

Establishing the Power of Judicial Review and the Incorporation of the Bill of Rights

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Construction of the judiciary

- What elements of the Constitution built the judiciary, and what did this look like?



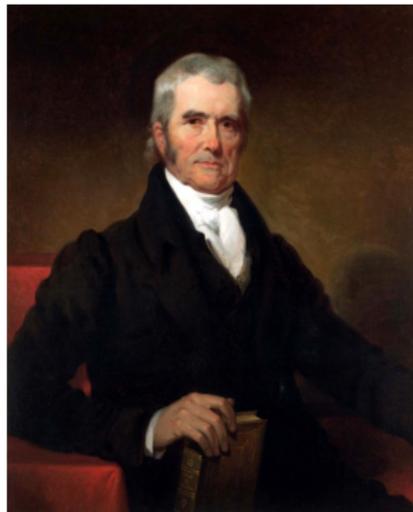
Origins of judicial review

- If Article III never mentioned judicial review, where does it come from?
- Why do politicians defer to the Court's judgment, and does this institution present a problem?
- What strategic considerations should the Court keep in mind in exercising its judgment?



Early efforts at judicial review

- *Hylton v. U.S.* (1796)
- *Marbury v. Madison* (1803)
- *Martin v. Hunter's Lessee* (1816) and *Cohens v. Virginia* (1821)
- *McCulloch v. Maryland* (1819)
- *Scott v. Sandford* (1857)



John Marshall (1755-1835)

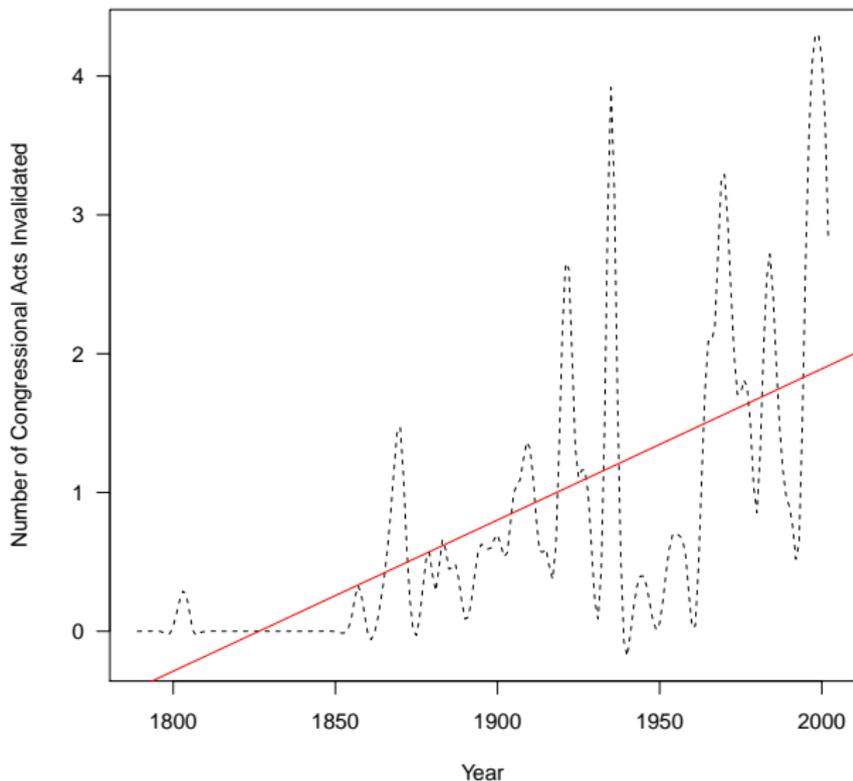
Some limits to judicial review

- *Worcester v. Georgia* (1832)
- *Ex parte Merryman* (1861)
- *Ex parte McCordle* (1868)



Andrew Jackson (1767-1845)

Judicial review of Congress since *Marbury*



Some practical limits on judicial review

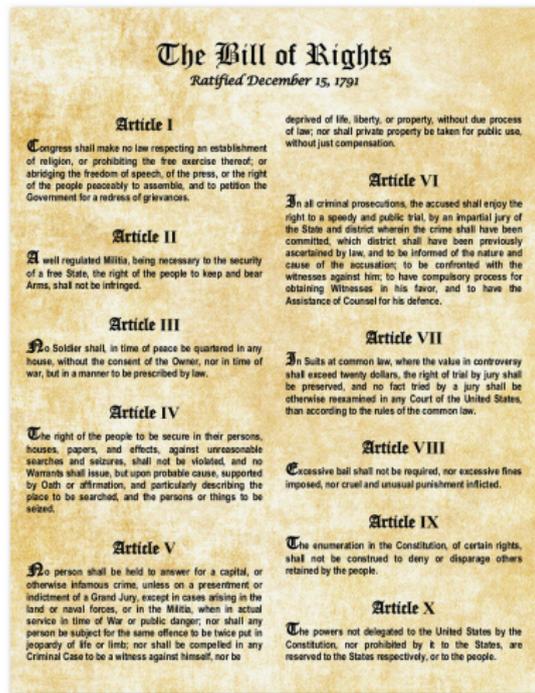
- Advisory Opinions
- Collusion/Justiciability
- Mootness/Ripeness
- Political Questions
- Standing



John Jay (1745-1829)

Judicial review, the Bill of Rights, and federalism

- Does the Bill of Rights constrain the states?
- *Barron v. Baltimore* (1833)



The profound significance of the Fourteenth Amendment

Amendment XIV, §1: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Early efforts to incorporate the Bill of Rights

- *Slaughterhouse Cases* (1873)
- *Hurtado v. California* (1884)
- *Twining v. New Jersey* (1908)
- *Gitlow v. New York* (1925)
- *Palko v. Connecticut* (1937)



Benjamin Gitlow (1891-1965)

The trajectory of the incorporation doctrine

- Selective incorporation has been the means by which the Bill of Rights has been applied to the states.
- Most of the remainder of this course will examine the process by which this occurred.

Conclusion

- The power of judicial review is not an obvious one in the Constitution.
- Nevertheless, that power has proliferated, virtually since the founding with, however, some constraints
- The evolution of judicial review with respect to the incorporation doctrine has been one of the most profound changes in federal-state relations since the founding.