THE NEW FICTION:

DRED SCOTT AND THE LANGUAGE OF JUDICIAL AUTHORITY

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Supreme Court Justices at the turn of the twenty-first century announce constitutional limits on federal and state power by declaring federal and state laws unconstitutional. Opinions restraining federal and state officials routinely include such phrases as "[w]e hold that the Act exceeds the authority of Congress"[1] or "[w]e hold that the congressional veto provision in § 244(c)(2) . . . is unconstitutional."[2] The Supreme Court declares laws unconstitutional in cases limiting federal authority[3] and in cases limiting state authority.[4] The same language is found in opinions striking down laws that enjoy substantial popular support[5] and in opinions striking down laws of interest only to a few specialists.[6] Both liberal and conservative Justices assert "this law is unconstitutional" when imposing constitutional limits on government power.[7]

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1. United States v. Lopez, 514 U.S. 549, 551 (1995).

2. INS v. Chadha, 462 U.S. 919, 959 (1983).

3. *See, e.g.*, Ashcroft v. ACLU, 542 U.S. 656, 661 (2004) ("The Court held the CDA unconstitutional because it was not narrowly tailored to serve a compelling governmental interest and because less restrictive alternatives were available.").

4. *See, e.g.*, Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 432 (2005) ("[B]ecause Michigan's fee is flat, it discriminates against interstate carriers and imposes an unconstitutional burden upon interstate trade.").

5. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 627 (2000) (declaring the Violence Against Women Act unconstitutional on the ground that "Congress' effort in § 13981 to provide a federal civil remedy can be sustained neither under the Commerce Clause nor under § 5 of the Fourteenth Amendment").

6. *See, e.g.*, Plaut v. Spendthrift Farm, 514 U.S. 211, 240 (1995) (holding that "[s]ection 27A(b)" of the Securities Act of 1934 "is unconstitutional to the extent that it requires federal courts to reopen final judgments entered before its enactment").

7. *See, e.g.*, Stenberg v. Carhart, 530 U.S. 914, 922 (2000) (majority opinion by Justice Steven Breyer asserting, "We hold that this statute violates the Constitution"); Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000) (majority opinion by Chief Justice William Rehnquist asserting, "This case presents the question whether applying New Jersey's public accommodations law in this way violates the Boy Scouts' First Amendment right of expressive association. We hold that it does.").

The consistency with which contemporary Justices pen these and similar expressions when announcing constitutional limits on government power may explain why contemporary scholars measure judicial activism by counting the number of cases in which judicial opinions assert that a state or federal law is unconstitutional. The canonical list of Supreme Court decisions exercising the power of judicial review is limited to "Supreme Court [d]ecisions [h]olding [a]cts of [c]ongress [u]nconstitutional in [w]hole or in [p]art" and "Supreme Court [d]ecisions [h]olding [s]tate [c]onstitutional and [s]tatutory [p]rovisions and [m]unicipal [o]rdinances [u]nconstitutional on [t]heir [f]ace or as [a]dministered."[8] The Supreme Court "database lists only decisions in which the Court clearly indicates that it has voided a legislative enactment."[9] One consequence of this categorization scheme is that *Roe v. Wade* is universally considered an instance when the Justices exercised the power of judicial review, while no one considers *Kentucky v. Dennison* an instance when the Justices exercised that power. Justice Blackmun's majority opinion in *Roe* concluded that the Texas "statute . . . cannot survive the constitutional attack made upon it here."[10] Chief Justice Roger Taney's opinion in *Dennison* concluded that the Fugitive Slave Act of 1793 should not be interpreted as imposing a legal duty on state officials to extradite fugitives from justice.[11] *Dennison* is not considered an instance where the judiciary announced constitutional limits of federal power even though Taney openly disregarded the plain meaning of the Fugitive Slave Act only because he believed that the measure, if interpreted literally, was unconstitutional.[12] Equating judicial review with the judicial power to declare laws unconstitutional, scholars determine whether particular Courts or Justices are activist or restrained by the number of opinions issued striking down state and federal laws. Tom Keck asserts that William Rehnquist presided over "the most activist court in American history," because the Justices from 1994 to 2005 declared unconstitutional more federal laws than any previous tribunal.[13] Justices Antonin Scalia and Clarence Thomas are thought to be particularly activist because they vote to strike down more federal laws than their peers.[14]

8. LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS 144, 148 (2d ed. 1996).

9. *Id.* at 147.

10. 410 U.S. 113, 164 (1973); *see also* EPSTEIN ET AL., *supra* note 8, at 167.

11. 65 U.S. (24 How.) 66, 106–07 (1861).

12. *See id.* at 106–07.

13. THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 40–41, 203–15 (2004).

14. *See id.* at 251 tbl.6.5.

The Supreme Court before the Civil War seems decidedly less activist than contemporary Courts when judicial activism is measured by how often the Justices assert they are striking down federal laws. Only two majority opinions issued from 1791 until 1864 explicitly declared a federal law unconstitutional. The first was *Marbury v. Madison*.[15] Chief Justice John Marshall's opinion for the Court in that case plainly stated that Section 13 of the Judiciary Act of 1789 was inconsistent with Article III. "The authority . . . given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers," Marshall asserted, "appears not to be warranted by the constitution . . . ." He then famously asked, "whether an act, repugnant to the constitution, can become the law of the land . . . ."[16] His answer was a resounding no.[17] *Dred Scott v. Sandford*[18] was the other decision handed down before the Civil War in which Supreme Court Justices explicitly asserted that Congress had passed an unconstitutional law. Chief Justice Roger Taney's opinion in that case stated, "[I]t is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution . . . ."[19] Two concurring opinions made similar declarations. Justice Grier asserted, "[T]he act of Congress of 6th March, 1820, is unconstitutional and void . . . ."[20] "Mr. Justice Nelson," Justice Wayne commented, "abstains altogether from expressing any opinion upon the eighth section of the act of 1820, known commonly as the Missouri Compromise law, and six of us declare that it was unconstitutional."[21]

Dred Scott is commonly reviled for abandoning this apparent judicial practice of "invariable and virtually complete deference" to "general federal legislation."[22] Critics of the majority opinions frequently point to the fifty-four year gap between judicial decisions declaring federal laws unconstitutional.[23] Although constitutional debates over national power wracked

15. 5 U.S. (1 Cranch) 137 (1803).

16. *Id.* at 176.

17. *See id.* at 180.

18. 60 U.S. (19 How.) 393 (1857).

19. *Id.* at 452.

20. *Id.* at 469 (Grier, J., concurring).

21. *Id.* at 455 (Wayne, J., concurring).

22. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 213 (2004). *See generally* MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 23–24 (2006) (noting institutional criticisms of the *Dred Scott* decision).

23. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 28 (1990).

antebellum America,[24] neither the Marshall nor Taney Courts declared any provision in the federal code unconstitutional between 1803 and 1856. The judicial decision to strike down the Missouri Compromise, in this view, was a dramatic and unwarranted break with an almost unbroken tradition of judicial passivity in cases raising questions of federal constitutional wrong. Robert McCloskey describes that Taney Court ruling as "one dramatic lapse from judicial self-restraint."[25] "*Dred Scott* stuck out like a sore thumb," Larry Kramer states, "partly because it was so unprecedented for the Supreme Court to assert its will over and against Congress."[26]

One problem with this consensus is that the Supreme Court before *Dred Scott* probably did not adjudicate the number of cases raising questions of federal constitutional wrong necessary to exhibit "invariable and virtually complete deference" to Congress or any other identifiable pattern of judicial behavior. The Taney Court heard an average of less than two appeals annually in which one party objected to a federal action on constitutional grounds. Many of those cases were decided on non-constitutional grounds.[27] The federal constitutional claims adjudicated on the merits concerned matters of little political salience. With the exception of constitutional issues associated with fugitive slaves and slavery in the territories,[28] the Taney Court was rarely ever asked to resolve any of the numerous federal constitutional questions that excited Americans during the three decades before the Civil War. Whigs and Democrats debated the constitutional status of such matters as internal improvements, protective tariffs, national expansion, and the Mexican War without any help from the federal judiciary.[29] This dearth of judicial rulings sustaining or striking down federal laws belies claims that any judicial tradition, activist or restrained, existed at the time when *Dred Scott* was decided.[30]

24. *See especially* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801 (1997); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829 (2001); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829–1861 (2005); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829–1861 (2005).

25. ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 60 (Sanford Levinson rev., 4th ed. 2005).

26. KRAMER, *supra* note 22, at 213.

27. *See* Mark A. Graber, *The Jacksonian Origins of Chase Court Activism*, 25 J. SUP. CT. HIST. 17, 28 (2000).

28. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

29. *See* Mark A. Graber, *Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited*, 21 CONST. COMMENT. 485, 508–24 (2004).

