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THE HISTORY OF THE COUNTERMAJORITARIAN DIFFICULTY, PART ONE: THE ROAD TO JUDICIAL SUPREMACY

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This portion of my broader project on the role of constitutional courts was conceived while I was a Visiting Scholar at the Rockefeller Foundation's Study Center in Bellagio, Italy. The opportunity to spend time at Bellagio was a very special one, and the time there helped place this entire project in perspective. The Vanderbilt University Research Council and the Dean's Research Fund at the law school provided unstinting financial support for the historical research. Without that support, this project would not have been completed.

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The apparent tension between judicial review and the democratic process—what Alexander Bickel dubbed the “countermajoritarian difficulty”—has been the focal point of modern constitutional scholarship. At the same time, however, scholars have rarely examined the origins of the countermajoritarian difficulty. In this Article—the first of a three-part series—Professor Friedman undertakes such an examination. Although countermajoritarian criticism of the Supreme Court has surfaced to some extent throughout our nation’s history, Professor Friedman’s historical analysis identifies four factors that tend to presage the prominence of such criticism at any given time. By studying criticism of the Court during Jeffersonian Democracy, the Age of Jackson, and in the wake of the Dred Scott decision, he argues that an essential, but often overlooked, factor is the extent to which the Court’s decisions are regarded as binding—not only upon the parties to the case at bar, but upon future litigants and the other branches of the state and national government as well. Thus, Professor Friedman contends, when the Court is acting during a time of perceived (and actual) judicial supremacy, countermajoritarian criticism will flourish. In the latter two Articles in this series, Professor Friedman will address the responses of the political branches to the emergence of judicial supremacy and the eventual rise of the “countermajoritarian difficulty” as the central problem of constitutional scholarship.

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INTRODUCTION: THE COUNTERMAJORITARIAN OBSESSION

The “countermajoritarian difficulty” has been the central obsession of modern constitutional scholarship.¹ The phrase, coined by

¹ The fixation is so great the proposition hardly requires citation. Nonetheless, see, for example, Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *Yale L.J.* 1013, 1016 (1984) [hereinafter Ackerman, *Storrs Lectures*] (“Hardly a year goes by without some learned professor announcing that he has discovered the final solution to the countermajoritarian difficulty, or, even more darkly, that the countermajoritarian difficulty is insoluble.”); Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 *Harv. L. Rev.* 43, 71 (1989) (“Most constitutional scholars for the past quarter-century . . . have seen the task of constitutional theory as defining a role for

Alexander Bickel in 1962, serves as shorthand for the problem of reconciling judicial review with popular governance in a democratic society.² The problem is this: to the extent that democracy entails responsiveness to popular will, how to explain a branch of government whose members are unaccountable to the people, yet have the power to overturn popular decisions?³ Academic fixation with the problem is apparent everywhere; it is referred to variously as an “obsession,” a “preoccupation,” and even—could anything be more damning?—a “platitude.”⁴ As Erwin Chemerinsky observed in 1989, the

the Court that is consistent with majoritarian principles.”); Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 *Harv. L. Rev.* 30, 63 (1993) (“The competing conceptions of democracy and its relationship to judicial review . . . have framed the central debates in American constitutional theory during the past fifty years.”); Louis Michael Seidman, *Ambivalence and Accountability*, 61 *S. Cal. L. Rev.* 1571, 1573 (1988) (“The attempt to reconcile judicial independence with democratic premises has preoccupied several generations of political theorists and academic lawyers.”); Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 *Mich. L. Rev.* 1502, 1502 (1985) (“Constitutional theory consists in the main of theories of judicial review. Almost all recent work in the field takes as its central problem what Alexander Bickel called the ‘countermajoritarian difficulty’ with judicial review.” (footnote omitted)).

This half-century’s central works of constitutional theory are set squarely against the countermajoritarian problem. For a small selection, see Bruce A. Ackerman, *We the People: Foundations* (1991); Robert H. Bork, *The Tempting of America* (1990); Robert A. Burt, *The Constitution in Conflict* (1992); Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (1988).

In a thoughtful and important twist on the modern-day obsession, Steven Croley asks why we are not more concerned about the “majoritarian difficulty,” i.e., the problem of squaring elective judiciary with constitutionalism. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 *U. Chi. L. Rev.* 689, 694 (1995). In light of Croley’s elegant statement of the problem, modern-day obsession with the countermajoritarian difficulty is all the more puzzling.

² See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16 (1962) (“The root difficulty is that judicial review is a countermajoritarian force in our system.”). Bickel’s conclusion was stunning, given that judicial review had been exercised for some 160 years before he wrote that “nothing . . . can alter the essential reality that judicial review is a deviant institution in the American democracy.” *Id.* at 18.

³ See *id.* at 16-23. For a discussion of how scholars following Bickel have defined the problem, see Barry Friedman, *Dialogue and Judicial Review*, 91 *Mich. L. Rev.* 577, 586-90 (1993).

⁴ See Ackerman, *Storrs Lectures*, *supra* note 1, at 1046 (referring to problem as “platitude”); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *Colum. L. Rev.* 457, 495 (1994) (noting that last generation of constitutional scholars has been “[p]reoccupied with the ‘countermajoritarian difficulty’”); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 *Cal. L. Rev.* 1441, 1521 (1990) (discussing “mid-century obsession with the countermajoritarian difficulty”); see also Horwitz, *supra* note 1, at 63 (“The competing conceptions of democracy and its relationship to judicial review . . . have framed the central debates in American constitutional theory during the past fifty years.”); Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classifications*,

countermajoritarian difficulty describes “the dominant paradigm of constitutional law and scholarship, a paradigm that emphasizes the democratic roots of the American polity and that characterizes judicial review as at odds with American democracy.”⁵

While academics have struggled to resolve the tension between judicial review and majoritarian governance, the countermajoritarian difficulty has had a profound effect on judicial decisionmaking. In his Foreword to the *Harvard Law Review*'s review of the Supreme Court's 1988 Term, Chemerinsky chastised the Rehnquist Court: “The Court is animated not by an affirmative view of the Court's role or of constitutional values to be upheld, but rather by a vision of the bounds of judicial behavior.”⁶ Chemerinsky's complaint was that rather than working to define constitutional values, the Supreme Court's jurisprudence frequently was one of simple deference to political solutions.⁷ It might strike many as paradoxical, to say the least, that the scope of constitutional protections has been defined so often with reference to the preferences of popular majorities.⁸ Yet, that has been the result of the Court's adherence to the “majoritarian paradigm” that came to dominate constitutional law in the latter half of the twentieth century.⁹

Despite the number of pages academics have dedicated to solving, “dis-solving,”¹⁰ or otherwise trying to escape from the countermajoritarian difficulty, precious little attention has been given to its origins. Failure to study the history of the countermajoritarian difficulty is unfortunate, because—as with all obsessions—understanding this one has the potential to teach us far more about our-

80 Geo. L.J. 1787, 1822 (1992) (“Liberals brood over the ‘countermajoritarian difficulty’ inherent in judicial review . . .”).

⁵ Chemerinsky, *supra* note 1, at 61.

⁶ *Id.* at 49.

⁷ See *id.* at 56-59.

⁸ See *infra* notes 26-29 and accompanying text (describing Constitution's anti-majoritarian basis). For commentary on the majoritarian cast of judicial review, see Friedman, *supra* note 3, at 590-600.

⁹ See Chemerinsky, *supra* note 1, at 61-74. There are signs that the influence of the paradigm is waning in the Supreme Court. In *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997), for example, the Supreme Court treated the majoritarian principle as a caution, not an inexorable command. See *id.* at 2268. That same Term the Court struck down several acts of Congress without any evident concern about the countermajoritarian nature of its actions. See, e.g., *Printz v. United States*, 117 S. Ct. 2365, 2384 (1997) (striking provisions of Brady Bill); *City of Boerne v. Flores*, 117 S. Ct. 2157, 2162 (1997) (invalidating Religious Freedom Restoration Act of 1993).

¹⁰ See Ackerman, *Storrs Lectures*, *supra* note 1, at 1016 (“Rather than solving the countermajoritarian difficulty, I mean to dis-solve it, by undermining the vision of American democracy and American history that constitutional lawyers had developed by the Progressive era.”).

selves than about the object of the obsession. The academy, the bar, politicians, journalists, and lay members of society all have struggled to come to grips with the mysterious workings of judicial review, but for the most part that commentary seems to accept the countermajoritarian paradigm as a given. It has not always been so, however. In learning how and why we came to be obsessed with justifying judicial review in democratic terms, we may learn a great deal about our own comfort with our form of democratic government.

