

ARTICLE

POWERS, RIGHTS, AND SECTION 25

*Ann Woolhandler**

The 1789 Judiciary Act's Section 25¹ has proved an embarrassment for those claiming that all federal question jurisdiction must vest, either originally or by appellate review, in the federal courts.²

© 2011 Ann Woolhandler. Individuals and nonprofit institutions may reproduce and distribute copies of this Article in any format, at or below cost, for educational purposes, so long as each copy identifies the authors, provides a citation to the *Notre Dame Law Review*, and includes this provision and copyright notice.

* William Minor Lile Professor of Law and Joseph C. Carter, Jr., Research Professor, University of Virginia. My thanks to Michael Collins, Barry Cushman, George Rutherglen, John Harrison, Caleb Nelson, and Steve Walt for comments.

1 Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 83, 85–87.

2 See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 263 (1985) [hereinafter Amar, *Neo-Federalist*] (arguing that all federal question jurisdiction had to vest either originally or by appellate review in the federal courts); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1529–30 (1990) [hereinafter Amar, *Two-Tiered*] (same). For other proponents of mandatory vesting see, for example, Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1013–14, 1032–33, 1036, 1047 (2007), arguing for mandatory vesting using an objective-meaning textualist perspective, and adding that the Supreme Court must have review of federal question cases decided both by inferior federal courts and state courts; Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1618 (1986), arguing for mandatory vesting of both diversity and federal question jurisdiction; David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 100–04, arguing that the Necessary and Proper Clause limits congressional power over federal jurisdiction; Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Function of Federal Courts*, 69 NOTRE DAME L. REV. 447, 494–96 (1994), providing a version of Amar's two-tiered thesis, arguing that Congress must give jurisdiction, *inter alia*, over all federal question cases where its principal function is exposition of federal law; and Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 201 (1960), arguing that the Supreme Court must be available to address persistent conflicts

Because Congress did not provide for general federal question jurisdiction in the lower federal courts until 1875,³ Supreme Court review of state court judgments under Section 25 would be needed to ensure that all cases arising under federal law would vest in some Article III court. On its face, however, Section 25, as well as its 1867 successor,⁴ excluded some federal issues from Supreme Court review of state court judgments, particularly when the state court overvindicated a federal claim.⁵ Indeed, review at the instance of either side of federal issues was not clearly available until Congress amended the review provisions in 1914.⁶ This amendment responded to the apparent unreviewability of the New York Court of Appeals' decision in *Ives v. South Buffalo Railway Co.*,⁷ holding that the state's workers' compensation law was unconstitutional.⁸

A leading modern proponent of mandatory vesting, Akhil Amar, sought to blunt the impact of Section 25 on his mandatory vesting claim by two arguments—one specific to Section 25 and the other more general as to the role of federal question jurisdiction. As to Section 25 specifically, Amar reasoned that the direct review provisions in fact did encompass all federal questions, because Section 25's text could be read to include either side's claim under federal law.⁹ He argued that “[i]n virtually every case in which one party argues for a federal ‘right,’ the other side can argue that it has a federal ‘immunity’—which is simply another way of saying that one’s opponent has no federal right.”¹⁰

At a higher level of generality, Amar harkened to a more general theme in much federal courts scholarship—that the primary role of the federal courts is the protection of individuals against government.¹¹ This theme was somewhat in tension with Amar's theory that

between state and federal law or in the interpretation of federal law by the lower federal courts.

3 See Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470. The 1875 Act required over \$500 in controversy. *Id.* § 2, 18 Stat. at 470.

4 Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

5 See *id.* § 2, 14 Stat. at 386–87; Judiciary Act of 1789, § 25, 1 Stat. at 85–87.

6 See Act of Dec. 23, 1914, ch. 2, 38 Stat. 790.

7 94 N.E. 431 (N.Y. 1911).

8 See *id.* at 448.

9 See Amar, *Two-Tiered*, *supra* note 2, at 1530.

10 *Id.*; see also Ratner, *supra* note 2, at 185–86 (arguing that the proper scope of the review provisions logically would have supported review of state legislation that the state courts held unconstitutional, but that such review was not required as part of the Court's essential functions).

11 See Amar, *Neo-Federalist*, *supra* note 2, at 263. Although I have brought up this argument second, Amar made this argument earlier. See also David E. Engdahl, *Fed-*

all federal question jurisdiction necessarily vested in the federal courts and that Section 25 encompassed review no matter which way the federal issue had been decided.¹² But for Amar, even if Section 25 were more restrictive than he claimed, that section nevertheless had vested the most important part of mandatory federal question jurisdiction by providing review for all undervindications of federal rights.¹³ The point of Article III's mandatory vesting of federal question jurisdiction, after all, was not uniformity but federal rights enforcement:

The inspiration behind “arising under” jurisdiction was rooted not in uniformity but in the importance of protecting individual rights by providing an impartial and independent national tribunal. Where the state court decision violated no individual federal rights, but in fact gave the litigant raising a federal right more than he was entitled to as an absolute minimum, no compelling need for federal court supervision would arise.¹⁴

Other scholars who argue for some form of mandatory vesting, particularly those arguing against broad congressional power to strip federal courts of jurisdiction, similarly emphasize federal courts' central role in protecting constitutional rights.¹⁵ (For some mandatory vesting proponents, however, uniformity is also an important concern.¹⁶)

eral Question Jurisdiction Under the 1789 Judiciary Act, 14 OKLA. CITY U. L. REV. 521, 522–26 (1989) (arguing that given a narrower view of what arose under federal law, Congress had vested review of virtually all federal question jurisdiction in the First Judiciary Act); Engdahl, *supra* note 2, at 136–37 (same).

12 See Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1588 (1990) (noting the possible conflict between Amar's arguments).

13 See Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 83, 85–87.

14 See Amar, *Neo-Federalist*, *supra* note 2, at 263 (footnote omitted); see also Amar, *Two-Tiered*, *supra* note 2, at 152 (indicating that uniformity is not required by the structural principles underlying Article III).

15 See Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 44, 67 (1981) [hereinafter Sager, *Foreword*] (indicating that effective federal judicial review must be available for claims of constitutional rights); see also Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213, 1221 (1978) [hereinafter Sager, *Fair Measure*] (arguing that other branches of government should be given leeway to enforce underenforced constitutional norms—federal rights that the courts might limit due to concerns for, e.g., federalism); cf. Clinton, *supra* note 2, at 1541–42 (stating that the Framers' concern was not to assure uniformity but rather the supremacy of federal law, which was sufficiently vindicated by the 1789 Judiciary Act).

16 See Pushaw, *supra* note 2, at 496, 499 (stating that the federal courts' crucial function in “cases” was the exposition of federal law); *id.* at 499 (emphasizing both the necessity of uniformity and supremacy for federal question cases); Ratner, *supra* note 2, at 161, 166–68 (emphasizing uniformity and supremacy).

Daniel Meltzer disagreed with Amar's mandatory vesting thesis, and argued that history did not support Amar's claim that Section 25 granted the Supreme Court power to take review at the instance of either side of a federal rights claim.¹⁷ He noted that one could not always easily turn a claim of overenforcement of a federal right into an immunity or privilege.¹⁸ He acknowledged that reasoning like Amar's surfaced in a 1908 case and a few subsequent decisions involving employees' actions against railroads.¹⁹ But these late decisions did not overcome a number of decisions from 1806 to 1902, in which the Court read Section 25 and its 1867 successor as only giving review for federal rights denials.²⁰ Edward Hartnett has since reinforced Meltzer's arguments that historically review was not equally available to both sides.²¹ Hartnett's argument was not primarily addressed to the mandatory vesting issue, but rather in service of his argument that the Court should rarely grant review in cases such as *Michigan v. Long*,²² in which state prosecutors claim that the state courts have overvindicated criminal defendants' constitutional rights.²³

17 See Meltzer, *supra* note 12, at 1588.

18 *Id.* at 1588–89 (giving an example where a libel plaintiff who claims the state court should not have treated him as a public figure would not be seen as claiming a federal immunity or privilege); see also Edward Hartnett, *Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEX. L. REV. 907, 919 (1997) (providing additional support for Meltzer's argument).

19 See Meltzer, *supra* note 12, at 1589–90; see also Ratner, *supra* note 2, at 185 (relying primarily on *Ill. Cent. R.R. v. McKendree*, 203 U.S. 514 (1906), as well as the railroad liability cases beginning in 1908 to show that the Court had “apparently accept[ed] the full implications” of the review provisions). *But cf.* Meltzer, *supra* note 12, at 1589 n.68 (criticizing Ratner's reliance on several cases).

20 See Meltzer, *supra* note 12, at 1589–90, 1590 n.73 (citing FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 190 n.20 (1927) (listing the sixteen cases)).

21 See Hartnett, *supra* note 18, at 915–22 (arguing that Section 25 in fact was a substantial limit).

22 463 U.S. 1032 (1983) (indicating that the state court's ambiguous reliance on state as well as federal grounds would be treated as a reviewable decision in the context of a state's seeking review of a Fourth Amendment decision in the defendant's favor).

23 See *id.* at 1040–42; Hartnett, *supra* note 18, at 914 & n.46. While disagreeing with Amar as to mandatory vesting, Hartnett effectively agreed with Amar as to direct review's preeminent function being to address denials of federal rights. *Cf. id.* at 915–22. Others have critiqued the Court's taking review in cases of state overvindication of federal rights. See, e.g., Richard A. Seid, *Schizoid Federalism, Supreme Court Power and Inadequate Adequate State Ground Theory: Michigan v. Long*, 18 CREIGHTON L. REV. 1, 69 (1984) (concluding that the Court should not review state court decisions where no constitutional right was denied and the decision may rest on a state law ground, and that one can infer congressional approval of the Court's traditional reluctance to

Critics have also taken on the argument advanced by Amar and others that the primary role of federal question jurisdiction—and federal courts more generally—is the protection of individual rights (even while Amar argued for review of all claims). Paul Bator had previously criticized the view that individual constitutional rights protection was the only constitutional value, claiming that structural values such as federalism should be similarly appreciated.²⁴ And in the context of Supreme Court review of state court judgments, Thomas Baker defended cases such as *Long*, where the Court took review to address state court overenforcement of federal individual rights protections.²⁵ Such critiques were compatible with trends beyond federal

review cases such as *Long*); Robert C. Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of Michigan v. Long*, 59 NOTRE DAME L. REV. 1118, 1121 (1984) (criticizing *Long* for, inter alia, minimizing the importance of state courts as protectors of individual rights); cf. Sager, *Fair Measure*, *supra* note 15, at 1248–50 (suggesting the Court grant certiorari less in cases where state courts are alleged to have overenforced federal constitutional norms). See generally RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 516 (6th ed. 2009) (collecting authorities).

24 See Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 607 (1981) (noting the rhetorical tradition in federal courts scholarship that federal courts are the guardians of individual rights against the states); *id.* at 631 (criticizing assumptions that “the Constitution contains only one or two *sorts* of values: typically, those which protect the individual from the power of the state, and those which assure the superiority of federal to state law”). Carlos Vázquez has suggested that providing an inhospitable forum for certain types of claims may be an appropriate aim of federal question jurisdiction. See Carlos M. Vázquez, *The Federal “Claim” in the District Courts: Osborn, Verlinden, and Protective Jurisdiction*, 95 CALIF. L. REV. 1731, 1733, 1746 (2007) (stating that in *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983), “Congress conferred jurisdiction to provide a *less* hospitable forum for those raising claims against foreign states,” and concluding that this is a “valid reason to confer jurisdiction over federally-created claims”).

25 See Thomas E. Baker, *The Ambiguous Independent and Adequate State Ground in Criminal Cases: Federalism Along a Möbius Strip*, 19 GA. L. REV. 799, 828–29 (1985) (arguing that the *Long* approach advances the federal structure by requiring state courts to make their own decisions under state law); *id.* at 858 (suggesting that the “[f]ederal interests in error correction, coherence of doctrine, and uniformity” support federal court review of state overenforcement of federal constitutional rights); cf. Martin H. Redish, *Supreme Court Review of State Court “Federal” Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861, 865 (1985) (favoring more Supreme Court review of state court decisions that may have been influenced by federal law, in order to promote interactive federalism); David A. Schlueter, *Federalism and Supreme Court Review of Expansive State Court Decisions: A Response to Unfortunate Impressions*, 11 HASTINGS CONST. L.Q. 523, 548–49 (1984) (concluding that *Long* embodies a sensible approach to ambiguous state law grounds). See generally PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 100 (6th ed. 2008) (collecting authorities); Michael E. Solimine, *Supreme Court Monitoring of State Courts in the*

courts scholarship that questioned the purposive interpretation of statutes and the Constitution—interpretations that advanced what the interpreter saw as their overriding aims and principles.²⁶ In the fields of legislation, law and economics,²⁷ and administrative law,²⁸ a wave of scholarship emphasized text, as well as the compromises and competing values reflected in statutes and the Constitution. Such views suggested that statutes should not be read as unidirectionally aimed toward forwarding one particular goal without regard to the limitations in the statutes, and that the over- and underenforcement of law could be of similar importance.²⁹

Twenty-First Century, 35 IND. L. REV. 335, 339–44 (2002) (finding that *Long* had no significant impact on state courts' reliance on state constitutional law).

26 See generally William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS*, at civ (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (noting that the Warren Court's statutory interpretation was a liberal version of legal process philosophy, emphasizing interpretation of statutes and the Constitution consistent with their purposes and constitutional principles, but deemphasizing the legal process concern with the limited competence of courts); *id.* at cxxiii (discussing rise of views contrary to purposivism and noting that law and economic scholars were doubtful of an approach that seeks to serve overall statutory purposes); see also generally FALLON ET AL., *supra* note 23, at 623–26 (discussing different statutory interpretation styles).

27 See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 538–40 (1983) (emphasizing that only the statutory text is what Congress enacted by legitimate processes for legislation, and the text reflects legislative compromises); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 266 (1982) (discussing an interest group theory of legislation that is “pessimistic concerning the purpose and effects of legislation, while [a] public interest theory is optimistic,” and noting that the public interest theory flourished when people favored an expansion of government and the interest group theory arose with “disillusionment with big government that began in the 1970's”); *id.* at 264 (finding the theories nevertheless compatible).

