# Roundtable: Negotiating the Constitution

PROFESSOR LYNCH: I will start with some comments. I started this book many years ago while I was doing research on *Martin v. Hunter's Lessee*.[1] I never really liked Justice Story's opinion in that case. It was a very convoluted textual analysis of the Constitution; and although I did like his reliance on Hamilton's argument in *The Federalist* papers[2]—that the need for uniformity requires that the Supreme Court of the United States take appeals from state court judgments involving the construction of federal statutes and treaties—he never cited *The Federalist* papers. He never mentioned Hamilton, and I wondered why.

I decided to look back at the Virginia Court of Appeals' opinion in *Martin*[3] and find out what went on. It turned out that the lawyers who won in the Supreme Court had argued *The Federalist* papers in the state courts and had cited Hamilton.[4] And all the judges in the Virginia courts ignored them.[5] Judge Roane of the Virginia Court of Appeals stated, and you can almost hear him sneering:

> With respect to the work styled to "the Federalist," while its general ability is not denied, it is liable to the objection of having been a mere newspaper publication written in the heat and hurry of the battle, (If I may so express myself), before the Constitution was adopted and with the view to ensure its ratification. Its principal reputed author was an active partisan of the Constitution and a supposed favorer of a consolidated government.[6]
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> Whatever weight may be attached to contemporaneous exposition in other cases, little credit is certainly due to the construction of those who are parties to the conflict and which were given before the heat of the contest had subsided or their passions had time to cool: and as to the advantages supposed to have been gained from their having formed the Constitution, which is expounded, that circumstance is in entire conflict with the principal, deemed vitally important to free government by all

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1 14 U.S. (1 Wheat.) 304 (1816).
2 *See id.* at 347-48.
3 *See* Hunter v. Martin, Devisee of Fairfax, 18 Va. (4 Munf.) 1 (Va. 1815).
4 *See id.* at 15, 27-29, 58-59.
5 *See id.*
6 *Id.* at 27.

> enlightened writers, "The Federalist" [*sic*] not excepted . . . that the power of making and expounding a law, or constitution, should not be blended in the same hands.[7]

Justice Roane's reasoning spurred my further research, and ultimately produced this book.

I think what Professor Levinson said is correct: My view of the Constitution is a radical one. But no more radical than the oral argument in *Morrison*[8] where some of the justices were arguing, in effect, in favor of federal authority. The Justices asked the counsel for the state of Virginia who should have the power to suppress biological warfare if some private citizen were engaged in biological warfare.[9] The argument was that it is certainly in the war powers.[10] Congress has the power to regulate anything that has to do with war.[11]

Another question had to do with whether or not someone in his own private house could pollute the environment in such a way that it would affect the East Coast.[12] And Justice Stevens asked, "What about a person who is growing marijuana in his own backyard?"[13] Unlike the farmer in *Wickard v. Filburn*,[14] someone who was not engaged in the commercial growth of marijuana, rather someone who was just doing it for himself.

I think all of these questions were looking for something under the Constitution and the constitutional text whereby they could say 'this is federal power. There is a valid exercise of federal power in that case and, therefore, why not in this case.'

In all of these cases the court was looking for some text in Article I, Section 8.[15] I am not quite sure that Judge Gibbons would really be concerned about whether or not they could find something in Article I, Section 8.[16] As long as the federal government and Congress has legislated something and it does not affect human rights, then it is constitutional. That, at least, seems to be the thrust of Judge Gibbons' argument.

JUDGE GIBBONS: Well, Joe, you certainly heard me right. That is exactly my position. If the Justices had asked me the questions that were

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[7] *Id.* at 29.

[8] *See* Transcript of Oral Argument, *United States v. Morrison*, 2000 U.S. Trans. Lexis 22 (Jan. 11, 2000).

[9] *See id.* at *28.

[10] *See id.* at *28-*29.

[11] *See infra* note 13.

[12] *See supra* note 8.

[13] *Morrison*, 2000 U.S. Trans. Lexis 22, at *40-*41.

[14] 317 U.S. 111 (1942).

[15] U.S. CONST. art. I, § 8.

