The Constitution in the Supreme Court: Civil War and Reconstruction, 1865-1873

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The appointment of Salmon P. Chase as Chief Justice in December 1864, like that of his predecessor in 1836, marked the beginning of a new epoch in the Court's history. Not only had the Civil War altered the legal landscape dramatically; Chase was to preside over an essentially new complement of Justices. Of those who had sat more than a few years with Chief Justice Roger Taney, only Samuel Nelson and Robert Grier were to remain for a significant time. With them were six newcomers appointed between 1858 and 1864, five of them by Abraham Lincoln and four of them Republicans: Nathan Clifford, Noah H. Swayne, Samuel F. Miller, David Davis, Stephen J. Field, and Chase himself. These eight Justices were to sit together through most of the period until Chase's death in 1873. Taney's longtime colleagues James M. Wayne and John Catron were gone by 1867; William Strong, Joseph P. Bradley, and Ward Hunt, appointed at the end of Chase's tenure, played relatively minor roles. The work of the Chase period was largely done by eight men.¹

Chase was Chief Justice for less than nine years, but his tenure was a time of important constitutional decisions. Most of the significant cases fall into three categories. The best known cases, which serve as the subject of this article, involve a variety of questions arising out of the Civil War itself. Less dramatic but of comparable impact on future litigation and of comparable jurisprudential interest were a number of decisions determining the inhibitory effect of the commerce clause on state legislation. Finally, at the very end of the Chase period the Court for the first time turned to the task of interpreting the constitutional amendments adopted as a result of the war, a labor that would absorb a major part of the

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energies of Justices down to the present day.²

My aim here, as in studies of earlier periods in the Court's history,³ is to explore and to criticize the Justices' methods of constitutional interpretation. Useful insights can sometimes be gleaned from cases whose holdings are of no particular interest, and the total workload of the Court is an important factor in determining how the Justices approach the writing of any single opinion. Thus, although from considerations of economy I shall focus primarily upon the more important cases, I shall also attempt to convey a more or less comprehensive overview of the constitutional work of the Chase period as a whole.⁴

¹JUSTICES OF THE SUPREME COURT DURING THE CHIEF JUSTICESHIP OF SALMON P. CHASE

		1864	1866	1868	1870	1872
James M. Wayne	(1835-1867)	_____				
John Catron	(1837-1865)	_____				
Samuel Nelson	(1845-1872)	_____				
Robert C. Grier	(1846-1870)	_____				
Nathan Clifford	(1858-1881)	_____				
Noah H. Swayne	(1862-1881)	_____				
Samuel F. Miller	(1862-1890)	_____				
David Davis	(1862-1877)	_____				
Stephen J. Field	(1863-1897)	_____				
Salmon P. Chase	(1864-1873)		_____			
William Strong	(1870-1880)					_____
Joseph P. Bradley	(1870-1892)					_____
Ward Hunt	(1872-1892)					

SOURCE: Adapted from G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* app. A, at A-2 to A-4 (10th ed. 1980).

² The thirteenth and fourteenth amendments were among the principal legacies of the rebellion; yet because their interpretation first confronted the Court during the last days of Chase's tenure, the decisions addressing them are considered, along with the commerce clause cases of the Chase period, in an article in the next issue of this *Review*.

³ Currie, *The Constitution in the Supreme Court: 1789-1801*, 48 U. CHI. L. REV. 819 (1981) [hereinafter cited as Currie I]; Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646 (1982) [hereinafter cited as Currie II]; Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835*, 49 U. CHI. L. REV. 887 (1982) [hereinafter cited as Currie III]; Currie, *The Constitution in the Supreme Court: Contracts and Commerce, 1836-1864*, 1983 DUKE L.J. 471 [hereinafter cited as Currie IV]; Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers, 1836-1864*, 1983 DUKE L.J. 695 [hereinafter cited as Currie V]. The entire study of the first hundred years will be published in book form by the University of Chicago Press.

⁴ The leading general histories of the Court during the Chase period are the excellent C. FAIRMAN, *6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES* (1971) [hereinafter cited as FAIRMAN, HISTORY], and 2 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (rev. ed. 1926). The best biographies of the Justices are C. FAIRMAN, *MR. JUSTICE*

An event as cataclysmic as the Civil War was bound to place considerable strain on the Constitution, and the brunt of the judicial burden of putting it back in shape was borne in the decade following the War itself—the period considered in this study.⁵

A series of landmark opinions characterizes this aspect of the Court's work. *Ex parte Milligan*⁶ invalidated military trials of civilians. *Cummings v. Missouri*⁷ and *Ex parte Garland*⁸ struck down state and federal test oaths enacted after the War. *Mississippi v. Johnson*,⁹ *Georgia v. Stanton*,¹⁰ *Ex parte McCardle*,¹¹ and *United States v. Klein*¹² laid down important principles of federal jurisdiction in the course of generally unavailing attempts to obtain a judicial test of Reconstruction measures. *Texas v. White*¹³ finally established both the illegality of secession and the validity of the basic Reconstruction principle. Wartime financial measures produced several important opinions culminating in the invalidation of paper tender under questionable circumstances in *Hepburn v. Griswold*¹⁴ and in the prompt overruling of that case after two new Justices were appointed.¹⁵

I. MILITARY TRIALS AND TEST OATHS

A. *Ex parte Milligan*

Sentenced to death by a military commission in Indiana during the war for giving aid to the rebellion, Milligan sought habeas

MILLER AND THE SUPREME COURT 1862-1890 (1939) [hereinafter cited as FAIRMAN, MILLER] and C. SWISHER, STEPHEN J. FIELD, CRAFTSMAN OF THE LAW (1930). Others include P. CLIFFORD, NATHAN CLIFFORD, DEMOCRAT (1922), A. HART, SALMON PORTLAND CHASE (1899), W. KING, LINCOLN'S MANAGER: DAVID DAVIS (1960), A. LAWRENCE, JAMES MOORE WAYNE, SOUTHERN UNIONIST (1943), and J. SCHUCKERS, THE LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE (1874), the last of which oddly makes virtually no reference to Supreme Court decisions.

⁵ The Civil War litigation was one factor contributing to an enormous increase in the Justices' workload. In the first 75 years of its existence the Court had produced 68 volumes of decisions; in Chase's nine terms it produced 15. The increase in constitutional litigation was more striking still: in less than nine years under Chase the Court resolved as many constitutional cases as it had in the preceding 28 years. For discussion of the increasing docket problems, see, for example, FAIRMAN, MILLER, *supra* note 4, at 401-08; F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT ch. 6 (1928).

⁶ 71 U.S. (4 Wall.) 2 (1866).

⁷ 71 U.S. (4 Wall.) 277 (1867).

⁸ 71 U.S. (4 Wall.) 333 (1867).

⁹ 71 U.S. (4 Wall.) 475 (1867).

¹⁰ 73 U.S. (6 Wall.) 50 (1868).

¹¹ 74 U.S. (7 Wall.) 506 (1869).

¹² 80 U.S. (13 Wall.) 128 (1872).

¹³ 74 U.S. (7 Wall.) 700 (1869).

¹⁴ 75 U.S. (8 Wall.) 603 (1870).

¹⁵ Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1872).

corpus from a federal circuit court. On certified questions the Supreme Court held, in a celebrated 1866 opinion by Lincoln's old friend David Davis, that the military trial of a civilian under such circumstances was unconstitutional.¹⁶

Davis's discussion of the constitutional question begins with one of the Court's most stirring affirmations of the rule of law:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.¹⁷

The merits, wrote Davis, were plain from the words of the Constitution. "Every trial involves the exercise of judicial power," and article III vests that power in "one supreme court and such inferior courts as the Congress may from time to time ordain and establish." "One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior."¹⁸ Moreover, the sixth amend-

¹⁶ 71 U.S. (4 Wall.) 2 (1866). The question had been avoided during the war itself in *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864), where the Court held it had no jurisdiction to review directly the judgment of a military commission. See *Currie V*, *supra* note 3, at 726 n.199. Of the various jurisdictional objections brushed aside in *Milligan*, the only one of interest was that the case was moot because it should be presumed that the petitioner had been hanged as directed. "[E]ven the suggestion [that the military had executed Milligan while his case was pending]," said Davis, "is injurious to the Executive, and we dismiss it from further consideration." 71 U.S. (4 Wall.) at 118. In fact, Milligan had been reprieved and was later released in accordance with the Supreme Court's decision. See 2 C. WARREN, *supra* note 4, at 427 n.1. For the guess that the Court would not have reached the same bold decision on the merits while the war was still going, see, for example, C. SWISHER, *supra* note 4, at 138; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 181 (1978). For a comprehensive description of the case and its historical context, see FAIRMAN, *HISTORY*, *supra* note 4, at 185-237.

¹⁷ 71 U.S. (4 Wall.) at 120-21; see also *id.* at 123-24:

When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty; . . . but if society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws.

But cf. 1 G. LEFEBVRE, *THE FRENCH REVOLUTION* 125 (1962) ("[T]hat one could not govern in time of war and revolution as in time of peace— . . . that . . . rights . . . depended upon circumstances . . . [—] was to become the doctrine of the [French] revolutionary government.").

¹⁸ 71 U.S. (4 Wall.) at 121-22 (quoting U.S. CONST. art. III, § 1).

ment had been offended as well, for it guaranteed that "in all criminal prosecutions the accused shall enjoy the right to a . . . trial by an impartial jury." ¹⁹

Having said this, Davis began in dicta to take much of it back. First, he conceded, soldiers were not entitled to jury trials for military offenses, for the fifth amendment excepts from its grand-jury requirement "cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger," and "the framers, . . . doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth."²⁰ Though unnecessary to the decision, this concession was necessitated by longstanding practice and was in accord with an earlier dictum.²¹ Moreover, though one may feel queasy over the Court's conclusion that the fifth amendment's military exception applies to the sixth as well, it helps to reconcile the conviction that the Framers had not meant to abolish traditional courts-martial with the apparently uncompromising text of the Constitution.²²

More troubling is what follows:

If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. . . . Because, during the late Rebellion [martial rule] could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does

¹⁹ *Id.* at 122-23 (quoting U.S. CONST. amend. VI).

²⁰ *Id.* at 123 (quoting U.S. CONST. amend. V).

²¹ See *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1858).

²² A still earlier precedent involving territorial courts, *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828), provides further evidence that article III was not quite so ironclad as Davis would have us believe, but the special status of the territories and the Court's explicit statement that its permissive holding did not apply within the states, *id.* at 546, make Davis's failure to distinguish the case a matter more of style than of substance. See *Currie II*, *supra* note 3, at 716-19. For a more general discussion of the problem of judicial power outside article III, see *Currie, Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441 (1983).

not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered.²³

There was no occasion to say any of this, for, as the Court emphasized, in Indiana "the courts were open," and there were no hostile armies.²⁴ More disturbing yet is the implication of this obiter pronouncement, for it undermines the very basis of the Court's decision. If military courts may try civilians whenever military necessity demands it, then neither article III nor the jury provision is plain on its face after all. Moreover, while in the purely formal sense the Court may still be right that the Constitution is not "suspended" in an emergency, it might as well be, for apparently its provisions implicitly include exceptions for emergency conditions.

Davis's dicta thus deprive his earlier ringing statements of much of their force. Unfortunately, however, it is difficult to escape the conclusion that he was right about military tribunals in places where war had interrupted the civil courts. Just as it is hard to believe the Framers meant by ostensibly unqualified language to overturn the tradition of sovereign immunity,²⁵ it is hard to believe they meant to do away with the tradition that occupying armies may temporarily govern.²⁶ *Milligan* was not the occasion for saying

²³ 71 U.S. (4 Wall.) at 127.

²⁴ *Id.* at 126-27.

²⁵ See Currie I, *supra* note 3, at 831-39 (discussing *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)).

²⁶ See *Ex parte Quirin*, 317 U.S. 1, 39 (1942) (allowing military trials of enemies for violating the laws of war):

The object of [§ 2 of article III] was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future, . . . but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right (citation omitted).

Article III's tenure requirement was not discussed. *Cf. infra* text accompanying notes 178-211 and note 196 (discussing *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869), and *The Grapeshot*, 76 U.S. (9 Wall.) 129 (1870)). In *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1871) (Strong, J.), the Court, upholding over two dissents (Field and Clifford) the power of Congress to confiscate rebel property without a jury trial on the acceptable ground that this was not punishment for crime at all, went to the shocking extreme of declaring that exercises of the war powers were *never* "affected by the restrictions imposed by the fifth and sixth amendments." *Id.* at 305-06. Counsel for the United States had so argued in *Milligan*, 71 U.S. (4 Wall.) at 20-21, 102-05 (argument of Messrs. Speed and Butler), quoting a speech by John Quincy Adams, *id.* at 104 (quoting CONG. GLOBE, 24th Cong., 1st Sess. 433 (1836) (statement of Rep. Adams)). *Cf. FAIRMAN, HISTORY, supra* note 4, at 201 ("A competent Attorney General would never have permitted such an outlandish argument to be made . . ."). The decision in *Milligan*, which rejected this position, was naturally ignored in *Miller*.

so; Davis could have satisfied the demands of candor without appearing to destroy the basis of his own holding. Rather than over-emphasizing the constitutional text and then taking it back, Davis might better have begun by observing that it was unnecessary to decide whether the Framers meant to do away with traditional military powers to govern either military personnel or conquered territories; it was enough that neither of those traditions came close to justifying an implied exception for the case at hand, and that a strong showing would be required to demonstrate that the Framers had not meant what they said.²⁷

Davis's opinion was joined by Nelson, Grier, Clifford, and Field—the Court's four Northern Democrats. Chase, with his fellow Republicans Swayne and Miller and the old Georgian Wayne, concurred on narrower grounds.²⁸ There was no need, they said, to hold that Congress had no power to authorize military trials of civilians in cases like Milligan's, for Congress had never purported to do so. Indeed, they argued, it had forbidden them. The statute that gave the circuit court jurisdiction of Milligan's habeas corpus petition required the release of all military prisoners once a civil grand jury had met and failed to indict them, and Milligan fell squarely within the statutory terms.²⁹

Convincing enough on this point,³⁰ Chase opened himself to

²⁷ For the position that Davis's distinction was in accord with that drawn in English common law, see FAIRMAN, MILLER, *supra* note 4, at 96, and the argument of counsel for the petitioner, 71 U.S. (4 Wall.) at 47 (argument of Mr. Garfield) (quoting M. HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 42-43 (Runnington ed. London 1820) (1st ed. London 1713)). Cf. 1 W. BLACKSTONE, *COMMENTARIES* *400:

"[T]he necessity of order and discipline in an army is the only thing which can give [martial law] countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land."

Not altogether easy to distinguish, of course, is the later *Ex parte Quirin*, 317 U.S. 1 (1942). See *supra* note 26. It might be argued that Milligan too was an enemy spy offending the laws of war. So to hold, however, would come close to saying that every case of treason is outside the jury and judge protections of article III—a hard position to maintain since it is the same article that narrowly defines the substantive offense itself.

²⁸ 71 U.S. (4 Wall.) at 132-42. This was not the first time the sturdy Southerner had been more supportive of Yankee war powers than several of his Northern brethren. See *Currie v. United States*, *supra* note 3, at 746 (discussing the Prize Cases, 67 U.S. (2 Black) 635 (1863), where Wayne cast the decisive vote to uphold Lincoln's blockade of Southern ports).

²⁹ 71 U.S. (4 Wall.) at 133-36 (invoking the Act of Mar. 3, 1863, ch. 81, §§ 2, 3, 12 Stat. 755, 755-56 (expired by its own terms at end of war)). Davis relied on this statute to support the circuit court's jurisdiction over Milligan's petition, see *id.* at 115-16; he did not discuss whether it also required Milligan's release, and this argument was not much pressed by counsel.

³⁰ Fairman terms this "an exceedingly generous construction of the statute that authorized the suspension of the privilege of the writ of habeas corpus—imputing to Congress an

his own criticism by adding that he thought Congress could have authorized a military trial.³¹ The bulk of his argument was devoted to a demonstration of the relatively easy conclusion that military tribunals may be necessary and proper to the raising and governance of armies and to the conduct of war.³² On the harder question whether those powers were not limited by the explicit guarantees invoked by the majority, Chase said only that the fifth amendment exception for "[c]ases arising in the land or naval forces" should be construed to include "protection and defence as well as . . . internal administration."³³ Language proposed by the state conventions ratifying the original Constitution was plausibly if unconvincingly invoked to support this broad interpretation,³⁴ but the language actually chosen by Congress is not conducive to Chase's conclusion, and even the rejected terminology did not compel the Court to equate Indiana with Virginia.

Despite Davis's brave words, then, the difference between him and Chase seems one of degree rather than of principle. The whole Court conceded unnecessarily that civil courts and juries would yield in the face of military necessity; Chase differed from Davis only in thinking the situation in Indiana serious enough to justify a military tribunal.³⁵ Nonetheless, many of our most important

intention at the same time to prohibit the military trial of civilians" FAIRMAN, HISTORY, *supra* note 4, at 210. In light of the Court's familiar principle of construing statutes if possible to avoid having to find government action unconstitutional, however, Chase's position seems entirely reasonable.

³¹ 71 U.S. (4 Wall.) at 136-42. Fairman agrees that Chase's constitutional discussion was as unnecessary as Davis's but adds fairly enough that "it seems that the minority would have been content to confine themselves to the facts of the particular case if the majority had done so." FAIRMAN, MILLER, *supra* note 4, at 97 n.60. For contemporaneous criticism of the majority for deciding too much, see 1 AM. L. REV. 572 (1867), *quoted in* 2 C. WARREN, *supra* note 4, at 441-42.

³² Even on this issue one must be wary, as Marshall warned, not to extend the logic of the relation between means and ends to its extreme without regard to the "spirit" of the Constitution. This spirit includes the notion that the people as well as the states retain some unspecified interests not subject to federal incursion. See Currie III, *supra* note 3, at 928-34 (discussing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)); see also *Reid v. Covert*, 354 U.S. 1, 19-41 (1957) (holding, without relying on the limitations invoked in *Miligan*, that the necessary and proper clause did not authorize courts-martial of civilians connected with the armed services); cf. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

³³ 71 U.S. (4 Wall.) at 137-39 (quoting U.S. CONST. amend. V).

³⁴ *Id.* at 138 ("except in such cases as may arise in the government and regulation of the land forces" (emphasis added)).

