The Constitution of the Republic of Texas

Part 2 of 2: The Decisions

David P. Currie

The Supreme Court of the Republic of Texas rendered a whole volume of decisions between 1840 and 1844,[1] and at least seventeen of them dealt in one way or another with the constitution. Most of them concerned provisions peculiar to the Texas constitution. Most of the opinions were quite brief by modern standards. Few gave detailed reasons for their conclusions. Several were abysmally written, sometimes approaching incomprehensibility. Nonetheless the court did establish the practice of constitutional adjudication, and in the process it enunciated a ringing endorsement of judicial review.

More than half the cases concerned the powers of the courts. Judicial districts must embrace entire counties; Chief Justices of the county courts may be elected by Congress.[2] A District Judge may not be limited to sitting during the remainder of his predecessor's unexpired term.[3] A plaintiff in a civil case may not be nonsuited against her will.[4] The constitution gives the right to appeal any final judgment of the district courts to the Supreme Court, in criminal as well as civil cases, and Congress may not prescribe a minimum jurisdictional amount.[5] Nor may

David P. Currie is Edward H. Levi Distinguished Service Professor of Law at the University of Chicago. *He thanks Paul A. Clark for invaluable research assistance. The first part of Professor Currie's study of the constitution of the Republic of Texas is at 8 Green Bag 2d 145 (2005).*

1 The cases are reported in James Wilmer Dallam, Opinions of the Supreme Court of Texas from 1840 to 1844 Inclusive (Gilbert, 1883) (first published in 1845) [hereafter cited as Dallam]. It was in 1840 that the court was directed to hire a reporter of decisions. Laws Rep Tex, 4th Cong 227, 2 Tex Laws 401 (Jan 21, 1840).

2 Allen v Scott, Dallam 615 (Jun Term, 1844); Dangerfield v Secretary of State, Dallam 358 (Jan Term, 1840).

3 Shelby v Johnson, Dallam 597 (Jun Term, 1844). See also Bradley v McCrabb, Dallam 504, 510–12 (Jun Term, 1843), reaching the same conclusion in the case of a district-court clerk, for some of the same reasons.

4 McGill v Delaplain, Dallam 493 (Jun Term, 1843).

5 Bradley v McCrabb, Dallam 504 (Jun Term, 1843); Republic of Texas v Smith, Dallam 407 (Jan Term, 1841); Morton v Gordon, Dallam 396 (Jan Term, 1841).

Congress give the Supreme Court jurisdiction to determine questions that have not been decided below.[6] The Supreme Court may review the facts as well as the law.[7] The time for seeking review may not be extended after it has expired.[8]

The reasoning is often cryptic at best. In the case first mentioned, for example, the cause had been transferred from the District Court of Bowie County to "the southern division of Red River County," which had been organized into a separate district a few months before.[9] Finding the law establishing the southern division unconstitutional, the Supreme Court set the transfer order aside: The tribunal to which the case had been transferred did not exist.

But why was the law unconstitutional? "[B]ecause it violates the spirit of the constitution and is at war with its plain meaning and intent." And why? It is difficult to say. The constitution, said the court, required the election in each county of a clerk and other officers necessary to the operation of the court. The statute, by requiring the clerk to keep records in both divisions of the county, effectively required him to appoint a deputy, "which congress cannot do." And why not? The court did not say; the constitution does not even speak in the singular in prescribing election of "[t]he clerks of the district courts … in the counties where the courts are established." The bottom line: "[T]he process of a court of general jurisdiction over a whole county must extend to each part and portion of that county." For otherwise a county could be divided into "an indefinite number of precincts; and a court could be held at each man's house in every county." This result was so "violently at war with" public policy as to "afford a strong argument" against the constitutionality of the law; and for "these and other grounds" the law was held invalid.[10]

The opinion is only two pages long. I find it almost complete gibberish. Near the end the court apologized for having provided only an "abstract of some of points" on which a more elaborate opinion would later be based. Unfortunately that opinion was never filed; we may never know why it was that an apparently innocuous attempt to provide convenient access to the courts evoked such a violent reaction from the judges.

The opinion respecting the election of county judges, though equally brief, is somewhat easier to understand. The law creating the county courts provided that the chief justice of each court should be "elected by joint ballot of both houses of congress."[11] That was indeed the method specified by the constitution for selecting judges of the supreme and district courts (Art IV, § 9), but the constitution said nothing about choosing judges of the county courts. Indeed it said only that there should be a county court in each county; it did not mention county judges at all.

