THE UNITED STATES SUPREME COURT AND NATIONAL STATE EXPANSION, 1789-1997

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This dissertation examines the Supreme Court's impact on the constitutional development of the federal government. By applying a central state authority framework to an original database of hundreds of Supreme Court decisions, I uncover the ways in which the Court has constitutionally expanded and restricted the powers of the federal government from 1789 to 1997. I code each decision's overall effect on central state authority as either restrictive, neutral, or expansion as well as code decisions along seven different dimensions of the federal government according to the central state authority framework. These constitutional decisions were gathered from fifty-eight constitutional law casebooks and treatises published between 1822 and 2010, and the decisions that repeated most frequently across these books were included into the dataset for analysis. After this systematic and empirical analysis of the decisions, it becomes clear that the Supreme Court has persistently constricted and expanded the national government, but, at the same time, its decisions have always leaned toward supporting and developing the national government's powers across each constitutional issue area. Thus, this dissertation speaks to scholarship that not only reconsiders nineteenth century national state power but also underscores the important role that judges play in advancing national state development.

BIOGRAPHICAL SKETCH

Michael Dichio was born in Waltham, Massachusetts and was raised in Westford, Massachusetts. He attended the town's high school, Westford Academy, and received his Bachelors of Arts from Boston College, majoring in both political science and history.

To my parents, Anthony and Anna Dichio, and
To my grandparents, Antonio and Michelina DiLuca

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Introduction

On June 25, 2013 the small, ornate chamber of the Supreme Court was transformed into a more spirited space than we typically see. On that day, Justice Ruth Bader Ginsburg read her dissent in *Shelby County v. Holder* aloud, a practice reserved only[1] for justices who strongly oppose the Court's majority. *Shelby County* concerned Section 4 of the 1965 Voting Rights Act, which gave the federal government control over electoral changes in states that have had a history of voter discrimination. The Court declared that this "preclearance" power exceeded the federal government's authority, violating, among other things, state equality and the reserved state powers of the 10th Amendment. Reading her strongly-worded dissent from the bench, Ginsburg said, "The sad irony of today's decision lies in its utter failure to grasp why the [Voting Rights Act] has proven effective. . . . Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet." Ginsburg essentially claimed that Congress (i.e. as part of the central state) has an ongoing and relatively unlimited authority to oversee federal elections.

By 2013, this debate over authority is nothing new for the Court, but what path did it take to get here? All of American constitutional law addresses questions about the federal government's reach. And thus at the root of constitutional law is the language of federal authority. The judiciary's central responsibility is to determine the boundaries of this authority and, in doing so, it expands and contracts federal power. This is the basic pattern of constitutional development. Shaping the federal government in this way places the Court at the center of American state development. The moral of

[1] The 36 years Warren E. Burger and William H. Rehnquist served as chief justices saw an average of three dissents read from the bench per term. Since Chief Justice John Roberts has led the Court, the average has risen to 3.75 (NYT, "In a Polarized Court, Getting the Last Word," 8 March 2010. accessed 13 August 2013, http://www.nytimes.com/2010/03/09/us/09bar.html?_r=0).

all this is: the Supreme Court will always crucially influence American political development. But we know little about this pattern, about when, where, and how the Court has decided to expand and constrict the federal power. If we better understand these patterns, we can understand the constitutional foundations of the American state.

This study charts and interprets the complicated relationship between American law and the development of central state authority. Through a systematic cataloguing of Supreme Court cases from America's founding until the present day, I reveal variation in the Supreme Court's decisions affecting national authority and thus the development of the American state. I argue that the Court is much better conceived as an institution that both delimits and expands central state authority at any particular period in constitutional development rather than as an institution that does largely one or the other in a certain period. Indeed, I find that the Supreme Court has often done both throughout constitutional development, yet, at the same time, its decisions have typically leaned toward supporting and developing the national government's powers. These patterns challenge academic narratives that see law as either an inhibitor or facilitator of the American state, narratives that pivot on understanding state development only as the emergence of the modern welfare-state. In other words, studies that view pre-New Deal legal decisions as largely inhibiting and post-New Deal decisions as primarily expanding state development overlook important patterns of American statebuilding vis-à-vis the Supreme Court. Instead, I offer a more rigorous explication of Supreme Court decisions, over a broader time horizon, to develop a stronger foundation on which to assess the Court's position toward the federal government.

Research Problem

American Political Development (APD) research traces the expansion of the American state resulting from the evolution of political institutions.[2] APD has closely charted the growth of the presidency (Skowronek 1993) and the bureaucracy (Carpenter 2003; Skowronek 1982). Other studies have emphasized Congress as an important source of state development (Schickler 2001). Political party leadership, too, has been the focal point of studies of American state-building (Shefter 1994). Still others have focused on regional (Bensel 1990; Sanders 1999) and city political patterns as factors that contributed to state-building (Bridges 1984, 1997). Therefore while parties, presidents, legislators, and bureaucrats are seen as primary agents of American state-building, the Supreme Court's role in this expansion is considerably less well-charted. As a result, the Court's proclivity and substantive impact on the expansion of central state authority remain relatively less well-known.

While these important studies have advanced our understandings of American state-building and its concomitant effect on society, "a significant part of the field [has] pursued a delegalized study of the American state" (Skrenty 2006, 217).[3] To the extent that APD examines the Court, it often portrays the judiciary as an obstacle to the growth of the federal government, focusing on the period between the late nineteenth century and the New Deal.[4] However, those within the "law and APD" field have begun to revise this understanding of American state-building by showing how law and

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[2] American Political Development (APD) is a movement that began in political science in reaction to quantitative behavioralist studies of political phenomena. Students of APD "eschew small-scale hypothesis testing of the behavioralists in favor of large-scale historical studies asking big questions about the construction of political authority across time" (Kahn and Kersch 2006, 8). These scholars attempt to understand the effects of ideational and institutional factors on the creation of the modern state. For an overview of APD as a discipline, see Kahn and Kersch's (2006) introduction to their edited volume, *The Supreme Court and American Political Development.* Lawrence, Kansas: University Press of Kansas. For a critical exchange about APD, its methods, and its objectives among some of APD's founders, see Richard Bensel's, John Gerring's, Stephen Skowronek's, and Rogers Smith's articles in the 2003 volume 17 edition of *Studies in American Political Development.*

[3] Skrenty argues, "The American exceptionalism question that dominated the field led to a focus on the lack of a national administrative welfare state structure and on the historical period—the Progressive era to the New Deal—when Europe developed such state structures and the United States did not" (Skrentny 2006, 217). Consequently, law and courts played less of a role in studies of American state-building.

[4] Paul Frymer makes this argument in his review article, "Law and American Political Development," *Law & Social Inquiry* 33, 3 (2008): 779-803, 789. See chapter 2 for citations pertaining to this view of the judiciary.

courts have successfully enhanced, and not just constricted, national regulatory power (Frymer 2003; Farhang 2010; Novak 1996). Scholars have also shown how the federal courts are part of both the broader national regime and electoral politics, expanding the powers of national governing coalitions (Gillman 2002; Graber 1993; Whittington 2007). Thus far, however, the literature typically understands constitutional development vis-à-vis critical junctures: the Founding, Reconstruction, and New Deal eras (Ackerman 1991, 1998), but a more sustained treatment of the effects of the Court's constitutional doctrine on state-building across history has yet to be seen. A more expansive look across history and across constitutional issues will add important texture to our understanding of the Supreme Court's hand in state formation. Therefore the purpose of this dissertation is to better understand the Court's role in developing central state authority across American history and to explain these patterns of development.[5]

Research Questions

Given this problem, my dissertation charts the Court's influence on national state authority across history and addresses two research questions: How has the Court impacted central state authority? And, when and in what areas of the central state has the Court facilitated state development? These questions are important because, as *Shelby County* demonstrates, the Court continually shapes government authority. With a more rigorous and systematic examination of Supreme Court decisions, we can develop a stronger foundation on which to assess the Court's impact on American state development.

To uncover the Court's influence on national state authority, this study compiles an original database of landmark constitutional decisions derived from fifty-eight constitutional law casebooks and treatises, which spans from 1789 to 1997. I adopt Richard Bensel's (1990, 114) central state

[5] Part of that state, of course, includes the Supreme Court itself. As such, Chapter 6 examines the Court's own authority as well as its placement among the other branches of government.

authority framework, which helps determine whether a judicial decision expanded or restricted central state authority. With these data, I uncover the ways in which the Supreme Court has contributed to the development of the American central state and present patterns of expansion and restriction in constitutional development not fully discussed within historical institutionalist literatures about the Supreme Court. By doing so, this dissertation contributes to literatures that see judges as important state-builders (Forbath 2008), that see regime politics as important influences on the Court (Whittington 2007), and that view federal courts as significant forces, extending central state power to the periphery (Shapiro 1981; Gillman 2002).

Significance

These questions make an intervention in the American Political Development literature on national state formation. Much of APD defines the central state (and its relative strength) according to a Weberian typology based on increased administrative and bureaucratic autonomy. In doing so, scholars have typically viewed the Court as retarding central state expansion. The Weberian tradition, however, misses the myriad other forms of national state authority advanced and consolidated by the Supreme Court through the years.

Correcting our interpretation of the Court is important because U.S. political discourse has been defined by its reliance on and mythological reverence for the Constitution. In this way, the U.S. stands in contrast to other Western democratic states whose constitutions are much younger and, in some cases, unwritten. Thus, studying the Court's constitutional tradition illuminates great changes in national state formation because, as Alexis de Tocqueville opined back in the mid-19th century, many political problems eventually become legal problems.[6] Tocqueville uncovered a now long-

[6] To be sure, contemporary constitutional scholars have persuasively challenged Tocqueville's thesis that political questions often become legal ones. See Mark Graber. 2004. "Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited." *Constitutional Commentary* 21: 485.

recognized feature of America's political development: that the United States has a much thicker and extensive legal discourse on political power than Western European nation-states. The reason for this discourse has much to do with a written constitution, but, as Judith Shklar points out, it also has to do with the institution of chattel slavery the rights-claims it has produced (Shklar 1998, 111). More specifically, these claims—born from a written constitution and chattel slavery—necessitate that the Supreme Court play a vital role in defining the relationship between the federal government and society. Since all citizens' federal rights are inscribed in this written constitution, every citizen can claim her rights before the judiciary. The Supreme Court, as an institution, has traditionally defined what it means to be a citizen and what counts as legitimate state authority. As such, the study of the Court and its pivotal cases sheds light on far more than jurisprudential changes because the Court has shaped the contours of membership and authority more than any other institution. The United States' reliance on a written constitution has enabled the Court to serve this unique role, a role not played by judicial institutions in the national state formation of other Western democratic countries.

U.S. political rhetoric is preoccupied with the size of government, which turns into questions about the constitutional boundaries of the federal government. The rhetoric of "big" versus "small" government, however, misses the nuanced constitutional evolution of national authority wrought by the Supreme Court. Therefore, it is important to examine where, when, and how the national state constitutionally expanded and narrowed. Understanding these changes might help produce a more intelligent political discussion about the role of the federal government in American lives. Ultimately, I study constitutional development because I want to find out the degree to which the Court has extended the federal government's control versus prohibiting its control over society. By doing so, I help us understand that the growth of central state power has often required the Court's enabling.

What is Constitutional Development?

The progressive welfare state dimension is the metric by which most American Political Development studies assess "state development." Traditionally, American Political Development has defined the American state in relation to its European counterparts, attempting to explain the U.S.'s comparative "weakness." Recent comparative political development scholarship notes the conceptual problems with this traditional understanding.[7] Still, even these recent studies focus on uncovering strength in the American state—defining ways the American federal state is "strong."[8] I see these understandings as ideologically-infused because they focus on assessing state strength along a singular European welfare-state model. A less ideologically-infused interpretation of judicial decisions, however, is necessary for a project exploring the Court and state development across most of American history. More to the point, a theoretical framework that allows us to interpret judicial decisions in terms of their impact on advancing the myriad kinds of states across time is needed.

A less ideologically-infused understanding of state development produces different interpretations of the Court's role in building the national government. Applying this interpretation

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[7]In their review article, Desmond King and Robert Lieberman argue to move away from the Weberian framework of understanding modern states (King and Lieberman 2009, 551). They laud the studies reviewed (Gryzmala-Busse 2007; Hacker 2002; Johnson 2007; Ziblatt 2006) for "expanding the view of state building to include the role of actors that are conventionally considered to be outside the 'state' proper" and locating "stateness" in a variety of unconventional places (King and Lieberman 2009, 555-56). Desmond King and Robert Lieberman, "Ironies of State Building: A Comparative Perspective on the American State." *World Politics* 61, 3 (July 2009): 547-588.

A recent wave of scholarship revises our understanding of American central state in the nineteenth century, arguing the central state was stronger than we previously thought. See, for example, Brian Balogh, *A Government out of Sight: The Mystery of National Authority in Nineteenth-Century America* (New York: Cambridge University Press, 2009); William Novak, "The Myth of the 'Weak' American State," *American Historical Review* 113 (2008): 752-72; William Adler, "State Capacity and Bureaucratic Autonomy in the Early United States: The Case of the Army Corps of Topographical Engineers," *Studies in American Political Development,* 26 (October 2012): 107-24; Richard John, "Governmental Institutions as Agents of Change: Rethinking American Political Development in the Early Republic, 1785-1835," *Studies in American Political Development* 11 (1997): 347-80.

Still, even these recent studies focus on finding strength in the American state—uncovering the unique ways the American state is "strong." While these studies inform my discussion of the "state," my project does not weigh in on the debate about American central state strength except to say that this dichotomy between weak and strong, in some ways, obscures our understanding of the evolution of the American state. "Building" the state, in my view, means the advancement of federal authority to govern citizen behavior irrespective if that authority expands the welfare state.

[8] Balogh, *A Government out of Sight;* Novak, "The Myth of the 'Weak' American State;" Adler, "State Capacity and Bureaucratic Autonomy in the Early United States;" John, "Governmental Institutions as Agents of Change."

to a Court decision will help illuminate both this project's view of state development and its divergence from the progressive interpretation discussed above. I will apply my understanding of central state authority to a judicial decision that perhaps most typifies the Court's restrictive role, according to the Progressive interpretation: *Lochner v. New York* (1905). The *Lochner* Era has come to symbolize the Court at its most restrictive period, embracing a "laissez-faire" interpretation of Constitutional rights that prevented state governments from regulating the labor market.[9] With a neutral understanding of state authority, however, *Lochner* represents an expansion *not* restriction of the state, in particular, an expansion of judicial power.

In *Lochner*, the Supreme Court held that a New York law forbidding bakers to work more than sixty hours a week was unconstitutional. New York fined Joseph Lochner $50 for allowing an employee to work more than 60 hours in a week at his bakery in Utica, New York. Lochner was sent to county jail until he paid the fine or, if he did not pay, for 50 days (*Lochner,* 47). The New York Court of appeals upheld the statute, but Lochner appealed to the Supreme Court, claiming the labor law was unconstitutional.

In a 5-4 decision the Court held that the law "interferes with the right of contract between the employer and employees," and declared that "the general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution" (*Lochner,* 53). Writing for the majority, Justice Peckham maintained that the Constitution prohibits the states from interfering with most employment contracts because these contracts represent the fundamental freedom to buy and sell labor, which the Fourteenth Amendment protected. The Fourteenth Amendment's Due Process Clause prohibited states from

[9] *E.C. Knight, In Re Debs,* and *Lochner v. New York* have been invoked as the "Holy Trinity of laissez-faire," decisions that advanced corporate interests over monopoly (*E.C. Knight*), labor union strikes (*In Re Debs*), and workplace regulation (*Lochner v. New York)* (Novak 2002, 273). But state development, properly understood, should not necessarily equate laissez-faire as an obstacle to state growth because two of these decisions (*Debs* and *Lochner*) significantly advanced some of the dimensions in the central state authority framework employed in this project. I discuss this framework in chapter 2.

depriving any person of life, liberty, or property without due process of law, and to the Court, the right to buy and sell labor through contract was a "liberty of the individual" protected under the amendment (*Lochner,* 53, 58).

By invalidating the New York Statute, the Court centralized decision-making authority over labor questions in one part of the central state: the judiciary. The Court's interpretation and application of the Fourteenth Amendment advanced the central state's authority to determine the boundaries of state-level regulation. While this interpretation prevented *welfare* state developments, it nevertheless helped create a powerful judiciary. In this way, constitutional development is not the advancement progressive welfare state ideals. Instead, constitutional development is better understood as the advancement of national governing *authority* over state governments and citizens. *Lochner* thus represents an important feature of American statebuilding: judicial expansion of power.

Beyond welfare state development, there are several other areas of constitutional law in which we can uncover the positive role the Court played in building the American state. A widely known theme in American constitutional development, for example, is the Marshall Court's role in expanding central state power to create a stronger national commercial union through opinions like *Dartmouth College v. Woodward,*[10] *McCulloch v. Maryland,*[11] *Gibbons v. Ogden,*[12] and *Fletcher v. Peck*[13]

[10] 17 U.S. 518 (1819). The Court held that the New Hampshire legislature could not change the college's corporate charter to make it a public state university. Dartmouth's corporate charter was a contract between private parties, which the legislature could not interfere.

[11] 17 U.S. 316 (1819). Unanimously, the Court maintained that Congress had the power to incorporate a national bank and that Maryland could not tax this bank.

[12] 22 U.S. 1 (1824). *Gibbons* involved a New York state law giving individuals the exclusive right to operate steamboats on waters within state jurisdiction. Laws like this one were duplicated by other states, and some would require foreign (out-of-state) boats to pay substantial fees for navigation privileges. In this case, Thomas Gibbons—a steamboat owner who did business between New York and New Jersey under a federal license—challenged the monopoly license granted by New York to Aaron Ogden. In *Gibbons,* the Court was asked, did the New York licensing requirement infringe on a realm of authority reserved exclusively to Congress, namely, the regulation of interstate commerce? A unanimous Court found that the New York law did violate the Supremacy Clause and in so finding the Court consolidated and affirmed central state authority. In his opinion, Chief Justice John Marshall concluded that regulation of navigation by steamboat operators and others for purposes of conducting interstate commerce was a power reserved to and exercised by the Congress.

[13] 10 U.S. 87 (1810). In this case, the Court held that a contract between John Peck and Robert Fletcher over the sale of land had been legally "passed into the hands of a purchaser for a valuable consideration" (*Fletcher,* 139). After Peck obtained the land from Georgia in 1795, the Georgia legislature subsequently voided the grant the next year. The

(Newmyer 1986, White 1990). All these decisions involve invaliding state-level actions over contracts and commercial activity, and by doing so, the Marshall Court centralized economic and property questions at the federal level. In these decisions, the Court's interpretation of the Contract and Commerce Clauses expanded Congress's power to rule over these questions. Ultimately, this project understands "development" as the construction of national governing authority over subordinate governments and over citizens, as represented not only in *Lochner* but also in these Marshall Court rulings.

The Evolution of Constitutional Law: Primary Findings

Constitutional change is the product of persistent contestation over the meaning of values and institutional powers the Constitution enshrines. The contestation over values and institutions produces a tension that any fallible institution, like the Court, would have difficulty applying to an evolving society.

But what does constitutional development look like? That is, *how* has the Court shaped the federal government since 1789? My project contributes three things that help explain patterns in constitutional development. First, as noted above, the Court persistently expanded central state authority over time. Yet, there remained substantial variation between the restriction and expansion of state authority. While this variation persists across time, what changes is the kind of central state that the Court entrenches during any moment in political development. Rather than impose a teleological, progressive understanding of "the state" on constitutional development, this project recognizes that the variation between expansion-restriction changes during different eras and in relation to different models of central state formation.

Georgia act repealing the land grant act of 1795 violated the Contracts Clause thus Peck's sale to Fletcher was not fraudulent. Noting that the Constitution did not permit bills of attainder or ex post facto laws, the Court declared that state laws annulling contracts or grants made by previous legislative acts were unconstitutional.

Second, constitutional design made federalism a major project in American state expansion; reducing individual state autonomy became the primary avenue through which the central state expanded between 1870 and 1920, but federalism—delineating between federal and state power—is a large reason why we see so much variation among the decisions in the data. In this era, the central state's primary problem was the reduction of state autonomy. Thus, conflicts over competing models of federalism were paramount during this time. Federalism decisions moved the U.S. from the federation created in 1789 to a consolidated nation-state in the wake of the Civil War. The consolidation of national power became one of the Court's primary projects vis-à-vis federalism and thus the growth of central state power has occurred largely through constitutional doctrine.[14]

Last, the Court used a strategy of calculated diffidence to maximize its own legitimacy while also enhancing broader central state powers of the other branches.[15] As a political institution, the judiciary has always recognized its vulnerability in the central state ensemble and thus has recognized that its legitimacy depends on how it interprets its own powers as well as the powers of the broader federal state. Over time, the institution of the Court has displayed a reluctance to assert the judiciary's primacy within the central state ensemble, which has contributed to this persistent consolidation of national power as well as helped build the ideological and institutional legitimacy of the Court.

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[14] Between 1870 and 1920 many scholars assume that the Supreme Court constrained central state expansion. On the contrary, this project demonstrates that the major challenge was not the development of a national welfare state but, instead, the consolidation of national authority at the expense of the individual states**.** For the Court, navigating questions of federalism was the central focus of national state development. During the turn of the twentieth century, the Court extended national authority into realms that were once previously considered the province of the states and thus helped solve many political problems associated with federalism.

This interpretation supports Skowronek's (1982) understanding that the Court's kept the American national regime together because it (and political parties) were the only institutions strong enough to confront the challenges of federalism. For Skowronek, the Supreme Court "shaped the boundaries of intergovernmental relations. It defined the legitimate forms of interaction between states, between state and national governments, and within the national government itself" (Skowronek 1982, 27).

[15] This project understands diffidence as the Court's refusal to maximize political power for itself in an attempt to maintain its institutional and ideological legitimacy.

From these data, this study concludes that in every era of American history the Court expanded the federal government more often than it contracted that power.[16] This conclusion confirms arguments made by Martin Shapiro (1981) and the Anti-federalist Brutus: that, on balance, the Supreme Court, as an instrument of the national government, will support the development and power of the national government. It turns out that a main pattern of constitutional development is the oscillation between restriction and expansion with a tendency toward expansion, irrespective of the ideological and political makeup of the Court.

So what do these findings say about the evolution of constitutional law and the American state? We see that the boundaries of central state authority are ever-changing, and the Court has a decisive role in constructing these boundaries. We find a judicial institution that acts fairly consistently—when it expands federal power it usually does so by redefining federal relationships and extending the reach of the 14th Amendment, shifting power from the states to the federal government. When the Court constricts federal power, it typically does so by allowing states to control civil and political rights.

Ultimately, the Court's power over the central state's reach and scope forms the constitutional foundation for governance. The fact is that the Court laid the constitutional foundations for the American central state power in some areas but left other areas to the states. The story of the American state is not necessarily about strong versus weak but rather about federal versus state. The contestation over the meaning and authority of the of the Constitution, at bottom, concerns one question—does the central state have power to regulate whatever issue is before the Court? Once we uncover the central state's constitutional foundations, we can better understand the judiciary's precise role in building the American federal government.

[16] Chapter 3 provides a detailed discussion of these findings.

Overview of Methodology

While the research design is developed in the next chapter, a brief word on the overarching methodological approach is necessary. This project employs an historical institutionalist methodology to studying the Court, and by doing so, it speaks to both legal historical and American Political Development literatures. More specifically, in contrast to judicial behavioralist and rational choice scholars,[17] historical institutionalists are less concerned with the behavior of actors with fixed preferences, but instead concerned with the behavior of actors who also have historically constituted beliefs involving the norms of their institution.[18] Thus, historical institutionalist studies attempt to illuminate the long-term process that lead to the construction of both judicial preferences and of the institutions that constrains a judge's preference.[19] In sum, historical institutionalism does not deny the attitudinal belief that judicial actors often vote their policy preference nor does it deny that justices often act strategically within a relatively stable environment when making decisions. However, since this project understands American constitutionalism as a developmental phenomenon, it rejects the idea that there is a single explanatory variable to explain judicial decisions at any one time. This study, like other historical institutionalist and APD studies, will examine longer periods and will emphasize how the construction of authority is formed, shaped, and changed.

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[17] Jeffrey Segal and Harold Spaeth. 1993. *The Supreme Court and the Attitudinal Model.* New York, NY: Cambridge University Press. This study is well-known for putting forth the 'attitudinal model,' which sees justices as voting their ideological preferences when issuing Court rulings. For rational choice institutionalists, justices seek to maximize their preferences in a complex setting; justices must bargain, compromise, and consider institutional structures (rules/norms) both internal to the Court and external constraints when seeking to achieve their preferences (Epstein and Knight 1998, Murphy 1964). Justices do not simply make decisions in a unidimensional context of ideological beliefs as behavioralists argue, rational choice scholars maintain. Rational choice studies focus on the "collegial game" by modeling the strategic behavior of justices to create majority coalitions (Maltzman, Spriggs II, Wahlbeck 2000).

[18] Howard Gillman and Cornell Clayton's edited volume *The Supreme Court in American Politics: New Institutionalist Interpretations* provides an excellent overview of the historical institutionalist research agenda. (Lawrence, KS: University Press of Kansas, 1999). Looking more specifically at the Court and American Political Development, the contributors to Robert Kahn and Ken Kersch's (2006) edited volume also embrace an historical institutionalist approach to Supreme Court politics.

[19] Paul Pierson recognizes the importance of studying politics as a long-term process. Pierson argues, "Contemporary social scientists are more likely to take a 'snapshot' view of political life" (Pierson 2005, 34). Too often, Pierson argues, social scientists focus on moments of specific policy enactments (or in this study's case specific Court decisions) thereby blinding scholars to what happens before and what happens after such decisions. Pierson, Paul. 2005. "The Study of Policy Development." *Journal of Policy History* 17: 34-51.

Organization of the Project

In chapter 2 I explain this project's research design and go into further depth about the scholarship to which this project contributes. My research design synthesizes the traditional and revisionist scholarship on law and state building discussed in the present chapter. To do this, my project moves beyond singular case studies of particular eras and constitutional issues and, instead, builds a dataset of constitutional law decisions spanning American history and constitutional issues.

The dataset samples the Supreme Court's landmark decisions, decisions that have had the greatest effect on constitutional and political development. This sample of decisions is derived from 58 constitutional law casebooks and treatises[20] published between the early 18th century and the present (following David Mayhew's [21] *America's Congress* methodology). The breadth of these casebooks helps to reduce the "hindsight bias" risked by basing a list of landmark decisions solely on the perceptions of contemporary scholars.

I code each decision using Bensel's (1990)[22] central state authority typology, a typology that comprises seven dimensions of central state authority. Each decision is also coded on a nominal scale of state authority.[23] With this method, I develop not only a stronger foundation on which to assess the Court's position toward the state but also uncover constitutional law cases once considered salient by legal scholars that contemporary scholars may have now forgotten. In sum, chapter 2 explicates "state authority." The collection of systematic empirical evidence on constitutional law will enable me to speak about law's influence on state development more confidently than previous studies.

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[20] I include only law school casebooks. The selection criteria is explained below.

[21] David Mayhew uses a similar methodology to explain the behavior of Congressional representatives' actions in the "public sphere." See David Mayhew, *America's Congress: Actions in the Public Sphere, James Madison Through Newt Gingrich,* (New Haven, CT: Yale University Press, 2000). Mayhew catalogued the "actions" of members of Congress in the "public sphere." To do so, Mayhew used thirty-eight secondary source history textbooks to identify 2,304 instances of members' actions in Congress.

[22] Richard Bensel. 1990. *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877*. New York, NY: Oxford University Press.

[23] This scale is discussed in the "Key Variables" section below in chapter 2.

Using this dataset, chapters 3 presents the findings. Chapter 3 overviews the data, discussing the seven central state dimensions—which decisions expanded the federal government and which restricted the central state. The chapter also reports the dimensions that more frequently lent themselves to expansion. The "citizenship" dimension, for example, constricted the federal government far more often than did the "administrative capacity" dimension. However, the main takeaway is that Court's decisions persistently expand and constrict national authority over time.

Chapter 4 builds on the data presented in chapter 3 by looking at the constitutional issues and framework that have justified expansion and restriction over time. It first begins with a section on dual sovereignty in the founding and early republic eras, a constitutional and political issue that contributed to the Court expanding and restricting central state authority. Moreover, this chapter discusses the Constitution's design and how constitutional design, especially of federalism, has facilitated and hindered American state expansion.

Chapter 5 then shifts focus on the Court and the emerging modern state, roughly the period 1870 to 1920—the primary era of modern state-building. In this era, issues of dual sovereignty and federalism came to a head where the federal government's glaring problem was to reduce individual state autonomy. This problem produced conflicts over competing models of federalism, with some calling for a state-centered model while others advocating a federally-centered one. Ultimately, as a constitutional and political issue, federalism moved the U.S. from the federation created in 1789 to a consolidated nation-state in the wake of the Civil War. Chapter 5 argues that constitutional law, and institutional development, does not follow a linear path but, instead, develops unevenly, producing a central state that is strong in some areas and weak in others. In particular, with its federalism decisions, the Court advanced commerce-related aspects of the central state while individual rights, especially in civil rights and labor decisions, constricted federal authority. Accordingly, I argue that the Court helped facilitate a compromise between race/labor and economics in American political

development during the emergence of the modern state. Doing so reconciled the call for economic nationalism with the call for a return to the state-centered federalism of the pre-Civil War era.

The final empirical chapter, chapter 6, places the Court within the broader central state ensemble, considering the Court's relationship with the other branches. This chapter's main question is how does the Court construct central state authority over time? From the data, we see that the Court has displayed diffidence in expanding its own powers, and instead has more often expanded the authority of the political branches. The Court's diffidence helps produce the expansion and restriction we see throughout time. Reticent to assert itself over the other federal branches, the Court's decisions over federal laws often lead to an expansion of the political branches. Similarly, the Court's reluctance to expand the reach and scope of the Constitution over state governments helps contribute to the restriction of the authority of the federal government. Chapter 6 explains some of the mechanism for this behavior and why the Court engages in it.

Conclusion

This dissertation contributes to the broader discussions of inter-branch politics and institutional development. The Court's constitutional evolution implicates it in the American state building project, a story that has largely been the told vis-à-vis the other major federal branches (the Congress, the presidency, and the bureaucracy). A closer look at the Court's hand in state expansion allows us to draw comparisons between it and the other major branches with respect to the substantive impact the Court has on central state power. Another contribution of this study is its emphasis on constitutional design and how this design shapes constitutional development.

More broadly, this dissertation revises our understanding that the Supreme Court was largely responsible for inhibiting state growth until 1937 when, finally, the Court accepted New Deal efforts to expand federal government powers. This interpretation juxtaposes Court power against other

political institutions, and, as such, overlooks the many ways the justices have acted as state-builders. The Court's constitutional interpretation did much to build a national government powerful in some areas while slowing it in others. To show that the Court did not mainly inhibit state expansion, I construct an original dataset of Court decisions—gathered from constitutional law casebooks published between 1822 and 2010. Each decision's effect on national governing authority is coded along seven different dimensions of the federal government. Thus, this dissertation speaks to literature that, first, reconsiders nineteenth century national state capacity, and, second, emphasizes the Court's role in advancing the national state.

Chapter 2: Literature and Research Design

Law and American Political Development

The Supreme Court's assumed opposition to regulatory state expansion, especially during the *Lochner* era has been the dominant narrative surrounding the Court and state-building. But APD scholars have viewed court power in opposition to other political institutions and state building for too long. Part of the reason for this rests on how APD scholars define "development" and on the time-periods that they study. Development turns on the creation of the social-welfare and regulatory state as well as on the creation of positive rights (i.e. obligations of the government to protect to citizens). Consequently, APD tends to focus on the Progressive and New Deal eras, critical junctures in the development of the modern state and positive rights. The problem is not that APD scholars have misinterpreted these histories. Instead, the problem is that they have defined the "state" (and the state powers the Court could advance) too narrowly. Because the Court opposed regulatory expansion in these critical junctures, the literature concludes the Court to be an obstacle to state expansion. When we look beyond these narrower conceptions, we find that court power has not persistently opposed other political institutions both during the emergence of the "modern" state and the periods preceding and proceeding it.

The historiography of constitutional development and state expansion pivots on two perspectives. The first perspective, "Progressive," views the Court as an inhibitor of state development because the Court invalidated federal and state laws that attempted to create a stronger welfare state. Charles Beard's *Economic Interpretation of the Constitution* typifies this "Progressive" school of thought. In it, he argued the Constitution "was essentially an economic document based upon the concept that the fundamental private rights of property are anterior to government and morally

beyond the reach of popular majorities."[24] American Political Development as a subfield—with its original intention to explain why the U.S. was a relative laggard in the creation of a centralized, social welfare state—has generally taken up the cudgels for Beard's interpretation. Certainly, Skowronek's *Building a New American State*—which has been held as an example of portraying the Court as an obstacle[25] interprets the Court's behavior through this Progressive lens.[26] In other words, the Progressive standard is the metric by which APD has evaluated the growth of the central state.[27]

In detailing the emergence of a "new American state" during the late nineteenth century, the scholarly work has emphasized the importance of elected officials responding to a variety of interests, from laborers to farmers to capitalist entrepreneurs (Sanders 1999). The Supreme Court, in contrast, is seen as the foe in these efforts in the pre-New Deal Era, as it gutted the Interstate Commerce Commission (Skowronek 1982, 154-156, 253), state-level workplace laws (Gillman 1993, 10-11), railroad regulation (Berk 1994), and laws designed to promote labor union formation

[24] Charles Beard quoted in William Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937* (New York, Oxford University Press: 1998), 256.

[25] William Novak "Legal Origins of Modern American State," in Austin Sarat, Bryant Garth, Robert Kagan, *Looking Back on Law's Century*, (Ithaca, NY: Cornell Press, 2002); John Skrentny, "Law and the American State" *Annual Review of Sociology* 32 (2006): 213-244; Paul Frymer, "Law and American Political Development." *Law and Social Inquiry* 33 (2008): 779-803.

[26] One of the primary reasons for the "the limits of America's achievement in regenerating the state through political reform," Skowronek argued was the "outmoded judicial discipline" spurred on by "the constancy of the Constitution of 1789." Skowronek concluded, "Forged in the wake of a liberal revolt against the state, the American Constitution has always been awkward and incomplete as an organization of state power" (1982, 287). Stephen Skowronek. 1982. *Building a New American State.* New York, NY: Cambridge Press.

[27] I elaborate on this Progressive interpretation of the Court in chapter 5, which looks specifically at the Court's role in state expansion during the turn of the twentieth century. Suffice it to say here that Beard did not invent the Progressive critique of law as an obstacle to state growth. Many of Beard's contemporaries joined him—people such as Louis Boudin (1932), J. Allen Smith (1930), Edward Corwin (1938), and Frank Goodnow (1911), and Gustavus Myers (1912). Boudin's *Government by Judiciary,* for example, claimed, "We are ruled by dead men . . . generations of dead judges" (Boudin 1932, viii). J. Allen Smith similarly indicted the Court's interpretation of constitutional law, declaring law's interpretation "inherent opposition to democracy [and] the obstacles which it has placed in the way of majority rule" (Smith 1930, vii). What these Progressive studies overlook is how a powerful judiciary advances the American state. These studies only measure state power vis-à-vis the creation of a European welfare state, but the centralization of decision-making authority in the judiciary should not be overlooked. So while the Progressive interpretation sees a strong judiciary, they understand this as an obstacle to state development. But, by doing so, the Progressives implicitly view the judiciary as separate from the central state.

(Forbath 1991, 59; Hattam 1993 chapter 4; Orren 1991, 208).[28] Accounts of the role of courts and state development of the post New Deal era continue to convey this perception, such as Jacob Hacker's work (2002, 296-7), which argues that courts discourage government activism in the realms of retirement and health insurance expansion.[29] These studies, however, often only examine defining moments in the Court's legal development, primarily the Progressive and New Deal eras. I suspect broadening the scope of study will yield more dynamic variation than these studies maintain.

Like political scientists, legal historians also depict the Supreme Court as a foe in the narrative of state development not just during the late nineteenth century but also after the New Deal. Bruce Ackerman's (1991, 1998), two volume, *We the People*, in particular, argues that during "normal politics"—the day-to-day operations of the political system where elected representatives make decisions for the "People"—the Court's role is "preservationist" across constitutional history (1991, 10). The Court, much like the political science literature posits, exerts a negative power on legal development whereby the Court's duty is to protect the "hard-won principles" achieved by the People during a constitutional moment. Moreover, he subscribes to a similar punctuated equilibrium model of constitutional development, dividing development into three "constitutional moments:" the Founding, Civil War Reconstruction, and the New Deal (1991, 59).

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[28] To be sure, studying the pre-New Deal Era, William Novak (1996) illuminates the myriad of ways in which courts have worked as bulwarks of the state by providing workers common law protections against employers and corporations that the national government refused to pass.

[29] Other studies of the post-New Deal era also depict courts as obstacles. Although his work does not speak directly to the APD community, Robert Kagan's (2001) study of "adversarial legalism" portrays an APD version of U.S. courts as an obstacle to expansions in the area of social regulation (e.g. environment, consumer protection, and health). Similarly Steven Teles (2006) has shown the restrictive impact of courts on state growth and development since the New Deal. He attributes this largely to the successes of conservative organizations using a litigation strategy to limit the national government. The idea of courts as obstacle to state development pertains mainly to a particular conception of the modern central state—one that is typified by social welfare provisions and increasing bureaucratic autonomy. Because of this conception of the state, APD studies have tended to focus on the late nineteenth century to the New Deal period, a reason that the courts as obstacles interpretation prevails in this period. Part of this project's purpose, then, is to recognize other forms of the national state which the Court helped build and to apply APD's focus on statebuilding to other historical periods.

To be sure, the Court has not constrained federal expansion writ large. Exploring various policy areas' influence on central state expansion would be a useful way to capture these differing effects on national state development. One way to do this might be to categorize each judicial decision along more specific policy areas than the present central state authority framework allows.

Rebutting Beard and the Progressive interpretation, Charles Warren (1922) represents the second perspective, defending the Court's decisions. He analyzed 790 state police power and tax decisions handed down between 1889 and 1918 and discovered that only 53 invalidated police-power regulations, and of those, only 14 involved what he called "the general rights and liberties of individuals" (Warren 1922, 741). Scholars in this camp have attempted to revise history by relocating quintessentially "anti-Progressives" like Justice Stephen Field and Judge Thomas Cooley in the context of their era and to dissociate their ideas from "shorthand caricatures" [30] of Progressive/liberal historiography.[31]

In Warren's camp, but more contemporary (and thus in direct conversation with American Political Development), are revisionist studies like William Novak's (2002, 2008). Looking at 1877 to 1937, he maintains that law and courts were not the "great bogeymen of liberal reform," persistently frustrating modern welfare state building (Novak 2002, 251). Contrary to the progressive narrative, Novak contends that American public law was a "font of creative energy" at the state and local level, and therefore crucial to the development of the modern American state—a state comprised of a centralized, administrative, and regulatory government (Novak 2002, 260). Additionally, Paul Frymer's (2008) and John Skrenty's (2006) review articles join Novak's broader argument about uncovering the way law has acted as a positive force toward (as opposed to an obstacle toward) American state-building.[32]

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[30] Wiecek, *The Lost World*, 255. For a thorough historiography of the legal ideologies dominant on the Supreme Court between 1886 and 1937 see Wiecek's Appendix in *The Lost World*.

[31] For example, Michael Les Benedict's study of the ideological foundations of laissez-faire constitutionalism rests less on class-based motivations and greed of a governing elite and more on an ethical libertarian foundation expounded by Progressive Era "moral philosophers" such as Francis Wayland and Amasa Walker. Michael Les Benedict "Laissez-Faire and Liberty: A Reevaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," *Law & History Review* 3, 293 (1985): 293-331.

[32] Paul Frymer (2008) notes APD scholars' "skepticism of courts," which leads APD scholars to go "too far in juxtaposing court power against other political institutions and . . . miss the important ways that courts contribute to the development of state power" (Frymer 2008, 789). Additionally, in an *Annual Review* article, sociologist John D. Skrentny concurs with Novak and Frymer: "I argue here for increased attention to the positive role of law and courts in policymaking and statebuilding" (Skrentny 2006, 214). Indeed, he also maintains that studies of the Gilded and

In the end, these rather narrow understandings of development muddy our view of the Court's role in state-building. The progressives—who implicitly define "development" or "expansion" as enhancements to the welfare state—naturally see the Court as constraining state development. Those in Novak's and Warren's camp, meanwhile, are not as concerned with questions about state development but instead seek to push against this progressive narrative. Still, even these revisionist studies pivot on a welfare-state conception of state expansion. Although Novak does address state development, his study focuses on *how* and *where* scholars can locate the Court's positive role in state development rather than on actually showing us that the Court does, in fact, do so.

What is more, the idea of the Court as an obstacle does not stem just from its behavior during the emergence of the modern state. It also stems from the more general view that the American (federal) constitutional tradition has been built upon principles of limited government and negative rights (i.e. rights devoted to the restraint of government) (Hartz 1955). The negative character of American rights is often attributed to political culture and to American's deeply rooted suspicion of government (Schauer 2005, 46), which has led us to conceptualize the Court as a persistently limiting institution (Zackin 2010, 33-34). Like APD depictions of the state, the negative rights tradition centers primarily on welfare-state rights thereby viewing the Court as an obstacle to development. But while the Supreme Court has embraced a largely negative reading of constitutional (individual) rights, it still has contributed a great deal to the positive expansion of the central government's right to coerce and aggrandize power. Therefore, it is important for to ask, to what end has the Court been an obstacle? And to what end has it expanded central state power?

Despite these varying perspectives, they all adhere to the same punctuated periodization and to the same definition of the "state." Yet there is still no broad consensus on the Supreme Court's

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Progressive Eras (citing Skowronek 1982) and "national welfare state studies" (citing Orren 1991; Forbath 1991; Hattam 1993) view the courts as "crucial actors but are typically an obstacle to growth and development" (Skrentny 2006, 218).

role toward the state's authority and development. As such, my study seeks to take a wider approach to understanding the Court's position toward state-building and state authority by explicitly coding the Court's leading constitutional law decisions across issue areas and across American history. In doing so, I take a more dynamic view of constitutional development and seek to show that broad characterizations of, for example, the Progressive Era Court as an inhibitor to state development or, alternatively, the 1960s as a period of persistent positive lawmaking power, miss important variation. Moreover, in taking a wider approach to constitutional development, I uncover how the Court developed central state authority during moments studied less by APD scholars—that is, pre-twentieth century constitutional development. Thus, I attempt to offer a more comprehensive analysis of the Court's role in state development and bring law into APD's theoretical core of state autonomy and institutional apparatuses of power

Developmental Explanations

This project's focus is on the outcomes in terms of the collective decisions handed down by the Supreme Court, and these outcomes are explained with an emphasis on the intricacies of law, precedent, and constitutional design.[33] There are three interrelated explanations that contribute to American constitutional development's tendency toward expansion. These three explanations work in tandem to cause many of American's most important constitutional and political outcomes. At the same time, these three explanations will relate to each other differently during different moments of constitutional development. Shifts in the state-building project largely rests on these three

[33] Accordingly, this study's theoretical approach is not competitive with reigning political science theories of judicial decision-making—the attitudinal model (Segal and Spaeth 1993) and the governing coalition model (Dahl 1957)—because they focus on the decisions of individual justices. Both models could fully explain the decisions in my data and, at the same time, offer explanations for how justices make up their minds that would be fully compatible with my approach. For example, if justices always preferred, for whatever reason, to hand down rulings that were fully aligned with precedent (because they were very "conservative"), the attitudinal model would constitute a satisfactory explanation for both those decisions and complement my approach.

explanations. This section briefly overviews the explanations as well as outlines expectations derived from the literature.

Institutional Explanation: This explanation recognizes that the Supreme Court (and the rest of the central state) will grow in strength exponentially over time due to constitutional design. We see this argument in the early republic with the debate between Brutus and Publius (Hamilton)[34] and we see this in the contemporary work of Martin Shapiro (1981).

Legal Explanation:[35] The Court operates legally. It limits central state authority where the Constitution and precedents dictate it should. It expands central state authority where the Constitution and precedents permit it to do so. Here, again, constitutional design makes some parts of the central state amenable to expansion (e.g. Commerce Clause) while prohibiting power in other parts (e.g. criminal rights). That particular areas of the law are more susceptible to expansion is an explanation founded in both legal historical and American political development scholarship.[36]

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[34] As I discuss in Chapter 4, the constitutional framers laid the foundation for the institutional expansion of the federal branches. Among the framers, Hamilton was the "premier state-builder in a generation of state-builders" (Kramnick 1987, 67). Hamilton's zeal for a strong central state came together in his writings on the American presidency. The presidency, for Hamilton, was at the heart of the new American state (Kramnick 1987, 70). More than that, Hamilton's desire for an expansion of central state authority fulfilled his fantasies of grandeur and the glory that history accords to empire builders. In *Federalist* 11, he discussed "what this country can become," and the glories for an America of a "striking and animating kind." He wrote, "Under a vigorous national government, the natural strength and resources of the country, directed to a common interest, would baffle all the combinations of European jealousy to restrain our growth" (Federalist 11). Hamilton's beliefs were emblematic of the fervor for a strong central government that many of his fellow framers helped put in motion.

[35] The "legal explanation" has its foundations in a theoretical approach to the study of law and courts rather than in specific scholars. In fact, the "legal" approach encompasses much of what Shapiro's body of scholarship sought to debunk: assuming that the legal features of courts distinguished them from conventional political institutions. In contrast to the legal approach, Shapiro's work, broadly speaking, viewed American politics as made up of many centers of decision-making and asked how courts fit into these decision-making centers (Gillman 2004, 364-5). See Gillman's 2004 *Annual Review* article on Shapiro for a longer discussion (363-82). Additionally, Howard Gillman's (1993) *Constitution Besieged* demonstrates the importance of law and precedent in explaining constitutional development. He finds that the decisions of the *Lochner* era were not the product of "Neanderthal justices" advancing their preferences for laissez-faire constitutionalism but rather, "a principled effort" to uphold a legal distinction having its foundations far before the *Lochner* era. Substantive due process during this era, according to Gillman, reflected "an overarching set of well-established legal doctrines and principles governing the legitimate exercise of police powers" long before laissez-faire ideologies were dominant among America's legal and political elites (1993, 177).

[36] Paul Frymer (2008) has shown the ways in which the Court helped build and expand the state's power in the realm of labor law. He argues, "[J]udges, lawyers, administrators, as well as the rules and procedures that define and influence

Historical Context Explanation: The Court, for example, expanded central state authority in the Early Republic when the new state was vulnerable. The Court also expands central state authority during wars because the state (and the nation) are threatened and thus new expansions of power become engrained in American political culture.[37]

Expectations of Development

In arguing that some areas of the law are more susceptible to expansion than other areas, I am supporting a broader theoretical argument: that law develops non-linearly (Kersch 2004; Wilson 2008, 4). Non-linear development understands the tensions and contradictions inherent in constitutional adjudication, which might lead the Court to advances the state in one area of law while constricting the state in another area of law.

Nevertheless, the conventional, more-linear narrative of the Court argues that the judiciary hindered American state development from (roughly) 1880 to 1937, and in 1937, the courts accepted and welcomed the expansion of state power; and finally, by the 1960s, courts took major steps to expand the authority of the federal government (Schwartz 1957; Horwitz 1992, 1998; McCloskey 2004, Leuchtenburg 1995). This conventional narrative, while having much validity, overlooks some of the nuances in the multiple Supreme Court eras of America's history. The data collected in this project will begin to asses some of the expectations regarding when and where the Court expanded state authority such as:

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their actions were absolutely vital to integrating labor unions during the latter stages of the twentieth century" (Frymer 2008, 75). Similarly, Gillman (1997) shows how changes in constitutional interpretation helped advance the modern American state. He argues that the Court largely abandoned its doctrine of originalism during the New Deal era in order to "cope with the innovative challenges of managing a national industrial economy" (Gillman 1997, 192-3).

[37] Geoff's Stone study of free speech makes this argument. *Perilous Times: Free Speech in Wartime from the Sedition Act of 1789 to the War on Terrorism.* (New York: W.W. Norton & Company, 2004).

1. The Supreme Court aggressively expanded state authority during the Early Republic when the Court itself was politically vulnerable (Newmyer 1986, White 1990, Ellis 2007).
2. The Court more likely expanded central state authority at a greater rate after the mid-1930s than before by allowing for the delegation of authority to the bureaucracy and by expanding the scope of civil liberties and rights (Konvitz 1966; Horwitz 1998).
3. It also impeded state expansion most frequently at the turn of the twentieth century when it resisted the growth of administrative agencies (and the broader central state) (Skowronek 1982).

A wider collection of empirical evidence, however, will enable me to confirm or disconfirm these developmental expectations and will provide stronger foundation upon which to assess the conventional narrative. More than that, a wider collection will allow us to better understand the Court's effect on developing national government powers in the nineteenth century. The empirical evidence used to assess these expectations is the focus of the next section.

Dataset Construction

This section explains how I selected the judicial decisions and coded the variables in the dataset, but first a word on the theoretical foundation of the dataset. It adopts Richard Bensel's (1990) "central state authority framework," which he grounds in the traditional understanding of a Weberian "state" in order to measure central state power.[38] Recent studies, however, suggest that

[38] Governmental organization and policymaking are routinely measured against Weber's chief characteristics of modern statecraft: (1) a rationalized and generalized legal and administrative order amenable to legislative change; (2) a bureaucratic apparatus of officers conducting official business with reference to an impersonal order of administrative regulations; (3) the power to bind—to rule and regulate—all persons (national citizens) and all actions within the state's official jurisdiction via its laws; and (4) the legitimate authority to use force, violence, and coercion within the prescribed territory as prescribed by the duly constituted government. Evans, Rueschemeyer, and Skocpol (1985) *Bringing the State Back In.* See especially Skocpol's introduction to the volume.

students of the American state should move away from the tradition Weberian understanding and toward understanding the central state in action, but these suggestions are not well-suited for studying the Supreme Court.[39] This dataset applies a Weberian conception to judicial decisions for a number of reasons. First, coding individual judicial decisions necessitates a delimited, explicit definition of state authority rather than the more nebulous concepts put forth by the revisionist strand. Second, and more importantly, the business of the Court involves the specification of state *authority* and, as such, my project fits within the Weberian framework—a judicial ruling only formally bestows (or diminishes) state authority through a text; it does not involve the implementation or government in action understanding of the state embodied by the revisionists. Last, the competing explanations in the literature that I wish to engage have held the Supreme Court responsible for either increasing or decreasing authority in this Weberian sense.

The Supreme Court's position as a central state actor poses a difficult conceptual problem for understanding its role in national state expansion. In particular, it can be argued that each time the Court issues a decision—no matter the case outcome—it expands national state authority simply because the Court itself is a central state actor. To address this conceptual problem, this project distinguishes between a substantive understanding of the aims of the national state and the jurisdictional understanding of the Court when it decides which branch has the right to decide what the central state does. The interpretation that each judicial decisions represents a positive expansion of the national state (vis-à-vis the Court) makes little sense because this interpretation would often result in ignoring the substantive policy aims of the statute under Court review.

[39] Revisionists uncover American state growth and strength by looking at some of the unique features of the American state that while not "strong" according to the European understanding of the state, still demonstrate the power of the American federal government especially in collaborating with lower level governments. This revisionist trend concerns itself with uncovering state growth by looking at "state capacity" (as opposed to "authority"), that is, government in action, which uncovers the ways in which the state, in practice, implements its policy goals (Novak 2008, 762-763; King and Lieberman 2009, 568-569; Hacker 2002; Johnson 2007).

Take *Citizens United vs. Federal Elections Commission* (2010) for example. Here the Court reviewed a challenge to the federal Bipartisan Campaign Reform Act, an act which sought to regulate "big money" in federal campaign elections. In a 5-4 decision, the Court ruled that Congress may not prevent corporations or unions from spending money to support or oppose individual candidates because this form of spending qualifies as a kind of protected speech. By invalidating part of this Congressional statute, the Court weakened the authority of actors in the central state (the Federal Electoral Commission and Congress) to regulate parts of society. Thus, *Citizens* represents a restriction on national governing authority. If we understood every Court decision as an expansion of national authority, however, then we would misinterpret decisions such as *Citizens* that very clearly undercut national authority to control society. While it is true that jurisdictionally the Court determined it had the power to hear this case, substantively the Court's decision did far more to restrict central state authority than advance it by its mere assertion of jurisdiction.[40]

Constitutional Casebooks and Treatises

To demonstrate the Court's multifaceted relationship with central state authority, I compiled a list of landmark constitutional law decisions. No two scholars, however, agree on the same list of landmark decisions (i.e. the constitutional law canon). This canon, as Keith Whittington and Amanda Rinderle note, "is neither timeless nor natural" (Whittington and Rinderle 2012, 5). Given the ever-changing nature of the canon, my project required a research design that allows me to construct a relatively unbiased list of landmark decisions. I derived my decisions from fifty-eight

[40] This same logic applies when the Court reviews state and municipal-level statues, too. In *Kelo v. City of New London* (2005), for example, the City of New London used its eminent domain authority to seize private property to sell to private developers. The property owners challenged New London's property taking, arguing it violated the Fifth Amendment. However, the Court declared that New London did not violate the Fifth Amendment and thus the city's land taking could continue. Because the Court held that a federal constitutional right did not apply in this case, substantively this decision restricted central state authority from protecting these property owners. Like in *Citizens,* a pure jurisdiction interpretation of national power (that is, the Court decided to rule), would overlook the more accurate interpretation and substantive effect of *Kelo*: that it restricted the application of federal protection and thus authority.

constitutional law casebooks and treatises[41] published between 1822 and 2010, following David Mayhew's[42] *America's Congress* methodology, which is detailed further below in Figure 1. The breadth of these casebooks mitigates the hindsight biases associated with creating a list of landmark decisions grounded in the opinions of contemporary scholars.[43] These landmark decisions were the basis upon which to discuss the constitutional foundations of the American state. Each decision is interpreted along the seven dimensions[44] outlined above in order to discover the Court's overall influence on central state authority. With this method, I developed not only a stronger foundation on which to assess the Court's position toward the state but also uncovered constitutional law cases once considered salient by legal scholars that contemporary scholars now consider superseded or defunct.

The main selection criteria for the fifty-eight constitutional law casebooks was their influence on the instruction of law students. The Appendix lists, in chronological order, all the casebooks used

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[41] I include only law school casebooks. The selection criteria is explained below.

[42] I explain Mayhew's methodology below.

[43] External validation of the cases selected is an important issue because I do not want to select decisions that only lawyers think are salient. The sample of cases should not just represent the casebooks selected but also should represent what the Court and other communities think are important, too.

While the casebook design used in this project relies upon what *legal* scholars view as important, the decisions extracted using this design also dovetail with non-legal scholars' opinions, too. In particular, Jerry Goldman conducted a study in 1992 of twelve leading constitutional law casebooks authored by both legal scholars *and* political scientists used in undergraduate classrooms. He attempted to identify a constitutional law canon—"a widely accepted body of rules, principles, and norms exemplified in a common set of Supreme Court opinions" (Goldman 1992, 134). Like my research, Goldman found very little overlap in the cases that comprise these casebooks (Goldman 1992, 137). In 2005, he conducted a similar study of thirteen casebooks authored by political scientists for undergraduate teaching. Using his loosest definition of "canonical," Goldman identified 49 constitutional law decisions. My database includes 46 of his 49 decisions. While this is not sufficient external validation of my case selection, it begins to show that the cases identified by my method are not systematically biased by lawyers' own educational experiences and their intellectual beliefs.

A more thorough form of external validation (and identification of landmark decisions) would examine the citations counts of Supreme Court decisions over time. On using citation counts as a form of identifying landmark decisions and precedent, see Ryan Black and James Spriggs. 2013. "The Citation and Depreciation of U.S. Supreme Court Precedent," *Journal of Legal Empirical Studies* 10 (2): 325-358. As a way to link Supreme Court decisions to lower federal and state courts' behavior, I could use Westlaw or LexisNexis legal databases to gather citation counts for all the decisions in a given Supreme Court term. Doing so would allow me to see if the cases identified by my research design are also cases that the Court (and lower courts) frequently cite as precedent.

Finally, I could cross-check some of my case selection with other scholars' indicator of case salience. Lee Epstein and Jeffrey Segal have a measure of Supreme Court case salience for the 1946 to 2009 terms; their measure relies on cases appearing on the front page of the *New York Times*. See Lee Epstein and Jeffrey Segal. 2000. "Measuring Issue Salience." *American Journal of Political Science,* 44 (1): 66-83.

[44] Bensel, *Yankee Leviathan*. See Part C in the Appendix for a description of all seven dimensions.

to construct the dataset; these are all the earliest editions of a casebook/treatise. The books selected are considered some of the most important treatises and casebooks of constitutional law.[45] In each instance, the first edition was consulted because many of the casebooks are still in print and used throughout the most prestigious law schools in the U.S. In addition to using first editions of each book, I distributed casebooks fairly evenly across American history (weighted toward the present-day) and chose only casebooks used to train lawyers; I selected books that were used to train legal actors, individuals who would most likely shape the development of American law. Moreover, I also selected books for their wide use in current law school curricula. Most, if not all, the major casebooks currently used in law schools are represented on my list (Sullivan and Gunther; Brest et al.; Choper et al.; Stone et al.; and Varat et al.). The authors of these major casebooks often use their books in their respective institution. And, of course, these authors have taught at some of the most well-regarded law schools around the country—Yale (Balkin), Stanford (Brest and Sullivan), Texas (Levinson), Choper (Berkeley), and Varat (UCLA). The casebook list thus includes the most authoritative and contemporary casebooks used to teach constitutional law.[46]

This project created an original dataset, spanning America's history, coding judicial decisions for their importance toward constitutional law as well as their relationship toward central state

[45] I have accessed syllabi, where possible, from leading law schools as well as explored a widely-read legal academic blog regarding the selection of casebooks for constitutional law classes: "Choosing a Constitutional Law Casebook" http://prawfsblawg.blogs.com/prawfsblawg/2007/05/choosing_a_case_1.html accessed 23 June 2014. I have included all the casebooks referenced in this blog entry.

[46] Because I am unable to include *all* casebooks ever published, there is a selection effect on the casebooks included in the database. This concern pertains especially to the latter part of twentieth century when casebook publication proliferated. Accordingly, I selected more casebooks from the twentieth century to mitigate this problem (see the distribution of casebooks in Figure 2 below). Still, a great deal of books have been omitted. The omission of these books is less of a problem considering that there is a large consensus, *in a given era*, of what comprises landmark decisions. From the link in footnote 45, it appears that the law schools, in a given period, use only a handful of casebooks to teach constitutional law. I have included what seems to be the most widely-used casebooks. Nevertheless, to fully counter concerns of selection bias, it will be important to obtain sales records and the specific number of law schools using these books. Another way to assuage selection bias problems would be to uncover the case listing for a handful of books excluded and see if these case listings differ widely from the case listing of the books chosen for inclusion.

Concerns over casebook selection resemble concerns over individual case selection: that the method biases against selecting a representative sample of decisions from the population. Thus, showing that these decisions—and the books used to extract these decisions—are, in fact, viewed as landmark decisions by broader communities would properly solve both selection bias issues (i.e. addressing the external validation concern in footnote 43).

authority (expanding, restricting, or neutral). Following David Mayhew's (2000) *American Congress* dataset construction style, I used secondary source constitutional law casebooks (textbooks used to teach constitutional law in law schools) in order to collect my observations. In his book, Mayhew sought to catalogue Congressional members' "actions" in the "public sphere." To do so, Mayhew used thirty-eight secondary source undergraduate history textbooks to identify 2,304 instances of members' actions in Congress. From this database, Mayhew offers insight on a variety of Congressional public actions, from the nature of congressional opposition to presidents and the surprising frequency of foreign policy actions to the timing of important activity within congressional careers (and the way that term limits might affect these behaviors).

In a similar sense, I assembled a dataset of Supreme Court cases from dozens of constitutional law casebooks published between the late-nineteenth century and the present day. The publications of these casebooks began in the mid-1800s when universities started to offer law degrees. [47] Accordingly, the legal community considers these casebooks authoritative and representative of the important decisions spanning America's constitutional history. Indeed, many of the casebooks used in this study have appeared in many revised editions thereby indicating the legal community's high regard for these sources. To represent the period before the rise of casebooks, I incorporated widely read legal treatises, such as James Kent's (1826) *Commentaries on American Law* and Joseph Story's (1833) *Commentaries on the Constitution of the United States,* in my casebook list (see

[47] Dean of Harvard Law School, Christopher Columbus Langdell, instituted the now-prototypical three year casebook method law school curriculum in 1876. Langdell's casebooks were excerpts of actual cases arranged to illustrate the principles of law and how law developed. As a result, writes Lawrence Friedman in his seminal *A History of American Law,* "the classroom tone was profoundly altered" (Friedman 2005, 468). Before the rise of law schools, legal education took place through apprenticeships: "Most lawyers gained their pretensions by spending some time in training in the office of a member of the bar. . . . For a fee, the lawyer-to-be hung around an office, read Blackstone and Coke and miscellaneous other books, and copied legal documents" (Friedman 2005, 238). See Friedman p. 238-241 for an overview of legal education in America until the mid-19th century.

