

The U.S. Supreme Court and National State Development
Prepared for the 2015 Western Political Science Association Conference
Please do not cite or circulate

Michael A. Dichio
Assistant Professor of Political Science
Fort Lewis College
Durango, Colorado
12 March 2015

The U.S. Supreme Court and National State Development

That the judicial power of the United States will lean strongly in favour of the general government, and will give such an explanation to the Constitution, as will favour an extension of its jurisdiction, is very evident from a variety of considerations.

-Brutus, Letter XI, 31 January 1788

Abstract

Using an original dataset of constitutional decisions, I uncover the ways in which the Supreme Court, through its constitutional decisions, has expanded and contracted national state authority. I connect my methodology and findings to American Political Development understandings of central state formation in two ways: to the historical periodization of the development of the state and to the varying notions of central state strength and weakens in these periods. To pinpoint the Court's relationship toward the national state development, my data extracts constitutional decisions that appear most frequently across 58 constitutional law casebooks and treatises published between 1820 and 2000. Each decision is coded for its overall impact on central state authority—expanding, restricting, or neutral—as well as coded along seven dimensions of the central state that the Court could possibly affect in each decision. This paper presents the descriptive findings of these data, connecting American constitutional development with changes in national state building.

Introduction

American constitutional law addresses questions about the federal government's reach. At the root of constitutional law, thus, is the language of federal authority. The judiciary's central responsibility is to determine the boundaries of this authority and, in doing so, it expands and contracts federal power. This is the basic pattern of constitutional development. Shaping the federal government in this way places the Court at the center of American state development. While we know the Supreme Court will always crucially influence American political development, we know little about this pattern, about when, where, and how the Court has decided to expand and constrict the national government. If we better understand these patterns, we can better understand the constitutional foundations of the American state.

Constitutional decisions represent the development of both civil liberties (individual rights claims) and governmental structures and powers (the design of the state). Americans have had an ambivalent relationship toward the government and its use of power. Nevertheless, central state power has grown persistently across time. American anxieties and questions surrounding state power have

often ended up before the Supreme Court, an institution that has traditionally defined what it means to be a citizen and what counts as legitimate state authority. This responsibility makes the Court one of the best venues for understanding changes in the national state. As such, the study of the Court and its pivotal cases sheds light on far more than jurisprudential development because the Court, whether we like it or not, has shaped the contours of membership and authority more than any other institution.

Recently scholars have presented impressive evidence demonstrating the strengths of the early American central state, but a broader discussion of state strength over time has yet to be seen.¹ In order to further our understanding of state development, this paper analyzes original historical data collected on U.S. Supreme Court constitutional decisions and reaches two conclusions.

First, the Court tends to expand central state authority over time primarily through centralization—that is, by transferring decision-making authority from the states to the federal government. Second, the division between “weak” and “strong” federal government obscures our understanding of state development²; indeed, Court decisions frequently alternate between the expansion and restriction of authority, thus revealing the difficulty in dubbing the state “strong” or “weak” at least from the vantage point of constitutional law. These findings cast doubt on the standard

¹ In their review article, Desmond King and Robert Lieberman argue to move away from the Weberian framework of understanding modern states (King and Lieberman 2009, 551). They laud the studies reviewed (Gryzmala-Busse 2007; Hacker 2002; Johnson 2007; Ziblatt 2006) for “expanding the view of state building to include the role of actors that are conventionally considered to be outside the ‘state’ proper” and locating “stateness” in a variety of unconventional places (King and Lieberman 2009, 555-56). Desmond King and Robert Lieberman, “Ironies of State Building: A Comparative Perspective on the American State.” *World Politics* 61, 3 (July 2009): 547-588.

A recent wave of scholarship revises our understanding of American central state in the nineteenth century, arguing the central state was stronger than we previously thought. See, for example, Brian Balogh, *A Government out of Sight: The Mystery of National Authority in Nineteenth-Century America* (New York: Cambridge University Press, 2009); William Novak, “The Myth of the ‘Weak’ American State,” *American Historical Review* 113 (2008): 752-72; William Adler, “State Capacity and Bureaucratic Autonomy in the Early United States: The Case of the Army Corps of Topographical Engineers,” *Studies in American Political Development*, 26 (October 2012): 107-24; Richard John, “Governmental Institutions as Agents of Change: Rethinking American Political Development in the Early Republic, 1785-1835,” *Studies in American Political Development* 11 (1997): 347-80.

² Peter Baldwin (2005) makes a similar argument in “Beyond Weak and Strong: Rethinking the State in Comparative Policy History.” *Journal of Policy History* 17, 1: 12-33. He calls for more a nuanced analysis of state strength: “[States] may not be consistently laissez-faire or interventionist, but be so in one respect and the opposite in another,” 19.

developmental narrative and show that the rate of state expansion remains relatively steady across time, even during critical junctures. This paper provides an overview of the Court's role in state-building from the Founding until the present day. The Court did much to advance the powers of the central government with respect to federalism and individual rights as well as along centralization and citizenship dimensions of central state authority.

Central State Dimensions and Constitutional Issues

The standard narrative of constitutional development argues that, from 1870-1937, the Court inhibited American state expansion then, in 1937, an amalgam of exogenous factors quickly shifted the Court's constitutional jurisprudence so that it accepted a larger and more powerful central government. This kind of "punctuated equilibrium" model, however, draw too sharp of a distinction between normal politics and moments of constitutional change.³

Rather than punctuated change, constitutional development is better conceived as what Orren and Skowronek have termed "layered political development." They underscore that punctuated equilibrium models, by contrasting "normal" politics with moments of exogenous disruption, obscure "a good deal of what is characteristic about politics and...political change" (Orren and Skowronek 1994, 320).⁴ They encourage scholars to focus, instead, on the tensions and contradictions inherent in politics.

³ For an example of this model see Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (New York: Oxford University Press, 1987). Adam Sheingate's (2003) study argues against punctuated equilibrium models as a way to understand institutional change. Focusing on political entrepreneurship, he contends that "an *endogenous* account of institutional change would appreciate the way institutions themselves make change possible and therefore would not rely on the occurrence of some exogenous shock or event to explain when and how change takes place" (Sheingate 2003, 186, emphasis original). "Political Entrepreneurship, Institutional Change, and American Political Development." *Studies in American Political Development* 17 (2003): 185-203. Similarly, Kimberly Johnson's study of Congress and federalism also argues against the punctuated equilibrium model (Johnson 2007, 7-9).

⁴ Karen Orren and Stephen Skowronek. 1994. "Beyond the Iconography of Order" in Lawrence Dodd and Calvin Jillson, eds. *The Dynamics of American Politics*, Westview Press.

While the state expands in myriad ways, the judiciary offers a unique view of state expansion because it reviews the governing authority of other political institutions. Studying the Court in this way recognizes the tensions inherent in constitutional development and decision-making. We will see, as Orren and Skowronek note, the “tensions and contradictions” in the Court’s jurisprudence that lead the American central state to be strong in some areas and weak in others at the same moment in time.

The central state dimensions are derived from Richard Bense’s work on the origins of central state authority in America. In his study, Bense compares Union and Confederate state strength along “seven dimensions of central state authority” (Bense 1990, 114). This paper uses Bense’s taxonomy as the interpretative framework through which to determine a constitutional decision’s effect on central state authority. Any decision that advances/constricts one or more of the seven aspects is interpreted as expanding/restricting overall state authority. Below, Table 1 enumerates these exhaustive central state dimensions.

Table 1: Bensel's Dimensions of Central State Authority⁵:

1. Centralization of authority: Measures involving the transfer of decision-making authority from subordinate governments and the citizenry to the central state; in the case of individual citizens, such measures do not involve a substantive expansion of central state activity but, only, the allocation of influence and control over that activity. In the case of subordinate governments, such measures include the review of subordinate government decisions by central state institutions and the form of subordinate government participation in central state decision making.

2. Administrative Capacity: measures involving a broadening or narrowing of bureaucratic discretion and long-term planning capacity within the central state; these measures affect only institutions within the central state itself; in analyzing policy, reference is made to a hierarchy based on relative insulation from societal or outside political influence.

3. Citizenship: measures involving the religious practices, political beliefs, ethnic identity, and rights and duties of citizens in their relations with the state; this category excludes measures affecting property but includes all measures concerning the physical movement and labor of citizens (such as conscription).

4. Control of property: measures involving the control or use of property by individuals or institutions other than the central state itself, including expropriation, regulation of the marketplace, and labor contracts between private parties.

5. Creation of client groups: measures that increase the dependence of groups within society upon the continued existence and viability of the central state; includes only measures that provide income or income substitutes to individuals (pensions, employment by central state institutions, welfare, and price-control programs for specific groups in society), that establish future-oriented obligations that depend on state viability (the issuance of long-term debt), and that control the value of the currency (the gold standard and redemption of paper money).

6. Extraction: the coercive dimensions of material resources from society into the central state apparatus; extraction measures skim wealth and resources from the flow of commerce and marketplace transaction without significantly redirecting or influence the volume of these transactions (unlike otherwise similar measures falling under the property, client-group, or world system dimensions); primarily forms of light taxation or manipulations of the financial system such as gradual inflation of the currency.

7. The central state in the world system: measures concerning the relationship of the central state and nation with other states and the world economy; these include access to foreign markets (licensing, import quotas, export subsidies, and tariffs), diplomatic relations (membership in international organizations, treaties, and military conflict), immigration restrictions, and broadly conceived policies of internal development (the construction of a railroad to the Pacific Ocean, the Homestead Act, and administration of territorial possessions).

To illustrate the uses of these dimensions, I will apply this typology to three Supreme Court decisions from my dataset, decisions that represent all possible outcomes on central state authority and on its dimensions: restrict, neutral, and expand. These are simply examples of how to incorporate Bensel's typology to interpret a constitutional decision. The decisions below were chosen because they are well-

⁵ The following section is taken directly from Richard Bensel *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877* (New York: Cambridge University Press, 1990, p. 114).

known cases in constitutional, come from different moments in American constitutional history, and typify the outcomes on central state authority.

***Barron v. Baltimore* (1833): Restriction**

Barron came down shortly before Chief Justice John Marshall's tenure ended in 1835. In this case, John Barron was co-owner of a successful wharf in Baltimore's harbor. As the city developed its infrastructure, the city deposited sand and earth into the Baltimore harbor from a road construction project, depriving Mr. Barron of the deep waters needed to maintain his profitable business. By depositing sand and earth around his wharf, the road construction project made the waters around the wharf too shallow to dock most vessels. Barron sued, claiming that the city ruined his business and violated his Fifth Amendment rights, which provides that the government may not take private property without just compensation. The question the Court faced was does the Fifth Amendment deny the states as well as the national government the right to take private property for public use without justly compensating the property's owner?

In a very brief, unanimous decision, Marshall held for the Court that the limitations on government articulated in the Fifth Amendment were intended to limit the powers of the national government *not* state governments: "The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states" (247). Citing the framers' intent and the development of the Bill of Rights⁶ as an

⁶ Of the framers intentions with respect the Bill of Rights, Marshall said:

[I]t is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government -- not against those of the local governments (250).

exclusive check on the national government, Marshall argued that the Supreme Court had no jurisdiction in this case since the Fifth Amendment did not apply to the states.