A later clause of the constitution provided that the President, with Senate consent, should "appoint all officers whose offices are established by this constitution, not herein otherwise provided for" (Art VI, § 5). But the constitution, the court reasoned, did not create the office of chief justice; it said nothing about it. The office was established by the

6 Republic of Texas v Laughlin, Dallam 412 (Jan Term, 1841); Nash v The Republic, Dallam 631 (Jun Term, 1844).

7 Republic of Texas v Smith, Dallam 407, 409–11 (Jan Term, 1841).

8 Taylor v Duncan, Dallam 514 (Jun Term, 1843).

9 Laws Rep Tex, 8th Cong 52 (Feb 1, 1844), 2 Tex Laws 964.

10 Allen v Scott, Dallam at 615–16.

11 Laws Rep Tex, 1st Sess 148, § 1 (Dec 20, 1836), 1 Tex Laws 1208.

statute setting up the county courts, and thus the provision for presidential appointment did not apply. It followed, said the court, that the provision for election by Congress was "strictly constitutional."[12]

That seems right as far as it goes; the missing link can be supplied by reference to the necessary-and-proper clause. Less convincing was the court's effort to bolster its conclusion by observing that judges of both the supreme and inferior courts were "eligible to re-election" (Art IV, § 1). "Do we speak of election," the court asked, "when we mean appointment?" The language was clear: All judges were to be elected, not appointed.[13]

It was just as well this was not the only argument in support of the court's conclusion, for the constitution itself did not distinguish carefully between election and appointment. Although Article IV, § 9 clearly prescribed that district judges should be elected, § 2 provided that a judge should be "appointed" in each district; and § 12 said there should be "appointed" various county officers "to be elected by the qualified voters of the district or county." If "appointed" means simply "named" without regard to the method by which an officer is chosen, then "re-election" may equally mean "re-selection" – especially in a clause whose evident purpose was to prescribe the period of judicial service.[14]

The third opinion was quite straightforward. The constitution declared that "[t]he judges of the supreme and inferior courts sh[ould] hold their offices for four years" (Art IV, § 1). A district judge had died in office, and a successor was elected to fill his unexpired term. When that term expired, a third judge was elected; but his predecessor refused to surrender the office, and the Supreme Court upheld him. The constitution, the court said, was clear: Congress could neither curtail nor extend the four-year term guaranteed to each judge by Article IV.[15]

That was not the only way the provision could have been read,[16] but it was surely a plausible interpretation, and the opinion shored it up by invoking the underlying policy of judicial independence:

> The advantages of an independent judiciary are acknowledged and attempted to be secured by all wise communities. These, to some limited extent, are obtained by conferring the office for a period of four years. Where the appointment endures but for a year, a few months, or even days, the firmness of the judicial magistrate receives no support, under such circumstances, from the tenure of his office; but on the contrary it tends to enfeeble the inherent independence of his character.[17]

Very true; at last we have encountered a worthy opinion of the Republic's Supreme Court.

The next decision is so straightforward that it speaks entirely in bald conclusions.

12 Dangerfield v Secretary of State, Dallam at 359.

13 Id at 358–59.

14 It must have been suggested that the court issue an order against the President in this case, for the opinion begins with a disclaimer of the power to do so:

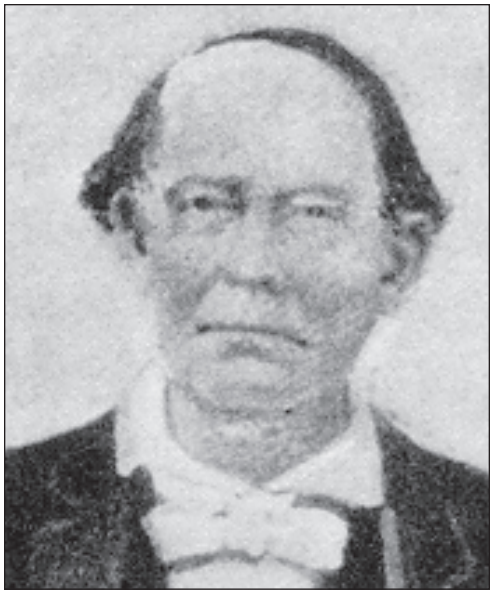
> I do by no means yield to the opinion that the president or any of the heads of executive departments can be commanded by this or any other court to answer for the non-performance of duty, nor that we can attach "the pain of contempt" to a refusal to obey such a summons.

