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RECONSTRUCTING MURDOCK V. MEMPHIS

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INTRODUCTION

MURDOCK v. City of Memphis is a mainstay of American federalism. Murdock earned this distinction for holding that, in cases coming from state courts, the Supreme Court can ordinarily review only the federal questions in the case, and not questions of state law. This principle continues to govern the Court today, and it reinforces the view that state courts are the final arbiters of the meaning of state law. Some scholars charge, however, that Murdock failed to give meaning to a Reconstruction-era statute that eliminated an older restriction, in Section 25 of the 1789 Judiciary Act, that had limited review to federal questions. They argue that in 1867 Congress gave the Court the power to hear the whole case, including questions of state law, and that Murdock’s contrary conclusion was wrong.

Murdock has also achieved fame in connection with the doctrine of adequate and independent state grounds. Today, the Court lacks appellate jurisdiction over cases coming to it from state courts if the state law grounds in the case would be sufficient to uphold the judgment, independent of the federal grounds. The New Deal Court invoked history and cited Murdock for this practice, stating, “if the same judgment would be rendered by the state court after

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we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.\(^7\)

As many have noted, however, the jurisdictional rule often associated with Murdock was not the rule actually articulated by Murdock.\(^8\) Rather, Murdock declared that sufficient state grounds could affect the Court's disposition of a case on the merits, but not its jurisdiction.\(^9\) Murdock thus embraced the "advisory" role of deciding possibly unnecessary questions of federal law when state law grounds might require it to uphold the judgment. Scholars suggest that it was decades later when the Court changed course and adopted the modern rule, in which adequate state grounds ("ASGs")\(^10\) would present a jurisdictional barrier to appellate review.\(^11\) Here, however, some who are critical of Murdock's first principle—non-review of state law questions—welcome Murdock's nonjurisdictional treatment of ASGs. Instead, they criticize the Court's seemingly abrupt change many years later, the consequence of which was to disable the Court from articulating the meaning of federal law whenever ASGs were present, even though the state courts had allegedly denied federal rights.\(^12\)

These conventional understandings and criticisms, however, may not fully capture Murdock's place in the history of Supreme Court review, particularly as it relates to the role of ASGs. One question this Article considers is whether Murdock's nonjurisdictional treatment of such grounds may have marked a departure from prior Court practice, and if so, the possible reasons for such a departure. Although the fact is not well-known, the pre-Murdock

\(^7\) Herb v. Pitcairn, 324 U.S. 117, 125–26 (1945) (stating that this was the Court's practice "from the time of its foundation").


\(^9\) See Murdock, 87 U.S. (20 Wall.) at 636.

\(^10\) This Article will refer to "adequate state grounds" rather than "adequate and independent state grounds" because it is unclear whether the old Court understood "independence" in its modern sense, or as anything other than formal independence. See infra note 230.


\(^12\) See, e.g., Matasar & Bruch, supra note 5, at 1320–21.
Court appears to have applied a fully jurisdictionalized version of ASGs akin to the modern rule in cases presenting alternative state and federal grounds. These decisions show that when state courts had clearly decided on both federal and state law grounds, and the state grounds were sufficient to uphold the judgment, the Court would dismiss the case because it would be "useless labor" to hear it.\(^3\) This is an approach that *Murdock* appears to have abandoned—apparently under the influence of the Reconstruction-era changes to Section 25 of the 1789 Judiciary Act. This shift in approach to ASGs thus tends to undermine the critique of *Murdock* that it gave no significant meaning to those changes.

A second question this Article considers is why the Court later retreated from *Murdock's* decision to deny a jurisdictional role to ASGs. Current scholarship posits that modern jurisdictional treatment of ASGs appeared out of the blue well after *Murdock* was handed down. Contrary to this traditional understanding, this Article will contend that the Court rather quickly abandoned *Murdock's* nonjurisdictional treatment of ASGs, thereby realigning itself with pre-*Murdock* precedent. In addition, around the same time, the Court first began to scrutinize the correctness of such grounds. Before then, the Court had (with a couple of notable exceptions) steadfastly refused to second-guess the correctness of explicit state court determinations of state law—including ASGs, and despite the impact such grounds could have on the vindication of federal rights.

A third and related question is the overall extent to which *Murdock* may have been faithful to Reconstruction alterations to Section 25, and the likely meaning of those alterations. In addition to its decision to deny jurisdictional force to ASGs, *Murdock* made it much easier for federal claims to be brought to the Supreme Court by loosening up the requirement that the requisite federal question appear on "the face of the record." In the antebellum period, the record on review had acquired a highly technical meaning and would not even have included the written or oral opinion of the court below. That often made it hard to discern whether the state courts had actually decided a jurisdiction-conferring federal question. *Murdock's* novel allowance of recourse to the opinion of the

\(^3\) See infra Subsection I.C.3.b.
state court was specifically tied to the 1867 deletion of Section 25’s proviso that had limited review to federal questions appearing on the face of the record. The decisions to dejurisdictionalize ASGs and to allow recourse to the opinion below—both linked to the 1867 Act—had the potential to greatly expand the Court’s appellate jurisdiction.

Beyond this, what Congress intended by its changes to Section 25 may be hard to know. Nevertheless, contemporaneous historical events and past Court practices offer clues to this last question. And a reasonable surmise may be that the 1867 Congress was not attempting to open up Supreme Court review generally to state law questions appearing on the record—as argued by losing counsel in *Murdock* and by some scholars—so much as attempting to open up review to questions of federal law that did not readily appear on the record. Congress might have done so because of the narrow way in which the Court had long construed the record, a concern to which the *Murdock* Court was partly responsive. Congress might also have worried that recalcitrant state courts in the immediate post-rebellion period might artfully suppress evidence of their decisions on federal law. That possibility is also suggested by the temporal proximity of Congress’s 1867 revisions of Section 25 to the Civil Rights Act of 1866,\(^\text{14}\) which mandated racial equality in connection with state court enforcement of various rights under state law. Policing denials of such rights in state court litigation involving ordinary state law claims could have been tricky business under old Section 25, and might have required the Court to look beyond what constituted the technical record at common law.

In addition, to the extent that the Reconstruction Congress may also have meant to open up Supreme Court review to certain questions of state law, it may have been primarily to reinforce review of federal law—particularly as it related to ASGs. Just as the modern Court perceives a clear federal interest in scrutinizing state court decisions on issues of state law that impact decisions of federal law, Congress may have been concerned that federal questions might also be artfully suppressed by doubtful interpretations of state law on which state courts rested their judgment. By contrast, there would have been little federal interest in allowing for Supreme

\(^{14}\) Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.
Court review of distinct or parallel state law grounds for recovery, as argued for in *Murdock* and by some scholars.

This Article proceeds in three Parts. Part I addresses the development of Section 25 prior to *Murdock* to better understand what the Court and the 1867 Congress were reacting against. It shows the difficulties that parties had in satisfying the "face of the record" requirement and the difficulty the Court had in determining whether the state courts had actually decided a jurisdiction-conferring federal question. It also shows that the Court undertook no review of state court decisions on ASGs and that, with rare exceptions, it undertook no review of state law otherwise. Part II addresses *Murdock*'s novel treatment of ASGs by denying them jurisdictional effect and then assesses the Court's apparent disenchantment with this feature of *Murdock* beginning very soon thereafter. It also shows that the roots of a jurisdictionalized treatment of ASGs predated *Murdock* and that *Murdock* itself may have been something of a detour in this respect. Part III addresses the Reconstruction origins of the 1867 statute in an effort to understand what Congress may have wanted in terms of enhanced review of questions of federal law, as well as questions of state law that impacted questions of federal law. In addition, it addresses *Murdock*'s accommodation of those interests by its choices to de-jurisdictionalize ASGs, but to continue to insulate them from review—a set of choices that the Court would later invert. This Article will conclude that *Murdock*'s understanding that Congress did not wish the Court to be able routinely to review questions of state law in cases within their appellate jurisdiction was likely right, as is the Court's continued adherence to that understanding.

I. REVIEWING FEDERAL AND STATE LAW UNDER SECTION 25—PRE-MURDOCK

Section 25 of the 1789 Judiciary Act provided for review in the Supreme Court of final judgments from state courts. In addition, review was by writ of error, meaning that it was largely obligatory.

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15 See Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85.
16 Id. at 85–86; see also Twitchell v. Pennsylvania, 74 U.S. (7 Wall.) 321, 325 (1869) (noting that § 25 required a party to obtain from the state court or a U.S. Supreme Court Justice a "citation" authorizing the writ which could be refused only if it were
Review was limited, however, to cases involving the “validity” of federal or state law, or involving the “construction” of federal law.\(^7\) And it was further limited to cases in which the state courts had allegedly denied federal power or federal rights.\(^8\) Section 25 concluded with the following proviso:

But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.\(^9\)

By the time of its 1867 revision, Section 25 had been heavily litigated\(^2\)—particularly (1) the proviso’s “face of the record” requirement and (2) its limitation to errors that “immediately respect” the “construction” of federal law or the “validity” of state or federal law. The first requirement had made it difficult for the Court to take review, even when federal rights may have been denied, whereas the second made it difficult for the Court to review questions of state law that might operate to defeat claims of federal rights. As discussed in this Part, however, there had been a limited amount of erosion respecting these two requirements, prior to the elimination of the proviso in 1867.\(^21\)

\(^7\)clear that the application for the writ is made under manifest misapprehension as to the jurisdiction of this court”\).

\(^8\)§ 25, 1 Stat. at 85–86.

\(^9\)§ 25, 1 Stat. at 86–87.

\(^10\)See Bridge Proprietors v. Hoboken Co., 68 U.S. (1 Wall.) 116, 142 (1864) (noting that “very few questions have been as often before this court” as those concerning the requirements of § 25); see also Alfred Conkling, A Treatise on the Organization and Jurisdiction of the Supreme, Circuit and District Courts of the United States 28 n. (b) (2d ed. New York, Gould, Banks & Co. 1842) (noting proliferation of such questions).

\(^21\)Also eliminated was the requirement that a “construction” of federal law must be “drawn in question,” at least when the validity of a state or federal law was not in issue. Instead, under the 1867 revision, a party merely needed to “claim[]” a right, title, privilege or immunity under federal law, and have the state court’s decision go against it. See Richard H. Fallon, Jr., et al., Hart and Wechsler’s The Federal Courts and the Federal System 431–32 (6th ed. 2009) [hereinafter Fallon et al., Hart & Wechsler] (contrasting the texts of the 1789 and 1867 statutes).
Reconstructing Murdock v. Memphis

A. Federal Questions and “the Face of the Record”

1. The Contents of “the Record”

The requirement that a jurisdiction-conferring federal question appear on the face of the record repeatedly caused difficulty. The Court gave a narrow and highly technical meaning to “the record” and the documents that comprised it. In common-law actions, the record included only the parties’ pleadings, the jury’s verdict, the judgment of the court, and a “bill of exceptions.” The latter would detail the court’s jury instructions and its ruling on objections to them, as well as objections to the court’s denial of requested instructions. Other matters, such as the evidence, exhibits, depositions, arguments of counsel, and assignments of error on appeal, would not have been considered a proper part of the record. Particularly significant was the Court’s regular practice of refusing to treat the opinion of the state court as a proper part of the record. Today, of course, the state court’s opinion is indispensable to determining whether it decided a question of federal law or rested on ASGs to uphold the judgment. But according to the pre-Murdock Court, because the opinion below could not have had any influence on the jury’s verdict, it did not form part of the “judgment.”

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23 See Suydam v. Williamson, 61 U.S. (20 How.) 427, 432–34 (1858) (discussing a similar problem respecting the record from federal circuit courts). In suits in equity, the record included the pleadings and the decree(s), but—unlike in actions at law—it would also include the evidence. However, given that there was no jury, there was no bill of exceptions. See Curtis, supra note 22, at 36. In addition, the decree in equity might be more ample than the usually terse judgment in an action at law, and it might include a statement indicating how the court decided questions raised in the pleadings. Although nothing in the 1789 Act purported to define the record, the Court seemed to borrow accepted English practice. See Philip Phillips, Statutory Jurisdiction and Practice of the Supreme Court of the United States 180 (4th ed. Washington, W.H. & O.H. Morrison 1878).

24 See Williams v. Norris, 25 U.S. (12 Wheat.) 117, 118 (1827) (“Is the opinion a part of the record? As a general proposition, every gentleman of the profession will, without hesitation, answer this question in the negative.”).

25 See id. (“An opinion not given to the jury, pronounced after a verdict was rendered, and, consequently, having no influence on that verdict, which states merely the course of reasoning which conducted the Court to its judgment, may explain the views and motives of the Court, but does not form a part of its judgment . . . .”). The “opinion” thus contrasted with the “judgment,” which was a part of the record. See Inglee
Court therefore refused to consult the opinion or other statements of reasons for the judgment, even to resolve ambiguity about whether a federal question had been decided. This refusal to look at the opinion was a primary reason why the Court often had difficulty in determining what the state courts had actually decided, especially when the opinion made perfectly clear what was otherwise unclear. Instead, the presence of federal grounds or ASGs often had to be inferred from the other (sometimes meager) evidence appearing in the record.

Consequently, it was no trivial matter when Murdock later held that, because of the elimination of Section 25's proviso and its "face of the record" requirement, the Court could now look at the state court's opinion. The result was to enhance the Court's jurisdiction over claimed denials of federal rights. Even though the state court's opinion might also more clearly reveal the presence of ASGs, such grounds—as discussed in Part II—were not a jurisdictional barrier to review under Murdock.

2. To "Appear" on the Face of the Record

a. "Express Averment" vs. "Necessary Intendment"

The pre-Murdock Court repeatedly stated that, for jurisdiction to attach, it must "appear" from the record that a requisite federal

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v. Coolidge, 15 U.S. (2 Wheat.) 363, 363, 368 (1817) (holding that the trial judge's written "report" was not a proper part of the record, although it was actually included in the physical record).

26 See, e.g., Gibson v. Chouteau, 75 U.S. (8 Wall.) 314, 317 (1869). The only exception to this common-law practice was for judgments from Louisiana. See, e.g., Cousin v. Blanc's Ex'r, 60 U.S. (19 How.) 202, 207 (1857); Armstrong v. Treasurer of Athens Cnty., 41 U.S. (16 Pet.) 281, 285 (1842). The Court also rejected recourse to the state judge's "citation" authorizing the writ of error, see supra note 16, as evidence that a federal question had been decided, at least absent other evidence. See, e.g., Parmelee v. Lawrence, 78 U.S. (11 Wall.) 36, 39 (1871); Lawler v. Walker, 55 U.S. (14 How.) 149, 152 (1852).