Because Marshall declared the Court (part of the central state) had no jurisdiction to hear this case, this decision represents a restriction along the “centralization” dimension. The Court left power in the hands of the Maryland state legislature to control property rights as it saw fit thus the Court also restricted the “property” dimension with respect to the federal government. In other words, the central state—in this case the Supreme Court—had no authority to remedy Mr. Barron’s property claim. In confronting questions both about decision-making authority and property, *Barron* thus interacted with two of Bense’s seven dimensions: the centralization and property dimensions, restricting the central state authority in both realms.

Humphrey’s Executor v. United States (1935): Neutral

On December 10, 1931, President Herbert Hoover nominated, and the Senate eventually confirmed, William Humphrey as head of the Federal Trade Commission (FTC). When Franklin Roosevelt assumed the presidency he asked for Humphrey’s resignation in 1933 since Humphrey, as a conservative, might not be sympathetic to many of Roosevelt’s New Deal policies over which Humphrey had jurisdiction. When Humphrey refused to resign, Roosevelt fired him. However, the FTC Act⁷ only allowed a president to remove a commissioner for “inefficiency, neglect of duty, or malfeasance in office” (623). Since Humphrey died shortly after being dismissed, his executor sued to recover Humphrey’s lost salary. The Court was asked to determine if section 1 of the Federal Trade Commission Act unconstitutionally interfered with the executive power of the president to remove appointees.

⁷ 15 USCS § 41

The Court's unanimous decision said the FTC Act was constitutional and that President Roosevelt, given the circumstances, did not have the authority to dismiss Humphrey. The Court reasoned that the Constitution had never given "illimitable power of removal" to the president and, instead, authority rested with Congress to create agencies of the central government independent of executive control:

We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office (629)⁸

Humphrey thus limited the power of one branch of the central government while expanding power of another branch. In doing so, *Humphrey* typifies a "neutral" impact on overall central state authority because it merely said that Congress, not the executive, has the authority to determine when an agency head may be discharged from her duties. Therefore, the overall central state (as a single entity) did not lose authority.⁹ With respect to the individual dimensions, *Humphrey* constricts the administrative dimension because it left the authority to control an administrative agency with the less statist branch of the national government—the Congress.

***Brown v. Board of Education* (1954): Expansion**

Brown v. Board of Education expanded central state authority. In Topeka, Kansas, the school board denied black children admission to public schools attended by white children under local laws permitting segregation according to the races. White and black schools, in Topeka, both assessed equality in terms of objective factors such as buildings, curricula, qualifications, and teacher salaries.

⁸ Writing for the opinion of the Court, Justice Sutherland dismissed the government's main line of defense in this case which relied heavily on the Court's decision in *Myers v. United States* (1926). In that case the Court upheld the president's right to remove officers who were "units in the executive department" (627). Sutherland argued that the FTC was different because Congress created the agency to perform quasi-legislative and judicial functions and hence it was not "subject to the exclusive and illimitable power of removal by the Chief Executive" (627). The *Myers* precedent, therefore, did not apply in *Humphrey*.

⁹ Neutral outcomes, like *Humphrey*, make up less 4 percent of the data: 13 of 388 decisions.

The central question in *Brown* was did segregation of children in public schools solely on the basis of race deprive the minority children of the equal protection of the laws guaranteed by the 14th Amendment? Despite the equalization of the schools by “objective” factors, the Court held that intangible psychological issues foster and maintain inequality. More specifically, racial segregation in public education has a detrimental effect on minority children because it is interpreted as a sign of inferiority. Consequently, the Court rejected the long-held doctrine, first promulgated in *Plesy v. Ferguson* (1896), that separate facilities were permissible provided they were equal. The unanimous decision invalidated all forms of state-maintained racial separation.

Brown conferred rights on blacks by expanding their national citizenship rights and thus diminished *local state* authority to promote segregationist laws. Here, the Court rested its justification on the importance of public school education in shaping democratic citizens:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship (493).

Any state policy that obstructed the creation of “good citizenship,” then, was unconstitutional. In *Brown*, the policy, of course, was state mandated segregation and, according to the Court, such segregation impeded the education of African-Americans:

To separate [African-Americans] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn (494).

Brown, therefore, falls along one of the seven dimensions in the above taxonomy, citizenship.

In addition to the citizenship dimension, the decision also falls within the “centralization of authority” dimension. The Court moved the authority to determine citizenship (education) rights from state/local governments to the *federal* Supreme Court. *Brown* thus shifted the status quo of a policy area (education) into federal sovereignty. In the end, *Brown* expanded the private rights of African-Americans, and it also consolidated authority over such questions as education in the hands of the

central government. To that extent, the Court simultaneously contracted local governmental authority and expanded central state authority.

The decisions above exemplify how the Court influences central state expansion vis-à-vis Bensel's seven dimensions. Delineating the central state along these attributes enables us to examine American state expansion in a nuanced *and* systematic way. The next section reports the findings when Bensel's framework is applied to the constitutional decisions comprising the data.

Case Selection Method

This project created an original dataset, spanning America's history, coding judicial decisions for their importance toward constitutional law as well as their relationship toward central state authority (expanding, restricting, or neutral). Following David Mayhew's (2000) *American Congress* dataset construction style, I used secondary source constitutional law casebooks (textbooks used to teach constitutional law in law schools) in order to compile a list of landmark constitutional decisions and to demonstrate the Court's multifaceted relationship with central state authority.¹⁰

No two scholars, however, agree on the same list of landmark decisions (i.e. the constitutional law canon). This canon, as Keith Whittington and Amanda Rinderle note, "is neither timeless nor natural" (Whittington and Rinderle 2012, 5). Given the ever-changing nature of the canon, my project required a research design that allows me to construct a relatively unbiased list of landmark decisions. I derived my decisions from fifty-eight constitutional law casebooks and treatises¹¹ published between 1822 and 2010, which is detailed further in Figure 1 below. The breadth of these casebooks mitigates the hindsight biases associated with creating a list of landmark decisions grounded in the opinions of

¹⁰ In his book, Mayhew sought to catalogue Congressional members' "actions" in the "public sphere." To do so, Mayhew used thirty-eight secondary source undergraduate history textbooks to identify 2,304 instances of members' actions in Congress. From this database, Mayhew offers insight on a variety of Congressional public actions, from the nature of congressional opposition to presidents and the surprising frequency of foreign policy actions to the timing of important activity within congressional careers (and the way that term limits might affect these behaviors).

¹¹ I include only law school casebooks. The selection criteria is explained below.

contemporary scholars. These landmark decisions were the basis upon which to discuss the constitutional foundations of the American state. Each decision is interpreted along the seven dimensions¹² outlined above in order to discover the Court's overall influence on central state authority. With this method, I developed not only a stronger foundation on which to assess the Court's position toward the state but also uncovered constitutional law cases once considered salient by legal scholars that contemporary scholars now consider superseded or defunct.

The main selection criteria for the fifty-eight constitutional law casebooks was their influence on the instruction of law students. The Appendix lists, in chronological order, all the casebooks used to construct the dataset; these are all the earliest editions of a casebook/treatise. The books selected are considered some of the most important treatises and casebooks of constitutional law.¹³ In each instance, the first edition was consulted because many of the casebooks are still in print and used throughout the most prestigious law schools in the U.S. In addition to using first editions of each book, I distributed casebooks fairly evenly across American history (weighted toward the present-day) and chose only casebooks used to train lawyers; I selected books that were used to train legal actors, individuals who would most likely shape the development of American law. Moreover, I also selected books for their wide use in current law school curricula. Most, if not all, the major casebooks currently used in law schools are represented on my list (Sullivan and Gunther; Brest et al.; Choper et al.; Stone et al.; and Varat et al.). The authors of these major casebooks often use their books in their respective institution. And, of course, these authors have taught at some of the most well-regarded law schools around the country—Yale (Balkin), Stanford (Brest and Sullivan), Texas (Levinson), Choper

¹² Bense, *Yankee Leviathan*. See Table 1 above for a description of all seven dimensions.

¹³ I have accessed syllabi, where possible, from leading law schools as well as explored a widely-read legal academic blog regarding the selection of casebooks for constitutional law classes: "Choosing a Constitutional Law Casebook" http://prawfsblawg.blogs.com/prawfsblawg/2007/05/choosing_a_case_1.html accessed 23 June 2014. I have included all the casebooks referenced in this blog entry.

(Berkeley), and Varat (UCLA). The casebook list thus includes the most authoritative and contemporary casebooks used to teach constitutional law.¹⁴

In a similar sense, I assembled a dataset of Supreme Court cases from dozens of constitutional law casebooks published between the late-nineteenth century and the present day. The publications of these casebooks began in the mid-1800s when universities started to offer law degrees.¹⁵ Accordingly, the legal community considers these casebooks authoritative and representative of the important decisions spanning America's constitutional history. Indeed, many of the casebooks used in this study have appeared in many revised editions thereby indicating the legal community's high regard for these sources. To represent the period before the rise of casebooks, I incorporated widely read legal treatises, such as James Kent's (1826) *Commentaries on American Law* and Joseph Story's (1833) *Commentaries on the Constitution of the United States*, in my casebook list (see Appendix). Legal treatises were the primary way individuals learned how to practice law before the advent of law schools.¹⁶

¹⁴ Because I am unable to include *all* casebooks ever published, there is a selection effect on the casebooks included in the database. This concern pertains especially to the latter part of twentieth century when casebook publication proliferated. Accordingly, I selected more casebooks from the twentieth century to mitigate this problem (see the distribution of casebooks in Figure 2 below). Still, a great deal of books have been omitted. The omission of these books is less of a problem considering that there is a large consensus, *in a given era*, of what comprises landmark decisions. From the link in footnote 13, it appears that the law schools, in a given period, use only a handful of casebooks to teach constitutional law. I have included what seems to be the most widely-used casebooks.

¹⁵ Dean of Harvard Law School, Christopher Columbus Langdell, instituted the now-prototypical three year casebook method law school curriculum in 1876. Langdell's casebooks were excerpts of actual cases arranged to illustrate the principles of law and how law developed. As a result, writes Lawrence Friedman in his seminal *A History of American Law*, "the classroom tone was profoundly altered" (Friedman 2005, 468). Before the rise of law schools, legal education took place through apprenticeships: "Most lawyers gained their pretensions by spending some time in training in the office of a member of the bar. . . . For a fee, the lawyer-to-be hung around an office, read Blackstone and Coke and miscellaneous other books, and copied legal documents" (Friedman 2005, 238). See Friedman p. 238-241 for an overview of legal education in America until the mid-19th century.