Id at 359. No reasons were given for this intriguing conclusion. Contrast Marbury v Madison, 5 US 37, 162–73 (1803), concluding that mandamus did lie against the Secretary of State.

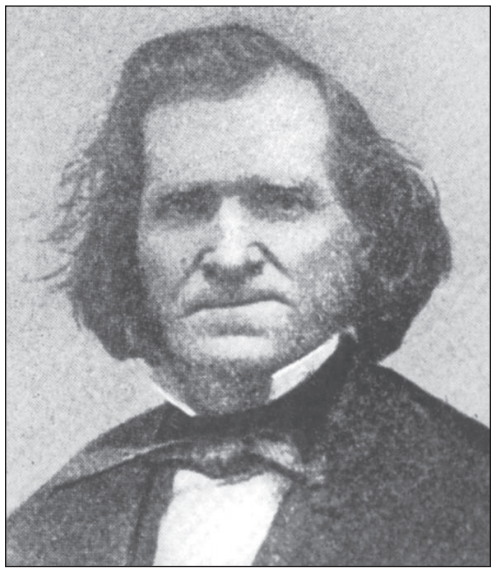
15 Shelby v Johnson, Dallam at 598–99.

16 See David P. Currie, The Constitution in Congress: The Federalist Period, 1789–1801 144–46 (Chicago, 1997), discussing a 1792 statute that provided for special elections when a President died in office.

17 Dallam at 600.



James Collinsworth (above) was the first chief justice of the Supreme Court of the Republic of Texas. Shelby Corzine (not pictured), Benjamin C. Franklin, Robert W. Williamson, and James W. Robinson were elected district judges for the first, second, third and fourth districts respectively, entitling them to seats on the high court as well.



Benjamin C. Franklin

The complaint sought compensation for services performed and the recovery of money had and received for the plaintiff's use. On appeal from a decree of the probate court the matter was retried. After the evidence was submitted to the jury, the defendant moved for a nonsuit, and the motion was sustained. The Supreme Court reversed.

In part the decision was based on an unreported earlier decision; we do not know what the court there said beyond the bare holding that "the district court had no power to compel the party to take a non-suit." The court then added its own two cents in dismissing the relevance of the civil law, which had been in force when the judgment was rendered: "By our constitution and laws, we think the trial by jury was secured to the plaintiffs, if they chose to persist in it."[18]

That was all; there was no effort to explain. Nor was the conclusion at all obvious. As I have said, it was not even clear that the constitution gave a right to a jury in civil cases in the first place.[19] Nor was it clear that, if there was a right to jury trial, that implied that cases could never be taken from the jury.[20] Finally, although the headnote is quite categorical about it, it is not even clear that the court meant to say the plaintiff could *never* be involuntarily nonsuited. Earlier in the opinion the court had adverted to the plaintiff's argument that there was no right to a nonsuit when the evidence disclosed "a strong presumption in favor of the plaintiff's right to recover,"[21] and in light of this passage the court may have meant only that it was

18 McGill v Delaplain, Dallam at 494.

19 See David P. Currie, The Constitution of the Republic of Texas, Part 1 of 2, 8 Green Bag 2d 145, 153 (2005).

20 See David P. Currie, Thoughts on Directed Verdicts and Summary Judgments, 45 U. Chi. L. Rev. 72 (1977).

21 Dallam at 494.

Robert W. Williamson

James W. Robinson

error to grant a nonsuit under the circumstances of this case.

The several decisions respecting the right to appeal may be considered together. The broadest statement came in an unelaborated passage explaining why it was unnecessary to be so chary as other courts had been in granting writs of mandamus:

> One of the reasons for the abundant caution in the exercise of this jurisdiction under the common law … was the final character of the judgment awarding the writ of *mandamus;* as no writ of error lay, by which it could be subjected to the revision of a superior tribunal. But under our constitution and laws, the defeated party is entitled to an appeal from any final judgment rendered in the district courts; and the jealous caution which might arise from the influence of apprehensions that remediless wrongs might be committed, can have no foundation or support in the structure of our judicial system.[22]

The jurisdictional-amount decision was more promising. The Act establishing the district courts permitted an appeal to the Supreme Court from any final district-court judgment, "provided, the amount in controversy, amounts to three hundred dollars";[23] the judgment below was for a lesser sum. The Supreme Court, in an opinion larded with references to Marshall and Story, held the restriction unconstitutional. The U.S. Constitution, in speaking of the appellate jurisdiction of the Supreme Court, "states that it is to be exercised *with such exceptions and under such regulations as the congress shall make*." The Texas constitution, the court observed, contained no provision for exceptions. Commendably, the court acknowledged that it had doubts about the validity of its conclusion:

> [W]ere these expressions casually dropped from the circumstance that the constitution was formed in the midst of a revolution, or were they left out of the

22 Bradley v McCrabb, id at 506–07.

23 Laws Rep Tex, 1st Cong 198, 203, § 15 (Dec 22, 1836), 1 Tex Laws 1256, 1263.

> constitution in order to take from congress this restrictive power, and leave the appellate jurisdiction of the supreme court unfettered, "co-extensive within the limits of the republic?"