³⁵ See *id.* at 140 (stressing that Indiana "was the theatre of military operations, had been actually invaded, and was constantly threatened with invasion" and that it was apparently the home of "a powerful secret association . . . plotting insurrection").

rights turn on subjective questions of degree; and *Milligan's* willingness to reject a plea of military necessity, though falling short of the romantic vision with which the opinion began, stands nonetheless as an important landmark in the judicial protection of civil liberties.³⁶

B. The Test Oath Cases

At the end of the war both Congress and the people of Missouri adopted provisions requiring that persons seeking to carry on specified professional occupations subscribe to an oath that they had never given aid to the rebellion.³⁷ Missouri convicted a priest for practicing his calling without taking the state oath, and a former Confederate congressman asked the Supreme Court for permission to practice before it without taking the federal one. In the famous decisions in *Cummings v. Missouri*³⁸ and *Ex parte Garland*,³⁹ a closely divided Court held both requirements un-

³⁶ Along the way Chase offered an interesting insight into a constitutional question distinct from that resolved by the majority: since Congress was the lawmaker and the President the Commander-in-Chief under article II, Chase wrote, "Congress cannot direct the conduct of campaigns, nor can the President, . . . *without the sanction of Congress*, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity . . ." *Id.* at 139-40 (emphasis added). Both halves of this statement seem reasonable enough, but Chase had no occasion for making it since he had already concluded that Congress had *forbidden* the President to set up such tribunals without discussing whether it had power to impose such a restriction. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Justice Black's opinion for the Court seeming to announce that the President could not seize the steel mills to assure war production without statutory authorization, though a majority of Justices concluded that Congress had *forbidden* the seizure); Currie III, *supra* note 3, at 957-58 (discussing *The Flying Fish*, 6 U.S. (2 Cranch) 170 (1804)).

³⁷ The federal statute was the Act of July 2, 1862, ch. 128, 12 Stat. 502, which read in part:

[E]very person elected or appointed to any office of honor or profit under the government of the United States . . . shall, before entering upon the duties of such office, . . . take and subscribe the following oath or affirmation: "I, A.B., do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States . . . ; that . . . I have voluntarily given no aid . . . to persons engaged in armed hostility thereto . . ."

Missouri's provision was part of its newly adopted constitution:

The oath to be taken as aforesaid shall be known as the Oath of Loyalty, and shall be in the following terms:

"I, A.B., do solemnly swear . . . that I have always been truly and loyally on the side of the United States against all enemies thereof, foreign and domestic . . ."

Within sixty days after this constitution takes effect, every person in this State holding any office of honor, trust, or profit . . . shall take and subscribe the said oath. Mo. CONST. of 1865, art. II, §§ 6, 7.

³⁸ 71 U.S. (4 Wall.) 277 (1867).

³⁹ 71 U.S. (4 Wall.) 333 (1867).

constitutional.⁴⁰

Both decisions were written by Justice Field, a California Democrat appointed by Lincoln. Disqualification from an occupation, he argued with impressive support from history and from the impeachment provisions of the Constitution, was a traditional punishment for crime.⁴¹ Thus the oath laws both made criminal certain acts that had not been forbidden when committed and inflicted additional punishments for those that had been; they therefore were *ex post facto* laws prohibited to both Congress and the states by sections nine and ten of article I.⁴² It was no excuse, said Field, that the laws disqualified not rebel sympathizers as such but only those refusing to take the oath, for the result was the same: "To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right [I]f that which cannot be accomplished by means looking directly to the end, can be accomplished by indirect means, the inhibition may be evaded at pleasure."⁴³ Indeed, the oath requirement was worse than a direct disqualification of those who had aided the rebellion; a direct disqualification would have occurred only after a finding of guilt, while, as Alexander Hamilton had said, oath provisions "'oblige the citizen to establish his own innocence to avoid the penalty.'"⁴⁴

Moreover, Field announced, the oath requirements were bills of attainder proscribed by the same two sections. This term, he stated without citation, was meant to embrace what the English had called bills of pains and penalties as well as technical attainders imposing death, and thus included any "legislative act which inflicts punishment without a judicial trial."⁴⁵ Historical examples

⁴⁰ For a discussion of the test oath cases and reaction to them, see FAIRMAN, HISTORY, *supra* note 4, at 240-48. A similar oath requirement for access to the courts was struck down in *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234 (1873), over the dissent of Justice Bradley.

⁴¹ *Cummings*, 71 U.S. (4 Wall.) at 320-22.

⁴² *Id.* at 327-28; *Garland*, 71 U.S. (4 Wall.) at 377-78.

⁴³ *Cummings*, 71 U.S. (4 Wall.) at 327, 329.

⁴⁴ *Id.* at 331.

⁴⁵ *Id.* at 323. Field cited nothing for this important departure from the conceded common law meaning of the term, though Story, whom Field quoted a paragraph later for the proposition that "[b]ills of this sort" had commonly been enacted in the heat of "violent political excitements," had made the same unexplained equation, citing a conclusory dictum of Marshall. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1338, at 211 (Boston 1833) (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87, 138 (1810) ("A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.")). Professor Berger has castigated the Court for extending the term beyond its established meaning, arguing plausibly enough that the presumption should be that the Framers used common-law terms in their understood sense, particularly where, as with the

were given of bills that had named classes of offenders rather than individuals, and of bills that had imposed conditional punishments.⁴⁶ In effect, Field concluded, the oath provisions deprived persons who had aided the rebellion of their professions without judicial trial; and, once again, "[i]f the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."⁴⁷ Finally, one of the petitioners had received a Presidential pardon that freed him from punishment for his Confederate activities; to remit him to the choice between perjury and disqualification, the Court concluded, was to impair the effect of the pardon.⁴⁸

As in *Milligan*, there were only five votes against the constitutionality of the challenged measures, and this time the division was on strict party lines. Justice Wayne, who had disagreed with the majority in *Milligan*, joined his Democratic brethren in the oath cases;⁴⁹ Davis, who had differed from his fellow Republicans in the earlier case, joined them in arguing that the oath provisions ought to have been upheld.⁵⁰ Justice Miller's well-written dissent, covering both cases, made a variety of arguments, based upon the form of the oath requirements, that seem, as Field said, to permit the

bills of attainder clause, a provision was adopted without debate. Berger, *Bills of Attainder: A Study of Amendment by the Court*, 63 CORNELL L. REV. 355, 367, 380 (1978); see also *Garland*, 71 U.S. (4 Wall.) at 387 (Miller, J., dissenting) (complaining that the traditional bill of attainder had provided for "corruption of the blood": "[t]he party attainted lost all inheritable quality, and could neither receive nor transmit any property . . . by inheritance."); cf. Currie I, *supra* note 3, at 866-75 (discussing *Calder v. Bull*, 3 U.S. (3 Dall.) 385 (1798)). But Berger offers no reason to explain why the Framers would have wanted to distinguish sharply between death and other penalties inflicted by legislation without trial; they expressed no antipathy to the death penalty as such, nor even to judicially imposed corruption of blood, except in the specific case of treason against the United States. See U.S. CONST. art. III, § 3; see also 3 J. ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 236 (2d ed. Wash., D.C. 1836) (1st ed. Wash., D.C. 1830) (statement of Mr. Nicholas) (stressing that condemnation without trial was the vice which the clause was meant to prevent).

⁴⁶ *Cummings*, 71 U.S. (4 Wall.) at 323-24.

⁴⁷ *Id.* at 325.

⁴⁸ *Garland*, 71 U.S. (4 Wall.) at 380-81. The Court also added, in a passage significant for a much later controversy, see P. KURLAND, *WATERGATE AND THE CONSTITUTION* 136-48 (1978), that the President can pardon offenses "before legal proceedings are taken" as well as after. *Garland*, 71 U.S. (4 Wall.) at 380; see 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 426 (M. Farrand rev. ed. 1937) [hereinafter cited as *CONVENTION RECORDS*]:

Mr. L. Martin moved to insert the words "after conviction" after the words "re-prieves and pardons".

Mr. Wilson objected that pardon before conviction might be necessary in order to obtain the testimony of accomplices. . . . Mr. L. Martin withdrew his motion.

⁴⁹ Wayne himself had been declared an "alien enemy" and his property confiscated by his own state of Georgia during the war. See A. LAWRENCE, *supra* note 4, at 189.

⁵⁰ *Garland*, 71 U.S. (4 Wall.) at 382-99; *Cummings*, 71 U.S. (4 Wall.) at 332.

constitutional safeguards to be evaded at pleasure.⁵¹ Miller's essential contention, however, was more thought-provoking. The disqualification of rebel sympathizers, he argued, was not punishment at all, but only a prophylactic measure to protect the public in the future.⁵² Both Congress and the state had the right to make certain that practitioners possessed "the proper qualifications for the discharge of their duties," and "fidelity to the government under which he lives" was "among the most essential qualifications which should be required in a lawyer."⁵³ Since the laws under examination did not inflict punishment, Miller concluded, they were neither *ex post facto* laws nor bills of attainder, and they did not contradict the pardon.⁵⁴

Miller's position cannot be lightly dismissed. Incompetent medical treatment cannot retroactively be made a crime; but it does not follow that it cannot be taken into account in determining whether to allow a doctor to continue plying his trade, and one may legitimately doubt the Framers meant to forbid its consideration.⁵⁵ If one agrees with Miller on this point, one is led to ask whether the disqualification in question was intended as punishment or as protection; Marshall had cautioned about the difficulties of investigating legislative motives as early as 1810.⁵⁶ Miller accepted the challenge frankly if less than convincingly:

The history of the time when this statute was passed—the darkest hour of our great struggle—the necessity for its exis-

⁵¹ Unlike a bill of attainder, said Miller, the laws in question did not identify any individuals who were to be punished; furthermore, the oath requirements were neither retrospective nor criminal. *Garland*, 71 U.S. (4 Wall.) at 389-92 (dissenting opinion). Miller further argued that attorneys could have been disqualified before the statutes were imposed on the ground that disloyalty showed bad character. *Id.* at 393. That can hardly be a complete apology for the statutes, which made disqualification mandatory and contained a very broad list of disqualifying acts. *See id.* at 374-77. For contemporaneous criticism, see J. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 329 (1870), arguing that what distinguished the oath requirements from bills of attainder was "the entire absence of the judicial element. There is no adjudication; no usurpation of the functions of courts; no persons or class of persons, either by name or by description, are, by the mere force and operation of the enactment, convicted of any crime existing or alleged."

⁵² *Garland*, 71 U.S. (4 Wall.) at 393-96.

⁵³ *Id.* at 385.

⁵⁴ *Id.* at 396-97. That retroactive punishment was the hallmark of an *ex post facto* law had been established in *Calder v. Bull*, 3 U.S. (3 Dall.) 385 (1798), discussed in Currie I, *supra* note 3, at 866-75.

⁵⁵ *Cf. Hawker v. New York*, 170 U.S. 189, 196 (1898) (upholding a ban on medical practice by convicted felons: "The State is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character.").

⁵⁶ *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810); see Currie III, *supra* note 3, at 890.

tence, the humane character of the President who signed the bill, and the face of the law itself, all show that it was purely a qualification, exacted in self-defence, of all who took part in administering the government in any of its departments, and that it was not passed for the purpose of inflicting punishment, however merited, for past offences.⁵⁷

Justice Field did not deny that past behavior might sometimes be considered in determining qualifications, and he seemed to agree that the legislative motive was determinative. The Missouri oath, he said in *Cummings*, "was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment"⁵⁸ Unlike Miller, he based his conclusion as to motive on objective considerations:

It is evident from the nature of the pursuits and professions of the parties, placed under disabilities by the constitution of Missouri, that many of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for those pursuits and professions. There can be no connection between the fact that Mr. Cummings entered or left the State of Missouri to avoid enrolment or draft in the military service of the United States and his fitness to teach the doctrines or administer the sacraments of his church; nor can a fact of this kind or the expression of words of sympathy with some of the persons drawn into the Rebellion constitute any evidence of the unfitness of the attorney or counsellor to practice his profession, or of the professor to teach the ordinary branches of education, or of the want of business knowledge or business capacity in the manager of a corporation, or in any director or trustee.⁵⁹

At least with respect to the priest in *Cummings*, Field seems to have had the better of this argument, and Miller made no attempt to show that past acts of disloyalty were relevant to the qualifications of the clergy. Even Field was careful to point out that neither case involved qualifications for public office,⁶⁰ where Miller's position becomes much more compelling: could the Framers really have meant to require admission into the councils of gov-

⁵⁷ *Garland*, 71 U.S. (4 Wall.) at 396.

⁵⁸ *Cummings*, 71 U.S. (4 Wall.) at 320.

⁵⁹ *Id.* at 319-20.

⁶⁰ *Garland*, 71 U.S. (4 Wall.) at 378.

ernment of people who had demonstrated their desire to sabotage it?⁶¹ Miller placed his reliance on the intimate role of attorneys in the governmental process: "They are, by the nature of their duties, the moulders of public sentiment on questions of government, and are every day engaged in aiding in the construction and enforcement of the laws."⁶² I think I side with Field on this one, but it seems to me both sides argued ably for supportable positions⁶³ in a case to which the Constitution gave no clear answer.⁶⁴

II. RECONSTRUCTION

The Court made few friends among the dominant radical faction by striking down military trials and test oaths; there were those who labelled *Milligan* and the oath cases "Dred Scott II and III."⁶⁵ A series of cases that immediately followed appeared to confront the Court with a still more explosive issue: the constitutionality of the statutes providing for the fate of the former Confederate States. This set of cases produced several important rulings respecting the powers of the federal courts, but some of the central substantive issues remained unsettled. The Court tended to treat the latter as hot potatoes, and the other branches of government were only too willing to help see to it that they were never completely resolved.⁶⁶

The substantive issues were both fundamental and difficult. Among other things, Congress had subordinated the elected governments of ten Southern states to military authority⁶⁷ and made

⁶¹ See *Garner v. Board of Public Works*, 341 U.S. 716, 720 (1951) (allowing inquiry into past affiliations of applicants for municipal employment: "Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust."). After Wayne's death, the Court divided 4-4 over the validity of an oath of past loyalty as a qualification for voting. See FAIRMAN, *HISTORY*, *supra* note 4, at 613-16; C. SWISHER, *supra* note 4, at 154 n.21.

⁶² *Garland*, 71 U.S. (4 Wall.) at 386.

⁶³ The similar question of citizenship requirements for bar admission was to divide a much later Court. See *In re Griffiths*, 413 U.S. 717 (1973) (holding that Connecticut's exclusion of aliens from the practice of law violates the equal protection clause of the fourteenth amendment).

⁶⁴ For an excellent discussion of later bill-of-attainder cases, see Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 *YALE L.J.* 330 (1962).

⁶⁵ See FAIRMAN, *HISTORY*, *supra* note 4, 216, 218, 219, 232, 236, 245; C. SWISHER, *supra* note 4, at 152; 2 C. WARREN, *supra* note 4, 430-32.

⁶⁶ For general discussions of the Reconstruction cases, see FAIRMAN, *HISTORY*, *supra* note 4, chs. 8-10, 12; S. KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS* chs. 5-6 (1968); 2 C. WARREN, *supra* note 4, ch. 30.

⁶⁷ Act of Mar. 2, 1867, ch. 153, §§ 1-3, 6, 14 Stat. 428, 428-29 (expired upon readmission of rebel states to representation in Congress). The Act directed the military to keep the

both black suffrage and ratification of the fourteenth amendment conditions of admitting their representatives to Congress.⁶⁸ Not only was it less than obvious what constitutional provisions might support such legislation; on its face the statute seemed a gross breach of Congress's constitutional obligation to guarantee each state a republican form of government,⁶⁹ a denial of the constitutional right of representation in Congress,⁷⁰ and a perversion of the ratification provisions of article V.⁷¹ It also raised the article III and jury-trial problems already identified in *Ex parte Milligan*.⁷²

The Radical argument that the Southern states were no longer part of the Union and thus could be treated as conquered territo-

peace and punish offenders and declared that "any civil governments" in those states were "provisional only, and in all respects subject to the paramount authority of the United States." *Id.* § 6, 14 Stat. at 429. Tennessee, which was safely in Republican hands and had ratified the fourteenth amendment, see FAIRMAN, HISTORY, *supra* note 4, at 99, 132, 264 n.41, was not included. Act of Mar. 2, 1867, ch. 153, § 6, 14 Stat. 428, 429.

⁶⁸ Act of Mar. 2, 1867, ch. 153, § 5, 14 Stat. 428, 429. A supplementary act, in response to the difficulties experienced by loyalists attempting to vote, provided that military authorities conduct elections for the state constitutional conventions contemplated by the basic reconstruction law. Act of Mar. 23, 1867, ch. 6, 15 Stat. 2; see FAIRMAN, HISTORY, *supra* note 4, at 317-27 (criticizing Chief Justice Chase for stepping outside the judicial role to draft the supplementary bill).

⁶⁹ U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . ."). President Johnson invoked this clause and the clauses cited *infra* text accompanying notes 70-72, among others, in the message accompanying his veto of the basic reconstruction bill, Act of Mar. 2, 1867, ch. 153, 14 Stat. 428 (enacted over presidential veto). CONG. GLOBE, 39th Cong., 2d Sess. 1729, 1731-32 (House), 1969, 1971-72 (Senate) (1867) [hereinafter cited as Johnson Veto Message], reprinted in 6 J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 498, 506-10 (1900).

⁷⁰ U.S. CONST. art. I, §§ 2, 3 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States The Senate . . . shall be composed of two Senators from each State"); see also U.S. CONST. art. V ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate."). Moreover, to the extent that the question pertained to the "Qualifications" of Senators and Representatives, but see *Powell v. McCormack*, 395 U.S. 486 (1969) (holding "Qualifications" limited to the constitutional requirements of age, citizenship, and residence), it was by no means clear that either House could surrender by statute its constitutional authority as "Judge of the . . . Qualifications of its own Members," U.S. CONST. art. I, § 5. See A. McLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 677-78 (1935) (discussing President Johnson's veto, on similar grounds, of a bill to "readmit" Arkansas to congressional representation).

⁷¹ U.S. CONST. art. V (providing that amendments become law "when ratified by the Legislatures [or Conventions] of three fourths of the several States"); see Johnson Veto Message, *supra* note 69, at 1729, 1969, reprinted in 6 J. RICHARDSON, *supra* note 69, at 500 (arguing that the sole purpose of military rule was "as a means of coercing the people into the adoption of principles and measures to which it is known that they are opposed, and upon which they have an undeniable right to exercise their own judgment").

⁷² See *supra* notes 16-36 and accompanying text.

ries⁷³ was contrary to the premise on which the North had fought the war.⁷⁴ The argument that military rule was a means to the establishment of truly republican government⁷⁵ involved, among other things, a substantial redefinition of what "Republican" meant, if not an actual play on the word.⁷⁶ The most effective ar-

⁷³ See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 73 (1865) (statement of Rep. Stevens) (arguing that the war "broke all the ties" with the seceding states and that they had to apply for admission as new states under article IV); *id.* at 24 (statement of Sen. Howard) (describing the rebel states as "simply conquered communities, subjugated by the arms of the United States—communities in which the right of self-government does not now exist"); *id.* at 31 (statement of Rep. Stevens) (objecting to the presentation of credentials on behalf of Representatives from Tennessee: "The State of Tennessee is not known to this House nor to Congress."). Compare the more subtle variant of this argument employed by Representatives Shellabarger and Bingham, *id.* at 142-45, 156-59, and later espoused for the Court by Chase, see *infra* text accompanying notes 180-96: though secession was unlawful, the states had forfeited their rights. See FAIRMAN, HISTORY, *supra* note 4, at 119, 123, 268, 268, 288-89 (describing views of Reps. Stevens and Shellabarger). The Act itself began by reciting in its own justification that "no legal state governments . . . now exist[]" in the rebel states. Act of Mar. 2, 1867, ch. 153, § 1, 14 Stat. 428, 428. As Fairman says, this was also a swipe at Andrew Johnson's efforts at presidential reconstruction. FAIRMAN, HISTORY, *supra* note 4, at 298.