¹⁶ There is a well-documented history regarding the evolution of American legal education. For an extensive overview of this literature, see Hugh C. MacGill and R. Kent Newmyer's chapter in *The Cambridge History of Law in America, Volume II (1789-1920)*: "Legal Education and Legal Thought, 1789-1920 (p. 36-67). Of particular importance to American legal education, MacGill and Newmyer note that through the War of 1812 most of American law students educated themselves by reading primarily English treatises, especially Sir William Blackstone's (1764) four volume *Commentaries on the Laws of England*. They maintain that, up until the 1870s, Blackstone "did more to shape American legal education and though [more] than any other single work" (MacGill and Newmyer 2008, 40-41). Nevertheless, American treatises like James Kent's (1826) *Commentaries on American Law* because progressively widely used (MacGill and Newmyer 2004, 43). MacGill and Newmyer note that several developments—among them, the steam press, cheap paper, and the establishment of subscription law libraries—enabled wide circulation long before the advent of law schools in the 1870s:

The first step in creating the dataset was to create a single, alphabetical list *all* the cases found in each casebook’s index in an Excel spreadsheet. This list comprised the far left column in the Excel spreadsheet (see Figure 1 below). When a casebook distinguishes¹⁷ “principal” cases in its index, I listed only the “principal”¹⁸ Supreme Court cases in the far left column of the spreadsheet. If the casebook did not distinguish among cases then I listed *all* cases found in the index. Each column within the spreadsheet represents the author of one of the fifty-eight casebooks. From left to right, the columns are listed chronologically. If a case appeared in casebook, I placed a “1” in the cell; if a case did not appear in the book, I placed a “0” in the cell. Figure 1 is a representation of this method:

Figure 1: Example of Casebook Listing Method

| Case: | Sergeant, Thomas 1822 | Pomeroy, John 1868 | Cooley, Thomas 1880 | Boyd, Carl 1898 | Hall, James 1913 | Wambaugh, Eugene 1915 |
|--------------------------------|--------------------------|-----------------------|------------------------|--------------------|---------------------|--------------------------|
| Abate v. Mundt | 0 | 0 | 0 | 0 | 0 | 0 |
| Abby Dodge, The | 1 | 0 | 0 | 0 | 0 | 0 |
| Abercrombie v. Dupuis | 1 | 0 | 0 | 0 | 0 | 0 |
| Ableman v. Booth | 0 | 1 | 1 | 0 | 0 | 1 |
| Abood v. Detroit Board of Ed | 0 | 0 | 0 | 0 | 0 | 0 |
| Abrams v. US | 0 | 0 | 0 | 0 | 0 | 0 |
| Adair v. United States | 0 | 0 | 0 | 0 | 1 | 0 |
| Adams v. Brennan | 0 | 0 | 0 | 0 | 1 | 0 |
| Adams v. Chicago, B & N R. Co. | 0 | 0 | 0 | 0 | 1 | 0 |
| Adams v. Hackett | 0 | 1 | 0 | 0 | 0 | 0 |

Note and Sources: Compiled by author. This graphic represents a microcosm of the larger database, but these decisions and casebooks appear in the Excel case-listing in actuality. The far left column are the cases, and the remaining columns each represent a casebook (author and year of publication).

“The treatise tradition, which did so much to shape law-office education, also greatly influenced the substance and methods of instruction in early law schools” (2004, 44).

¹⁷ Casebook editors most frequently distinguish principal cases by italicizing the case name in the index.

¹⁸ “Principal cases” are the Supreme Court decisions quoted and discussed at length in a casebook whereas non-principal cases are merely cited in a footnote or parenthetical within the casebook. An average casebook discusses anywhere between 100 to 500 principal cases.

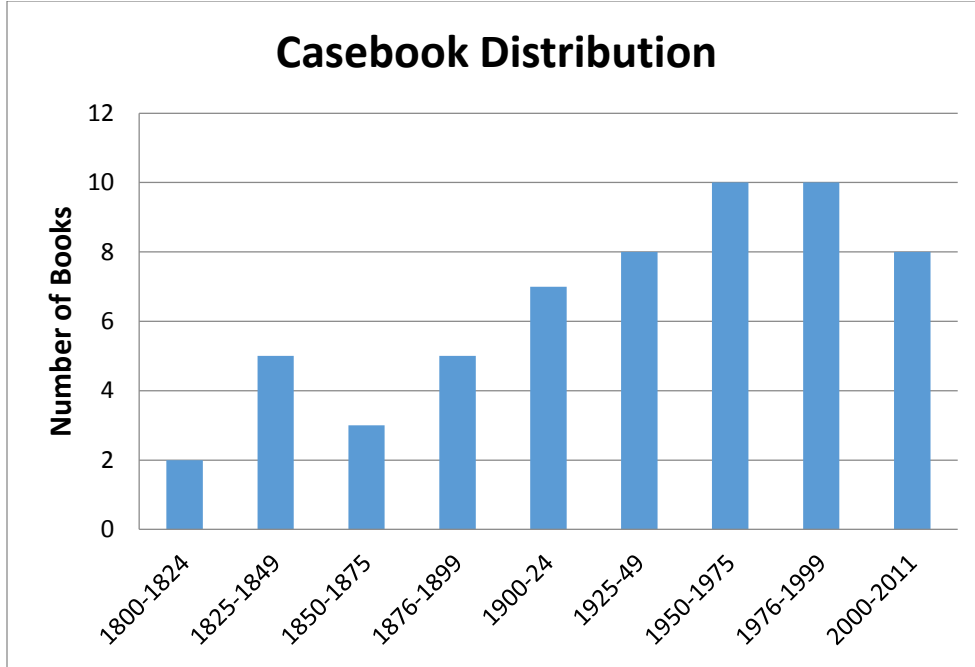
Once all cases were listed, I noted the overlap of cases across the books; the cases cited most often *across* books will be considered leading decisions in constitutional law. Using this case listing method, I extracted 12,192 total cases from these fifty-eight casebooks and treatises of which the vast majority were not Supreme Court cases. Moreover, 8,391 of these 12,192 cases were cited in only one book.¹⁹ From this collection, I selected the 388 decisions (of which all but four were Supreme Court cases) that overlapped across the books eight times or more, which produced an even distribution across history and thus ensured the dataset captured sufficient variation.²⁰

While the list is weighted toward contemporary casebooks, I drew from almost two centuries of casebooks. Drawing casebooks across two centuries' time allows me to track changes in the constitutional law canon; I chose casebooks beginning with the earliest publication I could find (1822) and ending with the most recent (2010). Figure 2 is a graphical illustration of the distribution of casebooks used in the dataset.

¹⁹ This might indicate something about the canon—or lack thereof—of American constitutional law. For a discussion the different kinds and objectives of constitutional canons, see Jack Balkin and Sanford Levinson. 1998. “The Canons of Constitutional Law.” *Harvard Law Review* 111 (4): 963-1024.

²⁰ This eight-book cutoff number produced a manageable-sized dataset as well as prevented biasing against decisions that were handed down later in American constitutional history. The selection criteria intentionally ends the case sample date at 2000, but the casebook sample date ends in 2000. As eight casebooks appear after 2000, a decision in, say, 1999, would have to appear in all casebooks in the 21st century in order to appear in the dataset. Since over 8,000 of the just over 12,000 cases appeared in only one casebook or treatise, a decision appearing in eight or more books proved to be a relatively high rate of appearance.

Figure 2: Casebook Distribution (N=58)



Note and Sources: Compiled by author. This is the distribution of the 58 casebooks and treatises from which I derived the landmark decisions in my database. The selection criterion for these books is outlined above.

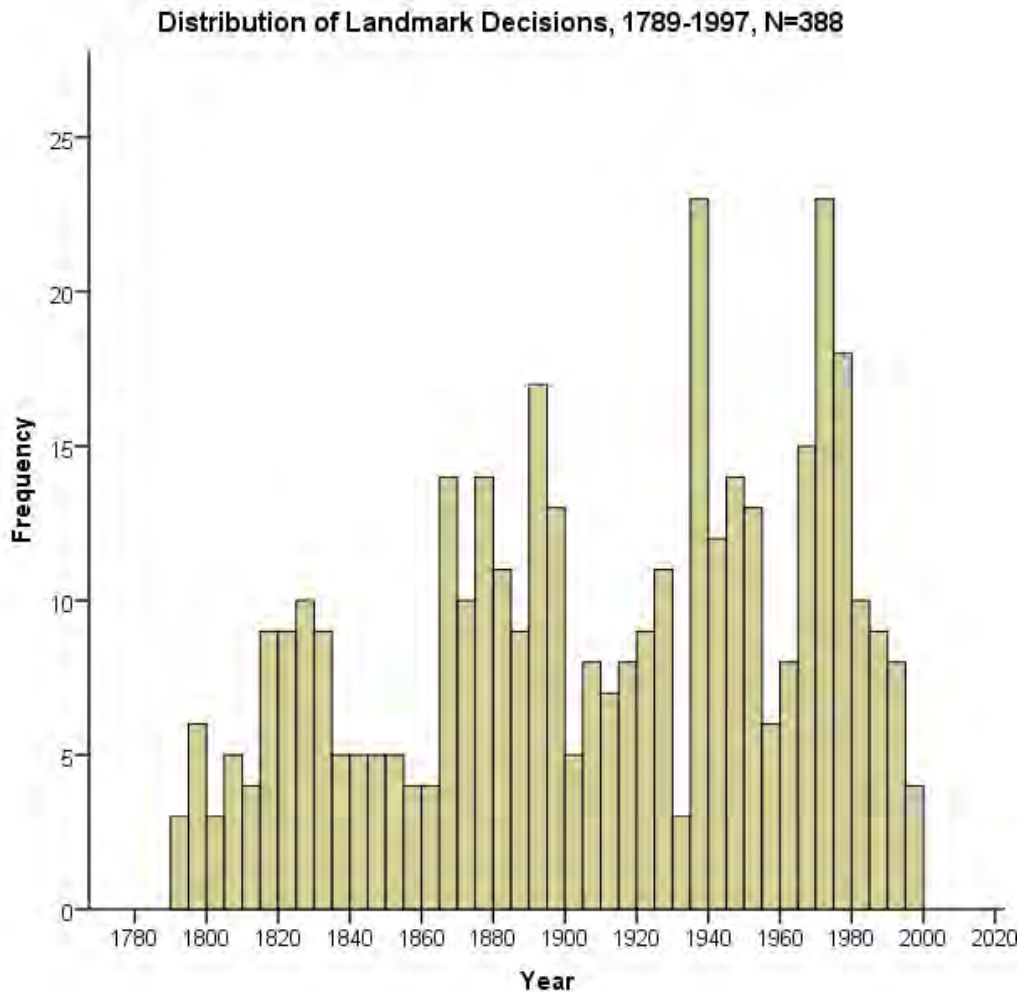
External validation of the cases selected is an important issue because I do not want to select decisions that only lawyers think are salient. The sample of cases should not just represent the casebooks selected but also should represent what the Court and other communities think are important, too. While the casebook design used in this project relies upon what *legal* scholars view as important, the decisions extracted using this design also dovetail with non-legal scholars' opinions, too. In particular, Jerry Goldman conducted a study in 1992 of twelve leading constitutional law casebooks authored by both legal scholars *and* political scientists used in undergraduate classrooms. He attempted to identify a constitutional law canon—"a widely accepted body of rules, principles, and norms exemplified in a common set of Supreme Court opinions" (Goldman 1992, 134). Like my research, Goldman found very little overlap in the cases that comprise these casebooks (Goldman 1992, 137). In 2005, he conducted a similar study of thirteen casebooks authored by political scientists

for undergraduate teaching. Using his loosest definition of “canonical,” Goldman identified 49 constitutional law decisions. My database includes 46 of his 49 decisions. While this is not sufficient external validation of my case selection, it begins to show that the cases identified by my method are not systematically biased by lawyers’ own educational experiences and their intellectual beliefs.

The Court and Central State Expansion: Descriptive Findings

When Bense’s framework is applied to the 388 constitutional decisions comprising the dataset, we find that the Supreme Court has moved back and forth between contraction and expansion of state authority across constitutional development. Figures 3.1 and 3.2 display the distribution of the leading decisions across year and across influence on national government power. Figure 3.1 arrays the frequency of all leading casebook decisions contained within the dataset with a bin size set at 5. Important to note is that each quarter-century contains at least thirty landmark decisions. The number of decisions is generally greater toward the present day because casebooks were also weighted toward the present day.

