (1830) (holding that incorporation of Louisiana civil procedures into federal courts conflicts with rights of jury when allowing appellate courts to review factual record); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 239 (1824) (holding that federal coasting licenses are authorization for free navigation of interstate waterways).

506. See, e.g., *People’s Ferry Co. of Boston v. Beers*, 61 U.S. (20 How.) 393 (1858); *Propeller Genesee Chief v. Fitzhugh (The Genesee Chief)*, 53 U.S. (12 How.) 443 (1851), *overruled by* *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 253 (1972); *N.J. Steam Navigation Co. v. Merchants’ Bank of Boston*, 47 U.S. (6 How.) 344 (1848); *Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847); *United States v. Phelps*, 33 U.S. (8 Pet.) 700 (1834).

provision.⁵⁰⁷ *Marbury* and *Dred Scott* were both cases of this type. *Yale Todd* apparently fit this characterization, because the Justices accepted neither the explicit statutory scheme nor the informal workaround as producing valid pension certificates.⁵⁰⁸ *Cantril* and *Pollard* similarly provided cases in which the Justices did not attempt to salvage any aspect of the statutory provision.⁵⁰⁹ In each case, the relevant provision was simple and the Court was gutting its primary function by its constitutional ruling. Of course, as we have seen, *Yale Todd* and *Cantril* are also not clear-cut cases of the exercise of judicial review. In the case of *Yale Todd* and *Cantril*, Congress had already replaced the statute in question.⁵¹⁰ In the case of *Pollard*, the law in question was a private act with no broader application, though the equal-footing doctrine underlying the decision did have broader implications.⁵¹¹ In *Dred Scott*, the statute in question had likewise been displaced, but as in all the cases, the constitutional rule being established was prospective and had potential implications for the future. The implications of *Dred Scott* were particularly meaningful to the politics of the period, but it was not alone in laying down a rule that had consequences that extended beyond the parties in the case itself.

More often in these early decades, the Court took a more partial, if not necessarily a more modest, approach to applying constitutional limits to federal law. The Court focused on the application of the law directly before it and, if necessary, refused to allow it. Depending on the statutory language, this could require disallowing a certain class of applications of the statute, requiring implicit exceptions to the application of the statute, or effectively rewriting the statute to accomplish constitutional objectives while excluding the unconstitutional ones. Regardless of how the Justices approached the task, the Court and commentators both recognized that the Judiciary was imposing constitutional limits on the legislative power of Congress in such cases and rendering parts of federal statutory law legally unenforceable. In some cases, the dubious statutory text covered a complex set of applications, some constitutional and some not. Consistent with *Marbury*'s logic that the power of judicial review is grounded in the authority of the judge to decline to follow a statutory command that would lead to an unconstitutional outcome in the case before the bench, the Court refused to allow the law of Congress to supersede the law of the Constitution in individual cases, but it frequently left in place the law itself if there were other potential applications that were not then before the bench.⁵¹²

507. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), *superseded by* U.S. CONST. amend. XIII, XIV; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *see also* Graber, *supra* note 15.

508. *See supra* text accompanying notes 75–81.

509. *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845) (holding that submerged land belonged to the states, contrary to a federal statute); *United States v. Cantril*, 8 U.S. (4 Cranch) 167 (1807) (invalidating law punishing acts of fraud against the national bank).

510. *See supra* text accompanying notes 70 and 194.

511. *See supra* text accompanying notes 405–408.

512. *See, e.g., Veazie v. Moor*, 55 U.S. (14 How.) 568, 575 (1853) (excluding reliance on federal coasting licenses in intrastate waterways); *United States v. Phelps*, 33 U.S. (8 Pet.) 700 (1834)

The fact that the Court was willing to hear constitutional arguments on the limits of congressional power did not make the Court an important player in the biggest constitutional disputes of the period. It remained largely a bystander in the great constitutional debates of the early republic. It is still true that it was Congress and the Executive branch that largely debated and resolved the critical issues of separation of powers, federalism, and individual rights in the late eighteenth and early nineteenth centuries.⁵¹³ Even when the federal Judiciary spoke to those issues, it was a secondary player and it certainly did not settle them. When politically important and controversial federal policies arrived at the Court, such as the Bank or the bankruptcy law or the fugitive slave law, it almost always upheld them. *Dred Scott* and *Dennison* are the notable exceptions, where the Court inserted itself into an ongoing political dispute and invalidated or narrowed federal statutory provisions.

