RESOLVING POLITICAL QUESTIONS INTO JUDICIAL QUESTIONS: TOCQUEVILLE'S THESIS REVISITED

*Mark A. Graber**

Americans throughout the Jacksonian era bitterly disputed the proper use of the President's veto power.Whigs insisted that Democratic Presidents were abusing an authority to reject legislation originally intended to be confined largely to unconstitutional measures." The powers of Congress are paralyzed," Henry Clay complained, "by frequent and an extraordinary exercise of the executive veto, not anticipated by the founders of the constitution, and not practiced by any of the predecessors" of Andrew Jackson.[1] Democrats insisted Jacksonian Presidents were acting well within their Article II powers when preventing from becoming law bills incorporating a new national bank and funding internal improvements. The veto power, future president James Buchanan informed Congress, "is a mere power to arrest hasty and inconsiderate changes, until the voice of the people, who are alike the masters of Senators, Representatives and President, shall be heard."[2] President Jackson was censured and President John Tyler nearly impeached in part over controversies arising out of their exercise of the veto.[3]

The federal judiciary was the only branch of the national government whose members refrained from expressing official opinions on the proper constitutional use of the veto power. Many Supreme Court justices had strong personal opinions on that issue. Chief Justice Taney while Attorney General helped

* Professor of Government at the University of Maryland and Professor of Law at the University of Maryland School of Law. A.B. Dartmouth College 1978; J.D. Columbia Law School 1981; PhD Yale University 1988. Much thanks to Howard Gillman, Rogers Smith, Sandy Levinson and Jim Chen.

1. 16 REG. DEB. 59 (1833).

2. CONG. GLOBE, 27th Cong., 2d Sess. App. 141 (1842).

3. These controversies are discussed at length in DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829-1861 185-201 (2005); Gerard N. Magliocca, *Veto! The Jacksonian Revolution in Constitutional Law*, 78 NEB L. REV. 205 (1999).

draft Jackson's message vetoing the bill rechartering the national bank. Levi Woodbury when in Congress vigorously defended Tyler's aggressive use of the veto power.[4] Nevertheless, the numerous political and constitutional questions raised by the way Jacksonian presidents wielded the veto power were never resolved into judicial questions. No federal justice ever expressed an official judicial opinion on the constitutionality of pocket vetoes or on whether the veto power could be constitutionally exercised only when rejecting unconstitutional legislation. Constitutional questions associated with the veto in Jacksonian America were resolved entirely by nonjudicial processes.

These debates over presidential power in antebellum America belie Tocqueville's famous assertion, "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[5] The more accurate assertion when Tocqueville wrote is, "scarcely any national political question" arose that was "resolved into a judicial question." With the exception of slavery, the prominent political questions that dominated national politics during the 1830s, 1840s, and 1850s did not become federal judicial questions. Federal courts during the three decades before the Civil War resolved only a very small percentage of the national political controversies that excited Jacksonian America.

The remarkably truncated agenda of the late Marshall and Taney Courts is only partly explained by the Jacksonian failure to resolve some political questions into legal or constitutional questions. Henry Clay and other Whigs consistently stated their objections to Jacksonian uses of the veto power in constitutional terms. American System proposals were widely understood as raising fundamental constitutional questions. Whigs claimed that the Constitution empowered the national government to incorporate a national bank, fund internal improvements, impose protective tariffs, and distribute surplus revenue to the states. Jacksonian Democrats insisted that such measures were unconstitutional. Nevertheless, majorities on the Taney Court refrained from ruling on the constitutionality of any major American System proposal. During the three decades before the Civil War, the official position of the Supreme Court on the veto power, on the national bank, and on the vast majority of political

4. CONG. GLOBE, 27th Cong., 2nd Sess. App. 157-64 (1842).

5. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (Phillips Bradley ed., 1945).

questions not directly concerned with slavery was, "No comment."

This article explores the relationships between national political questions and national judicial questions during the second party system and, to a lesser extent, the present. Part I elaborates the meaning of Tocqueville's thesis. Both Tocqueville and those who have quoted him believed that throughout American history, whether from 1787 to 1835 or from 1787 to 2004, most national political questions have been resolved into judicial questions adjudicated by the Supreme Court of the United States. Part II details appropriate tests for Tocqueville's thesis. The main measure compares the issues discussed in national party platforms before the Civil War and the issues adjudicated by the Supreme Court during that period. Part III performs that test, finding Tocqueville's thesis wanting. Most national political questions that excited Jacksonians were not resolved into national judicial questions. Part IV explains why most political and constitutional questions in Jacksonian America were not resolved into judicial questions. That section then details both continuities and discontinuities with present judicial practice. Most political questions that have arisen at the turn of the twenty-first century are still not resolved into judicial questions because they are not first resolved into constitutional questions. Changes in legislative activity, support services for litigation, and legislative support for constitutional litigation, however, explain why constitutional questions that arise at the turn of the twenty-first century are far more likely than constitutional questions that arose in Tocqueville's time to be resolved into judicial questions.

Unthinking citation of Tocqueville has distorted constitutional scholarship in law, history and political science. Seduced in part by *Democracy in America* and in part by the rhetoric of judicial supremacy, constitutional history in the United States has largely been the history of Supreme Court. This history ignores the constitutional debates over the American system, over national expansion, and over the veto power that sharply divided Americans during the decades before the Civil War. The *Supreme Court Reporter* does not even provide a complete guide to the constitutional debates over slavery. The Tocquevillean paradigm also presents the transformation of political questions into judicial questions as a fairly automatic process. The actual processes are more complicated and not automatic. Most political questions in Jacksonian America were not resolved into constitutional questions. Most constitutional questions were not re-

solved into judicial questions. Only by discarding Tocqueville's thesis will scholars be able to explore what must happen for a political question to become a constitutional question and a constitutional question to become a judicial question.

The constant citation of Tocqueville's thesis fares only slightly better as a description of national constitutional politics at the dawn of the twenty-first century than as a description of national constitutional politics in the middle of the nineteenth century. The Supreme Court of the United States currently resolves more national political questions than did the Marshall or Taney Courts. Still, examination of the Democratic and Republican Party Platforms for the 2000 national elections reveals numerous political questions that have not been resolved into constitutional questions. Several important contemporary constitutional questions have not been resolved into judicial questions. These matters include whether President Bush could order an invasion of Iraq in the absence of a declaration of war[6] and whether President Clinton committed an impeachable offense when he lied under oath about his sexual activity.[7] Unless scholars abandon Tocqueville's thesis, future generations may look at Supreme Court opinions and conclude that federalism limitations on the commerce power[8] raised the most important constitutional questions Americans debated at the turn of the twenty-first century.

I. TOCQUEVILLE'S THESIS

Tocqueville's thesis is constantly cited and rarely analyzed. His "famous observation" that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question," commentators note, "has been repeated so often that is has become part of our national lore."[9] These ritual incantations are rarely accompanied by close textual analysis of *Democracy in America* exploring what Tocqueville meant when he claimed that little difference existed in the United

6. *See generally* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993).

7. *See* Richard Posner, *Dworkin, Polemics, and the Clinton Impeachment Controversy*, 94 NW. U. L. REV. 1023 (2000); Ronald Dworkin, *Philosophy & Monica Lewinsky*, N.Y. REV., March 9, 2000, at 46 vol 47 no. 4.

8. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

9. Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to Private Regulation*, 71 U. COLO. L. REV. 1263, 1291 (2000).

States between political and judicial agendas. The absence of serious exegesis raises the possibility that what Tocqueville meant in 1835 is not what contemporaries mean when they quote him in 2004. If Tocqueville's thesis plainly misdescribes the Jacksonian political universe, the fault may lie in how that thesis has been interpreted, not in Tocqueville.

More thorough examination of *Democracy in America* and Tocqueville's sources alleviates concerns that misinterpretation or misappropriation has taken place. While marginal differences no doubt exist, Tocqueville and the commentators who quote him agree on two fundamental points. First, the tendency for political questions to become judicial questions is a permanent feature of American politics, an accurate description of constitutional politics throughout American history. Second, national politics is particularly subject to the tendency for political questions to be resolved into judicial questions. The Supreme Court of the United States, Tocqueville and contemporary Tocquevilleans agree, has always resolved the vast majority of national political questions that excite American political actors.

Democracy in America maintains that the tendency for political questions to become judicial questions is an enduring feature of the American regime. "Armed with the power of determining the laws to be unconstitutional," Tocqueville wrote, "the American magistrate *perpetually* interferes in political affairs."[10] He insisted that courts have "immense political influence" because "**few** laws can escape the searching analysis of the judicial power for any length of time" (emphasis added).[11] Tocqueville worried that Jacksonians might curb what he believed to be desirable political and legal practice. He criticized the "secret tendency to diminish judicial power" in several states.[12] Nevertheless, *Democracy in America* regarded judicial power as a previously well-established practice that might soon be subjected to political attack. Tocqueville worried about the future, but thought that from 1789 until 1835, most political questions in the United States had been resolved into judicial questions.

The Supreme Court of the United States was the primary subject of these references to the judiciary. Tocqueville when writing about judicial power relied almost entirely on secondary sources discussing the federal judiciary and Constitution of the

10. TOCQUEVILLE, *supra* note 5, at 279 (emphasis added).
11. *Id.* at 101 (emphasis added).
12. *Id.* at 279.

United States. He read *The Federalist Papers*, which included Hamilton's famous defense of judicial review; Joseph Story's *Commentaries on the Constitution of the United States*, a work that celebrated federal judicial power; and the sections in James Kent's *Commentaries on American Law* devoted to the Constitution of the United States. Tocqueville did not read material on state courts, examine judicial interpretation of state constitutions, or have any extensive first-hand experience with state constitutional litigation.[13]

A less famous passage in *Democracy in America* more prolixly asserts that virtually all national political questions in the United States are resolved into national judicial questions adjudicated by the Supreme Court of the United States. "The peace, the prosperity, and the very existence of the Union," Tocqueville wrote,

> are vested in the hands of seven Federal judges. Without them the Constitution would be a dead letter: the executive appeals to them for assistance against the encroachments of the legislative power; the legislature demands their protection against the assaults of the executive; they defend the Union from the disobedience of the states, the states from the exaggerated claims of the Union, the public interest against private interests, and the conservative spirit of stability against the fickleness of democracy. Their power is enormous. . . .[14]

Tocqueville thought state courts were powerful institutions and discussed their power in *Democracy in America*.[15] Still, the textual and extra-textual evidence clearly indicates that Tocqueville's thesis primarily referred to the Supreme Court of the United States, that he thought the justices on that tribunal had their say on the vast majority of political questions that arose in antebellum America.

Contemporary commentators think Tocqueville correctly described constitutional politics in the Jacksonian era and throughout American history. Citing and quoting *Democracy in America*, scholars declare, "our political controversies *inevitably* turn into legal controversies."[16] Ruth Gavison states, Toc-

13. *See* ANDRE JARDIN, TOCQUEVILLE: A BIOGRAPHY 201-02 (Lydia Davis & Robert Hemenway trans., 1988).

14. TOCQUEVILLE, *supra* note 5, at 151.

15. *See id.* at 98-105.

16. Stephen R. Shapiro, *Commentary—Constitutional Issues*, 1998 ANN. SURV. AM. LAW 223, 223 (emphasis added); *see* Jane C. Murphy, *Lawyering for Social Change: The Power of the narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243,

queville's thesis highlights "one of the defining marks of the American political community."[17] Although most citations to Tocqueville support observations about constitutional politics at the turn of the twenty-first century, commentators assume political questions have always been resolved into judicial questions. The consensus view is that Tocqueville's thesis "*remains* accurate."[18] "The openness of our judicial system" to political questions, Justice Sandra Day O'Connor asserts, "is as true today as it was in 1835 when Alexis de Tocqueville wrote."[19] R. Kent Newmyer claims that Tocqueville's thesis predates Jacksonian America. "Long before Tocqueville said it," he writes, "[John] Marshall realized that in America every major political question . . . turns into a constitutional one."[20] Commentators sometimes note that Tocqueville's thesis is even a more accurate account of contemporary judicial politics,[21] but no one suggests his thesis was inaccurate when made or fails to describe any period in American history.

Contemporary Tocquevilleans further agree that Tocqueville correctly described the agenda of the Supreme Court of the United States. Lawrence Baum is one of many scholars who quotes Tocqueville when explaining how, "[t]hrough its individual decisions and lines of decisions, the Supreme Court contributes a great deal to government policy."[22] Tocqueville's observation is frequently cited as supporting claims about other courts. Still, commentators on the Supreme Court believe that institution is the primary beneficiary of the tendency in the United States for political questions to be resolved into judicial questions.

1248 (1993).

17. Ruth Gavison, *Holmes's Heritage: Living Greatly in the Law*, 78 B.U. L. REV. 843, 869 (1998).

18. Berman, *supra* note 9, at 1291 (emphasis added); Thomas D. Rose, Jr., *Litigation, Alternatives and Accommodation: Background Paper*, 1989 DUKE L.J. 824, 832.

19. Sandra Day O'Connor, *Courthouse Dedication: Justice O'Connor Reflects on Arizona's Judiciary*, 43 ARIZ. L. REV. 1, 7 (2001); *see* ROBERT A. CARP & RONALD STIDHAM, JUDICIAL PROCESS IN AMERICA 14 (1990).

20. R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 378 (2001).

21. *See, e.g.*, Michael W. Bowers, *Public Financing of Judicial Campaigns: Practices and Prospects*, 4 NEV. L.J. 107 (2003).

22. LAWRENCE BAUM, THE SUPREME COURT 6 (6th ed. 1998). For examples of other citations of Tocqueville with specific reference to the Supreme Court of the United States, see LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 46 (1998); DAVID O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 182 (5th ed. 2000).

The grounds for Tocqueville's thesis suggest the possible need for revision. Tocqueville relied heavily on Story and Kent. Both jurists were Whigs, who had political reasons for promoting a strong judicial presence in American political life. Americans at the turn of the twenty-first century rely heavily on Tocqueville. No one has actually compared national political and national judicial questions at the time Tocqueville was writing to see whether his claims were correct or whether Tocqueville unintentionally passed on Whig propaganda.

II. TESTING TOCQUEVILLE

A. PRESENT FAILINGS AND BETTER STANDARDS

Tocqueville's claim that political questions in the United States invariably become judicial questions is more often assumed than tested. The most common practice is simply to declare without supporting argument that "[a]s a policymaker, the Court is involved in most issues affecting society."[23] At most, the obligatory reference to Tocqueville is supplemented by a list of political questions that have been resolved into judicial questions. Jeffrey Segal and Harold Spaeth merely note that "[f]rom a woman's control of her own body to the Vietnam war and from desegregation of schools to drunken drivers, it is hard to imagine a fact of American existence that has not been subjected to constitutional scrutiny."[24] Any cursory glance at the numerous issues courts have resolved throughout history apparently obviates the need for more rigorous examination of Tocqueville's thesis.

Listing issues the Supreme Court has decided, however impressive and lengthy the list, does not adequately test Tocqueville's claim that the political and judicial agendas in the United States are nearly identical. Some independent measure of important political questions is needed to test whether virtually all political questions that excite the polity are resolved into judicial questions or only the many political questions that interest judges, lawyers, and persons who study courts. Other concerns must also be addressed when constructing a fair test of

23. RICHARD L. PACELLE, JR., THE TRANSFORMATION OF THE SUPREME COURT'S AGENDA: FROM THE NEW DEAL TO THE REAGAN ADMINISTRATION 2 (1991).

24. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 4 (1993) (quoting Bertha Wilson, *The Meaning of a Constitution*, 71 JUDICATURE 334 (1988)).

