

July 2019

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### Recommended Citation

Mark A. Graber, *Overruling McCulloch?*, 72 Ark. L. Rev. 79 (2019).

Available at: <https://scholarworks.uark.edu/alr/vol72/iss1/4>

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## Overruling McCulloch?

Mark A. Graber\*

Daniel Webster warned Whig associates in 1841 that the Supreme Court would likely declare unconstitutional the national bank bill that Henry Clay was pushing through the Congress.<sup>1</sup> This claim was probably based on inside information. Webster was a close association of Justice Joseph Story.<sup>2</sup> The justices at this time frequently leaked word to their political allies of judicial sentiments on the issues of the day.<sup>3</sup> Even if Webster lacked first-hand knowledge of how the Taney Court would probably rule in a case raising the constitutionality of the national bank, the personnel on that tribunal provided strong grounds for Whig pessimism. Most Jacksonians vigorously opposed the national bank on both policy and constitutional grounds.<sup>4</sup> The most vigorous opponents of that institution had been appointed to the Taney Court. The partisan activities of these justices while on the bench gave little hope that Taney Court majorities would abandon

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\* Regents Professor, University of Maryland School of Law. Much thanks to David Schwartz and the Arkansas Law Review for their help and forbearance. Thanks to Mark Killenbeck for helping me avoid many unforced errors.

1. MERRILL D. PETERSON, *THE GREAT TRIUMVIRATE: WEBSTER, CLAY, AND CALHOUN* 306-07 (1987). See CARL BRENT SWISHER, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: VOLUME 5, THE TANEY PERIOD, 1836-64* at 29 (1974) [hereinafter *TANEY PERIOD*] (quoting Leslie Combs to Nicholas Biddle, July 27, 1835) (“Genl J. says the Bk is unconstitutional. Mr. Van Buren echoes the opinion and old Tecumseh [Richard Johnson] follows suit. Will the Judges—his officers, dare to decide otherwise by & bye?”).

2. See CARL BRENT SWISHER, *ROGER B. TANEY* 201-02, 258-59 (Archon Books 1961) (1935) [hereinafter *ROGER TANEY*] (noting that Story routinely advised Webster on the constitutional issues of the day).

3. See *id.* at 564. The most famous leak of judicial sentiments occurred when Justice John Catron, with the permission of Chief Justice Taney, Justice Robert Grier and Justice James Wayne, kept President-elect James Buchanan informed of the judicial deliberations in the *Dred Scott* case. See Philip Auchampaugh, *James Buchanan, the Court and the Dred Scott Case*, *TENN. HIST. MAG.*, Jan. 1926, at 231-38; *TANEY PERIOD*, *supra* note 1, at 615-18. Taney may have privately discussed how to resolve *Dred Scott* with Attorney General Caleb Cushing. *ROGER TANEY*, *supra* note 2, at 500. John McLean may have leaked information about the judicial deliberations in *Dred Scott* to his supporters. *Id.* at 489.

4. See MICHAEL F. HOLT, *THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR* 16 (1999).

their partisan predilections when deciding a case raising those constitutional questions that divided their Jacksonian sponsors from their Whig rivals.

Webster's prediction that the Supreme Court was primed to overrule *McCulloch v. Maryland*<sup>5</sup> on the constitutionality of federal power to incorporate a national bank was widely shared.<sup>6</sup> Thomas Hart Benton praised President Andrew Jackson for "prepar[ing] the way for a reversal of that decision."<sup>7</sup> Reverdy Johnson, a leading Democrat and member of the Supreme Court bar was "convinced that the Court would declare that it would be unconstitutional to establish a branch [of the national] bank in a state that had specifically refused to sanction it."<sup>8</sup> Representative Henry Wise noted that Whigs in Congress committed to rechartering the national bank should consider the composition of the Supreme Court, and then ask, "if the distinguished gentleman [Taney], who removed the public deposits [sic] from the Bank of the United States was not at the head of it, and if a majority of its members, was not of that school of politicians, who believed a Bank of the United States to be unconstitutional?"<sup>9</sup>

This paper explores whether Webster was right to fear a judicial overruling of *McCulloch v. Maryland*. The bulk of the essay discusses the relevant political and constitutional commitments of the sixteen justices who sat on the Taney Court from 1837 until 1860. That analysis concludes that the Supreme Court probably would have overruled *McCulloch*'s holding that the federal government was constitutionally authorized to incorporate a national bank if a proper vehicle for doing so had come before the court. From 1837 until 1853, the median justice on the Taney Court had fought with Andrew Jackson in the bank wars while serving in the executive or legislative branch of the national government. After 1853, at least seven justices were committed Jacksonians who were either on record as declaring the national bank unconstitutional or, where primary sources are not available, were regarded by their peers as persons with

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5. 17 U.S. 316 (1819).

6. See Gerard N. Magliocca, "Veto! The Jacksonian Revolution in Constitutional Law," 78 NEB. L. REV. 205, 248-50 (1999).

7. 13 CONG. DEB. 387 (1837).

8. NORMAL LOISE PETERSON, THE PRESIDENCIES OF WILLIAM HENRY HARRISON AND JOHN TYLER 70 (1989) (quoting Reverdy Johnson).

9. CONG. GLOBE, 27th Cong., 1st Sess. 299 (1841).

orthodox Jacksonian positions on the constitutional issues of the day.

The following pages are concerned with whether in the proper case the Supreme Court would have overruled *McCulloch* by holding that Congress had no power to incorporate a national bank or no power to adopt other crucial planks of Henry Clay's American System. The American System, on which the Whig party campaigned for most of its history,<sup>10</sup> was a set of proposed exercises of national power to stimulate commercial development. Proposals included a national bank, federal internal improvements, protective tariffs and the distribution of federal surpluses from the sale of public lands to the states to enable states to sponsor more local commercial developments.<sup>11</sup> The Supreme Court in *McCulloch* ruled that the federal government had power to incorporate a national bank.<sup>12</sup> Immediately after handing down the decision, the Justice William Johnson wrote a letter to President Monroe—claiming to speak for all the justices on the Supreme Court—saying his brethren believed that the constitutional justification for federal power to incorporate a national bank also provided constitutional justification for federal power to sponsor internal improvements.<sup>13</sup> The analysis below suggests that the Taney Court would not have been as hospitable to these exercises of federal power, and that the justices would not have sustained federal power to incorporate a national bank, sponsor internal improvements, or adopt related Whig policies.

This paper does not consider whether in overruling *McCulloch*'s holding that Congress under Article I could incorporate a national bank, the Taney Court would also have overruled *McCulloch*'s holding that the national government had implied powers or that states could not interfere in any way with

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10. See WHIG PARTY, PLATFORM OF 1852, <https://www.presidency.ucsb.edu/documents/whig-party-platform-1852> [<https://perma.cc/92AZ-RY78>]; WHIG PARTY, PLATFORM OF 1844, <https://www.presidency.ucsb.edu/documents/whig-party-platform-1844> [<https://perma.cc/F3Y4-6YMJ>].

11. See HOLT, *supra* note 4, at 2.

12. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

13. Whether Johnson was speaking for the entire court is doubtful. See Mark R. Killenbeck, *William Johnson: The Dog That Did Not Bark*, 62 VAND. L. REV. 407, 441-42 (2007).

federal programs.<sup>14</sup> David Schwartz's essay in this symposium makes a powerful case that Jacksonians in general and the Taney Court in particular adopted modified understandings of implied federal powers and reserved state powers that did not require a head-on assault on the pillars of Marshall Court jurisprudence. He observes, "Jacksonian legalists had a plan to undermine *McCulloch v. Maryland* without overruling it, and thereby maintain the prestige of a Supreme Court that would take a notably states'-rights turn."<sup>15</sup> The Taney Court, however, would not have had to abandon implied powers to overrule *McCulloch*'s specific holding. A judicial decision declaring Congress had no power to incorporate a national bank would more likely assert that the national government did not have this particular implied power or that the bank was not sufficiently necessary to the exercise of the enumerated powers than denounce every sentence in Chief Justice Marshall's opinion.

The continued survival of *McCulloch* raises important questions about the nature of judicial power and constitutional authority. The simple explanation for the judicial failure to overrule *McCulloch* is that no proper vehicle came before the Court. Jacksonian presidents forestalled litigation by vetoing efforts to recharter the national bank and vetoing those internal improvement bills that raised similar questions of federal constitutional power. A more sophisticated answer is that, in Jacksonian America, parties rather than courts had the final authority to determine the official constitutional law of the land. The Taney Court left *McCulloch* alone because the national executive and the national legislature during the thirty years before the Civil War took responsibility for resolving constitutional issues concerning the scope of federal power over national economic life.

The conclusion briefly raises questions about constitutional pedagogy in times of regime change. The fate of *McCulloch* during the three decades after Roger Brooke Taney assumed the Chief Justiceship illustrates how official constitutional law may diverge from constitutional politics on the ground. Persons

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14. See David S. Schwartz, *Defying McCulloch? Jackson's Bank Veto Reconsidered*, 72 ARK. L. REV. 129, 158 (2019) (noting that "*McCulloch*'s doctrine extended beyond the Bank, to the matter of implied congressional powers in general").

15. *Id.* at 163.

during the 1850s training “practice-ready” constitutional lawyers to represent clients might have continued teaching *McCulloch*, given that decision was never officially overruled. They might have better prepared students by teaching *McCulloch* and Taney Court cases that ignored *McCulloch*, teaching *McCulloch* and the bank veto, or just teaching the various Jacksonian vetoes of American System measures. Constitutional law professors in our time of regime change may soon be confronting analogous pedagogical challenges with analogous alternatives.

### I. FEDERAL POWER AND JUDICIAL RECRUITMENT IN JACKSONIAN AMERICA

Jacksonian Democrats after 1832 were relatively united in their effort to limit certain powers of the federal government. Many Jacksonians were nationalists on issues concerning national expansion and federal assistance during the rendition process for fugitive slaves,<sup>16</sup> but on matters concerning federal regulation of the economy, antebellum Democrats almost always advanced narrower conceptions of federal power than their Whig rivals. Democratic Party Platforms from 1840 to 1856 contained the identical declaration that “the federal government is one of limited powers, derived solely from the Constitution; and the grants of power made therein, ought to be strictly construed by all the departments and agents of government; and that it is inexpedient and dangerous to exercise doubtful constitutional powers.”<sup>17</sup> That assertion was immediately followed by nearly identical provisions declaring unconstitutional a national bank,

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16. See Arthur Bestor, *State Sovereignty and Slavery: A Reinterpretation of Proslavery Constitutional Doctrine*, J. OF THE ILL. ST. HIST. SOC’Y, Summer 1961, at 138-140.

17. DEMOCRATIC PARTY, 1856 PLATFORM, <https://www.presidency.ucsb.edu/documents/1856-democratic-party-platform> [<https://perma.cc/WF62-F7XU>]; DEMOCRATIC PARTY, 1852 PLATFORM, <https://www.presidency.ucsb.edu/documents/1852-democratic-party-platform> [<https://perma.cc/4VJN-4B6C>]; DEMOCRATIC PARTY, 1848 PLATFORM, <https://www.presidency.ucsb.edu/documents/1848-democratic-party-platform> [<https://perma.cc/NBZ4-Z5XJ>]; DEMOCRATIC PARTY, 1844 PLATFORM, <https://www.presidency.ucsb.edu/documents/1860-democratic-party-platform> [<https://perma.cc/22QL-7EFK>]; DEMOCRATIC PARTY, 1840 PLATFORM, <https://www.presidency.ucsb.edu/documents/1840-democratic-party-platform> [<https://perma.cc/E23P-3MAR>].

any federally sponsored internal improvements and various schemes to distribute to the states the proceeds from the sale of public lands. The protective tariff, while not expressly declared unconstitutional, was claimed to be inconsistent with “justice and sound policy.”<sup>18</sup> Jacksonians in 1852 and 1856 added a provision stating, “the democratic party will faithfully abide by and uphold the principles laid down in the Kentucky and Virginia resolutions of 1798, and in the report of Mr. Madison to the Virginia legislature in 1799 . . . .”<sup>19</sup>

Jacksonian politicians made self-conscious efforts to secure a federal judiciary committed to this narrow conception of federal power. Presidents after 1830 carefully scrutinized their judicial nominees to ensure fidelity to Jacksonian constitutional visions. In 1834, Jackson informed Martin Van Buren that only jurists whose “principles on the Constitution are sound, and well fixed” were considered for Supreme Court appointments.<sup>20</sup> Van Buren in turn sought to ensure that prospective justices were “Democrat[s] [who] would stick to the true principles of the Constitution.”<sup>21</sup> Tyler insisted that “no one should be appointed who was of the school of Story and Kent.”<sup>22</sup> Concerned that Marshall Court justices were “broadly Federal and latitudinarian in all their decisions involving questions of Constitutional power,” Polk “resolved to appoint no man who was not an original Democrat and strict constitutionalist, and who would be less likely to relapse into the broad Federal doctrines of Judge Marshall and Judge Story.”<sup>23</sup>

Jacksonians were committed to appointing justices willing to act on these commitments to limiting powers. They sought what would later be called “judicial activists” rather than proponents of judicial restraint. Before joining the bench, Many

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18. See sources cited *supra* note 17.

19. See sources cited *supra* note 17.

20. Richard P. Longaker, *Andrew Jackson and the Judiciary*, 71 POL. SCI. Q. 341, 358 n.43 (1956) (quoting Andrew Jackson to Martin Van Buren, October 27, 1834).

21. ROGER TANEY, *supra* note 2, at 428.

22. 2 THE LIFE AND LETTERS OF JOSEPH STORY 523 (William W. Story, ed., Books for Libraries Press: Freeport, NY, 1971) [hereinafter 2 LIFE AND LETTERS]. Millard Fillmore, by comparison, sought to pack the judiciary with committed Whigs. See ROGER TANEY, *supra* note 2, at 445 (quoting Fillmore to Webster, September 10, 1851).

23. JAMES K. POLK, POLK: THE DIARY OF A PRESIDENT 1845-1849 37 (ed. Allan Nevins, Longmans, Green and Co.: London, 1929). See CHARLES GROVE SELLERS, JR., JAMES K POLK: CONTINENTALIST 1843-46 298 (1966).