[16] *See id.*

asked of the counsel for Virginia, I would have said: If the political majority in Congress says it's a federal responsibility, it is; that's the end of it. Why should it be otherwise? If Congress wants to spend the money to police marijuana growing in someone's backyard, why not? Someone can do it. No individual human rights are violated by it, and why should that even be a justiciable question?

PROFESSOR LYNCH: All I can say is that is a radical proposition.

JUDGE GIBBONS: I think something that Gene Gressman said and something Professor Levinson said are significant. Gene said that in these cases we have been discussing, the Court is enforcing the structural parts of the Constitution—federalism and separation of powers. But then he went on to point out that those terms are found nowhere in the Constitution. These are judge-created structures. The Court is imposing its own idea of a structure of the national government, despite the majority will of the elected representatives—and that includes the President because he has a veto power—who have to face the electorate.

Professor Levinson pointed out at the outset of his remarks that the strength of Professor Lynch's book is in establishing that constitutional law is an ongoing negotiation; it is not static. The problem of the Court undertaking to impose its structure is that the Court is not a participant in that ongoing negotiation. It does not have to face the electorate. When the Court speaks, at least in our scheme of things, it speaks finally and, thereby, forecloses further negotiations. Sometimes, however, Justices read the election returns as well.

The point I make is that this cutting-off of ongoing negotiations is a serious and dangerous thing that should be reserved for instances in which the government, state or federal, has intruded on individual rights, and not to take the position, such as the Court has been taking with respect to the Fair Labor Standards Act,[17] of second-guessing the elected branches over the lobbying efforts of labor unions.

PROFESSOR GRESSMAN: I think, even during the historical debates, the framers recognized the necessity of separation of powers as an essential attribute in the founding of the Constitution. So while I might agree more with Judge Gibbons about federalism, I think separation of powers is the real concern. Indeed there was a proposal made during the constitutional debates for a specific provision in the Constitution concerning separation. Moreover, the whole theory of Constitutionalism, a

[17] 29 U.S.C.S. § 201 (Law. Co-op. 2000).

division of the government into three separate powers, was certainly at the top of their understanding and determination to make a permanent part of our form of government.

JUDGE GIBBONS: But Gene, that does not mean that it was the Court's task to enforce these, as they referred to them back then, republican principles. The example that comes to mind is the veto provision in *Chadha*[18] which is, at least to me, the most outrageous piece of overreaching on the part of the Court in taking sides in political dispute. Why the Court chose to step into that dispute, instead of saying that Congress and the President are as capable of selecting a structure for that administrative law decision as we are, completely escapes me.

PROFESSOR GRESSMAN: Now, suppose that, responding to popular will, Congress passes a statute that says the Congress should have the power to consider and overrule constitutional decisions written by the Supreme Court.

JUDGE GIBBONS: Well that's a different issue. Of course the court can decide what it needs to protect its own power to protect individual rights.

PROFESSOR LEVINSON: I think the fallacy here, again, is assuming that there is a specific answer to these questions rather than that it is a negotiated process. It does seem to me that the Court's articulation of separation of powers, meaning that it is "the ultimate interpreter" of the Constitution, is a fabrication of the post World War II constitutional order. It is an understandable fabrication, because the first articulation of that notion was in *Cooper v. Aaron*,[19] involving a very fundamental struggle over federal power with regard to school desegregation. But then the Court articulated it again in *Powell v. McCormack*,[20] and then again in the *Nixon*[21] case. Now it has just become part of the Court's own description of itself. So much so that we see, in a case like *Boerne*,[22] a complete and utter unwillingness to negotiate, which I think is really quite astonishing.

I would also say that I think one possible mistake or problem with

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[18] 462 U.S. 919 (1983). The veto provision in dispute in *INS v. Chadha* was § 244 (c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2), repealed by Pub. L. 104-208, Div. C, Title III, § 308(b)(7), Sept. 30, 1996, 110 Stat. 3009-615.

[19] 358 U.S. 1 (1958).

[20] 395 U.S. 486 (1969).

[21] *See* United States v. Nixon, 418 U.S. 683 (1974).