28 See, e.g., Jerry L. Mashaw, “Rights” in the Federal Administrative State, 92 YALE L.J. 1129, 1170 (1983) (discussing that limiting implied rights of action avoids courts' “interfering with legislative-administrative lawmaking and enforcement discretion,” and with the difficult task of optimizing public enforcement); Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 947 (1985) (approving signs of the federal courts' drawing back from implying individual rights of action from conditions of federal grants, due to interference with state and local self-determination).

29 See, e.g., Bator, *supra* note 24, at 633 (indicating that the limitations on statutes are an important part of their purposes); William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 15, 31–32 (1975) (discussing problems of overenforcement of criminal statutes if private prosecution were allowed, including that private enforcers would not rein in penal law's tendency to overbreadth); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1290–93 (1982) (discussing problems with implying private rights of action, including disrupting legislative judgments as to appropriate enforcement levels and undermining congressional decisions to entrust regulation to agencies, although still

This Article examines the history of direct review of state court judgments with a view to casting further light on the issue of the scope of review under Section 25 and its 1867 successor. It employs Wesley Hohfeld's categories of legal relations³⁰ to show the gradual development from more one-sided review of underenforcement claims to more symmetrical review over time that included overenforcement.³¹ This trend was partly attributable to the malleability of the review statutes' language.³² It was also due to the Court's seeing general law protections of liberty and property as increasingly federal,³³ and to the Court's seeing both sides of federal issues as intended beneficiaries of federal law. Overall, the Article presents a middle ground between Amar's expansive view on the one hand and Meltzer's restrictive view on the other. On the one hand, this history lends support to Amar's view that the statute governing Supreme Court review of state court judgments could often support symmetrical review.³⁴ On the

finding such implication sometimes appropriate). See generally FALLON ET AL., *supra* note 23, at 709–10 (discussing arguments against implying rights of action from statutes, including that statutes represent compromises and that implied rights risk overdeterrence).

30 See generally Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28–59 (1913) [hereinafter Hohfeld I] (outlining and explaining categories of legal relations); see also generally Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) [hereinafter Hohfeld II] (same).

31 Hohfeld primarily provides more accurate categories for description, and his categories do not dictate any particular interpretation of Section 25. Hohfeld, moreover, was not concerned with whether the legal relations he discussed were sourced in state or federal law. By offering interchangeable ways to discuss the same legal relations, however, Hohfeld may implicitly lend support to Amar's view that in "virtually every case in which one party argues for a federal 'right,' the other side can argue that it has a federal 'immunity'—which is simply another way of saying that one's opponent has no federal right." See Amar, *Two-Tiered*, *supra* note 2, at 1530; *infra* text accompanying notes 44–54.

32 See Amar, *Two-Tiered*, *supra* note 2, at 1530; see also Ratner, *supra* note 2, at 185–86 (arguing that the proper scope of the review provisions logically would have supported review of state legislation that the state courts held unconstitutional, but that such review was not required as part of the Court's essential functions).

33 In this respect, the Article takes up suggestions by Harnett and Meltzer that Amar paid insufficient attention to the sources of rights that the party was trying to vindicate. See Harnett, *supra* note 18, at 920–21, 920 n.77 (arguing that in the railroad liability cases, "federal law has so occupied the field that any claim or defense is federal," but that in some examples, "when one party relies on federal law, the other is relying on state law"); Meltzer, *supra* note 12, at 1588 n.66 (arguing that the federal Truth in Lending Act, 15 U.S.C. §§ 1607, 1635 (2006), gives rights to borrowers and against lenders, and asking if a European bank lost on such a claim, "what provision of federal law would be the source of the bank's right or immunity?").

34 See Amar, *Two-Tiered*, *supra* note 2, at 1530.

other hand, in accordance with Meltzer's views, the Court saw itself as bound by congressional limitations, and its decisions expanding review may have had more to do with expansions of what the court saw as federal legal positions and less to do with suggestions that all federal question jurisdiction had to vest in the federal courts.³⁵

The history also casts light on the view that Supreme Court review of state courts judgments in particular, and federal court jurisdiction in general, exist for the overriding purpose of individual rights vindication. Such views continue to infuse critiques of the Court's taking jurisdiction to review state court overvindications of federal rights in cases such as *Long*.³⁶ While protection of individuals was and remains an important aim of direct review, the Court's early applications of Section 25 serve as a reminder that protection of federal power could be at least as important as the protection of individual immunities opposed to such power.³⁷ The increasing symmetry of review reflects the Court's understanding that enforcing not only federal power but the limits of such power, and not only federal rights but the limits of such rights, are important to the federal courts' role.

I. SECTION 25 AND ITS SUCCESSOR

Section 25 of the 1789 Judiciary Act provided:

That a final judgment or decree in any suit, in the highest court of law or equity³⁸ of a State in which a decision in the suit could be had,

[1] where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity;

35 See Meltzer, *supra* note 12, at 1591 (noting the absence of suggestions in cases denying review that there was a constitutional difficulty).

36 See *supra* note 23.

37 See Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 503 (1954) ("So completely did Congress conceive of the Court as an agency only for vindicating federal authority, rather than for the coordination even of federal law, that it limited the Court's jurisdiction strictly to cases in which the state courts had *denied* claims of federal right."); Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1259 & n.8 (2009) (arguing generally that judicial review in the form of narrowing interpretations of federal law was more prevalent than is generally thought, and also stating, "The Supreme Court has often used the power of judicial review to advance rather than to obstruct the political projects of [federal] political leaders," and citing authorities); *cf.* Baker, *supra* note 25, at 858 ("The position of the individual as the focal point of judicial concern did not emerge in this country until after the Second World War.").

38 The 1867 version of the Act deleted "of law or equity." See Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385, 386.

[2] or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity,

[3] or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission,³⁹

may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error⁴⁰

The 1867 revisions, which the Court interpreted as making no significant changes with respect to the question of symmetrical review at issue herein,⁴¹ are provided in the footnotes.⁴²

II. HOHFELD'S CATEGORIES

As noted above, Amar argued that a state court's overenforcement of federal rights could be turned into a reviewable claim of federal immunity, while Meltzer argued that this reversal was not always possible.⁴³ Wesley Hohfeld's categories may help to analyze the interpretation of Section 25 and its 1867 successor. Although Hohfeld's famous articles appeared in 1913 and 1917—toward the close of the period under study here—Hohfeld aimed to describe existing legal categories and thus his categories may help to clarify earlier practices. This is not to suggest that the Court itself employed Hohfeld's categories, but rather that his analytical categories provide a way accurately to describe what the Court in fact did.

Hohfeld believed legal relations could not be reduced merely to rights and duties.⁴⁴ Rights and duties were, however, one important pair of correlative legal relations.⁴⁵ For example, if *A* had a valid right

39 The 1867 revision to Clause 3 provided: “[O]r where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission, or authority” *Id.*

40 Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 83, 85–86 (paragraph breaks added).

41 See *Trebilcock v. Wilson*, 79 U.S. (12 Wall.) 687, 694 (1871) (indicating that the revisions were not significant).

42 See *supra* notes 38–39.

43 See *supra* notes 9–10, 17–23 and accompanying text.

44 See Hohfeld I, *supra* note 30, at 28.

45 *Id.* at 33.

to a piece of property, then *B* would have a duty to stay off *A*'s property. But one could also express their opposites. If *A* had no right in the property, then *B* had a privilege vis-à-vis *A* to enter the property—that is, *B* had no duty to *A* to refrain from entering the property.⁴⁶

Another set of jural relations starts with the correlatives of power and liability. Hohfeld defined a power as a party's legal ability to effect changes in legal relations as against another person.⁴⁷ The correlative was the liability of another party to have the latter's legal relations changed by the person with power.⁴⁸ For example, an agent has power to bind his principal by entering a contract, and the principal is liable to having his legal relations changed by the agent.⁴⁹ Hohfeld stated that the powers of public officers (for example, of a sheriff to sell property under a writ of execution) were similar to those of agents.⁵⁰

But if *Y* is not liable to have his legal relations changed by *X*, then *Y* has an immunity.⁵¹ An immunity makes one not liable to the power of another to change one's legal relations. Thus although a sheriff may have a power to sell property at a sheriff's sale (and thereby change the legal relations of the owner), the owner could have an immunity with respect to some parcel, such that he is not liable (to the sheriff's power to change legal relations) with respect to that parcel.⁵²

Hohfeld summarized:

A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative "control" over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or "control" of another as regards some legal relation.⁵³

46 *Id.* at 37. A privilege was the negation of a specific duty. *B* could still have duties to a third party who owned the property. *See id.* at 36.

47 *Id.* at 44–45.

48 *Id.* at 45.

49 *Id.*

50 *Id.* at 47.

51 *Id.* at 55.

52 *Id.*

53 *Id.*

Hohfeld's charts of correlative and opposites are reproduced in the footnote.⁵⁴

III. COORDINATING SECTION 25 AND HOHFELD

Neither Section 25 nor the Court used terminology in the same precise way as Hohfeld. In addition, the Court's rulings on motions to dismiss writs of error were often brief and revealed little of the Court's reasoning. This Article nevertheless translates the Court's applications of Section 25 and its successor into Hohfeldian terminology to describe which positions as to federal law got review and to trace changes over time in the Court's applications of the review provisions. To avoid the multiplication of terminology, this Article principally uses the Hohfeldian categories of right/privilege and power/immunity to refer to the opposing positions of parties.⁵⁵ Statutory terms will generally be in quotation marks, while Hohfeldian categories will be in regular type; e.g., "title, right, privilege or exemption" refer to Section 25's language, while right, privilege, power, and immunity refer to Hohfeldian terms.

In most of the cases this Article will discuss, the party seeking review will be arguing a proposition of federal law, which the review provisions generally required. Section 25's Clauses 1 and 2 involved the validity of federal and state law vis-à-vis supreme federal law,⁵⁶ and Clause 3 required that there be "drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States."⁵⁷ Additional language in Section 25 provided that "no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as . . . immediately respects the before mentioned questions of validity or

54 See *id.* at 30:

{	Jural Opposites	rights no-rights	privilege duty	power disability	immunity liability
{	Jural Correlatives	right duty	privilege no-right	power liability	immunity disability

55 One could use other Hohfeldian terms to describe essentially the same positions, without changing the analysis. For example, one could say that a defendant arguing against a plaintiff's right is arguing that the *plaintiff* has no right vis-à-vis the defendant—which is generally the same as arguing that the *defendant* has a privilege vis-à-vis the plaintiff.

56 See *supra* Part I.

57 Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86. The 1867 Act did not use the "construction" language. See *supra* note 39.

construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.”⁵⁸

That a party was arguing a proposition of federal law, however, did not mean that he got review under Section 25. Rather, Clause 1⁵⁹ and Clause 2⁶⁰ clearly indicated that only certain positions with respect to federal law got review under those clauses. While Clause 3⁶¹ was more ambiguous, the early Court did not interpret Clause 3 to allow review merely because the would-be appellant⁶² argued that that state court had decided a controlling issue of federal law incorrectly. Thus, it was not every loser on an issue of federal law that the Court saw as stating a sufficiently *federal* “title, right, privilege or exemption” to obtain review under Section 25. (By using the term *federal*, this Article does not exclude interests taking their origins in nonfederal law that are nevertheless federally protected.⁶³)

In translating the Court’s application of the review provisions to Hohfeldian terminology, then, this Article adds possible characterizations of positions as federal or nonfederal—characterizations that were not a concern of Hohfeld. For example, the Article may refer to a nonfederal immunity. A characterization of a Hohfeldian position as nonfederal does *not* indicate that no federal law was at issue on appeal (for federal law generally was at issue), but rather that the Court did not see the would-be appellant as seeking to vindicate a sufficiently federal position to obtain review. In statutory terms, the

58 § 25, 1 Stat. at 86–87. This qualification was eliminated in the 1867 version, although the Court determined the amendments still required its review to be limited to matters respecting the federal question. *See* *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 626–33 (1874). A nonfederal issue might need to be decided to determine the federal issue.

59 Clause 1 provided for review “where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity.” § 25, 1 Stat. at 85.

60 Clause 2 provided for review “where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity.” *Id.*

61 Clause 3 provided for review “where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission.” *Id.* § 25, 1 Stat. at 85–86.

62 This Article will sometimes use the words “appeal” and “appellant” in place of the more correct terms “writ of error” and “plaintiff in error.”

63 For example, a title might be federally protected even if the federal government did not grant the title. *See infra* notes 77–79 and accompanying text.

party was not stating a sufficiently federal “title, right, privilege or exemption” under Clause 3.

IV. CONSTITUTIONAL CHALLENGES TO STATE STATUTES: STATE POWERS/FEDERAL IMMUNITIES

The paradigm case for Section 25 review was one in which the plaintiff in error (appellant) brought a federal constitutional challenge to a state statute—a statute that the state courts upheld. For example, in *Gibbons v. Ogden*,⁶⁴ Ogden sought to enforce a New York–granted steamboat monopoly against Gibbons, who operated two steamboats under federal coasting trade licenses.⁶⁵ Gibbons claimed the state-granted monopoly was repugnant to the federal licensing legislation.⁶⁶ When Gibbons lost on his claim of federal immunity to the state power, his appeal fell squarely within Section 25’s language providing for mandatory review in Clause 2: “where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity.”⁶⁷ Numerous other cases fit this model of review at the instance of the party who claimed a federal immunity to state power, and who had lost in the state courts.⁶⁸

By contrast, the party seeking to vindicate state power and who lost in the state court could not seek review—in accord with Professors Meltzer’s and Hartnett’s views of the one-sided nature of Supreme Court review. In *Commonwealth Bank of Kentucky v. Griffith*,⁶⁹ for exam-

64 22 U.S. (9 Wheat.) 1 (1824).

65 See *id.* at 2 (statement of the case); see also Whittington, *supra* note 37, at 1296 (noting that the Court was sometimes called upon to uphold the validity of federal power as part of its inquiry into conflicting state action, as was true in *Gibbons*).

66 *Gibbons*, 22 U.S. (9 Wheat.) at 2–3 (statement of the case).

67 Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85; see *Gibbons*, 22 U.S. (9 Wheat.) at 186 (noting that the appellant contended that the laws giving the exclusive privileges were repugnant to the Constitution and laws of the United States). Review also might have fit under Clauses 1 and 3.

