



Judicial Nominations

Implementing the Rule of Law

By Simon Lazarus

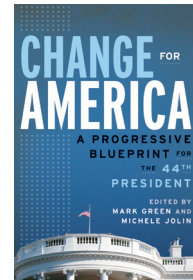
Introduction: Reframing the Debate

Few of the new president's actions will have as broad and lasting an impact as his appointments to the Supreme Court and the lower federal courts. To be sure, judicial nominations will likely not be a featured item in his first State of the Union address. Soon after taking office, however, the new administration will probably face a surge of vacancies on the federal courts, including one or possibly more vacancies on the Supreme Court.

A critical imperative is to reframe the currently polarized national debate about the Constitution and the courts with a progressive vision that is at once compelling, credible, and broadly inclusive. This is a challenge that the new president will be uniquely well-positioned to address immediately upon taking office and, indeed, even before, during the transition. He will need to move quickly, in order to pre-empt the drive that hard-line conservatives will surely mount to re-establish and reinforce the bitter divisions characteristic of judicial nomination politics under the Clinton and Bush administrations.

The new administration's strongest opponents will be motivated not simply to block new nominees but to galvanize their social-conservative base and undermine bipartisan collaboration essential for the new administration's overall success. To thus seize the initiative before strategic vacancies arise, the president could find an early occasion for a major speech on the subject. Such an address, and the administration's overall approach to selecting and confirming nominees, should stress four themes.

First, the nation's commitment to the Constitution, the rule of law, and a judiciary that conscientiously executes that commitment, should be a source of national unity, not division. For all our disagreements about results in particular cases or on particular issues, all Americans, conservative or liberal, embrace the document and the fundamental principles of individual liberty and equality and democratic governance expressed in its provisions. *We are all constitutionalists.*



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Second, the role of judges is to interpret the actual provisions, principles, and purposes of the Constitution and laws, not to substitute their own policy or political agendas. Stressing this commitment is entirely consistent with, indeed requires, keeping faith with our underlying constitutional principles of liberty, equality, and democracy.

Third, fidelity to the Constitution promotes approaches and decisions that are at once progressive—because the Constitution itself embodies progressive ideals—and adapted to modern needs. Conservatives have misrepresented phrases like “The Living Constitution” as evidence of a progressive penchant for “making it up as we go along.” To avoid creating that erroneous impression, a clearer and entirely accurate approach is to stress that the fundamental commitments to popular sovereignty, liberty, and equality were etched by the framers in broad, noble words deliberately crafted, as Chief Justice Marshall explained in 1819, to create a Constitution designed “to endure for ages to come” and “adapted to the various crises of human affairs.”¹

Those commitments were reaffirmed, and amplified, by the Bill of Rights; the Reconstruction-era amendments to the Constitution, which firmly established national citizenship and equality; and the Progressive-era amendments, which reinforced the Constitution’s commitment to popular sovereignty, extended political equality to women, and empowered the federal government to act in service of the nation’s welfare.

Finally, fidelity to the law as written is consistent with—indeed, essential for—a judiciary seeking to interpret statutes enacted by Congress fairly in order to address the real-world threats faced by ordinary American individuals and families. Too often in recent years, federal judges, including members of the Supreme Court, have allowed their personal deregulatory views to undercut forthright application of laws protecting citizens’ basic pocketbook needs against corporate abuse.

The most notorious example was the Supreme Court’s 2007 5-to-4 decision to bar recovery by Lilly Ledbetter for decades of unlawful pay discrimination—discrimination which she did not and could not have detected in time to meet the Court’s contrived and unrealistically short time limit for suits under the Civil Rights Act.² Regrettably, the Ledbetter case is the tip of an iceberg, part of a pattern of activist misinterpretation of laws passed by Congress and state legislatures to protect retirement benefits, access to health care, equal job opportunity, consumer and medical product safety, sound and honest credit practices, and a healthy environment. A judiciary attuned to how the courts affect people’s lives will restore a rule of law that faithfully serves the statutory goals and the beneficiaries Congress intended to protect.

