A Compliant Court: The Political Effects of the Addition of Judgeships to the United States Supreme Court Following Electoral Realignments

Lauren Paige Joyce Judson

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Jason P. Kelly, Chair
Wayne D. Moore
Karen M. Hult

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ABSTRACT

During periods of turmoil when ideological preferences between the federal branches of government fail to align, the relationship between the three quickly turns tumultuous. Electoral realignments especially have the potential to increase tension between the branches. When a new party replaces the "old order" in both the legislature and the executive branches, the possibility for conflict emerges with the Court. Justices who make decisions based on old regime preferences of the party that had appointed them to the bench will likely clash with the new ideological preferences of the incoming party. In these circumstances, the president or Congress may seek to weaken the influence of the Court through court-curbing methods. One example Congress may utilize is changing the actual size of the Supreme

The size of the Supreme Court has increased four times in United States history, and three out of the four alterations happened after an electoral realignment. Through analysis of Supreme Court cases, this thesis seeks to determine if, after an electoral realignment, holdings of the Court on issues of policy were more congruent with the new party in power after the change in composition as well to examine any change in individual vote tallies of the justices driven by the voting behavior of the newly appointed justice(s).

DEDICATION

To my son, Colby Patrick, for blessing me with moments of respite from the stress and demands of composing this thesis.

A special thank you to my support team: my understanding husband, my family - Joyce and Judson (especially you Mom), and my best friend, Allyson. Without your encouragement and assistance, I would never have been able to finish. Thank you to my proofreaders, naggers (Yes, Mom! I have finished Andrew Jackson!), cheerleaders, and babysitters!

"When you get to the end of your rope, tie a knot and hang on."
-Franklin D. Roosevelt

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Introduction

The United States Supreme Court is a formidable political actor in the American governmental system. Though inauspiciously described as the "least dangerous branch" by Alexander Hamilton in his *Federalist #78*, the Supreme Court has proven a powerful contender in American politics through its responsibility to interpret the United States Constitution. In addition, the justices that comprise the bench play an essential role in influencing the overall behavior of the Court. With the power to shape policy, the individual decisions of the justices are incredibly significant. Justices may decide cases that support the ideological preferences of the president and/or Congress and may even strike down laws they personally favor. However, Supreme Court justices also have been known to pursue their own preferences and to advance, through their decisions, their own policy goals. As a result, the decisions of the Court may clash with the ideological preferences of the other two branches, and when the Supreme Court hinders the shared policy goals of the president and Congress, Congress may create legislation aimed at weakening the Court.

In the two centuries of the Court's existence, hundreds of *court-curbing* measures have been introduced to hinder, alter, or block influential decisions reached by the justices (Clark, 2011). One such method, though rare, is the alteration of the size of the Supreme Court. Modifying the size of the Court is an incredibly visible action that takes immense support from several political actors including Congress, who along with the support of the president, exercises the power to alter the number of justices serving on the bench. Since the ratification of the Constitution, the size of the Supreme Court has been

altered six times. The Judiciary Act of 1801 lowered the number of justices from six to five. After the act was repealed, a seventh justice was added in 1807; a ninth was added in 1837; and a tenth in 1863. During the presidency of Andrew Johnson (1866), the number of justices was reduced to seven, and finally in 1869, the number increased to nine where it has remained for almost 150 years.

The implications of altering the size of the court are significant to the study of judicial politics. For example, removing seats from the Court essentially limits the overall influence of the president in American government. Two out of the six cases that involve the alteration of Court size provide examples of the legislature decreasing the number of justices in order to limit this influence of the president. Judgeships were eliminated during the presidency of Thomas Jefferson by the Federalists and Andrew Johnson by the Republicans. Adding members to the bench is a measure that allows the president to appoint new justices (with the approval of the Senate) to the Supreme Court. The change in ideological composition after an alteration in the number of justices may significantly influence the holdings of the Court. The composition change also has the potential to alter the votes of justices as a result of the voting behavior of the new justices. As a result, presidents seek to select appointees who support their policy preferences and will be loyal to their ideology while serving on the bench.

Four out of the six cases illustrate the addition of justices to the High Court. However, three cases, each involving the addition of justices, are the focus of this study. The addition of justices during Jefferson's presidency in 1807, Andrew Jackson's in 1837, and Abraham Lincoln's 1863, are distinctive because each occurred after a critical election, when both the newly elected president and Congress were ideologically

congruent, but the Court was out of sync. Electoral realignments mean new parties take control of the elected branches of American government. During the historic realignment periods of Jefferson, Jackson and Lincoln's presidencies, new political parties emerged in both the legislative and executive branches; in 1801 the Democratic-Republicans replaced the Federalists, in 1829 the Jacksonian Democrats replaced the Democratic-Republicans, and in 1861 the Republicans replaced the Democrats and Whigs.

As a result of such realignments, the potential for the ideological preferences of the new Congress and president to clash with the decisions of the Court is high. Without new appointments, the Court is likely to be ideologically out of step with the new president and Congress. When this is the case, the Supreme Court is also likely to be antagonistic to the newly elected president and Congress following a critical election. More specifically, the Court may decide cases in a way that conflict with the new regime's position on key issues. Therefore the question emerges, after electoral realignments, what is the effect of adding an additional seat to the Supreme Court on the holdings of the Court as well as the individual vote tallies of the justices? Through research and analysis, this Master's thesis tests the following hypothesis: Following electoral realignments, the addition of a Supreme Court justice will reduce conflict between the branches

In order to test this hypothesis, I will examine Supreme Court cases and decisions that involve key issues of policy related to the ideological preferences of the incoming party starting from the year of realignment, before the addition of a Court justice, and equal years after. The ideological positions of the Court and the justices are indicated by the party of the appointing president. Cases are selected based on the potential for

conflict between the branches where holdings of the Court may clash with the policies of the new dominant party. The specific issues examined are determined by the policies most frequently described by scholars as characteristic to the new party in power during the era being examined. However, this thesis does not ignore cases that may be confrontational on more than one dimension. Cases that include possible confrontation involving institutional prerogatives such as the question of federal power over state power, the role and power of the president, Congress, and/or the Court carry significant weight. Cases that involve questions of institutional prerogatives will be distinguished from those of policy and included in the analysis and conclusion.

The unit of analysis for this research is the selected Supreme Court cases where the focus includes the holdings of the Court as well as the vote tallies of the individual justices. In this sense, the Court's holding simply means the ruling in the case. Cases are considered confrontational when the holdings of the Court clash or undermine at least one issue of policy related to the ideological preferences of the party in power. Cases that involve more than one issue of policy will be distinguished and examined separately in the analysis.

Once the ideological composition of the Court has been altered, this thesis seeks to determine if we are more likely to observe holdings that are preferred by the new party in power, or if failing that, if we are likely to see more votes in support of the holding. The holdings of the cases indicate the overall decision at the level of the Court, which demonstrates either alignment or discord between the majority of the Court and the president and Congress. The holdings of the Court are considered consistent with the incoming party if the holding of the Court are consistent the new party's preferences.

The outcome of the case is only a blunt instrument and only one factor in determining significant change in the Court after an alteration. Therefore, vote tallies of the individual justices before the change in composition and after will also be examined to see if there was a change due the voting behavior of the newly appointed justice(s). Analyzing the individual vote tallies allows us to observe alterations in the voting behavior of each justice, which provides additional evidence of the effects a change in composition has on the bench. The vote tallies, both before and after the alteration, help determine if newly appointed justices vote differently from the veteran justices which may constitute evidence of an effect from the change in the Court's composition.

For the 1800 realignment, I examine cases involving issues of policy that may have evoked conflict between the Federalist appointed Court and the Democratic-Republicans. Cases are selected based on ideological preferences that were characteristic to the Democratic-Republicans which included decisions that strengthened the federal courts vis-à-vis the two other branches of government as well as decisions that affected or defined Westward expansion, the relationship with the French, and the role of the federal government in relation to the rights of states.[1] Decisions on cases will be examined from 1801 until the addition of a justice in 1807 to determine if the holdings of the Court before the alteration were confrontational with the newly elected Democratic-Republicans. Individual vote tallies will also be examined to determine voting behavior of the justices before the change in composition. I will then analyze cases from 1808 to 1814 to ascertain if holdings of the Court were less confrontational with the ideological

[1] William Nester, *The Jeffersonian Vision, 1801-1815: The Art of American Power During the Early Republic* (Washington: Potomac Books, 2013).

preferences of the new party as well as to determine if the decisions of individual veteran justices changed after the alteration due to the voting behavior of the new justice(s).

For the 1828 realignment, I will analyze cases involving issues that represent the ideological preferences of the Jacksonian Democrats that were more likely to collide with the decisions of the Court. Cases are selected if decisions sough to strengthen the federal courts vis-à-vis the two other branches of government as well as cases that examine the power struggle of the National Bank and/or state banks, states' rights, and the role of the federal government. Cases will be examined from the year of Jackson's inauguration in 1829, until the addition of a justice in 1837, to discover if the holdings of the Court were ideologically out of sync with the policies of the incoming Jacksonian Democrats. Individual vote tallies will also be analyzed to determine the voting behavior of justices before the alteration. Cases will then be examined from 1838 to1846, to determine if the addition of a justice modified the holdings of the Court to be less confrontational with the Jacksonian Democrats as well as to determine if the voting behavior of justices before the addition changed once a new justice was placed on the bench.

Finally, for the Republican realignment, I will examine cases that involve issues characteristically supported by the Republicans that may have clashed with the Court. Cases will be selected if they involve decisions that would affect the abolition of slavery, the role and powers of the president during conflict, nullification, and the preservation of the union.[2] Cases will be examined from the year of Abraham Lincoln's inauguration in 1861, to the alteration in size of the Court in 1863 to ascertain if the holdings of the Court were in conflict with the newly elected Republicans. The individual votes of the justices

[2] Eric Fonder, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (Oxford: Oxford University Press, 1970).

in each case will also be examined to determine voting behavior before the addition. Lastly, cases will be analyzed from 1864 to1866, to determine if holdings of the Court were less confrontational with the Republicans and to find any change in voting behavior of the veteran justices after the addition of a new justice.

This thesis will seek to answer the following question: Following these three realignment elections, were holdings of the Court incongruent with the preferences of the new regime? If so, did holdings of the Court change after the addition of a justice to reflect the policies of the new president and Congress in control? Additionally, was there a change in individual vote tallies of the justices driven by the voting behavior of the newly appointed justice(s)?

Decisions in cases will be considered consistent with the new regime when the Court supports the new party's ideological preferences. From the decisions of the cases, I will test the hypothesis: When Congress and the president add a justice following an electoral realignment, the Court will become less likely to overturn cases that are in line with the ideological preferences of the new executive and the legislative branches. For example, did the Court modify its decisions in support of limiting the power of the National Bank after Andrew Jackson, a staunch states' rights advocate, appointed a ninth justice? Was the Court already deciding cases to limit the National Bank's power even before the addition of a justice? After an analysis of the cases, two conclusions will support my hypothesis. If the holdings of the Court in the time period before the addition of a justice conflict with the new Congress and president, but after the addition of a justice, the holdings change to reflect support of the policies of the new Congress and president, then my hypothesis will be supported. In addition, even if the holdings of the

cases do not reflect a change in confrontation, a change in voting pattern may also lend support to my hypothesis. Specifically, if the vote tallies of veteran justices change due to the voting behavior of the newly appointed justice(s), and justices switch from their "standard" voting pattern to align with the new president and Congress, then my hypothesis is supported. However, if I find that the political behavior of the Court, in the form of its holdings and individual vote tallies, does not change in favor of the new Congress and president after the addition of a justice, or if the decisions and political behavior of the Court support the new Congress and president before the addition of a justice, then the null hypothesis cannot be rejected.

All three eras will illustrate the effect the alteration in size and change in ideological composition has on the holdings of the Supreme Court and the voting behavior of the justices. In addition, understanding the effects of the modification of judgeships within the Supreme Court helps to predict what policies will survive the decisions of the Court as well as provide insight into when the Court is most likely to be compliant. The repercussions of a malleable court in this instance, due either to the threat of or as a consequence of actual court-curbing, are considerable. The modification in the size of the Supreme Court has only been successfully achieved six times in over two hundred years, with the last alteration occurring over one hundred and forty years ago. Such a change is monumental to judicial politics and carries significant political consequences for the Court, the president, and Congress.

Chapter Two: The Founding of the Supreme Court

I. The Beginning – The Creation of the Supreme Court

The creation of the Supreme Court lies within the third article of the U.S. Constitution. Article III, Section I specifically states:

> The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

The third article of the Constitution is not only incredibly short, but also somewhat vague. In addition, the first Congress created the Judiciary Act of 1789, which was referred to as "An Act to establish the Judicial Courts of the United States." The Judiciary Act of 1789 reads, "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Supreme Court of the United States shall consist of a chief justice and five associate justices, any four of whom shall be a quorum…" The Act was signed into law by President Washington and officially created the procedures and organization of the Supreme Court.

The Judiciary Act of 1789 organized the High Court into a body of six members. The first justices of the Supreme Court nominated by George Washington and confirmed by the Senate, included Chief Justice John Jay, John Rutledge, William Cushing, John Blair, Robert Harrison, and James Wilson. On February 2, 1790, the newly appointed

justices met in New York at the Royal Exchange building for their first official meeting. Out of the six members, only four participated in this first meeting, with Robert Harrison declining the position, and John Rutledge, even after three terms as a High Court justice, failing to attend any session. Whether or not the justices realized the significance of their newly appointed occupation, the Supreme Court was brought to life by the four members who sat within the walls of the Royal Exchange in 1790. The cases discussed or ignored, the decisions reached, and the interaction of the justices between themselves, the public, and the other branches would set the precedent for the future of the Highest Court.

II. ***The Supreme Court and the Separation of Powers***

Once ratified by the states, the Constitution set into place a government that consisted of not only the Supreme Court, but two other branches created to check the power and influence of one other. As a result, America's democracy was tied to a relationship of checks-and-balances that existed between the separate executive, legislative, and judicial branches. With the acceptance of the Great Compromise, the Framers hoped to prevent the domination of any one branch; a major motivation for colonists in the Revolution. Thus, the Framers looked to Classical Greek Philosophers and Enlightenment thinkers to help inspire the creation of three branches that were all separate but equal, in which each had the power to check the others. "Among all of the institutional features of the American Constitution, none is more significant than the separation of powers." [3]

[3] Tom S. Clark, *The Limits of Judicial Independence* (New York: Cambridge University Press, 2011), 1.

The concept separating the government branches stemmed from the birthplace of democracy, Athens, Greece, around the fourth century B.C. Greek philosopher Aristotle described the separation of three branches of government (the deliberative, the executive, and the judicial) in his treatise, *Politics.* However, the true doctrine of the separation of powers can most be connected with the work of Baron de Montesquieu from his *Spirit of Laws*. Montesquieu stated, "In every government there are three sorts of power; the legislative; the executive, in respect to things dependent on the law of nations; and the executive, in regard to things that depend on the civil law." He believed that in order to protect the liberty of the people, the government bodies must be separated.

> It is requisite the government be so constituted as one man need not be afraid of` another… there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.[4]

The federal government in the United States is based on these principles from both Aristotle and Montesquieu. The three branches - executive, legislative, and judicial – are connected through their ability to check the power of each other. This ability, known as checks-and-balances, is a major foundation of American democracy. In John Adams' *Thoughts on Government* (1776), he believed the separation of branches helped

[4] Baron de Montesquieu, *The Spirit of the Laws, vol. 1,* trans. Thomas Nugent (London: J. Nourse, 1777), pp. 221-237.

"to preserve the idea of democracy and protect the government from corruption." Therefore, each branch is tasked with the obligation to uphold the Constitution, as well as to prevent the other from usurping their power and jeopardizing the Republic. Political scientist and law professor Kermit Roosevelt III (2006) further explains:

> The great innovation of the framers was to create a government that is not our master but our servant. The Constitution gives each branch distinctive powers to avoid dangerous concentrations of authority, and in order to protect the status of the People as the ultimate sovereign. Likewise, each branch has distinctive abilities in deciding whether particularly kinds of acts are consistent with the Constitution.[5]

At the federal level, the Supreme Court is tied to both Congress and the president. The powers of the three branches may be described as separate, but in actuality, their powers are intertwined. An insulated judiciary is a falsehood. The Framers ensured the branches were connected through checks and balances based on interdependence. "The Constitution instituted a complex set of interdependencies among the major departments of government, permitting each branch to exercise its assigned functions, but requiring them to enlist the cooperation of other branches for certain purposes." [6] The Supreme Court may have the power to interpret the Constitution, but the president and Congress have the ability to enforce its rulings and appoint its members. Therefore the Court shares

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[5] Kermit Roosevelt III, *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions* (New Haven and London: Yale University Press, 2006), 23.

[6] John Ferejohn, "Independent Judges, Dependent Judiciary: Explaining Judicial Independence," *Southern California Law Review* 72, no. 353 (1999):355.

in the administration of democracy with each branch coming together to create a "basic tripartite framework of our national governmental system demanded by the constitution text. As one of three coordinate branches…the Court must actually share in the governance of the United States."[7]

The checks and balances system means that the development of public policy depends on the interaction among the president, Congress, and the Court. [8] However, the relationship between the three cannot always be described as cooperative. During times of crisis or political upheaval, where emerging parties disagree with receding parties, diplomacy may break down and the relationship becomes strained. The question then emerges, how do two branches influence one that is failing to align or cooperate?

III. Judicial Decision-Making

Judicial behavior in the form of decision-making has an enormous impact on the relationship between the three branches. When the Supreme Court votes to uphold acts of Congress or the president and make decisions in-line with the preferences of the executive and legislator, relative peace is maintained between the branches. However, when the justices seek to increase the Court's independence, strike down legislation supported by the other two branches, or make decisions that are counter to the preferences of the legislature and the executive, the Court risks inciting confrontations with Congress and the president.

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7 Arthur A. North, *The Supreme Court: Judicial Process and Judicial Politics* (New York: Meredith Publishing, 1966), 4.

8 Walter F. Murphy et al, *Courts, Judges, & Politics* (New York: McGraw-Hill, 2006), 334.

The influences on judicial decision-making are rooted in several schools of thought. One school of thought has been described as the legal model. Legal theorists believe "justices make decisions based on the facts of the case in light of plain meaning, the intent of the framers, precedent, and a balancing of societal interests." [9] In other words, justices are merely following the law and legal precedent. They are objective, not allowing their on their own personal attitude to influence decisions, but instead relying on the law and the Constitution to guide them. "Judges merely apply the existing law to the facts of the case in a neutral and objective fashion. According to this view, judges are simply legal technicians...the courts are guided by clear rules and principles established by prior cases or stare decisis in resolving legal disputes" [10] Even John Marshall, in his opinion in the case *Osborn v. United States Bank,* stated "judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing."

An alternative view is that Supreme Court justices make decisions based primarily on their ideological interests. Scholars such as Jeffrey Segal and Harold Spaeth (1993) formalize and test the attitudinal model that was developed during the legal realist movement of the 1920s. Built on the research of Glendon Schubert (1965), Segal and Spaeth (1993, pg. 69) show the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the Justices. Thus, justices make decisions based on their own ideological attitude without paying attention to the ideological values of other internal and external actors.

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[9] Jeffrey A. Segal and Harold J. Spaeth. *The Supreme Court and the Attitudinal Model.* (New York: Cambridge University Press, 1993), 72.

[10] John B. Gates, "The American Supreme Court and Electoral Realignment: A Critical Review," *Social Science History* 8, no. 3 (1984): 267.

The attitudinal and legal models provide excellent scholarship regarding judicial decision making. However, Lee Epstein and Jack Knight (1998) build on the Attitudinal Model by adding a strategic dimension, under which justices pursue their individual policy goals, but make strategic decisions based on the policy goals of other political actors. For analytical purposes, this thesis relies on the premise that justices follow more of a hybrid model where they are influenced by not only outside forces such as Congress and the president, but they at times also seek to further their own preferences..However, justices seeking to pursue their own policy may experience constraints from other political actors. As a result, justices may curb their desire to pursue their own policy preferences when doing so jeopardizes their own power or power of the Court. For example, when Congress and/or the president seek to limit the Court's influence and power, justices may curb their decisions to better align with the preferences of Congress and/or the president. More specifically, the model suggests that after an electoral realignment with a new political party controlling Congress and the president, the Old Guard Court may come into conflict with the new party. However, when the ideological composition of the Court changes after an addition of a justice by the new party in power, confrontation between the Court versus the president and Congress on policy issues may decrease. As a result, the holdings of the Court may favor the preferences of the new party and the vote tallies of the new justice(s) will reflect the ideological preferences of the nominating party. In addition, votes of the Old Guard may also alter to favor the new party as a result of the voting behavior of the additional justice(s). This does not mean justices do not make decisions that are influenced by their interpretation of the law or even their own preferences, but also that justices make decisions based on numerous

variables. The main constraints the justices face are their consideration for the perceived ideological preferences of other political actors. As result, in the rare instances when the Court fails to take the ideological preferences of the president and/or Congress when deciding cases, the president and/or Congress will utilize threats of court-curbing as measures to "encourage" the judiciary to arrive at decisions that are strategic and support the current policy goals of the two branches. When the Court fails to heed those warnings and behaves in a manner that is not strategic, it provides major motivation for Congress to legislate against the Court to weaken their power in the form of court-curbing.

Chapter Three: Court-Curbing in American Politics

I. Curbing the Court

The infrequent examples of disagreement between the three branches bring attention to the High Court. Alexander Hamilton described the judicial branch as the "least dangerous branch" because of its inability to enforce its decisions. In the *Federalist #78*, Hamilton specifically stated, "The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever." Hamilton's words resonate truth in the fact that the Court remains dependent on the legislature and the executive to help substantiate and execute its decisions; a product of the separation of powers. However in the modern era, the active and independent Court can hardly be described as an inferior branch. Since John Marshall's tenacious tenure and the acceptance of judicial review, the Supreme Court has proven an equal partner in the checks-and-balance system. When justices utilize their independence and become active in policy making, they bring the attention of outside political actors such as Congress, the president, and even the public. For the most part, justices make strategic decisions that not only help them attain their ultimate goals of influencing policy, but they reach these decisions by observing the wishes of the other external actors. Epstein and Knight (1998) describe justices as "strategic" because they "realize their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act."[11] However, judicial behavior is not

[11] Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington D.C.: Congressional Quarterly Inc, 1998), 10.

always strategic. On the opposite end of the spectrum, justices may instead exhibit sincere behavior. "Judges vote sincerely when they support the case outcomes and doctrines that they most prefer, without considering the impact of their votes on the collective result in their court or in other institutions."[12] As a result, justices may make decisions that seek to hinder preferences of both the president and congress risk turning the Court into a political target. As a result, both the legislature and the executive may seek to weaken the impact of the decisions and/or behavior of the court by curbing its power.