30. Anticipated reactions do not explain the lack of constitutional litigation from 1835 to 1856. Many commentators believe that the Taney Court would have imposed narrow limitations on federal power if presented with the proper case. The Taney Court could not decide whether the major planks of

The more serious problem with claims that the Justices in *Dred Scott* abandoned a tradition of judicial restraint is that the standard measure scholars use when determining judicial activism is anachronistic. Antebellum Justices asserted that laws were unconstitutional only when restraining state officials. Judicial etiquette, in their opinion, required more circumspection when imposing constitutional limits on a coordinate branch of the national government. Contrary to accepted wisdom, the Justices before the Civil War imposed constitutional limitations on federal power in approximately twenty cases. They did so, however, without explicitly declaring federal legislation unconstitutional. The Justices in some federal cases ignored the plain meaning of federal statutes on the ground that Congress would always be presumed to have intended to act constitutionally, as constitutionality was defined by the Supreme Court.[31] In other cases, Justices determined that the federal government could not constitutionally engage in some activity without determining whether Congress by statute had authorized that activity.[32] These and other techniques were means by which the Supreme Court could announce constitutional limits on the national government while pretending that no constitutional conflict was taking place between national elected officials and federal Justices. The majority and concurring opinions in *Dred Scott* broke with past judicial practice only by explicitly declaring, when limiting federal power, that the national legislature had passed an unconstitutional law. Their actual ruling, if not their language, was consistent with previous cases imposing constitutional limits on the federal government.

This paper places in historical perspective the judicial decision in *Dred Scott* to declare explicitly that the Missouri Compromise was unconstitutional. Part I analyzes a speech made during the debates over the Repeal Act of 1802 in which Senator Gouverneur Morris of New York predicted that the Supreme Court, when restraining federal power, would never acknowledge that the national legislature had made a constitutional mistake. Judicial opinions that interpreted or misinterpreted federal laws as consistent with judicial understandings of federal authority, he insisted, prevented the "hateful clashing of public authorities," and permitted justices to declare official constitutional meanings without "deny[ing]" the "full supremacy" of Congress.[33] Part II examines the approximately twenty

the American system were constitutional primarily because proposed measures were vetoed by Jacksonian presidents and, hence, never became law. *See id.* at 534–35.

31. *See infra* Part II.A.

32. *See infra* Part II.B.

33. 12 ANNALS OF CONG. 55 (1802).

cases decided before the Civil War in which the Justices employed some version of Gouverneur Morris's fiction when announcing constitutional limits on federal power. While these cases are hardly sufficient to demonstrate a tradition of judicial activism, they belie the common understanding that the Taney Court before 1856 was committed to some version of judicial minimalism.[34] Part III hypothesizes why the Justices in the *Dred Scott* majority may have broken with past practice and stated bluntly that a federal law was unconstitutional. The best explanation, the limited evidence suggests, is that the Justices could not easily employ Gouverneur Morris's fiction when adjudicating politically charged constitutional issues and that Taney wished to "deny" as plainly as possible the "full supremacy" of a future Republican majority. Taney's *Dred Scott* opinion, the conclusion briefly suggests, may have substituted one legal fiction for another. Gouverneur Morris's fiction was a means by which the federal judiciary claimed authority by minimizing the appearance of conflict between elected officials and federal Justices. Roger Taney's fiction, the declaration that the congressional majority had made a constitutional mistake, was a means by which the federal judiciary claimed authority by exaggerating the appearance of conflict between elected officials and federal Justices.

Taney's rhetorical strategy in *Dred Scott* for imposing constitutional limits may have been a consequence of fundamental changes in American constitutional politics. Gouverneur Morris's fiction could be plausibly employed only when the Justices were confident that Congress would not challenge the legal ruling imposing constitutional limits on federal power. Justices could pretend that they were merely carrying out the legislative will when voiding land titles, for example, because little reason existed for thinking that anyone in Congress cared about the disposition of the particular tract in dispute. The constitutional debates over the Missouri Compromise excited the body public. Prominent political actors were aggressively defending the constitutionality of the Missouri Compromise, and they were unlikely to desist after the Supreme Court had pronounced their views wrong. These political circumstances made relying on past rhetorical conventions in *Dred Scott* problematic, because legislative acquiescence could not be taken for granted. In light of the underlying politics, the decision to use language previously employed only in judicial decisions restricting the power of state governments and to declare the offending law unconstitutional probably communicated three points to the antebellum audience reading the majority opinions in *Dred Scott*. First, the Court recognized the

34. The classic discussion of judicial minimalism is CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

bitter political debate over whether the Missouri Compromise was constitutional. Second, the judicial decision was intended to settle that debate. Third, those who championed bans on slavery in the territories were not worthy of the respect the Justices had previously shown to national officials who had merely made constitutional mistakes.

While rejecting language that minimized the appearance of conflict between national elected officials and federal courts, Taney and his brethren used language in their opinions that inflated the appearance of conflict between national elected officials and federal courts. The judicial assertion that "the act of Congress . . . is not warranted by the Constitution" strongly implies that a constitutional disagreement existed between the present electoral and judicial majorities. The Justices in 1857, a reasonable reader of the *Dred Scott* opinions might believe, were challenging the dominant legislative belief that Congress was constitutionally authorized to ban slavery in the territories. Whether that disagreement actually existed in 1857 is doubtful. No Justice in the *Dred Scott* majority noted that many elected officials maintained that the Compromise of 1850 or the Kansas-Nebraska Act of 1854 had repealed the Missouri Compromise,[35] that both those measures contained provisions expediting appeals of any ruling on the constitutionality of slavery in the territories,[36] and that President Buchanan had privately endorsed the *Dred Scott* decision before that judicial ruling was publicly announced.[37] While the judicial decision to state explicitly that Congress had made a constitutional mistake suggests that the Justices were "thwart[ing] the will of representatives of the actual people of the here and now,"[38] the judicial ruling that slavery could not be prohibited in American territories probably enjoyed as much legislative support as previous rulings such as the holding that the federal government could not grant title to riverbeds after a territory became a state.[39] The roots of the counter-majoritarian problem may lie more in changing rhetorical practices for imposing constitutional limits on federal power than in any increased judicial tendency to frustrate popular majorities.

35. *See* MICHAEL F. HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR 806–21 (1999).

36. Kansas-Nebraska Act, ch. 59, §§ 9, 27, 10 Stat. 277, 280, 287 (1854); Act of Sept. 9, 1850, ch. 49, § 10, 9 Stat. 446, 450; Act of Sept. 9, 1850, ch. 51, § 9, 9 Stat. 453, 455–56.

37. *See* Philip Auchampaugh, *James Buchanan, the Court and the* Dred Scott *Case*, 9 TENN. HIST. MAG. 231, 236–37 (1926). For a more general argument that the decision in *Dred Scott* was not counter-majoritarian, see GRABER, *supra* note 22, at 30–35.

38. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 17 (1962).

39. *See* Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845).

I. GOUVERNEUR MORRIS'S FICTION

Shortly after repealing the Judiciary Act of 1801, the Senate considered a memorial from eleven dispossessed federal judges, asking that they be assigned judicial duties and be paid their judicial salaries.[40] A three-person committee, for some unknown reason composed entirely of Federalists, was appointed to consider the petition. Its final report urged the Senate to request that President Jefferson initiate a court action for the purpose of determining whether the petitioners had been unconstitutionally deprived of their offices.[41] Jeffersonians in the national legislature vigorously opposed this effort to have the Supreme Court determine the constitutionality of the Repeal Act of 1802. Several Jeffersonians repeated claims made during the debate over the Repeal Act that federal Justices had no power to declare laws unconstitutional.[42] "Ought we to go to the courts and ask them whether we have done our duty, or whether we have violated the Constitution," Senator Thomas Jackson of Georgia asked. Jackson, a good Jeffersonian, thought the answer to this rhetorical question obvious. "[T]his report of the committee" he asserted, is "contrary to the spirit of the Constitution and Government of the country, and contrary to our own dignity." In his view, "[t]he courts have no power to control the proceedings of the Legislature or the Executive."[43]

Senator Gouverneur Morris of New York responded to these Republican fears by suggesting that the Supreme Court might support the dispossessed federal justices without asserting that Congress had made a constitutional mistake. "Will the judges rudely declare that you have violated the Constitution, unmindful of your duty, and regardless of your oath?" he asked. "No." Morris did not anticipate that Chief Justice John Marshall and his brethren would leave the midnight justices without a remedy. Rather, Morris maintained, the Supreme Court would engage in statutory misconstruction. Disregarding the plain language and obvious intention of the Repeal Act, the Justices would hold that Congress had not actually sought to deny the petitioners their judicial offices in violation of Article III. "With that decency which becomes the judicial character," Morris declared,

40. 12 ANNALS OF CONG. 30–31 (1803).

41. *Id.* at 51–52.

42. For a sampling of attacks on judicial review made during the debate over the Repeal Act, see 11 ANNALS OF CONG. 59, 61–63 (1802) (statement of Sen. Mason); *id.* at 73–74 (statement of Sen. Stone); *id.* at 105 (statement of Sen. Baldwin); *id.* at 178–80 (statement of Sen. Breckenridge).

43. 12 ANNALS OF CONG. 64 (1803).