Appendix). Legal treatises were the primary way individuals learned how to practice law before the advent of law schools.[48]

The first step in creating the dataset was to create a single, alphabetical list *all* the cases found in each casebook's index in an Excel spreadsheet. This list comprised the far left column in the Excel spreadsheet (see Figure 1 below). When a casebook distinguishes[49] "principal" cases in its index, I listed only the "principal"[50] Supreme Court cases in the far left column of the spreadsheet. If the casebook did not distinguish among cases then I listed *all* cases found in the index. Each column within the spreadsheet represents the author of one of the fifty-eight casebooks. From left to right, the columns are listed chronologically. If a case appeared in casebook, I placed a "1" in the cell; if a case did not appear in the book, I placed a "0" in the cell. Figure 1 is a representation of this method:

[48] There is a well-documented history regarding the evolution of American legal education. For an extensive overview of this literature, see Hugh C. MacGill and R. Kent Newmyer's chapter in *The Cambridge History of Law in America, Volume II* (*1789-1920*): "Legal Education and Legal Thought, 1789-1920 (p. 36-67). Of particular importance to American legal education, MacGill and Newmyer note that through the War of 1812 most of American law students educated themselves by reading primarily English treatises, especially Sir William Blackstone's (1764) four volume *Commentaries on the Laws of England*. They maintain that, up until the 1870s, Blackstone "did more to shape American legal education and though [more] than any other single work" (MacGill and Newmyer 2008, 40-41). Nevertheless, American treatises like James Kent's (1826) *Commentaries on American Law* because progressively widely used (MacGill and Newmey 2004, 43). MacGill and Newmeyer note that several developments—among them, the steam press, cheap paper, and the establishment of subscription law libraries—enabled wide circulation long before the advent of law schools in the 1870s: "The treatise tradition, which did so much to shape law-office education, also greatly influenced the substance and methods of instruction in early law schools" (2004, 44).

[49] Casebook editors most frequently distinguish principal cases by italicizing the case name in the index.

[50] "Principal cases" are the Supreme Court decisions quoted and discussed at length in a casebook whereas non-principal cases are merely cited in a footnote or parenthetical within the casebook. An average casebook discusses anywhere between 100 to 500 principal cases.

Figure 1: Example of Casebook Listing Method

Case:	Sergeant, Thomas 1822	Pomeroy, John 1868	Cooley, Thomas 1880	Boyd, Carl 1898	Hall, James 1913	Wambaugh, Eugene 1915
Abate v. Mundt	0	0	0	0	0	0
Abby Dodge, The	1	0	0	0	0	0
Abercrombie v. Dupuis	1	0	0	0	0	0
Ableman v. Booth	0	1	1	0	0	1
Abood v. Detroit Board of Ed	0	0	0	0	0	0
Abrams v. US	0	0	0	0	0	0
Adair v. United States	0	0	0	0	1	0
Adams v. Brenan	0	0	0	0	1	0
Adams v. Chicago, B & N R. Co.	0	0	0	0	1	0
Adams v. Hackett	0	1	0	0	0	0

Note and Sources: Compiled by author. This graphic represents a microcosm of the larger database, but these decisions and casebooks appear in the Excel case-listing in actuality. The far left column are the cases, and the remaining columns each represent a casebook (author and year of publication).

Once all cases were listed, I noted the overlap of cases across the books; the cases cited most often *across* books will be considered leading decisions in constitutional law. Using this case listing method, I extracted 12,192 total cases from these fifty-eight casebooks and treatises of which the vast majority were not Supreme Court cases. Moreover, 8,391 of these 12,192 cases were cited in only one book.[51] From this collection, I selected the 388 decisions (of which all but four were Supreme Court cases) that overlapped across the books eight times or more, which produced an even distribution across history and thus ensured the dataset captured sufficient variation.[52]

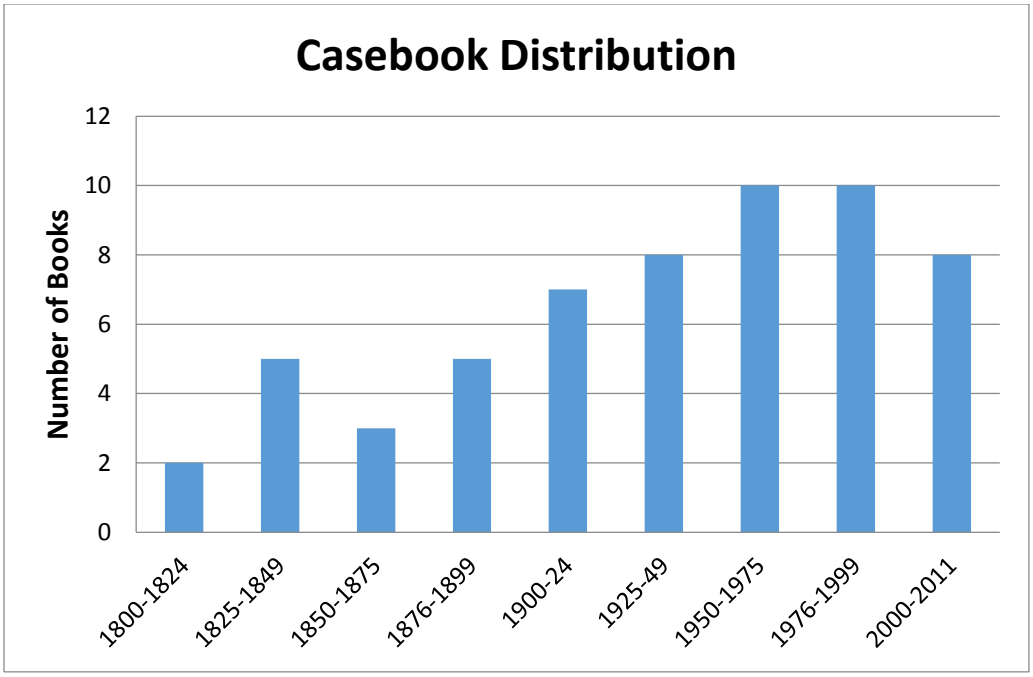
While the list is weighted toward contemporary casebooks, I drew from almost two centuries of casebooks. Drawing casebooks across two centuries' time allows me to track changes in the

[51] This might indicate something about the canon—or lack thereof—of American constitutional law. For a discussion the different kinds and objectives of constitutional canons, see Jack Balkin and Sanford Levinson. 1998. "The Canons of Constitutional Law." *Harvard Law Review* 111 (4): 963-1024.

[52] This eight-book cutoff number produced a manageable-sized dataset as well as prevented biasing against decisions that were handed down later in American constitutional history. The selection criteria intentionally ends the case sample date at 2000, but the casebook sample date ends in 2000. As eight casebooks appear after 2000, a decision in, say, 1999, would have to appear in all casebooks in the 21st century in order to appear in the dataset. Since over 8,000 of the just over 12,000 cases appeared in only one casebook or treatise, a decision appearing in eight or more books proved to be a relatively high rate of appearance.

constitutional law canon; I chose casebooks across time beginning with the earliest publication I could find (1822) and ending with the most recent (2010). Figure 2 is a graphical illustration of the distribution of casebooks used in the dataset.

Figure 2: Casebook Distribution (N=58)



Note and Sources: Compiled by author. This is the distribution of the 58 casebooks and treatises from which I derived the landmark decisions in my database. The selection criterion for these books is outlined above.

Key Variables

After identifying the judicial decisions that constituted the dataset, I coded for several variables. There are three central variables to the dataset: "central state dimensions," "impact on state authority," and "constitutional issue area." To determine if a judicial decision expanded or constrained central state authority, my project followed Bensel's (1990) seven-point central state authority framework (see Table 1 below).

Central State Dimension and *Impact on State Authority*

The "*central state dimension*" variable, listed in Table 1, categorized the seven areas of the state that could be affected by a judicial decision. These dimensions of state authority identify the specific policy area that the Court expanded or restricted in particular decision. This variable is a nominal variable coding of the seven areas of the state potentially expanded-restricted by a judicial decision. I aimed to capture variation in areas of the state that the Court expanded-restricted in particular eras of American history. This variable allows me to say, for example, what areas of the state the Court expanded/restricted in the early republic, in the New Deal Era, in the regulatory era, and so forth.

"*Impact on state authority*" measured whether a judicial decision expands, restricts, or remains neutral towards central state authority. This measure consists of three points. "-1" represents a judicial decision that restricted state authority; "0" represents a decision that is neutral toward state authority; "1" is a decision that expanded some aspect of state authority. I will code the "impact on state authority" -1/0/1 for each of Bensel's seven dimension of central state authority for every judicial decision. A decision that enhances any one of Bensel's (1990) seven dimensions of the central state receives a "1" in my coding scheme while a decision that restricts any one of the following dimensions receives a "-1" (see Table 1 below). However, the coding is not additive (e.g., expansion on two dimensions does not necessarily mean that the decision had a greater effect on state authority than a decision that expanded only one dimension).

Most importantly, I restricted coding to the text of the majority decision for three reasons. First, that was the form the decision was rendered in at the time it was issued (avoiding anachronistic readings from later periods when the meaning of the decision may have changed). Second, Court opinions are not only public rationales for a ruling because they also serve, as bureaucratic rulings, to guide the decisions of the lower courts and, at some remove, litigants generally. Moreover, when political institutions and legal actors respond to the Court they are

responding to the directives found within the Court's formal decision thereby necessitating I restricted my coding to the text of these decisions. And, last, I am interested in the relationship between Court rulings (as formal statements of constitutional interpretation) and the actual impact of these rulings on the practice of government. If I conflated formal statements with the impact on governance then it would difficult study this relationship. For example, *Brown v. Board of Education*[53] (1954) meant one thing as a formal interpretation of the Constitution and quite another, for a decade or more, in terms of its impact on government practice. Ultimately, the business of the Court involves the specification of authority, and the Court can only bestow (or diminish) this authority through a text.

The areas of the central state are derived from Bensel's work on the origins of central state authority in America.[54] This project uses these seven dimensions as the interpretative framework through which to assess a constitutional decision's effect on central state authority as well as to discuss the primary findings of these data. Any decision that advances/constricts one or more of Bensel's seven dimensions is interpreted as expanding/restricting overall state authority. Table 1 enumerates Bensel's exhaustive central state dimensions.

Table 1: Bensel's Dimensions of Central State Authority[55]:

> ***1. Centralization of authority:*** Measures involving the transfer of decision-making authority from subordinate governments and the citizenry to the central state; in the case of individual citizens, such measures do not involve a substantive expansion of central state activity but, only, the allocation of influence and control over that activity. In the case of subordinate governments, such measures include the review of subordinate government decisions by central state institutions and the form of subordinate government participation in central state decision making.
> ***2. Administrative Capacity****:* measures involving a broadening or narrowing of bureaucratic discretion and long-term planning capacity within the central state; these measures affect only

[53] 347 U.S. 483
[54] In his study, Bensel compares Union and Confederate state strength along "seven dimensions of central state authority." *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877* (New York: Cambridge University Press, 2004, p. 114).
[55] The following section is taken directly from Bensel (1990, 114).

institutions within the central state itself; in analyzing policy, reference is made to a hierarchy based on relative insulation from societal or outside political influence.
3. Citizenship: measures involving the religious practices, political beliefs, ethnic identity, and rights and duties of citizens in their relations with the state; this category excludes measures affecting property but includes all measures concerning the physical movement and labor of citizens (such as conscription).
4. Control of property: measures involving the control or use of property by individuals or institutions other than the central state itself, including expropriation, regulation of the marketplace, and labor contracts between private parties.
5. Creation of client groups: measures that increase the dependence of groups within society upon the continued existence and viability of the central state; includes only measures that provide income or income substitutes to individuals (pensions, employment by central state institutions, welfare, and price-control programs for specific groups in society), that establish future-oriented obligations that depend on state viability (the issuance of long-term debt), and that control the value of the currency (the gold standard and redemption of paper money).
6. Extraction: the coercive dimensions of material resources from society into the central state apparatus; extraction measures skim wealth and resources from the flow of commerce and marketplace transaction without significantly redirecting or influence the volume of these transactions (unlike otherwise similar measures falling under the property, client-group, or world system dimensions); primarily forms of light taxation or manipulations of the financial system such as gradual inflation of the currency.
7. The central state in the world system: measures concerning the relationship of the central state and nation with other states and the world economy; these include access to foreign markets (licensing, import quotas, export subsidies, and tariffs), diplomatic relations (membership in international organizations, treaties, and military conflict), immigration restrictions, and broadly conceived polices of internal development (the construction of a railroad to the Pacific Ocean, the Homestead Act, and administration of territorial possessions).

Notes and Sources: Richard F. Bensel. 1990. *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877*. New York: Cambridge University Press (p. 114). Bensel uses this "exhaustive" list to measure the comparative strength of the Union and Confederate states.

The unit of analysis in my dataset is the judicial decision. In other words, the row in my dataset is the decision. After collecting these data, I analyzed them in the context of the institutional development of the Court as well as within the broader development of the emergence of the modern central state.

Constitutional Issue Areas[56]

The issue area comprises seven legal issues adapted from Harold Spaeth's widely-used Supreme Court Database.[57] Although this is a broad variable (with multiple issues existing in any

[56] These issue areas, and their definitions, are derived from the "Issue Area" variable of Harold Spaeth's Supreme Court Database. Accessed here: http://scdb.wustl.edu/documentation.php?var=issueArea

given case), the constitutional issue represents the most central legal issues in a given decision as gleaned from the casebooks and from the treatment according to the LexisNexis "headnotes" and summary. Like the central state dimensions, the constitutional issues consist of an exhaustive list of issues that may arise under U.S. constitutional law.

Table 2: Constitutional Issue Areas

1. Individual rights:

I. **Criminal procedure** encompasses the rights of persons accused of crime, except for the due process rights of prisoners. Such as: involuntary confession, habeas corpus, plea bargaining, search and seizure, self-incrimination, contempt of court, Miranda warnings, right to counsel, cruel and unusual punishment, double jeopardy, retroactivity (of newly announced or newly enacted constitutional or statutory rights). Often includes: Amendments 4, 5, 6, 8, and 14.

II. ***Civil rights/liberties*** includes cases which pertain to classifications based on race (including American Indians), age, indigency, voting, residency, military or handicapped status, gender, and alienage. Often includes: Amendments 13, 14, 15, and 19. Civil Rights Acts of 1866, 1870, 1871, 1875, and 1964. It also includes the following:

III. **First Amendment**[58]

IV. **Due Process** is limited to civil guarantees (but *does* include criminal due process). Such as: prisoners' rights and defendants' rights, government taking of property for public use (takings clause), impartial decision maker, Due process rights as written in the Fifth[59] and/or Fourteenth[60] Amendments, which encompasses procedural as well as substantive due process:

V. **Privacy** non-criminal privacy, abortion, use of contraceptives/birth control, right to die, Freedom of Information Act and related federal or state statutes or regulations

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[57] The database can be accessed here: http://scdb.wustl.edu/

[58] **First amendment:** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

[59] **Fifth Amendment:** No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[60] **Fourteenth Amendment, Section 1:** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VI. **Unions** encompasses those issues involving labor union activity.

2. Economic Activity is largely commercial and business related; it includes tort actions (suing business entities) and employee actions in relation to employers.

3. Judicial Power/Jurisdiction concerns the exercise of the judiciary's own power. To the extent that a number of these issues concern federal-state court relationships, they may be included in the federalism category.

4. Federalism pertains to conflicts and other relationships between the federal government and the states, except for those between the federal and state courts, often includes interstate commerce clause, Amendments 10 and 11. It also includes:

I. **Interstate relations** not relating to interstate commerce, but including boundary dispute between states, miscellaneous interstate conflicts, and non-real property disputes (anything that is non-real property is personal property and personal property is anything that isn't nailed down, dug into or built onto the land. A house is real property, but a dining room set is not).

5. Federal/State Taxation concerns the Internal Revenue Code and related statutes and the general extraction of material resources from citizens. Often includes: Amendment 16

6. Private law relates to disputes between private persons involving real and personal property, contracts, evidence, civil procedure, torts, wills and trusts, and commercial transactions. This category also pertains to slavery, land claims (mostly state and territorial), and incorporation of foreign territories. The passage of the Judges' Bill of 1925 gave the Court control of its docket, as a result of which such cases have disappeared from the Court's docket in preference to litigation of more general applicability.

7. Executive Power pertains to the authority of the president to execute his/her office. Often includes Article

Notes and Sources: These issue areas come from Harold Spaeth's Supreme Court Database accessed here: http://scdb.wustl.edu/documentation.php?var=issueArea. They represent an exhaustive list of constitutional issues with these data.

All of the variables and their coding protocol are outlined in detail in the Appendix. This coding protocol is both accurate and reliable. I provided and explained this coding protocol to four research assistants who remained anonymous to one another. Three of these research assistants were exceptional undergraduate students (all upperclassmen) who I taught either in constitutional law-related writing seminars or lectures previously. I chose them because they were intelligent and dedicated to their coursework, and I assumed they would demonstrate the same care toward their

work for me. More than that, their coursework showed that they were capable of independent thinking, applying difficult theories to analyze legal phenomenon. The fourth assistant was a third year Fordham Law student who I chose because of his constitutional law coursework. More than the undergraduates, he was accustomed to reading difficult judicial decisions, making him a good fit for applying a central state authority framework to arcane Court decisions. After I chose these assistants, I randomly selected fifteen constitutional decisions from the dataset, asking each assistant to code each decision along the constitutional issues and impact on authority variables thus yielding a total of 30 outcomes in each set of fifteen decisions. The research assistants matched my coding between 86% to 93% similarity. Thus the coding protocol is accurate to the interpretation outlined in the Appendix as well as fairly reliable in reaching the accurate outcomes.

To illustrate the application of these variables, I applied them to three Supreme Court decisions from my dataset, decisions that represent the outcomes of restriction and expansion. The decisions below were chosen because they are well-known cases in the constitutional canon, come from different moments in American constitutional history, and typified the outcomes on the central state authority variable.

State Authority and the Supreme Court: Applications of the Variables

This brief section applies the taxonomy outlined above to three Supreme Court decisions—*Barron v. Baltimore* (1833), *Humphrey's Executor v. United States* (1935), and *Brown v. Board of Education* (1954). Coding the judicial decisions that comprise my dataset will require thorough textual analysis of each individual decision. The purpose here is to demonstrate how I code a Court decision as either enhancing or restricting national state authority.

Barron v. Baltimore (1833): Restriction

Barron was decided shortly before Chief Justice John Marshall's tenure ended in 1835. In this case, John Barron was co-owner of a successful wharf in Baltimore's harbor. As part of a road construction project, the city deposited sand and earth into Baltimore harbor, depriving Mr. Barron of the deep waters that made his wharf profitable. Because the dirt made the waters around the wharf too shallow to dock most vessels. Barron sued, claiming that the city ruined his business and violated his Fifth Amendment rights, which provides that the government may not take private property without just compensation. The question confronting the Court was: Does the Fifth Amendment deny the states as well as the national government the right to take private property for public use without justly compensating the property's owner?

In a very brief, unanimous decision, Marshall held that the limitations on government articulated in the Fifth Amendment were intended to limit the powers of the national government *not* state governments: "The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states" (247). Citing framer intent and the development of the Bill of Rights,[61] Marshall argued that the Supreme Court had no jurisdiction in this case since the Fifth Amendment did not apply to the states.

Because Marshall declared the Court (part of the central state) had no jurisdiction to hear this case, this decision represents a restriction along the "centralization" dimension. Because the Court denied its own authority to review the actions of the Maryland state legislature with respect to

[61] Of the framers' intentions with respect the Bill of Rights, Marshall said:

> [I]t is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government -- not against those of the local governments (250).

property rights, the Court also restricted federal authority along the "property" dimension. In other words, the central state—in this case the Supreme Court—had no authority to remedy Mr. Barron's property claim. In confronting questions both about decision-making authority and property, *Barron* thus interacted with two of Bensel's seven dimensions: centralization and property, restricting the central state authority in both realms.

With respect to the constitutional questions raised, the most salient issue concerned federalism. While *Barron* raises questions about individual property rights, these questions were merely byproducts of the Court's primary argument: that Maryland, as a state, had the authority to regulate property within its boundaries and the Fifth Amendment's purview extended only to national government. In concluding, the Chief Justice wrote, "[T]he provision in the fifth amendment to the constitution…is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states. We are therefore of opinion that there is no repugnancy between the several acts of the general assembly of Maryland" (250-51). Here, Marshall indicates the central issue in *Barron* concerned who has the authority to govern and the potential conflict between federal and state rights concerning legislation pertaining to property. Thus, *Barron* is fundamentally about centralization and federalism.

Barron demonstrates restriction vis-à-vis the federal-state relationship, but there is another way the Court often restricts or expands state authority: through structural reallocation of decision-making authority *exclusively within* the central state. In the next decision, *Humphrey's Executor v. United States,* the Court confronts issues concerning only the federal state.[62]

[62] Bensel's *Yankee Leviathan* argues of his administrative dimension that "since generally accepted administrative principles favor the executive bureaucracy over the legislative and judicial branches, statist alternatives are those that further the autonomy and discretionary authority of the central state bureaucracy. From the perspective of strong state advocates, the least attractive of the major central state institutions is the Congress" (Bensel 1990, 108). This is essentially an argument about the "permeability" central state institutions—the more democratic the institution, the less statist.

Humphrey's Executor v. United States (1935): Restriction

On December 10, 1931, President Herbert Hoover nominated, and the Senate eventually confirmed, William Humphrey as head of the Federal Trade Commission (FTC). When Franklin Roosevelt assumed the presidency in 1933 he asked for Humphrey's resignation since Humphrey, as a conservative, might not be sympathetic to many of Roosevelt's New Deal policies over which Humphrey had jurisdiction. When Humphrey refused to resign, Roosevelt fired him. However, the FTC Act[63] only allowed a president to remove a commissioner for "inefficiency, neglect of duty, or malfeasance in office" (623). Since Humphrey died shortly after being dismissed, his executor sued to recover Humphrey's lost salary. The Court was asked to determine if section 1 of the Federal Trade Commission Act unconstitutionally interfered with the executive power of the president to remove appointees.

The Court's unanimous decision said the FTC Act was constitutional and President Roosevelt, given the circumstances, did not have the authority to dismiss Humphrey. The Court reasoned that the Constitution had never given "illimitable power of removal" to the president and, instead, authority rested with Congress to create agencies of the central government independent of executive control:

> We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office (629)[64]

Humphrey thus limited the power of a more statist branch of the central government (the presidency) while expanding the power of a less statist branch (the Congress). In doing so, *Humphrey* typifies a

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[63] 15 USCS § 41

[64] Writing for the Court, Justice Sutherland dismissed the government's primary defense in this case, which relied heavily on the Court's decision in *Myers v. United States* (1926). In that case the Court had upheld the president's right to remove officers who were "units in the executive department" (627). Sutherland argued that the FTC was different because Congress created the agency to perform quasi-legislative and judicial functions and hence it was not "subject to the exclusive and illimitable power of removal by the Chief Executive" (627). The *Myers* precedent, therefore, did not apply in *Humphrey*.

restriction of the administrative capacity dimension and thus its overall impact on central state authority is restrictive. In other words, *Humphrey* constricts the administrative dimension because it lodged the authority to control an administrative agency within the less statist branch of the national government—the Congress. As *Humphrey* centered on the president's removal power, it falls into the "executive power" constitutional issue area.

Brown v. Board of Education (1954): Expansion

Brown v. Board of Education expanded central state authority. In Topeka, Kansas, the school board denied black children admission to public schools attended by white children under local laws mandating race segregation. White and black schools, in Topeka, were generally equally endowed in terms buildings, curricula, qualifications, and teacher salaries. The central question in *Brown* was did segregation of children in public schools solely on the basis of race deprive the minority children of the equal protection of the laws guaranteed by the 14th Amendment? Despite the equal endowment of the schools by "objective" criteria, the Court held that intangible psychological issues foster and maintain inequality. More specifically, racial segregation in public education has a detrimental effect on minority children because it is interpreted as a public judgment of inferiority. Consequently, the Court rejected the long-held doctrine, first promulgated in *Plessy v. Ferguson* (1896), that segregated facilities were permissible provided they were equal. The unanimous decision invalidated state-maintained racial separation in educational settings.

Brown conferred rights on blacks by expanding their national citizenship rights and thus diminished *local state* authority to promote segregationist laws. Here, the Court rested its justification on the importance of public school education in shaping democratic citizens:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship (493).

Any state policy that obstructed the creation of "good citizenship," then, was unconstitutional. In *Brown,* the policy, of course, was state mandated segregation and, according to the Court, such segregation impeded the education of African-Americans:

> To separate [African-Americans] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn (494).

Brown, therefore, falls along one of the seven dimensions in the above taxonomy, citizenship.

In addition to the citizenship dimension, the decision also falls within the "centralization" dimension. The Court moved the authority to determine citizenship (education) rights from state/local governments to the federal Supreme Court. *Brown* thus brought a policy area (education) under federal sovereignty. In the end, *Brown* expanded the private rights of African-Americans by consolidating authority over questions such as education in the hands of the central government. To that extent, the Court simultaneously contracted local governmental authority and expanded central state authority, indicating that *Brown's* primary legal issues concerned civil rights.

The decisions above exemplify how the Court influences central state expansion vis-à-vis Bensel's seven dimensions. Delineating the central state along these attributes enables us to examine American state expansion in a nuanced *and* systematic way.

Justifications for Casebook Design

A few words justifying the project's casebook design are necessary. I am concerned with constitutional law decisions because these decisions mainly deal with the nation state's relation to its citizens. Hence, the use of constitutional law casebooks to create a dataset of salient decisions across U.S. history. Critics may argue that including what scholars see as the most salient, "principal" cases may will lead to oversampling decisions that increase state authority and under-sample ones that do not. That is, scholars might likely consider "prominent" decisions as the ones that only increased

state authority. However, two factors temper this potential problem. First, I found great variation in the degree to which these cases expand/constrain state authority because of the typical constitutional law curriculum in law schools (and thus the casebook used to teach this curriculum). More specifically, constitutional law casebooks are organized along two themes I.) structural and governmental powers and II.) individual rights. These two overarching divisions present divergent predictions of the path of central state development. With respect to governmental power, the expectation is that the Court facilitates central state growth over time. By contrast, in the realm of individual rights, the Court's negative rights interpretation of the Constitution enables the restriction of the reach and scope of rights afforded by the federal government. Second, salient judicial decisions selected for inclusion in casebooks are worthy of study; they are the decisions that, over time, legal educators have deemed the most important for the teaching of legal principles. Consequently, the most salient cases should be the ones initially included, but as I expand the dataset, I will include less salient cases.

But, there also remains the problem of editor bias. Constitutional decisions that might have been salient in one period (because they were still "live" law in that lawyers had to learn) might not have been salient in another period (when the holding had been superseded by one or more subsequent rulings). To counter this problem, I created my dataset based on casebooks published from across time because whether or not a historical decision is now "live law" is irrelevant for my project; such a decision (whether live or not) still affected state development and thus needs to be included in the dataset. Moreover, there are many casebooks in my list (especially in the present era) from the same era. The post-2000 era, for example, contains eight casebooks. Accordingly, any ideological or political editorial biases will not skew my results because I have included the spectrum of views in the casebook list.

Thus, using casebooks, and the salient decisions therein, is a sound way to assemble my dataset. This is because salient decisions are those that guide the decisions of the lower courts in making their own rulings as well as guide lawyers when they decide whether or not to litigate. Salient decisions, for that reason, do almost all the "work" of hindering or facilitating central state development; they influence a wide range of legal thinking and activity thereby affecting many more decisions than the one for which the salient decision is named. In fact, many non-salient decisions not included in casebooks can be interpreted as the descendants of one or more "salient" decisions. Considered in this way, it is not presently necessary to include non-casebook decisions in my dataset.

The data derived from this design will prove useful in assessing important interpretations of the growth of central state power. The next chapter presents these data and shows that the Court expands and restricts state authority yet, overall, constitutional interpretation has facilitated much of the growth of the American state.

Chapter 3: The Constitutional Foundations of American Central State Expansion

That the judicial power of the United States will lean strongly in favour of the general government, and will give such an explanation to the Constitution, as will favour an extension of its jurisdiction, is very evident from a variety of considerations.

-Brutus, Letter XI, 31 January 1788

Introduction

Recently scholars have presented impressive evidence demonstrating the strengths of the early American central state, but a broader discussion of state strength over time has yet to be seen.[65] In order to further our understanding of state development, this chapter analyzes the dataset outlined in the previous chapter. Chapter 3 presents the descriptive findings from these data and reaches several conclusions. Chapters 4-6 frame and interpret these findings.

First, the Court tends to expand central state authority over time especially through centralization—that is, by transferring decision-making authority from the states to the federal government. Second, the division between "weak" and "strong" obscures our understanding of state development[66]; indeed, Court decisions frequently alternate between the expansion and restriction of authority, thus revealing the difficulty in dubbing the state "strong" or "weak" at least from the field of constitutional law. These findings cast doubt on the standard developmental narrative and show that the rate of state expansion remains relatively static across time, even during critical junctures. This chapter provides an overview of the Court's role in statebuilding not just from between the Progressive to New Deal eras but from the Founding until the present day. The Court did much to advance the powers of the central government along federalism and individual rights as well as along the centralization and citizenship dimensions discussed in Chapter 2.

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[65] See footnote 7 above.

[66] Peter Baldwin (2005) makes a similar argument in "Beyond Weak and Strong: Rethinking the State in Comparative Policy History." *Journal of Policy History* 17, 1: 12-33. He calls for more a nuanced analysis of state strength: "[States] may not be consistently laissez-faire or interventionist, but be so in one respect and the opposite in another," 19.

Central State Dimensions and Constitutional Issues

The standard narrative of constitutional development argues that, from 1870-1920, the Court inhibited American state expansion then, in 1937, an amalgam of exogenous factors quickly shifted the Court's constitutional jurisprudence so that it accepted a larger and more powerful central government. This kind of "punctuated equilibrium" model, however, draw too sharp of a distinction between normal politics and moments of constitutional change.[67]

Rather than punctuated change, constitutional development is better conceived as what Orren and Skowronek have termed "layered political development." They underscore that punctuated equilibrium models, by contrasting "normal" politics with moments of exogenous disruption, obscure "a good deal of what is characteristic about politics and…political change" (Orren and Skowronek 1994, 320).[68] They encourage scholars to focus, instead, on the tensions and contradictions inherent in politics. While the state expands in myriad ways, the judiciary offers a unique view of state expansion because it reviews the governing authority of other political institutions. Studying the Court in this way recognizes the tensions inherent in constitutional development and decision-making.

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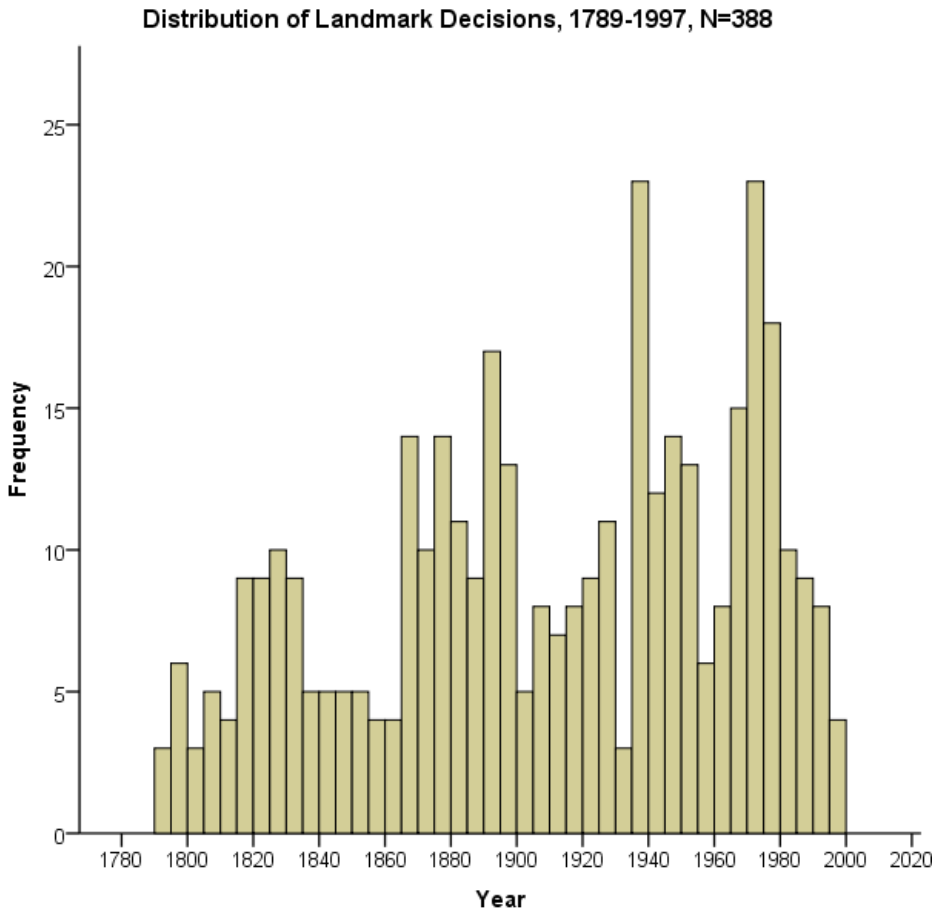
[67] For an example of this model see Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (New York: Oxford University Press, 1987). Adam Sheingate's (2003) study argues against punctuated equilibrium models as a way to understand institutional change. Focusing on political entrepreneurship, he contends that "an *endogenous* account of institutional change would appreciate the way institutions themselves make change possible and therefore would not rely on the occurrence of some exogenous shock or event to explain when and how change takes place" (Sheingate 2003, 186, emphasis original). "Political Entrepreneurship, Institutional Change, and American Political Development." *Studies in American Political Development* 17 (2003): 185-203. Similarly, Kimberly Johnson's study of Congress and federalism also argues against the punctuated equilibrium model (Johnson 2007, 7–9).

[68] Karen Orren and Stephen Skowronek. 1994. "Beyond the Iconography of Order" in Lawrence Dodd and Calvin Jillson, eds. *The Dynamics of American Politics*, Westview Press.

The Court and Central State Expansion: Descriptive Findings

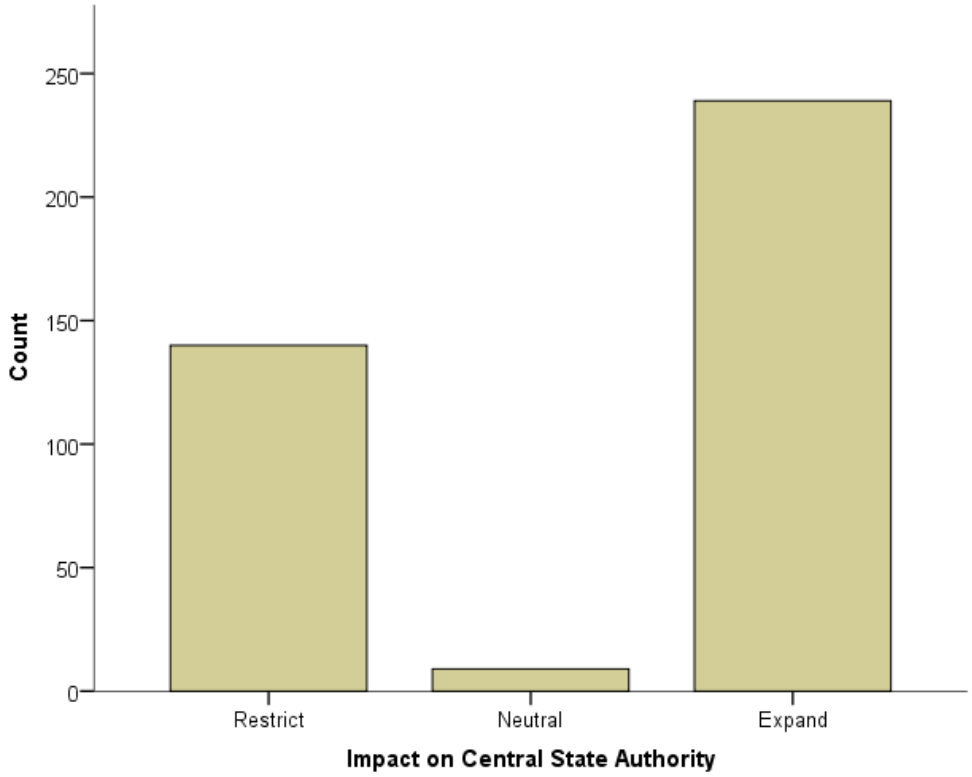
This section reports the findings when Bensel's framework, as outlined in Chapter 2, is applied to the constitutional decisions comprising the dataset. The dataset design produced a total of 388 decisions. The findings show that the Supreme Court has moved back and forth between contraction and expansion of state authority across constitutional development. Figures 3.1 and 3.2 display the histogram distribution of the leading decisions across year and across influence on national government power.

Figure 3.1: Distribution of Landmark Decisions Across Years, 1789-1997 (N=388)



Notes and Source: Compiled by author. This graphic arrays the frequency of all leading casebook decisions contained within the dataset with a bin size set at 5. Important to note is that each quarter-century contains at least thirty landmark decisions. The number of decisions is generally greater toward the present day because casebooks were also weighted toward the present day, as discussed in Chapter 2.

Figure 3.2: Distribution of Cases Affecting Central State Authority, 1789-1997 (N=388)



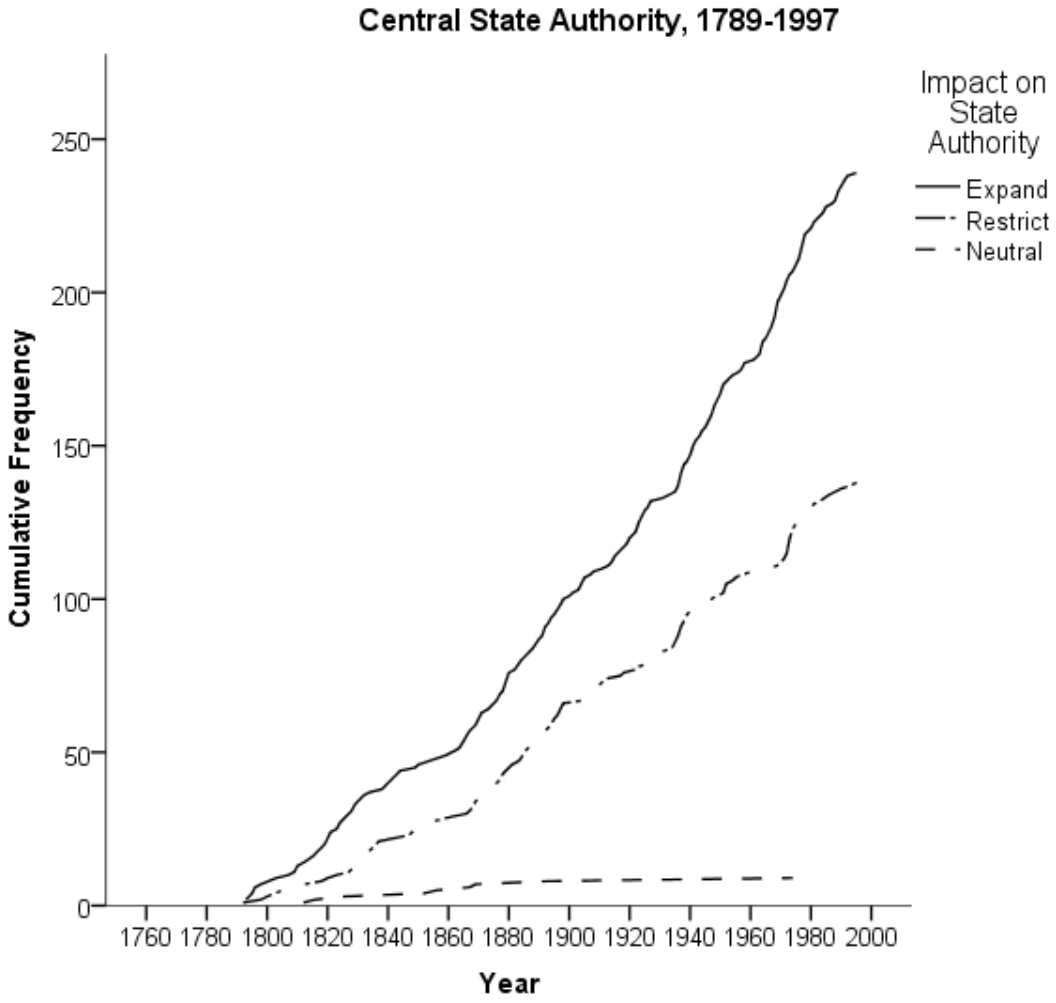
Notes and Source: Compiled by author. This distribution represents an important trend of American constitutional development—that it generally expanded the powers of the federal government. The trend in this chart reveals that the Court did much to expand federal power through its constitutional interpretation. Of the 388 decisions, 141 restricted authority, 8 remained neutral, and 239 expanded governing authority. Important to note is that we see only the *overall* impact on federal government power; the impact on each of the seven central state dimensions is presented in Figures 7.1 and 7.2 in this chapter and in Figure 14 in the Appendix.

While expansion remains the largest of the three categories, the Court also frequently restricted state development. Figure 4 portrays this distribution over time. The line chart shows us that constitutional development expands and restricts governing authority throughout history.

The Court's expansive and restrictive decisions, however, consistently grows farther apart. Below, Figure 4 considers time as it maps the number of constitutional decisions influence on overall state authority. Decisions that expand grow at a far quicker rate than those that restrict

especially after 1900. More than that, Figure 4 demonstrates that expansive decisions grow at a faster rate than restrictive decisions throughout all of American constitutional history.

Figure 4: Cumulative Frequency of Constitutional Decisions Impact on Central State Authority, 1789-1997 (N=388)

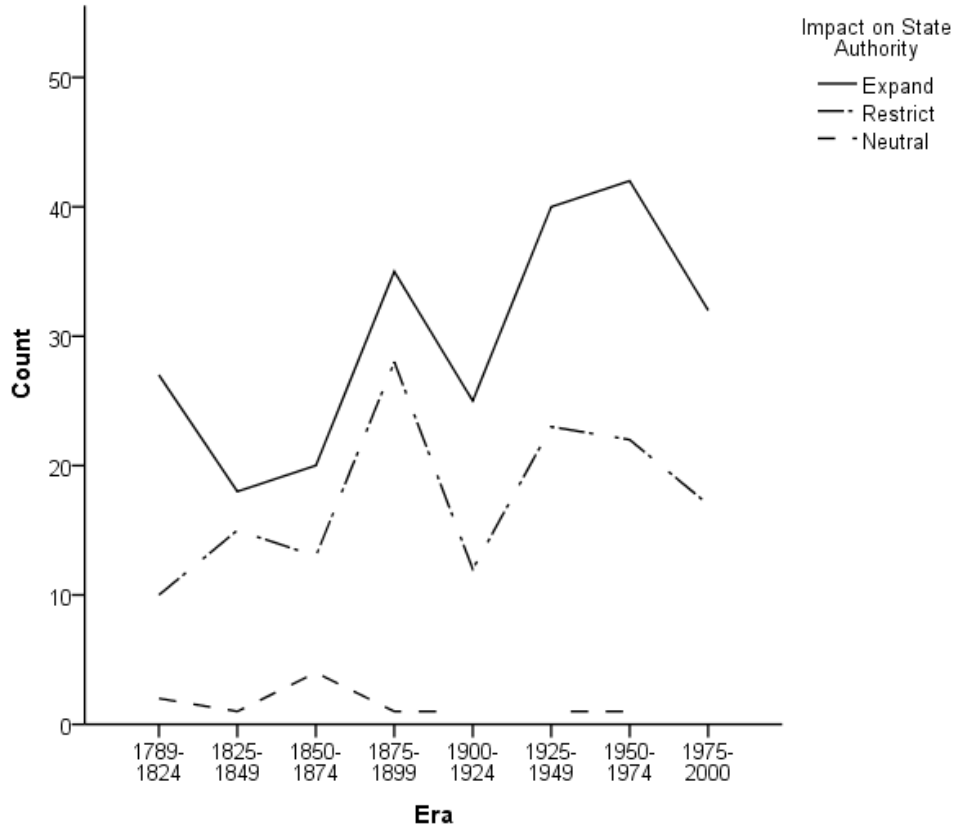


Notes and Source: Compiled by author. This cumulative frequency chart shows the relatively steady growth of decisions that both expand and restrict federal government power. Around 1900, decisions that restrict experienced a more gradual growth rate while expansion decisions experience a faster growth rate.

Nevertheless, the story of American constitutional development rests largely on the push and pull between expanding and restricting the federal government's power. Breaking down the Court's behavior across quarter centuries reveals a more detailed look at the Court's impact on

national power so Figure 5.1 maps these cumulative frequencies across quarter-centuries. In Figure 5.1 we begin to see a more detailed relationship between decisions that restrict and expand than we see in the overall cumulative frequency. The founding period witnessed the greatest disparity between decisions that expand and those that restrict while the period that followed (1825-1849) saw roughly an equal number of decisions that expand restrict federal power. After around 1874 the decisions mirror each other's trajectory, that is, the shape of their lines resemble one another, but restrictive decisions nevertheless remain less frequent.

Figure 5.1: Impact on Central State Authority Line Chart across Quarter-Centuries, 1789-1997 (N=388)



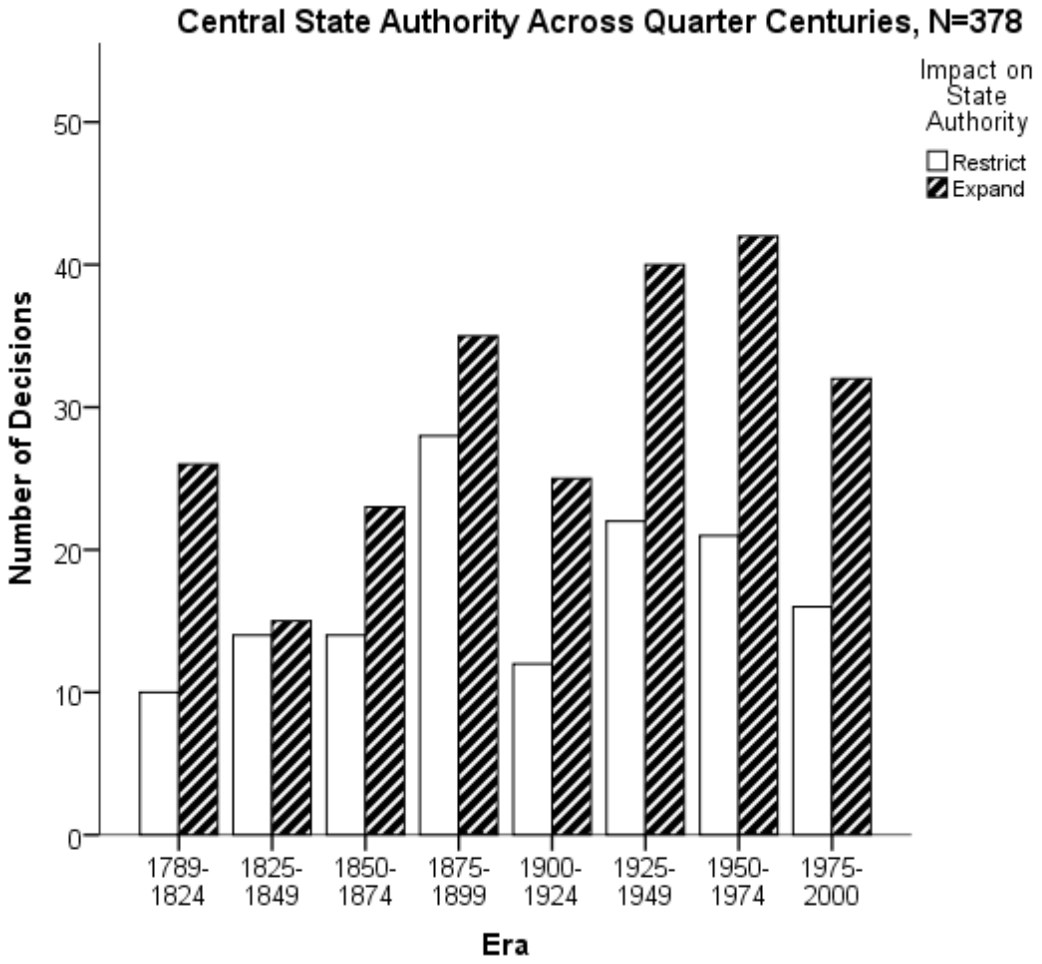
Notes and Sources: Compiled by author. The graph plot the number of decisions in each quarter-century, presenting the relationship among the three outcomes on central state authority across constitutional history. Expanding and restricting decisions follow similar patterns to one another after 1874. Before 1874, however, developmental patterns do not follow as neat of a pattern. The disparity between decisions that expand and decisions that restrict is greatest during the founding until about the Jacksonian era (1789-1824).

Figure 5.2 simply takes the line chart above and transforms it into a clustered bar chart, across quarter centuries, allowing these frequencies to be compared more precisely side by side. It is clear that while restriction declined in the twentieth century, it remained a prominent feature throughout constitutional development. Somewhat surprisingly, the Court, contrary to well-known accounts,[69] handed down many decisions expanding central state authority between 1875 and 1920. Typically, the Court is depicted as inhibiting central state growth, but Figure 5.2 demonstrates the opposite: the Court was active in advancing important dimensions of central state authority.

Still using the quarter centuries in Figure 5.2, the ratio of state expansion graph (Figure 5.3) reveals a relatively static picture of constitutional development post-1900; constitutional development vis-à-vis central state authority did not shift too far from the average rate of expansion across quarter-centuries. But before 1900, constitutional development fluctuated more widely than it did post-1900. Figure 5.3 maps the rate of expansion as a ratio across time, supporting Figure 5.2 in showing that some supposed periods of restriction (i.e. 1875-1920) show more variation than we think, and other periods (like the New Deal era) witness more stasis than we think.

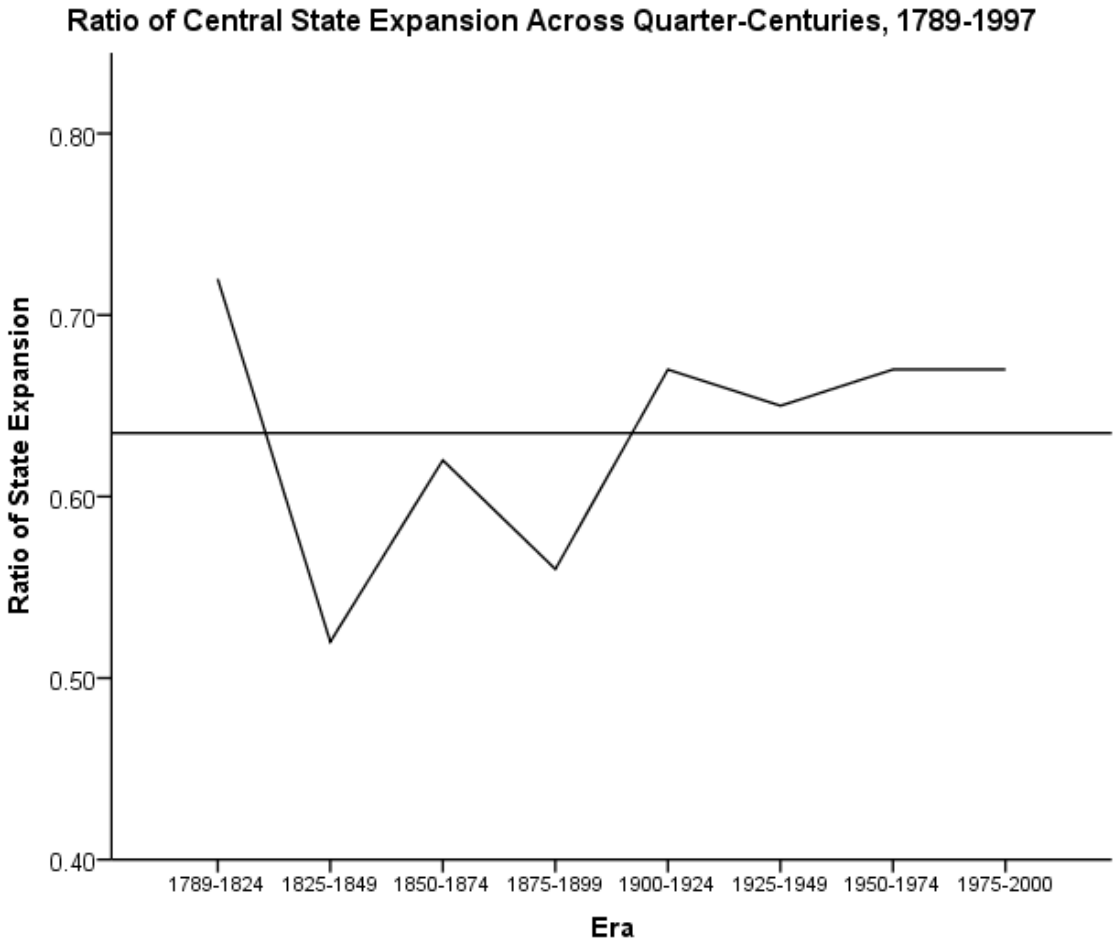
[69] For example, Stephen Skowronek's (1982) *Building a New American State* and Howard Gillman's (1993) *Constitution Besieged* both of which see the Court as a the foil in efforts to build the American state. See Chapter 2 (pages 23-27) for a more detailed discussion.

Figure 5.2: Clustered-Bart Chart of State Authority across Quarter-Centuries, 1789-1997 (N=378)



Notes and Source: Compiled by author. For the purpose of this graph, neutral outcomes were not included because they comprise only 10 of the 388 decisions in these data. We see here that the Court persistently expanded the federal government's power but not without significantly restricting central state power throughout constitutional history. Important to note is that number of decisions that expand become much larger in the twentieth century yet that ratio between expansion-restriction stabilizes in this period, too, as demonstrated in Figure 5.3 below.

Figure 5.3: Ratio of Central State Expansion across Quarter Centuries (N=378)



Notes and Sources: Compiled by author. Neutral decision were not included. The ratio is a function of the number of decisions that expanded authority over the total number of decisions in a given quarter-century era. The Y-line is set at the mean rate of expansion (.63). This graphic maps Figure 6.2 (the clustered bar chart) as a line chart. Until the twentieth century, there was much greater fluctuation in the rate of state expansion yet, even during the slowest rates of state-building, the Court's decisions expanded governmental power over half the time.

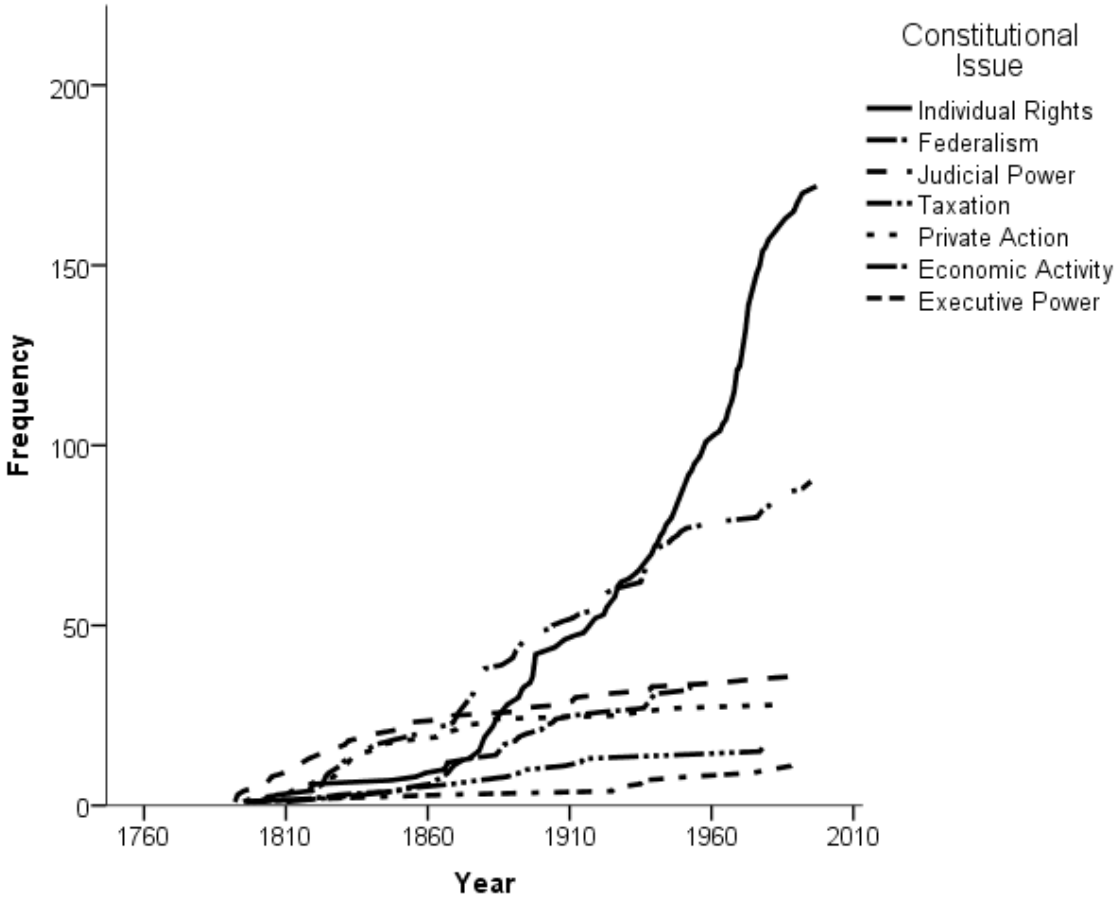
The ratio of state expansion (Figure 5.3) tells us a great deal about the evolution of the constitutional interpretation pertaining to state authority: it has not changed a whole lot. Surely, the interpretation of the federal government's specific powers have changed immensely, but the *overall* impact on the growth of the state has not. Taking the long view, the Court has not focused on the general domain of authority but has, instead, usually ruled on whether or not central state authority should be expanded in particular policy areas. Moreover, the punctuated equilibrium depictions of

the New Deal are put into question with Figure 5.3. This Figure has implications for the standard interpretation of the New Deal as a critical juncture, which, it is held, witnessed an abrupt shift in federal government authority.[70] On the contrary, Figure 5.3 shows that the process of change was far more gradual than typically posited. While Figures 3 through 5 offer sweeping characterizations of the Court's role in state development, incorporating the seven central state dimensions and constitutional issues yields a more nuanced story than Figures 3 through 5 allow.

Two constitutional issues dominate the Court's jurisprudence—individual rights and federalism.[71] Federalism pertains to decisions concerning the relationship between national and state governments (often Commerce Clause related) while individual rights concerns the government's control over individuals. Individual rights decision do not become prominent in the data until after 1870 when we see a steep increase in the frequency of these decisions, which surpasses the federalism decisions by around 1920. By contrast, federalism steadily rises throughout American constitutional history. Figure 6.1 demonstrates these trends along seven legal issue areas.

[70] Cushman's *Rethinking the New Deal* and White's *Constitution and the New Deal* also push against the standard interpretation that the New Deal was an abrupt turning point in constitutional development. See footnote 35 above.
[71] See the Appendix for definitions of each constitutional issue area.

Figure 6.1: Cumulative Frequency of Constitutional Decisions across Issue Areas, 1789-1997 (N=388)



Notes and Source: Compiled by author. The legend displays legal issues in descending order with the frequency line corresponding with the legend (e.g. Individual Rights is the most frequent thus it is at the top of the legend). By measuring these frequencies, this chart tracks the evolution of seven different legal issue areas. A more fine-grained legal issue variable includes sixteen categories (Figure 6.2 below), but for the purposes of visual display, this graphic collapses sixteen issues into seven. "Individual rights," for example, includes issues of procedural and substantive due process, criminal procedure, First Amendment, and civil rights and liberties decisions. Most telling is that individual rights and federalism decisions comprise the vast majority of decisions in the data.

The crosstabulation seen in Table 3 examines these constitutional issue areas with respect to their impact on central state authority. All legal issues both expand and restrict central state authority save executive power, but at twelve total decisions, there are not enough cases within executive power to draw any conclusions.

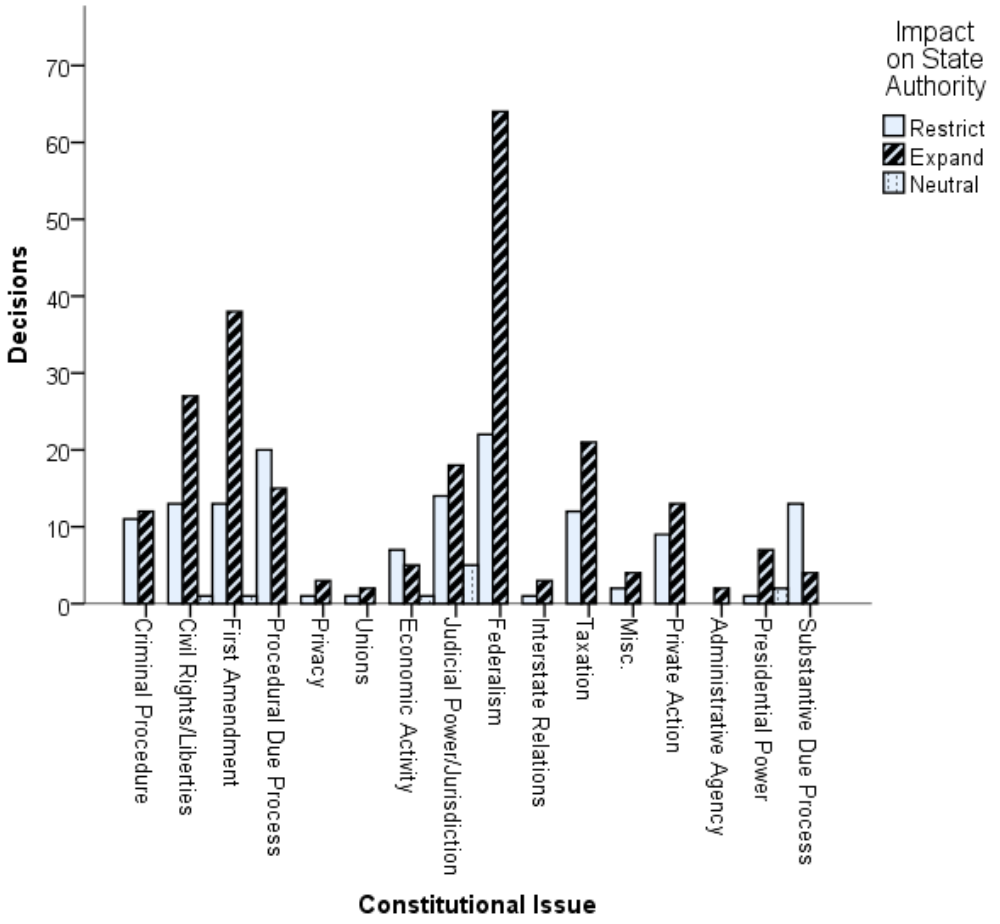
Table 3: Crosstabulation of Constitutional Issue Area by Impact on Federal Authority, 1789-1997 (N=388)

Constitutional Issue Area		Impact on Central State Authority			Total
		Restrict	Neutral	Expand	
Individual Rights	Count	70	3	99	172
	% of Total	18.0%	0.8%	25.5%	44.3%
Economic Activity	Count	7	1	8	16
	%	1.8%	0.3%	2.1%	4.1%
Judicial Power	Count	14	5	18	37
	%	3.6%	1.3%	4.6%	9.5%
Federalism	Count	23	0	67	90
	%	5.9%	0.0%	17.3%	23.2%
Taxation	Count	12	0	21	33
	%	3.1%	0.0%	5.4%	8.5%
Private Action	Count	11	0	17	28
	%	2.8%	0.0%	4.4%	7.2%
Executive Power	Count	2	1	9	12
	%	0.5%	0.3%	2.3%	3.1%
Total	Count	139	10	239	388
	% of Total	35.8%	2.6%	61.6%	100.0%

Notes and Source: Compiled by author. The crosstab indicates that individual rights and federalism decisions are most abundant in the data and that each issue tends generally toward the expansion of federal power.

