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"THIS NEW AND BEAUTIFUL ORGANISM":
THE EVOLUTION OF AMERICAN FEDERALISM IN THREE STATE SUPREME COURTS

JOSEPH A. RANNEY*

The integrity of the union has been tried. The integrity of the states is on trial. Much rests upon the moderation and forbearance of the federal courts; as much perhaps upon the firmness of the state courts, refusing to abdicate state authority, in state matters, to assumption of federal jurisdiction. We will faithfully try to do our part.

--Chief Justice Edward Ryan (Wisconsin), 1876

This new and beautiful organism is yet in the course of practical development, which may soon prove whether its fundamental equilibrium of local and national power is in most danger of disturbance from the centrifugal tendencies of the States, or the centripetal attractions of the central government.

--Chief Justice George Robertson (Kentucky), 1865

I. INTRODUCTION

The relationship between the state and federal governments has been a regular subject of legal and political controversy since the American Revolution.3

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3. See, e.g., WALTER H. BENNETT, AMERICAN THEORIES OF FEDERALISM passim (1964); FORREST MCDONALD, STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776-1876 passim
Historians and jurists have devoted substantial attention to the debates between federalists and anti-federalists over the creation and ratification of the United States Constitution, the conflict between the Jackson administration and South Carolina over that state's attempt to "nullify" a federal tariff law in 1832, and the role that the states' rights doctrine played in the chain of events leading to the Civil War. Studies of Southern resistance to federal desegregation efforts during the mid-twentieth century and of recent decisions of the Rehnquist Court, arguably favoring the states against Congress, have triggered renewed interest in the dilemmas of federalism.

It is a truism that federalism underwent a fundamental change during and after the Civil War, that Americans developed a heightened sense of national union, and that federal power expanded dramatically at the expense of the states. But there are surprisingly few studies of the legal and psychological mechanisms that facilitated that transition, particularly at the state level. Did state supreme courts actively resist federal expansion before, during, and after the Civil War era, or did they cooperate with federal lawmakers and judges? Have state courts led the way in fostering states' rights sentiment, or have they acted as a check on such sentiment?

This Article makes a beginning attempt to address these questions by comparing judicial approaches to federalism in three states: Wisconsin, Georgia, and Kentucky. These states were selected as exemplars of the three sections involved in the Civil War (the North, the South, and the border slave states), and one might predict they would illustrate the entire spectrum of legal and psychological mechanisms that facilitated the fundamental change in federalism during and after the Civil War.
states’ rights sentiments in America. Wisconsin was a staunch anti-slavery state and generally has been in the mainstream of national economic development.\textsuperscript{11} Georgia was one of the first states to secede and one of the first to overthrow federal Reconstruction efforts after the war; it did not join the economic mainstream until the mid-twentieth century.\textsuperscript{12} Kentucky falls between these two states: It had close cultural and economic ties to both the North and South before and after the Civil War, but despite resentment of wartime Union occupation and a growing realization that the war would mean the end of slavery, the state remained loyal to the Union throughout the war.\textsuperscript{13}

The Article begins by examining the early evolution of federalism in each state. Kentucky and Georgia experienced several episodes of near open rebellion against the federal government before the Civil War. In 1798, Kentucky led a protest against the federal Alien and Sedition Acts, and in the early 1820s, it protested and resisted a Supreme Court decision that jeopardized the land holdings of many of its citizens.\textsuperscript{14} Georgia’s resistance to an adverse 1792 Supreme Court land title decision led to a constitutional amendment limiting federal power, and in the early 1830s, the state successfully ignored several Supreme Court decisions that impeded its Indian removal policy.\textsuperscript{15} But the Kentucky and Georgia Supreme Courts, particularly Kentucky’s, acted as moderating forces throughout the prewar period. Wisconsin, like many Northern states, experienced a wave of anti-federalist sentiment in reaction to the Fugitive Slave Act of 1850, but Wisconsin was the only state whose supreme court led a revolt against the federal law rather than trying to moderate opposition.\textsuperscript{16}

The Article next examines the effect that war and Reconstruction had on federalist sentiment in each state and the role each state’s supreme court played in shaping such sentiment. Strikingly, the Wisconsin court’s anti-federalist streak did not end when the state’s cause prevailed in the war. During the late 1860s and early 1870s, a divided court criticized and attempted to invalidate several federal removal laws that it viewed as a threat

\textsuperscript{12} See Alan Conway, The Reconstruction of Georgia passim (1966).
\textsuperscript{13} See E. Merton Coulter, The Civil War and Readjustment in Kentucky passim (1926).
\textsuperscript{14} See infra notes 28-40 and accompanying text. For the sake of economy of expression, the United States Supreme Court is referred to in this Article as “the Supreme Court” or “the Federal Supreme Court”; references to state supreme courts include the name of the state in question unless the identity of the state is clear from the context.
\textsuperscript{15} See infra notes 84-95 and accompanying text.
\textsuperscript{16} See infra notes 63-83 and accompanying text.
to state sovereignty. The challenges failed, but they were an important part of the postwar transition to federal supremacy: Indeed, Wisconsin may fairly be said to have sealed that supremacy. The Kentucky Supreme Court bitterly protested federal wartime laws affecting the slave system, the civil liberties of white Kentuckians, and the postwar civil rights laws that expanded the influence of federal courts, but for the most part, the Kentucky court continued its prewar tradition of moderation as to federalism. During its short life, Georgia’s Reconstruction-era Supreme Court urged acceptance of federal supremacy as a permanent legal principle; successor courts agreed, and judicial deference to federalism was one of the Reconstruction court’s few permanent legacies. After the end of Reconstruction, resistance to federalism died out in all three states, except for a minor controversy over anti-removal provisions in state corporation laws that was resolved in favor of federalism in 1921.

II. STATE SUPREME COURTS AND FEDERALISM DURING THE ANTEBELLUM ERA

The American debate over federalism began during the colonial era as a prolonged dispute between advocates of centralized British control over North America and supporters of governmental and economic autonomy for each colony. The dispute continued after independence: It reached a peak in the debates of the 1787 Constitutional Convention, in the Federalist Papers, and in the state ratifying conventions after the Constitution was drafted. It fell to Alexander Hamilton to expound the federalists’ view of the proper judicial relationship between state governments and the new federal government. Echoing the view of many federalists that the national government was a creation of the American people directly, not of the states, Hamilton stated that the federal judiciary should have the final and perhaps the only word as to the meaning of the new Constitution:

The national and State systems are to be regarded as one whole. The courts of the latter will of course be natural auxiliaries to the execution

17. See infra notes 128-81 and accompanying text.
18. See infra notes 157-71 and accompanying text.
19. See infra notes 188-229 and accompanying text.
20. See infra notes 237-251 and accompanying text.
21. See infra notes 252-265 and accompanying text.
22. See BENNETT, supra note 3, at 15-51; MCDONALD, supra note 3, at 11-12.
of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions.\textsuperscript{25}

In the state ratifying conventions, many anti-federalists contended that state courts should have a concurrent right with the federal courts to decide the constitutionality of state laws, but unlike Hamilton, few of them addressed the issue of who would prevail in case of conflicting interpretations.\textsuperscript{26} The first Congress confirmed in section 12 of the 1789 Judiciary Act that federal courts had jurisdiction over all cases involving constitutional issues, including jurisdiction over state cases by right of removal, but Congress did not address the issue of who had the final say on such issues.\textsuperscript{27}

\textbf{A. Kentucky: A Loyalty Sorely Tested (Part 1)}

Between 1789 and 1861, many states participated in a running dispute with the federal government over the boundaries of federal and state power. Wisconsin, Kentucky, and Georgia all played prominent roles in the dispute. In 1798, the Kentucky and Virginia legislatures, reacting to the highly unpopular Federal Alien and Sedition Acts,\textsuperscript{28} produced the first important statements of the interposition doctrine—that is, the concept that a state's right to determine the validity of federal laws independently of the federal judiciary is an essential component of liberty. Virginia contented itself with a general statement that the states have a right "to interpose for arresting the progress of the evil" of abusive federal laws,\textsuperscript{29} but Kentucky went further and made clear that it believed interposition powers extended to the state courts. The Kentucky legislature stated:

Resolved, . . . That the government created by [the Constitution] was not made the exclusive or final \textit{judge} of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions, as of the

\textsuperscript{25} THE FEDERALIST NO. 82, at 494 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).
\textsuperscript{26} BENNETT, supra note 3, at 78-87.
\textsuperscript{27} Judiciary Act of Sept. 24, 1789, ch. 20, 1 Stat. 79 (1789).
\textsuperscript{28} Act of July 6, 1798, ch. 66, 1 Stat. 577 (1798). The Act provided that citizens of a nation that conducted or threatened "any invasion or predatory incursion" of the United States were liable to arrest and removal upon order of the President. \textit{Id}.
mode and measure of redress.\textsuperscript{30}

Kentucky’s discontent with the federal government surfaced again in two controversies of the 1820s. The first controversy arose out of a 1792 compact by which Virginia ceded its claims to Kentucky’s territory, thus allowing Kentucky to become a state, and the new state agreed to recognize pre-1792 Virginia land grants within its borders.\textsuperscript{31} In response to the numerous disputes that subsequently arose over land grant boundaries, the Kentucky legislature enacted laws providing that in order to have their titles confirmed, Virginia claimants must pay Kentucky holders of disputed lands the value of improvements the holders had made on the land.\textsuperscript{32} Virginia claimants charged that such laws impaired their contract rights under the 1792 compact, and in Green v. Biddle, the Supreme Court upheld their position, much to the Kentuckians’ displeasure.\textsuperscript{33}

Second, by the early 1820s, many Kentuckians were heavily indebted to the Bank of the United States and other out-of-state creditors. In order to relieve their plight, the legislature enacted relief laws, including laws providing that land foreclosure sales must fetch close to the full value of the land to be valid and laws forcing debtors to accept Kentucky state bank notes in payment of debts.\textsuperscript{34} The Kentucky District Court refused to enforce such laws, reasoning that they unconstitutionally impaired creditors’ contract rights; the laws were a subject of bitter controversy in the Kentucky state courts, with most courts enforcing them.\textsuperscript{35} The conflict created an anomalous situation: Out-of-state creditors could take advantage of diversity jurisdiction to obtain full relief in federal courts, but Kentucky creditors, who were limited

\textsuperscript{30} Id. at 162. Forrest McDonald has pointed out that many states had sedition laws similar to the federal law that Kentucky and Virginia attacked; Kentucky’s primary concern was the threat that nationalization of sedition laws posed to state sovereignty. McDonald, supra note 3, at 41.

\textsuperscript{31} Act of Feb. 4, 1791, ch. 4, 1 Stat. 189 (1791); KY. REV. STAT. ANN. §§ 7, 9 (Michie 2002); McDonald, supra note 3, at 79.

\textsuperscript{32} McDonald, supra note 3, at 79-80.

\textsuperscript{33} 21 U.S. (8 Wheat.) 1 (1823).

\textsuperscript{34} McDonald, supra note 3, at 79-80; STATE DOCUMENTS ON FEDERAL RELATIONS: THE STATES AND THE UNITED STATES 105-13 (Herman V. Ames ed., Da Capo Press 1970) (1900-06) [hereinafter STATE DOCUMENTS].

\textsuperscript{35} The Kentucky Supreme Court struck down most of the debtor relief laws, agreeing that they unconstitutionally impaired creditors’ contract rights. See, e.g., McDonald, supra note 3, at 83-84. In 1824 the legislature responded by abolishing the court and creating a new supreme court. 1824 Ky. Acts 53. The old court refused to retire, and for several years, the clash between the two dominated Kentucky politics. When economic conditions improved and pressure for debtor relief abated in the late 1820s, the legislature abolished the new court. See McDonald, supra note 3, at 83-84.
to state courts, could not. This inequity, together with the deep resentment over the Green decision, impelled Kentucky lawmakers to consider reviving the interposition doctrine of 1798. In a message to the 1825 legislature, Governor Joseph Desha complained:

What chance for justice have the States when the usurpers of their rights are made their judges? Just as much as individuals when judged by their oppressors. It is therefore believed to be the right, as it may hereafter become the duty of the State governments, to protect themselves from encroachments, and their citizens from oppression, by refusing obedience to the unconstitutional mandates of the federal judges.