Taney Court justices aggressively championed the judicial power to declare laws unconstitutional. While on the New Hampshire bench in the 1810s, Levi Woodbury endorsed both judicial review and judicial supremacy when declaring a law unconstitutional.<sup>24</sup> James Wayne vigorously opposed a Georgia resolution denying federal judicial power to declare laws unconstitutional.<sup>25</sup> On the Tennessee Supreme Court, John Catron agitated for Jacksonian policies from the bench and revised his own views to bring them in line with Jackson's.<sup>26</sup> Barbour when litigating *Cohens v. Virginia* insisted that the Supreme Court must protect state sovereignty by declaring unconstitutional overly broad federal laws.<sup>27</sup> John Bannister Gibson disqualified himself for a Jacksonian judicial appointment in *Eakin v. Raub*<sup>28</sup> by questioning the judicial power to declare unconstitutional the act of a coordinate branch of government.<sup>29</sup>

Jacksonian executives sought to ensure reliable justices who would break what they perceived as a Federalist stranglehold on the federal judiciary by appointing veterans of the Bank War with close personal and partisan connections to other influential Jacksonian leaders to the Supreme Court. Most Jacksonian judicial nominees first attracted public notice during the political struggles over the appropriate scope of federal power contested during the 1820s, 1830s and 1840s.<sup>30</sup> Roger Taney, Levi Woodbury, James Wayne, Philip Pendleton Barbour, John McKinley, Nathan Clifford, and John Catron played prominent roles in Jacksonian fights against the national bank and the American system. Taney and Woodbury were trusted members

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24. See *Merrill v. Sherburne*, 1 N.H. 199, 201-03, 210 (1818). See also 2 LEVI WOODBURY, WRITINGS OF LEVI WOODBURY: POLITICAL, JUDICIAL AND LITERARY 333-34, 344 (ed. Charles L. Woodbury, Little, Brown and Company: Boston, 1852); William D. Bader, Henry J. Abraham & James B. Staab, *The Jurisprudence of Levi Woodbury*, 18 VT. L. REV. 261, 274-75 (1994).

25. ALEXANDER A. LAWRENCE, JAMES MOORE WAYNE: SOUTHERN UNIONIST 26-27 (1943).

26. See Edmund C. Gass, *The Constitutional Opinions of Justice John Catron*, 8 E. TENN. HIST. SOC'Y'S PUBLICATIONS 54, 54-55, 58 (1936).

27. See WILLIAM S. BELKO, PHILIP PENDLETON BARBOUR IN JACKSONIAN AMERICA: AN OLD REPUBLICAN IN KING ANDREW'S COURT 79-82 (2016).

28. *Eakin v. Raub*, 12 Serg. & Rawle 330, 344-45 (Pa. 1825).

29. HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 78 (5th ed. 2008).

30. For the precise details of each justice's political activities before joining the bench, see *infra* Part II.

of Jackson's cabinet (McLean was appointed to the federal bench in part because on patronage matters he was not a trusted member of Jackson's cabinet<sup>31</sup>). Clifford was the attorney general under Polk. Daniel turned down offers to join both Van Buren's and Polk's cabinets, though he remained "one of [Van Buren's] most effective advisors."<sup>32</sup> Barbour was almost the Jacksonian nominee for vice president in 1832.<sup>33</sup> Woodbury, Wayne, Barbour, McKinley and Clifford were Jacksonian leaders in Congress. Nelson was a Jacksonian candidate for the Senate in New York. Baldwin, Taney, Catron, McKinley, and Daniel played major roles organizing Jacksonian forces in Pennsylvania, Maryland, Tennessee, Alabama and Virginia respectively.<sup>34</sup>

Supreme Court justices on the Taney Court did not abandon partisan activities once on the bench. Catron remained particularly active in political affairs. He helped manage James K. Polk's successful presidential campaign in 1844 and served as a trusted political advisor to Jackson, Polk and James Buchanan.<sup>35</sup> Taney corresponded regularly with Jacksonian presidents on the issues of the day and helped formulate Martin Van Buren's

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31. ABRAHAM, *supra* note 29, at 78; Swisher, ROGER TANEY, *supra* note 2, at 132-33.

32. ABRAHAM, *supra* note 29, at 84-85; ROGER TANEY, *supra* note 2, at 245.

33. BELKO, *supra* note 27, at 169-74; ROGER TANEY, *supra* note 2, at 433.

34. ABRAHAM, *supra* note 29, at 79 (noting "Baldwin had been instrumental in bringing Pennsylvania into the Jacksonian fold in the election of 1828"); *Id.* at 80 (noting Taney "served as chairman of the Jackson Central Committee of Maryland in 1828"); *Id.* at 83 (crediting Catron for having "created a favorable public climate on behalf of Jacksonian policies" in Tennessee); *Id.* at 84 ("McKinley had been one of Van Buren's key managers during the presidential campaign of 1836 and was personally responsible for capturing Alabama's electoral votes"); *Id.* (Daniel "had worked hard for Jackson in the abortive campaign of 1824 and in the ensuing campaigns as well").

35. Letter from John Catron to James Polk (Aug. 27, 1839), in 5 CORRESPONDENCE OF JAMES K. POLK, 1839-1841, 211 (Wayne Cutler ed., Vand. Univ. Press 1989); Letter from William Allen to James Polk (Oct. 20, 1839) in 5 CORRESPONDENCE OF JAMES K. POLK, 1839-1841, 266 (Wayne Cutler ed., Vand. Univ. Press 1989); Letter from John Catron to James Polk (Nov. 19, 1839) in 5 CORRESPONDENCE OF JAMES K. POLK, 1839-1841, 302 (Wayne Cutler ed., Vand. Univ. Press 1989). *See also* CHARLES GRIER SELLERS, JR., JAMES K. POLK: JACKSONIAN 1795-1843 322, 350-51, 384, 400, 454-55 (1957); SELLERS, CONTINENTALIST, *supra* note 23, at 5, 19-20; ROGER TANEY, *supra* note 2, at 438; Gass, *supra* note 26, at 54-55, 58, 71. Catron may have written the portion of President Buchanan's inaugural address that urged citizens to adhere to whatever ruling the Supreme Court made on the constitutional status of slavery in the territories. TANEY PERIOD, *supra* note 1, at 617, 621.

financial policies.<sup>36</sup> Taney did not hide his partisan sentiments when congratulating Polk on the Tennessee Jacksonian leader's election as president. The Chief Justice wrote,

I feel so truly rejoiced at your election as President of the U. States, that I must indulge myself in the pleasure of offering you my cordial congratulations. We have passed through no contest for the Presidency more important than the one just over; nor have I seen any one before in which so many dangerous influences were combined together as were united in support of Mr. Clay. Your triumphant success gives me increased confidence in the intelligence firmness & virtue of the American people; and in the safety and stability of the principles upon which our institutions are founded.<sup>37</sup>

Daniel continued to advise Democratic leaders and conservative Virginia politicians. He publicly supported Martin Van Buren's presidential efforts in 1844.<sup>38</sup> Taney, Grier and Clifford regularly informed Buchanan, his subordinates or political allies that the Supreme Court fully supported crucial administration policies.<sup>39</sup> Grier vigorously supported the Fugitive Slave Act of 1850, publicly attacking opponents of that measure.<sup>40</sup> Story drafted Whig campaign documents and legislative proposals, including the prototype for the Fugitive

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36. ROGER TANEY, *supra* note 2, at 339-42, 344-45. Taney served as Attorney General for almost a year after the Senate confirmed his nomination as Chief Justice. During this time, he advised Jackson on constitutional issues and helped write the president's farewell address. *Id.* at 326-27.

37. Letter from Roger B. Taney to James Polk in 9 CORRESPONDENCE OF JAMES K. POLK, SEPTEMBER – DECEMBER 1844, 338 (Wayne Cutler ed., Univ. of Tenn. Press 1993). See SWISHER, ROGER B. TANEY, *supra* note 3, at 435-36, 457-58, 554. Taney may have privately discussed the proper ruling in *Dred Scott* with Attorney General Caleb Cushing. Taney may have also privately discussed the proper ruling in *Dred Scott* with Attorney General Caleb Cushing. See TANEY PERIOD, *supra* note 1, at 620.

38. ROGER TANEY, *supra* note 2, at 434-45; JOHN P. FRANK, JUSTICE DANIEL DISSENTING: A BIOGRAPHY OF PETER V. DANIEL, 1784-1860 142 (1964). See also ROGER TANEY, *supra* note 2 at 437-38 (discussing Daniel to Van Buren, November 19, 1844); TANEY PERIOD, *supra* note 1, at 400.

39. See TANEY PERIOD, *supra* note 1, at 645 (quoting Taney to Franklin Pierce, August 29, 1857); *Id.* at 732-33 (quoting Robert Grier to J.S. Black, September 15, 1859 and Nathan Clifford to James Buchanan, July 19, 1859).

40. See ROGER TANEY, *supra* note 2, at 482. Grier publicly sided with Attorney General Jeremiah Black in his debate with Stephen Douglas over the proper interpretation of *Dred Scott*. *Id.*

Slave Act of 1850.<sup>41</sup> McLean used his judicial post as a springboard for his incessant campaigns for the presidency.<sup>42</sup> Samuel Nelson and John Campbell were seriously considered for the Democratic Party's 1860 presidential nomination.<sup>43</sup> Woodbury probably would have been the Democratic Party nominee in 1852 had he not suddenly died.<sup>44</sup> The Jay Court may have sworn off issuing official advisory opinions,<sup>45</sup> but that precedent did not inhibit Story, Daniel and Baldwin from responding to a Senate request to analyze a federal bankruptcy law<sup>46</sup> or Story from submitting to the full court his proposals for expanding federal admiralty jurisdiction.<sup>47</sup>

The Jacksonian tendency to prefer seasoned political veterans for judicial vacancies provided the same benefit to Jacksonians and contemporary scholars: known opinions on the constitutional questions of the day. Jacksonian Presidents could and contemporary scholars can learn what Jacksonian justices thought about the constitutional issues of the day by looking at their congressional speeches, writings when in the cabinet, partisan activities before joining the bench and partisan activities after their Supreme Court appointments. Jacksonian executives had the paper trail necessary to have a high degree of confidence that their judicial nominees were committed to Jacksonian understandings of national power and the judicial function. Contemporary scholars who read the primary and secondary sources can access judicial values directly when they construct various models of judicial decision making rather than use judicial votes to establish the judicial values that explain those

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41. R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 376-77* (1985).

42. For McLean's presidential ambitions, see Paul Brickner, *Reassessing Long-Accepted Truths About Justice John McLean: His Secret of Success*, 38 OHIO N. UNIV. L. REV. 193, 202-04 (2011); Paul Finkelman, *John McLean: Moderate Abolitionist and Supreme Court Politician*, 62 VAND. L. REV. 519, 520, 525-33 (2009).

43. Ronald Sklut, *John Archibald Campbell: A Study in Divided Loyalties*, 20 ALA. LAW. 233, 244 (1959).

44. TANEY PERIOD, *supra* note 1, at 526. For Woodbury's decade-long quest to become president, see Bader, Abraham, & Staab, *supra* note 24, at 265-66.

45. Letter from Justices of the Supreme Court to George Washington in 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, 755 (Maeva Marcus ed., Colum. Univ. Press 1998).

46. Taney, Thompson and McLean refrained. See TANEY PERIOD, *supra* note 1, at 432.

47. TANEY PERIOD, *supra* note 1, at 432.

votes or, almost as bad, use newspaper predictions of judicial votes to establish judicial values.<sup>48</sup> A judge, who when in Congress repeatedly declared that Congress had no power to incorporate a national bank, and when on the bench frequently engaged in political maneuvers to advance Jacksonian causes, was a judge a Jacksonian president could trust to vote the party line when there was a party line and a judge a twenty-first century law professor could predict in an appropriate case would reject *McCulloch's* holding that Congress had power to incorporate a national bank.

## II. THE JUDGES

Sixteen justices sat on the Supreme Court from 1837 until 1860.<sup>49</sup> Twelve were appointed by Jacksonian Democrats, although Henry Baldwin and John McLean were appointed by Andrew Jackson before sharp partisan divisions over national power began structuring constitutional politics. Two, Joseph Story and Smith Thomson, were appointed by National Republicans, most of whom by 1815 had come to accept the constitutionality of the national bank. Samuel Nelson was appointed by a nominal Whig, John Tyler, whose opinions on national power were those of an orthodox Jacksonian.<sup>50</sup> Benjamin Curtis was appointed by Millard Fillmore, an orthodox Whig.

The available sources are more helpful for identifying some judicial attitudes and some justices' attitudes on the political merits and constitutional status of American system proposals than others. For some justices, most notably Story and Roger Brooke Taney, the substantial primary and secondary sources provide insight into almost all details of their professional and private lives. For other justices, Peter Daniel and Curtis being

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48. Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559 (1989).

49. For the conventional history of appointments to the Taney Court, see ABRAHAM, *supra* note 29, at 77-93.

50. Frank Otto Gatell, *Samuel Nelson*, in 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS, 817, 819-22 (Leon Friedman & Fred L. Israel eds. 1969).

good examples,<sup>51</sup> the primary and secondary sources are more than sufficient to assess their attitudes on the political and constitutional merits of various American System proposals. For yet other justices, John Catron and John Archibald Campbell being good examples,<sup>52</sup> the primary and secondary sources, while providing much information, either do not address particular issues or are ambiguous. In the case of Robert Grier and Samuel Nelson, for whom few primary and secondary sources exist, little more than partisanship can be determined with any confidence.

Several rough categories of justices emerge when the justices on the Taney Court are rank ordered from the most opposed to American System proposals to the most supportive of such measures. Five justices—Daniel, Barbour, Woodbury, Clifford, and Taney—repeatedly condemned American system proposals on political and constitutional grounds. Two other justices, Catron and Wayne, repeatedly condemned American system proposals, condemned some on constitutional grounds, participated actively in the fight against the national bank, allied with politicians who declared the bank unconstitutional, but never made an absolutely clear declaration that the Constitution forbade Congress from incorporating a national bank, at least in easily accessible primary sources. McKinley and Campbell throughout most of their careers belonged to the first or second category of justices, but occasionally appeared open to some American system proposals. Robert Grier and Samuel Nelson were orthodox Jacksonians who left no paper trail adequate to determine their specific views on the national bank or related proposals. Smith Thompson left a meager paper trail, but one more suggestive of a Whig orientation toward the constitutional questions of the 1830s. Baldwin, McLean, Curtis and Story were orthodox Whigs.

