AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 5: The Jacksonian Era – Judicial Power and Constitutional Authority

OXFORD UNIVERSITY PRESS

Ableman v. Booth, 62 U.S. 506 (1858)

The Supreme Court at the beginning of the Jacksonian Era was increasingly under siege by advocates of state sovereignty who objected to decisions made during the Early National Era that expanded national power and restricted state authority. The most important of these decisions were Martin v. Hunter's Lessee *(1816) (federal courts have the power to reverse state court decisions),* Cohens v. Virginia *(1821) (federal courts have the power to reverse state criminal convictions),* McCulloch v. Maryland *(1819) (Congress has the power to incorporate a national bank), and* Gibbons v. Ogden *(1824) (Congress has broad powers to regulate interstate commerce). Section 25 of the Judiciary Act of 1789 was the federal law that gave the Supreme Court the jurisdiction necessary to issue these rulings. That provision authorizes the Supreme Court to "reverse" or "affirm" decisions from the highest state courts when that state court denied a right under the U.S. Constitution, federal law, or treaties.*

Southern opponents of federal judicial power concluded that repealing Section 25 was the best means for restoring state authority to settle constitutional controversies. Success would accomplish a dramatic decentralization in constitutional authority through the normal legislative process. Article III of the Constitution provides grounds for thinking Congress may constitutionally strip the Supreme Court of jurisdiction over state court decisions. That provision declares that "in all other cases" besides the Court's "original jurisdiction," the "Supreme Court shall have appellate jurisdiction, . . . with such exceptions, and under such regulations as the Congress shall make." This language suggests that, if Congress refrained from granting the Supreme Court the authority to hear appeals from the decisions of state high courts, then the decisions of those courts would be final on matters relating to the meaning of federal law or the U.S. Constitution. John C. Calhoun of South Carolina, the leading proponent of state sovereignty during the early Jacksonian Era, recognized that state immunity from federal authority might be accomplished by the simple expedient of repealing Section 25. He observed, "If the appellate power from the State courts to the U[nited] States court provided for by the 25th sec[tio]n did not exist, the practical consequence would be, that each government would have a negative on the other, and thus possess the most effectual remedy, that can be conceived against encroachment."[1]

Southern Jacksonians made a vigorous effort to repeal Section 25 after the election of Andrew Jackson in 1828. The southern-dominated House Judiciary Committee reported a bill to repeal Section 25 on January 24, 1831.[2] *Representative Warren Davis of South Carolina penned a committee report concluding that Section 25 was unconstitutional. Congress, his report, maintained, could give the Supreme Court appellate power only over other federal courts that Congress had created. Davis relied on the Virginia and Kentucky Resolutions of 1798 as authority for that understanding of federal judicial power. His report stated,*

> *a great diversity of opinion has existed as to the power of which resort must be had to determine questions and controversies that might arise between the several departments of our federative system. The question is not a new one. In the great political contest in 1798 and 1800, this very question made a distinction, and marked the line of division between the two parties that then divided the country. The federal party, who were then in power, asserted, that the federal court (which had just then declared and enforced as constitutional the alien and sedition laws,) was the tribunal of last resort established by the constitution, to judge of and determine questions of*

[1] Letter from John C. Calhoun to Littleton W. Tazewell (Aug. 25, 1827), quoted in David Currie, *The Constitution in the Supreme Court: The Second Century, 1888–1986* (Chicago: University of Chicago Press, 1994), 603.
[2] House Report 43, 21st Cong, 2nd Sess (Jan 24, 1831).

controversy between the departments of the Federal Government, and between the Federal Government and the States. The republican, or States rights party of that day, on the contrary, denied that the judicial department of the Federal Government, or all the departments of that Government conjointly, were empowered to decide finally and authoritatively, in questions of sovereignty, controversies between a State and the Federal Government, and asserted and insisted that there was no common tribunal established by the constitution for such a purpose, and that, consequently, each party had a right to judge of and determine the extent of its own rights and powers. The avowed political creed of that party was, that the Union was the result of a compact between the people of the several States, in their sovereign and corporate capacities and characters of separate and independent societies, or States, and not as one entire people forming a nation. . . .

. . .