The Kentucky Supreme Court took a more restrained tone. In Bodley v. Gaither, it concluded that it was not bound by Green, but it expressed its opinion with caution rather than defiance. The court relied on the fact that there was no majority opinion in Green, but it stated that as a general rule it would defer to the United States Supreme Court in areas where the Constitution clearly gave that Court the final say:

That we should consider ourselves bound by the decisions of the Supreme Court of the United States settling a construction of the constitution, or laws of the United States, in cases where the Supreme court [sic] possesses revising jurisdiction over the decisions of this court, we shall not pretend to controvert.

The Kentucky court continued to decline opportunities to promote a states’ rights position in the remaining years before the war. In Dickey v. Maysville, Washington, Paris & Lexington Turnpike Road Co., the court held that the federal government had the right to use a state-built post road between Maysville and Lexington on the same terms as other users, notwithstanding the fact that the government’s refusal to finance the road eight years earlier had created a new surge of hostility toward the federal government within Kentucky. The Dickey case is not so notable for its result as for its rejection

36. MCDONALD, supra note 3, at 83-84.
37. STATE DOCUMENTS, supra note 34, at 111-13.
38. Joseph Desha Message to Kentucky Legislature, November 7, 1825, reprinted in STATE DOCUMENTS, supra note 34, at 113.
39. 19 Ky. (3 T.B. Mon.) 57 (1825).
40. Id. at 58.
41. 37 Ky. (7 Dana) 113, 137-38 (1838).
42. See REMINI, supra note 5, at 210-12.
of a challenge to Congress’s authority to build federal post roads: The Kentucky court held that the Constitution must be read broadly to give Congress such power, even though Congress had chosen not to exercise it here. In the 1850s, the Kentucky court also drew a careful line between federal and state power in several cases addressing the right of each government to regulate traffic on the Ohio River. The court took pains to acknowledge the authority of the United States Supreme Court in this area and to defer to federal authority when Congress had enacted laws clearly pre-empting state regulation, but it also emphasized that federal legislation on aspects of river navigation that only “remotely” affected interstate commerce would be “inconsistent with the essential rights of self-government and self-preservation which never were, and, so long as they retain a vestige of independence, never can, be yielded by the states.”

B. Wisconsin: Changing the Contours of the States’ Rights Debate

Wisconsin became a state in 1848, at the beginning of the final phase of the struggle over slavery, which culminated in the Civil War. Wisconsin’s major contribution to the anti-slavery movement was in the legal arena: It fundamentally changed the shape of anti-slavery jurisprudence by welding the states’ rights doctrine to the more limited arguments that previously had been made against laws protecting slavery.

From its inception in the 1830s, the legal wing of the anti-slavery movement, led by Salmon Chase of Ohio and James Birney of New York, had focused primarily on the dichotomy between “natural” laws (that is, principles of justice embedded in the human spirit that did not need to be codified because they were universal) and “positive” laws that did not reflect universal human sentiments and therefore could be created only by legislative act. Anti-slavery jurists argued that because slavery was repugnant to human nature, it could be enforced only through positive laws and that such laws, particularly the Fugitive Clause of the United States Constitution and

43. 37 Ky. (7 Dana) at 130-37.
44. See, e.g., Dryden v. Commonwealth, 55 Ky. (16 B. Mon.) 476, 479-80 (1855) (holding that federal licensing scheme for river pilots pre-empted state licensing laws); City of Newport v. Taylor’s Ex’rs, 55 Ky. (16 B. Mon.) 557, 630-31 (1855).
45. City of Newport, 55 Ky. (16 B. Mon.) at 631.
46. See infra notes 47-83 and accompanying text.
48. COVER, supra note 47, at 150-54, 161-65. See also id. at 8-82 for a detailed discussion of the intellectual history of the arguments developed by the Chase-Birney group.
49. Article IV, Section 2, Clause 3 of the Constitution states:
the Federal Fugitive Slave Act of 1793,50 should be interpreted as narrowly as possible.51 Because the Fugitive Clause and the 1793 Act did not contain enforcement mechanisms, none should be implied, and Northern efforts to aid escaped slaves should not be subject to civil or criminal penalties.52 In addition, the Chase-Birney group argued that if enforcement laws did not provide such basic rights as the right to a jury trial (which as a practical matter would have ensured that no aider of fugitive slaves would ever be convicted in the North), then the laws should be held invalid.53 The group's arguments met with little success: A series of challenges to the 1793 fugitive slave law met with failure in the United States Supreme Court and in the supreme courts of several northern states.54

In 1850, as the slavery crisis deepened, Congress passed a new fugitive slave law that was deeply unpopular throughout the North,55 and in 1854, an opportunity to challenge the new law arose when Joshua Glover, a fugitive slave who had escaped from Missouri to Wisconsin, was captured in Racine and held by federal officials for return to his owner. A mob led by Sherman Booth, a leading Milwaukee abolitionist, broke into the jail and freed Glover, who then escaped to Canada.56 Federal officials charged Booth with aiding and abetting, a violation of the 1850 Act. Booth's attorney, Byron Paine, applied to Justice Abram Smith of the Wisconsin Supreme Court for a writ of habeas corpus releasing Booth from federal custody on the ground that the 1850 Act was unconstitutional.57 Paine asserted the traditional Chase-Birney arguments against the Act, but added a new one: interposition.58 Relying on

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51. COVER, supra note 47, at 157-68.
52. Id. at 157-85.
53. Id.
54. In Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) and Jones v. Van Zandt, 46 U.S. (5 How.) 215 (1847), the high Court upheld the validity of the 1793 Act and affirmed Congress's power to implement the Fugitive Slave Clause of the Constitution by enacting enforcement provisions. See also In re Sims, 61 Mass. (7 Cush.) 285 (1851); Ex parte Bushnell, 9 Ohio St. 198 (1859); Commonwealth ex rel. Wright v. Deacon, 5 Serg. & Rawle 62 (Pa. 1819).
58. 3 FUGITIVE SLAVERY AND AMERICAN COURTS 347 (Paul Finkleman ed., Series No. 2,
the portion of the 1798 Kentucky Resolutions previously quoted and on the Virginia Supreme Court’s refusal to obey a mandate of the United States Supreme Court in *Martin v. Hunter’s Lessee*, Paine argued that Wisconsin had the right to decide the Act’s constitutionality independently of the federal courts, which could not override its decision. He warned further that “it is only by maintaining the rights of the States, that the Union can be preserved.”

To the great surprise of most observers, Justice Smith adopted Paine’s arguments in full and ordered Booth’s release. The full supreme court sustained Smith’s position by a 2-1 vote. Interestingly, Smith emphasized interposition more heavily than traditional anti-slavery arguments, perhaps out of concern that because other courts had rejected the traditional arguments, reliance on them would weaken the force of his opinion. Smith recited several lines of argument often made by interpositionists: For example, he relied heavily on the fact that the United States Constitution conferred enumerated rather than general powers on the United States government and on the Tenth Amendment’s general reservation of other powers to the states. Smith also cited the Virginia Supreme Court’s opinion in the *Martin* 1988) (reprinting Paine’s argument).

59. 3 id. at 348; see supra note 30 and accompanying text.

60. 14 U.S. (1 Wheat.) 304 (1816); see also 3 FUGITIVE SLAVERY AND AMERICAN COURTS, supra note 58, at 348. In the *Martin* case, during the Revolution, Virginia confiscated a large tract of land owned by Lord Fairfax; after the war it sold the land. Fairfax’s heirs subsequently demanded return of the land under the Jay Treaty of 1794. The Virginia Court of Appeals rejected their claim, Hunter v. Martin, 18 Va. (4 Munf.) 1 (1814), but in 1816 the United States Supreme Court reversed the Virginia court’s decision. *Martin*, 14 U.S. (1 Wheat.) at 360-62. Judge Spencer Roane, the author of the Virginia court’s decision, denounced the Supreme Court’s decision and denied that it had the right to reverse a state’s interpretation of a treaty or any other law. Virginia actively resisted enforcement of the Supreme Court’s decision for a number of years. See TIMOTHY S. HUEBNER, THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS 1790-1890, at 31-38 (Paul Finkleman & Kermit L. Hall eds., 1999); MCDONALD, supra note 3, at 76-78.

61. 3 FUGITIVE SLAVERY AND AMERICAN COURTS, supra note 58, at 349.

62. Id. at 368.

63. *In re Booth*, 3 Wis. 1 (1854) (“*Booth I*”). The procedural history of the *Booth* decision is complex. In his original opinion (“*Booth I*”), Smith issued a writ of habeas corpus voiding a federal magistrate’s order to hold Booth pending the filing of charges against him. Id. at 1. The full court affirmed by a 2-1 vote. 3 Wis. at 49 (“*Booth II*”). Federal authorities then indicted Booth and again jailed him; Booth sought a second writ from the full Wisconsin Supreme Court, which was denied because Booth was now being held as part of pending federal proceedings and comity required the Wisconsin court not to interfere in such proceedings. *Ex parte Booth*, 3 Wis. 145 (1854) (“*Booth III*”). After Booth was convicted, he again applied for a writ; the full court granted the writ, again by a 2-1 vote, on the ground that the 1850 Fugitive Slave Act was unconstitutional, and thus, the proceedings under it were invalid. *In re Booth*, 3 Wis. 157 (1854) (“*Booth IV*”).

64. *Booth II*, 3 Wis. at 49; *Booth IV*, 3 Wis. at 157.

65. *Booth I*, 3 Wis. at 24-25; *Booth IV*, 3 Wis. at 193.
controversy and Thomas Jefferson's expressions of concern that giving the Supreme Court (and thus the federal government) final say as to the meaning of the Constitution might lead to a fatal unbalancing of federal and state spheres of power, and eventually, to federal tyranny and the demise of democracy. Smith was deeply concerned about these issues. He argued that state court judges must interpret the Constitution and hold to their interpretation regardless of federal pressure, and that such independence was vital to the preservation of American liberty:

Unless that [federal] court proceeds within the limits which the constitution and the laws of congress have prescribed, its acts are a nullity. Its jurisdiction is always open to question, and must affirmatively appear... Were it otherwise, that court might... administer the whole common law code of offenses and punishments, from whose judgments there could be no appeal, and whose prison doors no earthly power could unlock. Such doctrine is monstrous. We have not yet reached the point of submission.

Smith was stung by the criticism of his opponents that independent state interpretation of the Constitution would lead to judicial inconsistency and, ultimately, to anarchy. In a supplemental opinion, Smith responded that

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66. Booth II, 3 Wis. at 88-89; see supra note 60. In particular, Smith cited a comment of United States Supreme Court Justice William Johnson in his concurring opinion in Martin that:

[...] so firmly am I persuaded that the American people can no longer enjoy the blessings of a free government, whenever the state sovereignties shall be prostrated at the feet of the federal government... that I could borrow the language of a celebrated orator, and exclaim, "I rejoice that Virginia has resisted!"

Booth II, 3 Wis. at 88-89 (quoting Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 363 (1816)) (Johnson, J., concurring). However, Johnson was more critical of the Virginia court than his colleagues, and he agreed that in case of conflict between the United States Supreme Court and state courts, the Supreme Court must prevail. See Martin, 14 U.S. (1 Wheat.) at 363-64.

67. Booth II, 3 Wis. at 94.

68. Booth IV, 3 Wis. at 217.

69. The most eloquent criticism was that of Edward Ryan, a prominent Milwaukee lawyer who was hired to assist federal authorities in their appeal of Smith's initial decision. Ryan filed a brief with the full court in which he pointed out that:

If the supreme law of the land, the constitution of the United States as interpreted by its constitutional exponent [the Supreme Court], is to give way to elementary criticisms and decisions of the State authorities, it is not difficult to foresee most grave and disastrous results... And the system which, with all the inherited evils and all its own sins, is still the political hope of all mankind, may be led step by step into dissension, disruption and civil warfare, to gratify the consciences of those who trusting nothing to concession, nothing to time, nothing to Providence, would destroy everything imperfect, in a world in
there would be no danger if the federal and state courts respected the boundaries of each other's power, and he pointed out that the controversy over the Alien and Sedition Acts died out quickly after the Kentucky and Virginia Resolutions were passed.\(^7\)

The Wisconsin court's *Booth* decision quickly attracted national attention and made Paine a hero of the anti-slavery movement.\(^7\) The federal government appealed to the Supreme Court, and in 1859, after a long delay caused by the Wisconsin court's refusal to certify the appeal record, the Supreme Court, speaking through Chief Justice Roger Taney, overturned the Wisconsin court's decision.\(^7\) Chief Justice Taney spent relatively little time reviewing the original constitutional debates over federalism and subsequent legal clashes such as the *Martin* controversy. Instead, he invoked the Supremacy Clause of the United States Constitution\(^7\) and characterized section 25 of the 1789 Judiciary Act\(^7\) as "tell[ing] us, in language not to be mistaken, the great importance which the patriots and statesmen of the First Congress attached to this appellate power, and the foresight and care with which they guarded its free and independent exercise against interference or obstruction by States or State tribunals."\(^7\) Chief Justice Taney bluntly criticized the Wisconsin court's states' rights theory as "new in the jurisprudence of the United States, as well as of the States"\(^7\) and pointed out which nothing is perfect.