The rank ordering below is more impressionistic than scientific. The brief discussions use no rigid formula for determining the strength and scope of political and constitutional objections to American System proposals. Justices who declared the bank unconstitutional rank as more opposed than justices who

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51. *See infra* notes 58-61, 152-60. The other examples are Philip Barbour, Levi Woodbury, Nathan Clifford and John McLean. *See also infra* notes 62-81, 161-68.

52. *See infra* notes 87-91, 125-34. The other examples are James Wayne, John McKinley, Smith Thompson and Henry Baldwin. *See also infra* notes 92-124, 140-51.

merely condemned the bank in powerful terms, even though no good reason exists for thinking that, say, Wayne was less opposed to the bank than Taney on either political or constitutional grounds. The rank ordering of justices in the same category is for all practical purposes random. Whether Grier or Nelson was the more orthodox Jacksonian is impossible to determine, as is determining whether Daniel or Barbour was the stricter constructionist.

The following rank ordering of justices by how narrowly they interpreted the constitutional powers of the national government is also unscientific because attitudes are determined by off the bench behavior. The discussion of Levi Woodbury concludes he was opposed to the American System because Woodbury gave numerous speeches that condemned American system proposals, he consistently voted against American System proposals in Congress, he helped draft Jackson's bank veto message, he was a leading candidate for the Democratic presidential nomination in 1852, his contemporaries regarded Woodbury as a militant opponent of the American system and Woodbury's biographers after extensively researching the primary documents concluded that Woodbury was an orthodox Jacksonian.<sup>53</sup> The more scientific approach in orthodox political science determines judicial attitudes by judicial votes or newspaper articles predicting judicial votes.<sup>54</sup> Jeffery Segal and Harold Spaeth scientifically conclude that Levi Woodbury was "staunchly Hamiltonian" because Woodbury frequently voted against state power in contract clause cases.<sup>55</sup> The value of the unscientific approach taken in this paper is for readers to determine.

**Peter Daniel.** Justice Peter Daniel was probably the most militant Jacksonian on the Taney Court. Daniel, "a major Jackson-Van Buren lieutenant in Virginia" before joining the federal bench,<sup>56</sup> opposed virtually every proposal in the

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53. Bader, Abraham, & Staab, *supra* note 24, at 281.

54. See Segal & Cover, *supra* note 48, at 559; JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED*, 320-21 (2002).

55. HAROLD J. SPAETH & JEFFREY A. SEGAL, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 82 (1993). For Woodbury's tendency to reject Jacksonian orthodoxy on contract clause cases, see *Planter's Bank v. Sharp*, 47 U.S. 301 (1848); Bader, Abraham & Staab, *supra* note 24, at 289-305.

56. FRANK, *supra* note 38, at 77.

American system and did so on constitutional grounds. With reference to an unknown political actor, Daniel in 1840 declared, “[h]e has professed a belief in the **constitutionality** of a **national bank**, and that is an objection which with me would overrule any and every recommendation which could be urged for him or for any other person.”<sup>57</sup> Daniel in 1843 informed Martin Van Buren that “[s]ince a protective tariff necessarily aided selective industries, it was a discrimination and hence unconstitutional.”<sup>58</sup> When President Polk vetoed on constitutional grounds an internal improvements bill, he received a congratulatory note from Daniel, urging him to stand firm against any future congressional legislation of that ilk.<sup>59</sup>

**Philip Pendleton Barbour.** Justice Barbour was as militant an opponent of federal power as Justice Daniel. The essay on Barbour in the Biographical Encyclopedia of Supreme Court Justices describes him as being “as representative a Virginia strict constructionist as can be found.”<sup>60</sup> Barbour’s recent biographer details “his constant and determined struggle to stem the tide of Clay’s so-called American System—a protective tariff, federally sponsored internal improvements, and a national bank.”<sup>61</sup> When in Congress from 1814 to 1824 and again from 1827 to 1830, Barbour consistently opposed legislation broadly interpreting national power.<sup>62</sup> He fought “a relentless war . . . against the tariff and internal improvements” during his first stint in Congress and, on his return to the national legislature, “fired the first salvo of Jackson’s forthcoming war against the Bank of the United States.”<sup>63</sup> Barbour on the floor of Congress repeatedly declared

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57. FRANK, *supra* note 38, at 111, 113 (quoting Peter Daniel to William Brent, February 29, 1840). TANEY PERIOD, *supra* note 1, at 67; ROGER TANEY, *supra* note 2, at 428-29.

58. FRANK, *supra* note 38, at 164-65 (quoting Peter Daniel to Martin Van Buren, July 6, 1843).

59. TANEY PERIOD, *supra* note 1, at 400 (quoting Peter Daniel to James Polk, August 5, 1846). See FRANK, *supra* note 38, at 315 n.3; *id.* at 213 (“Daniel’s detestation of internal improvements financed by the Federal government was as great as his hatred of banks, and he could as easily claim that they were unconstitutional”).

60. FRANK OTTO GATELL, *Philip Pendleton Barbour*, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS, 717 (Leon Friedman & Fred L. Israel eds. 1969).

61. BELKO, *supra* note 27, at 3.

62. DANIEL FELLER, THE PUBLIC LANDS IN JACKSONIAN POLITICS 50 (1984); TANEY PERIOD, *supra* note 1, at 56.

63. BELKO, *supra* note 27, at 3.

internal improvements, protective tariffs, national bankruptcy laws and the national bank unconstitutional.<sup>64</sup> When challenging these proposals, he championed an interpretation of national power even narrower than what Jackson outlined in his veto messages. Barbour insisted that “the framers of the Constitution meant to guard as carefully against the latitudinous construction which might be given to indefinite powers” and maintained that all federal measures had to have an “immediate, direct, and appropriate relation to the granted power.”<sup>65</sup> When defending Jackson’s veto of the Maysville road bill, Barbour asserted that his only quarrel with administration policy was Jackson’s claim that the federal government could constitutionally build some roads.<sup>66</sup> “We were not authorized to construct either post roads or military roads, or dig canals,” he at another time declared, “either by any power expressly granted or properly to be inferred.”<sup>67</sup> Barbour frequently challenged the Marshallian pretensions of such cases as *McCulloch*. He informed fellow representations that the Marshall Court had “enlarged the sphere of its action . . . to an indefinite extent beyond what was in the contemplation of those who formed it.”<sup>68</sup>

**Levi Woodbury.** Levi Woodbury was the leading New England opponent of the American System and the interpretation of federal powers that justified constitutional power to incorporate a national bank. His biographer describes Woodbury

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64. See 4 REG. DEB. 1644-645 (1828); 41 ANNALS OF CONG., 1<sup>st</sup> Sess. 1679, 1918-19 (1823); 38 ANNALS OF CONG., 1<sup>st</sup> Sess. 1060-62 (1821); 35 ANNALS OF CONG., 1<sup>st</sup> Sess. 1221, 2054-56 (1819); 30 ANNALS OF CONG., 2<sup>nd</sup> Sess. 893-99 (1816). For Barbour’s political and constitutional opposition to federally sponsored internal improvements, see 6 REG. DEB. 1143-44, 646-54 (1830); 5 REG. DEB. 251-54 (1829); 4 REG. DEB. 1513 (1827); 41 ANNALS OF CONG., 1<sup>st</sup> Sess. 1005-13 (1823); 31 ANNALS OF CONG., 2<sup>nd</sup> Sess. 1159-64 (1817); 30 ANNALS OF CONG., 2<sup>nd</sup> Sess. 893-98 (1816); BELKO, *supra* note 27, at 59-63, 113, 132, 167-68. For Barbour’s political and constitutional opposition to federal bankruptcy laws, see 38 ANNALS OF CONG., 1<sup>st</sup> Sess. 1060-72 (1821); 35 ANNALS OF CONG., 1<sup>st</sup> Sess. 2054-55 (1819). For Barbour’s political and constitutional opposition to the incorporation of the national bank, see BELKO, *supra* note 27, at 135-38. See also GATELL, *Phillip Pendleton Barbour*, *supra* note 60, at 719, 724-25; P.P. Cynn, *Philip P. Barbour*, THE JOHN P. BRANCH HISTORICAL PAPERS OF RANDOLPH-MACON COLLEGE, 67,70, 72, 75 (Richmond, E. Waddey Co. 1913); ROGER TANEY, *supra* note 2, at 172 (noting that in Congress, Barbour “initiated one of the early skirmishes” in the Bank War).

65. 31 ANNALS OF CONG., 2<sup>nd</sup> Sess. 627, 1156 (1817) (“natural, direct, and obvious relation”). See BELKO, *supra* note 27, at 73-74.

66. 6 REG. DEB. 1143-44 (1830).

67. 31 ANNALS OF CONG., 1<sup>st</sup> Sess. 1152 (1817).

68. 4 REG. DEB. 1645 (1827); see BELKO, *supra* note 27, at 84.

as “a strict constructionist of the Constitution” who “deplored” *McCulloch v. Maryland*.<sup>69</sup> Woodbury was a prominent Jacksonian leader in the House of Representatives and then in the Senate, where he repeatedly condemned both the national bank and internal improvements on constitutional grounds.<sup>70</sup> “[A] national banking corporation,” he declared, “is at all times, and in all forms, unconstitutional.”<sup>71</sup> Another speech in Congress asserted, “the State Rights man or Democrat of 1798, who can swallow this new fiscal Bank as constitutional, could swallow both Jonah and the whale as easy as the whale did Jonah alone.”<sup>72</sup> Woodbury when in Jackson’s cabinet supported the presidential decision to veto the bill rechartering the national bank and helped write the veto message declaring that institution unconstitutional.<sup>73</sup>

**Nathan Clifford.** Nathan Clifford was a younger associate and near political clone of Woodbury, who Clifford regarded as one of “the great men of our country.”<sup>74</sup> Both Woodbury and Clifford were New England Jacksonians who had extensive political careers before joining the bench and were committed throughout their political life to limiting national power.<sup>75</sup> Clifford first came to national attention as the author of a state resolution against reincorporating the national bank.<sup>76</sup> His speeches in Congress repeated that position. He was “opposed to a National Bank,” Clifford declared in one congressional speech,

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69. Philip D. Wheaton, *Levi Woodbury: Jacksonian Financier* (1955) (unpublished Ph.D. thesis, University of Maryland). See Bader, *Abraham & Staab*, *supra* note 24, at 261, 261 (“Woodbury’s *raison d’être* on the Court was states’ rights, as protected by a strict construction of constitutional powers”).

70. See CONG. GLOBE, 27th Cong., 1st Sess. 178, 23, 192, 260, 380 (1841); 6 REG. DEB. 179-83 (1830). For a brief summary of Woodbury’s political career, see Bader, *Abraham & Staab*, *supra* note 24, at 265-66.

71. CONG. GLOBE, 27th Cong., 1st Sess. 180 (1841).

72. CONG. GLOBE, 27th Cong., 1st Sess. App. 41 (1841).

73. For Woodbury’s role in the bank veto, see Wheaton, *supra* note 69, at 42-45; ROGER TANEY, *supra* note 2, at 194; TANEY PERIOD, *supra* note 1, at 101. For Woodbury’s opposition to the national bank while in Jackson’s cabinet, see Bader, *Abraham & Staab*, *supra* note 24, at 283-84.

74. PHILIP GREELY CLIFFORD, NATHAN CLIFFORD, DEMOCRAT 49-50 (G.P. Putnam’s Sons: New York 1922).

75. *Id.* at 13 (“ardent Jackson supporter”); Walter Chandler, *Nathan Clifford: A Triumph of Untiring Effort*, 11 AM. BAR ASS’N J. 57, 57 (1925).

76. CONG. GLOBE, 23d Cong., 1st Sess. 148 (1833).

“believing it to be both unconstitutional and inexpedient.”<sup>77</sup> Clifford in other legislative speeches asserted that internal improvements, protective tariffs and efforts to give the states the proceeds from the sale of public lands were unconstitutional.<sup>78</sup> While a member of Polk’s cabinet, he helped write presidential veto messages declaring unconstitutional internal improvements bills.<sup>79</sup>

**Roger Brooke Taney.** Roger Brooke Taney may have been the most orthodox of the Jacksonians on the Taney Court. Daniel Feller notes that Taney “stood closer to the ideological heart of Jacksonianism than anyone save Jackson himself.”<sup>80</sup> Taney helped led the fight against the national bank in Jackson’s cabinet. Taney was the first member of the cabinet to claim the bank was unconstitutional, he wrote a memo to Jackson urging him to veto on numerous constitutional grounds the bill rechartering the bank, he helped draft the passages in Jackson’s veto message that declared the bank neither constitutionally necessary nor constitutionally proper and he was the only member of Jackson’s cabinet who consistently supported Jackson’s effort to remove federal deposits from the national bank.<sup>81</sup> “The overthrow of **The Monster**,” Taney later wrote, “was the greatest of all the great public services of Genl. Jackson.”<sup>82</sup> Taney opposed on constitutional grounds other proposed Whig exercises of national power, most notably bills distributing surplus federal revenue to the states. He informed President Jackson, “the revenue which this government is authorized to raise was intended to be used for national purposes only, and whenever it shall exceed what may

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77. CONG. GLOBE, 26th Cong., 1st Sess. App. 475 (1840).

78. See CONG. GLOBE, 27th Cong., 1st Sess. 92, 96, 127-30 (1841); CONG. GLOBE, 26th Cong., 1st Sess. App. 475 (1840). See also CLIFFORD, *supra* note 74, at 109, 115-17, 126-128.

79. PAUL H. BERGERON, THE PRESIDENCY OF JAMES K. POLK 197 (University Press of Kansas 1987).

80. DANIEL FELLER, THE JACKSONIAN PROMISE, AMERICA, 1815-1840 176 (The John Hopkins University Press 1995).

81. For Taney’s participation in the Bank Wars, see ROGER TANEY, *supra* note 2, at 176-77, 180-81, 189-95, 218-19, 228, 230-32, 258, 333-334. See also CHARLES WARREN, THE SUPREME COURT IN THE UNITED STATES HISTORY 100-05 (Little, Brown, and Company 1918); TANEY PERIOD, *supra* note 1, at 20.