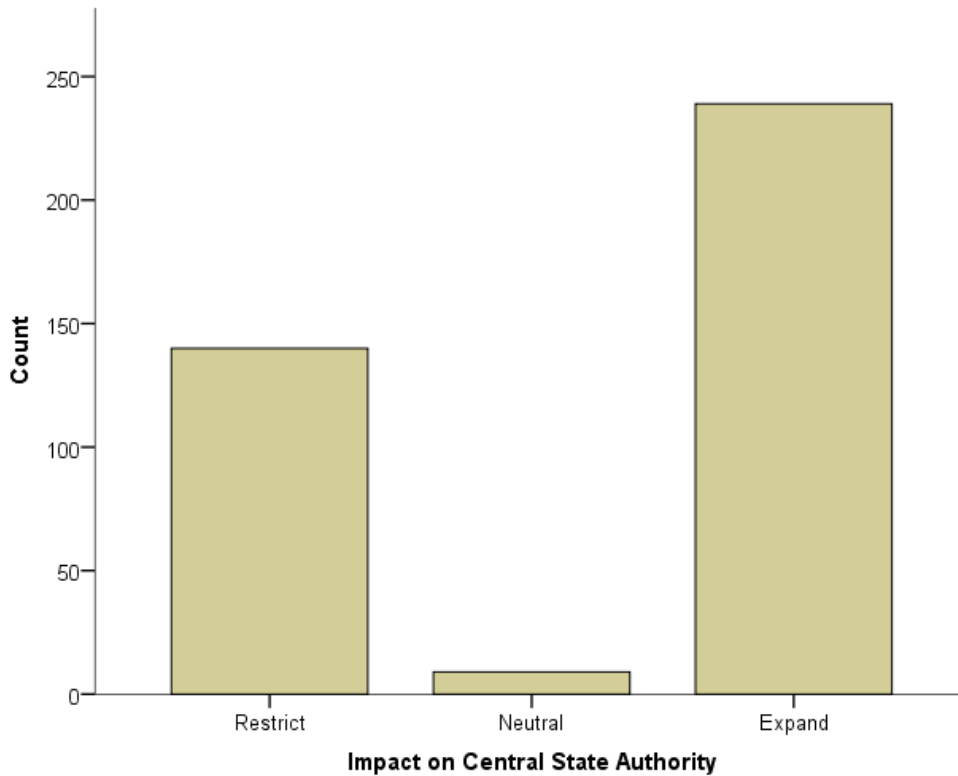
Figure 3.1: Distribution of Landmark Decisions Across Years, 1789-1997 (N=388)



Notes and Source: Compiled by author.

The distribution in Figure 3.2 represents an important trend of American constitutional development—that it generally expanded the powers of the federal government. The trend in this chart reveals that the Court did much to expand federal power through its constitutional interpretation. Of the 388 decisions, 141 restricted authority, 8 remained neutral, and 239 expanded governing authority. Important to note is that we see only the *overall* impact on federal government power; the impact on each of the seven central state dimensions is presented in Figure 7.1 below

Figure 3.2: Distribution of Cases Affecting Central State Authority, 1789-1997 (N=388)

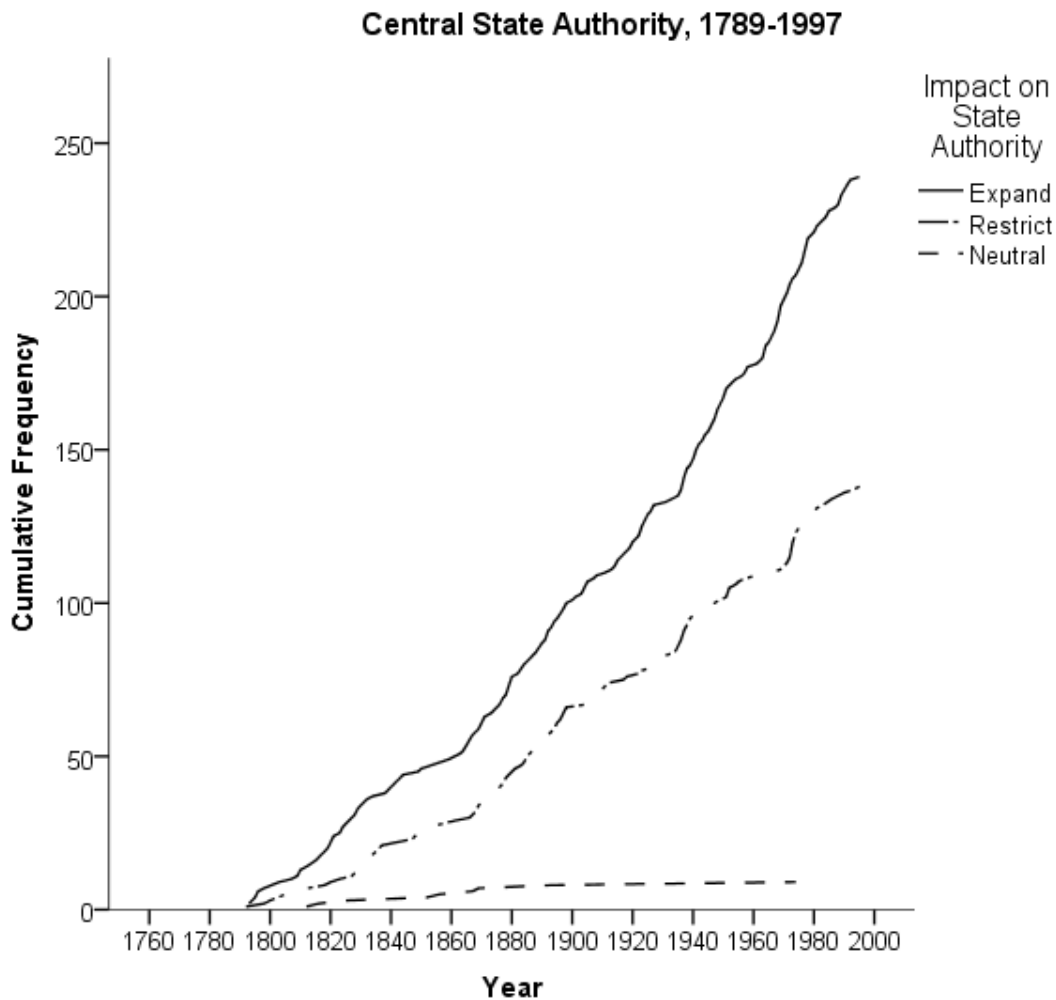


Notes and Source: Compiled by author.

While expansion remains the largest of the three categories, the Court also frequently restricted state development. Figure 4 portrays this distribution over time. The line chart shows us that constitutional development expands and restricts governing authority throughout history.

The Court's expansive and restrictive decisions, however, consistently grows farther apart. Below, Figure 4 considers time as it maps the number of constitutional decisions influence on overall state authority. Decisions that expand grow at a far quicker rate than those that restrict especially after 1900. More than that, Figure 4 demonstrates that expansive decisions grow at a faster rate than restrictive decisions throughout all of American constitutional history.

Figure 4: Cumulative Frequency of Constitutional Decisions Impact on Central State Authority, 1789-1997 (N=388)

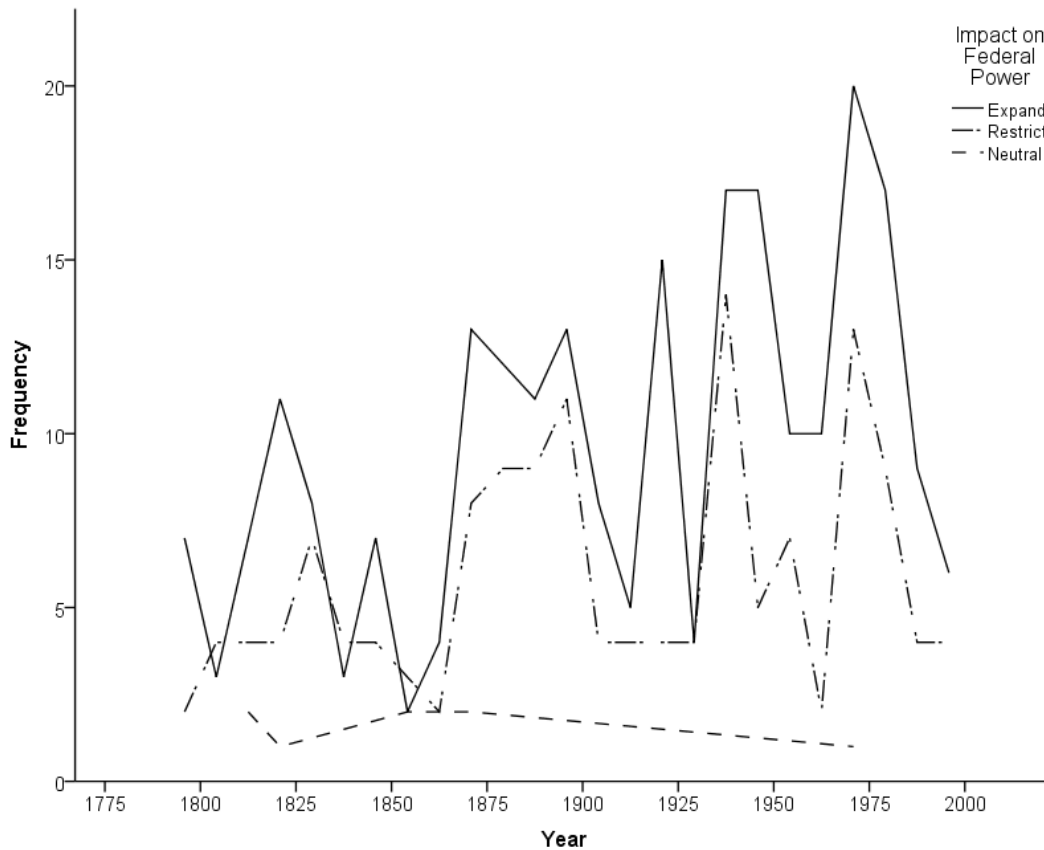


Notes and Source: Compiled by author. This cumulative frequency chart shows the relatively steady growth of decisions that both expand and restrict federal government power. Around 1900, decisions that restrict experienced a more gradual growth rate while expansion decisions experience a faster growth rate.

Nevertheless, the story of American constitutional development rests largely on the push and pull between expanding and restricting the federal government’s power. Breaking down the Court’s behavior across quarter centuries reveals a more detailed look at the Court’s impact on national power so Figure 5.1 maps these cumulative frequencies across quarter-centuries. In Figure 5.1 we begin to see a more detailed relationship between decisions that restrict and expand than we see in the overall

cumulative frequency. The founding period witnessed the greatest disparity between decisions that expand and those that restrict while the period from 1825 to 1850 saw roughly an equal number of decisions that expand restrict federal power. After around 1860 the decisions mirror each other's trajectory, that is, the shape of their lines resemble one another, but restrictive decisions nevertheless remain less frequent.