**MADISON DAILY ARGUS & DEMOCRAT, June 30, 1854, at 2.**

70. *Booth IV*, 3 Wis. at 202-03. The other members of the Wisconsin court left the leading role to Smith. Chief Justice Edward Whiton, who supported Smith, issued two short opinions adding little to Smith's arguments. Justice Samuel Crawford concluded that Booth should be released because of procedural errors by the federal authorities, but he argued that the United States Supreme Court had the final say as to the meaning of the Constitution in cases of conflict with state authorities. Other than a brief reference to a constitutional treatise written by Justice Joseph Story of the United States Supreme Court, he cited no authority in support of his position. *Booth II*, 3 Wis. at 75-76 (Crawford, J., dissenting). Crawford was defeated for reelection in 1855 by Orsamus Cole, who supported Smith's position; the election turned almost exclusively on the states' rights issue. See Ranney, supra note 56, at 94-97.

71. See letter from Charles Sumner to Paine (August 8, 1854) and letter from Wendell Phillips to Paine (November 24, 1854), Byron Paine Papers, Wisconsin Historical Society.


73. Article VI of the United States Constitution provides that: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

74. Act of Sept. 24, 1789, ch. 19, 1 Stat. 85 (1789). Section 25 provides that any judgment of a state supreme court holding a federal law unconstitutional, rejecting a constitutional challenge to a state law, or rejecting a claim of right under the United States Constitution may be appealed to the United States Supreme Court.


76. *Id.* at 514.
no one will suppose that a Government which has now lasted nearly seventy years, enforcing its laws by its own tribunals, and preserving the union of the States, could have lasted a single year, or fulfilled the high trusts committed to it, if offences against its laws could not have been punished without the consent of the State in which the culprit was found.\textsuperscript{77}

When Chief Justice Taney's decision was transmitted to Wisconsin, the Wisconsin Supreme Court took the extraordinary step of declining to accept and file it.\textsuperscript{78} Justices Cole and Paine supported interposition and did not file an opinion, but newly appointed Chief Justice Luther S. Dixon defended the federalist position in a lengthy dissenting opinion.\textsuperscript{79} In 1854, Justice Smith forged a link between states' rights and the battle against slavery, portraying the initial Booth opinion in part as a stand against a federal court system controlled by slaveholding interests;\textsuperscript{80} Chief Justice Dixon tried to sever that connection by citing leading jurists from both sections of the nation, Chancellor James Kent of New York and John C. Calhoun of South Carolina, in support of the rule of federal supremacy as to matters within the scope of federal jurisdiction.\textsuperscript{81} Chief Justice Dixon, like Justice Smith, cited \textit{Martin v. Hunter's Lessee}, but Dixon naturally relied on the Supreme Court's affirmation of federal judicial supremacy over constitutional matters and not on the Virginia court's opinion to the contrary.\textsuperscript{82} Like Smith and Taney, Dixon devoted a part of his opinion to the practical implications of states' rights: He agreed with Taney that his colleagues' reasoning would "place it in the power of any one state, beyond all peaceful remedy, to arrest the execution of the laws of the entire Union, and to break down and destroy at pleasure every barrier created and right given by the constitution."\textsuperscript{83}

\begin{itemize}
\item \textsuperscript{77} \textit{Id.} at 515.
\item \textsuperscript{78} \text{Ableman v. Booth, 11 Wis. 498 (1859). Byron Paine, who had just been elected to the supreme court on the strength of his role in the \textit{Booth} case, recused himself. \textit{Id.} at 499. Justice Cole voted not to file the decision; Chief Justice Luther S. Dixon voted to file it. \textit{Id.} Because an affirmative vote to file the Supreme Court's decision was necessary, the opinion was not filed.}
\item \textsuperscript{79} \textit{Id.} at 499.
\item \textsuperscript{80} \textit{See In re Booth, 3 Wis. 1, 48-49, 118-20 (1854).}
\item \textsuperscript{81} \text{\textit{Ableman,} 11 Wis. at 505-06 (citing Calhoun), 515-16 (citing Kent).}
\item \textsuperscript{82} \textit{Id.} at 507-09.
\item \textsuperscript{83} \textit{Id.} at 513. Dixon was nominally a Republican; when he ran for re-election in 1860, his party refused him renomination, but he won a very close race with help from Democrats and dissident Republicans. Dixon's victory, together with the fact that by 1860 it was clear the Republican party was about to take power nationally, caused states' rights sentiment to ebb somewhat in Wisconsin after that time. Ranney, \textit{supra} note 56, at 108-11.
\end{itemize}
C. Georgia: The Defensive Side of States’ Rights

Georgia did not create a state supreme court until 1845, but prior to that time it played an important role in the national debate over federalism. In *Chisholm v. Georgia*, the United States Supreme Court held that creditors of a British loyalist whose estate Georgia had confiscated during the Revolution could sue the state directly notwithstanding its claim of sovereign immunity. The Georgia Assembly passed a resolution refusing to recognize the decision and threatening any official who tried to enforce it with hanging. Other states also protested, and as a result, the Eleventh Amendment was enacted, immunizing states from suit in federal court.

In the early 1830s, tension again flared between Georgia and the Supreme Court over the state’s effort to remove the Cherokee tribe and open tribal lands in Georgia to white settlement. The Georgia legislature enacted laws asserting state jurisdiction over such lands and nullifying federal treaties that recognized Cherokee land rights. At about the same time, state officials prosecuted a tribal member, Corn Tassel, for murdering a fellow Indian on tribal lands, notwithstanding a consensus among legal authorities that the federal courts had exclusive jurisdiction over such crimes. In late 1830, the Supreme Court stayed Corn Tassel’s execution until it could decide a challenge to the state’s right to prosecute him, but Governor George Gilmer and the legislature openly refused to obey the writ, and Corn Tassel was hanged. Gilmer explained that “the right to punish crimes, against the peace and good order of this state, in accordance with existing laws is an original and a necessary part of sovereignty which the State of Georgia has never parted with.” The Cherokees subsequently challenged the Georgia laws, asserting state jurisdiction over tribal lands, and in *Worcester v. Georgia*, the
Court upheld their position. But Georgia officials again refused to obey the Court’s decision, and during the next few years, virtually all Cherokees in Georgia were forced to leave the state.

The Indian removal controversy had passed by the time the Georgia Supreme Court was created, and with one notable exception, the court took a moderate tone on states’ rights between 1845 and 1860. Chief Justice Joseph H. Lumpkin was primarily responsible for that tone. Two years spent away from Georgia at Princeton University and a lifelong sympathy for the Whig party and its commercial orientation gave Lumpkin a nationalist perspective that was lacking in many Georgians, and during his legal and judicial career, he reinforced this perspective by maintaining active contacts with colleagues in other states.

In 1848, the Georgia court explicitly affirmed that the United States Constitution, federal treaties, and federal laws “made in pursuance of the Constitution” took precedence over Georgia laws, and in two cases, Lumpkin indicated that, like the early federalists, he viewed the federal government as a creation and instrument of the American people rather than of the states.

The one exception to the court’s moderate tone was an opinion written by Justice Henry Benning, an ardent states’ rights advocate elected to the court in 1844.
1853. In *Padelford, Fay & Co. v. Mayor of Savannah*, a Savannah merchant, relying on the United States Supreme Court’s recent decision in *Brown v. Maryland*, challenged the city’s sales tax on the ground that to the extent the tax covered imported goods passing through Savannah, it violated the Commerce Clause of the United States Constitution. Speaking on behalf of the Georgia court, Benning rejected the challenge, holding that *Brown* applied only to direct taxes on goods, whereas the Savannah tax was based on merchants’ overall profits. But Benning was not content to stop there: He criticized *Brown* as an example of unwarranted federal meddling in state commerce and used the occasion to publish a lengthy personal discourse on the respective spheres of the federal and state courts.

Benning began with an exhaustive dissection of the constitutional ratification debates in order to show that the states had not intended to give Congress any powers other than those specifically enumerated in the Constitution. He reviewed the *Chisholm* and Cherokee removal controversies and interpreted Georgia’s reaction to the *Worcester* decision as not only merely political resistance but also a pronouncement that Congress had no power to enact section 25 of the 1789 Judiciary Act. Benning articulated the interposition doctrine in terms strikingly similar to those used by Abram Smith in the *Booth* case:

The Supreme Court of the United States has no jurisdiction over this Court, or over any department of the Government of Georgia. This Court is not a United States Court; and therefore, neither the Government of the United States, nor any department of it, can give this Court an order.

99. Benning served one term on the court from 1853 to 1859. He had served as a Georgia delegate to the 1850 Nashville Convention, at which the Southern states considered future action to be taken in light of Northern resistance to the expansion of slavery, and had spoken favorably of secession at the convention. Benning was one of the leaders of Georgia’s secession movement in 1861, and he served as a general in the Confederate army. A HISTORY OF THE SUPREME COURT OF GEORGIA 50 (John B. Harris ed., 1948).

100. 14 Ga. 438 (1854).

101. 25 U.S. (12 Wheat.) 419 (1827). In *Brown*, the Supreme Court struck down a Maryland law that imposed a license fee on persons importing goods by the bale or package. *Id.* at 436.


104. *Id.* at 445-520.

105. *Id.* at 454-76.

106. *Id.* at 478-84.
The idea meant to be conveyed [in the ratification debates] is clearly this: that the General Government has a sphere in which it is supreme, and the State Governments a sphere in which they are supreme, that these spheres intersect each other, and that the space included between the arcs of intersection, is common to both—is a space in which both are equally supreme, and in which there is no rule but one—Qui prior est in tempore potior est in jure [he who is first in time prevails in law].

Benning concluded by warning that broad construction of Article III of the United States Constitution to give federal courts power to overrule state court decisions “would be to make the States exist, at the mercy of the General Governments.”

The parallels between Booth and Padelford and the irony that two states at opposite ends of the debate over slavery were both espousing states’ rights did not go unnoticed. Six years later, as the prospect of civil war was moving from conjecture to reality, James Doolittle of Wisconsin and Robert Toombs of Georgia defended their respective supreme courts during a prolonged debate in the United States Senate over Northern resistance to fugitive slave laws. Senator Toombs began by denouncing Wisconsin as “one of the youngest of our sisters, who got rotten before she got ripe,” who as a result of the Booth decision “comes to us . . . with her hands all smeared with the blood of a violated Constitution, all polluted with perjury.” Senator Doolittle responded by pointing out instances of Southern defiance of the federal government, with particular emphasis on Georgia’s course in the Chisholm and Cherokee removal controversies, the Kentucky and Virginia Resolutions, and Virginia’s action in the Martin controversy. Doolittle also cited Benning’s Padelford opinion as an example of Southern intransigence: He argued that, unlike Benning, the Wisconsin Supreme Court had not absolutely denied priority of federal decisions over those of state courts but “ha[d] only asserted [its] right to judge for [itself] as to what cases are not under the Constitution of the United States.” Doolittle warned that the dispute over federal jurisdiction was a more important and enduring issue than many people realized:

It is a question altogether of more consequence than the slavery...
question itself... whether any jurisdiction or authority can be conferred upon a district court of the United States by an unconstitutional law... All the world knows that the district courts of the United States are courts of *special and limited jurisdiction*. They have just such power as the law gives them, and no more. Their whole jurisdiction is statutory, and depends upon the acts of Congress; and they, in their turn, depending upon, and subject to, the Constitution. When you speak of an act of Congress, which is itself unconstitutional, having any validity to confer any jurisdiction, it is preposterous, a solecism, an absurdity. Sir, an unconstitutional law is no law; it is a mere nullity.