Graphing Table 3 into clustered bar chart offers a more fine-grained look at constitutional issues' impact on federal power. Figure 6.2 disaggregates the constitutional issues into further categories, offering a more nuanced depiction of the legal issues. First Amendment and federalism decisions greatly expand federal government power.

Figure 6.2: Impact on Federal Authority by Constitutional Issue, 1789-1997 (N=388)



Notes and Sources: Compiled by author. This chart disaggregates the constitutional issues see above in Figure 7.1 and Table 2 into sixteen different issue areas. Notably, First Amendment and federalism decisions enhance federal government control over lower governments and citizens. More than that, in virtually every legal issue area the Court expanded the powers of the national government. As noted in Chapter 2, these issue areas come from Harold Spaeth's Supreme Court Database accessed here: http://scdb.wustl.edu/documentation.php?var=issueArea

Because individual rights and federalism comprise almost 68% of all the decisions, it is worth exploring the two central state dimensions[72] that touch closely upon these constitutional issues: the centralization and citizenship dimensions. Centralization involves the transfer of decision-making

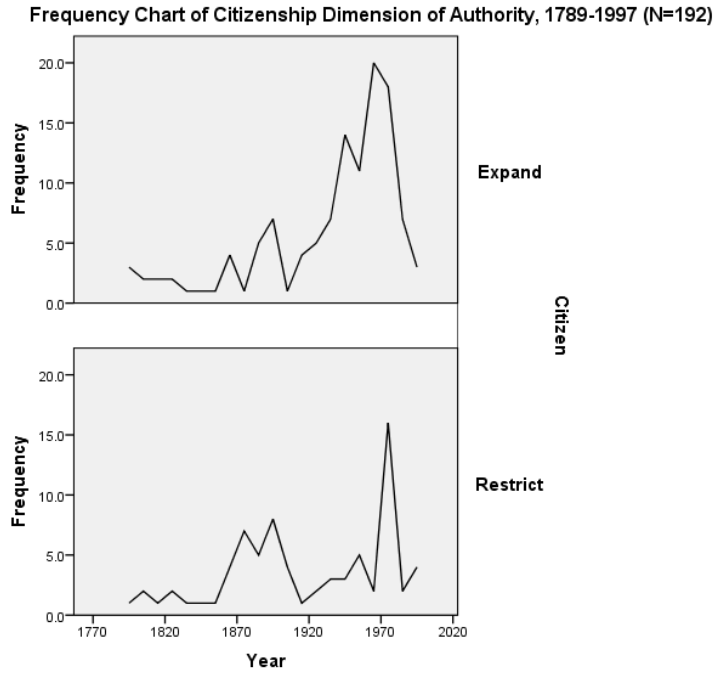
[72] See Table 1 above for a list of all seven dimensions.

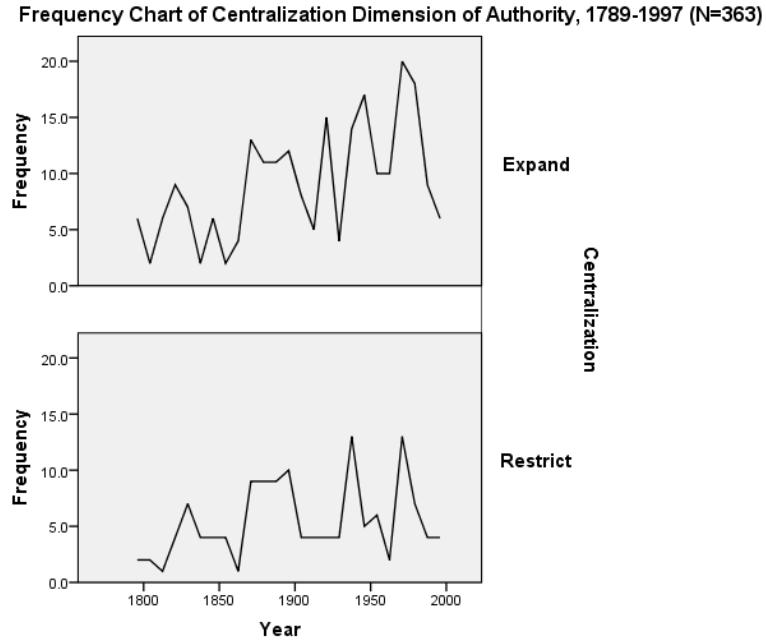
authority from the individual states or citizens to the national government. And citizenship pertains to issues concerning individual rights. Consequently, these two dimensions interact with civil rights and federalism frequently.

Of the seven dimensions, centralization and citizenship are the most frequent—nearly 50% of all decisions interact with citizenship while 94% of all decisions interact with centralization. Indeed, the development of the centralization dimension looks identical to the development of the overall impact on central state authority seen in Figure 4.[73] The graphs in Figure 7.1 juxtapose the development of citizenship and centralization dimension

[73] Figure 4 graphs the overall impact on central state authority, that is, the change of any one of the seven central state dimensions. Thus, as Chapter 2 details, "overall impact" is not separate from the seven central state dimensions. For example, if a decision restricted/expanded the centralization dimension then that would also indicate a restriction/expansion of the overall impact on authority. However, simply because these two variables (central state dimensions and overall impact) are intimately linked does not explain why the centralization dimension—more than any other dimension—is the most abundant in these data.

Figure 7.1: Frequency of Citizenship and Centralization Dimensions, 1789-1997

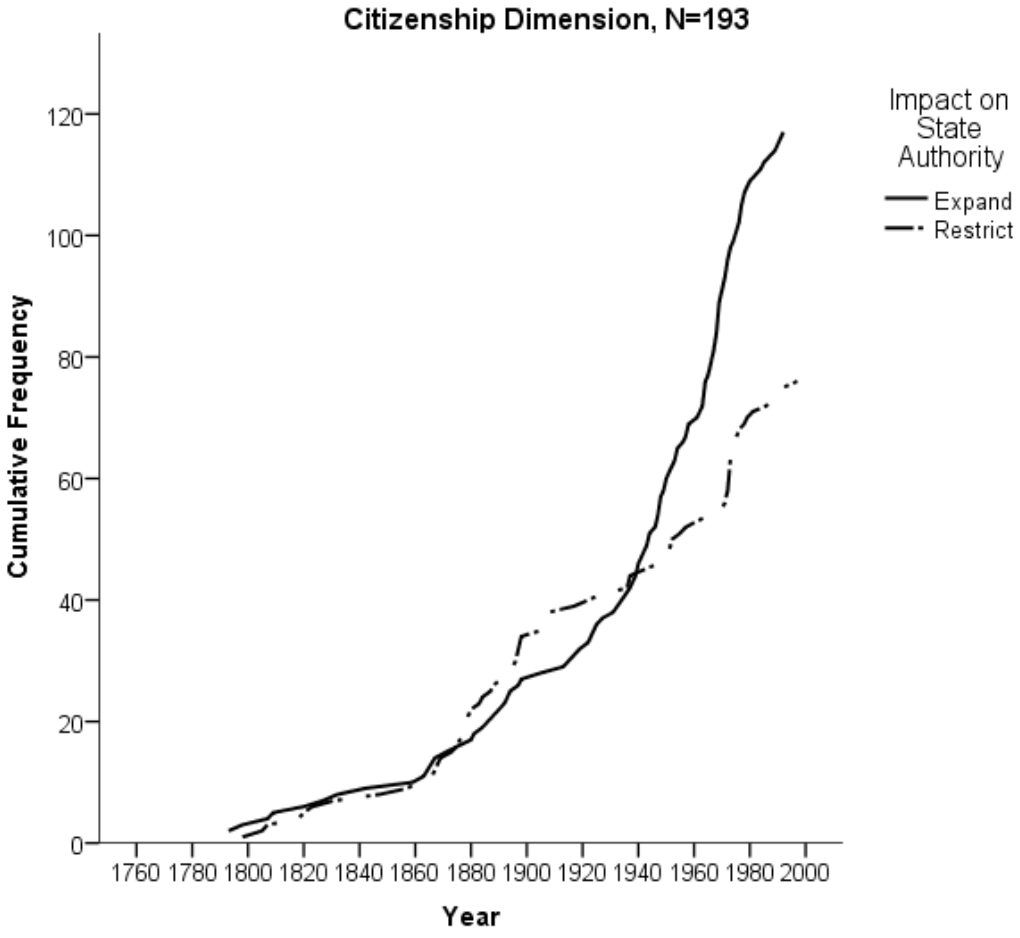


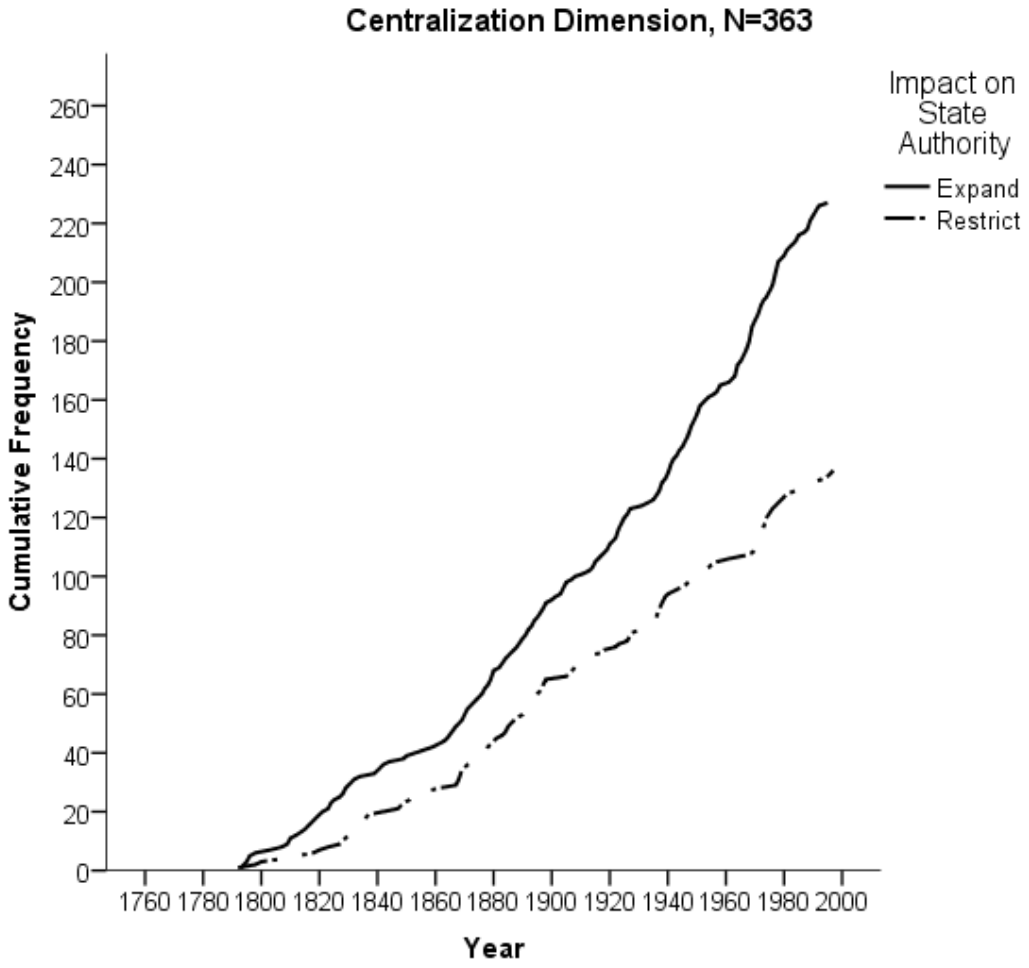


Notes and Sources: Compiled by author. There is much fluctuation on both these dimension of the central state. Between 1920 and 1970, the citizenship dimension saw a surge in decisions that expanded the federal government's control over this dimension. Conversely, the centralization dimension did not experience as long-lasting of a surge in decisions that either expanded or restrict control over this dimension.

Like many of the graphs above, Figure 7.1 indicates that both central state dimensions fluctuated between expansion and restriction. Nevertheless, expansion is the predominant outcome over time, especially in the centralization graph, as the cumulative frequency graphs below in Figure 7.2 also demonstrate. Expansion is persistently the more frequent outcome for centralization while - expansion-restriction stays much closer together for citizenship until around 1940 when decisions that expand federal power rise dramatically.

Figure 7.2: Cumulative Frequency of Citizenship and Centralization Dimensions, 1789-1997





Notes and Sources: Compiled by author. These graphics take a cumulative count of the expansion-restriction decisions under the centralization and citizenship dimensions, first displayed in Figure 7.1. Important to note that expansive decisions within centralization always outweigh restrictive decisions, which resembles the pattern of overall impact on state authority displayed above in Figure 4. In contrast, expansive-restrictive decisions within citizenship grow at nearly the same rate until 1940 when these decisions diverge greatly. After 1940, decisions that expand the federal government's authority along the citizenship dimension grow sharply.

From the foregoing discussion, we see that the Court's interpretation of constitutional law both advances and constricts the federal government's authority, and it does so primarily through the medium of individual rights and federalism. That the central government's authority expands more frequently than not comes as no surprise, but we do not yet know why this happens. Figure 7.2 seems to indicate that this expansion occurs largely through the channel of centralization, that is, through the transfer of decision-making authority from subordinate governments to the central

government—a hallmark of American constitutional development.[74] At bottom, constitutional development deals with who has the authority to decide,[75] and this question is enshrined by constitutional design.

Any of the central state dimensions can theoretically involve any of the legal issue areas. The stacked bar chart (Figure 8.1) below shows the ubiquity of centralization across the constitutional issue areas. The bar chart represents the number of decisions (and their corresponding legal issue areas) that fall under the centralization; every legal issue entails some form of centralization and nearly every judicial decision (363 of 388) interacts with centralization. The constitutional issue areas do not fall neatly into each of the seven dimensions; there is some overlap among legal issues and central state dimensions. For example, "federalism" does not fall *solely* under the centralization dimension, as one might think;[76] it is also seen as the primary legal issue in some individual rights-related decisions (Figure 8.2), though to a far lesser extent than in the centralization dimension. Similarly, individual rights decisions affect not only the citizenship dimension, as we might suspect,

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[74] Others have recognized that transferring of governing authority typifies constitutional development, but that transference often centers of the emerging "modern state" of the New Deal era. See, for example, Keith Whittington "Dismantling the Modern State? The Changing Structural Foundations of Federalism." *Hastings Constitutional Law Quarterly* 483 (1997): 483-528. Whittington argues that the "logic of the modern state" of the early twentieth century "favored centralization of political authority and influence" (Whittington 1997, 489). I agree with this interpretation, but I would also argue that the Court's interpretation of constitutional law began centralizing political authority long before the emergence of the "modern state."

[75] This claim is supported by David Robertson's comprehensive study of American federalism, which argues that the Framers created "a double battleground." The first pertains to battles fought in every country, "whether the government should do something about health, welfare, the economy…" The second battleground touches upon the question of who decides; Robertson says this battleground "turns on which level of government should have the power to choose whether to act." David Robertson. 2012. *Federalism and the Making of America.* (New York, NY: Routledge), p. 35.

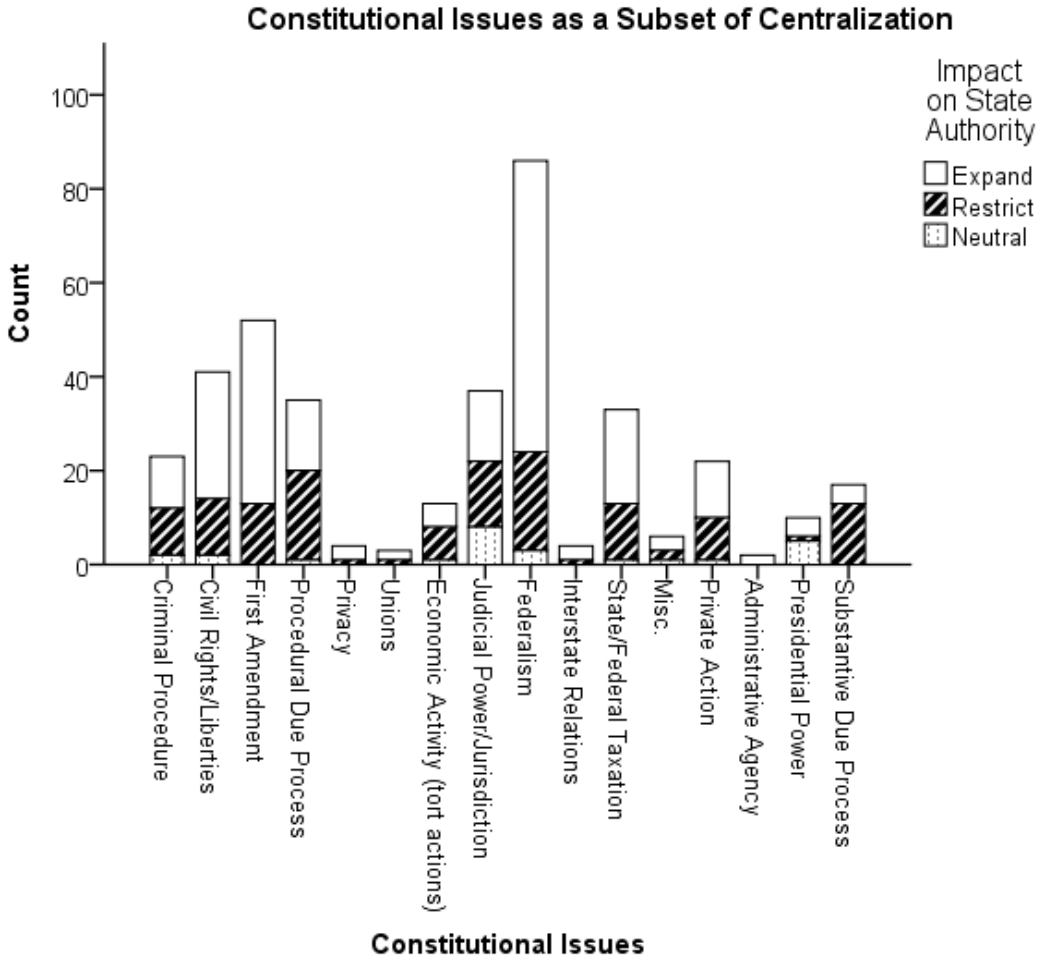
[76] Since federalism is a question about national versus state governing authority, one might logically assume that it would fall entirely within the centralization dimension. While federalism nearly always pertains to centralization, there are a couple decisions where it involves a dimension other than centralization.

For example, *Ashwander v. Tennessee Valley Authority* 297 U.S. 288 (1936) involved not the centralization but the administrative, property, and world system dimensions. In this case, the Court held that Congress did not exceed its power by creating the Tennessee Valley Authority (TVA), a government corporation created as part of the New Deal to improve the economy. *Ashwander* concerned the creation of a federal agency, the TVA, to advance the long-term regional planning capacity of the central state (administrative dimension); and it dealt with the TVA's acquisition of property and equipment of a private power company (property dimension). Last, the Court argued that the Wilson Damn—from which the TVA generated electricity—had been built originally for national defense: to produce materials involved in munitions manufacturing and thus the federal government could assert authority (world system dimension).

Nevertheless, eighty-three of eighty-five federalism decisions implicated the centralization dimension. However, the vast majority touched upon more than simply centralization: forty-nine decisions affected two central state dimensions, and nineteen dimensions concerned three central state dimensions.

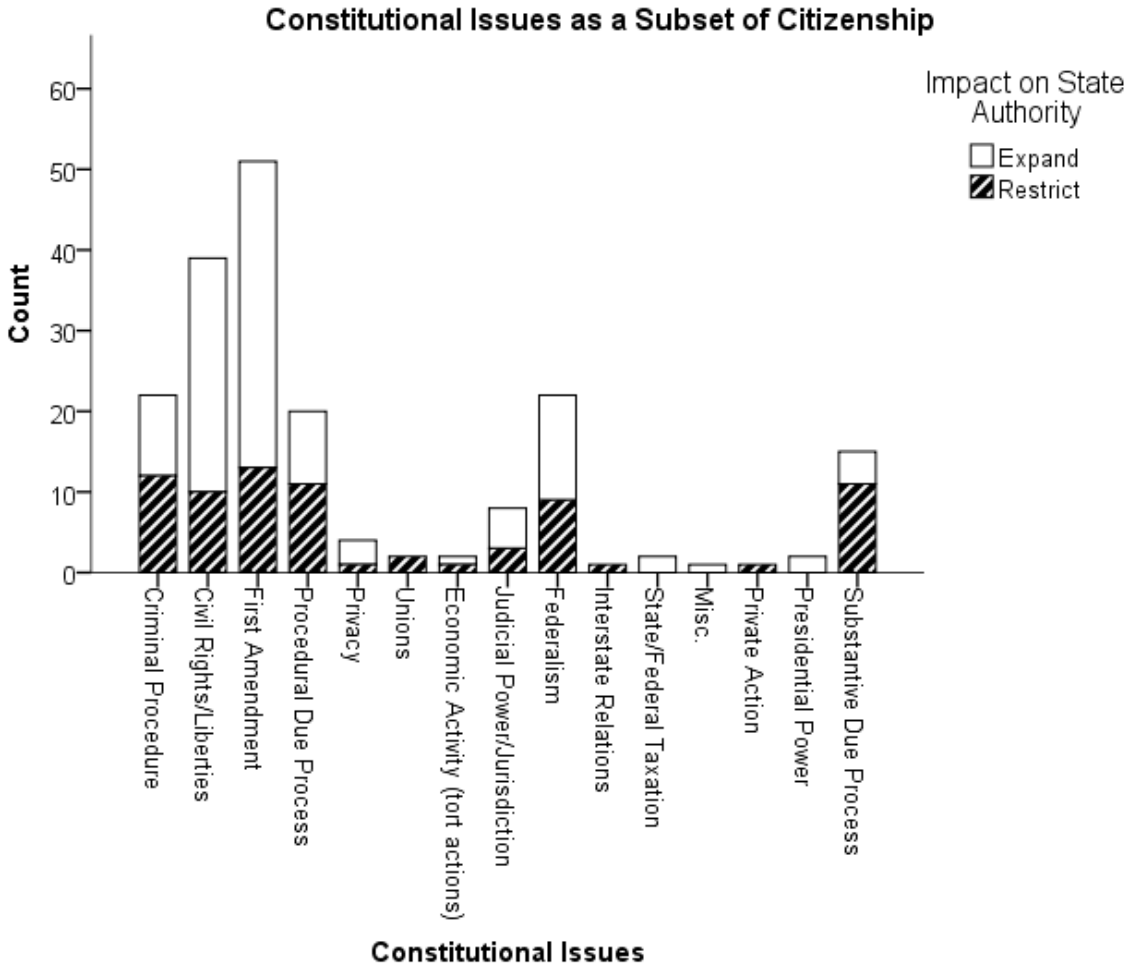
but also the centralization dimension (Figures 8.1). Unlike centralization, the citizenship dimension does primarily comprise one legal issue area: civil rights/liberties, but nevertheless, it does entail a handful of other legal issues at times.

Figure 8.1: Constitutional Issues as a Subset of Centralization (N=388)



Notes and Source: Compiled by author. In this stacked bar chart, federalism decisions, the tallest column, primarily fall under the "centralization" dimension. Only a very small portion of federalism cases do not involve centralization as indicated by the dotted "neutral" category. By contrast, the striped (restrict) and white (expand) patterns indicate that when a federalism decision expanded or restricted central state authority, it did so typically through centralization. This graphic shows the prevalence of centralization in American constitutional development across a multitude of legal issues.

Figure 8.2: Constitutional Issues as a Subset of Citizenship (N=193)



Notes and Source: Compiled by author. Because almost 200 decisions did not implicate the citizenship dimension they were not included. Individual rights decisions—criminal procedure, civil rights/liberties, First Amendment, and due process—mainly comprise the citizenship dimension as indicated by the columns on the far left. But much like "centralization," "citizenship" does not solely subsume individual rights related constitutional issue areas as we might expect. Some federalism and judicial power issue areas, for example, involve the citizenship dimension, albeit to a far lesser extent than the individual rights issue areas. It is important to note that constitutional issues, as seen in Figures 8.1 and 8.2, do not fall neatly into a single dimension of the central state.

Conclusion

The data presented here reveal two facts about constitutional development: 1.) there is a bias toward state expansion and yet 2.) there is still considerable variation, over time, between decisions that expand and restrict authority. By coding hundreds of decisions along seven dimensions of the

federal government, we are able to see when and where the central state grew in authority. The persistent expansion of the "centralization" dimension begins to show us that the unsettled boundary between state and national authority was an integral part of American constitutional development. Additionally, even decisions that were not overtly about centralization (like the individual rights decisions) still had at their foundation questions about *who* (i.e. what level of government) had the authority to regulate individual rights. Focusing on watershed moments in political development, current theories of American political development do not currently recognize these patterns.[77] The data here, however, reveals the similarities across periods of history and, as such, theories of American political development might benefit from considering the nature of the Constitution in structuring state development as opposed to looking at exogenous moments of "shock" to explain change.

[77] Recently, Karen Orren put forth a "theory of the Constitution" that views "each period of major constitutional development [Founding, Reconstruction, New Deal] was driven in significant part by a preceding crisis in the enforcement of criminal law" (Orren 2012, 72). Orren. "Doing Time: A Theory of the Constitution." *Studies in American Political Development* 26 (April 2012): 71-81, p. 72. Orren's theory gets us to think holistically about the Constitution and development, but it still focuses our attention on "critical junctures." The data presented in this chapter, however, attempts to show that even during moments of great change the Court never really strays too far in either expanding or constricting state development.

Chapter 4: Structures of Constitutional Development

> *The question of the relation of the states to the federal government is the cardinal question of our constitutional system. At every turn of our national development we have been brought face to face with it, and no definition either of statesmen or of judges has ever quieted or decided it. It cannot, indeed, be settled by the opinion of any one generation because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question.*
>
> --Woodrow Wilson, President of Princeton University, 1908[78]

Introduction

Americans' skepticism and ambivalence toward central state power is as old as the republic itself.[79] This ambivalence toward central state government rests on an interpretation of the United States as a liberal polity, a polity of limited government designed to protect private rights from public interference. This interpretation rejects classical notions of the public good and instead recognizes that the founders left individuals to seek their own self-interest (Morone 1998, 15). American Political Development scholars have long noted—if not the anti-statism shared in political culture—then the virtual absence of a central state in the U.S.[80] Indeed, the APD field is largely premised on the comparatively weak American central state, which stemmed from this skepticism of

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[78] Woodrow Wilson. 1908. *The Constitutional Government in the United States.* (New York, NY: Columbia University Press), p. 173.

[79] In *Democratic Wish,* James Morone points out that both republican communitarian and liberal individualistic conceptions of democratic ideology share one thing: "each rests on a suspicion of government" (Morone 1998, 8). For a nice overview of the American "dread of government" see Morone (1998, 2-4); Part I (33-145) is devoted to demonstrating how this fear of central state power ironically helped build the American state (Morone 1998). In fact, this ambivalence, Morone contends, was what precisely led to a larger, administrative central state; this is the "great irony" of American political development that animates Morone's narrative: "the search for more democracy builds up bureaucracy" (Morone 1998, 1). Like most studies within the APD tradition, Morone understands "state-building" as the creation of a centralized, bureaucratic administration. Moving beyond this conception, my study allows us to see where the tentacles of the central state expanded into other policy realms.

[80] This sentiment is shared not just by APD scholars. German philosopher G.W.F. Hegel thought the United States had no state at all—without a bureaucracy, a national culture, or a monarch to represent the permanent interests of the national community (Hegel quoted in Skowronek 1982, 6-7). See also Hegel, *The Philosophy of History* (New York: Dover, 1956), 84-87. Alexis de Tocqueville's *Democracy in America* is also remembered for recognizing the relative statelessness in the U.S. Of the "administration in New England," Tocqueville wrote, "Nothing is more striking to a European traveler in the United States than the absence of what we term the Government, or the Administration. Written laws exist in America, and one sees that they are daily executed; but although everything is in motion, the hand which gives the impulse to the social machine can nowhere be discovered" (Tocqueville 2003, 51–52). Distinctions between state and society, according to Tocqueville, were difficult to discern.

state power.[81] Yet, despite Americans' fear of state power, Chapter 3 revealed the persistent expansion of the federal state vis-à-vis constitutional development. Chapter 4 will explain the effects of a dual sovereign design on constitutional development and the importance of this design was in the debates surrounding central state power, debates that persisted during the emergence of the modern central state (the focus of Chapter 5).[82] In particular, the founders' establishment of federal and state sovereigns left unanswered many questions of political authority that the Court had to later address.[83] These murky boundaries help explain why constitutional development consistently expanded and restricted state power.

Ultimately, Chapter 4 frames some of the findings overviewed in Chapter 3. The previous chapter has shown an important pattern in constitutional development: that while state power consistently grows, it also experiences regular restrictions on its growth. Thus, Chapter 4 charts some of the legal doctrines and constitutional interpretations that facilitated expansion with a focus on the centrality of federalism—that is, the constitutional relationship between national and state governments—in constitutional development. American skepticism of central state power belies the

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[81] APD began as an enterprise based upon the idea that the American state was weak—or absent—compared to Western European nation-states. The comparison to Europe focused less on what the American state had than what it did not have: a consolidated national executive branch with an extensive civil service system. See (Skowronek 1982) and (Evans, Rueschemeyer, and Skocpol 1985) for examples of these comparative analyses of state strength. The American exceptionalism at root in this field centered on the lack of a national administrative welfare state and thus on the historical period when Europe developed such a welfare state and the United States did not: from around the Progressive era to the New Deal. Weir, Orloff, and Skocpol's (1988) edited volume, *The Politics of Social Policy in the United States,* expanded on these ideas of the American state as especially diffuse and lacking in capacity. The Court's constitutional evolution, however, challenges some of these narratives that focus more narrowly on the administrative welfare state.

I realize, however, that central state weakness and anti-statism are not synonymous. Nevertheless, if the American central state did, in fact, lack a strong central state, then this was due in no small part to the anti-statist ideas that made their way into the design of the Constitution. As this chapter will discuss, the fear of a strong central state contributed greatly to America's federalist structure, a structure that created two sovereigns—the state governments and the federal government—whose boundaries of powers would be—and continue to be—determined largely by the Supreme Court.

[82] Chapter 5 will discuss how the Court played a pivotal role in navigating between these two sovereigns especially between 1870 and 1920 during the emergence of the American modern state.

[83] David Robertson recognizes this in his article "Madison's Opponents and Constitutional Design," *American Political Science Review* 99, 2 (2005): 225-243. His article understands constitutional design, like this dissertation does, as an independent variable that influences the behavior of political actors by allocating authority and providing "legally defined constraints, opportunities, and incentives" (Simeon 2009, 242). Richard Simeon, "Constitutional Design and Change in Federal Systems: Issues and Questions, *Publius* 39, 2 (2009): 241-261.

empirical reality of the constitutional development. This is puzzling because we often interpret American political culture as largely anti-statist and because we believe that the period before 1870 was when federalism impinged state development. On the contrary, however, the ambiguity in the design of federalism—and the boundaries of powers allotted to America's two sovereigns—has been a political idea that the Court has wrestled with since the founding.

Given the finding that the centralization dimension—the idea of who decides—is fundamental to development, the constitutional design of federalism helps explains the ebb and flow depicted in chapter 3. Centralization, as the most frequent dimension represented, shows us that the trajectory of constitutional development has much to do with the allotment of decision-making authority between the states and the federal government. One place to examine this idea's effect on constitutional development is the Founding era and the early republic where distributing powers between these two levels of governments was paramount. In designing America's Constitution, the founders nearly ensured that the debate over the boundaries between state and federal sovereignty would color constitutional development, reaching a crescendo during the emergence of the modern state—the focus of Chapter 5.

Constitutional Design at the Founding: Federal versus State Sovereignty

The Constitutional Convention comprised two main groups—broad nationalists and narrow nationalists. Broad nationalists such as James Madison of Virginia sought to build a very strong central government that had complete authority over tax, commerce, and defense. These broad nationalists aimed to diminish state governments' powers and relegate states to a secondary role in American government. By contrast, narrow nationalists like Roger Sherman of Connecticut,

supported only a few and limited national powers.[84] Sherman and his supporters believed that states should remain the locus of power, governing most of American life, as the states did under the Articles of Confederation (Robertson 2012, 19).[85] The Convention, then, pivoted on negotiating between the preferences of broad and narrow nationalists, ensuring the Constitution would enshrine an amalgam of vague boundaries between state and national governing authority.

The compromise between these two groups produced what Madison called a "compound republic"[86] that left the relationship between national and state authority imprecise (Robertson 2012, 34). Given the ambiguous nature of national and state powers, the framers of the Constitution were aware that the boundary lines of governing authority would produce persistent conflicts over time. Antifederalist Richard Henry Lee, suspected author of the *Letters from the Federal Farmer,* noted that the extent of national authority would be left for subsequent politicians to determine:

> The powers of this [national] government as has been observed, extend to internal as well as external objects, and to those objects to which all others are subordinate; it is almost impossible to have a just conception of

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[84] Robertson's *Federalism and the Making of America* carefully details the arguments for both the broad and narrow nationalists, see chapter 2. For a detailed discussion of Roger Sherman's pivotal role at the Convention see Robertson's (2005) "Madison's Opponents and Constitutional Design," p. 231-235. (Robertson 2005a)

[85] Prominent Anti-federalist literature underscored the importance of states' rights. After the Convention adjourned, and during state ratification of the proposed Constitution, Anti-federalist and Federalists alike took to persuading their fellow citizens of their perspectives. The Antifederalist, "John DeWitt," penned a number of articles circulated among his fellow Massachusetts citizens. He feared an enlarged central state, claiming the proposed Constitution asks the states and their citizens to "invest the new Congress with powers, which you have yet thought proper to withhold from your own present government" (John DeWitt, II, 27 October 1787), accessed 12 October 2013: http://www.constitution.org/afp/dewitt02.htm.

Other Anti-federalists agreed with DeWitt. After the Pennsylvania Convention ratified the new Constitution in December of 1787, a dissenting address appeared in the *Pennsylvania Packet and Daily Advertiser,* which was subsequently reprinted in many other states. Judging by similarities between the author of "Centinel," Samuel Bryan, and the Pennsylvania address, scholars believe that the author was likely Bryan. Within his lengthy address, Bryan reiterated DeWitt's fear of a strong central state and the erosion of states' rights: "[T]he new government will not be a confederacy of states, as it out, but one consolidated government, founded upon the destruction of the several governments of the states…The powers of Congress under the new constitution, are complete and unlimited over the purse and the sword, and are perfectly independent of, and supreme over, the state governments, whose intervention in these great points is entirely destroyed" ("The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents," 12 December 1787, accessed 3 November 2013 http://www.constitution.org/afp/pennmi00.htm).

[86] Madison uses the phrase "compound republic" in *Federalist Papers* 51 and 62. In *Federalist* 9, Alexander Hamilton called this compromise a "confederate republic." Here, Hamilton laid out his theory of federalism: "The proposed Constitution, so far from implying abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power." In contrast, Madison's theory of federalism was animated more by the ambiguity between state and national governmental authority, as *Federalist* 51, quoted at length above, suggests.

> their powers, or of the extent an number of the laws which may be deemed necessary and proper to carry them into effect, till we shall come to exercise those powers and make the laws.[87]

As shown throughout his *Letters,* Lee was highly skeptical of a centralized government, and the *Letters* outlined what would become the Antifederalist's main objections to the Constitution (Kramnick and Lowi 2009, 248). Madison also recognized the ambiguity in governing authority, but unlike Lee, Madison celebrated it as a potential check on national power:

> In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself (*Federalist* 51).

Madison thus argued that the state governments would have the ability to check the national government. The ambiguity between national and state authority, combined with the Tenth Amendment that left the states with powers not specifically granted to Congress, ensured that constitutional development would be characterized by clarifying the boundaries between state and national power (Robertson 2012, 34). [88]

American constitutional design created an inherent tension[89] between the central and state-level governments, relationships that created questions the Supreme Court—and other political institutions—would have to later address. Conflicts over the authority of subordinate governments and the national government became the *sine qua non* of constitutional development as well as the focus of the convention itself. William P. Murphy's (1968) extensive study of the making of the Constitution finds, "The convention thus had before it a clear-cut choice between two systems. . . a

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[87] Letter IV, *Letters from the Federal Farmer,* 12 October 1787, in Isaac Kramnick and Theodore Lowi, *American Political Thought: A Norton Anthology,* p. 253.

[88] With respect to drawing the line between federal and state sovereignty, both the Marshall and Taney Courts had difficulty finding the precise boundaries of what Martin Shapiro called "the absurdity of two-sovereignty federalism" (Shapiro 1980, 360). This difficultly, I argue below, contributed to the Court restricting and expanding central state authority at any given period in constitutional development. Constructing precise boundaries between these sovereigns is unrealistic and, more than that, such boundaries have never existed historically in America (Shapiro 1980, 367).

[89] Scholars have noted that the Constitution creates conflicting governing prerogatives. Karen Orren and Stephen Skowronek have recognized that "the Constitution stands midway between prescriptive and positive law and in that sense is a perfect example of multiple orders" (Orren and Skowronek 2004, 171). For Orren and Skowronek, the Constitution, in general, represents "intercurrence"—their idea that "the normal condition of the polity will be that of multiple, incongruous authorities operating simultaneously" (Orren and Skowronek 2004, 108). I embrace the general idea advanced by Orren and Skowronek that the Constitution creates conflicting spheres of governing authority.

national government of virtually unlimited powers, armed with complete and absolute supremacy over the states" and "a confederation in which the central authority had enforceable supremacy only in sharply limited areas, with the states retaining their sovereignty in all others" (Murphy 1968, 147). He concludes, "The convention rejected the continuation of a system based on state sovereignty and decided in favor of a system based on national supremacy. It was a decision which was never changed" (Murphy 1968, 148). Nevertheless, it was a decision that would be repeatedly challenged, at least until the Civil War, vis-à-vis economic questions largely pertaining to tax, property, and contracts issues, which focused on the boundaries between state and federal sovereignty.

Both federalism and individual rights decisions—decisions that comprise the majority of these data—had, at their foundation, unsettled questions about the boundaries between state and national government. The constitutional design of sovereignty—and the Supreme Court's interpretation of the accompany powers of each sovereign—facilitated the continued expansion of the American central state.[90] The Supreme Court has favored central state expansion precisely because it is part of the federal government. More specifically, since the other political branches have favored expanding their own authority—and because these branches control judicial appointments—this has introduced a tendency toward the gradual expansion of national state powers.[91] As the Court has adjusted its constitutional interpretation to modern conditions, this, too, has created a bias toward central state expansion. Indeed, the federal government has involved itself

[90] Federal versus state sovereignty colored not only the constitutional convention but also animated subsequent constitutional development. This debate was especially prominent in the early republic during Chief Justice Marshall's tenure (1801-1835). Indeed, as Figure 5.3 in chapter 3 shows us, the first period of constitutional development (1789-1824) witnessed the greatest rate of state expansion whereby the Court attempted to ensure the national government's supremacy. Murphy maintains, "The Constitution was fatal to the sovereignty of the states . . . there was no misunderstanding as to the effect that the Constitution would have upon state sovereignty, for in the campaign for ratification one of the principal bases of opposition to the Constitution was that it would destroy the sovereignty of the states." Soon after ratification, however, people had "conveniently forgotten" that the Constitution destroyed state sovereignty, and from this grew doctrines of state interposition and nullification articulated by John C. Calhoun, for example, "the brilliant pre-Civil War high priest of state sovereignty" (Murphy 1968, 410–411).

[91] On the ability of the federal courts to help the national political branches overcome thorny issues, see Keith Whittington. 2005. "'Interpose Your Friendly Hand': Political Supports for the Exercise of Judicial Review by the United States Supreme Court," *American Political Science Review* 99: 584-96.

in a growing number of political issues, which in turn, necessitated the Court review a growing corpus of legal questions, too.[92] To keep the coherence and legitimacy of the national regime intact, the Court has thus tended to support the aims of the political branches.

Yet, the oscillation between expansion and restriction of authority has grown out of defining federal and state sovereignty. Martin Redish observes, "The difficult problem facing the Court is to allow the Constitution to grow in recognition of the need for expanded federal power to meet new social needs while simultaneously preserving the values of federalism unambiguously embodied in the Constitution's text" (Redish 1995, 61). Meeting new social needs has greatly contributed to the persistent central state expansion seen especially in the post-Civil War era when the Supreme Court shifted from a prescriptive to prospective understanding of law.[93]

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[92] The growth in law became particularly pronounced by the late nineteenth and early twentieth centuries. For example, the total amount of federal litigation in the United States rose from 47,553 cases in 1911 to 196,953 cases by 1930. Similarly, while the Supreme Court had only 253 cases pending before it in 1850, by 1890 the Court's docket swelled to 1800 appellate cases. Moreover, the law profession grew, too: lawyers in the United States numbered around 39,000 in 1870 to 161,000 by 1930. Consequently, the number of law schools with a three-year program increased from seven schools in 1890 to over 170 in 1931. All these numbers come from Novak (2002, 262-263).

[93] Orren and Skowronek argue that the move from prescriptive to prospective law undergirds all of American political development (Orren and Skowronek 2004, 178-181). This sweeping theory has received scant attention in the literature, but with respect to the judiciary, it has long been held that the Civil War (and the subsequent passage of the 14th Amendment) facilitated a move from prescriptive (based on common law precedent) to prospective (based on social circumstance) understandings of law. Yet even during the prescriptive of era of American political development the Court consistently expanded the powers of the federal government, a finding that does not necessarily contradict Orren and Skowronek's argument. The ways in which the Court expanded central state authority, however, during prescriptive versus prospective eras differed.

In the prescriptive era (before the Civil War), courts typically expanded central state authority vis-à-vis questions that had an established history within English common law, largely pertaining to property and contract rights and to taxing powers. *Dartmouth College* (1819) exemplified prescriptive lawmaking, invalidating a New Hampshire state law that attempted to change Dartmouth College from a private institution to a state university. Marshall rooted his decision in a lengthy discussion of English common law concerning contracts (*Dartmouth College,* 707). Yet *Dartmouth College* still asserted judicial authority over the New Hampshire legislature and, in this sense, expanded federal power. Prescriptive-era decisions, while not based on broader questions of public welfare, nevertheless affirmed the enumerated powers of the federal government over state governments. For other prescriptive-era constitutional decisions that expanded central state authority, see *Ware v. Hylton* (1796), *Terrett v. Taylor* (1815), and *Bronson v. Kinzie* (1843).

But not until the twentieth-century did the Court (and the other national political institutions) turn toward proscriptive lawmaking, an approach that accommodated a society looking more to the federal government for regulatory solutions than it had previously. Just after the Civil War, however, the Court was reluctant to take on this proscriptive approach. In *United States v. DeWitt* (1870), for example, the Court refused to extend police powers to the federal level. *DeWitt* held that the federal government power was enumerated and limited, and it possessed nothing like the general police authority of state legislatures to regulate health, morals, and public welfare. The Court quickly abandoned its holding in *DeWitt,* in the twentieth century, and secured federal police power (and thus embraced a positive understanding of lawmaking) *de facto* if not *de jure* through commerce, taxing, and postal powers (Novak 2002, 270). Indeed, *Brown v. Board of Education* (1954) typified central state expansion through proscriptive lawmaking—a

Beyond the overarching design of dual sovereignty, there is another design attribute that helped create an ever-expanding federal state: the centrality of the national economy in the Constitution, which placed the federal state on an expansionary track especially within the realm of economics. "The convention deliberately left the distribution of commercial authority ambiguous," which enabled the Court to interpret the Commerce Clause as a vehicle for state expansion, as indicated by the ubiquity of "federalism" decisions in the data from Chapter 3 (Robertson 2005b, 183). The economic goals of the Founders thus provided a foundation upon which the Court could affirm the expansion of congressional power via the Commerce Clause.

Economic Independence at the Founding

In drawing up the new Constitution, the Founders sought to escape "their mercantile dependence" from a world of "predatory European states" (Rana 2010, 133), which thus helped make the Commerce Clause, a central concern in "federalism" issues in Chapter 3, integral to state expansion.[94] During the Convention, independence from Europe rested on creating a federalist system that could limit outside interference as well as insulate the central state from democratic pressure, a system that would enable strong national economic power.[95] Moving away from a state-based idea of liberty and sovereignty became the goals of Federalist constitutional architects like

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decision based less on precedent and more on the social and psychological consequences of racial segregation (Orren and Skowronek 2004, 179).

[94] Aziz Rana's claims echo Robert Wiebe's *The Opening of American Society* who notes that a primary concern at the constitutional convention was the relationship between the U.S. and Europe: "Establishing a national government meant locating the United States in a European-dominated universe" (Wiebe 1985, 70). Moreover, the "American gentry responded to Europe's revolutionary tremors as neo-colonials who saw their own independence at stake in the outcome. Since 1783 they had pictured their nation as a prisoner on parole, protecting its precarious freedom against international forces that it might elude but could never control" (Wiebe 1984, 68).

[95] Walter Licht recognizes this in *Industrializing America.* According to Licht, "The fortunes of the now former colonialist remained in the grips of the British commercial interests; the ups and downs of economic activity during and after the 1780s reflected the abilities of British merchants to flood the American market with goods or block American exports. . . . Hamilton and his allies sought to build a power nation through commerce. . . . The United States was shredding its mercantile cast in the late eighteenth and early nineteenth centuries. That is how best to characterize society at the time" (Licht 1995, 18–19). Doing so helped produce a central state that would grow exponentially in the economic and property realm.

Alexander Hamilton and James Madison (Rana 2010, 134). Many worried that if not united in a strong union America's fate would be the same as the failed confederal republics of the past. David Hendrickson writes that the American founders, by 1787, "were coming to understand that they stood in danger of duplicating the circumstances that had produced [Machiavelli's] recommendation" of a "strongman willing to act decisively" (Hendrickson 2003, 51).[96] For example, Rufus King, a Massachusetts delegate to the Continental Congress, wrote in a letter to fellow delegate Jonathan Jackson that "the causes which changed the [republican] Governments alluded to may, and probably will, change those of America."[97] Delegates to the Constitutional Convention began to realize that to ensure independence of European states and to secure American safety would require a stronger, centralized federal government never before seen in the history of republics.

A strong, centralized federal government could better assure America's safety and longevity in the international arena, Hamilton argued in *Federalist Papers* numbers 6 and 7. Conversely, he maintained, a decentralized U.S. would produce competing European alliances among the separate colonies. In the *Federalist Papers,* Hamilton warned of this possibility:

> America, if not connected at all, or only by the feeble tie of a simple league, offensive and defensive, would, by the operation of such jarring alliances, be gradually entangled in all the pernicious labyrinths of European politics and wars; and by the destructive contentions of the parts into which she was divided, would be likely to became a prey to artifices and machination s of powers equally the enemies of them all (*Federalist Paper* no. 7, 113).

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[96] *Federalist Papers* no. 18-20, penned by Madison, offer an account of the lessons gleaned from the history of previous republics. At the convention, Madison also referenced the history of republics and the dangers of loose confederations. See Max Farrand *Records of the Federal Convention* (RFC) vol. I (1911, 285-291). Madison's solution: "The general power whatever be its form if it preserves itself, must swallow up the State powers. Otherwise it will be swallowed up by them" (*RFC,* 287). David Hendrickson's *Peace Pact* also details how the history of failed republics such as those of Italy, Greece, and Germany informed the preferences for a strong, centralized federal government among founders like Madison and John Adams (Hendrickson 2003, 47–54). Hendrickson argues, "The fatal link between disunion and foreign domination—first demonstrated among the republics of ancient Greece, and sadly confirmed by in the experience of the Italian commonwealths—seemed self-evident to the Federalists, and they repeatedly warned their compatriots to treat these lessons with the utmost gravity" (Hendrickson 2003, 52).

[97] 3 September 1786, King quoted in Hendrickson (2003, fn 14, 323-324).

Creating a centralized federal government would help the U.S. defend against the "arms and arts of foreign nations" if America otherwise remained "in a state of disunion" (*Federalist* no. 6, 104).[98] To do this required a strong commercial union because commercial interests would create peace among the colonies, Hamilton believed:

> The genius of republics (say they) is pacific; the spirit of commerce has a tendency to soften the manners of men, and to extinguish those inflammable humors which have so often kindled into wars. Commercial republics, like ours, will never be disposed to waste themselves in ruinous contentions with each other. They will be governed by mutual interest, and will cultivate a spirit of mutual amity and concord (*Federalist* no. 6, 106).

He went on to argue in *Federalist* no. 12 that "the prosperity of commerce is now perceived and acknowledged by all enlightened statesmen to be the most useful as well as the most productive source of national wealth, and has accordingly become a primary object of their political cares" (*Federalist* no. 12, 134). Accordingly he concluded, "one national government would be able, at much less expense, to extend the duties on imports, beyond comparison, further than would be practicable to the States separately, or to any partial confederacies" (*Federalist* no. 12, 137). A strong central state authority—in its constitutional makeup—would have to be designed to advance the property and commercial interests of speculators, merchants, and manufactures which would contribute to a growing federal state partly designed to protect these financial interests, which helps explain relatively persistent state expansion along Commerce Clause issues.[99]

In *Federalist* no. 41, Madison reiterated Hamilton's argument that without a strong central state, the United States would be prey to powerful European states: "Should a war be the result of the precarious situation of European affairs, and all the unruly passions attending it be let loose on the ocean, our escape from insults and depredations, not only on that element, but every part of the

[98] (Madison et al. 1987). Madison also echoed this sentiment during the federal convention. On 18 June 1787, in speaking to the committee of the whole house, Madison said, "Foreign powers also will not be idle spectators. They will interpose, the confusion will increase, and a dissolution of the Union ensue." (*Records of Federal Convention*, 285)
[99] For a discussion on how the founders sought to create an environment conducive to investment, see Woody Holton, *Unruly Americans and the Origins of the Constitution* (New York: Hill and Wang, 2007), 179-223.

other bordering on it, will be truly miraculous" (*Federalist* no. 41, 271). Because of this possibility Madison argued for a vigorous union:

> A plentiful addition of evils would have their source in that relation in which Europe stands to this quarter of the earth, and which no other quarter of the earth bears to Europe. This picture of the consequences of disunion cannot be too highly colored, or too often exhibited. Every man who loves peace, every man who loves his country, every man who loves liberty, ought to have it ever before his eyes, that he may cherish in his heart a due attachment to the Union of America, and be able to set a due value on the means of preserving it (*Federalist* no. 41, 269).

In sum, as Rana points out, "In order to achieve not just juridical independence from foreign masters but substantive independence as well, the defenders of the new Constitution sought to develop a political system that was based on greater centralization and able to limit the internal and external challenges to freedom" (Rana 2010, 135).

Looking closer at the Constitution's design shows us the areas that lent themselves to the expansion seen in the previous chapter as well as demonstrates how these calls for a mighty national economic power contributed to the structure and expansion of the federal state.

Constitutional Architects: Alexander Hamilton and James Madison

America's understanding of central state authority owes a great deal to two of the Constitution's most prominent architects: Alexander Hamilton and James Madison. And while economic commitments contributed to persistent central state growth, Hamilton's and Madison's divergence on the powers of the central state help us understand why expansion and restriction remain ubiquitous in constitutional development. Despite their Federalist alliance during the ratification of the Constitution, much of the competing conceptions of central state authority pivot on their differences regarding the strength and purposes of the national government. The constitutional framers laid the foundation for the expansion of central state authority and, among these framers, Hamilton was the "premier state-builder in a generation of state-builders" (Kramnick 1987, 67). During the Constitutional Convention, Madison, Hamilton, and their Federalist allies

sought to create a government that would defend national sovereignty and support the expansion of market-driven economic development.[100] This constituency wanted a national government that could vigorously protect property rights, promote commerce, and grow markets (Robertson 2005b, 28, 69).[101] Yet, Madison envisioned a less active state than Hamilton.

The different conceptions of the central state embodied in Hamilton and Madison are simply illustrative of two important strands in American political thought, strands that contribute to the persistent expansion and restriction seen in chapter 3. On the one hand, Hamilton's penchant for an active centralized government is seen in his writings on the presidency: "Energy in the executive is a leading character in the definition of good government. . . . A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executive, whatever it may be in theory, must be, in practice, bad government" (*Federalist* 72). On the other, Madison saw the central state necessary only in its limited, Lockean sense—to protect private rights and to ensure justice. Isaac Kramnick argues, "Madison saw the central government providing an arena for competitive power, where the private bargaining of free men, groups and interest would take place, and the state would define no goals of its own other than ensuring the framework for orderly economic life" (Kramnick 1987, 74). Contrary to Hamilton, energy in politics, for Madison, came from individuals and groups seeking their immediate goals, not from a vigorous state seeking to make its place in history.[102]

Of course, disagreements over the vigor and energy of the central state were not confined to constitutional architects like Hamilton and Madison. The Supreme Court, especially during the

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[100] In 1791, Madison split from Hamilton and the Federalist Party, allying with Jefferson to form the Democratic-Republican Party. On the divergence between Madison and Hamilton, see David Siemers. 2002. *Ratifying the Republic: Antifederalists and Federalists in Constitutional Time.* Stanford, California: Stanford University Press.

[101] David Robertson. *The Constitution and America's Destiny.* (New York: Cambridge University Press, 2005).

[102] Siemers's *Ratifying the Republic* provides an excellent treatment on the differences between Hamilton's and Madison's political thought, which were evident before the Constitution was ratified, he contends. Madison, according to Siemers, was simply too focused on ratifying the Constitution to let these differences get in the way. After ratification, Madison and the Republicans had much more in common with the Anti-Federalists than they did with the Federalists. Thus, Siemers shows that three strands of political thought existed at this time—Federalists, Antifederalists, and Madisonians.

Marshall Court years, had the onerous task of determining the boundaries between the federal and state governments. Defining these powers mapped onto the debates over constitutional interpretation during the early republic and Jacksonian years, and it is to these debates to which we now turn.

Constitutional Interpretation on the Marshall Court

While these ideas made their way into the Constitution's text and design, the persistent state expansion seen in Chapter 3 was far from inevitable. The Constitution's text could just as easily lent itself to an American state development story of persistent restriction rather than one of expansion. Indeed, Walter Licht recognizes that the design of the Constitution facilitated economic centralization but did not make it certain and, as such, the Court's interpretation played a pivotal role in state development: "Did the Constitution guarantee economic development. No. . . . What it did was *allow*. A political framework was laid down in the United States that placed no obstacles in the way of economic transformation and expansion" (Licht 1995, 93, emphasis original).[103] But, *how* did the Court contribute to this economic development and, more broadly, to central state development?

The debate between strict and broad interpretation has had an enormous impact on the growth of the federal government.[104] In his three volume study of American government, James Bryce, a British academic and politician, noticed,

> Soon after the formation of the National government in 1789 two parties grew up, one advocating a strong central authority, the other championing the rights of the States. Of these parties the former naturally came to insist on a liberal, an expansive, perhaps a lax construction of the words of the Constitution, because the more wide is the meaning placed upon its grant powers, so much the wider are those powers themselves. The latter party, on the other hand, was acting in protection both of the States and of the individual citizen against the

[103] Much like this chapter discusses below, Licht saw that the courts—not just the Supreme Court—"occupied a preeminent place in the nation's divided system of government" (Licht 1995, 93–95).
[104] The Republican challenge to the Federalist's broad constitutional interpretation of the 1790s "has framed much of American constitutional debate ever since," claims Gillman, Graber and Whittington's *American Constitutionalism,* (Gillman et al. 2013, 119)

> central government, when it limited by a strict and narrow interpretation of the fundamental instrument the power which that instrument conveyed. The distinction which began in those early days has never vanished (Bryce quoted in Gillman et al. 2013, 119).[105]

The expansion and restriction of federal powers in due in part to the divide between those who view the Constitution as bestowing broad powers on the central state and those interpret the Constitution's language more narrowly. The Federalist and Republican divide in the early republic dealt fundamentally with the debate between a strong central state and a weak central state. These interpretational philosophies did not necessarily deal with specific provisions, but on the contrary, defined broad constitutional clauses such as the Necessary and Proper and Commerce Clauses as we will see below in *McCulloch v. Maryland* (1819) and *Gibbons v. Ogden* (1824).

The origins of strict versus broad constitutional interpretation also map onto the notions of federal versus state sovereignty—broad interpretations dovetailing with federal sovereignty and strict interpretation favoring state sovereignty arguments. And like the debate over sovereignty, the constitutional interpretation debate began at the founding. In particular, Jeffersonians gave us the notion of "strict" interpretation, believing that the powers bestowed by the Constitution should be read narrowly. Similarly, a widely-read Virginia law professor and judge, St. George Tucker, injected the term into the legal lexicon with his publication of an Americanized 1803 edition of William Blackstone's *Commentaries on the Laws of England*. In his appendix, Tucker explained that the Constitution should be understood as a "federal compact, or alliance between the states." He

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[105] In the same section, Bryce went on to say that both American parties—Republicans and Federalist—did not strictly adhere to either form of interpretation; the parties used whatever form of interpretation serviced their momentary political interests: "Whenever there has been a serious party conflict, it has been in reality a conflict over some living and practical issue. . . .men did not attack or defend a proposal because they held it legally unsound or sound on the true construction of the Constitution, but alleged it to be constitutionally wrong or right because they thought the welfare of the country, or at least their party interests, to be involved."

More central to the arguments made later in this chapter is Bryce's claim that since the Civil War, the broad construction has "prevailed" thus indicating great consolidation of national power. Yet, he observed, "there is still a party inclined to strict construction, but the strictness which it upholds would have been deemed lax by the Broad Constructionists of thirty years ago. The interpretation which has thus stretched the Constitution to cover powers once undreamt of, may be deemed a dangerous resource" (Bryce 1888, 379–380). That has been the story of constitutional development—it has consolidated central state power, especially after Union victory, and with each episode in political development, the threshold for what constitutes central state authority has ratcheted upward toward greater federal power.

believed that the powers of central government were "pretty accurately defined and limited" by the Constitution in order to distinguish between the sovereign people who made constitutions and the governments created by them, citing the Ninth and Tenth Amendments as protections against the central state from infringing the rights of the people and of the states, respectively. He thus concluded, "The sum of all which appears to be, that the powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or of the people, either collectively, or individually, may be drawn in question" (Tucker [1803] quoted in Gillman et al. 2013, 120).[106] Jacksonian Democrats continued the Jeffersonian Republican's strict constructionist creed: "We adhere to the constitutional doctrines of the republican party of 1789-9; we adopt the rule of strict construction they maintained, as the only true and safe one, applicable to our constitution," declared Congressional Democrats in an address to the people before the launch of the campaign season (Gillman et al. 2013, 120).

Other important legal thinkers sought to rebut Tucker's and the Republicans' predilection toward strict constitutional construction. Justice Joseph Story—who sat on the Court from 1811 to

[106] In the early 19th century, a strict interpretation of constitutional law was common among Republicans. The ascension of Thomas Jefferson to the presidency had much to do with the principle that federal government powers would be construed narrowly. Jefferson told his followers that when central state powers were questionable, it would be better to seek a constitutional amendment rather "than assume it by a construction which would make our powers boundless. Our peculiar security is in the possession of a written constitution. Let us not make it a blank paper by construction" (Jefferson quoted in Gillman, Graber, and Whittington 2013, 120).

To be sure, once in office, political circumstance presented President Jefferson with many situations, like the Louisiana Purchase, that required Jefferson to take a more expansive constitutional interpretation of executive power. How Jefferson reconciled his strict constructionist interpretation with the political demands of his office is the subject of Jeremy D. Bailey's (2007) *Thomas Jefferson and Executive Power.* Prior to Bailey's study, much of the scholarship viewed Jefferson as a hypocrite because he initially argued for limited national and executive powers, but then he presided over the greatest expansion of national and presidential power the country had seen. Contrary to this prevailing interpretation, Bailey argues that Jefferson was not ever an "enemy of executive power" (Bailey 2007, 4). Instead, Bailey finds that Jefferson's frequent use of presidential prerogatives did not contradict his strict interpretational stance; instead, Jefferson's strict construction demanded grounding executive power in popular consent. Expansion of executive power, for Jefferson, required public approval and justification, at least for the executive's more-questionable actions. Jefferson defended his actions before the public in what Bailey calls "declarations of principle" (Bailey 2007, 22-24, 152). This democratic understanding of presidential power contrasted with Hamilton and other advocates of a strong presidency who located executive prerogative in doctrines of implied powers and loose construction

1845 and authored a famous constitutional treatise[107] first published in 1833—was one such figure. An advocate of Chief Justice Marshall's nationalism, Story's treatise provided an alternative interpretational theory to Tucker's understanding.