> that decency which upholds national dignity and impresses obedience on the public will; that decency, the handmaid of the graces, which more adorns a magistrate than ermine, aye, than royal robes; with that decency which so peculiarly befits their state and condition, they will declare what the Legislature meant. They will never presume to believe, much less to declare, that you meant to violate the Constitution. There will be no dangerous and hateful clashing of public authorities. They will never question the exercise of that high discretion with which you are invested. They will not deny your full supremacy. They will not examine into your motives, nor assign improper views. They will respect you so long as they preserve a due respect for themselves. They will declare, that in assigning duties to one officer, and taking them from another, you have to consult only your own convictions of what the interest or convenience of the people may require.—They will modestly conclude, that you did not mean to abolish the offices which the Constitution had forbidden you to abolish; and, therefore, finding that it was not your intention to abolish, they will declare that the offices still exist. Such, sir, would be the language of your supreme Judiciary, from the high sense they entertain of their duty.[44]

By creatively interpreting federal law, the Justices would restore the midnight justices to their offices without directly challenging federal legislative authority over official constitutional meanings. In so doing, the Supreme Court would impose constitutional limits on national power without declaring any federal measure unconstitutional.

Gouverneur Morris's fiction, in sharp contrast to the present practice of explicitly declaring laws unconstitutional, minimized the appearance of conflict between national elected officials and federal Justices. "There will be no dangerous and hateful clashing of public authorities," Morris asserted. Justices who followed the recommended path would have never declared that Congress had made a constitutional mistake that had to be corrected by the federal judiciary. The national legislature was always presumed to have intended to act constitutionally, but those constitutional standards were established by the federal judiciary. Statutory language is interpreted with this precept in mind. Both plain meaning and legislative history were ignored when these interpretive logics supported an unconstitutional result. Courts that adopted the recommended precepts, Morris believed, would hold that Congress, when passing the Repeal Act of 1802, did not intend to abolish judicial offices solely because Congress had no constitutional authority to abolish judicial offices.

Justices who employed this rhetorical convention for placing constitutional limits on federal power did not need to distinguish between judicial review, the judicial power to determine whether a statute may be constitu-

44. *Id.* at 55–56.

tionally applied to the parties before the Court, and judicial supremacy, the judicial power to determine authoritatively what the Constitution means. As Morris informed Congress, the Justices "will not deny your full supremacy." Federal statutes bound all citizens, including federal Justices. These fetters, however, were remarkably loose because Justices interpreting federal law would be licensed, no matter what the text or history of the bill, to find that the measure mandated only federal actions the Justices believed constitutional. Judicial opinions that employed this strategy avoided raising questions about the actual division of constitutional authority between the courts and the elected branches of the national government because Congress was presumed never to have acted inconsistently with constitutional standards laid out by the Supreme Court.

Rhetorical conventions that denied conflict between the legislative and judicial branches were more embedded in notions of judicial etiquette than judicial restraint. Justices, Morris believed, demonstrated respect for a coordinate branch of the federal government by never explicitly asserting that national elected officials had made a constitutional mistake. In his view, the "decency which upholds the national dignity" meant that Justices should "never presume to believe, much less to declare, that [Congress] meant to violate the Constitution." This "decency" did not entail any deference to legislative judgments about the Constitution. Morris would have the Supreme Court restore the dispossessed justices to their offices, even though during the extensive debates over the Repeal Act, the congressional majority made clear that they believed Congress could consistently with Article III remove federal justices from office by abolishing their offices.[45] Courts would show deference to Congress solely by presuming, text and history to the contrary, that the national legislature "did not mean to abolish the offices which the Constitution had forbidden [Congress] to abolish." The presumption that Congress never passes an unconstitutional measure, in short, was strictly a canon of statutory interpretation and not a precept requiring deference to constitutional judgments made by elected officials.

The cases discussed below that employed variations on Gouverneur Morris's fiction display a far more aggressive understanding of federal judicial power than that championed by Alexander Bickel when he called for judicial reliance on "passive virtues."[46] Justices committed to a modest role, Bickel asserted, made every effort to resolve non-constitutional questions in ways that prevented a constitutional question from arising. He would have the Supreme Court follow Justice Lewis Brandeis's famous

45. *See, e.g.*, 11 ANNALS OF CONG. 25–30 (1802) (statement of Sen. Breckenridge).

46. *See* BICKEL, *supra* note 38, at 111–98.

suggestion in *Ashwander v. Tennessee Valley Authority* and interpret federal statutes, whenever legally plausible, in ways that left the law free from constitutional doubt. This practice, Brandeis and Bickel believed, promoted judicial restraint by enabling Justices to refrain from "passing upon a large part of all the constitutional questions pressed upon [them] for decision."[47] Antebellum Justices, by comparison, enthusiastically adjudicated the constitutional questions Brandeis and Bickel sought to avoid. Marshall and Taney Court opinions consistently began by discussing the constitutional questions raised by the litigants. The Justices then resolved the remaining non-constitutional issues in light of their constitutional holding. Justice John Catron in *People's Ferry Company of Boston v. Beers*, for example, first ruled that federal courts had no constitutional power to exercise admiralty jurisdiction in disputes over the wages due to a shipbuilder. After determining that the Constitution did not permit the Supreme Court to adjudicate such appeals, he then concluded that the federal law in question must not have been intended to vest the Supreme Court with the forbidden jurisdiction.[48] Unlike Bickel and Brandeis who interpreted statutes in ways that enabled Justices to avoid potential constitutional questions, Catron and his peers typically interpreted the Constitution in ways that settled potential statutory questions.

II. GOUVERNEUR MORRIS'S FICTION IN PRACTICE

The Lord Chancellor in Gilbert and Sullivan's *Iolanthe* would have felt at home on the Ellsworth, Marshall, and Taney Courts. Just as he ensured a happy ending consistent with the fairy law by interpreting the provision in the fairy code declaring "any fairy who marries a mortal shall incur death" as meaning, in fact, "any fairy who don't marry a mortal shall incur death," so antebellum federal Justices found equally clever ways to avoid declaring federal laws unconstitutional when limiting federal power. The Supreme Court, in approximately twenty cases decided between 1791 and 1860, employed some version of Gouverneur Morris's fiction. Some opinions rejected the plain meaning of federal statutes in order to avoid declaring laws unconstitutional. Others held that the federal government could not exercise a particular power, ignoring federal statutes purporting to exercise that power. Several decisions sustained state court decisions that

47. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring); *accord* BICKEL, *supra* note 38, at 180–82.

48. *See* 61 U.S. (20 How.) 393, 402 (1858). For a similar use of constitutional analysis to determine the proper interpretation of a federal statute, see *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 251 (1864).

declared federal laws unconstitutional, without noting the ground for the state court decision. All the decisions discussed below ruled that the federal government lacked constitutional power. All that was missing was an explicit judicial assertion, found in *Dred Scott* and *Marbury*, that a particular federal law was unconstitutional.

A. Statutory Miscontruction

The Supreme Court in many cases decided before the Civil War interpreted federal statutes inconsistently with their obvious meaning in order to establish constitutional limits on federal power without having to declare a federal law unconstitutional. The Justices in *Kentucky v. Dennison* construed the statutory declaration in the Fugitive Slave Act of 1793 that "it shall be the *duty* of the executive authority of the state . . . to cause the fugitive to be delivered" whenever "the executive authority of [another] state . . . shall demand any person as a fugitive from justice,"[49] as stating only a moral responsibility. Chief Justice Taney's opinion for the Court acknowledged that "[t]he words 'it shall be the duty,' in ordinary legislation, imply the assertion of the power to command and coerce obedience." He rejected that interpretation because the statute so understood was unconstitutional. "[T]he Federal Government, under the Constitution," Taney wrote, "has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it . . . ."[50] Consistent with Gouverneur Morris's fiction, provisions in the federal code that explicitly imposed a "duty" on a state official were not interpreted as imposing a legal duty that Congress was forbidden to impose on those state officials.

The Marshall and Ellsworth Courts similarly twisted statutory language when interpreting the Judiciary Act of 1789. Section 11 of that measure vested federal circuit courts with jurisdiction over "all suits of a civil nature at common law . . . where . . . an alien is a party . . . ."[51] Read literally, the provision plainly authorized federal courts to adjudicate cases when both the plaintiff and defendant were not American citizens. So interpreted, Section 11 was inconsistent with Article III of the Constitution. *Mossman v. Higginson* observed, "[t]he legislative power of conferring jurisdiction on the federal Courts, is . . . confined to suits between citizens

49. Act of Feb. 12, 1793, ch. 7, § 1, 1 Stat. 302, 302 (emphasis added).

50. Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107 (1861). For other Taney Court decisions employing statutory misconstruction as a means for imposing constitutional limits on federal power without declaring federal laws unconstitutional, see Withers v. Buckley, 61 U.S. (20 How.) 84, 92 (1858); Veazie v. Moor, 55 U.S. (14 How.) 568, 575 (1853); Lytle v. Arkansas, 50 U.S. (9 How.) 314, 334 (1850); United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

51. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

and foreigners . . . .” Rather than declare Section 11 unconstitutional, the Justices interpreted that provision as vesting federal jurisdiction only when the suit was between a citizen and an alien. “We must so expound the terms of the law,” the unsigned opinion of the Court stated, “as to meet the case.” Statutes, the Justices asserted, “must receive a construction, consistent with the constitution.”[52]