⁷⁴ See CONG. GLOBE, 39th Cong., 1st Sess. 292 (1866) (statement of Sen. Nesmith):

Why should we involve ourselves in the paradoxical absurdity of denying the right of secession, of fighting them for four years to enforce that denial, and when they admit their failure by the last arbitrament, turn round and admit that they have accomplished their purpose, and are to-day outside the Union?

See also Johnson Veto Message, *supra* note 69, at 1730, 1970, reprinted in 6 J. RICHARDSON, *supra* note 69, at 503-04. In his first inaugural address President Lincoln had argued that secession was unconstitutional and had expressed his determination to enforce federal law throughout the nation, Lincoln's First Inaugural Address, in 6 J. RICHARDSON, *supra* note 69, at 5, 7; in calling up troops he noted the need for measures "for the protection of the National Constitution and the preservation of the National Union by the suppression of the insurrectionary combinations now existing in several States for opposing the laws of the Union," Proclamation of May 3, 1861, in 6 J. RICHARDSON, *supra* note 69, at 15; in addressing a special war session of Congress on July 4, 1861 he described his efforts "to prevent, if possible, the consummation of such attempt to destroy the Federal Union," Special Session Message (July 4, 1861), in 6 J. RICHARDSON, *supra* note 69, at 20; in his first Annual Message that December he emphasized that he had "thought it proper to keep the integrity of the Union prominent as the primary object of the contest on our part," Message of December 3, 1861, in 6 J. RICHARDSON, *supra* note 69, at 54; and in the Emancipation Proclamation he declared that "hereafter, as heretofore, the war will be prosecuted for the object of practically restoring the constitutional relation between the United States and each of the States and the people thereof in which States that relation is or may be suspended or disturbed," Proclamation of September 22, 1862, in 6 J. RICHARDSON, *supra* note 69, at 96.

⁷⁵ See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 143, 145 (1866) (statement of Rep. Shellabarger) (suggesting that President Johnson had invoked the clause guaranteeing a republican form of government as authority for his own earlier efforts at reconstruction in the teeth of state constitutions). To create governments under the clause in the face of anarchy, however, as Johnson did, is not the same as to set aside governments already established.

⁷⁶ Racial qualifications for voting had not been thought to subject Northern governments to congressional tinkering in the past. Only five states permitted blacks to vote at the time of the war. See FAIRMAN, HISTORY, *supra* note 4, at 96. Several states rejected proposals

gument in favor of military rule was that put forward by Davis in his dictum in *Milligan*.⁷⁷ the relevant constitutional provisions were subject to implicit exceptions for military necessity. Unlike Indiana, the seceding states had taken arms against the nation, and a measure of military occupation could be defended as inherent in putting down the insurrection.⁷⁸ Davis had also insisted, however, that military rule could not be "continued *after* the courts are reinstated,"⁷⁹ and the provisions of the new law were to be applied whether or not the civil tribunals were open.⁸⁰

A. *Mississippi v. Johnson*

These troubling questions were first pressed upon the Court in 1867, when Mississippi filed an original action in the Supreme Court to enjoin the President from enforcing the Reconstruction Acts on the ground that they were unconstitutional. In a brief opinion by Chief Justice Chase, the Court unanimously held it had "no jurisdiction of a bill to enjoin the President in the performance of his official duties."⁸¹

The legal basis of this conclusion was left in obscurity. Since Andrew Johnson was apparently a citizen of Tennessee,⁸² the case

for black suffrage between 1865 and 1867, *see id.* at 128 n.121, and Tennessee had been readmitted to Congress without black voting, *see id.* at 264 n.41. Shellabarger's argument was that a "[r]epublican" government meant one that was "loyal." CONG. GLOBE, 39th Cong., 1st Sess. 145 (1866); *see also* A. McLAUGHLIN, *supra* note 70, at 643 ("A state government, that is seized by 'rebels,' and made to do their will, can scarcely be considered a free constitutional government. Technically, a state not in the possession of its loyal citizens is not, constitutionally speaking, republican." (footnote omitted)). In the Constitutional Convention the term "republican" had been contrasted with monarchy. *See* 1 CONVENTION RECORDS, *supra* note 48, at 206.

⁷⁷ *See supra* notes 20-27 and accompanying text.

⁷⁸ This much was conceded by Senator Doolittle, one of the most articulate opponents of reconstruction. *See* CONG. GLOBE, 39th Cong., 1st Sess. 271-72 (1866).

⁷⁹ *Milligan*, 71 U.S. (4 Wall.) at 127.

⁸⁰ Many thought *Milligan* spelled the doom of the provisions for military rule. Davis himself did not, emphasizing that he had expressly recognized the power to authorize military trials "in insurrectionary States." *See* S. KUTLER, *supra* note 66, at 67, 95. For an able defense of military jurisdiction on the ground that it was "for Congress . . . to determine when the war has so far ended that this work [of restoring peaceful relations] can be safely and successfully completed," *see* 13 Op. Att'y Gen. 59, 65 (1869). Professor Fairman, who has given us a superb account of the intricate legislative history of the Reconstruction Acts, FAIRMAN, HISTORY, *supra* note 4, chs. 3, 6, refrains from expressing a categorical judgment on their constitutionality, but does seem to view the legislation on the whole as necessary and desirable in light of Southern intransigence. *See id.* at 333-55, 591-98.

⁸¹ *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867).

⁸² *See id.* at 475 (reciting the allegations of the complaint); *id.* at 501 (assuming the allegation of citizenship to be true). In the case that follows, *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1868), it was argued that federal officers "have no State citizenship," but have

seemed to fall within article III's provisions for federal judicial authority over "Controversies . . . between a State and Citizens of another State"⁸³ and for original Supreme Court jurisdiction over "Cases . . . in which a State shall be a Party."⁸⁴ As an original matter, one might have argued with considerable force that the general expressions of article III were not intended to override the tradition of sovereign immunity,⁸⁵ and that a suit to enjoin an officer from acting in his official capacity was in effect one against the government;⁸⁶ but the Court had already rejected the latter proposition in the analogous state-officer case of *Osborn v. Bank of the United States*.⁸⁷ Chase disclaimed reliance on sovereign immunity—expressly reserving the question whether in appropriate cases a state might sue the United States itself.⁸⁸

Much of the *Johnson* opinion was devoted to showing that *Marbury v. Madison*⁸⁹ was not precedent for the injunction requested. Marshall had made clear in the earlier case that even a cabinet officer could be subjected to a court order in some cases, emphasizing that it was "not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety . . . of issuing a *mandamus* is to be determined."⁹⁰ But *Marbury*, as Chase insisted, had expressly been limited to compelling the performance of "ministerial" acts;⁹¹ Marshall had specifically disavowed any authority "to inquire how the executive,

their "official residence" in the District of Columbia, *id.* at 53-54; see *infra* notes 104-27 and accompanying text; the Court did not pick up the suggestion. Johnson's Tennessee citizenship was used as an argument against the Radical theory of Reconstruction: if Tennessee was no longer a state, he was not qualified to be President. See CONG. GLOBE, 39th Cong., 1st Sess. 118 (1865) (statement of Rep. Finck) (noting U.S. CONST. art. II, § 1, which requires that the President be a citizen of the United States).

⁸³ U.S. CONST. art. III, § 2, para. 1.

⁸⁴ U.S. CONST. art. III, § 2, para. 2; see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-75 (1803). The case would also appear to fall within the statutory grant of original Supreme Court jurisdiction. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 78 ("[T]he Supreme Court shall have . . . jurisdiction of all controversies of a civil nature . . . between a state and citizens of other states, or aliens, in which . . . case it shall have original but not exclusive jurisdiction.") (current version at 28 U.S.C. § 1251(b) (1976)). By modern standards Mississippi's case also arose under federal law, but there was no statute at the time giving the trial courts jurisdiction on that basis.

⁸⁵ See Currie I, *supra* note 3, at 831-39 (discussing *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)).

⁸⁶ See Currie II, *supra* note 3, at 697-99 (discussing *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824)).

⁸⁷ 22 U.S. (9 Wheat.) 738 (1824).

⁸⁸ *Johnson*, 71 U.S. (4 Wall.) at 501.

⁸⁹ 5 U.S. (1 Cranch) 137 (1803).

⁹⁰ *Id.* at 170; see Currie II, *supra* note 3, at 651-52 & n.43.

⁹¹ See *Johnson*, 71 U.S. (4 Wall.) at 498-99.

or executive officers, perform duties in which they have a discretion."⁹² The enforcement of the Reconstruction Acts, Chase continued, involved the exercise of executive discretion: the President was required to appoint military commanders, to provide the necessary troops, and to supervise the commanders in carrying out their duties.⁹³ Judicial enforcement of such nonministerial duties, said Chase, would in Marshall's words be "an absurd and excessive extravagance"; the fact that the present suit sought not "to enforce action by the Executive . . . but to restrain such action under legislation alleged to be unconstitutional" did not take it "out of the general principles which forbid judicial interference with the exercise of Executive discretion."⁹⁴

This passage, whose essence would seem equally applicable to suits against other government officers,⁹⁵ wholly fails to persuade. The distinction the Court brushed aside is crucial; the President may have broad discretion in executing a valid law, but he has no discretion to enforce an invalid one since he has no discretion to violate the Constitution.

Less frivolous was the suggestion later in the opinion that the President enjoyed a special immunity from suit by virtue of his unique position: "The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance."⁹⁶ The consequences of such an injunction, Chase continued, were so grave as to make plain its "impropriety":

If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government?⁹⁷

Surely, Chase argued, Congress could not be enjoined from enact-

⁹² *Marbury*, 5 U.S. (1 Cranch) at 170.

⁹³ *Johnson*, 71 U.S. (4 Wall.) at 499.

⁹⁴ *Id.* (quoting and paraphrasing *Marbury*, 5 U.S. (1 Cranch) at 170). For an approving view of Chase's argument respecting discretion, see FAIRMAN, HISTORY, *supra* note 4, at 381 n.57.

⁹⁵ Indeed, though the opinion notably failed to discuss the fact, the military commander of the district including Mississippi had been named as an additional defendant. See *Johnson*, 71 U.S. (4 Wall.) at 475, 497.

⁹⁶ *Id.* at 500.

⁹⁷ *Id.* at 500-01.

ing an unconstitutional law, and how could an injunction against presidential enforcement of such a law be distinguished?⁹⁸

Distinguishing the two cases is child's play: the Constitution expressly immunizes members of Congress from being questioned about their legislative actions "in any other Place";⁹⁹ it makes no comparable provision for the President. Moreover, the argument that the Framers must have meant to avoid the risk of a direct confrontation between the branches had already been blunted in *Marbury*; conflict is likely when a Secretary of State is ordered about as well. Now the negative inference from the congressional immunity is not airtight, for that provision may have been inserted out of an abundance of caution with no intention of foreclosing an implicit Presidential immunity;¹⁰⁰ and, as counsel argued, the indispensability of the President makes his immunity argument far stronger than that of his subordinates.¹⁰¹ Thus, a respectable argument might have been made in favor of holding as a constitutional matter that the President himself could not be enjoined,¹⁰² but neither of Chase's arguments seems to fill the bill.¹⁰³

⁹⁸ *Id.* at 500.

⁹⁹ U.S. CONST. art. I, § 6.

¹⁰⁰ See *Nixon v. Fitzgerald*, 457 U.S. 731, 784 n.27, 786 n.31 (1982) (finding a presidential immunity from damage actions, apparently in the Constitution itself, and rejecting any negative inference from the explicit congressional immunity); cf. *Hans v. Louisiana*, 134 U.S. 1 (1890) (finding an implication of state immunity from suit by its own citizens although the eleventh amendment immunized it in express terms only from suits by citizens of other states and by aliens).

¹⁰¹ *Johnson*, 71 U.S. (4 Wall.) at 487-90 (argument by Attorney General Stanbery) (With the President in jail for contempt, "there is not a law of the United States that can be executed, not an officer that can be appointed or . . . removed."); see also P. KURLAND, *supra* note 48, at 131-36 (arguing on this basis for an implicit Presidential immunity against criminal process); cf. 3 J. STORV, *supra* note 45, at 419 (President immune from arrest); Memorandum for the United States Concerning the Vice President's Claim for Constitutional Immunity at 15-20, *In re Proceedings of the Grand Jury Impaneled Dec. 5, 1972*, No. Civ. 73-965 (D. Md. 1973) (President Nixon's Justice Department's response to Vice President Agnew's defense of immunity from criminal prosecution; arguing that only the President is indispensable, and only in his case would conviction be inconsistent with the constitutional powers of prosecution and pardon), cited in D. CURRIE, *FEDERAL COURTS—CASES & MATERIALS* 611 (3d ed. 1982).

¹⁰² The Court specifically reserved the question whether the President could be required "to perform a purely ministerial act, . . . or may be held amenable, in any case, otherwise than by impeachment for crime." *Johnson*, 71 U.S. (4 Wall.) at 498; see also *United States v. Nixon*, 418 U.S. 683 (1974) (upholding an order to produce tapes without even advert to any argument of immunity from process); *Nixon v. Sirica*, 487 F.2d 700, 708-12 & n.53 (D.C. Cir. 1973) (ordering production of Watergate tapes, distinguishing *Johnson* on its own flimsy "discretionary" ground).

¹⁰³ See FAIRMAN, *HISTORY*, *supra* note 4, at 382-83 (arguing that a contrary decision would have "subverted" "something very fundamental to the constitutional system" and praising the President for protecting his office at the cost of defending a law he bitterly

B. *Georgia v. Stanton*

Educated by Mississippi's misadventure, Georgia sought to enjoin not the President but his subordinates, the Secretary of War and two of his generals, from enforcing the Reconstruction Act. Once again the Supreme Court's original jurisdiction was invoked, and once again without success.¹⁰⁴ The judgment was again unanimous; the Chief Justice, who disagreed with the Court's reasons, declined to give any of his own.¹⁰⁵

It is noteworthy that Justice Nelson, writing for the majority, did not rely on *Mississippi v. Johnson*; apparently, despite some of the language in that opinion and the fact that a subordinate officer had been named as an additional defendant,¹⁰⁶ the Court had not meant in the earlier case to hold that no officer could be enjoined from enforcing an unconstitutional law. Rather, the case was largely governed, in the eyes of the majority, by *Cherokee Nation v. Georgia*,¹⁰⁷ in which the Court had refused to entertain a suit by the tribe to enjoin Georgia from exercising jurisdiction over its reservation. As in *Cherokee Nation*, the complaint in *Stanton* called "for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character," and thus did not "belong to the jurisdiction of a court, either in law or equity."¹⁰⁸

Nelson properly acknowledged that the language on which he relied had been unnecessary to the result in *Cherokee Nation*, since the Court had held the tribe not a "foreign State" entitled to sue in the Supreme Court.¹⁰⁹ Nevertheless, the language had in fact been used,¹¹⁰ and on the "political" issue the cases were analogous: both concerned the protection of an established government against an arguably usurping rival. So, the reader will recall, had

opposed); S. KUTLER, *supra* note 66, at 96-97 (arguing that *Johnson* was correctly decided and pointing out that none of the Justices supposedly hostile to Reconstruction dissented).

¹⁰⁴ 73 U.S. (6 Wall.) 50 (1868).

¹⁰⁵ *Id.* at 77-78. For speculation as to Chase's position, see FAIRMAN, HISTORY, *supra* note 4, at 393.

¹⁰⁶ See *supra* text accompanying notes 81-103 & note 94.

¹⁰⁷ 30 U.S. (5 Pet.) 1 (1831).

¹⁰⁸ 73 U.S. (6 Wall.) at 76, 77.

¹⁰⁹ *Id.* at 74 (quoting *Cherokee Nation*, 30 U.S. (5 Pet.) at 29-30).

¹¹⁰ The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savours too much of the exercise of political power to be within the proper province of the judicial department.

Cherokee Nation, 30 U.S. (5 Pet.) at 20.

the famous decision in *Luther v. Borden*,¹¹¹ where, in refusing to determine which of two contending factions was the legitimate government of Rhode Island, Taney had suggested, among other things, that the question was "political."¹¹² Predictably, counsel opposing the suit in *Stanton* argued that *Luther* had placed the constitutionality of Reconstruction beyond judicial ken by classifying it as a "political question."¹¹³

Although no earlier decision had established as a general principle that questions of political import were nonjusticiable—indeed, such recent decisions as *Milligan*, *Cummings*, and *Garland* had demonstrated the contrary—a substantial argument could have been made on the basis of precedent for a refusal ever to consider the validity of Reconstruction. In the first place, the guarantee of a republican form of government was a principal basis both for justifying the statute and for attacking it,¹¹⁴ and one of the things clearly, if unnecessarily and unconvincingly, said in *Luther* was that the administration of this clause was entrusted exclusively to the other branches of government.¹¹⁵ Moreover, the *Prize Cases*¹¹⁶ might well have been called into service in support of such a decision; for in upholding the President's blockade of Southern ports during the war, the Court had flatly, if unnecessarily, suggested that judges could never second-guess the responsible political authority as to the degree of force necessary to put down the rebellion.¹¹⁷

It is striking that neither the *Prize Cases* nor even *Luther* was mentioned in the *Stanton* opinion. In fact, passages in the opinion strongly suggest that the Court did not consider the case analogous to *Luther* and did not mean to classify the issue of Reconstruction as "political" in the sense in which that term is understood today. First, in distinguishing the interstate boundary dispute the Court

¹¹¹ 48 U.S. (7 How.) 1 (1849).

¹¹² *Id.* at 42, 46.

¹¹³ 73 U.S. (6 Wall.) at 61 (argument by Mr. Stanbery).

¹¹⁴ See *supra* text accompanying notes 69-76.

¹¹⁵ See 48 U.S. (7 How.) at 42-43; *Currie V*, *supra* note 3, at 714-19.

¹¹⁶ 67 U.S. (2 Black) 635 (1863).

¹¹⁷ Whether the President . . . has met with such armed hostile resistance . . . as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this court must be governed by the decisions and acts of the political department . . . to which this power was entrusted.