It is no more necessary to the harmonious action of the Federal and State Governments that the federal courts should have power to control decisions of State courts by appeal, than the Federal Legislature should have power to control the legislation of the States, or the Federal Executive a State Executive, by a negative. It cannot be that when a direct negative on the laws of a State was proposed in convention, as part of the Federal Constitution, and rejected, that it was intended to confer on the federal courts, by implication, a power subjecting their whole legislation, and their judgments and decrees upon it, to this negative of the federal courts. It cannot be that this prostration of the independency of the State judicatories, this overthrow of the State Governments as co-ordinate powers, could be left to any implication of authority.[3]

Pennsylvania Representative James Buchanan, a Democratic regular and future president, retorted in a minority report that, without an appeal to federal courts from state court decisions, states could effectively nullify federal law. His Counter-Report asserted,

It was clearly the intention of its framers to create a Government which should have the power of construing and executing its own laws, without any obstruction from State authority. Accordingly, we find that the judicial power of the United States extends, in express terms, "to all cases" *in law and equity, arising under the Constitution, the laws, and the treaties of the United States."*

. . . .

If the decisions of the State courts should be final, the Constitution and laws of the Union might be construed to mean one thing in one State, and another thing in another State.

All uniformity in their construction would thus be destroyed. . . . Some common and uniform standard of construction was absolutely necessary.

. . . .

. . . . The history of our country abundantly proves that individual States are liable to high excitements and strong prejudices. The judges of these States would be more or less than men if they did not participate in the feelings of the community by which they are surrounded. Under the influence of these excitements, individuals, whose rights happen to clash with the prevailing feeling of the State, would have but a slender hope of obtaining justice before a State tribunal. There would be the power and the influence of the State sovereignty on the one side, and an individual who had made himself obnoxious to popular odium on the other. In such cases, ought the liberty or the property of a citizen, so far as he claims the same under the Constitution or laws of the United States, to be finally decided before a State court, without an appeal to the Supreme Court of the United States, on whom the construction of this very Constitution and these laws has been conferred, in all cases, *by the Constitution.*

The Supreme Court, considering the elevated character of its judges, and that they reside in parts of the Union remote from each other, can never be liable to local excitements and local prejudices. . . .

. . . .

[3] Ibid., 3.

> *This section ought not be repealed, because, in the opinion of the minority of the Committee on the Judiciary, its repeal would seriously endanger the existence of this Union. The chief evil which existed under the old confederation, and which gave birth to the present Constitution, was that the General Government could not act directly upon the people, but only by requisition upon sovereign States. The consequence was that the States either obeyed or disobeyed these requisitions, as they thought proper. The present Constitution was intended to enable the Government of the United States to act immediately upon the people of the States, and to carry its own laws into full execution, by virtue of its own authority. If this section were repealed, the General Government would be deprived of the power, by means of its own judiciary, to give effect either to the Constitution which called it into existence, or to the laws and treaties made under its authority. It would be compelled to submit, in many important cases, to the decisions of the State courts, and thus the very evil which the present Constitution was intended to prevent would be entailed upon the people. The judiciary of the States might refuse to carry into effect the laws of the United States; and without that appeal to the Supreme Court which the 25th section authorizes, these laws would thus be entirely annulled, and could not be executed without a resort to force.*[4]

Supreme Court Justice Joseph Story agreed that the bill was "alarming." He privately warned that if Section 25 was repealed, "the Constitution is practically destroyed."[5]

Despite the Democratic majority in the House of Representatives, the bill to repeal Section 25 was rejected by an overwhelming vote of 138 to 51. The defeat of the repeal effort did not signal a general triumph for federal judicial power in the early 1830s. President Jackson challenged the Supreme Court's decision in McCulloch *when vetoing the Second Bank of the United States and refused to implement the judicial decision in* Worcester v. Georgia *(1831). The Marshall Court, perhaps fearful of political reprisal, rarely challenged state authority when Jackson was president. In* Barron v. Baltimore *(1833), the Marshall Court held that the states were not bound by the provisions of the federal bill of rights. The federal courts could still hear a wide variety of challenges to state actions that allegedly violated federal statutory, treaty, or constitutional rights, but litigants could not look to the first ten amendments to the U.S. Constitution for assistance. The fact that the repeal measure was allowed to come to a floor vote was itself a serious challenge to the Court, but the Democratic leadership was not yet prepared to emasculate the federal judiciary and there was no danger that the bill would pass.*