Gerald Rosenberg (1992) describes court-curbing as legislation designed to limit judicial power and influence while forcing the Court to align with presidential or congressional preferences. When ideological preferences between Congress and the Court fail to align, repression of the Court's decision making may follow. A loss of public support may develop as a result of the relationship between the political actors and the failure of the Supreme Court to survey the political environment. When the Court acts in a way that is detrimental to the president and the congress, the Court may be faced with a variety of court-curbing methods. "The power of the Court in relation to legislation, both state and national, has increased vastly during the last half-century, and certain aspects of this increase are to be deplored as out of harmony with democratic institutions. As to these, the power of the Court ought to be, if not diminished, at least brought under control."[13]

Congress utilizes several techniques to curb the power of the Supreme Court which can be divided into six categories: Composition, Jurisdiction, Judicial Review,

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[12] Lawrence Baum, *The Puzzle of Judicial Behavior* (Ann Arbor: University of Michigan Press, 1997), 90.

[13] Edward S. Corwin, "Curbing the Court," 45.

Remedy, Procedural, and Resolutions(Clark, 2011). Court-curbing in the form of composition is the most prominent form and is simply the attempt to reorganize the composition of the Court. Jurisdiction refers to the change in the Court's jurisdiction over cases or parts of the law in which the Court makes decisions. Judicial review court-curbing methods seek to eliminate or limit the Court's power of judicial review. Remedy methods are created to "restrict the Court from issuing some specific type of order or using a particular means to resolve a dispute." [14] Procedure bills are created to change the Court's judicial procedures, and finally, resolution bills are miscellaneous attempts of congress to limit the Court based on decisions from specific cases (Clark, 2011).

II. Motivations to Curb the Power of the Court

Congress and the president may have the ability to weaken the Court through court-curbing, but the motivations behind court-curbing are more opaque. Stuart S. Nagel (1964) believed congressional attacks that take the form of court-curbing are instigated by judicial provocation. In other words, court-curbing measures are enacted when the Court's behavior disrupts the balance between the branches. The legislature as a whole is "protective of its own lawmaking. Thus, the intensity of judicial review may be a large determinant of the success of controversial Court-curbing bills as well as a determinant of the introduction of Court-curbing bills."[15]

Another motivation to curb the Court develops when justices make decisions based on their own legal agendas. In this regard, a justice may make decisions and seek to

[14] Tom S. Clark, *Limits of Judicial Independence,* 41.
[15] Stuart S. Nagel., "Court-Curbing Periods in American History," 928.

influence polices based on their own personal preferences. "Judicial specialists generally agree that justices, first and foremost, wish to see their policy preferences etched into law. They are, in the opinion of many, 'single-minded seekers of legal policy.'"[16] The justices who follow their own political agenda serve on the bench for life and are not up for continual re-election, which leaves them safely ensconced in the High Court. Collectively, their unique experiences and attitudes will inevitably shape the decisions they make. "The judges are mortal…judges may have prejudices, and those prejudices may affect their understanding of the Constitution."[17] A prominent attorney, Robert Rantoul, explained:

> Why is an ex post facto law, passed by the Legislature, unjust, unconstitutional and void, while Judge-made law, which, from its nature, must always be ex post facto, I not only to be obeyed, but applauded…The Judiciary shall not usurp legislative power, says the Bill of Rights; yet it not only usurps, but runs riot beyond the confines of legislative power…The judge is human, and feels the bias which the coloring of the particular case gives.[18]

Therefore regardless of the intent to interpret the Constitution in a professional and objectionable manner, the simple fact remains that the Supreme Court is made of human judges with their own political identities and preferences.

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16 Lee Epstein and Jack Knight, *The Choices Justices Make*, 10.

17 Robert McCloskey, *The American Supreme Court*, 12.

18 Gustavus Myers, *History of the Supreme Court of the United States*, (New York: Burt Franklin, 1912), 358-359.

Regardless of the motivations to curb the court, the power of the Court can threaten the policies of other external political actors. In the 1930s, Thomas Powell commented that, "Nine men in Washington have a pretty arbitrary power to annul any statute or ordinance or administrative order that is properly brought before them…It is arbitrary in the sense that in the last analysis it is exercised as five or more of the nine men think best."[19]Thomas Jefferson believed that "to consider the judges as ultimate arbiters of all constitutional questions would place us under the despotism of an oligarchy."[20]

III. Altering the Size of the Supreme Court

There are six key methods used to curb the power of the Court. (Clark, 2011) The legislative branch has the most far-reaching control over the judiciary that can alter the "court of judicial policy making for decades."[21] Congress' powers include the ability to determine the number of judges, develop court procedures, and appropriate judicial funds. As a result of these controls, Congress becomes a viable threat to the concept of judicial independence of the Supreme Court. "Congress has the constitutional power to change certain institutional aspects of the federal judiciary...and can affect the Court in direct ways."[22] The president also serves as a threat to the Court in relation to court-

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19 Thomas Reed Powell, Review of *The Progress of the Law in the United States Supreme Court:1930-1931,* by Gregory and Charlotte Hankin, *Columbia Law Review32,* no. 4 (April 1932): 768.

20 Thomas Jefferson, *Writings*, Meme d. XV 276-278.

21 De Figueiredo, John M. and Emerson H. Tiller, "Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary," *Journal of Law and Economics 39,* no. 2 (1996), 435.

22 Gerald Rosenberg, "Judicial Independence and the Reality of Political Power," 371.

curbing. "With the astute use of his tools of leadership, the President can be a powerful figure both in the initiation and successful outcome of Court-curbing bills. With his active support, Court-curbing legislation is probably more likely to pass, and without it, such legislation is more likely to fail."[23] For example, the president may have influence over members of Congress that will push legislation through. He or she may cease to enforce Court decisions, or wield direct command over media coverage that reflects negatively on the justices. The president is also directly involved with the judiciary by having the ability to elect judges and even set the agenda for the federal courts. As a result of these powers enjoyed by president and congress, there have been hundreds of actions taken to curb the court. (Clark, 2011) Within the category of composition, one measure that has been considered with some regularity is the alteration in the number of justices on the bench.[24] As a result, this thesis examines the court-curbing method of composition and the effect of adding a justice to the Supreme Court.

Congress and the president have the power to add or delete seats on the Supreme Court. "From the earliest days of the Republic, Congress has determined not only the number of justices but also the number which shall constitute a quorum."[25] Robert McCloskey added, "… the composition of the Court, including the number of its members, is left for congressional decision; and, while federal judges cannot be removed except by impeachment, there is nothing to prevent Congress from creating additional judgeships whenever it chooses."[26] Adding justices to the bench helps influence policy by allowing the president and Congress to add members that will support their own political

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23 Stuart S. Nagel., "Court-Curbing Periods in American History," 943.

24 Clark, *The Limits of Judicial Independence*, 38.

25 William E. Borah, "Five to Four Decisions as Menace to Respect for Supreme Court; How Borah Sees Danger," *New York Times*, February 18, 1923.

26 Robert G. McCloskey, *The American Supreme Court 5th Edition,* 3.

attitude. Congress is also satisfied with the addition of judges, because the new appointees help alleviate the need to closely observe the actions and decisions of the Court. “Expanding the judiciary facilitates this effect [relying on judges to make the ‘right’ decision] by allowing Congress to selectively allocate judgeships to fit its own liking.”[27]The attempt to change the size of the Supreme Court does not simply happen when there is a mutual agreement in political policy between the president and Congress. Congress may choose to decrease the size of the Supreme Court in order to castigate both the Supreme Court and the president.

Legislation to alter the size of the Supreme Court has rarely passed; however, the effectiveness of the simple "threat" is insurmountable. A threat to curb the Court usually results in a change of behavior and "is sufficient to limit the Court."[28] For example, Franklin Roosevelt's 1937 Court Packing Plan was only a threat, but the plan itself helped to influence the behavior of the justices. Though the threat to curb the Court carries significant weight in changing the behavior of the justices, the actual change in composition of the Court's size potentially effects the holdings of the Court and the individual votes of the justices on the bench. The size of the Supreme Court has been successfully altered six times in United States history. In 1800, the lame-duck Congress lessened the number of judgeships to five in hopes of limiting the influence of Thomas Jefferson and his newly elected party. However, the Democratic-Republican Congress repealed the Judiciary Act of 1800 which brought the Court’s number back to six. In 1807, the Democrats voted to add a seventh judge. During the Jacksonian era, the number increased to nine and in 1863, the Republican Congress once again increased the Court to

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[27] De Figueriedo and Emerson Tiller, “Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary,”459.

[28] Gerald Rosenberg, "Judicial Independence and the Reality of Political Power,” 382.

ten during the Presidency of Abraham Lincoln. However, during the Presidency of Andrew Johnson in 1866, Congress voted to reduce the number of justices to seven, but by 1869, the number was increased to nine where it has remained for almost 150 years. Four out of the six examples of changing the size of the Supreme Court deal with the addition of justices. What is most unique about three out of the four examples is that each occurred during an electoral realignment where new parties, with new agendas and political policies, took control of both the presidency and Congress.

IV. Altering the Size of the Supreme Court Following Electoral Realignments

The political party plays an essential role in American government. Joseph Schlesinger points out, "Political parties lie at the heart of American politics." Schattschneider (1942) went so far as to state "political parties create democracy…democracy is unthinkable save in terms of parties."[29]Even by the Second and Third Congress, the American two-party system had emerged and the polarization of the early political parties, the Federalists and the Democratic-Republicans, was clearly visible. Political parties, as defined by modern standards, emerged in 1828 with the election of Andrew Jackson and the Democrats. Political party realignments and the elections that follow provide motivation to oust justices appointed by old regime members. For example, electoral realignments where new controlling parties emerge may have a significant impact on the desire to create legislation to alter the size of the Court,

[29] John H. Aldrich, *Why Parties? The Origin and Transformation of Political Parties in America* (Chicago and London: The University of Chicago Press, 1995), 3.

as well as the actual effect of any addition on the acceptance and support of policies presented by the new party in power.

Electoral realignments have proven to be significant to the dynamics of American politics. Gates (1984) defines electoral realignments as:

> Rapid change[s] in the social and political agenda, which results in a significant and durable change in the party support in the electorate as well as in a significant change in intuitional roles and national policy. The new party balance may give rise to a shift from the dominance of one party to another, or an entirely new party system may develop"[30] (Burnham, 1970; Jahnige, 1971; Sundquist, 1973; Trilling and Campbell, 1980)

These specific realignments occur after a party realignment and are a direct result of the shifting values and issues of the electorate. In an electoral realignment, different sub sections of the electorate give support to a new political party. In the United States, there have been five periods of party realignment: the Democratic-Republicans, the Jacksonians, the First Republican, the Second Republican, and the Democratic. (Key, 1955 and Gates, 1984)

The actual elections that demonstrate the electorates' new shift in values and changing political alignment are termed critical elections. For Key (1955), a critical election was one in which "the depth and intensity of electoral involvement are high, in which more or less profound readjustments occur in the relation of power within the

[30] John B. Gates, "The American Supreme Court and Electoral Realignment: A Critical Review," 267.

community, and in which new and durable electoral groupings are formed." [31] The Survey Research Center classifies presidential elections as maintaining, deviating or realigning in relation to existing conditions. The realigning election occurs when "popular political feeling is so intense that the basic underlying patterns of the electorate's party identifications are changed, and a new party balance is created which endures several decades." [32]The elections stand out as critical in that they represent a new era and are the first or last election before the realignment. There is an overhaul of the status quo in relation to the party in power where new issues become prominent, and the constituents look to a new political party to help solve social, economic, or political dilemmas that the previous party in control seemed inept to handle. The results of critical elections then "reveal a sharp alteration of the pre-existing cleavage within the electorate." [33]

The significance of electoral realignments on national politics is extensive. Usually these realignments are centered on changing values of the electorate or in response to certain crises. The critical elections that precede or follow the realignments also affect the relationship between government branches. Some have argued "the Court will delegitimize or invalidate the policies of the new regime immediately after it gains control of the government because the Court will be staffed by justices appointed under the old regime."[34] In regards to the size of the Supreme Court, three of the alteration

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[31] John B. Gates, "The American Supreme Court and Electoral Realignment: A Critical Review," 272.

[32] Richard Funston, "The Supreme Court and Critical Elections," 797.

[33] V.O. Key, "A Theory of Critical Elections," 4.

[34] John B. Gates, "The American Supreme Court and Electoral Realignment: A Critical Review," 268.

periods where justices were added occurred during the five periods of party realignments. Therefore, the question emerges: Is there a connection?

Party alignment plays a role when adding justices to the bench, because the new justices must be selected by the president and confirmed by the Senate. "Legislators have regularly attempted to pack the federal courts, especially at times when they and the president have shared the same general political policy."[35]Newly selected judges that support the political ideology of both the president and congress will ultimately undermine the influence of the current judges that are openly opposing the other branches. Therefore, the addition of judgeships to the Court benefits both the president and Congress. For example, when openings become available on the bench, presidents will most likely choose candidates that align with their political preferences. Therefore, the addition of a justice allows for a sympathizer to the president's political goals to be admitted to the Supreme Court. Political research has shown that over 90% of justices that have been nominated aligned with not only the political preferences of the president, but were also from the same political party. (Gates, 1984)

When an electoral realignment occurs, the new political party in power likely faces challenges when trying to implement new policies that reflect the changing political attitude. The old coalition of the Court may continue to reflect values and attitude of irrelevance with the new party in power. The judicial activism of the Court may thwart the party in power and cause contention within the three branches. As a result, Congress and the president may seek to relieve the disharmony created by the old regime Court by limiting its influence in the form of "packing the Court." The addition of new justices that align with the preferences of the new re-aligned president and congress will help to curb

[35] Walter F. Murphy et al, *Courts, Judges, & Politics*, 339.

the Court from deferring or stopping new legislation that limits the policies of the new government. Justice Story, upon his resignation, stated:

> I have long been convinced that the doctrines and opinions of the 'old court' were daily losing ground, and especially those on great constitutional questions. New men and new opinions have succeeded. I am the last member now living of the old court, and I cannot consent to remain where I can no longer hope to see these doctrines recognized and enforced.[36]

If these ideas hold true, the main question emerges: Were justices added in 1807, 1837, and 1863 to alter the composition of the Court in way that made the overall decisions and behavior of the justices reflect compliance with the new president and Congress?

[36] Drew Pearson and Robert S. Allen, *The Nine Old Men* (Garden City: Doubleday, Doran & Company, 1936), 55.

Chapter Four: The Supreme Court and the Democratic-Republican Realignment

I. The Electoral Realignment of the Democratic-Republicans

The first realignment election in United States history was evinced by the election of 1800. The country was changing rapidly as the borders of the original colonies were expanding westward. The election of Thomas Jefferson signaled a clash in American government with the electorate's shifting support from the Federalists to the Democratic-Republicans. "The election of 1801 was the first in which power was transferred from one party to a rival."[37] The Federalists had been defeated and the newly elected Democratic-Republicans were ready to rid the country of their ideology. "Upon taking power, the Democratic-Republicans exhibited the mindset that Jefferson would later reveal in his famous 1819 letter to Spencer Roane, in which he dubbed his victory 'the revolution of 1800.' In truth, the electoral realignment of 1800 resulted in the inability of the Federalists to ever again control either the executive or legislative branches of the national government. John Quincy Adams remarked on his father's past that:

> Whatever the merits or the demerits of the former administrations may have been, there never was a system of measures more completely and irrevocably abandoned and rejected by the popular voice. It [the administration of his father and the Federalists] can and never will be revived…and to attempt the restoration

[37] Cliff Sloan and David McKean, *The Great Decision: Jefferson, Adams, Marshall, and the Battle for the Supreme Court* (New York: Public Affairs, 2009), xi.

would be as absurd as to undertake the resurrection of a carcass seven years in the grave.[38]

The Congressional election in 1800 resulted in the Democratic-Republicans winning control of both the House and Senate. However, the presidential election ended in a tie between presidential nominee Thomas Jefferson and the vice presidential nominee Aaron Burr. The tie was broken within the House of Representatives where each state was given one vote. With the help of Alexander Hamilton, the House elected Thomas Jefferson as the third president of the United States. Federalists, most especially John Adams, were horrified at the idea of a transition from their central-government oriented political ideology, to a party that advocated for local over a central government. However, the new president and Congress would not officially accept the role until March, "and in that period much could be done, particularly with the judiciary, whose members were appointed for life."[39] In a scramble for time, lame duck President John Adams presented legislation to reduce the size of the Supreme Court to five, as well as add Federalist justices to the district courts. Adams, in an episode known as the appointment of the Midnight Judges, was able to push through this legislation, the Judiciary Act of 1801, which was passed in February. With the resignation of Justice Ellsworth, Adams selected a new Chief Justice. In January, the Federalist Senate voted to uphold the appointment of John Marshall, Virginia lawyer and veteran of the Revolutionary War, to Chief Justice. Upon his election Marshall stated, "Of the importance of the judiciary at all times but more especially the present, I am very fully

[38] Drew Pearson and Robert S. Allen, *The Nine Old Men*, 47.

[39] Leo Pfeffer, *The Honorable Court: A History of the United States Supreme Court* (Boston: Beacon Press, 1965), 66.

impressed and shall endeavor in the new office to which I am called not to disappoint my friends." [40]

The relationship between the Democratic-Republican Congress and president and the Federalist Supreme Court in the early years of Jefferson's presidency was tense. "Republicans now saw the federal judiciary as a refuge of Federalist holdouts determined to thwart them, and they saw federal judges as a symbol of centralized, antidemocratic federal power."[41] Many view the clash to be centered around "the cousins" - Thomas Jefferson and John Marshall. The animosity between Jefferson and Marshall was apparent from the beginning of Jefferson's term in office. Even during Jefferson's inaugural address, Marshall made a point to briefly turn his back on the newly elected president. With the Supreme Court remaining as the only governmental branch controlled by Federalists, John Marshall was prepared to thwart the Democratic-Republicans during his tenure on the bench. In a letter to his friend, Charles Pinckney, Marshall wrote, "The Democrats are divided into speculative theorists and absolute terrorists. With the latter I am disposed to class Mr. Jefferson. If he ranges himself with them it is not difficult to foresee that much difficulty is in store for our country – if he does not, they will soon become his enemies and calumniators.'"[42] Jefferson was prepared to face the battle with Marshall and the Supreme Court. Annoyed, Jefferson told James Monroe, "that Richmond had become a hotbed of 'federation and Marshallism, and this latter spirit, I

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[40] Jeffrey Rosen, *The Supreme Court: Personalities and Rivalries that Defined America* (New York: Times Books, 2006), 27.

[41] Cliff Sloan and David McKean, *The Great Decision: Jefferson, Adams, Marshall, and the Battle for the Supreme Court* , 109.

[42] Drew Pearson and Robert S. Allen, *The Nine Old Men,* 49.

thought nothing should be spared to eradicate.'" [43] When the Court decided to listen to arguments presented by William Marbury, Jefferson later wrote: "The Federalists have retired into the judiciary as a stronghold, and from that battery all the works of republicanism are to be beaten down and erased." [44]

II. The Supreme Court from 1801 to 1814

As a result of the animosity between Jefferson versus Marshall and the Court, the Democratic-Republicans pushed through legislation to alter Adams' appointments of the Midnight Judges. In 1802, the Judiciary Act of 1801 was repealed, and when Jefferson delivered his inaugural address there were six justices, including the chief justice, serving on the bench: William Cushing, William Paterson, Sam Chase, Bushrod Washington, Alfred Moore, and John Marshall. Justices William Cushing, William Paterson, and Samuel Chase were appointed by George Washington. Before serving on the High Court, William Cushing was a Revolution supporter and served as the Chief Justice of the Massachusetts Supreme Court with familial connections to royal judgeships before the War.[45] William Paterson, also an advocate for American independence, was an immigrant from Ireland that went from the Attorney General of New Jersey to the U.S. Senate. Samuel Chase practiced law until he became a representative in the Maryland legislature.

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43 Jeffrey Rosen, *The Supreme Court: Personalities and Rivalries that Defined America*,27.

44 Cliff Sloan and David McKean, *The Great Decision: Jefferson, Adams, Marshall, and the Battle for the Supreme Court* , 100.

45 Leo Pfeffer, *The Honorable Court: A History of the United States Supreme Court*, 42

John Adams, a Federalist president, appointed not only Chief Justice John Marshall, but also justices Bushrod Washington and Alfred Moore. Bushrod Washington practiced and taught law as well as served in the cavalry in the Revolutionary War. Alfred Moore served in the state legislature of North Carolina and later became a judge for the State Superior Court before Adams nominated him to the Supreme Court.

Even though Federalists had a major stronghold in the Court through their appointments, Jefferson was able to appoint his first justice in 1804. For Jefferson, any candidate for the bench must show "loyalty to the Jeffersonian cause and 'appropriate geographical provenance.'"[46] Therefore, Jefferson selected justices that were staunchly professed Democratic-Republicans and representatives from different regions within the U.S. Jefferson anticipated that by following these two criteria, his appointments would break the Federalist-Marshall stronghold. When Alfred Moore resigned, the Senate affirmed the appointment of William Johnson, a lawyer from South Carolina and a steadfast supporter of states' rights to the bench. Jefferson's second appointment occurred in1806 after the death of Justice Paterson when he selected Henry B. Livingston from New York. By 1807, Congress had passed the Seventh Circuit Act of 1807, which increased the number of justices serving in the Supreme Court from six to seven. For his additional appointment, Jefferson asked Congress to provide him with two choices for the new justice. However, their choice of U.S. Representative George W. Campbell was too scandalous even for Jefferson. Still wanting to make an appointment that would please Congress, Jefferson chose Kentucky Chief Justice of Appeals Thomas Todd.

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[46] Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (New York: Oxford University Press, 1985) 85.

James Madison, also a distinguished Democratic Republican, assumed the presidency after Jefferson in March of 1809. During his two terms, Madison was able to appoint two additional justices to the Supreme Court. His first appointee was Maryland state judge, Gabriel Duvall, upon the death of William Cushing in 1810. Once seated on the bench, he became a trusted and loyal supporter of John Marshall. In 1811, James Madison appointed Joseph Story after the death of Samuel Chase. Story was a celebrated Massachusetts lawyer and brief member of Congress. He and John Marshall made a formidable coalition for several years in the High Court.