Figure 5.1: Impact on Central State Authority Line Chart by Year, 1789-1997 (N=388)



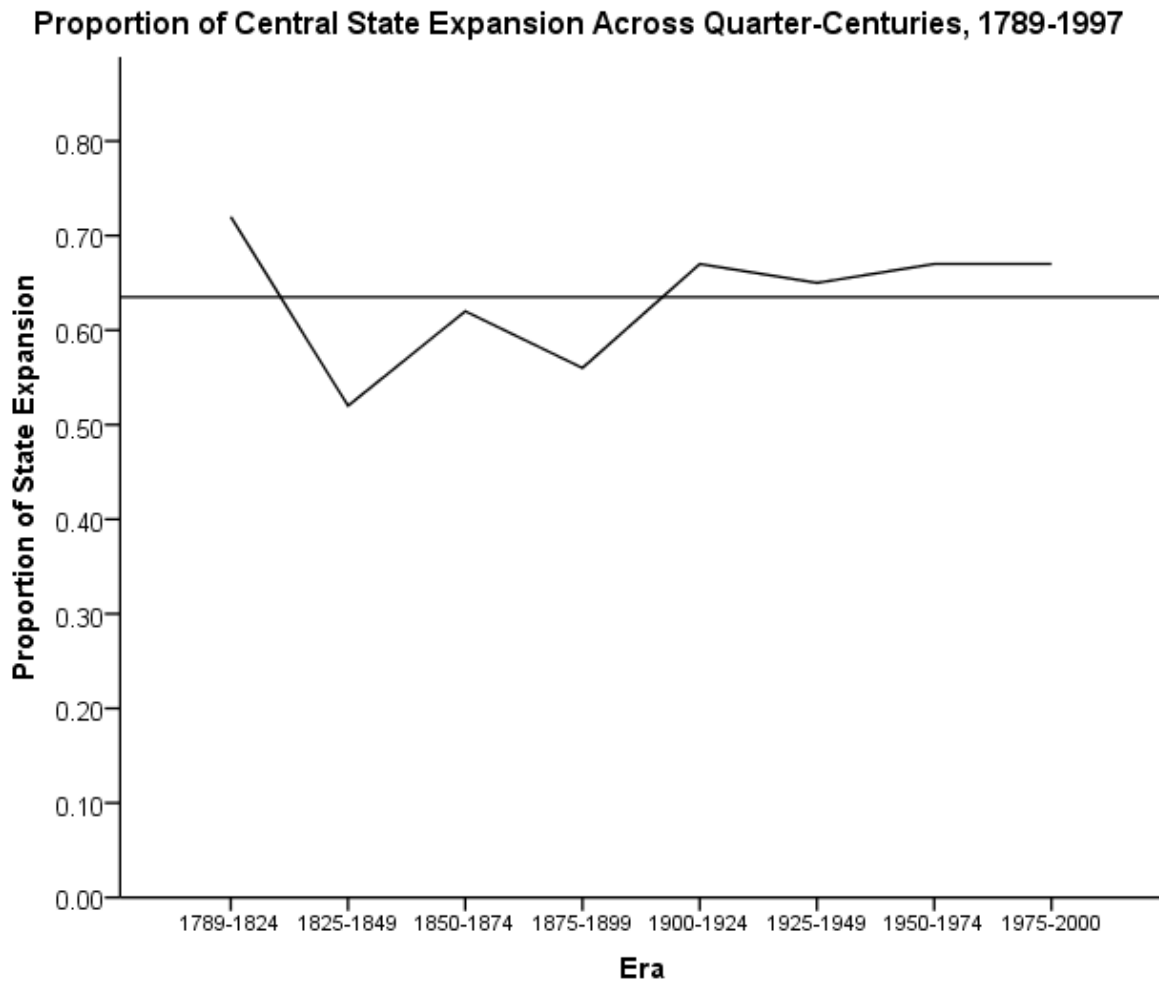
Notes and Sources: Compiled by author. The graph plots the number of decisions in each year, presenting the relationship among the three outcomes on central state authority across constitutional history. Expanding decisions persistently outweigh restricting ones after around 1860. Before then, however, developmental patterns do not follow as neat of a pattern. The disparity between decisions that expand and decisions that restrict is greatest during the founding until about the Jacksonian era (1789-1824).

While restriction declined in the twentieth century, it remained a prominent feature throughout constitutional development. Somewhat surprisingly, the Court, contrary to well-known accounts,²¹ handed down many decisions that expanded central state authority between 1875 and 1920. Typically, the Court is depicted as inhibiting central state growth, but Figure 5.1 demonstrates the opposite: the Court was active in advancing important dimensions of central state authority.

Using quarter century periods in Figure 5.2, the proportion of state expansion graphic reveals a relatively static picture of constitutional development post-1900; constitutional development vis-à-vis central state authority, did not shift too far from the average rate of expansion across quarter-centuries. But before 1900, constitutional development fluctuated more widely than it did post-1900. Figure 5.2 maps this proportion across time, supporting Figure 5.1 in showing that some supposed periods of restriction (e.g. 1900-1924) show more variation than we think, and other periods (like the New Deal era) witness more stasis than we think.

²¹ For example, Stephen Skowronek's (1982) *Building a New American State* and Howard Gillman's (1993) *Constitution Besieged* both of which see the Court as a the foil in efforts to build the American state.

Figure 5.2: Proportion of Central State Expansion across Quarter Centuries (N=378)



Notes and Sources: Compiled by author. Neutral decisions were not included. The proportion is a function of the number of decisions that expanded authority over the total number of decisions in a given quarter-century era. Neutral decisions were not included in the proportion. The Y-line is set at the mean rate of expansion (.63). Until the twentieth century, there was much greater fluctuation in the rate of state expansion yet, even during the slowest rates of state-building, the Court's decisions expanded governmental power over half the time.

The proportion of state expansion (Figure 5.2) tells us a great deal about the evolution of the constitutional interpretation pertaining to state authority: it has not changed a whole lot. Surely, the interpretation of the federal government's specific powers have changed immensely, but the *overall* impact on the growth of the state has not. Taking the long view, the Court has persistently expanded federal power with a focus on whether this power should be advanced in new policy areas.

Moreover, the punctuated equilibrium depictions of the New Deal are put into question with Figure

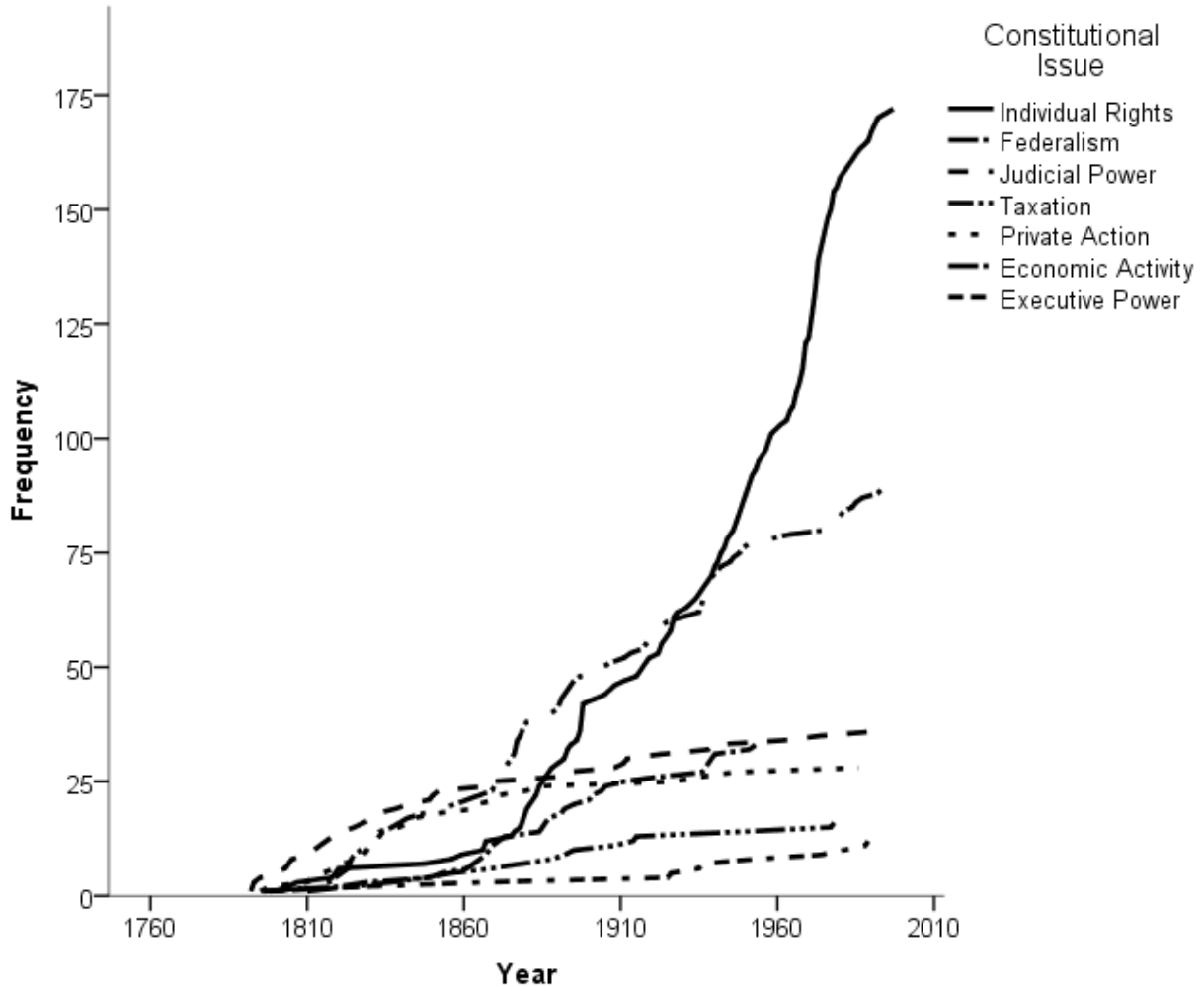
5.2. This Figure has implications for the standard interpretation of the New Deal as a critical juncture, which, it is held, witnessed an abrupt shift in federal government authority.²² On the contrary, Figure 5.2 shows that the process of change was far more gradual than typically posited.

While Figures 3 through 5 offer sweeping characterizations of the Court's role in state development, incorporating the seven central state dimensions (Table 1 above) and constitutional issues yields a more nuanced story than Figures 3 through 5 allow. Two constitutional issues dominate the Court's jurisprudence—individual rights and federalism.²³ Federalism pertains to decisions concerning the relationship between national and state governments (often Commerce Clause related) while individual rights concerns the government's control over individuals. Individual rights decision do not become prominent in the data until after 1870 when we see a steep increase in the frequency of these decisions, which surpasses the federalism decisions by around 1920. By contrast, federalism steadily rises throughout American constitutional history. Figure 6.1 demonstrates these trends along seven legal issue areas.

²² Barry Cushman's (1998) *Rethinking the New Deal* and G. Edward White's (2000) *Constitution and the New Deal* also push against the standard interpretation that the New Deal was an abrupt turning point in constitutional development. See footnote 35 above.

²³ See the Appendix for definitions of each constitutional issue area.

Figure 6.1: Cumulative Frequency of Constitutional Decisions across Issue Areas, 1789-1997 (N=388)



Notes and Source: Compiled by author. The legend displays legal issues in descending order with the frequency line corresponding with the legend (e.g. Individual Rights is the most frequent thus it is at the top of the legend). By measuring these frequencies, this chart tracks the evolution of seven different legal issue areas. A more fine-grained legal issue variable includes sixteen categories (Figure 6.2 below), but for the purposes of visual display, this graphic collapses sixteen issues into seven. “Individual rights,” for example, includes issues of procedural and substantive due process, criminal procedure, First Amendment, and civil rights and liberties decisions. Most telling is that individual rights and federalism decisions comprise the vast majority of decisions in the data.