82. TANEY PERIOD, *supra* note 2, at 127 (quoting Taney to Ellis Lewis, October 25, 1845). Taney let Jackson know that he approved when President John Tyler vetoed a national bank bill. ROGER TANEY, *supra* note 2, at 345 (quoting Taney to Jackson, September 30, 1841).

be usefully and constitutionally employed in the exercise of its legitimate duties it is bound to reduce it.”<sup>83</sup> Taney broke from more southern justices, Daniel and Barbour in particular, only in his support for protective tariffs.<sup>84</sup>

**John Catron.** John Catron was a prominent political leader who did not cease his Jacksonian political maneuvers when on the bench. He was a “longtime personal and political friend” of Andrew Jackson and a self-described “enem[y] of the U.S. Bank.”<sup>85</sup> During the bank wars, Catron organized support for Jackson administration policy and wrote several articles for the Knoxville *Examiner* condemning that institution.<sup>86</sup> Immediately before being appointed to the Supreme Court, Catron urged Jackson not to be distracted from the “battle against thirty-five millions of money [the Bank of the United States], against uncompromising nullification, against a scheme of protection, and of its correlative, waste by internal improvements.”<sup>87</sup> Catron retained his Jacksonian connections while on the federal bench. He corresponded regularly with Presidents Jackson, Polk and Buchanan. He managed Martin Van Buren’s presidential campaign in Tennessee and was one of Polk’s main campaign advisors.<sup>88</sup> Austin Allen, the author of a rare analysis of Catron’s

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83. ROGER TANEY, *supra* note 2, at 329-331. Taney endorsed Jackson’s decision to sign a distribution bill that merely deposited federal surpluses with state governments. He made clear, however, that the federal government could not give such moneys to the states. He told Jackson that if Jacksonians in the federal government did “not bring [the deposited funds] back from the states, they will be compelled to sanction a principle, which is directly at war with that construction of the federal Constitution for which they have been so long contending.” *Id.* at 329-331.

84. ROGER TANEY, *supra* note 2, at 155.

85. ABRAHAM, *supra* note 29, at 84; Walter Chandler, The Centenary of Associate Justice John Catron of the United States Supreme Court (June 11, 1937) (quoting John Catron to Andrew Jackson, February 5, 1838). See JOSHUA W. CALDWELL, SKETCHES OF THE BENCH AND BAR OF TENNESSEE 87 (1898). (“[f]or many years [Catron] had been one of Jackson’s most ardent admirers and most efficient supporters”); GATELL, *Phillip Pendleton Barbour*, *supra* note 60, at 738, 748-49 (describing Catron as “one of the leading Jackson men”).

86. TIMOTHY S. HUEBNER, THE SOUTHERN JUDICIAL TRADITION STATES JUDGES AND SECTIONAL DISTINCTIVENESS, 1790-1890 51-52 (1999); GATELL, *Phillip Pendleton Barbour*, *supra* note 60, at 739-40; Chandler, *supra* note 85, at 15; see DONALD MALCOM ROPER, MR. JUSTICE THOMPSON AND THE CONSTITUTION 108 (1987); SELLERS, JACKSONIAN, *supra* note 35, at 174-75; Gass, *supra* note 26, at 54-55; TANEY PERIOD, *supra* note 1, at 60, 113.

87. GATELL, *Phillip Pendleton Barbour*, *supra* note 60, at 743, 745.

88. GATELL, *Phillip Pendleton Barbour*, *supra* note 60, at 743, 745; ROPER, *supra* note 86, at 108.

judicial opinions concludes that the Tennessee jurist was devoted to “Jacksonian jurisprudence” and “articulat[ed] a set of jurisprudential assumptions quite similar to Taney’s . . . .”<sup>89</sup> Catron is ranked below Taney only because, although he devoted his political life to orthodox Jacksonian causes and condemned American system proposals in strong terms, no easily accessible surviving records exists of Catron declaring specifically that Congress had no constitutional power to incorporate a national bank or finance internal improvements in the states.

**James Wayne.** Justice Wayne’s political opinions are easy to discern though they were less often expressed in constitutional terms than were those articulated by Barbour, Daniel and Woodbury. While a Jacksonian member of Congress representing Georgia during the 1820s, Wayne led the fight against Whig efforts to recharter the national bank. Thomas Hart Benton, the Jacksonian leader of the Missouri delegation, regarded Wayne as “among the ten zealous, able, determined” members of the House who support Jackson administration banking policies.<sup>90</sup> Wayne praised Jackson’s veto of the Maysville Road Bill and declared that Congress had no constitutional power to pass protective tariffs.<sup>91</sup> Wayne’s biographer, Alexander Lawrence, concludes that “Wayne had no trouble in subscribing to his party’s platform, which was distinctly Jacksonian in tone. It opposed the Bank of the United States, the principle of the protective tariff, and Internal Improvements by the general government.”<sup>92</sup> Lawrence is confident that Wayne would have declared internal improvements unconstitutional had a proper case come before the court.<sup>93</sup> Although Wayne explicitly declared unconstitutional protective tariffs and federally sponsored internal improvements, his

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89. Austin Allen, *Jacksonian Jurisprudence and the Obscurity of Justice John Catron*, 62 VAND. L. REV. 491, 493, 517 (2009). See HUEBNER, *supra* note 86, at 41 (“thorough[ly] [devoted] to Jacksonian principles”).

90. ALEXANDER A. LAWRENCE, JAMES MOORE WAYNE: SOUTHERN UNIONIST 71-74 (1943) (quoting Benton). See 10 REG. DEB. 350 (1834); 9 REG. DEB. 2132 (1832); 8 REG. DEB. 351-353 (1831); GATELL, *Phillip Pendleton Barbour*, *supra* note 60, at 604; TANEY PERIOD, *supra* note 1, at 25-26, 54.

91. 8 REG. DEB. 390 (1831); 6 REG. DEB. 1147-48 (1830); see also LAWRENCE, *supra* note 90, at 40, 101-02; 10 REG. DEB. 461 (1834).

92. LAWRENCE, *supra* note 90, at 75; GATELL, *Phillip Pendleton Barbour*, *supra* note 60, at 604.

93. LAWRENCE, *supra* note 90, at 102.

congressional speeches condemning the Bank of the United States did not as explicitly address constitutional issues. Still, Wayne interpreted federal powers quite narrowly. His speeches called for “a limitation of the action of the Government to the text of the constitution” and rejected “the employment of all means, which are not essential to the execution of a substantively granted power.”<sup>94</sup> These statements are inconsistent with central planks of *McCulloch* and Marshallian jurisprudence. Wayne in 1854 claimed he gave national powers “a rational and limited interpretation” as opposed to those “whose tendency has been to give [the national government] legislative ability in cases where the power has not been delegated to the United States by the Constitution, or when powers have been asserted by the Legislation of this United States, which were reserved to the States respectively or the people.”<sup>95</sup>

Wayne exhibited stronger nationalist strains when on the bench than such stalwart state rights activists as Daniel, Barbour and Taney. He was more inclined to expand federal jurisdiction and insist on the exclusivity of the federal commerce power than some Jacksonian judicial appointees on the Taney Court.<sup>96</sup> Curtis on the basis of these votes declared that Wayne and McLean were the “most high-toned Federalists on the bench.”<sup>97</sup> Wayne exhibited similar nationalist strains in Congress. He supported all military appropriations, opposed nullification and was the only member of the Georgia congressional delegation who vote for Jackson’s Force Bill, a measure that substantially increased the scope of federal habeas corpus jurisdiction.<sup>98</sup>

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94. 6 REG. DEB. 701 (1830); James M. Wayne, Address, Thirty-Seventh Annual Report of the American Colonization Society 40 (C. Alexander, Printer: Washington, DC, 1854); see LAWRENCE, *supra* note 90, at 40, 111.

95. Wayne, *supra* note 94, at 41.

96. See LAWRENCE, *supra* note 90, at viii (describing Wayne as “a Georgian who made love of the Federal Union the governing principle of his political and judicial career”).

97. GEORGE TICKNOR CURTIS, 1 MEMOIR OF BENJAMIN ROBBINS CURTIS, L.L.D. 168 (Benjamin R. Curtis ed., Little, Brown, and Company 1879) (quoting Benjamin Robbins Curtis to Mr. Ticknor, February 29, 1852). See Lawrence, *supra* note 90, at 93-94; SPAETH & SEGAL, *supra* note 55, at 82 (describing Wayne as “staunchly Hamiltonian”).

98. LAWRENCE, *supra* note 90, at 55, 63-65; see FRANK OTTO GATELL, *James M. Wayne, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS*, 603-04 (Leon Friedman & Fred L Israel eds. 1969). Wayne also strongly supported Jacksonian efforts to remove the Cherokees from Georgia. See LAWRENCE, *supra* note 90, at 62.

These nationalistic sentiments are consistent with important strains of Jacksonian Democracy. Jacksonians supported expanding the federal court system once the federal courts were staffed with Jacksonians likely to be more pro-slavery than state court justices in free jurisdictions.<sup>99</sup> Jackson vehemently opposed nullification and appointed to the Supreme Court only politicians who supported his position in the Nullification Crisis.<sup>100</sup> Jacksonians as a whole had no consensual understanding of whether federal commerce power was exclusive. They were united on a narrow interpretation of federal power, but not on whether states had concurrent power on those matters on which the Constitution authorized federal regulation.<sup>101</sup> Wayne articulated the more nationalistic strand of Jacksonianism that combined strict construction of national power with sharp limits on state power to regulate the limited subjects constitutionally entrusted to the federal government. Wayne's opinions in slavery cases illustrate this understanding of national power and federalism. He agreed with Story in *Prigg v. Pennsylvania* that federal power over the rendition process was exclusive.<sup>102</sup> He agreed with Taney in *Dred Scott v. Sandford* that Congress had no power to ban slavery in American territories.<sup>103</sup> Curtis may have initially associated Wayne with McLean's Whiggish nationalism but McLean who was more familiar with Wayne knew otherwise. During the early 1840s, McLean complained that Wayne, Catron, Daniel and Thompson had formed a judicial alliance against the proto-Whig nationalists on the Court.<sup>104</sup>

**John McKinley.** Justice John McKinley was another of the many Jacksonian judicial appointees who had previously distinguished themselves in congressional fights against the national bank. McKinley began his career as a Federalist and

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99. See Mark A. Graber, *James Buchanan as Savior? Judicial Power, Political Fragmentation, and the Failed 1831 Repeal of Section 25*, 88 OR. L. REV. 95, 126-32 (2009).

100. See ABRAHAM, *supra* note 29, at 80, 83-84.

101. See, e.g., *The Passenger Cases*, 48 U.S. 283 (1849).

102. *Prigg v. Pennsylvania*, 41 U.S. 539, 636 (1842) (Wayne, J., concurring).

103. *Dred Scott v. Sandford*, 60 U.S. 393, 454 (1856) (Wayne, J., concurring). Wayne was the moving force behind the judicial decision to declare that Congress could not ban slavery in the territories rather than, as the Taney Court had originally decided, to resolve *Dred Scott* strictly on conflict of laws principles. See LAWRENCE, *supra* note 90, at 147-49; CURTIS, I CURTIS, *supra* note 97, at 206-07, 234-36; ROGER TANEY, *supra* note 2, at 487-98.

104. See FRANK, *supra* note 38, at 171-72.

National Republican,<sup>105</sup> but joined the Jacksonian forces by 1826.<sup>106</sup> “Once he converted to Jacksonianism,” his biographer declares, McKinley “remained true to its basic tenets, both on and off the bench, until his death.”<sup>107</sup> Some contemporaries questioned whether his initial conversion was sincere,<sup>108</sup> but by the time Jackson assumed the presidency McKinley had established his strict constructionist bona fides. McKinley was the acknowledged leader of Jacksonian forces in Alabama and a close associate of James K. Polk, then the Jacksonian speaker of the House.<sup>109</sup> He actively participated in the fight against the national bank in the Alabama legislature, where he wrote a petition declaring the bank “inconsistent with our free institutions,” and “dangerous to the peace and safety of the union.” McKinley in Congress strongly supported Jackson’s effort to remove government deposits from Biddle’s institution.<sup>110</sup> McKinley was one of five representatives selected when Jacksonians in the House of Representatives sought to pack the Ways and Means committee with opponents of the national bank.<sup>111</sup> Without mentioning *McCulloch* by name, McKinley condemned Marshall Court decisions by which “the powers of the Federal Government are, by mere construction, made to overshadow State powers, and render them almost contemptible.”<sup>112</sup> He insisted that the national government exercise only those powers “expressly granted by the Constitution.”<sup>113</sup>

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105. See STEVEN P. BROWN, JOHN MCKINLEY AND THE ANTEBELLUM SUPREME COURT: CIRCUIT RIDING IN THE OLD SOUTHWEST 20, 27 (2012).

106. *Id.* at 44, 79; FRANK OTTO GATELL, *John McKinley*, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS, 769-71 (Leon Friedman & Fred L Israel eds. 1969); Jimmie Hicks, *Associate Justice John McKinley, A Sketch*, 18 ALA. REV. 227, 238-31 (1965).