68 See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425, 436–37 (1819) (reversing the state court’s holding that the federal law creating the bank was unconstitutional, and also holding that the bank could not be taxed by the state); *Sinnot v. Davenport*, 63 U.S. (22 How.) 227, 238–39, 244 (1859) (invalidating, at the instance of a steamboat operator, a fine exacted by Mobile pilotage commissioners as conflicting with federal laws); *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557, 577 (1886) (invalidating, on direct review at the railroad’s instance, state rate regulation to the extent it covered interstate commerce, even though Congress had not yet regulated).

69 39 U.S. (14 Pet.) 56 (1840).

ple, a debtor sought to avoid paying a promissory note he gave to the state-owned and incorporated bank by arguing that the bank notes he received in exchange for the promissory note violated the federal constitutional prohibition on state-issued bills of credit.⁷⁰ A Missouri court upheld the debtor's constitutional defense against the Kentucky bank, and the bank sought review.⁷¹ The state bank's attorney argued to the U.S. Supreme Court that the bank notes did not violate the bill-of-credit prohibition, and that the bank was entitled to review because the reserved powers of the states were constitutional rights under the Tenth Amendment:

The state of Kentucky, in the exercise of its reserved rights, had established the Bank of the Commonwealth. She claims under this authority, and relies on the clause of the Constitution which declares all powers not granted by the Constitution to be reserved. She says that by the decision of the Supreme Court of Missouri she is interrupted in the exercise of her reserved rights. She claims to have these rights guaranteed to her, and their exercise protected by this Court.⁷²

There were two possible ways one might view the parties' positions in this case, using Hohfeldian terms and adding characterizations of the position as state or federal. One might be:

*state power/federal immunity.*⁷³

That is, the bank argued that the state had validly conferred upon the bank power to change legal relations by issuing the bank notes; the debtor argued that the Constitution's bill-of-credit prohibition disempowered the state from authorizing the bank to issue those notes, thereby giving the debtor a federal immunity from the change in legal

⁷⁰ *Id.* at 57; see U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . emit Bills of Credit . . .").

⁷¹ See *Griffith*, 39 U.S. (14 Pet.) at 57.

⁷² *Id.* at 57 (argument of counsel). In a prior case on direct review, *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257 (1837), a Kentucky court sustained the bank's authority. *Id.* at 311. The U.S. Supreme Court reviewed the case at the debtor's instance, but rejected his constitutional challenge. *Id.* at 327. The statute establishing the bank provided "[t]hat a bank shall be, and the same is hereby established, in the name and on behalf of the Commonwealth of Kentucky," and that "[t]he whole capital of said bank shall be exclusively the property of the Commonwealth of Kentucky, and no individual or corporation shall be permitted to own, or pay for any part of the capital of said bank." See *id.* at 302. There does not appear to have been a standing problem in the bank's arguing for the state's "rights" in *Griffith*. See *Griffith*, 39 U.S. (14 Pet.) at 57 (argument of counsel).

⁷³ In such set-off pairings, the position that poses difficulties for review is in italics. The position in regular type, had it been rejected by the state court, could easily obtain review under Section 25.

relations that the use of the bank notes purported to effect.⁷⁴ This characterization would suggest that the bank should not get review, because it only sought to vindicate the state power position. Clause 2 of Section 25, moreover, indicated review should only be available when a state court *upheld* state authority in the teeth of a federal law challenge (“or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity”).⁷⁵ And as was generally the case for those facing Section 25 difficulties, the plaintiff in error (here, the bank) was ultimately arguing for federal law to have no effect on it.⁷⁶

On the other hand, a power can be protected by the Constitution even if not sourced in it, just as can a right, privilege, or immunity.⁷⁷ Indeed, a large concern of the Framers of the Constitution and the 1789 Judiciary Act was protection of British landowners and creditors from state confiscations. The treaties with Britain protected but did not create the British subjects’ land and contract rights, and clearly Section 25 encompassed review for their federally protected rights.⁷⁸ Similarly, there is nothing incorrect in saying that the Tenth Amendment protects the powers that it reserves to the states, even if those powers do not take their origins in the federal Constitution.⁷⁹

Thus one could plausibly characterize the parties’ positions in *Griffith* as:

federally protected state power/federal immunity

That is, the state’s power was not within the restriction of the Constitution’s bill-of-credit prohibition, and thereby was protected by the Tenth Amendment. And although Clause 2 would not accord review,

74 *Griffith*, 39 U.S. (14 Pet.) at 56–57 (argument of counsel).

75 Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85.

76 Thanks to John Harrison for this insight.

77 *See, e.g.,* *Mayor of New Orleans v. De Armas*, 34 U.S. (9 Pet.) 224, 234 (1835) (rejecting an argument that a case can arise under the Constitution or a treaty only when the right is created by the Constitution or by a treaty).

78 *See, e.g.,* *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 356–57 (1816). Analogously the Due Process Clauses protect property rights that generally are not federally sourced.

79 *Compare* Amar, *Two-Tiered*, *supra* note 2, at 1531 (arguing that an overbroad interpretation of a constitutional restriction on state power can be seen as a “denial of the state’s tenth amendment rights, rights arising under federal law”), *with* Hartnett, *supra* note 18, at 921 n.79 (“Amar’s view of the Tenth Amendment as a source of nationally protected states’ rights against the people of the state [is] implausible.”), *and* Meltzer, *supra* note 12, at 1588 n.66 (suggesting that the Tenth Amendment is more plausibly read as a truism than a source of rights).

Section 25's Clause 3 might arguably accommodate such a reserved power claim ("or where is drawn in question the construction of any clause of the constitution . . . and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution").⁸⁰ The Bank of Kentucky could argue that it had an "exemption"⁸¹ due to its notes' being outside of the bill-of-credit prohibition, and that it therefore had an "exemption" protected by the Tenth Amendment.

The Court implicitly opted for the state power/federal immunity view, and unanimously denied review, apparently seeing Section 25's text as disallowing its jurisdiction. Chief Justice Taney relied on Clause 2 of Section 25,⁸² and he may well have thought that the potentially broader Clause 3 should not be read to undo Clause 2's restrictions that specifically addressed the constitutionality of state statutes. The Court may thus have seen Clause 2 as occupying the field of its review of the validity of a state statute, although the Court did not explicitly articulate this interpretation. Add to this that Chief Justice Marshall had already given a one-sided reading even to Clause 3 in holding that a party who complained that a state court had improperly granted the defendant removal under a federal statute could not obtain review, reasoning that the state court decision "was not against the privilege claimed under the statute."⁸³ Indeed, the Marshall and Taney Courts fairly consistently interpreted Section 25 in such a way that it did not give review to the party arguing that, at the end of the day, federal law should leave him alone.⁸⁴ That both the Marshall and Taney courts opted for the narrower view when a potentially broader interpretation was arguably available suggests that mandatory vesting did not loom as a concern for most Justices of the early Court.⁸⁵

80 Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85.

81 As above, this Article uses quotation marks to refer to statutory categories, not Hohfeld's categories. *See supra* text accompanying notes 55–56.

82 *Commonwealth Bank of Ky. v. Griffith*, 39 U.S. (15 Pet.) 56, 57–58 (1840).

83 *Gordon v. Caldcleugh*, 7 U.S. (3 Cranch) 268, 270 (1806) (emphasis omitted).

84 *But cf. Montgomery v. Hernandez*, 25 U.S. (12 Wheat.) 129, 134 (1827) (allowing a losing defendant on a federal statutory claim for recovery on a bond to raise a federal statute-of-limitations defense on review from a state court judgment). In addition, a party with federal title or a federally protected title could not always get review, when his primary argument was directed to defeating the other party's federal title. *See infra* notes 194–95 and accompanying text.

85 The Taney Court gave broad interpretations to federal court jurisdiction on a number of occasions. *See* DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888*, at 262, 277 (1985) (concluding that the Taney Court presided over "a striking expansion of federal judicial authority beyond the boundaries set by the Marshall Court"); Charles Evans Hughes, *Roger*

The narrow interpretation implicitly required the Court to determine what would and would not count as a sufficiently federal “title, right, privilege or exemption” to obtain review. Treating the state power at issue in *Griffith* as *federally protected* state power would likely have seemed odd for the Court because such a characterization might have implied that the states owed their reserved powers to federal concession. Prevailing notions of federalism saw state and federal power as independently derived from the sovereign people. The Taney Court, moreover, espoused notions of dual sovereignty whereby the state and federal governments were supreme in their respective spheres, with the Court helping to police the boundaries between those spheres.⁸⁶ While review in *Griffith* would have assisted the Court’s policing of the state/federal boundaries, still the notion that state power was state power would seem the more natural view under dual sovereignty and other views of federalism.

Dual sovereignty notions, moreover, did not seek merely to protect the proper state sphere, but the federal sphere as well—as the Taney Court was well aware when it fended off attacks upon the federal fugitive slave laws in cases such as *Prigg v. Pennsylvania*.⁸⁷ And in *Griffith* it was the federal sphere—federal power, not state power—that Taney saw Section 25 as protecting:

The power given to the Supreme Court by this act of Congress was intended to protect the general government in the free and uninterrupted exercise of the powers conferred on it by the Constitution, and to prevent any serious impediment from being thrown in its way while acting within the sphere of its legitimate authority. The right was therefore given to this Court to re-examine the judgments of the state Courts, where the relative powers of the general and state government had been in controversy, and the decision had been in favour of the latter.⁸⁸

Brooke Taney, 17 A.B.A. J. 785, 787 (1931) (noting that Taney’s jurisdictional decisions could be even more national than Marshall’s). The narrow interpretation of Section 25, however, often had the effect of promoting federal power.

86 See Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 45–46; Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 3–4 (1950).

87 41 U.S. (16 Pet.) 539, 617–18 (1842) (upholding the federal law and indicating that states were largely precluded from providing additional regulation); see also *Ableman v. Booth*, 62 U.S. (21 How.) 506, 526 (1859) (rebuffing a challenge to the Fugitive Slave Act in holding that state courts could not issue habeas to federal officers).

88 *Commonwealth Bank of Ky. v. Griffith*, 39 U.S. (14 Pet.) 56, 58 (1840) (discussing Clause 2); see also Meltzer, *supra* note 12, at 1590 (discussing *Griffith* as giving a possible explanation for Section 25’s drafting in that “Congress might have feared

V. FEDERAL POWER/OPPOSING IMMUNITIES

As Chief Justice Taney's reasoning in refusing to give review in *Griffith* highlights, protecting federal power against state encroachments was a large concern in Section 25. And indeed, the Court's practice under Section 25 sometimes allowed concerns for federal power to trump concerns for individual immunities.

A. *Trespass Actions Against Federal Officers*

In the early Republic, citizens frequently sued federal officers on common law claims in state courts. In a typical case, a plaintiff brought a trespass-type claim against a federal customs officer who had seized his goods or his vessel, the officer claimed legal justification, and the plaintiff replied that such justification was wanting. Particularly before the 1833 statute allowing customs officers to remove cases against them to federal court, the Supreme Court had occasion to review many such common law actions that had been decided in the state courts and rendered a number of decisions favorable to the plaintiffs.⁸⁹ One might, then, easily assume that a citizen who lost in state court on an argument that a federal official acted in excess of his authority would often have been the party to obtain review.⁹⁰

Closer examination of these cases, however, indicates it was the officer and not the citizen who generally sought and obtained review in such cases.⁹¹ The officer who lost on his defense of federal power

that state courts would underprotect rather than overprotect federal rights"); cf. Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 3 (1913) (discussing hostility to Supreme Court review of state court judgments, which hindered legislative proposals to expand the statute).

89 See, e.g., *Sands v. Knox*, 7 U.S. (3 Cranch) 499, 503 (1806) (affirming on writ of error to New York state court a judgment against the customs collector for detaining a schooner); *Otis v. Bacon*, 11 U.S. (7 Cranch) 589, 596 (1813) (affirming on direct review a judgment for the plaintiff in a trover action); cf. *Teal v. Felton*, 53 U.S. (12 How.) 284, 289 (1851) (upholding on direct review a plaintiff's trover claim against a postmaster for withholding mail absent statutory justification and noting, "As the Court of Appeals could not have adjudicated the case without having denied to the defendant a defence which he claimed under a law of the United States, the case is properly here under the 25th section of the Judiciary Act of 1789").

90 See Engdahl, *supra* note 11, at 531 (referring to tort actions against both state and federal officials in state courts and stating "but if the state court ruled against the plaintiff's claimed federal right, of course that federal question could be taken to the Supreme Court under section 25").

91 See, e.g., *Sands*, 7 U.S. (3 Cranch) at 499 (indicating Knox had sued Sands, the collector, for trespass for seizure of cargo and vessel); *Otis*, 11 U.S. (7 Cranch) at 593 (indicating that Bacon was the original plaintiff and the state court had rejected the

in state court obtained review under Clause 1 of Section 25 (“where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity”).⁹² The citizens who argued that the officer overstepped his powers, and that federal power had been overenforced against the plaintiff, were not the plaintiffs in error as to these trespass claims, although one might plausibly believe them candidates for review under Clause 3 (“where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission”).⁹³

Again using Hohfeldian categories, one way to characterize the parties’ positions would be:

officer’s claim of justification). This Article’s assessment that review was at the instance of the officers derives primarily from checking cases collected in Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396 (1987). Particularly see *id.* at 412–37, 441–47, 453–58 and accompanying notes. This technique is admittedly not conclusive.

If, however, the plaintiff took the option of suing not on the common law action but under a federal statute that required marshals to maintain bonds and that allowed suits on the bonds, the plaintiff presumably could have received review. *Cf.* *M’Clung v. Silliman*, 19 U.S. (6 Wheat.) 598, 599, 604 (1821) (reviewing at the instance of the citizen a claim for mandamus against the register of the federal land office, although ultimately holding that the state court lacked jurisdiction); *Montgomery v. Hernandez*, 25 U.S. (12 Wheat.) 129, 132 (1827) (indicating that the defendant surety on the bond was not the proper party to seek review for most issues of statutory liability on the bond); *McNulta v. Lochridge*, 141 U.S. 327, 330–31 (1891) (holding that although the statute allowing suits against federal receivers without leave of court gave the plaintiff rather than the defendant receiver rights, still the receiver could obtain review because the decision was adverse to the authority exercised under the United States).