The Taney and Marshall Courts avoided declaring unconstitutional numerous congressional land grants by adopting the presumption that “[t]he State never intended to grant the lands of another.”[53] “[W]hensoever a tract of land shall have once been legally appropriated to any purpose,” Justice Phillip Barbour asserted in 1839, “no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it; although no reservation were made of it.”[54] No matter what the text of the private grant, antebellum Justices employing Gouveuneur Morris’s fiction interpreted laws granting federal lands as granting only whatever property interest the federal government enjoyed when the grant was made. In the frequent cases in which Congress had previously granted the land in question, the national legislature was deemed to have granted nothing by the subsequent deed. That the actual tract of land was meticulously detailed in the private law was of no legal significance. Needless to say, no statute could be declared unconstitutional under this approach to statutory interpretation. One reason why the Chase Court “declared” more federal laws unconstitutional than the Taney or Marshall Courts was that the Justices after the Civil War abandoned this presumption. In *Reichart v. Felps*,[55] Justice Robert Grier first interpreted a federal statute as granting to one settler land that was previously granted to another settler, and then declared the second land grant unconstitutional.[56]

B. Statutory Neglect

Antebellum Supreme Court Justices frequently avoided declaring federal laws unconstitutional by resolving constitutional issues before statu-

52. 4 U.S. (4 Dall.) 12, 14 (1800) (emphasis omitted); *accord* Jackson v. Twentyman, 27 U.S. (2 Pet.) 136 (1829); Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809). For a similar Marshall Court exercise in statutory misconstruction, see Owings v. Norwood’s Lessee, 9 U.S. (5 Cranch) 344 (1809); *see also* Dennis J. Mahoney, *A Historical Note on* Hodgson v. Bowerbank, 49 UNIV. CHI. L. REV. 725 (1982) (discussing the influence of statutory misconstruction on Marshall Court decision making in constitutional cases).

53. Doe *ex dem.* Governeur’s Heirs v. Robertson, 24 U.S. (11 Wheat.) 332, 359 (1826).

54. Wilcox v. Jackson, 38 U.S. (8 Pet.) 498, 513 (1839); *see also* United States v. Arredondo, 31 U.S. (6 Pet.) 691 (1832); Rutherford v. Greene’s Heirs, 15 U.S. (2 Wheat.) 196, 203 (1817).

55. 73 U.S. (6 Wall.) 160 (1868).

56. *See id.* at 165–66.

tory issues. Opinions first discussed whether the federal government was constitutionally authorized to engage in the contested action. After the Justices concluded that federal officials lacked constitutional authority to take some action, they did not bother determining whether Congress had, in fact, authorized the forbidden behavior. Such statutory analysis was unnecessary, given that the national government could not exercise the power in question even if warranted by federal statute. By dispensing with any independent statutory analysis, Justices employing this version of Gouverneur Morris's fiction could easily impose constitutional limits on federal power without striking down federal laws.

Benner v. Porter[57] provides a good illustration of this technique. The Justices in that case held that when passing laws establishing federal jurisdiction over new states, Congress could not authorize former territorial courts and judges to continue functioning. Federal jurisdiction in new states, the Justices agreed, could be exercised only by newly established federal tribunals that met all Article III standards. Any action taken after statehood by an Article I territorial court or judge was a nullity, even when that action was authorized by federal law. Justice Samuel Nelson asserted that

> Congress must not only ordain and establish inferior federal courts within a State, and prescribe their jurisdiction, but the judges appointed to administer them must possess the constitutional tenure of office before they can become invested with any portion of the judicial power of the Union. There is no exception to this rule in the Constitution. The Territorial courts, therefore, were not courts in which the judicial power conferred by the Constitution on the Federal government could be deposited. They were incapable of receiving it, as the tenure of the incumbents was but for four years. Neither were they organized by Congress under the Constitution, as they were invested with powers and jurisdiction which that body were incapable of conferring upon a court within the limits of a State.[58]

This passage plainly circumscribes federal power over federal jurisdiction. Congress, *Benner* explicitly ruled, may not constitutionally vest an Article I court with Article III powers. Any decision made by a territorial judge after statehood is utterly void. The *Benner* opinion does not, however, indicate whether Congress actually authorized a territorial court to exercise federal judicial power in a state. Losing counsel pointed to several statutes that appeared to vest territorial courts with some powers until Article III courts were established.[59] Justice Nelson never spoke of these statutes. Having concluded that territorial courts could not

57. 50 U.S. (9 How.) 235 (1850).

58. *Id.* at 244 (citations omitted).

59. *Id.* at 239 (argument of appellee) (referring to Act of Feb. 22, 1847, ch. 17, 9 Stat. 128).

utes. Having concluded that territorial courts could not constitutionally adjudicate cases once a territory became a state, he refrained from exploring whether Congress had attempted to vest former territorial courts with that jurisdiction.

The Justices similarly ignored federal statutes when settling disputes over the ownership of land acquired by the Louisiana Purchase and Mexican Cession. The Supreme Court in several cases ruled that persons who held good title to land before that land was ceded to the United States could not constitutionally be divested of that title. "Such a title," *Doe v. Eslava* ruled, "is not to be affected or regulated by the political authorities to whom a country is afterwards ceded, any more than any private rights and property of the inhabitants of such a country."[60] This presumption meant that when faced with a lawsuit between a person who claimed to hold title to land before the cession and a settler who claimed title by a private grant from Congress after the cession, the Supreme Court had no need to interpret the grant or any law authorizing a federal agent to grant land. If the former settler's title was good before the cession, the land belonged to that settler no matter what the provisions in subsequent federal law. As was the case in *Benner*, the Supreme Court, by resolving the constitutional issues before the statutory issues, was able to impose a constitutional limit on federal power without determining whether any existing federal law was unconstitutional.[61]

C. Omitting the Magic Words

The Supreme Court in several cases did everything possible to declare a federal law unconstitutional but utter the phrase "we find this federal law unconstitutional." Several of these decisions rejected claims based on federal laws granting land below the highwater mark of the Mobile River. When these assertions of federal right were made in state court, the congressional grants were declared "inoperative."[62] Judge Henry Collier of the Alabama Supreme Court ruled that "it is not competent for Congress to grant a right of property" in state riverbeds.[63] Justice John McKinley in *Pollard v. Hagan*[64] endorsed that state court holding. His majority opinion

60. 50 U.S. (9 How.) 421, 445 (1850); *see also* Garcia v. Lee, 37 U.S. (12 Pet.) 511 (1838).

61. For other instances of statutory neglect as a means of imposing constitutional limits on federal power without declaring federal laws unconstitutional, see *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 251 (1864); Willot v. Sandford, 60 U.S. (19 How.) 79, 82 (1857); DeLauriere v. Emison, 56 U.S. (15 How.) 525, 538 (1854); Chouteau v. Eckhart, 43 U.S. (2 How.) 344 (1844).

62. City of Mobile v. Eslava, 9 Port. 577, 604 (Ala. 1839).

63. *Id.* at 603.

64. 44 U.S. (3 How.) 212 (1845).

asserted, "This right of eminent domain over the shores and the soils under the navigable waters . . . belongs exclusively to the states . . . and they, and they only, have the constitutional power to exercise it."[65] Interpreting federal powers under Article IV narrowly, McKinley further declared, "The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant the plaintiffs the land in controversy . . . ."[66] The last sentence of his opinion stated, "The judgment of the Supreme Court of the state of Alabama is, therefore, affirmed."[67] What McKinley did not note is that the Alabama Supreme Court had explicitly declared federal laws void. This omission did not go unnoticed. Justice Catron's dissent in *Pollard* bluntly asserted, "This act is declared void in the present cause . . . ."[68]

The Supreme Court reaffirmed and expanded the principles of *Pollard* in two subsequent cases. *Doe v. Beebe*[69] summarily declared that the federal government had no power to grant lands below the highwater mark of a river. The reporter's headnote to the case asserted that the Justices had determined that "after the admission of Alabama into the Union as a State, Congress could make no grant of land situated between high and low water marks."[70] Neither the reporter nor the Court bothered to declare void the actual congressional grant of such land. The Justices in *Goodtitle v. Kibbe*[71] ruled that while the federal government could grant land below the highwater mark of a river when governing territories, states had to honor past federal grants only when the title had been perfected before statehood. The existence of an imperfect title, Chief Justice Taney stated, "could not enlarge the power of the United States over the place in question . . . nor authorize the general government to grant or confirm a title to land when the sovereignty and dominion over it had become vested in the State."[72] Again, while the Justices rejected a claim of federal constitutional authority, they refrained from noting that federal statutes passed on the basis of that claimed authority were unconstitutional.

65. *Id.* at 230.
66. *Id.*
67. *Id.*
68. *Id.* at 233 (Catron, J., dissenting).
69. 54 U.S. (13 How.) 25 (1852).
70. *Id.* at 25.
71. 50 U.S. (9 How.) 471 (1850).
72. *Id.* at 478.