> In construing a constitution of government, framed by the people for their own benefit and protection for the preservation of their rights, and property, and liberty; where the delegated powers are not, and cannot be used for the benefit of their rulers, who are but their temporary servants and agents; but are intended solely for the benefit of the people, no such presumption of an intention to use the words in the most restricted sense necessarily arises (Story quoted in Gillman, Graber, and Whittington 2013, 121).

Story thus argued that popular sovereignty required that judges take a liberal, or broad interpretation, of the federal government's powers. By doing so, Story's treatise sought to rebut Tucker's scholarship, advanced Chief Justice Marshall's broad constitutional vison, and equipped the Whig Party to oppose the Democrat's arguments for strict interpretation well into the nineteenth century.

The Court expanded power, and did so exponentially, largely because the Marshall Court went to great lengths to employ broad interpretations of Congressional power, namely, the Commerce Clause and the Necessary and Proper Clause as demonstrated in *Gibbons v. Ogden* and *McCulloch v. Maryland,* respectively. In *Gibbons*, for example, Marshall defended the Court's use of broad constitutional interpretation. When a lawyer urged the Court to use a strict interpretation of Congress's commerce power, Chief Justice Marshall said that doing so would weaken the federal government.[108] *Gibbons* structured Commerce Clause cases at least through the nineteenth century, which helps explain why the Court, via commerce and federalism decisions, persistently expanded central state authority across time.[109]

Defining the spheres of sovereignty (i.e. political authority) was also central to *McCulloch*. With regard to this issue, the Court held that the sovereignty of the Union lies with the people of the

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[107] Joseph Story, *Commentaries on the Constitution of the United States* (Boston: Hilliard, Gray, 1833). This treatise is included in my dataset.

[108] Marshall wrote that a "narrow construction" would "cripple the government, and render it unequal to the object, for which it is declared to be instituted." He thus concluded, "We cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded" (*Gibbons*, 187-188).

[109] In their American legal history casebook, Kermit Hall, Paul Finkelman and James Ely note, "*Gibbons* is the most important commerce clause case in Supreme Court history. All subsequent nineteenth-century commerce clause cases (and many twentieth-century ones) were, to a great extent, merely commentary on *Gibbons*" (Hall et al. 2005, 155).

United States, not with the individual states that comprise it. The United States, not a simple alliance of states, is a "constitutional sovereign" with its authority resting exclusively with "the people" who created and are governed by the Constitution. To the Court, "the government of the Union is a government of the people; it emanates from them; its powers are granted by them; and are to be exercised directly on them, and for their benefit" (*McCulloch,* 409). With this logic, Marshall's opinion struck down the Maryland's tax on the bank as violation of constitutional sovereignty because the tax acted against all the people in the United States by a state accountable only to some of the people. *McCulloch*—and those cases like it[110] that determined the limits the Constitution placed on the sovereignty of states—primarily dealt with preserving the Union against powerful state sovereignty arguments that threatened the dissolution of the Union.[111] Marshall thus favored reading the Constitution as providing Congress wide discretion in determining the reach and scope of its expressed powers.[112]

Nevertheless Marshall's penchant for employing a broad interpretation of constitutional language evoked ire from powerful figures outside the courtroom.[113] After Marshall's landmark ruling, two eminent Virginia state judges, William Brockenbrough and Spencer Roane, protested *McCulloch* in a series of publications in the Richmond *Enquirer.*[114] The Court delivered its opinion on

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[110] These cases include *Gibbons v. Ogden* (1824)*, Brown v. Maryland* (1827)*, Willson v. Blackbird Creek Marsh Co.* (1829)*, Craig v. Missouri* (1830)*,* and *Barron v. Baltimore* (1833).

[111] G. Edward White makes this argument in his comprehensive volume written for the Oliver Wendell Holmes Devise History of the Supreme Court of the United States, *The Marshall Court and Cultural Change, 1815-35,* Volume III-IV. White argues that many of the Marshall Court's cases "did not so much promote federal sovereignty as restrict state sovereignty." The nationalism promulgated in Marshall's rulings "was not a nationalism in the modern sense of support for affirmative plenary federal regulatory power; the Court's posture can more accurately be described as a critique of reserved state sovereignty" (White et al. 1988, 486). Nonetheless, throughout Marshall's tenure, the Court was preoccupied with defining the boundaries between state and federal sovereignty, and the difficulty engendered by this duty produced decisions that restricted and expanded central state authority.

[112] Charles F. Hobson, editor of *The Papers of John Marshall,* sees Marshall less as a proponent of broad constitutional interpretation and more as an opponent of the "restrictive construction" advocated by Maryland's counsel in *McCulloch.* Hobson notes that Marshall's primary concern with strict construction was that it "would inexorably transform the Union into a league of sovereign states—a belated triumph for Antifederalism" (Marshall et al. 1974, 258).

[113] For a detailed treatment of *McCulloch* and the different degrees of opposition among states and between divergent factions within states, see Richard Ellis's (2007) *Aggressive Nationalism,* especially chapters 5-7.

[114] (Marshall et al. 1974, 282–287). These men along with Thomas Ritchie, editor of the *Enquirer,* formed the "Richmond Junto"—a powerful Republican organization that controlled politics in Virginia. They saw the Federalists as expanding

March 6, 1819 and as early as March 13 criticisms were published. Hezekiah Niles, editor of *Niles' Weekly Register* in Baltimore, published a series of attacks on the decision as a "deadly blow" to the "sovereignty of the states" and the "first grand step towards a consolidation of the states, or a separation of them."[115] Similarly, Marshall's most vociferous and redoubtable opponent, Spencer Roane protested, "The states have also constitutions, and their people rights, which ought also to be respected. It is in behalf of these constitutions, and these rights, that the enlarged and boundless power of the general government is objected to. The construction which gives it, is in entire derogation of them."[116] These criticisms claimed that the Court, by expanding the powers of the central state, undermined the meaning of the Constitution's text, which consequently prostrated the rights of the states and of the people.

Marshall expressed growing concern over these state sovereignty-based arguments to two of his fellow justices and closest confidants—Bushrod Washington and Joseph Story.[117] So strong was this opposition that Marshall felt compelled to write eleven newspaper articles defending *McCulloch* under the pseudonyms "A Friend of the Constitution" and "A Friend of the Union."[118] Marshall went to great lengths to defend the Court's interpretation of "necessary" and the resulting expansion of Congressional power this caused. In his second article, Marshall criticized Hampden for his narrow understanding of "necessary:" "Will any man seriously contend that the rights of a nation are

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the powers of the federal government at the expense of state sovereignty primarily through the Supreme Court's rulings. They saw Marshall Court decisions like *McCulloch, Dartmouth, Sturgis v. Crowinshield,* and *Martin v. Hunter's Lessee* as proof that the federal judiciary sought to overthrow state governments. Together, with Thomas Jefferson's blessing, these men used the *Enquirer* to disseminate the Richmond Junto's constitutional ideas regarding state rights (Marshall et al. 1974, 284).

[115] Niles quoted in *Papers of John Marshall* volume VIII (Marshall et al. 1974, 282)

[116] 18 June 1819 *Richmond Enquirer,* "Rights of the States and of the People," p. 2-3.

[117] Writing to Justice Story about these criticisms in the *Enquirer*, Marshall said, "Our opinion in the bank case has roused the sleeping spirit of Virginia—if it indeed it ever sleeps. It will I understand be attacked in the papers with some asperity; and as those who favor it never write for the publick it will remain undefended & of course be considered as *damnably heretical."* Marshall to Joseph Story 24 March 1819 (Marshall et al. 1974, 280, emphasis original). See also Marshall to Bushrod Washington 27 March 1819 (Marshall et al. 1974, 281).

[118] These articles can be found in *The Papers of John Marshall,* volume VIII (Marshall et al. 1974, 287–309; 318–327; 335–349; 353–359). Marshall's newspaper articles constituted his only direct engagement in public debate during his thirty-four year tenure on the Supreme Court (Marshall et al. 1974, 282).

limited to those acts which are necessary for its preservation, in the sense affixed by Hampden to the term 'necessary'? May it not pass the bounds of strict necessity, in order to consult or provide for its happiness, its convenience, its interest, its power?"[119] Here Marshall argued that the Necessary and Proper Clause encompassed more than simply the enumerated powers listed in the Constitution because "the power to do a thing, and the power to carry that thing into execution, are I humbly conceive, the same power, and the one cannot be termed with propriety 'additional' or 'incidental' to the other."[120] Marshall also protested Hampden's decentralized conception of the United States as a "league" of states: "our constitution is not a league. It is a government; and has all the constituent parts of a government. It has established legislative, executive, and judicial departments, all of which act directly on the people, not through the medium of the state government."[121] Marshall's objection to Hampden thus rested in part on the conception of state versus federal sovereignty, which animated constitutional development at least until the end of the Civil War.

It comes as no surprise that dual sovereignty proved a difficult concept to balance in practice. Looking closer at the decisions of the Marshall Court, it becomes evident that drawing the boundaries between two sovereigns—defining federalism, essentially—occupied constitutional development; decisions from the dataset reveals this fact. *Gibbons* is known for its expansion of the central state's power to regulate commerce, but just five years later in *Willson v. Blackbird Creek Marsh Company* (1829),[122] the Court's ruling left power to the states. A unanimous opinion in *Willson*

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[119] "A friend of the Constitution," II 1 July 1819, volume VIII (Marshall et al. 1974, 324)
[120] "A friend of the Constitution," II 1 July 1819, volume VIII (Marshall et al. 1974, 323)
[121] "A friend of the Constitution," VII 9 July 1819, volume VIII (Marshall et al. 1974, 350-351)
[122] 27 U.S. 245. In *Willson,* Delaware authorized the Blackbird Creek Marsh Company to build a dam spanning the Blackbird Creek. Willson. This dam obstructed the creek and prevented a small sailing vessel, possessing a coastal license similar to the one held in *Gibbons,* from navigating the creek. During the course of his travel on the creek, the licensed owner of the tiny sailing vessel broke part of the dam. Consequently, the Company successfully sued Willson for trespassing and obtained a Delaware court order requiring Willson to pay damages. Willson appealed to the Supreme Court, claiming that Delaware's law violated Congress's Commerce Clause. The Court disagreed because Congress had taken no action with which the Delaware law could conflict: "We do not think that the Act…can…be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject" (*Willson,* 252). Thus, Marshall laid the ground for the "dormant" Commerce Clause, a constitutional

allowed a Delaware state law regulating the navigation of Blackbird Creek to stand.[123] Other decisions during Marshall's tenure like *Providence Bank v. Billings* (1830)[124] also relegated power to the states thus restricting central state authority, demonstrating why we often see both expansion and restriction of federal power (Gunther 1969, 19-21).[125]

As Figure 5.3 in chapter 3 shows, the rate of expansion was greatest from 1789 to 1824. Indeed, *Gibbons* and *McCulloch* are representative of this general trend, which witnessed the Supreme Court affirming its own review powers as well as securing the supremacy of the national government over the state governments. Yet as the broad trends in chapter 3 also reveal, restriction remained an important facet of constitutional development and turns on the division of powers between state and national government. Consequently, the next era from 1824 to 1849 experienced the slowest rate of state expansion in all of the data because—during the final years of the Marshall Court and the rise of the Taney Court—a shift in the Court's understanding of dual sovereignty occurred. This produced a growing number of restrictive cases that devolved power to state governments, but

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interpretation of the Clause that allowed the Court to regulate commercial activity even when Congress had not promulgated a law intending to do so, which is discussed below.

[123] The attorney for the sailor argued that the dam "unconstitutionally impeded" the boat "in use of her license." More than that, the Commerce Clause prevented Delaware from "closing a navigable river" (*Willson,* 248). In contrast, the attorney for the company argued that body of water being dammed was insignificant to water traffic: it was "one of those sluggish reptile streams, that do not run but creep, and which, wherever it possesses, spreads its venom, and destroys the health of all those who inhabit its marshes" (*Willson,* 249). Thus, the attorney for the company claimed that damming unhealthy waterways was a justifiable use of a state's police power to regulate healthy and safety of its citizens, especially since Congress had passed no legislation affecting the creek to which the Court agreed.

[124] 29 U.S. 514. Influenced by the growing Jacksonian democracy sentiment, the Court limited the amount of protection afforded to corporate charters under the Contracts Clause (Hall et al. 2005, 801). Here Marshall rejected Providence Bank's argument that its charter exempted it from state taxation. Writing for the majority, Marshall held that the Constitution "was not intended to furnish the corrective for every abuse of power which may be committed by the state governments" (*Providence,* 563).

[125] Gerald Gunther's *John Marshall's Defense of McCulloch v. Maryland* supports this claim. Gunther shows us that "The degree of centralization that has taken place since [Marshall's] time may well have come about in the face of Marshall's intent rather than in accord with his expectations. That centralization may be the inevitable consequence of economic and social changes. And this development may suggest the impossibility of articulating general constitutional standards capable of limiting those centralizing forces" (Gunther 1969, 20).

nevertheless, Taney's Court still did more to expand central state power than not, contrary to how we typically remember the Taney Court.[126]

Conclusion

Consistency in the law required that the logic of a single, ultimate central authority trump the idea of dual sovereignty, or what Martin Shapiro calls, the "absurdity of federalism" (Shapiro 1980, 361). Constitutional development reflected the need to reconcile the tension between federal and state governments, which the Court helped to do with its relatively consistent support of the two political branches, an idea discussed further in chapter 6. If the Court had not resolved this tension in favor of the central state then this would have constrained American political development and weakened the U.S. Given the ever-changing economy and technology of America, the only way that this logic could flourish was to assign supremacy—that is, single ultimate political authority—to the central state (Shapiro 1980, 361). A modernizing economy necessitated a Court that would respond to the growing economic pressures felt throughout the country if the country were to grow commercially. Thus the early republic witnessed rapid central state expansion because it comprised members sympathetic to creating a strong commercial republic. Yet, at the same time, the Court oscillated between expansion and restriction because it took seriously the boundaries of two sovereigns and because fitting constitutional doctrine to the ever-changing sociopolitical environment naturally produced these differing outcomes.[127]

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[126] Michael Les Benedict notes that the "divergence between the Marshall and Taney Courts on matters of federalism has been exaggerated," and he emphasizes the Taney's Court "continued commitment to national supremacy" (Les Benedict 1978, 44), see also footnote 13 on the same page. Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court," *The Supreme Court Review* (178): 39-79.

[127] Loren Beth makes a similar argument in *The Development of the American Constitution, 1877-1917*. Of the interpretation of the Court during the Industrial Revolution, Beth writes:

> It does not do, in this latter day, to take a simplistic view of the judges or the way the courts handled the resulting cases. . . . What emerges is what might be expected of a human institution: a fumbling and vacillating response which in the long run was astonishingly but accidentally successful in allowing both for *increasing* governmental regulation of the worst aspects of the Industrial Revolution and for the maintenance of the system (sometimes loosely called 'free enterprise') which was creating the revolution (Beth 1971, 141).

Chapter 5: The Court and the Rise of the Modern State, 1870-1920

> *"The great danger now will be that things will rush in the opposite direction, and the central authority, from being limited and straitened in all its powers and functions, and scarcely able to maintain a precarious existence, will be in danger of absorbing all the important functions of governmental administration"*
>
> --Vermont State Supreme Court Judge Isaac F. Redfield, 1867[128]

Introduction

The previous chapter explored important ideas set in motion at the founding, ideas about the division between federal and state sovereignty and about the debate between strict and broad constitutional interpretation. The founding cemented these divisions within the constitutional lexicon and thus ensured the persistent conflict between national and state power. While this conflict persists to the present-day, its apotheosis was the Civil War. The Civil War and the Reconstruction Amendments mark the most important constitutional change since the founding, and accordingly, the effects wrought by these changes warrant closer investigation.

From 1870 to 1920, the Supreme Court, through its decisions, navigated a moderate course of state development between the Union and the former Confederacy. On the one side, the Union wanted a unified national market (thus broad interpretation of the commerce clause) and little or no government regulation of private enterprise (thus narrow interpretation of the due process clause). On the other side, the former Confederate states wanted local control of race relations and politics generally (thus individual state control of citizenship/social policies). From the northern perspective, constitutional development largely traded away civil rights for blacks in the South for rapid industrial expansion in the nation (particularly the Northeast and Midwest). Thus, the Court nationalized a good portion of capital-labor relations during this period and, at the same time, localized civil and political rights. What is important to state development is that the Court played an

[128] Isaac Redfield. 1867. "The Proper Limits between State and National Legislation and Jurisdiction. Speculations and Monopolies in the Staples of Subsistence. Railways a Matter of National Interest." *The American Law Register,* 15 (4): 193-202, 197.

integral role, through its decision, in the reconciliation between North and South after the Civil War. The Court helped steer a more moderate course between those who sought a return to a state-centered understanding of federalism and those who wanted to aggressively expand federal state power.

Scholars interested in understanding the modern American state have closely examined the turn of the twentieth century—roughly, the last quarter century of nineteenth to the first quarter century of the twentieth. During this period the central enterprise of the Court was consolidating the nation state and reducing state autonomy as questions concerning federal-state relations became ever-more paramount in the wake of the Civil War. During this period, the modern American state began to take root. And while virtually all other aspects of modern governance emerged, the conventional narrative holds, that the Court was somehow a constant obstacle to the growth of modern state. The most glaring issue with this conventional narrative is that it is myopic in its view, looking only at the emergence of the administrative state as well as a few unrepresentative Supreme Court decisions.[129] It also treats the Court's doctrine as a monolithic entity, neglecting to dissect the various developments within the law. Indeed, the empirical reality presented in the previous chapter casts doubt on these overarching characterizations of the Court. The discussion below begins to revise this narrative and explains the nuanced relationship the Court had with central state authority from around 1870 to 1920, showing that the Court—because of its newly expanded jurisdictional powers and its interpretation of commerce—was far from a persistent inhibitor of state development.

[129] John E. Semonche makes this latter point forcefully in his extensive treatment of the Supreme Court between 1890 and 1920. He concludes, "To stress *Pollock* in the 1890s, *Lochner* in the 1900s, and *Hammer* in the 1910s presents a distorted image of the Court, which during these three decades was struggling, most often successfully, with the task of accommodating the law to the demands of a changing society" (Semonche 1978, 434). John E. Semonche. 1978. *Charting the Future: The Supreme Court Responds to a Changing Society, 1890-1920*. Westport, CT: Greenwood Press.

The Court and Central Authority

The epigraph above captured the central dilemma facing the Supreme Court as it confronted questions about the relationship between the states and the Union during the Reconstruction era. During this time, America's federalist system came under close judicial scrutiny. The Civil War period was a time of extraordinary growth in national power—a federal income tax, new banking system, the beginning of national railroad control, and presidential suspensions of habeas corpus typified this important growth in central state power. Senator James Grimes[130] recognized that during the Civil War the Union drew to "the Federal Government authority which had been considered doubtful by all and denied by many of the statesmen of this country." But he was quick to urge his fellow senators: "That time . . . has ceased and ought to cease. Let us go back to the original condition of things, and allow the States to take care of themselves."[131]

The Civil War, however, definitively ended the idea that the United States was a confederate state, subject to the will of its individual states. Yet, in the aftermath of the war, the country did not embrace the centralization implicit on war based on union would predict.[132] While there was no going back, the Civil War and Reconstruction were not enough to forge the modern American state, and instead, much of the building of the American state occurred as the Supreme Court balanced

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[130] A well-regarded Senate Republican from Iowa, Grimes served on the Joint Committee on Reconstruction, the committee that drafted the Fourteenth Amendment.

[131] Congressional Globe, 39, 1, p. 2446.

[132] See, for example, *The Boston Globe,* "The State Rights Question," 30 March 1876, p.4 and *Chicago Daily Tribune,* 24 January 1909, "Nationality and the New South," p. G4. Both articles rejected persistent calls for a return to pre-Civil War understandings of federalism. Similarly, Johnson's *Governing the American State* is built on the "curious puzzle" that the "crisis of the Civil War and Reconstruction was not enough to create a centralized state, yet the key elements necessary for a modern state to form were already in place before the crisis of the Great Depression and the response of the New Deal" (Johnson 2007, 5). Johnson's purpose is to show the ways in which Congress through "intergovernmental policies" helped foster the "development of interlocking bureaucracies at the national and state levels" during a period of "New Federalism," a period where the United States straddled a dual federalist system and a centralized modern state (Johnson 2007, 4, 6). While this dissertation recognizes this puzzle, it disagrees with Johnson's view of the Court as a persistent inhibitor of state growth (Johnson 2007, 29-32) as well as with the conception that the pre-1877 era can be entirely dubbed as "dual federalist." Other scholars have objected to this dual federalism characterization, too. See Martin Redish, *The Constitution as Political Structure,* (1995, 27-30). Redish finds little utility in the distinction between "dualist" and "cooperatist" federalism theories. Dualists see federalism where "each of the two sovereignties has its own exclusive area of authority and jurisdiction, with few powers held concurrently" (Elazar 1962, 22). Cooperatists, Edward Corwin notes in his seminal law review article, claim that "the National government and the States are mutually complementary parts of a single governmental mechanism" (Corwin 1950, 19).

this new authority bestowed upon the federal government against the calls to return to a state-centered model of federalism.[133]

The rest of this chapter argues that the Supreme Court—far from obstructing state building—often provided much of the foundation on which subsequent political actors built the coercive apparatus of the central state. Instead of viewing the Court as outside of the central state[134] (and juxtaposed to this state), I view the Court as part and parcel of the central state. My argument has two facets, one theoretical and one empirical. The theoretical part shifts our understanding of "state development" away from European welfare-state conceptions and toward a broader definition of "development." The empirical analysis, from a sample of 104 landmark decisions, reveals that the Supreme Court was an institution with a complex relationship toward federal authority, building it in some policy realms while obstructing it in others.

Two developments greatly influenced this complex relationship. First, questions pertaining to federalism became ever-more pressing and thus the dominant vehicle through which the Court expanded its own power as well as the powers of the other federal branches. The Court at this time, legal historian Stanley Kutler argues, should be remembered for its "remarkable tenacity and toughness," which enlarged its judicial power (Kutler 1968, vii). Second, the Court became the

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[133] Michigan Judge Thomas Cooley, arguably the most famous jurist and legal thinker of the post-Civil War decades, called for the return to the state-centered model of federalism: "The proper boundary between national and state powers was agreed upon after long discussion . . . and it has been found so satisfactory that we have willingly endured a most destructive war in its defence. The cost of that war has been expended in vain if at its conclusion we propose to treat that boundary as a shadowy line which none need regard. The only safety to our institutions consists in standing by their fundamental principles, of which the just division of local and general powers is, by the constitution, made first and most prominent" Thomas M. Cooley, "The Legal Aspects of the Louisiana Case," *Southern Law Review* 1 (1875): 18-44, 42.

[134] It might be asked, who would place the Court outside of the central state? Narratives that view the Court as a persistent inhibitor, however, do just this—though not quite consciously. In viewing the Court as an obstacle during the *Lochner* era, for example, scholars have failed to recognize the very strength of the Court itself to rule over new questions and extend its reach into new areas of society. The increased power of the Court itself might also be an indication of greater judicial independence and insulation from other political institutions and society, indications of enhanced central state strength. Outside of the APD literature, judicial independence has also be recognized as a constitutional design principle that enhances economic growth; economic scholars have noted this causal connection (Congleton and Swedenborg 2006, 278). See Lars P. Feld and Stefan Voight, "Judicial Independence and Economic Development" in *Democratic Constitutional Design and Public Policy,* Roger D. Congleton and Birgitta Swedenborg, eds. (Cambridge, MA: MIT Press, 2006).

primary institution to resolve controversies over central state authority whereas, previously, other institutions had more of a say in regulating the whole political system. These changes were important because they inadvertently created a Supreme Court strong enough to define federalist boundaries as the New Deal approached—a central political and legal debate throughout the New Deal.

The mechanism through which the Court operated was both legal and institutional. In particular, the creation of the Dormant Commerce Clause doctrine[135] enabled the Court to strike down state-level barriers to interstate commerce *even if* Congress had not passed a law governing the behavior a state law sought to regulate. The dormant clause, in effect, allowed the Court to become a mouthpiece of the state, enhancing national state authority in the name of economic expansion. Moreover, institutional developments enhanced the power of the Court itself thereby enabling it to expand state authority; during Reconstruction, the Court acquired "removal"[136] power, broader jurisdiction, and an extension of habeas corpus powers of the federal courts, to name a few examples.[137] Indeed, the congressional judicial reorganization bills of 1862 and 1863, of 1866, and of 1869 were attempts to vest more power in the judiciary in order to help extend Republican Party

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[135] For an historical overview of the dormant Commerce Clause see Martin H. Redish and Shane V. Nugent, "The Dormant Commerce Clause and the Constitutional Balance of Federalism." *Duke Law Journal* (Sep. 1987), 574-581. The "dormant" Commerce Clause refers to the prohibition, *implied* in the Commerce Clause, against states passing legislation that discriminates against or excessively burdens interstate commerce. For a normative critique of the application of the dormant Commerce Clause over time see Martin Redish, *The Constitution as Political Structure,* chapter 3.

[136] Congress permitted many cases that started in state courts to be removed into federal circuit courts. The courts used this new power, at first, to defend the rights of African-Americans and federal officials in the South during the Reconstruction Era, but this quickly changed. See, William Wiecek, "The Reconstruction of Federal Judicial Power, 1863-1875." *The American Journal of Legal History.* 13, 4 (October 1969): 333-359. For a list of the changes in Court powers see Wiecek "The Reconstruction of Federal Judicial Power," 333.

[137] Wiecek notes these advancements "laid the groundwork" for subsequent judicial moments of state expansion of the late nineteenth and early twentieth centuries (Wiecek, "The Reconstruction of Federal Judicial Power," 334). For a close look at the Habeas Corpus Act's effect on Court power, see William Wiecek, "The Great Writ and Reconstruction: The Habeas Corpus Act of 1867," *The Journal of Southern History,* 36, 4 (Nov. 1970): 530-548. Wiecek highlights the new role the federal courts played in the post-Civil War era, a role that required building the central state apparatuses:

> [T]he expanded scope of federal activity during Reconstruction, together with the problems facing the freedmen, made it apparent that the objectives of the [Congressional-judicial] partnership would have to be expanded. By 1865 it had become obvious that the overriding result of the Civil War was the supremacy of the Union over the claims of state autonomy. Federal policy was to take precedence over state objectives in the event of a clash between the two, and the federal courts were to protect this precedence (Wieck, "The Great Writ," 537).

power. Changes in federal court jurisdiction were not embarked upon because of antipathy to the institution or to President Johnson, but instead, because the Republican controlled Congress sought to tailor "the judicial system of the United States to suit better the demands and needs of the dominant section, and, of course, the dominant party" (Kutler 1968, 62).[138] But, before any discussion of specific constitutional developments in this period, let us take a look at the broader state theories and changes in constitutional thought advanced in the last quarter of the nineteenth century. These help explain the expansion and restriction of central state authority.

Evolving Constitutional Thought and State Theory after the War

Beyond looking at the empirical reality, we can begin to revise the APD narrative concerning the Court and state development by looking at the constitutional thought of the late nineteenth and early twentieth centuries. Here we certainly see arguments for the restrictions of central state authority—state-centered federalism arguments—but, we also see evolving state and legal theories calling for a stronger, centralized national government. Political scientists and legal scholars offered new conceptions of the state, sovereignty, and law that helped justify the expansion of the federal government as well as called on courts to remember states' rights arguments of the pre-Civil War era thus contributing to constitutional development's restriction-expansion patterns.

For all the evolving ideas arguing to an enhancement of central state power, there remained voices in the American legal community advocating for the maintenance of states' rights. Coming out of the Civil War, the Court—and the rest of the country, for that matter—was unsure as to the

[138] For further discussion regarding the expansion of federal court jurisdiction, see Kutler, *Judicial Power and Reconstruction Politics,* (1968, 143-160). Like Wiecek (1969), Kutler stresses the importance of congressional legislation which removed cases from state to federal courts (Kutler 1968, 143-144). More recently, and with a focus on judicial institutional development, Justin Crowe contends that congressional removal legislation "not only expanded the reach of judicial power but also unequivocally affirmed the federal judiciary as a crucial partner in the emerging economic regime" (Crowe 2012, 163).

boundaries of state and federal power. These states' rights arguments still had a great impact on constitutional doctrine.

John Norton Pomeroy—a lawyer from New York, New York University professor, and widely read legal writer—believed that while the concept of state sovereignty was "illogical [and] absurd," he nevertheless claimed that the states did retain rights "as perfect within their sphere as those of the general government." He believed that the Constitution gave "to the agents appointed to manage the national affairs, power enough to meet any emergency." At the same time, he argued that the Constitution had "clothed the separate states with capacities to limit and restrain any unlawful exercise of that power, and to preserve our liberties to all time" (Pomeroy and Bennett 1886, 103–104).[139]

Pomeroy understood that the Civil War guaranteed a perpetual national union. Yet the union was still a collection of active, strong states. If the national government were permitted to occupy these states with military troops at its discretion, or if federal courts had total jurisdiction over these states, then the union, under the Constitution, would no longer exist. Pomeroy resisted what he saw as a dangerous expansion of central state authority during the Reconstruction Era. Even as he saw benefits to this nationalism, he cautioned against these threats to the states (Paludan 1968, 292).[140]

The ideas of Pomeroy made their way into an important Supreme Court decisions concerning the nature of the federal union, *Texas v. White* (1869)[141]. In settling a question over

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[139] An earlier edition of Pomeroy's casebook is included in my dataset.

[140] Reviewing Francis Lieber's *On Civil Liberty* in 1874*,* Pomeroy wrote, "The book is especially needed in our own country to counteract those tendencies of the day towards a complete centralization" (Pomeroy quoted in Paludan 1968, 292). Here Pomeroy represents the push and pull between the expansion and restriction of central state power occurring during the post-Civil War era that the Court attempted to navigate.

[141] 74 U.S. 700. *Texas* pertained to an 1851 Congressional authorization that transferred $10 million in U.S. bonds to the state of Texas in settlement of boundary claims. The bonds were to be redeemable in 1864, but in 1862, the Confederate Texas state legislature transferred some of the bonds to dozens of private individuals and to Droege & Co., in England, in payment for Confederate military supplies. After the Civil War, the Reconstruction state legislature filed a suit in the Supreme Court to recover the bonds held by these private citizens, which were located across various states at the time. The fundamental questions in this case revealed a principal dilemma facing the Court (and the country) during Reconstruction—was Texas a state in the union eligible to seek redress in the Supreme Court and could Texas constitutionally reclaim the bonds? The Court held that Texas did have right to bring suit in the Court. It also held that

bonds, the Court in *Texas* addressed the more important question of the nature of the union. Historians have considered *Texas* as a victory for congressional reconstruction in that it upheld the power of the central state to regulate the reentry of rebel states into the union. But while the Court had acknowledged such power, it robbed that power of significant meaning by defining the form of the nation in terms that would prove the undoing of Reconstruction. It provided Pomeroy's definition of the nature of the nation.[142] On August 9, 1869 Chief Justice Chase wrote to Pomeroy, "You have doubtless seen some traces of your own thinking in the late judgment of the Supreme Court" (Chase quoted in Paludan 1968, 291). Pomeroy added the letter to a footnote in his constitutional casebook because there was great resemblance between his thought and the Court's decision (Paludan 1968, 291). The decision coincided so well with Pomeroy's ideas that he called it "remarkable for its clearness and for the cogency of its reasoning." It "struck the solid ground of historical fact." The decision provided "the greatest security for the nation . . . also the greatest security for the several states" (Pomeroy quoted in Paludan 1968, 291).

In *Texas v. White* Chase promulgated an idea about the nation that the Court perpetuated—and Pomeroy supported—throughout the Reconstruction era. Chase held for the majority, "The Constitution in all its provisions looks to an indestructible Union composed of indestructible states" (*Texas,* 725). Similarly, Justice Nelson held in *Collector v. Day* (1870)[143] that the powers of states "remained unaltered and unimpaired" in most internal matters (*Collector,* 124). And, again, in *Lane County v. Oregon* (1869) the Court advanced ideas concurrent with Pomeroy's: "in many of the articles of the Constitution, the necessary existence of the states, within their proper spheres, the

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individual states could not secede from the Union and the acts of the rebellious Texas in 1862—transferring bonds to various citizens—were null.

[142] Historians often share the view expressed in Alfred H. Kelly and Winfred A, Harbison's *The American Constitution* that *Texas v. White* was "a major victory for the Radicals" (Kelly and Harbison 1967, 481).

[143] 78 U.S. 113. *Collector* represented a restriction of central state power, inhibiting Congress from imposing taxes on states and state officials because the states and national government were two separate entities. Thus, restricting central state authority along Bensel's extraction dimension.

independent authority of the states are distinctly recognized. To them nearly the whole charge of interior regulation is committed" (*Lane County,* 76).[144]

In these decisions and in Pomeroy's constitutional casebook, we see the important question of state versus federal power continue to animate constitutional development. After the Civil War, states' rights arguments did not disappear; yet as the country moved beyond Reconstruction, the consolidation of parts of the central state vis-à-vis the Supreme Court became ever-more apparent.

Pomeroy's ideas of states' rights notwithstanding, the general trend of constitutional thought lent credence to the idea of an expanded, powerful central state.[145] A fundamental shift in the conceptualization of the American state was occurring as Pomeroy wrote in the treatises of Sidney Fisher (1862), John Jameson (1867), Orestes Brownson (1866), and John Hurd (1881).[146] These legal thinkers moved us away from a state-centered understanding of the American union and toward a more nationalistic, centralized conception, often criticizing the compact theory and state sovereignty arguments of John C. Calhoun made in the mid-nineteenth century (Larsen 1959, 361). The theories promulgated in these treaties believed "that sovereignty inhered in the American people as a nation, that the nation existed before the Constitution was adopted and that the nation was the source of

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[144] 74 U.S. 71. *Lane County* also pertained to issues of taxation. Lane County, Oregon paid its county taxes to the state of Oregon in U.S. legal tender notes—not in gold and silver coin as stipulated by the Oregon legislature. Counsel for Lane County claimed that an 1862 Congressional statute authorizing U.S. notes to be used as legal tender to pay debts enabled Lane County officials to pay taxes with such notes. The Court, however, disagreed, holding that the Congressional statute imposed no restriction on the requirements stipulated by the Oregon legislature on its counties.

[145] Pomeroy is actually most remembered for his vigorous defense of a strong, centralized union, inspiring the nationalistic treatises of Orestes Brownson's (1866) *The American Republic: Its Constitution, Tendencies, and Destiny,* and John C. Hurd's (1881) *A Theory of our National Existence*. See Charles E. Larsen, "Nationalism and States' Rights in Commentaries on the Constitution after the Civil War," *American Journal of Legal History* 3, 4 (1959): 360-369. (Larsen 1959, 361–362). For a revisionist interpretation of Pomeroy, see Phillip S. Paludan, "John Norton Pomeroy, States' Rights Nationalist," who argues that it is a mistake to understand Pomeroy as inspiring the idea, in subsequent constitutional treatises, that "states' rights was a casualty of war" (Paludan 1968, 279). For a discussion of Pomeroy's understanding of constitutional interpretation, see David M. Rabban. 2013. *Law's History: American Legal Thought and the Transatlantic Turn to History*. New York: Cambridge University Press, 349-351.

[146] Yet, as Morton Keller's *Affairs of the State* recognizes, even in these nationalistic treatises, we can see the difficulty in discerning the reach of central state power. Indeed, Hurd dedicated his book "in homage to the Sovereign: whoever he, she, or they, may be" (Hurd 1881). Morton Keller, *Affairs of the State: Public Life in Late Nineteenth Century America* (Cambridge, MA: Harvard University Press, 1977), 41, see also footnote 6 on the same page. Certainly the Court was no different from the broader legal community in its inability to precisely and coherently draw boundaries between federal and state power, and this was not simply a phenomenon of the immediate post-bellum era.

the Constitution." The fundamental premise uniting these treaties was that they "accepted as xiomatic the principle that sovereignty is indestructible" (Larsen 1959, 361).

The chief aim in Brownson's *The American Republic*, for example, was to topple the notion of state sovereignty, so long and so vigorously maintained in the pre-Civil War era (Brownson 1866, 192-195). According to Brownson (the onetime Jacksonian radical who moved from Unitarianism to Roman Catholicism), the United States had always been one nation, never a confederation of states.[147] The doctrine of state sovereignty, said Brownson, was rejected in 1787, during the ratification of the Constitution, and in 1861 during the Civil War: "the first and last attempt to establish State sovereignty have failed, and the failure vindicates the fact that the sovereignty is in the States united, not in the States severally" (Brownson 1866, 217). These changes in state theory were best summarized by political scientist Charles Merriam in 1903: "In the new national school, the tendency was to disregard the doctrine of social contract, and to emphasize strongly the instinctive forces whose action and interaction produces a state. . .the great difference between 'people' and 'nation' lies in the fact that the latter possess organic unity. . .In general, the new school thought of the Union as organic[148] rather than contractual in nature" (Merriam 1903, 296–297).

The new national school emerging in the wake of the Civil War virtually spawned modern political science as embodied in the works of Woodrow Wilson (1890), Westel Willoughby (1896), and John W. Burgess (1890). These political scientists shifted America's understanding of the state away from local conceptions of self-government toward the national state and its broad sovereign authority. In his two-volume work, *Political Science and Comparative Constitutional Law,* Burgess represented the changing American conceptions of the state: "The state must constitute itself in

[147] Brownson's argument has roots in America's Declaration of Independence: "The declaration was not made by the states severally, but by the states jointly, as the United States. They unitedly declared their independence; they carried on the war for independence, won it, and were acknowledged by foreign powers and by the mother country as the *United* States, not as severally independent sovereign states" (Brownson 1866, 209, emphasis original).

[148] Pomeroy helped spread this notion of "organic." The nature of the federal union, he argued, could be understood only by seeing the United States "as a nation, and its Constitution as the fundamental organic law of that nation" (Pomeroy quoted in Larsen 1959, 362).

sufficient power to preserve its existence and proper advantage against other states, and to give itself a universally commanding position over against its own subjects, either as individuals or associations of individuals" (Burgess 1890, I. 83). All forms of the state, Burgess contended, share one important attribute: "The essence of the state is everywhere, and at all times, one and the same *viz;* sovereignty" (Burgess 1890, I. 74). Moving away from social contract and natural law theories of the state (Willoughby 1896, 98-128), these political scientists put forth a positivist redefinition of law and the state. Following Burgess, Willoughby also argued for the broad scope of national state power vis-à-vis law. His positivist conception saw laws as the command of the sovereign: "All is considered as a command of the sovereign, which, for present purposes, may be considered as meaning State." Willoughby even went so far as to claim that "there are in the individual no so-called innate or 'natural rights,' that is such rights as exist independent of the state and beyond its control" (Willoughby 1896, 163, 181). Essentially, then, the positivistic theories promulgated by these political scientists contributed to the constitutional expansion and growth of the central state by providing new views on the powers of the federal government.

While the "new national school" helped redefine state and sovereignty, another development—the invention of centralizing administrative law—put forth by Frank Goodnow also advanced the positive powers of the central state. For Goodnow, an important area of legal innovation focused on the problem of the constitutional separation of powers. A system of divided government (with its various institutional loci of power) posed an obstacle for Progressive reformers like Goodnow who sought to centralize administrative power in the executive branch. Goodnow helped consolidate power in the executive with his critique of the prevailing constitutional understanding of federalism and the separation of powers. In *Social Reform and the Constitution,* he argued that the emphasis on states' rights and the American peoples' "extremely individualistic conception of the powers of government has resulted in a constitutional tradition which is apt not to

accord to the federal government powers which it unquestionably ought to have the constitutional right to exercise" (Goodnow 1911, 11). He went on to say that courts should "abandon certainly the strict application of the principle of the separation of powers whenever the demand for administrative efficiency would seem to make such action desirable" (Goodnow 1911, 221). Goodnow's work embodied the Progressive legal changes, and it reconceived the ideas of the state, sovereignty, and law that began shortly after the Civil War.

But, in what ways did these abstract theories of the state, sovereignty, and union affect constitutional law? At the turn of the twentieth century, these ideas came together in the public law treatises of political scientist Westel Willoughby (whose 1912 casebook is in my dataset). Like those in the "national school," Willougby argued, "Since the close of the Civil War the sovereignty of the National Government has been undisputed" (Willoughby 1910, 62). Unlike those before him, however, Willoughby went to great length to demonstrate that constitutional law—as promulgated by the Supreme Court (even before the Civil War)—developed not only federal judicial power but also the federal government thus demonstrating the positive force of constitutional law. His 1904 casebook, *The American Constitutional System: An Introduction to the Study of the American State,* for example, devoted a whole chapter to the "development of national sovereignty" (Willoughby 1904, 32-59). In this chapter, he posited that even the Taney Court—most often remembered for its penchant for state rights—built the American state:

> Regarding the attitude of the Supreme Court during [the Taney] period, the important fact is to be noticed that, though it threw the weight of its influence upon the side of the States so far as conferenced a liberal interpretation of the powers reserved to them by the Constitution, not once, in the slightest measure, did it during these years, any more than it had done in the years preceding, intimate that the actual legal and political supremacy was not vested in the National Government. The position of Taney and of the court upon this point was clearly shown in the judgment rendered, and in the opinion delivered, in the case of *Ableman v. Booth* (1859)[149] (Willoughby 1904, 58-59).

[149] 62 U.S. 506. In *Ableman,* Sherman Booth was convicted by a federal district court in Wisconsin for violating the Fugitive Slave Act of 1850 after he aided the escape of a slave. Booth petitioned the Supreme Court of Wisconsin for his release, claiming that the Fugitive Slave Act was unconstitutional and that the federal district court did not have jurisdiction. After the Wisconsin Supreme Court released him, the United States appealed to the Supreme Court. Chief Justice Taney, writing for the majority, dismissed Wisconsin's claim of judicial power. Taney held that "it certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the State to confer it"

With regard to these treatises concerning the nature of state power, the bottom line was that a positivist redefinition of the state bled into constitutional law, nationalizing many legal questions that once remained under the purview of the individual states. Questions concerning state police powers, for example, became thoroughly nationalized in the last quarter of the nineteenth century in decisions such as *Munn v. Illinois* (1877), *Mugler v. Kansas* (1887), and *Budd v. New York* (1892) (Novak 2002, 268). This nationalization, by its very nature, provided the foundation upon which the Court's review power grew, which thus resulted in an expansion of the central state itself.[150] Indeed, Ernst Freund—a progressive era law professor known for his treatises on police powers—noted the persistent expansion of central state power vis-à-vis law and the Court, remarking, "The consolidation of our own nation has proved our allotment of federal powers to be increasingly inadequate; and had it not been aided by liberal judicial construction, our situation would be unbearable" (Freund quoted in Thompson 1923, 10). The growing number of legal issues coming before the Court resulted in the development of a federal police power, which was premised largely on issues of Commerce Clause and economic regulation, as then-retired Justice Charles Evan Hughes[151] pointed out in a 1918 speech to the American Bar Foundation: "the extended application of the doctrine that federal rules governing interstate commerce may have the quality of police regulations" (Hughes quoted in Novak 2002, 270). Hughes saw central state expansion as the

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(*Ableman,* 515). In dealing with questions of habeas corpus and jurisdiction, *Ableman* expanded the powers of the federal government over Bensel's citizenship dimension as well as the centralization dimension.

[150] For then-contemporary accounts of the centralization of federal judicial power and its effects on broader aspects of central state authority, see Fred Perry Powers, "Recent Centralizing Tendencies in the Supreme Court," *Political Science Quarterly* 5, 3 (Sept. 1890): 389-410. Powers closely examines questions relating to commerce between the states and federal government and writes disapprovingly of the Court's jurisprudential changes (Powers 1890, 410). See also L.H. Pool, "Judicial Centralization," *Yale Law Journal,* 11, 5 March 1902): 246-55. The "strongest evidence" of the Court's expanding power, Pool claims, rests with the battle between the "common law of the United States" and the "preservation of the right of local self-government" (Pool 1902, 251). Navigating this battle became the Court's duty following the Civil War. In doing so, the Court expanded state authority along some realms (where it advanced U.S. common law) and restricting it along others (where it preserved local self-rule).

[151] In 1918, Charles Evans Hughes was in between Court appointments. Hughes served on the Court from 1910 to 1916 then again he served as Chief Justice of the Court from 1930 to 1941.

inevitable consequence of a modernizing industry and economy (Hughes 1918, 93-94). With that, we can now turn to the empirical data concerning the Court's decision between 1870 and 1920.

State-building at the Turn of the Twentieth Century

During this period, the Court balanced the competing models of federalism advanced by industrialists and states' rights advocates. Ultimately, the Court advanced the Republican Party's most sacred rights—property, contract, and physical security—while granting the members of both parties their preference for state-centered federalism, allowing states to have the authority to regulate individual and race-related rights. The Supreme Court's navigation of competing political demands for, on the one hand, a unified national market and, on the other, Confederate demands for local control of race relations represented the manifestation of this national community.[152] By navigating these competing demands, the Court helped along the calls made by the broader national community that began to form in the wake of the Civil War.[153]

The period from roughly 1870 to 1920, in particular, is when the Court is said to have most frequently opposed state expansion. We should expect, then, that the Court's most prominent decisions to stymie expansion. But when we shift our focus away from the creation of the administrative state and look more broadly at multiple dimensions of the federal state, we find that the Court and legal doctrine greatly advanced the federal government.[154]

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[152] Bruce Ackerman. 1984. "The Storrs Lectures: Discovering the Constitution," 93 *Yale Law Journal* 1013. For Ackerman constitutional politics *is* the politics of the "national community" wherein the "people sacrifice their private interests to pursue the common good." (Ackerman "Discovering the Constitution," 1020). See also Paul Kahn. 1989. "Community in Contemporary Constitutional Theory." *Yale Law Journal.* Kahn provides an excellent discussion of the theoretical conception and role of "community" in understanding constitutional change.

[153] Akhil Reed Amar also discusses the formation of this national community in *America's Constitution A Biography.* (New York, NY: Random House. 2005), chapters 10 and 11, describing the effects of the Reconstruction Amendments and the Progressive Era reforms, respectively. The Court's constitutional jurisprudence marked a way in which this national community was advanced legally.

[154] Decisions like *Lochner v. New York* garner most of the scholarly attention, but the Court left much regulation intact in the states during this period. Two important law review articles penned by Charles Warren, during the Progressive Era, challenged the Progressive interpretation that the Court embodied a "judicial oligarchy." Warren argued, "The National

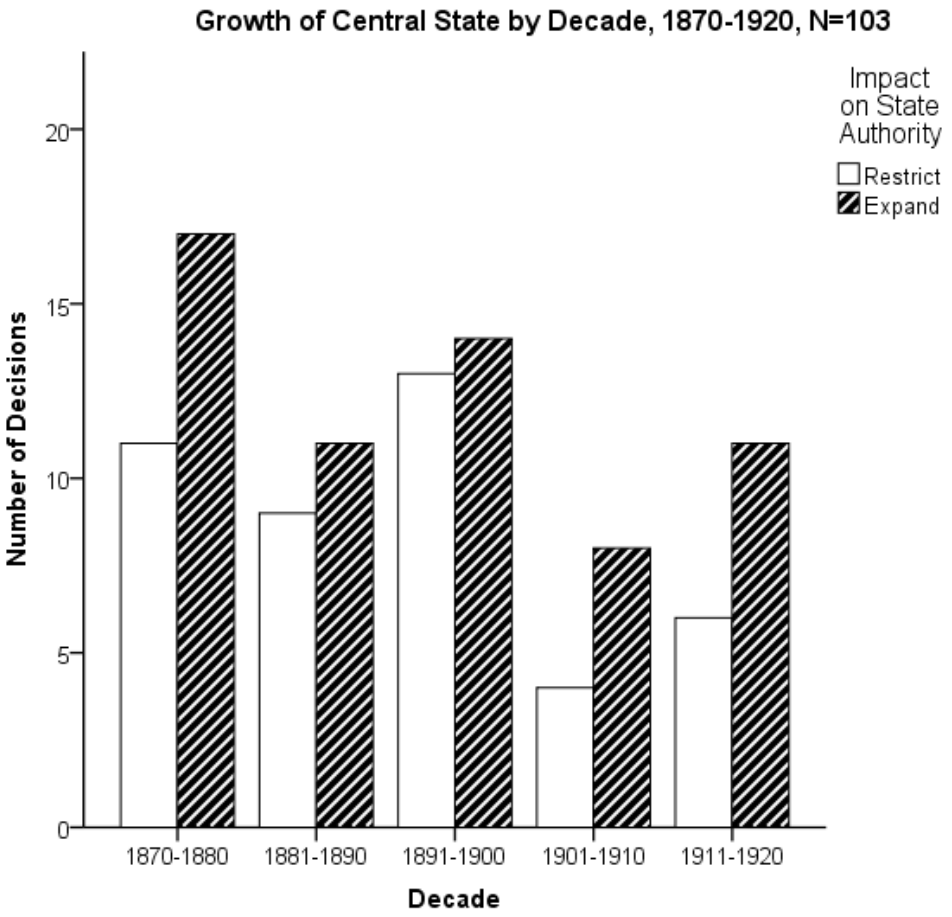
Of the 388 decisions in the data, 104 decisions were handed down between 1870 and 1920. Contrary to the conventional narrative, the Court did not persistently inhibit state development. Instead, the Court, as we might expect during a tumultuous time, did both. Figure 9 reveals that the Court, more often than not, affirmed the central state's authority to govern, showing the difference between decisions that expanded authority (61) and the cases that restricted central authority (43). In each decade across this fifty-year period, expansion outweighed restriction.

Supreme Court, so far from being reactionary, has been steady and consistent in upholding all state legislation of a progressive type" (Warren 1913b, 295). He based this conclusion on looking at 560 decisions between 1887 and 1911 (inclusive), pertaining to the "due process" and "equal protection" clauses of the Fourteenth Amendment. The Court invalidated only three state laws (including *Lochner*) relating to "social justice" questions of the due process clause (Warren 1913b, 295). In another article from the same year, Warren found that of a total of 302 cases, only thirty-six state and local social and economic regulations were held unconstitutional in forty years. The vast majority of cases in Warren's study were upheld by the Court pertaining to a diverse set of issues:

> anti-lottery laws; anti-trust and corporate monopoly laws; liquor laws; food, game, oleomargarine and other inspection laws; regulation of banks, telegraph and insurance companies; cattle, health, and quarantine laws; regulation of business and property of water, gas, electric light, railroad (other than interstate trains) and other public service corporations; regulation of rates of public service corporations, grain elevators; stockholders' liability laws; regulation of business of private corporations; negro-segregation laws; labor laws; laws as to navigation, marine lines, ferries, bridges, etc., pilots, harbors, and immigration. (Warren 1913a, 695)

One thing Warren's study revealed was the explosion of law in the early twentieth century; the simple empirical reality was that there were more cases being adjudicated, falling under an ever-growing range of legal issues. This explosion led to an unprecedented expansion in the Court's review power, especially concerning federal police power (Novak 2002, 262).

Figure 9: Decisions' Impact on Central State Authority by Decade, 1870-1920



Notes and Sources: Compiled by author. This distribution resembles the larger distribution seen above in Figure 6.2. We can see here that the Court persistently expanded the federal government's power but not without also significantly restricting central state power. Important to note is that number of decisions that expand relative to the number decisions that restrict becomes much larger in the twentieth century, which dovetails with the evolving state theories and constitutional treatises discussed in the previous section. Thus, Figure 10 represents an important trend of American constitutional development—that it generally expanded the powers of the federal government. The one neutral decisions was excluded from this figure.

Thus far, these results merely suggest that the narrative of constitutional and political development is more complicated than previously argued. The data suggests that the Court acted as more of an ally with other federal branches during the expansion of the new American state.

Looking closer at the central state dimensions, 61 expanded at least one of the seven dimensions of the central state; the "centralization" dimension expanded most frequently (in 60 of

the 61 decisions that expanded authority). This "centralization" dimension embodies taking decision-making authority from subordinate governments and placing it under the purview of the national state.[155]

As noted above, the "expansion" category embraces a broader understanding of state-building, a form of state-building that not only lays foundation for a welfare-state arrangements but also advances myriad other structural and substantive apparatuses integral to a powerful central state. And this state-building took place primarily in the realm of federalism (economic and industrial-related questions). Table 4 arrays the impact constitutional issues had on central state authority comprising this period. With 33 decisions, "federalism" is the issue that came before the Court most frequently. Individual rights issue areas—due process (procedural and substantive), civil rights/liberties, criminal procedure, and First Amendment—comprise another 41 decisions. Together, federalism and individual rights issue areas makeup 70 percent of the 104 decisions between 1870 and 1920. Such numbers indicate that the Court was preoccupied with navigating between federalism and individual rights questions. Table 4 suggests that Court generally advanced state authority within the commerce realm while taking a more moderate approach toward individual rights. Of the 40 individual rights decisions, 21 restricted the federal government, meaning that the Court either invalidated a Congressional statute or allowed a state-level statute to stand. The opposite is true with federalism decisions: 26 of 33 decisions expanded central authority. With federalism, the Court often affirmed Congressional statutes, which sought to create a national marketplace.

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[155] As Chapter 2 details, expansion cases advanced any arm of the central state across seven the dimensions of central state authority. Two of the seven dimensions—centralization and administrative—are structural, concerning only the design of the state and "the process of decision making and its location within the state apparatus" (Bensel, *Yankee Leviathan,* 111). The remaining 5 dimensions—citizenship, property rights, client-group formation, extraction, and involvement in the world system—deal with the substantive content of central state policy. See Chapter 2 and the Appendix for further discussion. This broader interpretation of the American state captures not only forms of state-building that lay foundation for welfare-state arrangements but also forms of state-building that advances myriad other structural and substantive apparatuses integral to a powerful central state.

Table 4: Constitutional Issue by Impact on Authority, 1870-1920

		Impact on Central State Authority			
		Restrict	Neutral	Expand	Total
Constitutional Issue	Civil Rights and Liberties	21	1	19	40
	Economic Activity	3	0	4	7
	Judicial Power	3	0	2	5
	Federalism	7	0	26	33
	Taxation	6	0	8	14
	Private Action	2	0	2	4
Total		42	1	61	104

Notes and Sources: Compiled by author. This crosstab indicates that individual rights generally restrict while federalism decisions generally expand the federal government. This tables collapses twelve issues areas into six. Most importantly, the "individual rights" issues comprise due process, criminal procedure, First Amendment, and civil rights/liberties issues. "Federalism" largely deals with commerce and economic issues, but the conflict between state-federal spheres of power is central to the individual rights issue area, too.

With this descriptive overview, we can now take a closer look at the substantive constitutional and political developments of the period.

Emerging Social Consensus: Fashioning Reconciliation

If ever the Court was faced with federal-state relationships as "a new question," as Woodrow Wilson phrased it, then Civil War and Reconstruction years were such a time.[156] And on this altar of federalism the Court fashioned doctrine that helped fortify an emerging consensus in the country. Constitutional development during this period, as it does in any period, largely reflected the broader politics of the day. The commitment to a pre-Civil War understanding of federalism, with its emphasis on state rights, inhibited the radical Republican agenda to establish full freedom and equality for newly freed African-Americans (Les Benedict 1978, 47). For the rest of the nineteenth-century, historians recognize, protection of citizenship rights (i.e. social control) remained the duty

[156] Woodrow Wilson. 1908. *The Constitutional Government in the United States.* (New York, NY: Columbia University Press), p. 173.

of the states not the federal government.[157] Congressional debates indicate the centrality of federalism and states right in the construction of the Civil Rights Act of 1866. Republican Congressman John Bingham, for example, sought to strengthen Congressional power in the Civil Rights Act by allowing Congress power to impose criminal sanctions against state officers, but Democrats and moderate Republicans rebuffed him. They "opposed the transfer of sovereignty over civil rights to the federal government" (Belz 1976, 171). Essentially, in this period, neither radical Republicans nor Democrats steered Congressional policy; it was determined by moderates, which created a polity colored by the "interplay between the war-born ideals of strong central government and race-blind citizenship, and more traditional American beliefs in localism, limited government, and racial inequality" (Keller 1977, 37-38).

Other political ideas help explain the advancement of commerce and restriction of civil rights as well as the push for reconciliation. In particular, New South thought[158] and politics made known by people like Henry W. Grady[159] propelled national reconciliation forward, joining forces with southern conservative Redeemers and northern Republicans who favored an end to Reconstruction and a return to national prosperity. Economic self-interest pulled the sections together, but shared convictions about the mistakes of Reconstruction facilitated this reunion (Dennis 2002, 103-104). The New South boosterism of Grady, a well-known Southern orator in the late nineteenth century, embodied these convictions that helped advance reunion. This New South

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[157] Morton Keller *Affairs of the State,* 31-81 and Herman Belz *A New Birth of Freedom* (Westport, CT: Greenwood Press, 1976): 113-137, 152-182.

[158] The New South ideology embraced a "creed of regional progress through national reconciliation, industrial growth, agricultural diversification, and racial control." Michael Dennis. 2002. "Looking Backward: Woodrow Wilson, the New South, and the Question of Race," *American Nineteenth Century History* 3, 1: 77-104, 77. In this way, individuals of the New South embraced a strong central state in the area of economic regulation while a weaker central state over issues concerning race. See also David Blight's chapter on "Reconstruction and Reconciliation" in *Race and Reunion: The Civil War in American Memory.* (Belknap Press of Harvard University, 2001).

[159] Henry W. Grady (1850-1889) was a journalist and orator from Athens, Georgia. He was dubbed, "by common consent, as the representative Southern orator since the Civil War" (Grady and Shurter 1910, iii). For a sense of the New South ethos see Grady's speech to a banquet of the New England Society, New York City, 21 December 1886 entitled "New South" in *The Complete Orations and Speeches of Henry W. Grady*, ed. Edwin Shurter (New York City: Hinds, Noble, & Eldredge, 1910).

ethos saw many mistakes with Reconstruction one of which was the enfranchisement of African-Americans. In an 1889 speech to the Boston Merchants' Association,[160] Grady declared:

> The negro vote can never control in the South, and it would be well if partisans in the North would understand this . . . never, sir, will a single State of this Union, North or South, be delivered again to the control of an ignorant and inferior race. We wrested our State government from negro supremacy when the Federal drumbeat rolled closer to the ballot box . . . but, sir, though the cannon of this Republic thundered in every voting district of the South, we still should find in the mercy of God the means and the courage to prevent its reestablishment.[161]

Woodrow Wilson concurred with Grady's racial sentiment and the turn away from enforcing the Reconstruction Amendments and using the federal government to protect African-Americans. On the "return to normal conditions," Wilson wrote, "The period of reconstruction was past; Congress had ceased to exercise extra-constitutional powers; natural legal conditions once more prevailed. Negro rule under unscrupulous adventurers had been finally put an end to in the South, and the natural, inevitable ascendency of the whites, the responsible class, established" (Wilson and Corwin 1910, 273).[162] The New South sought a state-centered model of federalism for civil and political rights, but also simultaneously pressed for advancement in industry and commerce.

The emerging voices of the post-Reconstruction Era included these New South proponents like Wilson and Grady who advocated for localized racial control but also allied with Northerners calling for a unified national market. Espousing an ideology that united the North and the South, they protested the 15th Amendment enfranchisement of African-Americans because it deviated from southern tradition. Instead, Wilson and his New South counterparts, formulated a local vision of race control, which stemmed from "a sanitized, clinical doctrine of racial control that echoed prevailing assumptions about scientifically verifiable racial distinctions and struggles for existence" (Dennis 2002, 97). The New Southerners looked toward the industrializing northern commercial

[160] Grady made many of these speeches to various New England organizations. Of a speech Grady made to the New England Society of New York, historian Paul M. Gaston notes that the Society wanted a "man who would speak for reconciliation and who would, at the same time, command the respect of all parts of the country. Grady was a natural choice . . . His record as a spokesman for progressive economic policies and sectional reconciliation was already well known, and his oratorical abilities similarly commended him" (Gaston 1970, 87). Paul M. Gaston. *The New South Creed: A Study in Southern Mythmaking,* (New York: Alfred A. Knopf, 1970).

[161] "The Race Problem in the South" December 1889 (Grady and Shurter 1910, 212–213).

[162] Woodrow Wilson. *Division and Reunion: 1829-1909.* (New York: Longmans, Green, and Co., 1910 [1893]).

horizon in order to rebuild the south post-Reconstruction. Elites from both north and south understood the advancement of industrial capitalism and commercial agriculture as a way to move the country forward. But, according to the New South creed, it would be blacks who would continue to work the fields, as Wilson wrote: "North and South are becoming daily more alike and hourly growing into a closer harmony of sentiment . . . Happily freed from the curse of slavery." In the largely agricultural south, however, some would have to tend the fields while others produced, but as Wilson recognized, there existed a "perfectly natural division of labor" that replaced the "unnatural system of slave labor."[163] After Reconstruction ended and Democratic dominance returned to the south, Wilson saw this as the beginning of southern progress: "The South had been changed, as if by a marvel, into likeness to the rest of the country. Freed from the incubus of slavery, she sprung into new life" and became "one of the chief industrial regions of the Union." Out of this development, New Southerners formed the bonds of reunion with the north.[164]

The Court reflected these trends of reconciliation and helped steer a moderate course of development. Chief Justice Salmon P. Chase (1864-1873), a Lincoln appointee, sought to bring about reconciliation. Chase was aware of the fragility of the Court and attempted to shift away from the Court's "tarnished" "public image" that Taney and *Dred Scott* produced (Chase and Niven 1993, xvii).[165] Consequently, Chief Justice Chase expressed his support for an accommodating approach to former Confederates. Chase revealed this in a letter to George H. Hill, an Ohio legislative representative serving from 1870 to 1872:

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[163] Wilson quoted in Dennis (2002, 81).