27 See Alfred Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943, 954 n.43 (1965).

28 Murdock, 87 U.S. (20 Wall.) at 633 ("[T]his court has been inclined to restrict its inquiries too much by this express limitation of the inquiry 'to the face of the record.'"). The Court added that then-recent departures from common-law practice and procedure in the state courts had changed the content of the record, and had "confused the matter very much." Id.
question was raised in the state court and that it was decided. But it did not have to appear in “positive terms.” Rather it was “sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided in order to have induced the judgment.” Absent access to the state court’s opinion, however, the Supreme Court acknowledged that its jurisdiction might fail, even though federal law “probably[] was disregarded” in the state courts.

b. The Outer Limits of “Necessary Intendment”

Nevertheless, the Court could be accommodating of parties claiming a denial of federal rights. For example, in Craig v. Missouri, the State of Missouri brought suit on a promissory note given by the defendants in exchange for certain state-issued “certificates.” Defendants denied liability on the note, but the state courts ruled against them. In the U.S. Supreme Court, the defendants argued that the state certificates were unconstitutional “Bills of Credit.” Nothing in the record expressly indicated that the state courts upheld the constitutionality of the state law authorizing the certificates. But Missouri’s original complaint alleged that the defendants’ note was given in exchange for certificates issued pursuant to a state statute. Furthermore, the defendants’ plea of “non assumpsit,” said Chief Justice Marshall, would have allowed them to draw into question the validity of the consideration on which the

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30 Crowell, 35 U.S. (10 Pet.) at 398. According to counsel in Crowell, the Court’s earlier practice had been stricter. See id. at 376.

31 Id. at 398; see also Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 251 (1829) (stating that it was “sufficient” if the record showed that federal law “must have been misconstrued”); Conkling, supra note 20, at 26 (noting that it was sufficient if the question was decided “in express terms or by necessary intendment”).

32 Miller v. Nicholls, 17 U.S. (4 Wheat.) 311, 315 (1819); see also Gibson v. Chouteau, 75 U.S. (8 Wall.) 314, 317-18 (1868) (refusing to consider federal question that was the apparent basis for the state court’s reversal of its prior decision, because it did not appear on the face of the record).


34 U.S. Const. art. I, § 10, cl. 1 (“No State shall . . . emit Bills of Credit . . . .”).
note was given, including the ability “to question . . . the constitutionality of the law in which it originated.”

Had there been a jury trial, the question would have been placed on the record by the defendants’ motion for a jury instruction on the state statute’s unconstitutionality and by the state court’s ruling on it. But the parties in Craig had waived a jury trial, so there was no record of such motion or ruling. Instead, the Court looked to the state supreme court’s somewhat prolix judgment, which stated that the obligation was valid because of the state statute authorizing the issuance of certificates. “On what ground can its obligation be contested, but its repugnancy to the constitution of the United States?” asked Marshall; “[n]o other is suggested.” The Court therefore concluded that it was “impossible to doubt” that the Missouri statute’s constitutionality “constituted . . . the only real question decided by the [state] court.” Were the Missouri Court required to state “in terms” that the statute was constitutional before appellate jurisdiction could attach, then the Constitution could “always [be] evaded” or, as in Craig itself, “unintentionally defeated.” Although Craig may illustrate the outer limits of drawing projurisdictional inferences from the record, its approach seems to have been a by-product of the Court’s narrow interpretation of the sources to which it could look.

c. The Overinclusiveness of “Express Averment”

As just noted, basing jurisdictional decisions on the limited sources of the record meant that the Court might be unable to hear cases in which a state court had, in fact, ruled contrary to federal law. But this approach could also draw unwanted business into

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36 Id. at 428.
37 Id.
38 Id. at 429. Marshall’s liberal treatment of “necessary intendment” drew the notice of the three dissenters on the merits, but even they conceded that this was part of the Court’s settled practice. See id. at 451 (M’Lean, J., dissenting); id. at 440 (Johnson, J., dissenting); id. at 445 (Thompson, J., dissenting).
39 See Conkling, supra note 20, at 26 (noting that the record was “strictly considered”); see also 3–4 G. Edward White, The Marshall Court and Cultural Change, 1815–1835, at 842 (1988) (noting strictness in interpreting the record contrasted with the Court’s liberality in finding that federal law was drawn into question).
40 See supra text accompanying note 32.
the Court. In *Murdock* itself, Justice Miller noted that under pleading conventions of the day, a party might easily set up a doubtful federal question in the state court record and thereby secure Supreme Court review. His example was a defendant in an ordinary civil action for assault who falsely pleaded he was a federal marshal who used no more force than necessary to serve a warrant. Although the defendant would obviously lose on that plea and might lose on the assault claim generally, “the record shows a Federal question decided against him,” and the Court would have to consider the case on the merits “though there was not a particle of truth in his plea, and it was a mere device to get the case into this court.”\(^4\) Review was obligatory, and the Court had yet to develop any summary mechanism for dealing with frivolous appeals.\(^2\) If a “sagacious lawyer” with a frivolous federal claim could thus secure review and also get the Court to entertain alternative state law grounds for recovery—as argued for in *Murdock*—there would be no state law question that could not be taken to the Supreme Court.\(^3\)

A somewhat less dramatic example of how a marginal federal question could secure jurisdiction was *Murdock* itself. Murdock’s ancestors conveyed land to the City of Memphis for use by the United States as a naval depot, along with a reversionary provision that the land be held in trust for them if not so used. Memphis, for

\(^{41}\) *Murdock*, 87 U.S. (20 Wall.) at 629. Miller added that this was “no exaggeration” and that “[v]ery many cases are brought here now of that character.” Id. at 628–29. Similar concerns about routine review of state law questions led the Court to reject a doctrine of judicial impairment of contracts. See R.R. Co. v. Rock, 71 U.S. (4 Wall.) 177, 181 (1867).

\(^{42}\) *Murdock* stated that if the federal question appeared frivolous, the Court would stop oral argument and require the case to be submitted on briefs. See 87 U.S. (20 Wall.) at 629. The Court did not yet have a formal mechanism for dealing with insubstantial federal questions. It promulgated an amendment to Supreme Court Rule 6 on May 8, 1876, which stated that along with a motion to dismiss a writ of error a party could file “a motion to affirm, on the ground, that, although the record may show that this court has jurisdiction, it is manifest the writ was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.” 91 U.S. [v] (1876) (“Amendments to General Rules”). Under Rule 6, however, frivolity did not translate into a jurisdictional defect. See, e.g., Swope v. Lef fingwell, 105 U.S. 3, 3 (1882).

consideration of $20,000, then deeded the property to the United States without any limitation of the purpose for which the land was to be used or any mention of a trust. The United States undertook work on the property to develop a depot, but later gave up. Then, by a congressional enactment, the United States reconveyed the land to Memphis for its use and benefit.44

Murdock brought suit in state court against Memphis to recover the property, basing his claim not only on general property law and the initial trust-deed to Memphis, but also on the federal statute. The statute, however, said nothing about a trust or the interest of those who initially conveyed to Memphis. Murdock's argument seemed to be that the United States could only have reconveyed the land subject to the trust because the United States originally received the property "fettered with a trust."45 At bottom, however, everything turned on ordinary property law, and the state courts ruled against Murdock on all of his claims.46 The Supreme Court acknowledged that nothing in the federal statute or deed seemed to indicate any rights in Murdock.47 Yet Murdock was successful in securing the Court's appellate jurisdiction based on his allegation that the federal statute conveyed the property in trust to him and that the state courts had ruled against the right that he claimed under the statute.

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In sum, the old Court's approach to Section 25's "face of the record" requirement could be jurisdictionally over-inclusive—as in Miller's assault hypothetical—or under-inclusive, if counsel neglected to adequately flag the possibly erroneous decision on the question of federal law. Yet the Court could accommodate federal rights claimants by its sometimes generous drawing of favorable inferences from the record regarding whether the requisite federal question had been raised and decided, as in Craig v. Missouri. This

44 Murdock, 87 U.S. (20 Wall.) at 596–98 (stating the facts).
45 Id. at 598.
46 See id. at 640–41 (Bradley, J., dissenting). Unlike his colleagues, Justice Bradley concluded that the Court lacked appellate jurisdiction over Murdock's case. But he also concluded that if jurisdiction was good, then the Court had jurisdiction over the whole case, including any state law questions necessary to its resolution. Id.
47 See id. at 637–38 (Miller, J.).
liberality, however, contrasted with the Court’s strict interpretation of what constituted the record itself. But as noted above, resort to generous inference drawing to resolve such questions may have been compelled precisely because the record was so narrowly defined, and because the state court’s opinion was off-limits.

B. Second-Guessing State Courts on State Law Questions

1. Antecedent State Law Questions and the “Construction” of Federal Law

Section 25 seemed to limit the Court to review of federal questions, but that proved to be not altogether true. There were a number of well-known decisions in which the Supreme Court also reviewed ostensibly state law questions when they were logically antecedent to resolving the federal questions in a case. Scholars have looked at these decisions mainly to assess the extent to which the modern Supreme Court might be able to second-guess state courts on questions of state law that operate to prevent the vindication of a federal right. But the decisions are also significant for their interpretation of Section 25.

One class of cases involved the application of treaty provisions to property rights acquired under state law. For example, in Smith v. Maryland, the plaintiff claimed that a treaty with Great Britain protected his property from confiscation by the state. All parties agreed that the treaty was valid and would protect the property, provided that Maryland had not validly confiscated it before the treaty went into effect. Maryland’s counsel therefore argued that the Court lacked jurisdiction because the case did not involve the “construction” of federal law, but only the construction of confiscation laws under Maryland statutes.

But the Court upheld its jurisdiction, finding power under Section 25 to inquire into the validity of the plaintiff’s “title” to see if it

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48 See, e.g., Laura S. Fitzgerald, Suspecting the States, 101 Mich. L. Rev. 80, 117 (2002); Monaghan, supra note 8, at 1937–41; Young, supra note 2, at 1188–92; see also Mitchell, supra note 5, at 1347–49 (considering such cases for their impact on § 25’s interpretation).
49 10 U.S. (6 Cranch) 286 (1810).
50 Id. at 305. The particular inquiry was “whether the confiscation, declared by the state laws, was final and complete, at the time the treaty was made, or not.” Id.
was protected by the treaty. Smith was consistent with the Court's observation elsewhere that the "right, title, privilege or exemption" referenced in Section 25 need not originate in federal law, so long as it was claimed to be protected by federal law. In addition, the Court specifically noted the logically antecedent role of state law in deciding the question of treaty protection. According to Smith, if the Court were to decide "according to the true construction of the state laws" that there had been no pre-treaty confiscation, then it would have to reverse, because the treaty would have been violated. Although Smith ended up agreeing with the state courts regarding the "true construction" of state law, the obvious point was that it did not have to.

In the more famous decision of Martin v. Hunter's Lessee, the Court reaffirmed that in such cases, it could not "decide whether a title be within the protection of a treaty, until it is ascertained what that title is, and whether it have a legal validity." And whether title was good or bad, the treaty was "equally construed." In addition, Martin seemed to suggest that Section 25's proviso did not, in so many words, limit review to federal questions. Rather, it limited the "ground[s] of reversal" to errors that "immediately respect[ed]" the questions of "validity" of state or federal law, or the "construction" of federal law. That might include an error of non-

51 Id.
53 See Smith, 10 U.S. (6 Cranch) at 305 ("The construction of those [Maryland] laws, then, is only a step in the cause leading to the construction and meaning of this article of the treaty . . . "). The Court later referred to the state law question in Smith as being "indispensable" to determine the "main question" of protection under the treaty. Crowell v. Randell, 35 U.S. (10 Pet.) 368, 393 (1836); cf. Fallon et al., Hart & Wechsler, supra note 21, at 457-58 (explaining the distinction between "antecedent" and "distinct" state grounds).
54 Smith, 10 U.S. (6 Cranch) at 305-06.
55 14 U.S. (1 Wheat.) 304 (1816).
56 Id. at 358. The reconsideration of state law had already occurred in an earlier round of the same litigation in Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603, 618-28 (1813). Martin provided the justification (missing in Fairfax's Devisee) for such reconsideration.
58 See Martin, 14 U.S. (1 Wheat.) at 357-59; see also Hart, supra note 2, at 502 n.32 (noting review of nonfederal questions seems to have been premised on § 25's "immediately respects" language).
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federal law when it bore the intertwined relationship to federal law exemplified in Smith and Martin. The Court also remarked that absent some ability of the Supreme Court to review such questions, states might "evade[] at pleasure" the command of federal law. As in Smith, the reexamination of state law seemed to be de novo. 59

Despite this willingness to second-guess state courts' decisions on nonfederal questions, the early Court noted that its review did not ordinarily extend to the "whole case," or even to all state law questions that arguably operated to defeat rights protected by a treaty. 60 If the nexus between the state question and the federal question was not as close as in Smith or Martin, and thus did not "immediately respect" the "construction" of the treaty, the Court lacked jurisdiction. 61

2. Antecedent State Law Questions and the "Validity" of State Law

The pre-Murdock Court also reconsidered state law when reviewing claims that state legislation had impaired a preexisting contract, in violation of the Contracts Clause. 62 These decisions did not implicate the "construction" category of Section 25, as did the

59 Martin, 14 U.S. (1 Wheat.) at 357; see also Fairfax's De vicee, 11 U.S. (7 Cranch) at 632 (Johnson, J., dissenting) (declaring it would be "worse than nugatory" if the Court could not review the question of title).
60 See Monaghan, supra note 8, at 1972.
61 Montgomery v. Hernandez, 25 U.S. (12 Wheat.) 129, 132 (1827) ("[W]e have no authority to re-examine the whole case. We can re-examine so much, and such parts of it only, as come within some one or other of the classes of questions enumerated in the act of Congress . . . ."); cf. Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 823 (1824) (asserting a broad constitutional scope for cases arising under federal law that could arguably extend to the whole case).
62 See, e.g., Chouteau v. Marguerite, 37 U.S. (12 Pet.) 507 (1838). In Chouteau, the Court rejected jurisdiction over an appeal by a slave owner claiming that a slave had been his at the time of a treaty with France, and that the treaty guaranteed the property of persons then residing in the Louisiana territory. The state courts had ruled in favor of the party who claimed she was free at the time of the treaty, and the U.S. Supreme Court refused to review the question whether she was in fact free. Id. at 507. The question resembled that in Smith and Martin: whether the Court could review a state court's determination that, as a matter of local law, there was no property held at a given time, which a treaty might protect.
63 For example, questions regarding property or boundary disputes between private parties attempting to assert rights under a treaty's protection were held to be nonreviewable. See, e.g., McDonogh v. Millaudin, 44 U.S. (3 How.) 693, 706-07 (1845) (considering boundary questions to turn wholly on "local law").
64 U.S. Const. art. I, § 10, cl. 1.
treaty decisions; instead they implicated the "validity" of state legislation upheld against a federal constitutional challenge. But as part of its review of validity, the Court routinely second-guessed state court findings that there was no contract that the state legislation could have impaired.65