Tocqueville's thesis. Political controversies and judicial decisions must have the temporal and causal relationship necessary to ensure that the Justices are resolving a live political controversy rather than announcing the terms under which an old political controversy was settled by elected officials. The political question must be resolved by courts reasonable people might think capable of settling the political controversy as opposed to merely handing down a decision in favor of a private litigant. Finally, Tocqueville's thesis is supported only to the extent that judicial answers are responsive to the full dimension of the political question and do not merely resolve minor aspects of the underlying political controversy.

1. Independent Measure of Political Questions. Scholars comparing legal and political agendas should obviously measure political and judicial agendas separately. Courts may appear to be interfering in all dimensions of political life only when judicial agendas are not compared with far broader political agendas. Persons who make their living studying courts may have some understandable tendency to think that the issues courts resolve are particularly important. If lawyers have distinctive opinions on the merits of various issues,[25] then good reason exists for thinking that judges, lawyers, and public law scholars have distinctive opinions on the salience of various issues. A good correlation is likely to exist between the issues adjudicated by the Rehnquist Court and the issues most Rehnquist Court watchers think are particularly important. Persons who do not study legal processes for a living may have different political priorities. The issues that most excite scholars whose research focuses on courts may not be the issues that most excite scholars whose research focuses on nuclear proliferation, a political question that for the most part has not been resolved into a judicial question, or the issues that most excite a general public that displays little interest in or knowledge about the Supreme Court.[26]

2. Relationship between Political Question and Judicial Decision. Political questions are resolved into judicial questions only when judicial decisions are handed down before the political controversy is settled. Tocqueville may have written, "scarcely a political question arises in the United States that is

25. Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 NW. U. L. REV. 985, 995-99 (1990).

26. *See id.* at 990, 995-96; Gregory A. Caldeira, *Courts and Public Opinion*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT 303-04 (John B. Gates & Charles Johnson eds., 1991).

not, *sooner or later*, resolved into a judicial question," but his famous observation was made when noting the extraordinary impact of the judiciary on American public life. Timing matters, as Tocqueville recognized when he declared, "few laws can escape the searching analysis of the judicial power for *any length of time*."[27] Contemporary commentators who quote Tocqueville share his assessment that "the judge is one of the most important political powers in the United States."[28] Tocquevilleans celebrating judicial power get no credit when judicial decisions occur significantly "later," merely reaffirming constitutional settlements made decades or a century earlier in nonjudicial forums. That federal circuit courts during the Adams administration sustained the Alien and Sedition Acts supports Tocqueville's thesis.[29] That the Warren Court in 1964 asserted that those measures were unconstitutional does not.[30]

"Sooner" is more complicated. Some political questions resolved into judicial questions at one point in history are not resolved into judicial questions at later points. The Supreme Court handed down two very important decisions on national banking policy during the first party system,[31] but no decision on national banking policy during the second party system even though banking and currency issues were arguably the most controversial political questions that arose during the first half of the Jacksonian Era. Tocquevilleans need not require courts to repeat themselves. Still, the influence of previous judicial decisions on subsequent political controversies cannot be taken for granted.

Two conditions must be met for Tocqueville's thesis to be satisfied by a judicial decision that predates a political controversy or a particular manifestation of a political controversy. First, general agreement existed that the previous decision remained good law. Persons who disagreed with the past judicial decision did not relitigate the issue because they recognized that the Justices would reaffirm that precedent. Opponents of judicial review[32] know they will be laughed out of court (and possibly the legal profession) should they ask the Rehnquist Court to recon-

27. TOCQUEVILLE, *supra* note 5, at 101 (emphasis added).

28. SEGAL & SPAETH, *supra* note 24, at 333.

29. *See* United States v. Callender, 25 F. Cas. 239 (C.C.D. Va. 1800); Case of Lyon, 15 F. Cas. 1183 (C.C.D. Vt. 1798).

30. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

31. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

32. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 175 (1999).

sider the 1803 decision in *Marbury v. Madison*[33] holding that courts have the power to declare federal laws unconstitutional. Second, elected officials were acting consistently with previous judicial rulings. Persons who favored the past judicial decision had no political reason to ask courts to reaffirm that precedent. Proponents of unregulated abortion do not litigate in states that never regulate abortion (and do fund abortions for poor women). When precedents may no longer be good judicial law or are being flouted by elected officials, the previous resolution of a political question into a judicial question does not explain the subsequent failure of the political question to be resolved again into a judicial question. If opponents of the original decision believe that Justices will not respect that precedent, then anticipated reactions based on past decisions do not explain their failure to relitigate the issue. If proponents of the original decision are suffering legislative defeats, they have reason to resolve that political question into a judicial question. Their failure to do so raises questions about the extent to which the previous judicial decisions influenced subsequent public policy.

3. Authority. A fair test of Tocqueville's thesis interprets "judicial" no more literally than "sooner or later." The letter of Tocqueville's claim is satisfied whenever any court is asked to resolve some political dispute. No one would think that reproductive choice in the United States was resolved into a judicial issue, however, had the only legal decision on abortion been made by a small claims court outside of Des Moines. Tocqueville's thesis describes practice only when political questions are resolved by courts thought capable of influencing public policy, and not merely capable of resolving a particular dispute between two private parties. National political questions are resolved into national judicial questions only when adjudicated by the Supreme Court, by numerous lower federal courts, or by the highest courts in influential states.

The emphasis on the political power of the judge suggests that scholars testing Tocqueville's thesis should consider whether judicial resolution actually influenced the political controversy. A very lively debate exists in political science over whether judicial decisions have a substantial impact on public policy.[34] Still, the present focus is on the judicial agenda, not ju-

33. 5 U.S. (3 Cranch.) 137 (1803).

34. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY AND THE POLITICS OF LEGAL MOBILIZATION (1994).

dicial efficacy. For present purposes, Tocqueville's thesis on the resolution of political questions into judicial questions is supported whenever courts make serious attempts to influence public policy, even when those attempts fail.

4. Completeness. Tests of Tocqueville's thesis should determine how completely a political question has been resolved into a judicial question. That the Supreme Court hands down a ruling on foreign policy hardly entails that all foreign policy questions have been resolved into judicial questions. Sometimes, a judicial decision or series of judicial decisions completely cover a political question. Most political questions associated with abortion have over the past three decades been resolved into judicial questions.[35] The Supreme Court's decision in *Dames & Moore v. Regan*[36] affirming the power of the president to freeze Iranian assets during the hostage crisis of 1980, by comparison, did not resolve other political questions associated with the hostage crisis, such as whether the United States should have attempted a military rescue. The precise scope of a particular decision or series of decisions is often unclear. Still, general agreement exists on rough contours. Whether *Brown v. Board of Education*[37] standing alone resolved all questions about segregation or race is an open question. No one thinks *Brown* resolved all political questions associated with education.

The completeness criteria highlights an important difference between judicial decisions declaring federal practices unconstitutional and most judicial decisions declaring a practice constitutional. Judicial decisions declaring a federal law unconstitutional fully resolve all political questions directly concerned with that particular law. *Dred Scott v. Sandford*[38] bluntly held that Congress could not ban slavery in the territories. The primary political questions associated with slavery in the territories remaining open after that decision concerned judicial supremacy and whether Congress had a constitutional obligation to pass a slave code for the territories. Should political actors comply with *Dred Scott* in the case before the court?[39] To what extent should the

35. See Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992); Harris v. McRae, 448 U.S. 297 (1980); Hill v. Colorado, 530 U.S. 703 (2000); Stenberg v. Carhart, 530 U.S. 914 (2000).

36. 453 U.S. 654 (1981).

37. 347 U.S. 483 (1954).

38. 60 U.S. (19 How.) 393 (1856).

39. Ableman v. Booth, 62 U.S. (21 How.) 506 (1858), might be interpreted as holding that elected officials were obligated to obey federal judicial rulings. Of course, that case left open whether elected officials were obligated to obey a federal judicial ruling

rule of *Dred Scott* guide future legislative and executive decision making?[40] Virtually all judicial decisions declaring a federal practice constitutional merely assert that federal actors are constitutionally authorized to choose whether to adopt a particular policy. *Prigg v. Pennsylvania*[41] held that Congress had the power to pass a fugitive slave law. That decision left unresolved such political questions as whether Congress should pass a fugitive slave law, whether Congress was constitutionally obligated to pass a fugitive slave law, and whether that fugitive slave law should be identical to either the statutes passed in 1793 or 1850. Judicial decisions sustaining federal practices merely resolve political questions concerned with whether power exists to engage in a practice, but not political questions concerned with whether engaging in that practice is desirable or mandatory. Political questions associated with fugitive slave law would have been fully resolved into judicial questions only if the Supreme Court determined whether Congress was constitutionally obligated to pass fugitive slave laws, whether such laws were good public policy, and what the content of the best fugitive slave law would be.

Whether completeness requires tests of Tocqueville's thesis to distinguish between statutory and constitutional decisions is not clear. *Democracy in America* emphasized constitutional decisions. Tocqueville highlighted "the power vested in the American courts of justice of pronouncing a statute to be unconstitutional."[42] "Armed with the power of declaring the law to be unconstitutional," *Democracy in America* opines, "the American magistrate perpetually interferes in political affairs."[43] Unlike constitutional decisions, statutory decisions leave open the underlying constitutional question. Elected officials remain free to pass a law embodying the policy that the court rejected. Contemporary scholars, however, realize that many statutory decisions bear a strong resemblance to constitutional decisions. Judicial interpretations of statutes, while not as difficult to overturn legislatively as constitutional decisions, still require in practice large or multiple legislative majorities to reverse.[44] Moreover,

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holding that elected officials were obligated to obey federal judicial rulings. *Cf.* Cooper v. Aaron, 358 U.S. 1 (1958).

40. Abraham Lincoln, *Mr. Lincoln's Speech, Sixth Joint Debate, October 13, 1858*, *in* THE LINCOLN-DOUGLAS DEBATES OF 1858 255 (Robert W. Johannsen ed., 1965).

41. 41 U.S. (16 Pet.) 539 (1842).

42. TOCQUEVILLE, *supra* note 5, at 103.

43. *Id*, at 279.

44. *See* GLENDON A. SCHUBERT, CONSTITUTIONAL POLITICS: THE POLITICAL BEHAVIOR OF SUPREME COURT JUSTICES AND THE CONSTITUTIONAL POLICIES THAT

Congress frequently writes statutes with vague language for the very purpose of facilitating judicial policymaking.[45] Statutory interpretation in these circumstances is practically as final as constitutional interpretation, Finally, the line between statutory and constitutional decisions is not always clear. Antebellum courts, in particular, frequently misinterpreted federal statutes in order to avoid declaring them unconstitutional.[46] No perfect resolution of the difficulties raised by statutory cases seems possible. Still, scholars exploring the extent to which political questions are resolved into judicial questions should be sensitive to cases where the judiciary is largely applying clear legislative language to a fact situation, and instances where the judges are more clearly establishing public policy that simple majorities in other branches of the national government may not be able or want to overturn.

B. THE TEST

Tocqueville's thesis is best tested by determining which important national political issues were resolved by the Supreme Court while those political questions were still being debated politically. Limited to Jacksonian America, the appropriate comparison contrasts the national political agenda and the national judicial agenda from 1828 to 1860. Cases decided before 1828 should be included to determine whether some Jacksonian political questions were not resolved into judicial questions during the second party system primarily because they had previously been resolved into judicial questions during the first party system. Such decisions as *McCulloch v. Maryland* and *Gibbons v. Ogden* might explain why the late Marshall and Taney Courts were not called on to resolve numerous political questions associated with federal power to promote economic development.

1. The Political Questions. The most important national political questions during the Jacksonian era were determined by examining the major and minor party platforms published during the three decades before the Civil War.[47] These party platforms were supplemented by presidential messages issued from 1828

THEY MAKE (1960).

45. *See* GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER AND AMERICAN DEMOCRACY (2003).

46. *See, e.g.*, Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1860); Mossman v. Higginson, 4 U.S. (2 Cranch) 12 (1800).

47. *See* 1 NATIONAL PARTY PLATFORMS, at 1-33 (Donald Bruce Johnson ed., 1978).

until 1860,[48] the primary and secondary sources on presidential elections held between 1828 and 1860 published in the four volume *History of American Presidential Elections*,[49] and general histories of the Jackson,[50] Van Buren,[51] Harrison and Tyler,[52] Polk,[53] Taylor and Fillmore,[54] Pierce,[55] and Buchanan[56] administrations.[57] These supplemental sources confirm that party platforms highlighted the major political questions debated during the Jacksonian era, detail numerous facets of those political questions, and refer to other national political questions of some importance not mentioned in party platforms.[58] Political questions mentioned only once or twice in primary sources may have been of transient importance only. Those issues are worth notice, given that Tocqueville declared that "*[s]carcely any* political question arises in the United States that is not resolved . . . into a judicial question." Nevertheless, that an issue is mentioned only once in the supplementary sources hardly constitutes geometric proof that the matter was of any importance or more important than issues not mentioned.

The analysis below uses a very broad, arguably too broad, conception of "political question" when examining Tocqueville's thesis. All controversies over the merits and behavior of public officials or candidates for public office, the processes by which public policies were made, and the substance of any governmental decision are considered political questions. Political questions

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48. *See* 2-5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897 (James D. Richardson ed., 1896).

49. *See* THE HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS (Arthur M. Schlesinger, Jr., & Fred L. Israel eds., 1971).

50. *See* DONALD B. COLE, THE PRESIDENCY OF ANDREW JACKSON (1993).

51. *See* MAJOR L. WILSON, THE PRESIDENCY OF MARTIN VAN BUREN (1984).

52. *See* NORMA LOIS PETERSON, THE PRESIDENCIES OF WILLIAM HENRY HARRISON & JOHN TYLER (1989).

53. *See* PAUL H. BERGERON, THE PRESIDENCY OF JAMES K. POLK (1987).

54. *See* ELBERT B. SMITH, THE PRESIDENCIES OF ZACHARY TAYLOR & MILLIARD FILLMORE (1988).

55. *See* LARRY GARA, THE PRESIDENCY OF FRANKLIN PIERCE (1991).

56. *See* ELBERT B. SMITH, THE PRESIDENCY OF JAMES BUCHANAN (1975).

57. No different conclusions would have been reached had other general histories of Jacksonian America been used. *See, e.g.*, MICHAEL F. HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR (1999); DANIEL FELLER, THE JACKSONIAN PROMISE: AMERICA 1815-1840 (1995).

Prominent works on judicial review before the Civil War were not used to determine the most important political issues during the Jacksonian Era. Studies that focus primarily on the Supreme Court or particular Supreme Court cases may understandably exaggerate the importance of the author's subject. For similar reasons, works on specific Jacksonian policies were not used to establish that those policies were particular important.

58. All issues mentioned below were discussed in at least one of these sources.

include such matters as the appropriate use of the presidential veto, whether Congress could ban slavery in the District of Columbia, whether the federal government was authorized to build post roads, whether the United States should have declared war against Mexico in 1845, whether a constitutional amendment changing the presidential election system should have been adopted after the election of 1828, whether the Whigs should have run a single candidate in 1836, and whether Presidents should have danced the polka in public. Several of these issues may seem inappropriate given that everyone knows that Justices do not determine when Congress should declare war, whether Americans should pass a constitutional amendment, what nomination strategies political parties should adopt, and how or where the President should dance. These issues are included partly because Tocqueville and those who quote him assert "scarcely any political question" without explicit qualification. More significantly, attempts at qualification are more difficult than appear and obscure important features of American judicial politics.