[164] Wilson quoted in Dennis (2002, 98). Dennis recognizes that the northerners realized "the errors of Reconstruction and the need for racial management" and thus joined the south in advancing its economic potential while leaving regulation of "social affairs" to whites (Dennis 2002, 98). Indeed, part of the New South's agenda for economic advancement required the control of black labor through Slave Codes then later through lien laws, debt peonage, anti-enticement measures, and urban segregation (Dennis 2002, 80).

[165] This phenomenon—the habit of present Court members looking back on the institutions' development—is the subject of the next chapter. The Court, because of the nature of law and precedent, confronts its historical and institutional memory far more often than any other political institution.

> I have always thought, too, that universal amnesty should be accorded, and the most liberal and generous policy should be adopted towards all who, having been enemies during the civil war, were willing to resume in good faith the relation of friends and fellow citizens when war was over. Hence, I very early adopted the motto, Universal Suffrage and Universal Amnesty. I felt sure that this policy would secure the peace of the whole country, and the highest prosperity of all the South.[166]

Chase, in this same letter, recognized that universal suffrage via the Fifteenth Amendment would not expand central state authority, leaving it to state control. He argued that civil rights were to be a state-based project: "The Amendment gives no power to Congress to interfere with suffrage in any state unless it is denied or abridged by the state . . . The full power of regulation, as it has existed heretofore will exist still in the states."[167] This remained the Supreme Court's interpretation long after Chase left the Court, and this sentiment assuaged the feelings of states-rights proponents who sought to keep in place the state-based, dual federalism understanding of the relationship between the national and state governments, as demonstrated by Chase's majority opinion in *Texas v. White*.[168]

At the same time, a rapid expansion of federal judicial power enabled the Court, on the one hand, to become an outlet for state expansion with respect to Commerce Clause and economic questions. The withdrawal of Southern congressional delegations, between 1861 and 1865, enabled Congress to make the judiciary the most Republican instrument of the federal government, protecting its favored constituencies who called for the rapid expansion of central state power (Crowe 2012, 170).[169] On the other hand, the expansion of federal authority moved at a slower pace

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[166] Letter to George Hill 7 January 1870 in the *Papers of Salmon P. Chase,* vol. V (Chase and Niven 1993, 323).

[167] Letter to George Hill 7 January 1870 in the *Papers of Salmon P. Chase,* vol. V (Chase and Niven 1993, 324). To be sure, Chase was an ardent proponent of suffrage for African-Americans, but he failed to convince President Andrew Johnson or his fellow justices that the Thirteenth Amendment incorporated the Declaration of Independence or the Bill of Rights against national and state officials as well as private persons. In a letter to his son-in-law, William Sprague, Chase explained his "wide divergence" with President Johnson over African-American rights, summarizing his views on these rights and his conversation with the president: "the blacks were citizens of the United States & of the States in which they live; that under an appeal from the President to the People to reorganize, the blacks as part of the people had a right their fair share of influence & control in the work of reorganization; that the People meant *all* People without respect to the color of the skin." Letter to William Sprague 6 September 1865, *Papers of Salmon P. Chase* vol. 5 (Chase and Niven 1993, 68, emphasis original).

[168] See the discussion of *Texas* above.

[169] In tracing the Court's institutional and administrative development, Crowe observes, "With the birth of central state authority came the rise of centralized *judicial* authority." Between 1870 and 1877 Congressional legislation greatly enhanced federal judicial power especially with the passage of the Jurisdiction and Removal Act of 1875. This Act granted the circuit courts both original and removal jurisdiction over the vast majority of cases arising under

in the individual rights realm in the way Chase outlined.[170] Constitutional development, during this time, involved an ideological process that constructed a compromise between conceptions of federalism. This continued long after the Chase Court. Political scientist Pamela Brandwein emphasizes that the Court under Chief Justices Fuller and Waite (1874-1910) aligned at least its civil rights decision with a "state-centered federalism" but not the extreme Democratic version. Instead, the Court produced a more "moderate version" which allowed states to have local control over crime yet still gave Congress the power to punish alleged criminals if states "defaulted in their duty to redress wrongs against 'civil rights'" (Brandwein 2006, 277).[171] Doing so helped create a climate of reconciliation between northern and southern interests as well as insured the Court's legitimacy in a tumultuous period in American state development (Brandwein 2007, 371).[172] Thus, the Court's doctrine produced an institution that expanded central state authority in some realms and constricted authority in others.[173]

Constitutional and federal law (Crowe 2012, 161-162, emphasis original). For a treatment of the important institutional developments that enhanced federal judicial power during this time, see Howard Gillman, "How Political Parties Can Use the Courts to Advance Their Agenda: Federal Courts in the United States, 1875-1891," *American Political Science Review* 96, 3 (September 2002): 511-524.

[170] To be sure, the judiciary did not completely halt the expansion of congressional power in the civil rights realm, which is a large focus of Pamela Brandwein's (2011) *Rethinking the Judicial Settlement of Reconstruction.* She stresses that Court decisions before and after the *Civil Rights Cases* held that Congress can reach private individuals but only when, what Brandwein terms, "state neglect" is present. That is, if "State or local officers . . . refuse to extend to black citizens the protection to which they are entitled as citizens" (Brandwein 2011, 168). The Fifteenth Amendment, she argues, led to judicial decisions that "provided the federal government with broad possibilities for rights enforcement" in electoral rights decisions like *Ex Parte Siebold* (1880) and *Ex Parte Yarbrough* (1884) (Brandwein 2011, 12).

[171] Pamela Brandwein (2006) "The *Civil Rights Cases* and the Lost Language of State Neglect," in *The Supreme Court and American State Development,* Ronald Kahn and Ken Kersch, eds. Brandwein's revises the constitutional developmental narrative concerning the Court and civil rights, urging us not to view the Waite Court as "racial villains who lost interest in Reconstruction" (Brandwein 2006, 276). She offers a nuanced depiction of the Court as it navigated a moderate course in the broader political milieu, not fully abandoning blacks yet not fully embracing radical Republican agendas.

[172] Pamela Brandwein, "A Judicial Abandonment of Blacks? Rethinking the 'State Action' Cases of the Waite Court," *Law & Society Review* 41, 2 (2007): 343-386. Of the Court's decision in *U.S. v. Cruikshank* (1876), Brandwein speculates that the Court's "modulated expression" was a reflection of the Court's "sensitivity to the political context and a concern for its own institutional influence" (2007, 371). Chapter 6 below examines this kind of Court behavior, that is, how the institutional and political context creates the Court's self-effacing nature.

[173] This conception accords with Kersch's understanding of constitutional development. Writing against the fallacies of "Whig history," Kersch argues for a non-linear understanding of constitutional development whereby development moved along two tracks: institutional and ideological (Kersch 2004, 12).

The popular press lauded the Court's state rights recognition in individual rights cases. Regarding the Court's decisions in upholding state liquor prohibition in *Mugler v. Kansas* (1877)[174] and upholding state regulation of oleomargarine in *Powell v. Pennsylvania* (1888),[175] the *Washington Post* wrote, "It is the business of the State, and not of the United States, to determine what is good or bad for the people of a State….Our Republican Supreme Court has become the fortress of State rights because it finds States rights in the Constitution. The process of centralization by interpretation of the fundamental law was, happily, checked in time to the save the Government."[176] In the same year, the *Washington Post* also celebrated an end to the "march of centralization" following the twenty-years after the Civil War, citing *Mugler* again.[177] The late nineteenth century witnessed a number of additional articles praising the Court's decisions leaving questions of social control to the states.[178] The steady calls to leave some policy areas—social policies—to the states, then, remained an important component in constitutional development during the emergence of the modern state. Indeed, the post-Civil War Court took care to establish "reasonably coherent" sets of categories to allocate regulatory authority between state and federal governments in order to preserve dual sovereignty (Compton 2014, 120).

The "genius" of Justice Harlan's opinion in *Mugler,* John Compton argues, was "that it defined the police power broadly enough to establish the constitutionality of liquor prohibition while at the same time leaving the door open to future constitutional challenges to industrial regulation" (Compton 2014, 115). In so doing, the Court created an avenue for the eventual national expansion of the police power seen later in the Progressive era as the noted legal scholar Ernst

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[174] 123 U.S. 623. *Mugler* concerned the prohibition of alcohol. Here the Court held that Kansas's prohibition of alcohol that led to the arrest of Mugler did not violate the 14th Amendment.
[175] 127 U.S. 678. *Powell* concerned the sale of oleomargarine and the state's regulation of this product. Again, the Court upheld a state statute regulating this sale of a good.
[176] *The Washington Post,* "State Rights," 12 April 1888, p. 4.
[177] *The Washington Post,* "The Supreme Court," 25 March 1888, p. 4
[178] *The Washington Post,* "A Right Decision," 3 November 1887, p. 2 (concerning criminal law); *Washington Post,* "An Important Result," 12 December 1887, p. 4 (concerning prohibition).

Freund recognized. In his 1904 police power treatise, Freund helped shift the understanding of police power from its pre-Civil War, common law definition to one of constitutional doctrine, "meaning the power of promoting the public welfare by restraining and regulating the use of liberty and property" (Freund 1904, iii).[179]

Ultimately, Union victory thwarted theories of the Southern separatist movement and thus relegated many questions upward to the Supreme Court. Moreover, Union victory put in motion many political projects, namely, the development of a national capitalist market,[180] the preeminence of national sovereignty,[181] and the expansion of federal judicial power.[182] Consequently, building the modern American state became the particular province of the Court.[183]

The Court's tendencies in the post-war era traveled along two tracks, one institutional and one policy-substantive, which are discussed in separate sections below. The institutional aspect dealt with political institutions that would decide the growing and complicated questions facing an industrializing republic. The post-war constitutional order had to reconcile the constitutional ideas of the previous state-centered agrarian society and a new rapidly industrializing nation state, which was undergoing profound social and economic transformation.[184] Negotiating between these two

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[179] Ernst Freund helped usher in modern state development with his scholarship on legislative and police power. Areas of the law that were once left to the states and local governments—business, labor, and police powers—soon came under the purview of the national government. Freund recognized that the judiciary was crucial to this upward shift: "The consolidation of our nation has proved our allotment of federal powers to be increasingly inadequate; and had it not been aided by liberal judicial construction, our situation would be unbearable" (Freund 1920, 181).

[180] "Bottom line," Bensel argues, the Court, in the last quarter of the nineteenth century, "unified the national marketplace in order to protect capital accumulation from claims arising within and forwarded by the states" (Bensel 2000, 347). On the Court's role in constructing the national market see Bensel, *Political Economy,* 321-349.

[181] "The Civil War killed State sovereignty," claims Michael Les Benedict. "Preserving Federalism: Reconstruction and the Waite Court," *The Supreme Court Review* (1978): 39-79, 51. Les Benedict's article provides a nice overview of the dilemma between federalism and the security of rights facing the Waite Court immediately following the Civil War (38-9).

[182] This expansion, embodied best by the Jurisdiction and Removal Act of 1875, diverted litigation concerning national commercial interests out of state courts and into the more sympathetic (Republican) federal judiciary. Howard Gillman, Mark Graber, and Keith Whittington, *American Constitutionalism Volume 1: Structures of Government* (New York: Oxford University Press, 2013), 331.

[183] Generally speaking, "the locus of constitutional power" shifted from the states to the federal government during this time. Loren Beth, *The Development of the American Constitution, 1877-1911* (New York: Harper & Row, 1971), 250.

[184] For a list of the major impacts of this transformation see William Wiecek *The Lost World,* 65-66.

constitutional orders required balancing federal versus state authority.[185] The recurring question along this institutional track was, where does decision-making authority rest?—the *sina qua non* of Bensel's centralization of authority dimension. Federalism decisions concerned questions about the traditional domain of national power—primarily in the realm of the Commerce Clause.[186]

The second track involved the substantive component—individual rights. This track often dealt with the "centralization" dimension, too, but also with issues along the "citizenship" dimension. By relegating questions of individual rights to the states, the Court gave credence to state rights arguments and thus constricted central state development. In this realm, the judiciary often inhibited federal enforcement of Reconstruction Amendments with decisions such as *United States v. Cruikshank* (1876),[187] the *Civil Rights Cases* (1893),[188] and *Plessy v. Ferguson* (1896)[189] as well as upheld state regulations of social behavior. Moreover, then-contemporary commentators agreed with this regulation of civil rights questions to the states. For example, when Congress debated the Civil Rights Act of 1875, a commentator in the *Nation* was highly skeptical of the validity of legislation taking individual rights to the national level:

> It is plainly unconstitutional. . . . The Fourteenth Amendment has twice come before the Supreme Court; and on neither of these well-known occasions was the decision of the Court of such a character as to lend much encouragement to those who believe the new Amendments to have introduced very revolutionary principles as to the relations of the States to the General Government. . . . In the light of these decisions, it may safely be

[185] The 33 federalism cases in my database comprise about one-third of the 104 Supreme Court decisions between 1870 and 1920.
[186] See Table 5 below. The ten most cited federalism cases between 1870 and 1920 all dealt with Commerce Clause questions.
[187] 92 U.S. 542. *Cruikshank* constricted Congress's ability to prosecute individuals under the Enforcement Act of 1870. It also dealt with the incorporation of the Bill of Rights, holding that the First Amendment was not intended to limit the powers of state governments with respect to their own citizens as well as holding that the Second Amendment only restricts the national government not state governments.
[188] 109 U.S. 3. Here, the Court held that Congress had no authority under the Reconstruction Amendments to prohibit discrimination in privately owned public accommodations. More specifically, argued the Court, the Fourteenth Amendment restrained only state action. And the fifth section of the Amendment empowered Congress only to enforce the prohibition on state action.
[189] 163 U.S. 537. A Louisiana state law requiring separate railway cars for blacks and whites was constitutional. The majority, written by Justice Brown, declared: "Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power" (*Plessy,* 544).

> inferred that the Supreme Court must look with extreme suspicion upon a law, upsetting the domestic law of States . . . In the interest of the negro, we trust that it may never reach the Court.[190]

Here, we see the endorsement of leaving questions of social control and civil rights within the purview of individual rights as opposed to nationalizing these questions via the 14th Amendment. Other press outlets echoed the *Nation's* arguments over federal civil rights legislation.[191]

Ultimately, the Court settled states' rights questions by constricting federal authority to enforce the Reconstruction Amendments. In doing so, constitutional development moderated between those who sympathized with pre-Civil War models of federalism and those who believed the Civil War profoundly changed the conception of federalism and central state authority, advancing federal power over commerce yet constricting it over individual rights. Let us now look at these legal issue areas of commerce and individual rights to see more specifically what the Court did in these realms.

Commerce and Expansion of Central Authority

The dormant commerce clause doctrine enabled the Court to expand central authority, a doctrine refined in 1852 then solidified in 1886. This clause prohibited, as implied by the Commerce Clause, states from passing legislation, which discriminated against or excessively burdened interstate commerce even if Congress had not passed legislation explicitly prohibiting state action. An 1852 decision, *Cooley v. Board of Wardens,* laid the foundation for the dormant commerce clause, recognizing that the constitutionality of a Philadelphia law requiring all ships entering or leaving the port of Philadelphia to hire a local pilot. The Philadelphia law was permissible because, in 1789, Congress granted permission for states to govern pilotage laws:

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[190] The *Nation,* Sept. 17, 1874 quoted in Charles Warren, *The Supreme Court in U.S. History Volume II,* 601.

[191] The *Independent* April 6, 1876 quoted in Charles Warren, *The Supreme Court in U.S. History Volume II,* 605:

> To assume State powers as the method of punishing and preventing wrong in the States would be an experiment with our political system that had better be omitted. . . . Southern questions . . . must be left to the States themselves, and to those moral influences which finally shape the course of legislation. The General Government cannot authoritatively deal with them, without producing more evils than it will remedy.

> The mere grant to Congress of the power to regulate commerce, did not deprive the States of power to regulate pilots. And that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States (*Cooley,* 320).

In other words, some subjects demanded a single uniform law for the whole nation, while others, like pilotage, demanded local laws, which understood the diverse local conditions. The power of Congress was therefore selectively exclusive.[192]

The dormant commerce clause, as a tool of central state expansion, took its most powerful form in *Wabash, St. Louis and Pacific Railway Company v. Illinois*[193] (1886). Penned by Justice Samuel Miller[194], *Wabash* involved an Illinois state law that charged companies differing railroad rates, depending on distance and cargo, which a railway company claimed was discriminatory. The Court concluded that this type of regulation, if established at all, had to be of general and national character, and could not be safely regulated by local regulations.[195] It declared that the Court could strike down state laws that interfered with the dormant (that is, yet-unexpressed) federal authority to regulate interstate trade.[196] The Court's presumption was that the United States was to be an

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[192] Justice Curtis writing for the majority held, "Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation" *Cooley v. Board of Wardens* (1852) 53 U.S. 299, 319.

[193] 118 U.S. 557

[194] Justice Miller embodied the balance between differing understandings of federalism; he had possessed a strong commitment to the Union and used the Commerce Clause to achieve uniformity in federal regulation yet he restricted the power of the central state in decisions such as *Slaughterhouse v. Louisiana* (1873) 83 U.S. 36, which limited the effectiveness of the privileges and immunities clause to protect individual rights. In the 1870s and 1880s, then, it was Justice Miller whose voice pressed for federal government strength over Commerce Clause issues and a weakness in individual rights cases.

[195] As a regulation of commerce, the Illinois law infringed on the central state's authority to decide rate regulation. *Wabash*, like much of the Commerce Clause jurisprudence, was fundamentally about who held decision-making authority. Justice Miller concluded for the majority: "And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution" (*Wabash,* 577).

[196] Writing for the majority, Justice Miller argued the importance of federal authority over state authority in establishing uniform laws:

> It would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States which was deemed essential to a more perfect union by the framers of the Constitution, if at every stage of the transportation of goods and chattels through the country, the State within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce (*Wabash,* 573).

internally free trade zone.[197] It followed, then, that the states could not obstruct the free flow of goods without express permission from Congress.[198] The dormant commerce clause allowed the Court to be a mouthpiece for central state expansion within the economic and industrial realm, constructing the national marketplace by invalidating state regulations and, more importantly, denoting who held decision-making authority with respect to commerce. Writing in 1906, the *Wall Street Journal* said that, in the realm of commerce, state expansion was inevitable: "It has been inevitable that, with this mighty expansion in business operations and financial power, there should be a corresponding accumulation of political power. As our trade and commerce have outgrown state lines, so it has been inevitable that the political power of the country should have grown state lines and concentrated more and more in the national government."[199]

Looking more broadly and systematically, the Court's ten most-cited federalism cases between 1870 and 1920 largely maintain the patterns found in *Cooley* and *Wabash.*[200] Table 5 compiles these ten cases indicating the Court's decision overall impact on central state authority, chief justice at the time, and the adjusted citation score.[201] Here, we see the Court's decisions overwhelmingly expanded central state authority. These decisions advanced primarily through the centralization dimension (the decision-making dimension) by either locating decision-making authority to regulate citizens' behavior with Congress (federal statute) *or* locating decision-making to invalidate state-level laws with the judiciary. Either way, these judicial decisions bolstered federal governmental power.

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[197] Howard Gillman, Mark Graber, and Keith Whittington, *American Constitutionalism,* 390.
[198] Gillman et al, 390.
[199] *Wall Street Journal,* "The Growth of National Unity," 20 December 1906, p. 1.
[200] Owen Fiss, author of Volume VIII of the *Oliver Wendell Holmes Devise* (an immensely thorough collection of Supreme Court history)—concurs with my interpretation. Despite the Fuller Court's reputation for being an inhibitor to state development, Fiss notes, "more generally, however, as in railroad regulation cases, the antitrust area, and *Debs,* the Court curbed the powers of state and affirmatively strengthened the power of the national government" Owen Fiss, *Troubled Beginnings of the Modern State, 1888-1910, Volume VIII,* (New York: Macmillan Publishing Company, 1993), 260.
[201] The adjusted citation score is the number of times a case appeared in each casebook over the number of chances a case could have possibly appeared in a casebook. This adjusted score accounts for changes in time. *Brown v. Board of Education* (1954), for example, could not appear in the same number the selected casebooks as *Marbury v. Madison* (1803).

Table 5: Most-Cited U.S. Supreme Court Federalism Decisions, 1870-1920

Case	Year	Impact on Authority	Summary & Dimensions Affected	Chief Justice	Adjusted Citation Score
Hammer v. Daggenhart	1918	Restrict	Congressional Act of Sept. 1, 1916, which prevented interstate commerce in the products of child labor, violated US Constitution. The Act tried to regulate property that was purely a state-level matter, which exceeded Congress' authority under the Commerce Clause and invaded the states' reserved power of 10th Amendment	White	75.00
Missouri v. Holland	1920	Expand	Missouri challenged 1918 Migratory Bird Treaty Act with Great Britain and Canada, claiming the treaty interfered with states' rights under the Tenth Amendment. The Court upheld Congress's authority to make treaties with other nation-states; the regulation of migratory birds was not prohibited by the 10th Amendment	White	69.44
Champion v. Ames	1903	Expand	Defendants arrested and convicted under 1895 Act of Congress making it illegal to transport lottery tickets across state lines. The Court held that lottery tickets, "tangible property," were indeed "subjects of traffic," and as such, Congress had plenary authority to regulate--via Commerce Clause--independent carriers of lottery tickets.	Fuller	57.14
Munn v. Illinois	1877	Restrict	Illinois law regulated grain warehouse and elevator rates by establishing maximum rates for their use. The Court upheld Illinois law because defendants were engaged in a public business to such an extent that the Illinois had authority to regulate. Such authority did not interfere with the Commerce Clause because the state's regulation occurred within Illinois's own boundaries.	Waite	54.17
Leisy v. Hardin	1890	Expand	Illinois liquor manufacturer and importer sought to import its property into Iowa market, but Iowa state law banned importation of liquor. Court held Iowa law violated Commerce Clause. Liquor manufacturer had right to sell property in Iowa.	Fuller	50.00
United States v. E.C. Knight & Co.	1895	Restrict	Congressional Act outlawed monopolization of any part of trade or commerce among the several States, or with foreign nations. New Jersey corporation acquired Philadelphia sugar refineries, but this had no direct relation to commerce between the States or with foreign nations. Thus, the Congressional Act could not regulate the New Jersey corporation's behavior.	Fuller	44.44
In re Rahrer	1891	Expand	Congressional Act declaring liquor traveling into a state are subject to the state's law therein is valid exercise of Congress's authority. Subsequently, Kansas law outlawed sale of liquor within state and jailed petitioner for selling liquor. Contrary to petitioner's claim, Kansas law did not violate commerce clause.	Fuller	43.48
Welton v. Missouri	1876	Expand	Missouri statute required those selling property/goods manufactured *outside* Missouri to pay for and obtain a license. But, the statute did not extract license fee for those who sold goods manufactured *within* Missouri. Court invalidated Missouri law because sellers who manufactured within Missouri were not required to pay the license tax, thus the statute discriminated against articles of interstate commerce.	Waite	39.58
The Daniel Ball	1871	Expand	Grand River, Michigan is a navigable water of the United States, within the meaning of two Congressional Acts of 1838 and 1852. Those Acts are applicable to a steamer engaged as a common carrier between places in the same state, when a portion of the merchandise transported by steamer is destined to places in other states, or comes from places beyond the state	Chase	37.50
Wabash, St. Louis & Pacific Railroad Co. v. Illinois	1886	Expand	The Court held that Illinois state law regulating railroad rates violated the Commerce Clause by placing a direct burden on interstate commerce. Court concluded that this type of regulation had to be of a general and national character and could not be safely instituted by local rules and regulations.	Waite	34.78

Notes and Sources: Compiled by author. These decisions were the most frequently included cases from 1870 and 1920 in 58 constitutional law treatises and casebooks published between 1822 and 2010. The coding criteria for "restrict," "neutral," and "expand" is discussed in an Appendix.

Individual Rights and Restriction of Central State Authority

While the Court expanded central authority with its nationalistic view of commerce, it simultaneously embraced a more state-centered approach with respect to individual rights. Beginning with the *Slaughterhouse Cases* (1873),[202] the Court interpreted the new 14th Amendment. Over a century's perspective makes it clear to us that these Reconstruction Amendments did, in fact, usher in a new constitutional order whereby the federal government protects the rights of individuals, but this new order was far from certain in 1873. *Slaughterhouse* narrowly interpreted citizenship rights (especially the Privileges and Immunities Clause) of the 14th Amendment holding that a Louisiana law creating a monopoly over the slaughtering business was constitutional because of a state's police powers to protect health, safety, morals, and the general welfare.

Justice Miller upheld the validity of this monopoly on a state-centered understanding of federalism. He asked rhetorically, "Was it the purpose of the 14th amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government?"(*Slaughterhouse,* 76). Miller further questioned the issue of civil rights in relation to the 14th Amendment: "And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?" (*Slaughterhouse,* 77). Miller's majority decision answered his own questions: if the 14th Amendment did mean these things then the Court would become "a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights" (*Slaughterhouse,* 78). In making this argument, the Court created two separate spheres of citizenship: one state-based and one national-based. Making

[202] 83 U.S. 36

such a distinction restricted the central state from enforcing subsequent civil rights legislation on state-level citizenship.

The Court's decision in *Slaughterhouse* clung to the state-centered model of federalism thereby constricting central state authority. Miller rejected the possibility that the Reconstruction Amendments ushered in a new constitutional order:

> [W]hen, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other (*Slaughterhouse,* 78).

Ultimately, this decision perpetuated a model of federalism, which limited the ability of the central state to monitor state police power.

This pattern continued, too, in individual rights decision as Table 6 indicates with five of the ten most-cited decisions restricting authority.

Table 6: Most-Cited U.S. Supreme Court Individual Rights Decisions, 1870-1920

Case	Year	Impact on Authority	Summary & Dimensions Affected	Chief Justice	Adjusted Citation Score
Slaughterhouse Cases	1873	Restrict	Louisiana law declared all butchering of animals in New Orleans take place in one facility. Several Louisiana butchers claimed this law violated their newly declared 14th Amendment rights of due process and privilege and immunity. Court held Louisiana law was constitutional—14th Amendment meant to apply to national citizenship not state citizenship.	Chase	81.25
Lochner v. New York	1905	Expand	New York law enacted maximum hours for bakers. A NY bakery owner, Lochner, was charged with violating this law. He claimed the law infringed on his 14th Amendment rights of due process. The Court agreed, invalidating the NY statute. The state had no reasonable ground for interfering with liberty of bakers by determining the hours of labor.	Fuller	71.43
Civil Rights Cases	1883	Restrict	The Civil Rights Act of 1875 affirmed the equality of all persons in the enjoyment of transportation facilities, in hotels and inns, and in theaters and places of public amusement. The Court held this Act violated the Constitution because Congress did not have the authority under the 14th Amendment enforcement provisions to regulate privately owned businesses. Equal protection applies only to state action not to privately held entities.	Waite	69.57
Yick Wo v. Hopkins	1886	Expand	The biased enforcement of an 1880 San Francisco ordinance violated the Equal Protection Clause of the 14th. San Francisco required all laundries in wooden buildings to hold a permit issued by the city. Although workers of Chinese descent operated 89 percent of the city's laundry businesses, the city did not grant a single permit to a Chinese owner.	Waite	60.87
Plessy v. Ferguson	1896	Restrict	A Louisiana law required separate railway cars for blacks and whites. Homer Plessy was arrested for sitting in a "whites only" car and claimed the state violated his 14th Amendment equal protection rights. The Court upheld the law viewing segregation, in itself, a form of unequal discrimination.	Fuller	57.78
Schneck v. US	1919	Expand	Schenck mailed circulars to draftees, which suggested that the draft was a wrong motivated by the capitalist system. The circulars urged "Do not submit to intimidation" but advised only peaceful action such as petitioning to repeal the Conscription Act. Schenck was charged with conspiracy to violate the Espionage Act. The Court held Schenck is not protected in this situation because some speech tolerable in peacetime can be punished during war time.	White	55.56
Strauder v. West Virginia	1880	Expand	A West Virginia law declared that only whites may serve on juries. The Court held this law violated the Equal Protection Clause of the 14th because law "is practically a brand upon them, affixed by law; an assertion of their inferiority."	Waite	55.32
Hurtado v. California	1884	Restrict	A California constitutional provision allowed prosecutions of felonies on information without a grand jury trial—information is a written set of accusations made by a prosecutor. Based on information by the district attorney, Hurtado was tried and sentenced to death. He claimed grand juries were constitutionally required in capital cases. Supreme Court held the California provision was constitutional—any legal proceeding that protects liberty and justice is due process.	Waite	43.48
Twining v. New Jersey	1908	Restrict	Twining, a bank director, was charged with a misdemeanor (deceiving a bank examiner). Twining declined to testify at his trial. Under New Jersey law, the prosecutor commented upon Twining's failure to testify. A jury convicted Twining; he appealed. The Court held the NJ law and comment did not violate the Fifth Amendment rights against self-incrimination.	Fuller	42.86
Abrams v. US	1919	Expand	Defendants were convicted under the Espionage Act on the basis of two leaflets they printed and distributed, denouncing sending American troops to Russia as well as the US war efforts to impede the Russian Revolution. The Court upheld the Espionage Act and the defendants' 20-year prison sentence.	White	41.67

Notes and Sources: Compiled by author. These decisions were the most frequently included cases from 1870 and 1920 in 58 constitutional law treatises and casebooks published between 1822 and 2010. The coding criteria for "restrict," "neutral," and "expand" is discussed in an Appendix.

But as Table 6 reveals, if there was to be any arm of the central state responsible for monitoring state police power it was to be the Supreme Court. Decisions like *Lochner v. New York* (1905)[203] and *Strauder v. West Virginia* (1880)[204] actually expanded central state authority in that they invalidated state-level laws regulating both the workplace (maximum hours) and the racial makeup of juries, respectively.

Notwithstanding *Lochner* and *Strauder,* many other decisions in the database, but not in Table 6, took a more state-deferential tact than *Lochner* or *Strauder*. For example, *U.S. v. Cruikshank* (1876)[205] involved federal indictments of conspiracy, which forbade any person "to injure, oppress, threaten or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution."[206] In this case, a white mob people attacked a peaceful assembly of blacks outside a Louisiana courthouse and killed between 60 and 100 of them.[207] But, here, the Court took a state-centered approach. The central state, according to the judiciary, did not have the authority to indict under these pretenses because:

> the right of the people to peaceably assemble for lawful purposes existed long before the adoption of the Constitution of the United States. . . . The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection. As no direct power over it was granted to Congress, it remains, according to the ruling in *Gibbons v. Ogden*, subject to State jurisdiction (*Cruikshank,* 552).

The bottom line is that constitutional development in the individual rights realm often constricted central state authority either by an explicit invalidation of Congressional statutes[208] or leaving state-level police power laws intact.[209]

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[203] 198 U.S. 45
[204] 100 U.S. 303
[205] 92 U.S. 542
[206] Section 6 Enforcement Act of 1870
[207] Gillman et al, *American Constitutionalism,* 347.
[208] *Adkins v. Children's Hospital* (1923); *Civil Rights Cases* (1883)*; Plessy v. Ferguson* (1896)*; U.S. v. Wong Kim Ark* (1898); *U.S. v. Lee* (1882)
[209] *Mugler v. Kansas* (1887)*; Muller v. Oregon* (1908)*; Holden v. Hardy* (1898)*; Barbier v. Connolly* (1885); *Powell v. Pennsylvania* (1888); *Jacobson v. Massachusetts* (1905)

Conclusion

Across American history, the Court's most salient constitutional decisions have shaped the contours of the American central state. Through its constitutional decisions, the judiciary both expands and restricts this state. This chapter has endeavored, first, to explain why the Court does this and, second, to show that the Court has done much to build the American state, contrary to the prevailing narratives. The restrict-expand patterns of development are deeply rooted in the dual sovereign design of American federalism that has come under continual scrutiny throughout American political development. Ultimately, this chapter was built on the understanding that while the substantive impact of other major federal branches on the expansion of central state authority has been studied, the Supreme Court's precise relationship to state authority remains considerably less well-charted.

In the aftermath of the Civil War, the Court helped chart a moderate course that pivoted on debates about varying conceptions of federalism, enhancing national power in commerce realms while leaving questions of social control to the states. More specifically, with a sample of 104 landmark Supreme Court decisions, state-building, in this era, took a non-linear path, generally expanding some policy areas while generally restricting others. The Court's role toward state expansion rested largely within the procedural and structural dimensions of central state authority addressing, essentially, the question of who has the ultimate decision-making authority. Throughout this era, the Court's answer to this question was that it had the decision-making authority in federalism cases, and in citizenship cases, states have that authority.

What is still left to be explored, however, is the Court's own institutional development and its relationship to the other branches. While this chapter has focused largely on constitutional and doctrinal developments, chapter 6 explores the Court's position in the broader state ensemble. The

Court's institutional mission and placement within the central state ensemble requires that it to operate more diffidently than the political branches, which we will be the focus of the next chapter.

Chapter 6: Supreme Court Diffidence

> *The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be therefore, great resistance to expand the substantive reach of those Clauses.*
>
> –Justice Byron White, 1986[210]

Introduction

Writing for the majority, Justice Byron captures two important themes of this chapter. First, Byron demonstrates the Court's cognizance of its legitimacy not just among the coequal branches but also among the broader public. A second theme is the constitutional reticence the Court uses to guard this legitimacy. These themes stem from the Court's institutional mission and from an historical understanding of the development of its own review powers.[211]

As the previous chapters demonstrate, the Court's decisions do much to extend federal government authority. Nevertheless, a major difficulty in conceptualizing the Court's role in this state expansion rests on its unique position within the central state ensemble. That is, the Court is simultaneously inside and outside of the central state because the Court's institutional mission necessitates that it remain "independent" and review the powers of coordinate branches. Because of these features, the Court helps determine the boundaries of central state authority as well as occupies a place within it. Thus, at times, the Court has opposed the expansion of the coordinate branches and, at other times, consolidated national power over state power. The judiciary's

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[210] Writing for the majority in *Bowers v. Hardwick* 478 U.S. 186 (1986), 195-196.

[211] On the importance of historical memory and narratives to institutions, see Charlotte Linde. 2009. *Working the Past: Narrative and Institutional Memory.* New York, NY: Oxford University Press. Linde's sociological study looks not at political institutions but at an insurance company. Her use of "institution," however, is theoretically useful far beyond the scope of her study (Linde 2009, 7-8). Especially helpful to understanding Supreme Court development is her fourth chapter, "Retold Tales: Repeated Narratives as a Resource for Institutional Remembering." Here she argues that these retold tales "are important because they represent a mechanism for continuing the past into the present; by developing new tellers who were not present" (Linde 2009, 86). This behavior is ubiquitous on the Supreme Court both from its own members as well as from scholars, politicians, and the broader public.

institutional mission within the central state places it in a precarious position, and this chapter illuminates how the Court walks this fine line and what can happen when it does not.

While Chapters 4 and 5 focused on substantive legal developments that contributed to the advancement of the central state, this chapter centers on the Court itself, that is, the institution of the Court and its relationship within the broader central state ensemble. This chapter is based on two principles. First, what makes something an institution is its mission—some definable purpose or shared normative endeavor that becomes indoctrinated within the institution as a result of its participants (Smith 1988; Gillman 1999; Keck 2007b).[212] Second, institutions are deliberate about protecting their legitimacy and, as such, they will adapt to changing contexts and the actions of other institutions to achieve this end (Gillman 1999, 79-81).

Taking these principles as our starting point, the main purpose of this chapter shows that the Supreme Court has often deployed a strategy of diffidence to help maintain its legitimacy and to advance its constitutional authority. Diffidence is the Court's refusal to maximize power for itself and instead allocate central state power to the other national branches, which has roots in the broader institutional context and in the Court's institutional mission. Ultimately, diffidence helps the Court balance the important state-building projects of consolidating broader central state authority and maintaining its ideological legitimacy. Within these two projects, the Court's reluctance to assert the judiciary's primacy has developed through three channels: jurisdiction, federalism, and the rules

[212] Rogers Smith (1988) recognizes that distinctive institutional missions might help explain the behavior of judges. He argues, "Political institutions appear to be 'more than simply mirrors of social forces.'" Instead, they often take on "a kind of life of their own," influencing "the self-conception of those who occupy roles defined by them in ways that can give those persons distinctively 'institutional' perspectives" (Smith 1988, 95). Rogers Smith. 1988. "Political Jurisprudence, the 'New Institutionalism,' and the Future of Public Law. *American Political Science Review* 82 (1): 89-108. See also Thomas M. Keck. 2007. "Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes." *American Political Science Review* 101 (2): 321-338. Building on Smith's ideas, Keck finds that "institutional missions" and "judicial motivations" help explain the judicial coalitions in the twenty out of fifty-three federal statutes invalided by the Supreme Court between 1981 and 2005 (Keck 2007, 331–336).

of constitutional interpretation. Thus, the centerpiece of Chapter 6 is on judicial authority—how the Court builds, protects, and maintains this authority.[213]

Diffidence is a curious behavior given that the Court remains relatively insulated from electoral pressures and exercises broad discretion over the size and content of its docket. Still, national political institutions have historically seen the Court as a convenient place for dealing with controversial policy questions that political branches seek to avoid (Graber 1993)[214] mainly because the public sees the judiciary as the most legitimate national institution (Gibson and Caldeira 2009).[215] The bottom line is that the Court often decides opinions that cause great controversy and, as a result, the justices consider how they construct Court opinions in order to maintain the institution's legitimacy (Farganis 2012). Yet much of this literature focuses on the influence of political branches

[213] There is a vast literature on judicial power. Judicial power literature largely concerns the Court's implementation ability. See Matthew Hall's (2011) *The Nature of Supreme Court Power* who frames his study as a counterargument to Gerald Rosenberg's (1991) thesis that the Court "can almost never be effective producers of significant social reform" (Hall 2011, 160 quoting Rosenberg's 2008 edition, 422). Relevant to reasons the Court might be diffident, Hall posits that "the Supreme Court's ability to alter the behavior of state and private actors is dependent on two factors: the institutional context of the Court's ruling and the popularity of the ruling" (Hall 2011, 4-5). Contrary to Rosenberg, Hall concludes, "the Court possesses remarkable power to alter the behavior of state and private actors in a wide range of policy issues" (Hall 2011, 160).

Constitutional diffidence, however, is not concerned with the implementation effects of the Court. Instead, this chapter characterizes the Court's institutional behavior and its effect on central state expansion. Moreover, scholarship on judicial power examines the virtual opposite of diffidence: it examines decisions in which the Court desired to produce great social change. In other words, the judicial power literature does not pinpoint moments when the Court attempted to preserve political capital or enhance its legitimacy—that is, when the Court acted diffidently (Hall admits this characterization in his conclusion, p. 159).

[214] This growing historical institutionalist literature, often dubbed the "regime politics" approach, examines the circumstances and conditions concerning the maintenance and changes of judicial authority, and it offers strategic explanations of how and why political institutions decide to share, surrender, and grant power to other institutions. Broadly speaking, the regime politics approach is concerned with pinpointing external (usually national party) political influences on judicial behavior at various points in American history. In doing so, this literature focuses primarily on the political foundations required for judicial review. Examples of this scholarship include Mark Graber (1993, 1998); Keith Whittington (2005, 2007) and J. Mitchell Pickerill and Cornell W. Clayton (2004).

[215] The literature on court legitimacy is primarily econometrics-based and has long recognized that the Supreme Court attends to its institutional legitimacy (Gibson, Caldeira, and Spence 2005; Hausegger and Baum 1999; Caldeira and Gibson 1992; and Caldeira 1987). The main takeaway in this literature is that the Court has preferences to maintain and shape its legitimacy. Beyond that, however, it does not tell us *how* the Court does this, save showing us that the Court will issue decisions that are acceptable to the "public mood" (McGuire and Stimson 2004; Casillas, Enns, and Wohlfarth 2011). Additionally, Caldeira (1987) argues that the justices—with well-timed Court decisions—are able to shape public support in order to bolster institutional legitimacy. In sum, this literature analyzes how public opinion affects judicial outcomes and how the Court attempts to garner public support as a means to remaining legitimate.

wield over the judiciary rather than on how the Court's own institutional mission produces distinctive legal innovations to deal with broader politics.[216]

The rest of this chapter discusses the unique institutional placement and mission of the Court and how these institutional features enable diffidence. Then it uses some of these data to demonstrate Court diffidence as well as explores some of the legal mechanisms through diffidence occurs.

Judicial Authority and Court Mythology

The Court's mythological and autonomous image puts it in a different position in the polity than the democratically elected branches, and maintaining this image has been a reason for Supreme Court diffidence. In discussing a number of Court decisions that evoked the ire of Congress in the late nineteenth century, James Bryce noticed that, still, "the credit and dignity of the Supreme Court stand very high" because few justices allowed "their political sympathies to disturb their official judgment" (Bryce 1891, volume 1, 264). In the late nineteenth-century, Bryce observed that the "new-made judge has left partisanship behind him" (Bryce 1891, 264). By embracing these judicial norms, the Court has cultivated an image that its legitimacy was "derived from the public's belief that the justices are vested with the special legal knowledge and expertise that enabled them to discover the true meaning of the Constitution" (Bassok 2009, 245-6)." In doing so, the Court helped perpetuate a judicial mythology. C. Herman Pritchett argues, "Every Court prior to the Roosevelt Court had enjoyed the protection of perhaps the most potent myth in American political life—the

[216] For a summary and a critical discussion of the "regime politics" approach to judicial decision making, see Thomas Keck's (2007a) review article, "Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools," *Law & Social Inquiry* 32, 2: 511-544. This chapter sympathizes with Keck's view by examining the behavior of the Court as it considers its institutional context as opposed to viewing the Court—as the regime politics literature often does—as being acted on by the other federal branches. Mark Miller's (2009) *The View of the Courts from the Hill* criticizes the regime politics approach along similar lines: "the regime politics approach can be seen as underemphasizing the unique legal voice that the courts bring to the constitutional dialogue" (Miller 2009, 33). For a longer and more heavy-handed criticism of the regime approach, see Matthew Hall. 2012. "Rethinking Regime Politics." *Law & Social Inquiry* 37(4): 878–907.

myth that the Court is a non-political body, a sacred institution" (Pritchett 1963, 14-5).[217] More recently, legal scholars like Lawrence Friedman, note, "Over time, the aura of the high courts has gotten thicker and more mystical. The Supreme Court in particular seems to be protected by a kind of magic barrier of myth and mystery" (Friedman 2003, 147).

Scholars and justices alike employ religious metaphors when describing the Court's mythology. Justice Flex Frankfurter likened the justices to "legal monks" and said, "When a priest enters a monastery, he must leave—or ought to leave—all sorts of worldly desires behind him. And this Court has no excuse for being unless it's a monastery" (Frankfurter quoted in O'Brien 2003, 87). Similarly, in describing the justices robes, Chief Justice Howard Taft said, "It is well that judges should be clothed in robes…in order to impress the judge himself with the constant consciousness that he is a high priest of the temple of justice and is surrounded with obligations of a sacred character that he cannot escape" (Taft quoted in Segal et al. 2005, 17)[218]. Political scientist Walter Murphy also observed, "Much of the sacred, mysterious character of the Constitution has been caught by the Justices in the performance of their priestly duty of expounding the meaning of the holy writ" (Murphy 1964, 16). In a similar vein, Max Lerner wrote, "The judges become, thus, not ordinary men, subject to ordinary passion, but 'discovers' of final truth, priests in service of a god

[217] Scholars in various disciplines and of various methodological persuasions have recognized this mythology. Institutionalist like David O'Brien and John Brigham have discussed the "myth of the cult of the robe (O'Brien 2003, 87). See Chapter 2 in David O'Brien's *Storm Center* for further depiction of "the cult of the robe." See also John Brigham. 1987. *The Cult of the Court.* Philadelphia, PA: Temple University Press. Brigham argues that the public has "come to speak of the Constitution as 'what the justices say it is' and we look for 'it' in their opinions." Their words are no longer authoritative gloss on the thing itself; they have become the thing itself" (Brigham 1987, 31). He contends that this has arisen because of the "cult" of the Court, that is, in "the way we see the institution" (Brigham 1987, 9). Quantitative political scientists, too, Jeffrey Segal, Harold Spaeth, and Sara Bensh see that "judicial mythology blunts criticisms and insulates judges" thereby allowing them to "do as they wish" (Segal et al. 2005, 17). See also legal scholars like Alpheus Thomas Mason. 1962. "Myth and Reality in Supreme Court Decisions," *University of Virginia Law Review* 48 (8): 1385-1406, 1387.

[218] The justices did not always wear robes. Not coincidentally, wearing judges' robes became more common at the turn of the twentieth century when the Court came under heavy criticism for aggrandizing power (Mason 1962, 1392). Taft believed the robes helped enforce the theory that "judges are mere instruments of the law and can will nothing" (Mason 1962, 1395-1394).

head" (Lerner 1937, 1312). Judicial mythology bestows a popular reverence and legitimacy on the Court not experienced by the other federal branches.

Given its vaunted image, the Court holds a unique position in the central state, balancing the "myth of judicial aloofness" to protect its autonomy with "the reality of profound political power" (Mason 1962, 1385). In this way, the Court is simultaneously part of and outside of the central state. If the Court—as an institution—commands broad public support and possesses this mythological image, then the judiciary might be in a privileged position to expand its own power.

The consistent historical criticism of the Court might also lead one to believe that the judiciary persistently expanded its own power. Indeed, William Ross notes, "During every period of the Republic's history, critics of the courts have assailed the judiciary with invective and have proposed measures to curtail the institutional prerogatives of the courts" (Ross 1994, 1). For most of American history, liberal critics have criticized the federal courts for stymieing social progress by protecting a powerful minority (Miller 2009, 35).[219] The recurrence of these criticisms might suggest that the Court has been active in garnering power for itself, but this is far from the case as this chapter details below.

Moreover, beyond judicial mythology and criticisms, the separation of powers design is premised on the theory that national institutions will aggrandize power for their respective branch because, as historical institutionalist scholars have noted, institutions have a "will."[220] In *Federalist* no. 51, Madison applied the idea of institutional will to the separation of powers system: "In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent, is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own." By each branch maximizing its own

[219] Miller's *The View of the Courts from the Hill* offers a detailed overview of "the more tense" conflicts the Court has had with the president and Congress throughout American history (Miller 2009, 38-76).
[220] See footnote 232 above.

power independent of the others, Madison's theory held that it would provide "the great security against a gradual concentration of the several powers in the same department." He continued on to say that the Constitution must give each branch "the necessary constitutional means, and personal motives, to resist encroachments of the others" (*Federalist* no. 51, 319). In this sense, Madison and the Federalists, at least, saw the separation of powers as not only dividing power but also creating a form of competition among the branches to restrain each other. Notwithstanding this constitutional design, the judiciary resisted encroachment not by maximizing its power but by refraining to do so. Indeed, these data below portrays a different story of the central state ensemble rooted in the precarious position held by the judiciary.

The Precarious Position of Independence

The judiciary's position within the federal government places it in a paradoxical role and its diffidence is a product of this institutional placement. On the on hand, courts are supposed to be "independent" from the controversial politics of the day so as to make their decisions appear legitimate to the polity. In *Federalist* no. 78, Hamilton argued that the "complete independence of the courts of justice is peculiarly essential in a limited Constitution." Without independent courts, Hamilton contended, "all the reservations of particular rights or privileges would amount to nothing" (*Federalist* no. 78, 438). Yet, on the other hand, this independence leaves the judiciary highly susceptible to the criticism of pursuing its own ideological interest under the guise of impartial adjudication. Thus, Anti-federalists objected to Hamilton's claims, fearing the power of an insulated judiciary: "There is no power above [judges] to controul any of their decisions…In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself" (*Letters of Brutus* XV, 525). Keith Bybee has called this paradox the "two faces of judicial power" (Bybee 2007, 1). Moreover,

this paradoxical position is not an historical artifact; a 2005 nationwide poll showed that the public understanding of judicial independence as a protection for citizens' rights "is locked in close competition" with the conception that judicial independence is a mechanism through which courts pursues their own political objectives (Bybee 2007, 2).[221]

To protect itself from such criticism and to ensure its autonomy, the judiciary embraces to a macro-institutional mission rooted in legal reasoning and analysis, which is distinct from the decision-making processes of the legislative and executive branches. Thus a person is likely to reach different conclusions as a justice than he or she would as a legislator or executive.[222]

A brief historical example from a decision in the dataset will illuminate this institutional phenomenon. In *Hepburn v. Griswold* (1870)—a case concerning the use of federally issued paper currency—the Supreme Court declared an 1862 federal statute (the Legal Tender Act) unconstitutional by a vote of 4-3, a statute that required creditors to accept paper money not backed by gold as payment for debts owed by the United States. President Lincoln's administration considered the Legal Tender Act as necessary to sustain the Civil War effort. The irony of *Hepburn* was that former-Lincoln cabinet member Chief Justice Chase penned the opinion, and Lincoln appointed Chase to the Court *because* he had been the Secretary of the Treasury in 1862 and helped write the Legal Tender Act in the first place. Thus, we can conclude that Chase believed the act be constitutional when he was a cabinet member but unconstitutional when he became Chief Justice (Miller 2009, 21-22). Chief Justice Rehnquist wrote, "Chase's vote in the Legal Tender cases is a textbook example of the proposition that one may look at a legal question differently as a judge

[221] Maxwell Poll conducted by the Campbell Public Affairs Institute at Syracuse University available at https://www.maxwell.syr.edu/uploadedFiles/campbell/data_sources/Law%20and%20Courts%20Questions%20from%202005%20Poll.pdf accessed 5 April 2014.

[222] See Mark Graber (2006, 59) "Legal, Strategic, or Legal Strategy: Deciding to Decide during the Civil War and Reconstruction," in Ronald Kahn and Ken Kersch, eds. Graber argues that "legal norms" explain Justice Miller's opinion in *Roosevelt v. Meyer* (1863) and Chief Justice Chase's opinion in *Ex Parte McCardle* (1868), but "had Justice Miller or Chief Justice Chase been in the executive or legislative branches of the national government, they probably would have behaved differently" (Graber 2006, 59).

from the way one did as a member of the executive branch" (Rehnquist quoted in Miller 2009, 22). Recent examples exist, too, of justices saying they reach different conclusions as a judge than they would if they were in another branch of the government.[223]

The institutional mission of the Court, then, rests on its judicial duty and legal reasoning. Whittington sums up these differences in institutional settings:

> The justices may adhere to the law because, in an important sense, that is what justices do. Litigants and justices make references to statutory text, legislative intent, or judicial precedent in part because they expect judges to be responsive to such considerations, to recognize their authority within the institutional context of the judiciary. Legislators and lobbyists, by contrast, are relatively unlikely to employ such argumentative tools because their intended audiences see such things neither as particular important parts of their normative environment. . .nor as familiar cognitive heuristics that facilitate decision making (Whittington 2000, 624)

Thus the institutional setting of the Court pushes the justices toward "maintaining coherent and defensible jurisprudential traditions" distinct from "conventional partisan or ideological preferences" (Gillman 1993, 79-80).[224]

The judiciary's institutional setting includes three primary constraints that contribute to diffidence or what Judge John M. Walker Jr. of the U.S. Court of Appeals for the Second Circuit has called "judicial modesty" (Walker 2007, 123). These constraints include, first, that judges make legal decisions based on a limited set of sources, giving primacy to language used by the litigants' representatives. Second, the judiciary is constrained by the requirement that judges pronounce and explain their decisions in writing unlike political actors who can often make a decision without explaining its justification. Last, judges are keenly aware of the reactive nature of their decision-making (Walker 2007, 124). He thus concludes, "Respect for the authority of the law depends on

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[223] See Miller's *View of the Courts from the Hill* (2009, 22-24) for additional examples. One such example includes Justice Potter Stewart's dissent in *Griswold v. Connecticut* (1965)—*Griswold* invalidated a Connecticut law, which banned a doctor from counseling married couples on birth control and from prescribing contraceptives to these couples. Justice Stewart, while politically sympathetic to the invalidation of this law, refused to the join the Court's opinion. He wrote, "I think this is an uncommonly silly law. . . .As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice. . . .But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do" (Stewart quoted in Miller 2009, 22-23).

[224] For an econometrics-based approach reaching a similar conclusion, see Mark J. Richards and Herbert M. Kritzer. 2002. "Jurisprudential Regimes in Supreme Court Decision Making." *American Political Science Review* 96 (2): 305-320. They conclude, "The Supreme Court is not simply a small legislature. Law matters in Supreme Court decision making in ways that are specifically jurisprudential" (Richards and Kritzer 2002, 315).

judicial modesty—judges performing their proper role within the judiciary's institutional limitations. Yet judicial modesty does not engender respect for the rule of law unless the public is aware of that constraint and realizes its significance in shaping judicial behavior" (Walker 2007, 123). Therefore the judiciary's institutional culture and context gives rise to a tempered form of behavior.

Legal scholars have also recognized other general institutional norms, which promote diffidence. More specifically, norms against justices speaking publicly—especially when the Court's under heavy criticism—makes them a generally "cautious lot" of political actors. The judiciary's capital is intellectual and reputational, based on effective job performance, and this capital "wears thin in the face of persistent criticism" (Ferejohn and Kramer 2006, 167). Prolonged criticism affects courts because "no judge likes to be criticized," Lawrence Friedman writes. Consequently, "judges will hesitate before making a decision, or a statement, that is likely to end up in the newspaper and make them look bad" (Friedman 2006, 145). Courts often avoid the center of controversy, at least considering their relative institutional autonomy, and they do this by employing a "politically astute" form of "self-abnegation" (Ferejohn and Kramer 2006, 167). At bottom, then, the Court's institutional position within the central state requires the use of diffidence, a claim developed in the next section.

In sum, the precarious position of independence gives rise to a paradox facing the Court that the democratically accountable branches do not face:

> In order to protect its image as a neutral, independent decision-making body, the Court must in fact pay close attention to what will be deemed acceptable by the populace and sometimes yield from any neutral perspective to avoid overstepping the bounds imposed by perceptions of what is legitimate. . . . In order to guard its image as an apolitical decision-maker, and with it its institutional legitimacy, the Court must engage in deeply political behavior (Clark 2011, 22).[225]

Constitutional diffidence helps solve this problem by maintaining institutional legitimacy and thus constitutional authority. Moreover, as demonstrated in chapters 3-5, the Court persistently expands

[225] Tom S. Clark. 2011. *Limits of Judicial Independence.* New York, NY: Cambridge University Press. Clark calls this the "politics-legitimacy" paradox. By examining the ideological direction of Court decisions from 1953 to the present, Clark demonstrates that, "as more conservative (or liberal) members of Congress engage in Court-curbing attacks on the judiciary, the justices move in a conservative (or liberal) direction (at least in statutory cases)" (Clark 2011, 237).

and constricts central state authority, and while this in and of itself is not diffidence, it does demonstrate that the Court does not aggrandize national power (for itself or for the other national branches) too aggressively. The Supreme Court's constitutional development, then, stands in contrast to the trajectory of its own *institutional* development, which "has been consistently and undeniably upward" (Crowe 2012, fn. 32 on p. 9).[226]

Why Judicial Diffidence?

The Court's diffidence is rooted in two institutionally-based reasons. First, the design of the federal political system encourages Court diffidence, a system typified by the interdependence among the branches.[227] Indeed, the Court has never been "truly independent" of the other national branches of government (Pickerill 2011, 106). Terri Peretti has gone even further, claiming that judicial independence is a "myth," and that she is not "particularly troubled by this state of affairs" (Peretti 1999, 2002, 103).[228] As Richard Neustadt recognizes in his study of the American presidency, the United States is a system of separate institution sharing power: "The Constitutional Convention of 1787 is supposed to have created a government of 'separate powers.' It did nothing of the sort.

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[226] That is, the Court's institutional power has grown exponentially while its constitutional impact on central state authority does vary a great deal between growth and restriction. Crowe emphasizes that the Court was a "partner in, and enforcer of, national policy-making"—a theme he stresses in each historical period examined, a finding bolstered by the data below (Crowe 2012, 133).

[227] The contributions to Bruce Peabody's edited volume *The Politics of Judicial Independence* all espouse this interdependent characterization, seeing judicial "independence" as essentially a shibboleth. Peabody's volume seeks to understand judicial independence in the wake of growing Court criticisms occurring over the last fifty years: "how does the current era of court criticism help us to understand the circumstances under which judicial independence can be compromised by 'improper' political influences?" (Peabody 2011, 17). Bruce Peabody, ed. 2011. *The Politics of Judicial Independence.* Baltimore, MD: The Johns Hopkins University Press. See also Louis Fisher's (1988) *Constitutional Dialogues,* which recognizes the multi-institutional context of Supreme Court decision-making. Constitutional meaning, for Fisher, is the product of ongoing discursive negotiations among the three national branches. Louis Fisher. 1988. *Constitutional Dialogues: Interpretation as Political Process.* Princeton, NJ: Princeton University Press.

[228] Terri Peretti. 2002. "Does Judicial Independence Exist? The Lessons of Social Science Research," in *Judicial Independence at the Crossroads: An Interdisciplinary Approach,* Stephen B. Burbank and Barry Friedman, eds. Thousand Oaks, CA: Sage Publications. See also Terri Peretti. 1999. *In Defense of a Political Court.* Princeton, NJ: Princeton University Press. In both pieces, Peretti contends that scholarship on judicial independence—with its presumption that independence produces impartial, law-based decisions—belies the empirical reality of how federal judges operate within the political system.

Rather, it created a government of separated institutions *sharing* power" (Neustadt 1980, 29, emphasis original). Accordingly, the checks and balances creates a federal government based not upon obstruction but upon interdependence, cooperation, compromise, and conflict (Pickerill 2011, 109). In this sense, viewing the judiciary as an obstacle to state development misses the more intricate ways that the federal branches interact with each other. The "governance as dialogue movement," as Mark Miller notes, rejects "the notion of either total legislative supremacy or total judicial supremacy in favor of a much more complicated and nuanced, continuous process of interaction among the institutions" (Miller 2009, 9).[229] Such an institutional setting requires that the Court, at times, persuade other political actors of the validity of its decisions, a form of "modified departmentalism" whereby all branches contribute to the constitutional understanding of particular issues (Murphy 1986, 417). In this kind of interdependent context, the Court exercises caution with regard to its judicial pronouncements.

Second, the Court fears reprisal from the other branches if its rulings impinge too much on the prevailing regime's preferences (Harvey and Friedman 2003, 2006, 2009; Lindquist and Solberg 2007). Aware of its fragility among the national branches, the Court behaves in ways that protects its authority because it remains vulnerable to political retaliation (Ferejohn 1999).[230] Throughout American history, public officials have often threatened to curb the Court's power either by constitutional amendment, statute, impeachment, jurisdiction stripping, or holding judicial salaries constant, and these threats have frequently altered the Court's behavior (Epstein and Knight 1998; Pickerill and Clayton 2004, 236; Clayton and Pickerill 2006, 1392; Rosen 2006, 7). To be sure,

[229] See Miller's section "The Governance as Dialogue Movement" for an overview of this perspective (Miller 2009, 5-12). Mark C. Miller 2009. *The View of the Courts from the Hill: Interactions between Congress and the Federal Judiciary.* Charlottesville, VA: University of Virginia Press.

[230] Much of the judicial behavior literature attempts to explain what occurs when a court does not maintain public support. As public support for the Court decreases, the public is more likely to approve of ways to curtail the institution's power (Caldeira and Gibson 1995; Gibson and Caldeira 1995, 2003; Gibson, Caldeira and Baird 1998). Indeed, Dahl's seminal article finds, "By itself, the Court is almost powerless to affect the course of national policy," but the Court maintains public support by "confer[ring] legitimacy on the fundamental policies" of the dominant political alliance (Dahl 1957, 581). This kind of institutional behavior can be seen as diffident.

Congress does not often deploy these methods, but the mere threat of them alters judicial behavior (Clark 2009; Ferejohn and Kramer 2006, 167).[231] The justices thus restrain their behavior to actions believed institutionally appropriate otherwise they may produce backlash from the public (Rosen 2006, 30; Klarman 1994). More than that, the federal government can limit the judiciary's power all together by avoiding its decisions because, as Hamilton stressed in *Federalist* no. 78, the Court has neither power of the sword nor the purse (Rosenberg 1991; Vanberg 2001). Some scholars have even suggested non-implementation of judicial decisions occurs frequently (Baum 2003, 177).[232]

Court reprisal can happen through various devices available to the executive and the Congress. In particular, three types of control loom largest. The first type is enforcement-related: the political branches could simply ignore Court mandates.[233] Certainly presidents rarely fully ignore Supreme Court orders, but there are plenty of examples of politically unpopular decisions receiving lackluster support. The failure of the desegregation cases to accomplish any substantive social change until the political branches joined the fight for civil rights is well-known (Rosenberg 1991, 42-82). Even today, the Court's school prayer decisions are ignored in some parts of the country (Alley 1996, 21-24; Ravitch 1999), and states still continue to push the limits on abortion rights promulgated in *Roe v. Wade* (Hadley 1996, 1-17). Certainly these challenges to judicial decisions impacts the posture of the Court.