The present is a particularly auspicious time to examine the history of the countermajoritarian difficulty, for even as politicians launch yet another wearying attack on judges,¹¹ there are signs that the premises underlying the paradigm are crumbling. Public choice scholars, among others, have undermined the notion that the political process can or does achieve majoritarian results.¹² If this is true, the

¹¹ See, e.g., Bruce D. Brown, *GOP Congressman Calls for Removal of Liberal Judges*, Recorder, Mar. 19, 1997, at 1, 1 ("The year-long Republican assault on federal judges was ratcheted up a notch last week when a leading GOP congressman broached the idea of impeaching jurists who have made 'activist' rulings."); Dan Carney, *Battle Looms Between Clinton, GOP Over Court Nominees*, Cong. Q., Feb. 8, 1997, at 367, 367 ("The House Judiciary Committee plans to hold hearings this year on judicial activism.").

¹² The relevant public choice literature is aptly reviewed (and the broad conclusions regarding its impact on American democracy criticized) in Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 Colum. L. Rev. 2121, 2128-43 (1990). Relying on this public choice scholarship, some have called explicitly for more aggressive judicial review of interest group legislation. See, e.g., William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 Va. L. Rev. 275, 307 (1988) (arguing for more intrusive judicial review when statutes' benefits are concentrated and costs are diffuse); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223, 234-35 (1986) (suggesting judges use techniques of statutory interpretation to enhance "public-regarding" nature of legislation); William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 Va. L. Rev. 373, 375 (1988) (using modern social choice theory to show that judicial activism to protect citizens' rights is necessary because of arbitrariness and manipulability of processes of majority rule). The relevant public choice literature is explored fully in these works. Although he disagrees with their conclusions, Einer Elhauge captures well the reaction of some to the public choice literature: "If the political process does not reflect the will of the people, why should the judiciary defer to it?" Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 Yale L.J. 31, 34 (1991).

Others are more skeptical, either that interest group politics is as undemocratic as it is portrayed, or that more aggressive judicial review is warranted in any event. Among them is Elhauge, who responds in part that the arguments for limiting the political process are themselves based on contestable normative theories of the political process, and that even if the political process is flawed, that is not to say judicial review is better. See Elhauge, *supra*, at 48-87; see also Daniel A. Farber & Philip P. Frickey, *Law and Public Choice: A Critical Introduction* (1991), which provides, from a skeptical standpoint, an excellent overview of the early public choice literature; Bernard Grofman, *Public Choice, Civic Republicanism, and American Politics: Perspectives of a "Reasonable Choice" Modeler*, 71

premise that judicial review interferes with popular will is called into question. It also is called into question by a body of political science scholarship begun by Robert Dahl, and carried on by many including Mark Graber and Thomas Marshall, who suggest that the judicial process tends to ratify popular preferences.¹³ They are joined in this work by scholars such as Michael Klarman, Gerald Rosenberg, and Girardeau Spann, who question the extent to which courts can be expected to, or do, protect minority groups against majority opinion.¹⁴ If this scholarship is read against the background reality that, whatever the reason, the Supreme Court and the judicial branch often have enjoyed a certain amount of tolerance, if not popularity, in the American polity,¹⁵ then there is ample room to doubt whether the

Tex. L. Rev. 1541 (1993), which is also skeptical of the ability of judicial review to correct any flaws in the political process, but which suggests a way to reconcile republican and public choice theory; and Pildes & Anderson, *supra*, which challenges public choice theory's view of democratic politics.

¹³ The seminal article is Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279 (1957). See also Robert A. Dahl, *Democracy and its Critics* 190 (1989) ("[T]he views of a majority of justices of the Supreme Court are never out of line for very long with the views prevailing among the lawmaking majorities of the country."); Robert G. McCloskey, *The American Supreme Court* 224 (1960) ("[I]t is hard to find a single historical instance when the Court has stood firm for very long against a really clear wave of public demand."). Contemporary scholars pick up Dahl's thread from a number of perspectives. See, e.g., Friedman, *supra* note 3, at 590-609 (explaining why Supreme Court decisions tend to comport with majority will); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 Stud. Am. Pol. Dev. 35, 70-72 (1993) (questioning descriptive accuracy of countermajoritarian paradigm); Steven L. Winter, *Tennessee v. Garner and the Democratic Practice of Judicial Review*, 14 N.Y.U. Rev. L. & Soc. Change 679, 683-92 (1986) (discussing Supreme Court's reliance on evidence of majoritarian state practices to determine constitutional meaning). Other scholars have relied upon polling data in testing the relationship between public opinion and the Supreme Court. See Thomas R. Marshall, *Public Opinion and the Supreme Court* 14-24 (1989) (describing 12 possible linkages between public opinion and Supreme Court decisions); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 Am. J. Pol. Sci. 635, 639-58 (1992) (reporting results of national survey on levels, sources, and explanations of public support for Supreme Court); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 Am. Pol. Sci. Rev. 557, 557-63 (1989) (discussing relationship between votes of justices and their ideological preferences).

¹⁴ See Girardeau A. Spann, *Race Against the Court* 27-31 (1993) (arguing that Supreme Court has always acted consistently with majority preferences and that it is institutionally incapable of taking minority position); Gerald N. Rosenberg, *The Hollow Hope* 39-71 (1991) (arguing that liberal judicial decisions of Warren Court era did not cause societal change); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 Va. L. Rev. 1, 6-18 (1996) (questioning capacity of Supreme Court to protect minority rights).

¹⁵ At times when the Court has faced political challenges, the people have stepped forward to defend judicial independence. See *Hearings Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Judiciary Comm.*, available at 1997 WL 11234802, at *6 (July 15, 1997) (statement of Professor Barry Friedman) (describing

“countermajoritarian difficulty” even presents an accurate description of the workings of judicial review.¹⁶ Nonetheless, in many quarters, the struggle with the countermajoritarian difficulty persists.

Like any dominant paradigm, at its height the description of the countermajoritarian difficulty must have seemed so correct that its terms were inescapable. The need to reconcile judicial review with democracy framed almost all constitutional scholarship about the role of the Supreme Court in the 1970s and 1980s,¹⁷ a phenomenon that only recently has begun to erode. Yet at present there is no other paradigm to replace the countermajoritarian framework.¹⁸ Thus, judicial review continues to live in the shadow of democratic illegitimacy, even as increasing evidence suggests the countermajoritarian paradigm does not quite capture the actual workings of our political and judicial system. Understanding the history of this obsession may help us move past it to another, deeper, understanding of the role of judicial review in the American republic.

This Article is the first in a series that traces the history of the countermajoritarian difficulty. Together these Articles tackle two distinct sets of questions. The first and most obvious question asks when, and why, modern constitutional scholarship became obsessed as it did

how public support for system of judicial independence has repeatedly derailed attempts to interfere with that independence).

¹⁶ The case for this proposition is made extensively in Friedman, *supra* note 3, at 590-609.

¹⁷ Support for the broad proposition can be found below, see *infra* note 23; see also, for example, John Hart Ely, *Democracy and Distrust* vii (1980) (arguing that neither originalism nor judicial determination of societal values “is ultimately reconcilable with the underlying democratic assumptions of our system” and offering theory of judicial review that is “consistent with those underlying assumptions”); Michael J. Perry, *The Constitution, The Courts, and Human Rights* ix (1982) (expressing concern with judicial review that goes beyond Framers’ value judgments, and thus raises question of “democratic theory”); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 *Stan. L. Rev.* 703, 706-07 (1975) (justifying theory of judicial review against backdrop of tension with democracy); Seidman, *supra* note 1, at 1571 (“[T]he ability of an elite corps of judges to wield enormous power that is unchecked by popular opinion and criticism seems to contradict liberal democracy’s fundamental premise.”).

¹⁸ Nonetheless, the project is on scholars’ minds. See Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 *Colum. L. Rev.* (forthcoming April 1998) (arguing that accountability to electorate serves as safeguard of individual liberty); see also Barry Friedman, *Constitutional Law’s Emerging Paradigm* (July 9, 1996) (unpublished manuscript, on file with author) (arguing that constitutional law is departing from countermajoritarian paradigm and coming to rest on more dialogic, more inclusive, more institutional understanding of constitutional interpretation); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution* (Dec. 23, 1997) (unpublished manuscript, on file with author) (arguing historical commitments of people, and not deference to majoritarian preferences, should be defining basis for constitutional meaning). For a discussion of how constitutional scholarship splintered in the face of countermajoritarian difficulty, see generally Laura Kalman, *The Strange Career of Legal Liberalism* (1996).

with reconciling judicial review and democracy. However, in order to answer that question it is essential to travel back much farther in history and ask the second question: when and why has the exercise of judicial review itself been criticized at some times—but not others—as interfering with popular will? Some recent scholarship suggests the countermajoritarian difficulty is purely a problem of this century's making,¹⁹ but that cannot be precisely correct because—as other scholars recognize—courts have been criticized in countermajoritarian terms for most of the nation's history.²⁰ The longer history is relevant, for only by tracing it does it become possible to understand the genesis of the modern-day academic obsession with judicial review.