As detailed elsewhere, however, *Dred Scott* is less exceptional than it might appear.⁵¹⁴ By the time of the decision, national political leaders of both established parties had clearly indicated their desire for the Court to step in and resolve the constitutional question of congressional power over slavery in the territories, and the more pro-slavery party had long controlled the Court and had won national election. It was the minority, insurgent Republicans, whom the established political leaders hoped to isolate with a judicial decision declaring their goals unconstitutional, who were upset by the Court's actions. The Court may have been swimming against the current of history with *Dred Scott*, but it was aligned with the governing coalition of the moment as it tossed out a nearly four-decade-old statute. By contrast, the Taney Court would seem to have been acting against its own pro-slavery instincts in *Dennison*. But again, by the time of the decision, the supporting coalition in the national government had collapsed. The Court would have been helpless to coerce a resistant Ohio Governor to turn over a free black man for the crime of assisting slaves to escape Kentucky days after Lincoln's inaugural. The Court had long suggested that Congress could not commandeer a recalcitrant governor with the fugitive statutes, but the case had not previously arisen. The Taney Court was now confronted with the case with an anti-slavery President in office and slave states leaving the Union. It was a good time for states' rights to trump nationalism and slavery on the Court.

(requiring lengthy continuances when genuinely necessary for defense); *Reynolds v. M'Arthur*, 27 U.S. (2 Pet.) 417 (1829) (disallowing retrospective applications); *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 13 (1800) (disallowing suits without citizens as a party).

513. For a survey of constitutional debates in Congress in the early republic, see generally DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829–1861* (2005); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801* (1997); DAVID P. CURRIE, *THE JEFFERSONIANS, 1801–1829* (2001); Mark A. Graber, *Resolving Political Questions into Judicial Questions: Tocqueville's Aphorism Revisited*, 21 CONST. COMMENT. 485 (2004).

514. See WHITTINGTON, *supra* note 8, at 248–55 (describing congressional efforts to put the slavery question before the Court); Graber, *supra* note 491, at 46–50 (“[I]n deciding *Dred Scott*, the Court was carrying out the wishes of Jacksonian moderates.”).

As the Court used its power to interpret the Constitution to void congressional actions, trim or redirect legislative actions, and validate or construct federal policy, it contributed above all to the process of nation-building. It reaffirmed national priorities and helped protect and sustain the institutions that would be needed to advance those priorities. It projected national power, such as it was in this early day, into the international arena, into the states, and into the frontier. It supported the flexibility of the governing institutions of the new constitutional system, while fleshing out the features, jurisdiction, powers, and prerogatives of the federal Judiciary and carefully laying down markers as to how Congress could and could not legislate over the courts. It announced what Congress could do, and it corrected Congress when it went astray. In doing so, the Court used judicial review to work with, rather than against, Congress during this period to construct a new national government. The Court never created serious obstructions to important policies favored by active majorities when reviewing federal laws before the Civil War. The Court established the power of judicial review by using it. But the Court used it to validate congressional actions or correct congressional errors, not to block what Congress was vested in trying to accomplish.