Moreover, the Court's rationale for reviewing state law in these cases was the same as in the treaty cases. For example, in Jefferson Branch Bank v. Skelly, the Court stated that its appellate power would be of little use "if this court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract."66 Here too, the Court's efforts to determine the "true meaning"67 of the contract seemed to call for plenary review.68 Yet just as in the treaty setting, the Court did not extend its review to all questions of state law that arguably impacted a claim of contractual impairment. If they bore a less immediate relationship to the federal claim than did the state law questions in cases such as Skelly, the Court would refuse review and would take the state court's determination of state law at face value.69

65 See, e.g., Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430, 438 (1869); see also Furman v. Nichol, 75 U.S. (8 Wall.) 44, 58 (1869) ("[T]his Court decides for itself, whether the construction which the court below gave to these different [state] statutes was correct or incorrect . . . ."); Bridge Proprietors v. Hoboken Co., 68 U.S. (1 Wall.) 116, 144-45 (1864) (making a similar assertion).
67 Ohio Life Ins. v. Debolt, 57 U.S. (16 How.) 416, 433 (1854) (stating that the Court must decide the contract's "true meaning" before it could decide the question of impairment).
68 Id.; see also Piqua State Bank v. Knoop, 57 U.S. (16 How.) 369, 378, 392 (1854) (stating "we . . . exercise our own judgments" on whether a state-issued bank charter was a "contract").
69 For example, in Kennebec Railroad v. Portland Railroad, plaintiff argued that a bank's foreclosure was based on a state statute enacted subsequent to a mortgage, and thus in violation of the Contracts Clause. 81 U.S. (14 Wall.) 23, 24 (1872). But the Court denied review because the state courts had determined that the foreclosure was consistent with prior state law. Id. at 25-26. The state courts' determination of the state law question clearly impacted the decision that the Clause had not been violated, but it apparently did not immediately respect the question of the validity of the state law. Id. The Court thus took the state court's determination at face value, despite the argument that the foreclosure had actually been made pursuant to the retroactive state legislation and in violation of the Constitution. Id. at 26; see also W. Tenn. Bank v. Citizens' Bank, 80 U.S. (13 Wall.) 432, 433 (1871) (dismissing Contracts Clause challenge under similar circumstances).
Overall, the pre-\textit{Murdock} Court’s willingness to second-guess state courts on their interpretation of state law was narrowly circumscribed. Review was limited to state law questions that the Court once described as “growing out of, and connected with” the federal question and “so blended with it as not to be separated, and, therefore, falling equally within the decision contemplated by the 25th section.”\textsuperscript{7} Today, scholars might argue that the existence of a contract, or the presence of property referenced in a treaty, was not entirely a nonfederal question.\textsuperscript{7} But the old Court appeared to view such matters as questions of nonfederal law.\textsuperscript{7} In addition, in the pre-\textit{Murdock} era, deference to state court interpretations of such questions was notably absent.\textsuperscript{7}

Outside of the treaty and contract-impairment settings, however, there is little evidence that the Court ever second-guessed state court decisions on questions of state law on direct review. Indeed, as discussed in the Section that follows, the Court’s non-review of state law also extended to state court decisions on state law grounds that would be adequate to uphold the judgment. Although such ASGs might bear a relationship to federal law somewhat similar to that of state law in the treaty and contract impairment cases, the old Court apparently did not consider them to be sufficiently intertwined with (or to “immediately respect”) the decision on federal law so as to allow for their review.

\textsuperscript{7} Williams v. Oliver, 53 U.S. (12 How.) 111, 124 (1851).
\textsuperscript{7} See Monaghan, supra note 8, at 1935–47. See generally Thomas Merrill, The Landscape of Constitutional Property, 86 Va. L. Rev. 885, 893 (2000).
\textsuperscript{7} See, e.g., Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 259 (1827) (stating, in a Contracts Clause challenge to state bankruptcy law, that the contracts in question were governed by “municipal law”).
\textsuperscript{7} The language of deference in the Contracts Clause cases was a post-\textit{Murdock} development. See Monaghan, supra note 8, at 1978 (referencing decisions from the 1920s and ’30s); see also Given v. Wright, 117 U.S. 648, 655–657 (1886) (considering whether the state court’s findings respecting state law were “well grounded” and finding the court’s reasoning “entirely satisfactory”); Univ. v. People, 99 U.S. 309, 322–23 (1879) (indicating that the Court would give “deference” to state court determinations of state law impacting a Contracts Clause claim).
C. Adequate State Grounds

ASGs played jurisdictional as well as nonjurisdictional roles in the pre-Murdock era. In addition, they often evaded review. The Court would generally refuse to consider the correctness of state court rulings on ASGs, at least when the decision on such grounds was clear. The only time the Court felt free to consider the tenability of ASGs was when the state courts had not clearly decided on such grounds, but might have.

1. ASGs as Dispositional: Clear Federal Grounds; Unclear State Grounds

Neilson v. Lagow provides an example of a nonjurisdictional use of ASGs. In Neilson, a state court had clearly decided a federal question that would confer appellate jurisdiction, but the case also presented potential ASGs on which the state court "may have" relied. In such cases, the Court would take jurisdiction, and if it affirmed on the federal grounds, it would affirm the judgment, without considering the state grounds. But if the Court found that the state courts had decided the federal question wrongly, it would still affirm the judgment if winning counsel below could point to ASGs on which the state courts might have based their judgment, but did not clearly do so. According to Neilson's author, it would be "useless" to reverse a judgment if—following remand—the same judgment would be re-entered by the state courts. Decisions such as Neilson mark the earliest articulation of ASGs, and their function was clearly dispositional, not jurisdictional.

Nevertheless, the Court's practice here was to insist that the potential state grounds be "tenable" as a matter of state law. If they were not, then the Court would refuse to infer that the state courts had rested their decision on the state law grounds. As stated in Neilson (in which the Court rejected a proffered ASG):

75 53 U.S. (12 How.) 98 (1851).
76 Id. at 109.
77 See Curtis, supra note 22, at 41.
78 Id. Justice Curtis was Neilson's author, but Curtis only used the word "useless" when discussing Neilson in his treatise.
We cannot infer that the decision rested on this ground, because we are of opinion that it is not tenable. If it had appeared affirmatively in the record that the [state] Supreme Court did so decide... this court would not inquire into the correctness of that decision; but when put to infer what points may have been raised, and what the court did decide, we cannot infer that they decided wrong...\textsuperscript{79}

In short, the Court would not second-guess state courts on their clearly decided ASGs; but it would do so when it was unclear whether the state courts had actually decided on such grounds. Otherwise, "nothing would be necessary in any case to prevent this court from reversing an erroneous judgment... but that counsel should raise on the record some point of local law, however erroneous, and suggest that the court below may have rested its judgment thereon."\textsuperscript{80} In such cases, however, the Court was not second-guessing the state courts regarding a clear decision on state law—unlike in its treaty and contract-impairment cases. Rather, the tenability inquiry only went to the question whether to infer the existence of state grounds, so that the judgment might be affirmed despite the state courts' error respecting federal law.

2. ASGs as Jurisdictional: Unclear Federal Grounds; Unclear State Grounds

The pre-Murdock Court also considered ASGs when the state court judgment was unclear whether a jurisdiction-conferring federal question had actually been decided. In such cases, if the record also revealed potential (but not clearly decided) state law grounds on which the judgment might have rested, the Court would refuse to infer that the state courts had, in fact, decided the federal question. And, consistent with Section 25's proviso, the lack of a decision on the federal question meant a lack of appellate jurisdiction.

Just as in Neilson, the Court insisted that the state law grounds be tenable in such cases. For example, in Maguire v. Tyler, the Supreme Court noted that the state court "may have decided" on the basis of state law; or it may have decided on the basis of federal

\textsuperscript{79} Id.
\textsuperscript{80} Id.
law. The record did not reveal a clear decision on either ground. The Court then stated that if the potential ASGs articulated to it by winning counsel below were valid, it would have no jurisdiction. But the Court also stated that its jurisdiction would not be defeated by the presence of state law grounds that could not “afford any legal answer to the suit.” Unlike in Neilson, however, Maguire’s consideration of state law was part of a genuinely jurisdictional inquiry, whereas in Neilson it was addressed to the manner of disposing of the case on the merits.

Although Maguire treated ASGs as a jurisdictional barrier to review, it was not an early example of the modern ASGs doctrine. That is because, in Maguire, it was not clear whether the state courts had actually decided a requisite federal question adversely to the federal rights claimant; if not, there was no jurisdiction. As discussed in Section I.A, however, the Court could take jurisdiction even if the record did not “expressly” indicate that the state courts had decided on federal grounds, provided it revealed “by necessary intendment” that the state courts had done so. Maguire was specifically directed to the latter inquiry. If the state courts may have decided on state law grounds (valid in the Court’s view), then the Court would not infer that the state courts had necessarily decided on federal grounds when it was unclear whether they had.

3. Non-Review of Clearly Decided State Law Grounds

Neither Nelson nor Maguire involved second-guessing a state court’s clearly decided ASGs. As discussed above, the Court’s general practice was not to consider the correctness of actual state court decisions on questions of state law, at least outside the treaty and contract impairment settings. Furthermore, as discussed in this

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81 75 U.S. (8 Wall.) 650, 665 (1869).
82 Id. In such event “this court will not presume that the court below decided the other issues erroneously in order to defeat [the Court’s] jurisdiction.” Id.
83 See supra Subsection I.A.2.
84 This approach to ambiguous grounds is contrary to the Court’s current practice. See Michigan v. Long, 463 U.S. 1032, 1044 (1983). For additional pre-Murdock examples of Maguire’s approach, see, e.g., Cockroft v. Vose, 81 U.S. (14 Wall.) 5, 8–9 (1872); Klinger v. Missouri, 80 U.S. (13 Wall.) 257, 261–62 (1872); Ins. Co. v. Treasurer, 78 U.S. (11 Wall.) 204, 209 (1871); see also Fitzgerald, supra note 48, at 120 n.160 (observing that inquiry into the tenability of state grounds was initially to resolve lack of clarity in state court’s judgment).
Subsection, the Court would not second-guess state court decisions on clearly decided ASGs, even when such grounds might pose a genuinely jurisdictional barrier to review.

a. Decisions Resting Entirely on ASGs

For example, a state court might refuse to consider a party's federal claim because of noncompliance with a state statute of limitations, or a failure properly to “set up” the federal claim in state court.\(^5\) Here, the Court's practice of treating state court decisions on questions of state law as conclusive meant that the case would go unreviewed. Today, such state grounds can invite scrutiny lest the Court's appellate jurisdiction be stymied by irregular state practice.\(^6\) But scrutiny of such grounds appears to be a later invention, and one that became commonplace only after 1900.\(^7\) The old Court's insistence that the record show that the state courts had actually decided a requisite federal question—either expressly or by necessary intendment—may have therefore kept it from hearing cases purporting to be decided wholly on the basis of state law.

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\(^5\) See generally Roosevelt, supra note 11, at 1899–1909 (viewing § 25's “specially set up” language as the source for the adequate state procedural grounds rule). There were many early cases in which jurisdiction was rejected because a party failed to get the requisite federal question to appear on the record, but few in which the denial of jurisdiction was expressly tied to noncompliance with a particular state procedure. One example of a case in the latter category was *Carter v. Bennett*, 56 U.S. (15 How.) 354, 356–57 (1854), in which the plaintiff in error had failed to get—consistent with state law—his federal-law objection that the state courts lacked jurisdiction, and the state supreme court therefore considered the issue foreclosed. The U.S. Supreme Court took the state court's ruling on state law at face value and held that it lacked jurisdiction to consider the federal-law objection. Id.; see also *Matheson v. Branch Bank of Mobile*, 48 U.S. (7 How.) 260, 261–62 (1849) (rejecting jurisdiction when state supreme court dismissed appeal raising federal claims because party failed to produce a transcript of the record in the intermediate appellate court, as supposedly called for by state law).

\(^6\) See generally Fallon et al., Hart & Wechsler, supra note 21, at 505–18 (discussing various modes of policing adequate state procedural grounds).

\(^7\) See 1 Reynolds Robertson & Francis R. Kirkham, Jurisdiction of the Supreme Court 157–59 (1936) (noting older practice was not to inquire into whether actually decided state law grounds were “tenable” or had “fair support”); Fitzgerald, supra note 48, at 120 n.160 (making similar observation); see also Hill, supra note 27, at 954 (stating that “an independent state ground was not subject to examination”).
b. Decisions Resting on Clear Federal and State Grounds

On those few occasions when state courts clearly decided on both federal grounds and on ASGs, it was also the pre-Murdock Court's practice to take the state courts' decisions on state law at face value. In addition, the Court posited a genuinely jurisdictional role for such grounds that would block consideration of an otherwise jurisdiction-conferring federal question. These decisions are not well known, yet it was their jurisdictional treatment of ASGs that Murdock would quietly abandon.

For example, in *Rector v. Ashley*, a state court had clearly decided a federal question adversely to the party who sought Supreme Court review. But on a motion to dismiss for want of jurisdiction, it was argued that the state court had also decided a question of state law—noncompliance with a state statute of limitations—that would have been sufficient to uphold the judgment. Justice Miller stated that, if a case would ultimately have to be affirmed because of the existence of such grounds, no matter how the Court ruled on the federal question, the Court could not entertain the case:

> It is conceded that one of the points decided in the Supreme Court of that State against the plaintiff in error would be a sufficient ground for the jurisdiction, if it were the only one on which that court decided the case; but it is claimed that the decree is also based on another and distinct ground, over which this court has no jurisdiction, and that, therefore, we cannot examine the first point. If there is this second ground on which the decree may still be supported, although the first were decided in favor of the plaintiff in error, it would be a useless labor to inquire into the correctness of the point which is of Federal cognizance; because, as the ruling of the State court must be assumed to be correct on the other proposition, no reversal could follow if that proposition was sufficiently broad to sustain the decree.

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*8* 73 U.S. (6 Wall.) 142 (1867).

*9* Id. at 147 (second emphasis added); see also Note, The Untenable Nonfederal Ground in the Supreme Court, 74 Harv. L. Rev. 1375, 1377, 1377 & n.20 (1961) (noting *Rector*’s conflict with *Murdock*).
Miller cited no precedent for his sequencing of the state and federal questions. And it is doubtful whether he could have, insofar as the Court does not appear to have squarely addressed the question before. Miller then applied his approach, looking first to see if the record disclosed any ASGs. He concluded that it did not, in part because the state court's opinion (which actually showed such grounds) was still off-limits. Although the Court thus took jurisdiction, *Rector* clearly showed that it was prepared—even when a federal question had been clearly decided—to refuse jurisdiction if the case presented ASGs, also clearly decided. *Rector* was thus a direct ancestor of the modern jurisdictional treatment of ASGs, although Miller did not offer a constitutional, as opposed to a labor-saving, rationale for its sequencing rule. On the other hand, *Rector* made clear that the Court would not second-guess the state courts on clearly decided ASGs, even if federal rights may have been erroneously denied in the courts below.