Doolittle then echoed the theme previously stated by both Smith and Benning that allowing the Supreme Court to have the final say as to the constitutionality of state and federal laws would lead to despotism:

Civil war is, indeed, a terrible calamity... But, sir, terrible as it is upon one hand, still greater dangers would arise from conferring on the Federal Supreme Court the absolute power of construing the Constitution of the United States... In the language of Mr. Jefferson, the constitution on this hypothesis would become “a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please.”

Toombs responded with a vigorous defense of his home state. He disposed of Doolittle’s allusion to *Chisholm* by noting that the enactment of the Eleventh Amendment had vindicated Georgia’s position, and he disposed of *Worcester* by means of a more technical argument, namely that the plaintiffs in that case had never sought to enforce the Supreme Court’s mandate in the Georgia courts. Toombs argued that the Virginia court’s course in the *Martin* controversy was distinguishable from Wisconsin’s decision in *Booth* because in *Martin*, unlike *Booth*, the state court acquired jurisdiction before the federal courts did. Toombs suggested Benning’s position was distinguishable on the same basis:

I say, then, that no decision was made on the twenty-fifth section of the judiciary act by the supreme court of the State of Georgia; that it has never been decided to be unconstitutional there;... Judge

112. *Id.* at 122.
113. *Id.* at 125 (citation omitted).
114. *Id.* at 890; see *supra* notes 94-95 and accompanying text.
115. *Id.* at 891.
Benning is a very able man; but in that case [Padelford] he does not support Wisconsin; on the contrary, he condemns her; for he holds the Supreme Court of the United States and of the State to be concurrent jurisdictions, and that whichever gets the case first shall finally determine it; that one cannot overrule the other. But Wisconsin holds that even when the courts of the United States have got the case and decided it, they may seize it.\textsuperscript{116}

Like many advocates, both Toombs and Doolittle read their supporting authorities narrowly and downplayed or ignored important countervailing authorities in order to achieve a strategic goal. Contrary to Toombs’ suggestion, Benning did not concede in Padelford that state courts must submit to federal constitutional decisions on all issues that by chance had first come before the federal courts: Rather, he indicated that state judges could make independent constitutional decisions in all cases before them, even if federal courts had previously addressed and decided the point at issue.\textsuperscript{117} Toombs’ careful effort to avoid criticism of Georgia’s interposition in the Cherokee removal controversy also is telling. Doolittle paid less attention to fine legal distinctions than Toombs: Like Justice Smith, he squarely affirmed the right of state courts to decide constitutional issues independently of federal authority and denied that federal courts had the final say as to constitutional principles under any circumstances. At bottom, the differences between Toombs and Doolittle were political, not legal. Doolittle was speaking at a time when most anti-slavery advocates felt that the federal government was controlled by slave interests, and therefore, they had little to gain by defending federalism; for exactly the same reason, Toombs undoubtedly felt that the times demanded that Southerners defend federal courts.\textsuperscript{118} But a close reading of their arguments shows that both men were squarely in the mainstream of nineteenth century states’ rights advocates.\textsuperscript{119}

\textsuperscript{116} Id. at 893.
\textsuperscript{117} Padelford, Fay & Co. v. Mayor of Savannah, 14 Ga. 438, 499 (1854).
\textsuperscript{119} Justice Charles Jenkins of the Georgia Supreme Court issued a final states’ rights manifesto for Georgia in Mims v. Wimberly, 33 Ga. 587 (1863). The manifesto is unusual because it dealt with the relationship between Georgia and the Confederate central government. Jenkins again criticized the original federalist view that “the character of the Government, is that the people of the United States, as an aggregate, sovereign community, or body politic, ordained and established the Constitution.” Id. at 589. Like Benning, Jenkins relied heavily on the ratification debates as evidence that this view “is against the truth of history.” Id. Jenkins noted that the Confederate Constitution corrected this “error” by referring to “we the states” rather than “we the people” in its preamble; he held that “[t]here are as many sovereignties as there are States in the Confederacy, and no more.” Id. at 591-92. Nevertheless, he held that as to military matters, the central government’s
III. CIVIL WAR AND RECONSTRUCTION (1860-1877)

The Civil War and Reconstruction transformed the relationship between the federal and state governments in both obvious and non-obvious ways. During Abraham Lincoln’s administration, the federal government grew exponentially in order to administer the war effort. It also revolutionized the American system of currency, taxation, and finance; stretched its wartime powers to the limits of the Constitution and beyond; and deposed the wartime governments of the Confederate states. The eclipse of Southern state governments was so complete that a significant number of lawmakers and jurists adopted the “state suicide” theory after the war, holding that the states had literally ceased to exist and had resumed territorial status. The delegitimation of the ex-Confederate states was an important factor in the general decline of states’ rights sentiment after the war.

But these developments did not end the debate over federalism. Even when federal supremacy was at its height, there was always a vocal minority that challenged its expansion and urged a return to “[t]he Constitution As It Is, The Union As It Was.” Such sentiment was particularly strong in the border states. Kentuckians bitterly opposed many congressional wartime measures and postwar civil rights acts that affected the rights of freed slaves, and as a result the Kentucky Supreme Court had to strike a delicate balance between anti-federalist sentiments and the court’s tradition of deference to federal authority. By contrast, Reconstruction effectively silenced any overt opposition Georgia might have mounted to the new federal supremacy: Unionist judges occupied the Georgia bench after the war and generally deferred to laws expanding the federal government’s power, partly out of necessity and partly out of conviction. The post-Reconstruction Georgia Supreme Court declined to reverse this trend; thus, judicial deference to federalism was one of the few permanent legacies Reconstruction left in

authority must take precedence; accordingly, the court quashed a writ of habeas that a lower state court had issued to release state officials held by central Confederate authorities under the Confederate draft laws. See 6 MCPHERSON, supra note 6, at 323-25.

120. See 6 MCPHERSON, supra note 6, at 323-25.

121. Id. at 287-90, 436, 442-48, 492-94; BENNETT, supra note 3, at 187.

122. MCDONALD, supra note 3, at 209-11. In Texas v. White, 74 U.S. (7 Wall.) 700, 702-09 (1868), the United States Supreme Court held that although the southern states’ participation in the Confederacy had operated to suspend their rights as states, they had never left the Union because the union of states was indissoluble. See id. at 702-09.

123. BENNETT, supra note 3, at 187-90; see also infra note 146 and accompanying text.

124. See 6 MCPHERSON, supra note 6, at 493-94.

125. See COULTER, supra note 13, at 156-60, 197-205, 259-61, 264-70.

126. See infra notes 230-51 and accompanying text.
Wisconsin's postwar course was the most surprising. Even though the Booth controversy faded and the Union won the war, the Wisconsin Supreme Court continued to defend its states' rights position, particularly in its opposition to several wartime removal acts designed to expand federal jurisdiction. Ironically, Wisconsin's opposition to the removal acts led to a series of United States Supreme Court decisions that upheld the acts and eliminated all doubt as to whether the Supreme Court could review and overrule state court constitutional decisions.

A. Wisconsin as Keeper of the States' Rights Flame

Byron Paine, Booth's lawyer, replaced Abram Smith on the Wisconsin court in 1859 and led the court's continuing defense of states' rights after the war. The court was not monolithic: Chief Justice Dixon continued to assert the federalist sentiments he had articulated in his 1859 Booth opinion, and as a result, the vote of the court's third justice, Orsamus Cole, was often decisive.

The Wisconsin court resumed its defense of states' rights in a series of cases in 1869 and 1870, all but one of which involved federal removal laws. Congress enacted the first removal law in 1789: Section 12 of the Judiciary Act allowed removal of cases between citizens of different states from state to federal court. The only other important prewar removal law was an 1833 law that allowed removal of disputes involving federal tax and revenue laws. The Civil War and Reconstruction brought a rapid expansion of the removal laws. In 1863, Congress provided for removal of suits against federal officers; in 1866, it allowed removal in certain cases involving incomplete diversity; and in 1866 and 1867, it enacted two removal measures designed to help freedmen secure justice in Southern federal courts when they could not do so in state courts. The 1866 Civil Rights Act granted the right of removal to all civil and criminal defendants who were not accorded the basic civil rights granted by the Act and to persons prosecuted for administering the Act.
or functions of the Freedman’s Bureau. The 1867 laws creating congressional Reconstruction allowed either party in a diversity case to remove the case by filing an affidavit stating a belief that “from prejudice or local influence, he will not be able to obtain justice in such State court.” In 1868, removal jurisdiction was expanded to include disputes involving federally chartered corporations, and the final removal statute of the era, enacted in 1875, allowed removal of all matters “arising under the Constitution or laws of the United States” and exceeding $500 in value.

In *Akerly v. Vilas*, Paine served notice that the struggle over states’ rights in Wisconsin was about to resume. Acting pursuant to the 1867 Removal Act, the plaintiff in *Akerly* removed a suit to federal court that he originally filed in state court. The Wisconsin Supreme Court held that the plaintiff had not followed the procedures prescribed by the 1867 Act; the court did not address the Act’s validity, but Paine went out of his way to suggest that he wished to overturn the Act. He reasoned that because the United States Constitution did not create any jurisdiction whatsoever over state courts, it did not authorize Congress to enact any removal statutes.

Three landmark decisions for American federalism, *Knorr v. Home Insurance Co. of New York*, *Whiton v. Chicago & Northwestern Railway Co.*, and *In re Tarble*, followed soon thereafter. In *Knorr*, Cole separated from Paine and joined Dixon to uphold a corporate defendant’s right to remove a case under the 1868 Removal Act. Cole affirmed that, like Paine, he believed the Constitution did not authorize Congress to enact removal laws and that section 12 of the 1789 Judiciary Act was unconstitutional, but he reluctantly recognized the Supreme Court would uphold the removal power if an appeal was taken. Cole stated he was no longer prepared to fight the Federal Court because resistance “would be of no earthly advantage, that I can see, to any person or any principle.” Paine responded to his colleagues with

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134. The 1866 Civil Rights Act, ch. 31, 14 Stat. 27 (1866).
138. 24 Wis. 165 (1869).
139. Id. at 180-81.
140. 25 Wis. 143 (1869).
141. 25 Wis. 424 (1870), rev’d, 80 U.S. (13 Wall.) 270 (1871).
142. 25 Wis. 390 (1870), rev’d, 80 U.S. (13 Wall.) 397 (1871).
143. *Knorr*, 25 Wis. at 149-50.
144. Id. at 143-49.
145. Id. at 149. Cole cited *Moseley v. Chamberlain*, 18 Wis. 700 (1861), in which he and Paine had rejected an attempt to remove a case to federal court on diversity grounds based on their belief that Congress had no power to create removal jurisdiction. Id. at 704-05 (Dixon, J., dissenting).
a lengthy, anguished, and unusually frank defense of his philosophy. He conceded his interpositionist views might have been shaped by his prewar belief that slavery must be resisted at any cost, but he argued that the fact that interposition had come to be identified with the Confederacy did not make the doctrine any less valid:

Secession is revolutionary; states rights not. Secession seeks to withdraw and overthrow the powers admitted to have been delegated to the federal government. States rights makes no such effort . . . .

