Naked Land Transfers and American Constitutional Development

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The constitutional prohibition on naked land transfers, laws granting to B property that belonged to A, played a far greater role in American constitutional development than is generally realized. The Marshall and Taney Courts heard numerous cases in which government officials were accused of expropriating private property, typically by legislative oversight rather than by deliberate intent. When resolving these cases, antebellum justices relied heavily on "certain great principles of justice" rather than on specific constitutional provisions. Supreme Court majorities on several occasions probably exercised the judicial power to declare federal laws unconstitutional. More frequently, Marshall and Taney Court decisions in naked land transfer cases imposed clear constitutional limits on federal power even if, in a technical sense, those rules did not strike down a particular federal measure. Such cases as Polk's Lessee v. Wendal & Al, United States v. Percheman, *and* Pollard's Lessee v. Hagan *provide an unappreciated link between* Calder v. Bull *and* Lochner v. New York *in the development of fundamental rights jurisprudence, and an unappreciated link between* Marbury v. Madison *and* Dred Scott v. Sandford *in the establishment of judicial review.*

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I. INTRODUCTION

Legislation "taking the property of worthy A and giving it to the undeserving B" was "the paradigmatic constitutional taboo" during the nineteenth century.[1] Supreme Court opinions proclaimed, "[i]t is against all reason and justice, for a people to entrust a Legislature with SUCH powers" as the power to make "a law that takes property from A. and gives it to B."[2] Leading constitutional treatises similarly

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1. Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 42-43 (1986); *see also* John V. Orth, *Taking From A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 CONST. COMMENTARY 337, 341-44 (1997) (noting that previous to the nineteenth century, permitting persons to be judges in their own cases was the standard paradigm of what legislatures could not do).

2. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.); *see also* Davidson v. City of New Orleans, 96 U.S. 97, 102 (1878); Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 658 (1829). The most recent Supreme Court assertion of this principle is in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 523 (1998). Early nineteenth-century state courts expressed similar sentiments. Justice Smith Thompson while on the New York bench asserted, "it is repugnant to the first principles of justice, and the equal and permanent security of rights, to take, by law, the property of one

declared, "if the legislature should take the property of A., and give it to B., . . . the law would be clearly unconstitutional and void."[3] Antebellum jurists confidently asserted this constitutional limitation on both state and federal power even though the original Constitution as amended in 1791 lacked explicit bans on all uncompensated state government takings of private property and on compensated state takings for no public purpose.[4] Moreover, nineteenth-century justices did not treat the Takings Clause of the Fifth Amendment as the primary source for the ban on federal expropriation.[5] The prohibition on these "naked" land transfers—the distribution of property "solely on the ground that those favored have exercised raw political power to obtain what they want"[6]—was almost universally recognized as an unenumerated, or at least not specifically enumerated, constitutional property right, valid against both state and federal action.[7] "Taking from A and giving to B," historian John V. Orth documents, was used as "the shorthand to describe what substantive due process was designed to prevent."[8]

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individual, without his consent, and give it to another." Dash v. Van Kleeck, 7 Johns. 477, 493 (N.Y. 1810) (Thompson, J.).

3. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 276 (1971). For a similar contention by a distinguished late twentieth-century commentator, see Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1724 (1984) (claiming that "[t]aking property from A in order to benefit B is the core example" of a governmental action banned by the Takings Clause of the Fifth Amendment).

4. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247-48 (1833) (explaining that neither the Takings Clause of the Fifth Amendment nor any other provision of the Bill of Rights limits the power of state governments); *accord* Withers v. Buckley, 61 U.S. (20 How.) 84, 90-91 (1858).

5. None of the federal cases discussed in this Article cite the Fifth Amendment. This provision was cited by counsel in only one case. *See* Sampeyreac v. United States, 32 U.S. (7 Pet.) 222, 228-29 (1833) (argument of Mr. Prentiss). At least one justice implied that the Takings Clause was superfluous, that no government could take property without compensation, even if such actions were not explicitly banned by the relevant constitution. *See* West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 540 (1848) (Woodbury, J., dissenting) (asserting that whether land "could be taken without compensation, where no provision exists like that in the fifth amendment of the Constitution of the United States, or that in the Vermont constitution, . . . is a more difficult question, and on which some have doubted").

6. Sunstein, *supra* note 3, at 1689. Strictly speaking, the prohibition on naked land transfers is not limited to a ban on land transfers that reflect naked preferences. Takings must not only be for a public purpose, but also accompanied by adequate compensation.

7. Ronald Dworkin persuasively maintains that the "distinction . . . between enumerated and unenumerated rights is . . . [a] misunderstood semantic device," and that understanding the meaning of all constitutional provisions requires interpretation." RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 76-81 (1996). I do not think Dworkin would dispute that the text specifies some constitutional rules and principles more clearly than others.

8. Orth, *supra* note 1, at 339.

This constitutional prohibition on naked land transfers played a far greater role in American constitutional development than is generally realized. The Marshall and Taney Courts heard numerous cases in which government officials were accused of granting to B property that belonged to A. When resolving these cases, antebellum justices relied heavily on "certain great principles of justice"[9] rather than on specific constitutional provisions. Supreme Court majorities on several occasions probably exercised the judicial power to declare federal laws unconstitutional.[10] More frequently, Marshall and Taney Court decisions in naked land transfer cases imposed clear constitutional limits on federal power even if, in a technical sense, those rules did not strike down a particular federal measure. The justices consistently misread or ignored federal statutes, making absolutely clear that the statute would have been declared unconstitutional if interpreted according to its obvious meaning. Such cases as *Polk's Lessee v. Wendal & Al*,[11] *United States v. Percheman*,[12] and *Pollard's Lessee v. Hagan*[13] provide an unappreciated link between *Calder v. Bull*[14] and *Lochner v. New York*[15] in the development of fundamental rights jurisprudence, and an unappreciated link between *Marbury v. Madison*[16] and *Dred Scott v. Sandford*[17] in the establishment of judicial review.

Polk's Lessee, *Percheman*, *Pollard's Lessee*, and similar decisions cannot be explained or even recognized by an approach to judicial review based on the premise that when the justices "declare[ ] unconstitutional a legislative act," they "thwart[ ] the will of representatives of the actual people of the here and now."[18] The justices in none of the naked land cases "declared unconstitutional a legislative act" in the very narrow sense of including in the majority opinion a declaratory sentence asserting that a federal law was being held unconstitutional. The *Pollard's Lessee* line of decisions voided federal laws without uttering the magic words; the *Polk's Lessee* and *Percheman* lines illustrate how the Supreme Court may assert consti-

9. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 133 (1810).

10. *See infra* notes 141-97 and accompanying text.

11. Polk's Lessee v. Wendal & Al, 13 U.S. (8 Cranch) 87 (1815). A later incarnation of this case was called *Polk's Lessee v. Wendell*, 18 U.S. (5 Wheat.) 293 (1820). The original case was sometimes cited by that name, as *Polk's Lessee v. Wendal*, as *Polk's Lessee v. Wendall*, or as *Polk's Lessee v. Windel.*

12. United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

13. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845).

14. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

15. Lochner v. New York, 198 U.S. 45 (1905).

16. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

17. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

18. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-17 (1986).

tutional limits on the power of federal and state officials without expressly declaring a law unconstitutional. More significantly, Bickel's countermajoritarian model erroneously assumes that exercises of judicial review necessarily reject the constitutional understandings of "the prevailing majority."[19] *Polk's Lessee*, *Percheman*, and *Pollard's Lessee* articulated a constitutional ban on government expropriation of private property that was endorsed by virtually every prominent political actor. A Congress committed to consensual property norms occasionally violated those values by accident or oversight, but was more than willing to allow federal courts to void those legislative mistakes that inadvertently granted to B property that already belonged to A. These cases highlight various conditions under which the Supreme Court can impose limits on federal power without "thwarting the will of the actual representatives of the people of the here and now."[20]

The Taney Court's decision declaring unconstitutional the Missouri Compromise[21] was consistent with the general tenor of antebellum practice in constitutional cases, and was not an aberration that resulted when the desire to place a pro-slavery imprimatur on the Constitution overcame the normal practice of judicial restraint.[22] The cases discussed in this Article demonstrate that the Taney Court was more than willing to declare constitutional limits on state power. Major national statutes were not declared unconstitutional before the Civil War because the justices lacked the opportunity to do so, not the will. Constitutionally-controversial policies in Jacksonian America that were not vetted by the national legislature were almost always vetoed by the national executive.[23] Southern political efforts during the 1850s to have slavery issues resolved by the Supreme Court make sense only if, in light of the naked land transfer and other cases, pro-slavery advocates had good reason to believe that the justices had few qualms about restricting national power.[24]

This Article explores the naked land transfer cases decided by the antebellum Supreme Court. The follow pages demonstrate the doctrinal significance of *Polk's Lessee* and related cases, discuss their role in the establishment of judicial review and the development of

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19. *Id.*

20. *Id.*

21. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

22. For the traditional view of *Dred Scott*, see ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 60 (2d ed. 1994).

23. *See* Mark A. Graber, *The Jacksonian Origins of Chase Court Activism*, __ J. OF SUP. CT. HISTORY (forthcoming 2000).

24. *See infra* notes 243-45 and accompanying text.

fundamental rights jurisprudence in the United States, and challenge the prevailing countermajoritarian model of judicial review most commonly associated with Alexander Bickel.[25] Part I details the variety of cases in which antebellum Supreme Court justices relied on the constitutional ban on naked land transfers, and discusses whether these cases are best labeled as exercises of judicial review, statutory interpretation, or some mixture of the two. Part II highlights the various techniques the antebellum justices used in naked land transfer and other cases to restrain federal power. The frequency with which Marshall and Taney Court justices handed down opinions imposing constitutional limits on the federal government suggests that judicial review of federal legislation was a fairly common practice before the Civil War. Part III points out how judicial review may occur even when elected officials and justices agree on basic constitutional limitations, and details how the naked land cases were an important missing link in the eventual establishment of judicial review. Judicial review may have survived and thrived before the Civil War because the justices spent much time and energy implementing general principles of property recognized as valid by virtually every prominent political actor.

The understandable neglect of those relatively obscure nineteenth-century land cases that limited federal power is nevertheless unfortunate for numerous normative and historical reasons. Normative scholarship, obsessed by Bickel's countermajoritarian difficulty,[26] never acknowledges that the majority, probably the substantial majority, of Supreme Court decisions limiting state or federal power raised issues that failed to excite the body politic or even a substantial number of political elites. Understood in their political contexts, judicial review in cases involving such matters as the ownership of a particular parcel of land in Missouri or the ownership of land below the high water mark of rivers in Alabama could not have been countermajoritarian in an important theoretical sense. No will of the people or of the elected representatives of the people existed for the justices to thwart. Popular and legislative majorities lacked the interest in the constitutional controversy necessary to form any opinion on the proper constitutional resolution. One even wonders how many persons who teach constitutional law, history, or politics could identify the holding of most cases where the Supreme Court has declared a state or federal

25. *See* BICKEL, *supra* note 18, at 17.

26. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998) (describing the "countermajoritarian difficulty" as the "central obsession of modern constitutional scholarship").

law unconstitutional. When thinking about the role the federal judiciary has and should play in the American constitutional order, therefore, commentators should begin by recognizing that the political history and salience of the typical judicial decision declaring a law unconstitutional more often resembles *Pollard's Lessee* than either *Dred Scott* or *Brown v. Board of Education*.[27]

Historical scholarship would benefit by acknowledging that these politically inconsequential cases may have played a central role in the process by which judicial review was established in the United States. The line of decisions limiting federal power from *Marbury* to *Pollard's Lessee* established important legal and political precedents for the judicial power to declare federal laws unconstitutional. By routinizing the process of judicial review in politically uninteresting matters, the Marshall and Taney Courts fostered beliefs that the judiciary was the appropriate forum for resolving all controversial constitutional issues.[28] The institution that most politicians agree should determine whether the federal government is constitutionally authorized to lease public land,[29] after all, has a strong claim to being the institution that should determine whether the federal government is constitutionally authorized to ban slavery on public lands. The antebellum judicial practice of first declaring a constitutional limit on government and then (mis)interpreting federal statutes as consistent with that limit proved an important and ignored bridge between ante- and post-bellum exercises of judicial review. The Chase Court explicitly declared more laws unconstitutional than the Taney Court in part because Chase Court justices were more willing to interpret statutes as violating agreed-upon constitutional limits.[30]

II. CONSTITUTIONAL FOUNDATIONS

A. Fletcher v. Peck *Revisited*

The Marshall Court first articulated the basic principles underlying the constitutional ban on naked land transfers in *Fletcher v.*

27. Brown v. Board of Educ., 347 U.S. 483 (1954).

28. For further development of this point, see Mark A. Graber, *Establishing Judicial Review?:* Schooner Peggy *and the Early Marshall Court*, 51 POL. RES. Q. 221 (1998); *see also* Mark A. Graber, *The Problematic Establishment of Judicial Review*, *in* THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST APPROACHES 28 (Howard Gillman & Cornell Clayton eds., 1999).

29. United States v. Gratiot, 39 U.S. (14 Pet.) 526 (1840).

30. *See infra* notes 118-22 and accompanying text.

Peck.[31] The precise issue before the Court in that case was whether a Georgia law rescinding an earlier land grant procured through bribery could constitutionally be applied to persons who previous to the recission had purchased the property from the original malfeasors unaware of their misconduct.[32] The Marshall Court's decision voiding the recission is routinely treated at present as an application of Contracts Clause principles.[33] Chief Justice John Marshall, however, conceptualized the issues as concerning state power to expropriate private property. The bulk of his opinion in *Fletcher* constitutionalized on general principles certain elements of the common law of property. The Contracts Clause served only as an alternative ground for the last step in Marshall's reasoning. Later cases suggested that the Contract Clause discussion in *Fletcher* played almost no role in the final analysis. Supreme Court justices and counsel before that tribunal consistently cited the principles of *Fletcher* as limiting both federal and state power, even though the Contracts Clause explicitly limits only the power of state governments.[34]

Marshall's opinion in *Fletcher* first defended on common law grounds the property rights of persons who, oblivious to the original swindle, had purchased the disputed Yazoo lands. In his view, "purchasers of a legal estate without knowledge of any secret fraud which might have led to the emanation of the original grant" held good title to their property.[35] Without citing any positive constitutional law, Marshall ruled that "certain great principles of justice"[36] constitutionally obligated legislatures to recognize the distinction between void and voidable title.[37] "The rights of third persons, who are purchasers without notice, for a valuable consideration," he wrote:

> cannot be disregarded. Titles which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law, he is innocent, whatever may be the guilt of others, and equity will not subject him to the

31. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

32. The *Fletcher* Court clearly ruled that the recision law could be constitutionally applied to the land still being held by the original grantees. *See id.* at 133.