92 See *Buck v. Colbath*, 70 U.S. (3 Wall.) 334, 340 (1865) (stating that “[t]here seems to be no reason to doubt that the case comes within the provisions of the 25th section of the Judiciary Act,” because the defendant had claimed the protection of “an authority exercised under the United States” and the decision was against that protection (quoting Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 83, 85)).

93 After the 1833 Removal Act allowed customs officers to remove actions against them, see Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 632, 633–34, federal marshals were the primary targets of generally unremovable citizen suits in state courts. Supreme Court review of common law actions against marshals still seemed to be primarily at the officers’ instance. See, e.g., *Buck*, 70 U.S. (3 Wall.) at 335 (indicating that Colbath sued Buck, who was the federal marshal); *Etheridge v. Sperry*, 139 U.S. 266 (1891) (reviewing an action at the instance of the defendant deputy marshal); see also Appellant’s Abstract of Record at R.1, *Etheridge v. Sperry*, 139 U.S. 266 (1891) (No. 486) (indicating that the original plaintiffs alleged conversion).

federal power/ *federal immunity*.

That is, the officer was arguing that federal law gave him power to effect a change in possession or ownership by the seizure; he therefore could easily obtain review if he lost. The citizen argued that the officer lacked such power to effect a valid change of possession or ownership, and the lack of federal power could be seen as giving rise to a corresponding federally sourced or federally protected immunity to be free from the seizure when federal power was lacking. (As noted above, “federal” as used in characterizing a party’s position encompasses both federally sourced and federally protected positions.⁹⁴) But the absence of review at the instance of citizens in the early federal officer cases suggests that contemporaries implicitly saw the positions as involving:

federal power/ *nonfederal immunity*.

This latter characterization was likely traceable to a view that the citizen was overall vindicating common law or state law protections (to property and to be free from trespass thereto) in his trespass action. That the officer was alleged to have acted beyond his federal power, while definitely involving an argument about the scope of that federal power, still was not seen as primarily vindicating a *federal immunity*.⁹⁵

One might think that the Fourth Amendment would provide a source of an explicit federal immunity in at least some of the seizure cases; modern cases (such as *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*⁹⁶ recognizing affirmative claims for relief under the Fourth Amendment) suggest that the citizen would have had a sufficiently federal “title, right, privilege or exemption” to qualify for Section 25 review.⁹⁷ And even in the absence of *Bivens* actions,

94 See *supra* text accompanying note 63.

95 One might arguably characterize the positions of the parties as involving state right (as against trespass) and federal privilege (giving the plaintiff no right as against a duly empowered federal officer). Hohfeld, however, used the power/immunity characterization in describing an officer’s seizure of property. See *supra* text accompanying note 50.

Note that the Court’s viewing the immunity as nonfederal does not suggest that the Court’s disallowing review is consistent with Amar’s mandatory vesting theory. Rather, his mandatory vesting theory takes the view that Article III requires that either an original or appellate federal forum must be available for “all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties.” See U.S. CONST. art. III, § 2. Cases arising under federal law have in turn been defined as those involving federal law issues. See Amar, *Neo-Federalist*, *supra* note 2, at 211 n.17, 229, 246.

96 403 U.S. 388 (1971).

97 See *id.* at 389 (recognizing a federal cause of action against federal officers for damages for violation of the Fourth Amendment); *id.* at 390 (noting the government’s argument that the rights asserted by the plaintiffs were primarily state rights of

the Fourth Amendment arguably might have been raised to negate the federal officer's claim of legal justification and form the basis for review. But the early nineteenth-century cases rarely mentioned the Fourth Amendment.⁹⁸ This failure may manifest a view that some of the Bill of Rights merely confirmed preexisting common law rights and did not create them.⁹⁹ Indeed, the Federalists had argued that a bill of rights was unnecessary, because the Constitution's limited enumeration of powers meant the general government already lacked powers to authorize, e.g., unreasonable searches and seizures.¹⁰⁰ Thus it was to common law protections rather than the Fourth Amendment that litigants looked to vindicate their search and seizure claims.

Nor is it clear that an explicit invocation of the Fourth Amendment would have mattered. Even where a citizen alleged a specific constitutional immunity to federal power, the Court was at least initially reluctant to grant review. In *Reddall v. Bryan*,¹⁰¹ for example, the plaintiff sued various federal officers for trespass after his land had been subjected to eminent domain. As described by Chief Justice Taney, the plaintiff alleged that the condemnation had been "repugnant to the Constitution" because it was "for no public purpose . . . connected with the United States."¹⁰² The plaintiff also alleged that

privacy); see also *Monroe v. Pape*, 365 U.S. 167, 169 (1961) (recognizing a damages claim under the 1871 Civil Rights Act, 42 U.S.C. § 1983 (2006), for Fourth Amendment violations by officers acting under color of state law); cf. *Bell v. Hood*, 327 U.S. 678, 681 (1946) (noting that the complaint should not be dismissed for want of federal question jurisdiction when, even if the complaint stated a common law damages action in trespass, it was clear that the petitioners nonfrivolously sought recovery for violations of the Fourth and Fifth Amendments); *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963) (stating that damages against federal officials for abuse of power are usually governed by local law).

98 See Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 605–11 (1993) (discussing that in the antebellum period, constitutional issues were associated with statutory validity, and that ad hoc violations by federal officials were rarely raised as constitutional issues as opposed to common law issues).

99 See Michael G. Collins, "Economic Rights," *Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1503 & n.60 (1989) (indicating that the Court did not see property rights as rights "secured by" the Constitution for purposes of what is now § 1983, because such rights "were defined and created by the common law; they pre-dated the Constitution and thus took their origin outside of it").

100 See THE FEDERALIST NO. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Here, in strictness, the people surrender nothing, and as they retain everything, they have no need of particular reservations . . .").

101 65 U.S. (24 How.) 420 (1860).

102 *Id.* at 421–22 (noting that the bill alleged that no such purchase was authorized by Congress, that the pretended sanction of Maryland legislation and the federal executive were repugnant to the Constitution, and that the land was not intended for

the Congress had not authorized the condemnation. His petition for writ of error explicitly invoked the Fifth Amendment, as well as the Tenth.¹⁰³ While the Court found the state court's decree nonfinal, it also noted that there was no ground for Section 25 review even were the decree final. Taney stated, "We do not see in the plaintiff's bill any right claimed under the laws of the United States. On the contrary, the claim is against the rights asserted by the United States, and exercised by the agents of the Government under its authority . . ."¹⁰⁴

As appeared to be the case in the customs officer cases that we might now treat as raising Fourth Amendment claims, the Court seems to have seen the plaintiff's property interests as to which he invoked Fifth Amendment protection as essentially nonfederal.¹⁰⁵ As mentioned above, it was possible to grant review for federally protected interests that were not federally created,¹⁰⁶ but the Court did not do so in this case. The Court in *Reddall* treated neither the more specific argument that the condemnation violated the public purpose requirement nor the more general argument that the executive acted outside of congressional authorization as covered by Section 25.

a public purpose of Maryland or of the United States in its federal character); *see also* Sager, *Foreword*, *supra* note 15, at 59 n.121 (concluding that although "*Reddall* hints that the case involved a fifth amendment challenge," the Court "did not take it into account").

103 *See* Petition of William C. Reddall at R. 12, *Reddall*, 65 U.S. (24 How.) 420 (No. 247). The original Bill of Complaint alleged that the condemnation, which had been authorized by a state statute, was "for no public purpose of the State of Maryland, nor for a purpose connected with the United States of America as such, and of a federal and general character, nor even so declared to be in said act of [the Maryland] Assembly, or in any action of Congress of the United States." Bill of Complaint at R. 7, *Reddall*, 65 U.S. (24 How.) 420 (No. 247); *cf.* *Reddall v. Bryan*, 14 Md. 444, 476–79 (1859) (addressing both state and federal law arguments).

104 *Reddall*, 65 U.S. (24 How.) at 422–23. Taney's reference to the absence of a "right claimed under the laws of the United States" seems to advert to language in Clause 3, although the reference to federal "authority" seems to refer to Clause 1. *See id.*

105 *Cf.* Michael G. Collins, *October Term, 1896—Embracing Due Process*, 45 AM. J. LEGAL HIST. 71, 91 (2001) (noting that when the Court read just compensation and public purposes limitations into the Fourteenth Amendment, "[w]hat was 'incorporated' . . . was not some provision of the Bill of Right's Fifth Amendment, but the pre-existing limitation on governmental action that the Fifth already happened explicitly to incorporate against federal action," and citing authority (footnote omitted)). *But cf.* *Barron v. Mayor of Balt.*, 32 U.S. (7 Pet.) 243, 247, 251 (1833) (holding that there was no Section 25 jurisdiction when the losing plaintiff below claimed that the city violated his Fifth Amendment rights because the Fifth Amendment did not restrain the legislative power of the states).

106 *See supra* text accompanying note 63.

Even in cases that the early Court reviewed at the officer's instance, the Court teased out state law issues it would not review, manifesting its view that federal power provided a discrete affirmative defense to otherwise operative state or general law. In *Gelston v. Hoyt*,¹⁰⁷ for example, the Court reviewed and affirmed a damages judgment against federal officers for seizing a ship.¹⁰⁸ The Court reviewed the exclusion of evidence offered by the defendants to prove the right of seizure—evidence that would support their defense of valid federal authority.¹⁰⁹ Justice Story, however, indicated that the Court's review did not encompass the officers' allegation that the plaintiff's proof of his original cause was insufficient.¹¹⁰ And although the Court effectively rejected the defendants' argument that their acting in an official capacity should reduce compensatory damages,¹¹¹ Story opined that the rule of damages was in any event one of the common law not reviewable by the Court.¹¹²

The Court's treating certain federally protected interests in property as insufficiently federal for purposes of direct review was also evi-

107 16 U.S. (3 Wheat.) 246 (1818).

108 *See id.* at 305.

109 *See id.* at 309. The Court, however, held that the evidence was properly excluded, because the vessel had been acquitted in a prior libel action in which the federal court had denied to the officers a certificate of probable cause—thereby conclusively establishing the seizure as tortious. *See id.* at 314, 320.

110 *See id.* at 309. The Court at first said, “no error has been shown,” and then indicated that if there were error it could not be reexamined, in that the determination of sufficiency “does not draw in question any authority exercised under the United States, nor the construction of any statute of the United States.” *Id.*

111 *See id.* at 325 (indicating that it was not error to exclude the evidence of official capacity that the defendants wanted introduced in justification or mitigation, given that official capacity legally did not diminish the actual damages that were sought).

112 *See id.* at 325–26 (“It is a question depending altogether upon the common law; and the act of congress has expressly precluded us from a consideration of such a question. Whether such a restriction can be defended upon public policy, or principle, may well admit of most serious doubts.”). Despite *Gelston's* language, the Court reviewed many common law issues in federal officer cases. *See, e.g.*, *Etheridge v. Sperry*, 139 U.S. 266, 267 (1891) (reviewing the issue of whether the plaintiff had a prior chattel mortgage on the seized property in affirming on the merits a judgment against a deputy marshal); *see also McNulta v. Lochridge*, 141 U.S. 327, 331 (1891) (referring to *Etheridge* as allowing review of common law defenses in allowing review at the instance of a federal receiver sued in state court). The Court necessarily developed what we might call a federal common law of legal justification. *See, e.g.*, *Buck v. Colbath*, 70 U.S. (3 Wall.) 334, 343–44 (1865) (indicating that when a marshal seized property that belonged to someone other than the judgment debtor, he was liable if acting under a writ directing him to seize property of the judgment debtor but not if he acted under a writ describing the particular property that he seized).

dent in cases involving federally protected land titles.¹¹³ Treaties and statutes protected property interests previously acquired under foreign governments, and the United States itself granted land patents to such prior claimants as well as to new claimants of unoccupied land that Congress had opened to sale or preemption.¹¹⁴ For the Court, the mere fact that federal or federally protected titles were involved was not enough to support jurisdiction under Section 25 or its successor.¹¹⁵ Sometimes the Court avoided jurisdiction by saying that only the party making the argument to uphold the federal title at issue could obtain review of a state court decision against him.¹¹⁶ But even when the party seeking review was the proponent of the federal title at issue, the Court might treat his argument as not sufficiently involving a construction of federal law to obtain review.

The Court apparently saw many federal protections of title as merely confirming preexisting rights that were nonfederal in nature.¹¹⁷ While the Court's review in *Martin v. Hunter's Lessee*¹¹⁸ had

113 The land cases generally involve federal rights and corresponding privileges rather than federal powers and corresponding immunities. See *infra* text accompanying notes 191–95.

114 The Court addressed many state and local issues in land claims in diversity cases. See 3–4 G. EDWARD WHITE WITH GERALD GUNTHER, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835*, at 763–64 (2010) (indicating that a number of state land grant cases came to the Court via diversity and that overall the Court did not develop general law property rules).

115 See, e.g., *Mayor of New Orleans v. De Armas*, 34 U.S. (9 Pet.) 224, 236 (1835) (indicating that to grant review would involve taking jurisdiction of all controversies respecting titles originating before the cession).

116 See, e.g., *Ryan v. Thomas*, 71 U.S. (4 Wall.) 603, 604 (1866) (dismissing appeal, where the plaintiff in error claimed that the state court should not have recognized the other party's federal patent because it was originally issued to a fake name); *De Lamar's Nev. Gold Mining Co. v. Nesbitt*, 177 U.S. 523, 528 (1900) (holding that because the plaintiff in error who had the junior claim was arguing to negative the senior claimant's title, he could not get review).

