

A MORE PERFECT UNION: FEDERALISM IN THE POSTBELLUM COURT¹

“The division of powers made by the Constitution between the States and the Union is not a proper one...the framers might have made a far better Government than the one they did make, if they had only tried.”

The Nation, October 18, 1883

In his Gettysburg Address, President Abraham Lincoln stressed the “unfinished work” of the nation.² In his Second Inaugural Address, delivered two years later and a month before the end of the Civil War, Lincoln again urged his fellow countrymen, “to finish the work we are in.” The “work” to which Lincoln referred were the goals laid out in the Declaration of Independence—“the proposition that all men are created equal”—and in the United States Constitution—“a more perfect Union.” We know, of course, that the Civil War brought an end to slavery, though just how much the ideals of the Declaration were realized is the subject of the next chapter. Yet it is far less clear whether, or how much, war altered the power of states within the Union.

Whereas antebellum southern slaveholders successfully advanced *states’ rights* in their effort to put slavery (or the property rights of slaveholders) beyond the reach of the national government, postwar Americans ratified three amendments to the United States Constitution in order to protect the rights of individuals from *state aggression*.³ It is

¹ Naming the post-Civil War Court is not without significant complications. It is not accurate to refer to the Court(s) by most of the usual conventions. First, as suggested elsewhere in this book, calling the bench by the name of the Chief Justice is misleading, since the Chief is often not the predominant influence within the Court. Neither Chase nor Waite—the two chief justices during the period under consideration—factored as significantly as Miller, Field, Bradley, or Harlan. Second, the pattern of decisions under a particular Chief often change character over time—partly as a function of the changing personalities on the bench—such that the whole tenure of a Chief cannot be treated as the same. Third, since legal matters often don’t percolate to the Court until well after the events in question; political Reconstruction ended long before legal Reconstruction actually did. On this last point, it is important to mention that Chase’s term as Chief does coincide, ironically, with the end of Reconstruction as Reconstruction, which is defined elsewhere in this book as having ended three or four years earlier than typically believed (in 1873, not in 1876/77).

² Gettysburg Address, delivered at the dedication of Soldiers’ National Cemetery on November 19, 1863.

³ On the development of the states’ rights theory and its relationship to slavery, see: Loren Miller, *The Petitioners*, (1967), 30. Miller states, “The constant harping on the rights of states to determine the fate of

commonly assumed that states' rights were significantly eroded, as result of the Civil War, and a new more vigorous nationalism was created. Furthermore, as is frequently observed, Americans began to refer to their country as one nation in a way they had not before. While it was previously said, "The United States are," postwar Americans began to speak of how "The United States is..." All of this suggests a meteoric rise of the national government at the expense of the states.

Reconstruction posed an undeniable threat to the power of states; never before was their political position so precarious. Thus, it is tempting to view the Civil War as an important fulcrum in the relations between national government and the states, pitting pre-war federalism and the commitment to state supremacy against post-war nationalism and the rise of centralized authority. But that would be doubly incorrect. On the one hand, even in the antebellum period, the states did not enjoy unlimited sovereignty over the national government and, on the other hand, although some postwar Radical Republicans were willing to sacrifice states' rights to support the rights of four million recently freed slaves, most Americans continued to support the idea of states' rights and cared very little for the rights of blacks. More relevant here, the Supreme Court harbored that majority view.

Lincoln's newly appointed Republican majority on the bench—Justices Swayne, Miller, Davis, Field, and Chase—might well have validated the social and political engineering of the Radical minority within their party, but they did not.⁴ Although the traditional division of power between the national government and the states appears to

slaves and slavery gave rise (along with other forces) to the states' rights doctrine. States' rights became the answer to any and all riddles with the Constitution."

⁴ As was seen in Chapter II, only four of Lincoln's five appointees were Republican; Stephen J. Field was a pro-Union Democrat. Nevertheless, all five justices remained loyal to the Republican agenda throughout Lincoln's tenure as president.

have meant little to some radicals within Congress, the Supreme Court justices, like the majority of Republicans who confirmed them, favored a continuation of the status quo and the traditional balance between federal and state authorities.

But if the postbellum Supreme Court favored a continuation of the existing federalist system, as is here contended, why did they suddenly overturn so much state legislation? Indeed, in the entire time between when the Supreme Court first overturned a state law and the Civil War, a period of over fifty years, the Court reversed forty acts of state legislation.⁵ By contrast, in just nine years after the Civil War, 1865 through 1873, the new Republican majority vetoed almost the exact same number of state acts, thirty-six, which suggests a rapid rise in anti-state bias on the bench. We so often hear that “the numbers never lie.” Well, in this instance, they just might. This chapter will consider the notion of “dual federalism,” Republican notions of federalism and the Reconstruction Amendments, some numbers relating to the Court’s oversight of state legislation, and the key federalism cases under Chief Justice Salmon Chase. It will become evident that the postbellum Court was as attached to states’ rights as the antebellum Court.

“Dual Federalism”

Americans have been consistently inconsistent as to states’ rights, which further complicates any effort to understand the concept of federalism. It is important to keep in mind that most Americans rarely encountered the national government *per se*. Most governance took place at the local level, such that even state government was regarded

⁵ The first time the Supreme Court overturned a state law was in *United States v. Judge Peters*, 9 U.S. 115 (1809). Many scholars have argued that the job of overturning the states is best left to Congress rather than the Supreme Court. See Herbert Wechsler, “The Political Safeguards of Federalism: The role of The States in the Composition and Selection of the National Government,” *Columbia Law Review*, Vol. 54, No. 4, 543-560, (April 1954), esp. 559-60. For the names of the forty cases in which the Court vetoed state legislation, see: *The Supreme Court Compendium*, (2007), 181-2; Also see Blaine Moore, *The Supreme Court and unconstitutional legislation*, (2002 edition), Appendix II, 225-27.

somewhat skeptically. Also, of course, people viewed all government—local, state, or federal—in accordance to their own evolving self-interest.⁶ In the post-Gold Rush euphoria and economic boom that spanned most of the 1850s, northerners were often as suspicious of federal government invasions upon business as southerners were open to national legal and commercial affiliations as well as national enforcement of fugitive slave laws. Come the panic of 1857, however, a significant flip occurred. Southerners whose cotton had doubled in price and were previously unaffected by national now feared federal policies (such as the homestead bill and protective tariffs) that were advocated by newly elected Republican congressmen trying to protect collapsing northern industry.⁷ What had been yesterday's illness became tomorrow's medicine.

Generally speaking, the prevailing notion of states' rights, before and after the Civil War, was predicated upon "dual federalism," where the compact (or Union) entered into by sovereign states involved only partial and specific relinquishment of sovereignty to the national government.⁸ Dual federalism assumed that distinct and autonomous spheres, as opposed to competing interests, separated the states from the national government.⁹ Over

⁶ Even the Court itself could be inconsistent, depending upon the justices' objectives. Taney, supposedly a states' rights advocate, found for the federal government in *Prigg v Pennsylvania*, 41 U.S. 539 (1842), thus creating the preemption doctrine that put *any* federal law above *all* state law. Justice Samuel Miller, a Republican and nationalist appointed by Lincoln, found for the state of Louisiana in the *Slaughterhouse Cases*, 83 U.S. 36 (1873). But for Taney, states' rights were apparently not as important as the national fugitive slave law; for Miller, national authority mattered less than railroad bondholders back home in Iowa. *Prigg*, *Slaughterhouse*, Miller, and the Court's inconsistency are all subjects covered in other chapters of this book.