Jacksonian opposition to federal judicial power faded rapidly during the 1830s. As a federal judiciary staffed with Democrats became more sympathetic to Democratic understandings of federalism and national power, Democrats became more sympathetic to the federal courts. President Jackson proposed and Congress adopted a provision in the Force Act of 1834 expanding federal judiciary power to enforce federal laws in the states. Over the next twenty years, Democrats encouraged the pro-slavery majority on the Supreme Court to resolve politically charged controversies over slavery. Days before the Supreme Court in Dred Scott v. Sanford *(1857) declared that Congress had no power to ban slavery in the territories, President James Buchanan in his inaugural address declared that the status of slavery in the territories was "a judicial question, which legitimately belongs to the Supreme Court of the United States."*[6] *The Democratic majority on the Supreme Court in* Ableman v. Booth *(1858) issued a powerful defense of judicial supremacy when responding to state legislative and judicial efforts to nullify the Fugitive Slave Law of 1850.*

Sherman Booth was an antislavery journalist in Milwaukee, Wisconsin. In March 1854, Booth helped a fugitive slave, Joshua Glover, break out of prison and escape to Canada. On May 26, Booth was arrested by a federal commissioner for violating the Fugitive Slave Act of 1850. Eventually, Booth was found guilty in federal court of helping Joshua Glover escape from federal marshals, but was not specifically found guilty of violating the Fugitive Slave Act. Booth then obtained a writ of habeas corpus from the Wisconsin Supreme Court. The state court justices claimed the writ was justified because the federal court erred in ruling that Booth had been charged with a federal crime. Federal authorities in Wisconsin appealed this decision to the Supreme Court of the United States.

---

[4] Ibid., 16.

[5] Joseph Story, "Letter to Sarah Story, Jan. 28, 1831," in William W. Story, *Life and Letters of Joseph Story*, vol. 2 (Boston: Charles C. Little and James Brown, 1851), 43.

[6] James Buchanan, "Inaugural Address," in James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents*, vol. 5 (Washington, D.C.: Bureau of National Literature, 1903), 431.

Roger Taney writing for a unanimous Court in Ableman v. Booth *reversed the Supreme Court of Wisconsin's decision. State courts, he declared, had no power to issue a writ of habeas corpus to a person in federal custody on the ground that federal courts had misinterpreted federal law or the federal constitution.* Ableman v. Booth *asserts federal judicial supremacy over state courts and, by implication, over all governing officials. What reasons does Taney give for reaching those conclusions? To what extent did this Jacksonian defense of judicial power reflect principled convictions or the political reality that the federal courts were controlled by a southern Jacksonian majority?*

The Taney Court decision in Ableman *did not bring the Booth affair to a halt. The Wisconsin Supreme Court refused to retract the writ of habeas corpus. The Wisconsin legislature passed a resolution nullifying* Ableman v. Booth. *That resolution declared*

> *Such assumption of power and authority by the Supreme Court of the United States, to become the final arbiter of the liberty of the citizen, and to override and nullify the judgments of the state courts' declaration thereof, is in a direct conflict with that provision of the Constitution of the United States which secures to the people the benefits of the writ of habeas corpus.*
>
> . . . .
>
> Resolved *That this assumption of jurisdiction by the federal judiciary, in the said case, and without process, is an act of undelegated power, and therefore without authority, void, and of no force.*
>
> Resolved, *That the government, formed by the Constitution of the United States was not the exclusive or final judge of the extent of the powers delegated to itself; but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.* [7]

To what extent did this attack on judicial power reflect principled convictions or the political reality that the federal courts were controlled by a southern Jacksonian majority?

President James Buchanan, in his last day in office, pardoned Booth. Litigation over the escape of Joshua Glover did not end until the closing days of the Civil War.[8]

CHIEF JUSTICE TANEY delivered the opinion of the court.

. . . .

[Q]uestions of this kind must always depend upon the Constitution and laws of the United States, and not of a State. The Constitution was not formed merely to guard the States against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose, it was felt by the statesmen who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the General Government; and that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities. And it was evident that anything short of this would be inadequate to the main objects for which the Government was established; and that local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one State upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals.

The language of the Constitution, by which this power is granted, is too plain to admit of doubt or to need comment. It declares that 'this Constitution, and the laws of the United States which shall be passed in pursuance thereof, and all treaties made, or which shall be made, under the authority of the

---

[7] Herman Ames, *State Documents on Federal Relations* (New York: Longmans, Green & Co, 1906), 304–305.