This Article tells the story of the first of three epochs in the history of the countermajoritarian difficulty, a time best identified by the rise of judicial supremacy. This first epoch, dating roughly from 1800 until the Civil War, covers the period of American history during which the public came gradually to accept the binding effect of Supreme Court constitutional pronouncements, not only upon the parties to the case, but upon other branches of state and national government and future litigants as well. For a long time such supremacy was contested,²¹ and when it was contested successfully no countermajoritarian problem was presented. Throughout this period prominent political actors denied the authority of the Supreme Court to bind other branches of government or the governments of the States to its constitutional decisions.

As these disputes subsided and the Supreme Court came to be seen as the "ultimate arbiter" of the Constitution's meaning, we entered the second epoch. During this epoch, which ran roughly from Reconstruction until the end of the New Deal, the Court frequently set itself against popular will, and great skepticism emerged about the determinate nature of constitutional meaning. Thus, despite (or because of) widespread popular acceptance of the notion of judicial supremacy, the political branches frequently considered and attempted various court-curbing measures to control the courts, particularly the Supreme Court. Eventually, however, it became clear that such techniques were generally not politically tenable, and their utility

¹⁹ See, for example, the many quotations *supra* note 1.

²⁰ As Jesse Choper correctly observed, "[t]he reconciliation of judicial review with American representative democracy has been the subject of powerful debate since the early days of the Republic." Jesse H. Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. Pa. L. Rev. 810, 810 (1974); see also Croley, *supra* note 1, at 714 ("Mistrust of unelected judges in America has colonial roots . . .").

²¹ Robert Burt's *The Constitution in Conflict*, *supra* note 1, is a wonderful account of struggles over judicial supremacy.

diminished, resulting in a federal judiciary with enhanced authority and a more active role. Thus, we entered the third epoch of the countermajoritarian history.

It was during this third epoch, beginning after the New Deal, that the academic obsession with the countermajoritarian difficulty came to flower, albeit under circumstances that pose a particular puzzle. For much of the nation's history, academic views regarding the performance and proper role of the judiciary comported with those of the public at large. Only in the 1940s did those views begin to diverge,²² and it was at that time that discussion of the countermajoritarian difficulty began to take its modern-day form. The very fact that at this same time techniques for controlling the Supreme Court became politically untenable suggests there was widespread popular acceptance of the institution of judicial review, even while the public often disagreed with specific judicial pronouncements. Yet, despite this broad public acceptance, academics became increasingly uncomfortable with the Supreme Court's role. Why this is so, and the questions with which academics struggled, form the third part of the story.²³

²² The turning point was right around Henry Steele Commager's work, *Majority Rule and Minority Rights* (1943). In that book he acknowledges that "many Americans have come to believe that our constitutional system is not, in fact, based upon the principle of majority rule" and that "the principal function of our constitutional system is to protect minority rights against infringement." *Id.* at 9. The book itself is essentially a paean to Felix Frankfurter's views of judicial restraint. It is dedicated "to Felix Frankfurter whose opinions confess an undismayed faith in democracy." *Id.* at 1.

²³ Although this question is taken up in a later part of the history, a preview here may be of interest. The academic obsession finds its roots in the 1940s, but comes full bloom in response to the Warren Court. And therein lies an enormous puzzle. Although the Court was not acting in a particularly countermajoritarian fashion as to many issues during this time, there were some hot-button issues, notably in regard to the rights of criminal defendants. What is odd, however, is that the hugely evident academic need to explain/justify/reconcile judicial review did not come in the face of a particularly strong criticism of the Supreme Court in countermajoritarian terms. Surely the Warren Court was criticized, and in many ways. But as compared, say, with the criticism leveled during the *Lochner* era, the criticism of the Warren Court was generally *not* that it interfered with the will of the people. And in fact, most of the commentators expressing worry about the countermajoritarian nature of judicial review in the years of the obsession's birth were *defenders*, not opponents, of the Warren Court's pronouncements.

It is in this latter irony—that the Court's *defenders* were more concerned about countermajoritarianism than its opponents—that we begin to see what accounts for the later-twentieth century academic obsession with the countermajoritarian difficulty. The Warren Court broke ground on the issues of the day, namely race, individual rights, and criminal procedure, and was arguably the first progressive Supreme Court in our history. Throughout history, as conservative courts have blocked a progressive agenda, liberals and progressives have attacked the Court for interfering with the will of the people. The conservative response consistently has been: "So what? That, after all, is the job of the Supreme Court—to defend the Constitution against temporary insanity in the people." When the tables turned, however—as they did in the Warren Court era—the countermajoritarian criticism stuck, despite the fact that conservatives attacking the

Again, the focus of this initial paper is the gradual evolution of the Supreme Court's authority to determine constitutional meaning for the entire country. Part I of this Article describes at greater length the "framework" out of which the countermajoritarian difficulty is constructed, i.e., the four factors that explain from a historical perspective when countermajoritarian criticism of the courts is likely to emerge. Those four factors are: (a) the extent to which judicial decisions are unpopular with a group substantial enough to be able to claim to speak for "the people"; (b) whether such decisions are rendered at a time when public sentiment favors a relatively popular or direct form of democracy; (c) whether at the time such decisions are rendered there is relative faith in the determinacy of judicial interpretations of the Constitution; and (d) whether such decisions are rendered during a period of judicial supremacy. Because today's commentators tend to see the countermajoritarian difficulty as a twentieth century phenomenon, they often fail to understand the significance of all four factors, and especially the importance of the fourth one. Without judicial supremacy, no countermajoritarian problem presents itself.

After setting out the framework, Parts II, III, and IV detail the history of three key moments during this first epoch: (a) the Jeffersonian struggle with the Federalist judiciary; (b) the "Era of Good Feeling" and the Age of Jacksonian Democracy; and (c) the vilification of the *Dred Scott*²⁴ decision. During the Jeffersonian struggle with the courts, discussed in Part II, there was widespread countermajoritarian criticism. This comes as somewhat of a surprise, for judicial supremacy was not widely accepted at that time. Nonetheless, the criticism surfaced both because in this first battle over the role of the federal judiciary the stakes were seen as uncommonly high, and because in the unusual context of the struggles of that time the judicial

Warren Court did not rely on a full-blasted countermajoritarian attack. Why? There are two reasons. First, because throughout history the progressive criticism, offered so forcefully and so often, had imprinted the countermajoritarian difficulty indelibly in the Warren Court's defenders' minds. It was *progressive* writers who, after the New Deal when the judicial agenda moved from property to individual rights, accused the Supreme Court of having a "double standard." When attacking, progressives had argued that the Court was countermajoritarian; when defending, they came up against the difficulty. Second, for the first time in history, the Court's defenders bought into—and indeed, in some ways were the architects of—the seeds of the countermajoritarian difficulty. The liberal defenders *believed* in popular democracy. But they also supported judicial review and judicial supremacy, at least as practiced by the Warren Court. The "countermajoritarian difficulty," therefore was in a very real sense the *creation* of these apologists for the Warren Court.

This, however, is racing far ahead of the story

²⁴ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

branch managed to be supreme in a limited but extremely controversial way. In the Era of Good Feeling and Jacksonian Democracy, discussed in Part III, there was only a very limited amount of countermajoritarian criticism, despite an active Supreme Court and strong notions of popular democracy. The reason for this lack of criticism was limited judicial supremacy and the fact that the Supreme Court's antagonists—virulent advocates of states' rights—saw themselves as a distinct minority. Finally, in the aftermath of *Dred Scott*, described in Part IV, we see the detractors of the Taney Court struggling to evade emerging notions of judicial supremacy that had begun to impress themselves upon the Nation's thinking, and engaging in numerous subterfuges to avoid confronting the ugly conclusion that judicial supremacy in the context of *Dred Scott* suggested.

These four factors, then, provide a framework for examining the relative volume and force of countermajoritarian criticism in any given era. There has been, of course, some limited countermajoritarian criticism in virtually every era in American history, and this Article does not suggest otherwise. Rather, the factors mentioned above and examined throughout the Article allow us to understand the basis for criticism of the Court since the founding and to determine when and why that criticism sometimes sounds in particularly countermajoritarian terms. In discussing the role of the judiciary vis-à-vis the other branches of government, present-day scholarship tends to focus almost entirely upon two of the factors giving life to countermajoritarian criticism: democratic values and the lack of public faith in the determinate nature of judicial review. In so doing, that scholarship omits a critical part of the story, perhaps one so ingrained we take it for granted. The omitted element is the idea of judicial supremacy. It is impossible to understand today's obsession with the countermajoritarian difficulty without tracing the growth of judicial supremacy. To miss this story is to miss something fundamental about ourselves: the deep roots of popular respect for constitutionalism and an independent judiciary.