Adoption of the above principles, it bears emphasis, is essential to correct the significant bias of the federal courts resulting directly from the concerted effort over the last 15 years to remake the courts in a conservative mold. Nominees who espoused “judicial restraint” and principles of neutral decision making prior to confirmation became activist judges

once on the bench, overturning long-settled legal principles in order reach results that undermine statutes enacted to protect ordinary Americans against corporate abuse.

Warfare Over the Courts

Decades of bitter battles have left a legacy that threatens to continue to infect the politics of judicial nominations. Between the first and second Bush administrations, the New Right (with its intense focus on establishing an intensely conservative judiciary) gradually ratcheted up its influence over judicial nominations. After Bill Clinton's election in 1992, Sen. Orrin Hatch (R-UT), the ranking Republican and after 1994 the chairman of the Senate Judiciary Committee, announced a novel and what seemed at the time highly aggressive posture. Hatch told President Clinton to “move to the center on judicial nominations” and send him “moderates,” not “liberals.”

Aggressive by historical standards, Hatch's posture did not satisfy his younger colleagues. After the 1996 elections, Sens. Jeff Sessions (R-AL), Jon Kyl (R-AZ), and Rick Santorum (R-PA) formally proposed to the Republican caucus, which controlled the Senate, that all members be required to pledge to vote against ideologically incorrect nominees. While this attempted coup failed, stonewalling of President Clinton's nominees grew progressively more blatant. Impeccably credentialed candidates, such as eminent D.C. practitioner Allen Snyder and subsequent Harvard Law School dean Elena Kagan, were bottled up in the Judiciary Committee. During the Clinton administration's last two years, Republicans granted Judiciary Committee hearings to only 47 percent of Clinton's appellate nominees (compared to 74 percent in 1995–96 and 79 percent in 1997–98),³ and blocked 56 percent of them, 60 percent more than Democratic senates blocked of nominees submitted by Presidents Reagan and George H.W. Bush.⁴

The rightward politicization and radicalization continued after Republicans secured control of the White House in 2000. In the Judiciary Committee, Sen. Hatch, the one-time advocate of accommodation with moderate Democratic judicial nominees, by-passed or abandoned various committee rules and procedural safeguards to push highly conservative nominees through the committee. Hatch, for example, dropped the “blue-slip” policy by which nominees could be blocked by either senator from the nominee's home state, as well as such rules as a three-week pre-hearing break after receiving the nominee's paperwork, limitation of each hearing to one controversial nominee at a time, postponement of final votes until post-hearing questions were answered by the nominee, and other procedural requirements.⁵

Ranking Judiciary member Sen. Patrick Leahy (D-VT) repeatedly, and futilely, asked President Bush to follow the same path that President Clinton had with Hatch—send up “moderate” nominees. But the Democrats came to recognize that they could count neither on pressure from Republican moderates nor adherence by Republican leaders to tradi-

tional Senate or Judiciary Committee procedures and practices, nor least of all, interest in accommodation by President Bush. Gradually, the Democrats embraced the filibuster as their only remaining tactic for keeping Bush’s “provocateur” nominees from obtaining lifetime appointments to the federal bench.

Since Democrats recaptured control of the Senate in 2006, they have confirmed the large majority of Republican nominees but carefully scrutinized and sometimes declined to act on controversial nominees for strategic judgeships. Contrary, however, to current Republican complaints that Sen. Leahy and Democratic leaders have put unprecedented barriers in the path of President Bush’s nominees, in fact his nominees, both to federal district courts and appellate courts, have been confirmed at rates identical or virtually identical to the rate at which President Clinton’s nominees were confirmed. Eighty-seven percent of President Clinton’s district court nominees were confirmed, compared to 88 percent of Bush’s nominees; 73 percent of both presidents’ appellate court nominees were confirmed.⁶ Bill Clinton left office with 27 appellate court vacancies for his successor to fill. George W. Bush leaves 15.

Struggle for the Supreme Court 2005–2006

This decade of ever-increasing polarization over judicial nominations set the backdrop for Senate consideration of President Bush’s 2005 choices to fill the two Supreme Court vacancies opened by Justice Sandra Day O’Connor’s resignation and Chief Justice William Rehnquist’s death. As a nominee, John Roberts portrayed himself as quite different from the provocateur Scalia-Thomas clone Democrats had feared and Bush had repeatedly promised. His aim was to win a “big-vote,” bipartisan confirmation. When the floor vote was taken on September 29, 2005, about half of the Democratic caucus voted not to confirm. Roberts’ strategy for appealing to moderates and liberals largely worked.