Id. at 670; see *Currie V*, *supra* note 3, at 738-40. Professor Fairman seems to view *Stanton* as a political-question case and to think it rightly decided. FAIRMAN, HISTORY, *supra* note 4, at 393-96.

had resolved in *Rhode Island v. Massachusetts*,¹¹⁸ Nelson described the question in the earlier case as "not a political question, but one of property" having only an incidental effect on sovereignty, because the state "as the original and ultimate proprietor" had the right of escheat over all lands within its borders.¹¹⁹ While this may trivialize the *Rhode Island* holding,¹²⁰ the implication seems to be that it was the fact that Georgia sued in its sovereign capacity in *Stanton*, and not the nature of the underlying issue, that made the case too "political" for judicial cognizance.¹²¹

This impression is strengthened by the penultimate paragraph of the *Stanton* opinion, in which Nelson dismissed the importance of an allegation that enforcement of the Reconstruction laws would deprive the state of the use of its public buildings. The loss of property, he wrote, had been alleged "only by way of showing one of the grievances resulting from the threatened destruction of the State, . . . not as a specific ground of relief"; protecting the state's property would not justify the broad injunctive relief the state had requested and "would have called for a very different bill" from the one before the Court.¹²² This may represent an unjustifiably hostile reading of the complaint,¹²³ but it also suggests the trouble was indeed not with the issue but with the party. The history of the Cherokee litigation invoked by the Court is equally instructive: after throwing out the tribe's suit with intimations that the case was "political," the Court held the laws the tribe had challenged unconstitutional in an action by a missionary whose personal rights

¹¹⁸ 37 U.S. (12 Pet.) 657 (1838); see *Currie V*, *supra* note 3, at 718 n.150.

¹¹⁹ *Stanton*, 73 U.S. (6 Wall.) at 73.

¹²⁰ The Court in *Rhode Island* never referred to the state's property interest; it relied on the express provision in the Articles of Confederation for settlement of boundary disputes and on the fact that the states had surrendered authority to settle them by either war or treaty. 37 U.S. (12 Pet.) at 723-31. The second argument applied equally to *Stanton*.

¹²¹ See also *Stanton*, 73 U.S. (6 Wall.) at 76 (stressing that "the rights in danger . . . must be rights of persons or property, not merely political rights" (emphasis added)).

¹²² *Id.* at 77.

¹²³ See *id.* at 53 (declaring that the state had averred that it was the "owner of certain real estate and buildings . . . (the State capitol, . . . and Executive mansion), and of other real and personal property, exceeding in value \$5,000,000; and that putting the acts of Congress into execution . . . would deprive it of the possession and enjoyment of its property."). For the more persuasive argument of counsel that the threat to state property was too conjectural to constitute a ripe controversy, see *id.* at 57-60 (argument by Mr. Stanbery).

In the absence of Justice Grier, the Court later divided equally along party lines and refused Georgia permission to file an amended complaint more clearly alleging a property right. See 2 C. WARREN, *supra* note 4, at 463-64. Kutler views Nelson's reference to property rights in *Stanton* as inviting an amended pleading and Grier's absence as crucial to avoiding a test of Reconstruction. S. KUTLER, *supra* note 66, at 99, 113.

were at stake.¹²⁴ Thus, despite its misleading terminology, *Stanton* seems to have held not that Reconstruction was a political issue but, in accord with the distinction earlier drawn in the *Wheeling Bridge* case,¹²⁵ that the state had no standing to assert merely political interests;¹²⁶ the door seemed to have been left open for an attack by someone in the position of that missionary in the land of the Cherokees.¹²⁷

C. *Ex parte McCardle*

Such a plaintiff was not long in presenting himself: an editor imprisoned by the military authorities in Mississippi on charges of having published "incendiary and libellous" articles¹²⁸ sought habeas corpus on the ground that the Reconstruction Acts were unconstitutional. When the circuit court denied relief, he appealed to the Supreme Court as provided for in an 1867 statute.¹²⁹ As if to demonstrate that *Stanton* had not really been a political-question case, the Court upheld its jurisdiction.¹³⁰ While the case was pending, however, Congress repealed the provision under which the ap-

¹²⁴ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); see *Currie II*, *supra* note 3, at 721; *Currie III*, *supra* note 3, at 953-56.

¹²⁵ *Pennsylvania v. Wheeling & Belmont Bridge Co. (I)*, 54 U.S. (13 How.) 518, 559-62 (1852); see *Currie IV*, *supra* note 3, at 511-12.

¹²⁶ For conflicting contemporaneous interpretations of the *Stanton* decision, see 2 C. WARREN, *supra* note 4, at 472-73. The confusion between political questions and standing was later perpetuated in the famous opinion in *Massachusetts v. Mellon*, 262 U.S. 447 (1923), which, in denying a state standing to assert its sovereign interest in keeping Congress within its powers, invoked *Stanton* and declared that the "question, as it is thus presented, is political and not judicial in character." *Id.* at 483 (emphasis added).

¹²⁷ For a real political-question case decided during the Chase period, see *United States v. Holliday*, 70 U.S. (3 Wall.) 407 (1866) (Miller, J.). There the Court deferred to the Executive as to whether the Chippewas were still to be treated as an Indian nation for purposes of a statute forbidding liquor sales to certain Indians: "In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs." *Id.* at 419. The statute in question seemed expressly to make the executive's position decisive, for it applied to "any Indian under the charge of any Indian superintendent or Indian agent appointed by the United States." *Id.* at 408. Miller's language went further, as it had to in order to sustain the constitutionality of the act under the Indian commerce clause of article I, § 8, U.S. CONST. art. I, § 8; see *Currie, The Constitution in the Supreme Court: Limitations on State Power, 1865-1873*, 51 U. CHI. L. REV. (in press); since there was no doubt that the Chippewas were in fact "Indians," the loose terminology of the opinion need not be taken as *carte blanche* for Congress to extend its powers by declaring all inhabitants of Kentucky, for example, to be "Indians." Cf. *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415 (1839) (deferring to the executive on the question of sovereignty over the Falkland Islands).

¹²⁸ *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 508 (1869).

¹²⁹ Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 386 (repealed 1868).

¹³⁰ 73 U.S. (6 Wall.) 318 (1868) (Chase, C.J.). The political-question issue, however, was not discussed; the argument concerned the interpretation of the provision for appeals.

peal had been taken.¹³¹ Thereupon the Court dismissed without dissent in an 1869 opinion by Chief Justice Chase.¹³²

The opinion made it seem quite simple. Article III gave the Supreme Court appellate jurisdiction of specified cases "with such Exceptions . . . as the Congress shall make,"¹³³ and Congress had made an exception by repealing the jurisdictional provision.¹³⁴ The text of the Constitution makes this conclusion appear obvious; but a moment's reflection should reveal that, if taken literally, the exceptions clause provides Congress with a ready means of frustrating Supreme Court review of its acts. If, as some passages in *Marbury v. Madison* suggest, judicial review is merely an unavoidable incident of the duty of judges to decide cases properly before them,¹³⁵ this conclusion is no cause for reexamining the statement in *McCardle*. Yet other passages in *Marbury*, made persuasive by explicit statements of Convention delegates and in *The Federalist*,¹³⁶ indicate that the Court thought the Framers had created judicial review as a means of enforcing the constitutional limits on congressional power.¹³⁷ On this view, to take the exceptions clause literally would give Congress a means of avoiding a critical check on its powers; even stronger than *Marbury's* presumption that the Framers did not mean to leave Congress as sole judge of its own powers is the presumption that they did not both create a judicial check and render it avoidable at the whim of Congress.¹³⁸ Thus, as

¹³¹ Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44 (enacted over presidential veto) (amending Judiciary Act of 1789, 1 Stat. 73, and repealing Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 386). For the history of this provision, courageously vetoed by President Johnson during proceedings for his own impeachment, see FAIRMAN, HISTORY, *supra* note 4, at 459-69; 2 C. WARREN, *supra* note 4, at 473-80.

¹³² For a thorough discussion of the legal issues, see Van Alstyne, *A Critical Guide to Ex parte McCardle*, 15 ARIZ. L. REV. 229 (1973).

¹³³ U.S. CONST. art. III, § 2.

¹³⁴ 74 U.S. (7 Wall.) at 514 ("The power to make exceptions to the appellate jurisdiction of this court is given by express words.").

¹³⁵ *E.g.*, 5 U.S. (1 Cranch) at 177-78 ("It is, emphatically, the province and duty of the judicial department, to say what the law is. . . . So, if a law be in opposition to the constitution; . . . the court must determine which of these conflicting rules governs the case. . . .").

¹³⁶ For citations of supporting statements by Convention delegates and in *The Federalist*, see Currie II, *supra* note 3, at 656 nn.69-70, 657 n.74, 658 n.77.

¹³⁷ 5 U.S. (1 Cranch) at 176, 178 (arguing that the reason for a written constitution was to limit legislative power and that to deny judicial review would give Congress "a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits"). For a discussion of the ambivalence of *Marbury* on this point, see Currie II, *supra* note 3, at 660-61.

¹³⁸ President Johnson's message vetoing the repeal of the Court's jurisdiction argued among other things that the deprivation of jurisdiction was "not in harmony with the spirit and intention of the Constitution" because "it establishes a precedent which, if followed, may eventually sweep away every check on arbitrary and unconstitutional legislation."

most modern commentators have concluded,¹³⁹ the issue was by no means so simple as Chase made it appear in *McCardle*.¹⁴⁰

On the other hand, the last paragraph of the opinion removes the suspicion that the Court meant to establish that Congress's power to make exceptions to its appellate jurisdiction was absolute:

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.¹⁴¹

What this cryptic passage meant was demonstrated soon enough when another military prisoner sought Supreme Court review of a similar denial of habeas corpus, not by appeal but by petitions for habeas corpus and certiorari under the Judiciary Act of 1789.¹⁴² In *Ex parte Yerger*,¹⁴³ also in 1869, the Court in another

CONG. GLOBE, 40th Cong., 2d Sess. 2094, 2094 (Senate), 2165, 2165 (House) (1868), reprinted in 6 J. RICHARDSON, *supra* note 69, at 646, 647.

¹³⁹ See, e.g., authorities cited in Currie I, *supra* note 3, at 847-49 (discussing *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 321 (1796)); authorities cited in Currie II, *supra* note 3, at 684-86 (discussing *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816)). *Contra* H. WECHSLER, *THE COURTS AND THE CONSTITUTION* 7 (1965):

Federal courts . . . do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of government. They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land.

¹⁴⁰ The argument that the repealing act could not be applied to a pending case was rejected summarily: precedent had established "that no judgment could be rendered in a suit after the repeal of the act under which it was brought"; cases cited to the contrary were distinguished as involving "the exercise of judicial power by the legislature, or of legislative interference with courts in the exercising of continuing jurisdiction." 74 U.S. (7 Wall.) at 514; see also *Van Alstyne*, *supra* note 132, at 245 (characterizing this "perfunctory discussion" as "quite correct, given the fact that the case had not come to decision by the date the Act became effective").

¹⁴¹ 74 U.S. (7 Wall.) at 515.

¹⁴² *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869) (holding that jurisdiction existed under the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82 (current version at 28 U.S.C. § 1651 (1976))). For earlier decisions respecting review of judicial imprisonments under this provision, see Currie II, *supra* note 3, at 668-70 (discussing *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807)). In *Yerger*, Chase reaffirmed that this jurisdiction was appellate and thus constitutional. 75 U.S. (8 Wall.) at 97-102. In this connection he cast belated aspersions at Marshall's conclusion in *Marbury*, 5 U.S. (1 Cranch) at 174, that Congress could not enlarge the Supreme Court's original jurisdiction:

If the question were a new one, it would, perhaps, deserve inquiry whether Congress might not, under the power to make exceptions from this appellate jurisdiction,

apparently unanimous Chase opinion upheld its jurisdiction. It was true that the appellate power was "subject to exception and regulation by Congress,"¹⁴⁴ but because a complete denial of Supreme Court review "must greatly weaken the efficacy of the writ . . . and seriously hinder the establishment of . . . uniformity in deciding upon questions of personal rights,"¹⁴⁵ no such construction of the statute would be adopted without a clearer statement by Congress; as *McCardle* had said, the repealing statute took away only the jurisdiction conferred in 1867, not that which had been confirmed in 1789.¹⁴⁶

At this point it appeared that a judicial test of Reconstruction was imminent, but the military came to the rescue: Yerger was turned over to the civilian authorities, and the case became moot.¹⁴⁷ Thus, despite an intervening decision yet to be discussed,¹⁴⁸ the Reconstruction cases failed to produce a decision on the validity of the provisions for military trials.

That all three branches were happy to avoid the confrontation was plain enough. Not only had Congress deprived the Court of jurisdiction over a pending case in a deliberate effort to prevent a decision; it had been the scene of a number of far more drastic proposals to insulate congressional actions from judicial scrutiny.¹⁴⁹ The Executive had done its part by releasing Yerger when all else had failed. The Court's attitude is suggested by its

extend the original jurisdiction to other cases than those expressly enumerated in the Constitution; and especially, in view of the constitutional guaranty of the writ of *habeas corpus*, to cases arising upon petition for that writ.

75 U.S. (8 Wall.) at 97.

¹⁴³ 75 U.S. (8 Wall.) 85 (1869). Professor Fairman says Miller dissented without opinion, FAIRMAN, HISTORY, *supra* note 4, at 583, but the official report does not say so.

¹⁴⁴ 75 U.S. (8 Wall.) at 102.

¹⁴⁵ *Id.* at 103.

¹⁴⁶ *Id.* at 103-05; cf. Van Alstyne, *supra* note 132, at 249 ("*McCardle*, in short, upheld only an inessential exception to the Supreme Court's jurisdiction, and did not curtail any of its important authority."). Indeed, as Van Alstyne further argues, the repealing act made no "Exception" at all: it merely regulated the manner in which jurisdiction should be exercised. *Id.* at 250-54.

¹⁴⁷ See FAIRMAN, HISTORY, *supra* note 4, at 584-91; 2 C. WARREN, *supra* note 4, at 496-97 & n.1.

¹⁴⁸ See *infra* text accompanying notes 179-211 (discussing *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869)).

¹⁴⁹ See S. KUTLER, *supra* note 66, at 64-88 (noting that various court-curbing measures failed so long as there was no immediate danger to the Reconstruction Acts, but that the Republican party was determined "to protect its reconstruction legislation" from the Court); 2 C. WARREN, *supra* note 4, at 466-72, 491-96 (discussing bills to require a two-thirds vote to invalidate federal statutes, to deprive the Supreme Court of jurisdiction over Reconstruction Act cases, and to abolish judicial review entirely).

transparently weak *Johnson* opinion, by its failure to assert continued jurisdiction in *McCardle* under the 1789 act on which it relied in *Yerger*,¹⁵⁰ and by its explicit decision, over the protest of Grier and Field, to postpone action in *McCardle* pending passage of the bill to take away its jurisdiction.¹⁵¹ At the same time, however, the Court studiously avoided giving a definitive opinion on Congress's power to limit its jurisdiction, and in both respects it seems to have been wise not to be bold. For the Court was fighting for its future, and like Marshall in *Marbury*,¹⁵² it did so tenaciously. With the *Dred Scott* debacle in the wings, and with a little help from the other branches, the Court managed to tread the narrow path between rendering a judgment that might have been ignored¹⁵³ and holding that Congress had the right to prevent judicial review.

D. *United States v. Klein*

Indeed, before three years were out, the Court found a somewhat less explosive context in which to say that Congress's power over the Court's appellate jurisdiction was not absolute after all. Congress had authorized the owner of property that had fallen into government hands during the war to recover the property's proceeds if he could demonstrate that he had not given aid or comfort to the rebellion,¹⁵⁴ and the Supreme Court had held in an earlier case that a presidential pardon, by purging the owner of his of-

¹⁵⁰ For discussion of the possibility of so relying, see Van Alstyne, *supra* note 132, at 245-48.

¹⁵¹ See 2 C. WARREN, *supra* note 4, at 480-84. Warren reprints Grier's eloquent statement: "By the postponement of this case, we shall subject ourselves, whether justly or unjustly, to the imputation that we have evaded the performance of a duty imposed on us by the Constitution, and waited for Legislative interposition to supersede our action, and relieve us from responsibility." *Id.* at 482 (quoting *National Intelligencer*, Mar. 31, Apr. 6, 1868; *Chicago Republican*, Apr. 3, 1868; *Indianapolis Journal*, Apr. 2, 3, 1868). But see FAIRMAN, *HISTORY*, *supra* note 4, at 479-80 (denying that the Court acted improperly). Fairman notes that both the Democratic Senator Reverdy Johnson and a leading member of the bar who had been an intimate of Chief Justice Taney had defended the Court from the charge of undue delay. *Id.* at 468.

¹⁵² See *Currie II*, *supra* note 3, at 661.

¹⁵³ Chase wrote to another judge that the Court would "doubtless" have held the provision for military trials unconstitutional had it taken jurisdiction in *McCardle*. See FAIRMAN, *HISTORY*, *supra* note 4, at 494 (quoting Letter from Chief Justice Salmon P. Chase to District Judge Robert A. Hill (May 1, 1869)); see also Hughes, *Salmon P. Chase: Chief Justice*, 18 VAND. L. REV. 569, 595 (1965) (asserting that "the Court performed like an expert, if aged, escape artist").

¹⁵⁴ Act of Mar. 12, 1863, ch. 120, § 3, 12 Stat. 820, 820, quoted in *United States v. Klein*, 80 U.S. (13 Wall.) 128, 131 (1872).

fense, satisfied this burden of proof.¹⁵⁵ Armed with a pardon, Klein obtained a judgment from the Court of Claims for the value of cotton taken by the government. While an appeal was pending, Congress enacted a law providing that a pardon should be taken instead as proof that the owner had aided the rebellion, and that upon such proof the suit should be dismissed for want of jurisdiction.¹⁵⁶ Without dissent on the central issue, the Court in an important 1872 Chase opinion held the new provision unconstitutional.¹⁵⁷

"Undoubtedly," said Chase, "the legislature has complete control over the organization and existence of [the Court of Claims] and may confer or withhold the right of appeal from its decisions"; if the statute "simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient."¹⁵⁸ "But," he continued, "the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have."¹⁵⁹ To "dismiss the appeal" when a pardon showed "that the judgment must be affirmed" would allow "one party to the controversy to decide it in its own favor," and permit Congress to "prescribe rules of decision to the Judicial Department . . . in cases pending before it."¹⁶⁰ Moreover, the statute was "liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive."¹⁶¹

Several distinct arguments appear in this jumble of reasoning, not all of them convincing. It had been equally obvious in *McCardle* that the denial of jurisdiction had been "a means to" the "end"

¹⁵⁵ *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 542-43 (1870) (Chase, C.J.).

¹⁵⁶ Act of July 12, 1870, ch. 251, 16 Stat. 230, 235, *quoted in* *United States v. Klein*, 80 U.S. (13 Wall.) 128, 133-34 (1872).

¹⁵⁷ *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147-48 (1872). Miller and Bradley, while arguing that the prior case was distinguishable because there the claimant had been pardoned *before* his property was seized, agreed that Congress had no power "to prescribe to the judiciary the effect to be given to an act of pardon or amnesty by the President." *Id.* at 148. For a brief background of the case, see FAIRMAN, HISTORY, *supra* note 4, at 840-46. The most comprehensive legal analysis is Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 WIS. L. REV. 1189.