But the court found solace in the Declaration of Rights (¶ Eleventh), which guaranteed a remedy for every wrong; for no remedy could be complete if the complainant was denied the right of appeal.[24]

I find the second argument, while not compelling, more persuasive than the first. It was true that the Texas constitution contained no exceptions clause; but it contained no clause providing for appellate jurisdiction in all cases either. What it said was that "[t]he supreme court shall have appellate jurisdiction only" (Art IV, § 8). The purpose of this provision seems to have been to preclude the court from hearing cases in the first instance; it appears to leave the extent of the appellate jurisdiction to be determined by Congress under the necessary-and-proper clause.

The opinion ends with an expression of judicial modesty so foreign to the U.S. Supreme Court that it bears quotation in full:

> We have had but little time to examine the important principle here settled; if errors should hereafter be found to exist in the opinion, we trust it will not be attributed to a love of power, but to an over-jealousy in guarding the rights of the people, and a desire to hear them, unrestricted, in this, the last citadel of justice known to the laws and constitution of the nation.[25]

After the amount-in-controversy decision the court had no difficulty in concluding that its appellate jurisdiction extended to criminal as well as civil cases, and for the same reasons, buttressed by the fact that the statute expressly provided for review of criminal decisions[26] – "a legislative declaration," as the court put it, "of the constitutional right of appeal in criminal cases."[27] The opinion went on to say, not altogether convincingly, that review could be by appeal rather than writ of error and that therefore it extended to questions of fact as well as law: The constitutional provision making the common law "the rule of decision" (Art IV, § 13) was not intended "to adopt irrevocably the practice of the common law in criminal proceedings."[28]

The last two decisions in this series were easy. In both the district court had reserved certain questions of law to the Supreme Court without deciding them, as the statute appeared to allow.[29] The Supreme Court concluded that this could not be done. The first opinion appeared to rest on the fact that there was no final judgment: "Under a similar provision found in the constitutions of other countries whose institutions and laws are analogous to our own, it has been held that their supreme courts cannot entertain jurisdiction in any case, until judgment has been rendered in the court below … ."[30] That was not very convincing; review may be appellate

24 Morton v Gordon, Dallam at 397–99.

25 Id at 400.

26 Laws Rep Tex, 1st Cong 79, § 3 (Dec 15, 1836), 1 Tex Laws 1139.

27 Republic of Texas v Smith, Dallam at 409.

28 Id at 410–11. In civil cases in federal courts in the United States such all-encompassing review would be precluded by the Seventh Amendment: "[N]o fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

29 Laws Rep Tex, 1st Cong 198, 209, § 43 (Dec 22, 1836), 1 Tex Laws 1258, 1269.

30 Republic of Texas v Laughlin, Dallam at 413. The statute was dismissed as providing merely "an additional mode of bringing a case of this nature into this court, after judgment shall have been rendered in the court below."

even if the decision below is not final.[31] The second opinion got it right:

> [T]he questions reserved for our deliberation not having been decided below, we are without jurisdiction and cannot properly consider any of the matters embraced in the record. The constitution having declared that the jurisdiction of the supreme court shall be appellate only, we are limited to the review of adjudications of inferior courts … .[32]

The final decision respecting the powers of the courts (reserving the all-important question of judicial review) turned on a question of retroactivity. The time for appeal under the law in force at the time judgment was rendered had expired. The question was whether later statutes argued to introduce the writ of error could be applied to permit review. The answer was no; statutes would not be given retrospective operation unless they expressly so provided. But the court went further: If the law *had* so provided, it would have been unconstitutional. Under the Bill of Rights (¶ Sixteenth) retrospective laws were forbidden.

> A law, then, which infringes a vested right by retrospective action is void under the constitution; the judgment in this case was a *vested right* at the time of the passage of these laws; therefore so far as affecting that judgment they are null and void.[33]

Given the plain terms of the constitutional provision, it is difficult to see how the court could have avoided this result.