107. BROWN, *supra* note 105, at 6.

108. See John M. Martin, *John McKinley: Jacksonian Phase*, 28 ALA. HIST. Q. 7, 7 (1966).

109. BROWN, *supra* note 105, at 103; SELLERS, JACKSONIAN, *supra* note 35, at 213.

110. Martin, *supra* note 108, at 27; GATELL, *John McKinley*, *supra* note 106, at 772-73.

111. BROWN, *supra* note 105, at 97.

112. Martin, *supra* note 108, at 9.

113. Martin, *supra* note 108, at 21 (quoting McKinley); GATELL, *John McKinley*, *supra* note 106, at 770. George Whatley claims that McKinley endorsed “[t]he compact theory of government” as was “a true disciple of Thomas Jefferson wrote in the Kentucky Resolution, and of the basic political philosophies of John C. Calhoun.” George C. Whatley,

McKinley's record on internal improvements and other exercises of federal power is less clear than his vigorous opposition to the national bank. McKinley occasionally spoke out against federal internal improvements programs, once describing the system as "unjust and partial."<sup>114</sup> Throughout his career, McKinley insisted that the federal government turn over control of public lands not being used for forts upon statehood. He maintained, "the United States cannot hold land in any State of the Union, except for the purposes enumerated in the Constitution."<sup>115</sup> McKinley at other times supported American system proposals. McKinley voted for the Maysville Road Bill, which ran through his home town.<sup>116</sup> He vigorously urged the federal government to give the proceeds of the sale of public lands to the states.<sup>117</sup>

These apparent heresies justify ranking McKinley slightly below Catron and Wayne, but they are not suggestive of substantial deviation from Jacksonian constitutional principles. Many Jacksonians during the early 1830s approved some internal improvement projects. Such stalwart Jacksonians as Thomas Hart Benton voted with McKinley for the Maysville Road Bill.<sup>118</sup> Jackson approved several internal improvements projects.<sup>119</sup> Jacksonians united against almost all internal improvements projects only over time. McKinley was a faithful Jacksonian during the 1830s because he rejected national power on all matters that the Jacksonian catechism at that particular time mandated rejecting national power. Contemporaries regarded him as an "orthodox, administration Democrat."<sup>120</sup> Neither Jackson nor Polk doubted McKinley's credentials as a strict constructionist.<sup>121</sup> In 1836, the year before his judicial

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*Justice John McKinley*, 4 BULLETIN OF THE NORTH ALABAMA HISTORICAL ASSOCIATION 15, 17-18 (1959).

114. CONG. GLOBE., 23rd Cong. 1st Sess., 429 (1834).

115. 4 REG. DEB. 508 (1928); see BROWN, *supra* note 105, at 84.

116. BROWN, *supra* note 105, at 85.

117. 6 REG. DEB. 302, 340 (1830); 4 REG. DEB. 453-54 (1828); see Hicks, *supra* note 106, at 229; GATELL, *John McKinley*, *supra* note 106, at 772; BROWN, *supra* note 105, at 85. McKinley insisted he supported the Maysville road under instructions from the Alabama legislature. Martin, *supra* note 108, at 17-18, 21.

118. See DONALD B. COLE, THE PRESIDENCY OF ANDREW JACKSON 64 (1993)

119. See *id.* at 66, 108-09.

120. GATELL, *John McKinley*, *supra* note 106, at 773.

121. See ABRAHAM, *supra* note 29, at 84; BROWN, *supra* note 105, at 106.

appointment, McKinley successfully campaigned for the Senate on a platform of constitutional opposition to the national bank, protective tariffs and internal improvements.<sup>122</sup>

**John Archibald Campbell.** Justice John Campbell was a public opponent of the national bank, internal improvements and related exercises of national power, but he may have had some private Whig sympathies. During the 1830s, Campbell identified with the Jacksonian coalition in Alabama that supported Jackson's veto of the Maysville road and his veto of the bill rechartering the national bank.<sup>123</sup> Robert Saunders's recent biography of Campbell maintains that Campbell early Democratic allegiance was a facade made necessary by Jackson's overwhelming popularity. The future justice during the bank wars, Saunders insists, secretly maintained an "all-but-Whig ideology."<sup>124</sup> Campbell's behavior during the 1836 Alabama Senate election provides some evidence that his public persona and private sentiments diverged. While publicly endorsing John McKinley, the Jacksonian candidate, Campbell informed intimates that he "infinitely prefer[ed] the alternative," a candidate on record as supporting "the constitutionality of tariff laws, of internal improvements, and [of] the incorporation of a national bank."<sup>125</sup> Campbell quickly added, however, that his preferred candidate, Arthur Francis Hopkins, "disclaims all idea of aiding in any & abhors the policy of each."<sup>126</sup> Moreover, his criticisms of John McKinley were personal rather than political. While Saunders interprets these sentiments as demonstrating that Campbell thought American System proposals constitutional,<sup>127</sup> the better interpretation may be that Campbell was willing to vote for a candidate who thought American System proposals impolitic only rather than a candidate he regarded as a demagogue.

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122. See ROBERT SAUNDERS, JR., *JOHN ARCHIBALD CAMPBELL: SOUTHERN MODERATE, 1811-1889*, at 31 (1997).

123. See Christine Jordan, *The Last of the Jacksonians*, in SUPREME COURT HISTORICAL SOCIETY, YEARBOOK 1980, at 80 (1980); SAUNDERS, *supra* note 122, at 30.

124. SAUNDERS, *supra* note 122, at 55-56; see also *id.* at 39, 69.

125. SAUNDERS, *supra* note 122, at 31.

126. Campbell to Henry Goldwithe, November 29, 1836, Campbell Family Papers, #135, Fol. 3, Southern Historical Collection, Library of North Carolina at Chapel Hill; SAUNDERS, *supra* note 122, at 31.

127. SAUNDERS, *supra* note 122, at 31.

Campbell's beliefs about the political and constitutional merits of the national bank and related measures are as uncertain at the time he was appointed to the Supreme Court. Saunders claims that Campbell by 1850 had "reassessed what he perceived as the fundamental meaning of the Constitution"<sup>128</sup> and had developed an "increasingly inflexible states' rights philosophy."<sup>129</sup> The *New York Tribune* when Campbell was nominated declared him "about the ablest man connected with the ultra State-Rights organization . . . filled with all the dogmas and mad metaphysics of Mr. Calhoun."<sup>130</sup> Still, Campbell's precise opinions on federal power in matter unrelated to slavery cannot be identified with any degree of certainty at the time he was nominated to the federal bench. Campbell's nomination was strongly supported by state's rights advocates, but whether that support transcended slavery issues is unclear. He made few easily accessible declarations on American system proposals and those he made are ambiguous. Campbell when opposing secession pointed out that federal law "has been purged of every law of which the Southern States [have] complained: the Tariff Act for protection; the Act for the Bank of the United States . . ."<sup>131</sup> This passage appears to indicate that Campbell was opposed to federal power to incorporate a bank and impose protective tariffs, but Campbell nowhere specifically indicates whether he shared the southern aversion to these measures.<sup>132</sup>

**Robert Grier.** Justice Grier's opinions on the questions of national power that arose in Jacksonian America are hard to discern. Unlike most other Jacksonian jurists, he was not conspicuously involved in public affairs before joining the bench. The sparse secondary literature indicates that Grier was a life-long Democrat who owed his appointments to the state and federal bench to his partisan affiliation. The Governor of

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128. SAUNDERS, *supra* note 122, at 83.

129. SAUNDERS, *supra* note 122, at 115; *see also id.* at 68, 87, 93.

130. CHARLES WARREN, 2 THE SUPREME COURT IN UNITED STATES HISTORY 246 (Little, Brown and Company 1926).

131. SAUNDERS, *supra* note 122, at 138 (quoting Campbell to Daniel Chandler, November 12, 1860).

132. Campbell's postwar statements are as ambiguous on national power. He called for a strict construction of federal power but did so when objecting to Reconstruction legislation mandating racial equality rather than federal laws regulating commercial life in the states. *See id.* at 226-27.

Pennsylvania, when recommending Grier to President Polk, claimed that Grier was “a sincere, and steadfast advocate” of “[t]he rights guaranteed by the Constitution to the states—the republican doctrine of state rights—opposition to a national bank—all the cardinal principles of the democratic party.”<sup>133</sup> Several commentaries on his appointment suggest that Grier’s views were “orthodox” and that his appointment was favored by the Calhoun wing of the Democratic party.<sup>134</sup> Unfortunately, no easily accessible record exists of a speech Grier gave or a letter he wrote confirming his opposition to the national bank and commitment to other planks of the Jacksonian constitutional vision.

**Samuel Nelson.** Justice Nelson left almost as tiny a paper trail as Robert Grier. He was deeply involved in both local and national Democratic politics. Nelson had close affiliations with the Van Buren wing of the New York Democrats, was their unsuccessful nominee for the Senate in 1844 and was apparently given some consideration for the Democratic presidential nomination.<sup>135</sup> Edward Countryman’s biographical essay asserts that Nelson while on the bench maintained “a deep interest in public affairs and entertained decided opinions upon all questions of National policy,” but Countryman does not reveal what those opinions were.<sup>136</sup> Given Nelson’s involvement with the Van Buren wing of the Democratic party and his nomination for Senate in 1844, a strong inference can be made that he thought the national bank and most internal improvements

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133. TANEY PERIOD, *supra* note 1, at 232.

134. See Daniel J. Curran, *Polk, Politics, and Patronage: The Rejection of George W. Woodward’s Nomination to the Supreme Court*, 121 PA. MAG. OF HIST. & BIOGRAPHY 163, 198 n.140 (1997); EUGENE IRVING MCCORMACK, JAMES K. POLK: A POLITICAL BIOGRAPHY TO THE PRELUDE OF WAR 1795-1845 339 (New York 1965).

135. See Edwin Countryman, *Samuel Nelson*, 19 THE GREEN BAG 329 (1907); Richard H. Leach, *The Rediscovery of Samuel Nelson*, 34 N.Y. HIST. 64, 65 (1953) (“there is reason to believe he was not without political influence in the Democratic Party as well.”); FRANK OTTO GATELL, *Samuel Nelson*, in 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 825 (Leon Friedman & Fred L. Israel eds., Chelsea House Publishers: New York 1980) (noting that Nelson was “seriously mentioned as a possible Democratic candidate for President” in 1860).

136. See Countryman, *supra* note 135, at 333.

unconstitutional, but that inference is not supported by easily accessible primary sources.<sup>137</sup>

**Smith Thompson.** Justice Thompson's opinions on the issues dividing Whigs from Jacksonians are difficult to discern with complete confidence, but he left more of a paper trail than either Grier or Nelson. Thompson's first political associations were with leading New York anti-Federalists. He formed a political alliance with Martin Van Buren early in both of their careers. Thompson was also a protegee of the conservative jurist James Kent, he strongly identified with the more moderate wing of New York Republicans during the 1810s, and he supported John Quincy Adams rather than Jackson during the 1828 presidential election.<sup>138</sup> Thompson when a judge in New York strongly supported banks incorporated by the states,<sup>139</sup> but the issue that divided Jacksonians from Whigs concerned the political and constitutional status of a national bank, not banks *per se*. Unfortunately, as Thompson's biographer acknowledges, on questions concerning, "Hamiltonian programs," "Thompson's views . . . were not specifically recorded."<sup>140</sup> Thompson concurred in a judicial decision condemning state power to interfere with the national bank his first year on the federal bench, but he had suggested a narrower conception of federal power while on the New York bench. He later reaffirmed that narrow conception of federal power in his dissenting opinion in *Brown v. Maryland*.<sup>141</sup> John Quincy Adams nevertheless thought that

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137. Nelson when on the New York bench supported state chartered banks and state financed internal improvements. See GATELL, *Nelson*, *supra* note 135, at 819-22. Such support was consistent with Jacksonian commitment to state powers.

138. For Thompson's conflicting and changing political alliances, see ROPER, *supra* note 86, at 1, 3, 10-14; GERALD T. DUNNE, *Smith Thompson*, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 475-78, 485 (Leon Friedman & Fred L. Israel eds., Chelsea House Publishers: New York 1980).

139. ROPER, *supra* note 86, at 13-14.

140. *Id.* at 35. Roper finds "a similarity in the patterns of Thompson's and Kent's economic thought." *Id.* Joseph Story in 1807, before his Whig views became clearly pronounced, thought Thompson had "the reputation of industry and soundness." 1 THE LIFE AND LETTERS OF JOSEPH STORY 145 (William W. Story, ed., Books for Libraries Press: Freeport, NY, 1971) [hereinafter 1 LIFE AND LETTERS] (quoting Joseph Story to Samuel P.P. Fay, May 18, 1807).

141. *Brown v. Maryland*, 25 U.S. 419, 449-59 (1827); see also ROPER, *supra* note 86, at 142.

Thompson was a friend of the national bank.<sup>142</sup> Perhaps the best that can be said of this sparse record is that Thompson probably would have sustained *McCulloch*, given his penchant for *stare decisis*,<sup>143</sup> but might have joined a judicial majority declaring some internal improvements unconstitutional. Donald Roper accurately sums up the available evidence when he declares, “[w]hat Thompson would have done had he been faced with positive Congressional legislation is so far removed from the actual facts that it is hardly worth conjecture. For what it is worth, however, he probably would have upheld such laws.”<sup>144</sup>

**Henry Baldwin.** Justice Baldwin in sane moments was nearly certain to support federal power, though those moments became rarer during his tenure on the Supreme Court.<sup>145</sup> Baldwin in Congress was a leading proponent of internal improvements and protective tariffs.<sup>146</sup> Carl Swisher describes him as “a fanatical friend of the Bank.”<sup>147</sup> Baldwin publicly opposed Jackson’s attempt to destroy the national bank, urged Taney to halt the administration’s attack on that institution, and joined the Whig opposition once opposition to Jackson organized.<sup>148</sup> Story, a reliable authority on Whig orthodoxy, thought “quite well of the [Baldwin] appointment.”<sup>149</sup> Baldwin’s later years were marked by mental illness, but when healthy he was a reliable supporter of national power.

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142. See 8 MEMOIRS OF JOHN QUINCY ADAMS 304 (Charles Francis Adams ed., 1876); TANEY PERIOD, *supra* note 1, at 45.

143. See ROPER, *supra* note 86, at 54; DUNNE, *supra* note 138, at 484.

144. ROPER, *supra* note 86, at 296.

145. Flavia M. Taylor, *The Political and Civic Career of Henry Baldwin, 1799-1830*, 24 W. PA. HIST. MAG. 45-49 (1941).

146. *Id.* at 37, 45-49; FRANK OTTO GATELL, *Henry Baldwin*, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 573-75 (Leon Friedman & Fred L. Israel eds., Chelsea House Publishers: New York 1980).