⁷ The Republican Party enjoyed huge congressional success in 1858, partly as response to economic fallout. McDonald's claim that southerners seceded "not as an act of desperation but rather as an act of supreme self-confidence" seems overstated. For more on this, and the economic argument, see: McDonald, *States' Rights*, 165-66, 180-83, 187.

⁸ See: Edward S. Corwin, *The Power of Congress to Prohibit Commerce*, 18 *Corn. L. Q.* 477, 482 (1933). Corwin later marked the end of dual federalism, after *United States v. Darby* 312 U.S. 100, 124 (1941), in *The Passing of Dual Federalism*, 36 *Va. L. Rev.* 1 (1950).

⁹ Of course the competing interests that separated the states from one another threatened to push states' rights advocates (who would have otherwise subscribed to the notion of dual sovereignty) back toward earlier notions of state sovereignty. Consider Franklin Pierce (the doughface Democrat who served as the 14th President of the United States) in his Third State of the Union Address, for example, where he cautions

time, a new perspective took shape, what I will call protonationalism.¹⁰ If not the Revolutionary era Federalists, then abolitionists were probably the original nationalists; the latter's constitutionalism held that the national government always had the superior authority of natural law.¹¹ But the majority of early Republicans, as Michael Les Benedict has demonstrated, "adhered to a concept of nationalism far less expansive than what has since emerged."¹² Reconstruction Republicans were hardly nationalists of the New Deal sort; they privileged Congress over the states, but they tended to limit the national reach to (ill-defined) civil rights violations.

Benedict gauged Republican commitment to states' rights by suggesting that, in their 1860 party platform, they "acknowledged the obligation to preserve 'rights of the States...inviolable..., and especially the right of each State to order and control its own domestic institutions...exclusively, rights essential to that balance of power on which the perfection and endurance of our political fabric depends.'"¹³ Though useful, the party platform of 1860 may not be the most reliable indicator of Republican sentiments. The Republican Party was grasping for straws by that time, as seen in their willingness to support a draft amendment to the Constitution that left slavery alone in the states where it

northerners (abolitionists) agitating against southerners, that the Constitution is "an express compact between the independent sovereign powers of the United States." For Pierce's Third State of the Union: http://en.wikisource.org/wiki/Franklin_Pierce%27s_Third_State_of_the_Union_Address

¹⁰ Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 Sup. Ct. Rev. 46. As Benedict suggests, "This commitment to States rights within the federal system seriously compromised Republican efforts to establish full freedom and equality for the newly freed slaves." 47. Truer words were never written. I am very grateful to Professor Benedict for bringing this article to my attention. I am also grateful for the emails he has exchanged with me on this and related topics. It is always frustrating, of course, to find that the ideas we take to be original have already been so articulately expressed by the scholars on whose shoulders we stand.

¹¹ See WILLIAM WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* (1977).

¹² Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 Sup. Ct. Rev. 39,40. For Benedict, it was quite clear: "Republicans could not shake off their older notions of federalism." 47 Benedict called the Republican brand of nationalism "State-centered nationalism," which is true but not entirely clear. 53

¹³ Benedict, *supra*, 45.

already existed, sometimes called the “ghost amendment.” That amendment, proposed late in 1860, read as follows: “No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.” Since the Republicans were desperate to hold the Union together, their public pronouncements are not entirely trustworthy, perhaps especially their party platform. Yet there is much else by which to gauge Republican intentions concerning federalism.

Secession and the Reconstructed Constitution

There is one clear way in which the Civil War diminished the power of the states.¹⁴ The power to secede certainly got squashed forever. Among the several constitutional conundrums after the Civil War, one of the most important pertained to how to deal with the seceded states. Never before had Americans confronted so profound a constitutional crisis. There were at least three different schools of thought regarding seceded states. A very few Republicans, Pennsylvania Representative Thaddeus Stevens most vocal among them, claimed that southern states had been conquered by the Union and were thereby deprived of any constitutionally recognizable rights. Some others, like Senator Charles Sumner of Massachusetts, insisted that southern states had committed political suicide and were thus reduced to the status of territories belonging to the nation at large.

Whereas Stevens implicitly endorsed the legality of secession, Sumner saw secession as

¹⁴ States’ rights suffered even in the Confederacy. Forrest McDonald astutely observed that both President Lincoln and President Jefferson Davis of the Confederate States of America “found it necessary to suppress states’ rights for the nonce and to centralize power...And yet,...the doctrine of states’ rights reemerged, altered but as vital as ever.” Forrest McDonald, *STATES’ RIGHTS AND THE UNION*, (2000), 194. McDonald later pointed out that, while Davis did indeed centralize, the constitutional protections there of states’ rights were “more formidable.” *Id.* 202

categorically illegal in a way that seceded states became instantly deprived of their statehood. Yet most Americans seem to have believed that seceding states had temporarily forfeited their rights and authorities as states while remaining states in the formal sense of the word; they could be reinstated if, as, and when Congress saw fit.¹⁵

According to the traditional view, southerners were states' rights advocates while northerners sought a more centralized (re-) Union.¹⁶ After the war, the story goes, nationalizing Republicans beat back once dominant southern states.¹⁷ Certainly, Amendments Thirteen through Fifteen bolstered the power of the national government, on paper at least.¹⁸ Historians also generally agree that the alterations to the Constitution

¹⁵ This view essentially corresponds to Chief Justice Chase's majority opinion in *Texas v White*, considered below.

¹⁶ See Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863, (1986). "Ambiguities in legal theory became urgent political questions as disagreements over the authority to determine the status and rights of slaves and fugitive slaves increasingly divided North and South...By determining to which government the citizen owed primary allegiance, the Civil War would resolve whether the national or the state government possessed primary authority to define and secure the status and rights of the individual." 872-74 Kaczorowski's larger point is that what emerges from the postwar period "congressional, administrative, and judicial record is a commonly shared theory of national civil rights enforcement authority," which "the Supreme Court ultimately rejected." 864 One has to wonder about the depth of American commitment to the "theory of national civil rights" given the lack of public resistance to the Court's decision in the *Slaughterhouse Cases* (as shown in the next chapter). In fact, Kaczorowski's article raises several questions. Were Republican efforts toward restoration of the Confederate states really about attaining civil rights, as suggested, or actually more about achieving Confederate submission? Kaczorowski insists that "a new national ideology" developed, where personal freedom would be guaranteed by national supremacy. "The protection of the Freedmen thus served as a rallying point behind which Republicans united." (880) But was that anything more than just a rallying point; how great was the actual commitment to black civil rights *per se*, independent of the punishment, implicit within the enforcement of those rights, inflicted upon southern states? In other words, were most Republicans *for* blacks or simply *against* southern resistance? Asked in yet another way, if Republicans were *for* anything, was it not for the rule of law that southerners openly defied? Even Kaczorowski is careful to acknowledge, "Congress was not attempting to integrate American society" and that civil rights as proposed was "a modest objective." (883) As for national authority, it seems more likely that the national government achieved (at best) parity with rather than supremacy to the states (which, though significant, was not all that Kaczorowski claimed).