New Orleans v. United States[73] further limited federal power to grant land by holding that the national government could not constitutionally grant title to property within a state, even when the disputed tract had been dedicated for public purposes while the state was a territory. Congress, after Louisiana joined the Union, passed at least three statutes exercising control over the particular parcels of land in dispute.[74] Justice John McLean's opinion for the Court recognized that Congress had asserted national authority over these tracts.[75] He nevertheless insisted that such control was inconsistent with the constitutional allocation of authority over property. In his view, the federal government could exercise exclusive jurisdiction only over land being used for the narrow purposes set out in Article I, Section 8. "Special provision is made in the constitution, for the cession of jurisdiction from the states over places where the federal government shall establish forts, or other military works," McLean wrote, "[a]nd it is only in these places, or in the territories of the United States, where it can exercise a general jurisdiction."[76] As the federal government did not use the contested land for "military works" when Louisiana was a territory, the land reverted to state control upon statehood. Having established the constitutional justification for state ownership of the contested land, McLean concluded that the local law authorizing sale of the land was constitutional.[77] In keeping with the rhetorical conventions of the time, his opinion did not assert that the local law was constitutional only because the conflicting federal laws were unconstitutional.

D. McNulty v. Batty

McNulty v. Batty[78] warrants special mention as an extraordinarily creative judicial effort to articulate constitutional limits on federal power without explicitly declaring a federal law unconstitutional. The issue before the Justices in that case was whether the Supreme Court could hear an appeal on a writ of error from a territorial court after the territory became a state. Following *Benner* and *Hunt v. Palao*,[79] the Justices first ruled that territorial courts could not constitutionally exercise any judicial authority

73. 35 U.S. (10 Pet.) 662 (1836).

74. *See* Act of Mar. 30, 1822, ch. 16, 3 Stat. 661; Act of Apr. 20, 1818, ch. 115, 3 Stat. 465; Act of Apr. 3, 1812, ch. 48, 2 Stat. 700.

75. *See New Orleans*, 35 U.S. (10 Pet.) at 734–35.

76. *Id.* at 737.

77. *See id.*

78. 51 U.S. (10 How.) 72 (1851).

79. 45 U.S. (4 How.) 589, 590 (1846).

after statehood.[80] Unlike those two cases, Justice Samuel Nelson's majority opinion in *McNulty* explicitly acknowledged that the national legislature had authorized appeals from territorial decisions to the federal judiciary. Congress in 1848 passed a statute vesting the Supreme Court with jurisdiction over "all cases which may be pending in the Supreme or other Superior Court of and for any Territory of the United States . . . at the time of such admission, and not previously removed by a writ of error . . . ."[81] The losing party in *McNulty*, however, obtained a writ of error to the Supreme Court before Wisconsin became a state. As such, that appeal was not within the terms of 1848 Judiciary Act, having been "previously removed." Justice Nelson recognized Congress, by the phrase "not previously removed by a writ of error," did not mean that federal courts should be vested with jurisdiction over appeals from territorial courts made after statehood but not before. The statutory language, he acknowledged, "was drawn, doubtless, under the supposition, that . . . no legislation was necessary to preserve or give effect to the jurisdiction of the court" when the writ of error had been granted before statehood.[82] Nevertheless, Nelson concluded, this federal legislative "opinion" was "founded in [constitutional] error."[83] Article III mandated that Congress pass new legislation vesting federal courts with jurisdiction over appeals from territorial courts after statehood, even when the appeal was taken while the state was still a territory. The legislative mistake, however, was one of omission. Congress had not passed an unconstitutional act. Rather, the national legislature, misinterpreting Article III, had failed to pass the necessary statute. The only consequence of the legislative failing was that the Supreme Court ruled that no jurisdiction existed to adjudicate appeals Congress thought the Justices were authorized by statute to adjudicate.

Justice Nelson then announced that had Congress understood the proper constitutional procedure for vesting courts with jurisdiction over appeals from defunct territorial courts, the resulting statute would have been unconstitutional. *McNulty* could not be adjudicated by an Article III court even if Congress passed a statute properly vesting jurisdiction, he insisted, because the case neither raised an issue of federal law nor met the constitutional standards for federal diversity jurisdiction. "Should the judgment be affirmed or reversed," Nelson concluded, federal courts "possessed no power to carry the mandate into execution, the case not being one

80. *McNulty*, 51 U.S. (10 How.) at 78–79.
81. *Id.* at 79 (internal quotations omitted) (quoting Act of Feb. 22, 1848, ch. 12, § 2, 9 Stat. 211).
82. *Id.* at 80.
83. *Id.*

of Federal jurisdiction . . . ."[84] Nelson could omit the magic words "this law is unconstitutional," because Congress, not understanding the constitutional requirements for providing for appeals from defunct territorial courts to federal courts, made a constitutional mistake by failing to pass an appropriately drafted federal statute. Had the federal statute been drafted correctly, the measure would have been declared unconstitutional.

E. Imposing Constitutional Limits on State Power

The structure of antebellum judicial opinions imposing constitutional limits on state power was different than the structure of antebellum judicial opinions imposing constitutional limits on federal power. Opinions imposing constitutional limits on federal power often began by discussing constitutional issues and then either did not bother with statutory interpretation or interpreted the federal law in light of constitutional standards. Opinions imposing constitutional limits on state power consistently began with the statutory question. Textualism was the dominant form of statutory interpretation when state laws were before the Court. "[W]here the words of a law, treaty, or contract, have a plain and obvious meaning," Justice Johnson declared, "all construction, in hostility with such meaning, is excluded."[85] Constitutional questions were resolved only after the Justices determined the plain meaning of the statute. This ordering of legal issues and commitment to textualism only when interpreting state statutes helps explain why the Justices made extensive use of Gouverneur Morris's fiction when imposing constitutional limits on federal power, while consistently asserting that state laws were unconstitutional when imposing constitutional limits on state power.

Supreme Court Justices do not ever seem to have employed Gouverneur Morris's fiction when imposing constitutional limits on state power. From the very beginning, judicial opinions typically contained blunt assertions that state statutes were unconstitutional. "[I]n this case," Chief Justice Marshall's opinion in *Fletcher v. Peck* concluded,

> the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired . . . .[86]

84. *Id.* at 79–80.

85. Green v. Biddle, 21 U.S. (8 Wheat.) 1, 89–90 (1823).

86. 10 U.S. (6 Cranch) 87, 139 (1810); *accord* Craig v. Missouri, 29 U.S. (4 Pet.) 410, 438 (1830) (stating "which act is, in the opinion of this court, repugnant to the constitution of the United States"); Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 868 (1824) (stating "the act of the State of

Many Marshall Court opinions imposing constitutional limits on state power began with a sentence asserting that the central issue in the case was whether a state law was constitutional and ended with a sentence declaring the state law unconstitutional. Marshall in *Dartmouth College v. Woodward* opened by stating, "The single question now to be considered is, do the acts to which the verdict refers violate the constitution of the United States." He concluded with the proposition that "the acts of the legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the constitution . . . ."[87] The few Marshall Court cases imposing constitutional limits on states that did not contain the declaration "the state statute is unconstitutional" nevertheless explicitly struck down the state law in question. In *United States v. Peters* the Justices first noted that the state "act in question" supported state "interposition in this particular case." After several pages of legal analysis, they determined that "the state of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause."[88]

Taney Court opinions similarly declared laws unconstitutional whenever the Justices imposed constitutional limits on state government. Many Justices continued the Marshall Court practice of announcing the issue to be the constitutionality of a state law and concluding with a declaration that the state law was unconstitutional. Justice Joseph Story in *Prigg v. Pennsylvania* first observed that "[t]he question arising in the case, as to the constitutionality of the statute of Pennsylvania, has been most elaborately argued at the bar." He finished by proclaiming, "[W]e are of opinion that the act of Pennsylvania upon which the indictment is founded, is unconstitutional . . . ."[89] Several opinions imposing constitutional limits on state

Ohio . . . is repugnant to a law of the United States, made in pursuance of the constitution, and, therefore, void"); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 208 (1819) (stating "the act of the State of New-York . . . is contrary to the constitution of the United States"); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819) (stating "[w]e are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void"); New Jersey v. Wilson, 11 U.S. (7 Cranch) 164, 167 (1812) (stating "[t]his contract is certainly impaired by a law which would annul this essential part of it").

87. 17 U.S. (4 Wheat.) 518, 625, 654 (1819). For other opinions similarly structured, see Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 536, 562 (1832); Weston v. City Council of Charleston, 27 U.S. (2 Pet.) 449, 463–64, 469 (1829); Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 436, 449(1827); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 186, 221 (1824); *Green*, 21 U.S. (8 Wheat.) at 10, 17.

88. 9 U.S. (5 Cranch) 115, 136, 141 (1809); *accord* Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 52 (1815) (concluding that state "statutes . . . are not . . . operative" after asserting that a legislative "repeal [of] statutes creating private corporations" is inconsistent with "the spirit and the letter of the constitution of the United States").