147. ROGER TANEY, *supra* note 2, at 181, 211, 311.

148. GATELL, *Baldwin*, *supra* note 146, at 576-77; ABRAHAM, *supra* note 29, at 79-80.

149. 2 LIFE AND LETTERS, *supra* note 22, at 35 (quoting Joseph Story to Sarah Waldo Story). Daniel Webster was similarly pleased. See TANEY PERIOD, *supra* note 1, at 49. While on the court, Baldwin penned a monograph sharply criticizing the views Story advocated in his *Commentaries on the Constitution*. Baldwin focused, however, on Story’s discussion of state laws. His text did not discuss the constitutional status of federal power. See HENRY BALDWIN, A GENERAL VIEW OF THE ORIGIN AND NATURE OF THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES (Da Capo Press: New York 1970). No evidence exists that Baldwin while on the Court modified the views he expressed in Congress on the national bank internal improvements or the tariff.

**Benjamin Curtis.** Justice Curtis identified with conservative Whigs throughout his political career.<sup>150</sup> He “always voted . . . for the candidates of the Whig party while that organization continued to exist.”<sup>151</sup> Specific records of his attitude toward the national bank do not seem to have survived,<sup>152</sup> in part because Curtis came to prominence after the bank wars had simmered down. Nevertheless, Curtis was a strong supporter of Daniel Webster, a prominent bank advocate. Curtis praised Webster for “the just and sound principles which you have always held and enforced on [the maintenance of a safe currency],” which is probably a reference to Webster’s support of the national bank, and for being “a steady and powerful friend” of “the internal improvements of the whole United States.”<sup>153</sup> Curtis’s analysis of the territorial clause in his dissenting opinion in *Dred Scott* echoed Marshall’s interpretation of the necessary and proper clause in *McCulloch*. “Whether a particular rule or regulation be needful,” the Massachusetts jurist wrote, “must be finally determined by Congress.”<sup>154</sup> Before joining the bench, Curtis asserted that “[t]he question whether the Constitution of the United States gives the power to construct roads [] is an open and difficult one.”<sup>155</sup> Nevertheless, nothing in his antebellum record supports an inference that Curtis would have declared

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150. See STUART STREICHLER, JUSTICE CURTIS IN THE CIVIL WAR ERA: AT THE CROSSROADS OF AMERICAN CONSTITUTIONALISM 3, 9 (2005) (stating that he was “a leading spokesman for the Whigs of Massachusetts” and “[h]is constitutional thought . . . was rooted most of all in what might be called the Whig tradition”).

151. CURTIS, 1 CURTIS *supra* note 97, at 150; *see also id.* at 114, 134, 180 (noting that Justice John McLean “would be a good President”).

152. After the Civil War, Curtis gave a speech implying that the national government had the power to incorporate a bank. GEORGE TICKNOR CURTIS, 2 MEMOIR OF BENJAMIN ROBBINS CURTIS, L.L.D. 366 (Benjamin R. Curtis ed., Little, Brown, and Company: Boston 1879) [hereinafter CURTIS, 2 CURTIS].

153. CURTIS, 1 CURTIS, *supra* note 97, at 115; *see also id.* at 73, 75, 463-66. Webster returned the favor by promoting Curtis when Whig presidents had the opportunity to appoint a Supreme Court justice. *Id.* at 154; *see* STREICHLER, *supra* note 150, at 37; ABRAHAM, *supra* note 29, at 88-89 (noting Curtis’s sterling Whig credentials).

154. *Dred Scott v. Sandford*, 60 U.S. 393, 614-15 (1856) (Curtis, J., dissenting). *Compare* *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) (“the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people”). *See* STREICHLER, *supra* note 150, at 141 (noting the parallels between the Curtis dissent in *Dred Scott* and the Marshall opinion in *McCulloch*).

155. CURTIS, 2 CURTIS, *supra* note 152, at 116.

unconstitutional proposed Whig exercises of national power and much indicates that he would have sustained such measures.

Curtis's behavior during the Civil War was consistent with his conservative Whig ideology, even as he broke with the Republican Party. Curtis strongly opposed the policies Lincoln adopted to fight the Civil War, most notably the emancipation proclamation and the suspension of habeas corpus.<sup>156</sup> These were issues of presidential power. Conservative Whigs who championed broad federal power had nevertheless historically been opposed to unilateral executive power when exercised by Andrew Jackson and other Jacksonian presidents.<sup>157</sup> Curtis remained committed to this distinction between broad federal power and limited executive power during the 1860s. On questions of national power, or at least national powers granted by the Constitution of 1789, Curtis remained an orthodox Whig. He condemned Lincoln for performing solos, but supported the Legal Tender Acts passed by Congress. Curtis defended congressional power to declare paper money legal tender before the Supreme Court, a defense that relied heavily on the principles underlying *McCulloch v. Maryland*.<sup>158</sup>

**John McLean.** Justice McLean was a committed "Madisonian Whig."<sup>159</sup> McLean claimed "he had never voted an anti-Whig ticket," and that "[n]o person in the [United States] desires more ardently than I do, the ascendancy of Whig principles generally."<sup>160</sup> Paul Finkelman notes that McLean "[a]t various times in his career . . . was considered a National Republican, a Jacksonian Democrat, an Anti-Mason, a Free Democrat, a Whig, a Free Soiler, a Know-Nothing, . . . and a Republican," but during his time on the Supreme Court he "was

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156. *Id.* at 306-35.

157. See DANIEL WALKER HOWE, *THE POLITICAL CULTURE OF THE AMERICAN WHIGS* 87-92 (1979); HOLT, *supra* note 4, at 28-30.

158. See STREICHLER, *supra* note 150, at 294; *Hepburn v. Griswold*, 75 U.S. 603, 606 (1869); *id.* at 629-30 (Miller, J., dissenting).

159. VERITAS, *A SKETCH OF THE LIFE OF JOHN MCLEAN OF OHIO* 15 (1846); *id.* at 6-7, 9.

160. FRANCIS P. WEISENBURGER, *THE LIFE OF JOHN MCLEAN: A POLITICIAN ON THE UNITED STATES SUPREME COURT* 110 (1937) (quoting John McLean to John Teesdale, December 17, 1846); BIBLIOTHECA SACRA, *LETTERS OF JOHN MCLEAN TO JOHN TEESDALE* 720 (William Salter ed., October 1899); see WEISENBURGER, *MCLEAN*, *supra* note 162, at 79-80 (noting that by 1832 McLean was an "anti-Jackson man").

unalterably hostile to the Democratic Party.”<sup>161</sup> McLean proved a strong supporter of American System proposals. When in Congress during the 1810s, he was a devotee of internal improvements and protective tariffs, as well as a thorn in the side of John Randolph, the leader of the old Republicans in the House of Representatives. An admiring biography declared that McLean “has always sustained the great Whig cause and measures—has supported a Revenue Tariff, shaped for the protection of Home Industry; a well regulated system of Currency; and uniformly opposed the Sub-treasury,” the banking system favored my many Jacksonian Democrats.<sup>162</sup> Finkelman observes that McLean on the Taney Court “emerged as a moderate nationalist on commercial issues” who “kept alive the tradition of Marshall and Story that Congress and the Constitution were superior to the states.”<sup>163</sup> Story regarded McLean as “a good and satisfactory appointment,” maintained “an intimate friendship” with him while they were on the bench, and “was warmly interested that [McLean] should become a candidate for the Presidency.”<sup>164</sup>

McLean might have betrayed Whig commitments in the right circumstances, but Jacksonians hopes of gaining his vote diminished each decade McLean sat on the bench. McLean’s attitude towards the national bank shifted earlier his career with his partisan allegiances. When a National Republican in 1816 McLean voted against the bank in Congress, but when his Whig commitments firmed up, McLean made clear he thought the constitutional issues had been settled by *McCulloch*. He informed a correspondent, “[t]he question is undoubtedly settled as fully as it is possible to settle any question arising on the construction of the Constitution.”<sup>165</sup> Given McLean’s constant hunger for the presidency, the possibility that he might have cast a vote against

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161. Finkelman, *supra* note 42, at 524, 531.

162. VERITAS, *supra* note 159, at 15; *id.* at 7. For specific Whig positions that McLean endorsed, see WEISENBURGER, *supra* note 160, at 18, 33, 48-49, 75-76, 85, 108; BIBLIOTHECA SACRA, *supra* note 160, at 722.

163. See Finkleman, *supra* note 42, at 538.

164. See 1 LIFE AND LETTERS, *supra* note 140, at 564 (quoting Joseph Story to William Fettyplace, March 1829); See also 2 LIFE AND LETTERS, *supra* note 22, at 35; ROGER TANEY, *supra* note 2, at 431 (quoting Story to McLean, Oct. 9, 1843).

165. BIBLIOTHECA SACRA, *supra* note 160, at 722. For McLean’s waffling on the bank issue, see *id.* at 721-22; WEISENBURGER, *supra* note 160, at 17, 93-95.

some aspect of the American System under the right conditions cannot be ruled out.<sup>166</sup> Still, while McLean's tendency to trim his principles means he might have voted to declare unconstitutional specific details of the American System, little doubt exists that his vote in most cases would have followed Justice Story.

**Joseph Story.** Joseph Story was the most certain vote on the Taney Court for sustaining exercises of national power. Story was a member of the unanimous Court in *McCulloch* that declared constitutional federal power to incorporate a national bank. While purporting to be above partisan politics, Story admitted to voting a straight Whig ticket,<sup>167</sup> frequently drafted legislation asserting national powers for Whigs to introduce in Congress,<sup>168</sup> and regarded the principles underlying *McCulloch* as of "fundamental importance to the existence of the government."<sup>169</sup> He told McLean that "a national bank is indispensable for the *true and permanent* interests of the Union."<sup>170</sup> When the War of 1812 ended, Story called on National Republicans to "extend the national authority over the whole extent of power given by the Constitution."<sup>171</sup> "Let us," he declared,

have great military and naval schools; an adequate regular army; the broad foundations laid of a permanent navy; a national bank; a national system of bankruptcy; a great navigation act; a general survey of our ports, and appointments of port-wardens and pilots; Judicial Courts which shall embrace the whole constitutional

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166. See ROPER, *supra* note 86, at 104 (noting McLean's willingness to "trim his principles" when doing so might advance his political ambitions). For McLean's presidential ambitions, see FINKELMAN, *supra* note 42, at 519, 520, 525-33; BRICKNER, *supra* note 42, at 193, 202-04.

167. For Story's allegiance to the Whig party, see 1 LIFE AND LETTERS, *supra* note 22, at 424, 426, 538, 540; ROGER TANEY, *supra* note 2, at 430 (quoting Story to Henry Clay, August 3, 1842 ("I am a Whig")).

168. For Story's career as a legislative draftsman on such matters as federal common law, federal jurisdiction, admiralty and bankruptcy, see 1 LIFE AND LETTERS, *supra* note 140, at 234, 246, 315, 437, 439; 2 LIFE AND LETTERS, *supra* note 22, at 268, 271-72, 292-96, 370-73, 402-08; TANEY PERIOD, *supra* note 1, at 43. Story may have drafted the rendition procedures that were eventually incorporated into the Fugitive Slave Act of 1850. See R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 376-77 (1985).

169. 1 LIFE AND LETTERS, *supra* note 140, at 326 (quoting Joseph Story to Sarah Wetmore Story, March 17, 1819).

170. TANEY PERIOD, *supra* note 1, at 114-15.

171. 1 LIFE AND LETTERS, *supra* note 140, at 254 (quoting Joseph Story to Nathaniel Williams, February 22, 1815).

powers; national notaries; public and national justices of the peace, for the commercial and national concerns of the United States.<sup>172</sup>

Whether Story endorsed New Deal and Great Society interpretations of *McCulloch* as sanctioning virtually any exercise of federal power that did not violate an individual right<sup>173</sup> is doubtful. Story and other antebellum jurists sympathetic to American system measures believed that most areas of economic life were reserved to the states. Nineteenth century Whigs should not be confused with mid-twentieth century Democrats.<sup>174</sup> Still, on all questions of federal power in which Whigs differed from Jacksonians, Story could be found firmly on the side of national power.

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172. *Id.*; see also *id.* at 270-71, 296, 484-85; 2 LIFE AND LETTERS, *supra* note 22, at 82.

173. See *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *United States v. Darby*, 311 U.S. 100, 118-19 (1941).

174. See generally Howard Gillman, *More on the Origins of the Fuller Court's Jurisprudence: Reexamining the Scope of Federal Power over Commerce and Manufacturing in Nineteenth-Century Constitutional Law*, 49 POL. RES. Q. 415 (1996); Howard Gillman, *The Struggle over Marshall and the Politics of Constitutional History*, 47 POL. RES. Q. 877 (1994).

## III. THE SCORECARD

TABLE ONE:

1836	1837	1841	1845	1846
Taney replaces Marshall/ Barbour replaces Duvall	New seats/Catron and McKinley	Daniel replaces Barbour	Nelson replaces Thompson	Woodbury replaces Story/ <sup>175</sup> Grier replaces Baldwin
<i>Barbour</i>	<i>Barbour</i>	<i>Daniel</i>	<i>Daniel</i>	<i>Daniel</i>
<i>Taney</i>	<i>Taney</i>	<i>Taney</i>	<i>Taney</i>	<i>Woodbury</i>
<i>Wayne</i>	<i>Catron</i>	<i>Catron</i>	<i>Catron</i>	<i>Taney</i>
<b>Thompson</b>	<i>Wayne</i>	<i>Wayne</i>	<i>Wayne</i>	<i>Catron</i>
Baldwin	<b>McKinley</b>	<b>McKinley</b>	<b>McKinley</b>	<b>Wayne</b>
McLean	Thomson	Thompson	<i>Nelson</i>	<i>McKinley</i>
Story	Baldwin	Baldwin	Baldwin	<i>Grier</i>
	McLean	McLean	McLean	<i>Nelson</i>
	Story	Story	Story	McLean

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175. Woodbury was given a recess appointment in 1845. Levi Woodbury, BALLOTPEdia, [https://ballotpedia.org/Levi\\_Woodbury](https://ballotpedia.org/Levi_Woodbury) [<https://perma.cc/X658-JTDN>] (last visited February 26, 2019).