33. *See, e.g.*, GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 506 (13th ed. 1997).

34. *See infra* notes 39-41 and accompanying text.

35. *Fletcher*, 10 U.S. (6 Cranch) at 135.

36. *Id.* at 133.

37. *See* Christopher I. Eisgruber, *John Marshall's Judicial Rhetoric*, 1996 SUP. CT. REV. 439, 466-68 (1996). For a good summary of the distinction between void and voidable, see Timothy Arnold Barnes, *The Plain Meaning of the Automatic Stay in Bankruptcy: The Void/Voidable Distinction Revisited*, 57 OHIO ST. L.J. 291, 306-08 (1996).

> penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle be overturned.[38]

The Contracts Clause played no role in this analysis of the initial property rights at issue in *Fletcher*.

Once Marshall determined that the subsequent purchasers held good title to the disputed property at the time Georgia passed the rescinding act, he then asserted that the sole constitutional issue *Fletcher* raised was whether governing officials could expropriate private property. "If the legislature felt itself absolved from those rules of property which are common to all the citizens of the United States," Marshall asserted, "its act is to be supported by its power alone, and the same power may divest any other individual of his lands, if it shall be the will of the legislature so to exert it."[39] "The principle, on which alone this rescinding act is to be supported," he continued, "is this: that a legislature may . . . divest the vested estate of any man whatever, for reasons which shall, by itself, be deemed sufficient."[40] These statements suggest that for unexplained constitutional reasons, the Marshall Court would not permit legislators to alter "those rules of property which are common to all citizens of the United States."[41] So understood, *Fletcher* apparently holds that "certain great principles of justice" would be violated should a state pass legislation preventing persons who acquired property by fraud from passing good title to an innocent purchaser. Whether the original land grant was procured from the government by bribery was no longer relevant to the constitutional issue. *Fletcher*, in Marshall's opinion, concerned the power of a state to make naked land transfers, to divest any person whose original acquisition of the property in dispute was valid under common law.

The Supreme Court in *Fletcher* held that such naked land transfers violated both natural/common law[42] and the Contracts Clause. Marshall maintained that "[t]he state of Georgia was restrained either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the

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38. *Fletcher*, 10 U.S. (6 Cranch) at 133-34.

39. *Id.* at 134, 136 (describing the issue in the case as concerning "the act of transferring the property of an individual to the public").

40. *Id.* at 134.

41. *Id.*

42. Scholars debate the extent to which Marshall's opinion in *Fletcher* regarded natural law or common law as the ultimate source of the "certain great principles of justice" that bound elected officials. *See* Eisgruber, *supra* note 37, at 468 n.119 (common law); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1170-71 (1987) (natural law).

United States."[43] Both prohibited states "from passing a law whereby the estate of the plaintiff in the premises legally so purchased could be constitutionally and legally impaired and rendered null and void."[44] Common law provided the principles by which land tenure was ascertained and banned naked land transfers. The Contracts Clause was relevant in *Fletcher* only because Marshall insisted that the initial state grant "implie[d] a contract not to re-assert" the right of ownership,[45] which is a contractual right that could be asserted by subsequent purchasers of that property.

Justice Johnson's concurring opinion in *Fletcher* would have struck down the Georgia repeal solely on natural law grounds.[46] Johnson rejected the part of Marshall's opinion holding that all government land grants contained an implied promise not to re-assert ownership. "A grant or conveyance," Johnson declared, "by no means necessarily implies the continuance of an obligation, beyond the moment of executing it."[47] Hence, his concurrence was "not founded on the provision in the constitution of the United States, relative to laws impairing the obligation of contracts."[48] Georgia fulfilled its contractual obligations by giving the original Yazoo landholders title to land. The Contracts Clause said nothing about whether Georgia could re-take the land under, for example, the power of eminent domain.[49]

Johnson regarded *Fletcher* as correctly decided because the recision law violated the ban on naked land transfers. Georgia was claiming title to the land, rather than the power of eminent domain. Justice Johnson was confident that a court of justice could not allow such a claim, because "a state does not possess the power of revoking its own grants."[50] "When the legislature have once conveyed their interest property in any subject to the individual," the justice from South Carolina wrote, "they have lost all control over it; have nothing to act upon; it has passed from them; is vested in the individual."[51] The source of this prohibition, however, was not positive constitutional law. Rather, Johnson's opinion was grounded in "a general principle, . . . the reason and nature of things; a principle which will impose laws even on the Deity."[52]

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43. *Fletcher*, 10 U.S. (6 Cranch) at 139.
44. *Id.*
45. *Id.* at 137.
46. *Id.* at 143-44 (Johnson, J., concurring).
47. *Id.* at 145.
48. *Id.* at 144.
49. *See id.* at 145.
50. *Id.* at 143.
51. *Id.*
52. *Id.*

This use of general principles in the *Fletcher* opinions as the sole or alternative ground for the decision was particularly important for the ultimate resolution of the dispute over the Yazoo lands. By the time the case was decided, Georgia had ceded full sovereignty over all the territory involved to the United States.[53] The real issue in 1810 was whether Congress, to some degree, would recognize the claims of those persons who claimed title by virtue of the first grant from Georgia. Thus, while *Fletcher* is nominally a decision about constitutional limits on state power, by relying more "on general principles which are common to our free institutions,"[54] the justices, at the very least, strongly implied that the federal government would also be constitutionally obligated to respect the property rights set out in their opinions. Indeed, *Fletcher* seems to have influenced the eventual federal decision to partly compensate the "innocent" Yazoo landholders.[55]

Subsequent legal cases made clear: (1) that the Supreme Court did not need the Contracts Clause to void government efforts to rescind land grants, and (2) that the result in *Fletcher* would have been no different had an identical national law been before the justices. A unanimous Supreme Court in 1862 asserted that the federal government was bound to respect the obligation of federal contracts as those obligations were understood by John Marshall and his brethren in *Fletcher*.[56] Justice Nathan Clifford's majority opinion in *Rice v. Railroad Co.* cited *Fletcher* for the proposition that "if the legal effect of the act of Congress" at issue "was to grant to the Territory a beneficial interest in the lands, then it is equally clear that it was not competent for Congress to pass the repealing act, and divest the title."[57] Justice Samuel Nelson's dissent agreed:

> It is well settled in this court that grants [of land], when made by the Legislature of a State, cannot be recalled, and we do not perceive any reason why the inviolability of the same class of grants should be less when made by the legislative power of the General Government.[58]

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53. For the details noted in this paragraph, see C. PETER MAGRATH, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC: THE CASE OF *FLETCHER V. PECK* 32-36, 112 (1966).

54. *Fletcher*, 10 U.S. (6 Cranch) at 139.

55. *See* MAGRATH, *supra* note 53, at 112.

56. *See* Rice v. Railroad Co., 66 U.S. (1 Black) 358, 374 (1862).

57. *Id.*

58. *Id.* at 382-83 (Nelson, J., dissenting); *see also* Gerald L. Newman, *Whose Constitution?*, 100 YALE L.J. 909, 955 (1991) ("[T]he Supreme Court was unanimous in assuming that an act of Congress retracting a vested right to tracts of land would be void."). Counsel in a previous case had similarly claimed that a federal law was "intended to impair the obligation of contracts," but the justices did not reach the issue. Christy v. Scott, 55 U.S. (14 How.) 282, 288 (1853). The Marshall Court in 1832 had similarly cited *Fletcher* for the proposition that no government could re-grant land already granted. *See* United States v. Arredondo, 31 U.S. (6 Pet.) 691, 738 (1832)

The only issue that divided the justices in *Rice* was whether Congress had, in fact, surrendered certain rights to the public domain. Justice Clifford declared that Congress had acted constitutionally because the national government had retained full ownership of the lands in question.[59] Justice Nelson would have declared the law at issue in *Rice* unconstitutional because he believed Congress was attempting to reacquire lands that had been granted away.[60] No justice in *Rice* noted that the Contracts Clause, under which *Fletcher* was nominally decided, only limited state power.

Counsel in numerous antebellum cases similarly asserted that the national government was bound to respect the principles asserted in *Fletcher*. On at least eight occasions, attorneys asked the Supreme Court to void a federal land grant as inconsistent with that judicial ruling in 1810.[61] In no case was this claim disputed either by opposing counsel or by any judicial opinion. Indeed, as late as 1870, no justice was willing to declare that the federal government could impair the obligation of contracts. Chief Justice Chase's dissent that year in the *Legal Tender Cases* cited *Fletcher* as establishing a ban on both federal and state actions that either impaired the obligation of contract or resulted in a naked land transfer.[62] Justice Strong's opinion for the Court did not challenge Chase's assertion that the principles of *Fletcher* limited both federal and state legislatures. His response was only that "it cannot . . . be maintained that the legal tender acts impaired the obligation of contracts,"[63] a statement implying that a federal law impairing the obligation of contracts would be unconstitutional.

Fletcher also indicates that the Marshall Court was far more willing to limit state power than scholars have realized. Understood

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(discussed *infra* at Part II.B). Justice Levi Woodbury, when in Congress, had maintained that the federal government was bound by the Contracts Clause. *See* CONG. GLOBE, 26th Cong., 2d Sess. 253-54 (1841).

59. *See Rice*, 66 U.S. (1 Black) at 375-81.

60. *Id.* at 383-85 (Nelson, J., dissenting).

61. *See* Hooper v. Schmeimer, 64 U.S. (23 How.) 235, 239 (1860) (argument of Mr. Stillwell); Roberts v. Cooper, 61 U.S. (20 How.) 467, 475 (1857) (argument of Mr. Vinton); Cooper v. Roberts, 59 U.S. (18 How.) 173, 174 (1856) (argument of Mr. Buel and Mr. Vinton); Doe v. Braden, 57 U.S. (16 How.) 635, 644 (1853) (argument of Mr. Mayer); Rundle v. Delaware & Raritan Canal Co., 55 U.S. (14 How.) 80, 83 (1853) (argument of Mr. Ashmead and Mr. Vroom); Marsh v. Brooks, 55 U.S. (14 How.) 513, 519 (1853) (argument of Mr. Geyer); Marsh v. Brooks, 49 U.S. (8 How.) 223, 229 (1850) (argument of Mr. May and Mr. Geyer); Bissell v. Penrose, 49 U.S. (8 How.) 317, 326 (1850).

62. Legal Tender Cases, 79 U.S. (12 Wall.) 457, 581 (1870) (Chase, C.J., dissenting); *see also* HAROLD M. HYMAN, THE RECONSTRUCTION JUSTICE OF SALMON P. CHASE: *IN RE TURNER & TEXAS V. WHITE* 153 (1997).

63. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 549.

as a case that forbade state legislatures from granting to B property that belonged to A, *Fletcher* dramatically limits the significance of antebellum judicial decisions holding that the Fifth Amendment and other provisions of the Bill of Rights only limited the power of the national government.[64] If the origin of all title to American soil was a government grant, then under *Fletcher* any state taking of land without compensation would violate the Contracts Clause of Article I or, more accurately, those "general principles" that prohibited all government officials from granting land owned by other persons. Moreover, as noted above, Marshall's opinion seemed to reject any state expropriation, and not simply expropriation of land originally granted by the state. Thus, aggrieved landholders had no need to plead the Takings Clause of the Fifth Amendment when attacking state legislation divesting them of title to their property. *Fletcher* provided sufficient precedential support for their right against naked land transfers. At most, such cases as *Barron v. City of Baltimore* permitted state regulatory takings, or state action that destroyed the value of property without taking title.[65] These governmental policies were thought consistent with "certain great principles of justice."[66] As Stephen Siegel notes, constitutional law before the Civil War "generally protected the possession of property, but not the value of that possession."[67]

Professor Siegel's analysis may partly explain the subsequent separation of Contract Clause and natural/common law analysis in Supreme Court opinions. His thorough analysis of antebellum legal concepts observes that while Americans at this time generally agreed on "the sanctity of contracts entered into by individuals in the exercise of their common law rights," they disputed the extent to which those principles should apply to "state-granted franchises."[68] "Nearly ninety percent" of the cases after *Fletcher* that the Supreme Court decided on contracts clause principles, Siegel notes, "involved state-granted franchises, mainly corporate charters."[69] Reliance on the Contract Clause made sense in these circumstances. Corporations do not exist in nature. The rules for their regulation, as well as the rights of corporate owners, must be found in positive, not natural, law. The land cases

64. *See, e.g.*, Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243, 250-51 (1833).

65. *Id.*

66. *Id.* (quoting Fletcher v. Peck, 10 U.S. (5 Dall.) 87, 133 (1810)).

67. Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 87 (1986).

68. *Id.* at 8.

69. *Id.* at 7.

the Supreme Court heard in the wake of *Fletcher*, by comparison, typically concerned charges that governing officials had granted to B property that belonged to A. This allegation raised fundamental natural law issues—issues the justices would resolve by reference to general principles rather than by positive constitutional law.