¹⁷ The process of beating back the states probably began with the Civil War, not Reconstruction. "As more than a few historians have noted, Reconstruction began not with Appomattox in 1865, but with Fort Sumter in 1861." Michael Vorenberg, *Reconstruction as a Constitutional Crisis*, in *Reconstructions*, Thomas J. Brown, Ed., (Oxford, 2006), 143.

¹⁸ See Lawrence Friedman, *A History of American Law*, and the "marvelous powers of germination." 300-301 Friedman insists that "Heavy use of the fourteenth amendment occurred only at the very end of the 19th century." 302 "In the first decade of the amendment. The United States Supreme Court decided only three cases, in the next decade, forty six. After 1896, "the flood burst. Between that date and the end of

resulting from the Reconstruction Amendments represent the most significant achievements of the period.¹⁹ Through those amendments, slavery was eliminated, recently freed slaves got included as American citizens, and it became unconstitutional to exclude blacks from voting *on account of race*.²⁰ The Fourteenth Amendment gave us some of the most commonly quoted and frequently employed clauses of the Constitution, including “privileges and immunities,” “due process,” and “equal protection,” although some legal historians have argued that the amendments were never really valid since southern states ratified them with a gun to their heads.²¹ To synthesize the literature on these amendments would take longer than it took Congress to create them.²²

Aside from proposing the Reconstruction Amendments, Congress passed a multitude of legislative acts concerning readmission of southern states, redevelopment of the national economy, and the four million freed slaves who made up over ten percent of the American population. In the decade between 1865 and 1875, Congress passed four Reconstruction Acts²³ and four Civil Rights Acts;²⁴ the former were *proactive* initiatives

the 1905 term of court, two hundred and ninety-seven cases were passed upon under the amendment—substantially all under the ‘due process’ and ‘equal protection’ clauses.” 302 Friedman quoted Edward Corwin, *The Twilight of the Supreme Court* (1934), 77.

¹⁹ Some, like George Fletcher, point out that it was a longtime coming, however, before the benefits of the Reconstruction Amendments could be realized. See George Fletcher, *Our Secret Constitution*. Others, like Harold Hyman, claim that Reconstruction “failed to translate into reality the substance of the Republicans’ vision of equality for Americans before states’ laws as a characteristic of national citizenship, and that vision dimmed.” See Harold M. Hyman, *A More Perfect Union* (Knopf, 1973), 553.

²⁰ The southern states became very adept at sabotaging black voters through other means than race, using such obstacles as nearly impossible literacy tests. There is more on this in a later chapter.

²¹ See Bruce Ackerman, *We The People: Transformations*. See also: Lawrence Friedman, *A History of American Law*; the Reconstruction Amendments got “rammed down the throats of the southern states.” 299

²² It would take far longer to read all the literature on the motivating influences (“intent”) behind the Fourteenth Amendment than the time it took the famous 39th Congress to actually create the amendment. On the lofty mission of the 39th Congress, see the opening remarks of House Speaker Schuyler Colfax, who insisted the session would provide “protection to all men in their inalienable rights.” Like so much of what came from the 39th Congress, whether they actually meant *all* men, white and black, and what they understood by “inalienable rights,” has long been debated. See *Congressional Globe*, 39-1, 5. For more on the history of the Fourteenth Amendment, see the introduction of this book.

²³ Congress passed four Reconstruction Acts: 1) March 2, 1867---39 Cong. Ch. 153; 14 Stat. 428; 2) March 23, 1867---40 Cong. Ch. 6; 15 Stat. 2; 3) July 19, 1867---40 Cong. Ch. 30; 15 Stat. 14; and 4) March 11,

designed to rebuild America and assimilate blacks, whereas the latter were *reactive* responses to southern resistance to Reconstruction efforts.

Deliberations in the Thirty-Ninth Congress over how to readmit seceded states and states' rights forcefully influenced the debates regarding the Fourteenth Amendment, as many congressmen strove to protect long-standing conceptions of federalism.²⁵

Representative Robert Hale of New York, one of the more conservative Republicans in the House, insisted that the rights of Congress were limited to those enumerated in Article 1 Section 8, which should not be expanded, especially by the “extremely vague, loose, and indefinite provisions of the proposed amendment.”²⁶ Hale's colleague from New York and fellow Republican Representative Thomas Davis spoke out even more directly. He professed that they were all representatives of the states, under “solemn obligations to see that while the national sovereignty of the Union is preserved, no infringement of the reserved rights of the States shall be permitted.”²⁷ These were just two of several northern Republicans speaking out for states rights. As Les Benedict suggested, Republicans strove “to protect the States' rights which had been an implicit

1868---Ch. 25, 15 Stat. 25. These acts created military districts in the seceded states, required approval of new state constitutions by Congress, granted voting rights to all men in southern states, and forced southern states to ratify the Reconstruction Amendments.

²⁴ Congress passed four Civil Rights Acts: 1) April 9, 1866---39 Cong. Ch. 31; 14 Stat. 27; 2) May 31, 1870---41 Cong. Ch. 114, Vol. 16 p. 140; 3) April 20, 1871---42 Cong. Ch. 22; 17 Stat. 13, also known as both the Enforcement Act and the Ku Klux Klan Act and codified as 42 U.S.C. § 1983; and 4) March 1, 1875---43 Cong. Ch. 114; 18 Stat. 335. The many acts of Congress during this period are often referred to by various names, sometimes “Reconstruction Acts” Enforcement Acts,” “Ku Klux Klan Acts,” and “Civil Rights Acts.” Each act begins with a descriptive statement along the lines of “An Act to protect,” or “An Act to Enforce,” but they have all been categorized as Civil Rights Acts here.

²⁵ The 39th Congress convened from March 4, 1865 to March 3, 1867, in three sessions: Special Session March 4-March 11, 1865; First Session December 4, 1865 to July 28, 1866; Second Session December 3, 1866 to March 3, 1867 (a lame duck session following the elections of 1866). The Fourteenth Amendment, formally proposed on June 13, 1866, was the product of the 39th Congress, First Session.

²⁶ Hale, CG 39-1, 1064.

²⁷ Davis, CG 39-1, 1083.

element of nationalism as it had been understood for fifty years.”²⁸ Nevertheless, a threat to federalism remained. As historian Richard Aynes succinctly observed, “The scope of the Fourteenth Amendment determines, in large measure, the allocation of responsibility and power between the states and the government of the United States.”²⁹

Republicans expected Congress to have the upper hand with regard to civil rights, but *only* when violated by southern states. The final section of each Reconstruction amendment granted Congress increased power over the states, whenever necessary to protect blacks. Section 2 of the Thirteenth (abolishing slavery), Section 5 of the Fourteenth (granting citizenship to blacks), and Section 2 of the Fifteenth Amendment (trying to franchise blacks), all stipulated that “Congress shall have the power to enforce...by appropriate legislation” against the states. Just how much power that gave Congress, and over what sorts of matters, has been forever contested.