It is natural enough, in view of our late rebellion, that the tendencies in the popular, and perhaps in the legal, mind should be toward a strong assertion of federal power; and that those who were advocates of state rights, when the northern states were turned into hunting ground for fugitive slaves . . . should now be ready to brand the doctrine as a pestilential heresy. But these fluctuations in the popular feeling and opinion can have no legitimate influence upon the question of legal interpretation. . . . [U]nder our system of divided sovereignty, it is . . . a question of the gravest delicacy and importance, and, at least, of doubt, whether the states, the original sovereignties, hold their reserved powers wholly subject to the judgment of the federal court.146

Paine concluded by again warning that a federal right to review state court decisions “could not [exist] without destroying the independence and existence of the state governments.”147

In Tarble and Whiton, Paine and Cole joined forces once again. In Tarble, the father of an army recruit under the legal age of enlistment obtained a writ from a Wisconsin state court ordering federal authorities to release the boy.148 Consistent with his position in the Booth controversy, Paine affirmed that state courts had broad power to determine the jurisdiction of federal authorities over their prisoners.149 He protested that Chief Justice Taney had misunderstood the Wisconsin court’s holding: The Wisconsin court held only that state courts could make an initial determination as to whether the federal courts had jurisdiction and did not hold that such a decision would stand in the face of a contrary United States Supreme Court decision.150 Paine suggested

146. Knorr, 25 Wis. at 152-54.
147. Id. at 155.
149. Id. at 410-11.
150. Id. at 407.
Taney had missed this point because of the Wisconsin court's strong language in *Booth* and its resistance to taking instruction from the United States Supreme Court on appeal, which resistance Paine conceded "was, in truth, contrary to the entire current of authority."

Paine was less than candid here: He ignored the fact that in *Booth* the Wisconsin court had emphasized not only just the right of state courts to decide issues that fell under federal jurisdiction but also their right to decide such issues independently of federal courts. Dixon, who dissented, did not respond to Paine's arguments in detail, but contented himself with stating that Taney's decision effectively refuted Paine's points and that in cases involving federal military service, power to issue habeas writs rested exclusively with the federal courts.

In the *Whiton* case, Cole, speaking for himself and Paine, held that the 1867 removal law was invalid because any plaintiff who filed a suit in state court thereby waived any right to elect another forum. Gone was the tone of resignation Cole had adopted in *Knorr*: It was now apparent that he and Paine would continue to look for ways to check removal. Dixon, finding himself again in the minority, argued that while the 1867 Act might encourage gamesmanship by plaintiffs, it was still within the limits of federal jurisdiction allowed by the Constitution. Citing his 1859 *Booth* opinion, the United States Supreme Court's opinion in *Martin*, and a contemporary Kentucky case that upheld the 1867 Removal Act, Dixon commented that "however unnecessary and ungracious such legislation may seem to be, or however burdensome to the parties, it must still be upheld, so long as it is within the constitutional authority granted to congress."

The *Tarble* and *Whiton* decisions were promptly appealed to the Supreme Court, which reversed both decisions in 1872 and used them to reinforce the principles of federal supremacy Taney had enunciated in 1859. In *Tarble*, Justice Stephen Field, speaking for the Court, quoted Taney's opinion at length. Field emphasized it was particularly important for federal courts and officials to be free of state interference in matters pertaining to the military and reminded the Wisconsin court that "[t]he United States are as much

151. *Id.*
152. *See supra* note 68 and accompanying text.
153. *Tarble*, 25 Wis. at 413.
155. *Id.* Dixon disagreed: He pointed out that unlike the plaintiff in *Akerly*, the plaintiff in *Whiton* had elected to change her forum well before the state court that initially had the case conducted a final hearing or trial. *Id.* at 435 (Dixon, C.J., dissenting).
156. *Id.* at 437 (Dixon, C.J., dissenting) (citing *Eifort* v. *Bevins*, 64 Ky. (1 Bush) 460 (1866)). The *Eifort* case is discussed in the text accompanying notes 211-12 below.
interested in protecting the citizen from illegal restraint under their authority, as the several States are to protect him from the like restraint under their authority, and are no more likely to tolerate any oppression." Field bluntly served notice that the Supreme Court had the final word in all cases of conflicting constitutional interpretation:

The two governments in each State stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments.159

In Whitton, Field elaborated on his views. He rejected Paine and Cole's view of the 1867 removal statute as creating a species of federal appellate jurisdiction over state courts. Rather, he stated, removal statutes activated areas of concurrent federal jurisdiction, which had always been authorized by the Constitution.160 Field responded to the Wisconsin court's concerns about procedural gamesmanship by noting that the statute was enacted in order to combat local prejudice in state courts, that prejudice may extend to plaintiffs as well as defendants, and that sometimes a plaintiff may not discover the extent of the prejudice until after suit has been filed.161 Field also alluded to an issue that would soon become the focus of the final phase of the nineteenth-century debate over federalism: state creation of statutory rights enforceable only in state courts. Whitton involved a claim under Wisconsin's wrongful death statute that recently had been amended to provide that claims under the statute could be brought only in state court.162 Field conceded that wrongful death claims were not recognized at common law and were purely a statutory creation; nevertheless, he held that when a state legislature creates a general statutory right, it cannot at the same time withdraw the right from the purview of federal jurisdiction.163 The issue flared up again in Wisconsin shortly after the Whitton appeal was decided. In

158. Tarble, 80 U.S. (13 Wall.) at 411.
159. Id. at 406. Chief Justice Chase dissented, arguing that states should be permitted to issue habeas writs with respect to persons held in federal custody, subject to final federal appellate review, which was allowed by section 25 of the 1789 Judiciary Act. Id. at 412 (Chase, C.J., dissenting).
161. Id. at 289-90.
162. 1870 Wis. Laws, ch. 56, § 22.
Morse v. Home Insurance Co. of New York City, the Wisconsin court upheld an 1870 state law that required insurance companies to agree not to remove suits brought against them in Wisconsin state courts as a condition of being licensed to do business in the state. Dixon joined his colleagues in upholding the statute: He drew a fine distinction between Whitton and Morse, reasoning that the legislature could not directly forbid corporations to remove cases, but that it had an absolute right to regulate their right to do business in Wisconsin and concluding that the legislature merely required them to choose whether they wished to do so or wished to exercise their right of removal.

Morse was also appealed to the Supreme Court, and in 1874, the Supreme Court again reversed the Wisconsin court. The Supreme Court drew a distinction between voluntary waiver in a specific case and statutes requiring a blanket advance waiver, holding that the latter are not permitted. Speaking for the Court, Justice Ward Hunt viewed the Wisconsin statute as a direct challenge to federal removal jurisdiction and, thus, federal authority. Hunt conceded that the Supreme Court in past cases had indicated that a state's right to regulate conditions of doing business within its borders was very broad, but he emphasized that any conflict between that right and the prerogatives of federal jurisdiction must yield to the latter.

The final dispute between the Wisconsin Supreme Court and the United States Supreme Court came four years later when, in Wisconsin ex rel. Drake v. Doyle, the Wisconsin court upheld an 1872 corporation law that supplemented the Morse statute by requiring the Wisconsin Secretary of State to revoke the license of any insurance company that removed a case to federal court in violation of an agreement filed under the 1870 law. Chief Justice Edward Ryan, who had replaced Dixon upon the latter's resignation in 1874,
wrote the court's decision in Doyle. Ryan, whose sharp intellect was matched by an equally sharp personality, had mixed feelings about the federal government: He had acted as a special federal attorney during the first phase of the Booth proceedings in 1854 and had presented an eloquent (though unsuccessful) defense of federalism to Justice Smith and his colleagues. But during the war years, Ryan had been a bitter critic of the Lincoln administration and the war effort, and his opposition had sent him into professional near-oblivion for nearly a decade after the war. In the Doyle case, Ryan used his talents to craft a moderately worded opinion—very much in the Kentucky style, as will be seen below—with which he ultimately was able to win a reprieve for the Wisconsin licensing law and the cause of states' rights, albeit a temporary one.

Ryan, knowing that opponents of the statute would rely heavily on the United States Supreme Court's Morse decision, began by professing respect for that decision, stating that while the Wisconsin court still thought "with all due deference" that it was right, "it is our duty and pleasure to submit to the decision of the federal court, on a point unquestionably within its final jurisdiction." Ryan then suggested that the Supreme Court would want Morse construed narrowly, and he conceded that the Wisconsin legislature could not destroy a corporation's right to remove a suit, although he argued that the corporation might violate a moral compact with the people of the state if it did so. Ryan then drew a key distinction that was the centerpiece of his opinion: He reasoned that, in Morse, the United States Supreme Court had declared agreements under the 1870 law to be unenforceable but had not struck down the statute itself and had not prohibited Wisconsin from revoking corporate licenses for failure to comply with such an agreement. Put another way, a corporation could not be forced to promise not to remove cases, but neither could the state be forced to license corporations that refused to make or keep such a promise.

Even though he knew the court's decision would almost certainly be appealed, Ryan could not resist ending with a warning to federal authorities.

175. BEITZINGER, supra note 174, at 67-103.
176. Drake, 40 Wis. at 189.
177. Id. at 191-93.
178. Id. at 193-94. The United States Supreme Court's Morse decision was unclear on this point. Hunt had stated that "[w]e do not consider the question whether the State of Wisconsin can entirely exclude such corporations from its limits, nor what reasonable terms they may impose as a condition of their transacting business within the State." Home Ins. Co. of N.Y. City v. Morse, 87 U.S. (20 Wall.) 445, 455 (1874). But, he also stated in broad terms that the 1870 statute was "repugnant to the Constitution of the United States . . . and . . . illegal and void." Id. at 458.
He concluded with a version of Paine’s original states’ rights credo, toned down to reflect Ryan’s view of the changed realities that the war and Reconstruction had brought to America, which he undoubtedly hoped would give the Supreme Court pause:

We abide by the letter and spirit of the constitution. Unfortunately many things in its administration are tending toward centralization, which the history and temper of the American people give grave warning might be closely followed by disintegration. The integrity of the union has been tried. The integrity of the states is on trial. Much rests upon the moderation and forbearance of the federal courts; as much perhaps upon the firmness of the state courts, refusing to abdicate state authority, in state matters, to assumption of federal jurisdiction. We will faithfully try to do our part.\textsuperscript{179}

Ryan’s strategy worked: A divided Supreme Court upheld the Wisconsin statute. Justice Hunt, again speaking for the Court, was reluctant to interfere in any way with state power over the incorporation and licensing process and concluded that even if Wisconsin’s licensing law was intended to impede removal, “emotion or a mental proceeding . . . is not the subject of inquiry in determining the validity of a statute.”\textsuperscript{180} Justice Joseph Bradley, joined by Justices Noah Swayne and Samuel Miller, dissented. They viewed Doyle as a direct contest between state power over incorporation and federal power to exercise constitutional jurisdiction and argued that the latter must prevail because “prohibition [of licensure], except upon conditions derogatory to the jurisdiction and sovereignty of the United States, is mischievous, and productive of hostility and disloyalty to the general government.”\textsuperscript{181}

\textbf{B. Kentucky: A Loyalty Sorely Tested (Part 2)}

The Civil War strained relations between Kentucky and the federal government nearly to the breaking point. Kentucky’s unionism was deep-rooted, having been “born of long periods of isolation in bearing the brunt of the American Revolution west of the Alleghenies”;\textsuperscript{182} by the beginning of the

\begin{footnotes}
\textsuperscript{179} Drake, 40 Wis. at 216-17. Ryan noted that the federal district court in Madison had recently enjoined the Wisconsin Secretary of State from revoking a corporate license in such a case, and he complained, citing \textit{Chisholm}, among other cases, that the United States Supreme Court had consistently used the implied powers doctrine to extend the scope of federal jurisdiction further than the Constitution allowed. \textit{Id.} at 199-204, 216-17.

\textsuperscript{180} Doyle v. Cont’l Ins. Co., 94 U.S. 535, 541 (1876).

\textsuperscript{181} Id. at 543 (Bradley, J., dissenting).