We come at last to the handful of decisions of the Republic Supreme Court dealing with matters other than the powers of the courts. Three of them dealt with the Contract Clause: A law shortening the period of notice of an execution sale may be applied to pre-existing contracts, and so may a statute repealing the requirement that property not be sold at execution for less than two thirds of its value; but substantive contractual rights may not be retroactively impaired.[34] In so holding the court drew upon the familiar distinction between rights and remedies developed in "the mother country," with liberal quotations in one case from Justice Story.[35] As the court said in the last of these three decisions, "Legislation affecting rights cannot be retrospective, though enactments changing remedies may be enforced upon pre-existing rights."[36]

The remaining decisions can be even more briefly described. An unidentified provision in a tariff law was upheld against unspecified constitutional attack[37] on the basis of a

31 Cf 28 USC § 1292(a), (b); Ex parte Bollman, 8 US 75, 101 (1807).

32 Nash v The Republic, Dallam at 631. Cf Marbury v Madison, 5 US 37, 175 (1803), calling it "the essential criterion of appellate jurisdiction … that it revises and corrects the proceedings" below. See also David P. Currie, Federal Courts: Cases and Materials 606 (4th ed 1990), discussing the same question in the context of questions certified to the U.S. Supreme Court under 28 USC § 1254(2).

33 Taylor v Duncan, Dallam at 517.

34 Austin v W.H. White & Co, Dallam 435 (Jan Term, 1841); Austin v Andrews, Dallam 447 (Jan Term, 1841); Selkirk v Betts & Co, Dallam 471 (Jan Term, 1842).

35 Austin v Andrews, Dallam at 448. For the early U.S. cases see David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789–1888 146–48 (Chicago, 1985).

36 Selkirk v Betts & Co, Dallam at 471. In the other two opinions the court acknowledged the limitation insisted upon by Story: If the creditor is left with no effective remedy, the obligation itself is impaired. Austin v White, Dallam at 435; Austin v Andrews, id at 448. See Bronson v Kinzie, 42 US 311 (1843).

37 One surmises that the challenged provision was one requiring collectors to accept Exchequer bills at market rather than face value, since the other sections of the law were inconsequential. See Laws Rep Tex, 6th Cong, Special Sess 4 (Jul 23, 1842), 2 Tex Laws 812.

bare conclusion.[38] A resident who had died before the Declaration of Independence was adopted was held not entitled to receive a land grant under the constitution, since § 10 of the General Provisions plainly limited the right to citizens, defined as those living in the state at the time of the Declaration.[39] Free blacks were held entitled to sue for assault and battery; for although the constitution denied them both citizenship and the right to remain permanently within the Republic without congressional consent (General Provisions, §§ 9–10),

> we cannot conclude that because they are not entitled to some particular privileges, they are … out of the pale of the protection of the law, and that injuries and aggressions may be wantonly committed on their persons and property … . We cannot … establish a principle which we regard against law, contrary to the spirit of our institutions, and in violation of the dictates of common humanity.[40]

Finally, the court struck down a statute creating "the territory of Ward" on the ground that it lacked a representative of its own, as the constitution plainly required.[41]

It was in this last-mentioned case that the Texas Supreme Court gave us its own *Marbury v Madison*, its detailed defense of judicial review. Interestingly in light of the later development of the political-question doctrine in the United States, the court phrased the question as whether the statute before it was "such an exertion of the *political* power of the legislative" as to exclude judicial scrutiny.[42] The court's answer was no:

> What is the constitution? It is the basis on which the government rests, the authority for all law; and it is the commission under which the legislature, the executive and the judiciary act. … Whatever the collisions of opposite interests, the virulence of parties and the conspiracies of corruption, public robbery and treason, it continues like the Himmaleh or the Andes, amidst and above the storm; the nation's destiny dependent upon its subsistence. If a legislative act impugn its principles the act must yield; and whenever it is brought before the court it must be declared void.[43]

At this point the court cited *Marbury v Madison*.

But the court was not yet through. After noting additional U.S. decisions practicing judicial review, the opinion continued:

> I am fully warranted from these and other numerous expositions of a constitution from which ours is mainly copied, to declare that the judiciary is not only a co-ordinate branch of the government, but a check interposed to

38 H.H. Williams & Co v Borden, Dallam 577 (Jun Term, 1844). The court apologized for the incompleteness of its opinion, invoking the "intrinsic difficulties" of the case, the shortness of time, and "the enfeebled condition … of several of the judges." Id.