117 See, e.g., *De Armas*, 34 U.S. (9 Pet.) at 236 (denying review where the city claimed that it had title from a French grant that was treaty protected, noting that the issue turned on the “legal rights of the parties under the crowns of France and Spain”); *Phillips v. Mound City Land & Water Ass'n*, 124 U.S. 605, 609, 612 (1888) (finding that where both parties claimed under Mexican grants confirmed by the United States and although treaties protected land titles to Mexican grantees, there was no federal issue for review when the question was one of whether a partition occurred while the land was under the Mexican government); *De Lamar's*, 177 U.S. at 527 (noting on direct review that conflicting mining claims under the federal statute were not alone enough to give jurisdiction “since no dispute arose as to the legality of such location, except so far as it covered ground previously located, or as to the construction of this section [of the federal statute]”). For a discussion of cases where the

encompassed nonfederal issues bearing on whether the plaintiff in error's preexisting British title was federal treaty protected, the Court did not see the issues in many land cases as so closely bearing on a construction of federal law.¹¹⁹ For example, in *Kennedy's Executors v. Lessee of Hunt*,¹²⁰ although the plaintiff in error claimed under a federal statute specifically confirming certain incomplete Spanish concessions, the Court denied review because the issue between the parties was one of alluvion that was not a matter of federal law.¹²¹ As the Court said in another case in denying review of a title that the plaintiff in error claimed was protected by the treaty with Mexico, "Article VIII of the treaty protected all existing property rights within the limits of the ceded territory, but it neither created the rights nor defined them. Their existence was not made to depend on the Constitution, laws, or treaties of the United States."¹²²

* * * *

The lack of review at the instance of citizens in their trespass-type cases against officers, and the Court's explicit denial that jurisdiction

Supreme Court held there was a lack of federal question jurisdiction in the lower federal courts based on similar reasoning, see generally James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 657 (1942). 118 14 U.S. (1 Wheat.) 304 (1816).

119 See *id.* at 312–13 (reviewing the nonfederal issue of whether the land had escheated under state law, to determine if the confiscation was forbidden by the treaty); see also *Crowell v. Randell*, 35 U.S. (10 Pet.) 368, 393–94 (1836) (discussing cases where the treaty issue of confiscation was presented on the face of the record and was reviewable).

120 48 U.S. (7 How.) 586 (1849).

121 See *id.* at 593–94 (indicating that the federal statute's confirmation was only conclusive as between the patentee and the United States, and the alluvion issue between the parties was not a matter of federal law); *id.* at 594 (indicating that the issue between the parties would have similarly been unreviewable even if the rival claimant's senior title originated in the United States).

122 *Cal. Powder Works v. Davis*, 151 U.S. 389, 395 (1894) (quoting *Phillips*, 124 U.S. at 610) (quoting such language to deny that a federal question existed for review where both parties claimed under Mexican grants that were protected by treaty and that had been confirmed by procedures under an 1851 statute, and where the plaintiff in error sought review from a quiet title action in which his claim of a senior Mexican grant had been held fraudulent); cf. *Iowa v. Rood*, 187 U.S. 87 (1902) (dismissing review for lack of a federal question when the state alleged that it had title to riverbeds pursuant, inter alia, to the statute admitting it to the Union on the same basis as other states, and stating, "The real question then is whether the sovereignty of the State over the beds of its inland lakes rests upon some statute or provision of the Constitution, or upon general principles of the common law which long antedated the Constitution, and had their origin in rights conceded to the Crown centuries before the severance of our relations with the mother country").

would exist in the eminent domain case *Reddall*, indicate that contemporaries did not necessarily see Section 25 as encompassing review in the ordinary case of a citizen arguing for an immunity from federal power. This contrasted with the easily available review for parties arguing a federal immunity from state power, as in cases such as *Gibbons*.¹²³ This lack of review in turn suggests that the Court often saw the citizen's preexisting freedom from unauthorized federal encroachments as insufficiently federal to qualify for review. This lack of review, moreover, encompassed not merely cases in which citizens alleged that officers acted beyond federal law authorization, but also those in which the plaintiff alleged a specific protection such as the Fifth Amendment.¹²⁴

The Court may have seen some explicit constitutional protections such as the Fourth and Fifth Amendments as merely protecting and restating preexisting common law interests in life, liberty, and property, and thus as essentially similar to claims to be free from unauthorized federal power *simpliciter*. While the Court explicitly indicated that its review could extend to both federally protected preexisting common law interests as well as federally created interests, the former were perhaps somewhat easier selectively to exclude from review as insufficiently federal. Modern parallels may be found in property interests protected by the Fourteenth Amendment, but whose random impairment by state and local government officials will not always give rise to a due process violation, nor a concomitant federal question. As Professor Fallon has pointed out, the Due Process Clauses often only require the government to maintain appropriate systems for protecting traditional property, rather than turning every allegedly unfair governmental encroachment into a constitutional violation.¹²⁵

B. *Constitutionality of Federal Statutes*

In suits against federal officers, as discussed above, the parties and the Court seemed to assume that the party arguing for federal power got review, while the party arguing for an immunity from that power generally did not. An example of the same phenomenon occurred when the constitutionality of a federal statute arose in suits

123 See *supra* text accompanying notes 64–68.

124 See *Reddall v. Bryan*, 65 U.S. (24 How.) 420, 421–22 (1860); see also *Roosevelt v. Meyer*, 68 U.S. (1 Wall.) 512 (1863); *infra* text accompanying notes 127–31 (discussing *Roosevelt*).

125 See Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 311 (1993) (discussing Fourteenth Amendment cases).

between private parties in state court. Clause 1 of Section 25 (“where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity”) readily gave review when a state court invalidated a federal statute. The difficult issue was whether a party who claimed that congressional power was lacking was asserting a sufficiently federal immunity under Clause 3.

The positions of the parties in cases involving the validity of federal statutes could be seen as involving

federal power/ *federal immunity*.¹²⁶

That is, one party argued for federal power to change legal relations by enacting and implementing the statute, and if he lost in state court he easily got review. The other side argued that the federal statute could not change legal relations because it violated federal constitutional limitations, thereby conferring a *federal immunity* to the claim of federal power. Alternatively, one might characterize the positions for review as

federal power/ *nonfederal immunity*.

The party arguing the want of federal power to enact the statute could be seen as seeking to vindicate the state of affairs that would exist without federal law (i.e., a *nonfederal immunity*).

The Court apparently took the latter view in *Roosevelt v. Meyer*,¹²⁷ toward the end of Taney’s Chief Justiceship. Roosevelt challenged an 1862 federal statute making U.S. notes legal tender in payment of debts, in that the statute reduced the value of repayment.¹²⁸ The state court upheld the federal statute, and Roosevelt sought review arguing that the federal act exceeded enumerated powers. In addition, Roosevelt claimed “particularly under Article 5 of the amendments” a violation of “a *right of property*, sacred under the fundamental law of the Union” that could not be taken away “without due process of good constitutional law.”¹²⁹ The Court, however, granted the motion to dismiss the writ of error, noting that the federal statute had been upheld by the state court.¹³⁰ As was perhaps the case in *Reddall*, the Court

126 Again, these are Hohfeldian positions, with the addition of federal and nonfederal characterizations. The position that easily garnered review if the state court rejected that position is in regular type, and the difficult position is in italics.

127 68 U.S. (1 Wall.) 512.

128 See *id.* at 516 (argument of counsel). The parties stipulated to the difference in value. See *id.* at 514 (statement of the case).

129 *Id.* at 516 (argument of counsel).

130 See *id.* at 517; see also Ratner, *supra* note 2, at 185 (“[The Court] failed to recognize that a state court decision upholding the constitutionality of a federal statute

may have seen the Fifth Amendment claim, as well as the lack-of-enumerated-powers argument, as essentially seeking to maintain a preexisting nonfederal status quo. In addition, the Court may have thought that Section 25's Clause 3 should not be read as an end-run around the limitations of Clause 1, which provided review only where the state court decision was *against* the validity of federal authority.¹³¹

Subsequent to *Roosevelt*, the Court gave more liberal interpretations to the review provisions. The Chase Court overruled *Roosevelt* in *Trebilcock v. Wilson*,¹³² a case challenging on various constitutional and statutory grounds the same 1862 legal tender act at issue in *Roosevelt*, and in which the state court had, as in *Roosevelt*, upheld the federal law. In *Trebilcock*, Justice Field noted that the *Roosevelt* court "appear[ed] to have overlooked" Clause 3 of the review statute, which according to Field would have sustained review of the constitutional claims alleged in *Roosevelt*.¹³³ He reasoned:

The plaintiff in error in that case claimed the right to have the bond of the defendant paid in gold or silver coin under the Constitution, upon a proper construction of that clause which authorizes Congress to coin money and regulate the value thereof and of foreign coin; and of those articles of the amendments which protect a person from deprivation of his property without due process of law; and declare that the enumeration of certain rights in the Constitution shall not be construed as a denial or disparagement of others retained by the people; and reserve to the States or the people the powers not delegated to the United States or prohibited to the States.¹³⁴

necessarily denies to the party attacking the statute an asserted right under the Constitution to have a judgment in his favor or an asserted immunity under the Constitution from having judgment entered against him on the basis of the statute . . .").

131 Seeing Clause 1 as occupying the field of review for the validity of federal authority faces the problem that Clause 3 explicitly refers to decisions against the "title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said *Constitution*." Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 83, 85 (emphasis added). Constitutional claims generally encompass claims that governmental action is invalid.

132 79 U.S. (12 Wall.) 687 (1871).

133 *Id.* at 692–93; see also P. PHILLIPS & W. HALLETT PHILLIPS, *THE STATUTORY JURISDICTION AND PRACTICE OF THE SUPREME COURT OF THE UNITED STATES 192–93* (New York, Banks & Bros. 5th ed. 1887) (noting the contrasting decisions in *Roosevelt* and *Trebilcock*). Field added that *Trebilcock* also had argued that he had been denied rights under federal statutes making gold and silver coin legal tender per their nominal and declared values. *Trebilcock*, 79 U.S. (12 Wall.) at 693. While these cases came up after the 1867 amendments to the review statute, the Court indicated that the amendments made no difference to the result. *Id.* at 694.

134 See *id.* at 693.

The Court had earlier reached a similar result without addressing reviewability in one of the more famous *Legal Tender Cases*¹³⁵ proper.¹³⁶

Given that the plaintiff in error in *Roosevelt* relied on Clause 3 in his brief arguing against the motion to dismiss the writ of error,¹³⁷ one doubts that—as Field suggested in *Trebilcock*—the Court had in fact “overlooked” Clause 3. Perhaps the Court, as noted above, merely took the position that the more restrictive Clause 1 covered the case. But the narrower review of the past may also have reflected a sense that many constitutionally protected preexisting interests were still somewhat nonfederal.

Field, by contrast, tended to enhance the federal constitutional status of common law interests in property and liberty that existed where legitimate government power ran out. For Field, when government acted beyond public purposes, or took property without just compensation, it invaded the liberty and property that government existed to protect.¹³⁸ A majority of the Court often agreed, but they were as yet only willing to impose such limitations on the states as a matter of general common law in diversity cases such as *Loan Ass’n v. Topeka*.¹³⁹ Field, however, would have moved such general common

135 79 U.S. (12 Wall.) 457 (1870).

136 See *id.* at 461–62 (describing facts in *Parker v. Davis* in which the Massachusetts court had ordered Parker to execute a deed upon payment by Davis of the amount under the contract in notes of the United States, as opposed to coin which Parker demanded; that is, the state court had upheld the federal act). The U.S. Supreme Court upheld the federal act in the *Legal Tender Cases*, see *id.* at 553, but in *Trebilcock* read the statute as inapplicable to contracts providing specifically for payment in specie, see *Trebilcock*, 79 U.S. (12 Wall.) at 697.

137 Points of Plaintiff in Error on Motion to Dismiss at 1, 4, *Roosevelt v. Meyer*, 68 U.S. (1 Wall.) 512 (1863) (No. 315).

138 See generally Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897*, 61 J. AM. HIST. 970 (1975) (discussing Field’s jurisprudence).

139 87 U.S. (20 Wall.) 655, 666 (1874) (striking down state taxation to subsidize a manufacturing plant, in that such subsidization did not serve a public purpose, but rather merely transferred funds from A to B). Compare *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 180–81 (1871) (upholding in a diversity action a claim for just compensation for flooding of plaintiff’s property), with *Barron v. Mayor of Balt.*, 32 U.S. (7 Pet.) 243, 247, 251 (1833) (holding that there was no Section 25 review of a claim for compensation for flooding of the plaintiff’s property because the Fifth Amendment was inapplicable to the states). See generally Michael G. Collins, *Before Lochner—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1291–93 (2000) (indicating that substantive due process norms had developed not only in the state courts but in federal courts as well, as general constitutional law in diversity cases); Collins, *supra* note 105 (discussing the Court’s transforming general law norms into Fourteenth Amendment constraints). Collins suggests

law limitations under the Fourteenth Amendment umbrella.¹⁴⁰ In his dissent in the *Granger Cases*, for example, he argued that unremunerative state-set railroad rates diminished the value of the railroad's property; such rates effectively took property for public use without compensation, and this taking violated the Due Process Clause.¹⁴¹ For Field in *Roosevelt*, then, the claim of reduction in the value of repayment from the federal legal tender act would clearly have involved a *federal* immunity to federal power, and not merely a protection of common law interests.

Despite Field's broader interpretation of the review provisions, the Court wavered in allowing the party challenging a federal statute to obtain review.¹⁴² Dicta in a later decision seemed to see the issue as still open,¹⁴³ and the Court in 1902 dismissed an appeal in an apparently insignificant legal tender case where the state court had upheld the federal statute.¹⁴⁴

that an impetus for grounding limitations on government in the Fourteenth Amendment may have been some Justices' increasing reluctance to rely on general constitutional law as a source of limitations, a related trend toward use of the 1875 federal question statute rather than diversity for actions to vindicate limits on state action, and nascent positivism. See *id.* at 76, 93–94; *id.* at 93–94 nn.109–16 (citing authorities).

140 For example, Field argued in his *Slaughter-House* dissent that the state lacked a sufficient public purpose in granting the butchering monopoly at issue; the state thereby encroached upon common law rights to engage in the common occupations, and violated the Fourteenth Amendment. See *Slaughter-House Cases*, 83 U.S. (18 Wall.) 36, 87–89, 101–02, 106 (1872) (Field, J., dissenting), discussed in McCurdy, *supra* note 138, at 976–78.

141 See *Munn v. Illinois*, 94 U.S. 113, 144 (1876) (Field, J., dissenting); *Stone v. Wisconsin*, 94 U.S. 181, 184–85 (1877) (Field, J., dissenting); see also McCurdy, *supra* note 138, at 999–1001 (discussing Field's views in the *Granger Cases* that constitutional protections for property extended beyond title and possession).

142 See Sager, *Foreword*, *supra* note 15, at 59–60 (discussing conflicting cases as to the reviewability of state court decisions upholding federal statutes and concluding “[t]hese brief, scattered, and inconsistent decisions” did not necessarily negate a claim that the federal courts need to be available to control federal officials).