*Rector*’s pre-Murdock articulation of a robust jurisdictional role for ASGs was no fluke. Miller later applied *Rector* and dismissed a writ of error on the basis of ASGs, despite the presence of clearly decided federal grounds. A property owner argued that a state supreme court had upheld a foreclosure based on a law enacted subsequent to a mortgage contract, in violation of the Contracts Clause. Although the state court decided that the post-mortgage statute did not violate the Clause, it also decided that the foreclosure was actually made in accordance with older laws in existence at the time of the mortgage—ASGs for upholding the judgment. “[W]e cannot take jurisdiction,” said Miller, “because we could not

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90 Perhaps the closest the Court previously came was its statement that for jurisdiction to attach “a question must not only exist on the record, actually or by necessary intendment,... but the decision must be controlling in the disposition of the case.” *Williams v. Oliver*, 53 U.S. (12 Wall.) 111, 124 (1851). In explaining what it meant by “controlling,” however, *Williams* quoted from decisions in which the federal question had not been clearly decided, and in which it was “sufficient” to show that the state courts could not have reached their decision without deciding the federal question. Id.; see also *Commercial Bank v. Buckingham’s Ex’rs*, 46 U.S. (5 How.) 317, 341 (1847) (stating, without apparent qualification, that the federal question “must have been decided, in order to induce the judgment”).
91 The statement about sequencing was thus probably not dicta, although the Court failed to find ASGs.
reverse the case though the federal question was decided, erroneously in the court below, against the plaintiff in error. Miller summarized: "The court re-asserts the principle, that... it will not entertain jurisdiction if it appears that, besides the Federal question decided by the State court, there is another and distinct ground on which the judgment or decree can be sustained, and which is sufficient to support it." In addition, the Court reaffirmed that it "cannot inquire" whether the state courts were "right in their view of the law as it stood when the contract was made."

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In sum, clearly decided ASGs were off-limits to the Court on direct review, as were questions of state law more generally—at least outside of the treaty and contract impairment settings. Yet the risk that intentional or inadvertent state court error on such questions could thwart the vindication of federal rights was also present in the ASGs setting. As discussed in Part III, the inability to review ASGs may, in part, have motivated the 1867 Congress to delete Section 25's proviso, which up until then had been read as generally disallowing review of such questions. One way of dealing with that problem would be to allow the Court to engage in some second-guessing of clearly decided ASGs. Another (perhaps less sure) way would be to insure that such grounds would not have jurisdictional consequences, but to continue to prohibit their second-guessing. As discussed in Part II, which follows, the latter seems to have been the choice made by Murdock, notwithstanding earlier decisions that had endowed ASGs with jurisdictional consequences.

* Id.
* Id. at 23 (headnote). Unlike Wallace's Report, the Lawyers' Edition (which consulted the Court's original records) correctly identifies Justice Miller as having personally authored the headnote. See Kennebec R.R. v. Portland R.R., 20 L. Ed. 850, 850 (1872).
* Kennebec R.R., 81 U.S. (14 Wall.) at 26. The pre-Murdock Court noted that cases such as Rector had "gone much further" than its earlier cases respecting the requirements for appellate jurisdiction. Smith v. Adsit, 83 U.S. (16 Wall.) 185, 189 (1873).
Prior to Murdock, Section 25's “face of the record” requirement had limited the Court's ability to review state court denials of federal rights. In addition, clearly decided ASGs were treated as a jurisdictional barrier to review, and the Court refused to second-guess their correctness. Murdock would fundamentally alter this regime. Murdock held that—because of Congress's 1867 changes to Section 25—it would no longer construe the record as strictly as before, and it would look to the state court's opinion to check for federal grounds. As discussed below, Murdock also addressed the ASGs problem by denying such grounds jurisdictional force (even though it continued to refuse to second-guess them). The decision to dejurisdictionalize ASGs, along with the decision to allow resort to the opinion below, had the potential to expand greatly the Court's appellate review, and it did so in the thick of Reconstruction's political and constitutional upheaval. Although Murdock is best known for its refusal to read the 1867 Act's changes to Section 25 as allowing the Court to review questions of state law in cases otherwise within its jurisdiction, its ruling on ASGs may have been closely related to that refusal.

A. Murdock's Adequate State Grounds Rule

1. The Sequencing of Federal Questions and ASGs

Murdock stated that the Court would take jurisdiction when a party showed that the state courts had ruled against his claim of federal right, ASGs notwithstanding. In a series of numbered “propositions,” Murdock stated that if a requisite federal question had been raised and decided by the state courts against the federal rights claimant, then: “These things appearing, this court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly decided.” The Court would therefore decide the federal question first, and if it found no error, would affirm the judgment. If it disagreed on the federal questions, it would proceed to the state court's judgment and apply its rules of review.

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97 See supra note 29 and accompanying text.
98 Murdock, 87 U.S. (20 Wall.) at 636 (stating Murdock's fourth proposition).
99 Id. (stating Murdock's fifth proposition: “If [the Court] finds that [the federal question] was rightly decided, the judgment must be affirmed.”).
question, then and only then would it look for ASGs. If such grounds existed, the Court would affirm, despite its disagreement on the federal grounds; if they did not exist, it would reverse.\(^{100}\)

Murdock thus echoed the dispositional treatment of ASGs in older cases like Neilson v. Lagow, although Neilson was applicable only when ASGs had not been clearly decided.\(^{101}\) Moreover, Murdock made clear that the Court would not scrutinize—even deferentially—the correctness of “adjudged” ASGs. Because the state courts’ decisions on such ASGs were “conclusive,”\(^{102}\) the Court might affirm a judgment against the federal rights claimant despite the state courts having erred on the federal question.

Under Murdock, therefore, ASGs lacked jurisdictional consequences as opposed to dispositional ones—contrary to its immediate prior practice under Rector v. Ashley, and contrary to modern practice. The Court’s rationale for affirming in such cases was that it would be “useless and profitless” to reverse the judgment if the state courts would simply reinstate it on state law grounds.\(^{103}\) Nevertheless, it was not a ground to reject jurisdiction that a decision on the federal question might not be necessary to the disposition of the case, given the presence of ASGs. As stated in Murdock’s first two propositions, the record only had to show that the federal question was actually decided or that its decision would have been “necessary” to the decision of the court below—but not both:

1. [I]t is essential to the jurisdiction of this court over the judgment of a State court, that it shall appear that one of the questions mentioned in the Act must have been raised and presented to the state court.
2. That it must have been decided by the State court, or that its decision was necessary to the judgment or decree, rendered in the case.\(^{104}\)

The Court’s decided-or-necessary distinction reflected the old dichotomy between “express averment” and “necessary intend-

\(^{100}\) Id. (stating Murdock’s sixth proposition). The Court also stated that its “first duty” was to inquire into the correctness of the decision on federal law. Id. at 627.

\(^{101}\) See supra notes 74–77 and accompanying text.

\(^{102}\) Murdock, 87 U.S. (20 Wall.) at 635.

\(^{103}\) Id.

\(^{104}\) Id. at 635–36 (emphasis added).
ment” as different ways to tell if a relevant federal question had actually been decided. As a result, if it appeared that the requisite federal question had actually been decided, then there was jurisdiction to review it on the merits. It did not matter that ASGs might render a decision on the federal question logically unnecessary. Consequently, if Murdock supposed that the presence of ASGs rendered reversal “useless and pointless,” it did not also suppose that review of a possibly unnecessary federal question was equally useless and pointless.

2. Accounting for Change

It was, of course, Justice Miller—Murdock’s author—who had authored Rector, which rejected what he called the “useless labor” of reviewing a case when reversal of the judgment would not be possible because of ASGs. Miller must have recognized that Murdock signaled a retreat from Rector. Counsel for the City of Memphis argued to dismiss the writ of error based on “the settled rule of this court,” given that the state court’s alternative decision on the statute of limitations would likely have been a sufficient state ground on which to uphold the judgment below. At the time,

105 See supra note 31 and accompanying text.
106 See Murdock, 87 U.S. (20 Wall.) at 636. Murdock once referred to the “necessity” and “controlling” character of the federal question, but only to identify a state ground as insufficient to uphold the judgment, after taking jurisdiction and addressing the merits of the federal question. Id. (stating Murdock’s seventh proposition). One of the few decisions to reiterate the point that Murdock might require the decision of unnecessary federal questions was Railroad Co. v. Maryland, 88 U.S. (21 Wall.) 456 (1875). Given the presence of ASGs in the case, the Court stated that the federal “constitutional question was not necessarily involved.” Id. at 467. It continued: [B]ut as this [constitutional] question was in fact passed upon by the [state courts], and ruled against the defendants, though not the principal ground on which it placed its judgment, it would be our duty, under our recent rulings on the construction of the act of 1867, to assume jurisdiction of the case, and review the judgment of the state court on the constitutional point.

107 Of course, if a federal question was actually decided, it might have to be “necessary” in the sense of being relevant to the decision. But Murdock supposes that a state court’s additional decision on a possibly dispositive question of state law would not itself render the decision on the federal question (or review of it) unnecessary.
108 See Brief for Defendant in Error at 4, 6, Murdock, 87 U.S. (20 Wall.) 590 (No. 106) (urging dismissal and stating that the limitations ruling “alone disposed of the whole case,” and thus the Court had “no jurisdiction”). The state chancery court had ruled that defendants had perfect title “both under the act of cession by the Congress
counsel was right to do so. Nevertheless, the *Murdock* Court took jurisdiction and affirmed, but only after first reaching the federal claim and concluding—that the state court had decided the federal question correctly. It therefore did not reach the statute of limitations issue (or any other question of state law).

That *Murdock* was a conscious pullback from the Court's prior decisions is also supported by its disposition of *Railroad Co. v. Maryland*, a case decided the same day as *Murdock*. The plaintiff in error pointed to a federal question that had been decided against it by the state courts; opposing counsel pointed to ASGs in the case, and moved to dismiss for lack of jurisdiction, citing *Rector*. After *Murdock*, the answer was not in doubt: the Court had jurisdiction. Justice Miller seemed to recognize that an explanation was in order. He conceded that "some of the decisions" of the Court under old Section 25 "would undoubtedly justify" the motion to dismiss, if the presence of ASGs "were very clear." But he then indicated that *Murdock* required a different result: "where the federal question has been raised, and has been decided against the plaintiff in error, the jurisdiction has attached, and it must be heard on the merits." The question of the state law ground's "sufficiency" to control the judgment, said Miller, would be decided only after the Court resolved the correctness of the federal law grounds.

Despite this almost apologetic acknowledgement, in neither *Railroad Co.* nor *Murdock* did Miller indicate precisely why the Court's older approach was no longer to be followed. Nevertheless,
in *Murdock*, Miller did state that the numbered propositions that it announced—which required hearing the federal question even when ASGs might be present—were ones "flowing from the statute as it now stands." In addition, Miller stated in *Railroad Co.* that the 1867 Act had eliminated some of the "restrictive language" of Section 25—thus suggesting that this was the reason the Court now had to take jurisdiction and decide the federal question first. Nevertheless, Miller did not spell out how the elimination of Section 25's proviso—the "restrictive language" to which Miller presumably referred—meant that the Court now had jurisdiction, whereas under *Rector* it did not.

Perhaps the Court surmised that a jurisdictional approach to ASGs would have somehow been inconsistent with the general thrust of the 1867 Act to expand jurisdiction, even though the extent of that expansion was contested. Counsel for Murdock had argued for merits review of all state law questions in cases otherwise subject to the Court's jurisdiction. Amicus briefs solicited by the Court did the same. Moreover, three Justices would conclude that some review of state law questions must be available in cases that otherwise fell within the Court's jurisdiction. The Court would reject those arguments. But the apparent decision to back off precedents such as *Rector*, and not to permit clearly decided ASGs to block the Court's review of alleged denials of federal rights, was a clear concession to greater appellate jurisdiction than pre-*Murdock* decisions would have sanctioned. Rightly or wrongly, the Court seemed to attribute its broader review to then-recent changes in Section 25.

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115 *Murdock*, 87 U.S. (20 Wall.) at 635.
116 See Hill, supra note 27, at 954 n.38 (suggesting *Murdock*'s sequencing rule was "apparently in reliance upon the then governing statute"); Matasar & Bruch, supra note 5, at 1318 (stating that *Murdock* "gave effect to the [1867] amendment by adopting [its] dispositional method").
117 See infra Subsection III.C.2.a.
118 As discussed below in Part III, the Court refused to read the 1867 Act's elimination of § 25's proviso as allowing for such review. In addition, the Court rejected an argument that, because the statute provided that the Court's review of cases from state courts should be "in the same manner" as for cases coming from lower federal courts (which could include questions of state law), state law questions were now fair game. The Court read this language (which was actually unchanged by the 1867 Act) as relating to procedure only. See *Murdock*, 87 U.S. (20 Wall.) at 620–25.
In hindsight, it appears that by the time of Murdock, there was no longer a majority for both of the requirements that Miller had articulated in Rector—namely, that clearly decided ASGs should play a jurisdictional role and that the Court would not review their correctness. As discussed below in Part III, the 1867 Congress may have been concerned that doubtful state law grounds could block Supreme Court review claims of state court denials of federal rights. Such a concern might have been addressed in one of two ways: (1) by opening up review of ASGs for their correctness (or tenability); or (2) by denying a jurisdictional role to ASGs. Of course, one could do both, and that is what the Murdock dissenters urged in one form or another. But as between the first two choices, Miller and his majority appeared to opt for the second. In doing so they may have concluded that any review of the state courts’ actual decisions on state law—including on ASGs—was the more problematic option from the perspective of federalism, particularly given the potential “constitutional qualms” about second-guessing state courts on clearly decided questions of state law as a general matter.

B. Eustis’s Adequate State Grounds Rule

Scholars suggest that Murdock’s nonjurisdictional approach to ASGs remained in place for the next two decades, and that it was the Court’s 1893 decision in Eustis v. Bolles that marked its end. In Eustis, the Court articulated a modern version of the rule, calling it “settled”:

[W]here the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient,

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119 John Harrison, Federal Appellate Jurisdiction Over Questions of State Law in State Courts, 7 Green Bag 2d 353, 355 (2003) (noting that Murdock’s non-review of state law “rests in part on constitutional qualms,” but considering them unfounded). By deciding that the Court could not ordinarily review state law questions, Murdock avoided deciding whether it could do so constitutionally.
120 150 U.S. 361 (1893).
121 See supra notes 10–11 and accompanying text.
notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment.\textsuperscript{122}

Eustis's statement is plainly at odds with Murdock, in which the Court stated that it would not reverse the judgment in such circumstances. Under Murdock, if the state court decided a jurisdiction-conferring federal question, ASGs would not prevent its review. Nevertheless, it is doubtful whether, at the time of Eustis, the Court's statement was "wrong."\textsuperscript{123} As discussed in this Section and elsewhere below, scholars may have given too much credit to Eustis as marking the break from Murdock, as opposed to confirming a break that had already occurred.