The crosstabulation seen in Table 2 examines these constitutional issue areas with respect to their impact on central state authority. All legal issues both expand and restrict central state authority save

executive power, but at twelve total decisions, there are not enough cases within executive power to draw any conclusions.

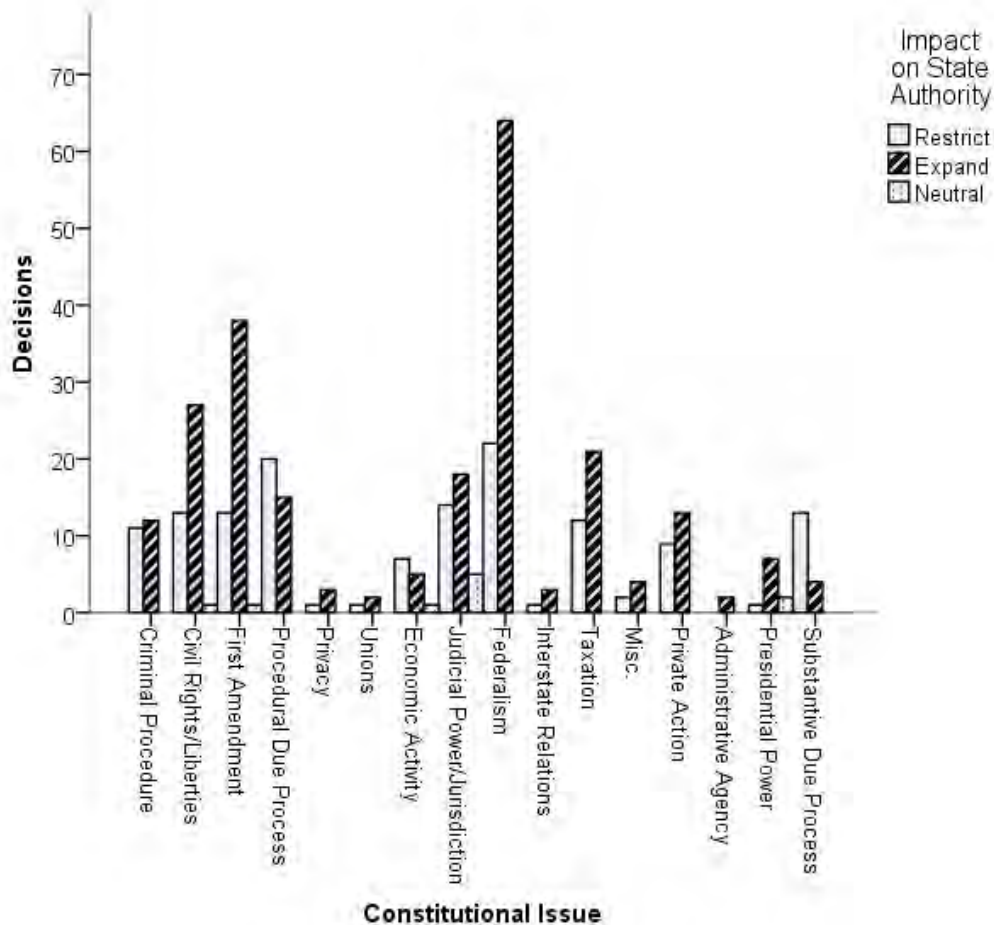
Table 2: Crosstabulation of Constitutional Issue Area by Impact on Federal Authority, 1789-1997 (N=388)

| Constitutional Issue Area | | Impact on Central State Authority | | | Total |
|---------------------------|------------|-----------------------------------|---------|--------|--------|
| | | Restrict | Neutral | Expand | |
| Individual Rights | Count | 70 | 3 | 99 | 172 |
| | % of Total | 18.0% | 0.8% | 25.5% | 44.3% |
| Economic Activity | Count | 7 | 1 | 8 | 16 |
| | % | 1.8% | 0.3% | 2.1% | 4.1% |
| Judicial Power | Count | 14 | 5 | 18 | 37 |
| | % | 3.6% | 1.3% | 4.6% | 9.5% |
| Federalism | Count | 23 | 0 | 67 | 90 |
| | % | 5.9% | 0.0% | 17.3% | 23.2% |
| Taxation | Count | 12 | 0 | 21 | 33 |
| | % | 3.1% | 0.0% | 5.4% | 8.5% |
| Private Action | Count | 11 | 0 | 17 | 28 |
| | % | 2.8% | 0.0% | 4.4% | 7.2% |
| Executive Power | Count | 2 | 1 | 9 | 12 |
| | % | 0.5% | 0.3% | 2.3% | 3.1% |
| Total | Count | 139 | 10 | 239 | 388 |
| | % of Total | 35.8% | 2.6% | 61.6% | 100.0% |

Notes and Source: Compiled by author. The crosstab indicates that individual rights and federalism decisions are most abundant in the data and that each issue tends generally toward the expansion of federal power.

Graphing Table 2 into clustered bar chart offers a more fine-grained look at constitutional issues' impact on federal power. Figure 6.2 disaggregates the constitutional issues into further categories, offering a more nuanced depiction of the legal issues. First Amendment and federalism decisions greatly expand federal government power.

Figure 6.2: Impact on Federal Authority by Constitutional Issue, 1789-1997 (N=388)



Notes and Sources: Compiled by author. This chart disaggregates the constitutional issues into the 16 issue areas utilized by Harold Spaeth’s leading Supreme Court Database. Notably, First Amendment and federalism decisions enhance federal government control over lower governments and citizens. More than that, in virtually every legal issue area the Court expanded the powers of the national government. These issue areas come from Spaeth’s Supreme Court Database accessed here: <http://scdb.wustl.edu/documentation.php?var=issueArea>

Because individual rights and federalism comprise almost 68% of all the decisions, it is worth exploring the two central state dimensions²⁴ that touch closely upon these constitutional issues: the centralization and citizenship dimensions. Centralization involves the transfer of decision-making

²⁴ See Table 1 above for a list of all seven dimensions.

authority from the individual states or citizens to the national government. And citizenship pertains to issues concerning individual rights. Consequently, these two dimensions interact with civil rights and federalism frequently.

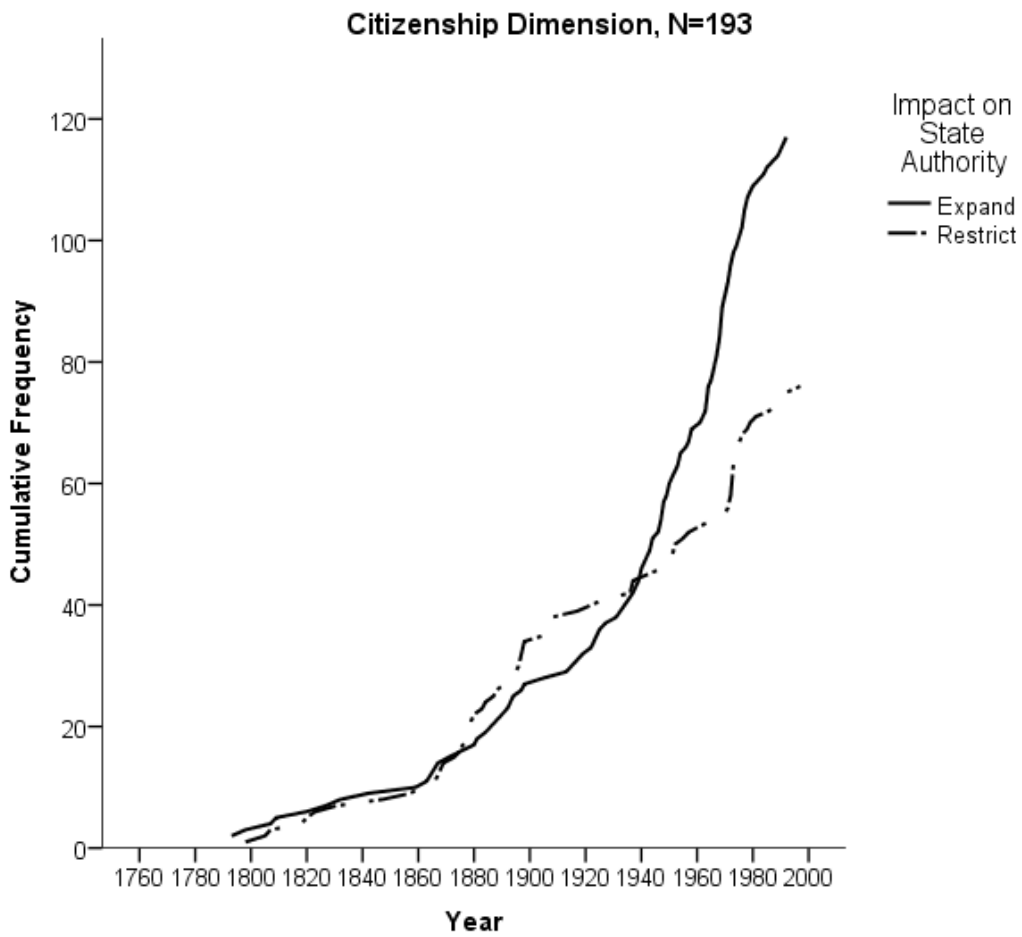
Of the seven dimensions, centralization and citizenship are the most frequent—nearly 50% of all decisions interact with citizenship while 94% of all decisions interact with centralization.

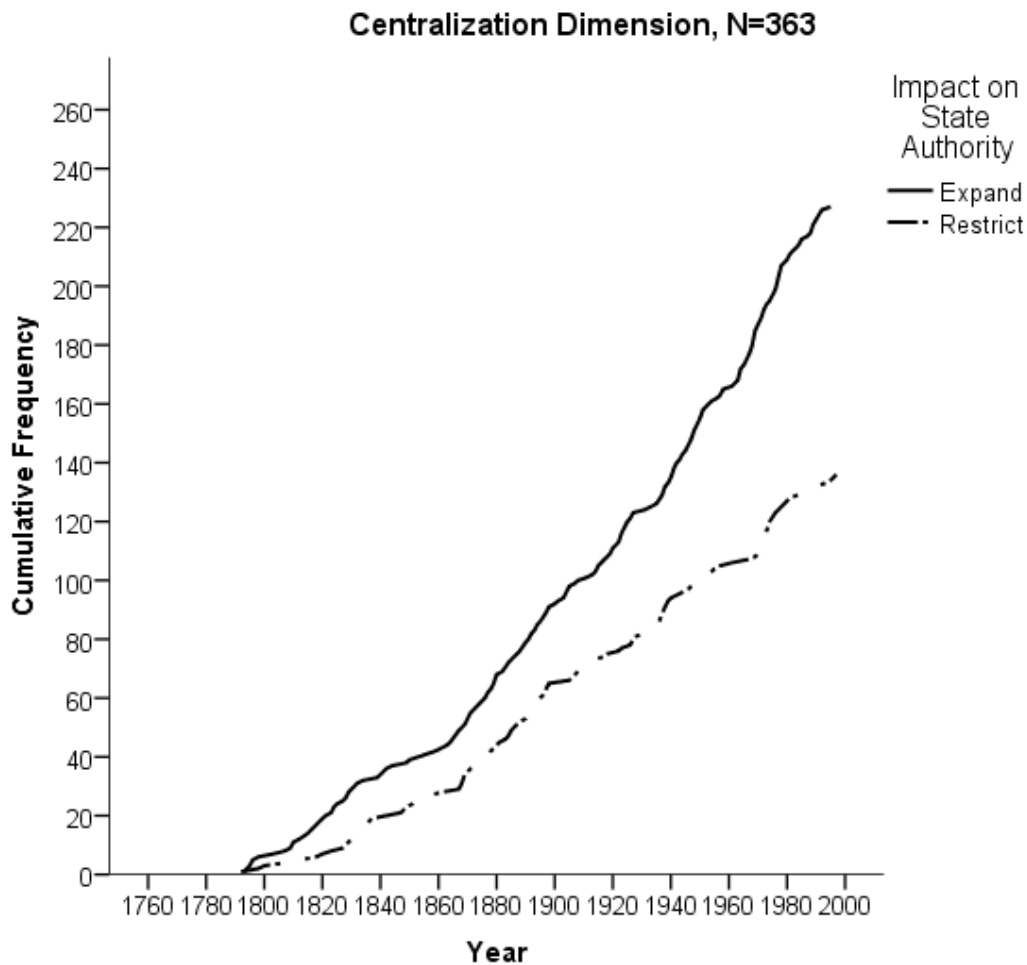
Indeed, the development of the centralization dimension looks identical to the development of the overall impact on central state authority seen above in Figure 4.²⁵ The graphs in Figure 7.1 juxtapose the development of citizenship and centralization dimension