Unlike Roberts, Alito did not seem especially inclined to dispel liberal concerns about his philosophy or his eagerness to act on it if the opportunity arose. Case in point: he declined to match Roberts’ observation that *Roe v. Wade* was “settled law.” Alito did not dispel concerns about the implications of a 1996 dissent he wrote narrowly construing the Congress’ commerce clause authority. Alito, too, was confirmed, albeit by a smaller margin.

The impact of judicial appointments on decisions relating to constitutional protections is well known. Indeed, it is over-emphasized in the public discourse. As *New Yorker* and CNN commentator Jeffrey Toobin observes, in the past three decades “there were two kinds of cases before the Supreme Court—abortion cases—and all the others.”

“Abortion,” he adds, “dominated the nomination and confirmation process, [and] nearly delineated the difference between the national Democratic and Republican parties.”⁷ In the 2008 presidential debates, the one question addressed to the Constitution or the courts was Bob Schieffer’s question in the third debate, whether either candidate would choose a nominee unsympathetic to their respective, opposing views on *Roe v. Wade*.

The new president should emphasize the importance of the battles over the composition of the federal courts to the pocketbook needs of low- and middle-class Americans. And indeed, as noted above, the new administration should favor nominees committed to fairly applying these statutory protections. This recommendation should not be misconstrued as a suggestion to back away from traditional progressive support for the courts' vital role as defenders of constitutional freedoms, which may vary in popularity across the nation and the electorate. The public counts on the courts to enforce the Constitution.

To be sure, the public is largely unaware of the federal courts' vital role in enforcing (or, as has too often been the case in recent years, erasing) social and economic reforms enacted by Congress and the states. But the only reason for this state of affairs is that, at least until the past year or so, neither political leaders, advocacy groups, nor the press has paid much attention to this aspect of the judiciary's performance.

Throughout the past four decades, during which Republican presidents have enjoyed dominance in making Supreme Court (and lower federal court) nominations, the biggest beneficiaries have been hard-line advocates for the business community. For the 18-year duration of Rehnquist's tenure as Chief Justice (1986 to 2004), a remarkable eight percent of the Court's civil docket was occupied by pleas—usually initiated by businesses—to “pre-empt” (invalidate) state regulatory statutes or common-law tort remedies as inconsistent with federal law.⁸ In the last two Supreme Court terms alone, the Chamber of Commerce participated in 29 cases, or nearly one-third of the 97 civil cases the Court decided in that period.

The Chamber won 20 of those cases. In a recent study, Harvard law professor Cass Sunstein compared Supreme Court decisions involving business and public-interest-group challenges to federal agency regulatory decisions. Ultraconservative firebrand Justice Antonin Scalia had the most “activist” record, meaning that he was the least deferential to agency judgments. (Liberal Justice Stephen Breyer was the least “activist.”)⁹

Activist Legal Strategies of Conservative Justices

As a matter of law and the Court's constitutional role, conservative pro-business doctrinal strategies richly deserve the label “activist.” They have systematically contravened statutory goals, misconstrued statutory terms, twisted or ignored congressional intent, and shown disrespect for democratic decision making by legislatures at all levels and for the democratic role of trial juries protected by the Seventh Amendment.¹⁰ In summary, these strategies have included

- Disavowal of the core purposes of a law when construing specific provisions—especially provisions providing remedies for individual victims—snatching them out of context and imposing technical, obscure interpretations of such provisions that defeat or reverse

Congress' goals. The most notorious recent example is the 2007 5-4 decision to throw out a \$360,000 jury award to Goodyear supervisor and pay discrimination victim Lilly Ledbetter—on the ground that the 1964 Civil Rights Act required pay discrimination cases to be brought within 180 days of the defendant's initial discriminatory act, regardless of when the victim did or could reasonably have discovered it. As Justice Ruth Ginsburg noted in her dissent, the majority's misreading of the law made the seminal injustice “a *fait accompli* beyond the province of [the 1964 Civil Rights Act] ever to repair.”¹¹