[22] *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

focusing only on Professor Lynch's book, or books like it, is that it reinforces the notion that the history of the Constitution is best found in what happened in the late eighteenth century; whereas with regard to *Boerne*, it really involves the transformation wrought by the Civil War and what the Fourteenth Amendment was designed to do. And I think it is quite clear that the Fourteenth Amendment was designed to transform the country and give the national government powers that almost nobody in 1787, except Madison at the very beginning of the convention, would ever have thought the national government would possess. But the war was transformative and I think that the current Supreme Court is just remarkably and stunningly ignorant of the history and theory from 1861 to 1868. I also think, not only for the reasons discussed so ably by Professor Lynch but for much more Lincolnesque reasons, it is just absurd to believe that the meaning of federalism in the year 2000 is best discerned by reading anything that was said in 1787 and 1788 rather than what was said, for example, in 1867 or 1868. You can read contemporary Supreme Court opinions and almost not realize there was a war fought and a Fourteenth Amendment added.

Now, in minimal fairness to Justice Kennedy, he does acknowledge that the Fourteenth Amendment comes after a war, but that is really all he says. The heart of the current majority in the Supreme Court is with the talmudic exegesis of what was it . . . *The Federalist No.* 27 or *The Federalist No.* 44 in *Printz*,[23] and, as I say, I think that is just remarkable and bizarre.

PROFESSOR LYNCH: To reply to John Gibbons, what I gather you are saying is that there should be no judicial review except in civil rights cases.

JUDGE GIBBONS: If I were to take that position I would be as extreme as you think. I would say that the court should certainly not interfere, as it is currently, in the instances where no human or civil rights issues are involved. The country will go on. The decisions will not particularly affect individual lives. There is no reason for the Court to spend its capital on these political power fights, and that is what they are. Frequently, the Court has resolved disputes that were heavily lobbied one way or another in Congress. That, I think, is not an appropriate function for the Court.

PROFESSOR LYNCH: I am not so sure that they are heavily lobbied

[23] *See* Printz v. United States, 521 U.S. 898, 911-15 (1997).

in Congress. I think the people who want the legislation passed lobby for it. I think what the Court considers is that there is an absence of lobbying on the other side, but we talked about that before.

PROFESSOR GIBBONS: The National League of Municipalities was right there lobbying with respect to the extension of the Fair Labor Standards Act.

PROFESSOR LYNCH: What I am saying is that I do not understand why we would not have judicial review in these cases, if the court does not pass on these issues.

PROFESSOR GRESSMAN: Well, consider that in the Religious Freedom Restoration Act,[24] the religious coalition came into Congress with a fully drafted statute. The hearings were perfunctory and there was no real opposition. The sole purpose of the Act was said to be to reverse, by legislative decree, an unpopular Supreme Court interpretation of the Free Exercise Clause. In my view that was a patent violation of the separation of powers doctrine. I do not see how that represented the will of the people, so that it should not be reconsidered by the Court.

JUDGE GIBBONS: I would suggest that the Court in the guise of exercising the power of judicial review has taken on the task of enforcing the quality of the legislative process.

PROFESSOR LYNCH: I think they have done that in the past, have they not?

JUDGE GIBBONS: I do not see how that can lead to anything down the road except trouble for the Court. I do not see how the Court can continue to do this without getting into deep political trouble.

AUDIENCE QUESTION: It seems that the whole thesis is the organic nature of the Constitution. Unquestionably, the Constitution is

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[24] 42 U.S.C.S. § 2000bb (Law Co-op. 2000). In *City of Boerne v. Flores*, the Supreme Court held the Act unconstitutional because it "contradict[ed] vital principles necessary to maintain separation of powers and the federal balance." 521 U.S. 507, 536 (1997). Congress sought to overrule the Court's earlier decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990) by the legislative adoption of the Religious Freedom Restoration Act, thereby creating a violation of the Separation of Powers Doctrine. *See* Eugene Gressman and Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L. J. 65 (1996).

organic, but the question still remains: Doesn't there have to be an ultimate arbiter? There seems to be a skepticism of the Court being that arbiter. If, however, the Court is not that arbiter, then who is? It seems that a lot of faith is being put into the Congress, but political debate, by its very nature, is partisan. How can Congress then become an arbiter? What then would be the role of the Court as opposed to the role of the Congress?