89. 41 U.S. (16 Pet.) 539, 609–10, 625 (1842); *accord* Curran v. Arkansas, 56 U.S. (15 How.) 304, 307, 320–21 (1854); Smith v. Turner, 48 U.S. (7 How.) 283, 393, 408–09 (1849); Planters' Bank v. Sharp, 47 U.S. (6 How.) 301, 318, 334 (1848); Gordon v. Appeal Tax Court, 44 U.S. (3 How.) 133, 144, 149 (1845); Bronson v. Kinzie, 42 U.S. (1 How.) 311, 314, 320 (1843); Dobbins v. Comm'rs of

power either announced the issue was whether a state law was constitutional or concluded the state law in question was unconstitutional. In *Woodruff v. Trapnall* and *Dodge v. Woolsey*, the Justices stated that the issue in the case was whether a particular state law was unconstitutional, interpreted the state law as impairing an obligation of an existing contract, and then stated that such laws, in general, were unconstitutional.[90] Justice Henry Baldwin in *McCracken v. Hayward* ended his opinion with the statement that the "legislation" in question was "repugnant to the Constitution of the United States."[91] The Taney Court in *Trustees for Vincennes University v. Indiana* and *Hays v. Pacific Mail Steamship Co.* first interpreted state laws as imposing certain obligations on the defendants and then, without explicitly stating the specific state laws were unconstitutional, ruled that states could not constitutionally impose those obligations.[92]

III. RETHINKING ANTEBELLUM JUDICIAL PRACTICE

A. Submerged Judicial Activism

The cases in which Supreme Court Justices employed some version of Gouverneur Morris's fiction reveal a different constitutional universe from that depicted by standard works on judicial review and American constitutional development. *Dred Scott* is thought to be a dramatic judicial break from past practice, because the Justices had not explicitly declared a federal law unconstitutional for more than fifty years.[93] The Taney Court's assertion that the Missouri Compromise was unconstitutional was, however, quite consistent with antebellum judicial practice in cases raising questions about constitutional limits on federal power. The Justices asserted that Congress could not vest Article I courts with Article III powers,[94] they forbade

Erie County, 41 U.S. (16 Pet.) 435, 444, 450 (1842); *see also* Howard v. Bugbee, 65 U.S. (24 How.) 461, 464–65 (1861); Almy v. California, 65 U.S. (24 How.) 169, 172, 175 (1861); Sinnot v. Davenport, 63 U.S. (22 How.) 227, 239, 244 (1860); Searight v. Stokes, 44 U.S. (3 How.) 151, 162, 169 (1845) (adopting the same structure for an opinion declaring a state law inconsistent with a compact between the United States and a state).

90. *See* Dodge v. Woolsey, 59 U.S. (18 How.) 331, 339, 360 (1856); Woodruff v. Trapnall, 51 U.S. (10 How.) 190, 204, 207 (1851).

91. 43 U.S. (2 How.) 608, 615 (1844); *see also* Piqua Branch of the State Bank of Ohio v. Knoop, 57 U.S. (16 How.) 369, 392 (1854) ("[T]he tax law of 1851 . . . impairs the obligation of contract, which is prohibited by the Constitution of the United States . . . .").

92. *See* Hays v. Pacific Mail Steamship Co., 58 U.S. (17 How.) 596, 599–600 (1855); Trs. for Vincennes Univ. v. Indiana, 55 U.S. (14 How.) 268, 277 (1853).

93. *See supra* note 23 and the relevant text.

94. *See supra* notes 57–58 and the relevant text.

forbade federal officials from imposing duties on state officers,[95] they denied federal authority over riverbeds and property previously dedicated to public use after a territory became a state,[96] and they insisted that the federal government honor land titles legally acquired before a territory became part of the United States.[97] The novelty of *Dred Scott* lay in the language the Justices used when imposing a constitutional limit on federal power, not in the judicial willingness to limit federal power.

The antebellum cases declaring constitutional limits on federal power cast doubt on common assertions that the judicial decision declaring the Missouri Compromise unconstitutional broke with a past tradition of judicial deference to national elected officials. The scholars who have celebrated this claimed practice insist that federal Justices, until *Dred Scott*, would declare unconstitutional only federal laws of a judicial nature[98] or federal laws that no reasonable person would think constitutional.[99] Dean Larry Kramer maintains that most antebellum Justices previous to *Dred Scott* understood their decisions as binding only the parties to the case.[100] Taney Court practice from 1835 until 1857 did not exhibit these tendencies. Judicial majorities often imposed limits on federal power in cases that were not of a judicial nature. *Pollard v. Hagan* and subsequent decisions resolved controversies over land titles, not disputes over federal jurisdiction or internal judicial processes. Judicial majorities before the Civil War were willing to prohibit federal actions that a reasonable person might think constitutional. Congressional majorities for more than two hundred years have imposed some legal duties on local officials,[101] and many distinguished constitutional thinkers have thought such measures constitutional.[102] When imposing these constitutional limits on federal power, the Justices announced broad principles of constitutional law that they believed

95. *See supra* note 50 and the relevant text.

96. *See supra* note 73 and the relevant text.

97. *See supra* note 60 and the relevant text.

98. *See* ROBERT LOWRY CLINTON, MARBURY V. MADISON AND JUDICIAL REVIEW 117–21 (1989); MATTHEW J. FRANCK, AGAINST THE IMPERIAL JUDICIARY: THE SUPREME COURT VS. THE SOVEREIGNTY OF THE PEOPLE 67–68 (1996).

99. *See* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 34–38 (1990); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW 1–116 (1986).

100. KRAMER, *supra* note 22, at 93–207.

101. *See, e.g.*, Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (requiring state officials to conduct background checks on persons purchasing handguns); Act of June 18, 1798, ch. 54, 1 Stat. 666 (requiring state officials to keep naturalization records); Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (requiring state officials to administer oaths of office).

102. *See especially* Puerto Rico v. Branstad, 483 U.S. 219, 228–30 (1987) (overruling Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861)); THE FEDERALIST No. 36, at 239 (Alexander Hamilton), No. 45, at 295 (James Madison) (Isaac Kramnick ed., 1987).

bound all government actors, not just the parties to the lawsuit before the Court. Indeed, the judicial practice of announcing general limitations on federal power probably better expresses the view that the Court was providing guidelines that all officials had to follow rather than a mere declaration that a particular law is unconstitutional, which might more plausibly be limited to the circumstances of a particular case.

This consistent judicial willingness to impose constitutional limits on federal power helps explain what would otherwise be an anomalous feature of the constitutional politics responsible for the *Dred Scott* decision. As is well known, most Southerners by the 1850s enthusiastically supported legislation promoting the Supreme Court as the institution responsible for determining the constitutional status of slavery in the territories.[103] "[W]e are entitled to a decision of the Supreme Court of the United States," Jefferson Davis stated in 1850, as to whether the South "may have that equal participation in the enjoyment of the Territories."[104] Other prominent Jacksonians made similar declarations.[105] Southerners would not likely have placed so much trust in a federal judiciary if they believed the Justices had not imposed a constitutional limit on federal power for over fifty years. Jacksonians who thought federal courts were committed to striking down only laws no reasonable persons thought constitutional would probably have insisted on more specific legislative sanctions for the right to bring slaves into the territories. Slaveholding representatives were aware that a Southern majority sat on the Taney Court and they may have had inside information. Antebellum Justices often leaked their constitutional sentiments.[106] Still, their confidence in a favorable judicial resolution was probably partly rooted in the common understanding that the Justices, in previous cases, had frequently declared constitutional limits on federal power in cases that were not of a judicial nature and where a reasonable person might think the federal action constitutional. Past practice gave Southerners little reason to expect a judicial opinion asserting that "the Missouri Compromise is unconstitutional." Nevertheless, given the narrow understanding of federal power to govern territory within a state announced in *New Orleans v. United States*[107] and the strict constitutional limits im-

103. *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 200–01, 204, 207–08 (1978); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 46–50 (1993); Wallace Mendelson, *Dred Scott's Case—Reconsidered*, 38 MINN. L. REV. 16, 22–23 (1953).

104. CONG. GLOBE, 31st Cong., 1st Sess. app. 154 (1850).

105. *See generally* GRABER, *supra* note 22, at 34 (citing numerous sources).

106. Auchampaugh, *supra* note 37, at 234–38.

107. 35 U.S. (10 Pet.) 662, 737 (1836).

posed on federal power in other antebellum decisions,[108] Southerners, at the very least, had reason for expecting a judicial opinion asserting "Congress has no power to ban slavery in the territories," even if that opinion did not find as a matter of statutory interpretation that Congress had, in fact, banned slavery in the territories.

B. Dred Scott Revisited

The rhetorical choices open to antebellum Justices exercising the power of judicial review suggest that Marshall in *Marbury* and Taney in *Dred Scott* were not merely announcing constitutional limits on federal power when they explicitly asserted that federal laws were unconstitutional. Gouvereur Morris's fiction, employed on every other occasion before the Civil War when Justices imposed constitutional limits on federal power, could easily have been employed in *Marbury* and *Dred Scott*. Marshall in *Marbury* might have first determined that the Constitution did not vest the Supreme Court with original jurisdiction over William Marbury's claim and then either ignored the statutory question or insisted that Section 13 of the Judiciary Act of 1789 be interpreted consistently with the Court's constitutional conclusions. The latter strategy would not have required an implausible interpretation of federal law.[109] Significantly, the Justices in 1800 and 1809 championed far more implausible interpretations of federal law in order to avoid exercising jurisdiction in circumstances they believed would be unconstitutional.[110] This judicial willingness to employ Gouverneur Morris's fiction when the political stakes were lower supports speculation that the *Marbury* opinion was structured in ways that would enable Marshall to conclude with an essay defending the judicial power to declare federal laws unconstitutional.[111]

Had Taney and his brethren wished to communicate only what the Justices had communicated in previous cases imposing constitutional limitations on the federal government, they similarly could have refrained from asserting that Congress had exceeded its constitutional powers. Following judicial practice in cases limiting federal power to make land grants,[112] the

108. *See especially* Kentucky v. Dennison, 65 U.S. (24 How.) 66, 106–07 (1861); Pollard v. Hagan, 44 U.S. (3 How.) 212, 229–40 (1845).