²⁵ Figure 4 graphs the overall impact on central state authority, that is, the change of any one of the seven central state dimensions. This overall impact is not separate from the seven central state dimensions. For example, if a decision restricted/expanded the centralization dimension then that would also indicate a restriction/expansion of the overall impact on authority. However, simply because these two variables (central state dimensions and overall impact) are intimately linked does not explain why the centralization dimension—more than any other dimension—is the most abundant in these data.

Like many of the graphs above, Figure 7.1 indicates that both central state dimensions fluctuated between expansion and restriction. Nevertheless, expansion is the predominant outcome over time, especially in the centralization graph, as the cumulative frequency graphs below in Figure 7.1 also demonstrate. Expansion is persistently the more frequent outcome for centralization while - expansion-restriction stays much closer together for citizenship until around 1940 when decisions that expand federal power rise dramatically.

Figure 7.1: Cumulative Frequency of Citizenship and Centralization Dimensions, 1789-1997





Notes and Sources: Compiled by author. These graphics take a cumulative count of the expansion-restriction decisions under the centralization and citizenship dimensions, first displayed in Figure 7.1. Important to note that expansive decisions within centralization always outweigh restrictive decisions, which resembles the pattern of overall impact on state authority displayed above in Figure 4. In contrast, expansive-restrictive decisions within citizenship grow at nearly the same rate until 1940 when these decisions diverge greatly. After 1940, decisions that expand the federal government’s authority along the citizenship dimension grow sharply.

From the foregoing discussion, we see that the Court’s interpretation of constitutional law both advances and constricts the federal government’s authority, and it does so primarily through the medium of individual rights and federalism. That the central government’s authority expands more frequently than not comes as no surprise, but we do not yet know why this happens. Figure 7.1 seems to indicate that this expansion occurs largely through the channel of centralization, that is, through the transfer of decision-making authority from subordinate governments to the central

government—a hallmark of American constitutional development.²⁶ At bottom, constitutional development deals with who has the authority to decide,²⁷ and this question is enshrined by constitutional design.

Any central state dimension can theoretically involve any of the legal issue areas. The stacked bar chart (Figure 8.1) below shows the ubiquity of centralization across the constitutional issue areas. The bar chart represents the number of decisions (and their corresponding legal issue areas) that fall under the centralization; every legal issue entails some form of centralization and nearly every judicial decision (363 of 388) interacts with centralization. The constitutional issue areas do not fall neatly into each of the seven dimensions; there is some overlap among legal issues and central state dimensions. For example, “federalism” does not fall *solely* under the centralization dimension, as one might think;²⁸ it is also seen as the primary legal issue in some individual rights-related decisions (Figure 8.2), though to a far lesser extent than in the centralization dimension. Similarly, individual rights decisions

²⁶ Others have recognized that transferring of governing authority typifies constitutional development, but that transference often centers of the emerging “modern state” of the New Deal era. See, for example, Keith Whittington “Dismantling the Modern State? The Changing Structural Foundations of Federalism.” *Hastings Constitutional Law Quarterly* 483 (1997): 483-528. Whittington argues that the “logic of the modern state” of the early twentieth century “favored centralization of political authority and influence” (Whittington 1997, 489). I agree with this interpretation, but I would also argue that the Court’s interpretation of constitutional law began centralizing political authority long before the emergence of the “modern state.”

²⁷ This claim is supported by David Robertson’s comprehensive study of American federalism, which argues that the Framers created “a double battleground.” The first pertains to battles fought in every country, “whether the government should do something about health, welfare, the economy...” The second battleground touches upon the question of who decides; Robertson says this battleground “turns on which level of government should have the power to choose whether to act.” David Robertson. 2012. *Federalism and the Making of America*. (New York, NY: Routledge), p. 35.

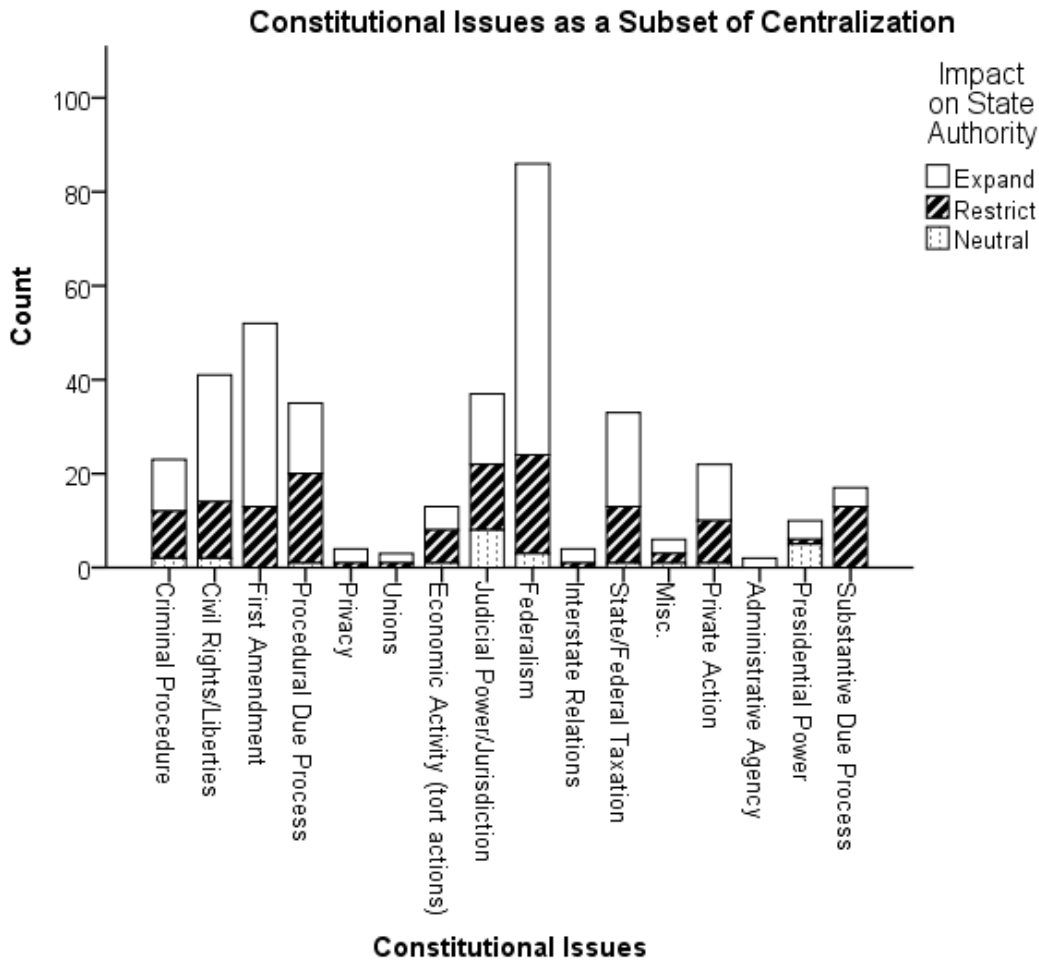
²⁸ Since federalism is a question about national versus state governing authority, one might logically assume that it would fall entirely within the centralization dimension. While federalism nearly always pertains to centralization, there are a couple decisions where it involves a dimension other than centralization.

For example, *Ashwander v. Tennessee Valley Authority* 297 U.S. 288 (1936) involved not the centralization but the administrative, property, and world system dimensions. In this case, the Court held that Congress did not exceed its power by creating the Tennessee Valley Authority (TVA), a government corporation created as part of the New Deal to improve the economy. *Ashwander* concerned the creation of a federal agency, the TVA, to advance the long-term regional planning capacity of the central state (administrative dimension); and it dealt with the TVA’s acquisition of property and equipment of a private power company (property dimension). Last, the Court argued that the Wilson Dam—from which the TVA generated electricity—had been built originally for national defense: to produce materials involved in munitions manufacturing and thus the federal government could assert authority (world system dimension).

Nevertheless, eighty-three of eighty-five federalism decisions implicated the centralization dimension. However, the vast majority touched upon more than simply centralization: forty-nine decisions affected two central state dimensions, and nineteen dimensions concerned three central state dimensions.