143 See *Missouri v. Andriano*, 138 U.S. 496, 499 (1891) (“[T]here is some force in the argument that the right of review in cases involving the construction of a federal statute should be mutual . . .”).

144 *Baker v. Baldwin*, 187 U.S. 61, 62–63 (1902) (noting that the Michigan court said the sole question was whether the act “making the silver dollar of 412.5 grams troy of standard silver a full legal tender” was constitutional, and the state court held it was (quoting *Baldwin v. Baker*, 80 N.W. 259, 260 (Mich. 1899))); *id.* (“That decision is assigned for error but it was not a decision against the validity of the statute As our jurisdiction over the judgments and decrees of state courts in suits in which the validity of statutes of the United States is drawn in question can only be exercised . . . when the decision is against their validity, the writ of error cannot be maintained.”). The constitutional objections were that the act exceeded congressional power to coin

In a pair of decisions not long thereafter, however, the Court reached a similar result as had Field in *Trebilcock*, and rejected motions to dismiss in cases where the state courts upheld the validity of federal laws against constitutional challenges. In *Illinois Central Railroad v. McKendree*,¹⁴⁵ the railroad challenged a federal statute restricting the transportation of diseased cattle as entailing an unconstitutional delegation of power to the Secretary of Agriculture. In addition, the railroad argued that the Secretary's regulations addressed intrastate commerce, thereby exceeding both constitutional and statutory authority, and also that the statute did not authorize a damages action.¹⁴⁶ The Court upheld its jurisdiction. In doing so, the Court did not require any explicit federal immunity such as a Fifth Amendment claim; the allegation of insufficient federal power equaled a federal immunity that now got review.¹⁴⁷ The Court reached a similar result in *St. Louis, Iron Mountain & Southern Railway v. Taylor*,¹⁴⁸ with respect to a nondelegation challenge to the Federal Safety Appliance Act.¹⁴⁹ This Article will discuss *McKendree* and *Taylor* again below, when addressing review of statutory issues.¹⁵⁰

By the time of *McKendree* and *Taylor*, two developments would have made review for the party seeking to invalidate the statute seem unexceptionable. First, as discussed more fully below, the Court had

and regulate the value of money and were "in conflict with the provision of the Fifth Amendment of the Constitution of the United States, that no person shall be deprived of life, liberty or property without due process of law." Brief for Plaintiff in Error at 2, *Baker*, 187 U.S. 61 (No. 17,526).

145 203 U.S. 514 (1902).

146 *Id.* at 526 ("The railroad company, by the proceedings and judgment in this case, was denied the alleged Federal rights and immunities specially set up in the proceedings, in the enforcement of a statute and departmental orders averred to be beyond the constitutional power of Congress and the authority of the Secretary of Agriculture, and in the rendition of a judgment for damages in an action under the statute and order, in opposition to the insistence of the defendant that, even if constitutional, the statute did not confer such power or authorize a judgment for damages."). The Court did not decide the railroad's nondelegation claim, but held that the regulation exceeded the Secretary's statutory power in that it regulated intrastate commerce that was beyond Congress's power. *See id.* at 527.

147 *Id.* at 525–27.

148 210 U.S. 281, 286–87 (1908) (indicating that a federal question for review was presented by the railroad's claim that there was an unconstitutional delegation, although rejecting it).

149 Act of Mar. 2, 1893, ch. 196, 27 Stat. 531.

150 The Court in *Taylor* seemed to address the issue as whether the argument against the act's constitutionality raised a federal issue, *Taylor*, 210 U.S. at 285, but that question encompassed what the party's position was on the federal issue. *Id.* at 293; *see also* Brief and Argument for Defendant in Error at 8, *Taylor*, 210 U.S. 281 (No. 201) (arguing that the plaintiff had not been denied a federal right).

moved in the direction of allowing symmetrical review in a number of cases involving the application of federal statutes. Second, a majority of the Court had moved toward Justice Field's views, thereby giving enhanced constitutional status to common law interests in liberty and property. In cases such as *Chicago, Burlington & Quincy Railroad v. Chicago*¹⁵¹ the Court held that the Fourteenth Amendment imposed just compensation and public purpose requirements on the states.¹⁵² What had once been general common law immunities that the Court might enforce in diversity cases were now *federal* immunities. As such, they gave a basis for direct review when denied in the state courts,¹⁵³ and they increasingly gave the basis for original federal court jurisdiction in cases such as *Ex parte Young*.¹⁵⁴

The Court's giving a more federal-positive-law spin to citizens' common law immunities when *state power* was at issue would tend to suggest that the Court would make a similar move when citizens' immunities against *federal power* were at issue as well.¹⁵⁵ Indeed, it would have been anomalous to treat public purpose limitations on state governments as positive federal constitutional immunities while not treating the often more textually supported limitations on the federal government as less than fully federal. Accordingly, the Court saw arguments that the federal statutes and regulations at issue in *McKen-*

151 166 U.S. 226 (1897).

152 See, e.g., *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 177–78 (1896) (indicating that the Fourteenth Amendment imposed a public purpose limitation on state taxation, although holding that an irrigation project served a public purpose); *Chi., Burlington*, 166 U.S. at 241 (holding that a just compensation principle was applicable to the states under the Fourteenth Amendment); see also *Smyth v. Ames*, 169 U.S. 466, 526, 546–47 (1898) (holding that state-set rates that did not provide a fair return on the current value of the railroad effectively took property for public use without compensation, and therefore violated Fourteenth Amendment due process).

153 See, e.g., *Chi., Burlington*, 166 U.S. at 228 (reviewing the state court's decision).

154 209 U.S. 123, 143–45 (1908) (holding that federal question jurisdiction existed where the railroad had sought to enjoin enforcement of a state law providing large penalties for charging in excess of state-prescribed rates that the railroad alleged were confiscatory).

155 See *Adair v. United States*, 208 U.S. 161, 172 (1908) (holding that it was not within congressional power to make it a criminal offense for a carrier in interstate commerce to discharge an employee for union membership, and that such statute invaded Fifth Amendment liberty and property and was therefore beyond the commerce power); cf. *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 111 (1902) (allowing an injunctive action against the postmaster for failing to deliver mail without sufficient statutory authorization); *Hammer v. Dagenhart*, 247 U.S. 251, 268 (1918) (entertaining an action by parent as next friend of minor children to enjoin enforcement of federal child labor prohibitions).

dree and *Taylor* exceeded congressional powers as stating plausible claims for genuinely *federal* immunities.¹⁵⁶

* * * *

The federal power/immunity cases suggest that the asymmetrical review of state court decisions cannot totally be attributed to an overriding purpose to protect individuals' interests from overreaching governmental power. Rather, federal power was the legal position that the Court favored over the opposing immunity position in many of its applications of its jurisdictional provisions. Characterizing the federal power position as involving federal rights obscures this concern. This is not to argue against review of the immunity claims—quite the contrary. Rather, the federal power cases suggest, as will the later congressional reaction to the Court's inability to review *Ives v. South Buffalo Railway* in which the state court struck down the New York workers' compensation law, that both power and immunity from power are commensurable concerns for Supreme Court review.

VI. THE EXPANSION OF SYMMETRICAL REVIEW AS TO ISSUES UNDER FEDERAL STATUTES

As alluded to above, the early twentieth-century cases in which the Court confirmed review for appellants arguing that federal statutes were unconstitutional had support in the Court's move from early asymmetrical review to more symmetrical review in some federal statutory cases. The Marshall and Taney Courts' interpretations of the interaction of Section 25 with federal statutes favored asymmetrical review. For example, in *Gordon v. Caldcleugh*,¹⁵⁷ the defendant exercised the statutorily granted power to remove an action from state court to federal court based on alienage diversity.¹⁵⁸ The plaintiff argued that complete diversity was lacking and sought Supreme Court review from the state court decision allowing removal. As mentioned above, the Court dismissed the writ of error, with Chief Justice Marshall reasoning that the decision "was not *against* the privilege claimed under the statute; and, therefore, this court has no jurisdiction in the case."¹⁵⁹ The Court effectively decided that the primary beneficiary of the federal statute was the party who sought removal; Section 25's text encouraged but did not necessarily require the Court to view statutes

156 See *supra* notes 6–8 and accompanying text.

157 7 U.S. (3 Cranch) 268 (1806).

158 *Id.* at 270; *cf.* *Provident Sav. Life Assurance Soc'y v. Ford*, 114 U.S. 635, 639 (1885) (reviewing on direct review the state court's denial of removal).

159 *Gordon*, 7 U.S. (3 Cranch) at 270; see also *supra* text accompanying note 83.

as having a purpose to benefit one side. Such one-sided review comports with the Meltzer view that Section 25 did not allow for review of all federal issues arising in the state courts.

In the interim between Justice Field's allowing review to a party arguing for an immunity from federal power in *Trebilcock* and the later confirmation of the availability of such review in *McKendree* and *Taylor*, the Court would move toward more symmetrical review in cases under some federal statutes. These cases thus provide support for the Amar view, that the language of the review statutes could accommodate both sides of many federal issues. Several factors may have made symmetrical review a slightly easier sell as to statutorily granted interests than as to constitutional interests in limitations on federal power.

First, even for the party who clearly was entitled to review, the Court treated Clause 3 as the review provision.¹⁶⁰ This meant that the Court may have been less inclined to see a broad interpretation of Clause 3 as an end-run around the clearly one-sided Clauses 1 and 2, as it perhaps had in cases involving the constitutionality of federal and state statutes discussed above.

Second, the explicit limitations in various federal statutes may have suggested to the Court that opposing parties could both be the beneficiaries of statutes. Indeed, the apparently singular instance of either the Marshall or Taney Courts' allowing review for a party who ultimately sought merely to be left alone by federal law involved a defendant arguing a federal statute-of-limitations bar to a federal statutory action.¹⁶¹ Of course it is also true that the Constitution had explicit limitations on federal power, such as the Fifth Amendment. But perhaps the Court saw federal statutes as more likely to crowd out the normal common law/state law default rules, whereas the Court

160 *Cf. Gordon*, 7 U.S. (3 Cranch) at 270 (noting, in denying jurisdiction, that state decision allowing removal "was not *against* the privilege claimed under the statute"); *McCormick v. Mkt. Bank*, 165 U.S. 553, 546 (1897) (indicating that the review for either side would have been under Clause 3, by referring to "immunity" and "right").

161 *See, e.g., Montgomery v. Hernandez*, 25 U.S. (12 Wheat.) 129, 132–33 (1827) (holding that where the plaintiff had brought an action under a federal statute allowing suits on the marshal's bond, the losing surety could not claim that he had been denied a "title, right, privilege, or exemption" as to most statutory issues he raised, but could claim as to the federal statute of limitations an "exemption under the laws of the United States, from liability as surety of the marshal"); *cf. Jenkins v. Lowenthal*, 110 U.S. 222, 222 (1884) (indicating that the decision upholding the federal statute-of-limitations defense against the claims of the bankruptcy assignee would be reviewable, but finding that the state court's decision had also been based on the state law ground that the present owners were innocent purchasers for value).

tended to see the Constitution as more confirmatory of common law/state law default rules.¹⁶²

This view of statutory law as displacing more of the state and common law would have been enhanced with Congress's increasingly comprehensive railroad regulation at the turn of the century, some of which the Court would eventually find preempted state liabilities and remedies in the same field.¹⁶³ The increasing federal occupation of certain areas of law arguably should have made little difference in the application of the review statute; after all, federal law had been at issue when the Court denied review because the party was on the *wrong side* of the federal issue. And one might still have conceptualized an argument for nonliability under a federal statute as seeking primarily to vindicate the defendant's nonfederal interests in retaining her property, free from the effect of federal law. Nevertheless, the increased perception that statutes displaced common and state law may have enhanced the tendency to see both sides of a federal issue as advancing claims of a federal "title, right, privilege, or immunity."¹⁶⁴ As the Court noted in allowing review at the instance of a defendant railroad in a Federal Safety Appliance Act case, "In the case before us, the liability of the defendant does not grow out of the common-law duty of master to servant."¹⁶⁵ This view contrasted with the early tres-

162 *Cf.* Ill. Cent. R.R. v. McKendree, 203 U.S. 514, 527 (1902) (noting that the suit for spreading disease to cattle was based on the federal statute and not on common law principles).

163 *See* Hartnett, *supra* note 18, at 920 & n.77 (treating the railroad cases brought under, inter alia, the Federal Safety Appliance Act and the Federal Employers' Liability Act as not supporting Amar's theory because in such cases federal law "so occupied the field that any claim or defense [was] federal"); *see also* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 801-02 (1994) (discussing the Court's decisions between 1912 and 1920 that knocked out state laws that were consistent or supplemental to federal law); *cf.* *Tex. & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 441-42 (1907) (disallowing a state action where the shipper claimed a published rate was unreasonable, in that primary jurisdiction belonged to the Interstate Commerce Commission under the Interstate Commerce Act, Act of Feb. 4, 1887, ch. 104, §§ 6, 10, 24 Stat. 379, 380-83, amended by Elkins Amendment, Act of Feb. 19, 1903, ch. 708, § 3, 32 Stat. 847, 848).

164 The language is from the 1867 version of the statute, which substituted "immunity" for "exemption." *See supra* note 39 and accompanying text.