109. For evidence that Marshall in *Marbury* was quite willing to manipulate both Section 13 of the Judiciary Act and Article III of the Constitution, see William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 14–16, 30–33.

110. *See* Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809); Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 14 (1800).

111. *See* MCCLOSKEY, *supra* note 25, at 25–28.

112. *See supra* notes 54, 60, 64–77 and the relevant text.

Justices in the *Dred Scott* majority might have interpreted the Missouri Compromise as banning slavery only in those territories where Congress was constitutionally authorized to ban slavery. Following judicial practice in cases on the status of territorial courts after statehood,[113] the majority and concurring opinions might have concluded that slaveholders had a right to bring slaves into the territories without discussing whether any contrary federal law existed. Taney might have ruled that Congress, by passing the Kansas-Nebraska Act and the Compromise of 1850, had repealed the Missouri Compromise and given that repeal retroactive effect.[114] After so interpreting federal statutory law of 1857, Taney might then have held that determining whether slavery was statutorily banned in territories before 1850 was unnecessary because the Ex Post Facto Clause did not forbid the national government legislature from retroactively applying civil laws.[115] Such opinions might seem strange to contemporary ears, but they were far more consistent with antebellum practice than the opinions actually written in *Dred Scott*.

Constitutional law does not explain why the Justices in *Dred Scott* abandoned the fiction employed in previous cases that the imposition of constitutional limits on federal power did not pit national elected officials against federal Justices. The constitutional questions *Dred Scott* resolved were quite similar to those resolved by *New Orleans*.[116] The Justices in *Dred Scott* narrowly interpreted federal power to govern territories outside the jurisdiction of existing states. The Justices in *New Orleans* narrowly interpreted federal power to govern territory within the jurisdiction of an existing state. Neither case raised questions of a judicial nature, both asserted very broad restrictions on federal power, and reasonable persons might dispute whether either restriction was correct. Judged by strictly legal standards, *New Orleans* was as activist a judicial decision as *Dred Scott*.[117] Nevertheless, the majority opinion in *New Orleans* minimized the appearance of conflict between Congress and the Supreme Court, while the Justices in *Dred Scott* bluntly asserted that they were challenging existing legislative constitutional understandings.

Constitutional politics better explain why no member of the *Dred Scott* majority employed some version of Gouverneur Morris's fiction

113. *See supra* notes 57–59, 78–84 and the relevant text.

114. For similar claims by Southern representatives, see HOLT, *supra* note 35, at 806–21.

115. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 390–91 (1798).

116. *See supra* notes 73–77 and the relevant text.

117. The Justices in *Kentucky v. Dennison* similarly imposed a sharp limit on federal power in a case that was not of a judiciary nature and in which reasonable persons might think federal power existed. *See supra* notes 49–50 and the relevant text.

when imposing constitutional limits on federal power to ban slavery in the territories. The central element of Morris's fiction was the pretense that national elected officials and federal Justices agreed on the relevant constitutional rules and standards. This illusion could be easily maintained in such cases as *Pollard* and *New Orleans*, which raised constitutional issues that were relatively inconsequential politically. No social or partisan movement of any prominence cared which of the two claimants was the rightful owner of a small tract of land. The precise intricacies of federal jurisdiction during the transition from territory to state at stake in *Benner v. Porter* was no more consequential politically. The Justices frequently employed Gouverneur Morris's fiction after Congress, because of poor record keeping, accidentally granted the same land twice. Judicial opinions correcting these errors and similar legislative "mistakes" could plausibly pretend that Congress had not intended to violate the Constitution as the Constitution was interpreted by the Supreme Court. The fiction was simply that the Court was acting consistently with preexisting legislative constitutional understandings rather than, as was actually the case, laying down constitutional rules that national legislators would not find objectionable.

Sustaining this portrayal of harmony between the Justices and elected officials was far more difficult in *Dred Scott*. The Missouri Compromise could hardly be described as a legislative oversight. The Taney Court could not as easily ignore the Missouri Compromise or insist that the 1820 agreement did not actually prohibit human bondage in the Northwest. Antislavery advocates were loudly proclaiming that the Missouri Compromise existed, federal law banned slavery in certain territories, and the federal government had the constitutional power to ban slavery in those territories. The Taney Court, for these reasons, could not plausibly disregard the Missouri Compromise or insist that, public consensus to the contrary, the 1820 agreement did not prohibit human bondage in the Northwest. By declaring the Missouri Compromise unconstitutional, the Justices were acknowledging the intense political debate over the constitutionality of slavery in the territories and communicating their constitutional disagreement with those elected officials who insisted that bans on slavery were constitutional.

Antebellum Justices tended to declare laws unconstitutional when imposing limitations on federal or state power only when federal judicial authority was challenged. Marshall's declaration in *Marbury* that a federal law was unconstitutional was a response to the numerous Jeffersonians who denounced judicial power during the debate over the Repeal Act of

1802.[118] The Justices may not have explicitly declared a federal law unconstitutional between *Marbury* and *Dred Scott*, because they recognized that national legislatures accepted the judicial prerogative to determine land ownership and technical issues of federal jurisdiction. As Chief Justice Marshall declared without contradiction in *Soulard v. United States*, "[T]he duty of deciding on these various titles" had been "transferred by the government to the judicial department . . . ."[119] The resulting judicial awareness that decisions imposing constitutional limits on federal power settled the constitutional issue as a practical matter mitigated against language asserting that the judicial decision also settled the constitutional issue as a theoretical matter. There being no explicit need to announce "a dangerous and hateful clashing of public authorities," no announcement was forthcoming.

The constitutional politics of *Dred Scott* more resembled the constitutional politics underlying decisions announcing limitations on state power in which the Justices consistently declared laws unconstitutional. Local officials in antebellum America frequently ignored federal judicial rulings;[120] prominent politicians asserted that states were constitutionally authorized to determine the constitutional limits on state and federal power;[121] and Congress debated whether to repeal Section 25 of the Judiciary Act of 1789, which authorized federal courts to declare state laws unconstitutional.[122] Judicial opinions that plainly challenged existing state legislative and judicial judgments by imposing limitations on state power were means for articulating the Justices' commitment to the supremacy of federal interpretations of federal constitutional law. Such an expression of judicial authority was necessary in *Dred Scott*. Antislavery advocates in Congress had challenged judicial authority over the status of slavery in the territories. Salmon Chase, when criticizing legislative proposals foisting responsibility for resolving sectional issues onto the federal courts, asserted that the Justices "are not more than other men exempt from the bias of edu-

118. *See* Mark A. Graber, *Establishing Judicial Review:* Marbury *and the Judiciary Act of 1789*, 38 TULSA L. REV. 609, 640–41 (2003).

119. 29 U.S. (4 Pet.) 511, 513 (1830).

120. *See* Leslie Friedman Goldstein, *State Resistance to Authority in Federal Unions: The Early United States (1790–1860) and the European Community (1958–94)*, 11 STUD. AM. POL. DEV. 149 (1997).

121. *See, e.g.*, THOMAS JEFFERSON, THE PORTABLE THOMAS JEFFERSON 286 (Merrill D. Peterson ed., 1975).

122. *See* Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States: A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 161, 164, 176–85 (1913).

cation, sympathy, and interest."[123] The Supreme Court in *Dred Scott*, by declaring the Missouri Compromise unconstitutional, was communicating the same judicial authority to settle controversies over the constitutional limits on federal power as the Justices had previously exercised in controversies over the constitutional limits on state power.

The explicit language declaring the Missouri Compromise unconstitutional probably also expressed contempt for antislavery advocates. Gouverneur Morris's fiction was partly a canon of judicial protocol. "Decency," he believed, normally counseled against "presum[ing] to believe, much less to declare" that elected officials "meant to violate the Constitution." National representatives who accidentally granted the same land twice or who were not familiar with the principles for vesting federal jurisdiction when a territory became a state remained worthy of constitutional respect. Opinions such as *Benner* and *New Orleans* communicated to the cognoscenti that the Whigs and Democrats who held nationally elected offices were as committed to constitutional norms as the Justices, only slightly less informed about the appropriate constitutional norms. Given the expected legislative willingness to abide by judicial standards, a judicial declaration that Congress had made a constitutional mistake would be bad legal manners, picking an unnecessary fight over constitutional authority with a complaisant legislature. From the perspective of the Taney Court, however, the Republican Party was engaged in a conspiracy against the Constitution. Politicians who insisted that bans on slavery in the territories were constitutional were acting in bad faith. Lincoln and others needed to be exposed as potential usurpers, not gently corrected. The linguistic practice that in 1857 best communicated this hostility to the antislavery movement was an explicit declaration that the Missouri Compromise was unconstitutional.