III. Supreme Court Case Analysis: Relevant Court Cases from 1801-1814

The Supreme Court met and decided ninety cases between 1801, the year the newly elected president and Republican Congress were inaugurated, and 1807, when the Seventh Circuit Act of 1807 was implemented with the addition of a new justice. The cases nearly doubled from 1808-1814. In order to test the hypothesis, cases must be examined to determine the existence of potential conflict on issues of policy between the newly elected Democratic-Republican executive and legislative branches and the Supreme Court. Cases were selected based on possible areas of conflict involving issues of policy dealing with Westward expansion, the role of the federal government, the strength of the federal courts vis-à-vis the two other branches of government, the relationship with France, and the rights of the states in relation to the federal government.[47] Democratic-Republican politics and the idea of republicanism were central

[47] William Nester, *The Jeffersonian Vision, 1801-1815: The Art of American Power During the Early Republic* (Washington: Potomac Books, 2013).

to the new party. For example, Jefferson's dream of Manifest Destiny was not simply a dream, but a practical reality for the young America. Gaining western territory meant economic stability and the chance for prosperity. The Democratic-Republicans also questioned the role of the federal government in the lives of the American people and the relationship and power it bore over the rights of the states. Holdings are classified as confrontational when the decision of the Court clashes with at least one preferred policy preference of the Democratic-Republicans. The model of this thesis suggests confrontation will be higher in the years 1801-1807 when justices make decisions on issues of policy related to the ideological preferences of the Democratic-Republicans. Confrontation from justice decisions on issues of policy will be less frequent from 1808-1814 after the addition of a justice. The model also predicts the justice added will affect the vote tallies of the individual justices who served on the bench before 1808. The justice(s) added will be more likely to vote in support of the ideological preferences of the Democratic-Republicans. The justices prior to the change will be more likely to alter their voting behavior after the change in composition to align more with the ideological preferences of the new party in power due to the voting behavior of the new justice.

a. Supreme Court Cases Before the Addition (1800-1807)

Talbot v. Seeman, 5 U.S. 1 (1801)

Talbot v. Seeman was the first case heard by the Supreme Court after the inauguration of Jefferson. The issue of policy within the case involved the relationship between the American and the French. The Democratic-Republicans and Jefferson

specifically was a sympathizer with the French, making the aftermath of the Franco-American an important topic to the new party in power. The case involved the Franco-American naval conflict, also known as the Quasi-War, and was also the first case in Jefferson's presidency that pitted Federalists policies against those of the Democratic-Republicans. The Quasi-War began under the presidency of John Adams and stemmed from a deteriorating relationship between the Federalists and France. As part of their foreign policy, Democratic-Republicans were opponents of the undeclared war and favored closer ties with France. By the time Jefferson assumed the presidency, the naval conflict had come to an end, but the Supreme Court was still faced with remnants of the undeclared war as such was the case in *Talbot v. Seeman*.

Talbot v. Seeman involved salvage rights of a vessel during the French naval conflict. A Hamburg owned vessel, the *Amelia,* was captured by a French corvette. The *USS Constitution* proceeded to recapture the vessel from the French, with its captain, Talbot, claiming salvage rights. Seeman claimed the ship was not an American vessel and its recapture served no benefit to the owners. The Federal District Court ruled in Captain Talbot's favor, but the appeal in circuit court was overturned.

Marshall and the Court faced a political dilemma and were hesitant to make a decision that would support the Federalists and their undeclared war with France. Following such a path would ultimately cause confrontation between the Court and the French favored foreign policy of the newly elected Democratic-Republicans. At the time of the decision the Court was composed of six justices: Cushing, Paterson, and Chase had been appointed during Washington's administration and Marshall, Washington, and Moore had been appointed during John Adams' administration. In a unanimous decision,

Marshall delivered the opinion of the Court. Since the *Amelia* was armed and in possession of the French, Talbot could lawfully claim salvage rights. “This Court therefore is of opinion that… the *Amelia* and her cargo ought to be restored to the claimant, on paying for salvage one sixth part of the net value after deducting therefrom the charges which have been incurred.”

In *Talbot v. Seeman*, The votes of the justices were unanimous with no justice dissenting from the majority opinion. The decision was considered confrontational to the newly elected Democratic-Republicans because not only did the holding award salvage rights to Talbot, but the decision also gave support to the naval conflict with the French. As a result, the holding of the Court did incite confrontation with the Democratic-Republicans as it wasless than satisfactory to the preferences of the Democratic-Republican president and Congress who supported congenial relations with the French. However, it must be noted the Talbot case was not only confrontational in regards to issues of policy, but the holding of the case was also confrontational on an institutional level. *Talbot v. Seeman* was significant due to its confrontation between the executive and legislative branches over the ability to declare war. Marshall and the Court’s finding further substantiated the power of Congress to declare war or "whether the president has the sole authority to engage in war, followed only by Congress’ latent approval via its power of the purse."[48] John Marshall specifically stated early in the decision, "The whole powers of war being by the Constitution of the United States vested in Congress, the acts

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[48] Richard Burst, "Constitutional Dilemma: The Power to Declare War Is Deeply Rooted in American History," *American Bar Association Journal,* February 2012, http://www.abajournal.com/magazine/article/constitutional_dilemma_the_power_to_declare_war_is_deeply_rooted_in_america.

of that body can alone be resorted to as our guides in this inquiry."[49] Thus the holding of the Court was also caused confrontation between all three branches.

Table 4.1: Talbot v. Seeman (1801)
Issue of Policy: American/French Relations
Issue of Institutional Prerogative: Congress' Ability to Declare War
Holding was Confrontational on both Issues

Justice	Appointing Party	Voted with Majority	In the Minority
William Cushing	Federalist	x	
William Paterson	Federalist	x	
Samuel Chase	Federalist	x	
John Marshall*	Federalist	x	
Bushrod Washington	Federalist	x	
Alfred Moore	Federalist	x	

*Delivered Majority Opinion

United States v. Schooner Peggy, 5 103 (1801)

The policy issue in question in the case *United States v. Schooner Peggy* was the French/American relationship after the Quasi War and directly involved the orders of Jefferson involving another captured vessel during the undeclared naval conflict. Throughout this time of hostility, French ships could be captured and seized (condemned) during a time of war. However, once the conflict was resolved between the United States and France, it was decided that ships not yet condemned were to be returned to their French owners. *Peggy* was a French schooner that had been captured by an American ship in 1800. After the treaty with France was enacted, the District Court ordered the schooner to be restored to the French. David Jewitt and the captors of *Peggy* appealed to

[49] *Talbot v. Seeman, 5 U.S. 1 (1801)*

the circuit court where it was decided to have the schooner condemned and labeled as a prize. The owners of *Peggy* then appealed to the Supreme Court.

The *United States v. SchoonerPeggy* again illustrated the Democratic-Republican support of peaceful relations with France as part of their foreign policy. Jefferson ordered the schooner and its cargo be restored to the French. (Cliff Sloan and David McKean, 2009) However, Jefferson's orders were ignored, with the case making its way to the Supreme Court's docket. In a unanimous decision from Marshall, Cushing, Paterson, Chase and Washington, (Justice Moore was absent) the Court delivered the opinion in favor of Jefferson's order and support of the treaty with France. The votes of the justices were unanimous, and the overall decision of the Court were considered non-confrontational with the Democratic-Republicans as it supported the Democratic-Republicans' policy of peaceful relations with the French. In the majority opinion, Marshall stated:

> But yet where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of Congress, and although restoration may be an executive, when viewed as a substantive act, independent of and unconnected with other circumstances, yet to condemn a vessel the restoration of which is directed by a law of the land would be a direct infraction of that law, and of consequence improper.[50]

[50] *United States v. Schooner Peggy, 5 103 (1801)*

Table 4.2: United States v. Schooner Peggy (1801)
Issue of Policy: American/French Relations
Holding Confrontational on Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
William Cushing	Federalist	x	
William Paterson	Federalist	x	
Samuel Chase	Federalist	x	
John Marshall*	Federalist	x	
Bushrod Washington	Federalist	x	
Alfred Moore	Federalist	Did Not Participate	

*Delivered Majority Opinion

Marbury v Madison, 5 U.S. 137 (1803)

Marbury v. Madison (1803) was a landmark case where the decision of the justices would permanently affect the relationship between all three branches of government. The issue of policy that stands out in *Marbury v. Madison* involves the strength of the federal courts vis-à-vis the two other branches of government. The case began with the creation of the "Midnight Judges," when William Marbury was to be appointed Justice of the Peace for the District of Columbia. However, his position was never secured and his commission never delivered. Once in office, Jefferson had no desire to fulfill the Federalist Marbury's commission and deliberately ignored the letters. ""I forbade their delivery, ' Jefferson wrote many years later to Justice William

Johnson…'If there is any principle of law never yet contradicted, it is that delivery is one of the essentials to vitality of the deed.'"[51]

Failing to receive his commission, Marbury appealed to the Supreme Court for his promised commission from Jefferson's Secretary of State, James Madison. The question centered around the case was whether or not Madison was required to deliver the commission. The justices decided to hear arguments for the case beginning in February of 1803. The Court then ordered Madison to justify his and the president's block on the undelivered commissions. "For many Republicans, the Court's order was an act of shocking audacity. The Supreme Court would force Jefferson and Madison to justify their actions about who would hold office!"[52] The Democratic-Republicans media voiced outrage on a deliberate attack on the executive by the judiciary. Marshall and the Court also faced a dilemma of their own. "If they upheld Marbury and ordered delivery of the commission, the order would surely be ignored by Madison, the Court would be exposed as impotent to enforce its mandates…If…they did not uphold Marbury, they would give aid and comfort to Jefferson…The latter course was impossibly distasteful to an ardently Federalist bench; the former was humiliating and might well be risky."[53]

The case was decided on February 24th, minus Justices Moore and Cushing. *Marbury v. Madison* produced a vote of 4-0 by Marshall, Paterson, Chase, and Washington with Marshall delivering the opinion of the Court. Marbury was owed his

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[51] Cliff Sloan and David McKean, *The Great Decision: Jefferson, Adams, Marshall, and the Battle for the Supreme Court* (New York: Public Affairs, 2009), 76.

[52] Cliff Sloan and David McKean, *The Great Decision: Jefferson, Adams, Marshall, and the Battle for the Supreme Court* , 99

[53] Robert G. McCloskey, *The American Supreme Court 5th Edition,* rev. Sanford Levinson (Chicago: The University of Chicago Press, 2010), 26.

commission, but the Court would not force Madison to give it to him. The votes of the justices were once again aligned with their chief justice, but the outcome of the case was anything but satisfactory to Jefferson and the Democratic-Republicans. In regards to policy, the Democratic-Republicans desired the power of the Court to remain limited. In addition, Marshall's decision to not take a position on the issue also demonstrates confrontation in regards to a claim of judicial power versus a claim of executive discretion. Though the decision of the case seemed to point the Court in the general direction of limiting its jurisdiction, a much more significant power was becoming concrete. The holding of the Court helped to reinforce the Court's power of judicial review, and as a result, the Democratic-Republicans were dissatisfied with a holding that ultimately increased the power of the High Court. "The Supreme Court, a weak, feeble body until that point, never had struck down an act of Congress. Nor had any other national court in the world struck down an act of a coordinate branch

Marbury v. Madison was a significant case on more than just a policy level. The case involved institutional prerogatives that questioned the ability of the president and/or Congress to disregard the deliverance of Marbury's commission. The Court seemed to have several options in deciding the case. The Court could issue a Writ of Mandamus forcing Jefferson to deliver the commission, deny jurisdiction in hearing the case, or simply not take a position on Madison's obligation to the deliver the commission. The Court seemed to avoid an early crisis between the branches by admonishing the actions of the executive, but restraining from issuing the Writ of Mandamus. As a result, the institutional facets of the case are much less confrontational than the policy issue of judicial power vis-a-vis the other branches.

Table 4.3: Marbury v. Madison (1803)
Issue of Policy: Strength of the Court vis-a-vis Congress/President
Issue of Institutional Prerogative: Judicial Restraint/Jurisdiction
Holding was Confrontational on Issues of Policy
Holding Avoided Confrontation on Issue of Institutional Prerogative

Justice	Appointing Party	Voted with Majority	In the Minority
William Cushing	Federalist	Did Not Participate	
William Paterson	Federalist	x	
Samuel Chase	Federalist	x	
John Marshall*	Federalist	x	
Bushrod Washington	Federalist	x	
Alfred Moore	Federalist	Did Not Participate	

Stuart v. Laird, 5 U.S. 299 (1803)

Stuart v. Laird was an excellent example of tension between the Court and the Democratic-Republicans involving legislation passed by Congress the year before. The possible confrontation between branches was in the Court's decision regarding the constitutionality of the repeal of the Judiciary Act of 1801. The Judiciary Act of 1801 was created to "use the courts to obstruct democratic majoritarianism. It increased federal jurisdiction, created new federal judgeships that were filled by reliable Federalist lawyers, separated the Supreme Court from the lower Courts…and took preliminary steps to rein in juries." [54] The Act also increased the number of judges in the circuit courts which helped to alleviate the burden of the Supreme Court justices from "riding the circuit." When Democratic-Republicans took Congress and the presidency from the

[54] William E. Nelson, "The Historical Foundations of the American Judiciary, *The Judicial Branch,* ed. Kermit L. Hall and Kevin T. McGuire (Oxford: Oxford University Press, 2005), 21.

Federalists, the new party repealed the Judiciary Act of 1801 with the Judiciary Act of 1802.

With the repeal of the 1801 Act, circuit judges that had been added by the Lame Duck president and Congress were hastily removed from their positions and ultimately caused confrontation between the Federalist and Democratic-Republicans, as it was argued that their position was for life, not to mention it returned the obligation of riding the circuits back to the Supreme Court justices. However, during their year of service, the newly appointed circuit judges had heard and decided many cases. In *Stuart v. Laird*, John Marshall, who at the time was riding circuit, delivered a decision made by one of the removed circuit judges against Stuart. Stuart's lawyer, Charles Lee, argued that only the judge who had originally presided over the case could make the decision. In addition, Lee also argued that the repeal of the Judiciary Act in 1802 was unconstitutional and "argued against the legitimacy of the court. Lee questioned the authority of Congress to impose circuit court duties on justices of the Supreme Court."[55]

The decision of the justices was very important for the Democrat-Republicans. If the justices upheld the opinion of Lee and struck down the Repeal of 1802 as unconstitutional, then the judiciary would incite a major dispute with both the executive and legislative branches. Instead, Justice Paterson delivered the opinion of the Court with a 5-0 unanimous vote (Marshall withheld his vote) affirming the original decision made by the Middle Circuit Court in Virginia in favor of the plaintiffs. Ultimately, the decision of Justices Paterson, Cushing, Chase, Washington, and Moore avoided a confrontation between the Court and the Democratic-Republicans.

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[55] Cliff Sloan and David McKean, *The Great Decision*, 120.

Table 4.4: Stuart v. Laird (1803)
Issue of Policy: Democratic-Republican Legislation/Court Power
Holding Avoided Confrontation on Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
William Cushing	Federalist	x	
William Paterson*	Federalist	x	
Samuel Chase	Federalist	x	
John Marshall	Federalist	Did Not Participate	
Bushrod Washington	Federalist	x	
Alfred Moore	Federalist	x	

*Delivered Majority Opinion

Little v. Barreme, 6 U.S. 170 (1804)

The case of Little v. Barreme was another complex case that involved the aftermath of the Quasi War between France and the United States. The *USS Boston* captured a Danish ship, the *Flying Fish*, during the undeclared war between the United States and France. Little, the *Boston's* captain seized the ship after the president ordered the Navy to capture any American ship suspected of trading at a French port. The problem lay in the fact that the ship was not an American vessel, nor was it sailing to a French port, which made the capture illegal. The federal district court freed the vessel and gave it back to its original owners, but did not force Little to pay restitution for damages. The Court of Appeals reversed the decision stating Captain Little would be responsible for paying damages for the illegal capture of the *Flying Fish*. John Marshall and a unanimous court affirmed the circuit court's decision.

The issue of policy raised within the case was once again the relationship with the French and the Democratic-Republicans. In a vote of 6-0, Marshall and the Court voted in favor of Little paying restitution for the *Flying Fish.*Ultimately, the holding supported the congenial relationship between the Democratic-Republicans and the FrenchThus the decision was not confrontational to the Democratic-Republicans on the issue of policy. However, *Little v. Barreme* was not potentially confrontational on only one dimension. The major question raised by the Court in hearing the case was also based on an institutional factor involving the power of the president to order the navy to capture American ships travelling from the French Empire. Marshall declared that:

> It is by no means clear that the President of the United States, whose high duty it is to "take care that the laws be faithfully executed," and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States to seize and send into port for adjudication American vessels which were forfeited by being engaged in this illicit commerce." [56]

Thus the case made clear that the president's actions to seize even American ships leaving French Ports was outside of the laws of Congress, which meant he did not have the authority to capture *The Flying Fish* or any American vessel in the same circumstance. The decision exuded interbranch conflict because validating the seizure of the ship highlighted the Court's prerogative to interpret the Constitution independent of

[56] *Little v. Barreme*, 6 U.S. 170 (1804)

Congress and the president. As a result, on an institutional level separate from policy, the outcome of the case was confrontational because the Court's decision limited the power of the president while at the same time asserting the power of the Court.

Table 4.5: Little v. Barreme, 6 U.S. 170 (1804)
Issue of Policy: American/French Relations
Issue of Institutional Prerogative: Power of President to Seize Ships
Holding Avoided Confrontation on Issue of Policy
Holding was Confrontational on Issue of Institutional Prerogative

Justice	Appointing Party	Voted with Majority	In the Minority
William Cushing	Federalist	x	
William Paterson	Federalist	x	
Samuel Chase	Federalist	x	
John Marshall*	Federalist	x	
Bushrod Washington	Federalist	x	
Alfred Moore	Federalist	x	

*Delivered Majority Opinion

Ex Parte Bollman, 8 U.S. 75 (1807)

Ex Parte Bollman was a riveting and confrontational case involving treason and the tug of war that ensued between Democratic-Republicans and the Court over their power to issue a writ of habeas corpus. The issue of policy within the case dealt with the question on the power of the federal court vis-à-vis both the president and Congress. In the case, Aaron Burr, along with co-conspirators Samuel Swartwout and Erick Bollman, were charged with treason when it was discovered they were trying to separate territories from the United States. The men were denied habeas corpus and sent to Washington. Jefferson and the Democratic-Republican Congress tried to push legislation through that

would "ensure that the prisoners would not be freed with another writ of habeas corpus. Senator William Branch Giles introduced legislation to suspend the writ for three months...legalize Wilkinson's arrest of Bollman and Swartwout and to keep the pair in confinement."[57]

With the lack of habeas corpus and a trial looming, Bollman and Swartwout looked to the Supreme Court to determine their fate. At the time of the case, a second justice, Justice Henry Livingston, had been appointed and affirmed by Jefferson and the Democratic-Republicans after the death of William Paterson. Marshall delivered the majority opinion with support of Cushing, Chase, Livingston, and Washington. The only dissent came from Jefferson appointed Justice Johnson whose dissent was significant due to the tendency of the Marshall Court to be largely unified in its decisions on potential confrontational cases. He was also Jefferson's first appointment to the Court and his vote in this case indicated his support for a non-confrontational decision where he issued the only dissent against the Old Guard. Marshall upheld the Court's power to issue a writ of habeas corpus, citing section 14 of the Judiciary Act of 1789. The Court also decided the charge of treason was not appropriate in this example. Thus, the Court ordered the two men to be set free against the wishes of both Jefferson and Congress. The case was significant for two reasons: The outcome of the case was confrontational between the Democratic-Republicans as it reinforced the power of the federal Court and it also illustrated a lack of unanimity of the Court with the dissent of Justice Johnson.

[57] Eric M. Freedman, "Just Because John Marshall Said it, Doesn't Make it So: Ex Parte and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789," *Alabama Law Review 51,* no. 2(2000): 560.

Table 4.6: Ex Parte Bollman (1807)
Issue of Policy: Court Power vis-a-vis Congress/President
Holding was Confrontational on Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
William Cushing	Federalist	x	
Samuel Chase	Federalist	x	
John Marshall*	Federalist	x	
Bushrod Washington	Federalist	x	
William Johnson	Democratic-Republican		x
Henry Livingston	Democratic-Republican	x	

*Delivered Majority Opinion
**Concurred with Majority Opinion

b. Supreme Court Cases after the Addition (1808-1814)

Bank of the United States v. Deveaux, 9 U.S. 61 (1809)

The power, including the jurisdiction, of the Court vis-a-vis the Stateswas a confrontational issue of policy for the Democratic-Republican president and Congress in the case *Bank of the United States v. Deveaux*. The case brought into question the power of the Court to hear disputes involving corporations. The Supreme Court case, *Bank of the United States v. Deveaux* dealt with the American National Bank and its ability to sue in a federal court. The details of the case involved the Bank of the United States' suit against a Georgian tax collector for properties taken after the failure of the bank to pay the state tax. The difficulty of the case laid in the question: Does a corporation fall under the Court's diversity jurisdiction? The federal courts had the power to hear cases that involved plaintiffs and defendants from different states, but it did not define how the

court should view a corporation in this regard. If this question was to be answered in the negative, then the federal courts would not have the jurisdiction to hear the case. In the majority opinion, John Marshall stated:

> "That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen, and consequently cannot sue or be sued in the courts of the United States unless the rights of the members in this respect can be exercised in their corporate name."[58]

Unfortunately for the National Bank, the corporation in question was not considered to have appeased the rule of diversity since some of its participants were in fact Georgia citizens. The case received a majority vote of the Court justices which included Justices Chase, Marshall, Cushing, Washington, and the Democratic-Republican appointments of Justices Todd and Johnson. Justice Livingston, also an appointment of the Democratic-Republicans, withheld his opinion. The case was an example of possible confrontation for the Court and the Democratic-Republicans, because it presented another opportunity for the justices to use a case to increase the federal power of the Court. However in this example, the Supreme Court did not decide to take advantage of establishing additional federal precedent. As a result, the holding of the Court was satisfactory to the Democratic-Republicans. In this case, the votes of the justices remained unanimous. In hindsight, "Marshall and other members of the Court reportedly expressed regret over the decision because it severely limited the right of corporations to sue or be sued in federal court and thereby diminished federal judicial power.