APPENDIX: CASES OF JUDICIAL REVIEW OF CONGRESS BY THE U.S. SUPREME COURT, 1789–1861

CASE NAME	CITATION	STATUTE	STATUTE DATE
<i>United States v. Yale Todd</i> (1794)	54 U.S. (1 How.) 40, 52 (1851)	<i>Invalid Pensions Act</i>	3/19/1792
Penhallow v. Doane's Adm'rs	3 U.S. (1 Dall.) 54 (1795)	Court of Appeals Resolution	5/24/1780
Hylton v. United States	3 U.S. (1 Dall.) 171 (1796)	Carriage Tax Act	6/5/1794
United States v. La Vengeance	3 U.S. (3 Dall.) 297 (1796)	Arms Exportation Act	5/22/1793
<i>Mossman v. Higginson</i>	4 U.S. (4 Dall.) 12 (1800)	<i>Judiciary Act of 1789</i>	9/24/1789
<i>Marbury v. Madison</i>	5 U.S. (1 Cranch) 137 (1803)	<i>Judiciary Act of 1789</i>	9/24/1789
Stuart v. Laird	5 U.S. (1 Cranch) 299 (1803)	Repeal Act of 1802	3/8/1802
United States v. Fisher	6 U.S. (2 Cranch) 358 (1805)	Effectual Settlement of Accounts Act	3/3/1797
Ex Parte Bollman	8 U.S. (4 Cranch) 75 (1807)	<i>Judiciary Act of 1789</i>	9/24/1789
<i>United States v. Cantril</i>	8 U.S. (4 Cranch) 167 (1807)	<i>Bank Frauds Act</i>	6/27/1798
United States v. The Schooner Betsey & Charlotte	8 U.S. (4 Cranch) 443 (1808)	St. Domingo Trade Suspension Act	2/28/1806
<i>Hodgson v. Bowerbank</i>	9 U.S. (5 Cranch) 303 (1809)	<i>Judiciary Act of 1789</i>	9/24/1789
Cargo of the Brig Aurora v. United States	11 U.S. (7 Cranch) 382 (1813)	Non-Intercourse Act of 1810	5/1/1810
Martin v. Hunter's Lessee	14 U.S. (1 Wheat.) 304 (1816)	<i>Judiciary Act of 1789</i>	9/24/1789
McCulloch v. Maryland	17 U.S. (4 Wheat.) 316 (1819)	Incorporation of the Bank of the United States	4/10/1816
United States v. Smith	18 U.S. (5 Wheat.) 153 (1820)	Protection Against Piracy Act	3/3/1819
Loughborough v. Blake	18 U.S. (5 Wheat.) 317 (1820)	District of Columbia Direct Tax	2/27/1815
Cohens v. Virginia	19 U.S. (6 Wheat.) 264 (1821)	<i>Judiciary Act of 1789</i>	9/24/1789
Gibbons v. Ogden	22 U.S. (9 Wheat.) 1 (1824)	Licensing Act	2/18/1793
Osborn v. Bank of the U.S.	22 U.S. (9 Wheat.) 738 (1824)	Incorporation of the Bank of the United States	4/10/1816
Wayman v. Southard	23 U.S. (10 Wheat.) 1 (1825)	<i>Judiciary Act of 1789</i>	9/24/1789
Bank of the U.S. v. Halstead	23 U.S. (10 Wheat.) 51 (1825)	Process Act of 1792	5/8/1792
Am. Ins. Co. v. 356 Bales of Cotton	26 U.S. (1 Pet.) 511 (1828)	Florida Territory Act	3/3/1823
<i>Jackson v. Twentyman</i>	27 U.S. (2 Pet.) 136 (1829)	<i>Judiciary Act of 1789</i>	9/24/1789
Foster v. Neilson	27 U.S. (2 Pet.) 253 (1829)	Louisiana Territory Act	3/26/1804
<i>Reynolds v. M'Arthur</i>	27 U.S. (2 Pet.) 417 (1829)	<i>Virginia Military Land Warrants Act</i>	4/11/1818
<i>Parsons v. Bedford</i>	28 U.S. (3 Pet.) 433 (1830)	<i>Louisiana Court Procedure Act</i>	5/26/1824
Worcester v. Georgia	31 U.S. (6 Pet.) 515 (1832)	Indian Trade Act	3/30/1802

(Continued)