Americans throughout history have turned to courts to resolve an impressive array of political questions. Hardly any kind of political question has enjoyed complete immunity from this litigious imperative. For virtually every political question that was not resolved into a judicial question at one point in American history, an analogous political question arose at some other time that was resolved into a legal question. Consider sex scandals involving national figures. Such incidents frequently raise important political questions. Washingtonians during President Andrew Jackson's first years in office vigorously disputed whether Margaret ("Peggy") O'Neal Eaton, when married to her first husband, John Timberlake, had an affair with her second husband, Jackson's friend, political confidante, and first secretary of war, John Eaton. The political consequences of the "Petticoat affair" included the collapse of Jackson's first cabinet, Jackson's alienation from his first vice-president, John C. Calhoun, and Jackson's decision to make Martin van Buren his heir apparent.[59] Issues concerning Peggy Eaton's virtue were discussed in numerous political forums and attracted the attention of most prominent political actors in Jacksonian America.

59. *See* JOHN F. MARSZALEK, THE PETTICOAT AFFAIR: MANNERS, MUTINY, AND SEX IN ANDREW JACKSON'S WHITE HOUSE (1997).

Although no issue arising out of that affair ever became the subject of litigation, President Bill Clinton was not as lucky. The sex scandals of his administration were resolved into political, legal, and judicial questions. His affair with Monica Lewinsky was investigated by a special prosecutor. His encounter with Paula Jones resulted in a lawsuit that eventually reached the Supreme Court of the United States.[60] Constitutional amendments provide a less salacious example of political questions resolved into judicial questions at some times, but not others. Debate over whether the first eighteen amendments were constitutionally legitimate took place entirely outside the courtroom. Opponents of women's suffrage resolved the legitimacy of the Nineteenth Amendment into a judicial question. Whether granting women the vote was an unlawful constitutional amendment was adjudicated, adversely, by the Supreme Court of the United States.[61]

Qualifying Tocqueville's thesis fails. *Democracy in America* loses its bite if interpreted as asserting only that those political questions which also raise legal issues are routinely resolved into judicial questions. Justices exercise substantial political power only if most political questions (of a certain type) are resolved into legal questions. Narrowing Tocqueville's thesis to the claim that *policy* questions in the United States are routinely resolved into judicial questions is problematic. Numerous policy questions are rarely resolved into judicial questions. Whether to declare war is a policy question, as is whether to amend the constitution to ban flag burning. Prominent nonpolicy questions are sometimes resolved into judicial questions. Who won the presidential election of 2000 is not normally considered a policy question, yet commentators routinely speak of *Bush v. Gore*[62] as playing a major role in determining who took the oath of office in 2001.

The logic of much judicial behaviorialism in political science provides additional reasons for initially relying on a very broad conception of "political question" when testing Tocqueville's thesis. The leading behavioral study of judicial decisionmaking declares "American judges have . . . virtually untrammeled policymaking authority" and that the individual justices individual

60. *See* Clinton v. New York, 524 U.S. 417 (1998).

61. *See* Leser v. Garnett, 258 U.S. 130 (1922); Fairchild v. Hughes, 258 U.S. 126 (1922). For an infamous claim that the justices should have declared the Fifteenth Amendment unconstitutional, *see* Arthur W. Machen, Jr., *Is the Fifteenth Amendment Void?*, 23 HARV. L. REV. 169 (1910).

62. 531 U.S. 98 (2000).

policy preferences . . . determine who gets into the Supreme Court.[63] These assumptions suggest that federal judges consistently determine when the United States goes to war and what constitutional amendments should be passed. These are all policy questions on which most Justices most of the time have fairly strong preferences. The central creed of much judicial behaviorism, that judicial decisions are made on the basis of judges' political preferences rather than legal rules, suggests that virtually any matter should be grist for the judicial mill. If judges are primary interested in making good policy, surely they would want to determine the outcome of political questions that would affect policy, and not simply confine themselves to resolving specific policy questions. Jacksonian Justices would more likely influence the direction of public policy by declaring that the Democrat won the presidential election of 1848 than by separately resolving all the policy issues that divided Whigs from Jacksonians. Strategic-minded Justices would certainly have intervened in the Eaton Affair. Martin Van Buren, perhaps the best political strategist of the time, devoted a good deal of time to Mrs. Eaton's problems. Given that the Petticoat Affair helped cause the breakup of a cabinet and a change in the line of presidential secession, one may wonder what a strategic court was saving its political capital for. Little in the judicial behavioral literature explains why Justices should limit themselves to political questions. If life tenure gives Justices "virtually untrammeled . . . power," then the Supreme Court should be arranging blind dates, firing football coaches, and judging quilt work whenever five Justices feel strongly enough on those subjects. Justice Brennan, after all, apparently declared that "five votes can do anything here."[64]

Beginning with a very broad conception of "political question" does not dictate concluding with such a conception. If investigation reveals some political questions are never or hardly ever resolved into judicial questions, scholars ought to explain why these matters are rarely placed on the judicial agenda. Thinking about what common features of presidential polkas and party nominations inhibit such political questions from being resolved into judicial questions is likely to be more fruitful than merely asserting, "These are not the political questions we mean." One reason why Tocqueville's thesis may seem attractive is that both he and subsequent commentators implicitly define

63. SEGAL & SPAETH, *supra* note 24, at 7, 192.

64. EDWARD LAZARUS, CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT 369 (1998).

out of existence those political questions that everyone knows courts do not resolve.

2. Judicial Decisions. Reports of all Supreme Court and lower federal court decisions were surveyed to discover which national political questions mentioned in party platforms or the supplemental sources were resolved into judicial questions. The Jacksonian era and second party system were clearly over by the election of Lincoln, but judicial decisions from 1860 until 1870 were surveyed to ensure that no case was missed merely because the normal time lags associated with litigation prevented a political question that arose late in the Jacksonian era from being resolved into a judicial question until or shortly after the Civil War. *Rice v. Railroad Co.*[65] supports Tocqueville's thesis. That 1862 decision resolved a congressional debate during the 1850s over whether federal land grants to railroads could be repealed. *Hepburn v. Griswold*[66] and the *Legal Tender Cases*[67] are not included in this study because the political questions resolved into judicial questions in those cases were associated with the methods used to finance the Civil War, and not the controversies over hard money that took place during the 1830s and 1840s.

III. POLITICAL QUESTIONS TO JUDICIAL QUESTIONS

Comparing political and judicial agendas reveals that scarcely any national political question arose in Jacksonian America that was resolved into a judicial question adjudicated by the Supreme Court of the United States. The Justices did hand down decisions on many, not all, of the slavery issues that disrupted the second party system. On those questions that divided National Republicans and Whigs from Democrats, the late Marshall and early Taney Courts were largely silent. That tribunal did not deliver authoritative opinions on the vast majority of issues that from 1828 to 1860 were sufficiently important to be included in a major party platform, a minor party platform, a presidential message, a political history of a particular presidential administrations or a political history of a particular presidential election. Lower federal courts adjudicated a similarly narrow range of cases. With the exception of a series of bankruptcy cases and several issues related to slavery, both federal district

65. 66 U.S. (1 Black) 358 (1861).
66. 75 U.S. 603 (1869).
67. 78 U.S. 682 (1870).

and federal circuit courts had no broader an agenda than the Supreme Court.

Numerous national political questions so excited Americans during the Jacksonian era that they were repeatedly highlighted in both party platforms and the supplemental sources. Slavery was undoubtedly the most important national political question in Jacksonian America. Many national disputes directly concerned the South's peculiar institution. Such matters as Kansas statehood and secession had little salience independent from slavery. Political questions associated with the American System or national economic development were debated almost as fervently as slavery. These issues included internal improvements, the tariff and the related nullification crisis, federal assumption of state debts, the national debt, the national bank, the independent treasury,[68] the currency, public land policy, the railroad to the Pacific, and the postal system. Political questions associated with ethnocultural issues, although more salient in state politics, periodically excited important national controversies. National calls for immigration and nationalization restrictions during the 1850s were matched by calls for religious freedom. Expansion generated intense political controversies concerning slavery and national development during the 1840s and 1850s, as Americans debated political questions associated with Oregon, Texas, and Cuba. Political questions associated with foreign policy similarly occupied space on the national political agenda. Jacksonians debated various foreign alliances, whether to support republican governments and republican revolutions in foreign countries, the role of international arbitration, and more specific political questions associated with the Mexican War, the Monroe Doctrine, Central America, and the Caribbean. The place of Native Americans in the Jacksonian regime proved an important national political question closely related to national expansion, foreign policy, and ethnocultural concerns. Americans in the Jacksonian era debated issues associated with the staffing of the national government and the new Jacksonian style of government. These political questions included the presidential veto, executive usurpation, the presidential term, direct elections for more governing officials, and ongoing concerns with political corruption. Finally, Americans debated such national political questions as whether to amend the constitution, issues

68. For a good discussion of President Van Buren's proposed independent treasury, see WILSON, *supra* note 51.

of political morality, political economy, and political sociology, and issues generated by social life in Washington.

Some political questions and particular issues were obviously more important than others. Many issues had numerous components. The railroad to the Pacific raised questions about whether Congress should finance that endeavor and, if so, what route should be chosen. Fortunately, present purposes do not require fine-tuning the categories. That most political questions debated between 1828 and 1860 were not resolved into judicial questions can be demonstrated by using admittedly very rough categories. Whether these categories should be or can be fine-tuned for other projects awaits those projects.

A. THE DETAILED SCORECARD

1. Slavery. The Supreme Court during the second party system adjudicated many political controversies associated with slavery. The Justices in *Scott v. Sandford* held that former slaves could not become American citizens,[69] that Congress could not ban slavery in American territories, and that slave states could determine whether slave status reattached when a person who had been held in slavery "voluntarily" returned from free soil. The Justices *in Prigg v. Pennsylvania* and *Ableman v. Booth* sustained the power of the federal government to pass fugitive slave laws and sustained particular details of the Fugitive Slave Laws passed by the federal government in 1793 and 1850, respectively. Chief Justice Taney in *Kentucky v. Dennison* ruled that the national government could not compel a state government to extradite persons accused of helping fugitive slaves. Two decades previously, the Justices in *Groves v. Slaughter*[70] were asked to determine the scope of state and federal power to regulate the interstate slave trade. The majority opinion decided the case on more narrow grounds, dubiously claiming that Mississippi had not yet legally regulated the interstate slave trade.[71] Chief Justice Taney and Justice McLean in separate opinions declared that slaves were not the sort of commercial good that the federal government had the power to regulate.[72] Justice Baldwin's dissent maintained that the federal government could regulate the

69. Chief Justice Taney on circuit did find that slaves were persons under federal criminal law. *See* United States v. Amy, 24 F. Cas. 792, 810 (C.C.D.Va. 1859) (No. 14,445).

70. 40 U.S. (15 Pet.) 449 (1841)

71. *See id.* at 499-503.

72. *See id.* at 508-10 (Taney, C.J., concurring); *id.* at 504-08 (McLean, J., dissenting).

interstate slave trade.[73] The *Amistad* case[74] declared that no compensation was due a ship engaged in the illegal slave trade that was captured and commandeered by its "merchandise." Justice Wayne in another case indicated that states could bar the entry of free persons of color and other "undesirables."[75]

Some questions concerning the federal law of slavery not resolved by the Supreme Court were resolved by other tribunals. Lower federal courts adjudicated numerous questions concerned with federal power to regulate the international slave trade, various facets of the fugitive slave law,[76] and private filibustering efforts to conquer Carribean or Central American nations with the goal of eventually making them slave states.[77] State courts heard numerous cases on the constitutional status of fugitive slaves[78] and slaves who traveled with their masters to free states.[79] A state court decision on the status of slaves sojourning with their masters in free territory[80] might have been reviewed by the Supreme Court had the Civil War not intervened. A North Carolina state court punished a clergyman for distributing an antislavery tract.[81]

Other important political questions associated with slavery were not resolved into judicial questions. The Supreme Court did not decide whether federal postmasters could exclude from the mails abolitionist tracts or other materials published by an antislavery editor, whether and how Congress could refuse to discuss abolitionist petitions, whether Preston Brooks should have been disciplined by Congress for caning Charles Sumner, whether the United States should have sent representatives to a central American conference attended by black delegates from Haiti, or whether the free states should have passed laws criminalizing antislavery speech. The federal bench issued no ruling

73. *See id.* at 510-17 (Baldwin, J., dissenting).

74. United States v. Libellants and Claimants of the Schooner Amistad, 40 U.S. (15 Pet.) 518 (1841).

75. Smith v. Turner, 48 U.S. (7 How.) 283, 428 (1849) (Wayne, J.) *See* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 227 (1997).

76. *See, e.g.*, United States v. Hanway, 26 F. Cas. 105 (C.C.E.D. Pa. 1851) (No. 15, 299).

77. *See, e.g.*, United States v. Quitman, 27 F. Cas. 680 (C.C. E.D. La. 1854) (No. 16,111).

78. *See, e.g.*, Sim's Case, 61 Mass. 285 (1851); Jack v. Martin, 12 Wend. 311 (N.Y. 1834).

79. *See, e.g.*, Jackson v. Bulloch, 12 Conn. 38 (1837); Commonwealth v. Aves, 35 Mass. 193 (1836).

80. *See* Lemmon v. People, 20 N.Y. 562 (1860).

81. *See* State v. Worth, 52 N.C. 488 (1860).

on how the United States should have responded when a filibustering expedition led by William Walker temporarily conquered Nicaragua, on whether the federal government had to provide defense counsel for any federal marshal sued for false imprisonment by an alleged fugitive slave, or on whether claimed fugitive slaves had a right to a jury trial in the state from which they allegedly fled. Federal judges during the Jacksonian era did not decide whether southern states could imprison free seamen of color.[82] No judicial decision discussed whether Congress should have banned slavery or the slave trade in the District of Columbia, or could have established a slave code in the territories. No judicial decision discussed whether the United States should have demanded compensation from Great Britain for freeing slaves who while on the *Creole* mutinied and brought the vessel to the West Indies. Federal judges did not decide whether British ships should be given permission to search for slaves on ships flying the flag of the United States, or whether Indian peonage should be banned in the western territories. No judicial decision considered any scheme to colonize freed slaves or on whether and how to maintain sectional equilibrium in the Senate. The Justices did not adjudicate such issues associated with Kansas statehood as the Lecompton Constitution, the English Bill, and best nominee for territorial governor. None of the political questions associated with the congressional response to and investigation of John Brown's raid on Harper's Ferry were resolved into judicial questions. Americans debated without official judicial assistance whether to sign the Quintuple Treaty, the Webster-Ashburton Treaty, or any other measure designed to suppress slave piracy. The Justices in their official capacity did not comment when New Englanders proposed a constitutional amendment repealing the three-fifths clause.

Some, but not all, of the political questions associated with efforts to prevent secession and Civil War were resolved into judicial questions. The Supreme Court's decisions in the *Prize Cases*[83] and *Texas v. White*[84] established that the President could respond militarily to secession without contemporaneous legislative approval and rejected claims that states could unilaterally

82. That issue was raised in federal circuit courts during the early 1820s. *See* Elkison v. Deliesseline, 8 F. Cas. 493 (C.C.D.S.C. 1823) (No. 4,366). Marshall in 1820 ducked the issue. *See* The Wilson v. United States, 30 F. Cas. 239 (C.C.D. Va. 1820) (No. 17,846). For the continued vitality of this issue during the Jacksonian Era in national legislative politics, *see* CARL B. SWISHER, THE TANEY PERIOD 1836-1864, at 378-82, 392-94 (1974).

83. 67 U.S. 635 (1862).