B. The Legacy of Polk's Lessee

Five years after handing down *Fletcher*, the Marshall Court indicated in *Polk's Lessee v. Wendal & Al*[70] that natural/common law principles would be used as sources of law should the government grant to B property belonging to A. The issue in *Polk's Lessee* was whether a litigant in an ejectment case could "impeach a grant [of land] from the state" to a third party on the ground that the state had previously granted the land in question to the litigant.[71] The second grantee maintained that courts were obligated to consider the most recent government grant to be conclusive evidence as to who had valid title to the disputed land. This argument followed from the general rule that the most recent legislative enactment is considered to be the authoritative source of law. As a general rule, any statutory provision inconsistent with subsequent legislation is deemed repealed.[72] Chief Justice John Marshall, writing for a unanimous court in *Polk's Lessee*, held that claims of prior ownership could be litigated.[73] In his view, a subsequent government land grant could not repeal a previous land grant. "[A] grant is absolutely void," Marshall held, when "the state has no title to the thing granted."[74]

Marshall did not clearly state the source or nature of this ban on naked land transfers. Some early passages in his opinion suggest that resort to general principles was necessary only because the precise issue before the court was undecided under Tennessee law.[75] Other passages indicate that the ban on state expropriation of private property was one of "the great principles of justice and law" that no government could violate, even by clear statutory enactment.[76] As was the case with Justice Johnson's concurring opinion in *Fletcher*, Mar-

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70. Polk's Lessee v. Wendel & Al, 13 U.S. (9 Cranch) 87 (1815).

71. *Id.* at 98.

72. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 3 (1993) ("[I]t is an elementary legal principle that later language erases incompatible earlier language.").

73. *See Polk's Lessee*, 13 U.S. (9 Cranch) at 99.

74. *Id.*

75. *Id.* at 98 (noting that Tennessee had not established rules for determining who obtained the first grant).

76. *Id.* at 98-99.

shall's opinion in *Polk's Lessee* provides no textual source for this "great principle of justice and law." That government could not grant to B land that belonged to A seemed sufficiently obvious as to obviate the need for any detailed explication of the foundations for that limit on state power.

Later cases established that *Polk's Lessee* was based on an unenumerated constitutional prohibition against government expropriation of private property. Justice Smith Thompson in 1826 never mentioned state law when citing *Polk's Lessee* as authoritative in a suit over the ownership of land in Georgia.[77] The next year, the justices cited both *Fletcher* and the Contracts Clause as a source for the ban on naked land transfers by state officials.[78] In neither *Doe ex dem. Patterson v. Winn* nor *Williams v. Norris* did the Marshall Court consider whether under the relevant state law the second grantee obtained good title when state authorities had made successive grants of the same property. Past precedent and "general principles of justice" were the grounds for these judicial decisions.

Six years later, in *United States v. Arredondo*, the justices specifically ruled that no government official, state or federal, could sell or give away land that did not belong to that government.[79] Justice Henry Baldwin's unanimous opinion asserted that no matter what language was used in the actual grant, government grants of land conveyed only the government interest in that land. "A grant, even by act of Parliament, which conveys a title good against the king," he declared, "takes away no right of property from any other; though it contains no savings clause, it passes no other right than that of the public, although the grant is general of the land."[80] Baldwin cited *Fletcher* as the precedential source for the principle that "[i]f land is granted by a state, its legislative power is incompetent to annul the grant and grant the land to another; such law is void."[81] Therefore, *Arredondo* clearly held this ban on successive grants applied to both the local and national authorities. After concluding that Arredondo had valid title to the property being litigated, Justice Baldwin's opinion, with specific

77. *See* Doe *ex dem.* Patterson v. Winn, 24 U.S. (11 Wheat.) 380, 382-84 (1826).

78. *See* Williams v. Norris, 25 U.S. (12 Wheat.) 117, 125 (1827); *see also* Green v. Biddle, 21 U.S. (8 Wheat.) 1, 75-76 (1823) (relying on "principles of law and reason" to bar naked land transfers).

79. United States v. Arredondo, 31 U.S. (6 Pet.) 691, 738 (1832).

80. *Id.*

81. HENRY BALDWIN, A GENERAL VIEW OF THE ORIGIN AND NATURE OF THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 148-49 (1970) (citing Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810)).

reference to Congress, stated: "such lands were not liable to subsequent appropriation by a subsequent grant."[82]

This ban on naked land transfers was frequently reiterated by various justices during Marshall's last years on the Court. The year *Arredondo* was decided, the justices unanimously asserted in another case "that on general principles, it is incontestable that a grantee can convey no more than he possesses."[83] "It is a principle applicable to every grant," Marshall declared during his final term on the bench, "that it cannot affect pre-existing titles."[84] Marshall Court justices by 1835 could and did cite numerous precedents for this legal rule. No opinion, however, detailed the positive constitutional law foundations for this ban on state and federal expropriation.

After Marshall's death, the Supreme Court remained committed to preventing naked land transfers. A unanimous Supreme Court reaffirmed *Arredondo* in 1836, the first year Marshall did not preside over that tribunal. Justice John McLean's opinion in *Mayor of New Orleans v. United States* asserted that a "grant has been frequently issued by the United States for land which had been previously granted; and the second grant has been held to be inoperative."[85] McLean then immediately referred to a specific instance where the justices had ruled against a federal grantee because the land in question had previously been granted to a third party.[86] By the end of the nineteenth century, Supreme Court opinions explicitly declared that "ever since the decision in *Polk's Lessee v. Wendall*, [sic] it has been the settled law of this court that a patent is void at law if the grantor State had no title to the premises embraced in it."[87] No clear explanation was ever given of what constitutional (or statutory) provision, if any, was the source of this "settled law."

The Taney Court proved particularly vigilant in naked land transfer cases. Unanimous or majority opinions in antebellum land decisions handed down during the Jacksonian era contain such sentences as "[a] patent is utterly void and inoperative, which is issued for land that had been previously patented to another individual,"[88] or "[t]he President of the United States has no right to issue patents for

82. *Arredondo*, 31 U.S. (6 Pet.) at 735.

83. Sampeyreac v. United States, 32 U.S. (7 Pet.) 222, 241 (1833); *see also Arredondo*, 31 U.S. (6 Pet.) at 731.

84. Mayor of New Orleans v. De Armas, 34 U.S. (14 Pet.) 224, 236 (1835); *see also* Lessee of Pollard's Heirs v. Kibbe, 39 U.S. (9 Pet.) 353, 391 (1840) (Baldwin, J., concurring).

85. Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 662, 731 (1836).

86. *See id.* The case in question may be *Wallace v. Parker*, 31 U.S. (6 Pet.) 680 (1832).

87. Knight v. United States Land Ass'n, 142 U.S. 161, 176 (1891).

88. Stoddard v. Chambers, 43 U.S. (2 How.) 284, 318 (1844); *see also Sampeyreac*, 32 U.S. (7 Pet.) at 238-41.

land, the sale of which is not authorized by law."[89] These principles were central to the holding in many decisions. In at least three cases, the justices invalidated a federal land grant on the ground that a third party already had valid title to the property in question.[90] The most famous beneficiary of this largess was John Sanford (or more accurately, his heirs), who during the 1857 term managed to convince the Supreme Court to void both the Missouri Compromise and a federal grant of his land to another party (though not to spell his last name correctly in either opinion!).[91]

The Taney Court also engaged in statutory misconstruction to prevent an unconstitutional land transfer. The justices in *Lytle v. Arkansas* interpreted a federal law granting land to a township as only granting land that had not been previously appropriated.[92] Nothing in the federal statute granting the land suggested that restriction on the right to choose. The plain meaning of the text was ignored for the sole reason that a literal interpretation of federal law would unconstitutionally take from A and give to B. "By grant to Arkansas," Justice McLean's unanimous opinion declared, "Congress could not have intended to impair vested rights."[93] No evidence of actual legislative intent was given to support this assertion. Indeed, the justices in *Lytle* held that the plaintiff had good title to the disputed land even though federal officials had previously ruled that the plaintiff had not met the statutory requirements for land ownership.[94]

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89. Easton v. Salisbury, 62 U.S. (21 How.) 426, 431-32 (1858) (holding that such sales were "absolutely void").

90. *See* Willot v. Sandford, 60 U.S. (19 How.) 79, 82 (1857) (explaining that 1816 confirmation defeats 1836 confirmation because "where there are two confirmations for the same land, the elder must hold it"); Delauriere v. Emison, 56 U.S. (15 How.) 525, 538 (1854) ("The confirmation of the claim by Congress, in 1836, had relation back to the origin of the title; but it could not impair rights which had accrued, when the land was unprotected by a reservation from sale; and when, in fact, the right of the claimant was barred."); Chouteau v. Eckhart, 43 U.S. (2 How.) 344 (1844) (holding claim confirmed in 1812 defeats claim confirmed in 1836); *see also* United States v. Covilland, 66 U.S. (1 Black) 339, 341 (1862) ("[A] confirmation in the name of the original grantee, divesting the legal title of the United States, is binding on the government and on the assignees."); Landes v. Brant, 51 U.S. 348, 370 (1851) ("[W]hen Congress confirmed and completed an imperfect claim, and then confirmed another and different claim for the same land, the older confirmation defeated the younger one."); Marsh v. Brooks, 49 U.S. (8 How.) 223, 233-34 (1850) ("[W]here the same land has been twice granted, the elder patent may be set up in a defence by a trespasser, when sued by a claimant under the younger grant."); Les Bois v. Bramell, 45 U.S. (4 How.) 449, 463 (1846) (holding confirmations must yield to prior confirmations); Stoddard v. Chambers, 43 U.S. 284, 317 (1844) ("[T]he elder legal title must prevail in the action of ejectment.").

91. *See Willot*, 60 U.S. (19 How.) at 82.

92. Lytle v. Arkansas, 50 U.S. (9 How.) 314, 334-35 (1850).

93. *Id.* at 335.

94. *Id.*

Hence, even if Congress never intended that the township appropriate land that all agreed was owned by third parties, federal officials had previously decided that the disputed land in *Lytle* was still owned by the federal government. Statutory language and previous federal actions to the contrary, however, the justices in *Lytle* concluded that federal law did not empower the national government to grant the disputed land. "The grants of the thousand acres and of the other tracts," Justice McLean concluded, "must be so construed as not to interfere with the preemption of [the claimant under the original grant]."[95]

Lytle articulated a constitutional principle of statutory construction that essentially enabled the Supreme Court to prevent the federal government from selling private land without ever having to declare a federal statute unconstitutional. Government could not expropriate land because no law would be interpreted as expropriating land. The Marshall Court articulated this statutory canon in several cases, declaring:

> [w]hatever the legislative power may be, its acts ought never to be so construed as to subvert the rights of property, unless its intention to do so shall be expressed in such terms as to admit of no doubt, and to show a clear design to effect the object. No general terms intended for property, to which they may be fairly applicable and not particularly applied by the legislature, no silent implied and constructive repeals ought ever to be understood as to divest a vested right.[96]

Justice Johnson more bluntly declared that "the State never intends to grant the lands of another."[97] When the State makes grants, he wrote, it "enters into contract no farther than that the purchaser shall have that quantity of vacant land if he can find it."[98]

Taney Court justices adopted similar rules of construction, leaving out, significantly, those clauses indicating that more explicit language might be construed as impairing vested rights. "Whensoever a tract of land shall have once been legally appropriated to any purpose," Justice Barbour declared in *Wilcox v. Jackson*, "no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it; although no reservation were made of it."[99] Justice Baldwin similarly asserted that "a patent from the United States . . . could not operate to destroy any previous existing title."[100] In short, no matter what the text of the relevant statute said, the

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95. *Id.*

96. United States v. Arredondo, 31 U.S. (6 Pet.) 691, 733 (1832) (quoting Rutherford v. Greene's Heirs, 15 U.S. (2 Wheat.) 196, 203 (1817)); *see also* BALDWIN, *supra* note 81, at 146.

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

98. *Id.*

99. Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 513 (1839).

100. Lessee of Pollard's Heirs v. Kibbe, 39 U.S. (14 Pet.) 353, 391 (1840) (Baldwin, J., concurring).

antebellum Court interpreted all federal land grants as merely granting the federal interest in the land. In cases where the land was previously owned, the statute was not unconstitutional—the law merely granted nothing to the grantee. No statute could be declared unconstitutional under this approach to statutory interpretation only because no matter what the statutory language or indicia of legislative intent, no statute would ever be interpreted as dictating an unconstitutional naked land transfer.

This constitutional ban on the sale of land previously granted extended to land granted by foreign governments at a time when the territory in question was indisputably under foreign control. Taney Court justices did rule that the United States was not constitutionally obligated to recognize foreign grants of land that were claimed by the United States at the time of the grant.[101] Still, the justices repeatedly insisted that persons had constitutional rights to any land validly granted by a foreign power before the territory was acquired by the United States. "[W]here the land had been rightfully granted before the cession," the Court declared in *Garcia v. Lee*, "it did not need the aid of an act of congress to ratify and confirm the grant."[102] "Such a title," the Court in *Eslava* opined, "is not to be affected or regulated by the political authorities to whom a country is afterwards ceded, any more or otherwise than any private rights and property of the inhabitants of such a country."[103] Justice Levi Woodbury's opinion further declared:

> [a]nd when a party, holding such complete title, is encroached upon, he should find protection in the judicial tribunals. . . . Chief Justice Marshall says, . . . "The king cedes that only which belonged to him. Lands he had previously granted were not his to cede." And the complete title to them before obtained is strengthened by no confirmation from the United States, who have acquired no interest in them.[104]

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101. *See* Garcia v. Lee, 37 U.S. (12 Pet.) 511, 518 (1838). Justice Baldwin, however, insisted that "grants of land in a disputed territory, by a government de facto, in possession, are valid." *Lessee of Pollard's Heirs*, 39 U.S. (14 Pet.) at 410 (Baldwin, J., concurring).

102. *Garcia*, 37 U.S. (12 Pet.) at 519; *see also* Knight v. United States Land Ass'n, 142 U.S. 161, 184 (1891) ("Irrespective of any such provision in the treaty, the obligations resting upon the United States in this respect, under the principles of international law, would have been the same."); *Lessee of Pollard's Heirs*, 39 U.S. (14 Pet.) at 421 (Baldwin, J., concurring) ("[W]ithout the acts of 1824 or 1836, the plaintiffs' title was as valid as with their aid."); United States v. Arredondo, 31 U.S. (6 Pet.) 691, 742 (1832) ("[W]hen the territory was ceded, the United States had no right in any of the lands embraced in the confirmed grants."); Soulard v. United States, 29 U.S. (4 Pet.) 511, 511-12 (1829) ("In the treaty by which Louisiana was acquired, the United States stipulated that the inhabitants of the ceded territory should be protected in the free enjoyment of their property.").