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[58] *Bank of the United States v. Deveaux, 9 U.S. 61 (1809)*

Table 4.7: Bank of the United States v. Deveaux (1809)
Issue of Policy: Strength of the Court vis-a-vis the States
Holding Avoided Confrontation on Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
William Cushing	Federalist	x	
Samuel Chase	Federalist	x	
John Marshall*	Federalist	x	
Bushrod Washington	Federalist	x	
William Johnson	Democratic-Republican	x	
Henry Livingston	Democratic-Republican	Did Not Participate	
Thomas Todd	Democratic-Republican	x	

*Delivered Majority Opinion
**Concurred with Majority Opinion

United States v. Peters, 9 U.S. 115 (1809)

The case of *United States v. Peters* was a confrontational case involving all three branches of government. The case was not confrontational on a policy level, but instead involved a question of institutional prerogative, where the power of federal government as a whole versus that of the state came into conflict.. In the case, the Pennsylvania legislature gave power to the governor to extract money that came from Gideon Olmstead. Olmstead was a previously captured American captain that had seized control of the British vessel, *Active*, on its way to New York. Once Olmstead was able to take command of the vessel and re-route the ship to New Jersey, a Pennsylvanian brig and an American privateer captured the ship and forced her to dock in Philadelphia. The state of Pennsylvania then claimed rights to the vessel and her cargo. Olmstead was only left with a fraction of the value of the vessel he and his crew had originally seized. As a result,

Olmstead petitioned the Committee of Appeals, a body representing the national government, for full value of the vessel. The Committee of Appeals granted Olmstead's request and ordered that all proceeds of the *Active* be awarded to Olmstead. However, the money was placed into the hands of the state treasurer of Pennsylvania where it remained for several years. After many court proceedings, district court judge Richard Peters ordered that the money be given to Olmstead. However, the Pennsylvanian legislature ignored the ruling of Judge Peters and gave authority to the governor "to use any further means he may think necessary for the protection of what it denominates 'the just rights of the State,'"[59] including the defiance of orders from district and/or federal courts. By 1809, the case made it to the Supreme Court where the justices were faced with the question of the power of the state legislator to ignore rulings of the Court. [60]

John Marshall delivered the unanimous opinion which declared the state of Pennsylvania did not have a right to the *Active* and could not resist the legal process. As a result a unanimous Court, including Justices Marshall, Chase, Cushing, Washington, Livingston, Todd, and Johnson, granted a peremptory mandamus. The decision of the justices ultimately highlighted the conflicting concept of federalism and defined the relationship between the state legislators and the federal government. The significance of the decision was Marshall's assertion that the federal courts must be superior to the state legislatures in order to preserve the new nation and the supremacy of national law."[61] Before McCulloch v. Maryland, Marshall and the Court were already setting the foundation for national power, including all three branches, over power of the states. As a

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59 *United States v. Peters, 9 U.S. 115*

60 McDougal Littell, *The Americans: Historical Supreme Court Decisions* (New York: McDougal Littell Publishing, 2002), 9-10.

61 McDougal Littell, *The Americans: Historical Supreme Court Decisions*, 10.

result, the holding of the case in regards to the institutional question of federal power versus power of the states, did not conflict with the federal branches of government. In the majority opinion, Marshall stated:

> If the legislatures of the several States may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all, and the people of Pennsylvania, not less than the citizens of every other State, must feel a deep interest in resisting principles so destructive of the union, and in averting consequences so fatal to themselves.[62]

Table 4.8: United States v. Peters (1809)
Issue of Institutional Prerogative: Strength of the National Government over State Holding Avoided Confrontation over Issue of Institutional Prerogative

Justice	Appointing Party	Voted with Majority	In the Minority
William Cushing	Federalist	x	
Samuel Chase	Federalist	x	
John Marshall*	Federalist	x	
Bushrod Washington	Federalist	x	
William Johnson	Democratic-Republican	x	
Henry Livingston	Democratic-Republican	x	
Thomas Todd	Democratic-Republican	x	

*Delivered Majority Opinion
**Concurred with Majority Opinion

[62] *United States v. Peters, 9 U.S. 115*

Fletcher v. Peck, 10 U.S. 87 (1810)

Another case which involved the state legislature and the Supreme Court was the notorious *Fletcher v. Peck*. This conflict in the case did not involve an issue of policy, but focused on an issue of institutional prerogative where the a state legislature challenged the superiority of the Constitution and the federal government. The Georgia legislature sold a large tract of land to several companies. However, the new legislature discovered those who voted to sell the land had been bribed to do so. Before the legislature could correct this act of corruption, the land had already been sold. John Peck was one of the innocent parties that bought the land in question. The Georgia legislature refused to acknowledge the validity of the deed to the land. Peck believed Georgia's attempt to rescind the claim for the title violated the Constitution. For the Supreme Court, the question emerged: "Could the contract between Fletcher and Peck be invalidated by an act of the Georgia legislature?"[63]

John Marshall delivered the majority opinion with a 5-0 vote. However, Johnson delivered a concurring decision and Chase and Cushing did not participate in the case. In the majority opinion, Marshall declared that the sale of land was legal, and as such, must be respected by the Georgia legislature as valid. "Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. She is part of a large empire; she is a member of the American Union." [64]

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[63] "Fletcher v. Peck," The Oyez Project at IIT Chicago-Kent College of Law, accessed February 18, 2014,*http://www.oyez.org/cases/1792-1850/1810/1810_0*.

[64] Hoffer, Peter Charles, Williamjames Hull Hoffer, and N.E.H. Hull. *The Supreme Court: An Essential History*, 62.

The case had enormous influence over contract law and the future economic world of laissez-faire. However, the most notable consequence of the holding was that the Supreme Court, for the first time in history, struck down a state law. The decision ultimately strengthened federal authority over states' rights. Though the case demonstrated institutional conflict, the potential for confrontation among the branches was still high. However, the Court's holding supported federalism and the national government, appeasing all three branches. As a result of the holding, the Court once again illustrated the superiority of the Constitution and the growing power of not only the Court but the federal government in America.. "*Fletcher v. Peck* was the first clear precedent for the general proposition that the Supreme Court was empowered to hold state laws unconstitutional…[*Fletcher v. Peck]* marked the end of the beginning of the Court's long struggle to find its place in the American governmental system."[65]

Table 4.9: Fletcher v. Peck (1810)
Issue of Institutional Prerogative: Strength of National Government over States
Holding Avoided Confrontation over Issue of Institutional Prerogative

Justice	Appointing Party	Voted with Majority	In the Minority
William Cushing	Federalist	Did Not Participate	
Samuel Chase	Federalist	Did Not Participate	
John Marshall*	Federalist	x	
Bushrod Washington	Federalist	x	
William Johnson**	Democratic-Republican	x	
Henry Livingston	Democratic-Republican	x	
Thomas Todd	Democratic-Republican	x	

*Delivered Majority Opinion
**Concurred with Majority Opinion

[65] Robert G. McCloskey, *The American Supreme Court 5th Edition, 33.*

IV. Analysis of Holdings after the Democratic-Republican Electoral Realignment

The relationship between the Court and the Democratic-Republican Congress and president was often described as tense. Even the duel between the cousins has received significant notoriety in American history. Though the clash between the Court and the Democratic-Republicans has been noted, the real intrigue is the effect of the alteration in size of the Court. Did the change in ideological composition after the addition of a justice influence holdings of the Court to be less confrontational with the Democratic-Republicans? Did the addition of Democratic-Republican nominated justices alter voting behavior?

The model predicted confrontation between the Democratic-Republicans and the Court will be high before the change in the Court's composition. From 1801-1807, most cases within this era involved maritime issues such as salvage, condemnation, and insurance of vessels, as well as bonds, contract laws, private property disputes, and bankruptcy. However, six cases involved confrontational issues of policy between the Court and the Democratic Republicans. The holdings of the Court were considered confrontational if the overall decision of the Court was in conflict with the ideological preferences of the new party. In four out of the six cases examined from 1801-1807, there was confrontation amongst branches due to the holdings of the Court. Only two cases involving possible issues of policy conflict were actually held by the Court to be non-confrontational., As predicted by the model, in cases involving issues of policy before the addition of a Supreme Court justice, the majority of Court holdings were defiant to the ideological preferences of the Democratic-Republicans and considered confrontational.

The model predicted the addition of a justice in 1807 influenced the holdings of the Court to be less confrontational with the ideological preferences of the Democratic-Republicans. From 1808-1814, the major trend of the Court was to increase national power, setting the groundwork for federal sovereignty over the states. There were significantly fewer cases with the potential to conflict with the ideological preferences of the new party in power. In the six years examined, only one case involved an issue of policy between the Democratic-Republicans and the Court. As the model predicted, the holding of the Court on the issue of policy was not confrontational with the Democratic-Republicans. However, the absence of confrontational cases involving issues of policy make it difficult to give significant support to the hypothesis.

Policy issues were not the only facet contributing to confrontation between the Democratic-Republicans and the Court. Conflict also existed revolving around institutional issues. Though the model makes predictions on issues of policy, it is important to note the existence of numerous cases regarding issues of institutional conflict such as holdings that may have created contention between the president and the Court, Congress and the president, or the state and the federal government. Between 1801-1807, three cases involved questions of institutional prerogatives, where two out of the three holdings were confrontational. Each of these three cases not only conflicted on an institutional facet, but were potentially confrontational concerning issues of policy. From 1808-1807 after the addition of a justice, two cases involved only institutional issues where the holdings were not confrontational to the Democratic-Republicans. Holdings were more confrontational involving institutional prerogatives before the addition of a justice, and less confrontational after the change in composition. In addition,

there were more cases involving potential issues of conflict over institutional prerogatives than issues of policy during the time span after the alteration of the Court.

The model predicted a change in judicial behavior will occur with the addition of a justice. According to this prediction, the voting behavior of the new justice will influence the vote tallies of the Supreme Court. In regards to the individual behavior of the justices only one case was not unanimous in which Democratic-Republican appointment, Justice Johnson voted independent of the Old Guard and gave the only dissent. Otherwise, the votes were unanimous in both confrontational and non-confrontational cases involving not only policy, but institutional facets as well. The unanimity of the votes illustrated the uniformity among the justices and a lack of a significant change in vote tallies among the justices.

As a result of the analysis, the electoral realignment of the Democratic-Republicans gives limited support to the hypothesis. In regards to the holdings of cases, the majority of cases from 1801-1807 were considered confrontational on at least one issue of policy. After the addition of a justice, there was only one case that held the potential for conflict, but the holding of the Court was not confrontational to the Democratic-Republicans. With only one case to examine involving a policy issue, the outcome gives limited support to the model. The analysis also shows conflict existed on more than one dimension where five cases held potential conflict over issues of institutional prerogatives. The Court's holding in two out of three cases involving institutional conflict were confrontational with the new party, but after the addition of a justice, the holdings of the Court in the last two cases were not confrontational with the Democratic Republicans. During both eras examined, the Court delivered unified

decisions in all but one of the cases. On the individual level, there was little alteration in judicial behavior. Before 1807, Justice Johnson was the only justice to dissent when the Court became confrontational with the Democratic-Republicans, but after the addition of a justice, the Court remained unanimous in its decisions. The unanimity of the Court under Marshall, especially from 1801-1807, ensured contention remained between Jefferson and the Court. At the end of his presidency, Jefferson described the Supreme Court as:

> The subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric. They are construing our constitution from a co-ordination of a general and special government to a general and supreme one alone… hey consider themselves secure for life; they sculk from responsibility to public opinion, the only remaining hold on them… An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his mind, by the turn of his own reasoning.[66]

[66] Andrew A. Lipscomb and Albert E. Bergh, *Thomas Jefferson Writings* (Washington D.C.: Thomas Jefferson Memorial Association, 1903), 482.

Table 4.10: Democratic-Republican Realignment: Table of Findings

Supreme Court Case	Era Examined	Issue of Policy	Institutional Issues Present	Confrontational Holding	Change in Vote Tallies
Talbot v. Seeman	1801-1807	French/American Relations	Yes	Yes	No
United States v. Schooner Peggy	1801-1807	French/American Relations	No	Yes	No
Marbury v. Madison	1801-1807	Strength of the Court vis-a-vis Congress/President	Yes	Yes	No
Stuart v. Laird	1801-1807	Democratic-Republican Legislation	No	No	No
Little v. Barrem	1801-1807	American/French Relations	Yes	No	No
Ex Parte Bollman	1801-1807	Strength of the court vis-a-vis Congress/President	No	Yes	Yes
Bank of the United States v. Deveaux	1808-1814	Strength of the Court vis-a-vis the States	No	No	No
United States v. Peters	1808-1814	Not Designated	Yes	No	No
Fletcher v. Peck	1808-1814	Not Designated	Yes	No	No

Chapter Five: The Supreme Court and the Jacksonian Democratic Realignment

I. The Electoral Realignment of the Jacksonian Democrats

For thirty years, seven justices remained firmly ensconced on the bench. However, as the United States continued to pursue its manifest destiny, the introduction of new states into the union and the continued clash between parties, altered the political atmosphere within the country. States' rights and the question of slavery weighed heavily in Washington. For the Supreme Court, even after the landmark case of *Marbury v. Madison* (1803), the Court still occupied a tenuous position within the governmental system. Therefore, the prestige and judicial independence of the High Court remained questionable. In March of 1829, Andrew Jackson assumed the presidency. With him emerged America's first clearly defined political party known as the Jacksonian Democrats. During his two terms of office, Old Hickory appointed six justices to the bench, but in 1837, Congress once again modified the number of justices in the High Court. Termed the Judiciary Act of 1837, also known as the Eighth and Ninth Circuit Act, the size of the Supreme Court was raised from seven to nine members. The addition of two justices during Jackson's second term helped ensure that Jacksonian Democracy would succeed during his tenure in office. "During Taney's term of office, the High Court became even more political than it had been in the years of Marshall's tenure. The Judiciary Act of 1837, increasing the size of the court to nine justices, permitted Jackson

and his handpicked successor in the presidency, Martin Van Buren, to make the Court even more a Democratic creature. "[67]

The Jacksonian Democrats of the 1830's sought to enhance and enforce the political philosophy of Andrew Jackson demanding absolute loyalty from all of its followers. The United States as a whole was changing. Half a century after the Revolutionary War, America was expanding farther west and developing its own unique culture. As a result, the party advocated for limited federal government and proclaimed themselves as the defenders of the common man against the National Republicans and later Whigs. The Jacksonian Democrats supported states' rights which clashed with the nationalistic ideology of the Supreme Court. In the presidential election of 1828, the people of the United States chose Andrew Jackson.

The election of 1828 was the second electoral realignment in American government. The election was between John Quincy Adams and the National Republicans versus Andrew Jackson and the Jacksonian Democrats. The election has gained notoriety in regards to the role the political party played in helping Jackson and the Jacksonian Democrats carry out a successful campaign. For Andrew Jackson and John Quincy Adams, the campaign was particularly nasty. "Jackson's forces attacked Adams as a corrupt politician, a monarchist, and an anti-Catholic zealot."[68] However by Election Day, the number of voters had increased exponentially, and Jackson won both the popular vote and the electoral vote against Adams. Once firmly ensconced in Washington, the Jacksonian Democrats were prepared to spread Jacksonian policies

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[67] Peter Hoffer, Williamjames Hoffer, and N.E.H. Hull, *The Supreme Court: An Essential History*, 84.

[68] Ken Walsh, "The Most Consequential Elections in History: Andrew Jackson and the Election of 1828," *U.S. News*, August 20, 2008, http://www.usnews.com/news/articles/2008/08/20/the-most-consequential-elections-in-history-andrew-jackson-and-the-election-of-1828.

throughout the country. Their policies were rooted in the South and centered around support for the common man and public good, anti-abolitionism, westward expansion, extension of voting rights, and support of limited national government which included the restriction of the Supreme Court's power vis-a-vis the other branches, .[69] The Jacksonians also sought to place ardent supporters in positions of power. In the infancy of his office, Jackson removed hundreds of public officials from their positions and demanded loyalty at any cost from those he selected to fill the vacant offices.

II. The Supreme Court from 1829-1846

During the presidencies of both Jackson and Van Buren, the Supreme Court once again proved powerful and "became a helpful adjunct and stamp of approval for the acts and policies of the Democratic party just as it had been in the Federalist Party."[70] The Supreme Court, at the time of Jackson's inauguration, was a mixture of old regime Federalists and Republicans. Carrying over from the Jeffersonian era, Federalists appointments Bushrod Washington and John Marshall and Democratic Republican appointment William Johnson remained on the bench. Gabriel Duvall was nominated by Democratic Republican James Madison in 1811. Duvall, a Democratic-Republican, was a Chief Justice in the Maryland Court, but later accepted a position under Jefferson as the Comptroller of the Treasury. Joseph Story was also a nominee of James Madison in the same year as Duvall, serving as both a delegate to the state and national legislature. Story was appointed justice at only thirty-two and considered to be "Marshall's intellectual

[69] Marvin Meyers, *The Jacksonian Persuasion: Politics and Belief* (Stanford: Stanford University Press, 1957).

[70] Drew Pearson and Robert S. Allen, *The Nine Old Men*, 55.

equal and with him provided a one-two punch unmatched until Oliver Wendell Holmes Jr.-Louis Brandeis alliance in the twentieth century."[71] Smith Thompson was nominated by Republican President James Monroe. Thompson had practiced law and served as Chief Justice in the New York before resigning to become James Monroe's Secretary of War.

Andrew Jackson nominated six justices during his tenure in the White House. In the history of the American presidency, Andrew Jackson only followed George Washington and Franklin Roosevelt in the number of judicial appointments. Once in power, the Democrats planned to select loyal candidates to the bench that would help ensure the Court would support the new reigning policies emerging from Washington. Jackson specifically chose justices based on "geography, public service, and political loyalty, making it clear that political loyalty would have primacy in his decisions."[72] The appointments would have to support the Jackson Administration and have to have proven their loyalty. In addition, "their selection was not, in the intrinsic sense, a judicial appointment; political considerations alone determined who was to go on the Supreme Court Bench." [73] For example, Jackson especially looked to fill positions with justices that were decidedly against the National Bank.

Jackson made his first appointment only days after his inauguration. On March 7, 1829, Jackson nominated John McClean, a dedicated lawyer and the former Postmaster General. McLean was an Ohio native and quite ambitious. However, he received little trust from Jackson, but was selected due to his ties to the West. In 1830, Jackson

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71 Peter Charles Hoffer, Williamjames Hull Hoffer, and N.E.H. Hull. *The Supreme Court: An Essential History*, 59

72 Henry J. Abraham, *Justices and Presidents*, 94.

73 Gustavus Myers, *History of the Supreme Court of the United States*, 355.

nominated Henry Baldwin to replace Bushrod Washington. Baldwin was a Congressman from Pennsylvania and was incredibly loyal to Jackson. "He supported the slave interest, denied Indian claims, insisted that the Court not make law in the Marshall manner, and disagreed with just about everyone on the bench." [74] The third appointment of President Jackson was James Moore Wayne, a congressman and justice from the Supreme Court in Georgia.

The most controversial nominee of Andrew Jackson came after the death of John Marshall when Jackson looked to the Roman Catholic politician, Roger B. Taney. Jackson had nominated Taney in 1835 as a justice for the Court, but the Senate failed to confirm him. During his tenure as the Secretary of Treasury, Taney had withdrawn government funds from the Bank of the United States, all but crippling the financial institution. This action earned Taney a reputation for being a "political hack" and a "supple, cringing tool of power." [75] However by July of 1835, Chief Justice Marshall passed away, creating another opportunity for a judicial appointment by Jackson. The judiciary mourned heavily from the loss of the great chief justice and the future of the Court. "The transformation was not one of the character or power of the institution; it was purely one embodying the divergent views, on a particular question, of new members from those held by the old body." [76]

The president once again nominated his former Attorney General and Secretary of Treasury. The Senate took three months to approve the appointment of Taney to Chief Justice after being initially rejected for Justice Duvall's position. The nomination of

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[74] Peter Hoffer, Williamjames Hoffer, and N.E.H. Hull, *The Supreme Court: An Essential History*, 73.

[75] Robert McCloskey, *The American Supreme Court, 53.*

[76] Gustavus Myers, *History of the Supreme Court of the United States*, 355.

Taney was also an excellent illustration of Jackson's reliance on the Spoils System. He had been Secretary of the Treasury, Attorney General, and Chairman of the Jackson Central Committee. Taney campaigned for Jackson and was a well-known adversary of the National Bank and an advocate for states' rights and for slavery. A writer for the New York Journal stated "The pure ermine of the Supreme Court is sullied by the appointment of that political hack, Roger B. Taney. Daniel Webster confided, 'Judge Story…thinks the Supreme Court is gone and I think so too.'" [77]

Philip P. Barbour replaced Justice Gabriel Duval in 1836. Barbour had been a legislator in the House of Delegates and the House of Representatives as well as a judge for U.S. District Court in Virginia. John Catron's appointment in 1837 was another example of the Jacksonian Spoils System. The Tennessean was a faithful friend and defender of Jackson as well as a supporter of states' rights and slavery. The final appointment in 1837 was Alabama lawyer John McKinley who was nominated as a second choice by Democrat Martin Van Buren. McKinley received the nomination for his support of Andrew Jackson at the state level. Martin Van Buren also nominated Peter Vivian Daniel, the Lieutenant Governor of Virginia, who was known to be "a far more consistent and vocal defender of stats' rights, the legality of slavery, and the limitations of federal jurisdiction than anyone else during Taney's term."[78]

Democratic president John Tyler was only able to nominate one justice to the bench to fill the vacancy left by Justice Thompson. In 1845, Tyler nominated New York native, Samuel Nelson. Democratic president James K. Polk was only able to nominate

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[77] "The Taney Court," *The Supreme Court Historical Society*, February 26, 2014, http://www.supremecourthistory.org/history-of-the-court/history-of-the-court-2/the-taney-court-1836-1864/.

[78] Peter Hoffer, Williamjames Hoffer, and N.E.H. Hull, *The Supreme Court: An Essential History*, 85.

two new justices after the deaths of Justices Story and Baldwin. Levi Woodbury was first nominated and confirmed by the Senate. Woodbury had a long resume of federal positions including governor and member of the United States Senate. Lastly, Polk appointed established Democrat and Pennsylvania native Robert Cooper Grier.

III. Supreme Court Case Analysis: Relevant Court Cases from 1829-1846

By Andrew Jackson's inauguration, the Supreme Court had established itself as a formidable counterpart in the American political system. From the Supreme Court's humble beginning to the rise of the Marshall Court, the amount of cases, along with the political responsibilities of the justices, had exponentially increased. By 1837, two additional justices nominated by the newly elected Jacksonian Democrats were added to the bench. With the historical change in size, two questions emerge: Would the change in ideological composition affect the holdings of the Supreme Court? Would the voting behavior of the new justices added to the bench alter the vote tallies?

To test the hypothesis, cases were examined to determine if conflict existed between the Jacksonian Democrats and the Court from 1829 to 1846. Cases were selected if they involved issues of policy that were consequential to the Jacksonian Democrats such as slavery and the slave trade, support of public good, the extension of voting rights, westward expansion, the National Bank, and the support of limited national government which included the restriction of the Supreme Court's power vis-a-vis the other branches. Cases were considered confrontational between the Court and the Jacksonian Democrats if the holding of the justices conflicted with at least one issue of policy. The model predicts conflicts over holdings will prove higher in the years 1829-1837 before the

addition of the justices. However, conflict over holdings will show a decrease from 1838-1846. The model also predicts the new justices selected by the Jacksonian Democrats made decisions in cases that supported Jacksonian Democratic policy, while veteran justices altered their votes to align with the new party.

a. Supreme Court Cases before the Addition (1829-1837)

Willson v. Black Bird Creek Marsh Company, 27 U.S. 245 (1829)

States' rights were the main policy issue highlighted in the case *Willson v. Black Bird Creek Marsh Company (1829).* The case brought into question the Commerce Clause and the rights of a state in relation to the Commerce Clause.The state of Delaware commissioned the Black Bird Creek Marsh Company to construct a Dam that obstructed a vessel's ability to pass through. Thomas Willson and his sloop, *Sally*, broke through the Dam causing significant damage. When the company sued Thomas Willson for trespassing and damages, Willson brought the case to the Supreme Court.