IV. ROGER TANEY'S FICTION

Chief Justice Taney in *Dred Scott* substituted one legal fiction for another. Gouverneur Morris's fiction diminished the appearance of actual conflict between the Justices and elected officials. Congress must have thought the federal government retained an interest in land dedicated to public purposes while a state was a territory; otherwise national legislators would not have passed three statutes asserting sovereignty over those tracts. Nevertheless, the opinion in *New Orleans*, by not explicitly declaring fed-

123. CONG. GLOBE, 31st Cong., 1st Sess. app. 474 (1850); *see also* CONG. GLOBE, 30th Cong., 2nd Sess. 610 (1849) (speech of Horace Greeley).

eral laws inconsistent with its holding unconstitutional, fostered perceptions that the Justices and national officials agreed on the relevant constitutional principles. Roger Taney's fiction, by comparison, inflated the appearance of actual conflict between the Justices and elected officials. As numerous scholars have pointed out, crucial features of the Missouri Compromise were legislatively repealed in 1854 (if not in 1850). Congressional majorities invited the Supreme Court to determine whether the Missouri Compromise was unconstitutional, and the Justices, before making the decision, were well aware that the holding would receive the support of the President of the United States.[124] The majority opinions in *Dred Scott*, by declaring the Missouri Compromise unconstitutional, fostered perceptions that the Justices were challenging congressional understandings of the appropriate constitutional principles.

The Supreme Court during the quarter century after *Dred Scott* oscillated between Gouverneur Morris's fiction and Roger Taney's fiction. An increasing number of decisions announcing limits on federal power declared laws unconstitutional. Others did not. Remarkably, the evidence suggests that the language the Justices employed bore no relationship to whether legislative majorities actually intended to enshrine contrary constitutional principles. Taney's opinion in *Dennison* was almost certainly inconsistent with the congressional belief in 1793 that the federal government could impose some duties on elected officials. The Chase Court relied on such techniques in *Collector v. Day* and *United States v. Railroad Company*, when the Justices ruled that, for constitutional reasons, a statute could not be interpreted as regulating behavior that the plain language of the statute quite clearly regulated. Both decisions held that the federal government could not constitutionally pass certain laws, but that constitutional barrier was used as a means to justify the decision to (mis)construe the federal statute in a certain way, rather than as a judicial declaration that the statute was unconstitutional. The same Justices, however, often declared laws unconstitutional even when little reason existed for thinking that elected officials were championing contrary constitutional principles. As noted above, one reason why the Chase Court "declared" more laws unconstitutional than the Taney Court was that Chase Court majorities tended to assert that the federal government had acted unconstitutionally when Congress granted the same land twice.[125]

124. *See supra* notes 35, 37.

125. *Compare* Reichart v. Felps, 73 U.S. (6 Wall.) 160, 165–66 (1868) ("Congress is bound to regard the public treaties, and it had no power to organize a board of revision to nullify titles confirmed many years before by the authorized agents of the government"), *with* Willot v. Sandford, 60 U.S. (19 How.) 79, 82 (1857) (holding that an 1816 confirmation defeated an 1836 confirmation because "where

Gordon v. United States,[126] the third case in which the Supreme Court is conventionally regarded as declaring a federal law unconstitutional, illustrates the transition between routine use of Gouverneur Morris's fiction before the Civil War and routine use of Roger Taney's fiction afterwards. The one paragraph majority opinion issued when the case was decided announced constitutional limitations on federal power without declaring a federal law unconstitutional. The Justices asserted only that "under the Constitution, no appellate jurisdiction over the Court of Claims could be exercised by [the Supreme Court] . . . ."[127] Twenty years later, the Justices published the draft opinion for *Gordon* that Chief Justice Taney had written before his death. That opinion made clear that the Court was declaring an act of Congress unconstitutional and included a spirited defense of that judicial power. Remarkably, while the Justices had previously relied on statutory misconstruction as a means for imposing constitutional limits on federal power without striking down a federal statute, *Gordon* was the first case since *Marbury* in which the Justices appear to have engaged in statutory misconstruction in order to declare a federal law unconstitutional.

The majority opinion in *Gordon v. United States* employed a particularly creative version of Roger Taney's fiction. The law under constitutional attack in that case was part of a federal statute designed to ensure that the Court of Claims would be a court in fact as well as in name. Courts in the United States enjoy Article III status only if their decisions cannot be reversed by non-judicial officials. A lengthy debate over whether the Court of Claims should be a legislative (Article I) or judicial (Article III) body was apparently resolved when the Senate rejected an amendment to the bill permitting elected officials to revise the decisions of the bench. Congress then added, without debate, Section 14, a provision authorizing the Secre-

there are two confirmations for the same land, the elder must hold it"); DeLauriere v. Emison, 56 U.S. (15 How.) 525, 538 (1854) ("The confirmation of the claim by Congress, in 1836, had relation back to the origin of the title; but it could not impair rights which had accrued, when the land was unprotected by a reservation from sale; and when, in fact, the right of the claimant was barred."); Chouteau v. Eckhart, 43 U.S. (2 How.) 344 (1844) (holding that a claim confirmed in 1812 defeated a claim confirmed in 1836). *See* United States v. Covilland, 66 U.S. (1 Black) 339, 341 (1862) ("[A] confirmation in the name of the original grantee, divesting the legal title of the United States, is binding on the government and on the assignees . . . ."); Landes v. Brant, 51 U.S. (10 How.) 348, 370 (1851) ("[W]hen Congress confirmed and completed an imperfect claim, and then confirmed another and different claim for the same land, the older confirmation defeated the younger one . . . ."); Marsh v. Brooks, 49 U.S. (8 How.) 223, 233–34 (1850) ("[W]here the same land has been twice granted, the elder patent may be set up in a defence by a trespasser, when sued by a claimant under the younger grant . . . ."); Les Bois v. Bramell, 45 U.S. (4 How.) 449, 464 (1846) ("[T]here being two adverse claims to the same land . . . the first grantee took the legal and exclusive title."); Stoddard v. Chambers, 43 U.S. (2 How.) 284, 317 (1844) ("[T]he elder legal title must prevail in the action of ejectment . . . .").

126. 69 U.S. (2 Wall.) 561 (1865).

127. *Id.* at 561.

tary of the Treasury to pay successful claimants in the Court of Claims. Oblivious to the debate and language of the bill, the Supreme Court in *Gordon* interpreted Section 14 as authorizing the Secretary of the Treasury not to pay certain claims.[128] On that ground, the Justices declared unconstitutional the section in the Court of Claims Act that required the Supreme Court to hear appeals from the Court of Claims rulings. No appeal to the Supreme Court, the Justices maintained, could lie from a body whose decisions could be upset by an administrative officer.[129] Congress, which never intended to give the Secretary of the Treasury discretionary power, responded immediately by removing the offending section.[130] Lyman Trumbull, the sponsor of both the original and repeal measure declared, "I do not think, and I did not think at the time, that the fourteenth section altered the previous provisions of the act," and that "[t]he construction of the law has been such as not to carry out the intention of Congress."[131]

Taney's draft *Gordon* opinion was published at a time when the Supreme Court was reasserting control over constitutional meaning. During the same year in which the Waite Court announced the rediscovery of Taney's defense of judicial review, the Justices in *Mugler v. Kansas*, for the first time in history, cited *Marbury* as supporting the judicial power to declare laws unconstitutional.[132] Gouverneur Morris's fiction, after *Mugler*, was increasingly abandoned. For Waite and Fuller Court Justices, judicial review was the judicial power to declare explicitly that federal and state laws were unconstitutional. That these Courts were in part a product of congressional decisions in 1875 to 1891 to expand federal jurisdiction as a means to promote Republican constitutional visions[133] was, as proper use of Roger Taney's fiction demanded, absent from these discussions of courts as a check on legislative power.

Taney's legal fiction dominates contemporary constitutional discourse. Contemporary constitutionalism remains obsessed by a countermajoritarian problem that a generation of political scientists and some law professors have demonstrated does not describe American constitutional politics. When the Justices explicitly declare a law unconstitutional, they typically do so only after being invited by members of the dominant na-

128. Draft opinion of Taney, C.J., in *Gordon*, 69 U.S. (2 Wall.) 561, published as an appendix at 117 U.S. 697, 698–99 (1886).

129. *Id.* at 702–03, 706.

130. *See* Act of Mar. 17, 1866, ch. 19, 14 Stat. 9.

131. CONG. GLOBE, 39th Cong., 1st Sess. 770–71 (1866) (speech of Mr. Trumbull).

132. *See* 123 U.S. 623, 661 (1887); CLINTON, *supra* note 98, at 120.

133. *See* Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511 (2002).

tional coalition. Affiliated Presidents typically promote judicial supremacy as means for holding their weakened political coalitions together.[134] Greater attention to antebellum political practice and the origins in *Dred Scott* of the contemporary judicial practice of explicitly declaring federal laws unconstitutional may not tell us whether *Roe* was correctly decided. Nevertheless, just as by not knowing past linguistical practices we have underestimated the extent of legislative/judicial conflict before the Civil War, by not being self-conscious about contemporary legal rhetoric, both opponents and proponents of constitutional protections for abortion rights may be overestimating legislative/judicial conflicts in the present.

134. *See* Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 584–86 (2005).