Examples of executives defying Court decisions are also well-known. State governors, more than presidents, have demonstrated a willingness to defy Court decisions (Goldstein 1997). But President Andrew Jackson ignored Chief Justice Marshall's mandates in two cases involving the Cherokee Indians, producing a story where Jackson allegedly said Marshall should enforce his own

[231] Some political scientists, however, see the Court as not particularly worried by other institutional actors. The paradigmatic example is Jeffrey Segal and Harold Spaeth. 1993. *The Supreme Court and the Attitudinal Model.* New York, NY: Cambridge University Press. They primarily understand judicial outcomes as the product of a justice's ideology.
[232] Matthew Hall's (2011) *The Nature of Supreme Court Power* persuasively challenges this non-implementation thesis.
[233] Former Chief Judge for the District of Columbia Circuit, Harry T. Edwards, finds this mechanism the most effective in encouraging the judiciary to exercise restraint (Edwards 2006, 231).

decisions.[234] Though most subsequent presidents have not followed Jackson, President Lincoln ignored Chief Justice Taney's order to release a prisoner in *Ex Parte Merryman,*[235] and Lincoln's cabinet also paid little attention to the Court's decision in *Ex Parte Milligan*, which called for the end of military trials when civilian courts were in session.[236] The important fact is that the judiciary can accomplish very little if the executive does not enforce its orders, which is something that "has not been lost on the federal executive or on the states and their executives" (Ferejohn and Kramer 2006, 168).

A second form of control concerns judicial administration: Congress can not only cut the federal judiciary's budget, which now comprises over 30,000 non-judicial employees, but it also can regulate court rules and procedures. For example, in the early 1980s, Congress grew frustrated with how the courts handled criminal sentencing, which led to the Sentencing Reform Act of 1984[237]—an act that stipulated mandatory sentencing guidelines. Federal judges "almost uniformly abhorred" the Act, yet it is an example of how the political branches might curtail judicial power (Ferejohn and Kramer 2006, 176).[238]

The last form of political control relates to the scope of judicial power. Congress has the power to define the subject-matter jurisdiction of federal courts. Notwithstanding repeated failures to divest federal court jurisdiction via Article III, Congress has created a host of Article I courts to hear a variety of federal claims and interpret federal law. Examples of Article I courts include old

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[234] *Worcester v. Georgia* (1832) 31 U.S. 515 and *Cherokee Nation v. Georgia* (1831) 30 U.S. 1. Whether Jackson actually made his now oft-cited remark has been the subject of scholarly investigation, see Richard P. Longaker. 1956. "Andrew Jackson and the Judiciary." *Political Science Quarterly* 71: 341-364, 349. Longaker finds that Jackson's attitude toward the Supreme Court was more than sole defiance, but nevertheless, as descendants of Jeffersonian Republicans, Jacksonians were unabashed critics of the Court (Longaker 1956, 341-343).

[235] *Ex Parte Merryman* (1861) 17 F. Cas. 144. *Merryman* was a federal circuit court decision where Chief Justice Taney, riding circuit, issued the opinion for the court.

[236] *Ex Parte Milligan* (1866) 71 U.S. 2. Mark Neely, Jr. writes, "The *Milligan* decision had little practical effect. It was written in thunderously quotable language . . . [but d]espite unmistakable condemnation, trials by military commission continued (Neely 1991, 176).

[237] Public Law No. 98-473.

[238] In *United States v. Booker* 543 U.S. (2005), the Supreme Court struck down mandatory sentencing guidelines as stipulated in the Sentencing Reform Act of 1984.

territorial courts, which heard claims in federal territories before statehood, and the Court of Custom Appeals, which monopolized conflicts over tariffs and trade questions. More recently, the Tax Court, the Claims Court, the Court of International Trade, and the courts of District of Columbia represent non-Article III courts, courts that are "subject only to the most limited sort of appellate review in an Article III tribunal" (Ferejohn and Kramer 2006, 175). These kinds of courts represents ways Congress limits Court power.

The interdependent nature of the branches and the political control over judicial power helps produce a Court that will act diffidently in its adjudication. Because "congressional attacks against the courts can turn into threats to judicial independence" (Miller 2009, 16) and because constitutional meaning does not end with the Supreme Court's decision (Whittington 1999; Murphy 1986), the Court engages in behavior that protects its institutional mission. With the reasons for diffidence outlined, let us now turn to some the mechanism that allow the Court to engage in diffidence.[239]

Mechanisms for Diffidence

Over time the federal judiciary has imposed a set of doctrinal constraints, which limit its authority. These constraints have facilitated diffidence, and in this way they act as mechanisms for the Court to maximize power of the other branches while avoiding aggrandizing too much power for itself. This section will discuss three such mechanism: jurisdiction and justiciability, federalism,

[239] Some might argue that the Court is rarely concerned with the range of its own authority because it is largely impervious to the structural constraints cited above. The precarious nature of the Court, however, does not necessitate that the political branches retaliate against the judiciary. Moreover, even if the Court is largely impervious to structural constraints, that does not mean it will ignore them when promulgating decisions. The Court's precarious nature stems from broader issues than formal structural constraints. Its precarious nature has roots in the counter-majoritarian problem of the Supreme Court (i.e. the democratic illegitimacy of judicial review), which a subfield of constitutional theory has attempted to address ever since Alexander Bickel's (1962) *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. The point here is that an amalgamation of forces—structural constraints, public opinion, institutional legitimacy—create an institution that cannot do whatever it desires. This is a modest claim endorsed by a diverse set of scholars in the "new institutionalist" school. See Howard Gillman and Cornell Clayton, eds. 1999. *The Supreme Court in American Politics: New Institutionalist Interpretations*. Lawrence, KS: University Press of Kansas.

and the rules of constitutional interpretation.[240] The mechanisms discussed below are by no means an exhaustive list of the ways the Court may act diffidently. Instead, this section seeks to chart some of the mechanisms evident in these data, which serve to illuminate some of the major lines of institutionalized Court diffidence developed over time.

Jurisdiction and Justiciability

The Court grounds its federal jurisdiction in Article III of the Constitution with its language of "cases" and "controversies."[241] This has led the Supreme Court to hold that federal courts may take jurisdiction only in "justiciable" disputes, that is, those "appropriate for judicial determination." [242] The limitations produced by this mechanism, however, have always been considered "a judicially-invented gloss on the Constitution" (Ferejohn and Kramer 2006, 185). That is, the Court's diffidence over its own jurisdiction is a consciously imposed limitation on its authority.[243] This jurisdiction section will first present some of the data on judicial power and then will discuss some of the case history to illuminate the ways diffidence has manifested in these decisions and in response to the broader political setting.

The invocation of constitutional mythology and lore is especially prominent in cases over judicial power because it is in these cases that the Court weighs in on its precise powers. In one such

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[240] In chronicling the causes of judicial restraint, John Ferejohn and Larry Kramer see these three legal innovations as Court-imposed "doctrinal limitations" that amount to "judicial abstinence" (2006, 183-184).

[241] Article III, Section 2 reads, "The judicial power shall extend to all *cases,* in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to *controversies* to which the United States shall be a party;--to controversies between two or more states…"

[242] *Aetna Life Insurance Co. v. Haworth* (1937), 240. Justiciability is a broad conceptual umbrella encompassing several interrelated doctrines, including standing, mootness, and ripeness. For the purposes of these data, any decision dealing with these doctrines were all coded under the "jurisdiction/judicial power" legal issue area, and thus they are not discussed as separate doctrine below.

[243] There is an important pragmatic side to jurisdictional denials, too. For much of the Court's history, the Court has advocated for reductions or stasis in federal rights because of their impact on federal court caseloads. Control over its own docket, and thus a reduction in caseload, was an impetus behind Chief Justice William Taft's efforts. See Justin Crowe. 2007. "The Forging of Judicial Autonomy: Political Entrepreneurship and the Reforms of William Howard Taft," *The Journal of Politics,* 69 (1): 73-87.

decision from these data, *Osborn v. Bank of United States* (1824),[244] Chief Justice Marshall invoked this mythology: "Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law" (*Osborn,* 866). With this decision, legal scholar Alpheus Mason observes, "the myth was born and consecrated" (Mason 1962, 1388).

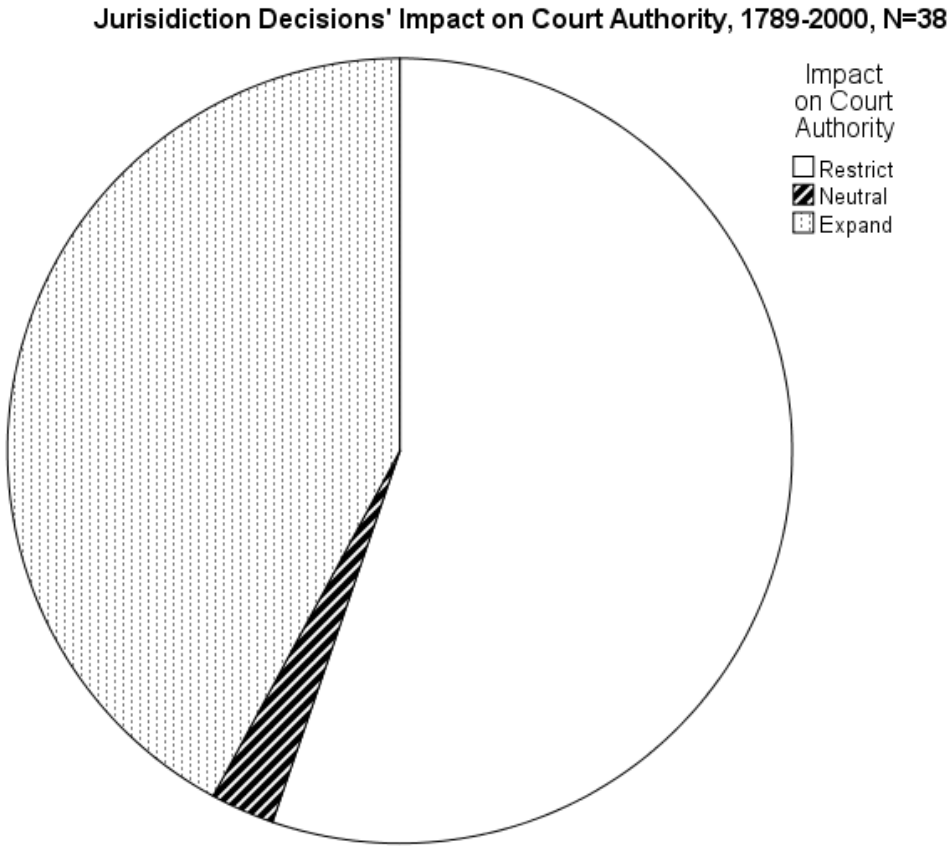
Looking at the thirty-eight decisions in the data concerning judicial power and jurisdiction reveals a Court reluctant to aggrandize power for itself or to controvert Congress's authority.[245] In just over 55% of these decisions, the Court refused to expand its jurisdictional power or to entertain challenges to a federal statute. Figures 10.1 and 10.2 display the impact judicial power decisions had - on the Supreme Court's authority—both the total distribution between 1789 and 2000 (Figure 10.1) and the distribution across quarter-century eras (Figure 10.2). Figures 10.1 and 10.2 support the claim that the Court exercises great care with respect to advancing its own authority.[246]

[244] *Osborn v. United States* (1824) 22 U.S. 738. At issue in *Osborn* was an Ohio state tax levied on the United States Bank. Despite *McCulloch,* Ohio insisted in enforcing the tax, which defied a federal circuit court injunction. The circuit court then asserted jurisdiction to require the Ohio State Auditor, Ralph Osborn, to repay the amount seized. The Supreme Court affirmed the lower federal courts jurisdiction and invalidated the Ohio law.

[245] "Judicial power" decisions are ones in which the Court is asked to *specifically* rule on its own authority to hear a case. This category pertains to questions about judicial jurisdiction and justiciability, which includes the political question doctrines, mootness, ripeness, and standing of the case at bar.

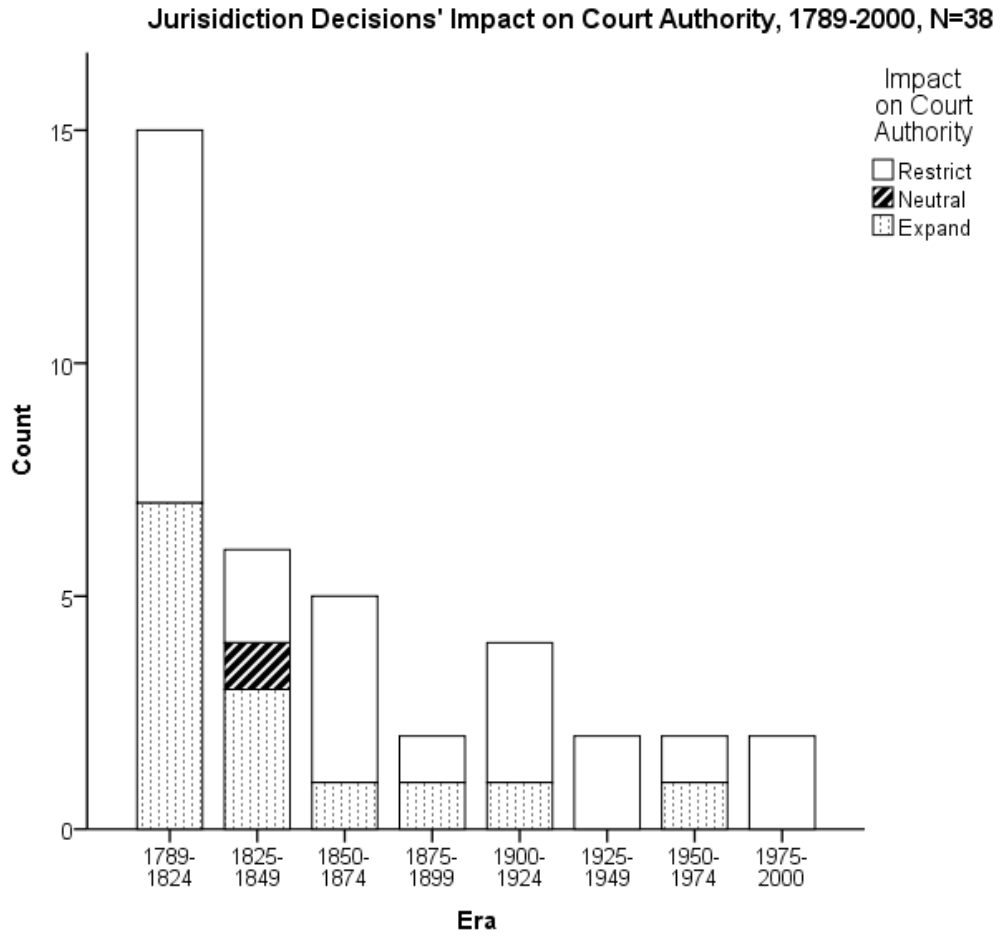
[246] For an historical discussion of the Court's jurisdictional power, see Louis Fisher's *Constitutional Dialogues* (1988, 85-118). Fisher argues, "Even when courts have jurisdiction, they may decide not to accept a case for reasons of equity and prudence" (Fisher 1988, 85).

Figure 10.1: Pie Chart of Judicial Power Decisions Impact on Central State Authority



Notes and Sources: Compiled by author. The neutral decision was not a case heard by the Supreme Court; *Eakin v. Raub* (1825) was a Pennsylvania Supreme Court case and, as such, could not possibly impact *central* state authority. Nevertheless, by my selection design (see Chapter 2), *Eakin* made the cut into the database. In *Eakin,* the Pennsylvania Supreme Court applied Marshall's theory of judicial review from *Marbury* to the state level, invalidating a state legislative act which violated the Pennsylvania constitution. The Pennsylvania act regulated the rules regarding those who could bring an "action of ejectment," a lawsuit brought to remove a party who is occupying real property. Figure 10.1 makes clear that the Court is careful with respect to allotting itself greater jurisdictional authority.

Figure 10.2: Stacked Bar Chart of Judicial Power Decisions' Impact on Central State Authority by Quarter-Century



Notes and Sources: Compiled by author. From this graphic, we can see a pattern of the Court refusing rather than accepting jurisdiction more often than not. Questions of judicial authority were most abundant during the founding and early republic years where the Court was especially diffident in its pronouncements (see the discussion of *Marbury* and *Stuart v. Laird* below).

To be sure, the Figures above still demonstrate expansion of judicial authority, but almost half of these expansions occurred when state-level questions were before the bench, as Figure 10. 3 shows. While there are too few cases disaggregated across the levels of government to draw definitive conclusion, Figure 10. 3 suggests a pattern of diffidence whereby the Court expands

review power over the federal branches less often, proportionally-speaking, and instead consolidates judicial power (and thus expands the central state) over state-level issues.[247]

Figure 10.3: Judicial Power Decisions Disaggregated Across Levels of Government Review

		Impact on Court Authority			
		Restrict	Neutral	Expand	Total
Level of Government	State	2	0	7	9
	Federal	19	0	9	28
	n/a	0	1	0	1
Total		21	1	16	38

Notes and Sources: Compiled by author. Proportionally, the Court expands its authority more often through overturning state-level actions (i.e. 7 in the "expand" category) rather than through federal ones. There are too few cases at the state-level to draw any definitive conclusions, but further evidence below in the "federalism" and "constitutional interpretation" sections bolsters the suggestions of this Figure. The "n/a" level of government is a Pennsylvania Supreme Court case, *Eakin v. Raub* (1825), which could not possibly affect Supreme Court authority.

Take *Cohens v. Virginia* (1824)[248] for example, which illuminates both Supreme Court diffidence *and* an expansion of Court authority over state-level actions. *Cohens* held that individuals convicted of state crimes had the right to appeal judgments in federal courts.[249] The political environment of the day necessitated Court diffidence. Indeed, simply declaring that the Court would even hear the case ignited a "political firestorm" in Virginia. In response, the Virginia legislature maintained that the Marshall Court had "no rightful authority under the Constitution to examine

[247] See Table 7 below for further evidence of this pattern.
[248] 19 U.S. 264
[249] *Cohens* dealt with a Virginia state law that prohibited the sale of lottery tickets. But after a congressional statute authorizing the operation of a lottery in the District of Columbia, the Cohen brothers proceeded to sell D.C. lottery tickets in Virginia. Virginia tried and convicted the Cohens, and then declared themselves to be the final arbiters of disputes between the states and the national government. Thus, the Marshall Court addressed this question: did the Supreme Court have the power to review the Virginia Supreme Court's ruling? Marshall answered in the affirmative, noting that Court had jurisdiction to hear state supreme court cases on appeal. But, after establishing the Court's jurisdiction, he deftly held that the state law over the lottery was a local issue and thus upheld the Virginia Supreme Court's conviction of the Cohens brothers. For an extended discussion of the Court's diffidence and careful avoidance of political controversy with Virginia, see Mark Graber. 1995. "The Passive-Aggressive Virtues: *Cohens v. Virginia* and the Problematic Establishment of Judicial Power." *Constitutional Commentary,* 12 (67): 67-92, 86-87, 90.

and correct the judgment for which the Commonwealth has been cited" (quoted in Graber 1995, 75).

In this case, the crime was selling out of state lottery tickets in Virginia. Congress had delegated to the Corporation of Washington the power to hold lotteries, the "Grand National Lottery," in order to generate funds to build a canal between Maryland and Washington, a common political practice in the late eighteenth and early nineteenth centuries. Marshall's assertion that the Grand National Lottery was local in scope—confined only to the District of Columbia—belied the common usage of lotteries; government officials often used proceeds from these lotteries to fund federal projects. More than that, anyone familiar with the nation's capital at this time knew Washington D.C. could not make good on the Grand National Lottery's $50,000 worth of prizes (Graber 1995, 73-81). Nevertheless, the justices adhered to a "highly implausible reading" of the congressional legislation creating the Grand National Lottery that concluded Congress did not intend to authorize the sale of tickets outside of D.C. (Graber 1995, 69).

At the same time, however, the Marshall Court affirmed central state authority (both of the Congress and the Court) without actually exercising this power. More specifically, Marshall held that the Court had appellate jurisdiction to hear cases of individuals convicted of state crimes. He also ruled that the Supremacy Clause prevented states from impinging on Congress's authority to govern the nation's capital. Despite these affirmations of central state authority, the Court still held that the Grand National Lottery did not prevent Virginia's ban of out-of-state lottery sales and thus, after all that, Marshall upheld Virginia's conviction of the Cohen brothers.

The Court's implausible reading of the congressional and Virginia statutes, Mark Graber argues, resulted from having no reason to believe that "Virginians would respect a decision in favor of the Cohen brothers" (Graber 1995, 86). One prominent Ohio attorney at the time said ruling in favor of Virginia's law was an attempt to "allay the apprehensions" that the Court's assertion of

jurisdictional authority would generate in Virginia (quoted in Graber 1995, 87). Fundamentally, the Marshall Court recognized its inability to declare laws—even state laws—unconstitutional if it lacked the support of the national political branches as it did in *Cohens* because of Virginia's vigorous objections. Notwithstanding this inability, the Court still expounded on broad constitutional issues pertaining to supremacy and jurisdiction before it issued its much narrower edict on the constitutionality of Virginia's ban on lotteries. Ultimately, *Cohens* demonstrated not only Supreme Court diffidence but also the way in which this diffidence helped lay the foundations for expansions of national authority.

Even earlier than in *Cohens,* the Marshall Court demonstrated the utility of judicial diffidence in protecting itself when faced with a hostile political environment during President Jefferson's tenure.[250] The Jeffersonian Republicans vigorous assault[251] on the judiciary produced diffidence in many of the Court's decisions, but particularly illuminating is the jurisdiction decision *Stuart v. Laird,*[252] which reviewed the Judiciary Act of 1802. Despite an exchange of letters in which a majority of the justices questioned the constitutionality of the Act, the Supreme Court ruled that Congress had authority to alter judicial jurisdiction as it did in in the 1802 Act (Haskins 1981 168-180). *Stuart* demonstrated the need for constitutional diffidence in the face of criticism from the political branches. *Stuart* revealed the Court—not as a power grabber that invented its judicial review

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[250] In these hostile political (i.e. "reconstructive") environments, political scientists have long recognized that the Marshall Court maintained its legitimacy and built its judicial review authority through calculated diffidence in decisions like *Marbury v. Madison, Stuart v. Laird, Schooner Peggy,* and *Cohens v. Virginia* (Whittington 2007, 75; Graber 1998, 90; Graber, 1995, 235-236).

[251] President Jefferson removed all Federalist attorneys and marshals, no matter how legitimate their appointments or how impartially they executed their duties, and replaced them with Republicans (Ellis 1971, 33). More than that, the impeachments of federal court Judge John Pickering and Associate Supreme Court Justice Samuel Chase demonstrated to the Court the vigor with which the Republicans would use to attack the judiciary. Congressional Republicans also repealed the Judiciary Act of 1801 and replaced it with Judiciary Act of 1802, further limiting Federalist control over the federal judiciary. See Richard Ellis (1971, 16–35), *The Jeffersonian Crisis: Courts and Politics in the Young Republic.* Author of one of the collections in *The Oliver Wendell Holmes Devise*, George Lee Haskins concludes, "The managers in charge of the 1802 legislation had more in mind than merely setting back the clock and ridding the judiciary of Federalist judges. The attack on the Supreme Court was part of an identifiable policy on the part of Republicans to reduce and confine the power of the federal courts generally" (Haskins et al. 1981, 162).

[252] 5 U.S. 299 (1803)

authority—but, instead, as a cautious institution cognizant of its vulnerability and therefore open to compromise (Crowe 2012, 75-77).[253] A pattern of judicial deference, too, endured for many decades after *Stuart* and helped put in place "relatively stable" interbranch relations (Ferejohn and Kramer 2006, 179). *Stuart* demonstrated an example of the Court restricting itself and thus expanding the power of Congress, a behavior that continued in other judicial power cases.

We see this diffident behavior again in other jurisdictional cases like *American Insurance Co. v. Canter* (1828).[254] This case concerned admiralty jurisdiction over shipwrecked goods in the then-territory of Florida. In this case, Chief Justice Marshall held that the Florida territorial courts were constitutional, contrasting these "legislative" courts (created by Article I and IV) with the more typical "constitutional" courts (created by Article III). The Court found that the plenary congressional power over the territories (in Article IV) justified Congress' creation of non-Article III courts in the territories. Marshall held that while admiralty jurisdiction is typically a power vested only in Article III constitutional courts in the *states,* this same limitation does not extend to the territories. In the territories, Marshall declared, "Congress exercises the combined powers of the general and of a state government" so the jurisdiction of Article I courts in the territories "is not a part of that judicial power" defined by Article III constitutional courts like the Supreme Court (*American Insurance,* 546). Thus, in *American Insurance,* the Marshall Court facilitated the growth of Article I "legislative" courts, which remain outside the reach of Article III constitutional courts' appellate review powers (a restriction of Supreme Court authority) yet, simultaneously, advanced the plenary powers of Congress to acquire and govern territory.[255]

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[253] This argument is consistent with some studies of post-communist constitutional courts, which also find that avoiding confrontation with political branches solidifies judicial authority in burgeoning democracies. See Lee Epstein, Olga Shvetsova, and Jack Knight. 2001. "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government." *Law and Society Review* 35 (1): 117-164.

[254] 26 U.S. 511

[255] This behavior is not simply a phenomenon of the Court's early history. In *Lujan v. Defenders of Wildlife* 504 U.S. 555 (1992), the Defenders of Wildlife sought a declaratory judgment on a 1986 Congressional amendment to the Endangered Species Act of 1973, an amendment which limited the Act's scope. The Court ruled that the Defenders of

The Court's reluctance to issue advisory opinions is another method by which the judiciary limits its authority under this justiciability rubric. For example, in 1793, as the war between France and England grew more intense, President Washington's administration wondered what, if any, obligations it had to France and its treaty of alliance with her. Washington asked the Supreme Court for an advisory opinion on the French ambassador's outfitting of both French privateers in American ports and enthusiastic American volunteers. But, in August 1793, the Court unanimously refused Washington's request to issue an advisory opinion, referencing the separation of powers as well as the "strong arguments against the propriety of" answering questions extrajudicially (Holt 1998, 178-179).[256] The Court's refusal in this instance was odd given the fact that the Court did not rule advisory opinions unconstitutional[257] and that advisory opinions were common in the English tradition (Holt 1998, 179). It was *this particular* advisory opinion that the Court rejected and for the calculated political reason that it would pull the Court into a hotly debated issue, an issue that pitted Washington's very administration against itself with Secretary of State Jefferson supporting French and Secretary of Treasury Hamilton supporting the British (Holt 1998, 178). Thus, Washington's decision to remain neutral in the war "provoked the first open attacks on his previously untouchable character and judgment" (Ferejohn and Kramer 2006, 186). Determined early in the Court's history, the norm of refusing to issue advisory opinions provided an avenue for constitutional diffidence and thus the maintenance of its own legitimacy and political capital.

Finally, the political questions doctrine is one of the most prominent ways the Court can refuse power for itself and instead leave power with the political branches. This doctrine has emerged as a way for the Court to duck potential cases that might make them vulnerable, removing

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Wildlife did not have standing to sue and thus—through this jurisdictional limitation—the Court left authority with Congress while simultaneously limiting judicial authority.

[256] The quote is from a letter from Chief Justice John Jay to President Washington. 8 August 1793. Access here: http://press-pubs.uchicago.edu/founders/documents/a3_2_1s34.html

[257] *Hayburn's Case* (1792)

constitutional law questions from judicial consideration because the Court deems it is beyond their constitutional authority to decide. The doctrine is as old as *Marbury v. Madison* (1803) where Chief Justice Marshall said, "The province of the Court is solely to decide on the rights of individuals, not to inquire how the Executive or Executive officers perform duties in which they have a discretion. Questions, in their nature political or which are, by the Constitution and laws, submitted to the Executive, can never be made in this court" (*Marbury,* 170). Certainly, there has been little consistency with which the Court applies this doctrine (Pacelle 2002, 88), but the important point is that "political questions," and jurisdiction questions more broadly, present the Court with an avenue for constitutional diffidence.

Over time, the Court has refined and advanced this doctrine. *Luther v. Borden* (1849) declared that the Court did not have the constitutional authority to determine which group—after a small civil war in Rhode Island—constituted the official government of that state.[258] In the realm of foreign policy, the Court has also refused authority in multiple areas: to decide when a war has begun or ended,[259] whether treaty obligations survive the fall of a foreign state,[260] and whether the conduct of foreign relations is the sole responsibility of the executive branch.[261] Similarly, the Court has avoided some questions that relate to important aspects of political parties.[262] And, last, but by

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[258] 48 U.S. 1. Chief Justice Taney held, "[T]he inquiry proposed to be made belonged to the political power, and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not" (*Luther,* 39).

[259] *Commercial Trust Co. v. Miller* (1923) 262 U.S. 51. Justice McKenna held for the Court, "[T]he power which declared the necessity is the power to declare its cessation, and what the cessation requires. The power is legislative. A court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time" (*Commercial Trust,* 57).

[260] *Terlinden v. Ames* 184 U.S. 270 (1903), holding "We concur in the view that the question whether power remains in a foreign state to carry out its treaty obligations is in its nature political, and not judicial, and that the courts ought not to interfere with the conclusions of the political department in that regard" (*Terlinden,* 288).

[261] *Oetjen v. Central Leather Co.* 246 U.S. 297 (1918) declaring, "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision" (*Oetjen,* 302).

[262] *O'Brien v. Brown* 409 U.S. 1 (1972). Here the Court refused to issue a decision on the merits concerning a challenge to the seating of delegates at the 1972 Democratic National Convention. In a per curiam decision, the Court noted that no precedent existed for interjecting into national convention deliberations: "No case is cited to us in which any federal court has undertaken to interject itself into the deliberative processes of a national political convention; no holding of

no means exhausting this list, the Court has found challenges to impeachment nonjusticiable.[263] The Court's invocation of the political question doctrine—or, really, any justiciable principle—is self-enforcing; it is the arbiter of its own rules and thus can ignore or invoke them (O'Brien 2003, 171). While the application of these jurisdictional principles can be sporadic, the bottom line is that the Court relies on them when its legitimacy is at risk and when its decision would have little effect and, consequently, undermine its authority (Ferejohn and Kramer 2006, 193). Using these jurisdictional methods is but one channel where Court diffidence can manifest.

Jurisdiction-related issues also bleed into questions of federalism focused on defining state court versus federal court jurisdiction. Take the examples of diversity[264] and federal question jurisdiction.[265] Diversity jurisdiction gives a federal court authority to hear civil actions that meet a $75,000 amount-in-controversy requirement and when no plaintiff shares a state of citizenship with any defendant. Federal question jurisdiction is even more broadly defined, allowing the filing of a lawsuit in federal court based on "all civil actions arising under the Constitution, laws, or treaties of the United States."[266] The statutory language could easily be construed to confer broad authority on federal courts, but fears over the federal judiciary's control over state courts in early republic made federal judges sensitive to jurisdictional conflicts between federal and state courts (Ellis 1971 10-16).[267]

As a consequence of these conflicts, the Supreme Court has interpreted the diversity and federal questions jurisdictional language narrowly, which curtails its authority over state courts. Despite the fact that the Constitution only requires there must be *a* plaintiff who is from a different

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this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do relationships of great delicacy that are essentially political in nature" (*O'Brien,* 4).

[263] *Nixon v. United States* 506 U.S. 224 (1993). Not President Nixon, but federal District Court Judge Walter Nixon challenged a Senate rule used during his impeachment.

[264] 28 U.S.C. § 1332(a)

[265] 28 U.S. C.§ 1331

[266] 28 U.S. C.§ 1331

[267] Between 1776 to 1801, important questions regarding the national judiciary arose, which even went as far as asking if the national judiciary was actually necessary (Ellis 1971, 16).

state than *a* defendant to permit federal court jurisdiction, the Court has held, very early in its interpretation of diversity jurisdiction that *every* plaintiff must be from a different state than *every* defendant.[268] In so holding, the Court precludes an enormous number of multiparty cases from reaching the federal courts. With respect to federal question jurisdiction, the Court has recognized Congress's broad authority to confer such jurisdiction as it did in *Osborn v. Bank of the United States* (1824).[269] Yet the Court has not interpreted federal statues concerning federal questions nearly this broadly, but has instead limited its constitutional authority to hear such cases. In *Louisville & Nashville Railroad v. Mottley* (1908),[270] for example, the Court held that a plaintiff could not bring a case in federal court based on the anticipation that the defendant would raise a federal law in defense of the plaintiff's suit. In other words, the plaintiff's case, in and of itself, must raise a federal question in order for federal courts to hear the case:

> A suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action, and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit—that is, the plaintiff's original cause of action—arises under the Constitution (*Mottley,* 153)

This interpretation of federal questions is crucial because, since 1887, defendants can only remove a case to federal court if the plaintiff could have filed it in federal court originally (Ferejohn and Kramer 2006, 194). Thus, the Court's self-imposed limitations over its own authority diminishes the number and kinds of cases it can expect to hear, leaving many of these cases to be addressed by state courts.

The Court's abstention doctrine also leaves jurisdiction with state courts and demonstrates the Court's reluctance to entangle federal courts in controversies that will likely create conflict with state governments. For example, federal courts often abstain if the case presents unresolved

[268] *Strawbridge v. Curtiss* 7 U.S. 267 (1806)

[269] Chief Justice Marshall construed the federal question doctrine very broadly, finding that federal courts can hear any case in which there is a federal "ingredient:" "We think, then that when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit court's jurisdiction of that cause" (*Osborn,* 823).

[270] 211 U.S. 149

questions pertaining to state law and the federal constitution. In an effort not to misinterpret the state law in question, the court often waits until a state court resolved the question.[271] The judiciary bases its abstention doctrine on a principle in advanced in one such case: that it should avoid "needless federal conflict with state policy."[272]

In sum, avoidance of needless conflict rests at the heart of Court diffidence. This avoidance should make the Court more likely to expand the powers of the other branches rather than expand its own jurisdictional judicial power. By the same logic, if the Court should aggrandize power for itself, it should do so through state governments rather than through restricting the federal government. In Table 7, when we remove "judicial power" decisions and look at the remaining constitutional issue areas, we see just that—the Court supports the expansion of federal actions (mainly congressional actions via federal statutes) at a greater rate than the "judicial power" rate of expansion portrayed in Figures 11.1 and 11.2 above.

Indeed, Table 7 reveals that the Court's decisions expand the power of the two political branches while expanding power for itself mainly through actions restricting state governments. We find that 76 decisions expand the political branches while 33 decisions restrict the broader central state (more than 2:1 ratio contrasted to the Court's judicial power decisions, which expand authority at a 1:1 ratio). Of course, the Court has aggrandized substantial power for itself over time but that has usually occurred vis-à-vis the state governments. Indeed, the Court invalidated (and thus expand its own review power) state level actions in 95 decisions while upholding state level actions in 61 decisions. These findings affirm our understanding that the Court, apart from its early beginnings,

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[271] The Court promulgated this idea—what has become known as the "Pullman abstention"—in *Railroad Commission of Texas v. Pullman Co.* 312 U.S. 496 (1941).

[272] *Burford v. Sun Oil Co.* 319 U.S. 315, 327 (1943). *Louisiana Power & Light Co. v. Thibodaux* 360 U.S. 25 (1959) also advanced a similar abstention doctrine in the name of federalism Here the Court called upon federal courts to recognize "the respective competence of the state" court system on questions like eminent domain because these matters are "close to the political interests of a State." Doing so, Justice Felix Frankfurter held, would advance "the maintenance of harmonious federal-state relations" (*Thibodaux,* 29).

has always viewed itself as supreme over the states.[273] Table 7 also supports the idea that the Court, for the most part, has acted as an important facet of the central state, extending the control of the political branches across the polity.

Table 7: Impact on State Authority by the Level of Government Action Reviewed 1789-1971 (N=288)

		Impact on Central State Authority			
		Restrict	Neutral	Expand	Total
Level of Govt.	Local	7	0	13	20
	State	61	0	95	156
	Federal	33	1	76	111
Total		101	1	184	288

Notes and Sources: Compiled by author. These data include all constitutional issue areas *except* "judicial power" because this category was displayed above in Figures 11.1 and 11.2. This Table shows us that the Court more frequently reviews state laws than local or federal ones. More than that, the Court expands its own power most often by invalidating state actions rather than by invalidating federal ones (95 state laws to 33 federal laws). We also see that the Court expands federal government action at more than a 2:1 ratio (76 upheld to 33 invalidated). Per the coding instructions (see the Appendix below), expanding decisions at the *state-level* are ones in which the Court—as a member of the central state—*invalidated* a state-level action. By contrast, expanding decisions at the *federal* level means that the Court *upheld* a federal statute.

Ultimately, Table 7 indicates the importance of federal-state relations to the expansion of national authority, which we will see further in the next section.

Federalism

In addition to principles of jurisdiction embodied in "judicial power" decisions, federalism provides another mechanism for diffidence. As Chapters 4 and 5 demonstrated, federalism is often

[273] See Gillman et al. 2013 for a chart graphing the rate in which the Court has invalidated state versus federal laws per year between 1850 and 1950 (Gillman et al. 2012, 331). For a line chart graphing the same thing but between 1930 and 1980 see Gillman et al. 2013 (427). Thomas Keck (2002) also provides the number of decisions and annual average of Supreme Court decisions striking down federal, state, and local statutes on constitutional grounds (Keck 2002, 128-129). All this scholarship makes clear that the judiciary has always been *far* more reluctant to invalidate federal laws than state laws.

the battle ground over which the expansion of central state authority has been fought. Beyond the thirty-eight "judicial power" decisions, the remaining decisions in the data depict an even fuller picture of the Court's diffidence. While "judicial power" deals *specifically* with cases that concern the Court's jurisdiction, every decision in the data is a commentary on judicial power, broadly construed, because whenever the Court rules on a case it implicitly acknowledges its power to do so. In other words, we can look beyond pure jurisdictional decisions to uncover how the Court expands the central state with its penchant for diffidence.

Since its inception, the Court has reviewed state laws to determine if they impinged on federal interests. When it comes to federal-state issues, the Court has deferred to this diffident posture—protecting the federal government from the states by affirming national supremacy against nullification (Kramer 2000, 228).[274] In these federal-state relations, the Supreme Court, has done very little to constrict Congress's attempts to expand its power over the states until the turn of the twentieth century (Kramer 2000, 228).[275] For example, in *Prigg v. Pennsylvania* (1842), the Court affirmed a congressional statute regulating fugitive slaves despite the fact that no explicit authority to do so existed. In cases like this and many others that "presented close, controversial legal questions" where the Court "easily could have gone either way," it affirmed congressional authority and left states to protect themselves (Kramer 2000, 229).

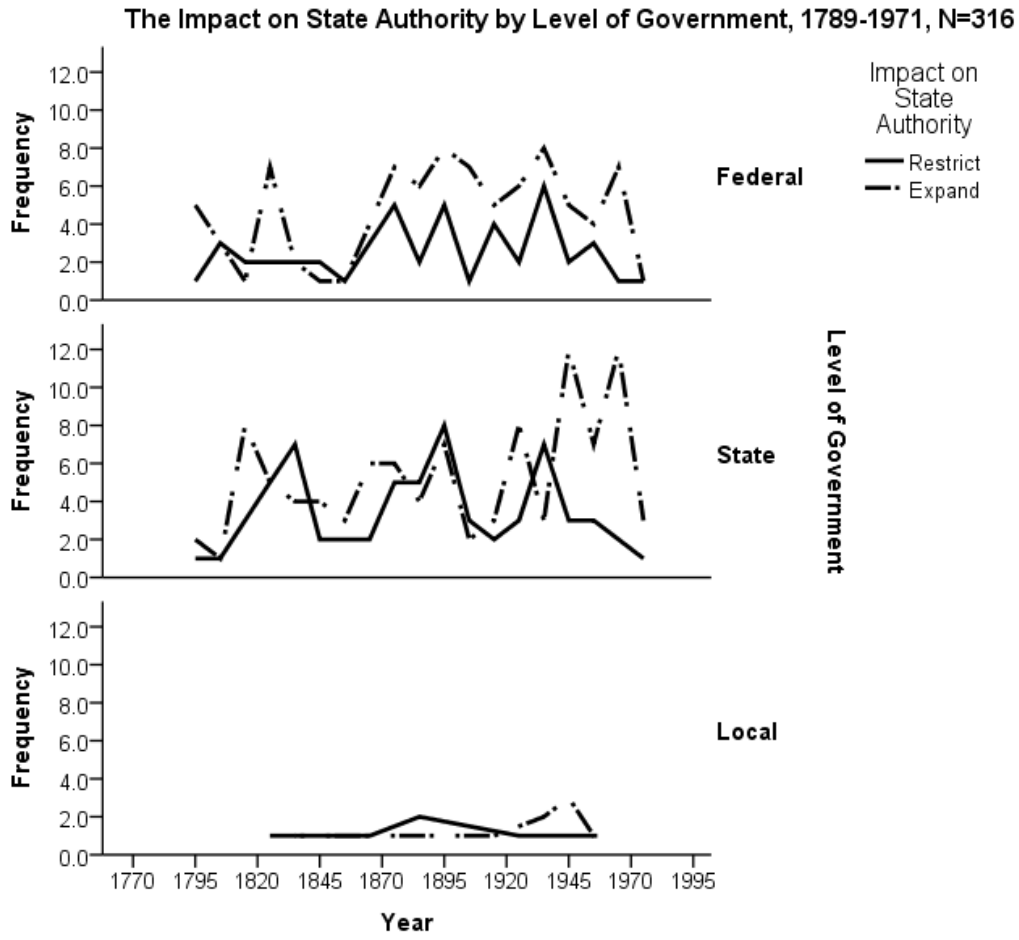
[274] Of this depiction of the Court's role, Larry Kramer writes, "This claim may sound jarring to lawyers today, who have for decades been fed a story about the Supreme Court's uncompromising stand against federal growth until Justice Roberts spinelessly caved to pressure from the Roosevelt Administration. Yet [this] account is, in fact, the more accurate rendition of events" (Kramer 2000, 228). Larry Kramer. 2000. "Putting the Politics Back Into the Political Safeguards of Federalism." *Columbia Law Review,* 100: 215-293.

[275] The one instance where the Court attempted to protect state sovereignty against Congress's power was *Dred Scott v. Sandford* (1857), holding that Congress did not have the authority to naturalize slaves or regulate slavery in territories acquired after the adoption of the Constitution. As all Court commentators agree, *Dred Scott* was an utter disaster from which the Court sought to escape for at least the subsequent generation.

When the Court did develop constitutional limits on central state authority, it often did so in relatively obscure cases involving property and land transfers (Graber 2000).[276] While the Court began to restrict Congress more openly in the early twentieth century with a cluster of well-known cases like *E.C. Knight Co.* (1895) and *Hammer v. Dagenhart* (1918), it still supported federal expansion with decisions like the *Swift & Co.* (1905) and the *Lottery Case* (1903). At best, then, constitutional doctrine remained "unsettled" and provided authority "available both to support and to oppose further federal innovation and expansion" (Kramer 2000, 231). The paneled chart in Figure 11 supports Kramer's interpretation, showing the Court's tendency to persistently support the federal political branches as revealed by the dotted line (expansion) almost always remaining above the solid line (restriction) in the federal panel. In the state panel, central state expansion occurs at a slower rate than in the federal panel, which is indicated by the dotted and solid lines following each other more closely in the state panel than in the federal panel. Each panel represents the level of government that passed the law that was under review by the Supreme Court.

[276] Mark Graber. 2000. "Naked Land Transfers and American Constitutional Development: The Consensual Foundation of Judicial Review and Fundamental Rights Jurisprudence." *Vanderbilt Law Review.*

Figure 11: Paneled Line Chart of the Impact on State Authority by Level of Government

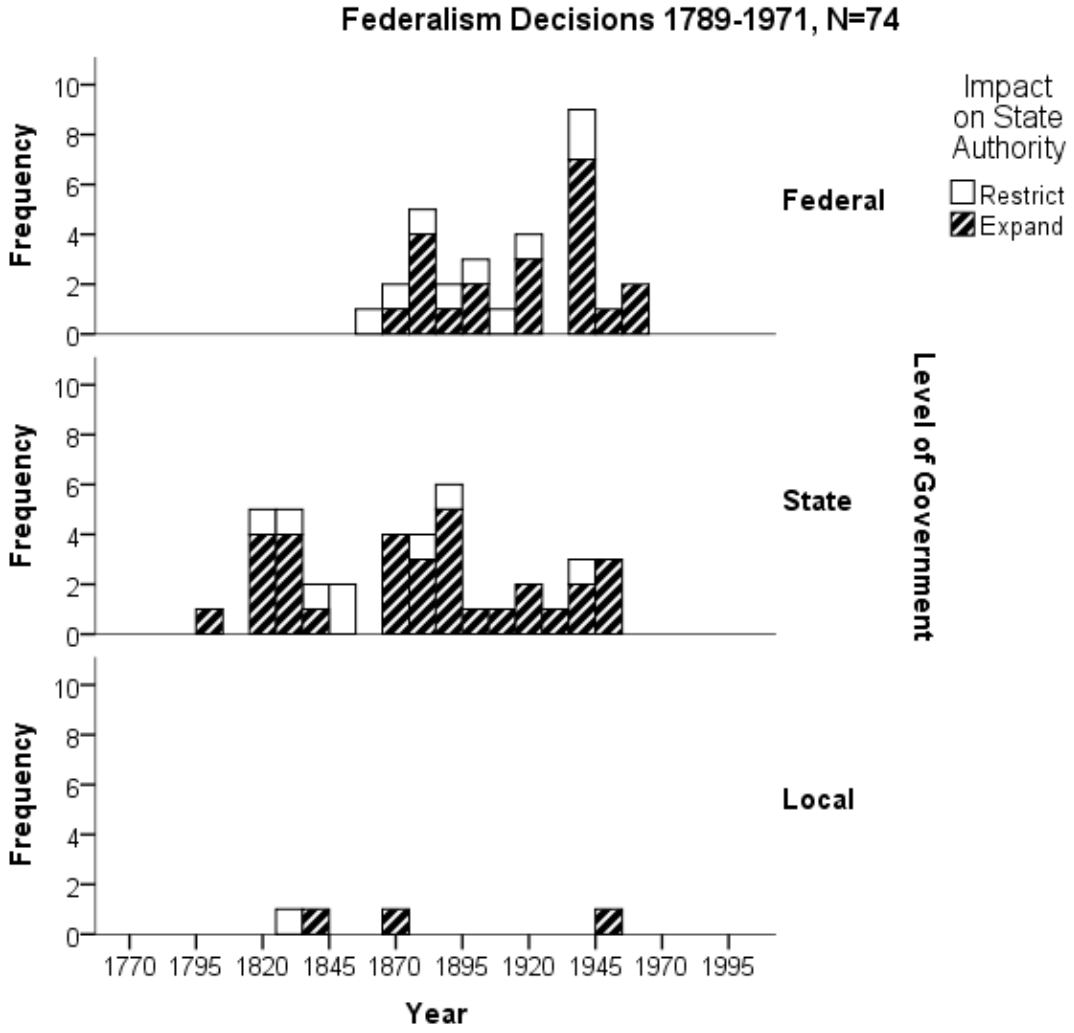


Notes and Sources: Compiled by author. This figure includes all constitutional issue areas, including "judicial power." When "judicial power" is removed from these data, the patterns look largely the same. The main takeaway from this figure is that, over time, the Court's decisions support the vast majority of federal laws, as represented by the dotted line expanding (i.e. affirming) federal statutes. At the state-level, the story is much more varied with the Court leaving many decisions to state governments thus restricting the central state (represented by the solid line) until around 1945 when the Court invalidated state-level laws at a higher frequency, which expanded judicial power (represented by the dotted line). The six neutral decisions are not presented; they all occurred at the federal level.

Looking specifically at the federalism decisions in these data also affirms the idea that the Court is an important instrument in extending central state authority. Figure 12 disaggregates 74 federalism decisions across three levels of government, and we can see both the Court's proclivity to support the federal government (in the federal panel) as well as its penchant to overturn state-level

action that infringes on federal governmental power (in the state panel), as shown by the striped columns in both panels

Figure 12: Paneled Distribution of Federalism Decisions by Level of Government



Notes and Sources: Compiled by author. The distribution presented in this paneled graphic (with a bin size of 10) shows that federalism has been one of the primary avenues in which central state authority has expanded over time. See also chapter 5.

Figures 11 and 12 show that the Court has done very little to restrict Congress. In most cases concerning the federal government, the Court acquiesced to Congress's legislation, and along the

state level, the Court aggrandized additional review power by expanding the application of the Constitution.

Rules of Constitutional Interpretation

One last mechanism of diffidence is the Court's constitutional interpretation. A reason for the vacillation presented in these data rests on what Lawrence Sager has called "underenforced constitutional norms" (Sager 1978, 1213). "Because of institutional concerns"—which Sager defines as "judicial construct[s]…based upon questions of propriety or capacity"—the Court restrains itself from fully enforcing constitutional norms like equal protection and, in turn, this slows the expansion and reach of central state authority (Sager 1978, 1213, 1217). Indeed, constitutional development has witnessed many issues placed beyond the reach of the judiciary:

> Constitutional case law is thin in this important sense: the range of those matters that are plausible candidates for judicial engagement and enforcement in the name of the Constitution is considerably smaller than the range of those matters that are plausibly understood to implicate serious questions of political justice. . . .The scope of the domain thus put beyond the reach of constitutional case law is considerable (Sager 1993, 410).

Sager's concerns deal largely with normative questions about individual rights claims to equal protection, the Takings Clause, and the Court's reluctance to repair "the harms of historic injustice" (Sager 1993, 411). The fact remains, however, that the Court's reticence to fix these "harms" results in it leaving many of these issues to the states thereby constricting national authority, as Table 7 shows above.

Beyond individual rights, many decisions that deal simply with the structure of the federal state (e.g. the separation of powers) reveal the Court's reluctance to exercise its power, often leaving the political branches broad discretion. The Court's reluctance helps explain the support seen for the federal government witness in Figure 12. More specifically, judicial invalidation of express powers of the political branches has been relatively rare, contributing to an expansion of central state power in

important areas such as war, treaty (and foreign affairs more generally), and the powers to tax and spend, which will all be discussed in turn.

There is no single case dealing with war powers, but the Court has historically been reluctant to assert itself. During Reconstruction, for example, the Chase Court held that it did not have jurisdiction over Reconstruction Act enforcement in the military-occupied South thus leaving power with President Johnson. Legal historian David Hughes has called the Court's interpretation of the Reconstruction Act a "tactical retreat" whereby the Court "transformed its stance from one of belligerent assertiveness to one of retiring prudence" (Hughes 1964, 588).[277] Similarly, Martin Sheffer has recognized the Court's deference to political branches in this realm: "One must constantly remember that executive-legislative conflicts regarding questions of emergency, war, and peace, although raising many constitutional controversies, rarely find their way to the judiciary and, when they do, are rarely decided according to proper constitutional interpretation. For the most part, they are resolved…through political settlements agreed to by Congress and the President" (Sheffer 1999, ix).[278]

Likewise, in the area of treaty and foreign affairs, the Court has upheld the power of Congress to delegate broad authority to the president to regulate arms shipment to South American countries.[279] In *Missouri v. Holland* (1920) the Court also affirmed Congress's treaty power over states that claimed Congress's treaty with Canada regulating the hunting of protected migratory birds was unconstitutional. The judiciary has also advanced Congress's taxing and spending powers with

[277] The case to which Hughes and I refer is *Mississippi v. Johnson* 71 U.S. 475 (1867). The Court followed this diffident pattern in two other decisions pertaining to the Reconstruction Act, holding that questions surrounding Reconstruction enforcement were political questions: *Georgia v. Stanton* 73 U.S. 50 (1868) and *Mississippi v. Stanton* 154 U. S. 554 (1868). See Lee Epstein and Thomas G. Walker. 1995. "The Role of the Supreme Court in American Society: Playing the Reconstruction Game," in *Contemplating Courts,* Lee Epstein, ed. Washington, DC: CQ Press, p. 334-335.

[278] Louis Fisher challenges this interpretation while also offering a detailed history of the Court's interpretation of war powers. See Louis Fisher. 2005. "The Judicial Review of War Power." *Presidential Studies Quarterly,* 35 (3): 466-495. Still, Fisher finds that from the Vietnam War on, the Court has acted diffident in its interpretation of war powers, often avoiding reviewing cases on the merits (Fisher 2005, 479). And, he also finds that leading up to the Vietnam War, the Court very rarely inhibited the political branches war powers behavior. At most, the Court allocated war power to one or the other branches thereby expanding central state authority.

[279] *United States v. Curtiss-Wright Export Corp.* 299 U.S. 304 (1936)

respect to the Social Security Act,[280] for example, as well as Congress's authority to withhold federal highway funds in order to coerce states to change the drinking age.[281] Thus, again, the Court did relatively little to assert its own review authority but, instead, facilitated the growth of congressional power.

A final area of constitutional interpretation that demonstrates diffidence is the area in which it the Court is expected to be most active: individual rights. Nevertheless, the rules the Court applies here leave much authority to the states, which constricts central state power. The Equal Protection Clause, for example, is theoretically applicable to all the federal government does because all laws create boundaries and categories. But instead of exercising potent judicial authority, the Court has developed three levels of scrutiny—strict, intermediate, and rational basis. The first two categories contain a small subset of laws while the vast majority of the government's laws fall under the "rational basis test," a test that often leaves statutes intact.[282] Moreover, the Court has partially withdrawn its once robust judicial authority from areas like criminal procedure[283] and retreated from difficult issues concerning gerrymandering.[284]

In questions of democratic representation, for example, legal scholars like James A. Gardner have recognized that the Supreme Court's initial consolidation of power over questions of apportionment of state legislatures[285] has been met with subsequent "constitutional diffidence"—or

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[280] *Helvering v. Davis* 301 U.S. 619 (1937) and *Steward Machine Co. v. Davis* 301 U.S. 548 (1937)
[281] *South Dakota v. Dole* 483 U.S. 203 (1987)
[282] Ferejohn and Kramer note, "[T]he use of rational basis scrutiny is ubiquitous in constitutional law, liberating most of what government does from serious judicial oversight whether it be under the Due Process Clause, the Takings Clause, the Contract Clause, or the Necessary and Proper Clause" (Ferejohn and Kramer 2006, 205). They recognized, however, that there are notable exceptions such as the right to privacy, race and gender, and First Amendment doctrine.
[283] See Clayton and Pickerill "The Politics of Criminal Justice (2006, 1415-1418). In this section, Clayton and Pickerill discuss how the Court withdrew some of its judicial authority in realm of capital punishment and the exclusionary rule, in the wake of the rise of the "New Right Regime."
[284] On political gerrymandering, see *Davis v. Bandemer* 478 U.S. 109 (1986). Here the Court held that while claims of partisan gerrymandering were within the judiciary's authority to review, it still eschewed a great deal of review power. The plurality opinion concluded that the judiciary has authority to hear gerrymandering cases but only where there is "continued frustration of the will of a majority of the voters or a denial to a minority of voters of a fair chance to influence the political process" (*Davis,* 133).
[285] *Reynolds v. Sims* 377 U.S. 533 (1964).

a reluctance to promulgate a coherent theory to deal with apportionment (Gardner 2013, 20, 1). The Supreme Court's consolidation of power was seen in *Reynolds v. Sims* (1964), which struck down Alabama's apportionment scheme, holding that Alabama's state districts (which created population disparities of 41 to 1) violated the Fourteenth Amendment's Equal Protection Clause. The Equal Protection Clause required states to make "honest and good faith" efforts to draw districts of nearly equal population (*Reynolds,* 577). Despite *Reynold's* far-reaching impact on political representation, the Court has remained reluctant to promulgate a theory of democratic practice and participation desperately needed to guide the application of the Equal Protection Clause in these political representation cases (Gardner 2013, 20-21).[286] Indeed, while Justice Kennedy's concurring opinion in *Vieth v. Jubelirer* (2004) left room for the Court to act more assertively in gerrymandering cases, he still recognized the Court's reluctance to develop a constitutional standard under the Equal Protection Clause for adjudicating these difficult political representation questions:

> There are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and political neutral standards for measuring the particular burden a given partisan classification imposes on representation rights…That no such standard has emerged in this case should not be taken to prove that none will emerge in the future. Where important rights are involved, the impossibility of full analytical satisfaction is reason to err on the side of caution.[287]

Instead the Court has avoided thrusting itself further into these types of cases by falling "back on [the] habit" of continually subdividing electoral districts[288] as well as on the deployment of justiciability principles, as the Court did in *Vieth* (Gardner 2013, 4). On balance, then, "if one

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[286] Justice Harlan's dissent in *Reynolds* makes this point. He argued that the Court did not specify—likely because these type of cases "are not amenable to the development of judicial standards"—either how much influence citizens should have in a democracy, what such influence might reasonably be, or a proper framework to address such questions (*Reynolds,* 621, 620-625). Harlan's dissent suggests that the difficulty in adjudicating political representation might be a symptom of constitutional diffidence.

[287] *Vieth v. Jubelirer* 541 U.S. 267 (2004). Kennedy dissenting at p. 308, 311.

[288] Gardner also calls the subdivision of the electorate, "partitioning" the districts. He describe the Court's practice of partitioning in this way:

> Where members of some group complain that their desire to become full participants in the political life of their community has been thwarted by some officially created obstacle, the Court has preferred not to dwell on ways in which the complaining group might be more fully integrated into existing democratic structures and practices. Instead, it has tended to solve these problems by portioning the jurisdiction in such a way as to make the complaining minority into a local majority (Gardner 2013, 22).

Whether one accepts Gardner's normative implications does not change the fact that the Court has exercised much constitutional diffidence in the realm of political representation and democratic process, more generally.

considers how easily the Justices could make their presence felt over a much broader range of governmental activity," it is not difficult to see that Court has acted diffidently with its potentially vast power (Ferejohn and Kramer 2006, 205).

Although tiered scrutiny of the Equal Protection Clause was introduced in 1938,[289] the Court has exercised diffidence with respect to civil rights questions dating back much further than this. During the Waite Court era (1874-1888), for example, the judiciary acted diffidently toward congressional legislation advancing African-American rights. Rather than affirm Congress's Enforcement Act (1870), the Court promulgated a "modulated expression" of central state authority in *U.S. v. Cruikshank* (1876) and in its civil rights cases more generally between 1870 and 1880 (Brandwein 2007, 370-372). With the return of Democratic control to the House in 1874 and a decade-long economic depression beginning in 1873, enforcing civil rights "became a dicey affair and rights enforcement became unsteady" (Brandwein 2007, 371). In this unstable political environment, the Court did not have the ability to take the lead and assert racial egalitarianism, but instead, charted a "middle path" based on state neglect concepts, concepts that were fundamental to Republicans' agenda–rights to property, contract, and physical security. The Court's interpretation of congressional power under Section 5 of the Fourteenth Amendment followed a "middle path," which only permitted federal prosecution of private individuals in strictly defined circumstances (Brandwein 2006, 276-277). The Court took this approach because a broader interpretation of civil rights would pressure "Republican political elites to act strongly and bring more prosecutions, which were expensive in both dollars and political capital" (Brandwein 2006, 303). Most importantly, the Court realized that the executive "would not have undertaken broad prosecutorial efforts to remedy the inaction the Court had highlighted," and thus in an effort to guard its prestige and legitimacy, the

[289] *United States v. Carolene Products* 304 U.S. 144 (1938). *Carolene Products* suggested two levels of judicial scrutiny: a "heightened" form (now known as strict scrutiny) for the three areas it lists in the footnote and the more lenient rational bases test. The third tier—intermediate scrutiny –was introduced later for gender discrimination in *Craig v. Boren* 429 U.S. 190 (1976).

Court took a more diffident approach in construing congressional power to enforce civil rights (Brandwein 2006, 303).

In the end, constitutional interpretation shows how the Court limits its own power. These limitations can expand the political branches (as seen in the Court's rulings on separation of powers) while at other times, with individual rights, constitutional interpretation constricts the reach of the federal Constitution as well as guards the Court's legitimacy.

Conclusion

At least since the Warren Court, the judiciary has been perceived as more active (and less diffident) in policy and politics than ever before. Empirically, too, the Court, on average, has struck down more state and local statutes on constitutional grounds in the late Warren (1963-1969) and Burger (1969-1986) Courts than in previous Court eras (Keck 2002, 129). Some scholars have contended this activism has tarnished its mythological reputation that diffidence helps protect and few would disagree.[290]

The erosion of the Court's myth of legal expertise led to a decline in its legitimacy and given rise to widespread Court criticism. Indeed, political criticism of the Court has grown sharply since the mid-twentieth century as witnessed both in national party platforms[291] and in court-curbing

[290] Reflecting on the New Deal crisis, Robert McCloskey wrote in 1956 that the crisis "shred" the mythical-naïve view "beyond any reasonable hope of mending" (McCloskey 1956, 736). Similarly, Martin Shapiro in 1964 noted that the principal basis upon which the Court's legitimacy rests—"the judicial myth of impartiality and nondiscretionary application"—"has lost much of its force in the United States" (Shapiro 1964, 26).

[291] Looking at national party platforms between 1948 and 1976, both Democratic and Republican party platforms have been deferential to the courts, in official party statements (Peabody 2011, 5). By the 1976 platforms, however, Republicans began to take a more critical tact and reacted to the Court's decision in *Roe v. Wade* (1973) and the curtailing effect this decision had on "public dialogue on abortion." Between 1976 and 2008 (save for 1984), all Republican platforms made at least some negative reference to the judiciary either singling out individual decisions (on topics like abortion, parental rights, religion, rights of the accused, and gay marriage), or calling for specific actions to counter the judiciary (such as the 1988 pledge supporting congressional restriction of federal court jurisdiction) (Peabody 2011, 5-6).

legislative proposals,[292] and these criticisms have come from both the left and the right (Keck 2002, 135-136; Peabody 2011, 9-10).[293] In fact, the public and political criticism of the Court has produced the judiciary's hyper-sensitivity to its own legitimacy. Indeed, since *Brown v. Board of Education* (1954), the Court, in its decisions, has specifically referenced its "legitimacy" 71 times compared to just nine references to "legitimacy" in the 164 years leading up to *Brown* (Farganis 2012, 207).[294] And since *Brown,* the Court has paid especially close attention to the construction of its arguments as a means to maintaining legitimacy (Farganis 2012, 213).