During the debates on the Fourteenth Amendment, the amendment’s primary author, Ohio Representative John Bingham, insisted, “The adoption of the proposed amendment will take from the States no rights that belong to the States.”³⁰ Yet he went on to say, “if they [the states] conspire together to enact laws refusing equal protection to life, liberty, or property, the Congress is thereby vested with powers to hold them to answer.”³¹ However much Republicans strove to protect the newly made black citizens, most of them intended to maintain the federalist system that had served them so well, especially if the South could be counted on to stay within the law.³²

²⁸ Benedict, *Preserving Federalism*, 41.

²⁹ Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and The Fourteenth Amendment*, 70 *Chi.-Kent L. Rev.* 1197, 1198, (1994-1995).

³⁰ *Congressional Globe* 39-1, 1090.

³¹ *Ibid.*

³² Some readers will rightly hesitate at language like “most of them,” but it is simply not possible to speak of the Republican Party in monolithic terms.

The Court Takes Center Stage

Due to the many unhealed wounds in the country just after the war, the Supreme Court proved reluctant to opine upon the constitutionality of any of federal legislation.³³ Lincoln's justices were certainly careful not to undermine their party's efforts to reconstruct the nation. Yet with time, and repeated evidence that southerners had no intention of adhering to the spirit of the Reconstruction Amendments, it became necessary for the Supreme Court to step in. Thus, as was seen in the last chapter, the power of the Supreme Court was greatly enhanced, quite unexpectedly, as it became the Court's role to determine the meaning of "appropriate legislation."

But to what extent did the justices honor Republican objectives, and how did they regard state legislation?³⁴ Making sense of the confusions and controversies surrounding federalism—"the uncharted borders where the powers of state and national governments would overlap"³⁵—very early became the job of the Supreme Court. As suggested in chapter two (The Antebellum Court), the Founders gave us mixed signals regarding the reach of the judiciary. To complicate things even further, neither Chief Justice John Marshall (1801 to 1835) nor Chief Justice Roger Taney (1836 to 1864) was completely

³³ It is often argued that the Court's timidity should be attributed to anxiety over Congressional retribution, but, as was seen in the earlier chapter *The Court and Congress*, that is simply bunk. Chase and his colleagues were more assertive than any previous justices of the Supreme Court.

³⁴ As always, defining "Republican" is as important as it is difficult. Les Benedict has quite successfully exposed the vast variety covered by the Republican umbrella. See *A Compromise of Principle: Congressional Republicans and Reconstruction, 1863-1869*, (NY: Norton, 1974) Benedict takes the view that "the Justices did not bow to racism, betray nationalism, and revive discredited theories of federalism." See "Preserving Federalism," supra. My contention, as shown below in the chapter *The Court and Blacks*, is that the justices were no more or less racist than their contemporaries, which is to say they were racist, anti-nationalist, and traditional (small "f") federalists. Indeed, the Court's success is partly a result of a racial bias (that can only be called "racism," however anachronistically) similar to that of most Americans at that time. With regard to federalism, the justices were at odds with the stated mission of the Fourteenth Amendment, but in sync with public opinion.

³⁵ Rakove, 175.

consistent with regard to federal authority, both having had different agendas and separate ways of employing the Constitution. It is mildly ironic that Marshall—the father of judicial review—only once overturned national legislation (and then just barely³⁶), while Taney—a supposedly strong states’ rights advocate and author of “political question” doctrine (the notion that many issues are better handled by legislatures than the courts)—had no qualms overturning state courts and legislatures, something the Court did twenty-two times under his watch (three times more than occurred under Marshall, in six fewer years).³⁷

During the eight years of Chief Justice Salmon Chase, the incidence of judicial review grew even more prevalent. Chase believed in a powerful judiciary: “It is the function of the judiciary to interpret and apply the law...It can only declare what the law is, and enforce, by proper process, that law thus declared.”³⁸ In applying that law, Chase proved quite willing to overturn both Congress and the States. Chase was true to his Jeffersonian roots in exercising judicial review, as it was Jefferson who first insisted that a judicial arbiter was preferable to a legislative overseer, on the assumption that judicial intervention would be a less draconian check on the states (as well as property and wealth) than a congressional or majoritarian negative.³⁹

³⁶ In *Marbury v. Madison*, 5 U.S. 137, (1803), Chief Justice Marshall overturned a single sentence, relating to writs of mandamus, of the Judiciary Act of 1789.

³⁷ As stated in an earlier chapter and is well known, in *Marbury*, Marshall really only vetoed a single sentence of the Judiciary Act of 1789, relating to writs of mandamus. With regard to Supreme Court vetoes of state legislation, the record is not entirely clear. Stanley Kutler, in his book *Judicial Politics During Reconstruction*, states that Taney and Marshall together overturned state legislatures 30 times, while The Supreme Court Compendium lists 41 such instances, 19 times under Marshall and 22 times under Taney. See *The Supreme Court Compendium*, Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker Eds. (Wash. D.C.: CQ Press, 2007), 181.

³⁸ *Hepburn v. Griswold*, 76 U.S. 603, 611, (1870)

³⁹ See Jefferson’s letter to Madison, June 20, 1787. Madison did not share Jefferson’s view, as indicated in his response of October 24, 1787. The debate over whether Congress or the Court should negative state laws, with Federalists typically taking the position that Congress should have that power and the Paterson Plan calling for a judicial arbiter.

The Numbers

Number can be numbing. Historians love dates, even if they are often less enamored with statistics. But to fully understand the Court's bias regarding federalism, an investigation of the numbers is necessary. Understanding the outcome of judicial review is not as straightforward as one might assume, or prefer. Significantly, much of that review pertains to federalism. According to historian Jack Rakove, "judicial review has always been much more concerned with policing the boundaries of *federalism* than with maintaining the balance of power within the national government itself. Most of the legislative acts that the Court overturns are the work of state and local legislatures, not Congress."⁴⁰ A closer look at the numbers, however, suggests a different and more complicated story.

Chief Justice John Marshall (1801-1835) and Chief Justice Roger Taney (1836-1864) used the power provided for in Section 25 of the Judiciary Act of 1789 (authorizing Supreme Court review of state court decisions) to overturn state legislatures many times.⁴¹ Yet Chief Justice Chase and his cohorts were even more active in slapping down the states, absolutely and relatively.⁴² That Marshall and Taney vetoed so much state

⁴⁰ Jack N. Rakove, *Judicial Federalism: A Quick Sketch*, OAH Magazine of History, Vol. 13 No. 1, Fall 1998

⁴¹ "Report upon the Judiciary," Register of Debates, 21st Cong., 2nd Sess., App., p. lxxvii. For the Judiciary Act of 1789, see: http://www.constitution.org/uslaw/judiciary_1789.htm Sec. 25 reads: "And be it further enacted, That a final judgment or decree in any suit, in the highest court of law or equity of a State... may be re-examined and reversed or affirmed in the Supreme Court of the United States..."