PROFESSOR LEVINSON: I think that James Madison was right in suggesting that an arbiter will be able to be effective only if there is general respect for the arbitrator in the first place;[25] otherwise, the argument is purely Hobbesian. That is to say we are in a very unattractive sort of political situation and we need somebody, anybody, to be the umpire, the arbitrator, and at that point, I think one gets into a functional argument. Why in the world would you pick judges and members of the Supreme Court to be the arbitrator rather than Congress? The Hobbesian's argument really is simply that we need somebody to set the final rules and that it really does not matter who that somebody is. Now, the people who defend the Court, it seems to me, are not really Hobbesians. What they want to do is smuggle in at least one of two arguments.

One is that judges really do have some particular talent for figuring out the one true meaning of the Constitution, and it does seem to me that one of the fundamental debates that we are having is whether that notion of the Constitution really does make much sense. If one does view it as an organic process of negotiation, then the idea that we really do rely on judges because they will keep us honest by telling us what the Constitution requires is not going to work.

The second argument for a strong judiciary assumes there is a functional competence—that judges have some special talents, namely political talents, to discern what is really in the national interest. They have more of those talents than do members of so-called political branches. But I think one has to ask why would anybody believe this. I do not want to sound particularly harsh of the current Court, but there is nobody who has had a distinguished public career prior to appointment in a way similar to, let us say, John Marshall,[26] Roger Taney,[27] Charles Evans Hughes,[28] Earl

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[25] PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 68-69 (2000) (citing THE VIRGINIA REPORT 195-96 (J.W. Randolph ed., 1850)).

[26] Chief Justice John Marshall participated in the Revolutionary War, and later served as a member of the Virginia Council of State, the Virginia House of Delegates, and as a delegate to the Ratification Convention of the United States Constitution in Virginia. *See* KENNETH JOST, THE SUPREME COURT A TO Z 278-79 (2d ed. 1998). Chief Justice Marshall also served as a member of the United States House of Representatives, and Secretary of State. *See* KERMIT L. HALL ET AL., THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 524 (1992).

Warren,[29] Hugo Black,[30] Felix Frankfurter,[31] William O. Douglas,[32] William Howard Taft,[33] or Samuel Chase,[34] to take people from a variety of places and from across the political spectrum. These people brought stature with them to the Court. One of the bases of their appointment and confirmation is that they had displayed a certain sort of political sagacity.

Let me pick up one point. Professor Wefing is the Richard Hughes Professor here at Seton Hall. I taught at Princeton some twenty-five years ago when Richard Hughes was still Governor. He then became Chief Justice of the New Jersey Supreme Court, and of course, *Robinson v. Cahill*[35] was one of his very, very important decisions. Now, we could certainly have another entire session on whether *Robinson* really worked, but one of the things that is interesting about the New Jersey Supreme Court, and about Richard Hughes, is that he brought a remarkable political stature with him to the court. I think one of the reasons that people did not lie in the streets after *Robinson* is precisely because Hughes was trusted to have a certain level of political sagacity. Earl Warren had never served on a court prior to his appointment. What he brought was a certain kind of political wisdom that he had gained as Attorney General and then Governor of what was then the third-largest state.

Now, I do think that in the last thirty years or so we have seen the

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[27] Chief Justice Roger Brooke Taney served as a representative in the Maryland House of Delegates, Senator of Maryland, Maryland Attorney General, Attorney General of the United States, and Secretary of the Treasury. *See* JOST, *supra* note 26, at 462.

[28] Chief Justice Charles Evans Hughes was elected to serve as the Governor of New York. *See id.* at 214.

[29] Chief Justice Earl Warren served as Deputy City Attorney of the City of Oakland, California, Deputy Assistant District Attorney of Alameda County, California, Chief Deputy District Attorney for Alameda County, California, District Attorney for Alameda County, California, Attorney General of California, and Governor of California. *See id.* at 505.

[30] Justice Hugo Black served two terms in the United States Senate prior to his appointment. *See id.* at 44.

[31] Justice Felix Frankfurter served as an Assistant United States Attorney, employee in the War Department, Harvard law professor, founding member of the American Civil Liberties Union, and advocate for the National Association for the Advancement of Colored People. *See id.* at 186-87.

[32] Justice William O. Douglas was a Columbia law professor and served as Chair of the Securities and Exchange Commission before his appointment to the United States Supreme Court. *See id.* at 159.