The power of the state of Delaware to construct the Dam and the jurisdiction of the Supreme Court were both called into question. Did the Court have jurisdiction in a case that did not directly involve a Constitutional matter? At the time of the case, the Court included the Federalist appointments of John Marshall and Bushrod Washington, as well as the Democratic-Republican appointments of William Johnson, Gabriel Duvall, Joseph Story, and Smith Thompson. In the context of the case, Marshall stated, "It impossible to doubt that the constitutionality of the act was the question, and the only

question, which could have been discussed in the State court."[79] Marshall went on to question if the building of the Dam by the state of Delaware, referred to as the Act of Assembly, was Constitutional or did it go against the navigational laws of the Commerce Clause? In a unanimous decision of 6-0, Marshall delivered the opinion of the Court. The Chief Justice declared, "The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States -- a power which has not been so exercised as to affect the question."[80] Therefore, Delaware did not infringe upon the Commerce Clause by building the dam because such an act was not referred to in the Clause itself. The case of Willson v. Black Bird Creek Marsh Company was an excellent example of possible confrontation between the Jacksonian Democrats and the Court. The case brought into question the right of a state to build a dam that had the potential to conflict with Congressional navigational law thus highlighting the potential for conflict among states' rights. The outcome of the case avoided confrontation between the Court and the Jacksonian Democrats, because the Court chose to support the building of the dam in Delaware, stating the construction did not interfere with Congressional law. The decision also endorsed the Jacksonian belief in providing public good for the citizen, which was tied to Delaware's construction of the Dam. The holding of the Court even included an institutional issue. In the majority decision, the Court believed if the Commerce Clause had included the navigation of creeks, the justices would have had no difficulty in striking against Delaware in the case.

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79 *Willson v. Black Bird Creek Marsh Company, 27 U.S. 245 (1829)*

80 *Willson v. Black Bird Creek Marsh Company, 27 U.S. 245 (1829)*

Table 5.1: Willson v. Black Bird Creek Marsh Company (1829)
Issue of Policy: States Rights and Commerce Clause
Holding Avoided Confrontation over Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
John Marshall*	Federalist	x	
Bushrod Washington	Federalist	x	
William Johnson	Democratic-Republican	x	
Gabriel Duvall	Democratic-Republican	x	
Joseph Story	Democratic-Republican	x	
Smith Thompson	Democratic-Republican	x	

*Delivered Majority Opinion
**Concurred with Majority Opinion

Foster v. Neilson, 27 U.S. 253 (1829)

Foster v. Neilson (1829) was potentially a confrontational case on an institutional facet between the Court and the Jacksonian Democrats, because it questioned the powers of the legislature in the execution of treaties. In the case, Foster sued Neilson for a tract of land in Louisiana. Foster claimed the land lawfully belonged to him as it was signed over by the Spanish governor before Louisiana was sold to France and then to the United States. Neilson believed Foster's land claim invalid, because the land had already been transferred to the French. In the case, both the legislature and the executive supported Neilson's claim.

The central issue to the case centered on the construction and execution of land treaties. The justices had to ultimately decide if the treaty could be enforced by the judiciary. Backed by all five justices including, Washington, Johnson, Duvall, Story, and Thompson, Chief Justice Marshall delivered a unanimous decision in which the Court

agreed, “When the terms of a treaty require a legislative act, the treaty cannot be considered law until such time as the legislature ratifies and confirms the terms. The treaty does not operate in itself to ratify or confirm title in land. The legislature must act before the terms of the contract are binding.”[81]

Foster v. Neilson was a very important case involving the concept of self-executing or non-self-executing treaties. The decision illustrated the legislature could not simply “intend” for treaties to be confirmed. Though the case had the potential of arousing confrontation between the branches due to the institutional role of Congress in ratifying treaties.

The outcome of the case actually avoided confrontation with the Jacksonian Democrats. the Court upheld the land grant to Neilson and recognized the legislature's role in making and abiding by treaties. Marshall stated in the majority opinion of the case, "A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the legislature. "[82]

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[81] “Foster v. Neilson Case Brief,” *Law School Case Briefs*, last modified April 24, 2012, http://www.lawschoolcasebriefs.net/2012/04/foster-v-neilson-case-brief.html.

[82] *Foster v. Neilson, 27 U.S. 253 (1829)*

Table 5.2: Foster v. Neilson (1829)
Issue of Institutional Prerogative: Congressional Power
Holding Avoided Confrontation over Issue of Institutional Prerogative

Justice	Appointing Party	Voted with Majority	In the Minority
John Marshall*	Federalist	x	
Bushrod Washington	Federalist	x	
William Johnson	Democratic-Republican	x	
Gabriel Duvall	Democratic-Republican	x	
Joseph Story	Democratic-Republican	x	
Smith Thompson	Democratic-Republican	x	

*Delivered Majority Opinion
**Concurred with Majority Opinion

Weston v. City Council of Charleston, 27 U.S. 449 (1829)

The policy issue at stake in the case *Weston v. City Council of Charleston (1829)*, was its review of the United States Bank and the state's ability to tax the stock of the National Bank. Jacksonian Democrats were staunch supporters of the dismantlement of the National Bank and of states' rights, so both the executive and legislative branches were invested in the decision of the Court. In the case, the City Council in Charleston, South Carolina decided to tax bonds issued by the United States Bank. However, the stock owners claimed the federal bonds were not subject to be taxed by the State. The question the Court faced was, "Could stock of the United States Bank, held by an individual, be taxed under the authority of the State?"[83]

Chief Justice Marshall delivered the opinion of the Court, reversing the decision of the Court in South Carolina. Citing McCulloch v. Maryland (1819) Marshall stated:

[83] John Edward Oster, *The Political and Economic Doctrines of John Marshall* (Clark: The Law Book Exchange Ltd, 2006), 288.

> A contract made by the government in the exercise of its power to borrow money on the credit of the United States is undoubtedly independent of the will of any state in which the individual who lends may reside, and is undoubtedly an operation essential to the important objects for which the government was created…The American people have conferred the power of borrowing money on their government, and by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. [84]

The holding of the Court was not unanimous and resulted in an overall decision of 4-2. Chief Justice Marshall and Justices Duvall, Story, and Washington supported the majority with Justices Smith Thompson and William Johnson giving the first dissents during the Jacksonian era in a confrontational case. Both justices who dissented in the case were previous nominees of the Democratic-Republicans, and their votes would seem peculiar in a holding that was confrontational with the Jacksonian Democrats. The outcome of the case was confrontational between the Court and the Jacksonian Democrats, because the decision illustrated Court support for the National Bank versus the taxing powers of the state. The decision was also not unanimous and resulted in the dissent of both Justice Johnson and Thompson both appointed by Democratic-Republicans.

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84 *Weston v. City Council of Charleston, 27 U.S. 449 (1829)*

Table 5.3: Weston v. City Council of Charleston (1829)
Issue of Policy: National Bank; States' Taxing Power
Holding was Confrontational over Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
John Marshall*	Federalist	x	
Bushrod Washington	Federalist	x	
William Johnson	Democratic-Republican		x
Gabriel Duvall	Democratic-Republican	x	
Joseph Story	Democratic-Republican	x	
Smith Thompson	Democratic-Republican		x

*Delivered Majority Opinion

Craig v. State of Missouri, 29 U.S. 410 (1830)

The Jacksonian Democrats were well known as opponents of the National Bank, and one of Jackson's significant actions during his presidency was to eliminate the National Bank. The defeat of the National Bank meant the states could exercise more economic power without interference from a federally sanctioned bank. In the case *Craig v. State of Missouri,* the potential confrontational issue of policy dealt with the right of a state to issue bills of credit. Specifically, Missouri had been issuing bills of credit/loan certificates to farmers in debt. Hiram Craig defaulted on his state issued loan and the state courts sued Craig for his failure to pay. The question for the Supreme Court was: Is it Constitutional for states to issue bills of credit?

In a 4-3 decision, Justices Duvall, Story, and Baldwin (newly appointed by the Jacksonian Democrats) supported Chief Justice Marshall in his majority opinion when he decreed that issuing bills of sale or any type of paper money by the States was unconstitutional. Justices Thompson, Johnson, and the newly affirmed McLean each

dissented claiming that defining a bill of sale is in itself vague and not appropriate in this case. Even though the justices had been "reminded of the dignity of a sovereign State; of the Humiliation of her submitting herself to this tribunal…This department can listen only to the mandate of the law, and can tread only that path which is marked out by duty."[85]

In *Craig v. State of Missouri (1830)* the holding of the case was confrontational with the new party because of the Jacksonian support for states' rights and state run banks. as The majority in this case was much slimmer with a 4-3 vote indicating more of a divide within the Supreme Court. Two justices that had been appointed by Democratic-Republicans, Thompson and Johnson, once again dissented in a case that was confrontational with the Jacksonian Democratic policy involving the economic void left to the states after the dismantlement of the National Bank. In addition, one of Jackson's new appointments, McLean, also issued a dissent in the confrontational case.

Table 5.4: Craig v. State of Missouri (1830)
Issue of Policy: National Bank; States' Rights
Holding was Confrontational over Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
John Marshall*	Federalist	x	
William Johnson	Democratic-Republican		x
Gabriel Duvall	Democratic-Republican	x	
Joseph Story	Democratic-Republican	x	
Smith Thompson	Democratic-Republican		x
John McLean	Jacksonian Democrat		x
Henry Baldwin	Jacksonian Democrat	x	

[85] Charles Grove Haines. *The Role of the Supreme Court in American Politics* (London: University Press, 1944), 592.

Cherokee Nation v. Georgia, 30 U.S. 1 (1831)

The 1800s was a century of progress and expansion, and by the Nineteenth Century, the United States had vastly grown in size since its inception. During the Jacksonian Democrat era, manifest destiny continued to push the United States' borders west. However, the additional territory meant confrontation with the Native Americans. Andrew Jackson's solution over the conflict in land was to physically relocate the Native Americans in the Indian Removal Act. In *Cherokee Nation v. Georgia*, the confrontational policy issues featured werewestward expansion and states' rights.. Georgia had passed laws stripping the Cherokee people of their rights in an attempt to push them from their land. As a result, the Cherokee nation filed for an injunction against the state of Georgia to restrain the state from executing these laws. The question the Court faced in this suit was: Did the Court have jurisdiction in matters involving "Indian Nations"?

The vote of the Court was not unanimous. The majority opinion was given by Chief Justice Marshall and supported by Justice McLean. Both Justices Johnson and Baldwin concurred, and Justices Thompson and Story dissented. Marshall declared the Court to lack jurisdiction in the case. Since the Cherokee were legally viewed as Indian Nations and not foreign nations, the Court could not constitutionally intervene in the situation. Marshall stated, "If it be true that the Cherokee Nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future."[86] Johnson in his concurrence had a difficult time defining the Cherokee nation as a "state" and Baldwin saw no true plaintiff, only

86 *Cherokee Nation v. Georgia, 30 U.S. 1 (1831)*

controversy if the Court acknowledged the Cherokees' suit. Baldwin believed if: "This case then is the case of the countless tribes who occupy tracts of our vast domain; who, in their collective and individual characters as States or aliens, will rush to the federal Courts in endless controversies growing out of the laws of the States or of Congress."[87]In *Cherokee Nation v. Georgia*, the split in the Court was quite palpable and the lack of unification must be noted. Thompson and Story, appointments of Monroe and Madison, dissented. Thompson had previously dissented in two cases that had actually incited confrontation with the Jacksonian Democrats. Both ofAndrew Jackson's nominated justices supported the majority opinion that avoided confrontation with the Jacksonians. The dissenters, Thompson and Story, believed the judiciary had the power to relieve some of the duress experienced by the Cherokee. They both declared the Cherokee as a foreign nation, which earned them protection of the Constitution and the right to receive a federal injunction against the State of Georgia. *Cherokee v. Georgia* was the first of many potentially confrontational cases in which Justice Story issued a dissent between 1829-1837. However, Justice Thompson's dissent was less expected since he had seemed to support Jacksonian policy when he issued dissents in two previous confrontational holdings.

The Jacksonian involvement in the Indian Removal Act illustrated the party's desire to relocate Native Americans and support Georgia's plight. Therefore, the holding of the Court was not confrontational with the Jacksonian Democrats. The Court chose to limit its own jurisdiction in deciding the case; and as a result, the justices curbed their power vis-à-vis the state to determine how Georgia dealt with Native American nations. The decision thus supported states' rights and avoided a conclusive stance on Native

87 *Cherokee Nation v. Georgia, 30 U.S. 1 (1831)*

American relations within the states. Marshall also knew "that Congress had spoken in the Indian Removal Act, that Jackson's opinions were not easily changed, and that Georgia would not have obeyed an injunction."[88]

Table 5.5: Cherokee Nation v. Georgia (1831)
Issues of Policy - Westward Explansion; Court strength vis-a-vis the States
Holding Avoided Confrontation over Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
John Marshall*	Federalist	x	
William Johnson**	Democratic-Republican	x	
Gabriel Duvall	Democratic-Republican	Did Not Participate	
Joseph Story	Democratic-Republican		x
Smith Thompson	Democratic-Republican		x
John McLean	Jacksonian Democrat	x	
Henry Baldwin**	Jacksonian Democrat	x	

*Delivered Majority Opinion
**Concurred with Majority Opinion

Menard v. Aspasia, 30 U.S. 505 (1831)

In regards to issues of policy, the case of *Menard v. Aspasia* brought attention to the growing issue of slavery. Slavery in the 1800s was a point of contention in the expanding United States, and as a pro-slavery and pro-agrarian party, the Jacksonian Democrats were invested in the holding of the Court . In the case, Aspasia was born to an enslaved mother in the Northwest Territory. When her mother died, Aspasia was bought by Menard and moved to Missouri. Aspasia filed suit against her owner, Menard, claiming to be free under the Northwest Ordinance. The State Court of Missouri agreed

[88] Peter Hoffer, Williamjames Hoffer, and N.E.H. Hull, *The Supreme Court: An Essential History*, 79.

and decided in her favor, but Menard took the case to the Supreme Court filing a writ of error against the state court.

In the majority decision, Justice McLean delivered the opinion of the Court with the Court returning to a unified state with a 6-0 vote which included Justices Johnson, Duvall, Story, Thompson, Baldwin, and McLean (Marshall did not participate). McLean "held that the Court lacked jurisdiction because the case did not raise a question under the Constitution, treatises, or statutes of the United States." [89] The Court was challenged with an opportunity to take a Constitutional position on the prohibition of slavery in the territories but did not take advantage of the opportunity. As a result, the holding of the Court was satisfactory and non-confrontational to the Jacksonians for two reasons: The Court had denied itself the jurisdiction to hear the case and had failed to take a definitive stance on slavery.

Table 5.6: Menard v. Aspasia (1831)
Issue of Policy: Slavery
Holding Avoided Confrontation over Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
John Marshall	Federalist	Did Not Participate	
William Johnson	Democratic-Republican	x	
Gabriel Duvall	Democratic-Republican	x	
Joseph Story	Democratic-Republican	x	
Smith Thompson	Democratic-Republican	x	
John McLean*	Jacksonian Democrat	x	
Henry Baldwin	Jacksonian Democrat	x	

*Delivered Majority Opinion
**Concurred with Majority Opinion

[89] Mark E. Brandon, *Free in the World: American Slavery and Constitutional Failure* (Princeton: Princeton University Press, 1998), 94-95.

Worcester v. Georgia, 31 U.S. 515 (1832)

Worcester v. Georgia again brought Native American relations and the state of Georgia to the spotlight in American politics. As in *Cherokee Nation vs. Georgia*, the case centered around two major issues of policy for the Jacksonian Democrats: Westward expansion and states' rights. In *Worcester v. Georgia*, the question of Native American rights in the state of Georgia once again came before the High Court. The spotlight was on the Court and how the justices would rule in a second case against Native American laws in Georgia. Samuel Worcester and his family resided in what was termed "Indian Territory," where he conducted mission work to many of the Cherokee Indians residing within the territory. In an effort to limit influence of Worcester and other missionaries like him that could support Native American resistance, Georgia decreed that non-Native Americans had to be granted a special permit by Georgia in order to live in Indian Territory. Samuel Worcester and his non-Native American family refused to leave the territory or apply for the special government permit. As a result, Georgia authorities physically removed and arrested Worcester and other missionaries residing without permits in the territory. In 1832, Worcester appealed to the Supreme Court where the Court had to examine the power of Georgia to "regulate the intercourse between citizens of its state and members of the Cherokee Nation?"[90]

The majority opinion was delivered by Chief Justice Marshall with support from Justices Thompson, Story, Duvall, and Johnson while Justice McLean concurred. The only justice to dissent was Jackson's second appointment, Justice Baldwin. In the majority, the justices found Georgia laws regulating the use of Indian lands were

[90] "Worcester v. Georgia," The Oyez Project at IIT Chicago-Kent College of Law. Accessed March 20, 2014. http://www.oyez.org/cases/1792-1850/1832/1832_2.

unconstitutional. The Cherokee Nation was sovereign which was reinforced by treaties with the national government and free from the control of the Georgia legislature. For Georgia to interfere was a direct violation against the national government and the Constitution. Marshall specifically stated:

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States.[91]

Due to the Court's decision to support Worcester and the sovereignty of the Cherokee Nation against the powers of Georgia law, the holding of the case was confrontational in regards to the Jacksonian support of Westward expansion and states' rights. The backlash from the case was even more dramatic when Georgia refused to obey or enforce the Court's ruling. "Governor Wilson Lumpkin…was heard to say he would rather hang the missionaries than free them." [92] As defenders of states' rights and especially the Indian Removal Act, President Jackson and the Jacksonian Congress supported Georgia in the case. Jackson has been credited with saying "John Marshall has made his decision, now let him enforce it." Though Jackson most likely never uttered these specific words the fact remains, Jackson ignored the order of the Court and instead

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91 *Worcester v. Georgia, 31 U.S. 515 (1832)*

92 Peter Hoffer, Williamjames Hoffer, and N.E.H. Hull, *The Supreme Court: An Essential History*, 79.

sent in the National Guard to help Georgia ethnically cleanse Georgia of Native Americans. Therefore, the actions of Jackson after the holding of the case also signified the question in the strength of the Court vis-a-vis the other two branches in regards to the Court's ability to force Congress and/or the president to execute its decisions. However, overall the Court was relatively unified in their decision to deny the wishes of the legislative and executive branches with only Jackson's new appointment of Baldwin providing the dissent against the votes of the Old Guard. Surprisingly, Jackson's first nominee, John McLean, concurred with the Chief Justice's decision rather than dissent with his newly appointed comrade.

Table 5.7: Worcester v. Georgia (1832)
Issue of Policy: Westward Expansion, States' Rights; Strength of the Court
Holding was Confrontational over Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
John Marshall*	Federalist	x	
William Johnson	Democratic-Republican	x	
Gabriel Duvall	Democratic-Republican	x	
Joseph Story	Democratic-Republican	x	
Smith Thompson	Democratic-Republican	x	
John McLean**	Jacksonian Democrat	x	
Henry Baldwin	Jacksonian Democrat		x

*Delivered Majority Opinion
**Concurred with Majority Opinion

United States v. Wilson, 32 U.S. 150 (1833)

The case of the *United States v. Wilson* did not include an issue of Jacksonian policy, but the case did question the institutional prerogative of the justices to recognize a presidential pardon that had not been brought before the Court. The defendant, George

Wilson, was arrested and later convicted for robbing the United States Postal Service. President Jackson had attempted to pardon Wilson, but Wilson chose to decline the president's pardon. In a unanimous decision, Justice Marshall and the Court decided they would not recognize the pardon of Wilson. Marshall stated, "This Court is of opinion that the pardon in the proceedings mentioned, not having been brought judicially before the court by plea, motion, or otherwise, cannot be noticed by the judges."[93] The Court also held it could not force Wilson to accept Jackson's pardon. Therefore in this case, the pardon issued by President Jackson was not upheld. Though the question of the president's pardon was not an issue of Jacksonian policy, the Court's decision to deny the pardon was confrontational on an institutional level. All justices united in the decision including Chief Justice Marshall and Justices Johnson, Duvall, Story, Thompson, Baldwin, and McLean.

Table 5.8: United States v. Wilson (1833)
Issue of Institutional Prerogative: The Courts Reorganization of Presidential Pardon
Holding was Confrontational over Institutional Prerogative

Justice	Appointing Party	Voted with Majority	In the Minority
John Marshall*	Federalist	x	
William Johnson	Democratic-Republican	x	
Gabriel Duvall	Democratic-Republican	x	
Joseph Story	Democratic-Republican	x	
Smith Thompson	Democratic-Republican	x	
John McLean	Jacksonian Democrat	x	
Henry Baldwin	Jacksonian Democrat	x	

*Delivered Majority Opinion
**Concurred with Majority Opinion

[93] *United States v. Wilson, 32 U.S. 150 (1833)*

Barron ex. Rel. Tiernan v. Mayor of Baltimore, 32 U.S, 243 (1833)

Jacksonian Democratic policy advocated significant loyalty to the power and rights of the states. In the case of *Barron v. Mayor of Baltimore (1833)*, the policy issue at stake questioned the limits of state power under the Fifth Amendment. John Barron, owner of a wharf in Baltimore, sued the city over financial losses in his business. For several years, Barron had utilized deep waters to house his wharf, but when the city began to divert waters from the harbor, Barron's wharf suffered damages due to sand accumulation. The case questioned if state governments faced the same limits as the national government. More specifically, when the case reached the Supreme Court, the justices had to decide if State governments, like the national government, were liable to the Fifth Amendment in regards to providing compensation for the destruction or loss of private property.

In a unanimous decision, all seven justices including Marshall, Johnson, Duvall, Story, Thompson, Baldwin, and McLean, agreed that the Fifth Amendment was intended to limit the powers of only the federal government. This limitation supported the Jacksonian policy of less restraint on the powers of the states. Thus the holding of the Court was not confrontational with Jacksonian ideological preferences. The vote of 7-0 by the justices reflected a unified ruling amongst all justices. Though the possibility for confrontation was notable in this case, the ruling of the justices illustrated their decision to avoid it.

Table 5.9: Barron ex. Rel. Tiernan v. Mayor of Baltimore (1833)
Issue of Policy: States' Rights
Holding Avoided Confrontation over Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
John Marshall*	Federalist	x	
William Johnson	Democratic-Republican	x	
Gabriel Duvall	Democratic-Republican	x	
Joseph Story	Democratic-Republican	x	
Smith Thompson	Democratic-Republican	x	
John McLean	Jacksonian Democrat	x	
Henry Baldwin	Jacksonian Democrat	x	

*Delivered Majority Opinion
**Concurred with Majority Opinion

Mayor of New York v. Miln, 36 U.S. 102 (1837)

The issues of policy present in the case, *Mayor of New York v. Miln (1837)*, included both states rights and the Jacksonian support of public good. Specifically, the case questioned the rights of states and the powers given to states to provide for and protect its citizens. New York had enacted legislation that required ships to provide a list of their passengers upon docking in the city harbor as a way to control immigration. The captain of the ship *Emily,* Miln, refused to abide by such laws, and the state of New York brought suit. However, Miln believed the New York law infringed upon the Commerce Clause created by the federal government and was therefore unconstitutional. The Court was left to decide the constitutionality of the law in regards to the Commerce Clause or determine if the state was simply utilizing their "policing power."