¹⁵⁸ 80 U.S. (13 Wall.) at 145.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 146.

¹⁶¹ *Id.* at 147.

of frustrating whatever substantive rights the applicant might have had, and that by depriving the Court of jurisdiction the United States had "decide[d]" the controversy "in its own favor." Yet the Court in *McCardle* had blandly deferred to the congressional command with no suggestion that either legislative motive or the effect on substantive rights was relevant.¹⁶² As for "prescrib[ing] rules of decision to the Judicial Department," that is what legislation is all about, and *McCardle* itself had involved a "pending" case.¹⁶³

Nevertheless, there were important differences between *Klein* and *McCardle*. First, in *Klein* Congress had foreclosed all judicial relief, while in *McCardle* it had left open not only the trial courts but an alternate route to the Supreme Court itself; only in *Klein* could it be argued that by closing all the courts Congress had effectively denied a substantive constitutional right.¹⁶⁴ Moreover, the law in *McCardle* had impartially excluded appeals by all habeas corpus applicants; the law in *Klein* discriminated against those claimants who had been pardoned. Since the Court had earlier suggested that the purpose of the pardon was to place its beneficiary on a par with those who had never aided the rebellion,¹⁶⁵ the Court could well view this discrimination as "impairing the effect" of the pardon—just as the Court might view a denial of jurisdiction over actions brought by Roman Catholics as an abridgement of their free exercise of religion even if Congress is under no general duty to provide a forum for the vindication of constitutional rights.¹⁶⁶ Thus it appears that the most *Klein* may even arguably have established is that Congress may not selectively close all the courts to claims of a class of litigants constitutionally entitled to equal treatment on the merits.

There is, however, a third basis for distinguishing *McCardle*, emphasized by the Court itself,¹⁶⁷ that makes it questionable whether *Klein* really established so much as the proposition just stated. As Henry Hart saw it, Congress had not deprived the Court

¹⁶² See *supra* notes 128-41 and accompanying text.

¹⁶³ See *supra* notes 131-32 and accompanying text.

¹⁶⁴ The right in question was the right conferred by the pardon as previously interpreted. *Klein*, 80 U.S. (13 Wall.) at 147.

¹⁶⁵ *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 542-43 (1870).

¹⁶⁶ See *Van Alstyne, supra* note 132, at 263; *cf. Elrod v. Burns*, 427 U.S. 347 (1976) (forbidding political discrimination in government employment although the Constitution gave no right to a government job). Similarly, *Klein* conceded that there need be no Court of Claims at all, and no appeal from its decisions. 80 U.S. (13 Wall.) at 145; see *Young, supra* note 157, at 1230-33 (arguing that the discriminatory nature of the proviso was the reason sovereign immunity did not bar the action).

¹⁶⁷ See *supra* note 161 and accompanying text.

of power to decide the case; it had attempted "to tell the court *how* to decide it" and indeed to do so "in accordance with a rule of law independently unconstitutional."¹⁶⁸ To Hart, *Klein* was like the later case of *Yakus v. United States*,¹⁶⁹ where Justice Rutledge, with the apparent agreement of the Court, had drawn the following distinction:

It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them. . . . [W]henever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it.¹⁷⁰

I have argued above that whether Congress may withdraw jurisdiction of entire constitutional cases depends upon whether one emphasizes those passages in *Marbury v. Madison* insisting that judicial review is a fundamental check on other branches or those describing it merely as a consequence of the judge's own obligation not to violate the Constitution.¹⁷¹ Rutledge's position, however, seems to follow even from the latter view. If the judge merely refuses to hear a case he keeps his hands clean; if he inflicts punishment on a defendant without listening to his constitutional objections, as Rutledge argued was the case in *Yakus*, he arguably violates the Constitution.

The harder question was whether *Klein* really was a case in which the Court was ordered to decide a case according to an unconstitutional rule. If, as the Chief Justice at one point suggested, the statute merely directed the Supreme Court "to dismiss the *appeal*,"¹⁷² the *Yakus* argument appears misplaced; the Court then was simply forbidden to act.¹⁷³ As Chase elsewhere recognized,

¹⁶⁸ P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 316, 337 (2d ed. 1973) [hereinafter cited as *HART & WECHSLER*] (Hart's well-known discussion of congressional control of the distribution of judicial power); accord *Young*, *supra* note 157, at 1215-24 (giving a much fuller explanation).

¹⁶⁹ 321 U.S. 414 (1944).

¹⁷⁰ *Id.* at 468 (dissenting opinion). The majority held there had been an adequate prior opportunity for judicial review, which the defendant had forfeited.

¹⁷¹ See *supra* notes 135-38 and accompanying text.

¹⁷² 80 U.S. (13 Wall.) at 146 (emphasis added).

¹⁷³ A grant of jurisdiction to decide against but not in favor of a pardoned claimant might have been vulnerable to the argument that the exercise of article III's "judicial Power" required the authority to decide either way if at all; but the statute in *Klein* avoided

however, what the statute actually required was that the Court "dismiss the *cause*"¹⁷⁴—that is, as the government requested, that it "remand" the case to the Court of Claims "with a mandate that the same be dismissed for want of jurisdiction."¹⁷⁵ The Court was thus told not to decline jurisdiction but to exercise it: to deprive the claimant of an existing judgment in his favor if it found, in the Court's words, "that the judgment must be affirmed"¹⁷⁶ because of the pardon. For Congress to have required the denial, on this basis, of relief on the *merits* would have unconstitutionally impaired the pardon. Although a contrary argument can be made,¹⁷⁷ there is therefore a strong case for finding that *Klein* fell on the wrong side of Justice Rutledge's principle that a court may not be ordered to violate the Constitution.¹⁷⁸

this objection, for it required dismissal on proof of a pardon without a decision on the merits one way or the other.

¹⁷⁴ 80 U.S. (13 Wall.) at 146 (emphasis added).

¹⁷⁵ *Id.* at 130. For a convincing demonstration that the government's position correctly reflected the intentions of Congress, see Young, *supra* note 157, at 1203-09. See also CONG. GLOBE, 41st Cong., 2d Sess. 3824 (1870) (statement of Senator Edmunds) ("[W]e say they shall dismiss the case out of court for want of jurisdiction; not dismiss the appeal, but dismiss the case—everything."), quoted in Young, *supra* note 157, at 1208.

¹⁷⁶ 80 U.S. (13 Wall.) at 146.

¹⁷⁷ Viewing the situation from the point before Klein brought his suit in the Court of Claims, the ultimate result was the same as if the courts had never been given jurisdiction over claims by persons whose rebel activities had been pardoned; the Supreme Court was directed merely to keep the lower court from giving Klein a judicial remedy. At the time Congress restricted jurisdiction, however, Klein already had a favorable judgment, and the Court was ordered to take it away because of the pardon.

¹⁷⁸ A final possible basis for distinguishing *Klein* from *McCardle* was that Klein had won in the lower court and *McCardle* had lost. In this light Chase's statement that the United States was attempting to decide its own controversy, see *supra* note 160 and accompanying text, takes on added significance. On several prior occasions the Justices had said that neither the Executive nor Congress could revise judicial decisions, see *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1865); *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1852); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (C.C.D.N.Y., C.C.D. Pa., C.C.D.N.C. 1792), discussed in *Currie I*, *supra* note 3, at 822-25, and one of the reasons given had been that to do so was to exercise judicial power, see *Hayburn's Case*, 2 U.S. (2 Dall.) at 410. While the statute in *McCardle* had left the lower court's denial of relief standing, that in *Klein* directed the Supreme Court to set aside a decision already rendered; the rule that Congress itself could not reverse the decision would be meaningless if Congress could order the Supreme Court to do so. *Pennsylvania v. Wheeling & Belmont Bridge Co. (II)*, 59 U.S. (18 How.) 421 (1856), which Chase distinguished on the obscure basis that the statute in question had created "new circumstances," 80 U.S. (13 Wall.) at 146-47, does not detract from this argument; Congress's decision to authorize a bridge over the Ohio River did not contradict the Court's holding that earlier statutes had forbidden it. On the other hand, Congress had not directed the Court to reverse Klein's case alone; it had enacted a general change in the law, and a long line of cases had already established that such a law could be applied to cases on appeal when it was enacted. *E.g.*, *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J.); see HART & WECHSLER, *supra* note 168, at 316 n.4; see also Young, *supra* note 157, at 1238-40.

In short, *Klein* does establish the welcome if unsurprising proposition that Congress's power to limit federal court jurisdiction, like all its other powers, is subject to limitations found elsewhere in the Constitution. *McCardle* was distinguishable, though the Court was not entirely clear in saying why. Chase deserves some credit for smelling a rat, even if he could not quite identify it; the unsatisfying quality of his opinion may to a large extent be forgiven in view of the difficulty, after a hundred years of second-guessing, of coming up with a wholly satisfactory explanation.

E. *Texas v. White*

At the outbreak of the war Texas owned federal bonds, which, according to state law, it could transfer only over the signature of the Governor. After secession the rebel legislature repealed the signature requirement, and the bonds were sold. When the war was over, the partly reconstructed state brought an action in the Supreme Court to recover the bonds, and in an 1869 Chase opinion it prevailed.¹⁷⁹

There was a threshold problem: the Supreme Court had jurisdiction only if the suit was between "a State and Citizens of another State,"¹⁸⁰ and Texas had purported to secede from the Union.¹⁸¹ Thus the Chief Justice found it necessary to hold that secession was unconstitutional. He did so in a single paragraph: the Articles of Confederation had declared the Union "perpetual"; the preamble to the 1789 Constitution had declared that the new Union was to be even "more perfect"; and "[w]hat can be indissoluble if a perpetual Union, made more perfect, is not?"¹⁸²

This hardly seems an adequate treatment of an issue on which reasonable people had differed to the point of civil war.¹⁸³ It was

¹⁷⁹ *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869). The case and its intricate aftermath are extensively described in FAIRMAN, HISTORY, *supra* note 4, at 619-76.

¹⁸⁰ U.S. CONST. art. III, § 2, para. 1. Since Texas had brought an original action in the Supreme Court, the Court had jurisdiction only if the suit was one "in which a State [was] a Party." U.S. CONST. art. III, § 2, para. 1; see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-75 (1803); see also *supra* notes 83-84.

¹⁸¹ See 74 U.S. (7 Wall.) at 722-24.

¹⁸² *Id.* at 724-25; see also *White v. Hart*, 80 U.S. (13 Wall.) 646, 649-52 (1872) (Swayne, J.) (reaffirming that Georgia had never left the Union and holding therefore that she was forbidden to impair contractual obligations notwithstanding her attempted secession). The *White v. Hart* opinion added nothing to the reasoning of *Texas v. White*, nor did it cite the *Texas* decision.

¹⁸³ For an argument in favor of the right of secession by a highly respected northern observer, see W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 295-310 (2d ed. Philadelphia 1829) (1st ed. Philadelphia 1825). We pass quickly over the

an act of considerable audacity to treat the mere statement of purpose in the preamble as if, contrary to its natural reading, it imposed legally binding limitations on the states.¹⁸⁴ As for the Articles, they had been superseded by the new Constitution. Indeed this very supersession, as well as the arguments that accompanied it, furnished an embarrassing argument in favor of secession. The Convention had deliberately chosen to ignore the procedure prescribed in the Articles for their own amendment,¹⁸⁵ invoking a variety of justifications ranging from popular sovereignty and the right of revolution¹⁸⁶ to the position that a breach of the Articles by one state dissolved the obligations of the others.¹⁸⁷ At least the first two arguments were still available in 1861,¹⁸⁸ but Chase did

objection that, so far as the mere text was concerned, the reason the earlier union was less "perfect" might have been precisely that it *was* perpetual, for that could (and should) have been refuted by a little history: it was the weakness of the central government under the Articles of Confederation, not its permanence, that gave rise to the call for revision. See, e.g., 1 CONVENTION RECORDS, *supra* note 48, at 18-27 (argument of Edmund Randolph in laying his plan before the Convention, spelling out the weakness of the Articles, finding them "totally inadequate to the peace, safety and security of the confederation," and declaring "the absolute necessity of a more energetic government"); see also 2 J. ELLIOT, *supra* note 45, at 185-90 (statement of Mr. Ellsworth), 208-15 (statement of Mr. Livingston), 430-31 (statement of Mr. Wilson); 3 *id.* at 26-27 (statement of Gov. Randolph), 226 (statement of Mr. Marshall); 4 *id.* at 253 (statement of Mr. Pinckney); 1 J. STORY, *supra* note 45, at 226-51.

¹⁸⁴ One might as persuasively argue that the preamble's recitation of the purpose to "promote the general Welfare" empowered Congress, in the teeth of the enumeration of limited powers emphasized by the tenth amendment and confirmed in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), to take any steps appropriate to achieving that goal. See 1 J. STORY, *supra* note 45, at 445 ("The preamble never can be resorted to, to enlarge the powers confided to the general government . . . Its true office is to expound the nature, and extent, and application of the powers actually conferred by the constitution, and not substantively to create them.").

¹⁸⁵ And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.

ARTICLES OF CONFEDERATION art. 13. Contrast U.S. CONST. art. VII ("The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying . . .").

¹⁸⁶ See, e.g., 1 CONVENTION RECORDS, *supra* note 48, at 262 (statement of Gov. Randolph) ("There are great seasons when persons with limited powers are justified in exceeding them . . ."); 2 *id.* at 469 (statement of Mr. Wilson) ("We must go to the original powers of Society, the House on fire must be extinguished, without a scrupulous regard to ordinary rights."). Compare the insistence in the Declaration of Independence on the "Right of the People to alter or to abolish" a bad government. The Declaration of Independence para. 2 (U.S. 1776).

¹⁸⁷ E.g., 1 CONVENTION RECORDS, *supra* note 48, at 314 (statement of Mr. Madison).

¹⁸⁸ Madison, who used the breach argument himself in 1787, see *supra* note 187, argued that ratification by conventions rather than by state legislatures would make that argument inapplicable to the new Constitution. 1 CONVENTION RECORDS, *supra* note 48, at 122-23; see

not stop to rebut any of them.

The Confederacy itself, as the Court was later to hold,¹⁸⁹ was easy to strike down if the states had not legally seceded; article I, section ten expressly forbids the states to enter into any "Alliance, or Confederation."¹⁹⁰ If secession was lawful, however, the Confederacy was not an alliance among states, and the secession question was harder. The best argument was based upon an important change of language from the Articles to the Constitution: while the former were a "firm league of friendship" among "sovereign[]" states,¹⁹¹ the latter was "the supreme Law of the Land."¹⁹² The Articles may have been a treaty voidable upon breach, but the "more perfect" Constitution was not; and Texas had unilaterally declared inoperative within its borders what the Constitution said was supreme law, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."¹⁹³ Even this argument was not conclusive, since the whole question was whether Texas was still part of the "Land"; while it is scarcely the most natural inference, it would not have been wholly inconsistent for the Framers to require that states respect federal law only so long as they chose to remain in the Union. The interesting fact is that the supremacy clause argument was not made.¹⁹⁴

Surprisingly, Chase went on to hold that the illegality of secession did not answer the jurisdictional objection. Though Texas had not left the Union, it had forfeited its right to sue:

All admit that, during this condition of civil war, the rights of the State as a member, and of her people as citizens of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the

also *infra* notes 191-94 and accompanying text.

¹⁸⁹ *Williams v. Bruffy*, 96 U.S. 176, 182 (1878) (Field, J.).

¹⁹⁰ U.S. CONST. art. I, § 10.

¹⁹¹ ARTICLES OF CONFEDERATION arts. 2, 3.

¹⁹² U.S. CONST. art. VI, para. 2.

¹⁹³ *Id.*

¹⁹⁴ It had, however, been made by Justice Story in his *Commentaries*. 1 J. STORY, *supra* note 45, § 340, at 308-09, § 352, at 318-22. Professor Fairman finds the issue simple: "The Constitution . . . allowed for amendment but not for dissolution; it did not speak to the situation where secession in arms had been attempted." FAIRMAN, HISTORY, *supra* note 4, at 641 (footnote omitted). This appears to turn the Constitution on its head: the tenth amendment reserves to the states all powers not prohibited by the Constitution. Madison's argument that ratification by conventions would make the Union permanent, on the other hand, see *supra* note 188, strongly supports the Court's conclusion; it was not cited.

consequences of rebellion.¹⁹⁵

Thus Chase, and the majority of the Court with him, accepted without supporting argument the standard Radical view of a one-sided secession: the Southern states had annihilated their rights but not their obligations.¹⁹⁶ This was a pretty shaky thesis; if Texas was still a state, article III seemed to give it the right to sue.

The Court's finding of forfeiture meant that Texas's right to sue depended upon the legitimacy of the provisional governments set up with federal approval after the defeat of the rebellion. "[S]o long as the war continued," wrote Chase, the President had power "as commander-in-chief" to "institute temporary governments within insurgent districts" or to "take measures . . . for the restoration of State government faithful to the Union"—"employing, however, . . . only such means and agents as were authorized by constitutional laws."¹⁹⁷ Whether presidential Reconstruction "was, in all respects, warranted by the Constitution," it was unnecessary to decide;¹⁹⁸ it was "primarily" up to Congress to restore constitutional government through article IV's guarantee of "a republican government";¹⁹⁹ and Congress had recognized Texas's civil government as a "provisional" one in the Reconstruction Acts themselves.²⁰⁰

For this proposition Chase relied on precedent: his predecessor's famous statement in *Luther v. Borden*²⁰¹ that "it rests with Congress to decide what government is the established one in a State."²⁰² The quoted statement was not only of questionable persuasiveness, as I have elsewhere argued;²⁰³ it was also unnecessary to the result in *Luther*. The plaintiff had not relied on the guarantee clause, and the Court ultimately held that the federal court

¹⁹⁵ 74 U.S. (7 Wall.) at 727.

¹⁹⁶ See *supra* note 195 and accompanying text.

¹⁹⁷ 74 U.S. (7 Wall.) at 730; see also *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 506-07 (1871) (Swayne, J.) (upholding Congress's authority under its powers "to declare war . . . and . . . suppress insurrections" to suspend civil statutes of limitations in state courts during the time the war precluded suit: "[The power] carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."); *The Grapeshot*, 76 U.S. (9 Wall.) 129, 131-33 (1870) (Chase, C.J.) (upholding the President's military authority to establish a civil tribunal in reoccupied Louisiana during the war).

¹⁹⁸ 74 U.S. (7 Wall.) at 729.

¹⁹⁹ *Id.* at 730 (quoting *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849) (Taney, C.J.)).

²⁰⁰ *Id.* at 730-31.

²⁰¹ 48 U.S. (7 How.) 1 (1849) (Taney, C.J.).