⁴² When reporting the numbers, it is obviously essential to be accurate. But that turns out to be as difficult as it is uncommon. It is quite enough to make the head spin. In 1913, Benjamin Moore wrote a widely respected book entitled *The Supreme Court and Unconstitutional Legislation*. Moore listed 43 cases where the Supreme Court overturned state legislation before 1865. In 1938, Harvard government professor Benjamin Wright claimed that Moore's list "contains a number of omissions." Wright found fifty-eight such cases before 1865, and 52 between 1865 and 1873. See Benjamin Fletcher Wright, *The Contract Clause of the Constitution*, (Cambridge: Harvard Univ. Press, 1938), 92. In 1968, Stanley Kutler put the number of state vetoes before the war at 30 and at 46 after (during Chase's term). See Stanley Kutler, *Judicial Politics During Reconstruction*. The Supreme Court Compendium lists 40 state vetoes before the

legislation is all the more notable when compared to the very few times, two only (once in *Marbury v Madison*⁴³ and again in *Dred Scott v Sandford*⁴⁴), where those justices vetoed Congress.⁴⁵ Here again, the Court under Chase became even more militant; in just eight years, the bench vetoed five times more congressional legislation than did Marshall and Taney combined.⁴⁶ The antebellum ratio of federal to state vetoes of 1:20 (only one federal veto for every twenty state vetoes) shifted to under 1:5 during the Chase years (one federal veto for every five state vetoes).⁴⁷ [Appendix A presents this information graphically.] As it turned out, Lincoln's justices were more assertive vis-à-vis both Congress and the states, though much more, relatively, toward Congress.⁴⁸ But consider what was happening between the Supreme Court and the states in the 1860s and early 1870s.

This brings up even more numbers to be evaluated. First, the Court's caseload grew rapidly. During Chief Justice Marshall's tenure, the number of cases the Court accepted was four in 1801 and twenty-seven in 1810. The numbers peaked at fifty-three in 1828

Civil War (19 under Marshall and 21 under Taney), with 34 under Chase. There are cases on each of these lists that are subject to review as to whether they qualify as vetoes.

⁴³ 5 U.S. 137 (1803)

⁴⁴ 60 U.S. 393 (1857)

⁴⁵ Marshall claimed the power to review state supreme court decisions in civil suits in *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816) and in criminal cases in *Cohens v. Virginia*, 19 U.S. 264 (1821).

⁴⁶ As is reported in the next chapter, between the years of 1865 and 1873 alone, the Court overturned 10 acts of Congress and 46 acts of state legislatures. Of course these numbers vary slightly, depending on the sources used, but the validity of the point is the same.

⁴⁷ The number of times the Court vetoed state acts between 1789 and the Civil War was 40, roughly once every other year. The ratio of federal to state vetoes for that period is 1:20, two national vetoes as compared to 40 state vetoes. Between 1865 and 1873, by contrast, the Court's 36 state vetoes work out to almost 5 per year, and the ratio of federal to state vetoes dropped to just under 1:5. So, although the absolute number of both state and federal vetoes increased sharply, the rate and number of federal vetoes grew much faster. In other words, the Supreme Court asserted itself relative to both Congress and the states, but the bench was much more willing, from an historical perspective, to take on Congress than the states. See chart: Appendix A

⁴⁸ The reasons for this are not entirely clear. The Court's caseload was substantially higher with time. The concentration of "great justices" was higher during Reconstruction. What is more, the justices appointed by Lincoln were unusually forceful and politically engaged, as demonstrated by the fact that four of five ran for president from the bench. All of these issues are considered elsewhere in this book.

until reaching the absolute high of fifty-nine in Marshall's final year on the bench, 1834.⁴⁹ The total number of cases heard during the thirty-four years of Marshall's tenure was 1,078. Under Chief Justice Taney, the Court never took on more cases than Marshall's peak number, until the peculiarly anomalous year of 1850, when the caseload jumped to one hundred fifty-six, a four-fold increase relative to the previous year.⁵⁰ Throughout the 1850s, the caseload remained between fifty-three and ninety-four, prior to touching one hundred-fifteen in 1859, then dropping precipitously during the Civil War. In Taney's twenty-nine years as Chief, the Court heard a total of 1,712 cases. Here is the point: after the Civil War, the Supreme Court's total caseload ballooned to well over one hundred-fourteen every year save one (there were ninety-six cases in 1867) and got to one hundred-ninety-three in Chase's last year, for a total of 1,226 cases in the mere nine years Chase presided over the Court.⁵¹ When comparing the number of state vetoes under Chase to those of Marshall or Taney, Chase and his colleagues demonstrated an increased inclination on an absolute basis, nearly doubling both. But when one considers the numbers from the perspective of total caseload, or by comparison to the incidence of federal vetoes, the Court appears little changed (state vetoes as a percentage of caseload) or even less aggressive (ratio of federal to state vetoes) during the Chase years. [All of these numbers are presented graphically in Appendix B.]

Secondly, nine of the thirty-six state overrides handed down under Chase, fully one-quarter of the whole, took place in a single year, 1866, when Radical Republicans held sway over war-torn America. The Supreme Court overturned more state legislation that

⁴⁹ The Supreme Court Compendium, 227.

⁵⁰ Though the occasion has yet to present itself, I hope to write about the Court in 1850 at a future date.

⁵¹ Id. 228. During the fourteen Waite years, the Court heard a total of 3,445 cases. To better understand the increase during the Waite years, consider his first decade, which consisted of 2,338 cases (up from 1,412 in the Chase years).

year than all but two other years throughout the entire nineteenth century, 1885 (when the Court overturned 12 state acts) and 1889 (another year of 9 state overrides).⁵² We might assume that there were many claims against southern states (or for black rights) during that year, given how eager most Republicans were to punish the South for secession and to protect recently freed slaves. In fact, not one of the cases in 1866 related to civil rights—all of the cases involved financial or property matters such as taxation, land exchanges, and contracts—and only two cases emanated from the South.⁵³ Actually, none of the cases in which the Court overturned state legislation throughout the period between 1865 and 1873, dealt with black civil rights of any kind. Furthermore, as in 1866, *all* the state veto cases under Chase were financial in nature. Curiously, only two cases even mentioned blacks or slaves, one regarding an unfulfilled contract in the sale of a slave and the other relating to the use of a slave as collateral for a promissory note.⁵⁴

Finally, as just noted, all of the state acts overturned by the Court related to economic matters. More to the point, the justices typically relied upon the contract clause for their authority. Fully sixty percent of all state contract cases before the Supreme Court (twenty of thirty-three) were deemed unconstitutional under the contract clause. The economy was growing rapidly, as was the importance of contracts. States were a named party in twelve of the contract cases.⁵⁵ Several of these contract cases resulted from anti-carpetbagger legislation in southern states. When one considers the numbers more

⁵² During the 1880s, the Court was especially active relative to the states. While 1866 stands out as an active year, until 1885, when the Court became far more active than ever before, overturning 36 states acts in just five years, 1885-1889. See: Blaine Moore, *The Supreme Court and Unconstitutional Legislation*, Appendix II, 131-137.

⁵³ The cases came from Missouri, California, Illinois (2), Iowa, Mississippi, and Arkansas.