\textsuperscript{182} Thomas L. Connelly, \textit{Neo-Confederatism or Power Vacuum: Post-War Kentucky Politics Reappraised}, 64 REG. KY. HIST. SOC. 257, 259 (1966).
\end{footnotes}
war, it had evolved into “a complex of fierce love for the Union [and] violent opposition to any infringement of the state’s constitutional rights or interference in the state’s affairs.”¹⁸³ Both the Union and the Confederacy viewed control of Kentucky as vital, and after the Kentucky legislature rejected secession, Confederate forces mounted a major invasion in 1862.¹⁸⁴ The Lincoln administration imposed strict martial law on the state for much of the war, and Union army camps attracted many escaped slaves and their families whom federal officials declined to return to their owners. Such actions were bitterly resented by virtually all political factions in the state.¹⁸⁵ Partly as a result, Kentucky stoutly opposed federal postwar reconstruction measures and expanded rights for freed slaves, so much so that one historian has characterized Kentucky as the only state that “waited until after the war to secede.”¹⁸⁶

As a result, during the Civil War and Reconstruction years the Kentucky Supreme Court had a more difficult job than ever of maintaining a balance between states’ rights and federalism. The court itself was divided: Justice Rufus Williams, a strong Unionist, frequently dissented in cases involving challenges to federal authority, and the debate between Williams and his colleagues sheds much light on divisions in the state as a whole.¹⁸⁷

The first major test for the Kentucky court came in the case of Norris v. Doniphan, in which a wartime federal law providing for confiscation of property of persons aiding the rebellion was challenged.¹⁸⁸ The court avoided a direct discussion of federalism and reached a mixed decision: It held that the law violated due process because it did not give the Kentuckian who was the target of confiscation the right of trial to determine whether he was in fact a rebel sympathizer, but it also held that if he were found to be an “alien enemy,” his right to sue to recover property would be suspended for the duration of the war.¹⁸⁹ Williams suggested that rebel sympathizers were presumptively alien enemies because they had no right to withdraw their allegiance from the United States at will. He reviewed the history of the debate over federalism in nearly as much detail as had Justice Benning in Padelford, but he reached a considerably different conclusion: He argued that the United States Constitution “is more than a compact”¹⁹⁰ and expressed his

¹⁸³. Id.
¹⁸⁴. 6 MCPHERSON, supra note 6, at 293-97.
¹⁸⁵. COULTER, supra note 13, at 145-51, 166-70, 207-08.
¹⁸⁶. Id. at vii.
¹⁸⁷. See infra notes 188-222 and accompanying text.
¹⁸⁸. 61 Ky. (4 Met.) 385 (1863).
¹⁸⁹. Id. at 401-02.
¹⁹⁰. Id. at 405.
concept of the relationship between federal and state power by stating: “This [federal] government is not sovereign, but it is supreme, and designed to be perpetual.” 191 Williams concluded by explicitly affirming that the United States Supreme Court had the final say as to the constitutionality of all laws. 192

In Griswold v. Hepburn, 193 the court was asked to decide the validity of the Legal Tender Act of 1863, which transformed the national economy and facilitated the financing of the war by creating federal paper currency for the first time. 194 By 1865 it was clear, to the regret of most Kentuckians, that the federal presence in Kentucky was transforming the state permanently, most notably by eroding slavery and hastening its end in the state. 195 In Griswold, the court addressed this transformation for the first time, and once again it strove to find middle ground. Chief Justice George Robertson, speaking for the majority, began with a lengthy meditation on the nature of federalism. He likened the states to planets orbiting the federal sun and took a fatalistic approach to the future of federalism: “This new and beautiful organism is yet in the course of practical development, which may soon prove whether its fundamental equilibrium of local and national power is in most danger of disturbance from the centrifugal tendencies of the States, or the centripetal attractions of the central government.” 196

The court ultimately concluded that the Legal Tender Act was unconstitutional, reasoning that the Constitution gave Congress power only to coin money and that to read the Constitution to give implied permission to Congress to issue paper treasury notes as currency “would have devoured all the other powers and resolved the national government into despotic anarchy.” 197 However, the court explicitly recognized that the Supreme Court would have the final say on whether the Act was constitutional and made clear it would defer to such decision. 198 Williams again dissented, arguing

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191. Id. at 409-10.
192. Id. at 439. However, Williams agreed with his colleagues that the law violated due process, and he argued that even treason did not permit seizure of the traitor’s property. Id. at 423-25.
196. Griswold, 63 Ky. (2 Duv.) at 23.
197. Id. at 27. The Kentucky court was the only state court that struck down the Act: Numerous other state courts, including the Wisconsin Supreme Court, upheld the Act. Breitenbach v. Turner, 18 Wis. 148 (1864); 6 Charles Fairman, History of the Supreme Court of the United States: Reconstruction and Reunion 1864-1888, at 698-99 n.70 (1971).
198. Griswold, 63 Ky. (2 Duv.) at 22. The United States Supreme Court subsequently affirmed
that the court should defer to Congress unless the Act was clearly unconstitutional and that if state courts were to unduly second-guess the federal government’s wartime measures, the United States “must vanish from the world as a thing of the past, and with its downfall must go the last brightest evidence of man’s capability for self-government.”

During the same term, the Kentucky court struck down two wartime laws affecting slavery. In *Corbin v. Marsh*, it held that an 1864 federal law freeing families of black soldiers was unconstitutional because it deprived loyal slaveowners of property without compensation and placed a discriminatory share of the war’s cost upon them. In *Hughes v. Todd*, the Kentucky court held that another 1864 law authorizing impressment of slaves for war service effectuated an unconstitutional taking of property in the case of slaves worth more than the statutory compensation limit of $300. The court used these cases to express openly its unhappiness with federal policy: “[U]nder what pretense,” asked Justice George Robertson, “could Congress assume power to abolish slavery in Kentucky, a devoted union State, always for a restoration of the union, and nothing more nor less?” Justice Williams once again dissented, arguing as he had in *Griswold* that such measures were justified under Congress’s broad war powers. Williams responded to Robertson’s complaints about federal overreaching by relying on the American people as the ultimate repository of safety. In language reminiscent of the early federalists’ view of the national government as a direct creature of the people rather than of the states, he argued that in case of overreaching, the

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199. *Griswold*, 63 Ky. (2 Duv.) at 67 (Williams, J., dissenting). One detects in Williams’ language the influence of Abraham Lincoln’s second annual message to Congress (“In giving freedom to the slave, we assure freedom to the free . . . . We shall nobly save or meanly lose the last, best hope of earth,” Abraham Lincoln’s Second Annual Message to Congress, in *ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865*, at 415 (Library of America 1989)) and the Gettysburg Address (“It is rather for us to be here dedicated to the great task remaining before us . . . . that government of the people, by the people, for the people, shall not perish from the earth,” Gettysburg Address, in *ABRAHAM LINCOLN SPEECHES AND WRITINGS 1859-1865*, supra, at 536).

200. 63 Ky. (2 Duv.) 193 (1865).


202. 63 Ky. (2 Duv.) 188 (1865).


204. *Hughes*, 63 Ky. (2 Duv.) at 191-92.

205. *Corbin*, 63 Ky. (2 Duv.) at 197-98.

206. *Id.* at 202 (Williams, J., dissenting).
The following year the court addressed the validity of federal removal laws for the first time. In *Short v. Wilson*, a Union army officer was sued in state court for taking the plaintiff's horse during the war; he removed the suit to federal court under the 1863 Removal Act. The Kentucky Supreme Court delivered a message of opposition to the removal law, but it did so in a much more indirect manner than the Wisconsin Supreme Court did. The Kentucky court noted that the state legislature had recently enacted a law authorizing appeal of removals and it relied on the statute for its jurisdiction. The statute was a legislative embodiment of Justice Paine's view (subsequently expressed in *Tarble*) that state courts were not bound to cede all questions of jurisdiction to federal courts once removal had taken place, but were free to evaluate the validity of removal notwithstanding the Supremacy Clause. But the Kentucky court studiously ignored its opportunity to express solidarity with the legislature's view: Instead, it concentrated on the issue of whether the defendant had complied with the procedural requirements of the federal removal statute and concluded that he had not. Soon afterward, the court tacitly disavowed any support for Paine's position in *Eifort v. Bevins*. In *Eifort*, a man detained by federal officials sued them in state court for wrongful imprisonment; the officials removed the case to federal court, and the Kentucky court held the federal removal acts must be observed "even though they might be deemed unnecessary and ungracious."

The issue that created the most postwar friction between Kentuckians and the federal government was whether blacks should be allowed to testify in court. Immediately after the war, most ex-Confederate states enacted "black codes," which prescribed certain basic civil rights for the freed slaves, such as the right to make contracts and hold property. However, the codes also preserved many slave-era restrictions and signaled to Northerners that the South had not truly accepted the result of the war. In response, Congress enacted the 1866 Civil Rights Act, which, among other things, allowed blacks to testify without restriction in all federal courts and permitted defendants in state courts that did not allow black testimony to remove their cases to federal

207. *Id.* at 232-33 (Williams, J., dissenting).
208. 64 Ky. (1 Bush) 350 (1866); *see supra* note 132 and accompanying text.
210. *Short*, 64 Ky. (1 Bush) at 352-54.
211. 64 Ky. (1 Bush) 460 (1866).
212. *Id.* at 461.
court. Most Southern states subsequently enacted constitutional or statutory provisions allowing black testimony, but Kentucky refused to do so. As a result, many black Kentuckians removed their cases to Judge Bland Ballard’s federal district court, and because of recurring incidents of violence against blacks, civil rights cases made up a large portion of Ballard’s docket after 1866. The testimonial and removal provisions of the 1866 Act triggered deep resentment in Kentucky, particularly after Supreme Court Justice Noah Swayne, sitting as a district judge in Kentucky, rejected a constitutional challenge to those provisions.

When the testimonial issue came before the Kentucky Supreme Court in Bowlin v. Commonwealth, the court departed from its tradition of trying to strike a balance between state and federal concerns: It protested that Congress had invaded the state’s “unquestionable right to regulate her own domestic concerns, and prescribe remedies, including rules of evidence, in cases in her own courts.” The court’s opinion reflected an interesting mix of racism and genuine states’ rights concerns:

[Federal civil rights measures] would place the black race, in all the States, under the pupilage of Congress, free from the control of the local sovereign that governs the white race, and ought to have the same jurisdiction over all citizens, black as well as white. . . . Such a monstrous construction . . . would yield to the arbitrary will of Congress absolute control over the interests and destiny of the black race, and the like control over the white race, so far as its rights might, in the opinion of Congress, conflict with the interest of the blacks.

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214. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (1866).
215. See Victor B. Howard, The Black Testimony Controversy in Kentucky, 1866-1872, in 12 BLACK SOUTHERNERS AND THE LAW, 1865-1900, at 162 (Donald G. Nieman ed., 1994). Kentucky judges were not prohibited from allowing black testimony, but only one, William Goodloe of Lexington, allowed such testimony in his court. Goodloe was a radical Unionist who warned blacks in one public speech that: “Your testimony must be admitted, otherwise you may be beaten and robbed nightly . . . your ministers may be shot down every Sabbath in your pulpits, without impunity.” Id. at 176-77 (citations omitted).
216. Id. at 169-70, 172-75.
217. United States v. Rhodes, 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151). Swayne took a broad view of the federal government’s power to assist freed blacks, commenting that if the courts were to “[b]lot out [the 1866] act and deny the constitutional power to pass it, . . . the worst effects of slavery might speedily follow. It would be a virtual abrogation of the [Thirteenth] Amendment [abolishing slavery].” Id. at 794.
218. 65 Ky. (2 Bush) 5 (1867).
219. Id. at 7.
220. Id. at 9.
Even Justice Williams made clear that the limits of his support for federalism had been reached. In his view, the 1866 Act improperly gave federal courts exclusive jurisdiction of all cases in states whose laws did not permit blacks to testify and put state judges at risk of being prosecuted for enforcing such laws.\footnote{Id. at 28-29 (Williams, J., dissenting).} Williams believed that the Act was a palpable invasion of state internal affairs and that:

> if [the federal government] can do this, no subject is perceived upon which it may not regulate for the several States, and thus the people of Kentucky must be legislated for by the people of Massachusetts in matters in which they can have no direct information or presumed interest, and \textit{vice versa}.\footnote{Id. at 30 (Williams, J., dissenting).}

The opinions in \textit{Bowlin} suggest that if the federal government had continued to interpret the 1866 Act broadly, at some point the Kentucky court might have joined Byron Paine in mounting a direct challenge to federal removal statutes. But in the early 1870s, the issue was defused. Opponents of the 1866 Act searched for cases that could be used to test its constitutionality in the United States Supreme Court; one such case, \textit{Blyew v. United States}, originated in Kentucky.\footnote{80 U.S. (13 Wall.) 581 (1871).} In \textit{Blyew}, the defendant, who was charged with the murder of a black family, argued that because murder was a state and not a federal crime, federal courts had no jurisdiction over the crime and could not obtain jurisdiction solely under the 1866 Act.\footnote{Robert J. Kacorzowski, \textit{The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876}, at 133-35 (1985); see \textit{Blyew}, 80 U.S. (13 Wall.) at 586-88.} In late 1868, Judge Ballard rejected the argument, and his decision was promptly appealed.\footnote{Kacorzowski, supra note 224, at 135; \textit{Louisville Courier-J.}, Nov. 29, 1868, at 4.} The appeal remained on the Supreme Court docket for several years, and in the meantime, pressure built in Kentucky for resolution of the testimonial controversy: An increasing number of political and bar leaders supported allowance of such testimony as the best means of reducing federal power in the state.\footnote{Howard, supra note 215, at 180-87.} In 1872, the legislature enacted a law allowing black testimony,\footnote{1871-72 Ky. Acts ch. 139.} and soon thereafter the Supreme Court handed down its decision in \textit{Blyew}: It held that federal jurisdiction under the 1866 Act was valid in all cases when state officials directly failed to enforce black citizens’ property and liberty rights, but that

\begin{itemize}
  \item \footnote{\textit{Id.} at 28-29 (Williams, J., dissenting).}
  \item \footnote{\textit{Id.} at 30 (Williams, J., dissenting).}
  \item \footnote{80 U.S. (13 Wall.) 581 (1871).}
  \item \footnote{Robert J. Kacorzowski, \textit{The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876}, at 133-35 (1985); see \textit{Blyew}, 80 U.S. (13 Wall.) at 586-88.}
  \item \footnote{Kacorzowski, supra note 224, at 135; \textit{Louisville Courier-J.}, Nov. 29, 1868, at 4.}
  \item \footnote{Howard, supra note 215, at 180-87.}
  \item \footnote{1871-72 Ky. Acts ch. 139.}
\end{itemize}
the mere denial of black testimony did not amount to such a failure. Ballard then concluded that his jurisdiction was "at an end" as to the testimonial controversy, and the number of civil rights cases in his court fell dramatically thereafter.