84. 74 U.S. 700 (1868).

leave the union. *White*, however, was decided rather late in the day to resolve political questions associated with secession, and is probably better conceptualized as only resolving questions associated with Reconstruction. No judicial decision discussed whether President Buchanan should have called a national convention after South Carolina attempted secession, determined whether the Congressional Committee of 13 should have made decisions by majority or supermajority vote, or helped establish the precise status of the ad hoc peace convention presided over by former President Tyler. The Supreme Court did not decide whether Americans should adopt Robert Toombs' suggestion that constitutional amendments be passed guaranteeing slaveholders rights in all territories, making clear that fugitive slaves had no right to a jury trial or habeas corpus, giving a majority of slave states a veto on any law relevant to slavery, and giving every slave state a veto on any proposed constitutional amendment related to slavery. Federal judges were similarly silent when Stephen Douglas proposed that territories be admitted as states when and only when they had 50,000 inhabitants, that a two-thirds vote of each house be required for any further national expansion, that blacks neither vote nor hold office, and that the federal government purchase land for colonization. No judicial decision discussed whether Americans should pass the Corwin Amendment or extend the Missouri Compromise line to the Pacific on the condition that no new territory be acquired. American politicians in the wake of secession debated without judicial assistance whether to retain southern forts, resupply those forts, or increase the military budget. Justices Nelson and Campbell participated actively as private citizens in efforts to maintain union in the wake of Lincoln's election.[85] No Justice participated in any official or semi-official discussion during the secession winter aimed at preserving the constitutional order.

2. National Economic Development. The Supreme Court resolved almost none of the major political questions raised by the American System and related proposals for national economic development. No judicial decision between 1828 and 1860 considered whether Congress had the power to incorporate a national bank. No judicial decision considered the merits of any particular national bank proposal, most notably the proposal to give states one opportunity to reject a branch of the national

85. *See* DAVID M. POTTER, LINCOLN AND HIS PARTY IN THE SECESSION CRISIS 345-49 (1979).

bank, or proposed Jacksonian substitutes for the national bank, most notably the Independent Treasury and Exchequer. No judicial decision considered the merits of proposed federal regulations of state banks, most notably proposals to close any bank that suspended specie payments and to ban special charters for banking corporations. Such political questions as how federal funds should be distributed to the states after being removed from the national bank, or whether federal policy should favor state banks or divorce national institutions from all banks were not resolved into judicial questions. The Supreme Court before the Civil War did not participate in the debates between hard and soft money advocates, or decide how much and what kinds of currencies should be in circulation. No judicial decision determined the conditions under which the federal government could deposit surpluses with state governments or discussed whether the federal government could assume state debts.

Public land policy during the three decades before the Civil War was made largely without judicial comment. The Justices expressed no opinion on western demands for cheap land, for gradation policies that would lower the price of unsold land, for preemption policies that would give rights to persons who had settled on unsold land, or for homesteading policies that would provide incentives for persons to settle the west. Justice McLean on circuit rejected claims that territories assumed ownership of all public lands within their jurisdiction upon attaining statehood.[86] That constitutional controversy was never resolved by the Supreme Court. No judicial decision discussed whether any conditions justified distributing to states the proceeds from the sale of public lands. No judicial decision discussed whether the federal government could grant states land or other subsidies to support higher education. Elected officials debated without judicial assistance the merits of various land grants to railroads, various railroad routes to the Pacific Ocean, and Jefferson Davis's proposal that camels be used to transport goods west until the railroad was built. The Taney Court in *Rice v. Railroad Co.*[87] did indicate that although Congress had not intended to repeal a controversial federal land grant to a railroad, such a repeal would be unconstitutional if intended.

The Taney Court was asked to hand down decisions on federal power to promote internal improvements, but issued only

86. *See* United States v. Gratiot, 26 F. Cas. 12, 13 (C.C.D. Ill., 1839) (No. 15,249).
87. 66 U.S. (1 Black) 358 (1861).

one relatively minor ruling. Counsel in *Searight v. Stokes*[88] declared that the federal government had no power to build post roads.[89] The judicial majority refused to discuss this issue, holding only that the federal government had the constitutional power to give states money to repair post roads.[90] Justice Daniel's dissent in *Searight* denied any federal power to finance internal improvements.[91] Dicta in later cases suggest that most Taney Court Justices believed that the federal government had the power to build lighthouses, but no power to build post roads.[92] No majority opinion explicitly stated that conclusion.

With those exceptions, political questions associated with the conditions under which the federal government could pay for internal improvements were not resolved into judicial questions. The Justices were never asked about and never ruled on federal power to improve harbors or build canals. No judicial decision provided standards for determining when an internal improvement bill satisfied the "national interest" test that Jacksonian presidents deemed necessary to approve such projects. Postal questions were not resolved into judicial questions. No judicial decision discussed the allocation of mail contracts, how to eliminate postal fraud or reduce the postal debt, what were appropriate postal rates, whether the franking privilege was justified, whether mail should be delivered on Sunday, and whether the Postmaster General should get a bigger office. Federal judges did not decide whether the national government should establish a national university, adopt a uniform system of weights and measures, explore the West, or build an astronomical observatory.

Tariff policies were made with some, but not extensive, judicial assistance. Counsel in *Aldridge v. Williams*[93] noted the argument that protective tariffs were unconstitutional but did not ask the Justices to resolve the case on that ground.[94] Chief Justice Taney's majority opinion in that case declared that the Justices would generally accept government claims that particular tariff rates were necessary for revenue.[95] *Aldridge* also ruled as a

88. 44 U.S. (3 How.) 151 (1845).
89. *See id.* at 160 (argument of Mr. Walker).
90. *See id.* at 166-67.
91. *See id.* at 180-81 (Daniel, J., dissenting).
92. *See* Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 442-43 (1856) (McLean, J., dissenting); *id.* at 449 (Wayne, J., dissenting).
93. 44 U.S. (3 How.) 9 (1845).
94. *See id.* at 12-13 (argument of R. Johnson).
95. *See id.* at 26.

matter of statutory interpretation that the Tariff Law of 1833 did not expire in 1842.[96] This resolved a minor controversy within the Tyler administration.[97] The Justices never discussed the constitutionality of protective tariffs, whether duties should be paid in cash, the merits of free trade, the merits of particular tariff rates or precise duties on particular goods, the merits of special wartime tariffs on tea and coffee, the merits of *ad valorem* as opposed to specific duties, or the precise date new tariff laws should take effect. The nullification crisis precipitated by the 1828 Tariff of Abominations was initiated, fought, and settled in nonjudicial forums. No federal judicial decision discussed whether South Carolina could nullify a protective tariff. No federal judicial decision explored whether the Force Bill of 1833 was an appropriate response to nullification.[98]

Bankruptcy was the one political question associated with national economic development almost completely resolved into a judicial question, although not a judicial question adjudicated by the Supreme Court. The Justices were asked on at least two occasions to invalidate aspects of the Bankruptcy Act of 1841. The Justices ducked the issue in *Nelson v. Carland*[99] by ruling that the Supreme Court had no jurisdiction to hear bankruptcy appeals from lower federal courts.[100] The Justices also avoided public comment on constitutional issues associated with bankruptcy in *Spalding v. New York*[101] when affirming a New York decision that found the Bankruptcy Act inapplicable on statutory grounds. Chief Justice Taney's one-paragraph opinion merely noted that the majority failed to agree on common grounds for the decision.[102] This suggests that some Taney Court Justices endorsed the claim made by defense counsel that the Bankruptcy Act was unconstitutional.[103] Lower federal courts handed down numerous decisions on the constitutionality and proper interpretation of the Bankruptcy Act during the short period of time that statute was on the books.[104] Justice Catron on

96. *See id.* at 29.
97. PETERSON, *supra* note 52, at 160.
98. Ableman v. Booth, 62 U.S. (21 How.) 506 (1858), while discussing nullification, cannot be said to have resolved the political questions raised by nullification into judicial questions, given that Ableman was decided thirty years after the nullification crisis was settled.
99. 42 U.S. (1 How.) 265 (1843).
100. *See id.* at 265-66.
101. 45 U.S. (4 How.) 21 (1846).
102. *See id.* at 36.
103. *See id.* (argument of Mr. Delano).
104. *See, e.g.*, Ex parte Hull, 12 F. Cas. 853 (D.C.S.D.N.Y. 1842) (No. 6,856); Ex

circuit wrote an opinion declaring the law constitutional.[105] At least one federal district judge, the judge who first heard *Nelson*, declared the Bankruptcy Act unconstitutional.[106] No federal judicial decision determined whether persons could be imprisoned for debt, or whether laws should be passed guaranteeing that employees owed past wages would obtain a fair share of assets when their employers declared bankruptcy.

2a. *McCulloch*. Several important political and constitutional questions on national economic development not resolved into judicial questions during the second party system had been resolved into judicial questions during the first party system. *McCulloch v. Maryland* plainly declared that the federal government had the power to incorporate a national bank and exercise any other power not explicitly prohibited by the constitution that was reasonably related to a legitimate constitutional end. Five years later, *Gibbons v. Odgen*[107] advanced a fairly broad reading of the commerce power, at least broader than some Jeffersonians preferred. Lest their contemporaries harbor any doubt about the direction of Marshall Court decisionmaking, several Justices on that tribunal wrote President Monroe a letter indicating that the principles supporting federal incorporation of a national bank committed the court to sustaining the bill authorizing extensive federal internal improvements then awaiting executive signature.[108] Given this early judicial commitment to national economic development, neither Jacksonian Justices nor Jacksonian politicians may have felt the need to have the Supreme Court repeat itself.

McCulloch and *Gibbons* did not judicially resolve the precise political questions being debated during the three decades before the Civil War. National Republicans/Whigs and Jacksonians disputed both the national power to enact and the economic advantages of the American System. At most, Marshall Court decisions supported claims that the federal government had the power to adopt the American System and other proposals for national economic development. Nothing in the case law before 1828 supported claims that the federal government was constitu-

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parte Breneman, 4 F. Cas. 54 (D.C.E.D. Penn. 1842) (No. 1,830).

105. Nelson, 42 U.S. at 277-81 (reprinting Justice Catron's opinion on circuit in *In re Klein*).

106. *See id.* at 268-76 (Catron, J., dissenting).

107. 22 U.S. (9 Wheat.) 1 (1824).

108. *See* 1 CHARLES WARREN THE SUPREME COURT IN UNITED STATES HISTORY 596-97 (1947) 1922.

tional obligated to incorporate a national bank or fund internal improvements, or that these American System proposals were desirable public policies. Although Henry Clay and his political supporters lost most of their political battles, they refrained from asking the Supreme Court to interpret *McCulloch* as mandating the incorporation of a national bank or at least as forbidding the president from vetoing laws on either policy grounds or mistaken constitutional grounds.

Whether past judicial precedents sustaining broad federal power over national economic development would have been reaffirmed in such a lawsuit was doubtful. By the end of Jackson's second term, political sentiment in Washington was that *McCulloch* would be overruled whenever the Taney Court was presented with a proper case. Thomas Hart Benton on the Senate floor praised President Jackson for "prepar[ing] the way for a reversal of that decision."[109] Daniel Webster in 1841 warned Whig associates in Congress that the Supreme Court would almost certainly declare unconstitutional any bank bill similar to the one sustained by the Marshall Court in *McCulloch*.[110] 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."[111]

These predictions were quite realistic given the composition of the Supreme Court. "The opinions and actions of men are known, and the sanctity of the ermine cannot change the character of the men," Whigs sadly noted. "Who removed the deposits?" Representative Henry A. Wise continued. "Who have since been appointed on that supreme bench? How many? By whom? Count!"[112] Before joining the court, Roger Taney, Levi Woodbury, James Wayne, Philip Pendleton Barbour, John McKinley, Nathan Clifford, and John Catron all played prominent roles in Jacksonian fights against the national bank and American System. Taney and Woodbury were trusted members of Jackson's cabinet (Peter Daniel turned down an invitation to join the cabinet)[113], Woodbury was in Van Buren's cabinet (Daniel again

109. CONG. GLOBE, 24th Cong., 2nd Sess. App. 122 (1837).

110. MERRILL D. PETERSON, THE GREAT TRIUMVIRATE: WEBSTER, CLAY, AND CALHOUN 306 (1987).

111. PETERSON, *supra* note 52, at 70. *See* Magliocca, *supra* note 3, at 208, 212, 226, 248-50, 254-55.

112. CONG. GLOBE, 27th Cong., 1st Sess. App. 412 (1841).

113. *See* SWISHER, *supra* note 82, at 245.

turned down a position)[114], and Clifford was the attorney general in the Polk administration. Woodbury had received serious consideration as a Jacksonian presidential candidate; Barbour was almost the Jacksonian nominee for the vice presidency in 1832.[115] Woodbury, Wayne, Barbour, McKinley, and Clifford were Jacksonian leaders in Congress; Nelson was a Jacksonian candidate for the Senate. Baldwin, Taney, Catron, McKinley, and Daniel played major roles organizing Jacksonian forces in Pennsylvania, Maryland, Tennessee, Alabama, and Virginia respectively.[116]

The majority on the Taney Court was on record either as believing *McCulloch* wrongly decided or as harboring extreme anti-bank sentiments. Five Taney Court Justices, Taney, Barbour, Daniel, Clifford, and Woodbury had, while in political office, declared that the national bank was unconstitutional.[117] The other orthodox Jacksonian members of the Taney Court were either leading opponents of the national back (Wayne, Catron, McKinley, and possibly Samuel Nelson)[118] or identified with political factions or political leaders that regarded the bank as unconstitutional (Robert Grier and John Campbell).[119] Only five Justices who sat during the Taney era, Joseph Story, Smith Thompson, Henry Baldwin, John McLean, and Benjamin Curtis, were relatively sure votes for sustaining a national bank bill.[120] At no time did these five Justices sit together.

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114. *See* HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS, A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 78, 81 (rev. ed., 1999).

115. *See* SWISHER, *supra* note 82, at 433, 443.

116. *See* ABRAHAM, *supra* note 114, at 73 ("[l]ong an aggressive and enthusiastic supporter. . . , Baldwin had been instrumental in bringing Pennsylvania into the Jacksonian fold in the election of 1828"), 74-75 (Taney); 76-77 (Catron), 78 ("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"), 78-79 (Daniel); SWISHER, *supra* note 82, at 125-29, 296-98.

117. For Taney, *See* SWISHER, *supra* note 82, at 190-95, 345 (1935); for Barbour, *see Annals of Congress*, 16th Cong. 1st Sess. (1218) 1221 (Feb. 10, 1820); for Daniel, *see* JOHN P. FRANK, JUSTICE DANIEL DISSENTING: A BIOGRAPHY OF PETER V. DANIEL, 1784-1860 113 (1964); for Woodbury, *see* CONG. GLOBE, 27th Cong., 1st Sess. app. (175) 180 (1841); for Clifford, *see* CONG. GLOBE, 26th Cong., 1st Sess. app. (469) 475 (1840).

118. For Wayne, *see* ALEXANDER' A. LAWRENCE, JAMES MOORE WAYNE: SOUTHERN UNIONIST 72 (1943); for Catron, *see* WALTER CHANDLER, THE CENTENARY OF ASSOCIATE JUSTICE JOHN CATRON OF THE UNITED STATES SUPREME COURT 29 (1937); for McKinley, *see* John M. Martin, *John McKinley: Jacksonian Phase* 28 ALABAMA HIST. Q. 7, 25-27 (1966); for Nelson, *see* Edwin Countryman, *Samuel Nelson* 19 GREEN BAG 329 (1907).

119. For Grier, *See* SWISHER, *supra* note 82, at 444; for Campbell, *see* Christine Jordan, *Last of the Jacksonians*, 1980 SUP. CT. HIST. Y.B. 80.