Thus in an age of heightened judicial activism with its erosion of the Court's mythology, diffidence might be on the decline. And to be sure, diffidence cannot insulate the Court from criticism; the Court has always, like any branch of government, received persistent criticism and scrutiny. But the vociferous criticism that has resulted from judicial activism reveals the importance diffidence can serve as a politicking tool for the federal judiciary.[295]

American constitutional development reflects the Supreme Court's efforts—in order to guard its institutional legitimacy—to support the continued expansion of the political branches. This behavior, which I have dubbed as diffident, embraces the Court's reluctance to aggrandize its own power in favor of permitting expansion by the other federal branches. When judicial power expands,

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[292] Data on court-curbing legislation indicates the rise in attacks on the judiciary (Clark 2009, 2011). The legislative proposals comprising Clark's data represent an "institutional assault on the Court rather than a case-specific effort to reverse a Court decision" (Clark 2009, 979). From 1946 to 1966 he finds that Congress averaged just under five court-curbing proposals a year, but from 1967 to 1983, this average jumped to about nineteen proposals a year, and in the twenty-first century from 2003 to 2008, Congress has averaged thirteen proposals a year (Clark cited in Peabody 2011, 7).

[293] In 2005, for example, thirty-nine Democrats joined over two hundred Republicans in approving the Pledge Protection Act, which—if it had passed the Senate—would have limited the Supreme Court's jurisdiction to hear cases pertaining the Pledge of Allegiance (Peabody 2011, 9-10).

[294] Farganis generated these results from a LexisNexis search for "legitimacy" (N=17,255) and a subsequent content analysis of those results. Search conducted 10 April 2009. See Dion Farganis. 2012. "Do Reasons Matter? The Impact of Opinion Content on Supreme Court Legitimacy." *Political Research Quarterly* 65 (1): 206-216, fn. 1.

[295] The use of diffidence fluctuates across Court eras. In particular, there are two dimensions to consider when conceptualizing the Court's relationship to the other branches. The first dimension uncovers the Court's legitimacy and prestige within the central state ensemble and among popular opinion. The second dimension concerns the assertiveness with which the Court exercises its own authority. These two dimensions wax and wane over time and produce differing levels of judicial diffidence and deference. Presently, however, this dissertation's unitary treatment of the Court does not account for the ebb and flow of these dimensions. To correct this, it would be useful to take two moments in the Court's history that vary on both dimensions and see how this influences national state expansion.

it typically does so over state governments, but, still, this happens at a slower rate than its supports for the federal branches. In sum, reticent to assert itself over the federal branches, the Court's decisions often affirm federal laws, leading to support and expansion of the political branches. Similarly, the Court's reluctance to expand the reach and scope of the Constitution over state governments helps contribute to the restriction of the authority of the federal government.

From this chapter, we see that the Court has been reluctant to expand its review power over the federal government because this helps reduce the political branches' criticism of the Court and thus preserves the Court's own authority. Supreme Court diffidence manifests itself in many ways but of particular note are the Court's justiciability, federalism, and constitutional interpretation principles. These principles help the Court avoid aggrandizing power and instead defer to the other federal branches or state governments, producing the expansion-restriction pattern we see in these data across time. Thus, chapter 6 has underscored an important takeaway of this dissertation: that the Court, throughout American history, has acted as an important instrument of the central state, enabling the expansion of the national government.

Chapter 7: Conclusion

Introduction

The findings of this project rest upon a systematic examination of constitutional development. The research design first uncovered the most important constitutional decisions across U.S. history. And, second, by applying a central state authority framework to hundreds of these decisions, it determined the Supreme Court's relationship toward national authority. These decisions were collected from fifty-eight constitutional law casebooks and treatises published between 1822 and 2010. The data were arranged to construct the arc of American constitutional development without contemporary biases as to what constitutional decisions are most worthy of study. It also aimed to consistently apply this central state authority framework to all judicial decisions in the data, a framework that would not bias against the evolving aims of the central state seen from the founding to the present day.

Patterns were identified concerning the Supreme Court's role in expanding the central state.[296] While constitutional development has been the subject of countless scholarly investigations across many disciplines, we have yet to see a study that examines the trajectory of constitutional law with an eye toward effects on national governing authority. This project, then, represents an account of the Court's impact on its own powers as well as the powers of the broader central state. Two research questions underlie this project. First, how has the Court affected central state authority over time? Second, when and in what areas has the Court facilitated or restricted the federal government?

In asking these questions, this project positioned itself against the traditional accounts of state-building in two ways: first, by looking not just at critical junctures and, second, by defining the

[296] Certainly there are myriad ways to understand American constitutional development and change. This project has taken a top-down perspective, but political scientists like Emily Zackin have offered a more bottom-up perspective of changes in constitutional rights and the concomitant effects on state development. Her dissertation examines how social movements and interest groups at the state-level, with their focus on positivist rights, helped build a more activist, welfare state. Emily Zackin. 2010. *Positive Constitutional Rights in the United States.* Princeton Dissertation. Ann Arbor, MI: ProQuest LLC.

"state" not just as developments that build welfare and administrative apparatuses. The American state is a legal entity, and while not every aspect of state development has a significant legal component, much is lost when scholars view law and courts as they have been traditionally depicted: as outside the state, limiting and checking the broader political system. The rest of this chapter will summarize the main findings, discuss the implication of these findings, and overview some limitations of this project.

Overview of Findings

By coding hundreds of decisions along seven dimensions of the federal government, this study has underscored the persistent expansive impact of the Court on the American state. Based on analyses of these decisions, it was concluded that the Supreme Court, as a member of the national government, has supported the development and expansion of national governmental power about twice as often as not, and it has supported this expansion across almost every legal issue area in these data.

The project's main findings, discussed in chapter 3, revealed several interrelated features of constitutional development that can be summarized as follows: the Court remains biased toward national state expansion and, yet there remains considerable variation, over time, between decisions that expand and restrict federal government authority. However, since around 1900, the Court's decisions have affected the rate of central state expansion at a relatively steady rate. Chapters 4 to 6 framed and interpreted chapter 3's findings, examining the importance of federalism to state expansion (chapter 4 and 5) and characterizing the Court's institutional behavior as deferential to national political authority (chapter 6).

These findings indicate a few things about how the Supreme Court influenced the American state. First, the steady rate of expansion seen after 1900 is an important finding for the periodization

put forth in the American constitutional development literature. Scholars typically focus on three "moments" of major constitutional change—the Founding, Reconstruction, and New Deal eras (Ackerman 1991, 1998; Orren 2012). While these are important moments in American history, this study finds great similarities across watershed moments of constitutional change—at least in terms of the rate in which the central state grew during the twentieth century.[297] With respect to the Court's disposition toward federal state power, some constitutional moments look quite alike, which problematizes theories of constitutional change resting on critical junctures. Other scholars have also stressed how the growth of the judiciary creates issues for understanding constitutional development through these moments.[298]

Second, this study also found that the Court—through time and regardless of its ideological composition—has persistently acted as an important instrument of the broader central state, expanding federal power over society. This finding supports a broad swath of literature holding on the role of judicial systems in extending national governing authority; for example, some of "Brutus's" suspicions about the federal judiciary promulgated during the founding era: that the judiciary would continually expand the powers of the national government and usurp state rights.[299] More recently, comparative judicial scholars like Martin Shapiro have detailed how judicial systems outside the U.S. extended national state power to hold the countryside and to facilitate control of conquered territories (Shapiro 1981, 22-23). Focusing on the U.S., some historical institutionalists have found that federal courts are crucial to enhancing the dominant regime's power (Gillman 2002,

[297] Work in political development has questioned the periodization employed by Ackerman. A number of authors argue that the standard periodization overemphasizes temporal discontinuities and overlooks continuities (Kersh, 2005; Orren and Skowronek, 2004; Thelen, 2003).

[298] Legal historian David Strauss underscores the empirical reality of the growth of constitutional law. Consider, as Strauss says, "expansive federal power; expansive presidential power, particularly in foreign affairs; the current contours of freedom of expression; the federalization of criminal procedure; a conception of racial equality that disapproves de jure distinctions and intentional discrimination; the rule of one person, one vote; a (somewhat formal) principle of gender equality; and reproductive freedom protected against criminalization" (Strauss, 1996, 929). None of these changes map onto an obvious "'moment' at which a strong popular consensus crystallized behind them" (Strauss, 1996, 929).

[299] Brutus detailed his opposition to the federal judiciary in Letters XI-XV. See, *The Federalist with Letters of "Brutus,"* Terence Ball, ed. (2006): New York: Cambridge University Press.

Whittington 2005). Chapters 4 and 5 buttress these literatures by showing the Court's proclivity to expand its power and congressional power over state governments via federalism issues.

The third finding pertaining to how the Court has affected central state authority dealt with its tendency to support actions of the political branches rather than supporting persistent judicial review power, and this pattern was the focus of the final chapter on Court diffidence. Chapter 6 revealed that the Court has both consolidated central state power and maintained its ideological legitimacy by supporting the coordinate branches and by acting reluctant to assert judicial primacy—a form of institutional behavior that I termed diffident. Diffidence helped describe the empirical reality of American constitutional development presented in chapter 3. In particular, the Court's hesitance to assert itself over the federal branches has led to the affirmation of federal laws and thus an expansion of the political branches. Similarly, the Court's reluctance to expand the reach and scope of some portions of the Constitution over state governments has helped contribute to the restriction of the national authority. The pattern of diffidence joins institutionalist, behavioralist, and legal studies of the judiciary. These studies find that federal courts often act in calculated ways to protect their legitimacy among the citizenry and the federal branches (Graber 1995; 1998b, Clark 2009, Ferejohn and Kramer 2006). Most fundamentally, diffidence underscored a primary finding of this dissertation: that the Court, throughout American history, has acted as an important instrument of the central state, enabling the expansion of the national government. The bottom line of these three findings is that the Court has influenced central state authority steadily, persistently, and with diffidence.

To the question when and in what areas has the Court facilitated American state expansion, this project also revealed important patterns. As noted above, the Court facilitated American state expansion more often than not, but more precisely, it did so most rapidly during the early republic, a finding that dovetails with historical accounts of the importance of the Marshall Court (Newmyer

1986; White 1990). It stymied central state authority most frequently *not* during the *Lochner* era, as much of the APD narrative assumes, but instead between 1825 and 1849 during the end of Marshall's and most of Chief Justice Taney's tenures. Yet, even in this most-restrictive period, the Court expanded national authority more often than not.

With regard to the policy areas that experienced the greatest state expansion, the centralization and citizenship dimensions of the central state were most implicated by constitutional development, as chapter 3 indicated. The persistent expansion of the centralization dimension buttresses the idea that navigating a federal constitutional design will produce inevitable political conflict, a point made in chapters 4 and 5 and in literature on the American state and federalism (Wilson 1908, 173; Robertson 2012). Surprisingly, the emergence of greater "administrative capacity" dimension was little affected by the Court, which is surprising because APD studies typically focus on the emergence of the administrative state—a hallmark of a "modern" central state (Skowronek 1982). That the administrative capacity dimension was little affected certainly does not mean the Court did not influence bureaucratic development, but instead, that the focus on constitutional law used here does not capture this dimension well. Nevertheless, I expected to see more of the administrative dimension since some of these administrative judicial decisions do make it into constitutional law casebooks. Additionally, chapter 6 also showed us an important legal issue area that often inhibits central state expansion—Court jurisdiction questions. Here we saw that throughout the years the Court was less likely to expand the central state through jurisdictional questions, and instead it was more likely to expand the state when the case involved questions about the powers of the other two branches of government.

Theoretical Implications

The central state authority framework used in this dissertation has implications for how we define and conceptualize the central state. Typically, scholars have recognized "development" as the accretion of social welfare rights and the concomitant ability of the federal government to provide and protect these positive rights. Compared with Western Europe, the U.S. has been described as deeply suspicious of government and devoted to protecting private property rather than building its welfare-state (Hartz 1955). Hartz's work inspired much of the APD movement, and its proclivity to see the U.S. as comparatively weak, a finding that pivots on the distinction between negative and positive rights.[300] Part of the reason scholars define the U.S as relatively "stateless" is because most public officials see the American federal constitution as Judge Richard Posner declared, as "a charter of negative rather than positive liberties" (Posner quoted in Zackin 2010, 15).[301] While this project has no measure of overall central state "strength" and "weakness," from the vantage point of constitutional law, nevertheless, we have seen here that the Court consistently bolstered the federal government's coercive powers. In this way, arguments about the weakness of the central state in the U.S. miss the very real and consistent affirmation the federal government has received from the Supreme Court.

Contrary to Hartz and early APD scholars, revisionists like Brian Balogh (2009) have found strength in the early American state, providing social goods primarily through state and local intermediaries.[302] Measuring central state strength in this non-European state way, he dispels a belief held by both progressives and conservatives: that "the national government only began to exercise significant influence over the lives of most Americans in the early twentieth century" (Balogh 2009,

[300] Positive rights identify activities that the government *must* do while negative rights identify activities the government *cannot* do.

[301] Zackin provides an excellent overview of the legal and APD literature concerning the negative rights tradition in the U.S. (Zackin 2010, 23-36). Her work uncovers the positive rights tradition in American constitutional development, but nevertheless, she admits that at the federal level a negative rights tradition prevails (Zackin 2010, 36).

[302] For an examination of how national and state governments worked together to expand the modern state, see Kimberly Johnson (2007) *Governing the American State,* in particular her concept of "intergovernmental policy" (2007, 4-6).

8). But even Balogh and other revisionist accounts of the state (John 1997; Adler 2012; Novak 2002; Zackin 2010) define state capacity in the same terms as the scholars whose accounts they oppose—the delivery of welfare-state goods and positive rights through an autonomy bureaucracy. Not even the revisionist accounts deny that, on balance, "the Supreme Court has adopted an almost exclusively negative reading of the federal Constitution, consistently expressing the view that its purpose is to limit the government's scope and restrain its actions" (Zackin 2010, 34).

There is something unsatisfying about debates over "strong" and "weak" central states. Namely, it discourages scholars from studying the central state before the Progressive era and forces us to define the central state in terms of its social-welfare provisions, rather than through regulatory and citizenship dimensions. Moreover, older conceptions of the central state lead scholars to look primarily at the development of individual rights rather than the development of central state powers. This dissertation complicates these prevailing depictions of the Constitution and the state because it finds that the Court has done less to limit the federal government than assumed. To be sure, the findings here do not dispute that in terms of welfare-state rights the Court has been reluctant to embrace a positive rights reading of the Constitution.[303]

This project has conceptualized the central state as an entity that has been in development since the founding. It has not pivoted on the typical negative versus positive rights distinction in depicting constitutional development; rather, positive expansions of the federal government often do not include the federal government's capacity to provide social welfare goods. Instead, expansion of national government power encompass a far broader meaning: any new power of the federal government sustained by the Court. Whether the federal government uses this authority to deliver welfare-state goods or some other form of governance has not been the central focus. Seen in this

[303] In the last fifty years, for example, the Court has denied the right to decent housing (*Lindsey v. Normet* 405 U.S. 56 (1972)), the right to public education (*San Antonio Indep. Sch. Dist. v. Rodriguez* 411 U.S. 1 (1973)), and the right to welfare (397 U.S. 471 (1970)).

agnostic way, the Court, has from the beginning, done much to develop the federal government, a pattern lost when we fixate on the time when the "modern" state emerged, and when we use a welfare centered understanding to define this state.

Another important implication of this work pertains to periodization. As noted above, scholars of constitutional development usually focus on watershed moments of history to understand change. In terms of their impact on the rate of central state expansion, though, these watershed moments expand federal power at roughly the same rate, underscoring some of the continuity in development over time.[304] Why, despite changing conceptions of the national government and the rights afforded to citizens during these moments, has the Court's constitutional interpretation actually expanded national authority at a relatively stable rate since 1900? A reason for this might be that studies of constitutional development often center less on state power and more on constitutional law's impact on the rights afforded to citizens (Ackerman 1991, 1998; Zackin 2010; Brandwein 2011). So while political scientists have "brought the state back in" to studies of political institutions, the Supreme Court's relationship to the central state remains relatively less well known.

Improvements and Future Research

This dissertation has a number of limitations worth considering. First, because this project rests on governing *authority,* it has not examined the implementation efficacy of all the decisions in these data. Some constitutional decisions are ignored by the government and public, and, in this sense, have little effect on national authority. This research design attempted to mitigate that problem by collecting the Court's most salient constitutional decisions, the decisions likely followed by the public and the government.[305]

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[304] See footnote 289 above for scholars who call for examining continuity over time.
[305] To be sure, some decisions were salient *because* they were not followed, but they are few and far between. *Dred Scott* typifies this kind of decision.

A second limitation is the focus on constitutional law. Much of the state development literature pivots on the creation of the *administrative* state. Looking at changes in administrative law, then, might be a fruitful area to uncover additional ways that the judiciary contributed to state expansion. The casebook research design employed here could also apply to administrative casebooks but with an important caveat: administrative casebooks probably do not reach as far back in time as constitutional textbooks and treatises do. Along these same lines, additional constitutional casebooks and decisions might bolster and add more depth to this study's findings. More decisions in the database would allow us to build on the number of decisions falling into the less abundant legal issue areas.

Third, this dissertation uses a top-down perspective of constitutional development. But it would certainly be worth examining the bottom-up perspective to see what segments of society sought an enlarged central state. In what ways do litigants and social groups generate cases that enhance or constrict central state authority? Given that judicial decisions lean toward state expansion, it might be the case that all segments of society call for a stronger state, but for very different ends.

A final limitation of my study might be its application of the central state authority framework. Certainly, some of these study's findings resulted from a reinterpretation of what state authority means. Like any interpretation of constitutional law, there is much room for debate and subjectivity. That said, the advantage of my application is that it seeks to be transparent and consistent.

An extension of this study might look at the broader federal—not just Supreme Court—judicial system. The focus on the Supreme Court follows the APD tradition, but examining lower federal courts would reveal additional decisions and ways in which the courts affect state authority.

For the purposes of this study, however, the Supreme Court was the logical starting point because, as the highest court in the land, its decisions have the greatest impact on state development.[306]

Conclusion

The reach and scope of the federal government remain contentious for all Americans. On the one hand, Americans have had an ambivalent attitude toward the government and its exercise of power. On the other, central state power has grown exponentially across time. American anxieties and questions surrounding state power have often ended up before the Supreme Court because of the pervasive litigiousness in American society as well as its proclivity to mythologize law and the Constitution. These attributes make the Court one of the best venues for understanding changes in the national state.

In spite of the scores of legal histories on constitutional development and accounts of the American state, a single study of the Court's hand in state development across U.S. history has not been written. This dissertation contributes a rigorous and empirical depiction of constitutional development with a focus on the changes in national authority spanning American history. Most studies see the Constitution and the Court as bastions of negative rights, limiting the powers of the federal government. Instead, this study has shown that no matter the period or ideological

[306] Throughout this dissertation, the Supreme Court is treated as a relatively unitary actor, which some legal scholars might especially resist. Political scientists use this unitary actor model to study Congress and the executive branch, but it is less accepted for the study of the Court. This scholarly norm, however, is curious given that the Court has acted more uniformly than any of the other branches. In fact, for the vast majority of the Court's history (from when Marshall took office in 1801 until around 1935), the institutional norm was to speak in one voice through an opinion of the Court. Opinions of the Court accounted for 80-90 percent of all the Court's decisions between 1801 and the New Deal (O'Brien 1999, 93-94). Individual opinions concurring or dissenting in part only proliferated after the New Deal with the advent of legal realism (O'Brien 1999, 111).

Nevertheless, individual justices and their politics have contributed a great amount to the institutional and administrative development of the Supreme Court, and consequently, to central state expansion. To ascertain these micro-level developments, it would be prudent to narrow the period under study. One place to begin would be the emergence of the modern American state, uncovering how individual judges' voting records and philosophies interacted to build a central state strong some areas and weak in others.

composition, the Court consistently allies itself with the broader central state, expanding the powers of the federal government in myriad ways.

APPENDIX

Coding Manual and Application of Coding Scheme

A.) Introduction:

This document outlines the coding instructions for the variables to be coded for each judicial decision. Seven variables comprise the seven dimensions of the central state (the "central state" and "federal government" are interchangeable terms) that the Court might possibly expand or restrict in any judicial decision. Additionally, I provided four sample cases to illustrate how I analyzed each decision—one expanded, two restricted, and one that did not alter central state authority.

B.) Coding Rules:

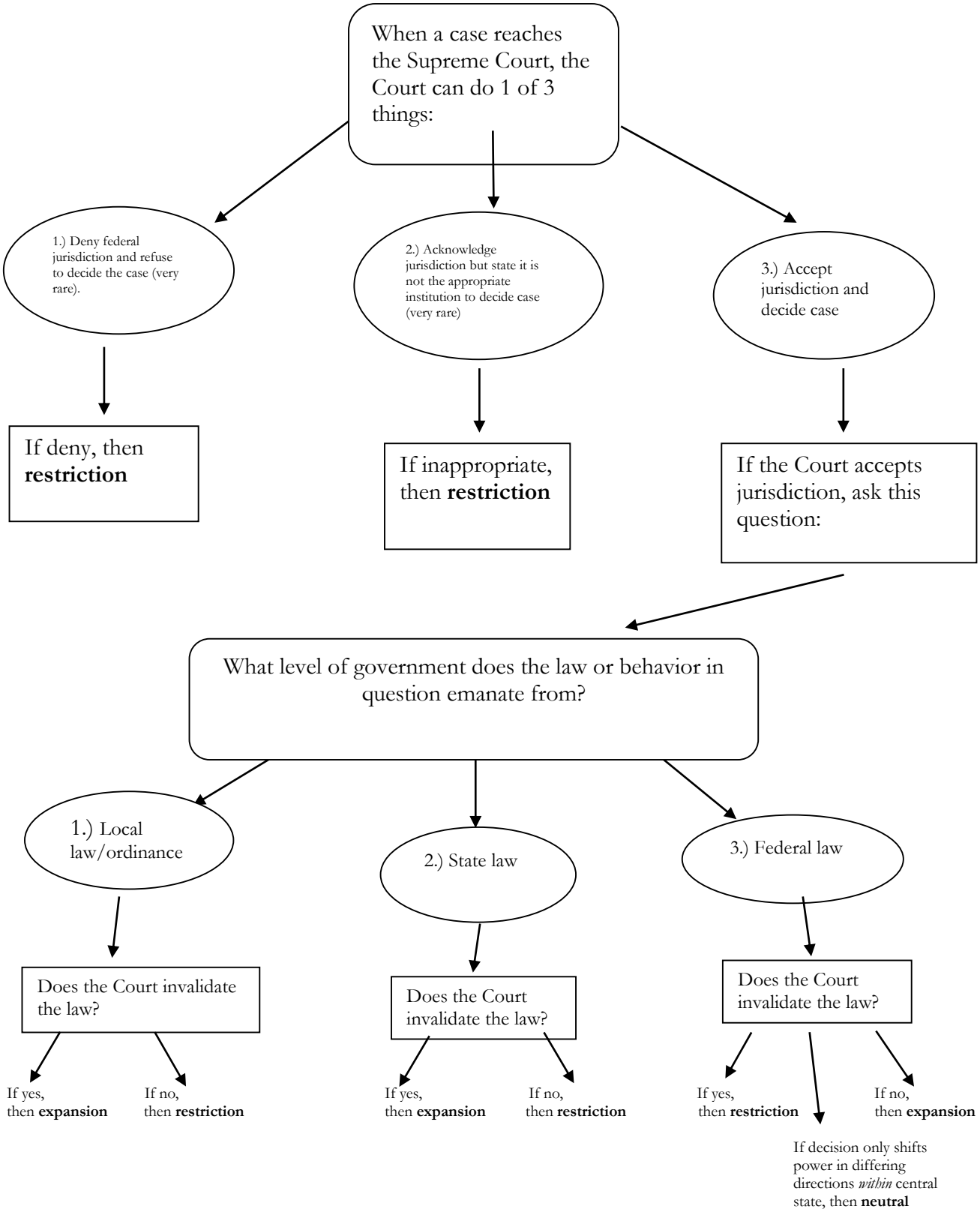
When state and local-level laws/actions are before the Supreme Court:

1. If a Supreme Court decisions **invalidates/overturns** *any* law or action of a **local *or* state**-level government then this is **an expansion** of central state authority.
2. If a Supreme Court decisions **upholds/sustains** *any* law or action of **local *or* state-level** governments then this is **restriction** (state-level law does not infringe on a federal constitutional right)**.**

When federal-level laws/actions are before the Supreme Court:

3. If the Supreme Court **invalidates** a federal law or action then the decision **restricts** central state authority**.**
4. If the Supreme Court **upholds/sustains** a federal law or action then this decision **expands** central state authority**.**

The chart below illustrates the coding process:



C.) Seven Dimensions of Central State Authority Variables[307]:

1. Centralization of authority **(Variable Name: Centralization)*:*** Measures involving the transfer of decision-making authority from subordinate governments and the citizenry to the central state; in the case of individual citizens, such measures do not involve a substantive expansion of central state activity but, only, the allocation of influence and control over that activity. In the case of subordinate governments, such measures include the review of subordinate government decisions by central state institutions and the form of subordinate government participation in central state decision making.

- When decision-making power/authority is vested in the federal government and *not* in lower-levels of government (states, municipalities i.e. "subordinate governments") this is an expansion of central state authority= "1." Any decision that concentrates decision-making in various branches of the federal government is an expansion of central state authority.

Some of the following will signal that this dimension was considered by the Court:

a. discussion of an individual state law infringes on the power of Congress.
b. discussion of national unity, uniformity, paramount authority, sustaining federal power—all of these are possible indications of an affirmation and expansion of central state authority.
c. Discussion of the "justiciability" or jurisdiction of a case—in other words, does the Supreme Court have the right to hear the case?
d. Any reference to "revising power," "review," or "violation of"

2. Administrative Capacity **(Variable Name: Admin_Cap):** measures involving a broadening or narrowing of bureaucratic discretion and long-term planning capacity within the central state; these measures affect only institutions within the central state itself; in analyzing policy, reference is made to a hierarchy based on relative insulation from societal or outside political influence.

- This dimension is about locating decision-making authority among the national branches (and the bureaucracy). An expansion of central state authority occurs when a Court decision further insulates decision-making authority from societal influence. The least insulated to most insulated federal branches: Congress→President→Courts→Bureaucracy. Taking decision-making, for example, from Congress and giving it to president is an expansion while taking decision-making from bureaucracy and giving it to Congress is a restriction.
- When the Court sustains the federal administrative/bureaucratic authority (i.e. the power to administer and execute procedure and rules) the decision expands central state authority= "1." A decision that affirms the creation of an agency or

[307] The following section is taken directly from Richard Bensel. *Yankee Leviathan: The Origins of Central State Authority, 1859-1877* (New York: Cambridge University Press, 1990), 114.

any other administrative structure design of the central state is an expansion of authority.

Indications that this dimension is implicated in a decision:

a. Discussion of commissions, agencies, validation of a federal commission's findings may indicate that administrative capacity is implicated.
b. Administrative procedure or procedural rules, any decision that pertains to allocating authority between *federal* branches of government and possibly insulating decisions from the more political branches of government (e.g. Congress).
c. Discussion of the interior design of the state—who gets to make decisions over procedural question.

3. Citizenship **(Variable Name: Citizen)***:* measures involving the religious practices, political beliefs, ethnic identity, and rights and duties of citizens in their relations with the state; this category excludes measures affecting property but includes all measures concerning the physical movement and labor of citizens (such as conscription).

- When the Court **sustains the federal government's** authority/power to control civil liberties or rights—either to curtail or provide further rights[308]—this decision expands central authority= "1"
- When the Court **strikes the federal government's** authority/power to control civil liberties or rights—either to curtail or provide further rights—this decision expands central authority= "1"
- When the Court **strikes down state-level** laws/power (often through the 14th Amendment) that either curtail or provide further civil rights/liberties, this decision expands central authority = "1"
- When the Court **sustains state-level laws/power** (brought to the Court often via the 14th) this decision is a restriction= "-1"

Indications that this dimension is implicated in a decision:

a.) Discussion of a person's individual rights with respect to the *federal* government authority.
b.) Discussion of a person's right to "standing" to assert claims in a *federal* court.

4. Control of property **(Variable Name: Property):** measures involving the control or use of property by individuals or institutions other than the central state itself, including expropriation, regulation of the marketplace, and labor contracts between private parties.

- When the Court upholds federal authority to use and own property this is an expansion of the central state.

[308] The coding application does not distinguish the *purpose* of a federal law—whether it expands or restricts the rights of citizens. The coding application *only* concerns whether the central state has the power to control citizens—whether the central state uses that control to give more civil rights or to take civil rights away does not affect the coding.

- When the Court upholds federal authority regulate private contracts involving property and the use of property (including, for example, environmental regulations)

Indications that this dimension is implicated in a decision:

a. Discussion of contracts, infrastructure, land use, property (even intangible property such as stocks and bonds), and so forth.
b. Discussion of federal government regulation of private economic activity and marketplace relations.

5. Creation of client groups **(Variable Name: Client_Group):** measures that increase the dependence of groups within society upon the continued existence and viability of the central state; includes only measures that provide income or income substitutes to individuals (pensions, employment by central state institutions, welfare, and price-control programs for specific groups in society), that establish future-oriented obligations that depend on state viability (the issuance of long-term debt), and that control the value of the currency (the gold standard and redemption of paper money).

- When the Court validates federal programs, statutes, and/or agencies that ensure the viability of the groups that depend on these parts of the federal government this is an expansion of central state authority.

Indications that this dimension is implicated in a decision:

- Discussion of 1.) pension and welfare systems; 2.) salaries from government employment, 3.) income substitutes (such as price controls on commodities sold to targeted groups), and 4.) currency, federal debt

6. Extraction **(Variable Name: Extract):** the coercive extraction of material resources from society into the central state apparatus; extraction measures skim wealth and resources from the flow of commerce and marketplace transaction without significantly redirecting or influence the volume of these transactions (unlike otherwise similar measures falling under the property, client-group, or world system dimensions); primarily forms of light taxation or manipulations of the financial system such as gradual inflation of the currency.

- When the Court enables the federal government to skim resources from citizens, businesses, and other aspects of society this is an expansion of central state authority.

Indications that this dimension is implicated in a decision:

a.) Discussion of any measures that support federal government operations within society
b.) Discussion of taxation, duty, tonnage, fees, charges, and the like.

7. The central state in the world system **(Variable Name: World_Sys):** measures concerning the relationship of the central state and nation with other states and the world economy; these include

access to foreign markets (licensing, import quotas, export subsidies, and tariffs), diplomatic relations (membership in international organizations, treaties, and military conflict), immigration restrictions, and broadly conceived polices of internal development (the construction of a railroad to the Pacific Ocean, the Homestead Act, and administration of territorial possessions).

- When the Court enables the federal government to control its relations with other central states in the international arena, this decision expands central state authority.

Indications that this dimension is implicated in a decision:

a.) Discussion of trade relations between national and world economics (tariffs, import quotas export subsidies)

b.) Discussion of diplomatic relations with foreign nations (treaty negotiations, military conflict, formal international alliances).

c.) Discussion of settlement/annexing of territory, territorial expansion, or the administration of territorial possess.

d.) Discussion on the manipulation of immigration restriction and quotas.

Other Variables:

8.) "**Total Dimension:"** This is a simple count of the total number of the 7 dimensions expanded or restricted in any one decision. The number can range from 0 to 7.

9.) **"Impact on State Authority:"** This refers to the overall impact on central state authority. When coding for this variable consider the following: what is the main question the Court is addressing? Does this question implicate the powers of the federal government? Does the Court's ruling on this question enhance the authority/power on the federal government with respect to any one of the seven dimensions? Or does the ruling keep power in the hands of subordinate governments and/or the citizens?

If the decision:

i. expanded federal/central authority= "1"
ii. restricted federal/central authority= "-1"
iii. neutral federal/central to authority= "0"

D.) Example Cases for "Impact on Authority" Coding:

Below, I apply my coding scheme for the overall "impact on state authority" variable to four cases that are part of the dataset. Chronologically, the cases are as follows:

Julliaird v. Greenman (1884) 110 U.S. 421

Hurtado v. California (1884) 110 U.S. 516

Monongahela Navigation v. United States (1893) 148 U.S. 312

Coyle v. Smith (1911) 221 U.S. 559

Case 1: *Juilliard v. Greenman* (1884):

Expansion

Step 1: Identify the background and context of case

Juilliard made a contract with Greenman to sell 100 bales of cotton at a price agreed upon by both parties: $5,122.90. Greenman, the defendant, agreed to pay that sum upon delivery of the cotton. Upon delivery of the cotton, Greenman paid Juilliard $22.90 in gold and silver coins and the remaining $5100 in U.S. currency, one note of $5000 and one note of $100. Juilliard demanded the $5100 be paid in coin, too. Greenman refused. He claimed the U.S. paper currency provided were as good as coin, and the notes should be taken for their respective face value for all debts, public and private.

Step 2: Identify the central legal claims

Juilliard claimed Greenman's payment was a breach of their original contract because the U.S. notes were not equivalent to gold and silver coin.

Step 3: Identify the central legal questions

Are U.S. treasury notes a tender of lawful money in payment of Greenman's debt?

Step 4: Identify the Supreme Court's outcome

Yes. The Court held U.S. treasury notes were a tender of lawful money in payment of debt. Because the Congressional Act of May 31, 1878, under which the treasury notes were issued, was constitutional. The majority opinion argued, "The constitutional authority of Congress to provide a currency for the whole country is now firmly established" (445). And it went on to say,

> The power of making the notes of the United States a legal tender in payment of private debts, being included in the power to borrow money and to provide a national currency, is not defeated or restricted by the fact that its exercise may affect the value of private contracts. If . . . a particular power or authority appears to be vested in Congress, it is no constitutional objection to its existence, or to its exercise, that the property or the contracts of individuals may be incidentally affected (448).

Finally, the Court concluded that the issuance of treasury notes for payment of private debts is "conducive and plainly adapted to the execution of the undoubted powers of Congress" and within the meaning of the Necessary and Proper Clause (450).

Step 5: Code Decision for Impact on State Authority

What, if anything, does this Court case say about the central government's authority? The answer is that a federal statute allowed Greenman to repay his debt, lawfully, in cash. This congressional act, the Court maintained, fell within the scope of Congress's authority under the Constitution. In validating the act, the Supreme Court affirmed (or expanded) the purview of the central state's authority, the authority in this case, of course, being the ability to make treasury notes legal tender

for debt repayment. **The impact on central state authority is coded a "1," an expansion of state authority because the Court sustained federal statute vis-à-vis the property dimension.**

Case 2: *Hurtado v. California* (1884)

Restriction by allowing a state law to stand

Step 1: Identify the background and context of case.

The State of California accused Joseph Hurtado, the defendant, of murder in the first degree. The District Attorney of Sacramento County, in particular, made and filed an information against Hurtado, charging him with the murder of Jose Antonio Stuardo. Accordingly, Hurtado was arraigned and tried. After the trial, the jury found Hurtado guilty of murder in the first degree. On conviction of murder in the first degree, the Supreme Court of California sentenced Hurtado to death. However, Hurtado appealed his conviction claiming that it was unlawful to send him to trial based solely on the information provided by the district attorney; Hurtado said he first needed to appear before a grand jury (23 of his peers) before California could try him for murder. The defendant appealed to the U.S. Supreme Court claiming his death sentence was void because he was not indicted by a grand jury.

Step 2: Identify the central legal claims

Joseph Hurtado claimed the following State of California Penal Code violated his Fourteenth Amendment right of due process:

> When a defendant has been examined and committed, as provided in section 872 of this Code, it shall be the duty of the district attorney, within thirty days thereafter, to file in the Superior Court of the county in which the offence is triable, an information charging the defendant with such offence. The information shall be in the name of the people of the State of California, and subscribed by the district attorney, and shall be in form like an indictment for the same offence.

This section of the Penal Code enabled the district attorney to avoid grand jury proceedings and to charge Hurtado based solely upon information. On appeal, Hurtado argued that proceeding by information *only* in capital cases violated his Fourteenth Amendment rights to due process, claiming that the Due Process Clause of the Fourteenth incorporated his Fifth Amendment right to a grand jury indictment in federal capital cases.

Step 3: *Identify the central legal question*

Does a state trial based on information from a district attorney rather than on a grand jury proceeding violate Hurtado's 14th Amendment right of Due Process?

Step 4: *Identify the Supreme Court's outcome*

No. The Court found Hurtado's Due Process rights were upheld in both receiving counsel and a fair trial by his peers.

Step 5: Code Decision for Impact on State Authority

What, if anything, does this Supreme Court decision say about the limits of federal authority? What questions, if any, about the authority of the federal government did the Court decide? *Hurtado* prevents federal law from affecting a state-level law. **Therefore, I code a "-1" for this case.** The case is a restriction on central state authority because the Court allowed the State of California's interpretation prevail thereby leaving power in state government hands and preventing federal authority from altering California law.[309]

Case 3: *Monongahela Navigation v. United States* (1893)

Neutral

Step 1: Identify the background and context

A federal statute passed on August 11, 1888 authorized the Secretary of War to seize a dam in Pennsylvania at a cost of no more than $161,733.13:

> The Secretary of War be, and is hereby, authorized and directed to negotiate for and purchase, at a cost not to exceed one hundred and sixty-one thousand, seven hundred and thirty-three dollars, and thirteen cents, lock and dam number seven, otherwise known as 'the Upper Lock and Dam,' and its appurtenances, of the Monongahela Navigation Company, a corporation organized under the laws of Pennsylvania, which lock and dam number seven and its appurtenances constitute a part of the improvements in water communication in the Monongahela River, between Pittsburgh, in the State of Pennsylvania, and a point at or near Morgantown, in the State of West Virginia. And the sum of one hundred and sixty-one thousand, seven hundred and thirty-three dollars and thirteen cents, or so much thereof as may be necessary, is hereby appropriated, out of any moneys in the Treasury.

The Monongahela Navigation Company protested the amount offered by Congress was too small, claiming that the value of the lock and dam number seven was really $209,393.52. The lower amount in the statute, the Company claimed, did not did not take into consideration the right of the company to collect tolls granted by Pennsylvania.

Step 2: Identify the Central Legal Claims

The Monongahela Navigation Company asserted that the Fifth Amendment required the government to pay the entire value of the property taken from the company, including the value of the right to collect tolls.

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[309] In 14th Amendment (or any Amendment) cases, where the Court strikes down one or more *state-level* laws this constitutes *an expansion* of central state authority because the Court has asserted national power in declaring that its interpretation overrules state-level authority. Conversely, when the Court upholds a state or local-level law the decision is restricts national authority because the Court has declared that a *federal* constitutional right does not apply to the subordinate government's authority in question.

Step 3: Identify the Central Question

Does the Congressional Act of August 11, 1888 violate the Navigation Company's Fifth Amendment right to just compensation? Is the Navigation Company entitled to additional monies?

Step 4: Identify the Supreme Court's Outcome

Yes. The majority opinion declared that Congress does not have the authority to determine the amount of compensation:

> By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial (327).

The Court found the taking of the Navigation Company's property unconstitutional because the central state owed more money to the Navigation Company. The Court held:

> the right of the national government, under its grant of power to regulate commerce, to condemn and appropriate this lock and dam belonging to the navigation company, is subject to the limitations imposed by the Fifth Amendment that private property shall not be taken for public uses without just compensation, that just compensation requires payment for the franchise to take tolls, as well as for the value of the tangible property, and that the assertion by Congress of its purpose to take the property does not destroy the state franchise (345).

Step 5: Code Decision for Impact on State Authority

What, if anything, does this Court case say about the central government's authority? The Court's decision restricted the authority of the central state from acquiring lock and dam number seven under the existing congressional act. The Court's decision determined that Congress and the Secretary of War did not offer just compensation to the Navigation Company. Moreover, Congress, the Court held, did not have the authority to determine the amount of compensation. As a result, the Court inhibited the Congress and the Secretary of War from taking the property under the original congressional act. However, **I coded this "0" overall because the decision merely said that the Courts (not Congress) have the authority to determine compensation, therefore the overall central state (as a single entity) did not lose power. For the same reason, the decision expanded the administrative capacity dimension because it left power with the more statist branch—the Court.**

Case 4: *Coyle v. Smith* (1911)

Restriction by invalidating federal statute

Step 1: Identify the background and context of case:

In 1910, Oklahoma enacted a law (Oklahoma Act) moving its state capital from Guthrie to Oklahoma City. In admitting Oklahoma to the Union, the Congressional statue (Enabling Act of 1906) declared the temporary capital to be Briscoe and that a change to some other location would not occur until 1913. Citizens of Oklahoma attempted to prevent the enforcement of the act. The citizens seeking to prevent enforcement of the Oklahoma Act were owners of property interests in the former location of the state capital.

Step 2: Identify the central legal claims:

According to petitioner citizens, the act, which provided for the immediate relocation of the state capital, violated a Congressional Act—Enabling Act of Congress of June 16, 1906, 34 Stat. 267, ch. 3335, under which the State was admitted to the Union

Step 3: *Identify the central legal question:*

Does Oklahoma have the power to locate its seat of government when Congress has imposed conditions limiting that location?

Step 4: *Identify the Supreme Court's outcome*

Yes. This was congressional overreaching. States are on an equal footing to determine their own location for the seat of government. The constitutional duty of Congress of guaranteeing to each State a republican form of government does not give Congress the authority to impose upon a new State, as a condition to its admission to the Union, restrictions which render that state unequal to the other States, such as limitations upon its power to locate or change its seat of government.

Step 5: Code Decision for Impact on State Authority

What, if anything, does this Supreme Court decision say about the boundaries of federal authority? What questions, if any, about the authority of the federal government did the Court decide? The Court's decision determined that Congress did not have the authority to mandate the location of a state's capital because this decision falls within the scope of the individual state's authority. Moreover, the Constitutional guaranty of a republican form of government does not necessitate the central state to determine lower states' capitals. **Therefore, this case is a restriction, "-1," on central state authority because the Court invalidated a Congressional statute.**

E.) Descriptive Variables: Definitions

1.) Variable Name: Con_Issue (Constitutional Issue Area)
This variable indicates the *central* constitutional issue/subject matter of the case at hand. It is a broad variable, and although multiple issues may exist in an individual case, we must choose the issue that is most central according to the LexisNexis "headnotes" and summary.

"Criminal procedure" encompasses the rights of persons accused of crime, except for the due process rights of prisoners. Such as: involuntary confession, habeas corpus, plea bargaining, search and seizure, self-incrimination, contempt of court, Miranda warnings, right to counsel, cruel and unusual punishment, double jeopardy, retroactivity (of newly announced or newly enacted constitutional or statutory rights). Often includes: Amendments 4, 5, 6, 8, and 14.

"Civil rights/liberties" includes non-First Amendment freedom and non-criminal cases which pertain to classifications based on race (including American Indians), age, indigency, voting, residency, military or handicapped status, gender, and alienage. Often includes: Amendments 13, 14, 15, and 19. Civil Rights Acts of 1866, 1870, 1871, 1875, and 1964.

"First Amendment" encompasses the scope of this constitutional provision:

> **First amendment:** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

"Due Process" is limited to civil guarantees (but *does* include criminal due process). Such as: prisoners' rights and defendants' rights, government taking of property for public use (takings clause), impartial decision maker. Due process rights as written in the 5th and/or 14th Amendments:

> **5th Amendment:** No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> **14th Amendment, Section 1:** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Privacy" non-criminal privacy, abortion, use of contraceptives/birth control, right to die, Freedom of Information Act and related federal or state statutes or regulations

"Unions" encompass those issues involving labor union activity.

"Economic Activity" is largely commercial and business related; it includes tort actions (suing business entities) and employee actions in relation to employers.

"Judicial Power/Jurisdiction" concerns the exercise of the judiciary's own power. To the extent that a number of these issues concern federal-state court relationships, I include them in the federalism category. This variable pertains to the reach and scope of the judiciary's power, namely,

the extent of its jurisdiction and the justiciability of the case before them.

"Federalism" pertains to conflicts and other relationships between the federal government and the states, except for those between the federal and state courts, often includes interstate commerce clause, Amendments 10 and 11:

"Interstate relations" not relating to interstate commerce, but including boundary disputes between states, miscellaneous interstate conflicts, and non-real property disputes (anything that is non-real property is personal property and personal property is anything that isn't nailed down, dug into or built onto the land. A house is real property, but a dining room set is not).

"Federal/State Taxation" concerns the Internal Revenue Code and related statutes and the general extraction of material resources from citizens. Often includes: Amendment 16

"Miscellaneous" contains cases that do not fit into any other category.

"Private law" relates to disputes between private persons involving real and personal property, contracts, evidence, civil procedure, torts, wills and trusts, and commercial transactions. Prior to the passage of the Judges' Bill of 1925 much -- arguably most -- of the Court's cases concerned such issues. The Judges' Bill gave the Court control of its docket, as a result of which such cases have disappeared from the Court's docket in preference to litigation of more general applicability.

"Administrative Agency" power includes issues that pertain the ability of bureaucratic agencies of the government to regulate/control facets of governance.

"President Power" pertains to the authority of the president to execute his/her office. Often includes Article II

2.) Variable Name: Chief
This is variable indicating who the chief justice was during the time the Court decided a case.

Dates of Chief Justices' Tenure:

	Name	Term start (oath)	Term end
1	John Jay	October 19, 1789	June 29, 1795
2	John Rutledge	August 12, 1795	December 28, 1795
3	Oliver Ellsworth	March 8, 1796	December 15, 1800

4	John Marshall	February 4, 1801	July 6, 1835†
5	Roger B. Taney	March 28, 1836	October 12, 1864
6	Salmon P. Chase	December 15, 1864	May 7, 1873
7	Morrison Waite	March 4, 1874	March 23, 1888†
8	Melville Fuller	October 8, 1888	July 4, 1910†
9	Edward Douglass White	December 19, 1910	May 19, 1921†
10	William Howard Taft	July 11, 1921	February 3, 1930
11	Charles Evans Hughes	February 24, 1930	July 1, 1941
12	Harlan F. Stone	July 3, 1941	April 22, 1946†
13	Fred M. Vinson	June 24, 1946	September 8, 1953†
14	Earl Warren	October 5, 1953	June 23, 1969
15	Warren E. Burger	June 23, 1969	September 26, 1986
16	William Rehnquist	September 26, 1986	September 3, 2005†
17	John G. Roberts, Jr.	September 29, 2005	*present*

3.) Variable Name: War_Time
This variable indicates if the US was engaged in war when the Court handed down its decision.

0=US is not in war

1=US is in war

List of Major Wars in US History:

1. War of 1812: June 18, 1812 – February 18, 1815
2. Mexican-American War: April 25, 1846 – February 2, 1848
3. Civil War: April 12, 1861- May 9, 1865
4. Spanish-American War: April 25, 1898- December 10, 1898
5. Philippine War: June 2, 1899 – July 4, 1902
6. World War I: April 6, 1917-November 11, 1918
7. World War II: December 7, 1941-September 2, 1945
8. Korean War: 25 June 1950 – 27 July 1953
9. Vietnam War: August 2, 1964- April 30, 1975.
10. Persian Gulf: 2 August 1990 – 28 February 1991
11. War in Afghanistan and War on Terror: 7 October 2001-Present
12. Operation Iraqi Freedom: 20 March 2003 – 18 December 2011

4.) State=what state was the case first heard in?
5.) Org_Court=where is the case on appeal from? Who decided the case last?

Additional Tables and Figures

Constitutional Casebooks and Treatises List:

In chronological order, these are the books that comprise the database and from which I drew my cases.

1. Sergeant, Thomas. 1822. *Constitutional law: Being a Collection of Points Arising upon the Constitution and Jurisprudence of the United States.* Philadelphia, PA: A. Small.

2. DuPonceau, Stephen. 1824. *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States.* Philadelphia: Abraham Small.

3. Rawle, William. 1825. *A view of the Constitution of the United States of America.* Philadelphia, PA: H.C. Carey & I. Lea.

4. Kent, James. 1826. *Commentaries on American Law.* New York, NY: O. Halstead.

5. Gordon, Thomas. 1827. *A Digest of the Laws of the United States: Including an Abstract of the Judicial Decisions Relating to the Constitutional and Statutory Law.* Philadelphia, PA.

6. Story, Joseph. 1833. *Commentaries on the Constitution of the United States.* Boston, MA: Hilliard, Gray and Company.

7. Baldwin, Henry. 1837. *A General View of the Origin and Nature of the Constitution and Government of the United States.* Philadelphia, PA: J.C. Clark.

8. Curtis, George Ticknor.1854. *Commentaries on the jurisdiction, practice, and peculiar jurisprudence of the courts of the United States***.** Philadelphia, PA: T. & J.W. Johnson

9. Pomeroy, John and Edmund Bennett. 1868. *An Introduction to the Constitutional Law of the United States*. Cambridge, MA: Riverside Press.

10. Cooley, Thomas. 1868. *Treatise on Constitutional Limitations.* Boston, MA: Little, Brown and Co.

11. Cooley, Thomas and Andrew Cunningham McLaughlin. 1880. *General Principles of Constitutional Law in the United States of America.* Boston, MA: Little, Brown and Co.

12. Lawson, John 1882. *Leading Cases Simplified: A Collection of Leading Cases of the Common Law.* St. Louis : F.H. Thomas.

13. Thayer, James Bradley. 1895. *Cases on Constitutional Law Vol. 1-2.* Cambridge, MA: Charles W. Sever.

14. Boyd, Carl Evans. 1898. *Cases on American Constitutional Law*. Chicago, IL: Callaghan and Co.

15. Tucker, John Randolph. 1899. *The Constitution of the United States: A Critical Discussion of its Genesis, Development, and Interpretation* Vol. 1-2. Chicago, IL: Callaghan and Co.

16. McClain, Emlin. 1900. *A Selection of Cases on Constitutional Law.* Boston: Little Brown

17. Barnes, Edgar. 1910. *Selected Cases in Constitutional Law.* Philadelphia: Lyon & Amor.

18. Willoughby, Westel. 1912. *Principles of the Constitutional Law of the United States.* New York, NY: Baker, Voorhis and Company.

19. Hall, James Parker. 1913. *Cases on Constitutional Law*. St Paul, MN: West Publishing Co.

20. Wambaugh, Eugene. 1914. *A Selection of Cases on Constitutional Law.* Cambridge, MA: Harvard University Press.

21. Evans, Lawrence. 1916. *Leading Cases on American Constitutional Law.* Chicago, IL: Callaghan and Co.

22. Baker, Fred. 1916. *The Fundamental Law of American Constitutions.* Washington, DC: J. Byrne

23. Gerstenberg, Charles. 1926. *Constitutional Law: A Brief Text with Leading and Illustrative Cases.* NY: Prentice-Hall, Inc.

24. Long, Joseph. 1926. *Cases on Constitutional Law.* Rochester, NY: Lawyers Cooperative, Co.

25. Field, Oliver Field. 1930. *A Selection of cases and Authorities on Constitutional Law.* Chicago, IL: Callaghan and Co.

26. McGovney, Dudley. 1930. *Cases on Constitutional Law.* Indianapolis, IN: Bobbs-Merril Co.

27. Dodd, Walter. 1932. *Cases and other Authorities on Constitutional Law: Selected from Decisions of State and Federal Courts.* St Paul, MN: West Publishing, Co.

28. Dowling, Noel. 1937. (Now Sullivan, Kathleen and Gerald Gunther). *Cases on Constitutional Law.* Mineola, NY: Foundation Press.

29. Peirce, Joseph and Harry Cook. 1938. *A Manual to the Constitution of the United States.* Charlottesville, Va. : Michie Co.

30. Maurer, Robert Adam. 1941. *Cases on Constitutional Law.* Rochester, NY: Lawyers of Cooperative Publishing Company.

31. Strong, Frank R. 1950. *American Constitutional Law.* Buffalo, NY: Dennis and Co. Inc.

32. Frank, John P. 1950. *Cases and Materials on Constitutional Law.* Chicago, IL: Callaghan and Co.

33. Sholley, John B. 1951. *Cases on Constitutional Law.* Indianapolis, IN: Bobbs- Merrill Company, Inc.

34. Kauper, Paul. 1954. *Constitutional Law Cases and Materials.* New York: Prentice-Hall

35. Freund, Paul. 1954. *Constitutional Law: Cases and Other Problems.* Boston, MA: Little Brown

36. Cushman, Robert. 1958. *Cases in Constitutional Law.* Englewood Cliffs, NJ: Prentice-Hall

37. Forrester, Ray. 1959. *Constitutional Law Cases and Materials.* St. Paul, MN: West Publishing Co.

38. *Lockhart, William; Yale Kamisar; and Jesse Choper. 1964. *The American Constitution: Cases and Materials.* St. Paul. MN: West Publishing Co.

39. Brest, Levinson, Balkin, Amar, and Siegel. 1975. *Process of Constitutional Decision-making.* New York, NY: Aspen Publishers.

40. Barron, Jerome and Thomas Dienes. 1978. *Constitutional Law, Principles, and Policy: Cases and Materials.* Indianapolis: Bobbs-Merril.

41. Tribe, Laurence. 1978. *American Constitutional Law.* Mineola, NY: Foundation Press.

42. Nowak, John; Ronald Rotunda; and J. Nelson Young. 1978. *Handbook on Constitutional Law.* St Paul, MN: West Publishing Co.

43. Rotunda, Ronald. 1981. *Modern Constitutional Law*. St. Paul, MN: West Publishing Co.

44. Stone, Geoffrey R, et al. 1986. *Constitutional Law*. Boston, MA: Little, Brown and Co.

45. Crump, David, Eugene Gressman, and Steven Reiss. 1989. *Cases and Materials on Constitutional Law*. New York, NY: M. Bender.

46. Farber, Daniel A., Eskridge, William N., Frickey, Phillip P. 1993. *Constitutional Law: Themes for the Constitution's Third Century*. St. Paul, MN: West Publishing Co.

47. Redlich, Norman, Bernard Schwartz, and John Attanasio. 1995. *Understanding Constitutional Law*. New York, NY: M. Bender.

48. Araiza, William, Phoebe Haddon, and Dorothy Roberts. 1996. *Constitutional Law Cases, History, and Dialogues*. Newark, NJ: Lexis Nexis**.**

49. Chemerinsky, Erwin. 1997. *Constitutional Law Principles and Policies*. New York, NY: Aspen Publishers.

50. Ides, Allan and Christopher May. 1998. *Constitutional Law* Vols. 1-2. New York: Aspen Law and Business.

51. Shanor, Charles. 2000. *American Constitutional Law: Structure and Reconstruction: Cases, Notes and Problems*. St. Paul, MN: West Publishing Co

52. Massey, Calvin. 2001. *American Constitutional Law: Powers and Liberties*. New York, NY: Aspen Publishers.

53. Parker, Wilson J.; Douglas M. Davison; Paul Finkelman; Michael Kent Curtis. 2003. *Constitutional Law in Context*. Durham, NC: Carolina Academic Press.

54. Choper, Jesse et al. 2007. *Constitutional Law: Leading Cases*. St Paul, MN: West Publishing Co.

55. Barnett, Randy. 2008. *Constitutional Law: Cases in Context*. New York, NY: Aspen Publishers.

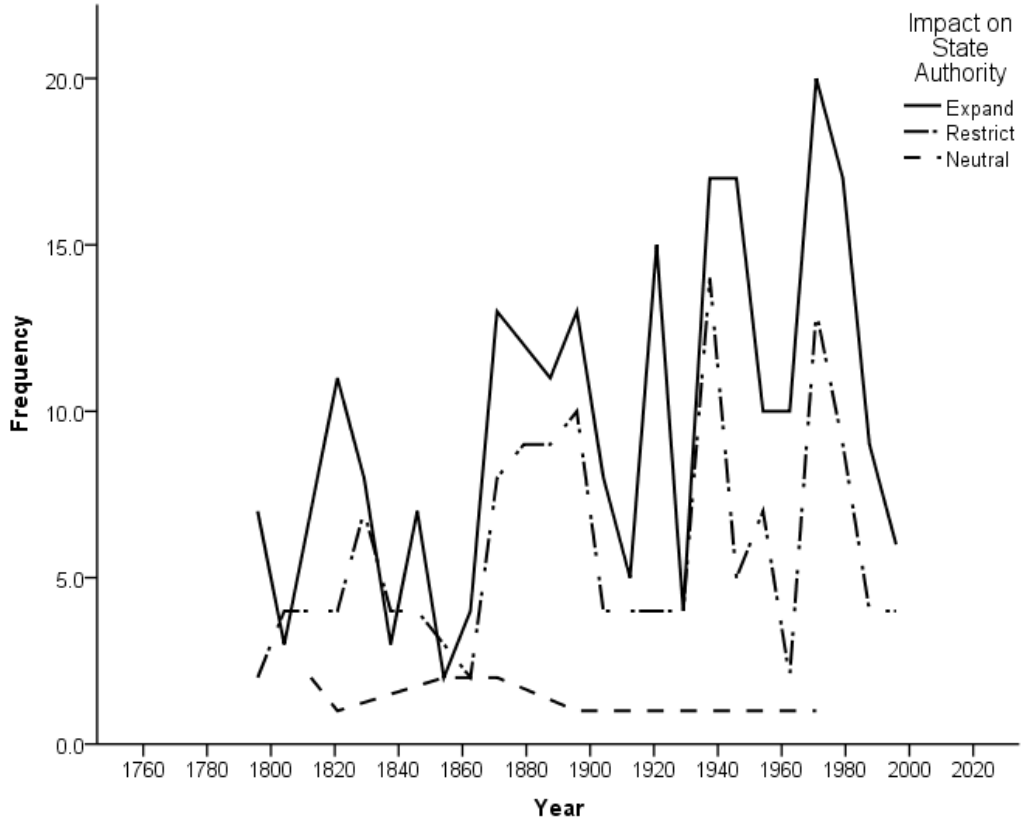
56. Funk, William. 2008. *Introduction to American Constitutional Structure*. St. Paul, MN: West Publishing Co.

57. Odom, Thomos. 2009. *Cases and Materials on Federal Constitutional Law Vol. 1-3*. Newark, NJ: LexisNexis.

58. Paulsen, Michael; Steven G. Calabresi; Michael W. McConnell, and Samuel L. Bray. 2010. *The Constitution of the United States: Text, Structure, History, and Precedent*. New York, NY: Foundation Press.

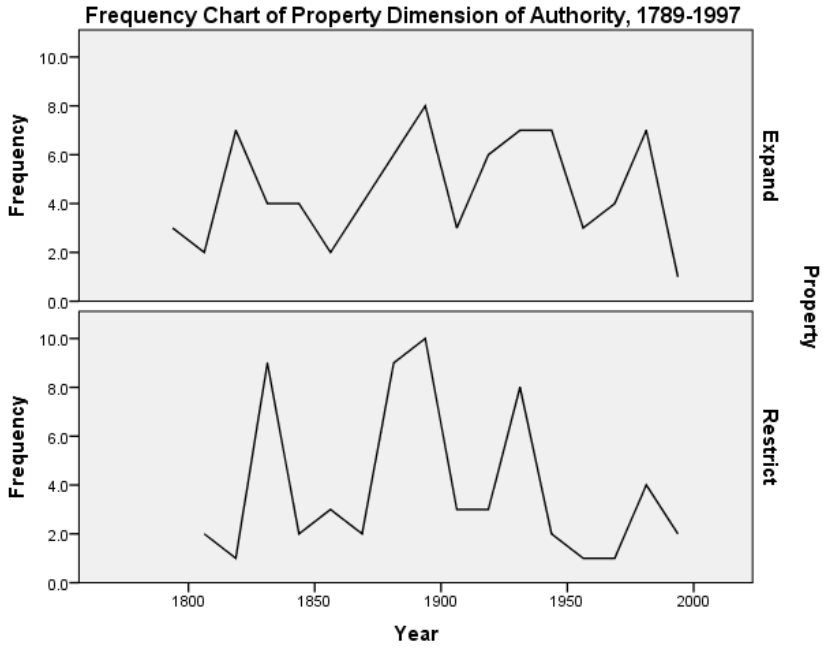
Notes and Sources: Compiled by author used to create my database. This list of casebooks and treatises includes some of the most prominent American legal scholars and some of the most important books used to train American lawyers.

Figure 13: Impact on Central State Authority Line Chart, 1789-2000, N=388

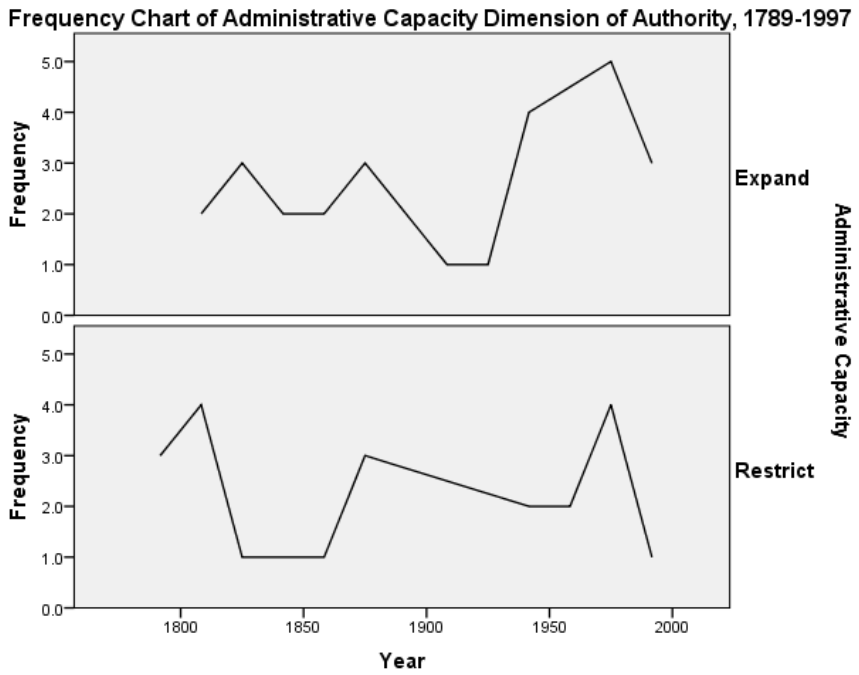


Notes and Sources: Compile by author. This graph shows the ebb and flow of expansion and restriction across all of the data. After around 1860, we see little overlap between expansion and restriction, and the shape and trajectory of both outcomes take similar paths of development after 1860, too.