165 *St. Louis, Iron Mtn. & S. Ry. v. Taylor*, 210 U.S. 281, 294 (1908); *see also* *St. Louis, Iron Mtn. & S. Ry. v. McWhirter*, 229 U.S. 265, 277 (1913) (reasoning that the action was reviewable because the controversy was of a purely federal character); *cf.* *St. Louis, S.F. & Tex. Ry. v. Seale*, 229 U.S. 156, 157-58 (1913) (holding that under the Federal Employers' Liability Act (FELA), the proper party to bring the case was the personal representative, and noting that the wrongful death action was not recognized at common law and that compliance with the applicable statutes was required).

pass cases against officers such as *Gelston v. Hoyt*, in which the Court saw federal law as only discretely intervening into state law.¹⁶⁶ In addition, preemption of state regulation reinforced notions that both over- and underenforcement of federal law were significant.¹⁶⁷

A. *Bankruptcy Discharge Cases*

The initial one-sided nature of review, and the later expansion to symmetrical review, are evident in cases in which a party claimed the benefit of a federal bankruptcy discharge. Typically a creditor sued on a state contract, and the defendant claimed a federal privilege (discharge) to the state-created right.¹⁶⁸

A party who was denied this federal privilege in state court easily fit within the review statute's Clause 3.¹⁶⁹ By contrast, the Court initially would not allow the creditor to obtain review if the state court sustained the debtor's discharge defense to the state law contract claim. In *Strader v. Baldwin*,¹⁷⁰ for example, a creditor brought an assumpsit action for \$10,000 against Baldwin, and Baldwin claimed discharge. The creditor argued the debtor was not entitled to the discharge due to a statutory exclusion if the debt had been incurred while "acting in a fiduciary capacity."¹⁷¹ After the state court upheld the discharge defense, the Taney Court rejected the creditor's attempt to obtain review on the fiduciary capacity issue. The Court stated that it was only the debtor who had "pleaded a privilege or

166 See *supra* text accompanying notes 107–12.

167 See, e.g., *N. Pac. Ry. v. Washington*, 222 U.S. 371, 377–78 (1912) (holding that the state could not enforce an hours-of-service regulation that tracked the federal regulation that Congress had specified would not go into effect for a year so as to allow for adjustment to the new law).

168 Prior to the discharge, the creditor had a right to collect and the defendant a duty to pay. The affirmative defense of discharge turned the plaintiff's state law right into a no-right. See Hohfeld II, *supra* note 30, at 744 ("If, e.g., R threatens bodily harm to X, R's right that X shall not strike him becomes thereby extinguished, and a no-right in R substituted; or, correlatively, in such contingency, X's duty to R ceases, and X acquires a privilege of self-defense against R.").

169 See, e.g., *Neal v. Clark*, 95 U.S. 704, 709 (1877) (reviewing denial of a bankruptcy discharge).

170 50 U.S. (9 How.) 261 (1850).

171 *Id.* at 261 (statement of the case). The statute provided for bankruptcy for, "[a]ll persons . . . owing debts, which shall not have been created in consequence of a defalcation as a public officer; or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity." Act of Aug. 19, 1841, ch. 9, § 1, 5 Stat. 440, 441.

exemption” under the statute.¹⁷² The Court thus implicitly saw the legal positions of the parties as:

creditor's state contract right/debtor's federal discharge privilege.

The Court treated the creditor's opposition to the federal privilege as trying to restore the creditor's state law contract rights, such that there was not review. The creditor was arguing that, at the end of the day, federal law should not affect its legal rights.

As usual, however, there was another way to view the creditor's claim. The reliance on specific federal statutory language limiting the discharge for debts incurred “while acting in any fiduciary character”¹⁷³ could be seen not merely as seeking to restore the status quo ante state contract right by arguing against the federal discharge privilege, but as itself seeking a federally granted statutory benefit. In *Hennequin v. Clews*,¹⁷⁴ the Court effectively overruled *Strader* by allowing review at the instance of the creditor who—as had the creditor in *Strader*—argued that the debtor was not entitled to the discharge due to the debt's being incurred as a fiduciary.¹⁷⁵ The party ultimately arguing to be left alone by federal law thus was now able to get review.

In Hohfeldian terms, we might characterize *Hennequin* and later cases as implicitly seeing the legal positions of the parties as:

*(partly federally protected) state contract right/
federal discharge privilege.*

The Court, in this statutory area, was thus beginning to recognize both the creditor and debtor as statutory beneficiaries, such that over-

172 *Strader*, 50 U.S. (9 How.) at 262; see also *Linton v. Stanton*, 53 U.S. (12 How.) 423, 425 (1851) (holding under the same act that a disappointed creditor was not entitled to review where the state supreme court upheld the discharge, and also indicating that claims that the debt was covered by subsequent promises was a state law issue).

173 Act of Mar. 2, 1867, ch. 176, § 33, 14 Stat. 517, 533.

174 111 U.S. 676 (1884).

175 See *id.* at 678–79; see also *McCormick v. Mkt. Bank*, 165 U.S. 538, 546–47 (1897) (describing *Hennequin* as overruling *Strader*). It is not evident that anyone raised the reviewability issue in *Hennequin*. See Index, *Hennequin*, 111 U.S. 676 (No. 252). The bankruptcy in *Hennequin* was under the 1867 Act which provided “[t]hat no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act.” § 33, 14 Stat. at 533; see also *Palmer v. Hussey*, 119 U.S. 96, 98 (1886) (relying on *Hennequin* in upholding review of a fraud argument at the instance of a party opposing the bankruptcy discharge); *id.* at 97–99 (reviewing an argument that the discharge was invalid for undue delay, with the Court noting that perhaps a construction of a statutory time-limitation provision may have been involved, but finding against the creditor on the ground that the prior bankruptcy proceeding foreclosed this argument).

enforcement favoring one party (e.g., too broad a discharge) was another party's underenforcement (e.g., of state contract rights that were federally protected if the debt were incurred in a fiduciary capacity).

B. *National Bank Ultra Vires Cases*

The Court's turnaround in the bankruptcy cases had been foreshadowed in cases involving federally granted powers to private parties. The National Bank Act¹⁷⁶ granted and limited the powers of the banks chartered under it. The Act did not allow national banks to make certain loans secured by real estate.¹⁷⁷ When national banks sought to enforce their security interests when debtors defaulted on loans, the debtors or other creditors sometimes sought to void the bank's lien by claiming that it was effectively a mortgage that exceeded the bank's federally granted powers. The banks could easily obtain review if a state court held they lacked power under federal law to enforce their lien.¹⁷⁸ And on the merits the Court ruled in favor of the banks' power vis-à-vis the debtors and rival creditors,¹⁷⁹ holding

176 Act of June 3, 1864, ch. 106, 13 Stat. 99.

177 The National Bank Act authorized national banking associations to exercise "all such incidental powers as shall be necessary to carry on the business of banking by . . . loaning money on personal security." *Id.* § 8, 13 Stat. at 101. The Act further provided

it shall be lawful for any such organization to purchase, hold, and convey real estate as follows:

First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by such association, or shall purchase to secure debts due to said association.

Such associations shall not . . . hold the possession of any real estate under mortgage, or hold the title and possession of any real estate purchased to secure any debts due to it for a longer period than five years.

Id. § 28, 13 Stat. at 107-08.

178 See *Nat'l Bank v. Matthews*, 98 U.S. 621 (1878) (originating as a suit to enjoin the sale of the property); *Nat'l Bank v. Whitney*, 103 U.S. 99, 103 (1880) (involving the question of whether the bank or other mortgagees and judgment creditors were entitled to the proceeds of the foreclosure sale).

179 See *Hohfeld II*, *supra* note 30, at 756-57 (giving examples of how defective powers nevertheless may be recognized by the law as effective to change legal relations, such as the power of a "duly appointed agent, in certain cases, to sell chattels to

that Congress only intended federal officials to enforce the limitations on the banks' mortgage powers through proceedings for dissolution.¹⁸⁰

The ability of those opposing the national banks to obtain review if the state court rejected their arguments that the national banks acted *ultra vires* presented the difficult question. In several contexts, including where federal law granted powers to private parties, the Court had ruled that the party arguing for an immunity from the federally granted power could not obtain review, and thus implicitly saw the legal positions of the parties as:

federal power/ *nonfederal immunities*.

For example in *Gordon v. Caldcleugh*, mentioned above, the Court indicated that it was only the party who had been granted the federal power of removal to federal court, not the party who opposed removal, who could obtain review.¹⁸¹ In addition, the Court had already held in cases reviewed at the banks' instance that the debtors and rival lienholders could *not* use the *ultra vires* defense to void the national banks' liens. In *Swope v. Leffingwell*,¹⁸² however, a debtor who lost on his defense that the national bank had acted beyond its federally authorized powers sought review, and the Court denied a motion to dismiss the appeal.¹⁸³ The Court thus allowed review for the argument for an immunity from the federal power granted to a private

an innocent purchaser, even after his *factual* authorization has been revoked by the principal").

180 See *Matthews*, 98 U.S. at 626, 629 (holding that the *ultra vires* defense would not void the transaction, and that a judgment of ouster or dissolution was the only remedy intended by Congress); *Whitney*, 103 U.S. at 103 ("Whatever objection there may be to it as security for such advances from the prohibitory provisions of statute, the objection can only be urged by the government.").

181 See *supra* text accompanying notes 83, 157–59.

182 105 U.S. 3 (1881).

183 *Id.* (taking review at the instance of the borrower, who argued that the prohibition on mortgages should protect him from the sale of the property that secured a promissory note). The Court merely discussed the motion to dismiss as based on the absence of a "federal question." *Id.* at 3–4. The defendant in error so characterized its argument in its motion to dismiss, but meant this characterization to encompass his argument that the plaintiff in error "in no wise claims title under that act, nor does the decision in favor of the bank violate any right, title or privilege secured to him by the Constitution or laws of the United States." Brief of Defendant in Error Accompanying Motion to Dismiss at 4, *Swope*, 105 U.S. 3 (No. 1143). The plaintiff in error claimed that the contract violated the federal statute, and that he therefore "had immunity therefrom." Brief of Plaintiff in Error on Motion to Dismiss at 2, *Swope*, 105 U.S. 3 (No. 1143). Although denying the motion to dismiss the debtor's writ of error for lack of jurisdiction, the Court summarily determined that the debtor lost on the merits. *Swope*, 105 U.S. at 4.

party. The Court now saw the national bank cases, or at least those in which a debtor claimed that he should be free from his debt because of statutory exceptions to the bank's power as involving:

federal power/ *federal immunity*.

And in later cases involving claims that a private party acted outside of federal statutorily granted power, the Court allowed review to parties arguing against the federal power.¹⁸⁴

* * * *

Thus, for statutes, the Court had expanded review to allow those arguing against an alleged overindication of a federal privilege (bankruptcy) or a federally granted power (of national banks to enter mortgage contracts) to obtain review, reflecting changes from the more unidirectional view of statutory protections in older cases. The Court would treat the expanded review in the national bank and bankruptcy cases as mutually supportive,¹⁸⁵ and also as supporting expanded review in statutory cases more generally.¹⁸⁶ Admittedly, the Court episodically treated only one side of a federal statute as entitled to review.¹⁸⁷ But the Court later summarized its more liberal review cases as standing for the proposition that

184 See, e.g., *Logan Cnty. Nat'l Bank v. Townsend*, 139 U.S. 67, 72–73 (1891) (allowing review to a national bank arguing its own lack of power so as to avoid an obligation, and indicating that the “exemption or immunity” claimed under the act of Congress had been clearly denied by the state court); *Cal. Bank v. Kennedy*, 167 U.S. 362, 365–66 (1897) (denying a motion to dismiss the bank's writ of error where the bank alleged it should be able to avoid liability arising from an ultra vires act of holding shares of another corporation); cf. *Anderson v. Carkins*, 135 U.S. 483 (1890) (granting review and relief at the instance of a party who wished to void his contract to convey his homestead, when the statute forbade alienation of homesteads for five years); *McCormick v. Mkt. Bank*, 165 U.S. 538, 547–48 (1897) (allowing a lessor to obtain review, inter alia, on his argument that even if the bank's lease was ultra vires, still the lease was valid vis-à-vis the lessor, and that the state decision against the lessor “was a decision against the right so specially set up and claimed by the plaintiff under a statute of the United States”).

185 *McCormick*, 165 U.S. at 546 (discussing the bankruptcy cases in a national bank case).

186 *Nutt v. Knut*, 200 U.S. 12, 19 (1906) (citing, inter alia, *Swope* and *McCormick* in reviewing a claim that the plaintiff in error should not be liable on a state law contract that was alleged to violate a federal statutory prohibition on assignment of claims).

187 See, e.g., *Missouri v. Andriano*, 138 U.S. 496, 498–501 (1891) (denying review to a party who claimed his opponent in a sheriff's race was not a citizen, which was a requirement under state law); *Jersey City & Bergen R.R. v. Morgan*, 160 U.S. 288, 292–93 (1895) (denying review where the railroad had not properly set up its federal defense that it had no duty to accept a worn silver coin, and also finding that the federal right was more the other side's right to tender the coin); *Kizer v. Texarkana &*

[a] party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of [the review provision], to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary.¹⁸⁸

Indeed, the Court quoted this language in the *McKendree* case discussed above, where the Court allowed review at the instance of a railroad challenging a federal statute and regulations thereunder as to transportation of diseased livestock.¹⁸⁹ The Court used the language to support its review of the claim that the regulations exceeded statutory power, and seemed to think that this argument sufficed for its review of the argument that constitutional power had been exceeded as well.¹⁹⁰ Thus the Court's moves toward symmetrical review under statutes reinforced the argument for symmetrical review when parties claimed that federal statutes were unconstitutional.

C. *Land and Railroad Cases*

This Article has not discussed many cases involving federal rights, using the term rights in the Hohfeldian sense. Indeed, apart from the federal land claims, there apparently were not many claims in state courts that involved vindication of federal rights (as distinguished from, e.g., immunities). But from the land claims and a few other claims directly under federal statutes, one can generalize that the early Court often identified one party as a federal rightsholder, and therefore entitled to review if he lost. But the Court saw the party arguing against the federal right as seeking to vindicate nonfederal interests in being left alone by federal law, and therefore as not entitled to review.

Fort Smith Ry., 179 U.S. 199 200–01 (1900) (disallowing review where the state court upheld the railroad's claim that a contract was void under federal law because it provided for rate discrimination). Professor Hartnett correctly notes the difficulty one would have in trying to fit *Andriano* within the review statute. See Hartnett, *supra* note 18, at 919.

188 *Nutt*, 200 U.S. at 19; see also *Straus & Straus v. Am. Publishers' Ass'n*, 231 U.S. 222, 233–34 (1913) (allowing review where the plaintiff who sought review arguably had a federal antitrust claim which may not have been litigable in state court, as well as a state law claim, to which the defendant successfully raised a copyright defense; and noting that a party who argued that a federal statute gives an immunity from a judgment against him can obtain review).