120. Story was on the Court when *McCulloch* was unanimously decided. For Baldwin, *see* United States v. Shive, 27 F. Cas. 1065, 1067 (D.C.E.D. Penn. 1832) (No. 16,

Taney Court Justices who fought the bank on constitutional grounds in the national legislature or national executive might nevertheless have thought the Court lacked the power to strike down a law authorizing the national bank. Still, the most probable swing votes on that question from 1845 to 1860, Justices Wayne and Catron, were militant opponents of the bank who retained strong Jacksonian political connections. Two other swung justices, Justices Grier and Nelson, exhibited no such modesty after the Civil War when declaring that the government had no power to make paper money legal tender for private debts.[121] Given widespread speculation that *McCulloch* would be overruled and the numerous attacks on the national bank made by Taney Court Justices before being appointed, the reason that political questions associated with national economic development were not resolved into judicial questions from 1828 to 1860 cannot be a general understanding that those matters had already been permanently settled by past judicial decree.

3. Ethnocultural Issues. The federal judiciary during the three decades before the Civil War did not resolve any of the major ethnocultural political questions that dominated state political agendas and occasionally spilled over into the national arena. The federal judiciary handed down no decisions on the rights of Masons or the wrongs Masons were alleged to have committed. No judicial decision explored federal relations with the Mormons, such as whether Congress should have permitted Mormons in Utah to propose a state constitution, how the federal government should have responded when a state constitution was written without congressional permission, whether the federal land office was unduly protective of tribal claims only when Mormons claimed Native American soil, and whether federal officials in Utah had been physically prevented from enforcing federal law. Jacksonian federal courts did not rule on whether the Mormon legislature could pass a statute that essentially gave Brigham Young the power to determine which federal laws would be enforced in Utah. Polygamy had to wait for judicial resolution until after the Civil War.[122] An entirely Protestant Supreme Court did not respond when Samuel Morse and

278); for McLean, *see Letters of John McLean to John Teesdale*, BIBLIOTHECA SACRA, Oct. 1899, at 720; for Curtis, *see* 1 GEORGE TICKNOR CURTIS, MEMOIR OF BENJAMIN ROBBINS CURTIS, LL.D. 115 (Benjamin R. Curtis, ed., 1879) for Thompson, *see* DONALD MALCOLM ROPER, MR. JUSTICE THOMPSON AND THE CONSTITUTION 296 (1987).

121. *See* Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869).

122. Reynolds v. United States, 98 U.S. 145 (1878).

others called for a united front "against Catholic schools, Catholic officeholders, and especially against lenient immigrant laws."[123] The justices neither issued official condemnations of Catholic institutions or Catholic participation in politics nor spoke out for religious freedom and tolerance. The political questions raised by Know-Nothings and other nativist groups were not resolved into judicial questions. No federal judicial decision sought to settle any significant controversy over the immigration or naturalization of white persons, although the Supreme Court in the *Passenger Cases*[124] did rule that states could not tax ships bringing new immigrants. Neither the nascent women's movement nor movements to reform schools, asylums, and prisons attracted federal judicial attention. That the American Temperance Society had more members than the American Anti-Slavery Society[125] did not inspire any judicial decision on whether governing officials could ban alcohol. The Justices failed to intervene in a Senate debate over whether to invite an Irish priest opposed to both slavery and drinking.

4. National Expansion. The Supreme Court from 1828 until 1860 was not asked to resolve any major political question on the subject of national expansion. No judicial decision discussed the general merits of Manifest Destiny as public policy. No judicial decision sought to resolve controversies over the appropriate border between Maine and Canada, between Oregon and Canada, between Texas and New Mexico, or, though not an issue of national expansion, between New York and New Jersey. No judicial decision discussed the merits of purchasing Alaska, Hawaii, Cuba, or any part of Mexico. Federal justices were not asked to resolve and did not resolve debates over the Ostend Manifesto and other suggestions that Cuba be acquired by force. No judicial decision determined how much if any of Mexico to obtain and at what price as a result of the Mexican War. No judicial decision determined whether the United States should annex Canada. President Buchanan's more general effort "to annex everything from the Rio Grande to Columbia at the risk of war" attracted no official federal judicial notice.[126]

123. PETERSON, *supra* note 52, at 2-3.

124. 48 U.S. (7 How.) 283 (1849).

125. BERGERON, *supra* note 53, at 7; GARA, *supra* note 55, at 96; Robert V. Remini, *Election of 1828*, *in* 1 HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 1789-1968, at 431 (Arthur Schlesinger, Jr., & Fred Israel eds., 1971).

126. SMITH, *supra* note 56, at 78.

Political questions that arose when expansion efforts were successful similarly escaped judicial notice. No judicial opinion considered any issue raised by the annexation of Texas, the assumption of past Texas debts or whether to divide Texas into as many as five states. The Supreme Court did not resolve whether the United States could annex a foreign country or the conditions under which territory could be added to the United States. With the exception of slavery, major political questions over the organization of territories were not resolved into judicial questions. Debates over California and New Mexico statehood were resolved without judicial assistance.

5. Foreign Policy. The Supreme Court did not resolve any major foreign policy question that arose during the three decades before the Civil War. No judicial decision considered the merits of American policy toward Mexico before the Mexican War, after the Mexican war, the justice of the Mexican War, the appropriate strategies for fighting the Mexican war, whether anyone, most notably Senator Thomas Hart Benton, should have been made a lieutenant general during the Mexican War, or whether the United States should have invaded Mexico at the end of the Buchanan administration. The Supreme Court did rule that the President had the power to apply revenue laws to California while California was occupied territory,[127] but had no power to establish prize courts.[128] Federal courts did not become involved in the *Carolene* incident, a dispute over whether New York state courts could try a British national who had destroyed an American ship that was supplying Canadian rebels, the debate over whether to help the British find Sir John Franklin, or in any other matter concerning Anglo-American relationships. No judicial decision discussed the merits of the Clayton-Bulver treaty, the Gadsden Purchase treaty, the Webster-Ashburton treaty, the Zollverein treaty, the Dallas-Clarendon agreement, the Guadalupe-Hidalgo treaty, proposed agreements with Mexico to allow American companies to build roads, the proposed McLane-Ocampo treaty or any other controversial agreement with a foreign nation. Political questions on how to interpret or whether to abrogate those treaties were similarly not resolved into judicial questions.

No judicial decision helped resolve controversies over American relationships with China, Canada, Russia, Hawaii, Ja-

127. *See* Cross v. Harrison, 57 U.S. (16 How.) 164 (1853).
128. *See* Jecker v. Montgomery, 54 U.S. (13 How.) 498 (1851).

pan, Holland, China, Germany, Central America or South America. Americans in 1835 debated without judicial assistance whether to go to war with France, and in the 1850s Americans debated without judicial assistance whether to compensate victims of earlier French shipping policies. No judicial decision discussed the extent to which the United States should have supported democratic revolutions in Europe or intervened in the Crimean War. No judicial decision discussed such questions of international trade as the Peruvian monopoly in guano or how to encourage European countries to buy more southern rice. Federal courts played no role in legislative efforts to regulate passports and reform the diplomatic service. Federal courts stayed out of the political debate over whether to pay Nicholas Trist for his efforts when he continued to negotiate for Mexican land concessions after being recalled as the envoy to that nation.

6. Native Americans. Political questions associated with native Americans were resolved into judicial questions only at the very beginning of the Jacksonian era. The late Marshall Court after some hesitation[129] attempted to play a significant role in conflicts between southern states and the Cherokees over tribal lands.[130] Major resettlement issues arose after 1832, but the Taney Court played no role in their resolution. No judicial decision discussed any aspect of federal relationships with the Seminoles, including the controversial practice of using bloodhounds to help remove members of that tribe from Florida. Political questions over federal supervision of settled tribes and trading policy were similarly not resolved into judicial questions.

7. Military Policy. Supreme Court justices rarely participated in the domestic military controversies that excited Jacksonian America. Two political questions were resolved into judicial questions: whether Admiral Stephen Decatur's spouse was entitled to a special pension and the possibly corrupt procurement practices of President Buchanan's Secretary of War.[131] The Justices stayed out of political debates over who should command American military forces, what was the best command structure, and whether commanders should answer to the secretary of war. No federal judicial decision discussed how military forces should be organized, trained, disciplined, paid, and equipped, how those forces should be employed in peacetime, or

129. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
130. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
131. *See* Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840); *See* The Floyd Acceptances, 74 U.S. (7 Wall.) 666 (1868).

whether ten new regiments were needed in the wake of the Mexican War. No judicial decision resolved the controversy over whether cannons should be transported to Texas during the secession controversy. Federal courts did not determine whether the United States should establish a naval academy or rely more on steam than sail ships. Supreme Court Justices did not resolve political questions associated with military discipline. President Tyler's cabinet, not the Taney Court, determined whether to try in a federal court a captain who executed the son of a prominent government official for mutiny.

8. The Staffing and Structure of National Institutions. The Supreme Court did not resolve any major political question that arose during the second party system over the staffing of the national government. Judicial decisions neither endorsed candidates for any national office nor ruled that the candidates of one coalition were superior to the candidates of other coalitions. The federal judiciary never resolved any political question concerning whom a party should nominate for the presidency and vice-presidency, or the rules governing those nominations. No judicial decision discussed the character or qualifications of persons running for national office. Federal courts did not become involved in bitter debates during the 1828 presidential campaign over whether John Quincy Adams made a "corrupt bargain" to obtain office or over whether Andrew Jackson improperly married his wife. The soaring costs of presidential elections did not attract official judicial notice. No judicial decision resolved debates over whether the Vice-President became president or merely assumed presidential powers when the President died in office. Without judicial assistance, Americans debated what would happen if both the presidency and vice-presidency became vacant. The Justices were not asked to resolve and did not resolve the bitter legislative debates that frequently occurred when the House of Representatives elected its speaker and both Houses of Congress elected their official printer. The Justices did not adjudicate debates over the appointment of federal judges, ambassadors to foreign countries, cabinet members, and other members of the executive branch. John C. Calhoun killed Martin Van Buren's appointment to be minister to Great Britain without judicial support or resistance. The Justices did not participate in the debate over whether Tyler should have kept Harrison's cabinet, or the debate over whether Jackson demonstrated "vindictive party spirit" when he dissolved his first cabinet. No judicial decision explored controversial decisions by Jacksonian ex-

ecutives to appoint members of Congress and press editors to executive positions. The Justices in *In re Hennen*[132] did rule that, absent a federal statute to the contrary, federal judges could cashier their clerks at will. With that exception, the Justices did not become involved in any debate over the proper procedures for appointing or removing federal officials. No decision discussed the conditions under which executive officials could be removed, whether Congress had to approve removals, or whether the president had to give reasons for a removal. No decision handed down before the Civil War discussed the merits of the congressional decision in 1842 that required states to elect national representatives in single-member districts. No federal judicial decision discussed other controversies over federal interference in local elections, the merits of requiring a plurality rather than a majority vote in an election for Speaker of the House, the merits of supermajoritarian rules for nominating candidates for the presidency, the merits of a one-term presidency, or the appropriations necessary to pay federal salaries. The Justices did not even issue official opinions on the merits of various proposals to reorganize the federal judiciary.

The Supreme Court did not resolve any major political question raised by the new forms and styles of governance associated with the rise of mass political parties before the Civil War. Judicial decisions did not rule on the legitimacy of permanent political parties, the merits of a two-party system, or the vices and virtues of mass political parties as compared to the more deferential form of earlier American politics. The merits of universal male suffrage, the congressional caucus, or national conventions were not placed on the agenda of the late Marshall or Taney Courts. Federal judges did not participate in the 1844 debate over whether the Democratic Party should require a presidential nominee to obtain a supermajority vote in the national convention. The Justices were asked to determine the conditions under which the citizens of Rhode Island could adopt a new state constitution and to adjudicate other issues arising out of the Dorr Rebellion. The Taney Court declined on the ground that national elected officials were constitutionally authorized to determine both whether a state had a republican government and which officials legitimately held office in that state.[133] No judicial decision discussed the merits of the spoils system, the increasing

132. 38 U.S. (13 Pet.) 230 (1839).
133. *See* Luther v. Boren, 48 U.S. (7 How.) 1 (1849).

influence of patronage in American politics, the power of state legislatures to instruct Senators, or the extent to which federal officeholders could participate in political campaigns. Federal courts did not resolve the allegations of corruption against executive officials during the Galphin Affair, when one cabinet member awarded a large sum of money to another cabinet member. Alleged corruption in the Van Buren and other administrations similarly attracted no official federal judicial notice. Political questions associated with the partisan presses of the Jacksonian era were not resolved into federal judicial questions. No judicial decision resolved debates over who would edit the administration newspaper, a position equivalent to the contemporary presidential press secretary, whether Congress could expel reporters from legislative chambers, or who was leaking confidential administration information to the press.

The Supreme Court generally refrained from participating in the national debates over the presidential role pioneered by Jackson and practiced, with less success, by his successors in office. No judicial decision discussed the appropriate use of the veto power, whether the President could deliver the Annual Message before Congress organized, the appropriate division of power between cabinet officials and the President, the power of the President to make recess appointments, whether Congress could appoint the Secretary of the Treasury or define the tenure of executive offices, the power of Congress to censure the president, or the power of Congress to expunge the record of that censure. No judicial ruling decided whether Congress or the president best represented the people. The Justices on narrow grounds held that presidents could impose a war tariff,[134] but not create prize courts in the absence of congressional legislation.[135] The Justices also ruled in *Kendall v. Stokes*[136] that federal courts could issue a writ of mandamus to executive officials.[137] No judicial decision was forthcoming on more controversial exercises of executive power before the Civil War. The Supreme Court was not asked to rule and did not rule on whether President Jackson was authorized to remove federal deposits from the national bank or to require that persons buying federal land pay in specie.

134. *See* Jecker v. Montgomery, 54 U.S. (13 How.) 498 (1852).
135. *See* Cross v. Harrison, 57 U.S. (16 How.) 164 (1854).
136. 44 U.S. (3 How.) 87 (1845).
137. *See also* United States *ex rel.* Stokes v. Kendall, 26 F. Cas. 702 (C.C.D.C. 1837) (no. 15, 517). For the political salience of that debate, see WILSON, *supra* note 51, at 174-75.

The Justices did not determine whether President Tyler's decision to follow Jackson's precedents on appointments and vetoes was an executive usurpation that warranted impeachment. Nor did the Justices intervene in debates over whether cabinet members should always publicly support the president or the precise degree of presidential influence over the Treasury Department.

9. Other Political Questions. The Supreme Court before the Civil War did not resolve into judicial questions various questions of political morality, responsibility, or sociology. Republicans and southern Democrats debated the morality of slavery without judicial assistance. Daniel Webster and William Seward debated the morality of compromising with slavery without judicial assistance. No judicial decision resolved the debates between Jacksonians and their political opponents over whether the federal government ought to promote national economic and moral improvement. Informal understandings that northerners would support that gag rule in return for southerners refraining from pressing Texas annexation were not judicially supported or judicially challenged. No federal judicial decision determined who was responsible for the Panic of 1837 or corruption in the Van Buren administration. No federal judicial decision determined what caused increases in strikes and mob violence during the Jacksonian era, whether slavery would thrive in various Western territories, or whether slavery must expand or die. The Senate debated who wrote an anonymous letter to the Washington *Union* condemning the initial rejection of the ten regiment bill without judicial assistance.