1851	1853	1858
Curtis replaces Woodbury	Campbell replaces McKinley	Clifford replaces Curtis
Daniel	Daniel	Daniel
Taney	Taney	Taney
Catron	Catron	Clifford
Wayne	Wayne	Catron
McKinley	Campbell	Wayne
Nelson	Nelson	Campbell
Grier	Grier	Nelson
Curtis	Curtis	Grier
McLean	McLean	McLean

Table One lines up the justices in very rough order according to their political and constitutional opposition to the national bank and internal improvements for the purpose of determining who the median justice might have been had the Taney Court voted on the constitutionality of an American system proposal. Justices who identified as Jacksonian Democrats are italicized. The median justice is bolded. The ordering, as noted above, is rough. The respect placements of Grier and Nelson is random, as are the respective placements of Catron and Wayne, Barbour and Daniel, and all the committed Whig justices.

The lineups support Webster's fear that the Supreme Court was likely to overrule *McCulloch's* holding that Congress had the power to incorporate a national bank and more general concerns that the Jacksonians on the bench might move against other American system proposals. With exception of the period between 1853 and 1858, from 1837 to 1860 the Taney Court majority consisted of justices who had previously been Jackson's lieutenants in the bank wars. McKinley, who Polk placed on a House Ways and Means Committee stacked to condemn the Bank of the United States, is the median justice for most of this time period. Wayne, who led the fight in Congress against the national bank, is the other justice who occasionally appears in the coveted

five slot. As important, given the possibility that some justices, McKinley and Campbell, in particular, might have been unreliable, Jacksonians from 1845 until 1860 enjoyed supermajorities on the Supreme Court. In several years, eight of the nine justices on the Supreme Court were Jacksonian appointees whose Jacksonian constitutional commitments were repeatedly expressed or vouched for by leading politicians. If, for example, Campbell at some point between 1853 and 1858 revealed his alleged previously private Whig commitments, the Taney Court still would have held Congress had no power to incorporate a national bank or fund internal improvements in the states had either Nelson or Grier, who were considered orthodox Jacksonians by their contemporaries, remained true to the Jacksonian commitments that explain their appointments to the federal bench.

The historical record belies the possibility that the Bank of the United States or federally funded internal improvements would have survived a test case because two or three of the committed Jacksonians on the bench were as committed to judicial restraint. As noted above,<sup>176</sup> most Jacksonian judicial appointments championed judicial power before joining the bench. Six Jacksonians had no difficulty before the Civil War declaring that Congress had no power to ban slavery in the territories, a decision that required narrowly interpreting the constitutional meaning of “necessary.”<sup>177</sup> The surviving Jacksonians on the Supreme Court had no difficulty imposing limits on federal economic power after the Civil War.<sup>178</sup> If a Taney Court majority believed Congress had no power to incorporate a national bank or fund internal improvements in the states, this history suggests that in a proper case that majority would have declared that Congress had no power to incorporate a national bank or fund internal improvements in the states.

#### IV. THE REASON WHY

*McCulloch* survived, or at least was not overruled, in Jacksonian America because, contrary to Tocqueville’s

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176. See *supra* note 24 and accompanying text.

177. See *supra* Part II.

178. See sources cited *supra* note 173.

aphorism, “scarcely any political question [arose] in the United States” during the 30 years before the Civil War “that [was] . . . resolved . . . into a judicial question.”<sup>179</sup> Many political questions during the Taney period were resolved into constitutional questions. Each element of the American plan, the national bank, internal improvements, protective tariffs and the distribution of surplus funds, was discussed in constitutional terms by members of Congress and presidents.<sup>180</sup> Nevertheless, the constitutionalization of controversies over the national bank and American plan did not lead to judicialization. The Supreme Court as a whole did not speak decisively on the constitutionality of any American plan measure debated in Congress before Lincoln’s election. Daniel was the only member of the tribunal who offered an opinion on internal improvements.<sup>181</sup> The other justices ignored *McCulloch*, *McCulloch*’s claims about national powers, and the implications of *McCulloch* for other Whig programs.<sup>182</sup> The status of slavery in the territories and the means for recapturing fugitive slaves were the only two political questions that excited sustained national attention immediately before the Civil War that were resolved into judicial questions adjudicated by the Taney Court. The other constitutional issues that the Taney Court adjudicated, while of importance to the parties and court watchers, attracted little national political attention.<sup>183</sup>

The narrow construction of national power that Jacksonians in the executive and legislative branches of the national government championed partly explains why the Jacksonian majority on the Taney Court did not overrule or significantly narrow *McCulloch*. The Supreme Court could revisit the constitutionality of the national bank or some other controversial exercise of national power only after the national government adopted or implemented some core element of the American plan.

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179. Alexis de Tocqueville, 1 *Democracy in America*, I THE AMERICAN HISTORICAL REVIEW 245 (Phillips Bradley ed., 1945).

180. See Mark A. Graber, *Resolving Political Questions into Judicial Questions: Tocqueville’s Thesis Revisited*, 21 CONST. COMMENT. 485, 534-35 (2005).

181. See *Searight v. Stokes*, 44 U.S. 151, 180-81 (1845) (Daniel, J., dissenting).

182. See DAVID S. SCHWARTZ, *THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF MCCULLOCH V. MARYLAND* 524 (2019) (forthcoming) (“By the early 1850s, the Taney Court had ignored *McCulloch* into oblivion, and reversed its thrust”).

183. See Graber, *supra* note 179, at 525-29.

Whigs and Democrats agreed that the federal government had no constitutional obligation to incorporate a national bank or finance certain internal improvements. When the federal government failed to adopt those or other constitutionally controversial exercises of national power, the questions of constitutional law debated in Congress could not be resolved into a lawsuit. A Supreme Court primed to overrule *McCulloch* was denied that opportunity when two national bank bills were vetoed by Jacksonian presidents, when Jacksonian presidents vetoed other American System bills, and when Congress rejected proposed exercises of national power.<sup>184</sup>

The truncated agenda of the Taney Court also reflects the lack of support services for litigation in antebellum America. Many constitutional issues are resolved into judicial issues only when either government or private organizations provide victims of claimed constitutional wrongs with expert attorneys and other services necessary to initiate and maintain litigation.<sup>185</sup> Such services were rarely available in Jacksonian America. Aggrieved antebellum Americans did not have access to an American Civil Liberties Union analogue, that might sponsor litigation aimed at expanding constitutional rights or a Pacific Legal Foundation analogue, that might sponsor litigation aimed at curbing federal powers. This lack of support for constitutional litigation was

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184. See Andrew Jackson, *Veto Message*, in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 197 (James D. Richardson ed., 1987) (no power to finance local improvements); *id.* at 28 (no power to establish a national bank); John Tyler, *Veto Message*, in 4 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 100-113 (James D. Richardson ed., 1987) (no power to incorporate a bank); *id.* at 1021-23 (no power to improve navigation of rivers); James K. Polk, *Veto Message*, in 4 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 769-770 (James D. Richardson ed., 1987) (no power to construct local improvements); *id.* at 775-776; Franklin Pierce, *Veto Message*, in 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 170-73 (James D. Richardson ed., 1987) (no power to construct hospitals for the insane); *id.* at 207-209 (no power to make local improvements); *id.* at 199-208 (no power to make internal improvements); James Buchanan, *Veto Message*, in 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 355-56 (James D. Richardson ed., 1987) (no power over education); *id.* at 545-48 (no power to make local improvements); *id.* at 569-70 (no power to give public lands away to settlers). Congress failed to pass constitutionally controversial exercises of federal power when Zachary Taylor and Millard Fillmore, two Whigs, were president.

185. See CHARLES R. EPP, EXTERNAL PRESSURE AND THE SUPREME COURT'S AGENDA 255, 260-61 (Cornell W. Clayton & Howard Gillman eds., 1999); see generally SUSAN E. LAWRENCE, THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING 11-12 (1990).

partly rooted in elite understandings that the point of litigation was to win. John C. Calhoun and other South Carolinians preferred nullification to litigation because they believed that the Marshall Courts would uphold the constitutionality of protective tariffs.<sup>186</sup> Abolitionists were the only political activists in Jacksonian America who consistently provided support services for litigation and who were willing to litigate when the chances of success were limited. Federal courts were able to resolve constitutional questions about federal power to pass fugitive slave acts and the status of slavery in the territories because abolitionists or other persons opposed to slavery represented persons of color free of charge or for nominal fees.<sup>187</sup>

The way the Supreme Court resolved constitutional questions in slavery cases nevertheless casts doubt on whether Jacksonian vetoes and the absence of litigation support services fully explain why the Taney Court in the thirty years before the Civil War refrained from specifically ruling on federal power to incorporate a national bank, finance certain internal improvements, distribute government surpluses to the states or impose protective tariffs. Taney Court majorities in both *Prigg* and *Dred Scott* engaged in far-ranging discussions that were not necessary to the result in the case. Justices Story and Chief Justice Taney in *Prigg* debated at length whether states were obligated to help enforce the Fugitive Slave Act of 1793,<sup>188</sup> even though the case could have been decided solely by declaring that slaveholders had a right to recapture independent of the Fugitive Slave Act of 1793 or that Pennsylvania's liberty laws were inconsistent with federal law.<sup>189</sup> *Dred Scott* could have been resolved as a choice of law case,<sup>190</sup> with no need to consider either whether free persons of color might be citizens of the United States or the constitutional status of slavery in the

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186. See John C. Calhoun, *Exposition Reported by the Special Committee*, in THE PAPERS OF JOHN C. CALHOUN 447 (Clyde N. Wilson & W. Edwin Hemphill eds., 1977).

187. See DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 252 (1978); Richard H. Sewell & Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War*, 57 J. AM. HIST. 281-84 (1970).

188. See *Prigg v. Pennsylvania*, 41 U.S. 539, 613-21 (1842); *id.* at 626-36 (Taney, C.J., concurring).

189. See *Prigg*, 41 U.S. 539 at 579, 589; *id.* at 626-27 (Taney, C.J., concurring).

190. *Dred Scott v. Sandford*, 60 U.S. 393, 457-69 (1856) (Nelson, J., concurring).

territories, or having decided that free persons of color had no power to sue in a federal court, Taney could have cut the discussion of congressional power to ban slavery in the west.<sup>191</sup> Given the Taney Court's willingness to make "maximalist" decisions when slavery was on the table, questions remain as to why the Justices consistently made "minimalist" decisions when adjudicating cases concerned with other national powers.<sup>192</sup>

Jacksonian commitments to partisan supremacy may better explain judicial silence on *McCulloch* and the constitutional status of the national bank during the thirty years before the Civil War. Partisan supremacists believe constitutional questions are best settled by dominant political parties.<sup>193</sup> Martin Van Buren articulated the fundamental premise of partisan supremacy when he claimed, "[i]f different interpretations are put upon the Constitution by the different departments, the people is the tribunal to settle the dispute. Each of the departments is the agent of the people, doing their business according to the powers conferred; and where there is a disagreement as to the extent of these powers, the people themselves, through the ballot-boxes, must settle it."<sup>194</sup> Andrew Jackson and Abraham Lincoln were dedicated to some version of partisan supremacy.<sup>195</sup> The post-Civil Amendments make sense only in light of Republican commitments to partisan supremacy.<sup>196</sup> The Taney Court's willingness to remain on the sidelines during the debates over American System proposals is another manifestation of nineteenth century commitments to having dominant political parties rather than courts per se resolve the most constitutionally controversial issues of the day.

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191. *Id.* at 427-28.

192. On the difference between "maximalist" and "minimalist" decisions, see generally CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

193. For discussions of partisan supremacy, see MARK A. GRABER, *SEPARATION OF POWERS* 224, 235-42 (Karen Orren & John C. Compton eds., 2018) [hereinafter GRABER, *Separation of Powers*]; Mark A. Graber, *Teaching the Forgotten Fourteenth Amendment and the Constitution of Memory*, 62 ST. LOUIS U.L.J. 639, 649-50 (2018) [hereinafter *Forgotten Fourteenth Amendment*].

194. MARTIN VAN BUREN, *INQUIRY INTO THE ORIGIN AND COURSE OF POLITICAL PARTIES IN THE UNITED STATES* 330 (1867).

195. See GRABER, *Separation of Powers*, *supra* note 192, at 237-39.

196. See Graber, *Forgotten Fourteenth Amendment*, *supra* note 192, at 650.

Jacksonians from 1828 until 1860 consistently limited the judicial agenda by making self-conscious decisions not to resolve constitutional questions into judicial questions. When, as was the case with internal improvements and Negro Seamen's Acts, elected officials made clear that they preferred legislative and executive solutions to hotly contested constitutional question, the Supreme Court stayed out of the political fray.<sup>197</sup> Congress prevented constitutional litigation over trade policy by steadfastly refusing to describe the duty on any good as a protective tariff.<sup>198</sup> The central legislative debate during the New Mexico/Texas boundary dispute was whether Congress should draw the boundary line or authorize a lawsuit that would require the Supreme Court to draw the boundary line. After much debate, the legislative option was chosen. No litigation followed even though the issue was theoretically justiciable.<sup>199</sup>

Partisan supremacy differs from both legislative and executive supremacy. No institution has any inherent right to settle constitutional issues. Rather, the dominant party designates the proper forum for resolving particular constitutional controversies. On matters Jacksonians were united, they preferred legislative and executive solutions. Jackson maintained the election of 1832 established executive power to resolve the constitutional status of the national bank.<sup>200</sup> On matters Jacksonians were divided, they preferred judicial solutions. *Dred Scott* and *Prigg* were handed down only after the legislature whose laws were under constitutional attack initiated judicial policymaking.<sup>201</sup> Legislative supremacy on American plan measures and judicial supremacy on slavery measures were derived from the more fundamental commitments to partisan supremacy.

Jacksonians had no need for a judicial decision overruling *McCulloch* while they controlled the Senate, House or Presidency. Jacksonian majorities could determine the

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197. See *Searight v. Stokes*, 44 U.S. 151, 158 (1845) (argument of Nelson, A.G.); TANEY PERIOD, *supra* note 1, at 393-94.