\textit{1. Honoring Murdock—Pre-Eustis}

Although the Court regularly cited Murdock in the two decades leading up to Eustis, it was primarily for its general proposition that the Court would not review questions of state law,\textsuperscript{124} and not for its more specific proposition that ASGs were dispositional rather than jurisdictional.\textsuperscript{125} To be sure, there were post-Murdock, pre-Eustis affirmances in which the Court took jurisdiction, found no error in the state court's determination of the federal question, and then stated that it would not consider any other nonfederal questions decided below.\textsuperscript{126} But there is no clear indication in those cases that the state law issues to which the Court alluded would have constituted sufficient grounds to uphold the judgment if the Court had found that the state courts had erred on the federal question. As a result, these decisions do not squarely reaffirm

\textsuperscript{122} Eustis, 150 U.S. at 366 (emphasis added).

\textsuperscript{123} Monaghan, supra note 8, at 1949.


\textsuperscript{125} For a rare possible exception, see McLaughlin v. Fowler, 154 U.S. 663, 663 (1880), in which the Court stated that it could look "beyond the Federal question," but only when a state court decided the federal question erroneously (which it had not).

Murdock’s nonjurisdictional approach to ASGs. Indeed, post-Murdock, one is hard-pressed to find a single decision in which the Court actually did what Murdock said it could do: uphold a state court judgment because of the existence of clearly decided ASGs, but only after taking jurisdiction and concluding on the merits that the state courts had erroneously decided the federal ground.

2. Dishonoring Murdock—Pre-Eustis

On the other hand, there were a number of post-Murdock decisions during the 1880s that support Eustis’s eventual approach to ASGs, and that are difficult to reconcile with Murdock. These decisions fell into two categories: summary affirmance and jurisdictional dismissal.

a. Summary Affirmance

Jenkins v. Loewenthal provides a pre-Eustis example of summary affirmance because of ASGs. Jenkins stated (only nine years after Murdock) that when ASGs were clearly present along with federal grounds, the Court would simply “affirm,” without ruling on either the state law question or on the clearly decided federal question. Chief Justice Waite, Jenkins’s author, even went out of his way to state that such affirmance was consistent with Murdock. Yet under Murdock, affirmance in the face of state law grounds would come only after considering the merits of the federal questions raised by such a case—a point that Murdock’s
propositions make unmistakable.\textsuperscript{132} Jenkins's summary disposition was thus a giant step away from Murdock and toward making ASGs a jurisdictional barrier to review. Nor was Jenkins the only time the Court summarily affirmed on the basis of ASGs stating that it "need not inquire" into the federal question decided in such cases.\textsuperscript{133}

\textbf{b. Dismissal}

\textit{Hale v. Akers}\textsuperscript{134} provides a pre-Eustis example of outright jurisdictional dismissal because of ASGs. The defendant Akers raised two defenses—one state and one federal—to the plaintiff's state law claim, and both defenses were upheld by the state courts. On direct review, Akers argued that the U.S. Supreme Court lacked jurisdiction because of the presence of ASGs, and urged the writ of error be dismissed "[a]lthough the record disclose [sic] that a state court, as a matter of fact, has passed upon a federal question."\textsuperscript{135} Hale, who lost below, sensibly invoked Murdock. He argued that jurisdiction attached if the record clearly showed—as it did—that the requisite federal question had been raised and decided. And he argued that the Court "could go on no further into the re-examination" unless and until it concluded that the state court had decided the federal question erroneously.\textsuperscript{136}

In ruling against jurisdiction, the Court invoked Murdock for the principle that "even assuming that a Federal question was erroneously decided," it would ask whether there were state grounds "sufficiently broad to maintain" the decree, and if so, affirm the judgment below.\textsuperscript{137} As rightly argued by Hale's counsel, however, Murdock would not "assume" error on the federal question, but would first take jurisdiction and decide the federal question on the merits. Nevertheless, the Hale Court confidently added that "[t]his principle has since been repeatedly applied" as "one of [Mur-

\begin{itemize}
    \item \textsuperscript{132} See Brief and Argument for Defendants in Error at 1–2, Jenkins, 110 U.S. 222 (No. 1232) (stating that there were "sufficient" state law grounds that rendered the correctness of the state court's decision on the federal question "unimportant").
    \item \textsuperscript{133} See, e.g., Beaupre v. Noyes, 138 U.S. 397, 401 (1891).
    \item \textsuperscript{134} 132 U.S. 554 (1889).
    \item \textsuperscript{135} Brief for Defendant [in Error] at 4, Hale, 132 U.S. 554 (No. 270).
    \item \textsuperscript{136} Brief for Plaintiff [in Error] at 1, Hale, 132 U.S. 554 (No. 270).
    \item \textsuperscript{137} Hale, 132 U.S. at 564 (emphasis added).
\end{itemize}
dock’s] propositions which flowed from the provisions of the 1867 Act.\textsuperscript{138} Then, citing Jenkins, the Court declared that when the state courts had clearly decided on both state law and federal law grounds, and the former were sufficient to uphold the judgment, “it would affirm the decree, without considering the Federal question or expressing any opinion upon it.”\textsuperscript{139}

One might therefore have expected the Hale Court to summarily affirm the decision below, as in Jenkins. But the Court then dismissed the writ of error. It concluded that, given the lower court’s decision on the dispositive state law grounds, the decision on the federal grounds was “not necessary,” and that it was “of no consequence” whether the state court got federal law right.\textsuperscript{140} Hale did not explain why it dismissed rather than summarily affirmed.\textsuperscript{141} But Hale’s practice of dismissing the writ of error in the face of ASGs—and despite a clear decision on federal grounds—was followed in a number of other pre-Eustis decisions.\textsuperscript{142}

3. What Happened to Murdock?

Given such decisions, one wonders what had become of Murdock’s sequencing rule. By the time of Eustis, the Court already regarded the existence of ASGs as a barrier to appellate review. Hale and Jenkins show, respectively, that in such cases the Court sometimes dismissed the writ of error and sometimes summarily affirmed. And in both settings, it did so without considering the fed-

\textsuperscript{138} Id. at 564–65. The Court neglected to cite the “proposition” to which it was referring.
\textsuperscript{139} Id. at 565.
\textsuperscript{140} Id.
\textsuperscript{141} Unlike Jenkins, Hale was decided on a motion to dismiss, perhaps accounting for the disposition by dismissal rather than affirmance. But decisions ordering dismissal were sometimes made after briefing on the merits, and sometimes on motion to dismiss. See authorities cited infra note 142.
\textsuperscript{142} See, e.g., Hammond v. Johnston, 142 U.S. 73, 78 (1891) (dismissing writ of error after briefing on the merits); id. at 76 (Statement of the Case) (noting that although the state court expressly “ruled upon” various federal questions, they were “unnecessary” given ASGs); Brooks v. Missouri, 124 U.S. 394, 399–400 (1888) (granting motion to dismiss although the state court had upheld a state statute against a federal challenge, because ASGs were “equally conclusive”); De Saussure v. Gaillard, 127 U.S. 216, 232 (1888) (dismissing the writ of error after briefing on the merits, although the state supreme court in fact “passed upon the federal question,” because review was “not necessary” given ASGs).
eral grounds. Thus, *Eustis* staked out a new direction only by more clearly calling for dismissal of the writ of error in such cases, instead of summary affirmation. *Eustis* was choosing between two modes of summary disposition of cases that the Court said it “would not review” because of the clear presence of ASGs and despite the clear presence of federal grounds.

*Eustis* may therefore have confirmed *Murdock*’s demise, but scholars are probably wrong to assume that it was primarily responsible for treating the presence of ASGs as a jurisdictional barrier to review. Rather, that seems to have been a fait accompli by the time of *Eustis*. Professor Monaghan has criticized *Eustis* for relying on statements made in cases in which the Court had denied jurisdiction because no federal question had been decided. But *Eustis* also expressly relied on cases like *Jenkins* and *Hale* in which the federal question had been clearly decided, and in which the Court had already departed from *Murdock*. Those were the cases that better mark the break and that set up two modes of summarily disposing of cases presenting ASGs—from which *Eustis* later made its choice.

C. Explaining Eustis

1. Confusion?

What prompted the Court’s move away from *Murdock*’s non-jurisdictional treatment of ASGs may be difficult to know. The Court did not purport to disavow *Murdock*, nor did it suggest that it was simply reverting to pre-*Murdock* precedents such as *Rector*

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143 See supra notes 10–11 and accompanying text.
144 See Monaghan, supra note 8, at 1949–50 (noting *Eustis*’s reliance on *Klinger v. Missouri*, 80 U.S. (13 Wall.) 257 (1871), and *Johnson v. Risk*, 137 U.S. 300 (1890), in both of which the record insufficiently revealed a decision on the basis of federal law). As Monaghan notes, it had long been the Court’s practice to refuse jurisdiction in such cases and dismiss them, and such decisions hardly supported dismissing a case on jurisdictional grounds when the jurisdiction-conferring federal question had actually been decided, as called for by *Eustis*. See id. at 1949.
145 *Eustis*’s rule would not be applied in a case in which the requisite federal question had been clearly raised and decided (unlike in *Eustis* itself) for another three years. See *Seneca Nation v. Christy*, 162 U.S. 283, 289–90 (1896) (dismissing writ of error when state courts decided that federal statutes did not confer the property rights claimed by the Seneca Nation in its ejectment action, but also decided that the action was barred by a state statute of limitations).
v. Ashley that had articulated a fully jurisdictional role for clearly decided ASGs. On the other hand, the line of pre-Murdock cases in which ASGs had played a more modest jurisdictional role seems to have influenced the post-Murdock Court. As discussed in Part I, the Court often looked to possible state law grounds to help it determine whether a federal question was “necessarily decided” when it was unclear from the record. If there were “tenable” state law grounds sufficient to uphold a judgment, the Court would not infer that the state courts had actually decided a federal question.\footnote{See supra Subsections I.C.1–2.}

It may be that during the run-up to Eustis, the Court read those decisions as providing a more general rule that the federal question had to be necessary to the decision in all cases—including those in which the decision on federal grounds was clear.\footnote{See Fitzgerald, supra note 48, at 120 n.160 (suggesting this move on the part of the Court); see also Robertson & Kirkham, supra note 87, at 158 (finding “a basis for the current doctrine” in the older decisions involving ambiguous grounds).} Consequently, if a case presented ASGs, then resolution of any federal question was for that reason unnecessary. Such an approach, however, is hard to square with Murdock, which embraced the decision of potentially unnecessary federal questions. Although it is possible that the Court consciously redeployed these earlier precedents (focusing on unclear grounds) in support of a more broadly jurisdictionalized ASGs rule, simple confusion on the Court’s part cannot be excluded as an explanation. Consider the following pieces of evidence:

First, in arguing that ASGs would pose a jurisdictional bar in all cases, Eustis relied in part on decisions that had reiterated the Court’s more modest jurisdictional rule in cases of ambiguity—that is, in cases in which the fact of the federal question’s decision was unclear. However, those older decisions obviously did not reach cases in which the federal question had been clearly decided.\footnote{See Monaghan, supra note 8, at 1950.}

That is because there would have been no need to consult ASGs to infer whether a federal question had been decided, if the federal question clearly had been decided.

Second, a number of the Court’s opinions in the immediate post-Murdock years had stated in dicta that the federal question had to be “necessary” to the state courts’ decision in all cases, not just
those in which the federal question's decision was unclear. The assertion of Chief Justice Waite in Brown v. Atwell—decided the year after Murdock—provides an early and often cited example. In Brown, the record failed to show that any federal question had been raised or decided. But Waite attempted to lay down a general rule—one not needed to decide the case before him—stating that for the Court's appellate jurisdiction to attach, the requisite federal question must have been raised, and "[i]t must appear that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."  

This, of course, imprecisely restates Murdock's first two propositions—a case argued before Waite was sworn in as Chief Justice and in which he did not participate. For jurisdiction to attach under Murdock, it had to appear either that the federal question was clearly decided, or if not, that it was necessary to the state court's decision. Under Waite's formulation, however, "necessity" counts twice. It counts once as the point of inquiry in cases of ambiguity regarding whether a federal question was actually decided—that is, the state court judgment "could not have been given without deciding it." And it counts again as a general matter, applicable even to cases in which the federal question had clearly been decided.  

Perhaps Waite did not mean to say, even in dicta, that although a requisite federal question was clearly decided below, it would not be reviewable if ASGs rendered its decision unnecessary. Waite's

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149 92 U.S. 327 (1876).
150 Id. at 329 (emphasis added).
151 See supra text accompanying note 104.
153 Counsel offered no such argument in Brown. Rather, counsel cited Murdock for the proposition that the record had to show either that the requisite federal question had been decided, or that its decision was necessary to the outcome. See Brief for Defendant in Error at 5–6, Brown, 92 U.S. 327 (No. 622). Nor did the cases on which Waite relied squarely support his statement. See infra note 154.
154 There is evidence that he did so intend, however. In Citizens' Bank v. Board of Liquidation, 98 U.S. 140, 142 (1879), Waite stated that his formulation was consistent with Murdock because the federal question in Murdock "was necessary" to the decision. See infra text accompanying notes 156–58. In addition, Citizens' Bank stated that the Court would lack jurisdiction if it "would be compelled to affirm the judgment, whether we found any error," and that this was the "old rule" that the Court had reaffirmed post-Murdock. Citizens' Bank, 98 U.S. at 141–42. For support, Waite cited to his own dicta in Brown and to Moore v. Mississippi, 88 U.S. (21 Wall.) 636 (1875).
conjunctive (decided-and-necessary) formulation was flatly inconsistent with Murdock’s disjunctive (decided-or-necessary) formulation. And Murdock’s sequencing rules expressly called for a decision on the federal question ahead of a decision on ASGs. Moreover, the pre-Murdock cases on which Waite relied had not offered a formulation like his own. Nevertheless, the Court frequently reiterated Brown’s decided-and-necessary language, although usually in cases in which the record failed to show that the federal question had actually been decided. It may have been by sheer dint of repetition that Brown’s sequencing formulation eventually eclipsed the contrary—but perhaps less often repeated—sequencing formulation of Murdock.

Third, Eustis uncritically repeated the linguistic move first made in Brown, referring to it as “settled law.” According to Eustis:

*Citizens' Bank*, 98 U.S. at 142. The latter was only ambiguous authority for his point, however. There, Waite had stated (three months after Murdock) that the Court did not have jurisdiction simply because a federal question “may have been decided. To give us jurisdiction it must appear that such a question ‘was necessarily involved in the decision.’” *Moore*, 88 U.S. (21 Wall.) at 638. Certainly that was true, but only when it was unclear whether the requisite federal question had actually been decided, as in *Armstrong v. Treasurer of Athens*, 41 U.S. (16 Pet.) 282, 285 (1842), the source of the “necessarily involved” quotation in *Citizens' Bank*.