⁵⁴ In *White v. Hart*, 13 Wall. 646, the use of a slave as consideration for a promissory note was contested, and in *Osborn v. Nicholson*, 13 Wall. 654, the Court held that because slavery was not illegal at the time of a slave sale contract, the disputed contract had to be honored.

⁵⁵ As regards the contract clause, I have relied heavily on Benjamin Wright, *The Contract Clause of the Constitution*, 92-3.

closely, there are two significant factors to notice: 1) the postbellum Court got consumed by economic issues; and, 2) the justices did not overturn state legislation significantly more than their predecessors.

Linclon's Court

Just as the southern states seceded, the Supreme Court handed down its decision in *Kentucky v. Dennison*, claiming, “the Federal Government, under the Constitution, has no power to impose on a State officer,” and state governors had no duty to render up fugitive slaves when demanded by other states.⁵⁶ That case forced Chief Justice Taney (and his exclusively Democrat colleagues) to decide between his typical inclination to protect the interests of slaveholders and his overarching commitment to protect the power of states. What was good for the slave state of Kentucky in *this* instance (getting fugitive slaves returned), was not a safe precedent for states in *most* instances (becoming susceptible to national intervention), particularly at that point in time.⁵⁷ As such, the Court decided against Kentucky.

In the years just after the Civil War, it appeared the Court might severely restrict the states. In yet another important Kentucky case, *United States v. Rhodes*, Justice Noah Swayne sitting in circuit held that the recently ratified Thirteenth Amendment “trenches directly upon the power of the states.”⁵⁸ Prior to hearing that case, on special circuit assignment, Swayne consulted with Senator Lyman Trumbull of Illinois, leader among the framers, about the intent of the Fourteenth Amendment then being debated in

⁵⁶ 65 U.S. 66, 76 (1861). Heard in the December 1860 Term, the case was decided on March 14, 1861.

⁵⁷ I am grateful to Paul Finkelman for bringing this case to my attention. For a brief consideration of the case, see: *A March of Liberty*, Melvin L. Urofsky and Paul Finkelman, Eds., (NY: Oxford 2002), 405.

⁵⁸ 27 F. Cas. 785 (1866).

Congress.⁵⁹ Chief Justice Chase dispatched Swayne—normally assigned to the Seventh Circuit of Indiana and Ohio—to Kentucky in the Sixth Circuit, presumably on the assumption that Swayne would render a decision reflective of Republican objectives in this early civil rights case.⁶⁰ Kentucky, after all, recently rejected the Fourteenth Amendment in the ratification process and probably harbored hostilities toward the Thirteenth Amendment.

It was 1866, a time when Radical Republicans held sway during Reconstruction.⁶¹ And, as noted above, it was a time when the Court was extremely active overturning state legislation. In theory, if the justices were politically synchronized with Congress, they would have taken aggressive stances in support of radical objectives.⁶² In *Rhodes*, white defendants had burglarized the home of a black family, who because of Kentucky law were not allowed to serve as witnesses in the case; the government prosecuted the defendants for violations of the Civil Rights Act of 1866. Swayne insisted that the Supreme Court’s *Dred Scott* decision (which claimed that blacks could never be citizens) was not binding, especially since the Thirteenth Amendment put the rights of citizens under national control even if before the amendment “the power belonged entirely to the states.”⁶³ As to the originally enumerated powers of the federal government, Swayne

⁵⁹ R. Webb, Benjamin Helm Bristow: Border State Politician, 56 (1969).

⁶⁰ Chief Justice Chase surely understood the resistance he was up against. Bear in mind, President Andrew Johnson had recently vetoed the Civil Rights Act of 1866 precisely because of the intrusions it imposed upon the states. The Fourteenth Amendment was expected to give teeth to that Act. And remember too that, except for Tennessee, all the southern states refused to ratify, while several other states (Oregon, Delaware, Maryland, California, New Jersey, and, of course, Kentucky) either rejected the amendment or rescinded their approval. See: Forrest McDonald, *Sates’ Rights*, supra, 212-13.

⁶¹ See Patrick W. Riddleberger, *1866: The Critical Year Revisited*, (1979). Congress passed the Civil Rights Act of 1866 and the Fourteenth Amendment in the early part of that year.

⁶² Tom Ginsburg makes the interesting point that “political diffusion is good for judicial power” and “creates more disputes for courts to resolve and hinders authorities from overruling or counterattacking courts.” Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (NY: Cambridge University Press: 2003), 261.

⁶³ 27 F. Cas. 785, 790.

pointed out that in *McCulloch v Maryland*, Chief Justice Marshall used “appropriate” to mean “necessary and proper” just as was done in the Thirteenth Amendment, to use those means “plainly adapted to the end, which are not prohibited.”⁶⁴ Swayne’s whole mission was to validate the expanded powers for the national government: “It is Utopian to believe that without such constructive powers, the powers expressed can be so executed as to meet the intentions of the framers of the constitution, and to accomplish the objects for which governments are instituted.”⁶⁵ After some extraordinary judicial comments about the plight of blacks,⁶⁶ Swayne concluded with the observation that the Thirteenth Amendment had “reversed and annulled the original policy of the constitution, which left it to each state to decide exclusively for itself whether slavery should or should not exist.”⁶⁷ Things had changed, Swayne insisted, by virtue of “an act of great national grace.”⁶⁸ As a federal court jurist Swayne chipped away at states’ rights. But for Swayne as Supreme Court justice, as we will see, corralling the states proved much harder. Despite the finding in *Rhodes* and the Supreme Court’s many state vetoes, the justices were actually quite friendly to the states.

More often than not, the Court treated the states quite kindly. In *Lane County v Oregon*, where the state of Oregon attempted to recover revenue due from one of its counties meant to be paid in gold and silver coin rather than notes, the United States

⁶⁴ Id. 791.

⁶⁵ Id. 793.

⁶⁶ “Slaves were imperfectly, if at all, protected from the grossest outrages by the whites. Justice was not for them. The charities and rights of the domestic relations had no legal existence among them. The shadow of the evil fell upon the free blacks. They had but few civil and no political rights in the slave states. Many of the badges of the bondman's degradation were fastened upon them. Their condition, like his, though not so bad, was helpless and hopeless...Further research would darken the picture.” Id. 793-4.

⁶⁷ Id. 794

⁶⁸ Ibid.

Supreme Court found for the state.⁶⁹ Writing for the Court, Chief Justice Chase proclaimed fidelity to “the soundest principles of judicial administration, and by a long train of decision in this court,” to honor the opinions of a state supreme court when opining on “the statutes of that state.”⁷⁰ More significantly, when examining the question of whether states could legitimately impose taxes upon their people, Chase gave “some attention” to the relation between the states and the United States. “Without the States in union there could be no such political body as the United States.”⁷¹ He emphasized the importance and power of the states, underscoring that, in the Constitution, “the necessary existence of the States, and, within their proper sphere, the independent authority of the States, is distinctly recognized.”⁷² Should anyone conclude Chase limited the states to “their proper sphere,” he went on to stress that, “To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved.”⁷³ That seems a noteworthy inhibition of national government, especially since the Court handed it down (on February 8, 1869) just months after ratification of the Fourteenth Amendment theoretically expanded the national sphere.