103. Doe *ex dem.* Barbarie v. Eslava, 50 U.S. (9 How.) 421, 445 (1850).

104. *Id.* (quoting United States v. Percheman, 32 U.S. (7 Pet.) 51, 87 (1833)); *see also Lessee of Pollard's Heirs*, 39 U.S. (14 Pet.) at 390-91, 409 (Baldwin, J., concurring) ("[W]hen a territory

The Supreme Court's decisions in the foreign land grant cases demonstrated the same indifference to positive statutory law as did the cases concerned with successive land grants by the same governing agency. In both lines of decisions, federal justices ruled the precise language in the federal code or in federal treaties was not relevant to the actual decision. The federal government could not grant land that under common or international law was owned by a private party. Whether such grants were permitted by statute or treaty was, at most, only mentioned in passing. It was as if the justices in 1850 ruled on general principles that states could not impose the death penalty for blasphemy, not bothering to explore whether any state law actually imposed capital punishment for that crime.

1. Constitutional, Statutory, or Other

This judicial disinclination to consider the text of most federal land grants complicates efforts to determine whether many Supreme Court decisions forbidding naked land transfers actually declared federal laws unconstitutional. A clear statutory ground for voiding the federal grant usually existed. Congress was aware that ascertaining ownership of land in the territories and in the new states was extremely difficult. Both the national legislature and executive branch officials in the field were known to grant land accidentally that had previously been validly obtained by third parties. One case arose after both the title of the plaintiff and of the defendant to the same land was "confirmed at the same time and by the same act of Congress."[105] Acknowledging the constitutional rule permitting the national government to grant only those lands owned by the national government, Congress included in virtually every public and private federal land grant language clearly stating that the national government had only granted whatever federal interest existed in that land.[106] Federal statutes typically contained such reservations as:

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is acquired by treaty, cession, or even conquest, the rights of the inhabitants to property are respected and sacred."); Letter from Nathan Clifford to John M. Clayton (Sept. 6, 1849), *in* NATHAN CLIFFORD: DEMOCRAT 238-39 (Philip Greely Clifford ed., 1922). In his letter, Clifford wrote:

> All will agree, I suppose, that the treaty, in stipulating for the protection and maintenance of property, gives full confirmation to complete legal titles to lands. In giving this protection to property the treaty does no more than affirm a principle often recognized by the Supreme Court, that the United States, as a just nation, would support such titles although there was no treaty stipulation to that effect.

105. *Eslava*, 50 U.S. (9 How.) at 448.

106. *See, e.g.*, Les Bois v. Bramell, 45 U.S. (4 How.) 449, 463 (1846).

> [t]hat if it shall be found that any tract or tracts confirmed as aforesaid, or any part thereof, had been previously located by any other person or persons under any law of the United States, or had been surveyed and sold by the United States, this act shall confer no title to such lands in opposition to the rights acquired by such location or purchase.[107]

Another statute declared, "nothing in this act contained shall be construed to affect the claim or claims, if any such there be, of any individual or individuals, or of any body politic or corporate."[108] Federal treaties included similar language. Whenever the United States acquired territory from a foreign nation, the cession grant included a provision "stipulat[ing] that the inhabitants of the ceded territory should be protected in the free enjoyment of their property."[109] Justice Baldwin pointed out that "[e]very public act of Congress from 1803 till 1813" concerning the Louisiana territory "contained an express guarantee of property."[110] Thus, in an important sense, the national government avoided passing laws unconstitutionally taking from A and giving to B. Savings clauses were placed in all statutes and treaties declaring that no title would pass in any instance where the result would be an unconstitutional naked land transfer.

Still, important reasons exist for not treating these Taney and Marshall Court land cases as conventional instances of statutory interpretation. The most important reason is that antebellum tribunals did not treat these land cases as presenting simple questions of statutory interpretation. Judicial opinions repeatedly insisted that the federal government could not grant land the United States or a foreign government had previously granted, even if the relevant law lacked a savings clause. "The United States," the Marshall Court ruled in *Soulard v. United States*, "regard this stipulation as the avowal of a principle which would have been held equally sacred, though it had not been inserted in the contract."[111] "Irrespective of any such provision in the treaty" protecting existing titles, Justice Lamar similarly

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107. Act of July 4, 1836, ch. 361, 5 Stat. 126, 126-27 (1836) (confirming claims to land in Missouri).

108. Act of May 26, 1824, ch. 185, 4 Stat. 66, 69 (1824) (granting certain lots of grounds to the city of Mobile, and to certain individuals therein).

109. Soulard v. United States, 29 U.S. (4 Pet.) 511, 511-12 (1829); *see, e.g.*, Act of May 8, 1822, ch. 129, § 5, 3 Stat. 709, 718 (1822) (for ascertaining claims and titles to land within the territory of Florida); *see also* James K. Polk, *To the House of Representatives of the United States*, Jan. 2, 1849, *in* 4 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897 (Volume IV) at 2522-28 (James D. Richardson ed., 1897) [hereinafter MESSAGES AND PAPERS].

110. Lessee of Pollard's Heirs v. Kibbe, 39 U.S. (14 Pet.) 353, 375 (1840) (Baldwin, J., concurring).

111. *Soulard*, 29 U.S. (4 Pet.) at 512.

declared, "the obligations resting upon the United States, . . . under the principles of international law, would have been the same."[112]

Opinions noting the savings clause often did so only to declare that statutory provision superfluous. In *Percheman*, John Marshall explained that "a cession of territory is never understood to be a cession of the property belonging to its inhabitants."[113] In his view, "that sense of justice and of right which is acknowledged and felt by the whole civilized world" meant that "[h]ad Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change."[114] Some antebellum cases denying title to the second grantee explicitly rely on the savings clause as the ground of decision.[115] More often, the justices never mentioned the existence of the savings clause. For example, in *Willot v. Sandford*[116] the Court held that the federal government could not under any conditions grant to B land that belonged to A. At no point did the Court, in *Willot* or any other case, suggest that its decision was limited to the statutory proposition that the federal government, under "An Act confirming certain claims to land in the State of Missouri" (or the like), could not grant to B land that belonged to A.[117] Such a holding would have more clearly left open the possibility that the justices were prepared to sustain a federal law granting private property should the statute in question explicitly assert the power to make a naked land transfer.

Scholars classify the Chase Court's decision in *Reichart v. Felps*[118] as an exercise of judicial review[119] even though the case does not differ in any relevant way from the numerous Marshall and Taney Court land cases that have not been so classified. The crucial sentence in *Reichart* explains that, "Congress is bound to regard the public treaties, and it had no power to organize a board of revision to

112. Knight v. United States Land Ass'n, 142 U.S. 161, 184 (1891); Polk, *supra* note 109, at 2534 ("[I]f the ninth article of the treaty [ending the Mexican war] . . . had been entirely omitted, . . . all the rights and privileges which either of them confers would have been secured to the inhabitants of the ceded territories by the Constitution and laws of the United States.").

113. United States v. Percheman, 32 U.S. (7 Pet.) 51, 87 (1833).

114. *Id.* at 86-87, 88.

115. *See, e.g.*, Mills v. Stoddard, 49 U.S. (8 How.) 345, 364-65 (1851); Bissell v. Penrose, 49 U.S. (8 How.) 317, 336-37 (1850); City of Mobile v. Emanuel, 42 U.S. (1 How.) 95, 100 (1843); City of Mobile v. Hallett, 41 U.S. (16 Pet.) 261, 263 (1842).

116. Willot v. Sandford, 60 U.S. (19 How.) 79 (1856).

117. *Id.* at 80-82.

118. Reichart v. Felps, 73 U.S. (6 Wall.) 160 (1868).

119. *See* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 96-99 (1994) (including *Reichart* in a table of Supreme Court decisions: "Holding Acts of Congress Unconstitutional in Whole or in Part, 1789-1990").

nullify titles confirmed many years before by the authorized agents of the government."[120] Congress had done no such thing. The law struck down in *Reichart* contained a savings clause declaring that "nothing herein contained, shall be construed to confirm any particular decision, heretofore made in favour of any individual, or to affect the right of any other individual claiming the same land; but such conflicting claims shall be decided according to law by the proper tribunal."[121] As a result, the board of revision had no power to nullify private titles. As was the case with the Taney Court cases discussed above, the federal statute in question only authorized granting the federal interest in certain land.

Reichart was decided on constitutional grounds. Chief Justice Salmon Chase held that Congress could not constitutionally nullify private land titles and did not mention the savings clause.[122] Still, numerous antebellum cases had also held that Congress could not constitutionally nullify private land titles, similarly ignoring statutory language indicating that Congress had not intended to nullify land titles. Either *Reichart* should be taken off the list of cases declaring federal laws unconstitutional or other Supreme Court cases should be added. Better yet, these cases should all be understood as instances where the justices laid down clear constitutional limitations on federal power without necessarily declaring a federal law unconstitutional.

The constitutional ban on naked land transfers also justified principles of statutory interpretation that required justices to ignore the plain meaning of legislative or executive decrees in order to prevent constitutional violations. As noted above, the antebellum Supreme Court adopted an absolute presumption that governing officials had not intended to grant to B land that belonged to A, even when the relevant text seemed to sanction that outcome.[123] The justices in *Lytle* for similar reasons interpreted a statutory provision authorizing a town to select from all the land within a given region as merely authorizing the town to select from all the unappropriated land within the region.[124] Given that the unanimous Supreme Court in *Fletcher* and *Rice* insisted that state and federal land grants that did impair vested rights would be unconstitutional, sharp distinctions should not be made between decisions holding that governing officials could not constitutionally grant private property and decisions holding

120. *Reichart*, 73 U.S. (6 Wall.) at 166-67.
121. Act of Feb. 20, 1812, ch. 22, § 3, 2 Stat. 677, 678 (1812).
122. *See Reichart*, 73 U.S. (6 Wall.) at 166.
123. *See supra* notes 96-100, 111-17 and accompanying text.
124. *See, e.g.*, Lytle v. Arkansas, 50 U.S. (9 How.) 314, 334 (1850).

that for constitutional reasons the statute in question would not be interpreted as authorizing governing officials to grant private property.

Percheman[125] provides another instance where, instead of ignoring statutory law, the justices engaged in statutory misconstruction solely to prevent an unconstitutional naked land transfer of property. The issue in *Percheman* was not whether federal authorities had granted land to one person that was owned by a third party—the statute in question explicitly denied that intention[126]—rather the issue was how ownership was to be determined. Congress had provided a commission to ascertain land titles in Florida. "Any claim not filed" before a specific date, the crucial provision of the relevant statute declared, "shall be deemed and held to be void and of none effect."[127] Percheman filed no claim before the commission.[128] He nevertheless insisted that he retained title to the disputed land because of a land grant from Spain when Florida was acknowledged Spanish territory.

The Marshall Court found in favor of Percheman, interpreting the statutory provision in dispute as merely prohibiting the commission from confirming land claims filed after the given date. "The provision, that claims not filed with the commissioners previous to the 30th of June 1823 should be void," Marshall's opinion stated, "can mean only that they should be held so by the commissioners, and not allowed by them."[129] Marshall's remarkable analysis denied that the statute affected underlying property rights. In his view, the power of the commission "should not extend to claims filed afterwards" only because "[i]t is impossible to suppose that Congress intended to forfeit real titles not exhibited to their commissioners within so short a period."[130] Marshall made clear that the fundamental problem with a literal interpretation of the statute was the power to divest title, and not the short period of time to file claims. "Is it possible," he asked, "that Congress could design to submit the validity of titles, which were 'valid under the Spanish government, or by the law of nations,' to the determination of these commissioners?"[131] For this reason, Marshall concluded, "the mind of Congress was directed solely to the

125. United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

126. *See* Act of May 8, 1822, ch. 129, § 5, 3 Stat. 709, 718 (1822) ("[S]uch confirmation will only act as a release of any interest which the United States may have.").

127. *Id.* § 4, 3 Stat. at 717.

128. For the background of the *Percheman* litigation as discussed in this paragraph, see *Percheman*, 32 U.S. (7 Pet.) at 51-82.

129. *Id.* at 90.

130. *Id.*

131. *Id.* at 91.

confirmation of claims, not to their annulment."[132] Persons would not lose any property right to land in Florida merely because they ignored the procedures laid down by the federal government for ascertaining land titles.

The difficulty with Marshall's position is that the commission was statutorily charged with "ascertaining and determining . . . all claims to land within [Florida]."[133] The statute declared, "every person . . . claiming title to lands . . . valid under the Spanish government . . . shall file, before the commissioners, his, her, or their claim."[134] The same provision concluded that "any claim not filed . . . shall be held to be void."[135] This use of "void" seems a poor way to state that the commissioners could not consider such a claim, but courts could. Marshall's interpretation seems particularly perverse because the commissioners were obligated to post notices "requiring all persons to bring forward their claims."[136] Such language hardly bespeaks a legislative intent that persons who ignored the commission would nevertheless be able to assert title to Florida land in judicial proceedings. In short, the evidence strongly suggests that Marshall avoided declaring a law an unconstitutional naked land transfer in *Percheman* only by deliberately misreading the text of the statute.