Political questions associated with whether to amend the Constitution were not resolved into judicial questions. Federal courts did not rule on the merits of proposals to alter the presidential veto, have co-presidents from North and South, ban small bank notes, or any other constitutional amendment championed from 1828 to 1860. Previous judicial decisions had made clear that the Constitution as interpreted by the Taney Court supported many southern demands during the secession crisis. *Dred Scott* supported the right to bring slaves into all territories. *Prigg* sustained the Fugitive Act and clearly indicated that alleged fugitive slaves had no rights to jury trials in the state where they were found. No judicial decision discussed whether Americans should have ratified constitutional amendments that provided more explicit textual protection for slavery in order to prevent legislative, executive, or judicial backsliding.

Jacksonians did not resolve into judicial questions the political questions associated with the best strategies for securing certain political goals. The Justices did not become involved in debates over the best means for obtaining office or the best means for obtaining favorable legislation. Congress debated without judicial assistance whether Daniel Webster should have used bribery to help settle the Maine border, and whether compromise with Britain was appropriate to settle the Oregon boundary. Federal courts were not asked to resolve and did not resolve whether all the measures that eventually became the compromise of 1850 should have been voted on together or separately. No judicial decision determined the relationship between distribution and the tariff that vexed policymakers during the Tyler years, helped Tyler decide whether to call a special session on Texas annexation, or resolved debates over whether the bill annexing Texas was best left to the incoming Polk administration. The Justices did not rule on whether Henry Clay should have avoided talking about Texas during the 1844 campaign or been more willing to compromise with President Tyler on bank legislation three years previously. The Justices did not officially advise President Van Buren on how to respond to initial defeats of the Independent Treasury bill, Daniel Webster on whether to remain in Tyler's cabinet, or James Buchanan on whether to take a Supreme Court seat. Nor did federal judges officially help mediate President Tyler's relationships with Democrats and Whigs, or whether President Jackson and Daniel Webster should have formed a political alliance in the wake of the nullification crisis. The Justices did not rule on how many presidential candidates the Whigs should have run in 1836, or on whether the Whigs should have drafted a platform in 1840. The Justices did not decide questions central to the destruction of the second party system, such as whether the vote on the 1860 Democratic platform should have been delayed until after the candidate was chosen, whether President Buchanan should have supported Stephen Douglas, whether southern delegates should have bolted the convention, how the convention should have responded to that bolt, and whether all opponents of Abraham Lincoln should have joined forces.

The Supreme Court did not resolve any political questions raised by social life in Washington during the Jacksonian era. The Justices did not resolve any issue arising out of the Eaton Affair. The Justices did not participate as Justices in the social rivalry between Harriet Lane and Adele Douglas that signifi-

cantly influenced the politics of the late 1850s, as "the leaders of each Democratic faction scrupulously avoid[ed] the parties of the other."[138] Judicial decisions did not discuss whether the polka was too risque a dance to be performed in the White House, comment on President Buchanan's decision to ban dancing and card playing in the executive mansion, rule on whether President Adams's decision to install a billiard table was a legitimate campaign issue in 1828, or resolve debates over how much money was needed to refurnish the White House. The judiciary did not participate in the controversy over the "dress circular," a Pierce administration edict ordering persons in the diplomatic service to wear more formal attire.

B. THE SIGNIFICANCE OF THE SUPREME COURT AND SUPREME COURT DECISIONS IN JACKSONIAN AMERICA

The rarity with which party platforms and supplementary sources on Jacksonian politics discuss federal judicial decisions further highlights the remarkably low salience of the Supreme Court and federal judiciary before the Civil War whenever slavery was not on the table. Party platforms mention the Supreme Court once, when Douglas Democrats in 1860 sought judicial rulings on the claimed federal obligation to protect slavery in the territories.[139] *United States* ex rel. *Stokes v. Kendall*, which held that federal judges could order the Secretary of the Treasury to pay a specific government debt, was the only federal court decision not involving slavery mentioned in a presidential address. President Martin Van Buren publicly attacked that decision in 1838,[140] but a Jacksonian Congress showed no interest in pursuing the matter.[141] Political histories of presidential campaigns and administrations pay almost no attention to the federal judiciary. Judging only from political histories of presidential administrations, Americans during the 1840s and 1850s were more concerning with importing bird droppings than with any Supreme Court case not directly related to slavery. No Supreme Court decision or doctrine not concerned with slavery is mentioned as frequently as issues associated with the Pervusian mo-

138. SMITH, *supra* note 56, at 87-88.

139. *See Democratic Platform*, in 1 NATIONAL PARTY PLATFORMS, *supra* note 47, at 30-31; SMITH, *supra* note 56, at 112.

140. Martin Van Buren, *Second Annual Message*, *in* MESSAGES AND PAPERS, *supra* note 48, at 503-05.

141. *See* HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875 48-49 (1982).

nopoly on guano.[142] When on matters not related to slavery, the federal judiciary is mentioned in either the primary or secondary sources, the reference is most often to proposed expansions and reforms of the federal circuit courts,[143] a political question not resolved into a judicial question. Readers of Michael Holt's one-thousand page tome, *The Rise and Fall of the American Whig Party: Jacksonian Politics and the Onset of the Civil War*,[144] will not find one Supreme Court decision worthy of mention. They would have to read that volume and other detailed political histories fairly closely even to learn that a federal judiciary existed during the years immediately after Tocqueville declared that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."

The contract and dormant commerce clause cases that dominated the constitutional part of the Supreme Court's agenda during the Jacksonian era were not associated with the most riveting national political struggles of that time period. *Charles River Bridge v. Warren Bridge*[145] and *Cooley v. Board of Wardens*[146] are today described as landmark judicial decisions, excerpted in virtually all constitutional law casebooks, and discussed at length in historical commentaries on the Supreme Court. Neither those cases nor their underlying controversies are mentioned in party platforms or the supplemental sources surveyed on Jacksonian politics. *Barron v. Baltimore*,[147] *Swift v. Tyson*,[148] and *Foster v. Neilson*[149] are other rulings some contemporary scholars described as landmark cases that are not mentioned by the primary and secondary sources.[150] Contemporary scholars refer to *New York v. Miln*,[151] *Briscoe v. Bank of Kentucky*,[152] and *Charles River Bridge* as "The Three Bombshells of 1837."[153] The evidence for this claim consists largely of

142. *See* GARA, *supra* note 55 at 6; SMITH, *supra* note 54, at 226-27.
143. *See* GARA, *supra* note 55 at 69-70; COLE, *supra* note 50, at 242.
144. *See* HOLT, *supra* note 57.
145. 36 U.S. (11 Pet.) 420 (1837).
146. 53 U.S. (12 How.) 299 (1851).
147. 32 U.S. (7 Pet.) 243 (1833).
148. 41 U.S. (16 Pet.) 1 (1842).
149. 27 U.S. (2 Pet.) 253 (1829).
150. For one conventional list of landmark Supreme Court decisions, see LEE EPSTEIN, ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS 81-94 (1994).
151. 36 U.S. (11 Pet.) 102 (1837) (holding that states may regulate the passengers whom ships bring into the states).
152. 36 U.S. (11 Pet.) 257 (1837) (holding that state banks may issue negotiable instruments).
153. DAVID CURRIE. THE CONSTITUTION IN THE SUPREME COURT: THE FIRST

assertions by Joseph Story,[154] a Supreme Court Justice; Daniel Webster, the losing attorney in *Charles River Bridge*;[155] and James Kent, the leading constitutional commentator of the era.[156] Jacksonian politicians with less intimate relationships with the Supreme Court were not very concerned with these cases, certainly not as concerned as they were with the issues associated with the American System. None of these "bombshell" decisions were mentioned in a party platform, presidential message, or any other source surveyed on Jacksonian politics. John Quincy Adams did not mention any case associated with "The 'Revolution' of 1837"[157] in the 120 diary pages he devoted to that year.[158] Stanley Kutler's book on the *Charles River Bridge* ruling acknowledges that the judicial "decision did not arouse much comment outside of Massachusetts."[159]

The different weight legal and other elites place on contract clause and dormant contract clause issues casts doubt on recent assertions that "salience means roughly the same thing to newspaper editors as it does to the justices . . . since *both justices and editors make this calculation about the same time, within the same political context.*"[160] Joseph Story, Daniel Webster, and John Quincy Adams, three Whigs from Massachusetts, had different issue priorities that appear related to their different relationships to the federal judiciary. The question needs more investigation, but given evidence that legal elites have different opinions on legal matters than other citizens, some reason exists for thinking that the priorities of legal and journalistic elites might also be different.

Most Americans did not notice Taney Court rulings on state regulatory power because federal judicial decisions before the Civil War discussing state economic regulations were typically of interest only to the parties before the court and the state whose measures were under constitutional attack. "[I]t was (and is) a

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HUNDRED YEARS 1789-1888 204 (1985).

154. *See* STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE 120-21 (1971).

155. *See* MAURICE G. BAXTER, ONE AND INSEPARABLE: DANIEL WEBSTER AND THE UNION 444 (1984).

156. *See* KUTLER, *supra* note 154, at 117-18, 120.

157. KUTLER, *supra* note 154, at 117.

158. *See* 9 JOHN QUINCY ADAMS, MEMOIRS OF JOHN QUINCY ADAMS, COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848 340-461 (Charles Francis Adams ed., 1969).

159. KUTLER, *supra* note 154, at 183.

160. Lee Epstein and Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 73 (2000) (emphasis in original).

peculiarity of the states' rights doctrine," Robert McCloskey points out, "that its partisans were devoted to it only when their own oxen were being gored, when nationalism presented a specific threat to a concrete interest."[161] His study, *The American Supreme Court*, observes, "if Virginia had a problem today that Maryland did not share, Virginia's outraged protest in the name of states' rights would attract little support from Maryland any more than Maryland's similar protest tomorrow would bring Virginia rushing to her standard."[162] Contract and dormant commerce clause issues mattered locally, and local politics typically mattered more than national politics during the three decades before the Civil War. Still, Supreme Court decisions on state regulatory powers do not appear to have any significant impact on the structure of Jacksonian national politics.

The 1832 "Address of the National Republican Convention" did make an oblique reference to the contract and dormant commerce clause issues when condemning Jacksonians for seeking to end judicial review of state laws.[163] Prominent National Republicans no doubt had contract clause and possibly dormant commerce clause concerns in mind when attacking proposed repeals of section 25 of the Judiciary Act of 1789. Still, that campaign document did not give any example of an offending state law or vital judicial decision that justified maintaining the judicial power to void state laws. Moreover, Democrats by Jackson's second term were increasingly sympathetic to judicial review. The political controversy over section 25 was largely settled in favor of judicial power by 1832. The House of Representatives in 1831 voted by an almost three-to-one margin to maintain judicial review of state laws and the next year voted by a six-to-one margin against limiting judicial tenure.[164] Thus, even on the most optimistic reading of the evidence, the Supreme Court's contract clause and dormant commerce clause jurisprudence may have provoked important national controversies only during the earliest years of the Jacksonian era.

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161. ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 38 (Sanford Levinson 2000).

162. *Id.*; *see* Leslie Friedman Goldstein, *State Resistance to Authority in Federal Unions: The Early United States (1790-1860) and the European Community (1958-94)*, 11 STUD. AM. POL. DEV. 149, 155-56, 166, 185 (1997).

163. *See Address of the National Republican Convention*, *in* 1 HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS, *supra* note 125, at 564.

164. *See* Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States: A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 161, 164-65 (1913).

Relatively low salience is not no salience. *Charles River Bridge* and related judicial decisions did attract some national attention and stir some partisan debate. The *Washington National Intelligencer* in 1831 declared that case was of "much importance."[165] The merits of the eventual decision were debated in the leading journals of the period.[166] Later Taney Court decisions on the regulatory powers of state governments inspired similar commentary in the press and in the national legislature. Charles Warren notes that *Pennsylvania v. Wheeling and Belmont Bridge Co.*[167] "caused much excitement"[168] when decided, and that Justice McKinley's unreported decision on circuit in *Bank of Augusta v. Earle*[169] "was hailed with enthusiasm by large sections of the Democratic, or Locofoco, Party."[170]

Still, innumerable national political questions no doubt received an occasional comment in leading presses and journals. The level of attention paid to contract and dormant commerce clause issues, while not negligible, was substantially less than the attention national Jacksonian actors gave to such issues as the tariff, national bank, internal improvements, the Mexican War, reform of the military, and relationships between the elected branches of government. The "Revolution of 1837," while not insignificant, would not be considered by any Jacksonian politician or contemporary historian of Jacksonian America as involving one of the ten most important national political questions of that period. By almost any criteria, the presidential veto and Eaton Affair were far more important and had far more lasting impacts on American political and constitutional developments.

Justice Catron was not exaggerating when in 1845 he declared that *Pollard v. Hagan*[171] is "deemed the most important controversy ever brought before this court, either as it respects the amount of property involved, or the principles in which the present judgment proceeds."[172] That dispute over ownership of riverbeds when a territory became a state was far more politically interesting than the debates underlying the vast majority of

165. KUTLER, *supra* note 154, at 57.
166. *See id.* at 117-21, 127-29.
167. 54 U.S. (13 How.) 518 (1852)
168. 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 235-36 (1947).
169. That decision was modified by the Supreme Court in Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839).
170. 2 WARREN, *supra* note 168, at 51.
171. 44 U.S. (3 How.) 212 (1845).
172. *Id.* at 235 (Catron, J., dissenting).

antebellum federal cases. The modal Supreme Court case in this time period involved factual disputes over individual land titles. Numerous land titles were at stake in *Pollard*,[173] and the issue received some congressional attention.[174] Still, proponents of Tocqueville's thesis might consider that the issue Jacksonian Justices considered "the most important" political question adjudicated by the Supreme Court received scant attention by Jacksonian political elites and receives no attention in general political histories of the Jacksonian era. *Pollard v. Hagan* and *Charles River Bridge* were considered important questions by Supreme Court Justices and Supreme Court watchers only because the really important political questions of the Jacksonian era were not being resolved into judicial questions.

IV. EXPLANATIONS: THEN AND NOW

Political questions were not automatically resolved into judicial questions in Jacksonian America. Two distinct processes had to occur for judges to have the opportunity to hand down decisions on a public controversy. First, the political question had to be resolved into a legal question or a question of constitutional law. Second, the legal or constitutional question had to be resolved into a judicial question. Hardly any national political question arose in Jacksonian America that was resolved into a question about the meaning of a federal statute. The national government during the three decades before the Civil War passed very few major statutes and, slavery aside, those statutes embodied clear choices among policy alternatives. Many political questions arose in the antebellum United States that were not resolved into questions about the meaning of the federal constitution. In numerous policy areas, Jacksonian and Whigs generally agreed that government officials or other decisionmakers had the constitutional power to choose among various proposed alternatives. Debate was entirely over which alternative policy or decision was best. Remarkably, hardly any constitutional question arose in the antebellum United States that was resolved into a judicial question. The vast majority of political questions that spawned constitutional debate failed to appear on the judicial agenda because elected officials rejected the constitutionally controversial policy, no external support system ex-

173. *See* Hallett v. Beebe, 54 U.S. (13 How.) 25 (1851); Goodtitle *ex dem.* Pollard v. Kibbe, 50 U.S. (9 How.) 471 (1850).

174. *See* ERNEST R. BARTLEY, THE TIDELANDS OIL CONTROVERSY 63 (1979).

isted to litigate the constitutional issue, or political actors decided self-consciously to resolve the constitutional issue outside of courts.