Two days later, on February 10, 1869, the Supreme Court sent an interesting signal to the states.⁷⁴ After the state of Georgia filed a restraining order against Secretary of War Edwin M. Stanton to prevent him and his army from carrying out the First Reconstruction Act, the Supreme Court dismissed the case for lack of jurisdiction. But in

⁶⁹ 74 U.S. 71 (1868)

⁷⁰ Id. 74

⁷¹ Id. 76

⁷² Ibid.

⁷³ Ibid.

⁷⁴ *State of Georgia v Stanton*, 73 U.S. 50 (1868) This case was actually dismissed on May 13, 1867, though the decision got handed down on Feb 10, 1868. Chief Justice Chase wrote a concurring opinion.

explaining the Court’s position, the justices effectively tutored Georgia and all other states how they might circumvent Congress and Reconstruction. In his majority opinion, Justice Samuel Nelson—a Democrat, educated at Middlebury College in Vermont, previously a justice of the New York Supreme Court and the sixth nominee of President John Tyler to fill the vacancy of Justice Smith Thompson in 1845—made clear that “a judicial determination must be one appropriate for the exercise of judicial power.”⁷⁵ He then observed, “the State takes the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction.”⁷⁶ The Court looked to the precedent provided in *The Cherokee Nation v. The State of Georgia*,⁷⁷ where the Court rejected a claim submitted by the Cherokees, who claimed that their political rights had been annihilated, since it asked the justices to control the legislature of Georgia, rather than rule on a property right. Nelson quoted Chief Justice Marshall, author of the *Cherokee Nation* majority opinion, who insisted the case “savors too much of the exercise of political power, to be within the province of the judicial department.”⁷⁸ Most significantly, Nelson also quoted the *Cherokee Nation* dissent of Justice Smith Thompson: “This court can grant relief so far, only as the rights of persons or property are drawn in question, and have been infringed.”⁷⁹ As if to make the point doubly clear, Nelson then reiterated, “the rights in danger, as we have seen, must be rights of persons or property, not merely political rights.”⁸⁰ Thus, the message conveyed, if a case were

⁷⁵ Id. at 73

⁷⁶ Ibid.

⁷⁷ 30 U.S. 1, (1831)

⁷⁸ 73 U.S. 50, 74

⁷⁹ Id. at 75

⁸⁰ Id. at 76

brought for the violations “of persons or property,” a state could essentially force the Court to rule on the constitutionality of Reconstruction in favor of the states.⁸¹

With the clouds of war still lingering, Chief Justice Salmon Chase ruled on the constitutional status of seceded states in *Texas v. White*,⁸² a case concerning Texas bonds used as collateral for military supplies during the war. In a five to three opinion only nominally about a wartime securities transaction, the Court held that Texas did not leave the Union during the Civil War; indeed, states did not have the constitutional authority to secede from the United States. Recognizing that the Court only had jurisdiction if Texas was indeed a state, both at the time of the transaction and submission of the case, Chase offered a long statement about “the correct idea of a state”⁸³ and the “plain distinction...made between a state and the government of a state.”⁸⁴ But, as far as Chase and the majority of the Court were concerned, “It is needless to discuss, at length, the question whether the right of a State to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States.”⁸⁵ The Court effectively extirpated the more radical constitutional theories espoused by Charles Sumner (that the seceding states were reduced to territories) and Thaddeus Stevens (that the seceding states had been conquered by the Union).

That the states lacked the power to secede did not mean the states had relinquished

⁸¹ *Georgia v Stanton* is often linked with *Mississippi v Johnson* 71 U.S. 475 (1866), decided at around the same time. Inasmuch as the two cases gave hope to supporters of Reconstruction, since the Court refused in either case to rule the Reconstruction Acts unconstitutional, linking the two cases is appropriate. But for our purposes, considering the Court and federalism, the Mississippi case is less relevant particularly since even Attorney General Henry Stanbery (who along with President Johnson believed the Reconstruction Acts were unconstitutional) thought the Court should not grant Mississippi the requested injunction on the grounds that the President should not be restrained from executing laws passed by Congress. See *A March of Liberty*, supra, 467. In the Georgia case, it was Stanbery who argued that the case (now properly lodged against the Secretary of War rather than the President) improperly involved “political” questions.

⁸² 74 U.S. 700 (1869)

⁸³ Id. 720

⁸⁴ Id. at 721.

⁸⁵ Id. at 724.

their sovereignty. It has been suggested that the decision in *Texas v. White* “contributed nothing toward re-establishment of the autonomy of the state governments in the federal system.”⁸⁶ Yet, while denying a state’s right of “reconsideration or revocation, except through revolution, or through consent of the States,” Chase clearly supported the federalist system in its traditional form. It is necessary to quote the opinion at length:

Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.⁸⁷

In that final marvelously succinct yet emphatic sentence, Chief Justice Chase proclaimed the outcome of the Civil War and rejected a state’s constitutional right to secede. But, as will be discussed in the next chapter, by opining that the states were indestructible, the Court undermined Reconstruction and Congress in a manner that weakened both.⁸⁸

It is important to note that, in *Texas v. White*, Justice Robert Copper Grier—a Pennsylvania Democrat appointed by President James Polk—wrote a dissent that focused on the sanctity of contract rather than whether Texas was, at the time of the events in the case, actually a state. In fact, wrote Grier, Texas was not a state, as defined by previous Supreme Court cases (particularly Marshall’s opinion in *Hepburn & Dundass v. Ellzey*, 6 U.S. 445). Because Texas had no representative in Congress and did not vote for the president in the most recent election, she did not enjoy the privileges of statehood,

⁸⁶ Schmidhauser, *supra*, 83.

⁸⁷ 74 U.S. 700, at 725.

⁸⁸ Section I of the March 3, 1867 Reconstruction Act stated, “That said rebel States shall be divided into military districts and made subject to the military authority of the United States as hereinafter prescribed.” Chase’s opinion that the states are “indestructible” contradicted the very idea of dividing the states into five military districts. Chase clearly disagreed with Thaddeus Stevens and the Radicals who wrote the Reconstruction Act and proclaimed the states had been conquered as result of the Civil War.

including the right to invoke the original jurisdiction of the Supreme Court.⁸⁹

“Politically, Texas is not a State in this Union. Whether rightfully out of it or not is a question not before the court.”⁹⁰ Whatever the status of Texas as a seceded state “did not settle the question of her right to plead insanity and set aside all her contracts.”⁹¹

Justice Swayne wrote a separate dissent where he claimed to agree with the majority as to the merits but with Grier “as to the incapacity of the State of Texas, in her present condition, to maintain an original suit in this court. The question, in my judgment, is one in relation to which this court is bound by the action of the legislative department of the government.”⁹² With regard to his fidelity to Congress, Swayne insisted Justice Miller agreed with him. So, while the entire bench deferred to Congress in one way or another, the dissenters claimed the right of states to secede and Chase, Davis and Field (who all denied the right of any one state to secede) allowed that, “The union between Texas and the other States was...perpetual...except through revolution, or *through consent of the States.*”⁹³ Although individual states qua individual states lacked the power to secede, they continued to have power when acting in concert.