At the time of the case, Jackson had nominated five out of the seven members serving on the Supreme Court including Chief Justice Taney and Justices Baldwin,

Wayne, McLean, and Barbour. The remaining two justices, Thompson and Story, were nominations of Democratic-Republican presidents Madison and Monroe. In February, Justice Barbour delivered the majority opinion of the Court with a 6-1 vote with Justice Story providing the only dissent. The Court did not find the New York law unconstitutional and skirted past the Commerce Clause issue. The justices instead decided that New York was enacting their state police power. The Court believed that "Police power was just as applicable to 'precautionary measures against the moral pestilence of paupers, vagabonds, and possible convicts, as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported.' The state's right to protect the health and welfare of its citizens, moreover, was "complete, unqualified, and exclusive."[94] Accordingly, the holding of the case avoided confrontation between the Court and the state because the Court supported the Jacksonian belief in the right of the state to police and protect its citizens. The vote of Justice Story in the case is significant because *Mayor of New York v. Miln* was the first of several cases involving the question of states' rights that resulted in non-confrontational holdings where Justice Story issued a dissent.

[94] Thomas Tandy Lewis ,"New York v. Miln," *Encyclopedia of American Immigration.* Access Date March 22, 2014, http://salempress.com/store/samples/american_immigration/american_immigration_miln.htm.

Table 5.10: Mayor of New York v. Miln (1837)
Issue of Policy - States' Rights; Protection of Public Good
Holding Avoided Confrontation over Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
Joseph Story	Democratic-Republican		x
Smith Thompson	Democratic-Republican	x	
John McLean	Jacksonian Democrat	x	
Henry Baldwin	Jacksonian Democrat	x	
James Wayne	Jacksonian Democrat	x	
Roger Taney	Jacksonian Democrat	x	
Philip Barbour*	Jacksonian Democrat	x	

*Delivered Majority Opinion
**Concurred with Majority Opinion

Briscoe v. Bank of Kentucky, 36 U.S. 257 (1837)

During the tenure of Marshall, the Court supported the federal bank and the inability of the states to issue paper money or bills of credit. After Marshall's death, the issue made its way back to the Supreme Court's docket. In *Briscoe v. Bank of Kentucky (1837),* two issues of policy were connected to the case between the Court and the Jacksonian Democrats. First, the case related to the Jacksonian defeat of the national bank and the economic void left to the states once the bank was eliminated. Second, the power of the states was questioned regarding their ability to issue bills of credit[95]. The Bank of Kentucky was charged with issuing bills of credit to G. Briscoe. When Briscoe was unable to pay back the bank, he appealed to the Supreme Court declaring the bank notes issued were unconstitutional.

[95] Kevin R.C. Gutzman, *The Politically Incorrect Guide to the Constitution* (Washington D.C.: Regnery Publishing Inc, 2007), 108-109.

With a vote of 6-1, McLean delivered the majority opinion with support of Chief Justice Taney and Justices Baldwin, Wayne, McLean, Barbour, and Thompson. The one dissent came from Justice Story. In the case, the Court decided the prohibition of issuing bills of credit and paper money as stated in the Constitution did not apply in this case. "The bank was not the state itself and the bills of credit were redeemable by the bank, not the state." [96] The decision of the Court was a celebrated win for Jacksonian Democrats who supported localism and abhorred the national bank. Jackson himself refused to charter the Second Bank of the United States in support of state and local run institutions. In addition, "the decision allowed state banks to step in the breach left by Jackson's elimination of the Bank of the United States; they could issue notes that were the equivalent of paper money." [97] As a result, the holding of the Court was not confrontational, because the decision supported the ideological preferences of the Jacksonian Democrats involving states' rights as well as the right of the state to assume more economic freedom after the defeat of the National Bank. However, the Court was not completely unified with the decision as the Democratic-Republican nominated Justice Story once again provided the dissent. However, Story's dissent did not illustrate change in his usual voting, because he had remained in the majority in two previous cases where the holdings were confrontational with the Jacksonian policy of supporting state economic power after the dismantlement of the National Bank.

[96] Kevin R.C. Gutzman, *The Politically Incorrect Guide to the Constitution,* 108-109.
[97] Kevin R.C. Gutzman, *The Politically Incorrect Guide to the Constitution,* 109.

Table 5.11: Briscoe v. Bank of Kentucky (1837)
Issue of Policy: States' Rights; National Bank
Holding Avoided Confrontation over Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
Joseph Story	Democratic-Republican		x
Smith Thompson	Democratic-Republican	x	
John McLean*	Jacksonian Democrat	x	
Henry Baldwin	Jacksonian Democrat	x	
James Wayne	Jacksonian Democrat	x	
Roger Taney	Jacksonian Democrat	x	
Philip Barbour	Jacksonian Democrat	x	

*Delivered Majority Opinion
**Concurred with Majority Opinion

Prop. Of Charles River Bridge v. Property of Warren Bridge, 36 U.S. 420 (1837)

The issue of policy presented in the case of *Charles River Bridge v. Warren River Bridge Co.* centered around states' rights and the influence of corporations versus the protection of the community and support of public good. The Massachusetts legislature commissioned the Charles River Bridge Company to construct a toll bridge across the Charles River. The charter implied that the legislature would not permit other companies to build bridges that would incite competition with the company. After several years, the tolls on the bridge became very high, Consequently, n 1828, Massachusetts granted another charter to the Warren River Bridge Company to construct a toll free bridge for Massachusetts residents as a means of transportation over the Charles River. The result of the new construction for the Charles River Bridge Company would be a major decline in profit, and as a result, the company sued the state of Massachusetts claiming the new charter violated their original agreement with the state as well as the Contract Clause.

In a 5-2 decision, with Justices Story and Thompson dissenting (both appointed by Democratic-Republicans), Justice Taney composed the majority decision and found the state did not violate the original charter with the Charles River Bridge Company. Taney explained, "The Court cannot deal thus with the rights reserved to the States, and, by legal intendments and mere technical reasoning, take away from them any portion of that power over their own internal police and improvement which is so necessary to their wellbeing and prosperity."[98]The decision was not an attack on the Contract Clause, but rather a desire of the Taney Court to decline to expand the "doctrines Marshall had enunciated" within the Contract Clause that would "further inhibit state powers."[99] In addition, the Court sought to protect the community by limiting corporate interests when they conflicted with public good. Taney stated, "[T]he object and end of all government is to promote the happiness and prosperity of the community by which it is established... While the rights of private property are sacredly guarded, we must not forget, that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation."[100]

The case had potential to be confrontational on two levels of policy key to the ideological preferences of the Jacksonian Democrats: states' rights over corporations and the protection of the public good. The holding of the Court appeased the preferences of the Jacksonian Democrats on both issues of policy and did not incite confrontation with the newly elected party. Further,the only two justices to not have been nominated by Jackson were the only two justices who dissented.The dissent of Story was not surprising

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98 *Prop. Of Charles River Bridge v. Property of Warren Bridge, 36 U.S. 420 (1837)*

99 Alex McBride, "Charles River Bridge v. Warren Bridge (1837),"
http://www.pbs.org/wnet/supremecourt/antebellum/landmark_charles.html.

100 *Prop. Of Charles River Bridge v. Property of Warren Bridge, 36 U.S. 420 (1837)*

due to his previous votes on cases involving conflict of states' rights. However, Justice Thompson's dissent was rather unexpected, because the Democratic-Republican nominee had generally favored the majority in holdings that supported states' rights, and had even dissented in two cases that were confrontational with Jacksonian policy involving state power and the National Bank.

Table 5.12: Prop. Of Charles River Bridge v. Prop. of Warren Bridge (1837)
Issue of Policy: States' Rights; Protection of Public Good
Holding Avoided Confrontation over Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
Joseph Story	Democratic-Republican		x
Smith Thompson	Democratic-Republican		x
John McLean	Jacksonian Democrat	x	
Henry Baldwin	Jacksonian Democrat	x	
James Wayne	Jacksonian Democrat	x	
Roger Taney*	Jacksonian Democrat	x	
Philip Barbour	Jacksonian Democrat	x	

*Delivered Majority Opinion
**Concurred with Majority Opinion

b. Supreme Court Cases After the Addition (1838-1846)

Bank of Augusta v. Earle, 38 U.S. 519 (1839)

The Jacksonian interest in states' rights, specifically power given to state banks, were put to the test once again in 1839. In *Bank of Augusta v. Earle (1839)*, the Supreme Court confronted a major question in legal history concerning the rights of a state over corporations in another state. Alabama native and failed businessman Joseph Earle defaulted on paying a bill of exchange with the Bank of Augusta in Georgia. Earle cited

that the "foreign banks" were unconstitutional when they issued bills of exchange in a different state. He believed that "neither bank had been chartered under Alabama law and was therefore operating illegally when their agents purchased bills payable in Mobile." [101] Earle's argument was supported by both the state and federal circuit court in Alabama, and the Bank of Augusta appealed to the Supreme Court.

The major question the Supreme Court faced was "whether the bank had authority to make the purchase [to fulfill the bill of exchange]."[102] The vote of the Court was 8:1 in *The Bank of Augusta v. Earle*. Taney delivered the majority opinion and was supported by Justices Thompson, Story, Baldwin, Wayne, McLean, Barbour, and Catron. Justice McKinley, a recent nomination of Jacksonian Democrat Martin Van Buren, provided the only dissent. Taney and the majority supported the idea that a state should be able to exclude or control foreign corporations from doing business within their state, but these exclusions must be clearly stated. "Alabama had not made known her policy on the question of whether she intended to exclude all competition between her own banks and the corporations of other states…The Court could therefore not define State policy." [103] As a result, the Bank of Augusta's charter allowed for the bank to conduct business in not only Georgia, but other states as well.

The decision of the Court in *Bank of Augusta v. Earle (1839)* demonstrated the desire of the Court to find middle ground within the case. Taney "skillfully sidestepped

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[101] Howard Bodenhorn, *A History of Banking in Antebellum America: Financial Markets and Economic Development in an Era of Nation Building (*New York: Cambridge University Press, 2000), 205.

[102] Charles Grove Haines and Foster H. Sherwood, *The Role of the Supreme Court in American Government and Politics: 1835-1864* (Berkeley and Los Angeles: University of California Press), 69.

[103] .Charles Grove Haines and Foster H. Sherwood, *The Role of the Supreme Court in American Government and Politics: 1835-1864*, 61..

the liberal versus restrictive theory of corporations." [104]Essentially, a state has a right to do business in other states. As a result, Taney and the Court also skirted a major confrontation between the Court and the Jacksonian Democrats because the decision did not prevent state banks from making bills of exchange. Changes also occurred in the vote tallies for *Bank of Augusta v. Earle.* In the previous era examined, Justice Story usually voted in a manner that did not support Jacksonian policy on states' rights or issues involving the National Bank. However, Story refrained to issue a dissent in the non-confrontational case of Bank of Augusta v. Earle. In addition, newly appointed Justice McKinley surprisingly was the only justice to dissent in a case where the holding was non-confrontational with the party that had just selected him.

Table 5.13: Bank of Augusta v. Earle (1839)
Issue of Policy: States' Rights; State Banks
Holding Avoided Confrontation over Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
Joseph Story	Democratic-Republican	x	
Smith Thompson	Democratic-Republican	x	
John McLean	Jacksonian Democrat	x	
Henry Baldwin	Jacksonian Democrat	x	
James Wayne	Jacksonian Democrat	x	
Roger Taney*	Jacksonian Democrat	x	
Philip Barbour	Jacksonian Democrat	x	
John Catron	Jacksonian Democrat	x	
John McKinley	Jacksonian Democrat		x

*Delivered Majority Opinion
**Concurred with Majority Opinion

[104] Howard Bodenhorn, *A History of Banking in Antebellum America: Financial Markets and Economic Development in an Era of Nation Building, 205*

Decatur v. Paulding, 39 U.S. 497 (1840)

The case of *Decatur v. Paulding* involved the potential conflict over policy regarding the Supreme Court's jurisdiction and its decision to uphold or overturn executive action determined by the Secretary of the Navy. The widow of the naval hero Stephan Decatur sued the Secretary of the Navy, James Paulding, for two different pensions;however, Paulding insisted Mrs. Decator may only receive compensation for one. Justice Taney delivered the opinion of the Court with a 9-0 vote denying the Court's power to influence or control executive action. Taney stated, "The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied, that such a power was never intended to be given to them." Joining Chief Justice Taney in the majority opinion were Justices Thompson, Story, Baldwin, Wayne, McLean, Barbour, Catron, and McKinley. Justice Catron later expressed his opinion that "some of the Justices wondered why the Court would even take a case where it had to sit in judgement of the Secretary of the Navy backed by the President and the Attorney General." [105]The outcome of the Court's decision to deny mandamus and limit their own jurisdiction helped maintain balance between the Court and the executive which avoided confrontation between the Court and the Jacksonian Democrats.

[105] Louis Fisher, *The Law of the Executive Branch: Presidential Power* (Oxford: Oxford University Press, 2014), 81.

Table 5.14: Decatur v. Paulding (1840)
Issue of Policy: Limit of Court Jurisdiction
Holding Avoided Confrontation over Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
Joseph Story	Democratic-Republican	x	
Smith Thompson	Democratic-Republican	x	
John McLean	Jacksonian Democrat	x	
Henry Baldwin	Jacksonian Democrat	x	
James Wayne	Jacksonian Democrat	x	
Roger Taney*	Jacksonian Democrat	x	
Philip Barbour	Jacksonian Democrat	x	
John Catron	Jacksonian Democrat	x	
John McKinley	Jacksonian Democrat	x	

*Delivered Majority Opinion
**Concurred with Majority Opinion

The United States v. Gratiot, 39 U.S. 526 (1840)

The case of the *United States v. Gratiot (1840)*, lacked confrontation on a policy level, but instead questioned the institutional power of Congress and/or the president to operate or lease public land granted to them in an 1807 statute. The United States leased land to Gratiot for the operation of a lead mine. When Gratiot failed to pay on the lease, the United States brought suit. Gratiot claimed the statute was unconstitutional as it violated the Property Clause. However, in a decision of 9-0, the justices upheld the president's power to lease the mine. The justices found the 1807 statute did not apply to the Property Clause as the Constitution specifically states, "That Congress shall have power to dispose of and make all needful rules and regulations

respecting the territory or other property, belonging to the United States."[106] The interpretation elicited by the justices may have been quite nonspecific, but the end result upheld the power of Congress and the president to lease or sell public land which avoided institutional confrontation with the Court and the Jacksonian Democrats. In addition, the court was once again unified in the decision with no justice providing a dissent.

Table 5.15: The United States v. Gratiot (1840)
Issue of Institutional Prerogative: Power of Congress (Property Clause)
Holding Avoided Confrontation over Issue of Institutional Prerogative

Justice	Appointing Party	Voted with Majority	In the Minority
Joseph Story	Democratic-Republican	x	
Smith Thompson	Democratic-Republican	x	
John McLean	Jacksonian Democrat	x	
Henry Baldwin	Jacksonian Democrat	x	
James Wayne	Jacksonian Democrat	x	
Roger Taney*	Jacksonian Democrat	x	
Philip Barbour	Jacksonian Democrat	x	
John Catron	Jacksonian Democrat	x	
John McKinley	Jacksonian Democrat	x	

*Delivered Majority Opinion
**Concurred with Majority Opinion

Holmes v. Jennison, 39 U.S. 540 (1840)

Holmes v. Jennison was a controversial case for the Jacksonian Democrats in that it involved the right of a state, specifically a governor, to extradite a foreign citizen. Though the Jacksonians supported a limited national government and advocated for significant power designated to the states, *Holmes v. Jennison* put the powers of the

106 ***The United States v. Gratiot, 39 U.S. 526 (1840)***

federal government in direct conflict with the state governments. As a result, the case became a potentially confrontational issue on an institutional level because the Court ultimately had to decide the state's role in foreign policy. In the case, Vermont Governor, Silas Jennison, extradited George Holmes to Canada, where he was facing charges of murder. Holmes claimed Jennison did not have the power to extradite without a treaty between Canada and the United States. The real issue presented to the Court was "the right of a state to make foreign-policy decisions that were at variance with those of the federal government." **107**

The court was split 4-4 in the decision, so the lower Court decision stood. . Chief Justice Taney and Justices McLean, Story, and Wayne supported the belief that the federal government, not the states, only had the power to assert foreign policy. Taney declared, "The states by their adoption of the existing constitution have become divested of all their national attributes, except as relate purely to their internal concerns." **108** Four justices, Justices Baldwin, Thompson, Barbour, and Catron, provided their own dissents. Jacksonian appointed Baldwin advocated for state power and believed if the power wasn't expressly given to the federal government, then state governors could exercise absolute authority.[109]

Even though the Court was split with its decision, the dismissal of the case prevented confrontation between the Court and the Jacksonian Democrats over the differing political policies. The individual votes of the justices illustrated a major divide within the Court. The only two justices to not have been appointed by the Jacksonian

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[107] Glen Hastedt, *Encyclopedia of American Foreign Policy* (New York: Facts on File, Inc. 2004), 212.

[108] Glen Hastedt, *Encyclopedia of American Foreign Policy*,212

[109] Timothy S. Huebner, *The Taney Court: Justices, Rulings, and Legacy* (Santa Barbara: ABC-CLIO, 2003), 66.

Democrats, Story and Thompson, were split with Story concurring with the Chief Justice along with two other Jacksonian appointed justicesDemocratic-Republican nominee Thompson and three Jacksonians dissented where they believed powers in foreign policy power should be given to the states when not explicitly designated to the federal government.

Table 5.16: Holmes v. Jennison (1840)
Issue of Policy: States Rights vis-a-vis the Federal Government
Holding Avoided Confrontation over Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
Joseph Story	Democratic-Republican	x	
Smith Thompson	Democratic-Republican		x
John McLean	Jacksonian Democrat	x	
Henry Baldwin	Jacksonian Democrat		x
James Wayne	Jacksonian Democrat	x	
Roger Taney	Jacksonian Democrat	x	
Philip Barbour	Jacksonian Democrat		x
John Catron	Jacksonian Democrat		x
John McKinley	Jacksonian Democrat	Did Not Participate	

*Delivered Majority Opinion
**Concurred with Majority Opinion

Groves v. Slaughter, 40 U.S. 44 (1841)

The case of *Groves v. Slaughter (1841)* once again brought the issue over the powers of the state and the Commerce Clause to the Court. Robert Slaughter crossed into Mississippi to sell slaves to Moses Groves. However, when Moses Groves defaulted on payment, Groves was liable for the full payment of the contract. Groves argued that Mississippi law prohibited Slaughter from bringing slaves to sell from out of state. Thus,

the Court had to determine if the Mississippi law was unconstitutional in its violation of the Commerce Clause.

In a vote of 5-2, Justice Thompson delivered the majority opinion with concurrences from Taney, Baldwin, and McLean. Justices McKinley and Story both dissented and neither Catron nor Barbour was present for the decision. Ultimately the Court upheld the contract between Groves and Slaughter citing the prohibition in the Mississippi law had not become effective until after the transaction between the two. The decisions of the case appeased the Jacksonian Democrats, because the justices evaded the constitutional issue of slavery and federal versus state commerce. The vote of Justice Story, a nominee of Democratic-Republican James Madison, was not surprising in the case. Story had well established his reputation for dissent in cases where holdings were not confrontational to the policies of Jacksonians when involving questions of states' rights. Justice McKinley, a nominee of Jacksonian Democrat Martin Van Buren, s once again issued a dissent in a case where the holding was non-confrontational with the Jacksonians.

Table 5.17: Groves v. Slaughter (1841)
Issue of Policy: States' Rights; Slavery
Holding Avoided Confrontation over Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
Joseph Story	Democratic-Republican		x
Smith Thompson*	Democratic-Republican	x	
John McLean**	Jacksonian Democrat	x	
Henry Baldwin**	Jacksonian Democrat	x	
James Wayne	Jacksonian Democrat	x	
Roger Taney**	Jacksonian Democrat	x	
Philip Barbour	Jacksonian Democrat	Did Not Participate	
John Catron	Jacksonian Democrat	Did Not Participate	
John McKinley	Jacksonian Democrat		x

*Delivered Majority Opinion
**Concurred with Majority Opinion

United States v. Libellants of Schooner Amistad, 40 U.S. 518 (1841)

Another case involving the policy issue of slavery made its way to the Court's docket in February of 1841. *United States v. Libellants of Schooner Amistad (1841)* involved the kidnapping and subsequent trade of fifty-three Africans from their homeland by the Portuguese in hopes of selling them to the Spanish in Cuba. During this time period, the United States had declared the international slave trade illegal. Cuba, however, continued to import slaves and send them to plantations throughout the country. A group of kidnapped slaves were in route to Puerto Prince when, during the course of the journey, the slaves staged a mutiny and killed the captain and a few other crew members. The slaves spared two of the plantation owners in exchange for their cooperation in taking them back to Africa. However, the two men led them north and eventually the schooner made its way to American waters where the Africans were

captured and imprisoned in New Haven, Connecticut. Once the American government had seized control of the *Amistad,* the controversy erupted across the country in regards to the future of the kidnapped slaves. Many Americans wanted the slaves sent back to Africa while the Cubans, along with Spanish government, wanted them returned to Cuba as property of the Spanish government. The conflict was addressed by the American courts where District Judge Judson ruled in favor of freeing the African slaves and sending them back to Africa. However, as an anti-abolitionist, President Van Buren helped ensure an appeal to the Supreme Court. "The Van Buren administration hoped to end the affair quickly before it cause political complications. The administration took the position that the Africans were admitted mutineers and murderers."[110]

In a 7-1 decision (Justice Barbour hard recently passed away) the Court ruled in favor of the District Court and the imprisoned Africans. Chief Justice Taney and Justices Story, Thompson, Wayne, McLean, Catron, and McKinley found the group to have been illegally enslaved and ordered their return to Africa. “They stated that the Africans were free men and women, illegally taken from Africa and unlawfully transported to Cuba, and never the lawful slaves of Ruiz or Montez [Cuban Plantation owners] or of any other Spanish subject.” [111] Justice Story also concluded "the captives could not be merchandise, because the slave trade was illegal...they were free and not subject to the terms of the treaty with Spain."[112] The only justice to dissent in the case was Jacksonian nominee, Henry Baldwin. The decision was an incredible confrontation with the Jacksonian Democrats as it was an outright defiance to the preferences and wishes of the Jacksonian

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[110] Edgar J. McManus and Tara Helfman, *Liberty and Union: A Constitutional History of the United States (New York: Routledge, 2014), 245.*

[111] David Shultz, *The Encyclopedia of the Supreme Court* (New York: Facts on File, Inc., 2005), 489.