The processes that determined in 1835 whether political questions were resolved into judicial questions continue structuring the judicial agenda at the turn of the twenty-first century. Many national political questions are now resolved into questions about the meaning of federal statutes. Congress passes numerous laws, many of which contain language that foists crucial policy choices off on the federal judiciary or on administrative agencies subject to judicial oversight. Most political questions that arise in contemporary American politics, however, are not resolved into questions about the meaning of constitutional provisions. Republicans and Democrats on matters as diverse as tax, health, and foreign policy generally agree that the national government has the power to choose among proposed alternatives. As did Whigs and Jacksonians, they dispute only the merits of various policies. The main difference between now and then is that the vast majority of constitutional questions that have arisen during the past half-century are resolved into judicial questions. Government consistently makes constitutionally controversial policies, substantial support for constitutional litigation exists, and elected officials for the past one-hundred and fifty years have sought to foster judicial power to adjudicate constitutional questions.

A. POLITICAL QUESTIONS INTO CONSTITUTIONAL (LEGAL) QUESTIONS

Political questions are resolved into constitutional questions only when a distinctive controversy exists over whether the Constitution permits, forbids, or requires a decisionmaker to select a particular policy or make some other political choice. Political controversies over the quality of President Tyler's judicial nominees were not resolved into constitutional controversies because Tyler's Whig opponents agreed that Tyler was constitutionally permitted to make judicial nominations and Tyler agreed that Whigs in the Senate were constitutionally permitted to reject those nominees. Disagreement was entirely over whether Tyler had nominated wisely. For the same reason, political controversies over other presidential appointments, appropriate political strategies, and social life in Washington were not resolved into legal or constitutional controversies. An ambitious politician who showed up at the wrong party might have made a serious

political mistake, but the decision whether to be a Whig or whether to respond to an invitation from Peggy Eaton, all agreed, was one that an individual politician was constitutionally permitted to make. Anticipating Felix Frankfurter, Whigs and Jacksonians agreed that in many instances "constitutionality" is not "synonymous with wisdom."[175]

This distinction between legality and wisdom, regarded by some contemporary social scientists as illusory, had substantial bite in 1835. The set of political questions that no one thought could be resolved into legal questions was far larger than Tocqueville's thesis suggests. Americans debated matters as diverse as the best way to staff an army, what trade agreements to reach with foreign countries, and whether various government officials ought to be sanctioned for various "corrupt bargains" without resolving those political questions about the merits of various alternatives into constitutional questions about whether power existed to make particular decisions. Participants in the 1835 debate over whether to go to war with France agreed that Congress had the constitutional power to declare war. The dispute was over whether to exercise that power. John Quincy Adams regarded the rule counting every slave as three-fifths of a person as pernicious, but constitutional.

Jacksonians rarely resolved political questions into legal questions, questions involving the interpretation of federal law. With the usual exception of slavery, federal statutes passed during the three decades before the civil war clearly embodied a particular policy choice. Neither Whigs nor Democrats believed in delegating such matters as national economic development or national expansion to the courts or to an administrative agency subject to judicial supervision. Tariff laws, for example, declared specific duties on various goods. Political actors vigorously disputed the proper degree of protection, but those disputes were over the best tariff policy, not the best interpretation of existing tariff laws.

Contemporary Americans are far more inclined than Jacksonians to resolve political questions about desirable public policies into legal questions about the meaning of federal law. Numerous provisions in federal statutes do not establish clear rules, but rather articulate guidelines to be administered directly by courts or by administrative agencies subject to judicial supervi-

175. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 670 (1943) (Frankfurter, J., dissenting).

sion. The Sherman Anti-Trust Act's ban on "contracts in restraint of trade,"[176] for example, was designed to foster judicial policymaking in the guise of statutory interpretation. The legislative sponsors of that measure publicly admitted that they did not know what that phrase meant, that its meaning could be clarified only by adjudication.[177] Congress resolved a political question into a legal question because persons who disputed the best antitrust policy after passage of the Sherman Anti-Trust Act had a nearly identical dispute over proper interpretation of federal antitrust law.

Contemporary Americans do not, however, resolve most political questions into constitutional questions. A cursory survey of contemporary party platforms reveals numerous policy differences that are not presently disputes about the best interpretation of the constitution. Both the Republican and Democratic Party platforms adopted for the 2000 national election emphasized tax policy.[178] Republicans favored giving affluent Americans a large tax cut. Democrats favored more targeted tax cuts. Neither party declared the other's preferred policy unconstitutional. Democrats and Republicans dispute how tax burdens should be allocated, but both coalitions agree that elected officials are constitutionally authorized to determine the precise levels at which Americans should be taxed. War power issues aside, the substantial disputes between the two parties over foreign policy have not been resolved into constitutional disputes. Under the heading "Principled American Leadership" the 2000 Republican Platform listed thirteen failings of the Clinton administration, ranging from "the administration has run American defenses down" to "a misguided policy toward China." No claim is made that these mistaken policies are also unconstitutional. The 2000 Democratic Platform called for "Accessible, Affordable, Quality Health Care," charged Republicans with "refus[ing] to use one penny of the surplus to secure the solvency of Medicare" and "leav[ing] to drug companies the decisions about whether and where a drug benefit might be offered." Again, no suggestion is made that these policy differences are constitutional differences. Even in our litigious age, an analysis that be-

176. 15 U.S.C. § 1 (2000).

177. *See* Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 50-53 (1993).

178. *See* Republican Platform 2000, http://www.rnclife.org/platform/platform2000.html (last visited Dec. 29, 2004); 2000 Democratic Party Platform, http://www.democrats.org/about/2000platform.html (last visited Dec. 29, 2004).

gins by examining the main political issues that divide the major parties reveals that in 2000 as in 1835 numerous political questions about public policy are not resolved into constitutional questions about the powers of government.

The political questions resolved into constitutional questions have not remained static for the past 170 years. The Fourteenth Amendment provided constitutional language that over time has facilitated efforts to resolve what were formerly local political or constitutional questions into national constitutional questions. Abortion and other issues of family law that raised only policy questions in the nineteenth century are now resolved into hotly contested constitutional questions. The trend, however, has not entirely been toward expanding the number of political questions resolved into constitutional questions. Some important political questions resolved into constitutional questions during the nineteenth century now raise only political questions. Antebellum Americans debated whether protective tariffs and presidential vetoes on policy grounds were constitutional. Contemporary Americans who dispute the merits of trade policies and presidential vetoes nevertheless agree that Congress is constitutionally authorized to pass protective tariffs and the president is constitutionally authorized to veto legislation for policy reasons.

Examining national party platforms and related documents provides important perspectives on judicial output too often absent in legal or social science analysis. Independent attempts to assess the important political questions of an era reveal numerous issues not resolved or only partly resolved into legal or constitutional questions. From the debates over whether to acquire Cuba to the debates over the Bush tax cut, Americans have discussed political questions almost entirely in policy terms, without finding constitutional limits on national power. When political questions are not resolved into legal or constitutional questions, they cannot be further resolved into judicial questions. The Rehnquist Court has little authority to impose most Republican policy preferences when Democrats control the elected branches of government because most conservatives agree that the Constitution does not obligate governing officials to adopt most of the proposals laid out in the Contract with America.

Examination of broader political agendas also suggests that the most hotly contested judicial questions of an era are not the most hotly contested political questions of that era. The issues adjudicated by the Supreme Court in the *Charles River Bridge*

case and *United States v. Lopez*,[179] while of intense concern to court watchers, were not deemed of sufficient importance to be mentioned in the party platforms and related documents of their time period. Tocqueville and others, evidence from party platforms indicates, are wrong to think that the important political questions of any era are resolved into legal or constitutional questions. The better conclusion is that persons immersed in the study of courts too often attach special importance only to those political questions of their times that are resolved into legal questions.

B. CONSTITUTIONAL QUESTIONS INTO JUDICIAL QUESTIONS

The most significant differences between judicial agendas in 1835 and in 2004 reflect differences in the extent to which constitutional questions are resolved into judicial questions. At present, virtually all political questions that are resolved into constitutional questions are further resolved into judicial questions. The only two prominent contemporary political issues debated primarily in constitutional terms not resolved by the Supreme Court have concerned presidential power to send troops abroad without a declaration of war and the definition of high crimes and misdemeanors necessary to impeach a sitting President. During the Jacksonian era, scarcely any constitutional question was resolved into a judicial question. The only two prominent political issues debated in constitutional terms that came before the Supreme Court during the three decades before the Civil War were the status of slavery in the territories and the means for recapturing fugitive slaves. The other constitutional issues considered by the courts were matters of relatively minor political interest.

A remarkable number of constitutional debates took place in Jacksonian America that were not put on the agenda of the federal courts. Without any assistance from the federal judiciary, Congress debated at great length whether the United States could annex a foreign country (Texas).[180] Presidential vetoes of numerous American System proposals relied heavily on constitutional arguments that were subsequently not reviewed in

179. 514 U.S. 549 (1995).

180. *See* Mark A. Graber, *Settling the West: The Annexation of Texas, Louisiana Purchase and* Bush v. Gore,*"in* THE LOUISIANA PURCHASE AND AMERICAN EXPANSIONISM (Sanford Levinson & Bartholomew Sparrow eds., forthcoming 2006).

court.[181] Jacksonians resolved into constitutional questions the political questions associated with national economic development,[182] national expansion,[183] executive usurpation,[184] and the origins of the Mexican War[185] without further resolving these constitutional questions into judicial questions. David Currie's two volume study of constitutional debates in Congress from 1828-1860 details in approximately six-hundred pages numerous constitutional debates among Jacksonian elected officials, the vast majority of which were never placed on the agenda of the late Marshall and Taney Courts.[186]

The narrow construction of national power championed by Jacksonians in the executive and legislative branches of the national government explains why some antebellum questions of constitutional law were not resolved into judicial questions. Constitutional questions are resolved into judicial questions only when government officials adopt or implement constitutionally controversial policies. Whigs and Democrats agreed that the federal government was not constitutionally obligated to incorporate a national bank or finance certain internal improvements. Hence, when the federal government failed to adopt those or other constitutionally controversial policies, the questions of constitutional law debated in Congress could not be resolved

181. See Andrew Jackson, *Veto Message*, *in* 2 MESSAGES AND PAPERS, *supra* note 48, at 483-93 (no power to finance local improvements); Andrew Jackson, *Veto Message*, *in* 2 MESSAGES AND PAPERS, at 576-91 (no power to establish a national bank); John Tyler, *Veto Message*, *in* 4 MESSAGES AND PAPERS, at 63-72 (no power to incorporate a bank); John Tyler, *Veto Message*, *in* 4 MESSAGES AND PAPERS, at 330-33 (no power to improve navigation of rivers); James K. Polk, *Veto Message*, *in* 4 MESSAGES AND PAPERS, at 460-66 (no power to construct local improvements); James K. Polk, *Veto Message*, *in* 4 MESSAGES AND PAPERS, at 610-626 (same); Franklin Pierce, *Veto Message*, *in* 5 MESSAGES AND PAPERS, at 247-56 (no power to construct hospitals for the insane),; *id.* at 256-71 (no power to make local improvements); Franklin Pierce, *Veto Message*, *in* 5 MESSAGES AND PAPERS, at 386-88 (no power to make internal improvements); James Buchanan, *Veto Message*, *in* 5 MESSAGES AND PAPERS, at 543-50 (no power over education); James Buchanan, *Veto Message*, *in* 5 MESSAGES AND PAPERS, at 601-07 (no power to make local improvements); *id.* at 608-14 (no power to give public lands away to settlers).

182. *See Democratic Platform of 1840*, *in* 1 NATIONAL PARTY PLATFORMS, *supra* note 47, at 1; *Democratic Platform of 1844*, at 3; *Democratic Platform of 1848*, at 10; *Free Soil Platform of 1848*, at 14; *Democratic Platform of 1852*, at 16; *Free Democratic Platform of 1852*, at 19; *Whig Platform of 1852*, at 20; *Democratic Platform of 1856*, at 24; *Republican Platform of 1856*, at 28; *Democratic Platform of 1860*, at 30; *Democratic (Breckenridge Faction) Platform of 1860*, at 31; *Republican Platform of 1860*, at 33.

183. *See* WILSON, *supra* note 51, at 151; PETERSON, *supra* note 52, at 256.

184. *See* COLE, *supra* note 50, at 206.

185. *See* SMITH, *supra* note 54, at 14; PETERSON, *supra* note 52, at 225-26; BERGERON, *supra* note 53, at 86.

186. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829-1861 (2005).

into a lawsuit.[187] A Supreme Court primed to overrule *McCulloch* was denied that opportunity when two national bank bills were vetoed by Jacksonian presidents.

The truncated agenda of the Taney Court also reflects the lack of support services for litigation in antebellum America. Charles Epp and Susan Lawrence note that constitutional issues are frequently resolved into judicial issues only when interest groups provide citizens with expert attorneys and other services necessary to initiate and maintain litigation.[188] Such services were not normally available in Jacksonian America. Northern Whigs and their political allies did not sponsor litigation after Congress annexed Texas or President Jackson removed federal deposits from the national bank. This reticence was partly rooted in beliefs that Jacksonian justices were likely to sustain Jacksonian politics and that the point of litigation was to win. John C. Calhoun and other South Carolinians preferred nullification to litigation because they believed that courts would uphold the constitutionality of existing tariff policy.[189] 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. The two cases decided before the Civil War in which the Taney Court handed down rulings on the constitutionality of major national legislation, *Prigg* and *Dred Scott*, were cases in which abolitionists or other persons opposed to slavery represented persons of color free of charge.

Events between 1828 and 1860 suggest that elected officials consistently limited the judicial agenda by making self-conscious decisions not to resolve constitutional questions into judicial questions. *Dred Scott* and *Prigg* were handed down only after the legislature whose laws were under constitutional attack initiated judicial policymaking.[190] When, as was the case with internal improvements and Negro Seamen's Acts, elected officials

187. See Mark A. Graber, *The Jacksonian Origins of the Chase Court*, 25 J. SUP. CT. HIST.17, 34 (2000).

188. *See* Charles R. Epp, *External Pressure and the Supreme Court's Agenda*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 255-79 (Cornell W. Clayton & Howard Gillman eds., 1999); SUSAN E. LAWRENCE, THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING (1990).

189. *See* John C. Calhoun, *Exposition Reported by the Special Committee*, *in* 10 THE PAPERS OF JOHN C. CALHOUN 447 (Clyde N. Wilson &W. Edwin Hemphill ed., 1977).

190. *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 206 (1978); SWISHER, *supra* note 82, at 538.

made clear that they preferred legislative and executive solutions to hotly contested constitutional questions,[191] the Supreme Court stayed out of the political fray. Congress helped prevent constitutional litigation over trade policy by steadfastly refusing to describe the duty on any good as a protective tariff.[192] 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.[193] Although far more research on the political construction of the judicial agenda is necessary, the Jacksonian experience suggests that judicial review during the three decades before the Civil War took place by legislative invitation only.

Antebellum barriers to constitutional litigation have largely been removed. Every political coalition that dominated the national government after the Civil War has had a far more expansive notion of national power than did Jacksonian Democrats.[194] The more frequently the national government passes constitutionally controversial proposals, the more frequently such constitutional questions are resolved into judicial questions. The Fourteenth Amendment, in particular, eased the process by which constitutional questions are resolved into judicial questions. Before the Civil War, constitutional questions could rarely be resolved into national judicial questions when the national government rejected a constitutionally controversial policy.[195] When the federal government elected not to ban antislavery speech, the possibility of resolving that constitutional question into a judicial question was foreclosed. Once the vast majority of provisions in the Bill of Rights were incorporated, constitutional issues could be adjudicated in federal courts whenever one of the fifty states adopted the constitutionally controversial proposal. The Supreme Court decided whether states could prohibit married couples from using birth control[196] at a time when forty-eight states had rejected that constitutionally controversial policy.