On several occasions, usually when overturning federal legislation, the justices referred to various states’ rights that were essentially inviolable. In *Hepburn v Griswold*, Chief Justice Chase addressed legal tender acts of Congress (passed while he was Secretary of the Treasury) with the observation that the power to issue bills or notes

⁸⁹ “The original jurisdiction of this court can be invoked only by one of the United States.” 74 U.S. 700 at 737

⁹⁰ 74 U.S. 700, at 739.

⁹¹ Id. at 740

⁹² Id. at 741

⁹³ Id. at 726

never had meant the power to “make them a legal tender. On the contrary, the whole history of the country refutes that notion.” Chase immediately stressed, “The States have always been held to possess the power to authorize and regulate the issue of bills for circulation by banks or individuals.”⁹⁴ Chase had earlier confirmed, “and it is generally, if not universally, conceded, that the government of the United States is one of limited powers,” which he underscored by quoting the Tenth Amendment’s “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States of the people.”⁹⁵

Conclusion

Lincoln’s Justices held views consistent with their times. Among those was respect for federalism. It was not their mission, nor their inclination to destroy state authority. Recall that, during the period from 1866 to 1873, Republicans took control of the southern states. The Court’s support for the states could be seen as an effort to buttress those Republican efforts (be they scalawags, carpetbaggers, or black legislators) in the south. Also, America’s economy and transportation systems were growing rapidly, resulting in repeated attempts by states to tax and regulate business. Naturally, some of that regulation overreached, thereby requiring judicial overrides.

One would expect that after 660,000 Civil War deaths (largely attributable to state aggressions) and the appointment of five Supreme Court justices by the first Republican president, American attitudes toward state authority might have changed. But there were not two separate and distinct points of view regarding states’ rights—those in favor and those opposed. From the Founding through Reconstruction, Americans gradually shed

⁹⁴ 75 U.S. 603, 616, (1870)

⁹⁵ Id. at 613

their fears of centralized government, yet they never abandoned their attachment to the states. Even after the Constitution was amended—thus empowering Congress “to enforce, by appropriate legislation” the provisions of the three Reconstruction Amendments against the states—the Supreme Court refused to meaningfully challenge sacrosanct states’ rights, whatever the Republican Congress might have intended by those amendments. We can assume the Court’s decisions reflected popular opinion. Indeed, an important contributing factor to the growing power of the Court in the years after the war was that the bench successfully mirrored American sentiments.⁹⁶ Throughout Reconstruction, the justices remained circumspect and respectful toward the states.

Judicial review is not just a force against the states, but also against the other branches of government. As will be seen in the next chapter, it was against Congress—much more than against the states—that the postbellum Court grew increasingly powerful.⁹⁷ Amazingly, the Court did so without ever ruling on the various Reconstruction Acts, despite repeated efforts of southern states to force the issue. Precisely because the justices did not opine on Reconstruction, many legal historians point to *Mississippi v Johnson*; *Georgia v Stanton*, and *Ex parte McCordle* and incorrectly insist that the years immediately after the war saw no appreciable increase in the Supreme Court’s power.

Yet two doctrines proved vital in the Court’s newfound assertiveness. The doctrine of “separation of powers”—a concept borrowed from Montesquieu that first showed up

⁹⁶ This point is supported by various newspapers of the period, as seen in earlier chapters.

⁹⁷ As suggested in a previous chapter, and as mentioned briefly below, it may well be that the Court not only acted against Congress in overturning various legislation as unconstitutional, they may have also acted against Congress in not honoring the stated intent of the Fourteenth Amendment, namely that Congress replaced the states as guardian of individual rights. See Robert J. Kaczorowski, *Revolutionary Constitutionalism*.

in most of the early state constitutions to distinguish between the law-making of legislatures and the law-interpreting of courts⁹⁸—enabled the Court under Chief Justices Chase and Waite to resolve disputes between Congress and the Court, especially those emanating from the Fourteenth Amendment. Also, while the doctrine of “due process” defined the minutia of judicial review, the doctrine of “substantive due process” materially increased the reach of the Court. Justices Benjamin Curtis and Taney employed substantive due process in the decade before the Civil War, but the concept came of age during Reconstruction.⁹⁹ In the *Slaughter-House Cases*, the Supreme Court upheld a Louisiana state law granting monopoly rights, thus rejecting the plaintiffs’ (butchers) due process claim that their “right to labor” had been violated.¹⁰⁰ In that instance, the Court chose not to use “due process” in a substantive manner. In 1877, by contrast, the majority in *Munn v. Illinois* found that economic regulations could indeed result in a dispossession of private property without due process.¹⁰¹ To this critical matter (namely, the way the Court used substantive due process to bolster business rather than individual rights), we will soon return. But now that we have observed the Court’s gentle treatment of the states, let us consider how it dealt with Congress.

⁹⁸ Virginia’s constitution of 1776 states, “That the legislative, executive, and judiciary departments shall be distinct; so that neither exercise the powers properly belonging to the other.” Taken from the body of the constitution, following Sec. 16. A similar statement can be found in Sec. 5.

See: <http://www.yale.edu/lawweb/avalon/states/va05.htm>

⁹⁹ See Taney in *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539, 553 (1852); Curtis in *Murray’s Lessee v. Hoboken Land & Improvement Co.* 59 U.S. (18 How.) 272, 276 (1856); and Taney in *Dred Scott*.

¹⁰⁰ See 83 U.S. (16 Wall.) 36 (1873).

¹⁰¹ See 94 U.S. 113 (1877).

APPENDIX A¹⁰²

CHIEF JUSTICE	FED VETOES	STATE VETOES	Fed/State Ratio
Marshall	1	19	1:19
Taney	1	22	1:22
Antebellum Total	2	41 1 every other yr. (ish)	1:20
Chase	10 1 per yr.	36 4 per yr.	1:4
Waite	8 .6 per yr.	66 4.7 per yr.	1:8

APPENDIX B

CHIEF JUSTICE	CASELOAD	Total # Cases	NUMBER of STATE VETOES
Marshall	1801-1810: 4 low 37 high 1812-1820: 26 low 46 high 1821-1834: 26 low 59 high	1,048 (34 years)	19 1.8%
Taney	1835-1849: 19 low 51 high 1850: 156 1851-1860: 53 low 115 high	1,712 (29 years)	21 1.2%
Chase	1865-1873: 96 low 193 high	1,226 (9 years)	36 2.9%
Waite	1874-1888: 186 low 298 high	3,445 (14 years)	66 1.9%

¹⁰² See: Blaine Moore, 130-32. Moore’s numbers closely match those of *The Supreme Court Compendium*. It is important to note that not all sources agree on the incidence of overturned state legislation. Harvard Government Professor Benjamin Wright insisted that “the Court under Chase was more vigorous in its condemnation of state legisaiton than at any time since Marshall’s most active years,” and proceeds to mention (but not list) “46 cases in which the Court ruled against state laws, 23 of them involving issues of federalism, 20 the contract clause, 2 civil liberties, and 1 a state constitutional provision.” Benjamin Wright, *The Growth of American Constitutional Law*, (NYC: Houghton Mifflin, 1942), 82.