Figure 14: Frequency Charts of Central State Authority Dimensions.[310]

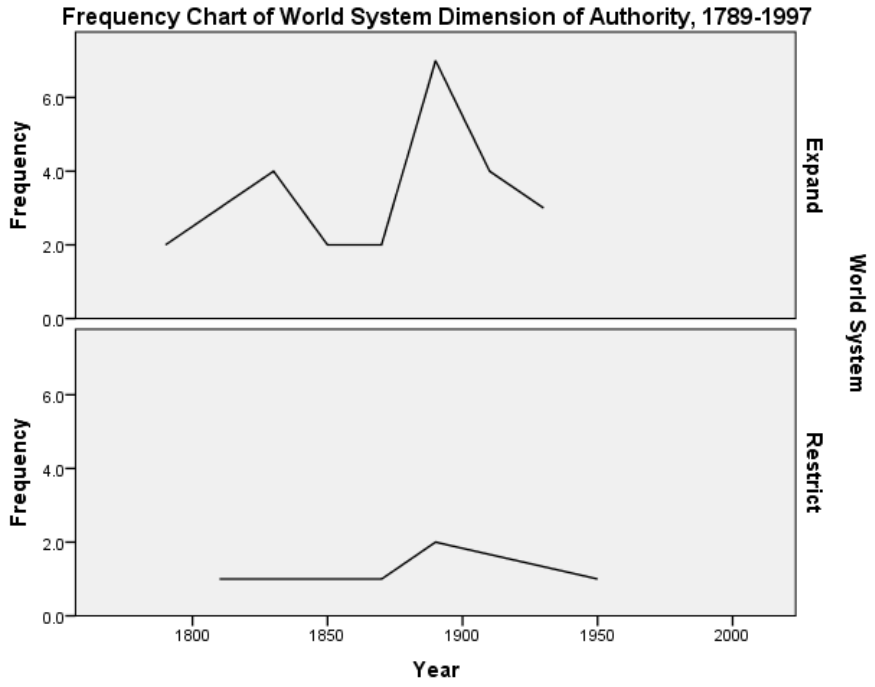


N=156. Expand=78; Restrict=62

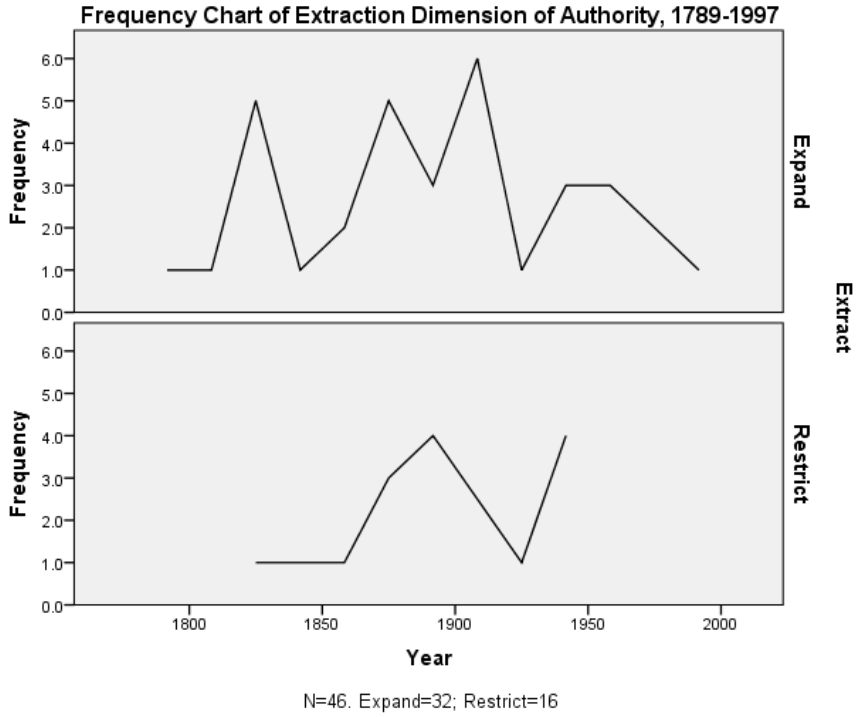


N=49. Expand=29; Restrict=20

[310] The "client group" dimension is not displayed because it comprises just 16 of 388 decisions in the data.



N=30. Expand=24; Restrict=6



N=46. Expand=32; Restrict=16

Notes and Sources: Compiled by author. These frequency charts represent the ebb and flow of decisions along the remaining central state dimensions not discussed in Figure 7.1 in Chapter 3. Notably, the Court's decisions expand and restrict the administrative dimension at about the same frequency; the same holds for the property dimension.

Figure 15: Top 25 Most-Cited Cases

Court Case	Year	Citation Score	Impact on Authority	Dimensions Affected
INS v. Chadha	1983	100.00	restrict	Administrative; Citizen; World System
Morrison v. Olson	1988	100.00	expand	Administrative; Citizen
Youngstown Sheet & Tube Co. v. Sawyer	1952	96.00	restrict	Administrative; Property
Darby, United States v.,	1941	92.86	expand	Centralization; Property
Planned Parenthood v. Casey	1992	92.31	expand	Centralization; Citizen
Marbury v. Madison	1803	91.38	expand	Centralization; Administrative; Citizenship
McCulloch v. Maryland	1819	91.38	expand	Centralization; Extraction
Boerne, City of v. Flores	1997	88.89	restrict	Centralization; Citizen; Property
Washington v. Glucksberg	1997	88.89	restrict	Centralization; Citizen
Gibbons v. Ogden	1824	87.50	expand	Centralization; Property
Brown v. Board of Education	1954	86.96	expand	Centralization; Citizen
South Dakota v. Dole	1987	85.71	expand	Centralization; Extraction
Nixon, United States v.,	1974	85.00	neutral	Administrative
Slaughterhouse Cases	1873	81.25	restrict	Centralization; Citizen; Property
Baker v. Carr	1962	80.95	expand	Centralization; Citizen
Cooley v. Board of Wardens	1852	80.39	restrict	Centralization; Property; Extraction
Griswold v. Connecticut	1965	80.00	expand	Centralization; Citizen
Katzenbach v. Morgan	1966	80.00	expand	Centralization; Citizen; World System
Roe v. Wade	1973	80.00	expand	Centralization; Citizen
Buckley v. Valeo	1976	78.95	restrict	Centralization; Administrative; Citizen
Wickard v. Filburn	1942	78.57	expand	Centralization; Property
Bowers v. Hardwick	1986	78.57	restrict	Centralization; Citizen
Green v. Neal's Lessee	1832	77.78	restrict	Centralization; Property
Fox v. Ohio	1847	77.78	restrict	Centralization; Citizen
Hammer v. Dagenhart	1918	75.00	restrict	Centralization; Citizen; Property

Notes and Sources: Compiled by the author. These are the twenty-five most frequently cited decisions in the database listed in descending order by "citation score." This score is the proportion of a decision's casebook appearance over the total number of casebooks (from the casebook list) that the decision could possibly appear in. Each decision (except *US v. Nixon*) implicates at least two, and often three dimensions, of the central state. No decision in this list affected more than three dimensions. Eleven decision restricted, thirteen expanded, and one remained neutral to central state authority.

Cases Selected for the Database:

Below is a chronological list of the decisions in the database:

Hayburn's Case	1792	2us409
Chisholm v. Georgia	1793	2us419
Ravara, United States v.,	1793	2us297
Penhallow v. Doane's Administrators	1795	3us54
Van Horne's Lessee v. Dorrance	1795	2us304
Hylton v. United States	1796	3us171
Ware v. Hylton	1796	3us199
Hollingsworth v. Virginia	1798	3us378
Calder v. Bull	1798	3us386
Cooper v. Telfair	1800	4us14
Marbury v. Madison	1803	5us107
Stuart v. Laird	1803	5us299
Hepburn v. Ellzey	1805	6us445
Moore, United States v.,	1805	7us159
Bollman, Ex parte	1807	8us75
Burr, US v., (VA Circuit Court)	1807	25 F Cas 55
Bank of United States v. Deveaux	1809	9us61
Fletcher v. Peck	1810	10us87
Durousseau v. United States	1810	10us307
New Jersey v. Wilson	1812	11us164
Hudson, United States v.,	1812	11us32
Terrett v. Taylor	1815	13us43
Pawlet v. Clark	1815	13us292
Martin v. Hunter's Lessee	1816	14us304
Coolidge, United States v.,	1816	14us415
Palmer, United States v.,	1818	16us610
Bevans, United States v.,	1818	16us336
McCulloch v. Maryland	1819	17us316
Dartmouth College v. Woodward	1819	17us518
Sturges v. Crownshield	1819	17us122
Houston v. Moore	1820	18us1
Loughborough v. Blake	1820	18us317
Smith, United States v.,	1820	18us153
Cohens v. Virginia	1821	19us264
Anderson v. Dunn	1821	19us204
Corfield v. Coryell	1823	6 Fed Cas. 546
Green v. Biddle	1823	21us1
Gibbons v. Ogden	1824	22us1

Osborn v. Bank of the United States	1824	22us738
Eakin v. Raub (SC of PA Case)	1825	12 Serg. & Rawle 330
Wayman v. Southard	1825	23us1
Brown v. Maryland	1827	25us419
Ogden v. Saunders	1827	25us213
Martin v. Mott	1827	25us19
American Insurance Co. v. Canter	1828	26us511
Willson v. Black Bird Creek Marsh Co.	1829	27us245
Weston v. Charleston	1829	27us449
Foster v. Neilson	1829	27us253
Satterlee v. Mathewson	1829	27us380
Craig v. Missouri	1830	29us410
Providence Bank v. Billings	1830	29us514
Cherokee Nation v. State of Georgia	1831	30us1
Worcester v. State of Georgia	1832	31us515
Green v. Neal's Lessee	1832	31us291
Gassies v. Ballon	1832	31us761
Barron v. Baltimore	1833	32us243
Watson v. Mercer	1834	33us88
Wheaton v. Peters	1834	33us591
Charles River Bridge v. Warren Bridge	1837	36us420
New York, City of v. Miln	1837	36us102
Briscoe v. Bank, etc.	1837	36us257
Kendall v. United States	1838	37us524
Bank of Augusta v. Earle	1839	38us519
Dobbins v. Commissioner of Erie County	1842	41us435
Prigg v. Pennsylvania	1842	41us539
Swift v. Tyson	1842	41us1
Bronson v. Kinzie	1843	42us311
McCracken v. Hayward	1844	43us608
License Cases, The	1847	46us504
Fox v. Ohio	1847	46us410
West River Bridge Co. v. Dix	1848	47us507
Luther v. Borden	1849	48us1
Passenger Cases, The	1849	48us283
Pennsylvania v. Wheeling & Belmont Bridge Co.	1850	50us647
Butler v. Pennsylvania	1851	51us402
Cooley v. Board of Wardens	1852	53us299
Ferreira, United States v.,	1852	54us40
Piqua Branch Bank v. Knoop	1853	57us369
Murray v. Hoboken Land & Improvement Co.	1856	59us272
Wynehammer v. People	1856	13ny378

Dred Scott v. Sandford	1857	60us393
Ableman v. Booth	1859	62us506
Kentucky v. Dennison	1861	65us66
Almy v. California	1861	65us169
Prize Cases	1863	67us635
Gelpcke v. Dubuque	1864	68us175
Milligan, Ex parte	1866	71us2
Crandall v. Nevada	1867	73us35
Mississippi v. Johnson	1867	71us475
Garland, Ex parte	1867	71us333
Von Hoffman v. City of Quincy	1867	71us535
Cummings v. Missouri	1867	71us277
License Tax Cases	1867	72us462
Woodruff v. Parham	1868	75us123
Georgia v. Stanton	1868	73us50
McCardle, Ex parte	1869	74us506
Paul v. Virginia	1869	75us168
Veazie Bank v. Fenno	1869	75us533
Texas v. White	1869	74us700
Dewitt, United States v.,	1869	76us41
Hepburn v. Griswold	1870	75us603
Collector v. Day	1871	78us113
Daniel Ball, The	1871	77us557
Legal Tender Cases	1871	79us457
Ward v. Maryland	1871	79us418
Tarble's Case	1871	80us397
Slaughterhouse Cases	1873	83us36
State Freight Tax Case	1873	82us232
Railroad Co. v. Peniston	1873	85us5
Loan Ass'n v. City of Topeka	1874	87us655
Minor v. Happersett	1875	88us162
Welton v. Missouri	1876	91us275
Kohl v. United States	1876	91us367
Cruikshanks, United States v.,	1876	92us542
Munn v. Illinois	1877	94us113
Pensacola Telegraph Co. v. Western Union Telegraph Co.	1877	96us1
Railroad Co. v. Husen	1877	95us465
Beer Co. v. Massachusetts	1878	97us25
Davidson v. New Orleans	1878	96us97
Hall v. De Cuir	1878	95us485
Reynolds v. United States	1879	98us145
Siebold, Ex parte	1879	100us371
Trade-Mark Cases	1879	100us82

Tennessee v. Davis	1879	100us257
Strauder v. West Virginia	1880	100us303
Stone v. Mississippi	1880	101us814
Virginia, Ex parte	1880	100us339
Hauenstein v. Lynham	1880	100us483
Kilbourn v. Thompson	1881	103us168
Lee, United States v.,	1882	106us196
Civil Rights Cases	1883	109us3
Hurtado v. California	1884	110us516
Juilliard v. Greenman	1884	110us421
Head Money Cases	1884	112us580
Yarbrough, Ex parte	1884	110us651
Barbier v. Connolly	1885	113us27
Brown v. Houston	1885	114us622
Yick Wo v. Hopkins	1886	118us356
Wabash, St. Louis & Pacific Ry. Co. v. Illinois	1886	118us557
Coe v. Town of Errol	1886	116us517
Mugler v. Kansas	1887	123us623
Robbins v. Shelby County Taxing Dist	1887	120us489
Bowman v. Chicago & N. W. R. Co.	1888	125us465
Powell v. Pennsylvania	1888	127us678
Leisy v. Hardin	1890	135us100
Neagle, In re	1890	135us1
Minnesota v. Barber	1890	136us313
Hans v. State of Louisana	1890	134us1
Rahrer, In re	1891	140us545
Crutcher v. Kentucky	1891	141us47
Pullman Palace Car Co. v. Pennsylvania	1891	141us18
Field v. Clark	1892	143us649
Texas, United States v.,	1892	143us621
Chicago etc. R. Co. v. Wellman	1892	143us339
Rapier, In re	1892	143us110
Fong Yue Ting v. United States	1893	149us698
Monongahela Navigation Co. v. United States	1893	148us312
Plumley v. Massachusetts	1894	155us461
Lawton v. Steele	1894	152us133
Luxton v. North River Bridge Co.	1894	153us525
Reagan v. Farmers' Loan & Trust Co.	1894	154us362
Debs, In re	1895	158us564
Knight Co, E.C., United States v.,	1895	156us1
Pollock v. Farmers' Loan & Trust Co.	1895	157us429
Plessy v. Ferguson	1896	163us537
Allegeyer v. Louisiana	1897	165us578

Chicago, Burlington & Q. R. Co. v. Chicago	1897	166us226
Robertson v. Baldwin	1897	165us275
Holden v. Hardy	1898	169us366
Wong Kim Ark, United States v.,	1898	169us649
Thompson v. Utah	1898	170us343
Blake v. McClung	1898	172us239
Hawker v. New York	1898	170us189
Thompson v. Missouri	1898	171us380
Knowlton v. Moore	1900	178us41
Downes v. Bidwell	1901	182us244
Champion v. Ames	1903	188us321
McCray v. United States	1904	195us27
Northern Securities Co. v. United States	1904	193us197
Lochner v. New York	1905	198us45
Jacobson v. Massachusetts	1905	197us11
South Carolina v. United States	1905	199us437
Kansas v. Colorado	1907	206us46
Twining v. New Jersey	1908	211us78
Muller v. Oregon	1908	208us412
Young, Ex parte	1908	209us123
Adair v. United States	1908	208us161
Muskrat v. United States	1911	219us346
Noble State Bank v. Haskell	1911	219us104
Flint v. Stone Tracy Co.	1911	220us107
Coyle v. Smith	1911	221us559
Pacific States Tel. & Tel. Co. v. Oregon	1912	223us118
McDermott v. Wisconsin	1913	228us115
Shreveport Rate Cases (Houston etc R. co. v. United States)	1914	234us342
Coppage v. Kansas	1915	236us1
Truax v. Raich	1915	239us33
Buchanan v. Warley	1917	245us60
Bunting v. Oregon	1917	243us426
Clark Distilling Co. v. Western Maryland R. Co	1917	242us311
Hammer v. Dagenhart (Child Labor Case)	1918	247us251
Schenck v. United States	1919	249us47
Abrams v. US	1919	250us616
Missouri v. Holland	1920	252us416
Johnson v. Maryland	1920	254us51
Bailey v. Drexel Furniture Co.	1922	259us20
Pennsylvania Coal Co. v. Mahon	1922	260us393
Stafford v. Wallace	1922	258us495
Massachusetts v. Mellon	1923	262us447
Adkins v. Children's Hospital	1923	261us525

Meyer v. Nebraska	1923	262us390
Pennsylvania v. West Virginia	1923	262us553
Gitlow v. New York	1925	268us652
Pierce v. Society of Sisters	1925	268us510
Grossman, Ex parte	1925	267us87
Buck v. Kuykendall	1925	267us307
Euclid, Village of v. Ambler Realty Co.	1926	272us365
Myers v. United States	1926	272us52
Whitney v. California	1927	274us357
Buck v. Bell	1927	274us200
McGrain v. Daugherty	1927	273us135
Tumey v. Ohio	1927	273us510
Miller v. Schoene	1928	276us272
Near v. Minnesota	1931	283us697
Nebbia v. New York	1934	291us502
Home Building & Loan Association v. Blaisdell	1934	290us398
A.L.A. Schechter Poultry Corp. v. United States	1935	295us495
Baldwin v. G.A.F. Seelig Inc.	1935	294us511
Humphrey's Executor v. United States	1935	295us602
Norman v. Baltimore & Ohio R. Co.	1935	294us240
Butler, United States v.,	1936	297us1
Curtiss-Wright Export Corp., United States v.,	1936	299us304
Carter v. Carter Coal Co.	1936	298us238
Ashwander v. Tennessee Valley Authority	1936	297us288
National Labor Relations Board v. Jones & Laughlin Steel Corp	1937	301us1
West Coast Hotel v. Parrish	1937	300us379
Steward Machine Co. v. Davis	1937	301us548
Palko v. Connecticut	1937	302us319
DeJonge v. Oregon	1937	299us353
Helvering v. Davis	1937	301us619
Henneford v. Silas Mason Co.	1937	300us577
South Carolina State Highway Dept v. Barnwell Brothers	1938	303us177
Carolene Products Co., United States v.,	1938	304us144
Lovell v. City of Griffin	1938	303us444
Erie R. Co. v. Tompkins	1938	304us64
Helvering v. Gearhardt	1938	304us405
Hague v. Committee for Industrial Organization	1939	307us496
Coleman v. Miller	1939	307us433
Graves v. New York ex rel. O'Keefe	1939	306us466
Cantwell v. Connecticut	1940	310us296
Thornhill v. Alabama	1940	310us88
McGoldrick v. Berwind-White Coal Mining Co.	1940	309us33
Darby, United States v.,	1941	312us100

Edwards v. California	1941	314us160
Bridges v. California	1941	314us252
Wickard v. Filburn	1942	317us111
Skinner v. Oklahoma ex rel. Williamson	1942	316us535
Chaplinksy v. New Hampshire	1942	315us568
West Virginia State Board of Ed v. Barnette	1943	319us624
Korematsu v. United States	1944	323us214
Smith v. Allwright	1944	321us649
Southern Pacific Co. v. Arizona	1945	325us761
Marsh v. Alabama	1946	326us501
Lovett, United States v.,	1946	328us303
Causby, United States v.,	1946	328us256
Prudential Life Ins. Co. v. Benjamin	1946	328us408
Everson v. Board of Ed of Ewing Township	1947	330us1
Adamson v. California	1947	332us46
United Pub Workers of America v. Mitchell	1947	330us75
Shelley v. Kraemer	1948	334us1
McCollum v. Board of Education	1948	333us203
Toomer v. Witsell	1948	334us385
Railway Express Agency v. People of State of NY	1949	336us106
Hood & Sons Inc. H.P. v. DuMond	1949	336us525
Terminiello v. Chicago	1949	337us1
American Communications Association v. Douds	1950	339us382
Sweatt v. Painter	1950	339us629
Dean Milk Co. v. City of Madison	1951	340us349
Feiner v. New York	1951	340us315
Dennis v. United States	1951	341us494
Spector Motor Service v. O'Connor	1951	340us602
Youngstown Sheet & Tube Co. v. Sawyer	1952	343us579
Zorach v. Clauson	1952	343us306
Beauharnais v. Illinois	1952	343us250
Kahriger, United States v.,	1953	345us22
Terry v. Adams	1953	345us461
Brown v. Board of Education of Topeka (Brown I)	1954	347us483
Bolling v. Sharpe	1954	347us497
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Boerne, City of v. Flores	1997	521us507
Washington v. Glucksberg	1997	521us702

BIBLIOGRAPHY

Ackerman, Bruce. 1991. *We the People: Foundations.* Cambridge, MA: Belknap Press of Harvard University.

———. 1998. *We the People: Transformations.* Cambridge, MA: Belknap Press of Harvard University.

Adler, William. 2012. "State Capacity and Bureaucratic Autonomy in the Early United States: The Case of the Army Corps of Topographical Engineers," *Studies in American Political Development* 26 (2): 107-124.

Alley, Robert S. 1996. *Without A Prayer.* Amherst, NY: Prometheus Books.

Araiza, William, Phoebe Haddon, and Dorothy Roberts. 1996. *Constitutional Law Cases, History, and Dialogues.* Newark, NJ: Lexis Nexis**.**

Baker, Fred. 1916. *The Fundamental Law of American Constitutions.* Washington, DC: J. Byrne.

Baldwin, Henry. 1837. *A General View of the Origin and Nature of the Constitution and Government of the United States.* Philadelphia, PA: J.C. Clark.

Balkin, J.M. and Sanford Levinson. 1998. "The Canons of Constitutional Law," *Harvard Law Review* 111: 963-1024.

Balogh, Brian. 2009. *A Government out of Sight: The Mystery of National Authority in Nineteenth-Century America.* New York: Cambridge University Press.

Barnes, Edgar. 1910. *Selected Cases in Constitutional Law.* Philadelphia: Lyon & Amor.

Barnett, Randy. 2008. *Constitutional Law: Cases in Context.* New York, NY: Aspen Publishers.

Barron, Jerome and Thomas Dienes. 1978. *Constitutional Law, Principles, and Policy: Cases and Materials.* Indianapolis: Bobbs-Merril.

Bassok, Or. 2011. "The Sociological-Legitimacy Difficulty." *Journal of Law and Politics* 26(2): 239–72.

Baum, Lawrence. 2003. "The Supreme Court in American Politics." *Annual Review of Political Science* 6:161–80.

Bensel, Richard. 1990. *Yankee Leviathan: The Origins of Central State Authority, 1859-1877.* New York: Cambridge University Press.

———. 2000. *The Political Economy of American Industrialization, 1877-1900.* New York: Cambridge University Press.

———. 2003. "The Tension between American Political Development as a Research Community and as a Disciplinary Subfield." *Studies in American Political Development* 17: 103-6.

Belz, Herman. 1976. *A New Birth of Freedom*: *The Republican Party and freedmen's rights, 1861 to 1866*. Westport, CT: Greenwood Press.

Berk, Gerald. 1994. *Alternative Tracks: The Constitution of American Industrial Order*, 1865–1917. Baltimore, MD: Johns Hopkins University Press.

Beth, Loren P. 1971. *The Development of the American Constitution, 1877-1917*. Harper & Row.

Bickel, Alexander. 1962. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. Indianapolis, IN: Bobbs-Merrill.

Black, Ryan and James Spriggs. 2013. "The Citation and Depreciation of U.S. Supreme Court Precedent," *Journal of Legal Empirical Studies* 10 (2): 325-358.

Boudin, Louis B. 1932. *Government by Judiciary*. 2 vols. New York: William Goodwin, Inc.

Boyd, Carl Evans. 1898. *Cases on American Constitutional Law*. Chicago, IL: Callaghan and Co.

Brandwein, Pamela. 2007. "A Judicial Abandonment of Blacks? Rethinking the 'State Action' Cases of the Waite Court." *Law & Society Review* 41(2): 343–86.

———. 2011. *Rethinking the Judicial Settlement of Reconstruction*. New York: Cambridge University Press.

Brest, Paul, Sanford Levinson, Jack Balkin, Akhil Amar, and Reva Siegel. 1975. *Process of Constitutional Decision-making*. New York, NY: Aspen Publishers.

Bridges A. 1984. *A City in the Republic: Antebellum New York and the Origins of Machine Politics*. New York: Cambridge University Press.

Bridges A. 1997. *Morning Glories: Municipal Reform in the Southwest*. Princeton, NJ: Princeton University Press.

Brigham, John. 1987. *The Cult of the Court*. Philadelphia, PA: Temple University Press

Bryce, James Bryce. 1888. *The American Commonwealth*. London; New York: Macmillan.

Brownson, Orestes A. 1866. *The American Republic: Its Constitution, Tendencies, and Destiny*. New York: P.O. Shae.

Burgess, John W. 1890. *Political Science and Comparative Constitutional Law*. 2 Vols. Boston: Ginn & Company.

Bybee, Keith, ed. 2007. *Bench Press: The Collision of Courts, Politics, and the Media*. Stanford: Stanford University Press.

Caldeira, Gregory A. 1987. "Public Opinion and The U.S. Supreme Court: FDR's Court-Packing Plan." *American Political Science Review* 81(4): 1139–53.

———. and James L Gibson. 1992. "The Etiology of Public Support for the Supreme Court." *American Journal of Political Science* 36(3): 635–64.

———. and James L. Gibson. 1995. "The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support." *American Political Science Review* 89: 356-76.

Carpenter, Daniel. 2003. *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862–1928*. Princeton, NJ: Princeton University Press

Casillas, Christopher J, Peter K Enns, and Patrick C Wohlfarth. 2011. "How Public Opinion Constrains the U.S. Supreme Court." *American Journal of Political Science* 55(1).

Chemerinsky, Erwin. 1997. *Constitutional Law Principles and Policies.* New York, NY: Aspen Publishers.

Choper, Jesse et al. 2007. *Constitutional Law: Leading Cases.* St Paul, MN: West Publishing Co.

Clark, Thomas. 2009. "The Separation of Powers, Court Curbing, and Judicial Legitimacy." *American Journal of Political Science,* (53) 4: 971-989.

———. 2011. *The Limits of Judicial Independence*. Cambridge; New York: Cambridge University Press.

Clayton, Cornell and Howard Gillman, eds. 1999. *Supreme Court Decision-Making: New Institutionalist Approaches.* Chicago, IL: University of Chicago Press.

——— and J. Mitchell Pickerill. 2005. "Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence, The." *Georgetown Law Journal* 94: 1385.

——— and J. Mitchell Pickerill. 2006. "The Political Determinants of the Supreme Court's Criminal Justice Jurisprudence: How the New Right Regime has Shaped the Rehnquist Court." *Georgetown Law Journal* 94(5): 1385-1425.

Collins, Ronald K. L, ed. 1980. *Constitutional Government in America: Essays and Proceedings from Southwestern University Law Review's First West Coast Conference on Constitutional Law*. Durham, N.C.: Carolina Academic Press.

Compton, John W. 2014. *The Evangelical Origins of the Living Constitution.* Cambridge, MA: Harvard University Press.

Congleton, Roger D, and Birgitta Swedenborg. 2006. *Democratic Constitutional Design and Public Policy Analysis and Evidence.* Cambridge, Mass.: MIT Press.

Cooley, Thomas. 1868. *Treatise on Constitutional Limitations.* Boston, MA: Little, Brown and Co.

——— and Andrew Cunningham McLaughlin. 1880. *General Principles of Constitutional Law in the United States of America.* Boston, MA: Little, Brown and Co.

Corwin, Edward S. 1938. *Court over Constitution: A Study of Judicial Review as an Instrument of Popular Government.* New York: P. Smith.

———. 1950. "The Passing of Dual Federalism." *Virginia Law Review* 36(1): 1–24.

Crowe, Justin. 2007. "The Forging of Judicial Autonomy: Political Entrepreneurship and the Reforms of William Howard Taft," *The Journal of Politics,* 69 (1): 73-87.

———. 2012. *Building the Judiciary: Law, Courts, and the Politics of Institutional Development*. Princeton, N.J.: Princeton University Press.

Crump, David, Eugene Gressman, and Steven Reiss. 1989. *Cases and Materials on Constitutional Law*. New York, NY: M. Bender.

Curtis, George Ticknor.1854. *Commentaries on the Jurisdiction, Practice, and Peculiar Jurisprudence of the Courts of the United States.* Philadelphia, PA: T. & J.W. Johnson

Cushman, Barry. 1998. *Rethinking the New Deal: The Structure of a Constitutional Revolution.* New York, NY: Oxford University Press.

Cushman, Robert. 1958. *Cases in Constitutional Law*. Englewood Cliffs, NJ: Prentice-Hall

Dahl, Robert A. 1957. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker." *Journal of Public Law* 6: 279–95.

Dodd, Walter. 1932. *Cases and other Authorities on Constitutional Law: Selected from Decisions of State and Federal Courts.* St Paul, MN: West Publishing, Co.

Dowling, Noel. 1937. *Cases on Constitutional Law*. Mineola, NY: Foundation Press.

Drobak, John N., ed. 2006. *Norms and the Law,* John N. Drobak, ed. New York, NY: Cambridge University Press.

DuPonceau, Stephen. 1824. *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States.* Philadelphia: Abraham Small.

Edwards, Harry T. 2006. "Judicial Norms: A Judge's Perspective," in *Norms and the Law,* John N. Drobak, ed. New York, NY: Cambridge University Press.

Ellis, Richard E. 1971. *The Jeffersonian Crisis; Courts and Politics in the Young Republic*. New York: Oxford University Press.

———. 2007. *Aggressive Nationalism: McCulloch v. Maryland and the Foundation of Federal Authority in the Young Republic.* New York: Oxford University.

Elazar, Daniel Judah. 1962. *The American Partnership; Intergovernmental Co-Operation in the Nineteenth-Century United States.* Chicago: University of Chicago Press.

Epstein, Lee and Thomas G. Walker. 1995. "The Role of the Supreme Court in American Society: Playing the Reconstruction Game," in *Contemplating Courts,* Lee Epstein, ed. Washington, DC: CQ Press.

——— and Jeffrey Segal. 2000. "Measuring Issue Salience." *American Journal of Political Science,* 44 (1): 66-83.

———, Olga Shvetsova, and Jack Knight. 2001. "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government." *Law and Society Review* 35 (1): 117-164.

Ernst, Daniel. 1998. "Law and American Political Development, 1877-1938." *Reviews in American History* 26 (1): 205-219.

Evans, Lawrence. 1916. *Leading Cases on American Constitutional Law.* Chicago, IL: Callaghan and Co.

Evans, Peter; Dietrich Rueschemeyer, and Theda Skocpol, eds. 1985. *Bringing the State Back In.* New York, New York: Cambridge University Press.

Farber, Daniel A., Eskridge, William N., Frickey, Phillip P. 1993. *Constitutional Law: Themes for the Constitution's Third Century*. St. Paul, MN: West Publishing Co.

Farganis, Dion. 2012. "Do Reasons Matter? The Impact of Opinion Content on Supreme Court Legitimacy." *Political Research Quarterly* 65(1): 206–16.

Farhang, Sean. 2010. *The Litigation State.* Princeton, NJ: Princeton University Press.

Farrand Constitutional Convention Max Farrand, ed. 1911. *The Records of the Federal Convention of 1787*. New Haven: Yale University Press.

The Federalist Papers. James Madison, Alexander Hamilton, John Jay, (Isaac Kramnick, ed.) 1987. Penguin Books Limited.

Feeley, Malcolm and Edward Rubin. 1998. *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons*. New York: Cambridge University Press.

Ferejohn, John. 1999. "Independent Judges, Dependent Judiciary: Explaining Judicial Independence." *Southern California Law Review,* 72 (2/3): 353–84.

——— and Larry D. Kramer. 2006. "Judicial Independence in a Democracy: Institutionalizing Judicial Restraint" in *Norms and the Law,* John N. Drobak, ed. New York, NY: Cambridge University Press.

Field, Oliver Field. 1930. *A Selection of cases and Authorities on Constitutional Law*. Chicago, IL: Callaghan and Co.

Fisher, Sidney George. 1862. *The Trial of the Constitution.* Philadelphia: J.B. Lippincott.

Fisher, Louis. 1988. *Constitutional Dialogues: Interpretation as Political Process.* Princeton, NJ: Princeton University Press.

———. 2005. "The Judicial Review of War Power." *Presidential Studies Quarterly,* 35 (3): 466-495.

Forbath, William. 1991. *Law and the Shaping of the American Labor Movement.* Cambridge, MA: Harvard University Press.

———. 2008. "Politics, State-Building, and the Courts, 1870-1920," in Michael Grossberg and Christopher Tomlins, eds. *The Cambridge History of Law in America* vol. II. New York: Cambridge University Press.

Forrester, Ray. 1959. *Constitutional Law Cases and Materials.* St. Paul, MN: West Publishing Co.

Frank, John P. 1950. *Cases and Materials on Constitutional Law.* Chicago, IL: Callaghan and Co.

Freund, Ernst, 1904. *The Police Power: Public Policy and Constitutional Rights.* Chicago, IL: Callaghan & Company.

———. 1920. "The New German Constitution." *Political Science Quarterly* (35): 177-203.

Freund, Paul. 1954. *Constitutional Law: Cases and Other Problems.* Boston, MA: Little Brown.

Friedman, Lawrence. 2005. 3rd edition. *A History of American Law.* NY, NY: Simon & Schuster.

———. 2006. "Judging the Judges: Some Remarks on the Way Judges Think and the Way Judges Act," in *Norms and the Law,* John N. Drobak, ed. New York, NY: Cambridge University Press.

Frymer, Paul. 2003. "Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935-1985." *American Political Science Review* 97: 483-499

———. 2004. "Race, Labor and the Twentieth Century American State." *Politics & Society,* 32: 475-509.

———. 2008. "Law and American Political Development." *Law and Social Inquiry* 33: 779-803.

Forbath, William. 1991. *Law and the Shaping of the American Labor Movement.* Cambridge, MA: Harvard University Press.

Funk, William. 2008. *Introduction to American Constitutional Structure.* St. Paul, MN: West Publishing Co.

Gardner, James A. 2013. "Partitioning and Rights: The U.S. Supreme Court's Accidental Jurisprudence of Democratic Process." *SUNY Buffalo Legal Studies Research Paper Series.*

Gerring, John. 2003. "APD from a Methodological Point of View." *Studies in American Political Development,* 17: 82-102.

Gerstenberg, Charles. 1926. *Constitutional Law: A Brief Text with Leading and Illustrative Cases.* NY: Prentice-Hall, Inc.

Gibson, James, Gregory A. Caldeira, and Lester Spence. 2005. "Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment." *Political Research Quarterly* 58(2): 187–201.

———, Gregory A. Caldeira, and Vanessa Baird. 1998. "On the Legitimacy of National High Courts." *American Political Science Review* 92(June):343-58.

——— and Gregory A. Caldeira. 2003. "Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court." *Journal of Politics* 65 (February):1-30.

Gillman, Howard. 1993. *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence.* Durham, NC: Duke University Press.

———. 1999. "The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making," in Cornell Clayton and Howard Gillman, eds. *Supreme Court Decision-Making: New Institutionalist Approaches.* Chicago, IL: University of Chicago Press

———. 2002. "How Political Parties Can Use the Courts to Advance Their Agenda: Federal Courts in the United States, 1875-1891," *American Political Science Review* 96, 3: 511-524.

———. 2006. "Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism" in *The Supreme Court and American Political Development*, Ronald Kahn and Ken I. Kersch, eds. Lawrence: University of Kansas Press.

———, and Cornell Clayton, eds. 1999. *The Supreme Court in American Politics: New Institutionalist Interpretations.* Lawrence, KS: University Press of Kansas.

———, Mark A Graber, and Keith E Whittington. 2013. *American Constitutionalism*. New York: Oxford University Press.

Goldman, Jerry. 1992. "Is There A Canon of Constitutional Law?" *Law and Politics Book Review* 2 (10): 134-137.

———. 2005. "The Constitutional Law Canon Revisited," *Law and Politics Book Review* 15 (8): 648-656.

Goldstein, Leslie Friedman. 1997. "State Resistance to Authority in Federal Unions: The Early United States, 1790-1860." *Studies in American Political Development* 11: 149

Gordon, Thomas. 1827. *A Digest of the Laws of the United States: Including an Abstract of the Judicial Decisions Relating to the Constitutional and Statutory Law.* Philadelphia, PA.

Goodnow, Frank. 1911. *Social Reform and the Constitution.* New York: Macmillan

Graber, Mark. 1993. "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary," *Studies in American Political Development* 7: 35-73.

———. 1995. "The Passive-Aggressive Virtues: Cohen v. Virginia and the Problematic Establishment of Judicial Power." *Constitutional Commentary* 12: 67–92.

———. 1998a. "Establishing Judicial Review? Schooner Peggy and the Early Marshall Court." *Political Research Quarterly Political Research Quarterly* 51(1): 221–39.

———. 1998b. "Federalist or Friends of Adams: The Marshall Court and Party Politics." *Studies in American Political Development* 12 (2): 229-266.

———. 2000. "Naked Land Transfers and American Constitutional Development: The Consensual Foundation of Judicial Review and Fundamental Rights Jurisprudence." *Vanderbilt Law Review* (53): 73.

———. 2004. "Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited." *Constitutional Commentary* 21: 485.

Grady, Henry Woodfin, and Edwin Du Bois Shurter. 1910. *The Complete Orations and Speeches of Henry W. Grady;* New York: Hinds, Noble & Eldredge.

Grzymała-Busse, Anna. 2007. *Rebuilding Leviathan: Party Competition and State Exploitation in Post-Communist Democracies*. Cambridge: Cambridge University Press.

Hacker, Jacob. 2002. *The Divided Welfare State: The Battle over Public and Private Social Benefits in the United States*. Cambridge: Cambridge University Press.

Hadley, Janet. 1999. *Abortion: Between Freedom and Necessity.* Philadelphia, PA: Temple University Press.

Hall, James Parker. 1913. *Cases on Constitutional Law*. St Paul, MN: West Publishing Co.

Hall, Kermit L, Finkelman, and James W Ely. 2005. *American Legal History: Cases and Materials*. New York: Oxford University Press.

Hall, Matthew E. K. 2012. "Rethinking Regime Politics." *LSI Law & Social Inquiry* 37(4): 878–907.

———. 2011. *The Nature of Supreme Court Power*. Cambridge; New York: Cambridge University Press.

Haskins, George Lee, Herbert Alan Johnson. 1981. *The Oliver Wendell Holmes Devise*: *Foundations of Power: John Marshall, 1801-15*. New York: Macmillan Pub. Co.

Hattam, Victoria. 1993. *Labor Visions and State Power: The Origins of Business Unionism in the United States*. Princeton, NJ: Princeton University Press.

Hausegger, Lori, Baum, Lawrence. 1999. "Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation." *American journal of political science*. 43(1): 162.

Hegel, Georg Wilhelm Friedrich. 1956. *The Philosophy of History*. Dover Publications.

Hendrickson, David C. 2003. *Peace Pact: The Lost World of the American Founding*. Lawrence: University Press of Kansas.

Horwitz, Morton. 1977. *The Transformation of American Law, 1780–1860*. Cambridge, MA: Harvard University Press.

———. 1992. *The Transformation of American Law, 1870-1960*. New York, NY: Oxford University Press.

———. 1998. *The Warren Court and the Pursuit of Justice*. NY: Hill and Wang.

Hughes, David F. 1964. "Salmon P. Chase: Chief Justice." *Vanderbilt Law Review* 18: 569.

Hurd, John C. 1881. *The Theory of Our National Existence, as Show by the Action of the Government of the United States since 1861*. Boston: Little Brown.

Hurst, John. 1956. *Law and the Conditions of Freedom*. Madison: University Wisconsin Press.

Ides, Allan and Christopher May. 1998. *Constitutional Law* Vols. 1-2. New York: Aspen Law and Business.

Jameson, John Alexander. 1867. *The Constitutional Convention.* New York: C. Scribner & Company.

John, Richard S. 1997. "Governmental Institutions as Agents of Change: Rethinking American Political Development in the Early Republic, 1787-1835." *Studies in American Political* 11: 347-380.

Johnson, Kimberly. 2007. *Governing the American State: Congress and the New Federalism, 1877-1929*. Princeton: Princeton University Press.

Kagan, Robert. 2001. *Adversarial Legalism: The American Way of Law*. Cambridge, MA: Harvard University Press.

Kahn, Ronald and Ken I. Kersch, eds. 2006. *The Supreme Court and American Political Development.* Lawrence, KS: University Press of Kansas.

Kauper, Paul. 1954. *Constitutional Law Cases and Materials.* New York: Prentice-Hall

Keck, Thomas M. 2002. "Activism and Restraint on the Rehnquist Court: Timing, Sequence, and Conjecture in Constitutional Development." *Polity* 35 (1): 121-152.

———. 2007a. "Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools." *Law & Social Inquiry* 32(2): 511–44.

———. 2007b. "Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?" *American Political Science Review* 101(2): 321–38.

Keller, Morton. 1977. *Affairs of the State: Public Life in Late Nineteenth Century America.* Cambridge, MA: Belknap Press of Harvard University Press.

Kent, James. 1826. *Commentaries on American Law.* New York, NY: O. Halstead.

Kersch, Ken. 2004. *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law.* New York, NY: Cambridge University Press.

———. 2006. "New Deal Triumph as End of History? The Judicial Negotiation of Labor Rights and Civil Rights" in *The Supreme Court and American Political Development*, Ronald Kahn and Ken I. Kersch, eds. Lawrence: University of Kansas Press.

Kersh, Rogan. 2005. "Rethinking Periodization? APD and the Macro-history of the United States." *Polity* 37(4): 513-24.

King, Desmond and Robert Lieberman. 2009. "Ironies of State Building A Comparative Perspective on the American State." *World Politics* 61: 547-588.

Klarman, Michael J. 1994. "How Brown Changed Race Relations: The Backlash Thesis." *The Journal of American History* 81(1): 81–118.

Konvitz, Milton. 1966. *Expanding Liberties: Freedom's Gain in Post-War America.* NY: Viking Press.

Kramer, Larry. 2000. "Putting the Politics Back into the Political Safeguards of Federalism." *Columbia Law Review,* 100: 215-293.

Kryder, Daniel. 2000. *Divided Arsenal: Race and the American State During World War II*. New York: Cambridge University Press

Kutler, Stanley I. 1968. *Judicial Power and Reconstruction Politics.* Chicago, IL: University of Chicago Press.

LaPiana, William. 1994. *Logic and Experience: The Origin of Modern American Legal Education.* New York: Oxford University Press.

Larsen, Charles E. 1959. "Nationalism and States' Rights in Commentaries on the Constitution after the Civil War." *The American Journal of Legal History* 3(4): 360–69.

Lawson, John 1882. *Leading Cases Simplified: A Collection of Leading Cases of the Common Law.* St. Louis: F.H. Thomas.

Lerner, Max. 1937. "Constitution and Court as Symbols." *Yale Law Journal,* 46: 1290.

Leuchtenburg, William. 1995. *The Supreme Court Reborn.* New York, NY: Oxford University Press.

Lieberman, Robert. 1998. *Shifting the Color Line: Race and the American Welfare State*. Cambridge, MA: Harvard University Press

Licht, Walter. 1995. *Industrializing America: The Nineteenth Century*. Johns Hopkins University Press.

Linde, C. 2009. *Working the Past: Narrative and Institutional Memory*. Oxford; New York: Oxford University Press.

Lockhart, William; Yale Kamisar; and Jesse Choper. 1964. *The American Constitution: Cases and Materials.* St. Paul. MN: West Publishing Co.

Long, Joseph. 1926. *Cases on Constitutional Law.* Rochester, NY: Lawyers Cooperative, Co.

Longaker, Richard P. 1956. "Andrew Jackson and the Judiciary." *Political Science Quarterly* 71: 341

Marshall, John et al. 1974. *The Papers of John Marshall.* Chapel Hill, N.C.: University of North Carolina Press.

Mason, Alpheus Thomas. 1962. "Myth and Reality in Supreme Court Decisions." *Virginia Law Review,* 48 (8): 1385-1406.

Massey, Calvin. 2001. *American Constitutional Law: Powers and Liberties.* New York, NY: Aspen Publishers.

Maurer, Robert Adam. 1941. *Cases on Constitutional Law.* Rochester, NY: Lawyers of Cooperative Publishing Company.

Mayhew, David. 2000. *America's Congress: Actions in the Public Sphere, James Madison Through Newt Gingrich.* New Haven, CT: Yale University Press.

McClain, Emlin. 1900. *A Selection of Cases on Constitutional Law.* Boston: Little Brown.

McCloskey, Robert (revised by Sanford Levinson). *The American Supreme Court.* 4th edition. Chicago, IL: University of Chicago Press.

Macgill, Hugh C. and R. Kenty Newmyer. 2008. "Legal Education and Legal Thought," in Michael Grossberg and Christopher Tomlins, eds. *The Cambridge History of Law in America* vol. II. New York: Cambridge University Press.

McCloskey, Robert. 2004. 4th edition. *The American Supreme Court.* Chicago: University of Chicago Press.

McGovney, Dudley. 1930. *Cases on Constitutional Law.* Indianapolis, IN: Bobbs-Merril Co.

McGuire, Kevin T, and James A Stimson. 2004. "The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences." *Journal of Politics* 66(4): 1018–35.

Merriam, Charles Edward. 1903. *A History of American Political Theories,*. New York; London: Macmillan Co.

Morone, James A. 1998. *The Democratic Wish: Popular Participation and the Limits of American Government*. Yale University Press.

Murphy, William P. 1968. *The Triumph of Nationalism; State Sovereignty, the Founding Fathers, and the Making of the Constitution*. Chicago: Quadrangle Books.

Myers, Gustavus. 1912. *The History of the Supreme Court of the United States*. Chicago: C.H. Kerr & Company.

Nagel, Stuart S. 1965. "Court-Curbing Periods in American History." *Vanderbilt Law Review*. 18: 925.

Neely, Jr., Mark E. 1991. *The Fate of Liberty*. New York: Oxford University Press.

Newmyer, R. Kent. 1986. *The Supreme Court under Marshall and Taney*. Arlington Heights, IL: Harlan Davidson.

Novak, William. 1996. *The People's Welfare: Law and Regulation in Nineteenth-Century America*. Chapel Hill: University of North Carolina Press.

———. 2002. "Legal Origins of Modern American State," in Austin Sarat, Bryant Garth, Robert Kagan, *Looking Back on Law's Century*. Ithaca, NY: Cornell Press.

———. 2008. "The Myth of the Weak American State." *American Historical Review* 113: 752-772.

Nowak, John; Ronald Rotunda; and J. Nelson Young. 1978. *Handbook on Constitutional Law*. St Paul, MN: West Publishing Co.

O'Brien, David. 1999. "Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions," in *Supreme Court Decision-Making,* Cornell Clayton and Howard Gillman, eds. Chicago, IL: University of Chicago Press.

———. 2003. *Storm Center: The Supreme Court in American Politics*. New York: W.W. Norton & Company.

Odom, Thomas. 2009. *Cases and Materials on Federal Constitutional Law Vol. 1-3*. Newark, NJ: LexisNexis.

Orren, Karen. 1991. *Belated Feudalism: Labor, the Law, and Liberal Development in the United States*. New York: Cambridge University Press.

———. 2012. "Doing Time: A Theory of the Constitution." *Studies in American Political Development,*

26 (1): 71-81.

———. and Stephen Skowronek. 1994. "Beyond the Iconography of Order" in Lawrence Dodd and Calvin Jillson, eds. *The Dynamics of American Politics*, Boulder, CO: Westview Press.

———. and Stephen Skowronek. 2004. *The Search for American Political Development.* New York, NY: Cambridge University Press.

Pacelle, Richard L. 2002. *The Role of the Supreme Court in American Politics: The Least Dangerous Branch?* Cambridge, MA: Westview Press.

Parker, Wilson J.; Douglas M. Davison; Paul Finkelman; Michael Kent Curtis. 2003. *Constitutional Law in Context*. Durham, NC: Carolina Academic Press.

Paulsen, Michael; Steven G. Calabresi; Michael W. McConnell, and Samuel L. Bray. 2010. *The Constitution of the United States: Text, Structure, History, and Precedent.* New York, NY: Foundation Press.

Peirce, Joseph and Harry Cook. 1938. *A Manual to the Constitution of the United States.* Charlottesville, VA: Michie Co.

Peretti, Terri. 2002. "Does Judicial Independence Exist? The Lessons of Social Science Research," in *Judicial Independence at the Crossroads: An Interdisciplinary Approach,* Stephen B. Burbank and Barry Friedman, eds. Thousand Oaks, CA: Sage Publications.

———. 1999. *In Defense of a Political Court.* Princeton, NJ: Princeton University Press.

Pickerill, J. Mitchell and Cornell W. Clayton. 2004. "The Rehnquist Court and the Political Dynamics of Federalism." *Perspectives on Politics* 2(2): 233-248.

———. 2011. "Institutional Interdependence and the Separation of Powers," in *The Politics of Judicial Independence: Courts, Politics, and the Public*, Bruce Peabody, ed. Baltimore: Johns Hopkins University Press.

Pierson, Paul. 2005. "The Study of Policy Development." *Journal of Policy History* 17: 34-51.

Pomeroy, John and Edmund Bennett. 1868. *An Introduction to the Constitutional Law of the United States.* Cambridge, MA: Riverside Press.

Pool, L.H. 1902. "Judicial Centralization," *Yale Law Journal* 11 (5): 246-255.

Powers, Fred Perry. 1890. "Recent Centralizing Tendencies in the Supreme Court," *Political Science Quarterly* 5, 3: 389-410.

Pritchett, Herman C. 1963. *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947.* New York: Octagon Books.

Rana, Aziz. 2010. *The Two Faces of American Freedom.* Cambridge, MA: Harvard University Press.

Ravitch, Frank S. 1999. *School Prayer and Discrimination.* Boston: Northeastern University Press.

Rawle, William. 1825**.** *A View of the Constitution of the United States of America*. Philadelphia, PA: H.C. Carey & I. Lea.

Redfield, Isaac. 1867. "The Proper Limits between State and National Legislation and Jurisdiction. Speculations and Monopolies in the Staples of Subsistence. Railways a Matter of National Interest." *The American Law Register* 15, 4, New Series Volume 6: 193-202.

Rehnquist, William H. 2003. "Judicial Independence." *University of Richmond Law Review* 38: 579.

Redlich, Norman, Bernard Schwartz, and John Attanasio. 1995. *Understanding Constitutional Law*. New York, NY: M. Bender.

Richards, Mark J. and Herbert M. Kritzer. 2002. "Jurisprudential Regimes in Supreme Court Decision Making." *American Political Science Review* 96 (2): 305-320.

Robertson, David Brian. 2005a. "Madison's Opponents and Constitutional Design." *American Political Science Review* 99(02): 225–43.

———. 2005b. *The Constitution and America's Destiny*. New York: Cambridge University Press.

———. 2012. *Federalism and the Making of America*. New York: Routledge.

Rosen, Jeffrey. 2006. *The Most Democratic Branch: How the Courts Serve America*. Oxford; New York: Oxford University Press.

Rosenberg, Gerald N. 1991. *The Hollow Hope: Can Courts Bring about Social Change?* Chicago: University of Chicago.

———. 1992. "Judicial Independence and the Reality of Political Power." *The Review of Politics* 54(3): 369–98.

Rotunda, Ronald. 1981. *Modern Constitutional Law*. St. Paul, MN: West Publishing Co.

Sager, Lawrence Gene. 1978. "Fair Measure: The Legal Status of Underenforced Constitutional Norms." *Harvard Law Review,* 91: 1212-1264.

———. 1993. "Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law." *Northwestern University Law Review,* 88 (1): 410-435.

Sanders, Elizabeth. 1999. *Roots of Reform: Farmers, Workers, and the American State, 1877-1917*. Chicago: University of Chicago Press.

Schauer, Frederick. 2005. "The Exceptional First Amendment." In *AmericanExceptionalism and Human Rights*, ed. M. Ignatieff. Princeton: Princeton University Press.

Schickler, Eric. 2001. *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress*. Princeton, NJ: Princeton University Press.

Schwartz, Bernard. 1957. *The Supreme Court: Constitutional Revolution in Retrospect.* New York, NY: Ronald Press, Co.

Segal, Jeffrey and Harold Spaeth. 1993. *The Supreme Court and the Attitudinal Model.* New York, NY: Cambridge University Press.

———. Harold Spaeth, and Sara Benesh. 2005. *The Supreme Court and the American Legal System*. New York: Cambridge University Press.

Semonche, John E. 1978. *Charting the Future: The Supreme Court Responds to a Changing Society, 1890-1920*. Westport, CT: Greenwood Press.

Sergeant, Thomas. 1822. *Constitutional law: Being a Collection of Points Arising upon the Constitution and Jurisprudence of the United States.* Philadelphia, PA: A. Small.

Shanor, Charles. 2000. *American Constitutional Law: Structure and Reconstruction: Cases, Notes and Problems*. St. Paul, MN: West Publishing Co

Shapiro, Martin. 1981. *Courts: A Comparative and Political Analysis.* Chicago, IL: University of Chicago Press.

Sheffer, Martin S. 1999. *The Judicial Development of Presidential War Powers*. Westport, CT: Praeger.

Shefter, Martin. 1994. *Political Parties and the State: The American Historical Experience.* Princeton, NJ: Princeton University Press.

Shklar, Judith N. 1998. "Redeeming American Political Theory," in Stanley Hoffmann and Dennis F. Thompson, eds. *Redeeming American Political Thought.* Chicago: University of Chicago Press.

———. 1998. "Positive Liberty, Negative Liberty in the United States," in Stanley Hoffmann and Dennis F. Thompson, eds. *Redeeming American Political Thought.* Chicago: University of Chicago Press.

Sholley, John B. 1951. *Cases on Constitutional Law.* Indianapolis, IN: Bobbs- Merrill Company, Inc.

Siemers, David. 2002. *Ratifying the Republic: Antifederalists and Federalists in Constitutional Time.* Stanford, California: Stanford University Press.

Skocpol, Theda. 1980. "Political Response to Capitalist Crisis: Neo-Marxist Theories of the State and the Case of the New Deal." *Politics and Society* 10:155– 201.

———. 1985. "Bringing the State Back In: Strategies of Analysis in Current Research," in Peter Evans, Dietrich Rueschemeyer, and Theda Skocopol, eds. *Bringing the State Back In.* New York: Cambridge University Press.

———. 1992. *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States*. Cambridge, MA: Harvard University Press.

Sklar, Martin. 1988. *The Corporate Reconstruction of American Capitalism, 1890–1916: The Market, the Law and Politics*. New York: Cambridge University Press.

Skowronek, Stephen. 1982. *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920*. New York, NY: Cambridge University Press.

———. 1993. *The Politics Presidents Make: Leadership from John Adams to George Bush*. Cambridge, MA: Belknap Press Harvard University Press

———. 2003. "What's Wrong With APD?" *Studies in American Political Development,* 17: 107-110.

Skrentny, John David. 1996. *The Ironies of Affirmative Action: Politics, Culture, and Justice in America*. Chicago: University of Chicago Press.

Skrentny, John David. 2006. "Law and the American State" *Annual Review of Sociology* 32: 213-244.

Smith, J. Allen. 1930. *The Growth and Decadence of Constitutional Government.* New York: Henry Holt and Co.

Smith, Rogers M. 1988. "Political Jurisprudence, The 'New Institutionalism,' and the Future of Public Law." *American Political Science Review* 82(1): 89–108.

———. 2003. "Substance and Methods in APD Research." *Studies in American Political Development*, 17: 111-115.

Streeck, Wolfgang and Kathleen Thelen, eds. 2005. *Beyond Continuity: Institutional Change in Advanced Political Economies*. New York: Oxford University Press.

Stevens, Robert. 1983. *Law School: Legal Education in America from the 1850s to 1980s.* Chapel Hill: University of North Carolina Press.

Stone, Geoffrey R, et al. 1986. *Constitutional Law*. Boston, MA: Little, Brown and Co.

Story, Joseph. 1833. *Commentaries on the Constitution of the United States.* Boston, MA: Hilliard, Gray and Company.

Strauss, David A. 1996. "Common Law Constitutional Interpretation." *University of Chicago Law Review* 63(3): 877-935.

Strong, Frank R. 1950. *American Constitutional Law*. Buffalo, NY: Dennis and Co. Inc.

Teles, Steven. 2006. "Conservative Mobilization against the Activist State," in *Transformations of the American Polit*y, Paul Pierson and Theda Skocpol, eds. Princeton, NJ: Princeton University Press.

Thayer, James Bradley. 1895. *Cases on Constitutional Law Vol. 1-2*. Cambridge, MA: Charles W. Sever.

Thelen, Kathleen. 2003. "How Institutions Evolve: Insights from Comparative Historical Analysis," in *Comparative Historical Analysis in the Social Sciences*, eds. James Mahoney and Dietrich Rueschemeyer. Cambridge: Cambridge University Press.

Tocqueville, Alexis de. 2003. *Democracy in America*. The Lawbook Exchange, Ltd.

Tribe, Laurence. 1978. *American Constitutional Law*. Mineola, NY: Foundation Press.

Tucker, John Randolph. 1899. *The Constitution of the United States: A Critical Discussion of its Genesis, Development, and Interpretation* Vol. 1-2. Chicago, IL: Callaghan and Co.

Tushnet, Mark. 2006. "The Supreme Court and the National Political Order: Collaboration and Confrontation" in *The Supreme Court and American Political Development*, Ronald Kahn and Ken I. Kersch, eds. Lawrence: University of Kansas Press.

———. 1922. *The Supreme Court in United States History, 1836-1918*. Boston: Little, Brown, and Company.

Vanberg, Georg. 2001. "Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review." *American Journal of Political Science* 45(2): 346–61.

Walker, John. 2007. "Politics and the Confirmation Process: Thoughts on the Roberts and Alito Hearings," in *Bench Press: The Collision of Courts, Politics, and the Media.* Keith Bybee, ed. Stanford: Stanford University Press.

Wambaugh, Eugene. 1914. *A Selection of Cases on Constitutional Law*. Cambridge, MA: Harvard University Press.

Weber, Max. 1930. *The Protestant Ethic and the Spirit of Capitalism*. New York: Routledge.

Weir, Margaret, Ann Shola Orloff, and Theda Skocpol. 1988. *The Politics of Social Policy in the United States*. Princeton University Press.

White, G. Edward. 1990. *The Marshall Court and Cultural Change, 1815-1835*. New York: Oxford University Press.

———. 2000. *The Constitution and the New Deal.* Cambridge, MA: Harvard University Press.

———. Gerald Gunther, United States, and Permanent Committee for the Oliver Wendell Holmes Devise. 1988. *The Marshall Court and Cultural Change, 1815-35*. New York; London: Macmillan Pub. Co. ; Collier Macmillan Publishers.

Whittington, Keith. 2000. "Once More Unto the Breach: Post-behavioralist Approaches to Judicial Politics. *Law & Social Inquiry* 25*:* 601-634

———. 2005. "'Interpose Your Friendly Hand': Political Supports for the Exercise of Judicial Review by the United States Supreme Court," *American Political Science Review* 99: 584-96.

———. 2007. *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History.* Princeton, NJ: Princeton University Press.

———, and Amanda Rinderle. 2012. "Making a Mountain Out of a Molehill? Marbury and the Construction of the Constitutional Canon." *Hastings Constitutional Law Quarterly*, 39 (4): 823-860.

Wiebe, Robert H. 1985. *The Opening of American Society: From the Adoption of the Constitution to the Eve of Disunion*. New York: Vintage Books

Willoughby, Westel. 1896. *An Examination of the Nature of the State: A Study in Political Philosophy*. New York: Macmillan.

———. 1912. *Principles of the Constitutional Law of the United States*. New York, NY: Baker, Voorhis and Company.

Wilson, Mark R. 2008. "Law and the American, from the Revolution to the Civil War: Institutional Growth and Structural Change" in Michael Grossberg and Christopher Tomlins, eds. *The Cambridge History of Law in America* vol. II. New York: Cambridge University Press.

Wilson, Woodrow. 1890. *The State: Elements of Historical and Practical Politics*. Boston: D.C. Heath.

———. 1908. *The Constitutional Government in the United States*. New York, NY: Columbia University Press.

——— and Edward S Corwin. 1910. *Division and Reunion, 1829-1909*. New York: Longmans, Green, and Co.

Zackin, Emily. 2010. *Positive Constitutional Rights in the United States*. Princeton Dissertation. Ann Arbor, MI: ProQuest LLC.

Ziblatt, Daniel. 2006. *Structuring the State: The Formation of Italy and Germany and the Puzzle of Federalism*. Princeton: Princeton University Press.