This judicial willingness to reject the plain meaning of a legislative decree, for the sole reason that such an interpretation would require the justices to void the offending measure, superficially resembles a "passive virtue" that Bickel urged federal justices to employ as a means for obviating the need to take positions on constitutional matters.[137] *The Least Dangerous Branch* championed Justice Brandeis's suggestion[138] in *Ashwander v. Tennessee Valley Authority* that by resolving cases on statutory grounds, the Supreme Court could "avoid[ ] passing upon a large part of all the constitutional questions pressed upon it for decision."[139] Antebellum justices, however, aggressively resolved those constitutional questions Bickel and Brandeis sought to avoid. Judicial opinions made clear that the statute was not being interpreted consistent with its literal meaning because the fed-

132. *Id.* at 94.
133. *See* Act of May 8, 1822, ch. 129, § 4, 3 Stat. 709, 717 (1822) (emphasis added).
134. *Id.*
135. *Id.*
136. *Id.* § 3.
137. Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).
138. BICKEL, *supra* note 18, at 175-83.
139. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

eral government had no power to pass such a measure.[140] Whereas Bickel and Brandeis sought to keep constitutional questions open, antebellum justices interpreted federal law in ways that foreclosed consideration of those constitutional questions. The Court held that the statute at issue in *Percheman* could not be interpreted as authorizing the commission to void titles not presented at a certain time, because the federal government had no constitutional authority to pass such a law.

The Supreme Court in one sense could never declare laws unconstitutional if every federal statute had a provision indicating that nothing in the law was intended to exercise powers not entrusted to the national government or violate constitutional rights. Similarly, the justices would never have to void a legislative decree if they always adopted an irrebuttable presumption that the statute before the Court was not intended to exercise unconstitutional powers or abridge constitutional liberties. Questions of judicial review in a democracy would hardly vanish, however, if savings clauses were routinely placed in all statutes or if statutes were routinely misconstrued rather than declared unconstitutional. *Dred Scott* would be no less controversial had Congress included in the Missouri Compromise a savings clause declaring, "nothing in this statute is intended to abridge any constitutional right," or if the justices for constitutional reasons declared that they would never interpret a federal law as prohibiting slavery in the territories.

The better approach is to acknowledge that judicial review is not necessarily countermajoritarian. Following *Willot v. Sandford*, some cases may hold that Congress is not constitutionally authorized to do what Congress by statute recognized the national legislature could not constitutionally do. The savings clauses in most antebellum land laws licensed the justices to enforce the consensual constitutional understanding that government could not grant private property. That the Supreme Court had legislative permission to void those land grants under certain conditions is consistent with the Court voiding those land grants on constitutional grounds. Moreover, as *Lytle* and *Percheman* indicate, the justices with tacit legislative approval understood this delegation of power as licensing the federal courts to misconstrue minor statutes that, if followed to the letter, would result in an unconstitutional naked land transfer. All these cases clearly imposed constitutional limits on federal power. Whether they also de-

140. *See, e.g.*, Commonwealth of Ky. v. Dennison, 65 U.S. (24 How.) 66 (1860); Lytle v. Arkansas, 50 U.S. (9 How.) 314 (1850); United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

clared a law unconstitutional should be recognized as a question of less significance.

C. Equal Footing

Supreme Court decisions in cases raising questions concerning the "equal footing" doctrine present more complex judicial applications of the constitutional ban on naked land transfers. The litigants in the federal land law cases discussed above agreed that the United States could have granted the land in dispute if that land had not previously been granted. The point of contention was over the facts or procedures necessary to determine whether that land had previously been granted. The dispute in equal footing cases was over whether the United States had the power to grant the land in dispute, even if that land had not previously been granted. Equal footing cases raised naked land transfer questions because the underlying claim was that federal officials had granted, or were asserting authority to grant, land that by constitutional law no longer belonged to the national government.

Antebellum Americans agreed that new states would be created equal. The Northwest Ordinance declared that new states were entitled "to a share in the federal councils on an equal footing with the original states."[141] Congressional resolutions similarly proclaimed that new states were "admitted into the Union on an equal footing with the original states, in all respects whatever."[142] What "equal footing" meant in practice, however, was never clear. Events during the constitutional convention established that new states would be allocated representation in Congress and electoral votes on the same basis as the original states.[143] No agreement was reached on whether the national government could pass laws attaching conditions for statehood that would be unconstitutional if applied to an existing state. Much of the debate during the Missouri crisis was over whether Congress could require a territory to free slaves as a condition for

141. THE NORTHWEST ORDINANCE (1787), *reprinted in* 2 DOCUMENTS OF AMERICAN HISTORY 130 (Henry Steele Commanger ed., 8th ed. 1968).

142. Act of Apr. 8, 1812, ch. 50, § 1, 2 Stat. 701, 703 (1812) (declaring admission of Louisiana); *see also* Act of Dec. 14, 1819, Res. I, 3 Stat. 608, 609 (1819) (declaring admission of Alabama).

143. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 2 (Max Ferrand ed., 1937).

statehood, even though all prominent political actors agreed that Congress had no power to interfere with slavery in an existing state.[144]

Public land policy proved a particularly thorny political application for the "equal footing" doctrine. The original states at the time of ratification owned all lands within their jurisdiction that had not previously been granted to private parties.[145] The national government, all agreed, could exercise exclusive jurisdiction over land within a given state only under the stringent conditions set out in the Constitution itself: in "Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."[146] Territories were a different matter. In these regions, there was a general consensus that the federal government had the right to govern and dispose of all land not previously granted to third parties. Some influential westerners, most notably future Justice John McKinley, maintained that when a territory became a state, equal footing principles required that title to all unappropriated land instantly become vested in the new state.[147] The Indiana legislature in 1829 declared, "this State, being a sovereign, free, and independent State, has the exclusive right to the soil and eminent domain of all the unappropriated lands within her acknowledged boundaries."[148] This state's rights position was never recognized by the national government,[149] and was largely abandoned by the early 1830s.[150] Most politicians during the Jacksonian era maintained that ownership rights over unappropriated land did not transfer from the national government to states upon statehood. New states were routinely required to "disclaim all right or title to the waste or unappropriated lands, lying within [their] territory."[151] Nevertheless, several peripheral matters concerning the

144. *See* GLOVER MOORE, THE MISSOURI CONTROVERSY, 1819-1821, at 42-46, 120-22 (1967); *see also* DANIEL FELLER, THE PUBLIC LANDS IN JACKSONIAN POLITICS 25-26 (1984).

145. *See* FELLER, *supra* note 144, at 5.

146. U.S. CONST. art. I, § 8.

147. FELLER, *supra* note 144, at 37, 43-44, 48, 74-78, 86, 94-95, 107-08, 115 (discussing other states' views on appropriating public lands within their domain); JOHN MCKINLEY, SPEECH OF MR. MCKINLEY, OF ALABAMA ON THE BILL TO GRADUATE THE PRICE OF PUBLIC LANDS (Mar. 26, 1828) (Washington, Green & Jarvis '1828). Justice Baldwin also seems to have held this view. *See* BALDWIN, *supra* note 81, at 95 ("[T]he United States can have no right of soil within any of the states of this Union, unless by a cession from the particular states, or a foreign state, who was the original, absolute, proprietary thereof.").

148. FELLER, *supra* note 144, at 108.

149. *See* NORTHWEST ORDINANCE, *supra* note 141, at 131 ("The legislatures of those districts or new States, shall never interfere with the primary disposal of the soil by the United States.").

150. *See* FELLER, *supra* note 144, at 108-09, 134.

151. Act of Feb. 20, 1811, ch. 21, 2 Stat. 641, 642 (1811); *see also* Act of Mar. 2, 1819, ch. 47, 3 Stat. 489, 492 (1819).

transfer of jurisdiction over land at statehood did come before the antebellum federal judiciary. The Taney Court in these cases relied on equal footing principles when placing constitutional limits on federal power.

The Supreme Court first proved willing to limit federal control of land in new states when handing down an important decision the year after Marshall died. The issue in *Mayor of New Orleans v. United States* was whether the local authorities or the national government was authorized to grant title to property that had been dedicated for public purposes when Louisiana was a territory.[152] Federal authorities had long presumed that such land remained under the exclusive control of the national government. After Louisiana became a state, Congress passed at least three statutes exercising control over particular parcels of the disputed area.[153] When New Orleans sought to sell another part of the land in question, the local federal attorney went to court seeking an injunction barring the sale.[154]

A unanimous Supreme Court sided with the city against the federal government. Justice McLean's opinion recognized that Congress had previously asserted control over the land.[155] He nevertheless insisted that such control was inconsistent with the constitutional allocation of authority over property. The federal government, McLean claimed, could exercise exclusive jurisdiction only over land that was being used for the narrow purposes set in Article I, Section 8. His opinion declared:

> Special provision is made in the constitution, for the cession of jurisdiction from the states over places where the federal government shall establish forts, or other military works. And it is only in these places, or in the territories of the United States, where it can exercise a general jurisdiction.[156]

As the federal government conceded that the land in question was not being used for any specified Article I purpose, New Orleans concluded that the Constitution vested sovereignty over land dedicated for special purposes in states immediately upon statehood.[157]

New Orleans was clearly a constitutional decision. In sharp contrast to the naked land transfer cases discussed previously, Justice McLean could not have relied on a statutory ground for his decision.

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152. Mayor of New Orleans v. United States (New Orleans), 35 U.S. (10 Pet.) 662, 711 (1836).

153. Act of Mar. 30, 1822, ch. 16, 3 Stat. 661 (1822); Act of Apr. 20, 1818, ch. 115, 3 Stat. 465 (1818); Act of Apr. 3, 1812, ch. 48, 2 Stat. 700 (1812).

154. *See New Orleans*, 35 U.S. (10 Pet.) at 663.

155. *Id.* at 734-35.

156. *Id.* at 737.

157. *Id.*

None of the three statutes under consideration had a savings clause preserving the rights of third parties. *New Orleans* held that local authorities had title to the land in question despite clear statutory assertion of federal control. "The state of Louisiana was admitted into the union," McLean wrote, "on the same footing as the original states."[158] In his view, Louisiana's "rights of sovereignty are the same, and by consequence no jurisdiction of the federal government, either for purposes of police or otherwise, can be exercised over this public ground, which is not common to the United States."[159] No federal injunction could prevent the city of New Orleans from granting private parties title to the disputed land. Previous sales or leases of that property were deemed unconstitutional naked land transfers.[160] "It belongs to the local authority to enforce the trust," McLean asserted, "and prevent what they shall deem a violation of it by the city authorities."[161] Later nineteenth-century cases treated *New Orleans* as authoritatively holding that, while the federal government could own lands in state, state law governed all land within the borders of a state except federal land being used for Article I purposes.[162]

New Orleans did not declare a federal law unconstitutional only because while past federal laws had assumed federal control over the land in controversy, no federal law explicitly banned the sale of the particular parcel of land at issue in the case. Although New Orleans's effort to sell the parcel was inconsistent with existing federal practice, the action did not directly impair any rights granted by previous federal laws. No beneficiary of any previous federal statute was a party to the *New Orleans* litigation. Hence, the constitutionality of those measures which asserting federal authority over the disputed property, strictly speaking, was not before the Court.

Still, when concluding that New Orleans could sell the disputed parcel, Justice McLean's opinion made clear that the national government had no power to pass the previous acts that counsel for the United States had claimed demonstrated federal control of the land in question.[163] Certainly third parties who had acquired rights by those previous federal acts could have no confidence that those rights would stand up when challenged by a party who had been granted a similar right by New Orleans. What confidence that might have been mus-

158. *Id.*
159. *Id.*
160. *Id.* at 731.
161. *Id.* at 737.
162. *See, e.g.*, Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 223-24 (1845).
163. *See New Orleans*, 35 U.S. (10 Pet.) at 735-36.

tered was surely abandoned nine years later when the Supreme Court clearly voided another federal land grant on equal footing grounds.

That case, *Pollard's Lessee v. Hagan*, concerned the constitutionality of a private federal law transferring title to land below the high water mark of the Mobile River.[164] Most Jacksonian leaders, as noted above,[165] agreed that when territories became states, the federal government retained title (though not jurisdiction) over unappropriated and waste lands. Consistent with this belief, the national government continued selling and giving away public lands after a territory became a state. One such grant was made to the heirs of William Pollard.[166] Alabama and other states maintained that when they joined the Union, their state at the very least acquired title to all rivers and riverbeds, and that such lands belonged to the states to dispose of, subject only to the requirement that state policies not obstruct interstate commerce.[167] The defendant in *Pollard's Lessee*, John Hagan, claimed title by virtue of a grant from Alabama to the shore lands that the national government had granted to Pollard's heirs.[168]

The Alabama Supreme Court in a series of decisions had previously endorsed Alabama's understanding of equal footing. Alabama grantees were ruled the proper owner of riverbeds in that state. The federal land grant to the heirs of William Pollard and related federal laws were declared "inoperative."[169] Judge Collier of the Alabama Supreme Court in *City of Mobile v. Eslava* held that "it is not competent for Congress to grant a right of property" in state riverbeds.[170] Why Congress lacked this power was not entirely clear in the original opinion and was further muddied in subsequent Alabama decisions. Judge Collier, in a related case handed down the next year, declared that *Eslava* "decided . . . that Congress did not possess the constitutional right to grant the shore of the navigable waters within the States."[171] Two years later, however, Judge Collier claimed that *Eslava* merely held that because, properly interpreted, the congressional act recognizing Alabama statehood left that state in possession of state riverbeds, the constitutional wrong in *Eslava* was merely the federal grant of land previously granted to the state of Alabama—a

164. For a good description of the background of that case, see ROBERT SAUNDERS JR., JOHN ARCHIBALD CAMPBELL: SOUTHERN MODERATE, 1811-1889, at 43-56 (1997).

165. *See supra* notes 147-51 and accompanying text.

166. *See* Act of July 2, 1836, ch. 344, 6 Stat. 680 (1836).

167. *See Pollard's Lessee*, 44 U.S. (3 How.) at 214-16 (argument of Mr. Sergeant).

168. *See id.* at 214 (argument of Mr. Coxe).

169. *See* City of Mobile v. Eslava, 9 Port. 577, 603 (Ala. 1839).

170. *Id.* at 603.

171. Doe *ex dem.* Duval's Heirs v. McLoskey, 1 Ala. 708, 747 (1840).

naked land transfer. *Eslava*, he now declared, did not explore "[w]hether an admission of a State into the Union, on the same footing as the original States, means any thing more than an equal participation in political rights and privileges."[172] To further confuse matters, the original *Eslava* opinion, without acknowledging the existence of the savings clause in the original land grant, asserted that the "act of Congress cannot be held to assert a title on the part of the United States, but is nothing more than a renunciation of whatever title the government may have."[173] These ambiguous passages suggest that the Alabama decisions on ownership of riverbeds can be interpreted as merely declaring that by statute Congress had not divested any state title, or as holding that Congress lacked the constitutional power to divest any state title.