²⁰² *Texas v. White*, 74 U.S. (7 Wall.) at 730 (quoting *Luther*, 48 U.S. (7 How.) at 42 (Taney, C.J.)).

²⁰³ See Currie V, *supra* note 3, at 718-19.

must defer to state courts in determining the question because it was a matter of state law.²⁰⁴ Even the dicta of *Luther*, moreover, did not clearly point to Chase's conclusion. At one point Taney had seemed to say that the guarantee clause issue was for each House of Congress to decide in determining whether to seat elected senators and representatives;²⁰⁵ and, as three dissenters argued in *Texas v. White*, those Houses had suggested that Texas was not a state by denying it representation.²⁰⁶ Furthermore, even the passage invoked by Chase seemed to cut against his decision to determine the legality of secession and forfeiture of the right to sue: if Congress alone had power to decide whether Texas had a legitimate state government, the Court had no business reaching either question. Finally, Chase's ultimate holding that Congress had given Texas authority to sue made it unnecessary to discuss whether the state had earlier lost that right; Chase seemed eager to take the occasion to affirm as much of standard Radical doctrine as he could.²⁰⁷

Having upheld jurisdiction, the Court held Texas could get its bonds back; the rebel act authorizing sale without the governor's signature was invalid because it had been passed "in furtherance or support of rebellion"²⁰⁸ Grier alone protested: if Texas had not left the Union, it had the power to repeal its own legislation.²⁰⁹ This plausible position was made more convincing by the singular failure of the majority to identify what provision of the Constitution the repealing act offended; unlike secession, the sale of state property did not on its face contradict federal law. Chase seems to have viewed the raising of funds for rebellious purposes as inseparable from secession itself;²¹⁰ but this conclusion, like so

²⁰⁴ *Luther*, 48 U.S. (7 How.) at 40.

²⁰⁵ *Id.* at 42.

²⁰⁶ 74 U.S. (7 Wall.) at 738 (Grier, Swayne, and Miller, JJ.).

²⁰⁷ Grier's dissent, *id.* at 737-39, substantially joined on the jurisdictional issue by Swayne and Miller, *id.* at 741, was no more satisfying. Professing to find the question of statehood one of "fact" rather than law, Grier noted that Texas was not represented in Congress, and invoked Marshall's holding that the District of Columbia was not a "State" for article III purposes because it did not elect congressmen. *Id.* at 737, 738 (quoting *Hepburn v. Ellzey*, 6 U.S. (2 Cranch.) 445, 452 (1805)). But the District of Columbia was not entitled to representation under the plain terms of the Constitution. If Texas had no right to secede, it seemed still to have the right to elect congressmen; Grier seemed to be saying that Congress could deny a state the right to sue by unconstitutionally excluding it from its own halls.

²⁰⁸ *Id.* at 732-34.

²⁰⁹ *Id.* at 739-40.

²¹⁰ See *id.* at 726 ("[T]he ordinance of secession . . . and all the acts of her legislature intended to give effect to that ordinance, were absolutely null."). Easier than *Texas v.*

much else in his opinion, would have benefited from further explication.²¹¹

In *Texas v. White* the Court went out of its way to embrace the Radical position that secession and all acts that served it were illegal, that the seceding states had nevertheless forfeited their rights, and that Congress could determine under the guarantee clause how they were to be governed. It did so essentially by fiat, without serious consideration of the opposing arguments.

III. FINANCIAL MEASURES

As it had in the area of federal and state relations, the Civil

White were cases holding void acts of the central government of the Confederate States, since the Confederacy itself was unconstitutional. See, e.g., *Hickman v. Jones*, 76 U.S. (9 Wall.) 197, 200-01 (1870) (Swayne, J.) (allowing damages against those responsible for trying the plaintiff under Confederate authority for "treason" against the Confederacy); *United States v. Keebler*, 76 U.S. (9 Wall.) 83, 86-87 (1870) (Miller, J.) (holding it no defense to an action against a postmaster who had unlawfully paid out government funds that he had done so in conformity with an act of the Confederate Congress); *supra* note 182 and accompanying text.

On the other hand, the Court managed to avoid massive disruptions by acknowledging acts of the Confederacy not directly in furtherance of the rebellion on the basis that the Confederacy was a "de facto" government. Thus in *Thorington v. Smith*, 75 U.S. (8 Wall.) 1 (1869) (Chase, C. J.), the Court enforced a contractual obligation to pay for land in Confederate money, and in *Delmas v. Insurance Co.*, 81 U.S. (14 Wall.) 661 (1872) (Miller, J.), it held such a contract had been unconstitutionally impaired. See also *Mauran v. Insurance Co.*, 73 U.S. (6 Wall.) 1 (1868) (Nelson, J.) (holding a seizure by the rebels to be a "capture" within an exception to a marine insurance policy). What is interesting are the dicta in *Texas v. White* suggesting that it was the same "de facto" doctrine that would justify the Court in upholding acts of the rebel state governments that were "necessary to peace and good order" and not "in furtherance or support of the rebellion." 74 U.S. (7 Wall.) at 733 (citing "acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, . . . and providing remedies for injuries to person and estate"). For reasons never adequately stated but probably related to its holding that Texas had forfeited its right to sue, the Court seemed to think that by unlawfully attempting to secede the state government had lost all its powers. But in *Horn v. Lockhart*, 84 U.S. (17 Wall.) 570, 580 (1873) (Field, J.), where the issue was the validity of a wartime Alabama probate decree, the Court said:

[T]he acts of the several States in their individual capacities, . . . so far as they did not impair . . . the supremacy of the National authority, . . . are . . . to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government, or the regular administration of the laws.

²¹¹ That actions supporting the rebellion were punishable as treason, U.S. CONST. art. III, § 3, and suppressible as insurrection, U.S. CONST. art. I, § 8, does not prove them unconstitutional, and the provision forbidding states to "engage in War," U.S. CONST. art. I, § 10, had an exception for cases of actual or threatened invasion. A strong argument could have been made that the exception did not apply to an "invasion" by federal troops seeking to enforce federal law, but Chase did not make it. For extensive criticism of the nonconstitutional aspects of the decision, some of which were promptly repudiated in other cases, see FAIRMAN, HISTORY, *supra* note 4, at 643-62, accusing Chase of "want of rigor in analysis," *id.* at 648.

War produced a revolution in the area of finance. As usual, the Supreme Court was asked to hold everything that was new unconstitutional; after one important setback, the Court confirmed the new order.

A. Federal Taxes

The first confrontation came in the field of federal taxation. Before the war, tariffs on imported goods had provided the principal source of federal revenue. To meet the extraordinary expenses of the emergency, Congress not only raised tariffs but imposed a variety of internal taxes, including one on the income of insurance companies and on the amounts they had insured.²¹² In the 1869 case of *Pacific Insurance Co. v. Soule*,²¹³ the Court rejected the argument that this tax was a direct one required by article I to be apportioned among the states according to population.²¹⁴ Justice Swayne's unsatisfying opinion carefully selected for quotation or unattributed paraphrase those relatively unconvincing passages from the carriage tax case, *Hylton v. United States*,²¹⁵ that favored his conclusion (the dicta that perhaps only land and poll taxes were direct²¹⁶ and the wishful argument that direct taxes meant those that could be fairly apportioned²¹⁷) and ignored the more persuasive argument of Justice Paterson that the carriage tax had been an indirect effort to reach what an income tax reached directly—the income itself.²¹⁸

²¹² Act of June 30, 1864, ch. 173, §§ 105, 120, 13 Stat. 223, 276, 283-84, amended by Act of July 13, 1866, ch. 184, 14 Stat. 98; see J. SCHUCKERS, *supra* note 4, at 222-23; Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367, 371.

²¹³ 74 U.S. (7 Wall.) 433 (1869).

²¹⁴ U.S. CONST. art. I, § 2 ("Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective numbers . . ."); U.S. CONST. art. I, § 9 ("No Capitation, or other direct, Tax, shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.").

²¹⁵ 3 U.S. (3 Dall.) 171 (1796).

²¹⁶ *Id.* at 175 (Chase, J.), 177 (Paterson, J.), 183 (Iredell, J.); the first two were quoted by Swayne, *Soule*, 74 U.S. (7 Wall.) at 444-45, with references to the approving views of several prominent commentators.

²¹⁷ *Hylton*, 3 U.S. (3 Dall.) at 174 (Chase, J.), 179-80 (Paterson, J.), 181-83 (Iredell, J.), restated in *Soule*, 74 U.S. (7 Wall.) at 446 (Swayne, J.).

²¹⁸ *Hylton*, 3 U.S. (3 Dall.) at 180-81. Paterson had quoted Adam Smith's explanation: "[T]he state, not knowing how to tax directly and proportionally the revenue of its subjects, endeavors to tax it indirectly, by taxing their expense . . ." *Id.* at 180 (quoting A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 692 (J. McCulloch ed. London 1838) (1st ed. London 1776)). Counsel for the taxpayer in *Soule* not only invoked Smith; he stated an alternative interpretation that would also make sense of the term "direct" while arguably outlawing the income tax: "The ordinary test of the difference between direct and indirect taxes, is whether the tax falls ultimately on the tax-payer, or whether,

More novel and more complicated was *Veazie Bank v. Fenno*,²¹⁹ an 1869 Chase decision upholding a prohibitive federal tax on state bank notes²²⁰ against a variety of constitutional objections. The first issue was easy after *Soule*: on the basis of the tests employed in that case, this tax was not direct.²²¹ More troublesome was the argument, advanced by Nelson and Davis in dissent,²²² that the tax in effect was one on the states that had created the banks, and that it was thus forbidden by an implicit immunity analogous to the immunity of federal banks to state taxes recognized in *McCulloch v. Maryland*.²²³ It was true that *McCulloch* had described this immunity in dictum as a one-way street: the supremacy clause operated only in favor of federal immunity, and

through the tax-payer, it falls ultimately on the consumer." 74 U.S. (7 Wall.) at 437-38, 440 (argument of Mr. Wills). For criticism of the *Hylton* opinions and a discussion of the meaning of "direct" taxes, see Currie I, *supra* note 3, at 853-60.

For a discussion of *Farrington v. Saunders*, an unreported 1871 case in which the Court divided 4-4 over the validity of the cotton tax imposed by the Act of July 13, 1866, ch. 184, § 1, 14 Stat. 98, 98, see FAIRMAN, HISTORY, *supra* note 4, at 883-95. Field, Nelson, and Clifford thought the cotton tax direct, probably on the basis of Paterson's suggestion in *Hylton*, 3 U.S. (3 Dall.) at 177, that a tax on "the immediate product of land" might be considered one on the land itself. FAIRMAN, HISTORY, *supra* note 4, at 890. Davis, Nelson, and Clifford thought it a tax on exports forbidden by section 10 of article I of the Constitution, apparently because (as argued by counsel) so much cotton was exported. FAIRMAN, HISTORY, *supra* note 4, at 884. Chase was absent. Counsel had also made the interesting argument that if the tax was not direct it violated the requirement that indirect taxes be "uniform throughout the United States," U.S. CONST. art. I, § 8, because all cotton was grown in the South. FAIRMAN, HISTORY, *supra* note 4, at 885 (argument of former Justice Curtis). Compare a similar argument made by Justice Nelson in the commerce clause context. See Currie, *supra* note 127 (in press).

²¹⁹ 75 U.S. (8 Wall.) 533 (1869); see FAIRMAN, HISTORY, *supra* note 4, at 711-12; Dam, *supra* note 212, at 374-76.

²²⁰ Act of July 13, 1866, ch. 184, § 9, cl. 2, 14 Stat. 98, 146 (repealed 1870). Similar notes had earlier been unsuccessfully attacked on the ground that they were bills of credit, which the states were forbidden by § 10 of article I to issue. *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257 (1837); see Currie IV, *supra* note 3, at 477-80. The tax on them was part of Chase's pet project as Treasury Secretary to replace them with a federal currency based in large part on national bank notes. See J. SCHUCKERS, *supra* note 4, at 240-41, 296-97; Dam, *supra* note 212, at 375.

²²¹ 75 U.S. (8 Wall.) at 540-47 (citing *Soule* and the passages it had quoted from *Hylton*). After pointing out that Congress had never imposed direct taxes on anything but land and slaves, the Court concluded:

[I]t may further be taken as established upon the testimony of Paterson, that the words direct taxes, as used in the Constitution, comprehended only capitation taxes, and taxes on land, and perhaps taxes on personal property by general valuation and assessment of the various descriptions possessed within the several States.

Id. at 546.

²²² *Id.* at 554-56.

²²³ 17 U.S. (4 Wheat.) 316, 431-32 (1819) (Marshall, C.J.) ("[T]he power to tax involves the power to destroy"; to allow states to tax federal activities would make the federal government "dependent on the States.").

the states were protected by their representation in Congress.²²⁴ Yet the case for state immunity was arguably stronger than that for federal immunity in *McCulloch*: precisely because the supremacy clause worked only one way, the states could not protect themselves by legislation as Congress could protect its instrumentalities.²²⁵

The Court had already recognized this argument by holding in *Kentucky v. Dennison*²²⁶ that Congress could not impose duties on state officers under the extradition clause; there seemed no reason not to apply the same reasoning to federal taxes, and the Court was soon to do so.²²⁷ Indeed, the Court in *Veazie Bank* conceded the principle,²²⁸ but insisted that the tax was on the banks' contracts and not on the process of governing.²²⁹ This distinction would equally have sustained the state tax in *McCulloch*. A better basis of decision might have been that (in apparent contrast to the national bank in *McCulloch*) "[t]here was nothing in the case showing that [Veazie Bank] sustained any relation to the State as a financial agent, or that its authority to issue notes was conferred or exercised with any special reference to other than private interests."²³⁰

The final and most interesting argument in *Veazie Bank* was that the measure was a tax in form only; in substance it was an ill-disguised attempt to forbid the state banks to issue notes at all. Though there seems little doubt that this characterization was cor-

²²⁴ *Id.* at 428, 435.

²²⁵ See Currie III, *supra* note 3, at 936-37. The power of Congress to exempt federal securities from state taxation had in fact just been confirmed in another Chase opinion. See *Bank v. Supervisors*, 74 U.S. (7 Wall.) 26, 30-31 (1869); *infra* note 247.

²²⁶ 65 U.S. (24 How.) 66, 107-10 (1861); see Currie V, *supra* note 3, at 705-07.

²²⁷ See Currie, *supra* note 127 (in press) (discussing *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871)).

²²⁸ It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress.

75 U.S. (8 Wall.) at 547.

²²⁹ *Id.* at 547-48.

²³⁰ This passage appears in the reporter's statement of the case, *id.* at 535, but not in the opinion itself. The argument that even the national bank had essentially served private interests had been made in *McCulloch* and ignored. See Currie III, *supra* note 3, at 936 n.353, and authorities cited therein. The decision in *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257 (1837), see *supra* note 220, that state bank notes were not those of the state for purposes of the bills of credit clause also lent some support to the decision that the tax in *Veazie Bank* was not one on the state. See 75 U.S. (8 Wall.) at 552 (Nelson, J., dissenting).

rect,²³¹ the Court piously said that the oppressiveness of a tax was no ground for holding it unconstitutional.²³² This was hardly an answer. Notwithstanding the reluctance Marshall had expressed to investigate legislative motive in *Fletcher v. Peck*,²³³ he had cautioned in *McCulloch* that Congress could not invoke its powers as a "pretext" for interfering with matters reserved to the states.²³⁴ As later Justices not known for judicial activism were to insist, a total refusal to investigate the motive or effect of a tax would make a mockery of the careful enumeration of limited federal powers recognized in *McCulloch*: Congress could effectively regulate anything it pleased simply by calling the price of action a tax instead of a penalty.²³⁵ Yet Madison had noted in the Convention that taxes were often properly laid for ulterior reasons,²³⁶ and Justice Robert Jackson later said with much force that it was impossible to formulate a tax law without making decisions about social or economic priorities.²³⁷ Moreover, the First Congress, whose views have often and for good reason been given special deference,²³⁸ had imposed discriminatory taxes to encourage American shipping.²³⁹ Thus, the question of motive in taxation scarcely seems to admit of such a simple answer as Chase offered in *Veazie Bank*.

²³¹ See 75 U.S. (8 Wall.) at 556 (Nelson, J., dissenting):

[T]he purpose is scarcely concealed, in the opinion of the court, namely, to encourage the National banks. It is sufficient to add, that the burden of the tax, while it has encouraged these banks, has proved fatal to those of the States; and, if we are at liberty to judge of the purpose of an act, from the consequences that have followed, it is not, perhaps, going too far to say, that these consequences were intended.

See also Dam, *supra* note 212, at 375 ("The power to tax was used with unprecedented effectiveness to destroy.").

²³² 75 U.S. (8 Wall.) at 548.

²³³ 10 U.S. (6 Cranch) 87, 130 (1810); see Currie III, *supra* note 3, at 890-91.

²³⁴ 17 U.S. (4 Wheat.) at 423. Also ignored in *Veazie Bank* was the apparent conclusion of the whole Court shortly before that the question in the test-oath cases was whether or not the legislature's intention had been to punish. See *supra* notes 38-48 and accompanying text.

²³⁵ See, e.g., *United States v. Kahriger*, 345 U.S. 22, 38 (1953) (Frankfurter, J., dissenting from the upholding of a tax on the business of accepting wagers); *Child Labor Tax Case*, 259 U.S. 20, 36-38 (1922) (Taft, C.J., joined by Holmes, J.) (striking down a prohibitive tax on goods manufactured by child labor); cf. 1 J. KENT, COMMENTARIES ON AMERICAN LAW 393-94 n.c. (4th ed. New York 1840) (1st ed. New York 1826) (arguing that taxes could be laid only for the purposes specified in article I, § 8: "to pay the Debts and provide for the common Defence and general Welfare of the United States").

²³⁶ 2 CONVENTION RECORDS, *supra* note 48, at 276 (discussing the clause forbidding the Senate to initiate revenue measures); see also 2 J. STORV, *supra* note 45, §§ 956-70, at 430-40 (defending the validity of taxes laid for purposes other than collection of revenue).

²³⁷ *United States v. Kahriger*, 345 U.S. 22, 35 (1953) (concurring opinion).

²³⁸ See, e.g., Currie II, *supra* note 3, at 681-82 (discussing *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816)); Currie III, *supra* note 3, at 928 (discussing *McCulloch*).

²³⁹ Act of July 20, 1789, ch. 3, 1 Stat. 27 (repealed 1970).