[112] Edgar J. McManus and Tara Helfman, *Liberty and Union: A Constitutional History of the United States , 247.*

Democrats on the issue of slavery and the desired outcome of the president himself Justice Baldwin, who had dissented in the confrontational case of *Worcester v. Georgia*¸ once again provided the dissent in support of Jacksonian Democratic ideological preferences..

Table 5.18: United States v. Libellants of Schooner Amistad (1841)
Issue of Policy: Slavery; Slave Trade
Holding was Confrontational over Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
Joseph Story*	Democratic-Republican	x	
Smith Thompson	Democratic-Republican	x	
John McLean	Jacksonian Democrat	x	
Henry Baldwin	Jacksonian Democrat		x
James Wayne	Jacksonian Democrat	x	
Roger Taney	Jacksonian Democrat	x	
John Catron	Jacksonian Democrat	x	
John McKinley	Jacksonian Democrat	x	

*Delivered Majority Opinion
**Concurred with Majority Opinion

Prigg v. Pennsylvania, 41 U.S. 539 (1842)

Slavery and the rights of states to outlaw the extradition of slaves were both issues of policy in the case of *Prigg v. Pennsylvania (1842).* Margaret Morgan, a slave from Maryland, left John Ashmore's plantation and moved to Pennsylvania. However, Ashmore's heirs hired Edward Prigg to abduct Morgan and bring her back to Maryland. The abduction and extradition of Morgan by Prigg was illegal based on Pennsylvanian law, and Prigg was convicted by the Pennsylvanian Court. Prigg appealed to the Supreme

Court where he argued the Pennsylvania laws on the extradition of slaves violated the Constitution and the Fugitive Slave Law of 1793.

The case not only revolved around slavery, but also the right of a state to develop statutes that contradicted federal slave laws. Justice Story delivered the majority opinion with concurrences from Chief Justice Taney and Justices Wayne, Baldwin, Thompson and Daniel. The only dissent was delivered by Jackson nominee Justice McLean. The Court held in an 8-1 vote supporting the Fugitive Slave Law of 1793 as constitutional and declaring the personal liberty law in Pennsylvania violated not only the slave law, but also the Fugitive Slave Clause in the Constitution. Overall, the Court reinforced the Supremacy Clause and the power of the federal government over that of the states.

The case made headlines across the nation, with the North incensed over the ruling of the Supreme Court. For the Jacksonian Democrats, the split in the nation was becoming more evident, and Democrats were forced to find compromise in future slave laws after this case. At the policy level, the Court's decision supported slavery, but at the same time it illustrated the limit of the states' powers against those of the national government. As a result, the decision both conflicted with the Jacksonian Democrats support of states' rights but in contrast also supported their view of slavery. However, the overall backlash of the decision for the federal government did invite confrontation between the Court and the Jacksonian Democrats. However, there was some change in justice votes within the case. Justice McLean, a Jacksonian Democratic nominee, was the only justice to dissent. However, he had remained in the majority in the confrontational holding of a similar case on issues of policy. Justice Baldwin, who had dissented in the same previous confrontational holding supported the majority ruling.

Table 5.19: Prigg v. Pennsylvania (1842)
Issue of Policy: States's Rights; Slavery
Holding was Confrontational over Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
Joseph Story*	Democratic-Republican	x	
Smith Thompson**	Democratic-Republican	x	
John McLean	Jacksonian Democrat		x
Henry Baldwin	Jacksonian Democrat	x	
James Wayne**	Jacksonian Democrat	x	
Roger Taney**	Jacksonian Democrat	x	
John Catron	Jacksonian Democrat	x	
John McKinley	Jacksonian Democrat	x	
Peter Daniel**	Jacksonian Democrat	x	

*Delivered Majority Opinion
**Concurred with Majority Opinion

Searight v. Stokes, 44 U.S. 151 (1845)

The case of *Searight v. Stokes (1845)* involved the dispute over the power of a state to charge tolls on federal government-run postal carriages. The case brought Pennsylvania into another dispute with the federal government, and the details of the case illustrated conflict on issues of institutional prerogatives between the federal government and the power of the state rather than issues of policy In *Searight v. Stokes*, the justices had to debate the constitutionality of the state of Pennsylvania charging a toll on government “business,"more specifically, on coaches transporting United States mail. In a 7-2 vote by the justices, Taney delivered the majority opinion supported by Justices Story, Thompson, Baldwin, Wayne, Catron, and McKinley. Justices McLean and Daniel issued the only dissent. The Court decided the United States mail coach in question was not liable to pay tolls to the state of Pennsylvania as long as only the number of

reasonably sufficient coaches were on the roads. Any additional means of transportation that exceeded the sufficient number would be liable to the toll.

The outcome of the case was significant because it further illustrated the "growing tendency of the Court to sustain the powers of the Federal Government, as it held valid an attempt on the part of the state of Pennsylvania to tax vehicles carrying the United States mail." [113] On an institutional level, the holding of the Court was not confrontational to the Jacksonians because the justices supported the authority of the federal government vis-a-vis the states. McLean and Daniel, both nominated by Jacksonian Democrats, were the only justices to dissent. McLean especially believed the ruling threatened the power of the states.

Table 5.20: Searight v. Stokes (1845)
Issue of Institutional Prerogative: Federal Power vis-a-vis State Power
Holding Avoided Confrontation over Issue of Institutional Prerogative

Justice	Appointing Party	Voted with Majority	In the Minority
Joseph Story*	Democratic-Republican	x	
Smith Thompson	Democratic-Republican	x	
John McLean	Jacksonian Democrat		x
Henry Baldwin	Jacksonian Democrat	x	
James Wayne	Jacksonian Democrat	x	
Roger Taney*	Jacksonian Democrat	x	
John Catron	Jacksonian Democrat	x	
John McKinley	Jacksonian Democrat	x	
Peter Daniel	Jacksonian Democrat		x

*Delivered Majority Opinion
**Concurred with Majority Opinion

[113] Charles Warren, *The Supreme Court in United States History, Volume Two* (Washington D.C.: Little, Brown, and Company, 1922), 412-413.

IV. Analysis of Holdings after the Jacksonian Democrat Electoral Realignment

The Court under the Jacksonian Democrats heard hundreds of cases. The majority of the decisions pertained to land and estate disputes, patent and copyright laws, execution of promissory notes, and bills of chancery. However, the Court did hear and decide several monumental decisions that affected the American government and its future. During his tenure in office, Andrew Jackson was able to nominate numerous justices to the bench. Subsequently, the questions emerge: Did the addition of justices in 1837 affect the holdings of the Court to be more in line with the ideological preferences of the Jacksonian Democrats? With so many justices added to the bench, was there a notable change in vote tallies after the alteration to the composition of the Court?

The model predicted confrontation between the Jacksonian Democrats and the Court will be higher before the change in the Court's composition in 1837. From 1829-1837, the Supreme Court decided ten cases with the possibility of conflict between the Court's holding and the ideological preferences of the Jacksonian Democrats. The holdings of the Court were considered confrontational if the overall decision of the Court was in conflict with issues of policy based on the ideological preferences of the new party. During this era, three out of ten holdings involving conflict over issues of policy were considered confrontational with Jacksonian Democrats. The Court's holdings in the remaining seven cases actually upheld Jacksonian policy. Therefore, the model was not accurate in its prediction, because the majority of holdings on issues of policy between 1829-1837 were not confrontational with the new party.

After the addition of two justices in 1837, the Supreme Court seated a majority of Jacksonian Democrats with only Story and Thompson remaining who had been nominated by Democratic-Republicans. From 1838-1846, the number of potentially confrontational cases reaching the Court decreased to only five. Out of the five cases, only two resulted in holdings that were confrontation between the Court and the Jacksonian Democrats. Though notably fewer cases threatened policy conflict from 1838-1846, the percentage of holdings that were confrontational to the Jacksonian Democrats actually increased. Thus, the model did not accurately predict fewer confrontational holdings after the change in composition.

Vote tallies from the Old Guard before appointments from the Jacksonians provide important data when examining the effect of the Court's change in size. The model predicted a change in judicial behavior will occur with the addition of a justice. According to this prediction, the voting behavior of the new justice(s) will not only differ from the Old Guard, but will also influence the vote tallies of the Court. The findings in the Jacksonian era give some support to the model. The Court overall was much less unified in the era of the Jacksonian Democrats. However, the Court was more unified from 1829-1837 than from 1838-1846. Justice Johnson, a nominee of Thomas Jefferson, before his death in 1834, dissented against his fellow Court justices in two cases where the holdings were confrontational to the Jacksonian Democrats. From 1829-1837, Justice Thompson, a nominee of the Democratic-Republicans, dissented in two cases where holdings were confrontational to the support of states' rights over the National Bank. However, towards the latter end of the era, Thompson dissented twice in cases where holdings were not confrontational with the Jacksonians involving states' rights and court

power. After the alteration in the size of the Court, Justice Thompson voted with the majority in all cases until his death in 1843. Another nominee of the Democratic Republicans, Justice Story, issued four dissents from 1829-1837 in cases where holdings were non-confrontational with the Jacksonian Democrats, especially in cases regarding states' rights. However, after the change in composition, Justice Story dissented in only one case until his death in 1845.

New justices appointed by the Jacksonian Democrats also provided important insight in the behavior of justices after the alteration of the Court. In the era from 1829-1837, Andrew Jackson's first nominee, Justice McLean, voted against the Court in one case whose holding was confrontational with the new party. From 1838-1846, McLean voted in a second case where the holding was confrontational with his nominating party. Justice Baldwin, was Andrew Jackson's second nominee and provided one very notable dissent against the Old Guard in the confrontational case of *Worcester v. Georgia*. Baldwin once again dissented with the Court majority after the change in composition over the confrontational holding involving slavery. Justice McKinley, the first justice to be appointed as a result in the increase in Court size, surprisingly did not vote with the Old Guard and dissented in two cases where the holding of the Court was not confrontational with the Jacksonian Democrats.

Cases revolving around issues of policy did not provide the only possibility for conflict among the branches. From 1829-1837, two cases were potentially agonistic based on issues of institutional prerogative. However, the holdings in the two institutional cases were split with the decision of the Court being non-confrontational with Congress in one, but confrontational with the executive in the other. Additionally, three cases

involving potential conflict of institutional prerogative were decided in the period 1838-1846, and all three holdings were not confrontational with Congress and/or the president.

After reviewing the cases, the holdings of the Court during the era of the Jacksonian Democratic realignment produced results that did not coincide with the predictions of the model The holdings in the majority of cases from 1829-1837 before the addition of a justice were not confrontational with the Jacksonian Democrats. From 1838-1846, fewer cases posed possible confrontation between the Court and the Jacksonian Democrats after the alteration of the Court; however, confrontational holdings slightly increased after the change in composition. Futhermore, unification was more likely among justices before the alteration of the Court with a higher trend of dissent among justices nominated by Democratic-Republicans. From 1838-1846, the results demonstrate less unification and a higher trend of dissent among justices nominated by Jacksonian Democrats. Individual voting behavior was also notable during the Jacksonian years. Voting behavior slightly shifted for Madison nominee, Justice Story. Before the alteration, Justice Story dissented in half of the cases that had outcomes not confrontational with the Jacksonian Democrats. After the alteration, Justice Story only dissented in one. Monroe nominee, Justice Thompson, dissented in two cases that aligned with Jacksonian Democratic preferences and two that did not. However, before his death in 1843, Thompson refrained from dissenting in any case after 1837. Jacksonian nominees Baldwin and McLean continued their pattern of dissent in cases that were confrontational for the Jacksonian Democrats before and after the addition of a justice. Justice McKinley, a nominee of Van Buren, dissented in several cases which did not conflict with the Jacksonian Democrats after the alteration. McKinley's behavior

indicates that even though the majority of the Court had been appointed by Jacksonian Democrats, the Court was still not submissive to the whims of the president or Congress.

Table 5.21: Jacksonian Democratic Realignment: Table of Findings

Supreme Court Case	Era Examined	Issue of Policy	Institutional Issues Present	Confrontational Holding	Change in Vote Tallies
Wilson v. Blackbird Creek Marsh Company	1829-1837	States' Rights	No	No	No
Foster v. Neilson	1829-1837	Not Designated	Yes	No	No
Weston v. City Council of Charleston	1829-1837	National Bank versus States	No	Yes	Yes
Craig v. State of Missouri	1829-1837	National Bank versus States	No	Yes	Yes
Cherokee v. Georgia	1829-1837	Westward Expansion; Court Power	No	No	Yes
Menard v. Aspasia	1829-1837	Slavery	No	No	No
Worcester v. Georgia	1829-1837	Westward Expansion, States' Rights; Court Power vis-a-vis Federal Power	No	Yes	Yes
United States v. Wilson	1829-1837	Not Designated	Yes	Yes	No
Barron ex. Rel. Tiernan v. Mayor of Baltimore	1829-1837	States' Rights	No	No	No

Mayor of New York v. Miln	1829-1837	States' Rights; Public Good	No	No	Yes
Briscoe v. Bank of Kentucky	1829-1837	States' Rights; National Bank	No	No	Yes
Property of Charles River Bridge Company v. Property of Warren Bridge Company	1829-1837	States' Rights; Public Good	No	No	Yes
Bank of Augusta v. Earle	1838-1846	States' Rights; State Banks	No	No	Yes
Decatur v. Paulding	1838-1846	Court Power vis-a-vis Other Branches	No	No	No
The United States v. Gratiot	1838-1846	Not Designated	Yes	No	No
Holmes v. Jennison	1838-1846	Not Designated	Yes	No	Yes
Groves v. Slaughter	1838-1846	States' Rights; Slavery	No	No	Yes
United States v. Libellants of Schooner Amistad	1838-1846	Slavery; Slave Trade	No	Yes	Yes
Prigg v. Pennsylvania	1838-1846	States' Rights; Slavery	No	Yes	Yes
Searight v. Stokes	1838-1846	Not Designated	Yes	No	Yes

Chapter Six: The Supreme Court and the Republican Realignment

I. The Electoral Realignment of the Republicans

The election of 1860 was a momentous election in United States history. The abolition of slavery was forefront in the election as the country was progressing into the modern age. The Southern states found themselves on the losing end of maintaining their old-order agrarian economy, and Southern representatives in congress were beginning to lose their influence in the national government. The country had seen over a decade of political turmoil, and the chaos was finally coming to a head. By 1860, two parties battled for control of Congress and the presidency: the Republicans and the Democrats. Republicans put forth presidential nominee Abraham Lincoln, but the Democrats were split in choosing a candidate. Northern Democrats selected Stephen Douglas and Southern Democrats selected John Breckinridge. When the election finally came, the split in the Democratic Party helped ensure a victory for Republican, Abraham Lincoln. For the first time, a president was elected without a single electoral vote from the southern states.

The election of 1860 was a product of an electoral realignment, which ultimately brought the Republican Party to power. The party emerged in 1854 to fight the expansion of slavery and was predominantly seated in the north with a conglomeration of members from the earlier Whig and Free Soil parties. "The name “Republican” was chosen, alluding to Thomas Jefferson’s Democratic-Republican Party and conveying a

commitment to the inalienable rights of life, liberty, and the pursuit of happiness."[114] The realignment was imperative to the continuation of the United States government and the development of modern politics. "The central reality of the realignment which produced the Republican Party was the restructuring of all political relationships along sectional lines. Were the cancer of slavery to be contained in order that it might be removed from the body politic, this was the only institutional arrangement possible." [115]

Once elected, Lincoln and the new Republican Party were faced with a prodigious challenge in a changing era. At the forefront of the political era were the declaration of war and the threat of the demise of a "United States." The issues plaguing the Democratic-Republicans and the Jacksonian Democrats faded when the Republicans took office. By the time Lincoln officially took his oath as the new president, many Southern states had already seceded from the union. Therefore in 1860, the focus of government was to keep the union intact especially when volatile issues such as the expansion of slavery and the election of Lincoln threatened its unity.

The president and Congress also had to deal with the politics and realities of war. The party sought to preserve republican institutions and support the preservation of the union, the abolition of the slave trade, and the containment of slavery. No political entity or public official would stand in the way of Lincoln resolving the conflict and bringing peace back to the United States. Lincoln also fully comprehended the urgency and extenuating circumstances that accompanied the chaos of the impending war. He utilized this understanding in deciding all political matters and urged other offices to take heed of the political atmosphere. During his oath of office, Lincoln announced to the American

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[114] "Our History," *The GOP*, Accessed on March 24, 2014, http://www.gop.com/our-party/our-history/.

[115] Richard Funston, "The Supreme Court and Critical Elections," 799.

people, as well as to a nearby seated Chief Justice Taney, that the Supreme Court would not have the final say on issues such as slavery. These decisions would be presented to the American people for resolution.[116] Such Supreme Court cases that depicted potential conflict with the new party's policies included issues involving slavery, nullification, secession of the Southern states, military legislation, or the powers of the president during war. The 1860 Republican Platform was based on the Declaration of Independence. The document stated:

> No person should be deprived of life, liberty, or property without due process of law. It becomes our duty, by legislation, whenever such legislation is necessary, to maintain this provision of the Constitution against all attempts to violate it; and we deny the authority of Congress, of a territorial legislature, or of any individuals, to give legal existence to slavery in any Territory of the United States.[117]

II. The Supreme Court from 1861-1866

Just like his predecessors before him, Lincoln was not always satisfied with the decisions of the High Court. He described the Supreme Court as "judicial machinery" that was created "not to sustain the government, but to embarrass and betray it." [118] The *Dred Scott* decision seriously wounded the credibility of the Court in Lincoln's eyes. By

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116 James F. Sigmon, "Lincoln and Chief Justice Taney," *Journal of Supreme Court History 35, no. 3*(2011): 236.

117 Judge William Jessup, "National Republican Platform," Found in the *Press and Tribune: Chicago, May 17, 1860.*

118 Drew Pearson and Robert S. Allen, *The Nine Old Men,* 60.

1861, the shadow of the American Civil War descended on the Court. “War is never a favorable environment for judicial power. It is characterized by emotion and quick, drastic action’ and courts are not well equipped to cope with either.” [119] President Lincoln and Chief Justice Taney were at times notable adversaries. In Lincoln’s opinion, the Chief Justice was oblivious to the “dire situation faced by the union” and Taney disagreed with Lincoln’s overreaching exercise of presidential authority during a time of war. [120]

When Lincoln took office, eight men remained on the bench with one position left vacant after the death of Justice Daniel. Seven of the eight had been appointed by Democrats including Andrew Jackson's appointments of Chief Justices Taney, Wayne, Catron, McLean, and Polk's appointment of Justice Grier. In addition, Democratic President Franklin Pierce nominated John Campbell to the bench in 1853. Campbell was a previous plantation owner from Alabama who resigned the year Lincoln entered office to join the Confederacy. Democratic President James Buchanan nominated Nathan Clifford, an active member of the legislature in Maine and member of President Polk's cabinet. The only Whig appointed justice was Samuel Nelson, who was appointed by President Tyler in 1845.

Seven out of eight justices were nominated and appointed by Democrats including Chief Justice Taney and Justices Catron, Wayne, McLean, Campbell, Grier, and Clifford. One justice on the bench had been appointed by Whig president John Tyler. Therefore, the Supreme Court looked to Lincoln as the personification of the old regime, and Lincoln knew he would have to do battle. "The Republicans went to Washington, war

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[119] Robert McCloskey, *The American Supreme Court,* 64.

[120] James F. Sigmon, “Lincoln and Chief Justice Taney,” *Journal of Supreme Court History 35, no. 3*(2011): 237-238.

came to the nation...but Taney and his Court stayed on; as so often the Court became a mourner's bench for an old order that had passed. Inevitably, conflict between Lincoln and Taney soon boiled into an immediate and specific issue."[121] Lincoln was prepared for more than just the battle between the states; he was ready to also battle the Court. "Lincoln's first inaugural address not so subtly warned the old Democrats on the bench that 'if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by the decisions of the Supreme Court, the instant they are made in ordinary litigation...the people will have ceased to be their own rulers.'"[122]

Lincoln may have been prepared to battle the Democrats, but by 1865, he was able to appoint five new justices to the bench. When looking for candidates to fill the vacancies, Abraham Lincoln appointed justices who lacked controversial views in regards to slavery and who dedicated themselves to the preservation of the union. "The Civil War dominated all aspects of Lincoln's Presidency…the effect a proposed Court member might have on the conduct of the war was of paramount importance to him…he regarded as desirable and perhaps even essential geographic suitability, political loyalty, and payment of political debts…"[123]

Lincoln filled three of the vacancies, left by Justices Daniel, McLean, and Campbell, during his first year as president. His first appointment was Noah Swayne. Swayne was an abolitionist and lawyer from Ohio. His second appointment was Samuel Miller, a lawyer from Iowa, who was a dedicated abolitionist. Judge David Davis from

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121 Fred, Rodell, *Nine Men*: *A Political History of the Supreme Court from 1790 to 1955* (New York: Random House),1955.

122 Peter Hoffer, Williamjames Hoffer, and N.E.H. Hull, *The Supreme Court: An Essential History*, 103.

123 Henry J. Abraham, *Justices and Presidents*, 116.

the Illinois Circuit Court was the third justice nominated. Davis had a close relationship with Lincoln as his campaign manager and confidante. In 1863, Congress voted to add a tenth justice to the bench. Lincoln looked to Californian jurist and Union supporter, Stephen J. Field. Finally in December of 1864 upon the death of Chief Justice Taney, Lincoln nominated and the Senate confirmed Salmon P. Chase. Chase was an Ohio native and former Secretary of the Treasury. There was some speculation as to Lincoln's motives for nominating Chase. "It was maintained then...that President's Lincoln's motive in appointed Chase Chief Justice of the Supreme Court was to rid himself of a too-ambitious competitive aspirant for the Presidential nomination." [124] The motives may have been questionable, but Chase's views on the Civil War and the South's eventual Reconstruction earned him recognition from the Republicans.

III. Supreme Court Case Analysis: Relevant Court Cases from 1861-1866

The Republicans came to office in some of America's darkest hours. The entire federal government faced a time of uncertainty and increased conflict. Issues that had seemingly plagued previous parties was dwarfed by the tension severing the Union. From 1861-1866, the cases of the Supreme Court were seemingly mild to the tumultuous atmosphere in the rest of the country. However, the potential for confrontation between the Republicans and the Supreme Court deserves examination.

In order to test the hypothesis during the Republican electoral realignment, cases are examined to determine the existence of potential conflict on issues of policy between the newly elected Republican executive and legislative branches and the Supreme Court.

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[124] Myers, Gustavus. *History of the Supreme Court of the United States.* New York: Burt Franklin, 1912.