[33] Chief Justice William Howard Taft served as an Ohio Superior Court judge before being appointed as Solicitor General of the United States. *See id.* at 461. Chief Justice Taft also served as Chairman of the Philippine Commission, Secretary of War under President Theodore Roosevelt, and, of course, the President of the United States. *See id.*

[34] Justice Samuel Chase served as a member of the Maryland General Assembly, and as a member of numerous committees of the Continental Congress. *See id.* at 73-74.

[35] 62 N.J. 473 (1973). In *Robinson*, the New Jersey Supreme Court held that disparities in state school funding violated the Equal Protection Clause of the New Jersey Constitution.

professionalization of the Supreme Court, so that it now seems to be a criterion for appointment that one have been on an appellate court for a suitable number of years. Clarence Thomas was a slight exception. David Souter is also a slight exception, though Souter had actually been on the New Hampshire Supreme Court. Right now I dearly hope that the next President, whoever he is, will not feel limited to the federal courts of appeals for the next Justice.

PROFESSOR LYNCH: I think Senator Orrin Hatch would agree.

PROFESSOR LEVINSON: It seems to me that this bespeaks some sort of notion that Supreme Court judging is a professional occupation. Judge Gibbons can speak to the extent that district court judging or circuit court judging requires professional skills of statutory analysis, and Supreme Court judging certainly involves some professional skills. But quite frankly, given what we have asked our court to do over history, I think it requires more political sagacity than technical skills. I think that we have gotten in the habit of appointing people who bring nothing with them to the Supreme Court. They become people of stature because they get on the Supreme Court, but most students and most professors could not tell you what members of the current United States Supreme Court did with their lives prior to appointment. On the contrary, that simply was not true with the *Brown v. Board of Education* Court[36] where everybody on that Court had a distinguished prior career.[37] I think this does relate. If we are

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[36] 347 U.S. 483 (1954).

[37] *See* Brown v. Bd. of Educ. of Topeka, Kansas, 347 U.S. 483, 485 (1954). The Justices who served on the *Brown* Court included Chief Justice Earl Warren, Justice Hugo Lafayette Black, Justice Stanley Forman Reed, Justice Felix Frankfurter, Justice William Orville Douglas, Justice Robert Houghwout Jackson, Justice Harold Hitz Burton, Justice Tom Campbell Clark, and Justice Sherman Minton. *See id.* at 485. Each of the members of the *Brown* Court held positions in public service outside the judiciary prior to their service on the Supreme Court.

Justice Reed's former occupations included Kentucky General Assemblyman, General Counsel for the Federal Farm Board, General Counsel for the Reconstruction Finance Corporation, Special Assistant to the Attorney general, and Solicitor General of the United States. *See* JOST, *supra* note 26, at 365-66. Before his appointment to the Supreme Court, Justice Jackson was a Democratic state committeeperson, General Counsel for the Bureau of Internal Revenue, Solicitor General of the United States, and for a short time United States Attorney General. *See id.* at 444. Justice Burton's career in public service included the roles of World War I veteran, Ohio legislator, Director of Law in Cleveland, Mayor of Cleveland, and United States Senator. *See id.* at 58-59. Justice Clark's earlier occupations included Dallas Civil District Attorney, Special Assistant in the Justice Department, Assistant Attorney General, and United States Attorney General. *See id.* at 91-92. Prior to becoming Associate Justice, Justice Minton served as Indiana Public Counselor, United States Senator, Administrative Assistant to President Franklin Roosevelt, and judge for the United States Court of Appeals for the Seventh Circuit. *See id.* at 282. *See also supra* notes

going to have the Supreme Court as arbitrator, then appoint to the Court people whose decisions will generate public approval rather than a feeling that here are people who really do not have much idea what they are doing.

Except for Sandra Day O'Connor, nobody has ever run for an election, and her electoral experience is confined to the lower house of the Arizona legislature.[38] You have nobody on the current Supreme Court who has been the head of a major Federal agency except for Clarence Thomas. So why should we take these people seriously as arbiters? I would much rather go with members of Congress, because they have run for elections. They do know how administrative agencies work, whereas the current court is full of very smart people who have a variety of degrees of technical skills, but I do not know why I should defer to their judgment on great national issues. I think that is a problem. We need an arbitrator. We need a final voice. You and I can see that premise, but why the Court?