In any event, Chase unnecessarily went on to announce an alternative ground that made it easier for later Justices to explain away his apparent conclusion that motive could not be investigated:²⁴⁰ it was irrelevant, he said, whether Congress had attempted to outlaw state bank notes under the guise of taxing them, because Congress could have outlawed them directly.²⁴¹ Congress, wrote Chase, had undoubted authority "to provide a circulation of coin," and it was "settled by . . . uniform practice . . . and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit."²⁴² Having this power to "provide a currency, . . . Congress may . . . secure the benefit of it to the people by appropriate legislation."²⁴³ Just as it had denied the status of legal tender to foreign coins and outlawed counterfeiting, Congress might therefore "restrain . . . the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile."²⁴⁴

All of this seems more than a little glib and was certainly generous in its interpretation of congressional power. The only explicit authority referred to was the power to coin money,²⁴⁵ and, as the next important financial controversy was to show, there was considerable doubt whether that power even authorized the issuance of paper money,²⁴⁶ much less empowered Congress to forbid state bank notes. Neither the constitutional source of the alleged power to issue bills of credit nor the alleged decisions upholding it were cited.²⁴⁷ The legislative precedent of the ban on counterfeit coins was of little use, since that had been authorized explicitly by article I,²⁴⁸ and the necessity of outlawing state notes in order to "secure a sound and uniform currency," which was the heart of the argument, was stated as a bald conclusion. No allusion was made

²⁴⁰ See, e.g., *Child Labor Tax Case*, 259 U.S. 20, 41-42 (1922).

²⁴¹ 75 U.S. (8 Wall.) at 548-49.

²⁴² *Id.* at 548.

²⁴³ *Id.* at 549.

²⁴⁴ *Id.* The dissenters did not discuss this issue.

²⁴⁵ *Id.* at 548-49 (citing U.S. CONST. art. I, § 8).

²⁴⁶ See *infra* text accompanying notes 254-319 (discussing the legal tender litigation).

²⁴⁷ The Supreme Court decision closest to being on point was *Bank v. Supervisors*, 74 U.S. (7 Wall.) 26 (1869), upholding Congress's power to immunize paper money from state taxation, where Chase had said it was "not seriously questioned" in argument that the notes had been issued "as a means to ends entirely within the constitutional power of the government." *Id.* at 29.

²⁴⁸ U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . [t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States . . .").

to the several Supreme Court precedents that would have been helpful: neither to *McCulloch*, with its broad test for necessity and propriety and its finding that the national bank was constitutional,²⁴⁹ nor to the broad conclusions reached by the Taney court under the commerce clause,²⁵⁰ nor to *United States v. Marigold*,²⁵¹ which had upheld the power to outlaw the mere *passing* of counterfeit coins, nor to Chase's own decision in the preceding Term that Congress had power to immunize paper money from state taxation.²⁵² As in *Texas v. White*,²⁵³ the Chief Justice seems to have been at pains to run roughshod over all possible objections and little concerned to give persuasive reasons for his debatable conclusions.

B. Legal Tender

An even greater controversy over wartime financial policy reached the Court the same Term in *Hepburn v. Griswold*.²⁵⁴ In a notorious split decision,²⁵⁵ the Court, speaking through Chase, held that Congress had no power to make its paper money legal tender. The contrast with the latitudinarian approach of *Veazie Bank* was

²⁴⁹ 17 U.S. (4 Wheat.) 316 (1819); see Currie III, *supra* note 3, at 928-34.

²⁵⁰ See, e.g., *Foster v. Davenport*, 63 U.S. (22 How.) 244 (1859) (upholding licensing of lighters confined to Mobile harbor on the ground that they were servicing vessels engaged in interstate and foreign commerce); *United States v. Coombs*, 37 U.S. (12 Pet.) 72 (1838) (upholding power to punish theft of shipwrecked goods); Currie IV, *supra* note 3, at 497-513.

²⁵¹ 50 U.S. (9 How.) 560 (1850); see Currie IV, *supra* note 3, at 511 n.275.

²⁵² [W]e think it clearly within the discretion of Congress to determine whether, in view of all the circumstances attending the issue of the notes, their usefulness, as a means of carrying on the government, would be enhanced by exemption from taxation; and within the constitutional power of Congress, having resolved the question of usefulness affirmatively, to provide by laws for such exemption.

Bank v. Supervisors, 74 U.S. (7 Wall.) 26, 30-31 (1869). Nothing had been cited in support of this conclusion either.

²⁵³ See *supra* notes 179-211 and accompanying text.

²⁵⁴ 75 U.S. (8 Wall.) 603 (1870).

²⁵⁵ Miller, Swayne, and Davis dissented; Nelson, Clifford, and Field joined Chase's opinion. For discussion of the lamentable circumstances surrounding the vacillating vote of the aged Grier, who was said to agree with the majority that the Act in question was invalid as applied to debts incurred before its passage, *id.* at 626, and of his resignation under pressure from his brethren before the decision was actually announced from the bench, see FAIRMAN, HISTORY, *supra* note 4, at 716-19 (doubting that Grier really believed the law unconstitutional and chastising Chase for proceeding to decision with such a questionable majority). See also *id.* at 739 (quoting from a memorandum by Justice Miller: "We do not say he did not agree to the opinion. We only ask, of what value was his concurrence, and of what value is the judgment under such circumstances?"); FAIRMAN, MILLER, *supra* note 4, at 164-66 (describing how Grier came to change his vote).

striking, and *Veazie Bank* was not even cited.²⁵⁶

In 1860, when only gold and silver coins were legal tender for debts, Hepburn gave Griswold a note promising to pay 11,250 "dollars." Two years later Congress authorized the issuance of paper money and declared it "a legal tender in payment of all debts, public and private."²⁵⁷ Hepburn tendered payment in this paper money, which had depreciated in value;²⁵⁸ the Supreme Court held Griswold did not have to accept it. The statute making paper money legal tender, wrote Chase—who as Lincoln's Secretary of Treasury had supported the measure²⁵⁹—was "not a means appropriate . . . to carry into effect any express power vested in Congress"; it was "inconsistent with the spirit of the Constitution"; and it was "prohibited by the Constitution" as well.²⁶⁰

The opinion begins by reaffirming the power of judicial review,

²⁵⁶ Professor Fairman's *History* devotes a hundred pages to discussion of this controversy, clearly disapproving of much about Chase's conduct but commenting only obliquely on the constitutional merits. FAIRMAN, *HISTORY*, *supra* note 4, at 677-775. An excellent early analysis of the legal issues is Thayer, *Legal Tender*, 1 HARV. L. REV. 73 (1887), reprinted in J. THAYER, *LEGAL ESSAYS* 60-90 (1908). For an enlightening explanation of the financial issues underlying the legislation, see Dam, *supra* note 212.

²⁵⁷ Act of Feb. 25, 1862, ch. 33, § 1, 12 Stat. 345, 345. In earlier cases the Court had construed the Act narrowly so as to avoid the constitutional question. See *Bronson v. Rodes*, 74 U.S. (7 Wall.) 229, 249-50 (1869) (Chase, C.J.) (holding over Miller's dissent that a contractual obligation in "dollars payable in gold and silver coin" was not a "debt" within the tender provision but "an agreement to deliver a certain weight of standard gold"); *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 77 (1869) (Chase, J.) (holding, in part because of a separate statutory reference to federal "taxes," that the "debts" for which the notes were made tender did not include state taxes, and adding that "it is not easy to see upon what principle the national legislature can interfere with the exercise" of state power to tax (emphasis added)). The tender issue had also been expressly reserved in *Bank v. Supervisors*, 74 U.S. (7 Wall.) 26, 29-30 (1869), where the notes were held immune from state taxation. In *Hepburn* itself, Chase found the statutory terms too clear to permit holding them applicable only to future contracts, despite the principle that laws "are not to receive an interpretation which conflicts with acknowledged principles of justice and equity, if another sense, consonant with those principles, can be given to them." 75 U.S. (8 Wall.) at 606-10. Grier alone disagreed. See *id.* at 626.

²⁵⁸ 75 U.S. (8 Wall.) at 608.

²⁵⁹ See FAIRMAN, *HISTORY*, *supra* note 4, at 684-87. In *Hepburn*, Chase adverted obliquely to his change of heart, contrasting "patriotic" acquiescence by "many" "amid the tumult of the late civil war" with "considerate reflection" "under the influence of the calmer time." 75 U.S. (8 Wall.) at 625-26. Later, when his earlier advocacy was used against him by a new majority, he acknowledged it expressly (though in the third person) and said bravely enough that "[e]xamination and reflection under more propitious circumstances have satisfied him that this opinion was erroneous . . ." *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 576 (1871) (dissenting opinion).

²⁶⁰ 75 U.S. (8 Wall.) at 625. Though the only question before the Court was retroactive application of the law, the first of Chase's arguments seemed strongly to imply that the Act could not be applied prospectively either; he so argued in the later *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 582-86 (1871) (dissenting opinion).

repeating Marshall's arguments, in best Marshall style, without attribution.²⁶¹ It also intones, again without citation—and, the result suggests, without conviction—the familiar canon that “acts of Congress must be regarded as constitutional, unless clearly shown to be otherwise.”²⁶² Moreover, said Chase in echo of *McCulloch v. Maryland*,²⁶³ the necessary and proper clause confirmed that Congress had “extensive” powers “incidental” to “the exercise of the powers expressly granted,” and “a very large part, if not the largest part,” of federal functions “have been performed in the exercise of powers thus implied.”²⁶⁴ Neither the necessary and proper clause nor the tenth amendment, he persuasively emphasized, “is to be taken as restricting any exercise of power fairly warranted by legitimate derivation from one of the enumerated or express powers.”²⁶⁵ The test of whether a law went beyond congressional authority, he concluded, was that laid down in *McCulloch*: “‘Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.’”²⁶⁶

Applying this test, Chase first concluded that paper tender was not an “appropriate” means of carrying out any of Congress’s enumerated powers. The power to “coin money,” he said, quite without elaboration, applied only to “the precious metals.”²⁶⁷ This brusque treatment may strike the modern reader as surprisingly literal; the Court has not taken the copyright clause’s reference to “Writing,”²⁶⁸ for example, as limited to the written word.²⁶⁹

²⁶¹ 75 U.S. (8 Wall.) at 610-12; see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

²⁶² 75 U.S. (8 Wall.) at 610.

²⁶³ 17 U.S. (4 Wheat.) 316, 407-12 (1819).

²⁶⁴ 75 U.S. (8 Wall.) at 613.

²⁶⁵ *Id.* at 613-14. Both clauses, wrote Chase, were “admonitory,” leaving no room to doubt either that Congress had incidental powers or that those powers were limited. *Id.* at 614. Marshall had said as much in *McCulloch* as well. See 17 U.S. (4 Wheat.) at 406, 420-21. Contrast the later statement in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), properly repudiated in *United States v. Darby*, 312 U.S. 100, 115-17 (1941), that an act forbidding interstate traffic in goods made by child labor “in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend.” 247 U.S. at 276.

²⁶⁶ 75 U.S. (8 Wall.) at 614 (quoting 17 U.S. (4 Wheat.) at 421). For discussion of this test, see Currie III, *supra* note 3, at 928-34.

²⁶⁷ 75 U.S. (8 Wall.) at 615-16.

²⁶⁸ U.S. CONST. art. I, § 8.

²⁶⁹ See, e.g., *Burrow-Giles Lithograph Co. v. Sarony*, 111 U.S. 53 (1884) (Miller, J.) (holding photographs protected).

Throughout the legal tender litigation, however, proponents of the paper money placed little emphasis on the coinage clause; while we may have wished for a better explanation, it seems that the obvious differences between coins and promises, illustrated elsewhere in the opinion,²⁷⁰ were understood at the time to have made the choice of the term "coin" a deliberately narrow one.²⁷¹ But if this was so, a respectable argument could have been made that the coinage clause by negative implication *forbade* Congress to issue paper money.²⁷² Though later opinions did invoke this contention against the law,²⁷³ they did not give it especial prominence;²⁷⁴ and Chase, who made a variety of arguments, did not mention it at all.²⁷⁵

²⁷⁰ See 75 U.S. (8 Wall.) at 608 (observing that the value of tender notes "sank in July, 1864, to the rate of two dollars and eighty-five cents for a dollar in gold").

²⁷¹ Miller conceded in dissent that the coinage provision did not itself support making paper tender. *Id.* at 627.

²⁷² See the argument of O.W. Holmes, Jr., in a note to 1 J. KENT, COMMENTARIES ON AMERICAN LAW 272 n.1 (12th ed. 1873) (1st ed. New York 1826): "[I]f the Constitution says expressly that Congress shall have power to make metallic legal tender, how can it be taken to say by implication that Congress shall have power to make paper money legal tender?" Holmes had first made this argument in 4 AM. L. REV. 768 (1870). See FAIRMAN, HISTORY, *supra* note 4, at 715.

²⁷³ E.g., Legal Tender Cases, 79 U.S. (12 Wall.) 457, 624 (1871) (Field, J., dissenting); see *infra* note 318.

²⁷⁴ In *McCulloch* Marshall had rejected the parallel argument that by authorizing Congress to make certain acts criminal the Framers had implicitly forbidden it to criminalize others, 17 U.S. (4 Wheat.) at 416-17, and the Court had confirmed Marshall's conclusion in *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850) (upholding a ban on the passing of counterfeit coins). The analogy is not decisive, since the Framers may have had different reasons for including the coinage and counterfeiting clauses; but the Court nonetheless made effective use of it when *Hepburn* was overruled. Legal Tender Cases, 79 U.S. (12 Wall.) 457, 536-37, 544-47 (1871). For further arguments against the negative implication, see Thayer, *supra* note 256, at 83-88, reprinted in J. THAYER, *supra* note 256, at 73-79, observing that the coinage clause was thought neither to preclude ordinary bills of credit nor to make coins legal tender.

²⁷⁵ Nor did Chase, like his dissenting brethren Field and Clifford in the case overruling *Hepburn*, Legal Tender Cases, 79 U.S. (12 Wall.) 457, 587, 635 (1871), see *infra* note 318, rely on the Convention's rejection of a proposal (taken from article 9 of the Articles of Confederation) to authorize Congress explicitly to "emit bills on the credit of the United States," 2 CONVENTION RECORDS, *supra* note 48, at 182. Professor Dam argues that, by omitting express authority, the Framers meant to prohibit bills of credit as contrasted with promissory notes, just as they had in the case of the states in article I, § 10. See Dam, *supra* note 212, at 382-90; *Craig v. Missouri*, 29 U.S. (4 Pet.) 410, 431-32 (1830). In support of this argument, Dam relies largely on a private note by Madison explaining to posterity (but not to his colleagues) his own vote. "[S]triking out the words," wrote Madison, "would not disable the Govt [sic] from the use of public notes as far as they could be safe & proper; & would only cut off the pretext for a paper currency and particularly for making the bills a tender," 2 CONVENTION RECORDS, *supra* note 48, at 310 note (emphasis added). Madison, however, spoke only for himself. As Professor Thayer long ago pointed out, Thayer, *supra* note 256, at 74-78, reprinted in J. THAYER, *supra* note 256, at 61-67, though Mason and

The argument that Chase did take seriously was that paper tender was necessary and proper to the exercise of the war powers, the commerce power, and the power to borrow money.²⁷⁶ No one doubted, he conceded, that Congress could issue ordinary bills of credit as paper money to facilitate the exercise of these powers, though unfortunately he did not bother to spell out why.²⁷⁷ But the fact that at the same time other notes that were not legal tender "circulated freely and without discount" was strong "evidence that all the useful purposes of the notes would have been fully answered without making them a legal tender for pre-existing debts."²⁷⁸ In any event, it was by no means clear "that any appreciable advantage is gained by compelling creditors to receive them in satisfaction of *pre-existing* debts,"²⁷⁹ as in *Hepburn*; and furthermore,

whatever benefit is possible is far more than outweighed by the losses of property, the derangement of business, the fluctuations of currency and values, and the increase of prices to the people and the government, and the long train of evils

apparently others agreed with Madison that Congress "would not have the power unless it were expressed," Gorham of Massachusetts ("Ghorum" in Madison's notes) argued "for striking out, without inserting any prohibition," so as not to encourage Congress to act lightly; Gorham believed that "[t]he power as far as it will be necessary or safe, is involved in that of borrowing." 2 CONVENTION RECORDS, *supra* note 48, at 309. Thus, despite Professor Dam's persuasive reading of Madison's own position, Justice Bradley seems right that the language was "struck out with diverse views of members," Legal Tender Cases, 79 U.S. (12 Wall.) 457, 559 (1871) (concurring opinion), and that, like the Framers' rejection of an explicit power of incorporation, *id.*, the omission does not demonstrate that the Convention as a whole thought it was prohibiting what it declined to authorize expressly—even if such an intention would be the equivalent of an express prohibition. See FAIRMAN, MILLER, *supra* note 4, at 159 ("[T]his was not a vote to forbid the issue of notes, since it was concurred in by several members who had made it clear that they were opposed to an absolute prohibition."). Moreover, as both Thayer and Dam pointed out, the argument from the omitted proposal proves too much: what was stricken was authority to issue bills of credit at all, not merely to make them legal tender. See Dam, *supra* note 212, at 389-90; Thayer, *supra* note 256, at 78-80, reprinted in J. THAYER, *supra* note 256, at 67-69. Congress had been issuing bills with general acquiescence since the War of 1812, and neither Chase nor any other Justice questioned their constitutionality. See *Hepburn*, 75 U.S. at 616; *supra* notes 242-43 and accompanying text (discussing *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869)).

²⁷⁶ 75 U.S. (8 Wall.) at 616-17.

²⁷⁷ *Id.* at 616, 619 (adding without citation that the Court had recently so held). The reference was apparently to *Bank v. Supervisors*, 74 U.S. (7 Wall.) 26 (1869), and to *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869), see *supra* text accompanying notes 246-47, where the question had not been argued. See also Legal Tender Cases, 79 U.S. (12 Wall.) 457, 574-75 (1871) (Chase, C.J., dissenting) (explaining that *Veazie Bank* had based the authority to issue bills on the borrowing power, with additional currency powers derived from the commerce clause).

²⁷⁸ 75 U.S. (8 Wall.) at 620.

²⁷⁹ *Id.* at 621 (emphasis added).

which flow from the use of irredeemable paper money.²⁸⁰

This was a clever argument, and not wholly unconvincing; if the tender provision did not facilitate government operations, it could hardly be "necessary" even in the loose sense employed by Marshall.²⁸¹ On closer scrutiny, however, Chase's argument begins to fall apart. In the first place, he was judging the legal-tender law in hindsight; he seemed to be saying that every law that failed to accomplish its purpose also fell outside the necessary and proper clause. One would have thought the question was whether the measure appeared necessary at the time of its adoption,²⁸² and on that basis one might think that Congress was within its rights in expecting that people would be likely to accept paper money at a smaller discount if their creditors would have to accept it too.²⁸³ Besides, Chase admitted that his evidence of the inutility of tender was somewhat flawed: since the nontender notes that had retained a value comparable to that of tender notes had been exchangeable for them, one may be skeptical of his easy conclusion that they derived their desirability essentially from the government's promise to receive them in satisfaction of public dues.²⁸⁴ More funda-

²⁸⁰ *Id.* For discussion of the adverse effects of the tender legislation, see FAIRMAN, HISTORY, *supra* note 4, at 690-91.