See, e.g., *Johnson v. Risk*, 137 U.S. 300, 307 (1890); *New Orleans Waterworks Co. v. La. Sugar Ref. Co.*, 125 U.S. 18, 29 (1888); *Adams Cnty. v. Burlington & Mo. R.R. Co.*, 112 U.S. 123, 127 (1884); *Citizens' Bank*, 98 U.S. at 142; see also *Boughton v. Exch. Bank*, 104 U.S. 427, 427 (1881) (“[T]he record must show affirmatively, or by fair implication, that some Federal question was involved which was necessary to the determination of the cause.”).

The pre-1888 decisions cited in note 156 were all authored by Waite. Nevertheless, Waite sometimes recited Murdock’s contrary formulation — although in cases in which it was unnecessary to the Court’s decision. See, e.g., *Detroit Ry. Co. v. Guthard*, 114 U.S. 133, 135–36 (1885) (quoting Murdock’s decided-or-necessary language); *Adams Cnty.*, 112 U.S. at 127 (stating that the record must show that the federal question “was decided, or that its decision was necessary”); *Chouteau v. Gibson*, 111 U.S. 200, 200 (1884) (same); see also *McLaughlin v. Fowler*, 154 U.S. 663, 663 (1880) (stating that the Court could look “beyond the federal question” if the state law question was decided incorrectly, but finding it was decided correctly).
Reconstructing Murdock v. Memphis

[I]t must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it.158

Eustis thus substituted “and” for Murdock’s “or,” just as Brown had done almost twenty years before. And the “necessity” requirement, which was once subsumed in the lack-of-clarity inquiry, was firmly converted into a freestanding requirement, including in cases in which the federal question was clearly decided. Yet none of the decisions leading up to Eustis—including Eustis itself—bothered to explain the shift in the treatment of “necessity,” perhaps suggesting that none was perceived.

2. Conscious Choice?

On the other hand, it is certainly possible that in the run-up to Eustis, the Court had made a conscious choice to reject Murdock’s nonjurisdictional treatment of ASGs. But if so, the Court was less than candid about what it was up to. For example, there is some evidence that Chief Justice Waite was aware of the tension between his own formulation and Murdock’s. Waite once protested that nothing he had said about the federal question always having to be “necessary” before the Court’s jurisdiction could attach was inconsistent with Murdock.159 His attempted explanation was that the federal question in Murdock “was necessary” to the decision in that case, and therefore the Court had jurisdiction.160 To be sure, the distinct state law grounds for relief in Murdock would not have been adequate to uphold the judgment, thus making the decision on the federal question necessary. But Waite’s explanation ignores Murdock’s statement that the Court would fully consider federal questions on the merits, prior to looking for ASGs. And it ignores Murdock’s assumption that ASGs could uphold the judgment, meaning that the decision on the federal question (which Murdock

158 Eustis, 150 U.S. at 366 (emphasis added).
159 Citizens’ Bank, 98 U.S. at 142.
160 Id.
embraces) might be logically unnecessary.\textsuperscript{161} The post-\textit{Murdock} Court, however, was not immediately confronted with a test case—that is, a case in which the state courts had clearly decided on both federal and state law grounds. But that seems to have happened within nine years of \textit{Murdock}, when the Court in \textit{Jenkins v. Loewenthal} chose not to decide a jurisdiction-conferring federal question because of the presence of ASGs, and to affirm summarily.\textsuperscript{162}

Perhaps the Court so chose as a way of self-policing its burgeoning docket, as some have argued.\textsuperscript{163} Jurisdiction was mandatory, and always having to decide the merits of the federal claim on direct review was genuinely useless labor. But significant docket concerns were also present in the post-Civil War era of \textit{Murdock},\textsuperscript{164} and yet \textit{Murdock}'s nonjurisdictional treatment of ASGs exacerbated those concerns. In addition, at the time of \textit{Murdock} and afterwards, docket complaints were primarily directed to the number of appeals coming to the Supreme Court from the lower federal courts, not from the state courts.\textsuperscript{165} And the 1875 general federal question statute\textsuperscript{166} likely channeled additional cases to the lower federal courts that would have come to the Court on direct review from the state courts. However, such re-routing may not have reduced the overall appellate burden on the Court, and docket congestion was reaching crisis proportions in the 1880s—the decade of \textit{Jenkins} and \textit{Hale}.\textsuperscript{167} It is certainly possible, therefore, that such events contributed to the Court's abandonment of \textit{Murdock}'s non-jurisdictional treatment of ASGs.

Alternatively (or additionally), the Court may have made its turn because of doubts about the propriety of deciding logically unnecessary—although clearly raised and decided—federal ques-

\textsuperscript{161} Waite's explanation also ignores the state courts' statute-of-limitations ruling in \textit{Murdock}, which was likely a sufficient ground to uphold the judgment. See supra note 108 and accompanying text.

\textsuperscript{162} See supra text accompanying notes 129–33.

\textsuperscript{163} See Matasar & Bruch, supra note 5, at 1362–63; Mitchell, supra note 5, at 1354.

\textsuperscript{164} Docket congestion began to take off soon after the Civil War. See 6 Fairman, supra note 152, at 1449–50.

\textsuperscript{165} See, e.g., Samuel F. Miller, Judicial Reforms, 6 W. Jurist 49, 53–55 (1872).


\textsuperscript{167} See Felix Frankfurter & James M. Landis, The Business of the Supreme Court 56–77 (1928) (noting bloated Supreme Court dockets arising from lower federal court appeals in years leading up to 1891 reforms).
Reconstructing Murdock v. Memphis

The Court may have supposed that the jurisdictional role of ASGs in those cases in which a decision on federal grounds was unclear reflected a broader understanding that decisions on federal questions had to be necessary in all cases. In any event, the rule commonly associated with Eustis seems to have been articulated well before Eustis. It seems also to have been articulated in the years shortly before Murdock, as discussed in Part I, in cases such as Rector v. Ashley.¹⁶⁸

D. The Court’s Double-Reverse

Whatever the basis for the post-Murdock Court’s move, events culminating in Eustis show that the Court had effectively revived a practice that Murdock, without explanation, had itself abandoned. What we are left with, therefore, is something of a double-reverse: first, Murdock’s quiet retreat from a jurisdictional role for clearly decided ASGs, even in cases involving clearly decided federal questions; and second, the Waite Court’s quiet retreat from Murdock. The fact that there was a genuine pre-Murdock pedigree for cases such as Eustis may suggest a conscious, if unexplained, choice on the part of the Court to recover a lost option—namely, the jurisdictional treatment of clearly decided ASGs—and to reject Murdock’s equally unexplained departure from it.¹⁶⁹ In addition, it was not too long after the Court’s rejurisdictionalization of ASGs that the Court ended up flipping both of Murdock’s choices, not only by deciding to have clearly decided ASGs play a jurisdictional role (again), but also by allowing the Court to scrutinize the ASGs’ correctness, not just their sufficiency.¹⁷⁰ It seems, therefore, that the trajectory of the Court both before and after Murdock was the jurisdictional treatment of ASGs. And once all the dust settles, it may be that Murdock is the exceptional or provisional decision, at least on the point of ASGs.

¹⁶⁸ See supra Subsection I.C.3.b.
¹⁶⁹ On the other hand, and more suggestive of possible confusion, Eustis did not invoke pre-Murdock decisions such as Rector v. Ashley that had articulated a fully jurisdictional role for ASGs. Nor did the Court refer to Rector in Jenkins or Hale. The only time Rector was relied on by the post-Murdock Court for its ASGs ruling was in New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co., 125 U.S. 18, 38 (1888).
¹⁷⁰ See infra notes 186–89 and accompanying text.
Critics, of course, might be quick to argue that the Court was not especially kind to Reconstruction enactments, or—more charitably—that it sought to preserve traditional federalism values with only grudging accommodation of those enactments.\(^7\) Murdock is thus often paired with the *Slaughter-House Cases*,\(^7\) which occupied time on the docket with Murdock.\(^7\) The pairing arises from the fact that *Slaughter-House* headed off a broad constitutionalization of state-law and common-law rights, while Murdock precluded a superintending role for the Court in connection with those same sorts of rights on direct review.\(^7\) In addition, there was rough but imperfect overlap in the line-up of the Justices in the two decisions.\(^7\) Yet simple animus toward Reconstruction cannot explain Murdock’s apparent willingness, post-*Slaughter-House*, to endorse a considerable expansion of federal jurisdiction, contrary to immediate past practice. Much less can it explain why buyer’s remorse over Murdock’s approach—if remorse there was—only set in later. A fuller discussion of the relationship between Reconstruction, the 1867 Act, and the jurisdictional alterations in Supreme Court review is provided in Part III, which follows.

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\(^7\) 83 U.S. (16 Wall.) 36 (1873).
\(^7\) Fairman, supra note 152, at 410 (observing that the Court ordered reargument in *Murdock* shortly before the decision in *Slaughter-House*).
\(^7\) As Professor Charles Fairman put it, *Slaughter-House* rejected a reading of the Constitution “that would make the Court ‘a perpetual censor upon all legislation of the States,’” and *Murdock* refused to “make the Court a perpetual censor upon the decisions of the state judiciaries in matters of state law.” Id. at 411.
\(^7\) Miller wrote both opinions, and Bradley dissented in both. Justices Strong, Davis, and Hunt joined Miller in the majority in both. But Justice Field dissented in *Slaughter-House*, while joining Miller in *Murdock*. Justice Clifford may have done the opposite, joining Miller in *Slaughter-House* while “dissenting” in *Murdock*. But see infra text accompanying notes 233–36 (noting that Justices Clifford and Swayne likely concurred in *Murdock*’s judgment). Chief Justice Chase, who dissented in *Slaughter-House*, had been replaced by Chief Justice Waite, but Waite did not participate in *Murdock*. See Fairman, supra note 152, at 411.
III. MURDOCK AND RECONSTRUCTION

A. Murdock's "Useless Labor": Reviewing Unnecessary Federal Questions

Thinking about ASGs as a jurisdictional barrier to review comes easily today, making any other approach seem "bizarre." One might therefore ask why Murdock did not see a problem in deciding federal questions that could not possibly affect the judgment, given the clear presence of ASGs. And why did the Murdock Court appear to abandon its more recent contrary practice?

First, Murdock's nonjurisdictional approach to ASGs was at least a plausible reading of the language of the 1867 Act. Once it appeared that the state courts had decided a requisite federal question, the statute could be read as saying that the Court had jurisdiction—the presence of ASGs notwithstanding. To the extent that Section 25's proviso had supplied any kind of jurisdictional limit (along with a limit on the scope of review once jurisdiction attached), it was now gone. In addition, Congress in 1867 might well have wanted what commentators argue Murdock provided: a strong law-articulation role for the Supreme Court on matters of federal law, at least in those cases in which there was a claimed denial of federal rights. Even when rights went unvindicated in the particular case because ASGs required affirmance, the law-articulation function could still play its role—particularly at a time before the advent of general federal question jurisdiction.

Furthermore, at the time of Murdock, it is not clear how often the Court would have had to undertake the "useless labor" of resolving an unnecessary federal question because the state courts also decided on ASGs. ASGs at the time of Murdock would have been far fewer than exist today. At the time, only claims of state court underenforcement of federal rights could be appealed to the Supreme Court, meaning that rulings on distinct state substantive grounds for relief would ordinarily be inadequate to uphold a judgment. That is because federal law imposes a substantive floor below which states cannot go. By contrast, when a claim on appeal

176 Matasar & Bruch, supra note 5, at 1359.
177 Nevertheless, the Court had placed no emphasis on the proviso in decisions such as Rector in concluding that ASGs would pose a jurisdictional hurdle.
178 See supra text accompanying note 11.
is one of overvindication of federal rights by the state courts, as has been possible for almost a century,^{179} distinct state substantive grounds can readily supply an independent basis to uphold the judgment. That is because states can generally give greater rights than those required by the Constitution.

Consequently, in an era in which review could be had only for undervindications of federal rights, ASGs would often have resembled procedural grounds, such as statutes of limitation, waiver of the federal grounds, or procedural default.^{180} And prior to Murdock, state court decisions on such grounds were not common occurrences in cases that also presented clear decisions on federal law. Perhaps that is not surprising, insofar as state courts might rest their decision solely on the state law ground rather than decide an unnecessary federal question. And if they relied wholly on state law grounds, there would have been no appellate jurisdiction. That is because no federal question would have been decided, and because the Court did not yet scrutinize the correctness of such clearly decided state law grounds—at least outside the treaty and contract impairment settings.

**B. Murdock’s Neglected Labor: The Non-Review of Adequate State Grounds**

In contrast to its willingness to review seemingly unnecessary questions of federal law, Murdock simultaneously provided for no review of clearly decided state law questions—including ASGs. In this respect, Murdock adhered to past practice.^{181} As stated in Murdock’s sixth proposition, if the Court found the federal question had been wrongly decided, and yet there were “adjudged” state law grounds sufficient to uphold the judgment, “the judgment must be affirmed without inquiring into the soundness of the decision on such [ASGs].”^{182} In Murdock itself, if the Court had found that the

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^{181} See supra Subsection I.C.3.

^{182} *Murdock*, 87 U.S. (20 Wall.) at 636.
state court had erred on federal law grounds, the judgment might have been affirmed on the basis of the state court’s decision on the statute of limitations—but without inquiring into its correctness.\textsuperscript{183}

As a consequence of this uncritical acceptance of the state court’s decisions on ASGs, the Court could, under Murdock, affirm a judgment against a party claiming a loss of federal rights, in which the state courts had erroneously construed federal law. And yet it might do so on the basis of a state court’s untenable construction of state law, insofar as tenability was not an inquiry when the state court’s ASGs were clearly decided.\textsuperscript{184} As discussed further below, counsel for Murdock raised this specific point as a reason for opening up review to questions of state law more generally.\textsuperscript{185} Of course, under Murdock’s approach, such unreviewed ASGs would not bar review of a state court’s decisions on federal law, so perhaps there may have been a less pressing need to scrutinize their correctness.\textsuperscript{186}

Significantly, the Court’s willingness to provide some scrutiny of clearly decided ASGs began to pick up steam only after such grounds started to play a jurisdictional role again, post-Murdock. For example, Brooks v. Missouri\textsuperscript{187} was one of the earliest decisions ordering jurisdictional dismissal because of the clear presence of ASGs, despite the state court’s having also clearly rejected a federal constitutional challenge to a state statute. Yet it was also one of the first times the Court indicated that it would scrutinize the correctness of such grounds, noting that they were “not evasive merely but real.”\textsuperscript{188} Around the same time as Brooks, the Court also began to acknowledge that a state court could deny a federal right either by positive decision or “by evading a direct decision

\textsuperscript{183} See supra note 108 and accompanying text; cf. Fallon et al., Hart & Wechsler, supra note 21, at 458 (observing that “under current practice” the statute-of-limitations issue might have served as an ASG to deny jurisdiction).