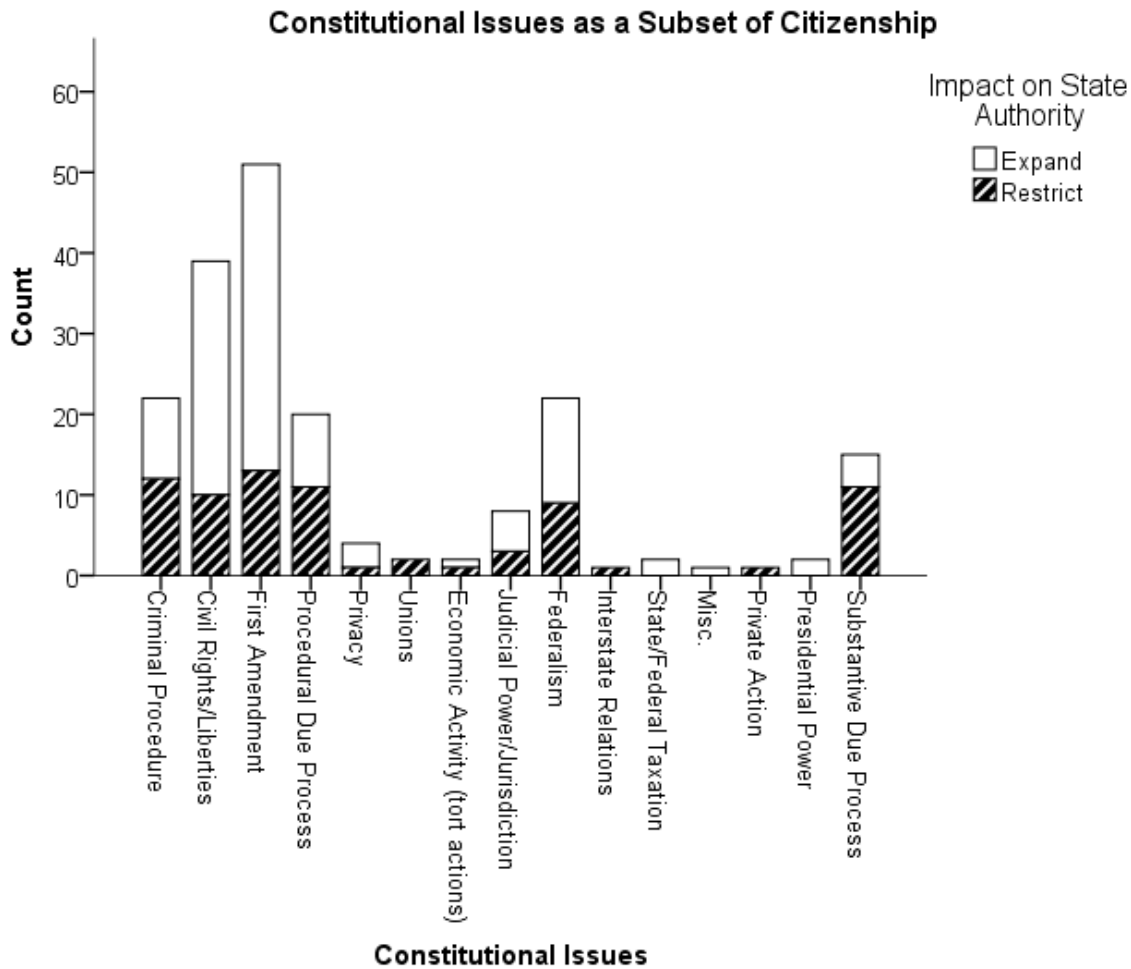
affect not only the citizenship dimension, as we might suspect, but also the centralization dimension (Figures 8.1). Unlike centralization, the citizenship dimension does primarily comprise one legal issue area: civil rights/liberties, but nevertheless, it does entail a handful of other legal issues at times.

Figure 8.1: Constitutional Issues as a Subset of Centralization (N=388)



Notes and Source: Compiled by author. In this stacked bar chart, federalism decisions, the tallest column, primarily fall under the “centralization” dimension. Only a very small portion of federalism cases do not involve centralization as indicated by the dotted “neutral” category. By contrast, the striped (restrict) and white (expand) patterns indicate that when a federalism decision expanded or restricted central state authority, it did so typically through centralization. This graphic shows the prevalence of centralization in American constitutional development across a multitude of legal issues.

Figure 8.2: Constitutional Issues as a Subset of Citizenship (N=193)



Notes and Source: Compiled by author. Because almost 200 decisions did not implicate the citizenship dimension they were not included. Individual rights decisions—criminal procedure, civil rights/liberties, First Amendment, and due process—mainly comprise the citizenship dimension as indicated by the columns on the far left. But much like “centralization,” “citizenship” does not solely subsume individual rights related constitutional issue areas as we might expect. Some federalism and judicial power issue areas, for example, involve the citizenship dimension, albeit to a far lesser extent than the individual rights issue areas. It is important to note that constitutional issues, as seen in Figures 8.1 and 8.2, do not fall neatly into a single dimension of the central state.

Conclusion

The data presented here reveal two facts about constitutional development: 1.) there is a bias toward state expansion and yet 2.) there is still considerable variation, over time, between decisions that expand and restrict authority. By coding hundreds of decisions along seven dimensions of the

federal government, we are able to see when and where the federal government grew in authority. The persistent expansion of the “centralization” dimension begins to show us that the unsettled boundary between state and national authority was, and remains, an integral part of American constitutional development. Additionally, even decisions that were not overtly about centralization (like the individual rights decisions) still had at their foundation questions about *who* (i.e. what level of government) had the authority to regulate individual rights. Focusing on watershed moments in political development, theories of American political development do not currently recognize these patterns.²⁹ The data here, however, reveals the similarities across periods of history and, as such, theories of American political development would benefit from considering the nature of the Constitution in structuring state development as opposed to looking at exogenous moments of “shock” to explain change.

²⁹ Recently, Karen Orren put forth a “theory of the Constitution” that views “each period of major constitutional development [Founding, Reconstruction, New Deal] was driven in significant part by a preceding crisis in the enforcement of criminal law” (Orren 2012, 72). Orren. “Doing Time: A Theory of the Constitution.” *Studies in American Political Development* 26 (April 2012): 71-81, p. 72. Orren’s theory gets us to think holistically about the Constitution and development, but it still focuses our attention on “critical junctures.” The data presented in this chapter, however, attempts to show that even during moments of great change the Court never really strays too far in either expanding or constricting state development.

Appendix

Constitutional Issue³⁰ Area Defined:

This variable indicates the *central* constitutional issue/subject matter of a case at hand. It is a broad variable, and although multiple issues may exist in an individual case, I choose the issue that was most central according to the LexisNexis “headnotes” and summary.

“**Civil rights/liberties**” includes cases which pertain to classifications based on race (including American Indians), age, indigency, voting, residency, military or handicapped status, gender, and alienage. Often includes: Amendments 13, 14, 15, and 19. Civil Rights Acts of 1866, 1870, 1871, 1875, and 1964. It also includes the following:

1. “**Criminal procedure**” encompasses the rights of persons accused of crime, except for the due process rights of prisoners. Such as: involuntary confession, habeas corpus, plea bargaining, search and seizure, self-incrimination, contempt of court, Miranda warnings, right to counsel, cruel and unusual punishment, double jeopardy, retroactivity (of newly announced or newly enacted constitutional or statutory rights). Often includes: Amendments 4, 5, 6, 8, and 14.

2. “**First Amendment**” encompasses the scope of this constitutional provision:

First amendment: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

3. “**Due Process**” is limited to civil guarantees (but *does* include criminal due process). Such as: prisoners' rights and defendants' rights, government taking of property for public use (takings clause), impartial decision maker. Due process rights as written in the 5th and/or 14th Amendments:

5th Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

14th Amendment, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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.

4. “**Privacy**” non-criminal privacy, abortion, use of contraceptives/birth control, right to die, Freedom of Information Act and related federal or state statutes or regulations

“**Economic Activity**” is largely commercial and business related; it includes tort actions (suing business entities) and employee actions in relation to employers.

³⁰ These issue areas, and their definitions, are derived from the “Issue Area” variable of Harold Spaeth’s Supreme Court Database. Accessed here: <http://scdb.wustl.edu/documentation.php?var=issueArea>

“Judicial Power/Jurisdiction” concerns the exercise of the judiciary's own power. To the extent that a number of these issues concern federal-state court relationships, you may wish to include them in the federalism category.

“Federalism” pertains to conflicts and other relationships between the federal government and the states, except for those between the federal and state courts, often includes interstate commerce clause, Amendments 10 and 11. It also includes:

“Interstate relations” not relating to interstate commerce, but including boundary dispute between states, miscellaneous interstate conflicts, and non-real property disputes (anything that is non-real property is personal property and personal property is anything that isn't nailed down, dug into or built onto the land. A house is real property, but a dining room set is not).

“Federal/State Taxation” concerns the Internal Revenue Code and related statutes and the general extraction of material resources from citizens. Often includes: Amendment 16

“Private law” relates to disputes between private persons involving real and personal property, contracts, evidence, civil procedure, torts, wills and trusts, and commercial transactions. Prior to the passage of the Judges' Bill of 1925 much -- arguably most -- of the Court's cases concerned such issues. The Judges' Bill gave the Court control of its docket, as a result of which such cases have disappeared from the Court's docket in preference to litigation of more general applicability.

“Executive Power” pertains to the authority of the president to execute his/her office. Often includes Article II

References

- Adler, William. 2012. "State Capacity and Bureaucratic Autonomy in the Early United States: The Case of the Army Corps of Topographical Engineers," *Studies in American Political Development*, 26: 107-24.
- Baldwin, Peter. 2005. Beyond Weak and Strong: Rethinking the State in Comparative Policy History." *Journal of Policy History* 17, 1: 12-33.
- Balogh, Brian. 2009. *A Government out of Sight: The Mystery of National Authority in Nineteenth-Century America*. New York: Cambridge University Press.
- Bensel, Richard. 1990. *Yankee Leviathan: The Origins of Central State Authority, 1859-1877*. New York: Cambridge University Press.
- Carpenter, Daniel. 2003. *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928*. Princeton, NJ: Princeton University Press
- Cushman, Barry. 1998. *Rethinking the New Deal: The Structure of a Constitutional Revolution*. New York, NY: Oxford University Press.
- Friedman, Lawrence. 2005. 3rd edition. *A History of American Law*. NY, NY: Simon & Schuster.
- Gillman, Howard. 1993. *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence*. Durham, NC: Duke University Press.
- Goldman, Jerry. 1992. "Is There A Canon of Constitutional Law?" *Law and Politics Book Review* 2 (10): 134-137.
- . 2005. "The Constitutional Law Canon Revisited," *Law and Politics Book Review* 15 (8): 648-656.
- Higgs, Robert. 1987. *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (New York: Oxford University Press.
- John, Richard. 1997. "Governmental Institutions as Agents of Change: Rethinking American Political Development in the Early Republic, 1785-1835," *Studies in American Political Development* 11: 347-80.
- Johnson, Kimberly. 2007. *Governing the American State: Congress and the New Federalism, 1877-1929*. Princeton: Princeton University Press.
- King, Desmond and Robert Lieberman. 2009. "Ironies of State Building: A Comparative Perspective on the American State." *World Politics* 61, 3: 547-588.
- MacGill, Hugh and R. Kent Newmyer. 2008. "Legal Education and Legal Thought, 1789-1920" in

- The Cambridge History of Law in America, Volume II, (1789-1920)*, Michael Grossberg and Christopher Tomlins, eds. New York: Cambridge University Press.
- Mayhew, David. 2000. *America's Congress: Actions in the Public Sphere, James Madison Through Newt Gingrich*. New Haven, CT: Yale University Press.
- Sheingate, Adam. 2003. Political Entrepreneurship, Institutional Change, and American Political Development." *Studies in American Political Development* 17: 185-203
- Novak, William 2008. "The Myth of the Weak American State." *American Historical Review* 113: 752-772.
- Orren, Karen. 2012. "Doing Time: A Theory of the Constitution." *Studies in American Political Development*, 26 (1): 71-81.
- Orren, Karen and Stephen Skowronek. 1994. "Beyond the Iconography of Order" in Lawrence Dodd and Calvin Jillson, eds. *The Dynamics of American Politics*, Westview Press.
- Robertson, David. 2012. *Federalism and the Making of America*. New York, NY: Routledge.
- Skowronek, Stephen. 1982. *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920*. New York, NY: Cambridge University Press.
- White, G. Edward. 2000. *The Constitution and the New Deal*. Cambridge, MA: Harvard University Press.
- Whittington, Keith. 1997. "Dismantling the Modern State? The Changing Structural Foundations of Federalism." *Hastings Constitutional Law Quarterly* 483: 483-528.
- Whittington, Keith and Amanda Rinderle. 2012. "Making a Mountain Out of a Molehill? Marbury and the Construction of the Constitutional Canon." *Hastings Constitutional Law Quarterly*, 39 (4): 823 860.