JUDGE GIBBONS: Well you say that we need to have a final arbitrator. Why? We only have a final arbitrator in the federalistic separation of powers disputes because the Court has undertaken that task. Why should they ever finally be decided? Why cannot the political process from time-to-time structure or restructure the state-federal relationship or the legislative-executive branch relationship? The great virtue of leaving it to the elective branches is that it *is not* final.

PROFESSOR LYNCH: But the doctrine of judicial review is, in effect, a Court-made doctrine. There is nothing in the Constitution that provides for judicial review. Now it is true that Hamilton in *The Federalist* elicited that power on the general principle that you cannot have a statute which is in contradiction or violates the constitutional text.[39] There must be some place that will set aside the statute when it violates the

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29-32 (discussing the professional experiences of Chief Justice Warren and Associate Justices Black, Frankfurter, and Douglas).

[38] Justice Sandra Day O'Connor served as Arizona State Senator before working in the judiciary. *See* THE OXFORD COMPANION TO THE SUPREME COURT, *supra* note 24, at 604.

[39] Hamilton's exposition of the principle of judicial review is set forth in *The Federalist* No. 78, where he wrote: "There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid." THE FEDERALIST NO. 78, at 524. Later, in the same essay, he went on to state: "[W]here the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former." *See id.* at 525. This formulation of the principle of judicial review was, of course, adopted by Chief Justice Marshall—without attribution to Hamilton, it should be noted—in his opinion for the Court in *Marbury v. Madison*. *See* 5 U.S. (1 Cranch) 137, 177-80 (1803).

Constitution, but that only happens in the process of adjudication of individual rights. That is to say *A* sues *B* in a court. Someone relies on a statute. Someone else says that this violates the Constitution, and then the judge compares the statute with the Constitution and says, "you're right. It does violate the Constitution and I will not enforce it." That is the real literal meaning of judicial review, that an unconstitutional statute will not be enforced in a federal court. It is void and has no effect.

That is the argument that was made in the early days of the history of the country. It was usually adopted and followed in non-human rights cases, and it was only much later that the Court applied this doctrine of judicial review to human rights cases.[40] What you are really suggesting is that we should just ignore that history and that we should ignore that tradition. That is why I think it is a radical proposition. A radical proposition is something that roots you someplace else from where you have been before.

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[40] None of the early cases, in which the Supreme Court was asked to invalidate a federal statute on the ground that Congress had exceeded its authority under the Constitution, involved human rights. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (involving the constitutionality of a federal statute, enacted pursuant to Article I, Section 8, Clauses 1 and 18, to reestablish the Bank of the United States); United States v. Fisher, 6 U.S. (2 Cranch) 358 (1805) (involving the power of Congress, under Article I, Section 8, Clauses 1, 4, and 18, to grant the United States government priority in the collection of debts from a bankrupt debtor); Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796) (involving the Article I power of the Congress to impose uniform taxes and excises). The case of *Marbury v. Madison* itself involved the constitutionality of a statute, passed by Congress under its Article III powers, establishing the jurisdiction of the Supreme Court in mandamus actions.

The exercise of judicial review by the Supreme Court in human rights cases came much later. *See, e.g.*, Bradfield v. Roberts, 175 U.S. 291 (1899) (addressing federally funded financial assistance to a religious institution under the Establishment Clause of the First Amendment); Reynolds v. United States, 98 U.S. 145 (1878) (challenging the validity of a federal statute under the Free Exercise Clause of the First Amendment); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (invalidating the provisions of a federal statute as contravening the substantive due process requirements of the Fifth Amendment); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856) (raising the issue of a deprivation of the due process requirements of the Fifth Amendment by virtue of the procedure established by a federal statute).

The earliest Supreme Court case involving the exercise of free speech or free press is *Patterson v. Colorado*, 205 U.S. 454 (1907). In that case, the Court declined to incorporate the First Amendment Clauses within the Fourteenth Amendment in an action arising out of a state contempt citation on the ground that the protection afforded by the First Amendment was limited to a restriction against prior restraint.

Finally, there is no record that during criminal trials brought pursuant to the Sedition Act of 1798, the issue of its constitutionality went beyond the argument that Congress in enacting the statute exceeded its authority under Article I, Section 8. *See* JULIUS GOEBEL, JR., ANTECEDENTS & BEGINNINGS TO 1801 633-51 (1971).