**C. Georgia: States' Rights in a Reconstructed State**

Georgia, like most of the former Confederate states, had several changes of government during the Reconstruction era. Under President Andrew Johnson's initial Reconstruction program (1865-67), native Unionists, many of whom were members of Georgia's prewar elite, were allowed to operate the state government. Johnson appointed Charles Jenkins, who had served on the Georgia Supreme Court during the war years, as provisional governor and retained Joseph Lumpkin as chief justice of the "Restoration" supreme court. Lumpkin was joined by Dawson Walker and Iverson Harris, both moderate Unionists. In early 1867, Congress concluded that the former Confederate states had not made satisfactory progress in giving basic legal rights to the freed slaves and enacted its own Reconstruction program: The states were placed under military occupation and were notified that their representatives would not be seated in Congress until they ratified the Fourteenth Amendment and enacted new state constitutions that guaranteed black suffrage. In Georgia, unlike some other states, military authorities did not remove the sitting justices, but when a new constitution was enacted in 1868, a new "Reconstruction" court was created, and two new justices, Joseph E. Brown and Henry K. McCay, were appointed. Hiram Warner, a moderate Unionist who had replaced Lumpkin upon the latter's death in 1867, was reappointed under the new constitution.

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229. LOUISVILLE COURIER-J., Mar. 23, 1872, at 3 (charge to grand jury); see KACZOROWSKI, *supra* note 224, at 142.

230. See *supra* note 119.

231. Walker and Harris were not politically active, but devoted their energies to their legal careers. After leaving the bench, Walker joined the new Georgia Republican party and was its candidate for governor in 1872. A HISTORY OF THE SUPREME COURT OF GEORGIA, *supra* note 99, at 90 (Walker), 90-91 (Harris). Walker and Harris replaced Jenkins and Richard F. Lyon, both of whom were conservatives sympathetic to states' rights. *Id.* at 88 (Lyon), 89 (Jenkins). Some states, such as Texas, had a high turnover of court personnel during Reconstruction; others, such as North Carolina, did not. See Joseph A. Ranney, *A Fool's Errand? Legal Legacies of Reconstruction in Two Southern States*, 9 TEX. WESLEYAN L. REV. 1, 5-10 (2002).


233. Like many Reconstruction-era lawmakers, each of these justices went through a major political conversion during the era. Both Warner and McCay were born in the North and moved to Georgia as young men; both were strong Unionists, and Warner was one of the few delegates to Georgia's 1861 secession convention who voted against secession. After the war, McCay became a
Thanks mainly to the enactment of black suffrage, Republican Unionists were able to control Georgia for a time, but they soon dissolved into factions, and as a result, Georgia returned to conservative control in 1872. The new “Redeemer” administration retained Warner, who had proven more conservative than his Reconstruction court colleagues, but appointed conservatives to the other two seats. Despite their distinct differences in outlook, both the Restoration and Reconstruction justices were disinclined to challenge federal primacy, particularly as to jurisdictional issues. Somewhat surprisingly, after Reconstruction ended in Georgia, the Redeemer justices followed their lead.

The Georgia court showed deference to federal authority in a number of ways. In Jones v. Harker, the Restoration court, unlike its Kentucky counterpart, upheld the validity of the Legal Tender Act with little comment. Justice Harris objected to the Act, but even he made clear he was not willing to take a stand against it. Harris protested that the implied powers doctrine, under which the power to circulate paper money had been defended, “makes the powers of Congress unlimited, and subverts the Constitution itself,” but he mistakenly believed the United States Supreme Court had already upheld that Act, and like his colleagues, he conceded that “the decisions of that Court, in the interpretation of the Constitution of the United States, are made obligatory upon the judgments rendered here.” After 1868, the Republican; Warner did not. A HISTORY OF THE SUPREME COURT OF GEORGIA, supra note 99, at 48-49 (Warner), 91-92 (McCay). Brown is an important figure in Georgia history: He “traveled the political dial from doctrinaire state rights Democrat and secessionist to Radial Republican scalawag and finally to Bourbon Democrat without more than temporary loss of face or fortune or his essential popularity in Georgia.” Id. at 94 (citation omitted). Brown served only briefly on the Georgia Supreme Court, resigning in 1870 to resume his political career. Id. at 93-94

234. CONWAY, supra note 12, at 190-95.
235. See infra notes 241-51 and accompanying text.
236. Brown’s seat was filled by Osborne Lochrane (1870-72), William Montgomery (1872-73), Robert Trippe (1873-74) and finally by James Jackson (1875-87). McCay’s term ended in 1875, and he was succeeded by Logan Bleckley (1875-80). Montgomery, Trippe, Jackson, and Bleckley all served the Confederacy as government officials or soldiers during the war; however, only Montgomery and Trippe filled major political posts. Like their Restoration and Reconstruction court colleagues, they devoted most of their energies to law rather than politics. See A HISTORY OF THE SUPREME COURT OF GEORGIA, supra note 99, at 97, 102, 125-26 (Lochrane), 126-27 (Montgomery), 127-28 (Trippe), 128-29 (Jackson), 129-30 (Bleckley).
237. 37 Ga. 503 (1867).
238. Id. at 507.
239. Id. at 504 (citing Thompson v. Riggs, 72 U.S. (5 Wall.) 663 (1863)). In Thompson, the Supreme Court did not decide the constitutionality of the Act but held only that when a bank deposit was made in coin, the bank became the owner of the money deposited and could pay its debt to the depositor in any legal tender. Thompson, 72 U.S. (5 Wall.) at 677-80; see also 6 FAIRMAN, supra note 197, at 701.
240. Jones, 37 Ga. at 504-05.
Reconstruction court dealt with federalism primarily in the context of removal disputes. Most of the Georgia removal cases involved the issues of whether complete diversity of citizenship was required for removal and how residence should be determined for diversity purposes. The court did not always allow removal, but in no case did it challenge the removal statutes as being beyond the scope of federal jurisdiction under the Constitution. In Mayor of Macon v. Cummins, the Georgia court spoke up for the federal courts in language that the recently deceased Judge Benning would have abhorred:

Both [the federal and state courts] are Courts of our own creation, and each is intended for the public good—the good of the State and the people of the State, as well as the people of other States. It is not a foreign Court, but a Court sitting under a Constitution and laws made by and for the State and people of Georgia.

The supreme courts of many ex-Confederate states engaged in debate over whether secession should be treated as “state suicide” or whether the states had continued to exist with all their inherent rights of sovereignty notwithstanding secession. Some courts, most notably the Texas Supreme Court, came close to adopting the state suicide theory: They voided virtually all laws enacted by Confederate state governments that came before them for review, and they used their powers to try to persuade their constituents to accept both the letter and the spirit of federal reconstruction policies. Georgia did not go this far, but in Hardeman v. Downer, the Reconstruction court touched on the issue when it upheld a state debtor exemption clause in the state’s 1868 Reconstruction constitution and rejected a claim that retrospective application of the clause impaired the contract rights of creditors. Justices Brown and McCay both voted to uphold the law primarily as a matter of federal deference. Brown bluntly stated that Congress as “the

241. Bliss & Co. v. Rawson, 43 Ga. 181 (1871). In Hines & Hobbs v. Rawson, 40 Ga. 356 (1869), the court held that where foreclosure proceedings against a debtor had been brought in state court and were well advanced, a creditor could not bring separate foreclosure proceedings in federal court. Id. at 359-60. However, the court held that the state court should not have dismissed the separate federal proceeding because “it is best to keep up the proper distinctions, especially on so delicate a question as an apparent conflict of jurisdiction between Courts equally supreme.” Id. at 360.

242. See cases cited supra note 241 and infra note 243.

244. Id. at 327.


246. 39 Ga. 425 (1869).

247. GA. CONST. of 1868, art. VII, § 1.
conquering government... had the power to approve and sanction it";\(^{248}\) McCay more circumspectly characterized the clause as "an adjustment of the political relations between the State and the United States, which had been disturbed by the revolution."\(^{249}\) Warner, dissenting, argued that the exemptions were a serious impairment of contract and charged that the only line of reasoning his colleagues could employ to support them was to assume that Georgia was not a state in the Union at the time the constitution was adopted.\(^{250}\) Warner made clear his opinion that Georgia had never lost its status as a state and its related rights.\(^{251}\)

IV. THE AFTERMATH OF RECONSTRUCTION

In hindsight, the Supreme Court's Tarble and Whitton decisions marked the end of the nineteenth century debate over federalism. By 1880, removal was not only an established part of the American legal system but also was common enough to merit its own legal treatise.\(^{252}\) Perhaps the most telling evidence that federal primacy had been secured is the fact that the treatise author, Professor John Dillon of Columbia University, did not feel compelled to explain or defend removal but simply celebrated it:

If we consider the intricate nature of the relations of the Federal and State governments;... that the two classes of courts sit in the same territory, and exercise day by day jurisdiction over the same subjects and the same persons; that the judicial system provided by the Judiciary Act [of 1789] was untried and experimental; that serious conflicts between the State and Federal Courts have been almost wholly avoided; that the Judiciary Act remains, after the lapse of nearly a century, almost intact,—it will appear that the admiration with which it has been regarded by statesmen, lawyers and judges, is not undeserved.\(^{253}\)

From Dillon’s comment that "serious conflicts have been almost wholly avoided," one would hardly know the struggles over federalism during the early nineteenth century\(^{254}\) and the postwar restiveness of the Wisconsin and

\(^{248}\) Hardeman, 39 Ga. at 447.

\(^{249}\) Id. at 443.

\(^{250}\) Id.

\(^{251}\) Id. at 460, 465 (Warner, J., dissenting).

\(^{252}\) DILLON, supra note 131, passim.

\(^{253}\) Id. § 1, at 2.