After ducking the issue in several cases on procedural or other statutory grounds,[174] the United States Supreme Court in 1845 more clearly asserted the constitutional grounds for ruling that the Alabama grantees were the legitimate owners of the disputed property. Justice McKinley's majority opinion did everything necessary to declare a federal law unconstitutional but explicitly utter the sentence "the federal law is unconstitutional."[175] His opinion focused almost entirely on the constitutional status of lands below the high water mark. His crucial conclusions were constitutional conclusions, highlighting the lack of federal power, not a mere statutory failure to exercise constitutional powers in a particular circumstance. McKinley asserted that "to Alabama belong the navigable waters and soils under them."[176] "This right of eminent domain over the shores and soils under the navigable waters," he continued, "belongs exclusively to the states and they, and only they, have the constitutional power to exercise it."[177] McKinley rejected claims that the provision in the law providing for Alabama statehood reserving all unappropriated and waste lands to the national government[178] supported the Pollard claim.

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172. Kemp *ex dem.* Pollard's Heirs v. Thorp, 3 Ala. 291, 293-94 (1842).

173. *Eslava*, 9 Port. at 596-97.

174. *See, e.g.*, City of Mobile v. Eslava, 41 U.S. (16 Pet.) 234, 245-46 (1842) (stating that the constitutional issue was not properly raised in the record); City of Mobile v. Hallett, 41 U.S. (16 Pet.) 261, 263 (1842) (holding that federal grantee had no statutory right against a private party because land fit within exception to the Act); *accord* City of Mobile v. Emanuel, 42 U.S. (1 How.) 95, 100 (1843); *see also* SAUNDERS, *supra* note 164, at 51 (pointing out that the Court kept dodging the underlying question).

175. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 229 (1845).

176. *Id.*

177. *Id.* at 229-30. McKinley did maintain that the compact between Alabama and the United States was not intended to vest rights to riverbeds in the federal government.

178. *See* Act of Mar. 2, 1819, ch. 47, 3 Stat. 489, 492 (1819).

"No compact," in his view, "that might be made between [Alabama] and the United States could diminish or enlarge these rights" to state rivers and riverbeds.[179] McKinley, in sharp contrast to Judge Collier of Alabama, did not consider whether Congress had ceded control of the disputed property in the law providing for Alabama statehood. Moreover, he never mentioned the existence of a savings clause in the federal grant to Pollard's heirs. Instead, McKinley concluded by laying down three constitutional limitations on federal power:

> First, The shores of navigable waters and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. Thirdly, The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case. The judgment of the Supreme Court of the state of Alabama is, therefore, affirmed.[180]

The Supreme Court reaffirmed and expanded the principles of *Pollard's Lessee* in two subsequent cases. *Hallett v. Beebe*[181] summarily declared on the authority of *Pollard's Lessee* that the national government could not give good title to land below the high water mark of a river. The brief opinion in *Beebe* noted the existence of a savings clause in the statute in question. That clause, however, played no role in the decision.[182] As the reporter's headnote declared, the holding in *Beebe* was "after the admission of Alabama into the Union as a State, Congress could make no grant of land situated between the high and low water marks."[183] The justices in *Goodtitle* ruled that while the national government could grant land below the high water mark when governing territories, states only had to honor federal grants when the title had been perfected before statehood.[184] The existence of an imperfect title, Chief Justice Taney declared, "could not enlarge the power of the United States over the place in question . . . nor authorize the general government to grant or confirm

179. *Pollard's Lessee*, 44 U.S. (3 How.) at 229.

180. *Id.* at 230.

181. Hallett v. Beebe (Beebe), 54 U.S. (13 How.) 25 (1851), *aff'g sub nom.* Doe *ex dem.* Kennedy v. Beebe, 8 Ala. 909 (1846).

182. *Id.* at 26. No justice in *Pollard's Lessee* or *Goodtitle ex dem. Pollard v. Kibbe*, 50 U.S. (9 How.) 471 (1850), mentioned the existence of a similar savings clause. *See* Act of July 2, 1836, ch. 344, 6 Stat. 680, 681 (1836). *But see* Mobile Transp. Co. v. City of Mobile, 187 U.S. 479, 490 (1903) (citing the savings clause as supporting the ruling that "inasmuch as all lands below the high water mark had passed to the State of Alabama upon her admission into the Union in 1819, there was nothing left upon which a subsequent patent of the United States could operate").

183. *Beebe*, 54 U.S. (13 How.) at 25.

184. *Goodtitle*, 50 U.S. (9 How.) at 478.

a title to land when the sovereignty and dominion over it had become vested in the State."[185]

Whether *Pollard's Lessee* declared a federal law unconstitutional is not perfectly clear, given the confused grounds for the original state court decisions. Still, Justice Catron's dissent in *Pollard's Lessee* recognized that the Supreme Court had declared federal laws unconstitutional. "The act," he wrote, "is declared void in the present cause."[186] Catron further observed, "[t]he charge of the state court to the jury was, that the act of Congress of 1836, . . . [and] the act of 1824, were void. . . . And this charge is declared to have been proper, by a majority of this court."[187] President Polk may have been referring to *Pollard's Lessee* when he reminded Americans in 1848 that "[t]he Supreme Court of the United States is invested with the power to declare, and has declared, acts of Congress . . . to be unconstitutional and void."[188] The reference to "acts of Congress" declared "unconstitutional and void" suggests that Polk and his audience believed the federal judiciary had struck down more than one federal law. For both grammatical and other reasons, the possibility cannot be ruled out that Polk was referring only to *Marbury* or only to *Marbury* and *United States v. Yale Todd*, an extraordinarily obscure case whose existence was not even reported until 1852.[189] Still, given that President Polk was attempting to justify the frequent use of the veto power by Jacksonian executives to prevent measures believed unconstitutional from becoming law, good reason exists that he was not just referring to two judicial decisions on trivial federal jurisdiction measures decided more than forty-five years in the past. Rather, the President may well have had in mind *Pollard's Lessee*, a decision handed down during his presidency, and perhaps some of the other cases discussed previously where the Supreme Court declared federal land grants void.

The *Pollard's Lessee*[190] and *New Orleans*[191] decisions belie recent claims that antebellum justices held narrow understandings of the judicial power in constitutional cases, and that the jurists on the Mar-

185. *Id.*

186. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 233 (1845) (Catron, J., dissenting).

187. *Id.*

188. James K. Polk, *Fourth Annual Message*, *in* 4 MESSAGES AND PAPERS, *supra* note 109, at 2479, 2518.

189. *United States v. Yale Todd* was decided in 1794, but was never printed as there was not an official reporter at that time. It appears, however, in *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52-53 (1852). *See* 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88, at 52 n.85 (Paul Freund ed., 1971).

190. *Pollard's Lessee*, 44 U.S. (3 How.) at 233.

191. Mayor of New Orleans v. United States (New Orleans), 35 U.S. (10 Pet.) 662 (1836).

shall and Taney Courts believed the judicial power in constitutional cases was restricted to questions of a judiciary nature[192] or should be exercised only when a federal law was unconstitutional beyond a reasonable doubt.[193] The issue in *Pollard's Lessee* and *New Orleans* concerned land law, not judicial procedure or federal jurisdiction. No justice or counsel in those cases, in any related case, or, for that matter, in any Taney Court case, asserted that the judicial power did not extend to disputes between the national and state governments concerning authority over land. Justice Catron's dissent in *Pollard's Lessee* suggests that the rule of reasonable doubt was more rhetoric than a principle that actually influenced judicial decisions. Catron's opinion in many ways reads like the dissents in *Roe v. Wade*[194] or *National League of Cities v. Usery*[195] in its accusation that new constitutional rights were being invented. The justice from Tennessee paid particular attention to a long legal history supporting the federal ownership of the riverbeds. "For thirty years," he complained, "neither Congress, [n]or any state legislature, has called into question the power of the United States to grant the flowed land."[196] In his view, "in such a case, where there is a doubt, and a conflict suggested, the political departments, state and federal should settle the matter by legislation."[197] No justice in the majority responded to Catron's effort to employ the principle of reasonable doubt.

III. THE ROUTINIZING OF JUDICIAL REVIEW IN ANTEBELLUM AMERICA

The naked land transfer cases belie the near universal claim that the Supreme Court did not declare a federal law unconstitutional between *Marbury* and *Dred Scott*. The Taney Court in the *Pollard's Lessee* line of cases clearly struck down a series of federal statutes. *New Orleans* might also count as an instance where the Supreme Court declared federal laws unconstitutional. When concluding that New Orleans could sell the disputed parcel, Justice McLean's unani-

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

193. *See generally* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1990); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW (rev. ed. 1994).

194. Roe v. Wade, 410 U.S. 113 (1973).

195. National League of Cities v. Usery, 426 U.S. 833 (1976).

196. *Pollard's Lessee*, 44 U.S. (3 How.) at 232 (Catron, J., dissenting).

197. *Id.* (Catron, J., dissenting).

mous opinion made clear that three federal laws asserting federal sovereignty over that land were unconstitutional. No third person, he made clear, could acquire any right to that property by virtue of those federal statutes.[198]

The naked land transfer cases also demonstrate that judicial review of federal law, understood as the judicial power to impose constitutional limits on federal action, was relatively common practice before the Civil War. The justices may have rarely declared federal laws unconstitutional. Still, the justices relied heavily on a variety of other means for preventing Congress from transgressing constitutional limits. Antebellum justices engaged in statutory misconstruction when interpreting a statute literally would result in a naked land transfer. In other cases, Marshall and Taney Court majorities engaged in statutory neglect, declaring that the federal government could not constitutionally grant land without determining whether the federal government by statute had attempted to grant that land. Significantly, the naked land transfer cases were not the only instances where the Supreme Court before the Civil War used statutory misconstruction and neglect to impose constitutional limitations on federal power. Close reading of other antebellum cases reveals a Supreme Court far more willing to restrict federal power than conventional accounts suggest.

The first sixty-five volumes of the U.S. Reports contain many examples of statutory misconstruction. Chief Justice Taney in *Commonwealth of Kentucky v. Dennison*[199] avoided declaring a federal law unconstitutional by refusing to adopt the plain meaning of a statutory declaration. Although nothing in the language or context of the statute suggested that Congress was engaged in mere exhortation when adopting that provision, the unanimous Court nevertheless ruled that the statutory declaration, "it shall be the duty" of a state executive to extradite a fugitive from another state, stated a judicially unenforceable moral responsibility rather than an enforceable legal obligation.[200] Taney admitted that "[t]he words, 'it shall be the duty,' in ordinary legislation, imply the assertion of the power to command and to coerce obedience."[201] He rejected that interpretation only because "the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel

198. *See* Mayor of New Orleans v. United States (New Orleans), 35 U.S. (10 Pet.) 662, 735-36 (1836).

199. Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861).

200. *Id.* at 107.

201. *Id.*

him to perform it."[202] The Marshall and Ellsworth Courts in at least three cases interpreted the provision in the Judiciary Act of 1789 granting federal jurisdiction in all cases "where an alien is a party,"[203] as granting jurisdiction only when "an alien is one party, but a citizen is the other."[204] Statutes, the justices explained, "must receive a construction, consistent with the constitution."[205]

Antebellum justices sometimes conflated statutory and constitutional analysis by first interpreting legislation as intended only to exercise constitutional powers and then holding that the Constitution did not vest the national government with the power to regulate the activity in question. *People's Ferry Co. of Boston v. Beers* held that federal courts could not exercise admiralty jurisdiction in disputes over the wages due to a shipbuilder.[206] No specific statutory analysis was necessary because the justices, without argument or evidence, assumed that federal admiralty statutes only vested federal courts with jurisdiction in cases where the Constitution (as interpreted by the Supreme Court) permitted jurisdiction, and that the Constitution did not authorize admiralty jurisdiction for disputes over a "contract made on land, to be performed on land."[207]

Taney Court justices demonstrated their capacity to engage in statutory neglect when adjudicating a series of cases concerning the transfer of federal judicial power after territories became a state.[208] The Supreme Court in *Benner v. Porter* held that when reestablishing federal jurisdiction, Congress could not authorize former territorial courts and judges to continue functioning.[209] Federal jurisdiction in new states, the justices agreed, could be exercised only by newly established federal tribunals that met all Article III standards. Any

202. *Id.* at 107-08. For other Taney Court decisions construing and misconstruing statutes to avoid declaring federal laws unconstitutional, see *Withers v. Buckley*, 61 U.S. (20 How.) 84, 92 (1858); *Veazie v. Moor*, 55 U.S. (14 How.) 568, 575 (1853).

203. Act of Sept. 24, 1789, ch. 20, § 10, 1 Stat. 72, 78 (1789).

204. Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 14 (1800); *see also* Jackson v. Twentyman, 27 U.S. (2 Pet.) 136, 136 (1829); Hodgson & Thompson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809). For a similar Marshall Court exercise in statutory misconstruction, see generally *Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344 (1809) (noting that the 25th section of the Judiciary Act must be limited by the Constitution); see also generally Dennis J. Mahoney, *A Historical Note on* Hodgson v. Bowerbank, 49 U. CHI. L. REV. 725, 730 (1982) (discussing the influence of this practice on Marshall Court decisionmaking).

205. *Mossman*, 4 U.S. (4 Dall.) at 14.

206. People's Ferry Co. v. Beers, 61 U.S. (20 How.) 393, 401 (1858).

207. *Id.* at 402. For a similar exercise in statutory/constitutional analysis, see *Ex Parte Vallandigham*, 68 U.S. (3 Black) 243, 251 (1864).