²⁸¹ Indeed, Chase came close to saying that tender did not even meet the still more lenient test that Marshall had employed in the earlier case of *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805) ("Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution."), since a measure that is wholly useless is not even "conductive" to the exercise of a granted power.

²⁸² See FAIRMAN, MILLER, *supra* note 4, at 162 ("[I]t is not good constitutional law to say that a measure is invalid because we see it worked out badly."). For a contemporaneous criticism on the same ground, see 4 AM. L. REV. 586, 606-09 (1870).

²⁸³ See 75 U.S. (8 Wall.) at 634 (Miller, J., dissenting); see also *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 543 (1871) (Strong, J.). This argument, moreover, seems as applicable to old debts as to new ones: the more creditors are required to accept paper money, the more likely it is that its owner can realize its full value. See Thayer, *supra* note 256, at 94, reprinted in J. THAYER, *supra* note 256, at 87 ("To make the currency do the usual office of money more effectually and fully, is legitimate regulation of the currency."). Professor Dam, however, is dubious: "[N]ot every new use increases value . . . [I]t is, of course, an empirical question." Dam, *supra* note 212, at 393.

²⁸⁴ 75 U.S. (8 Wall.) at 620. Professor Dam, who finds Chase's conclusion (as later repeated by Field, *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 647 (1871) (dissenting opinion)) "compelling," does not advert to this fact. Dam *supra* note 212, at 393-94, 409. Professor Dam persuasively argues, however, that the real necessity for making the notes tender was to protect the banks from having to pay out gold or keep gold in reserve—and thus was to prevent the collapse of the banks. *Id.* at 405-08; see also *id.* at 410 ("Collapse of the big city banks, which were in early 1862 the Treasury's indispensable link with the financial markets, might well have led to the collapse of the Union. Or at least a Court sitting in 1862 might reasonably have so feared.").

mentally, the Chief Justice's assumption that the test was whether the same goal could have been accomplished without paper tender²⁸⁵ seemed to contradict Marshall's insistence that a measure could be "necessary" without being indispensable;²⁸⁶ as Miller noted in dissent,²⁸⁷ there was nothing in *McCulloch* to suggest that Congress must choose the least intrusive means.²⁸⁸ Finally, in balancing the utility of the tender provision against its adverse effects on property and financial stability, Chase, without authority or explanation, added a brand new and debatable dimension to the Marshall calculus he purported to be applying: he seems to have read the requirement that a law be "proper" to demand that its benefits outweigh its costs—in the eyes, of course, of the judges.²⁸⁹

Having amply if unconvincingly disposed of the case on the ground that paper tender for existing debts was not an "appropriate" means of effectuating any express congressional power, Chase imitated Marshall once again by going on to find two additional grounds for his conclusions. The first, once more purporting to apply the passage from *McCulloch* already quoted,²⁹⁰ was that the tender law offended the "spirit" of the Constitution. One of the "cardinal principles" of that document, Chase wrote without citing the preamble in which the phrase appeared, was "the establishment of justice."²⁹¹ What was "just," in turn, was indicated in part by the clause forbidding the states to impair the obligation of contracts.²⁹² Although that clause did not itself limit the authority of

²⁸⁵ See, e.g., *supra* text accompanying note 278.

²⁸⁶ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414 (1819) (contrasting the provision in article I, § 10 forbidding all state import duties not "absolutely necessary" for the execution of inspection laws); *id.* at 424 (rejecting the relevance of Congress's option of relying on state banks); *cf. Dam, supra* note 212, at 411 ("[E]ven if the bonds could have been sold directly to the public for specie, Congress was not required to use this constitutionally less offensive method . . .").

²⁸⁷ 75 U.S. (8 Wall.) at 628-31.

²⁸⁸ It is also striking that Chase nowhere attempted to compare the necessity of the tender law with that of other measures that had been upheld in the past; as Miller argued, it is not obvious that tender was appreciably less necessary to the powers invoked than was either the national bank or the tax on state notes that Chase himself had voted to uphold the same term in *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869).

²⁸⁹ See *supra* notes 279-80 and accompanying text. Without citing it, Chase properly rejected Marshall's position that it was for Congress alone to determine "the degree of . . . necessity" of any measure "really calculated to effect any of the objects entrusted to the government," *McCulloch*, 17 U.S. (4 Wheat.) at 423, a view which threatened to eliminate judicial review of any measure adopted under the necessary and proper clause. *Hepburn*, 75 U.S. (8 Wall.) at 617-18.

²⁹⁰ See *supra* text accompanying note 266.

²⁹¹ 75 U.S. (8 Wall.) at 622.

²⁹² *Id.* at 623 (quoting U.S. CONST. art. I, § 10).

Congress, its spirit was meant to "pervade the entire body of legislation"; "a law not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution."²⁹³ The same was true of the fifth amendment ban on the taking of property for public use without just compensation, which did apply to Congress: "If such property cannot be taken for the benefit of all, . . . it is difficult to understand how it can be so taken for the benefit of a part without violating the spirit of the prohibition."²⁹⁴

One is tempted to protest with Miller²⁹⁵ that the contract clause, like the legal-tender clause of the same section, applied only to the states, that it was not even clear that property had been "taken" in the constitutional sense, and that "justice" was an open-ended notion that would allow judges to pass upon the wisdom of every law. One is tempted to add that the preamble is at best a guide to interpreting clauses with teeth in them, and that the supremacy clause requires acceptance of statutes that comply with the provisions of the Constitution without regard to its "spirit."²⁹⁶ Yet Chase's position does not seem to have been that the Court may disregard all unjust laws.²⁹⁷ He explicitly purported to apply Marshall's test for measures adopted under the necessary and proper clause, and in explaining why a federal bankruptcy law would not offend his principles he expressly distinguished laws passed under Congress's express powers.²⁹⁸ In effect, as he had earlier construed the word "proper" to require that laws incidental to express powers be utilitarian,²⁹⁹ so he now construed it to require

²⁹³ *Id.*

²⁹⁴ *Id.* at 623-24.

²⁹⁵ *Id.* at 627, 637-38 (dissenting opinion).

²⁹⁶ See Currie I, *supra* note 3, at 871-73 (discussing *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798)); Currie III, *supra* note 3, at 892-94 (discussing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810)). Moreover, if one were free to look at the "spirit" rather than the text of the governing provisions, one might as convincingly argue that the purpose of the enumerated powers in article I was to authorize Congress, as Randolph had proposed, 1 CONVENTION RECORDS, *supra* note 48, at 21, to deal with all subjects of national concern, which surely included deciding what would be legal tender. Yet the choice of specific provisions over general ones seems to have been deliberate. See also Thayer, *supra* note 256, at 89-91, reprinted in J. THAYER, *supra* note 256, at 80-83.

²⁹⁷ Speaking in dissent in the Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871), when *Hepburn* was overruled, see *infra* note 318, Field did invoke the natural-law utterances of his predecessors, apparently as a limitation on any exercise of congressional power. Chase invoked them too in a separate dissent in the later case, but apparently for a more limited purpose. See *infra* note 301.

²⁹⁸ 75 U.S. (8 Wall.) at 623.

²⁹⁹ See *supra* note 289 and accompanying text.

that they also be just. Moreover, he qualified even that relatively modest conclusion by professing to find the content of "justice" not in general notions of propriety but in analogous constitutional provisions. Finally, Chase appeared superficially to have impressive support for his restrictive reading of the term "proper," for Marshall had said in the famous *McCulloch* passage quoted above that a law was not necessary and proper unless it satisfied the "spirit" as well as the terms of the Constitution.³⁰⁰

Nevertheless, there are grave objections to Chase's reasoning. First, by failing to tie his arguments to the words "necessary and proper," Chase left the door open for a later argument that his decision had established the general power of the courts to invalidate unjust legislation, and he nowhere said "justice" was to be found *solely* in analogous provisions.³⁰¹ More fundamentally, he never explained why he thought "proper" should for the first time be construed, as it need not have been, to mean "just." Though Marshall had encouraged such an interpretation by his reference to the "spirit" of the Constitution, he had expressly (if not very convincingly) argued that "proper" was not a second and more stringent requirement but served instead to ameliorate the degree of necessity that might otherwise have been required.³⁰² The context suggests that what Marshall meant by his "spirit" reference was that the necessary and proper clause was part of an enumeration designed to give Congress only limited authority and thus should not be read so expansively as to defeat the purpose of the enumeration itself.³⁰³ It was a substantial step beyond that position for Chase to equate "proper" with conformity to the purposes underlying distinct provisions that the Framers had expressly made inapplicable to the case before him.

Beyond the foregoing argument, Chase found yet a third

³⁰⁰ See *supra* text accompanying note 266.

³⁰¹ The next Term, in dissent, he defined "justice" by reference to the natural-law musings of Marshall and of the earlier Justice Chase. See *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 581-82 (1871) (Chase, C.J., dissenting).

³⁰² *McCulloch*, 17 U.S. (4 Wheat.) at 418-19. Yet another possibility is that "proper" meant "not contrary to limitations found in other provisions of this Constitution," such as the *ex post facto* clause. "Proper" is a peculiarly vague and uninformative word with which to express that idea, and to modern eyes this interpretation makes the word redundant. Moreover, if the Framers thought this point needed explicit statement, one would expect them to have added "proper" to other grants of congressional power (e.g., the commerce clause) as well.

³⁰³ See Currie III, *supra* note 3, at 932. As Miller pointed out in dissent, legal tender could scarcely be considered "an invasion of the rights reserved to the States," since it was "among the subjects of legislation forbidden to the States" by article I, § 10. 75 U.S. (8 Wall.) at 627.

ground on which to declare the tender law unconstitutional: it deprived creditors of their property without due process of law, in violation of the fifth amendment.³⁰⁴ This was the second time this thesis had surfaced in the Supreme Court. The first was in the *Dred Scott* case, on which Chase understandably neglected to rely; there Chief Justice Taney, apparently speaking for less than a majority of the Justices,³⁰⁵ had said quite without explanation that for Congress to provide that a man lost his property in slaves by bringing them across a territorial line "could hardly be dignified with the name of due process of law."³⁰⁶ Chase did no better in *Hepburn*: contracts were property, the loss of value was "direct and inevitable," and, "whatever may be the operation of" the tender act, "due process of law makes no part of it."³⁰⁷ What due process meant he made no effort to say,³⁰⁸ and it was no clearer then than it had been at the time of *Dred Scott*—except for the uncited precedent itself—that the clause was meant to outlaw substantively arbitrary legislation.³⁰⁹ Furthermore, as with the question of the taking clause, it was not certain that there had been a "deprivation": the next Term a new majority was to say, again without adequate demonstration, that both clauses applied "only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power."³¹⁰ Finally, the equation of contract with property was at least as slippery and dangerous as

³⁰⁴ 75 U.S. (8 Wall.) at 624-25.

³⁰⁵ See *Currie v. Sandford*, *supra* note 4, at 730 n.234, 735.

³⁰⁶ *Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857); see *Currie v. Sandford*, *supra* note 3, at 726-38.

³⁰⁷ 75 U.S. (8 Wall.) at 624.

³⁰⁸ In contrast to later cases, there was no suggestion that a strong state interest might justify the alleged deprivation. Cf. *Lochner v. New York*, 198 U.S. 45 (1905) (finding "no reasonable foundation for holding" a limitation on work hours "to be necessary or appropriate as a health law"); *Munn v. Illinois*, 94 U.S. 113 (1877) (upholding regulation of rates of grain elevators "'affected with a public interest'" "when such regulation becomes necessary for the public good").

³⁰⁹ See *Currie v. Sandford*, *supra* note 3, at 726-38 (discussing *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)).

³¹⁰ *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1871). Miller had argued in his *Hepburn* dissent that Chase's reasoning would preclude a declaration of war or abolition of a tariff, since the former would "lessen[]" "the value of every ship" and the latter "sink the capital employed in the manufacture" of articles previously subject to duties. 75 U.S. (8 Wall.) at 637 (dissenting opinion). Chase conceded the principle but disputed its application: while the issuance of a manufacturing charter causes only a "contingent and incidental" injury to competitors, the loss to creditors in the tender cases was "direct and inevitable." *Id.* at 624. The ease with which the distinction between "direct" and "incidental" effects could be employed to support either result suggests it was little more than a label for the judges' independent conclusions.

the converse feat Marshall had performed in holding that a taking of property impaired the contract by which it had been granted; and Marshall had at least come up with plausible reasons for his conclusion.³¹¹ All Chase told us was that "[a] very large proportion of the property of civilized men exists in the form of contracts,"³¹² which is only to say that they represent much of what is of value; in every law school contract and property are the subjects of separate courses, and there was room for a historical argument that the phrase "life, liberty, and property" referred to the losses traditionally inflicted as punishment for crime.³¹³

Justice Miller's concise and readable dissent, joined by Swayne and Davis, said most of the right things.³¹⁴ The very next Term, following the retirement of the decrepit Grier³¹⁵ and the appointment of the Republicans Strong and Bradley,³¹⁶ Justice Strong said them well again,³¹⁷ this time for a 5-to-4 majority in

³¹¹ *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136-37 (1810); see Currie III, *supra* note 3, at 894-96.

³¹² 75 U.S. (8 Wall.) at 624.

³¹³ See Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions which Protect "Life, Liberty, and Property,"* 4 HARV. L. REV. 365 (1890).

³¹⁴ 75 U.S. (8 Wall.) at 626-39.

³¹⁵ See *supra* note 255.

³¹⁶ For rejection of the contention that President Grant packed the Court in order to assure the overruling of *Hepburn*, see 2 C. WARREN, *supra* note 4, at 516-19.

³¹⁷ As a state judge in Pennsylvania, Strong had already written an opinion upholding the legislation. *Shollenberger v. Brinton*, 52 Pa. 9, 56 (1866). There is a decided flavor in his Supreme Court opinion of Marshall's emphasis on the intolerable consequences of an adverse decision. He began by saying that if there were no authority to issue paper tender the government would be "without those means of self-preservation which, all must admit, may, in certain contingencies, become indispensable." 79 U.S. (12 Wall.) at 529. Once this was said, it was pretty clear what the result would be, for the Framers could hardly have meant to create a government whose powers were not adequate to deal with foreseeable emergencies. This sort of argument makes interpretation of the actual provisions supererogatory; as Chase came close to saying all bad laws were unconstitutional, so Strong seemed to hint that all good laws were valid. See Currie II, *supra* note 3, at 657, 688-89 (discussing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821)).

Strong may also be faulted for declining to specify to which of the enumerated powers the tender laws were necessary and proper, though he dilated at length upon the degree of their necessity for the good of the country. In this discussion he did stress the war effort and the need to raise money for government expenditures, so that we may say he implicitly related tender to the war powers and to the borrowing of money. At another point, however, he expressly said it was not necessary that the measure be ancillary to any one of the specified powers; it was "allowable to group together any number of them and infer from them all that the power claimed has been conferred." 79 U.S. (12 Wall.) at 534. Technically this conclusion may be unobjectionable, but it seems to suggest a leniency in reviewing congressional actions that borders on no review at all.

Finally, as Field pointed out in dissent, 79 U.S. (12 Wall.) at 664-66, Strong was on

the *Legal Tender Cases*,³¹⁸ *Hepburn v. Griswold* was formally overruled.³¹⁹

One of the principal lessons of this episode is how little general statements of governing principles contribute to the outcome of particular cases. The opinions on both sides of the legal tender controversy faithfully echoed Marshall's tests for determining the validity of laws passed under the necessary and proper clause, and in so doing they reached diametrically opposite results. It seems reasonably clear that it was the second legal tender decision that more accurately captured the spirit of Marshall's formulation; *Hepburn v. Griswold*, like *Scott v. Sandford*, was an aberration in a history of generally sympathetic interpretation of the affirmative grants of congressional power. *Hepburn's* due process holding, on the other hand, while flatly repudiated in the *Legal Tender Cases* and later ignored, was the harbinger of an idea whose time was to come again.

dangerous ground in arguing, *id.* at 534-35, that the existence of the Bill of Rights implied that Congress had broad powers not expressly listed in the Constitution; it was to preclude the inference that a particular power was authorized because others were prohibited that the ninth amendment provided that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX; 1 ANNALS OF CONG. 456 (J. Gales ed. 1789) (statement of Mr. Madison); Currie I, *supra* note 3, at 874.

Justice Bradley, whose concurring opinion, 79 U.S. (12 Wall.) at 554-70, showed off his historical knowledge without adding much of substance, did discuss the Convention history and even more brazenly spoke out for Congress's essentially unlimited powers: the federal government was "invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions." *Id.* at 556.

³¹⁸ 79 U.S. (12 Wall.) 457 (1871). Chase's dissent, *id.* at 570-87, joined by Clifford, Field, and Nelson, restated most of his arguments from *Hepburn*, adding references to the Convention and to *United States v. Dewitt*, 76 U.S. (9 Wall.) 41 (1870), where the Court had struck down a law regulating the inflammability of oil not passing in interstate or foreign commerce on the ground that any impact of the law on taxes was too remote to make the measure necessary and proper to the taxing power. Clifford wrote nearly 50 pages, 79 U.S. (12 Wall.) at 587-634, and remarkably managed to add essentially nothing beyond another discussion of the Convention history. See Currie, *The Most Insignificant Justice*, 50 U. CHI. L. REV. 466, 474-77 (1983). Field's equally lengthy offering, 79 U.S. (12 Wall.) at 634-81, detailed the Convention history, drew a negative inference from the coinage power, and invoked the natural law passages of *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), and *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1796). Significantly, in light of Field's later opinions, e.g., *Munn v. Illinois*, 94 U.S. 113, 136 (1877) (dissenting opinion), he did not mention due process. Nelson, as usual, was mercifully silent. Cf. Currie IV, *supra* note 3, at 501, 503 (discussing the License Cases, 46 U.S. (5 How.) 504 (1847), and the Passenger Cases, 48 U.S. (7 How.) 283 (1849)).

³¹⁹ 79 U.S. (12 Wall.) at 553. For criticism of Chase's efforts to preclude reconsideration of the issue by invoking an apparently fictitious agreement that the outcome of other cases would be governed by *Hepburn* and an inapplicable principle limiting the reopening of judgments in cases already decided, see FAIRMAN, HISTORY, *supra* note 4, at 738-52.

In dealing with the great issues arising out of the Civil War and its aftermath, the Court revealed deep divisions, sometimes along party lines. Congress and the President did not always get their way: the majority rejected both military trials and test oaths and originally rejected legal tender as well, and despite its efforts to avoid an ultimate confrontation over Reconstruction the Court managed in *United States v. Klein* to set significant though poorly defined limits to Congress's power to destroy the Court's own essential functions. All the wartime financial measures, however, eventually passed muster; and in *Texas v. White*, Chase finally succeeded in writing most of the Radical philosophy of Reconstruction into the Constitution. Overall assessments of the work of individual Justices must await discussion of the remaining decisions of the Chase period.³²⁰

³²⁰ See Currie, *supra* note 127 (in press).