\(^{254}\) See supra notes 28-119 and accompanying text.
Kentucky courts\textsuperscript{255} had ever occurred. Dillon notwithstanding, the debate was not quite over: The small pocket of state primacy over corporation laws that the Wisconsin Supreme Court had preserved in the \textit{Doyle} case continued to be a subject of sporadic debate into the early twentieth century.\textsuperscript{256}

Kentucky’s Supreme Court weighed in on this subject in \textit{Commonwealth v. East Tennessee Coal Co.}\textsuperscript{257} and \textit{Prewitt v. Security Mutual Life Insurance Co.}\textsuperscript{258} In \textit{East Tennessee Coal}, the court struck down a Kentucky anti-removal statute similar to Wisconsin’s\textsuperscript{259} and took a strong federalist stance. The Kentucky court concluded that \textit{Doyle} had been too narrowly interpreted over the years and that the real meaning of \textit{Doyle} was that “any legislation on part of the state by which it is proposed or designed to take away that privilege [removal], even under the power of the state to fix the terms upon which the corporation may enter that state for the purpose of doing business, is unconstitutional and void.”\textsuperscript{260} However, \textit{Prewitt} presented the issue that the Supreme Court had mentioned but not decided in \textit{Doyle}: namely, whether revocation of a corporate license after removal would be allowed. Here, the Kentucky court tacitly retreated from the broad language of \textit{East Tennessee Coal}: It held that the states had broad power to revoke as well as issue licenses and that the anti-removal law merely put foreign corporations on the same footing as Kentucky corporations.\textsuperscript{261} Two justices dissented in \textit{Prewitt}. They argued forcefully that to allow revocation was the equivalent of forcing corporations to agree to anti-removal provisions as a condition of licensure, which \textit{Doyle} had prohibited, and that it also amounted to nullification of federal removal laws.\textsuperscript{262} The dissenters were concerned that \textit{Prewitt} would be seen as a new states’ rights manifesto, and accordingly, they went out of their way to defend federalism. They argued that the policy of removal laws to protect out-of-state litigants from local prejudice benefitted Kentuckians in other states, and they reminded their colleagues in language reminiscent of the Georgia Reconstruction court’s language in \textit{Cummins}\textsuperscript{263} that “it is a narrow

\begin{footnotes}
\footnotetext[255]{See supra notes 128-222 and accompanying text.}
\footnotetext[256]{See infra notes 259-65 and accompanying text.}
\footnotetext[257]{30 S.W. 608 (Ky. 1895).}
\footnotetext[258]{83 S.W. 611 (Ky. 1904).}
\footnotetext[259]{See \textit{E. Tenn. Coal}, 30 S.W. at 608 (reciting the relevant language of Ky. Stats. § 572 (1895)).}
\footnotetext[260]{Id. at 610.}
\footnotetext[261]{\textit{Prewitt}, 83 S.W. at 614. The court’s language is reminiscent of Chief Justice Waite’s dissent in \textit{Morse}. See supra note 171. The court distinguished \textit{East Tennessee Coal} on the ground that the statute at issue in that case imposed criminal penalties for removal and did not involve license revocation. \textit{Id.}}
\footnotetext[262]{\textit{Prewitt v. Sec. Mut. Life Ins. Co.}, 84 S.W. 527, 527 (Ky. 1905) (Barker, J., dissenting).}
\footnotetext[263]{See supra notes 243-44 and accompanying text.}
\end{footnotes}
and provincial view to regard these national laws as harsh and severe edicts imposed by a foreign suzerain, instead of benignant laws imposed by ourselves in the interest of a broad and national justice."

The controversy over state corporation law anti-removal provisions was finally laid to rest in 1921 when the Supreme Court, frankly admitting that Doyle and subsequent decisions concerning corporation law anti-removal provisions "can not be reconciled," held that anti-removal provisions and all governmental acts implementing such provisions, including license revocation, constituted illegal obstruction of federal judicial power.

Since that time, there has been strikingly little discussion of states' rights issues in the supreme courts of the three states studied here. Debate briefly flared up in the Georgia Supreme Court in the 1930s over the issue of whether the states could tax federal war pension payments that Congress had decreed would be tax free. In City of Atlanta v. Stokes (1932), Justice Sterling Price Gilbert, in a passionate dissent, argued that the federal government could not restrict the state's power to tax in any way, but Chief Justice Richard Russell, speaking for the majority, disagreed. Citing Tarble among other authorities, Russell stated that the federal government's power to impose conditions on benefits it granted "has never been questioned by even the most ardent states rights men" and unequivocally affirmed the primacy of federal power: "Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. But whenever any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the national government are supreme."

No new debates have flared up in Kentucky or Wisconsin since 1921: Both states' supreme courts have increasingly treated the states' rights debate as a historical curiosity. As long ago as 1944, the Kentucky court commented laconically that while early nineteenth century cases such as M'Cullough v.

264. Prewitt, 84 S.W. at 532 (Barker, J., dissenting).
266. City of Atlanta v. Stokes, 165 S.E. 270 (Ga. 1932); Rucker v. Merck, 159 S.E. 501 (Ga. 1931).
267. Stokes, 165 S.E. at 278-84.
268. Id. at 272.
269. Id. at 276. But Russell also stated that Gilbert's general defense of states' rights was "splendid" and "meets my highest approbation." Id. at 271; see also Int'l Bus. Mach. Corp. v. Evans, 99 S.E.2d 220, 222 (Ga. 1957) (holding that Georgia had the right to tax personal property of a private corporation located on federal land provided that such taxation did not interfere with federal activities, but averring that federal law is the supreme law of the land and that "[n]o doubt . . . can be reasonably entertained as to the unflinching loyalty and respect of Georgia for the Constitution of the United States").
Maryland\textsuperscript{270} "did not quell the doctrine of 'State Supremacy within State Boundaries' sufficiently to avert the Civil War, we are disposed in the light of that event, to recognize them as binding upon us."\textsuperscript{271} In an unusual 1973 case, the Wisconsin court peremptorily restrained a state court judge who had attempted to enjoin a federal judge from proceeding in a civil rights lawsuit challenging the validity of actions taken by the state judge in a related case.\textsuperscript{272} Three concurring justices complained that federal courts were interfering too much in state affairs through collateral civil rights actions and called on federal judges to abstain from doing so.\textsuperscript{273} But even the concurring justices did not seriously challenge federal courts' right to proceed in such situations. Tellingly, they cited Booth, but referred to the controversy between their predecessors and Taney as merely "a bit of fascinating legal history."\textsuperscript{274}

V. CONCLUSION

The career of the states' rights doctrine in Wisconsin, Kentucky, and Georgia confirms the truism that the Civil War era transformed American federalism and dealt a lasting blow to states' rights sentiment. But the states studied here suggest two important qualifications to that truism: First, there was a culture of respect for federalism in the state courts from the nation's beginning, but, second, states' rights did not go out quietly after the war, even within the judiciary.

The first point is particularly borne out by Kentucky and Georgia. Both states' governors and legislators openly defied federal authority and proclaimed the virtues of independent state action on several occasions before the Civil War when they felt their interests were directly threatened,\textsuperscript{275} but the courts of both states declined to follow suit.\textsuperscript{276} Kentucky's judges probably were influenced by the state's abiding attachment to the concept of union, notwithstanding periodic temporary grievances against the federal

\textsuperscript{270} 17 U.S. (4 Wheat.) 316 (1819).
\textsuperscript{271} Chilcutt v. Watts, Inc., 180 S.W.2d 84, 86 (Ky. 1944).
\textsuperscript{272} In re Reynolds, 206 N.W.2d 428, 429 (Wis. 1973).
\textsuperscript{273} Id. at 431-32 (Hallows, C.J., concurring).
\textsuperscript{274} Id. at 433 (Hallows, C.J., concurring). It should be emphasized that state courts have not completely abandoned consideration of the intersection of federal and state laws: For example, they regularly consider whether state laws are preempted by similar federal laws. It might be argued that state court decisions against preemption in close cases constitute a tacit blow for states' rights, but such an argument would be strained: Preemption cases are decided based on a detailed set of legal standards, many established by the Supreme Court, which give state courts little room for creativity in the name of states' rights. See, e.g., CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 663-65 (1993).
\textsuperscript{275} See supra notes 28-30, 38, 86-95 and accompanying text.
\textsuperscript{276} See supra notes 40-45, 96-98 and accompanying text.
government. Though severely tested during the war and Reconstruction, the culture of judicial respect for federalism in Kentucky held. The Kentucky Supreme Court complained loudly against perceived federal excesses in Bowlin and attempted to strike down a key federal law in Griswold, but even in those cases it recognized that the United States Supreme Court would have the final say and indicated it would submit.

In Georgia, Justice Benning's states' rights manifesto in Padelford gained attention, but it is important to remember that his colleagues did not subscribe to the manifesto. The role that Chief Justice Lumpkin's nationalism played in shaping the court's moderate course and the fact that Lumpkin cultivated his nationalism through regular contacts with jurists in other states suggests that a distinctive American judicial culture, largely resistant to the recurring waves of political states' rights sentiment, may have evolved before the war and continued after the war. Not all judges cultivated outside contacts as assiduously as Lumpkin, but a reading of prewar decisions in all three states studied here shows that even in an area of primitive communication and transportation facilities, state court judges had extensive access to treatises and decisions of jurists throughout the United States. Constant perusal of materials from federal courts and other state courts during the course of their duties, together with an inherent judicial bent in favor of order and legal consistency, may have led state judges to defer to federal primacy on constitutional issues more readily than their constituents. Unionist judges placed on the Georgia bench during Reconstruction adhered to this path partly out of tradition, partly out of personal sentiment, and perhaps partly because as a practical matter, with federal authority victorious in the war, the state could not afford to offend such authority as it rebuilt itself.

Wisconsin is a genuinely puzzling exception to the state judicial culture of deference to federalism. One might try to explain the Wisconsin Supreme Court's antifederalism by arguing that: (1) by the mid-1850s, the court, like its constituents and many other Northerners, had come to believe that the spread of slavery must be stopped by any means; (2) in the Booth case, the court saw an opportunity to further this goal, saw states' rights and interposition as a useful tool, and made the most of both; and (3) the emotional residue of the

277. See supra notes 218-22 and accompanying text.
278. See supra notes 193-99 and accompanying text.
279. See supra note 198 and accompanying text.
281. See supra notes 96-98 and accompanying text.
282. For example, the state cases cited in this Article contain extensive citations to decisions of other state courts, federal courts, British courts, and treatises.
283. See supra notes 232-51 and accompanying text.
Booth cases carried over to the court’s postwar anti-federalist decisions. Byron Paine’s apologia in Knorr, particularly his allusion to the northern states as a “hunting ground for fugitive slaves” before the war, provides superficial support for this theory, but it must be remembered that after Paine explained his past hatred of slavery in Knorr, he wrestled with the very issue of whether his continuing belief in states’ rights was because of anti-slavery emotional residue, and he concluded it was not. Was this self-delusion on Paine’s part? Chief Justice Ryan’s opinion in Doyle suggests not. Even though Ryan had been a leading federalist during the Booth controversy and was at the opposite end of the political spectrum from Paine, he too had an abiding concern about the rapid advance of federalism and felt obligated to do what he could to check it.

Wisconsin’s efforts notwithstanding, the intellectual legitimacy of states’ rights and interposition doctrine was dealt a heavy blow in the war and died, at least in the state judicial arena, with the United States Supreme Court’s Tarble and Whitton decisions. Southern states resurrected the doctrine temporarily in response to Brown v. Board of Education and the second civil rights revolution of the 1950s and 1960s, but as before the Civil War, states’ rights were again advanced by state governors and legislators, not by state courts. Strikingly, recent speculation that a new era of deference to state powers and limitation of federal powers may be dawning has been based on decisions of the United States Supreme Court, not of state courts. If such an era is beginning (and that is very much open to question), it would present the paradox of states’ rights being espoused by the very government that states’ rights was intended to check. There is little if any sign that state

285. Id. at 153.
286. Id.
287. See supra notes 174-79 and accompanying text. The question also arises: Why was Wisconsin the only Northern state that struck down the 1850 Act and used states’ rights doctrine as the tool to do this? Why didn’t other Northern states follow suit, see supra note 54? The most plausible answer is that individuals can sometimes turn the course of legal history: If Booth had initially petitioned Justice Crawford instead of Justice Smith for a writ, his petition would have been granted based only on defects in federal process, see supra note 70, and the Booth controversy might never have happened. Smith’s opinion clearly shows he wanted to strike a blow against slavery; he realized Booth’s petition presented a prime opportunity to do so, and he took advantage of that opportunity. See supra notes 63-68 and accompanying text; see also Ranney, supra note 56, at 115.
288. 349 U.S. 294 (1954); see generally 11 BARTLEY, supra note 7, at 187-260.
290. See supra notes 172-79 and accompanying text.
291. See id.
292. Sentiment for increased deference to state power has not been confined to conservatives
courts are trying to revive states' rights as a major doctrinal tool: The tradition of judicial deference to federalism and of judges who have a more nationalist outlook than their constituents continues.