- Systematic refusal to authorize individual suits to enforce rights prescribed by Congress, thereby scuttling the long-respected “principle that every wrong would have a remedy,” as Justice John Paul Stevens put it.
- Moving the goalposts on Congress by retroactively replacing accepted interpretive methodologies with different rules that effectively defeat Congress' original intent, particularly lawmakers' intent to preserve or facilitate individual redress in court.
- Construing federal laws to require “pre-emption” of long-standing state law protections, even though Congress never actually contemplated such radical consequences. These decisions have often created what former Justice Byron White called the “perverse anomaly of leaving those Congress set out to protect with less protection than they enjoyed before [the law] was enacted.”¹²
- Empowering business and other powerful market-place players to bar employees, customers, retirees, depositors, borrowers, and other individuals from invoking *any* federal or state legal safeguard, by granting them unchecked authority to force all disputes into “binding mandatory arbitration” procedures that are often rigged to operate as pro-business kangaroo courts.

The Courts' Impact on Ordinary Americans' Needs

The Supreme Court's aggressive activism has inflicted harm on millions of Americans whom Congress intended to benefit from the laws that the Court has subverted. If unchecked, the conservative majority could well ratchet up the damage to progressive 20th-century reforms and undermine 21st-century initiatives of the new administration and Congress as well.¹³ Consider these areas of basic pocketbook needs:

- **Health security and access.** Over two past decades, the Supreme Court has converted the 1974 Employee Retirement and Income Security Act, which was enacted to protect over 130 million Americans insured by employer-sponsored health plans, “into a shield that insulates Health Maintenance Organizations from liability for even the most egregious acts of dereliction committed against plan beneficiaries—a state of affairs directly contrary to the intent of Congress.”¹⁴ Simultaneously, due to ever

more restrictive Supreme Court decisions, “The idea of Medicaid as an enforceable entitlement is hanging by a thread.”¹⁵

- **Retirement security.** Widely condemned decisions that leave health insurance beneficiaries defenseless against violations of ERISA also neuter ERISA’s pension guarantees for retirees.¹⁶ And the Court’s aggressive cuts in recovery for violations of securities law have compounded the inability of workers and their families to secure the retirement benefits for which they worked and invested.
- **Workplace fairness and job security.** Decisions by the Supreme Court and lower federal courts have severely eroded legal guarantees vital to American workers. For instance, the Court’s approach to closing courthouse doors in *Ledbetter* threatens workers’ prospects for redressing all forms of arbitrary and illegal treatment. The majority’s message to working citizens is clear: you must play by the rules, but we will use our life-tenured authority to keep Congress from applying those rules to your boss.
- **Predatory credit practices.** A 2007 Supreme Court decision upheld the aggressive drive of Bush Administration bank regulators to “pre-empt” state laws and administrative efforts to curb the predatory lending practices central to the nation’s current financial crisis. A recent *Business Week* article cited as an “overlooked” cause of the crisis this “stifling of prescient state enforcers and legislators who tried to contain the greed and foolishness.”¹⁷ In addition, the Supreme Court decision that radically distorted a century-old banking statute enabled credit card providers to locate in states with virtually nonexistent usury and other controls, thereby subjecting customers nationwide to interest rates over 30 percent and multiple exorbitant “fees” for routine services.

In sum, a compelling case can be made that deregulatory policy bias has affected some recent judicial appointees no less than regulatory appointees. Ordinary people like Lilly Ledbetter go to court to get justice, but too often they get cheated instead.

Recent studies make clear that this trend is significantly attributable to the influx of conservative ideologues onto the bench. According to a recent Brookings Institute study, Republican appointees now occupy 56 percent of seats on the U.S. Courts of Appeal, to 36 percent Democratic appointees (with eight percent vacancies); after four years of a Democratic administration, in 2012, the ratio could be reversed—to 58 percent Democratic appointees and 42 percent Republican appointees.¹⁸

The partisan distribution of appointees is important. Recent studies at the University of Chicago by Cass Sunstein and Thomas Miles showed that in approximately 20,000 cases challenging rulings by federal administrative agencies, appointees by the first and second Bush administrations sided with industry litigants and against public interest litigants 62 percent of the time—a proportion 20 percent greater than that registered by Eisenhower, Nixon, and Ford appointees.¹⁹ Sunstein saw these figures as “a major warning for the next administration—and a potential problem for democracy itself.”²⁰