208. For other examples of statutory neglect, see *Ex parte Vallandigham*, 68 U.S. (3 Black) at 251.

209. Benner v. Porter, 50 U.S. (9 How.) 235, 245 (1850).

action taken after statehood by an Article I territorial court or judge was null, even if that action was authorized by federal law. "Congress," Justice Nelson wrote,

> must not only ordain and establish inferior courts within a State, and prescribe their jurisdiction, but the judges appointed to administer them must posses the constitutional tenure of office before they can become invested with any portion of the judicial power of the Union. There is no exception to this rule in the Constitution. The Territorial courts, therefore, were not courts in which the judicial power conferred by the Constitution on the Federal government could be deposited. They were incapable of receiving it, as the tenure of the incumbents was but for four years. . . . Neither were they organized by Congress under the Constitution, as they were invested with powers and jurisdiction which that body were incapable of conferring upon a court within the limits of a State.[210]

Benner explicitly declared that Congress could not constitutionally vest an Article I court with Article III powers, and that the decision of the territorial judge after statehood in the case before the court was utterly void. The opinion does not, however, indicate whether Congress actually authorized a territorial court of justice to exercise federal judicial power in a state. Losing counsel pointed to several statutes that he claimed permitted territorial courts to continue functioning to some degree until Article III federal courts were established in a new state. Justice Nelson did not discuss this statutory matter. Having reached the constitutional conclusion that territorial courts could not adjudicate cases once a territory became a state, Justice Nelson apparently did not find it necessary to discuss whether Congress had attempted to continue jurisdiction.

Chief Justice Taney in 1846 similarly used a constitutional issue to avoid a statutory question. The issue in *Hunt v. Palao* was whether and how the justices could obtain the record of the territorial proceedings for a case then pending before the Supreme Court of the United States.[211] Taney first noted that the original writ of error from the territorial court was now void and could not support jurisdiction: "[t]he court which rendered the judgment in the case before us is no longer in existence."[212] Taney then noted that counsel had claimed that the Judiciary Act of 1789 might enable the justices to obtain the materials necessary to hear the case. Rather than explore whether federal statutory law justified jurisdiction, Taney indicated that statutory language was not relevant. In his view, even "if the language of that section would justify such a construction, and the record and proceedings were brought here by a writ of error . . . , still there is no

210. *Id.* at 244.
211. Hunt v. Palao, 45 U.S. (4 How.) 589, 590 (1846).
212. *Id.*

tribunal to which we are authorized to send a mandate to proceed further in the case, or to carry into execution the judgment which this court may pronounce."[213] Just as Justice Nelson had done in *Benner*, Chief Justice Taney did not determine whether federal statutes provided for jurisdiction because jurisdiction could not be constitutionally given.

McNulty v. Batty[214] deserves special mention as the most creative antebellum judicial effort to articulate constitutional limits on federal power without explicitly declaring a federal law unconstitutional. The issue in *McNulty* was whether the Supreme Court could hear a case on a writ of error from a territorial court after the territory had become a state. Following *Benner* and *Hunt*, the justices first determined that federal courts could not constitutionally adjudicate cases on a writ of error from a territorial court that no longer existed.[215] Justice Nelson's unanimous opinion recognized, however, that Congress had by law established a procedure for appealing territorial decisions to the federal judiciary. That federal law gave the Supreme Court jurisdiction over "all cases which may be pending in the Supreme or other Superior Court of and for any Territory of the United States" as well as "all cases in which judgments or decrees shall have been rendered in such Supreme or Superior Court at the time of such admission, and not previously removed by [a] writ of error or appeal."[216] Alas, the losing party in *McNulty* had removed that case to the Supreme Court by a writ of error before Wisconsin joined the Union. Justice Nelson recognized that the phrase " 'not previously removed by a writ of error or appeal' . . . was drawn, doubtless, under the supposition that . . . no legislation was necessary to preserve or give effect to the jurisdiction of the court" in cases that had been removed to the Supreme Court before statehood.[217] Congress had no reason for allowing appeals taken immediately after but not immediately before a territory became a state. Nevertheless, Nelson concluded that this federal legislative "opinion" was "founded in error."[218] Repeating the holding of *Benner*, Nelson asserted:

> this court can exercise no appellate power over cases, unless conferred upon it by act of Congress, if the act conferring the jurisdiction has expired, the jurisdiction ceases,

213. *Id.*
214. McNulty v. Batty, 51 U.S. (10 How.) 72 (1851).
215. *See id.* at 78.
216. *Id.* at 79 (quoting Act of Feb. 22, 1848, ch. 12, 9 Stat. 211 (1848)).
217. *Id.* at 80.
218. *Id.*

> although the appeal or writ of error be actually pending in the court at the time of the expiration of the act.[219]

Thus, even though Congress passed a statute clearly indicating a legislative belief that the justices could reach the merits of such cases as *McNulty* without additional jurisdictional support, the justices insisted that *McNulty* could not be resolved unless federal law explicitly authorized jurisdiction.

Justice Nelson then announced that the Court would not resolve *McNulty* even if Congress corrected this constitutional mistake. *McNulty* could not be adjudicated by an Article III court because the case neither raised an issue of federal law nor met the constitutional standards for federal diversity jurisdiction. "Should the judgment be affirmed or reversed," Justice Nelson concluded, federal courts "possessed no power to carry the mandate into execution, the case not being one of Federal Jurisdiction."[220] In short, *McNulty* avoids declaring a federal law unconstitutional only because the justices concluded that Congress, not understanding the constitutional requirements for providing for appeals from defunct territorial courts to the Supreme Court of the United States, made a constitutional mistake and failed to provide for jurisdiction over a particular class of cases. Had the federal statute been drafted correctly, the statute would have been unconstitutional.

Scholars who claim that the contemporary practice of judicial review dates only from Reconstruction[221] should reconsider this claim in light of the naked land cases, cases associated with the transfer of judicial power upon statehood, and other cases where antebellum justices imposed constitutional limitations on federal power. When resolving constitutional challenges to federal laws, Marshall and Taney Court justices did not adopt any of the narrow understandings of judicial review frequently attributed to them.[222] Supreme Court justices before the Civil War laid down constitutional restraints on federal power in cases that did not concern federal jurisdiction or judicial

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219. *Id.* at 79.

220. *Id.* at 79-80.

221. *See, e.g.*, STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 97 (1996); STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 125 (1968); G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 86 (expanded ed. 1988); William E. Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860,* 120 U. PA. L. REV. 1166, 1168-69 (1972).

222. For claims that the justices adopted narrow understandings of judicial power, see *supra* notes 192-93 and accompanying text.

procedure:[223] they laid down constitutional restraints when proposed federal actions had a rational constitutional basis,[224] and they insisted in the naked land transfer cases that the federal government had to respect certain fundamental rights that were not specifically enumerated in the Constitution.

Antebellum justices seemed no more restrained than contemporary justices when adjudicating those issues of federal power that reached the Supreme Court. The Supreme Court did not strike down any major piece of federal legislation before 1857, but that tribunal, after *McCulloch v. Maryland*[225] in 1819, also did not sustain any major piece of federal legislation.[226] The main reason for this abstinence was less a theory of judicial restraint than Jacksonian politics. During the four decades before the Civil War, virtually all controversial constitutional proposals that were not vetted by the national legislature were vetoed by the national executive.[227] The main difference between the exercise of judicial review before and after the Civil War is that Marshall and Taney Court justices preferred imposing constitutional limits on federal power through statutory misconstruction and neglect

223. In addition to the land cases set out in Part II, see *Withers v. Buckley*, 61 U.S. (20 How.) 84 (1858) and *Veazie v. Moor*, 55 U.S. (14 How.) 568 (1853).

224. *New Orleans*, *Pollard's Lessee*, and *Vallandigham* seem particularly good examples of decisions limiting a federal power that seemed to have some rational constitutional basis.

225. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

226. The most important federal policies sustained by the Taney Court were the Fugitive Slave Act of 1793, the Admiralty Act of 1843, and the congressional decision in 1832 to give states funds to repair the national road. *See* The Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 458 (1851); Searight v. Stokes, 44 U.S. (3 How.) 151, 165 (1845); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 625 (1842).

227. For vetoes by Jacksonian executives preventing constitutionally controversial exercises of federal power from becoming law, see James Buchanan, *Veto Messages*, *in* 4 MESSAGES AND PAPERS, *supra* note 109, at 3074-81 (no power over education); James Buchanan, *Veto Messages*, *in* 4 MESSAGES AND PAPERS, *supra* note 109, at 3130-38 (no power to make local improvements), & at 3139-45 (no power to give public lands away to settlers); Andrew Jackson, *Veto Message*, *in* 2 MESSAGES AND PAPERS, *supra* note 109, at 1046-56 (no power to finance local improvements); Andrew Jackson, *Veto Message*, *in* 2 MESSAGES AND PAPERS, *supra* note 109, at 1139-54 (no power to establish a national bank); James Madison, *Veto Message*, *in* 1 MESSAGES AND PAPERS, *supra* note 109, at 569-70 (no power to establish roads and canals); James Monroe, *Veto Message*, *in* 1 MESSAGES AND PAPERS, *supra* note 109, at 711-12 (no power to establish toll roads); Franklin Pierce, *Veto Messages*, *in* 4 MESSAGES AND PAPERS, *supra* note 109, at 2780-89 (no power to construct hospitals for the insane), at 2790-2804 (no power to make local improvements); Franklin Pierce, *Veto Messages*, *in* 4 MESSAGES AND PAPERS, *supra* note 109, at 2919-21 (no power to make internal improvements); James K. Polk, *Veto Messages*, *in* 3 MESSAGES AND PAPERS, *supra* note 109, at 2310-16 (no power to construct local improvements); James K. Polk, *Veto Message*, *in* 4 MESSAGES AND PAPERS, *supra* note 109, at 2460-76 (same); John Tyler, *Veto Messages*, *in* 3 MESSAGES AND PAPERS, *supra* note 109, at 1916-21 (no power to incorporate a bank); John Tyler, *Veto Messages*, *in* 3 MESSAGES AND PAPERS, *supra* note 109, at 2183-86 (no power to improve navigation of rivers).

rather than the modern method of explicitly declaring federal laws unconstitutional.

IV. JUDICIAL REVIEW AND FUNDAMENTAL RIGHTS REVISITED

Louis Hartz reached an important conclusion for the wrong reason when he famously declared that "law has flourished on the corpse of philosophy in America."[228] Hartz believed that "judicial review as it has worked in America" could be explained only by "the national acceptance of the Lockean creed, . . . since the removal of high policy to the realm of adjudication implies a prior recognition of the principles to be legally interpreted."[229] This observation hardly explains the best known fundamental rights decisions in Supreme Court history. When resolving political controversies over slavery, contractual relationships, and abortion, the justices could not be said to have applied consensual norms, unless those norms are described at such a high level of abstraction as to yield almost any result in practice.[230] The Supreme Court survived such decisions as *Dred Scott*, *Lochner*, and *Roe* because important members of the dominant national coalition supported the judicial decision at the time that the decision was handed down, and not because the decision was based on a Lockean creed endorsed by all.[231]

Hartz's analysis better fits the naked land transfer cases. With respect to the results in *Polk's Lessee*, *Percheman*, *Pollard's Lessee*, and related cases, the "national acceptance of the Lockean creed" did imply "prior recognition of the principles to be legally interpreted."[232] Everyone agreed that government could not give to B land that belonged to A. No political interest was thwarted by the "removal of [this] policy to the realm of adjudication"[233] because the Supreme Court was not resolving a controversy over whether government should recognize some fundamental right. All the justices did was to apply the consensual ban on government expropriation of private property to the particular facts before the Court.

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228. LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA 10 (1955).

229. *Id.* at 9.

230. Even Nazi policy could be described as a manifestation of one (perverse) conception of equality or human dignity.

231. *See* Mark A. Graber, *The Nonmajoritarian Difficulty, Legislative Deference to the Judiciary*, 7 STUD. IN AM. POL. DEV. 35 (1993); *see also* WILLIAM LASSER, THE LIMITS OF JUDICIAL POWER: THE SUPREME COURT IN AMERICAN POLITICS (1988).

232. HARTZ, *supra* note 228, at 9.

233. *Id.*

The consensual foundations of the naked land transfer cases belie Bickel's aphorism that the Supreme Court is "a counter-majoritarian force in our system of government," that "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now."[234] The Marshall and Taney Court, when enforcing the prohibition against naked land transfers, did not rely on a principle rejected by the dominant national coalition. For example, when Justice Baldwin upheld the validity of a foreign land grant against a contrary federal claim, he noted "a perfect coincidence of opinion between all the departments of the government, on the subject of Spanish titles."[235] Similar comments could have been made on most other land issues. Judicial review took place in such cases as *Polk's Lessee*, *Percheman*, and *Pollard's Lessee*, even though a broad interbranch consensus existed on the constitutional prohibition against naked land transfers.

The antebellum land cases illustrate various ways in which judicial review may be exercised even when legislative and judicial majorities agree on fundamental constitutional principles and rules. Sometimes, the justices grounded their decisions on consensual constitutional restraints on government power rather than on the relevant statute that embodied those consensual constitutional restraints. Little attention was given to savings clauses in federal land grants that Congress thought statutorily prevented federal grantees from obtaining title to land previously granted to another person. This judicial practice proved uncontroversial. No reason existed for elected officials to protest when the justices ruled that Congress could not exercise a power that Congress had not exercised, did not wish to exercise, and did not believe could be constitutionally exercised.

The decisions in many land cases are best characterized as correcting legislative mistakes that the legislature would have corrected if given better information and time. Because ascertaining land titles proved confusing in practice, elected officials had trouble identifying when they violated the constitutional taboo against naked land transfers. Rather than resolve the matter legislatively or by appointing a commission, elected officials consciously decided that the federal judiciary would be entrusted with the responsibility of ensuring that the government had not given land to B that belonged to A. By including a savings clause in virtually all land grants, Congress essentially

234. BICKEL, *supra* note 18, at 16-17, 128.
235. Lessee of Pollard's Heirs v. Kibbe, 39 U.S. 353, 390 (1840) (Baldwin, J., concurring).

charged the federal judiciary with the responsibility for ensuring that the federal government had not made a naked land transfer. As Chief Justice Marshall declared without contradiction in *Soulard v. United States*, "the duty of deciding on these various titles" had been "transferred by the government to the judicial department."[236] Federal land grants were voided by courts because legislatures wanted the justices to void land grants that by legislative accident had expropriated private property. This was hardly a counter-majoritarian practice.