I

"FRAMING" THE COUNTERMAJORITARIAN DIFFICULTY

Throughout history the Supreme Court has come under harsh criticism.²⁵ Sometimes the predominant complaint is that the Court is

²⁵ This series of Articles focuses on the periods in history during which courts were under attack. There is a fair amount of agreement in the literature about when those periods occurred, one measure being the amount of court-curbing legislation in Congress. See Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 *Vand. L. Rev.* 925, 929

interfering with popular will, the criticism that we call "countermajoritarian." At other times the primary critique is different. The specific task of this project is to understand why the countermajoritarian criticism surfaces at some times, but not others. In answering that question, however, this Article and the ones that follow necessarily explore the basis for the many different challenges to judicial authority. In a sense this project, writ large, explores the circumstances that motivate and define attacks on judicial authority.

The argument of this section is that there are four concerns or factors that "frame" the emergence of countermajoritarian criticism. When those four factors are present, to one degree or another, courts are (and will be) described as interfering with popular will. On the other hand, when the Supreme Court is handing down decisions that are unpopular with a portion of the populace, but some or all of the four factors are absent, the criticism will sound in different terms.

That the most enduring criticism of American judicial review has been its countermajoritarian nature is a fact that is more than a little odd.²⁶ After all, the Framers appear to have constructed the judiciary in deliberately countermajoritarian fashion.²⁷ Unless one is prepared to argue that the exercise of judicial review itself never was intended,²⁸ it is difficult (at least from the perspective of the original constitutional plan) to understand the basis for the

(1965) (describing Court-curbing periods); Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 *Rev. Pol.* 369, 379 (1992) (same).

²⁶ Often (but not always) when the countermajoritarian criticism surfaces judges also are accused of confusing their own views with the meaning of the Constitution. This complaint accompanied countermajoritarian criticism during the Jeffersonian era. See *infra* text accompanying notes 93-101.

²⁷ This is evident from Article III's guarantees of life tenure without reduction in salary. See *The Federalist No. 78* (Alexander Hamilton) (describing "good behaviour" provision as "excellent barrier to the encroachments and oppressions of the representative body"); see also *id.* ("The complete independence of the courts of justice is peculiarly essential in a limited Constitution."). Of course, the Framers constructed much of the Constitution in a countermajoritarian manner, as they were distrustful of majoritarian politics. See Chemerinsky, *supra* note 1, at 74-75; Friedman, *supra* note 3, at 617-22; see also 2 George Lee Haskins & Herbert A. Johnson, *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States* 41 (Paul A. Freund ed., 1981). See generally *id.* for engaging background on many of the events described in the section of this Article dealing with Jeffersonian attacks on the federal judiciary.

²⁸ There obviously have been those so prepared. They tend to surface at intervals when there is popular dissatisfaction with the judiciary. See, e.g., 1 Louis B. Boudin, *Government by Judiciary* iv (1932) ("Marshall's act was not warranted by the Constitution, and . . . the present exercise of power by the Judiciary is not warranted by the courts' own theory of the Constitution as laid down by Marshall."). Today, however, judicial review is entrenched and virtually no one offers any sustained argument that the exercise of judicial review is improper. See Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 *Tex. L. Rev.* 1881, 1924 & n.220 (1991) (noting that no one is heard today to criticize power of judicial review established in *Marbury v. Madison*,

countermajoritarian complaint. Particularly among the founding generation, one would not expect to find the courts criticized for doing what appears to have been anticipated. Nonetheless, even amid that generation, countermajoritarian criticism surfaced with great virulence.²⁹

There have been previous attempts to explain the prominence and emergence of countermajoritarian criticism, but for the most part those scholarly efforts have focused on the twentieth century.³⁰ Such a focus is understandable. In the academic world, at least, jurisprudential concern with the countermajoritarian difficulty has been a distinctly late-twentieth century phenomenon. Although a twentieth century frame of reference is therefore understandable, it also is unfortunate. The roots of the problem are much deeper, and to comprehend them fully requires a longer historical perspective.

In two recent Forewords in the *Harvard Law Review*, Professors Erwin Chemerinsky and Morton Horwitz examine the origins of the countermajoritarian difficulty, reaching somewhat similar conclusions. Horwitz concludes that “[a]s democracy has become one of our central legitimating constitutional ideals during the past half century”³¹ and because “New Deal ideologues narrowly and mechanically defined democracy simply to entail majority rule[,] . . . [j]udicial review eventually came to be characterized negatively as ‘countermajoritarian,’ and democracy came to be defined to be in fundamental tension with minority rights.”³² Similarly, Chemerinsky concludes

5 U.S. (1 Cranch) 137 (1803)). The debate, rather, is over the appropriate means of interpreting the Constitution.

²⁹ See *infra* text accompanying notes 105-09 (describing countermajoritarian criticism in early 1800s).

³⁰ See, e.g., *infra* text accompanying notes 31-35 (describing work of Chemerinsky and Horwitz).

³¹ Horwitz, *supra* note 1, at 64.

³² *Id.* at 62-63. As explained below, and throughout this series of Articles, the claim is only partially correct. As this Article itself makes clear, democracy was a basis for attacking judges long before the New Deal era. In fact, Horwitz relies on the frequency with which the term “democracy” is used as an organizing concept in Supreme Court decisions, but—paralleling the discussion in the second Article in this series regarding the Populist-Progressive era—democracy may have been an important concept to some members of the Court much earlier. See, e.g., *Burns Baking Co. v. Bryan*, 264 U.S. 504, 534 (1924) (Brandeis, J., concurring) (asserting that Court’s decision is “exercise of the powers of a super-legislature—not the performance of the constitutional function of judicial review”); *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418, 466 (1890) (Bradley, J., dissenting) (“If our legislatures become too arbitrary in the exercise of their powers, the people always have a remedy in their hands”); *Munn v. Illinois*, 94 U.S. 113, 134 (1876) (“For protection against abuses by legislatures the people must resort to the polls, not to the courts.”). Horwitz is closer to the mark when he states, “[Progressives] argued that democracy required judicial restraint. Starting from Thayer’s famous 1893 essay, the progressives developed the view that not only was judicial review undemocratic, but the

that as the "belief in natural law was challenged and then waned, the prevailing concept of American democracy changed."³³ According to Chemerinsky, "majoritarian decisionmaking became an end in itself," and it became necessary to justify the role of the judiciary in light of this new idea of democracy.³⁴ Thus, both Chemerinsky and Horwitz see the countermajoritarian difficulty as resulting primarily from a change in notions of democracy and the judicial role that occurred in the post-New Deal period.³⁵

Although Chemerinsky's and Horwitz's work is important, the conclusions they draw are problematic. Two specific problems come to mind. First, the latter half of the twentieth century was not the only time that the public defined democracy in terms of popular rule.³⁶ For example, populist sentiments were strong during both the Jeffersonian and Jacksonian eras.³⁷ Second, as one might expect given the first

Lochner Court had departed from a supposedly well-established historical baseline of judicial restraint." Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 *Wm. & Mary L. Rev.* 57, 61 (1987) (citation omitted). Obviously this is still somewhat contrary to the evidence in this first Article, but as the next in the series will show, the countermajoritarian criticism *was* leveled most vociferously during the Populist-Progressive era. Horwitz seems incorrect, however, in pointing to Thayer's article as a starting point. Not only does Thayer's article not sound in particularly countermajoritarian terms, see James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *Harv. L. Rev.* 129 (1893), but other authors before Thayer were explicitly countermajoritarian, see, e.g., James B. Weaver, *A Call to Action: An Interpretation of the Great Uprising, Its Source and Causes* 131 (1892).

³³ Chemerinsky, *supra* note 1, at 67.

³⁴ See *id.*

³⁵ And secondarily from the collapse of a natural rights jurisprudence. See *id.* at 70.

³⁶ This is a point so obvious it seems that Chemerinsky and Horwitz must have had their eye on a very different question. Horwitz, for example, seems to be talking about *scholarly* acceptance of the notion of democracy. See Horwitz, *supra* note 1, at 59 ("[N]ineteenth-century scholars, with few exceptions, were generally agreed in castigating Jacksonian Democracy as a corrupt, demoralizing force in national politics . . .") (quoting Alfred A. Cave, *Jacksonian Democracy and the Historians* 26 (1964)). The relevant question, however, should be when the people, and not just "scholars," saw themselves as favoring popular rule. As is evident from the discussion in Part III, *infra*, this unquestionably occurred in the Jeffersonian era, and it resulted in countermajoritarian criticism of the courts. Compare Horwitz, *supra* note 1, at 58 ("Democracy was consistently a negative term for most of the Framers' generation."), with *infra* notes 154-60 and accompanying text (discussing movement of popular democracy during Jeffersonian era). Moreover, it may be fair to call Jefferson and other political figures of the era "scholars." Chemerinsky, on the other hand, sees the problem of democracy juxtaposed against judicial review as a more enduring one. See Chemerinsky, *supra* note 1, at 62. It is thus unclear why he focuses only on the latter century, but this focus leads him to consider as causes for the emergence of the countermajoritarian paradigm only the juxtaposition of majoritarian political beliefs with a decline in natural law jurisprudence. See, e.g., *id.* at 67.