198. See Calhoun, *supra* note 185, at 447.

199. See ELBERT B. SMITH, THE PRESIDENCIES OF ZACHARY TAYLOR & MILLARD FILLMORE 103, 173-74 (1988).

200. FEHRENBACHER, *supra* note 186, at 206.

201. See TANEY PERIOD, *supra* note 1, at 538; FEHRENBACHER, *supra* note 186, at 206.

constitutional meaning of such phrases as “necessary and proper” and restrict the scope of implied powers by rejecting any measure Democrats thought inconsistent with a strict construction of the Constitution. No need existed for the Supreme Court to limit government power that was already being limited by Congress or the White House. No need existed for a Supreme Court decision resolving interparty squabbles over what internal improvements were and were not constitutionally permitted that Jacksonians were resolving in the elected branches of the national government. Judicial dicta declaring that the federal government had no power to incorporate a national bank or sponsor internal improvements might have been inconvenient while Jacksonians reigned. Jacksonians objected to the latitude of *McCulloch*, but not the concept of implied powers per se.<sup>202</sup> They supported some exercises of national powers. Many Jacksonians favored some internal improvements under certain conditions, with prominent Westerners being particularly enthusiastic.<sup>203</sup> A Supreme Court decision made without the consent of Jacksonians from all regions of the United States might have embarrassed some proposed Jacksonian exercises of national power and truncated intraparty debates over the constitutionality of other exercises of national powers.

Jacksonians were commitment to partisan supremacy only when Jacksonians had sufficient control of the elected branches of national government to prevent American system measures from becoming law. Once Jacksonians lost control of the elected branches of government, the Jacksonian justices on the bench became raging judicial supremacists.<sup>204</sup> Every former Democrat on the bench voted in 1869 and 1870 to declare that the federal government had no power to make paper money legal tender,<sup>205</sup> even though the general principles underlying *McCulloch* provided strong, probably convincing support for the Legal

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202. See David S. Schwartz, *supra* note 14, at 150-51, 158.

203. See Eric Foner, *The Wilmot Proviso Revisited*, 56 J. AM. HIST. 262 (1969).

204. See Mark A. Graber, *The Jacksonian Origins of the Chase Court Activism*, 25 J. SUP. CT. HIST. 17 (2000).

205. Salmon Chase, Stephen Field, Nelson, Clifford, and Grier were in the majority in *Hepburn v. Griswold*, 75 U.S. 603 (1969). Chase, Nelson, Clifford, and Field dissented in the *Legal Tender Cases*, 79 U.S. 457 (1870). Chase and Field, while appointed by Republican presidents, were Democrats before joining the bench. See Graber, *The Jacksonian Origins*, *supra* note 203, at 18.

Tender Acts.<sup>206</sup> If the surviving Jacksonians were willing to exercise judicial power to strike down aggressive exercises of national power by a Republican controlled government, little reason exists for thinking those justices would have been more restrained when adjudicating aggressive exercises of national power by a Whig controlled government. Had William Henry Harrison lived and fulfilled his inaugural promise from refraining from using the presidential veto except in exceptionally rare circumstances,<sup>207</sup> *McCulloch*, at least the *McCulloch* that authorized the national government to incorporate a national bank, would most likely not have survived the 1840s.

## V. TEACHING MCCULLOCH IN 1858 AND 2019

The high probability that *McCulloch*'s holding on congressional power to incorporate a national bank would have been overruled had the Supreme Court been given the opportunity in a proper case raises questions about how to teach constitutional law in periods of regime change. Constitutional pedagogy is simple when regime change takes the form of constitutional amendments or decisions that overrule decisions stating central commitments of the previous regime. The post-Civil War amendments relegated *Dred Scott* and *Prigg* to classes on constitutional history or constitutional theory, the small portion of a constitutional law class dedicated to constitutional history or constitutional theory or perhaps to a constitutional law class devoted to the use of anti-canonical cases in constitutional argument.<sup>208</sup> The New Deal Constitutional Revolution had the same impact on such judicially overruled cases as *Carter v. Carter Coal Company*<sup>209</sup> and *Hammer v. Dagenhart*.<sup>210</sup> Had the Supreme Court in 1845 declared the federal government had no

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206. *Hepburn*, 75 U.S. at 629-31 (Miller, J., dissenting); *Legal Tender Cases*, 79 U.S. at 537-39.

207. William Henry Harrison, *Inaugural Address*, in 4 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897 1, 10-11 (James D. Richardson ed., 1897).

208. See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

209. 298 U.S. 238 (1936).

210. 247 U.S. 251 (1918).

power to incorporate a national bank, no constitutional law class in 1858 would have taught *McCulloch* as good law and no hypothetical bar examination in 1858 would have marked as a correct assertions that a Third Bank of the United States was a constitutionally appropriate exercise of federal power. Constitutional pedagogy is more complicated when regime change takes the form of constitutional practices that ignore decisions stating the central commitments of the past regime. In such instances, the legal status of those past regime commitments is ambiguous. They remain technically good law. Nevertheless, the decisions stating those commitments have no impact on actual constitutional practice. While stating the holding of *McCulloch* might have been the right answer to an 1858 bar examination question on federal power to incorporate the national bank, that citation had no persuasive force in constitutional controversies adjudicated by the Taney Court or by Jacksonian presidents. Constitutional law professors in these circumstances must decide whether to teach the landmark decisions of a previous regime until they are overruled or teach the precedents, principles and processes that actually guide constitutional decision making in their present.

**Teach *McCulloch* until overruled.** Chief Justice Salmon Chase in *Hepburn v. Griswold* provided the foundations for teaching *McCulloch* in 1858 when he declared that *McCulloch* after 1819 was “accepted as a correct exposition of the Constitution.”<sup>211</sup> Jacksonians did not “accept” *McCulloch* in the sense that the decision was a precedent that guided constitutional decision making. The Taney Court never cited *McCulloch* as a precedent for implied federal powers or as a precedent for federal power to incorporate a national bank. *McCulloch* was “accepted” in Jacksonian American only in the sense that the decision had not been formally overruled by constitutional amendment or judicial decree. Presenting *McCulloch* as good law in 1858 taught future practitioners that the case remained a living precedent that could be revived without further ceremony. Decisions that are explicitly reversed by constitutional amendment or judicial decision can be revived only by a contrary constitutional amendment or another judicial decision overruling the initial

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211. 75 U.S. 603, 614 (1869).

overruling. Neither was necessary to reinvigorate *McCulloch*'s understanding of implied powers or any other case that has merely been ignored by constitutional decision makers for long periods of time.<sup>212</sup> All that was necessary for the federal government to incorporate a national bank in 1858 was more persuasive arguments or more persuadable judges.

**Teach *McCulloch* and the Cases Narrowing *McCulloch*.**

David Schwartz in his wonderful forthcoming book provides the foundations for teaching *McCulloch* and the Taney Court cases discussing implied powers.<sup>213</sup> Schwartz points out that the Supreme Court from 1837 until 1860 never repudiated *McCulloch*'s holding that the federal government had the power to incorporate a national bank or the general principles underlying the implied powers of the federal government. Instead, in a series of opinions that never mentioned *McCulloch*, the justices adopted narrower understandings of implied federal power and broader understandings of reserved state powers. Students training to be practicing attorneys in 1858 should have known *McCulloch* because attorneys may cite as good law any case that has not been explicitly overruled. They should have known such Taney Court cases as *United States v. Marigold*<sup>214</sup> and *United States v. Coombs*<sup>215</sup> because those were the precedents that federal courts would likely rely on when determining the scope of federal powers.

**Teach *McCulloch* and the Bank Veto.** What Schwartz describes as the “revisionist” account of Jackson’s bank veto<sup>216</sup> provides the foundation for teaching both *McCulloch* and the Bank Veto. On this account, Jackson was not challenging the judicial decision to sustain a federal law incorporating a national bank, but merely determining whether to exercise powers the Supreme Court had acknowledged were vested in election officials.<sup>217</sup> Practicing attorneys in 1858 needed to know

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212. See *Bush v. Gore*, 531 U.S. 98, 104 (2000) (reviving *McPherson v. Blacker*, 146 U.S. 1 (1892) after 108 years).

213. The first three sentences of this paragraph summarize SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 181.

214. 50 U.S. 560 (1850).

215. 37 U.S. 72 (1837).

216. Schwartz, *Defying McCulloch*, *supra* note 14, at 131.

217. See G. Edward White, *The Constitutional Journey of Marbury v. Madison*, 89 VA. L. REV. 1463, 1496-97 (2001).

*McCulloch*'s analysis of implied powers because Marshall's opinion remained the official law of the land in Jacksonian America with respect to the judiciary's exposition of constitutional law. They needed to know Jackson's veto of the bank bill because that was the constitutional precedent that guided the elected branches of the national government. Professors by juxtaposing *McCulloch* and the bank veto could teach students preparing to become practicing attorneys three important features of Jacksonian and American constitutionalism. First, in Jacksonian America, presidents exercised independent constitutional authority and did not defer to Supreme Court decisions broadly interpreting federal power and narrowly interpreting the reserved rights of the states. Second, elected officials in the United States at all times have the power to refrain from exercising what the Supreme Court has ruled to be their constitutional powers and elected officials may refrain because they believe the Supreme Court has too broadly interpreted their constitutional powers. Third, when Jacksonian presidents are exercising independent constitutional authority or when any government official is claiming constitutional grounds for refraining from exercising what judicial precedent regards as constitutional powers, the constitution in and outside of the courts diverges. Students preparing to be practicing attorneys in 1858 should know that while *McCulloch* governed what federal powers federal courts would sustain, the Bank Veto governed federal power the elected branches of government would exercise.

**Do Not Teach *McCulloch*.** Abraham Lincoln provided foundations for not teaching *McCulloch* at all in 1858 when in his sixth debate with Stephen Douglas he declared, “[d]id not he and his political friends find a way to reverse the decision of that [Supreme] Court in favor of the constitutionality of the National Bank?”<sup>218</sup> Teaching *McCulloch*'s discussion of implied powers as good constitutional law in 1858, from this perspective, made no more pedagogical sense than presently teaching as good constitutional law *Dred Scott*, the judicial decision in *Pollock v. Farmers' Loan & Trust Co.*<sup>219</sup> declaring the income tax

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218. Abraham Lincoln, *Sixth Debate with Stephen A. Douglas, at Quincy, Illinois*, in 3 COLLECTED WORKS OF ABRAHAM LINCOLN 1, 278 (Roy P. Basler ed., 1953).

219. 157 U.S. 429 (1895).

unconstitutional or *Plessy v. Ferguson*.<sup>220</sup> Constitutional lawyers concerned only with persuading Supreme Court justices and other constitutional decision makers had no need to be taught *McCulloch* in 1858 because that decision was unlikely to be cited by any court or constitutional decision maker for any constitutional proposition, was explicitly repudiated by the party presently controlling the exercise of federal powers and was likely to be overruled should the occasion arise. *McCulloch* was relevant to the practice ready lawyer in the years immediately before the Civil War only to the extent such an attorney could use some knowledge of constitutional history and theory, or as an example of how lawyers sometimes manipulate anti-canonical cases to persuade judicial tribunals.<sup>221</sup>

**Future Teaching.** The United States appears to be experiencing a regime change at least as significant as the regime change that took place at the onset of the Jacksonian Era,<sup>222</sup> but the nature and direction of that regime change is yet to be fully determined. On one possible future, the Trump/McConnell regime will consolidate, regain control of the House of Representatives and implement a very conservative constitutional vision. On another possible future, the 2018 national election will be the dawn of a new progressive era in which liberal Democrats gain control of all the branches of the national government and implement their constitutional vision. Constitutional decision makers in these new regimes may mark the new political order with constitutional amendments and constitutional decisions explicitly overruling those decisions embodying the central constitutional commitments of the rival regime. They might also follow the Jacksonian model and simply narrow or ignore particular constitutional landmarks of the past.

Jacksonian paths are open to political activists on the left and right. Americans in the near future might experience a conservative regime in which *Roe v. Wade*<sup>223</sup> is never overruled, but judicial decisions permit states to regulate abortion in ways

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220. 163 U.S. 537 (1896).

221. See Greene, *supra* note 207, at 391.

222. See SANFORD LEVINSON & JACK M. BALKIN, DEMOCRACY AND DYSFUNCTION (University of Chicago Press 2019) (forthcoming); Jack M. Balkin, *The Last Days of Disco: Why the American Political System is Dysfunctional*, 94 B.U. L. REV. 1159 (2014).

223. 410 U.S. 113 (1973).

that make terminating a pregnancy as difficult as was the case before 1973. In this regime, commerce clause precedents from the New Deal remain good law in theory, but few if any federal statutes remain on the books that regulate transactions that take place entirely within a single state. Presidents routinely veto for constitutional reasons legislation attempting such exercises of federal power on the ground that the commerce clause does not permit the federal government to regulate transactions that take place within a single state or because the impact on interstate commerce is not sufficiently substantial to warrant federal regulation. Alternatively, Americans in the near future might experience a progressive regime in which *District of Columbia v. Heller*<sup>224</sup> is never overruled, but courts routinely sustain all gun control regulations. In this regime, precedents declaring constitutional the imposition of capital punishment remain good law in theory, but no murderer is ever executed. The president and state governors in the few jurisdictions whose law permits executions routinely commute all death sentences on the ground that they believe capital punishment violates the Eighth and Fourteenth Amendments or because the crime in question is not sufficient heinous to merit the ultimate sanction.

Constitutional law professors in these regimes will have to ponder pedagogical issues analogous to those they might have considered had they been teaching in 1858. They might teach *Roe*, *Wickard v. Filburn*,<sup>225</sup> *Heller*, and *Gregg v. Georgia*<sup>226</sup> as good constitutional law until those cases are explicitly reversed by judicial decision or constitutional amendment. They might offer their students a more refined view of constitutional law by combining *Roe* or *Heller* with the most recent judicial decision sustaining remarkably burdensome abortion or gun control regulations. They might emphasize the difference between the constitution in and outside of courts by combining *Wickard* or *Gregg* with a presidential veto on constitutional grounds of a bill regulating intrastate commerce or a gubernatorial commutation on constitutional grounds of a death sentence. Finally, constitutional law professors might communicate that a practice ready attorney in these regimes need not know *Roe*, *Wickard*,

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224. 554 U.S. 570 (2008).

225. 317 U.S. 111 (1942).

226. 428 U.S. 153 (1976).

*Heller*, and *Gregg* by ignoring those cases, confining them to history or theory courses or confining them to the history and theory section of their constitutional law course.