191. Searight v. Stokes, 44 U.S. (3 How.) 151, 158 (1845) (argument of Nelson, A.G.); SWISHER, *supra* note 82, at 393-94.
192. *See* Calhoun, *supra* note 189, at 447.
193. *See* SMITH, *supra* note 54, at 103, 173-74.
194. Graber, *supra* note 187, at 34.
195. *See id.*
196. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

The substantial support structure for constitutional litigation that developed after the Civil War further eased the process by which constitutional questions were resolved into judicial questions. Jeremiah Black and other prominent Democrats facilitated litigation attacking Reconstruction measures by providing pro bono services to southerners imprisoned under martial law. Conservative legal groups provided the attorneys in cases challenging the constitutionality of progressive labor legislation. At present, such organizations as the American Civil Liberties Union, National Association for the Advancement of Colored People, and Washington Defense Fund ensure that persons with certain kinds of constitutional claims have the wherewithal to litigate. Paula Jones was able to sue President Clinton because the President's enemies financed her lawsuit. The probability of losing is no longer always a disincentive to litigation. Many contemporary interest groups are perfectly willing to fund lawsuits that have little chance of legal success when litigation is likely to bring favorably publicity and other benefits to their broader political causes.[197]

Elected officials after the Civil War consistently facilitated judicial resolution of pressing constitutional and political controversies. Republican legislative majorities in 1875 and in 1891 substantially expanded federal jurisdiction in order to ensure that the main legal and constitutional questions raised by the new industrial order would be resolved by a federal court system largely staffed with Republican appointees.[198] Congress at the turn of the twentieth century repeatedly passed vague laws that compelled judicial policymaking in the guise of statutory interpretation on such issues as antitrust and labor law.[199] Such self-conscious statutory ambiguities explain much present litigation.[200] Scot Powe details how liberals in the Kennedy and Johnson administrations helped create the Warren Court through a

197. *See* MCCANN, *supra* note 34. Willingness to lose has limits. Fearful of a judicial decision dramatically limiting the use of race in employment decisions, proponents of affirmative action paid more than $300,000 to settle Sharon Taxman's unlawful dismissal suit against the Piscataway School District. *See* Brendan M. Lee, *The Argument for Faculty Diversity: Recommendations after* Taxman v. Board of Education, 27 STETSON L. REV. 739, 743 (1997).

198. *See* Howard Gillman, *How Political Parties Can Use the Courts to Advance their Agendas: Federal Courts in the United States, 1875-1891*, 96 AMER. POL. SCI. REV. 511 (2002).

199. See GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY (2003). supra?

200. *See, e.g.*, MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS: JUDICIAL CONTROL OF ADMINISTRATION (1988).

combination of judicial appointments and federal support for constitutional litigation.[201] Recent Republican Presidents have used a similar combination of judicial appointments and litigation strategies when seeking to have constitutional questions resolved into judicial questions and then resolved favorably.[202]

The license Congress granted to the Supreme Court during the 1850s for determining the constitutional status of slavery in the territories is now routinely issued to federal courts for resolving a wide range of political and constitutional questions. Not every instance of contemporary judicial policymaking can be matched with a specific legislative invitation. Still, the generally supportive political climate for constitutional adjudication promotes judicial activism. Jacksonian Justices presumed they were not to make major constitutional decisions unless explicitly invited to do so by members of the dominant national coalition. The ubiquity of such invitations at present suggests that contemporary Justices feel free to make major constitutional decisions unless a united majority coalition plainly indicates that judicial intervention is not wanted.

V. TOCQUEVILLE, CONSTITUTIONAL DEVELOPMENT, AND JUDICIAL DECISIONMAKING REVISITED

The Jacksonian failure to resolve national political questions into national judicial questions is remarkable. Proof that some national political questions were not resolved into judicial questions would be important given the constant quotation of Tocqueville's thesis in contemporary public law scholarship. That scarcely any national political question not involving slavery was resolved into a national judicial question in Tocqueville's time is stunning. The textual and extratextual evidence indicates that Tocqueville was referring to the Supreme Court of the United States when he made his famous pronouncement. Contemporary commentators who cite his thesis assert that political questions in the United States are "invariably" resolved into constitutional questions. Nevertheless, Tocqueville's thesis bears no resemblance to Jacksonian national politics, even when

201. *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000); *see also* Howard Gillman, Constitutional Law as Partisan Entrenchment: The Political Origins of Liberal Judicial Activism, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT (Ronald Kahn & Ken Kersch eds., forthcoming 2005).

202. *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1076 (2001).

political questions that everyone knows are not resolved into judicial questions are excluded from the analysis. The Taney Court before the Civil War handed down no major decision on national economic development, national expansion, or any matter other than slavery that excited Jacksonian political actors. The Jacksonian judicial agenda was severely truncated even though the Justices theoretically had little power to control their docket. The judicial power to deny a writ of certiorari, which contemporary scholars believe is the most important means by which the Supreme Court's agenda is limited,[203] did not exist before 1925. Lack of resources, which prevented some constitutional issues from being litigated, hardly explains why Nicholas Biddle and the lawyers he retained did not judicially challenge President Jackson's decision to remove government deposits from the national bank.

The flaws in Tocqueville's thesis are a pointed reminder that the study of American political and constitutional development cannot be reduced to the study of American constitutional law. The common claim that "[r]eading through an American constitutional law text is like walking through modern human existence in an afternoon" horribly distorts American politics (and human existence).[204] Readers of the most comprehensive constitutional law casebook possible would learn hardly anything about the Mexican War, the annexation of Texas, virtually all issues associated with national economic development, the dawn of national political parties, the rise of white republicanism (though the "white" element would be communicated by *Dred Scott*), Manifest Destiny, and the advent of the popular presidency. That comprehensive casebook would not even be an adequate guide to *constitutional* developments during the three decades before the Civil War. The political questions associated with national economic development and national expansion, in particular, were resolved into constitutional questions during the second party system. Jacksonians simply did not further resolve those constitutional questions into judicial questions. One consequence of the persistent tendency to conflate American constitutionalism and American constitutional law is that few American constitutionalists are aware of the debates over the

203. H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 11 (1991); RICHARD L. PACELLE, JR., THE TRANSFORMATION OF THE SUPREME COURT'S AGENDA: FROM THE NEW DEAL TO THE REAGAN ADMINISTRATION 1-14 (1991).

204. SEGAL & SPAETH, *supra* note 24, at 4 (quoting Bertha Wilson).

American System and national expansion during the 1830s and 1840s, much less the constitutional principles that were employed to justify and discredit federal promotion of national economic development and Manifest Destiny.

Scholarship exploring constitutional decisionmaking outside the courts will thrive once American constitutionalists acknowledge how many constitutional questions have not been resolved into judicial questions. Because the present division of academic labor assigns constitutional questions exclusively to academic lawyers and political scientists who study courts, previous unthinking acceptance of Tocqueville's thesis has inhibited scholarship on the numerous constitutional questions that were debated and resolved almost entirely within legislative settings. Elected officials are recognized to have constitutional dialogues with political officials,[205] but only Donald Morgan, Keith Whittington, Michael Kent Curtis, and Susan Burgess point out that elected officials frequently perform constitutional solos.[206] Constitutional scholars more conscious of the numerous constitutional issues that arise, are debated, and settled outside of courts can begin exploring the details of those controversies, the extent to which the structure of constitutional debate outside the courts mirrors or differs from the structure of constitutional debate inside the courts, any changes in either the scope or nature of constitutional debates outside the courts, and the causes of those changes.

Persons studying judicial decisionmaking after the demise of Tocqueville's thesis must abandon common claims that political questions are easily translated into constitutional questions and that judicial preferences determine what political questions occupy the most space on the judicial agenda. Chief Justice Taney had a strong preference against the national bank.[207] Justice Ca-

205. *See* LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988); LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT (4th ed. 1997); JOHN J. DINAN, KEEPING THE PEOPLE'S LIBERTIES: LEGISLATORS, CITIZENS AND JUDGES AS GUARDIANS OF RIGHTS (1998); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

206. KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999); SUSAN R. BURGESS, CONTEST FOR CONSTITUTIONAL AUTHORITY: THE ABORTION AND WAR POWERS DEBATES (1991); DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY (1966); MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000).

207. *See* SWISHER, *supra* note 82, at 176-77, 180-81, 189-93, 218-19, 228, 230-32, 258,

tron had a strong preference for resettling Native Americans.[208] Justice Story had a strong preference against annexing Texas.[209] Justice McLean had a strong preference for excluding the Eatons from proper society.[210] None of these justices officially acted on these preferences. Jacksonians who had strong political preferences about whether to have a naval academy or fight a war with France refrained from translating their political preferences into constitutional preferences. Such hotly debated constitutional questions as whether the federal government had the power to finance internal improvements or annex Texas were never resolved into judicial questions. The resulting lack of relevant cases meant that Justices during the three decades before the Civil War were not free to make decisions on any of the most politically salient matters on the Jacksonian agenda. Slavery aside, the constitutional agenda of the Taney Court was dominated by relatively unimportant contract and dormant commerce clause cases because those were the only matters that existing constitutional arguments and political practices permitted to be resolved into judicial questions.

The predominant forms of legal and constitutional argument in Jacksonian America did not permit many political questions to be translated easily and persuasively into questions of constitutional law. Jacksonians lacked any good way to say in constitutional English that Thomas Hart Benton should have been made a lieutenant general during the Mexican War or that cabinet spouses should have treated Margaret Eaton as a social equal. These antebellum rhetorical practices confirm important work on how existing forms of legal argument structure judicial output. Philip Bobbitt has identified six legitimate constitutional modalities, constitutional logics that have historically shaped constitutional decisions.[211] Mark Richards and Herbert Kritzer are documenting how "jurisprudential regimes structure Supreme Court decision making by establishing which case factors are relevant for decision making and/or by setting the level of

333-334.

208. *See* Frank Otto Gatell, *John Catron*, *in* 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1978: THEIR LIVES AND MAJOR OPINIONS 740-43 (Leon Friedman & Fred L. Israel eds., 1980).

209. *See* 1 WILLIAM WETMORE STORY, THE LIFE AND LETTERS OF JOSEPH STORY 481, 509-10, 513-14 (1971).

210. *See* FRANCIS P. WEISENBURGER, THE LIFE OF JOHN MCLEAN: A POLITICIAN ON THE UNITED STATES SUPREME COURT 73 (1971).

211. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991).

scrutiny or balancing the justices are to employ in assessing case factors."[212] These regimes, Richards and Kritzer conclude, significantly limit judicial capacity to translate policy preferences into constitutional preferences.[213] The Jacksonian experience calls for further scholarship examining whether similar or different modalities of constitutional argument or jurisprudential regimes explain why elected officials, as well as Justices, do not automatically resolve political questions into constitutional questions.

These modalities or regimes are not timeless. Protective tariffs were thought to raise constitutional questions only in Jacksonian America. The presidential veto power was thought to raise constitutional questions before, but not after, the Civil War. Family law was not constitutionalized until the twentieth century. Why these changes took place is still largely a constitutional mystery. Changes in interest group politics, most notably the rise of the women's movement, help explain why abortion now raises significant constitutional questions. Constitutional rhetoric in other areas of constitutional law is more autonomous. Constitutional questions associated with the tariff were settled sometime in the late nineteenth century, even though political debate over trade policy has been an enduring feature of American politics.

The Jacksonian constitutional experience demonstrates how substantive political choices constrain judicial policymaking. Constitutional questions are not resolved into judicial questions whenever elected officials reject constitutionally controversial policies. The Taney Court did not determine whether the national government could incorporate a bank because the national government did not incorporate a bank while that tribunal sat. Had judicial passivity been merely a cover for agreement with the policies made by the elected branches of government, as some judicial behavioralists assume,[214] National Republican/Whig justices should have insisted that the federal government adopt American System proposals. No such decision was handed down during the three decades before the Civil War or at any other time in American history. Justices who regarded a

212. Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AMER. POL. SCI. REV. 305, 305 (2002); Herbert M. Kritzer & Mark J. Richards, *Jurisprudential Regimes and Supreme Court Decisionmaking: The* Lemon *Regime and Establishment Clause Cases*, 37 LAW & SOC. REV. 827 (2003).

213. *See* Richards & Kritzer, *supra* note 212, at 312-16.

214. *See* SEGAL & SPAETH, *supra* note 24, at 305.

national bank as constitutionally legitimate and good policy regarded governmental decisions not to incorporate a bank as bad, but constitutionally legitimate, policy.

This significant limit on judicial power continues to constrain constitutional adjudication. While *some* Justices opposed to capital punishment have struck down legislative efforts to mandate death as a punishment for crime,[215] no Justice who favored capital punishment has ever overturned a legislative refusal to mandate death as a punishment for crime. This point may seem obvious. Nevertheless, the remarkable number of influential studies that insist Justices are "untrammeled policy makers" imply that Whig Justices should have insisted the national government incorporate a national bank, progressive Justices should have compelled all states to adopt maximum hour laws, and contemporary conservative Justices will insist that all states adopt the death penalty. Contrary to this logic, law matters when elected officials refuse to adopt constitutionally controversial policies. The Rehnquist Court has no more power than the Marshall or Taney Courts to correct legislative or executive decisions based on what a judicial majority believes is an unduly narrow conception of federal or state power.

The constitutional politics of the Jacksonian Era highlight the political foundations of judicial review. Public law scholarship tends to regard elected officials as the persons primarily responsible for establishing judicial review in most countries. "[W]hen their policy preferences have been, or are likely to be, increasingly challenged in majoritarian decision-making arenas," Ran Hirschl observes in his important study of judicial power in Israel, South Africa, Canada, New Zealand, "elites that possess disproportionate access to, and influence over, the legal arena may initiate a constitutional entrenchment of rights and judicial review in order to transfer power to supreme courts."[216] Elected officials played a similar role establishing judicial power in the antebellum United States. Section 25 of the Judiciary Act, which authorized the justices to declare federal and state laws unconstitutional, was at least as responsible for establishing judicial review as *Marbury v. Madison*.[217] The Jacksonian decision not to

215. *See* Gregg v. Georgia, 428 U.S. 153, 227-31 (1976) (Brennan J., dissenting), Gregg, at 231-41 (Marshall, J., dissenting); Callins v. Collins, 510 U.S. 1143-59 (1994) (Blackmun, J., dissenting).

216. RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).

217. *See* Mark A. Graber, *Establishing Judicial Review:* Marbury and The Judiciary

repeal that provision was more crucial to the maintenance of that power than any decision by the Taney Court.[218] *Dred Scott* was decided by legislative invitation. When no invitation for judicial review was issued, no judicial activism was forthcoming.

The political foundations for judicial review in Jacksonian America that cast doubt on Tocqueville's thesis also belie Alexander Bickel's equally famous assertion that when "the Supreme Court declares unconstitutional a legislative act . . . , it thwarts the will of the representatives of the actual people of the here and now."[219] The Taney Court never made a countermajoritarian decision. No decision handed down by that tribunal invalidated legislation favored by the dominant national coalition. The Taney Court before the Civil War never even issued a ruling on the constitutionality of any important federal legislation unless the litigation was promoted by members of the dominant national coalition. Judicial politics is more complicated today. Still, the causes of the increased tendency for constitutional questions to be resolved into judicial questions, legislation expanding federal jurisdiction, the appointment and confirmation of justices committed to declaring certain laws unconstitutional, and extensive litigation campaigns sponsored in part by the federal government, belie a simply countermajoritarian interpretation of judicial power. A countermajoritarian difficulty that does not remotely describe the relationship between elected officials and the Supreme Court when Tocqueville was writing or at present is a poor vehicle for evaluating that relationship.

Act of 1789, 38 TULSA L. REV. 609 (2003)

218. *See* Warren, *supra* note 164.

219. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-17 (1962).