189 See *Ill. Cent. R.R. v. McKendree*, 203 U.S. 514, 525–26 (1906); see also text accompanying notes 146–47.

190 See *McKendree*, 203 U.S. at 525–26.

For example in the land claims where federally granted land titles were at issue, when the Court was willing to acknowledge a federal question at all,¹⁹¹ it frequently allowed only the party who was arguing to uphold the federal title to obtain review (as noted above).¹⁹² In other words, the Court implicitly saw the positions as:

federal right [claim to title under the federal land patent]/
nonfederal privilege [argument against the patent]

What is more, even when both parties claimed under federally granted patents, the Court might deny review based on reasoning that only one party was arguing to uphold the relevant federal right in the particular case. For example, in *Fulton v. M'Affee*,¹⁹³ a junior federal patent-holder (who would lose absent a problem with his opponent's earlier granted federal patent) complained that the state court had rejected parol evidence he offered of the senior claimant's fraud in obtaining his grant. The Court said no review was available because the evidence was only presented to defeat the senior claimant's title.¹⁹⁴ In other words, the Court treated the junior claimant as only arguing to defeat the senior claimant's federal right, although presumably defeating the senior claimant's title was necessary to establish the validity of the junior claimant's federal title. The Court, however, granted symmetrical review in some cases, particularly where the Land Department had previously litigated preemption claims between the parties in contested proceedings before the department.¹⁹⁵

The increasing federal statutory regulation of railroads after the turn of the century brought new actions, such as under the Federal Safety Appliance Act (FSAA)¹⁹⁶ and the Federal Employers' Liability

191 See *supra* notes 117–22 and accompanying text.

192 See *supra* note 116 and accompanying text.

193 41 U.S. (16 Pet.) 149 (1842).

194 See *id.* at 150–51.

195 See, e.g., *Quinby v. Conlan*, 104 U.S. 420 (1881) (allowing review at the instance of the junior preemption claimant who primarily argued against the senior claimant's preemption rights).

196 The Federal Safety Appliance Act (FSAA) could be the basis for liability not only for interstate workers, but also for intrastate workers who worked on railroad equipment in interstate commerce. See Act of Mar. 2 1893, ch. 196, 27 Stat. 531; see also Act of Mar. 2, 1903, ch. 976, § 1, 32 Stat. 943, 943 (expanding coverage to include all cars “used on any railroad engaged in interstate commerce”); *Moore v. Chesapeake & Ohio Ry.*, 291 U.S. 205, 213–14 (1934) (describing the expansion of the FSAA's coverage). The Court at first seemed to treat these claims as federal question suits. See *St. Louis, Iron Mtn. & S. Ry. v. Taylor*, 210 U.S. 281, 285, 292 (1908) (indicating that the case alleging violations of the FSAA was brought under the state wrongful death law, but also indicating that the action was one “arising under . . . the laws of the United States”); *Tex. & Pac. Ry. v. Rigsby*, 241 U.S. 33 (1916) (seeming to

Act (FELA),¹⁹⁷ where federal law was the basis for recovery in state courts. These actions, in which the employee could obtain compensation for injury if he could show the employer's breach of duty, presented fairly easy cases for identifying the plaintiff employee as the federal rightsholder and the defendant railroad as the party arguing against the right. Nevertheless, the Court allowed the party arguing against the statutory rights under the FSAA (as well as against the Act's constitutionality¹⁹⁸) to obtain review in *St. Louis, Iron Mountain & Southern Railway v. Taylor*.¹⁹⁹ While the defendant relied in part on a specific statutory argument that the instructions were incorrect as to whether certain equipment complied with the act, the position of the railroad was effectively to argue against the plaintiff's right.²⁰⁰ And in a later case, *St. Louis, Iron Mountain & Southern Railway v. McWhirter*,²⁰¹ as well as in others, the Court confirmed that the railroad could obtain review by merely arguing that it was not negligent.²⁰² The Court clearly saw the cases as involving:

treat the action of an intrastate worker for violation of the FSAA as a federal cause of action on review from a federal court). *But cf. Moore*, 291 U.S. at 217 (holding that an intrastate worker's allegation of a violation of the FSAA did not state a claim arising under federal law for purposes of original federal court jurisdiction); *Gilvary v. Cuyahoga Valley Ry.*, 292 U.S. 57, 61–62 (1934) (stating, with respect to a claim by an intrastate worker of an FSAA violation, that “[t]hese Acts do not create, prescribe the measure or govern the enforcement of, the liability arising from the breach”).

197 The Court invalidated the first Employer's Liability Act, Act of June 11, 1906, Pub. L. No. 59-219, §§ 1–5, 34 Stat. 232, 232–33, in the *Employers' Liability Cases*, 207 U.S. 463, 498 (1908), holding that the statute exceeded the commerce power by providing liability to employees of carriers in interstate commerce without regard to whether the carrier and its employees were engaged in interstate commerce at the time of the injury. In the *Second Employers' Liability Cases*, 223 U.S. 1 (1912), the Court upheld the replacement act. *See* Act of Apr. 22, 1908, Pub. L. No. 60-100, 35 Stat. 65, amended by Act of Apr. 5, 1910, Pub. L. No. 61-117, 36 Stat. 291.

198 *See supra* text accompanying notes 148–50.

199 210 U.S. 281, 287 (1908).

200 *Id.* at 282–83. The Court also reviewed a claim for an instruction less tied to specific statutory language, as to whether it would be a defense if the railroad provided shims that employees could use to keep drawbars at the heights directed by the statute. *Id.* at 294–95. *But cf. Seaboard Air Line Ry. v. Duvall*, 225 U.S. 477, 488 (1912) (saying that the denial of a particular instruction did not involve a construction of the act, although more or less rejecting the argument on the merits).

201 229 U.S. 265 (1913). *McWhirter* claimed under the 1908 FELA and also an earlier act limiting hours of service. *See* Act of Mar. 4, 1907, Pub. L. No. 59-272, § 2, 34 Stat. 1415, 1416.

202 *McWhirter*, 229 U.S. at 277–80 (reviewing an objection to an instruction that treated a seven minute overage of the hours of service rules as negligence per se); *id.* at 281 (reviewing failure to give requested instruction as to causation); *see also Chi., Rock Island & Pac. Ry. v. Wright*, 239 U.S. 548, 552 (1916) (reviewing on writ of error,

federal right [of the employee]/ *federal privilege* [of the railroad].

Indeed, the Court said in *McWhirter*: “[T]he right on the one part of the plaintiff, or the immunity on the other part of the defendant, depended exclusively upon the statute, were, in the nature of things both necessarily Federal—since they were from the point of view of the statute correlative.”²⁰³

Meltzer treated these cases as merely late-breaking exceptions to an otherwise consistent refusal of the Court to grant review along the lines Amar suggested.²⁰⁴ But these cases were continuous with developing caselaw starting with Field’s decision in *Trebilcock* and continuing in the bankruptcy and national bank cases. The *Taylor* Court noted that the question as to the Court’s review on the statutory issues was “whether it was a claim of a right or immunity under a statute of the United States. Recent decisions of this court remove all doubt from the answer to this question.”²⁰⁵ In light of these developments, allowing the defendant to seek a writ of error in the railroad liability cases seemed unexceptionable to most of the Justices.²⁰⁶

True, one could say that cases such as *Taylor* and *McWhirter* marked an advance on prior developments by so starkly allowing the party arguing *against* what was clearly a federal *right* to obtain review, as Justice Pitney’s dissent in *McWhirter* argued.²⁰⁷ Many of the prior cases involved allowing review where the plaintiff in error sought to negative a federal power or a federal privilege rather than a federal right. What is more, the railroads in some of the cases merely argued

inter alia, the railroad’s claim that it was entitled to a directed verdict because there had been no evidence of negligence, and stating, “In this it is contended that the company was denied a Federal right, that is, the right to be shielded from responsibility under the act of Congress when an essential element of such responsibility is entirely wanting”); *cf.* *Chi. & Alton R.R. v. Wagner*, 239 U.S. 452, 457 (1915) (allowing review under a writ of error as to a claim by a party that the release in question was under the common law and not within the FELA prohibition of such releases). While the 1914 amendments added the possibility of certiorari in certain cases, the allowance of a writ of error under the provisions of the 1867 Act continued until 1916. *See* Act of Dec. 23, 1914, ch. 2, 38 Stat. 790; Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1658–59 (2000) (indicating that FELA cases were part of the reason for the 1916 revisions and that the revisions shifted federal court litigated FELA cases from mandatory review as well).

203 *See McWhirter*, 229 U.S. at 281.

204 *See* Meltzer, *supra* note 12, at 1589 & n.67 and accompanying text.

205 *Taylor*, 210 U.S. at 293.

206 *Id.* (“Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress needs no justification.”).

207 *See McWhirter*, 229 U.S. at 284 (Pitney, J., dissenting) (“The attitude of the defendant was that of merely denying the validity of [the plaintiff’s] claims.”).

their lack of liability due to nonnegligence instead of relying on any explicit statutory language at least arguably running to their benefit, which distinguished the railroad cases somewhat from those involving the fiduciary exception to the bankruptcy discharge privilege or the mortgage exception to national banks' powers.²⁰⁸ But by the time of *Taylor*, the Court in *McKendree* had already found no trouble in allowing parties to obtain review who merely argued the absence of federal statutory and constitutional powers, without pointing to specific federal protections.

* * * *

Overall the Court had moved toward symmetrical review as to the following positions in some contexts. The easier positions for review remain in regular font, while the more difficult positions for review remain in italics. The difficult positions are now characterized as *federal* positions, in accordance with how the Court had come to treat them.

federal power/ <i>federal immunity</i>	(arguments against the validity of federal statutes and regulations; arguments against national banks' mortgage powers)
<i>federally protected state right/</i> federal privilege	(arguments against bankruptcy discharges)
federal right/ <i>federal privilege</i>	(arguments against rights of railroad employees to recover for injury under federal statutes).

The Marshall and Taney Courts, in allowing only the position in regular type to obtain review, had identified the party arguing that position as the primary beneficiary of Section 25 and by extension of the underlying federal law at issue. If a party were arguing that federal law, properly interpreted, should have no effect on him, he generally did not get review. The Court later was more likely to see both sides of a federal issue as beneficiaries of Section 25 and the underlying federal law.

208 The Court, however, had not in fact found that the mortgage exception was meant to benefit the debtors or rival creditors. See *supra* note 180 and accompanying text; cf. *McCormick v. Mkt. Bank*, 165 U.S. 538, 547–48 (1897) (reviewing the lessor's argument that the bank's statutorily disallowed lease was nevertheless valid vis-à-vis the lessor).

VII. RETURN TO THE CONSTITUTIONALITY OF STATE STATUTES

Despite increasingly symmetrical review beginning in the latter part of the nineteenth century, no one seems to have thought review was available when the New York Court of Appeals struck down the state workers' compensation statute on federal constitutional grounds in *Ives v. South Buffalo Railway*.²⁰⁹ The *Ives* case returns us to where we started:

state power [to enact the statute]/federal immunity
[invalidating the statute].

As discussed above, it might be possible to characterize an attempt to vindicate a state statute as attempting to uphold *federally protected* state power, and therefore as arguing for a federal "title, right, privilege, or immunity" under Clause 3 of the review statute. But perhaps notions of state power as existing independently of federal protections continued to prevail.

Those arguing to validate state labor legislation in cases such as *Ives*, moreover, might have been disinclined to characterize the state's power as a constitutionally protected "privilege or immunity" under Clause 3. After all, they were seeking to limit, not increase, the Constitution's reach, and to remove the due process umbrella for common law interests in liberty and property that Justice Field had worked to put in place. Those seeking to expand Supreme Court direct review for cases like *Ives* thus did not argue that the Tenth Amendment protected state power. Rather, they argued that with asymmetrical review the "rights of property" had improperly taken precedence over the "rights of humanity."²¹⁰ And the rights of humanity would be served by allowing review for those seeking to vindicate state power.

Allowing review for the state power position thus would require the 1914 legislation. That legislation allowed the Court to grant certiorari when

although the decision in such case may have been in favor of the validity of the treaty or statute or authority exercised under the United States or may have been against the validity of the State statute or authority claimed to be repugnant to the Constitution, trea-

209 94 N.E. 431 (N.Y. 1911).

210 See FRANKFURTER & LANDIS, *supra* note 20, at 194 n.37 (quoting Theodore Roosevelt); see also Hartnett, *supra* note 18, at 952 (indicating that the need to vindicate popular sovereignty and uniformity were among the themes of supporters of the 1914 revisions); Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 403-04 (1908) (characterizing judicial interference with legislation as standing between the public and what the public needs and discussing workers' compensation legislation as an illustration of the superiority of legislation to the common law).

ties, or laws of the United States, or in favor of the title, right, privilege, or immunity claimed under the Constitution, treaty statute, commission, or authority of the United States.²¹¹

CONCLUSION

The history of Section 25 and its 1867 successor may be somewhat more supportive of Amar's view than his critics argued. The history shows the statutes' Clause 3 was, as Amar suggested, susceptible to interpretations allowing for symmetrical review in many cases, and that the Court increasingly adopted such interpretations over time. The Court's gravitation toward review for both sides implicitly shows that the Court saw such review as appropriate to its constitutional role.

On the other hand, in accordance with Meltzer's observations, the Marshall and Taney Courts had no trouble respecting congressional limitations, and even later Courts did not advert to constitutional imperatives when they expanded review.²¹² Rather the expansion seems more attributable to the Court's treating common law interests in freedom from unauthorized governmental encroachments as increasingly federal, and to the Court's recognizing both sides of a federal issue as potentially significant beneficiaries of federal protections. Thus while the history of Section 25 is somewhat more favorable to Amar's position than his critics claim, still the Court's reasoning suggested judicial deference to congressional limitations on jurisdiction rather than mandatory vesting.

The history of Section 25 also suggests that viewing the overriding purpose of federal court jurisdiction as individual rights protection may be descriptively and normatively incomplete. The direct review cases manifest that protecting federal power was also a central concern, sometimes in preference to claims of individual immunities. The initial allowance of review only for the federal-government-power argument, and its later expansion to include the immunity-from-federal-power argument, serves as a reminder that one party's over-enforcement is another's underenforcement. The statutory expansion of review in 1914 in the wake of *Ives v. South Buffalo Railway* serves as a similar reminder.

211 Act of Dec. 23, 1914, Pub. L. No. 63, 38 Stat. 790.

212 Meltzer, *supra* note 12, at 1591 (“[N]o Justice even hinted that the prevailing view raised any constitutional difficulty.”).