³⁷ See *infra* text accompanying notes 154-60 (discussing populist sentiments during Jeffersonian era); *infra* text accompanying notes 189-201 (discussing populist sentiments during Jacksonian era). Of course, the franchise was not universally held in those eras, but that is irrelevant for present purposes. What matters is that among those who believed

point, countermajoritarian criticism of the courts surfaced at least by the early 1800s.³⁸ There is much wisdom in Chemerinsky's and Horwitz's excellent work, but to the extent countermajoritarian criticism has ebbed and flowed throughout history, it has had a great deal to do with factors and events that find no place in Chemerinsky's and Horwitz's analysis.

Chemerinsky and Horwitz assuredly are correct that the first side of the countermajoritarian frame is constructed by prevailing notions of democracy. As they suggest, and their suggestion comports with common sense, the greater the prevailing view that government itself should reflect the will of the people, i.e., should be "popular" or "direct," the likelier that there will be countermajoritarian criticism. It is in large part due to this factor that countermajoritarian criticism was so prominent during the Populist-Progressive era.³⁹ This side of the frame also helps explain periods in which countermajoritarian criticism might have been anticipated but was in fact less common. To take one example, in the 1930s Franklin Roosevelt initiated a "New Deal" to rescue the country from the Great Depression, proposing bold legislation designed to stimulate an ailing economy.⁴⁰ Repeatedly, the Supreme Court invalidated the handiwork of the New Deal

they were entitled to the franchise, there was a feeling that the will of the people should prevail.

³⁸ Another set of commentators makes this point regularly. See, e.g., Jesse H. Choper, *Judicial Review and the National Political Process* 4 (1980) ("[In] this nation's constitutional development from its origin to the present time, majority rule has been considered the keystone of a democratic political system in both theory and practice.").

³⁹ This is chronicled in the second Article in this series. For an example of the criticism from that era, see, e.g., 62 Cong. Rec. S9077 (1922) (statement of Sen. Robert LaFollette) ("To-day the actual ruler of the American people is the Supreme Court of the United States."); Walter Clark, *Is the Supreme Court Constitutional?*, 63 *Independent* 723, 725 (1907) ("The control of the policy of government is thus not in the hands of the people, but in the power of a small body of men not chosen by the people and holding for life."); Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 *Harv. L. Rev.* 495, 503 (1908) ("[W]e should not have the inconsistent spectacle of a government, in theory representative, which distrusted the courage and justice of its representatives, and put its faith in a body which was, and ought to be, the least representative of popular feeling."); Sylvester Pennoyer, *The Income Tax Decision, and the Power of the Supreme Court to Nullify Acts of Congress*, 29 *Am. L. Rev.* 550, 558 (1895) ("Our constitutional government has been supplanted by a judicial oligarchy."); Theodore Roosevelt, *Judges and Progress*, 100 *Outlook* 41 (1912) ("Here the courts decide whether or not . . . the people are to have their will.").

⁴⁰ See Franklin D. Roosevelt, *The Governor Accepts the Nomination for the Presidency*, 1 *The Public Papers and Addresses of Franklin D. Roosevelt* 647, 659 (Samuel I. Rosenman ed., 1938) ("I pledge you, I pledge myself, to a new deal for the American people.").

Congresses, ostensibly frustrating the will of the people.⁴¹ If there was any time one might expect to find countermajoritarian criticism, this was it.⁴² And yet, ironically, countermajoritarian criticism was not nearly as prevalent as during the Jeffersonian or Populist-Progressive periods. This is not to say that the Supreme Court was not criticized, for obviously it was. The Court was criticized on the merits;⁴³ it was criticized for being behind the times⁴⁴ (a "horse and buggy" court⁴⁵); and the Court and its members were even subjected to open ridicule.⁴⁶ But, critics did not claim in a sustained fashion that the Supreme Court's rulings were interfering with the proper operation of democracy, in that they were overruling the will of the people.⁴⁷ In part the reason for this was that at the time of the New Deal prevailing notions of democracy were not particularly populist. Rather, government was seen as something apart from the people, yet designed to help them.⁴⁸

⁴¹ See, e.g., William E. Leuchtenburg, *The Supreme Court Reborn 105* (1995) (describing series of Supreme Court decisions overturning state and federal legislation and resulting public outcry).

⁴² At the end of 1935, public newspaper editors voted the Supreme Court's judicial review of the New Deal the biggest story of the year. See *Biggest News Rose in Supreme Court*, N.Y. Times, Dec. 26, 1935, at 19.

⁴³ See, e.g., *Rail Labor Sees Blow at Security*, N.Y. Times, May 7, 1935, at 18 (quoting George M. Harrison, railroad workers' labor representative, as saying that Supreme Court had "show[n] a total disregard of the social obligations of industry to its workers").

⁴⁴ See, e.g., 81 Cong. Rec. 2144 (1937) (statement of Sen. Norris) ("Our Constitution ought to be construed in the light of the present-day civilization instead of being put in a straightjacket made more than a century ago."); Leuchtenburg, *supra* note 41, at 96-97 (reporting letter received by Roosevelt, questioning "fitness of 'that body of nine old has-beens, half-deaf, half-blind, full-of-palsy men. . . . That they are behind the times is very plain—all you have to do is look at Charles Hughes' whiskers.'" (quoting Letter from John B. Muller to Franklin D. Roosevelt (Jan. 9, 1936)); *Law Teachers Divided*, N.Y. Times, Feb. 6, 1937, at 9 ("The President's plan affords an opportunity for injecting a little much-needed new blood into the Supreme Court without in any way detracting from its power or independence." (quoting William W. Crosskey, Associate Professor of Law, University of Chicago)).

⁴⁵ Roosevelt offered the phrase in a press conference on the decision in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), invalidating the National Recovery Act. See Leuchtenburg, *supra* note 41, at 83. The comments were not well received. See Arthur Krock, *Roosevelt Charged With Court Design in 1932*, N.Y. Times, Feb. 11, 1937, at 22 ("The way in which his [horse and buggy] comments were received convinced the President that the occasion and tone of his remarks constituted a blunder . . .").

⁴⁶ See, e.g., *Six Supreme Court Justices Hanged in Effigy in Iowa*, N.Y. Times, Jan. 8, 1936, at 15.

⁴⁷ This is not to say the countermajoritarian criticism did not surface. It did, on occasion, in the political and academic realms. See, e.g., 80 Cong. Rec. 1882, 1883 (1936) (speech by Sen. Norris) ("The members of the Supreme Court are not elected by anybody. They are responsible to nobody. Yet they hold dominion over everybody."). But the criticism was not nearly as sustained as at other "countermajoritarian" times in history.

⁴⁸ This point, along with the entire New Deal story, is recounted in the second Article of this series. On the specific point, see Richard Hofstadter, *The Age of Reform* 304-10

The second side of the frame, implicit in the discussion thus far and perhaps so obvious it is often overlooked, is constructed by popular agreement or disagreement with judicial decisions. When the people (or most of them) agree with judicial decisions, criticism is less prevalent. On the other hand, countermajoritarian criticism obviously is likelier to surface when the Court is acting in countermajoritarian fashion.⁴⁹ As obvious as this factor is, however, it turns out to be both difficult to assess and, to a certain extent, overstated. First, it is extremely difficult to know as a matter of simple mathematics whether the Court was acting at any given time in countermajoritarian fashion. In the first *Legal Tender Case*,⁵⁰ the Court overturned an act of Congress,⁵¹ so one could entertain the assumption that the Court was acting in countermajoritarian fashion. Yet, when the Supreme Court quickly reversed its initial decision in the second *Legal Tender Case*,⁵² the Court was subjected to widespread derision.⁵³ Was the first *Legal Tender* decision countermajoritarian? It is incorrect simply to assume that by overturning a congressional enactment the Court is, by definition, frustrating popular will. Public sentiment about a law may have changed between enactment and invalidation, or—as public choice

(1955) (“[W]hile progressives often looked to entrepreneurial freedoms for solutions to problems, the New Deal focused on government intervention.”). Similarly, as the third Article explains, the School Prayer decisions of the early 1960s were unpopular, yet countermajoritarian criticism also was rather muted at that time. The reason for this seems to be a strongly pluralist strain to then-prevalent understandings of democracy, along with related respect for minority rights. Critics did not like the school prayer decisions, but they could understand them as within the plausible scope of the Supreme Court’s responsibility to protect minorities, even if wrong in those terms.