A new empirical study published in the *Harvard Law & Policy Review* found (grimly consistent with the result in *Ledbetter*) that employment discrimination plaintiffs “who lose at trial achieve reversals in less than nine percent of their cases. In contrast, defendants who lose at the trial court level are granted reversals in 41 percent of their cases.”²¹

Not only could runaway judicial ideologues continue to neutralize the landmark social- and economic-reform laws of the past century, but they also, as *Washington Post* columnist E.J. Dionne recently cautioned, could “block, frustrate and undermine the efforts of a new progressive majority” to enact 21st-century reforms.²²

A Progressive Approach to Judicial Appointments

When criticizing and proposing to counter pro-business judicial activism, the new president and his allies need to make clear that they are not simply advocating appointment of liberal ideologues in place of the Bush administration’s emphasis on conservative ideologues. To the contrary, the new president should emphasize his desire to appoint judges who will fairly apply and enforce the law. He should take note of a series of hearings held by Sen. Leahy’s Senate Judiciary Committee during the summer of 2008, designed “to shine a light on how the Supreme Court’s decisions affect Americans’ everyday lives.” To meet needs like “health care coverage, the uncertainty of retirement, credit card payments and mortgages,” Leahy stressed, “Congress has passed laws to protect Americans.” But in many cases, “[t]he Supreme Court has ignored the intent of Congress, oftentimes making these laws protections for big business rather than for ordinary citizens.”²³

Indeed, the administration should emphasize the basic principles governing the proper role of courts and judges. These principles include

- Judges sit to apply law, not their own ideological preferences or a political agenda
- In the first instance, the law is the actual words of the statute, or the regulation, or the decision, or the Constitution, and the fundamental purposes and principles expressed in the document
- The original understanding of legal text and principles is an important part of interpreting how to apply the words to contemporary circumstances
- Courts should show restraint and respect to legislatures, presidents, and governors, who are responsible for making policy and law in our system.²⁴

Marshalling these broadly recognized principles will not merely defuse attacks from the right but will greatly strengthen the ability of the administration to take the offensive. This is especially the case on constitutional issues and controversies. The president and his allies should stress that the text of the Constitution means the *whole* Constitution—not just, as conservatives often seem to assume, the original document as ratified in 1789. The Constitution, after all, includes all the amendments adopted over the last two centuries.

In addition to the first ten amendments (the Bill of Rights adopted in 1791), they include the Reconstruction-era 13th, 14th, and 15th Amendments, which mandate individual equality and national citizenship as the law of the land, and specifically empower Congress to enforce those mandates. They also include Progressive-era 16th, 17th, and 19th Amendments, which vastly increased the federal government’s economic resources and leverage through nationwide income taxation, reinforced democratic rule by requiring popular election of senators, and extended the franchise to women.

Moreover, focus on original meaning actually strengthens the case for adapting the Constitution to changing times and contemporary needs. The framers deliberately chose broad terms inherently tailored to adapt to unforeseen needs of future generations. Their “original” design was *not* to freeze constitutional requirements to mimic societal practices prevalent in the late 18th century—precisely the opposite of what Justice Scalia and his “originalist” allies contend. As Chief Justice John Marshall famously wrote in 1819, “This is a *Constitution* we are expounding . . . intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs.”²⁵