Cases were selected based on possible areas of conflict involving issues of policy dealing with the abolition of slavery, the role and powers of the president and/or Congress during conflict, nullification, and the preservation of the union. The model of this thesis suggests confrontation will be higher in the years 1861-1863 when justices made decisions on issues of policy related to the ideological preferences of the Republicans. Confrontation from justice decisions on issues of policy will be less frequent from 1864-1866 after the addition of a justice. The model also predicts the justice added will affect the vote tallies of the individual justices who served on the bench before 1863. The justice(s) added will be more likely to vote in support of the ideological preferences of the Republicans. The justices prior to the change will be more likely to alter their voting behavior after the change in composition to align more with the ideological preferences of the new party in power due to the voting behavior of the new justice.

a. Supreme Court Cases Before the Addition (1861-1863)

Kentucky v. Dennison, 65 U.S. 66 (1861)

The case of *Kentucky v. Dennison (1861)* reflected the connection to Republican preferences in relation to the issue of policy regarding slavery and the capture of fugitive slaves. Willis Lago was a free black man from Ohio who aided in the escape of a slave, Charlotte, from Kentucky. Charlotte's owner filed suit for both Lago and Charlotte to be returned to Kentucky to face an indictment. However, Governor Dennison of Ohio refused to extradite either Charlotte or Lago. The case went before the Supreme Court where the justices were faced with deciding if Kentucky had a right to extradition of a fugitive slave.

Chief Justice Taney, supported by Justices Campbell, Grier, Nelson, Clifford, Catron, Wayne and McLean, delivered the unanimous decision that permitted Governor Dennison to deny extradition of the fugitives. The Court declared governors of states could use their own executive powers of discretion to determine if extradition is an appropriate action. Taney stated, "If the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him."[125]

The holding of the Court supported the preferences of the Republicans in office because the Court did not force Dennison to return the fugitives. However, Taney was quick to admonish Dennison for not returning Lago and Charlotte. He believed it was necessary for states to offer mutual support to one another in "bringing offenders to justice without any exception as to the character and nature of the crime."[126] The overall holding of the Court resulted in a lack of confrontation with the newly elected Republicans, but the case was not without controversy in its own right.

125 *Kentucky v. Dennison, 65 U.S. 66 (1861).*

126 *Kentucky v. Dennison, 65 U.S. 66 (1861).*

Table 6.1: Kentucky v. Dennison (1861)
Issue of Policy: Slavery; Fugitive Slaves
Holding Avoided Confrontation over Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
John McLean	Jacksonian Democrat	x	
James Wayne	Jacksonian Democrat	x	
Roger Taney*	Jacksonian Democrat	x	
John Catron	Jacksonian Democrat	x	
Samuel Nelson	Whig	x	
Robert Grier	Democrat	x	
Nathan Clifford	Democrat	x	
John Campbell	Democrat	x	

*Delivered Majority Opinion
**Concurred with Majority Opinion

The Prize Cases, 67 U.S. 635 (1863)

The *Prize Cases (1863)* questioned the issue of policy over the powers of the Republican president and the passage of legislation during the Civil War. The details of the case centered on the ordered blockade of Southern ports by President Lincoln. Any ships that entered the blockade carrying supplies to the Confederate States were immediately seized by the Union. The Court had to determine the "U.S. president's power to suppress an insurrection and whether the president had sufficient legal authority to issue proclamations establishing a blockade of southern ports in furtherance of this goal."[127]

The *Prize Cases (1863)* ended in a 5-4 vote with Justice Grier writing the majority opinion joined by Wayne and all three of Lincoln's nominees: Justices Swayne, Miller,

[127] Erwin C. Surrency, "Prize Cases." *Encyclopedia of the Supreme Court of the United States.* Ed. David S. Tanenhaus. Vol. 4. Detroit: Macmillan Reference USA, 2008. 114-116.

and Davis. Justices Taney, Catron, Nelson, and Clifford joined the dissent. The majority upheld the powers of the president to order the blockade even though war had not be officially declared. In the decision, the majority justices believed "Though neither Congress nor the President can declare war against a state of the Union, when states waged war against the United States government, the President was 'bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name.'"[128]

The *Prize Cases* reflected a possibility for confrontation over the decision of the justices. The Republicans supported the methods of Lincoln to bring an end to the "War Between the States." Confrontation was possible due to the amount of Democratic justices remaining on the bench who represented the South. With a 5-4 vote, the holding avoided confrontation because the Court upheld the power of the president during early stages of the Civil War. However, the split in votes of the justices was notable. All three of Lincoln's recent nominations voted with the majority that avoided conflict with the Republicans. In addition, justices appointed previously by Democrats and Whigs were split between the affirmative and the dissent. Justices Wayne and Grier supported the majority, but Chief Justice Taney and Justices Nelson, Clifford, and Catron provided the dissent.

[128] "*The Prize Cases*," *The Oyez Project at IIT Chicago-Kent College of Law*. Accessed on March 20, 2014. <*http://www.oyez.org/cases/1851-1900/1862/1862_0*>.

Table 6.2: The Prize Cases (1863)
Issue of Policy: Powers of the president and/or Congress during Conflict
Holding Avoided Confrontation over Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
James Wayne	Jacksonian Democrat	x	
Roger Taney	Jacksonian Democrat		x
John Catron	Jacksonian Democrat		x
Samuel Nelson	Whig		x
Robert Grier*	Democrat	x	
Nathan Clifford	Democrat		x
Noah Swayne	Republican	x	
David Davis	Republican	x	
Samuel Miller	Republican	x	

*Delivered Majority Opinion
**Concurred with Majority Opinion

b. Supreme Court Cases after the Addition (1864-1866)

Ex Parte Vallandigham, 68 U.S. 243 (1864)

The actions and subsequent legislation of the Republican government during a time of war was the central issue of policy in the case of *Ex Parte Vallandigham(1864).* In 1863, President Lincoln posted General Burnside in Ohio. During his time of command, General Burnside issued a proclamation declaring any words uttered against the war or in support of the Southern cause would result in a charge of treason. Clement Vallandigham held a meeting and argued vehemently against the war as well as Burnside's proclamation. Vallandigham was arrested and tried in front of a military tribunal that found him guilty. The Court had to decide if the military proceedings were Constitutional.

The justices held a unanimous vote, with Justices Nelson, Grier, and Field concurring with the majority. In the decision, the justices affirmed the Court had no jurisdiction in deciding cases dealing with decisions from a military tribunal during times of war. For the Republicans, the decision was an ultimate win as it allowed war policies of President Lincoln and his generals to continue. The case examined "free expression and military necessity during the course of war. It represents the struggle between free speech rights and the imperiled security of the Union."[129] As a result of the Court's decision, a confrontation between the Republicans and the Court was avoided. The decision was also unified with no dissent even from justices who had previously been nominated by Democratic or Whig presidents.

Table 6.3: Ex Parte Vallandigham (1864)
Issue of Policy: Power of President and/or Congress during Conflict
Holding Avoided Confrontation over Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
James Wayne*	Jacksonian Democrat	x	
Roger Taney	Jacksonian Democrat	x	
John Catron	Jacksonian Democrat	x	
Samuel Nelson**	Whig	x	
Robert Grier**	Democrat	x	
Nathan Clifford	Democrat	x	
Noah Swayne	Republican	x	
David Davis	Republican	x	
Samuel Miller	Republican	x	
Stephen Field**	Republican	x	

*Delivered Majority Opinion
**Concurred with Majority Opinion

[129] Patrick H. Haggerty, "Ex Parte Vallandigham, 28 F.CAS. 874 (1863)," *American Civil Liberties*, June 20, 2012, http://uscivilliberties.org/cases/3772-ex-parte-vallandigham-28-fcas-874-1863.html.

Ex Parte Milligan, 71 U.S. 2 (1866)

By 1865, Republican president Abraham Lincoln had been replaced with Democrat, Andrew Johnson, and the Civil War had come to an end. However, another case involving the policy issue of presidential power during conflict emerged which specifically questioned the tactics of the government during the Civil War. During his presidency, Lincoln had suspended habeas corpus and authorized the actions of a military tribunal. The case of *Ex Parte Milligan (1866)* questioned the power of these military tribunals during times of war. The case came to the High Court after the surrender of the South in the Civil War. Lamdin Milligan was charged with conspiring against the government and aiding the South. Milligan was tried by a military tribunal in Indiana, convicted, and sentenced to death. Before his execution, Milligan appealed to the Court for a writ of habeas corpus. The Court's holding contrasted with *Ex Parte Vallandigham(1864).* In a unanimous vote, the Court justices agreed with the suppression of Milligan's civil liberties. Citizens not involved in the war could not be tried in a military tribunal when a civil court was available. The justices believed any other decisions would illustrate that "republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution." [130]

After the assassination of Lincoln and the inauguration of Johnson, the holding of the Court was confrontational to the ideological preferences of the Republican Congress. The Court's decision not only set the standard for future civil liberties, but it also incited confrontation because it implied the previous Republican government as well as other

[130] Scott P. Johnson, *Trials of the Century: An Encyclopedia of Popular Culture and the Law* (Santa Barbara: ABC-CLIO, 2011), 87.

future federal governments were not immune to committing unconstitutional acts during times of war. Most strikingly, with a 9-0 vote the Court was unanimous with support and/or concurrences from even Republican nominated justices. Justice Davis wrote for the majority, and Chief Justice Chase wrote the concurring opinion with support of Justices Chase, Wayne, Swayne, and Miller.

Table 6.4: Ex Parte Milligan (1866)
Issue of Policy: Power of President and/or Congress during Conflict
Holding was Confrontational over Issue of Policy

Justice	Appointing Party	Voted with Majority	In the Minority
James Wayne**	Jacksonian Democrat	x	
Samuel Nelson	Whig	x	
Robert Grier	Democrat	x	
Nathan Clifford	Democrat	x	
Noah Swayne**	Republican	x	
David Davis*	Republican	x	
Samuel Miller**	Republican	x	
Stephen Field	Republican	x	
Salmon Chase**	Republican	x	

*Delivered Majority Opinion
**Concurred with Majority Opinion

IV. Analysis of Holdings after the Republican Electoral Realignment

The time span for the analysis of the Republican realignment was significantly less than both the alignments of the Democratic-Republicans and the Jacksonian Democrats. Lincoln was only in office two years before Congress voted to add a tenth seat to the Supreme Court. As a result, only a handful of cases sparked confrontation between the Court and the Republican president and Congress. A higher

number of controversial legislation took place before the realignment, such as the Dred Scott case in 1857, and after the realignment such as the Reconstruction cases after 1866. The majority of cases heard by the Court from 1861-1866 dealt with the railroad expansion, land claims, patents, failure to execute bonds, and mortgage disputes.

The model predicted the majority of holdings centered around issues of policy were more confrontational before the addition of a tenth justice in 1863 rather than after. In addition, the model also predicted the voting behavior of the votes of the new justice will alter the votes of the Old Guard. The number of cases with the possibility of confrontation was few during the Republican time period of 1861-1866. Between the electoral realignment of the Republicans and the addition of a justice in 1866, only two cases dealt with specific Republican policies. In both *Kentucky v. Dennison (1861)* and the *The Prize Cases (1863),* the holdings of the Court failed to incite confrontation with the Republicans. The decisions of the justices aligned with the Republican policies on slavery and presidential/military power. However, noteworthy in *Prize Cases (1863),* was the split in the holding with the case receiving a 5-4 vote. The dissenters were justices that had been appointed by Democrats indicating though the Court avoided confrontation by voting to uphold Republican policy, there was not unity in the decision among the Democrats on the bench.

After the addition of a tenth justice, two more cases, *Ex Parte Vallandigham (1864) and Ex Parte Milligan (1866),* held the possibility for a potential clash between the Court and the Republicans. Of the two cases, the holdings of *Ex Parte Milligan (1866),* decided after Lincoln's death, did conflict with Republican Party's wartime policies during the Civil War. In both cases, the justices presented unanimous decisions.

The only divergence of justices from the majority was simply in the concurring opinions of Justices Nelson, Grier, and Field in *Ex Parte Vallandigham* and of Chief Justice Chase, Wayne, Swayne, and Miller in *Ex Parte Milligan*. Thus, the votes of the justices remained unanimous in both cases.

The addition of a justice in the Republican era of 1861-1866 reflects the inaccuracy in the prediction of the model. The Court's tendency to uphold Republican polices before the addition of a justice indicates the addition of a justice did not reduce conflict. The number of cases was also problematic for the analysis. With such a significantly low number of cases that represented a possible clash between branches, the results cannot be defined as reliable. There was one case outcome that was confrontational between the Court and the Republicans, which happened after the alteration to the Court.

With such limitation in the number of cases, there was not much change in judicial behavior during the Republican era to examine. In all but four of the cases studied, the votes of the justices were unanimous. Even those justices nominated by Lincoln supported the majority opinion in the one case that caused confrontation between the Court and the Republicans. *The Prize Cases* was the only case that evoked dissent among justices, which included three justices that had been appointed by Democrats: Chief Justice Taney, Catron, Clifford, and one justice that had been appointed by Whigs: Justice Nelson.

The cases, though not completely lackluster, are mild in comparison to those of the Democratic-Republicans and the Jacksonian Democrats. Robert G. McCloseky (1960) termed the Civil War era for the Court as a “judicial ice age” as the Court lacked

numerous cases of notoriety. As a result, "the role of the Supreme Court in the Civil War was not minor, but neither was it as important as it had been."[131]

Table 6.5: Republican Realignment: Table of Findings

Supreme Court Case	Era Examined	Issue of Policy	Institutional Issues Present	Confrontational Holding	Change in Vote Tallies
Kentucky v. Dennison	1861-1863	Slavery	No	No	No
The Prize Cases	1861-1863	Power of President and/or Congress during Conflict	No	No	Yes
Ex Parte Vallandigham	1864-1866	Power of President and/or Congress during Conflict	No	No	No
Ex Parte Milligan	1864-1866	Power of President and/or Congress during Conflict	No	Yes	No

[131] Peter Hoffer, Williamjames Hoffer, and N.E.H. Hull, *The Supreme Court: An Essential History*, 103.

Chapter Seven: Conclusion

Throughout American history, the relationship between the three government branches has been relatively innocuous. However, during periods of turmoil when ideological preferences between the branches fail to align, the relationship between the three quickly turns tumultuous. Electoral realignments especially have the potential to increase tension between the branches. When a new party replaces the "old order" in both the legislature and the executive branches, the possibility for conflict emerges with the Court. Justices who make decisions based on old regime preferences of the party that had appointed them to the bench will likely clash with the new ideological preferences of the incoming party. In these circumstances, the president or Congress may seek to weaken the influence of the Court through court-curbing methods. Court-curbing then becomes an invaluable sword for both the legislative and executive branches to wield in order to oppress opposing actions of the Court. Electoral realignments also serve as a mechanism for court-curbing because justices are more likely to alter their decisions when faced with increasing political pressure during a time of political passion. One such method is the alteration in the size of the Court in the hopes that the reorganization will encourage justices to reassess their positions and make decisions based on forward thinking. Altering the size of the Supreme Court is considered a success for the legislature and/or the executive when the Court's holdings align with the political agenda of both Congress and the president and/or if the justices alter their individual judicial behavior in favor of the new political party.

Congress has altered the number of justices serving on the Court six times in United States history. Twice, in 1801 and 1866, the Court reduced the number of justices

to limit the influence of the president. However, three out of the four remaining examples included not only the addition of a justice, but the addition of a justice during an electoral realignment when both Congress and the president shared the same political party. In 1801, the Democratic-Republicans replaced the Federalists, and a Supreme Court justice was added in 1807. In 1829, Jacksonian Democrats replaced the Democratic-Republicans, and a Supreme Court justice was added in 1837. Lastly, the Republicans replaced the Democrats and Whigs in 1861, and a Supreme Court justice was added in 1863. As a result of these additions, this thesis sought to answer the questions: Following these three electoral realignments, were holdings of the Court incongruent with the preferences of the new regime? If so, did holdings of the Court change after the addition of a justice to reflect the policies of the new president and Congress in control? Additionally, was there a change in individual vote tallies of the justices driven by the voting behavior of the newly appointed justice(s)?

Through research and analysis, this Master's thesis tested the following hypothesis: Following electoral realignments, the addition of a Supreme Court justice will reduce conflict between the branches. After an extensive examination of Supreme Court cases from 1801-1814, 1829-1846, and 1861-1866, the hypothesis finds little support. In two of the three eras analyzed, there was not a decrease in confrontation between branches after the addition of justices. The complete opposite held true; confrontations during the presidences of Jackson and Lincoln slightly increased after the alteration. The increase in confrontation between the Court versus Congress and the president also does not support the concept that the justices made decisions based on the ideological preferences of the new party in power. The only era to give credence to the

hypothesis and model owas during the tenure of the Democratic Republicans. The majority of cases from 1801-1807 were considered confrontational on at least one issue of policy, but after the change in composition, only one case held the potential for conflict, but the holding of the Court was not confrontational to the Democratic-Republicans. However with only one case to examine, the results contribute only limited results. Potentially, confrontational cases decreased during the era of the Jacksonian Democrats (1829-1846). Confrontational holdings of the Court slightly increased after the addition of a justice. The Republican era from 1861-1866 illustrated the same findings as those of the Jacksonian Democrats, but lacked enough confrontational cases to reach a reliable conclusion.

Overall, judicial behavior was minutely altered among the justices.During the Democratic-Republican realignment, the justices were notably unified in all cases except one. Justice Johnson, a nominee of Thomas Jefferson, was the only justice to dissent against the Old Guard in decisions that were confrontational between the Court and the Democratic-Republicans. Johnson did not alter this behavior after the addition of a justice in 1807, and continued to dissent in cases that did not align with Democratic-Republican preferences.

The Jacksonian Democrat realignment indicated the most change in the behavior of the justices after the alteration of the Court. Disunity increased amongst the Court after the death of John Marshall. Justice Story, a nominee of Democratic-Republican James Madison, illustrated a slight change in behavior after the Jacksonian Democrat era. Before the addition of a justice, Story dissented in half of the Court's decisions that were not confrontational between the Court and the Jacksonian Democrats. After the addition

of a justice in 1837, Justice Story dissented in only one case that aligned with Jacksonian Democratic preferences. Justice Thompson, a nominee of Democratic-Republican James Monroe, set less of a pattern during the Jacksonian Democrat era than Story. Before the addition of a justice, Thompson dissented in two cases that aligned with Jacksonian Democratic preferences and two that did not. However, after the alteration and before he left the bench, Thompson refrained from dissenting in any of the decisions examined. In both the time before and after the addition of a justice, Baldwin and McLean, both nominees of Jackson continued to dissent in several cases that did not align with the preferences of the Jacksonian Democrats. Justice McKinley, one of the first Jacksonian justices to be appointed after the alteration in size, dissented in two cases where the holding actually upheld Jacksonian policy.

The Republican era provided few cases for analysis, which made determining any alteration in judicial behavior difficult. Before the addition of a Supreme Court justice in 1863, holdings in two cases resulted in no conflict between the Court and the Republicans. In the first case, *Kentucky v. Dennison* (1861), the decision of the justices was unanimous. In the second case, *The Prize Cases* (1863), the decision of the justices was noticeably split with a 5-4 vote with the appointments of the old regime parties providing the dissent. The dissenters included Chief Justice Taney and Justices Catron, Nelson, and Clifford. Taney, Catron, and Clifford were each appointed by the Jacksonian Democrats and Nelson was a Whig appointment. After the addition of a justice in 1863, two cases were examined. The first case, *Ex Parte Vallandigham (1864),* did not elicit confrontation between the Republicans and the Court and resulted in a unanimous decision among the justices. The final case, *Ex Parte Milligan (1866),* was the only case

to provoke confrontation between the Republicans and the Court, but the justices still issued a unanimous decision. Therefore, the results demonstrate that old regime justices dissented in only one case where there was no confrontation between the Court and the Republicans.. The newly appointed justices of the Republicans did not even dissent in the only case that incited confrontation between the justices and the Court.

There can be many factors that contribute to the rejection of the hypothesis and the inaccuracy in the predictions of the model based on the holdings of the Court. The model failed to incorporate cases with potential conflict on more than one dimension. Especially within the Democratic-Republican era, the percentage of potentially confrontational cases involving issues of policies was relatively high. During the Republican era, the Court, along with the rest of the American government, was still in its infancy, which could have contributed to the presence of numerous cases involving conflict on more than one dimension. However, as the roles of the federal government and the power of the states became more clearly defined, the percentage of cases involving institutional conflict seemed to decrease. The influence of political actors on judicial decision-making should be considered. Justices do not always make decisions that are strategic and/or seek to support the ideological preferences of other political actors. Even the addition of justices did little to curb the court, which still decided several confrontational holdings in both the Jacksonian Democratic and Republican eras. What remains important for political leaders is the propensity of newly added justices to act independently, whether he or she supports the ideological preferences of the nominating party or opposes them. The prediction that justices will make decisions in line with the policy preferences of the nominating party is a falsehood. Some decisions may simply be

based on legal principles or the desire of individual justices to behave in a manner that supports their own preferences. In addition, there may be examples of cases where the president and Congress were not ideologically congruent and each supported decisions that conflicted with the other branch. As a result, the incongruence of the branches actually causes justices to feel less restraint when making decisions. The relationship among the justices themselves can also be tied to their individual behavior. For example, under the leadership of Chief Justice Marshall, the Court seldom made decisions that were not unanimous.

As with all research, there are limitations to this study. Hundreds of cases deserve thorough review, and selecting the cases that evoke conflict among the branches may be subjective or incomplete For example, some cases may have sparked confrontation with the president and/or Congress on a personal level but may not adequately illustrate the dialogue of the case itself. Therefore, cases could possibly be added to the study or deleted from review. In addition, the premise that justices are added to the Court to avoid confrontation may not be the only reason Congress votes to alter the number. Justices may be added to the bench not for the benefit of a new party, but as a mechanism to alleviate the strain of the case load on the justices or as a means of adding circuit judges to the new territories.

Though the hypothesis must be rejected, the research is still a valuable tool for understanding judicial politics. Packing the Court or subtracting justices does have an effect on the decisions justices make. Regardless, if confrontation declines, correlations are evident between court curbing and judicial behavior. Even when the holdings of the Court in the cases studied did not sway in the new party's favor, the vote tally of the

justices illustrated increased disunity among the Court, with the dissents usually coming from justices of the new party. Therefore, added pressure from new justices can sway justice votes in the Old Guard. For example, Story's lack of dissent in holdings that were not confrontational to the Jacksonians demonstrated the effect on judicial behavior of an additional justice to the Court.

Altering the size of the Court has been a rare occurrence in United States history. Justices have not been successfully added or removed since Reconstruction in 1866. Even the formidable Franklin Roosevelt could not "fireside chat" his people enough into supporting legislation to pack the Court in the 1930s. The lack of alteration in the size of the Court highlights major questions including: Why has the number of justices serving on the Supreme Court remained constant for almost 150 years? Could there be an increase in policy agreement among the branches since the era of the Civil War? Have the justices become more strategic in their decisions? Or have more constraints been placed on the justices that have helped prevent disunity among the branches? Consequently, these questions illustrate how modifying the Court deserves the significant attention of political scientists. Therefore, the research of this thesis begs political thinkers to examine deeper the conditions that must be met in order to successfully alter the number of justices on the Court, and to further discover what effect these alterations have on not only the holdings of the Court, but overall judicial behavior.

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