Federal justices also seem to have been legislatively entrusted with the authority to determine certain minor applications of the constitutional prohibition against naked land transfers. The text of the relevant statute in *Percheman* strongly implied that Congress thought all persons should submit their land claims to the federal commission. Nevertheless, Congress seemed more concerned with preventing naked land transfers than with the precise procedures that should be used for ascertaining good title, at least no one expressed any qualms when the justices provided an alternative means for establishing titles.

Pollard's Lessee may illustrate a combination of these forms of legislative/judicial cooperation. Given that the legislation under consideration was a private bill, most congresspersons may not have been aware that they were conveying land below the high water mark of a state river. During the 1840s, the few prominent politicians who took a strong interest in tidewater policy concluded that the Constitution vested states with title to land below the high water mark of state rivers. "There appears no doubt," the leading study of the issue concludes, "but that the Congress was aware of [*Pollard's Lessee*] and was in accord with it."[237] So understood, the Taney Court may have simply corrected an acknowledged legislative oversight. Alternatively, Congress may not have thought that the precise issue in *Pollard's Lessee* was worth deciding legislatively. Control of riverbeds in new states was certainly not considered important enough to be seriously debated. The federal executive proved no more interested than Congress, never intervening in any case involving title to lands below the high water mark. These cases, and other cases raising naked land transfers, were apparently deemed to be private contests for land to be legally resolved by the judiciary according to known judicial standards.

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236. Soulard v. United States, 29 U.S. (4 Pet.) 511, 513 (1829).

237. ERNEST R. BARTLEY, THE TIDELANDS OIL CONTROVERSY 63 (1979) (noting the discussion by Senators of the meaning of "equal footing" as used in the *Pollard's Lessee* case).

Polk's Lessee, *Percheman*, *Pollard's Lessee*, and related cases may have provided the consensual foundations that helped establish judicial review of federal statutes and judicial protection of certain fundamental rights not specifically enumerated in the constitutional text. Judicial review of federal legislation was a broadly accepted practice by the middle of the Jacksonian era[238] partly as the result of a series of decisions, such as *Marbury*, that imposed politically inconsequential constitutional limits on federal power.[239] Sharp attacks were made on judicial review every time the Supreme Court declared unconstitutional a state law of some consequence.[240] Judicial decisions striking down a federal law of similar consequence would no doubt lead to a similar antagonistic response. Fortunately for the fate of judicial review, the federal judiciary during the decades before *Dred Scott* was not asked to resolve those constitutional conflicts that divided the American polity. The Supreme Court's federal law docket until the Civil War was dominated by politically uncontroversial land cases, technical questions of federal jurisdiction, and other issues of similar political insignificance. No need existed in this legal environment for Supreme Court justices and their supporters to explain why

238. Charles Warren notes that most political attacks on the federal judiciary were abandoned after the early 1830s. *See* Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States: A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 161, 164, 176-85 (1913). Mainstream Jacksonians during the 1840s and 1850s lavished effusive praised on the Supreme Court. Lewis Cass, the Democratic candidate for the presidency in 1848 was one of many Jacksonians who became a judicial supremacist, proclaiming that "it is a great moral spectacle to see the decrees of the Judges of our Supreme Court on the most vital questions obeyed in such a country as this." CARL BRENT SWISHER, THE TANEY PERIOD, 1836-64, at 151 (1974). Senator Thomas Ewing of Ohio similarly "look[ed] to the Supreme Court as the palladium of our institutions and as one of the brightest and purest ornaments of our system." *Id.* at 217. Caleb Cushing, Attorney General during the Pierce Administration asserted that "our country looks with undoubting confidence" to the Court "as the interpreters and the guardians of the organic laws of the Union." CARL BRENT SWISHER, ROGER B. TANEY 501 (1935).

239. The naked land transfer cases also highlight *Marbury*'s peculiar contribution to the establishment of judicial review. Scholars have noted that Chief Justice Marshall was by no means compelled to declare unconstitutional Section 13 of the Judiciary Act of 1789. One reasonable alternative would have been to interpret that provision as not adding to the original jurisdiction of the Supreme Court. *See* William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 14-16. *Percheman* and related cases indicate that this was normal judicial practice in antebellum America. Marshall and Taney Court justices routinely construed, even misconstrued, statutes in order to avoid declaring those statutes unconstitutional. That Marshall rejected the statutory alternative in *Marbury*, and only *Marbury*, provides further evidence that the Court in 1803 went out of its way to provide a judicial precedent for judicial review, deliberately choosing a politically inconsequential measure to declare unconstitutional. *See* Graber, *supra* note 28, at 34-38.

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

countermajoritarian judicial review was a desirable practice.[241] With the exception of slavery, the late Marshall and Taney Court may never have adjudicated a question of federal constitutional law on which a majority of Americans had an opinion. Moreover, judicial review could easily be presented as a non-partisan practice. Again, with the exception of slavery, the justices before the Civil War rarely, if ever, adjudicated a question of federal constitutional power on which there were well-established partisan positions to take.

These politically inconsequential land cases helped establish judicial review of federal legislation by generating much good will for the judiciary. Judicial willingness to correct legislative errors that resulted in naked land transfers may have fostered a belief among a citizenry committed to Lockean notions of private property that judicial review as practiced during the Jacksonian era was largely a force for good. The only persons disturbed by judicial rulings were those parties whose land claims were rejected. All prominent persons endorsed the central constitutional principles the justices relied on to resolve disputes over title. All prominent officials believed that courts were the institutions that should resolve conflicting land claims. That judicial review was a popular practice during the 1840s and 1850s,[242] therefore, should hardly be surprising. No prominent oxen were gored by these judicial decisions. Asking courts to tackle more difficult issues, such as slavery in the territories, seemed a wise strategy given the demonstrated judicial capacity to resolve land controversies to the satisfaction of almost all citizens.

Indeed, the political events partly responsible for the *Dred Scott* decision probably took place only because the naked land transfer and related cases had placed judicial review of federal legislation in the United States on a secure footing. Past scholarship has demonstrated that prominent elected officials worked hard to foist responsibility on to the courts for determining the extent to which slavery could be banned in federal territories.[243] What this scholarship does not explain is why southern Democrats, who during the 1850s strongly championed legislative deference to the judiciary, thought the justices might declare the Missouri Compromise unconstitutional. Conven-

241. *See* Friedman, *supra* note 26, at 381-413 (noting the lack of countermajoritarian criticism of judicial review during the Jacksonian era).

242. *See* 2 CHARLES WARREN, THE SUPREME COURT IN THE UNITED STATES HISTORY 67 (1926).

243. For detailed accounts of legislative efforts to have the judiciary resolve contested issues over slavery, see DON E. FEHRENBACHER, THE *DRED SCOTT* CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 152-208 (1978); Graber, *supra* note 231, at 46-50; Wallace Mendelson, Dred Scott's *Case—Reconsidered*, 38 MINN. L. REV. 16, 22-23 (1953).

tional constitutional histories imply that pro-slavery advocates for some unknown reason expected the Supreme Court to hand down a decision that would be unprecedented in numerous respects. *Polk's Lessee*, *Percheman*, *Pollard's Lessee*, and related cases, by comparison, suggest that a judicial decision limiting federal power to regulate slavery in the territories would be relatively consistent, though hardly compelled, by recent judicial practice.

If past scholarship is correct, pro-slavery advocates were the most irrationally successful optimists in American history. Southern calls for a judicial ruling on the constitutional status of slavery in the territories, in this view, blithely assumed that a substantial chance existed that the Supreme Court would declare the Missouri Compromise unconstitutional even though that tribunal had not declared a federal law unconstitutional for approximately a half a century. Pro-slavery advocates were reasonably confident of a favorable judicial outcome, even though they should have known that Taney Court justices shared a very narrow conception of the judicial role in constitutional cases. As noted above,[244] much contemporary commentary suggests that antebellum justices until *Dred Scott* made every rational presumption in favor of constitutional power, were only willing to declare unconstitutional federal laws associated with federal jurisdiction or judicial procedure, and had never declared a federal law inconsistent with some fundamental right that was not specifically enumerated in the Constitution. Lacking inside information that the justices would abandon these practices only in slavery cases,[245] southerners during the 1850s apparently had no more reason to think that the Supreme Court would declare the Missouri Compromise unconstitutional on the basis of an unenumerated constitutional right to bring slaves into the territories, than contemporary democratic socialists have for thinking that the Rehnquist Court will declare federal welfare laws unconstitutional on the basis of an unenumerated constitutional right to livelihood.

Southern enthusiasm before *Dred Scott* for a judicial resolution of slavery issues makes far more sense if, as the naked land transfer and other cases discussed in this Article indicate, judicial review of federal legislation was a relatively established practice before the

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244. *See supra* notes 192-93.

245. James Buchanan was informed shortly before taking the oath of office that the Supreme Court had voted to declare the Missouri Compromise unconstitutional. *See* Phillip G. Auchampaugh, *James Buchanan, the Court, and the* Dred Scott *Case*, 10 TENN. HIST. MAG. 231 (1929). No evidence exists that pro-slavery advocates had inside information before 1857 on whether the justices would strike down that measure.

Civil War. These decisions gave pro-slavery advocates good reason for thinking that justices would rule that the national government had no power to ban slavery in the territories, or at the very least, that the justices would not refrain from handing down such a decision as the result of a judicial commitment to some strong theory of judicial restraint. The antebellum Supreme Court regularly established constitutional limits on federal power. Moreover, the justices did not in practice afford federal legislation a nearly irrebutable presumption of constitutionality, did not limit the power of judicial review to laws of a judiciary nature, and were quite willing to require the national government to respect certain fundamental rights that were not specified in the constitutional text. A judicial decision holding that Congress could not ban slavery in the territories would be far more politically consequential than any ruling the justices had ever handed down. That decision would not, however, be that legally different from past Supreme Court decisions.

The *Dred Scott* decision was not a gross deviation from past practice, or an instance where the Taney Court under political pressure abandoned previously cherished notions of judicial restraint. The justices in that case adopted neither a novel theory of judicial review nor a novel theory of constitutional interpretation. The Supreme Court had previously imposed constitutional limits on federal power and had claimed that certain unenumerated fundamental rights were the source of that constitutional limitation. The main difference between *Dred Scott* and the naked land transfer cases is that the justices in the former case imposed a constitutional limit on federal power by explicitly declaring a federal law unconstitutional instead of merely ignoring or misconstruing the statute under constitutional attack.

Scholars who criticize the result in *Dred Scott* or, for that matter, the results in such decisions as *Lochner* and *Roe* must nevertheless acknowledge that fundamental rights jurisprudence has played a role in constitutional adjudication from the beginning of the republic. The antebellum Supreme Court protected a right against government expropriation of land that was not explicitly mentioned in the federal constitution. Even when constitutional or statutory text could be used to support a particular decision, judicial opinions preferred the language of fundamental principle to positive law. This legal pedigree suggests that the principle that governing officials could not give to B land that belonged to A bears a distinct resemblance to the privilege to bring slaves into American territories protected by *Dred Scott*, the liberty of contract protected by *Lochner*, and the right to an abortion protected by *Roe*.

That *Polk's Lessee*, *Percheman*, and *Pollard's Lessee* provide historical support for claims that the Constitution protects certain fundamental rights not plainly specified in the constitutional text does not justify on historical grounds the theory of judicial review implicit in *Dred Scott*, *Lochner*, *Roe*, and other fundamental rights cases. The justices in *Polk's Lessee* and related cases were protecting a consensual right from legislative mistake or, with legislative permission, establishing minor rules respecting that right. With the possible exception of *Fletcher*, the justices in naked land transfer cases never made contested constitutional assertions concerning the rights protected by the Constitution. In the slavery, liberty of contract, and abortion cases, the justices attempted to resolve social conflicts over whether the Constitution protects what some citizens believed to be a fundamental right. The Supreme Court in these fundamental rights cases took sides in a political controversy, and did not merely apply consensual principles of right to a unique set of contested facts. *Polk's Lessee* would have resembled *Lochner* had the Tennessee legislature intervened in the lawsuit and asserted the constitutional authority to expropriate property. *Lochner* would have resembled *Polk's Lessee* had the real issue before the Court been only whether Joseph Lochner's employees were contractually obligated to work more than sixty hours a week, with all parties agreeing that the legislature had no authority to forbid contracts requiring an employee to work that hard. Following *Percheman*, the *Lochner* Court might have interpreted the New York statute as merely providing that agreements to work more than sixty hours a week must be stated explicitly in the contract, on the ground that the statute would have been unconstitutional if interpreted as banning such contractual arrangements.

V. CONCLUSION

Whether *Dred Scott*, *Lochner*, or *Roe* was correctly decided is beyond the scope of this study. The naked land transfer cases establish that the judiciary has historically protected fundamental rights not plainly specified in the constitutional text. The central issue in contemporary fundamental rights cases, however, is whether the judicial practice of protecting consensual fundamental rights from legislative oversight justifies the judicial practice of resolving controversies over what rights are sufficiently fundamental to enjoy constitutional protection. The naked land transfer cases do not provide historical support for any position in this debate because the justices were never asked to resolve those constitutional controversies over land that

divided the antebellum polity.[246] The above analysis of judicial review before the Civil War, however, may inform contemporary fundamental rights jurisprudence. *Polk's Lessee*, *Percheman*, and *Pollard's Lessee* demonstrate that judicial review is not necessarily countermajoritarian. Elected officials have approved, disapproved, and been indifferent to judicial decisions limiting government power. Determining whether *Dred Scott*, *Lochner*, *Roe*, or any other fundamental rights decision "thwarted the will of the prevailing majority," therefore, requires detailed investigation into the actual interactions between federal justices and elected officials, not ritual chanting of Bickel's aphorism.

246. *See supra* notes 147-51 and accompanying text.