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Endnotes

- 1 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).
- 2 *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162 (2007).
- 3 Lee Epstein and Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments* (New York: Oxford UP, 2005), p. 25.
- 4 Herman Schwartz, *Right-Wing Justice* (New York: Nation Books, 2004), p. 185 n. 69, citing People for the American Way Foundation, “President Bush, the Senate and the Federal Judiciary: Unprecedented Situation Calls for Unprecedented Solution” (2001), p. 6.
- 5 Schwartz, *Right-Wing Justice*, pp. 240-41.
- 6 Presentation by Russell Wheeler, “The Next Administration and the Future of the Judiciary,” September 4, 2008, available at http://222.brookings.edu/events/2008/0904_judiciary.aspx.
- 7 Jeffrey Toobin, *The Nine: Inside the Secret World of the U.S. Supreme Court* (New York: Random House, 2007), p. 36.
- 8 Michael S. Greve and Jonathan Klick, “Pre-emption in the Supreme Court: a Preliminary Empirical Assessment,” *Sup. Ct. Econ. Rev.* 14 (2006), p. 43, 50.
- 9 Cass R. Sunstein, “Judicial Partisanship Awards: Study of Over 20,000 Decisions Reveals How Politics Shapes Rulings,” *Washington Independent*, July 31, 2008, available at <http://www.truthout.org/article/cass-r-sunstein-judicial-partisanship-awards>.
- 10 See, e.g., Rochelle Bobroff, “The Early Roberts Court Attacks Congress’s Power to Protect Civil Rights,” *N.C. Cent. L.J.* 30 (2008), p. 101.
- 11 *Ledbetter v. Goodyear Tire & Rubber*.
- 12 *Mertens v. Hewitt Associates*, 508 U.S. 248, 263 (1993); Harper Jean Tobin, “Courts Ground Delay Fixes from Congress, States,” *RollCall*, April 17, 2008, available at http://www.rollcall.com/issues/53_122/guest/23090-1.html.

- 13 Jeffrey Rosen, "Supreme Court, Inc.," *New York Times Sunday Magazine*, March 16, 2008.
- 14 Honorable Edward Becker, former Chief Judge of the U.S. Court of Appeals for the 3rd Circuit (appointed by President Ronald Reagan), concurring in *Difelice v. Aetna US Healthcare*, 346 F.3d 442, 553 (3d Cir. 2004).
- 15 Robert Pear, "Legal Rulings Trim Leeway Given Medicaid Recipients," *The New York Times*, August 15, 2005, available at http://www.nytimes.com/2005/08/15/politics/politicsspecial1/15medicaid.html?_r=1&oref=slogin.
- 16 See, e.g., *Eichorn v. AT&T*, 484 F.3d 644 (3d Cir. 2007), rehearing en banc denied, 489 F.3d 590, cert. denied, 128 S. Ct. 709 (2007). Judge Ambro, concurring in the 3rd Circuit's denial of relief, observed that although "the plaintiffs here have produced sufficient evidence that AT & T and Lucent intentionally interfered with their ERISA [retirement] benefits," the Supreme Court's rules foreclose any remedy.
- 17 Robert Berner and Brian Grow, "They Warned us About the Mortgage Crisis: State whistleblowers tried to curtail greedy lending—and were thwarted by the Bush Administration and the financial industry," *Business Week*, October 9, 2008, available at http://www.businessweek.com/magazine/content/08_42/b4104036827981.htm.
- 18 Russell Wheeler, "The Next Administration."
- 19 Results summarized Sunstein, "Judicial Partisanship Awards." Charlie Savage, "Appeals Courts Pushed to Right by Bush Choices," *The New York Times*, October 29, 2008, p. A1.
- 20 Sunstein, "Judicial Partisanship Awards."
- 21 Stewart J. Schwab and Kevin M. Clermont, "Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?" *Harvard Law & Policy Review* 3 (forthcoming 2009), available at http://www.hlpronline.com/Vol3.1/Clermont-Schwab_HLPR.pdf.
- 22 E.J. Dionne, "The Court vs. Voters," *Washington Post*, July 1, 2008, p. A11.
- 23 Statement by Senator Patrick Leahy, "Short-Change for Consumers and Short-Shrift for Congress? The Supreme Court's Treatment of Laws That Protect Americans' Health, Safety, Jobs, and Retirement," hearing before the Committee on the Judiciary, Senate, June 11, 2008, available at http://judiciary.senate.gov/member_statement.cfm?id=3404&wit_id=2629.
- 24 Of course, the above are not an exhaustive set of all maxims about the role of courts and judges embraced by contemporary American conventional wisdom. There are others, also naturally congenial for many progressives. For example, a majority of Americans would presumably concur that courts must be independent of politics, that they must apply the law whether or not it is popular, that courts must protect the legal rights of individuals or minorities when majorities override those rights, and that "the law" includes judicial decisions—precedents—interpreting the words written into the Constitution and statutes.
- 25 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).