⁴⁹ In light of the fact that countermajoritarian criticism may appear when large numbers of citizens are dissatisfied with Supreme Court decisions, it is worth mentioning that countermajoritarian criticism can arise in situations other than when the Supreme Court exercises its power of constitutional review. Constitutional decisions (especially of the Supreme Court) are likeliest to arouse the greatest ire, precisely because those decisions cannot be overturned by a congressional majority. Consistent with this understanding, some of the harshest criticism of the Court arose during the Populist-Progressive period, when the courts struck down numerous state laws on due process grounds. Yet, countermajoritarian criticism also appears in response to judicial decisions that, strictly speaking, are not an exercise of the power of judicial review, such as John Marshall’s definition of treason in the Burr trial, see *United States v. Burr*, 25 F. Cas. 55 (C.C.D. Va. 1807) (No. 14,693), or in response to the Supreme Court’s decisions in *In re Debs*, 158 U.S. 564 (1895), and the *Sugar Trust* litigation, see *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895). These latter cases are discussed in the second Article in this series.

⁵⁰ *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1869).

⁵¹ See *id.* at 625 (overturning congressional law that authorized legal tender in payment of debts, as applied to debts contracted prior to passage of Act).

⁵² *Knox v. Lee*, 79 U.S. (12 Wall.) 457, 586 (1870) (reversing *Hepburn*).

⁵³ See 2 Charles Warren, *The Supreme Court in United States History*, 525-27 (revised ed. 1926) (providing examples of criticism from contemporary press). The *Legal Tender* decisions are discussed in the second Article in this series.

theory would suggest—a congressional enactment may not have represented popular will in the first place. Second, there is no necessary correlation between a countermajoritarian act of judicial review and the appearance of countermajoritarian criticism. Again the New Deal generated relatively little countermajoritarian criticism, yet from history it seems clear that the Court was interfering with popular will.⁵⁴

Ultimately one concludes that it is neither necessary nor sufficient for the courts to act in countermajoritarian fashion to engender countermajoritarian criticism. Rather, all that is required, assuming the other factors are present, is that the courts act in a manner that is contrary to the interests of some group “substantial” enough that it does not see itself as a distinct minority. There have been times that groups opposed to judicial decisions could not plausibly make the argument that they represented popular will. For this reason, there was very little countermajoritarian criticism of Supreme Court decisions invalidating state laws during the Jacksonian era⁵⁵ or of the Supreme Court’s decision in *Brown v. Board of Education*.⁵⁶ The states’ rights advocates of those days saw themselves in the minority, which is precisely why they fell back on arguments about nullification and interposition.⁵⁷ Nonetheless, any large body of opposition to Supreme Court decisionmaking is likely to insist it is in the majority and lay claim to

⁵⁴ See Graber, *supra* note 13, at 71 (suggesting Supreme Court acted in clearly countermajoritarian fashion during New Deal). There have been alternative explanations of the New Deal Court’s action, including Barry Cushman’s novel idea that the Court struck down statutes that were bad law, ill-drafted, and unclear, while upholding laws that were the result of better lawyering. See Barry Cushman, *Rethinking the New Deal Court*, 80 Va. L. Rev. 201, 251-55 (1994).

⁵⁵ See *infra* text accompanying notes 187, 214-19 (describing lack of countermajoritarian criticism in Jacksonian era).

⁵⁶ 347 U.S. 483 (1954). Erwin Chemerinsky argues to the contrary, pointing to language in the Southern Manifesto to the effect that *Brown* was a “clear abuse of the judicial power,” and that the “[f]ederal judiciary [was] undertaking to legislate in derogation of the authority of Congress.” Chemerinsky, *supra* note 1, at 63 (quoting “Declaration of Constitutional Principles” issued by southern congressmen). But every abuse of judicial power is not an abuse founded in trumping the popular will, and other language in the Manifesto makes clear that the southern congressmen saw themselves in the minority. See Text of 96 Congressmen’s Declaration on Integration, N.Y. Times, Mar. 12, 1956, at 19 (acknowledging that “we constitute a minority in the present Congress”). For this reason, the response to *Brown* was based largely on states’ rights, the battle cry of conservative minority rights. See *id.*; see also the interposition resolutions such as Alabama’s, H.R.J. Res. 18, 1st Spec. Sess. (Ala. 1956) (stating that “this State is not bound to abide” decision in *Brown*).

⁵⁷ See *infra* notes 306-19 and accompanying text (describing minority status of states’ rights advocates during Jacksonian era). With regard to the opponents of *Brown*, the point is made *supra* note 56.

countermajoritarian criticism, especially if it is difficult to know for sure where the body politic stands.⁵⁸

The third side of the frame consists of popular notions regarding the determinacy of constitutional decisionmaking. The more people accept judicial decisions as a legitimate interpretation of the Constitution as law, the less likely they are to criticize the Supreme Court in countermajoritarian terms. There have been times in history during which constitutional interpretation was seen in somewhat formal terms. One example is during the period *Dred Scott* was decided, which is why critics of that decision contrived somewhat formal arguments to justify evasion or disregard of the decision.⁵⁹ In contrast, as many commentators have observed, the Legal Realist critique of judicial decisionmaking during the early part of the twentieth century challenged the very possibility of constitutional determinacy.⁶⁰ It comes as little surprise that at that time judicial decisions often were viewed as nothing more than an imposition of the Justices' own views,⁶¹ a strong contributing factor to frequent countermajoritarian criticism during the period. This third factor is referred to throughout this Article as constitutional "formalism" or "determinacy." The essence of the inquiry is whether the populace understood constitutional decisions to rest in some fixed and discernible understanding of "law" or whether those decisions were seen as more mutable and politically motivated.

The final side of the frame, often ignored and yet in many ways the most important factor in the countermajoritarian equation, is whether the Court was rendering its judgment at a time of relative judicial supremacy. This fourth factor is the primary focus of the present installment. If the people are unwilling to treat judicial decisions as supreme, there is little likelihood they will complain about the

⁵⁸ Obviously this was a likelier occurrence prior to the advent of widespread polling. Even today, however, polls will come to different answers depending upon how a question is asked, and sometimes the challenge to judicial authority is not capable of being encapsulated in one clear inquiry.

⁵⁹ See *infra* text accompanying notes 361-66 (describing formalist nature of criticism of *Dred Scott*).

⁶⁰ See Morton J. Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* 198-206 (1992) (describing Legal Realist challenge to legal formalism). For examples of the Realist critique, see generally Roscoe Pound, *Mechanical Jurisprudence*, 8 *Colum. L. Rev.* 605 (1908); Thomas Reed Powell, *The Judiciality of Minimum-Wage Legislation*, 37 *Harv. L. Rev.* 545 (1924). An early entry was T.W. Brown, *Due Process of Law*, 32 *Am. L. Rev.* 14, 20 (1898) (criticizing justification of judicial decisions with generic terms like "general rules of jurisprudence").

⁶¹ See, e.g., Hand, *supra* note 39, at 501 ("A vote of the court necessarily depends not upon any fixed rules of law, but upon the individual opinions upon political or economic questions of the persons who compose it . . ."); Powell, *supra* note 60, at 552 (arguing that result in minimum wages cases depended in part upon which Justices were hearing case).

Court trumping popular will. Rather, they will disregard the Court's decisions (while complaining about them nonetheless). Such defiance was common during the period of Jacksonian democracy, the most famous example perhaps being the response to the Court's decision in *Worcester v. Georgia*.⁶² There was little countermajoritarian criticism during this period, but the Supreme Court's authority frequently was flouted.

The idea of judicial supremacy is a subtle one that requires further elaboration. Initially, it is necessary to distinguish the power of judicial review (essentially judicial supremacy in a case) from the broader concept of judicial supremacy, meaning that a Supreme Court interpretation binds parties beyond those to the instant case, including other state and national governmental actors.⁶³ Comparison of *Marbury v. Madison*⁶⁴ with *Cooper v. Aaron*⁶⁵ is a familiar example, but so too is comparison of Jackson's supposed response to *Worcester* with Abraham Lincoln's response to *Dred Scott*. The rule in *Marbury*, flouted in *Worcester*, was that judicial decisions are binding upon the parties. In *Worcester* the party most concerned—Georgia—gave little

⁶² 31 U.S. (6 Pet.) 515, 560 (1832) (holding that Georgia has no legislative authority over Cherokee Nation lands). See *infra* text accompanying notes 242-48, discussing challenges to supremacy during the Jackson era generally and the decision in *Worcester v. Georgia* particularly.