CASE NAME	CITATION	STATUTE	STATUTE DATE
Worcester v. Georgia	31 U.S. (6 Pet.) 515 (1832)	Indian Trade Act	3/30/1802
<i>United States v. Percheman</i>	<i>32 U.S. (7 Pet.) 51 (1833)</i>	<i>Florida Land Titles Law</i>	<i>5/8/1822</i>
Sampeyreac v. United States	32 U.S. (7 Pet.) 222 (1833)	Louisiana Public Land Act	5/5/1830
<i>United States v. Phelps</i>	<i>33 U.S. (8 Pet.) 700 (1834)</i>	<i>Duties Act of 1799</i>	<i>3/22/1799</i>
<i>New Orleans v. United States</i>	<i>35 U.S. (10 Pet.) 662 (1836)</i>	<i>Louisiana Statehood Act</i>	<i>4/8/1812</i>
United States v. Coombs	37 U.S. (12 Pet.) 72 (1838)	Act More Effectually To Provide for the Punishment of Certain Crimes	3/3/1825
Garcia v. Lee	37 U.S. (12 Pet.) 511 (1838)	Louisiana Territory Act	3/26/1804
United States v. Gratiot	39 U.S. (14 Pet.) 526 (1840)	Disposal of Public Land Act	3/3/1807
Prigg v. Pennsylvania	41 U.S. (16 Pet.) 539 (1842)	Fugitive Slave Act of 1793	2/12/1793
Nelson v. Carland	42 U.S. (1 How.) 265 (1843)	Bankruptcy Act of 1841	8/19/1841
Pollard's Lessee v. Files	43 U.S. (2 How.) 591 (1844)	Act for Relief of William Pollard's Heirs	7/2/1836
Searight v. Stokes	44 U.S. (3 How.) 151 (1845)	4 Stat. 772	3/3/1835
<i>Pollard v. Hagan</i>	<i>44 U.S. (3 How.) 212 (1845)</i>	<i>Act for Relief of William Pollard's Heirs</i>	<i>7/2/1836</i>
Cary v. Curtis	44 U.S. (3 How.) 236 (1845)	Appropriations Act of 1839	3/3/1839
Jones v. Van Zandt	46 U.S. (5 How.) 215 (1847)	Fugitive Slave Act of 1793	2/12/1793
Waring v. Clarke	46 U.S. (5 How.) 441 (1847)	1 Stat. 73	9/24/1789
N.J. Steam Navigation Co. v. Merchants' Bank of Boston	47 U.S. (6 How.) 344 (1848)	Judiciary Act of 1789	9/24/1789
Sheldon v. Sill	49 U.S. (8 How.) 441 (1850)	Judiciary Act of 1789	9/24/1789
<i>Benner v. Porter</i>	<i>50 U.S. (9 How.) 235 (1850)</i>	<i>9 Stat. 130</i>	<i>2/22/1847</i>
<i>Lytle v. Arkansas</i>	<i>50 U.S. (9 How.) 314 (1850)</i>	<i>4 Stat. 420</i>	<i>5/29/1830</i>
United States v. Marigold	50 U.S. (9 How.) 560 (1850)	Act to Punish Certain Crimes	3/3/1825
<i>McNulty v. Batty</i>	<i>51 U.S. (10 How.) 72 (1850)</i>	<i>9 Stat. 128</i>	<i>2/22/1847</i>
Propeller Genesee Chief v. Fitzhugh	53 U.S. (12 How.) 443 (1851)	Act Extending Jurisdiction of the District Courts	2/26/1845
<i>Veazie v. Moor</i>	<i>55 U.S. (14 How.) 568 (1852)</i>	<i>Licensing Act</i>	<i>2/18/1793</i>
Haydel v. Dufresne	58 U.S. (17 How.) 23 (1854)	Louisiana Land Claims Act of 1811	2/15/1811
West v. Cochran	58 U.S. (17 How.) 403 (1854)	Louisiana Land Claims Act of 1807	3/3/1807
United States v. Ritchie	58 U.S. (17 How.) 525 (1854)	California Land Claims Act	3/3/1851
Den <i>ex dem.</i> Murray & Kayser v. Hoboken Land & Improvement Co.	59 U.S. (18 How.) 272 (1855)	Treasury Department Reorganization Act	5/15/1820
Pennsylvania v. Wheeling & Belmont Bridge Co.	59 U.S. (18 How.) 421 (1855)	Post Office Appropriation of 1852	8/31/1852
<i>Dred Scott v. Sandford</i>	<i>60 U.S. (19 How.) 393 (1856)</i>	<i>Missouri Compromise</i>	<i>3/6/1820</i>
<i>People's Ferry Co. of Boston v. Beers</i>	<i>61 U.S. (20 How.) 393 (1858)</i>	<i>Judiciary Act of 1789</i>	<i>9/24/1789</i>
Dynes v. Hoover	61 U.S. (20 How.) 65 (1857)	Government of the Navy Act	4/23/1800
<i>Withers v. Buckley</i>	<i>61 U.S. (20 How.) 84 (1857)</i>	<i>3 Stat. 349</i>	<i>3/1/1817</i>
Ableman v. Booth	62 U.S. (21 How.) 506 (1858)	Fugitive Slave Act of 1850	9/18/1850
<i>Kentucky v. Dennison</i>	<i>65 U.S. (24 How.) 66 (1860)</i>	<i>Fugitive Slave Act of 1793</i>	<i>2/12/1793</i>

Cases involving invalidation or narrowing of statutes are in italics.