\textsuperscript{184} See supra text accompanying notes 77–79.

\textsuperscript{185} See Brief for Plaintiffs in Error at 2–3, Murdock, 87 U.S. (20 Wall.) 590 (No. 106).

\textsuperscript{186} A Justice concerned about second-guessing actual decisions of the state courts might extend that concern to ASGs, yet still prefer to deny them a jurisdictional role, while allowing them a role in disposing of the case on the merits. See Murdock, 87 U.S. (20 Wall.) at 626 (stating that “it is not lightly to be presumed that Congress acted upon a principle which implies a distrust of their integrity or... ability”); see also supra text accompanying note 119.

\textsuperscript{187} 124 U.S. 394 (1888).

\textsuperscript{188} Id. at 400.
thereon." In short, ASGs began to invite scrutiny even when they were not as immediately intertwined with federal issues as in the treaty and contract impairment cases. These post-\textit{Murdock} decisions thus basically inverted \textit{Murdock}'s resolution, which had been to provide no review of ASGs but also to deny them jurisdictional status. And something like the "tenability" inquiry, once reserved for cases in which ASGs had not been clearly decided, was expanded to cases in which they had been.

\textbf{C. Murdock and Reconstruction}

The 1867 revision of Section 25 was a product of Reconstruction, and \textit{Murdock} was the Court's response to it. Putting the Act and \textit{Murdock} in context may shed some light on the possible reasons for Congress's elimination of Section 25's proviso as well as other changes. To be sure, Justice Miller was probably right when he said "it is impossible to ascertain with any degree of satisfaction" what Congress's "precise motives" were in enacting its revisions. But the history addressed in this Article, along with other developments during Reconstruction discussed in this Section, may make some explanations more likely than others. And a reasonable surmise may be that the 1867 changes were meant to further open up review of federal questions decided by the state courts, and perhaps also to open up review of nonfederal questions that could impact federal law—including ASGs. And, to one degree or another, \textit{Murdock} may have honored those congressional choices. On the other hand, it is not clear why the Reconstruction Congress would have wanted to open up review to state law more generally, even if—as a matter of statutory construction—that may be a natural way of reading the 1867 Act's revision of Section 25, and even assuming the Constitution would have allowed for it.

\footnote{Chapman v. Goodnow's Adm'r, 123 U.S. 540, 548 (1887); see also id. at 546-47 (indicating that the Court would assess whether the asserted nonfederal ground "was the real ground of decision, and not used to give color only to a refusal to allow" the federal ground).}

\footnote{\textit{Brooks} and \textit{Chapman} were both authored by Chief Justice Waite.}

\footnote{\textit{Murdock}, 87 U.S. (20 Wall.) at 618 (noting difficulty of assigning a single motive to a collective body).}

\footnote{Jonathan Mitchell has suggested that the 1867 Congress might have wanted the Court to be able to reach certain questions of nonfederal "general law" in the same way that federal courts could then do in the exercise of their diversity jurisdiction. See}
1. Expanding Review of Federal Law

The fighting issue in *Murdock* was whether Congress's elimination of Section 25's proviso, which had limited review to federal questions on the face of the record, meant that all state law questions presented in a case could now also be reviewed. Reaffirming past practice, the Court famously decided against such a reading. The Court perceived that the old limitation on the scope of review managed to survive the 1867 Act, either because it silently remained a part of the new statute or because "general principles" had always required such a limit. But the question remains what Congress intended by the proviso's elimination.

a. The 1867 Act in Context

Others have looked at the legislative history surrounding the 1867 Act in an effort to identify Congress's possible motives for amending Section 25. Their general conclusion—with which it is hard to disagree—is that such history is not particularly helpful. Senator Trumbull, who reported the bill out of the Judiciary Committee, stated that the new version was "a little broader" than

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Mitchell, supra note 5, at 1349–50. He points to litigation over pre-Civil War debt claims and the prospect of (Southern) state court decisions against (Northern) creditors on nonfederal "law of nations" grounds that the debts were properly seized as "alien enemy" property, contrary to Supreme Court precedents in its review of diversity cases. Id. To the extent that review of nonfederal law would be "to give efficacy" to a federal tolling statute for such claims, as Mitchell argues, then the review of state law would be in service of the supremacy of federal law. But that possibility does not also suggest that Congress would have wanted review of the whole case more generally, including in cases like *Murdock* itself. Also, if the state courts honored the federal tolling provision, but denied enforcement of the debts on nonfederal grounds, it is not clear how a federal right would have been denied in a way that would have allowed for appellate jurisdiction.

193 But see Fitzgerald, supra note 48, at 111–14 (stating that *Murdock* "undercut the expansive supremacy-based and 'whole case' jurisdictional claims" that drove *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), and *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824)).

194 See *Murdock*, 87 U.S. (20 Wall.) at 630.

Section 25, but "of a similar character." In one of the amicus briefs filed in *Murdock*, Philip Phillips—a prominent treatise writer on Supreme Court practice—stated, "I have learned nothing by enquiries made of members of Congress, to throw light on this subject."

Contemporary observers did not attach any particular significance to the 1867 changes to Section 25. The bench and bar seemed not to notice the change or, if they did, they were not "aware of its portentous significance." The 1872 Revisers of the federal statutes seemed to understand that the change meant that the omitted provision of Section 25 could no longer be enforced, but that Congress could "readily" restore it "if Congress has intended to preserve the restriction."

The Supreme Court had itself noted the difference in wording in a few decisions prior to *Murdock*, but it too seemed perplexed. It was sufficiently puzzled after initial oral argument in *Murdock* that the Court ordered reargument, and even solicited assistance from the bar, resulting in the submission of a brief from, among others, former Justice Benjamin Curtis.

Scholars have tried to link the 1867 Act to the goals of Reconstruction, but the linkage has been at a fairly high level of generality. Scholars note the significant expansions of lower federal court jurisdiction taking place around the same time—including the expansion of federal habeas corpus for state prisoners, provisions for civil rights removal, the 1871 Ku Klux Klan Act, and—less than two months after the decision in *Murdock*—a statute providing for

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196 See Fairman, supra note 152, at 402 (quoting Sen. Trumbull). Fairman thought the bill's author, Representative Lawrence, was not being candid about the Act. See id. at 412 (referring to Lawrence's "surreptitious design").


198 Wiecek, supra note 195, at 233; see also id. at 238 (noting lack of reaction to *Murdock* in the legal press).

199 1 Revision of the United States Statutes, tit. XIII, ch. XI, § 175, at 112 (1872).


201 See *Murdock*, 87 U.S. (20 Wall.) at 595-96. In a series of 1871 lectures, given two years before filing his amicus brief, Curtis was noncommittal about whether the 1867 Act repealed § 25, what effect such repeal would have, and the constitutionality of granting the Court authority to reverse a judgment because of error on a question of state law. See Curtis, supra note 22, at 49-50. But in his amicus brief, he argued that the 1867 changes had opened up review to state as well as federal questions. See id. at 54-58 (reprinting Curtis's brief).
general federal question jurisdiction. They infer from this flurry of activity and the temper of the times that the 1867 Congress must have meant greatly to expand the Supreme Court’s jurisdiction as well. And from there, some conclude that the proviso’s elimination allowed for review of the whole case, including all questions of state law, when the case otherwise fell within the Court’s appellate jurisdiction. Because the Court refused to construe the 1867 Act in this manner, scholars lump Murdock with other Court decisions that gave a miserly interpretation to Reconstruction enactments.

As noted above, however, it is possible to conclude that Congress meant to expand the Court’s powers of review without also concluding that Congress meant to expand review to the whole case. And whatever the elimination of the proviso might suggest for the possibility of expanded review of state law, it clearly operated to lift prior jurisdictional limits on review of federal questions. Indeed, Murdock itself interpreted the proviso’s elimination in this manner, by its decision to expand jurisdictional opportunities through resort to the opinion below to see if a relevant federal question had been decided. Murdock also expanded jurisdiction over federal questions to the extent that it abandoned earlier precedents that allowed ASGs to act as a jurisdictional barrier to review.

Moreover, as discussed in Part I, the Court had consistently stated that the requisite federal question need not expressly appear in the record so long as it did so by “necessary intendment.” In cases such as Craig v. Missouri, the Court sometimes went to considerable lengths to infer the existence of a requisite federal question from the record’s relative silence. Murdock’s decision to allow recourse to matters beyond the technical record meant,

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203 See supra note 5; see also Frankfurter & Landis, supra note 167, at 66 n.35 (noting the “general tendency of the period” and finding the view rejected by Murdock “arguable”); Mitchell, supra note 5, at 1351–52, 1351 n.62 (noting authorities who seem to question this aspect of Murdock).
205 See supra Subsection I.A.2.
206 See supra text accompanying notes 33–38 (discussing Craig).
however, that the Court would no longer have to engage in such strained analysis or to decline review when federal law "probably[]" was disregarded" because a litigant failed to insure that the federal decision appeared on the face of the record. 207

The elimination of the "face of the record" requirement may also have been designed to allow for review of still other sorts of federal rights denials that might not readily appear on the face of the record. During oral argument, counsel appealed to the politics of Reconstruction in urging the Court to read the proviso's elimination to allow review of federal questions not appearing in the record. Counsel are reported as arguing that in the immediate post-rebellion period, "just after the overt acts of opposition had been suppressed by the force of Federal arms," it was "uncertain how far the spirit of opposition, though covert," 208 might remain. As a result, the federal question necessary to give the Court appellate jurisdiction might be suppressed from the record, even though it was actually raised and decided. "The new act shows an apprehension that Federal justice would be obstructed by local and State animosities and revenges, and that Federal questions might really be passed on in State courts, but the proof of adjudication artfully suppressed on the record." 209

Such a possibility had always been present—even before the Civil War—and the old Court's less-than-strict reading of Section 25's proviso countered it to some degree. The Marshall and Taney Courts' willingness to uphold jurisdiction in the contract impairment and treaty cases when the state courts had purported to resolve only a question of nonfederal law was justified as a way to avoid accidental or intentional disregard of federal law by the state courts. But it was certainly fair for counsel to argue, just after the Civil War, that Congress may have feared an increased risk of "artful suppression." And a state court determined to rule against a federal rights claimant might be able to do so in a way that left few obvious traces, if the reviewing court were left to the record as understood at common law. 210 But if this argument is correct, a primary goal of Congress's elimination of the proviso would have

207 See supra text accompanying note 32.
208 Murdock, 87 U.S. (20 Wall.) at 605 (summarizing argument of counsel).
209 Id.
210 See supra Section I.A.
been to enable the Court to flush out federal questions more readily than before, rather than providing for review of any and all questions of state law in the same case.

b. The Civil Rights Act of 1866

Artful or even inadvertent suppression of federal questions might have been a particular problem when one considers legislation such as the 1866 Civil Rights Act,211 enacted into law over the President's veto less than a year before Section 25's revision. As part of Congress's implementation of the Thirteenth Amendment outlawing slavery, the 1866 Act purported to define U.S. citizenship and required states to give "the same right[s]" to all citizens, without regard to race, "as [are] enjoyed by white citizens" in a variety of areas. They included the right to sue, to be a party, to give evidence, to make and enforce contracts, to hold and transfer property, to the equal benefit of laws and proceedings, and to be subject to "like punishment, pains and penalties."212

A large number of these equality guarantees related to state judicial proceedings involving enforcement of ordinary state law or common law claims and defenses. That state courts and the enforcement of state law were a primary focus of the Act is reflected in its provision for removal of actions to federal court by persons who were denied or who could not enforce their rights in state court consistent with the 1866 Act.213 For example, if a former slave were prosecuted in state court for a crime, or sued for breach of contract, and if state statutes imposed racial restrictions on who could testify, the case could be removed and tried in a federal court, minus the state's discriminatory evidentiary rule.214 In this respect, the 1866 Act provided a kind of protective jurisdiction in federal court over state-law-based lawsuits—civil or criminal. Fol-

211 Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.
212 Id. Moreover, by the time of the 1867 Act, the Fourteenth Amendment—which (among other things) constitutionally secured the protections of the 1866 Act—had already passed both the House and Senate, and was in the process of being ratified by the states. See Earl M. Maltz, Civil Rights, the Constitution, and Congress, 1863–1869, at 45 (1990).
213 § 3, 14 Stat. at 27.
lowing trial in federal court, moreover, questions of state law would be freely reviewable just as they would be in a diversity action.215

But pre-trial removal under the 1866 Act might not always be possible, even when the Act applied. Whether a litigant was denied or could not enforce his rights in state court might not be easy to predict if the Act’s violation arose from the ad hoc behavior of the judge or jury, rather from positive state law. Although the 1866 Act also provided for post-judgment removal and de novo proceedings,216 the scope of such post-trial removal had been the subject of constitutional doubt at the time.217 In addition, requests for removal were addressed in the first instance to the state courts, and their denial of removal could only be reviewed under Section 25 after a final judgment.218 This is perhaps where the 1867 jurisdictional changes came into play. Along with Section 1 of the 1867 Act, which provided for federal habeas corpus for those in state custody in violation of federal law, Section 2’s expanded provisions for Supreme Court review—in addition to whatever else they did—promised a fuller mechanism to police 1866 Act violations after the fact in state court cases that parties either did not or could not remove.219

215 Under the 1866 Act, review in the Supreme Court from the lower federal courts was by “appeal,” which would include questions of fact as well as law, unlike a writ of error. See § 10, 14 Stat. at 29.
216 The 1866 Act incorporated part of an 1863 statute authorizing removal by persons sued for acts undertaken “under color of” federal executive authority during the Civil War. See Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755, 756–57. The latter Act provided for trial upon removal “in the same manner as if the same had been there originally commenced, the judgment in such case notwithstanding.” Id.
217 See 6 Fairman, supra note 152, at 1431–34. In 1870, the Court held that the 1863 statute violated the Seventh Amendment to the extent that it allowed for a federal court’s post-judgment reconsideration of facts found by a state civil jury. See Justices v. Murray, 76 U.S. (9 Wall.) 274, 277, 282 (1870). This constitutional limitation would have been applicable to direct review as well.
218 See, e.g., Strauder v. West Virginia, 100 U.S. 303, 304 (1880).
219 Cf. Lewis Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31, 35–37 (1965) (noting that the habeas provisions in § 1 of the 1867 Act were designed to remedy 1866 Act violations). In addition, the 1866 Act allowed the Court to enter judgment itself rather than first having to remand the case to the state courts to secure compliance with its order. See Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385, 386–87.
Of course, if a denial of federal rights in violation of the 1866 Act actually materialized in state court, old Section 25 could sometimes have reached it. Some such questions might be visible from the face of the record if, for example, they arose from discriminatory state statutes whose validity might be drawn in question in the pleadings. But other violations resulting from the practices or ad hoc decisions of the individual judge—such as the exclusion of a witness on racial grounds in a civil suit, or the meting out of a discriminatory punishment in a criminal case—might be harder to police. Moreover, there was no guarantee that the requisite federal question would sufficiently appear on the record made by the state courts, or that the state courts would not artfully suppress the evidence of such challenges or rulings thereon if inquiry were limited to the record as traditionally understood.