⁶³ This distinction is examined in Walter F. Murphy's pithy piece, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 *Rev. Pol.* 401, 406-12 (1986). Murphy distinguishes between judicial review (supremacy in a case) and departmentalism (the power of other branches to interpret for themselves). See *id.* Similarly, in his classic study of the Supreme Court, Robert McCloskey distinguishes between judicial review and judicial "sovereignty," though he later uses the term "supremacy." See McCloskey, *supra* note 13, at 30, 37.

Robert Burt forcefully argues the intermediate position that the Supreme Court has authority to interpret the Constitution co-equal with the other branches. See Burt, *supra* note 1, at 3 ("[A] different conception of judicial authority—the Supreme Court as equal, not hierarchically superior, to other branches—is preferable in principle and practice.").

Although the supremacy of Supreme Court pronouncements often is taken as a given today, the issue still is debated hotly at times. Following a provocative speech on the subject by then-Attorney General Edwin Meese, the *Tulane Law Review* devoted an entire issue to the subject. See generally Symposium, *Perspectives on the Authoritativeness of Supreme Court Decisions*, 61 *Tul. L. Rev.* 977 (1987). Michael Paulsen vigorously argues for the co-ordinate Executive Branch interpretation. See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *Geo. L.J.* 217, 220 (1994) (arguing that President has, "as a logical incident of his textually specified powers," ancillary power to interpret law). A recent entry strongly defending Supreme Court supremacy is Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 *Harv. L. Rev.* 1359 (1997). A recent entry defending departmentalism from an originalist perspective, though conceding the President's general authority to enforce federal court judgments, is Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 *Iowa L. Rev.* 1267 (1996).

⁶⁴ 5 U.S. (1 Cranch) 137 (1803).

⁶⁵ 358 U.S. 1 (1958).

credence to the decision, and in the absence of Presidential support (and force), the limits of judicial power were evident. In *Dred Scott*,⁶⁶ by contrast, Lincoln agreed that the decision bound the parties; his contention was that the binding effect of the opinion extended no further and could be challenged by anyone not bound until the precedent was overturned.

Although this distinction (between parties being "bound" and nonparties being bound) is an important one, it is not the only distinction that matters here. Commentators generally fix the point of judicial supremacy, i.e., when the broad precedential effect of Supreme Court pronouncements began to carry weight, at some time late in the nineteenth century.⁶⁷ One would therefore not expect to see countermajoritarian criticism before the *Income Tax* and *Legal Tender* cases late in that century. Again, however, there is an anomaly, for countermajoritarian criticism plainly surfaces during the Jeffersonian attack on the courts. It turns out that with regard to countermajoritarian criticism, the significant question regarding judicial supremacy is whether the judiciary acting alone can interfere with popular will. For such interference to flow from a decision as *precedent*, there must be a broad idea of supremacy. But if the judiciary can interfere with popular will in individual *cases*, such as Sedition Act prosecutions or John Marshall's instruction to the jury to acquit Aaron Burr,⁶⁸ that may be enough supremacy to give rise to the criticism.

⁶⁶ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

⁶⁷ See, e.g., Burt, *supra* note 1, at 4-5, 253 (explaining that Supreme Court attained supremacy at end of nineteenth century and that supremacy was firmly entrenched by time of *Lochner*); Weaver, *supra* note 32, at 74 ("[A]t present the power of the Court in this respect seems to be no longer questioned."); *id.* at 100 ("During the course of the nineteenth century . . . the Supreme Court embraced a conception of judicial supremacy, with increasingly extensive scope following the Civil War . . ."). Further support for placing the rise of judicial supremacy in the late nineteenth century is found in William Nelson's excellent work on the growth of judicial review in the state courts. See William E. Nelson, *Commentary, Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States: 1790-1860*, 120 U. Pa. L. Rev. 1166 (1972). Nelson suggests that in state courts "by 1820 the doctrine of judicial review had attained general acceptance." *Id.* at 1169. Nonetheless, the scope of that review was quite limited. Thus, Nelson urges us not to lose sight of the difference between 1820s state judicial review and the modern conception of the practice. See *id.* at 1176-77. By 1860, however, "courts had held legislation unconstitutional in over one hundred fifty cases." *Id.* at 1181. This rise in judicial activity paralleled a rise in majoritarian government, see *id.* at 1182-85, and judicial review in the states at this time began to look more like the modern day understanding of the practice. It is at about this time that the authors cited above locate the establishment of judicial supremacy.

⁶⁸ These events all are discussed *infra* Section III.

Closely tied to judicial supremacy is the question of control over the judiciary. Accompanying the rise of judicial supremacy following the Civil War, there was an increase in actions taken by the political branches to try to control the courts. Examples include jurisdiction-stripping, such as that employed to avoid a decision on the constitutionality of Reconstruction in *Ex parte McCordle*,⁶⁹ and Court-packing, such as that alleged to have occurred in response to the first *Legal Tender* decision.⁷⁰ Over time, however, the public evidently came to believe that such techniques represent inappropriate attacks on judicial independence and judicial supremacy. Proof of this rests in the rejection of Franklin Roosevelt's Court-packing plan in 1937 and the hotly contested but ultimately failed attempt in 1957 to strip the Supreme Court of jurisdiction in cases involving Communist sympathizers. As these techniques gradually fell out of popular favor, even greater judicial supremacy was achieved, creating in some minds—particularly those of academics—yet more of a countermajoritarian tension.⁷¹

Having framed the problem with these four factors, some words are in order regarding precisely what is meant by countermajoritarian criticism. Because the Court is subjected to such a wide variety of criticism, it is important to define countermajoritarian criticism and isolate it from its competitors. What constitutes a criticism in Bickel's countermajoritarian terms, and what does not? "Countermajoritarian criticism," as used here, refers to a challenge to the legitimacy or propriety of judicial review on the grounds that it is inconsistent with the will of the *people*, or a majority of the people, whose will, it is implied, should be sovereign in a democracy. Therefore, the countermajoritarian criticism embraces any criticism of the courts as interfering with the will of a popular majority.

Stated thus, there are many criticisms that do not fall under this rubric. Some frequently voiced criticisms easily can be put to one side: among these is criticism of Supreme Court decisions on the merits or in purely partisan terms. Also not countermajoritarian is criticism of the Supreme Court or its decisions in "states' rights" terms, a frequent choice for criticism of the Court by those who are in the mi-

⁶⁹ 73 U.S. (6 Wall.) 318 (1867); see 2 Warren, *supra* note 53, at 467-73 (discussing legislation that stripped Supreme Court's jurisdiction). See generally Stanley I. Kutler, *Ex parte McCordle: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered*, 72 *Am. Hist. Rev.* 835 (1967); William W. Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 *Ariz. L. Rev.* 229 (1973).

⁷⁰ See 2 Warren, *supra* note 53, at 515-32 (discussing allegations of "court-packing").

⁷¹ These attempts (some successful) to curb the Court are discussed in the second Article in this series.

nority.⁷² It is somewhat more difficult to draw distinctions among other forms of criticism, the most difficult being the “institutionalist” or “separation of powers” criticism. Sometimes such criticism is plainly rooted in countermajoritarian concern, but sometimes it is not. A good example of the latter is criticism of some Warren Court decisions on the ground that the Court was usurping the legislative function by rushing ahead of the political branches. Such criticism is not necessarily countermajoritarian. For example, the reapportionment decisions of the 1960s were wildly popular despite strident criticism of those decisions in separation of powers terms by politicians and academics; thus, the criticism of those decisions could not have been, and was not, expressed in countermajoritarian terms.⁷³ In many instances, context is important in labeling a criticism countermajoritarian or not.

The scope of the search for countermajoritarian criticism summarized here has been quite broad, taking into consideration sources that have not received great attention from many scholars of this question. Often discussion of this issue focuses on academic or judicial criticism of judicial decisions. An example is Horwitz’s attention to the debate surrounding judicial restraint and “democratic principles” in Supreme Court decisions.⁷⁴ Academic and judicial commentary is important, but it is only a small subset of the material that ought to be considered if the voice of the people is the one that is relevant. In addition to legal scholarship, there obviously have been numerous books and treatises addressed to the general public and devoted to attacking the Supreme Court, some in remarkably strident tones. And there is the popular press. But there also have been pamphlets, grade school readers, correspondence among notable figures, congressional debates, and sundry other sources of information. Obviously, no matter how broad the sources, bias of the sample is toward elite views. Any search that depends upon written material inevitably will be skewed

⁷² See *infra* note 188 (describing minority status of states’ rights advocates during Jacksonian era).

