

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 5: The Jacksonian Era—Foundations/Scope

The Bill of Rights in the Territories

Whether the Bill of Rights restricted federal power in the territories was unsettled throughout most of the Jacksonian Era. In 1828, Daniel Webster argued that the Constitution did not limit Congressional power outside the states. When defending Congressional power in the Florida territory, Webster declared, Congress “might have done anything—she might have refused the trial by jury, and refused a legislature. She has given a legislature, to be exercised at her will.” He concluded that, “If the Constitution does not extend over this territory, the law cannot be inconsistent with the national Constitution.” The Supreme Court in *American Insurance Company v. 356 Bales of Cotton* (1828) did not indicate whether Webster’s analysis of the Bill of Rights was correct.

The Supreme Court in *Webster v. Reid* (1850) ruled that persons in the Iowa territory had a right to a jury in a civil case. Justice McLean’s opinion did not clarify whether that right was derived directly from the Seventh Amendment or from a federal statute. He wrote,

By the seventh article of the amendments of the Constitution it is declared, “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” The organic law of the Territory of Iowa, by express provision and by reference, extended the laws of the United States, including the Ordinance of 1787, over the Territory, so far as they are applicable.

Dred Scott v. Sandford (1857) was the first instance when the Supreme Court stated clearly that Congress could not violate the first ten amendments to the Constitution when governing territories. Chief Justice Taney stated,

[T]he power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of Government. The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined, and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a Government and sovereignty. . . .

. . .

For example, no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances.

The dissenting justices in *Dred Scott* did not contest Taney’s claim that the Bill of Rights limited federal power in the territory.