If this surmise is correct, then Congress's 1867 changes respecting Section 25 may have been designed to allow the Court to look for jurisdiction-conferring federal questions in sources previously considered off-limits, such as the arguments of counsel, the evidence and exhibits, the opinion of the state court(s), and perhaps even affidavits from counsel. At the same time, such a change need not have been intended to expand review more generally to all questions of state law, as opposed to enhancing review for questions of federal law. Of course, if the Court were to review a claimed 1866 Act denial, it might have to consider questions of state law—for example, to evaluate a claim of unequal treatment in the operation and application of state law. But the ground of reversal in such a case would still be federal law. It is just that the Court might have to take a detour through state law to decide the question of federal law—much as the Court had done in its treaty and contract impairment decisions. And as discussed briefly in the next Subsection, that might call for some second-guessing of state law, just as it did in those prior decisions.

2. Expanding Review of State Law Impacting Federal Law

a. Reviewing Antecedent and Adequate State Grounds

It seems likely that the elimination of Section 25's proviso was meant to open up the jurisdictional inquiry respecting federal questions. Murdock did not disagree. As just noted, the additional ar-
argument from its elimination—that once the requisite federal question properly appeared (either on the face of the record or by some lesser standard), the whole case could be heard—was not implausible, even according to the *Murdock* majority that rejected the argument.220 Counsel argued somewhat more extravagantly, however. Counsel stated that the point of the 1867 Act was “to place the whole jurisprudence of the country under the protection of this great Federal tribunal of the nation,” and to let all citizens understand that the Constitution and federal law “ARE the ‘supreme law of the land.’”221

It is not clear how routine review of any and all questions of state law in cases otherwise properly before the Court would reinforce the supremacy of federal law. But supremacy-based arguments might support a more targeted review of state law. Such arguments would exist, for example, in connection with the review of clearly decided ASGs in cases also presenting clearly decided federal grounds. That is because, as discussed above, such state law grounds were previously subject to no review at all. Non-review of such grounds might mean that there would be no jurisdiction to review the federal grounds if ASGs were viewed jurisdictionally—as they seem to have been in the years before *Murdock.*222 Such supremacy-based arguments would also exist in connection with other questions of state law that were somehow intertwined with federal law, similar to the review of state law in the contract impairment and treaty cases. Section 25’s “immediately respects” language—eliminated in 1867—had apparently allowed for some reconsideration of questions of state law, but only when the state law question was itself highly integrated with the construction of federal law.223

In 1867, in the face of state resistance to Reconstruction, Congress could realistically have been concerned that state courts might assert doubtful state law grounds as a way to avoid passing on claims of federal rights, including claims grounded in statutes

221 Id. at 605 (reporting argument of counsel).
222 See supra Subsection I.C.3.
223 See supra Section I.B.
such as the 1866 Civil Rights Act. If so, elimination of the proviso’s restrictive language and other changes might have been a way to secure some review of ASGs. Today, of course, the Court will scrutinize such grounds to see if they have support under state law, lest vindication of federal rights be undermined by unreasonable or novel interpretations of state law. But that was not true earlier, and it is certainly possible to imagine that Congress had concluded that erroneous assertions of ASGs should not block consideration of federal rights denials any more than in the treaty and contract impairment cases. In addition, it might be hard to assess equality-based deprivations under state law without some ability to police the state courts in their determinations of state law.

In his amicus brief to the Court in *Murdock*, former Justice Curtis illustrated what he argued was part of the broader reach of the 1867 Act’s revision of Section 25 with a relatively narrow example. Curtis hypothesized: “Suppose the State court ruled erroneously in admitting or rejecting evidence, or any other question of local law, and the decision was against the right or title [asserted under federal law], not by reason of any misconstruction of the Constitution, but by reason of such erroneous ruling.”

It “seems,” said Curtis, to have been Congress’s intent “to enable this court to protect the right, &c. claimed under the United States from the effect of such errors.” Curtis apparently read the Act—particularly its elimination of the requirement of a “construction” of federal law—as

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224 The Reconstruction Congress’s skepticism of state courts is clear. See, e.g., Mata-sar & Bruch, supra note 5, at 1319. But the extent to which Congress meant to channel that skepticism in its 1867 statute is less clear.

225 See generally Fallon et al., Hart & Wechsler, supra note 21, at 505–18.

226 Curtis, supra note 22, at 55.

227 Id.

228 Id. These remarks of Curtis thus did not focus on the 1867 Act’s elimination of § 25’s proviso, but on its elimination of language requiring the “construction” of federal law. See supra text accompanying note 17. The elimination of the “construction” language all but required the elimination of much of the proviso, which had limited grounds of reversal to questions immediately respecting the validity of state or federal law, or the construction of federal law. The Act’s elimination of any reference to a construction of federal law may have been a recognition that, in the Court’s treaty cases, the decision really turned on the construction of state law, not federal law. It may also have been a way to expand review to a somewhat broader set of cases in which state law impacted the disposition of federal claims, but in which state law was not as tightly intertwined with the federal claim as in the treaty cases. The elimination of the “immediately respects” language in § 25’s proviso may reflect a similar recogni-
opening up review when possible errors of state law impacted a
denial of rights under federal law, even absent an actual construc-
tion of federal law. Others offered similarly narrow illustrations
that emphasized the necessity of reviewing ASGs lest a state court
“misled by prejudice” contrive to “decide a case on grounds out-
side of the federal question.”

b. Reviewing Parallel State Grounds

(i) After finding error on federal grounds—Counsel in Murdock
clearly advocated for review of state law beyond those instances in
which the construction of state law might impact issues of federal
law. Counsel urged that the 1867 Act made state law grounds sub-
ject to review even when they bore no antecedent relationship to
the federal grounds, as was true of the distinct grounds for recov-
ery under state law in Murdock itself.

It is not easy to see, however, what point there would be to al-
lowing for such review from the perspective of federal supremacy,
or why the Reconstruction Congress would have wanted such re-
view. Admittedly, state courts might play fast and loose with state
law questions in ruling against a party who had distinct claims un-
der state and federal law. Such a concern, however, would primar-
ily be implicated when the state courts also erroneously ruled on
the federal claim. In other words, if a state court’s ruling on a
party’s federal claim was itself in error, there might be some spill-
over risk that the state court’s ruling on that party’s state law claim
was also in error. That might be because the state courts’ errone-
ous thinking regarding some question of federal law had infected
its decision of state law (although that might suppose the grounds
were not entirely independent), or because of the state courts’
hostility to the federal claimant or his claim.

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229 Brief for Plaintiff in Error at 2 (on reargument), Murdock, 87 U.S. (20 Wall.) 590 (No. 106); see also id. (arguing that, otherwise, the Court would be “shorn of its might by the fact that the state court has put the case upon a non-federal question, equally controlling, but clearly wrong”).

230 It may be that the concept of “independence” did not then contemplate that a misunderstanding of federal law could infect the understanding of state law. See Note, supra note 89, at 1382, 1383 n.61.
But in such a case, the Court's reversal on the erroneously decided federal grounds would mean reversal of the judgment. Distinct (non-antecedent) state grounds for relief would be insufficient to uphold a judgment if error on the federal claim warranted reversal. Nor, in most cases, would an additional finding of state court error on such parallel state law grounds likely add much to the Court's judgment of reversal on behalf of the federal rights claimant. In addition, within two months of Murdock, Congress would pass the general federal question statute, thus allowing parties to litigate claims arising under federal law in federal court, and (for a time) allowing for removal on the basis of a federal defense to a state law claim.

(ii) After finding no error on federal grounds—By contrast, if the state court ruled correctly on a party's federal claim (as in Murdock), the possibility that the state court ruling on the distinct state law grounds was itself erroneous because of hostility to the federal claimant or his claim seems even more remote. That is because one might expect to see the effect of hostility—were there any—on the federal claim as well, unless it was an obvious loser. But if it were an obvious loser, it might be less likely that the state courts were manipulating state law in the service of defeating a claim of federal right—or in the service of defeating a party who presented only a marginal federal claim. But a reading of the elimination of Section 25's proviso as generally allowing for review of parallel state grounds would allow review in both settings—that is, in cases involving erroneous rulings on federal law as well as correct ones—even though review of state law in the latter setting seems even less connected to any federal interest than review in the former.

(iii) Justices Clifford and Swayne, "dissenting"—This insight about the need to scrutinize state law, but only to vindicate the su-

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231 Of course, it is not inconceivable that such parallel state law claims could supplement recovery. But that may be what Justice Miller was getting at when he said, "It is not to be presumed that the State courts, where the rule is clearly laid down to them on the Federal question, and its influence on the case fully seen, will disregard or overlook it." Murdock, 87 U.S. (20 Wall.) at 632.


233 Murdock, 87 U.S. (20 Wall.) at 638.
premacy of federal law, may be reflected in the separate "dissent" of Justices Clifford and Swayne in *Murdock*. Their dissent is often treated as indistinguishable from Justice Bradley's, in which Bradley interpreted the 1867 Act as allowing for appellate review of the "whole case," including all questions of state law, when jurisdiction was otherwise present.\(^{234}\) But unlike Bradley, Clifford and Swayne actually concurred in the judgment in *Murdock*. They agreed with the majority that when the Court affirmed on the federal question, it should not review questions of state law in the case—the very result in *Murdock*. Their only point of disagreement was that if the Court found error on the federal question, then they thought the state law questions in the case should be fair game for review.\(^{235}\)

Although their opinion could be read otherwise,\(^{236}\) the state law questions to which they referred may not have extended to parallel state grounds for relief, such as those presented in *Murdock*. As just noted, if the federal questions were wrongly decided, no ruling on such parallel state law grounds would have added much to outright reversal of the judgment. Instead, the state law grounds that Clifford and Swayne stated that they would review were more likely those that would otherwise constitute ASGs. Under the majority's approach, even if the state courts had erroneously rejected a federal claim, the Court would require affirmance "without inquiring into the soundness of the decision" on such ASGs.\(^{237}\) But Clifford and Swayne would have allowed for review of ASGs as a precondition to affirming the judgment, when the state courts had also erred on the point of federal law.

Such an inquiry would be a way to insure that a state court judgment against federal rights—based on an erroneous interpretation of federal law—was not affirmed based on an erroneous interpretation of state law. And Clifford and Swayne seemed to read the elimination of Section 25's proviso as requiring such a result. In so doing, they may have come even closer to what Congress intended by its 1867 legislation insofar as review of state law was concerned: to allow for limited review of state law grounds, but

\(^{234}\) See id. at 641–42 (Bradley, J., dissenting).
\(^{235}\) See id. at 638. Thus, only Justice Bradley dissented from the Court's disposition of the case in *Murdock*.
\(^{236}\) See id. at 639.
\(^{237}\) Id. at 636.
only as they impacted denials of federal rights. Of course, the Court may have eventually come around to a roughly similar accommodation by its later decision to provide scrutiny of ASGs, while at the same time restoring the jurisdictional status that they enjoyed pre-Murdock.

**CONCLUSION**

Murdock was an important, if provisional, step toward greater Supreme Court review of state court decision-making based on a plausible reading of the Reconstruction legislation that expanded the Court's jurisdiction. But it was not an easy decision, largely because the scope of Congress's expansion was less than clear. The Murdock Court felt "free to confess" that the decision's "difficulties" were "many and embarrassing."\(^{23}\) Perhaps the most obvious difficulty was the Court's interpretation of Congress's 1867 statute as continuing to disable the Court from reviewing the whole case, including all state law questions, when jurisdiction was otherwise present. Old Section 25's proviso had largely limited review to the jurisdiction-conferring federal questions in a case, and the proviso was now gone, thus suggesting that the limitation was also gone. It was only with difficulty (and perhaps some embarrassment) that the Court concluded that the limitation had survived.

Another embarrassment—particularly for Justice Miller—was the fact that, in Murdock, the Court appeared to turn its back on then-recent decisions that Miller himself had authored, in which he had articulated a fully jurisdictional (although not constitutionally compelled) role for ASGs. Yet for reasons that Miller seemed to link to the 1867 Act, Murdock announced that the Court would no longer do what it had previously done: namely, give ASGs jurisdictional force and simultaneously refuse to review them for their plausibility. Rather, Murdock split the difference. It continued to deny review to such grounds, perhaps because allowing for even limited review of ASGs would have made it difficult for the Court to deny review of state law more generally—the fighting issue in Murdock. But in a reversal of prior practice, Murdock also chose to deny such state law grounds a jurisdictional role, perhaps as a way of addressing the heightened post-Civil War concern that state

\(^{23}\) Id. at 616.
courts might block review of federal rights denials by interposing doubtful but otherwise sufficient state law grounds.

A final (if unforeseen) embarrassment for Miller was the Court's rather quick abandonment of Murdock's resolution of the treatment of ASGs. It substituted instead a rejurisdictionalized version of clearly decided ASGs, while—for the first time—allowing some review of their plausibility. By the time of the Court's supposedly pivotal decision in Eustis v. Bolles, however, the switch had already been accomplished, and while Miller was still on the Court.\(^\text{299}\)

Such embarrassments notwithstanding, Murdock was probably more faithful to the Reconstruction Congress's 1867 reforms than scholars have assumed. By opening up the record on appeal, and by dejurisdictionalizing ASGs, the Court found means to curb the ability of state courts—whether by inadvertence or design—to block the Court's review of federal rights denials. Of course, the Court's quick rejurisdictionalization of ASGs, while opening them up to review for their plausibility, provided a substitute (and perhaps more sensible) means of achieving roughly similar ends. But Murdock's more fundamental holding—to which the Court continues to adhere—that Congress did not give the Court a general ability to reconsider state law questions on direct review, is more than plausible. To the extent that Congress may have been concerned with state court decisions on questions of state law, it was likely concerned about such decisions only when they might thwart the Court's ability to exercise appellate review over state court denials of federal rights. And if so, Murdock's more fundamental holding stands in need of no revision.

\[^{299}\text{Miller remained on the Court until 1890, see Charles Fairman, Mr. Justice Miller and the Supreme Court 1862–1890, at 424 (1939), well after the pivotal pre-Eustis decisions in Jenkins v. Loewenthal and Hale v. Akers had abandoned Murdock's handling of ASGs, see supra text accompanying notes 129–42.}\]