39 Republic of Texas v Inglish, Dallam 608, 609 (Jun Term, 1844).

40 Benton v Williams, Dallam 496, 497 (Jun Term, 1843).

41 Stockton v Montgomery, Dallam 473–79 (Jan Term, 1842). See Const Rep Tex, Art I, § 5:

> The house of representatives shall not consist of less than twenty-four, nor more than forty members, until the population shall amount to one hundred thousand souls, after which time the whole number of representatives shall not be less than forty, nor more than one hundred: Provided, however, that each county shall be entitled to at least one representative.

The court expounded no fewer than six rather labored reasons for its convincing conclusion that the final clause of this provision applied both before and after the population reached 100,000.

42 Dallam at 480.

43 Id.

> keep the other branches, not indeed within the limits of a sound and safe policy or of any policy at all – for that we shall see is exclusively entrusted to the other branches – but to constrain them to keep within the letter and spirit, the requisitions, the limitations and landmarks of the immutable constitutive law; that the exertion of this great and paramount duty is essential to the existence and transmission of freedom; and that this court is the last resort in which the rights of the people are protected, the constitution vindicated and the government preserved.[44]

It might be otherwise with respect to certain exclusive congressional powers, such as judging congressional elections, expelling members, and impeaching federal officers, but the statute creating the territory of Ward was a case of simple legislation, and the court was bound to determine its constitutionality. The peroration:

> Texas is not yet prepared for such an abandonment of a high trust reposed, though it be vested in the last, the feeblest and the most dependent branch of the government. Nor will it be yielded whilst the shadow of the name of civil liberty can be discerned.[45]

The court closed with an assurance that the de facto doctrine would preserve "all the judicial and ministerial action had in the territory under the seeming sanction of the constitution and the forms of law."[46]

One observation remains. In the course of differentiating Texas's unitary system from the federal structure of the United States, the court in the Ward Territory case had this to say about unenumerated powers:

> [T]he government which our constitution creates is, to all extents, in every degree, and for all purposes, a national and not federative government. The powers and rights not enumerated and declared are reserved to the people; and the only sensible, practicable and appreciable import of the reservation must be, that in regard to powers and rights, they are to be exerted by the people, *either in convention or through their senators and representatives in congress;* and until their will in any matter or ground not occupied by the constitution, shall be uttered in convention, it *can be expressed in legislation.*[47]

And thus the question that has troubled us throughout this essay has finally found its authoritative answer: The Texas legislature had plenary powers after all, not on the basis of a strained interpretation of the clauses respecting law revision and the common law, but because unenumerated powers were reserved to the people.

The End

In the footnotes I have said a thing or two about the constitutionality of statutes that never came before the Texas Supreme Court. One final piece of legislation remains for brief discussion: the joint resolution by which the Republic of Texas resolved to dis-

44 Id at 480–81.

45 Id at 486.

46 Id.

47 Id at 483. See also Rupert N. Richardson, Framing the Constitution of the Republic of Texas, 31 SW Hist Q 191, 212 n.60 (1928): "It appears that the courts assumed that congress had general legislative power, and that it was not dependent on any specific grant in the constitution." Cited for this conclusion was Board of Land Commissioners v Walling, Dallam 524, 527 (1843), where the court sustained a statute because it was "not in conflict with or in violation of any provision of the constitution."

solve itself and become a part of the United States.[48]

This was no ordinary act of legislation, and from the U.S. side its legality was sometimes questioned: No nation, skeptics argued, could consent to its own dissolution.[49] The theory espoused in the Ward Territory case provides one answer to this contention: Powers not expressly granted to congress could be exercised anyway, for they were reserved to the people. No such imaginative theory, however, was necessary to provide a legal basis for what appears at first glance an exercise of the extralegal right of revolution. For the constitution itself expressly recognized the right of revolution, and not only against an oppressive government:

> All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and they have at all times an inalienable right to alter their government in such manner as they may think proper (Declaration of Rights, ¶ First).[50]

With that we take our leave of the Republic of Texas, with thanks for an instructive trip; within a few months the Republic had ceased to exist. GB

48 Laws Rep Tex, 9th Cong, Extra Sess 4, 5, § 1, 2 Tex Laws 1200, 1201.

49 See David P. Currie, The Constitution in Congress: Descent into the Maelstrom, ch 5 (Chicago, forthcoming 2005).

50 Just to be on the safe side, congressional consent was echoed by a vote of the constitutional convention, which is to say by the people themselves. 2 Tex Laws 1228, 1229–30.