[8] Readers interested in all the bloody details should consult H. Robert Baker, *The Rescue of Joshua Glover: A Fugitive Slave, the Constitution, and the Coming of the Civil War* (Athens: Ohio University Press, 2006).

United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.'

But the supremacy thus conferred on this Government could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from the local influences of which we have spoken. And the Constitution and laws and treaties of the United States, and the powers granted to the Federal Government, would soon receive different interpretations in different States, and the Government of the United States would soon become one thing in one State and another thing in another. It was essential, therefore, to its very existence as a Government, that it should have the power of establishing courts of justice, altogether independent of State power, to carry into effect its own laws; and that a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, whether in a State court or a court of the United States, should be finally and conclusively decided. Without such a tribunal, it is obvious that there would be no uniformity of judicial decision; and that the supremacy, (which is but another name for independence,) so carefully provided in the clause of the Constitution above referred to, could not possibly be maintained peacefully, unless it was associated with this paramount judicial authority.

The importance which the framers of the Constitution attached to such a tribunal, for the purpose of preserving internal tranquility, is strikingly manifested by the clause which gives this court jurisdiction over the sovereign States which compose this Union, when a controversy arises between them. Instead of reserving the right to seek redress for injustice from another State by their sovereign powers, they have bound themselves to submit to the decision of this court, and to abide by its judgment. The same purposes are clearly indicated by the different language employed when conferring supremacy upon the laws of the United States, and jurisdiction upon its courts. In the first case, it provides that 'this Constitution, and the laws of the United States *which shall be made in pursuance thereof*, shall be the supreme law of the land, and obligatory upon the judges in every State.' The words in italics show the precision and foresight which marks every clause in the instrument. The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, nor were the State judges bound to carry it into execution. And as the courts of a State, and the courts of the United States, might, and indeed certainly would, often differ as to the extent of the powers conferred by the General Government, it was manifest that serious controversies would arise between the authorities of the United States and of the States, which must be settled by force of arms, unless some tribunal was created to decide between them finally and without appeal.

The Constitution has accordingly provided, as far as human foresight could provide, against this danger. And in conferring judicial power upon the Federal Government, it declares that the jurisdiction of its courts shall extend to all cases arising under 'this Constitution' and the laws of the United States- leaving out the words of restriction contained in the grant of legislative power which we have above noticed. The judicial power covers every legislative act of Congress, whether it be made within the limits of its delegated powers, or be an assumption of power beyond the grants in the Constitution.

This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the General Government. And as the Constitution is the fundamental and supreme law, if it appears that an act of Congress is not pursuant to and within the limits of the power assigned to the Federal Government, it is the duty of the courts of the United States to declare it unconstitutional and void. The grant of judicial power is not confined to the administration of laws passed in pursuance to the provisions of the Constitution, nor confined to the interpretation of such laws; but, by the very terms of the grant, the Constitution is under their view when any act of Congress is brought before them, and it is their duty to declare the law void, and refuse to execute it, if it is not pursuant to the legislative powers conferred upon Congress. And as the final appellate power in all such questions is given to this court, controversies as to the respective powers of the United States and the States, instead of being determined by military and physical force, are heard, investigated, and finally settled, with the calmness and deliberation of judicial inquiry. And no one can fail to see, that if such an arbiter had not been provided,

in our complicated system of government, internal tranquility could not have been preserved; and if such controversies were left to arbitrament of physical force, our Government, State and National, would soon cease to be Governments of laws, and revolutions by force of arms would take the place of courts of justice and judicial decisions.

Now, it certainly can be no humiliation to the citizen of a republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it. Nor can it be inconsistent with the dignity of a sovereign State to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a State of this Union. On the contrary, the highest honor of sovereignty is untarnished faith. And certainly no faith could be more deliberately and solemnly pledged than that which every State has plighted to the other States to support the Constitution as it is, in all its provisions, until they shall be altered in the manner which the Constitution itself prescribes. In the emphatic language of the pledge required, it is *to support this Constitution*. And no power is more clearly conferred by the Constitution and laws of the United States, than the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws; and for that purpose to bring here for revision, by writ of error, the judgment of a State court, where such questions have arisen, and the right claimed under them denied by the highest judicial tribunal in the State.