⁷³ Well, not completely. Predictably, Bickel criticized the decisions in countermajoritarian terms. See Alexander M. Bickel, *Reapportionment & Liberal Myths*, 35 *Commentary* 483, 488 (1963). But others recognized that such criticism made no sense in context. See Carl A. Auerbach, *The Reapportionment Cases: One Person, One Vote—One Value*, 1964 *Sup. Ct. Rev.* 1, 2 (explaining “paradoxical” nature of arguments about “judicial self-limitation” in context of reapportionment cases). Some commentators actually rushed forward to argue—echoing conservative arguments from earlier days—that majority rule was not the governing principle in the American constitutional system. For example, Raymond Moley chastised readers for thinking “that this is a democracy rather than a republic.” Raymond Moley, *A Great Dissent*, *Newsweek*, Apr. 16, 1962, at 116.

⁷⁴ See Horwitz, *supra* note 60, at 258.

toward elites,⁷⁵ and this particularly is true when the search is for criticism of courts, because politicians, lawyers, and the like have had so much to say on the subject. By delving into a wider set of sources, however, it is possible to obtain a reflection of what a broad base of society was thinking.

A final word is in order regarding the conclusions offered here as to how prevalent the countermajoritarian criticism was in any given period. It is difficult to "prove" any such conclusion, absent some sophisticated analytic tool that probably would be impossible to employ given the wide ranging historical sources considered. The problem is compounded because a single, stray statement quoted from a period in which countermajoritarian criticism was relatively rare might sound even stronger than a quoted statement from a period in which such criticism was common. The breadth of sources was intended to convey the breadth of contemporary criticism, but at some point readers simply are left to faith.

This, then, is the framework that shapes the countermajoritarian difficulty. The sides of the frame obviously reflect deeply felt understandings about American democratic government. The history of the countermajoritarian difficulty is about how these understandings have changed over time, often, but not always, in response to the work of the courts themselves. It is a history that properly begins with a focus on the rise of judicial supremacy.

II

JEFFERSONIAN DEMOCRACY AND THE ATTACK ON THE COURTS

For these judges, thus rendered omnipotent, may overleap the Constitution and trample on your laws; they may laugh the Legislature to scorn, and set the nation at defiance.⁷⁶

The election of 1800 was in some senses the second American revolution.⁷⁷ Because of a tie in the electoral college, Jefferson's as-

⁷⁵ Regrettably, this history relies exclusively on print materials and thus omits attention to what undoubtedly would be important radio, television, and video recordings. Some of these, however, are captured in print media reports.

⁷⁶ 11 Annals of Cong. 824 (1802) (statement of Rep. Nicholson).

⁷⁷ See Richard E. Ellis, *The Jeffersonian Crisis* 16 (1971) ("The judiciary issue, therefore, with its corresponding implications for constitutional change, became the overriding domestic issue of Jefferson's first administration; it became, in fact, the issue around which the meaning of the 'revolution of 1800' was to be defined."). Ellis's thesis is that many of the disputes over the judiciary described in this section were as much the function of tensions between the moderate and radical wings of each party, as they were struggles between the Federalist and Republican parties themselves. See *id.* at viii. There is much sense in this, and Ellis's thesis is cogently defended. Nonetheless, the real tension as far as

cension to the Presidency was not immediately assured,⁷⁸ but it was clear that the Democrat-Republican party had swept into power by taking control of both popularly elected branches of government.⁷⁹ This victory came as a result of a carefully cultivated popular movement, the attention of which was focused on the "monarchist" and "tyrannical" tendencies of the Federalists.⁸⁰ Facing banishment from the councils of government, the Federalists retreated to the judiciary. As one of their final pieces of business the Federalists passed the Circuit Judges Act of 1801 (similar legislation had failed passage the prior year), creating sixteen national Circuit Court judgeships and eliminating the obligation of Supreme Court Justices to ride circuit.⁸¹ In addition, the Federalists passed a bill authorizing the President to create new Justice of the Peace positions for the District of Columbia.⁸² Adams immediately filled forty-two new judgeships with Federalists, quickly condemned as "Midnight Judges."⁸³ The story is a familiar one, giving rise as it did to the seminal decision in *Marbury v. Madison*.⁸⁴

And so the stage was set. A new Democrat-Republican government strongly committed in tone to fulfilling the will of the people

judicial independence was concerned existed between the radical Republican and High Federalist positions, and those positions often framed the debates described here. On this point, Ellis concurs. See *id.* at 9.

⁷⁸ Both Jefferson and Burr received the same amount of electoral votes; one of the Republican electors failed to "throw" a vote for Burr. The dilemma was resolved in the House and provided the impetus for the Twelfth Amendment. See William Nisbet Chambers, *Political Parties in a New Nation: The American Experience 1776-1809*, at 160, 166-68 (1963).

⁷⁹ Republicans took 66 of the 106 House seats and 18 of 32 Senate seats. See *id.* at 160.

⁸⁰ See *infra* notes 154-60 and accompanying text.

⁸¹ See Act of Feb. 13, 1801, ch. 4, § 7, 2 Stat. 89, 90-91 (repealed 1802); Charles G. Haines, *The Role of the Supreme Court in American Government and Politics, 1789-1835*, at 180 (1944) (describing provisions of Act).

⁸² See Act of Feb. 27, 1801, ch. 15, § 11, 2 Stat. 103, 107; see Haines, *supra* note 81, at 245-46 (discussing Adams's appointments).

⁸³ See 1 Warren, *supra* note 53, at 201 (describing how at least four commissions had not been delivered when Adams's term expired at midnight). Stacking of the judiciary with solely Federalist appointees rankled Jefferson, who set about repealing the Judiciary Act of 1801. For a discussion of Federalist efforts to challenge repeal of the Act in the courts, see Wythe Holt, "[I]f the Courts have firmness enough to render the decision:" Egbert Benson and the Protest of the "Midnight Judges" Against Repeal of the Judiciary Act of 1801, in Wythe Holt & David A. Nourse, *Egbert Benson: First Chief Judge of the Second Circuit (1801-1802)*, at 9 (1987).

⁸⁴ 5 U.S. (1 Cranch) 137 (1803). For background on the *Marbury* litigation, see Susan Low Bloch & Maeva Marcus, John Marshall's Selective Use of History in *Marbury v. Madison*, 1986 Wisc. L. Rev. 301; William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L.J. 1.

faced off against the Federalist judiciary leery of King Mob.⁸⁵ Politics in the late 1700s and early 1800s were partisan to a degree difficult to appreciate fully today, and the newspapers were filled with scurrilous accusations. Behind every act of Federalist judges was seen a conspiracy to deprive the people of power.⁸⁶ The Federalists, for their part, saw the judiciary as the sole bulwark against leveling a democracy.⁸⁷

One might expect the countermajoritarian criticism to flower in this environment, and it did. During the Jeffersonian attack on the courts the countermajoritarian criticism surfaced repeatedly. Although not the most countermajoritarian period in history (yet, perhaps second-most), the era stands almost alone in the nineteenth century as a time when prominent criticism juxtaposed the popular will with judicial independence. Three events in particular generated controversy over the judiciary. First, although *Marbury* itself did not lead to countermajoritarian criticism, the decision solidified Republican interest in seeking—and ultimately obtaining—repeal of the Circuit Judges Act. Second, partisan activities of Federalist judges enraged Republicans, culminating in the impeachment trial of Justice Samuel Chase. Third, the Federalist judiciary incurred the wrath of Republicans over the treason trials of Aaron Burr and his associates.

Although, given the tensions between victorious Republicans and a Federalist judiciary, countermajoritarian criticism might be expected, there is paradox here as well: judicial supremacy did not arise until much later in the nineteenth century. Why is it, then, that amid frequent assertions of judicial nonsupremacy, countermajoritarian criticism appeared so often? A specific answer may be that, although

⁸⁵ Judge Chase believed that universal suffrage would “‘certainly and rapidly destroy all protection to property and all security to personal liberty, and our republican Constitution will sink into a mobocracy.’” 1 Warren, *supra* note 53, at 276 (quoting Nat’l Intelligencer, May 20, 1830).

⁸⁶ Consider the Republicans’ response to the mandamus issued during the *Marbury* case: “[T]he Judges, who have so much control over life and property and who by the boundless construction of common law assume the most dangerous power, would then regulate not only the law but the government’ . . .” 1 Warren, *supra* note 53, at 205 (quoting Salem Register, Jan. 28, 1802). In response to the acquittal of Judge Chase, Henry St. George Tucker expressed revulsion that “‘any class of men in society in any office . . . should be treated so much like gods, placed so far above the reach of censure and almost dignified with papal infallibility.’” *Id.* (quoting Letter from Henry St. George Tucker to Joseph H. Nicholson (Mar. 9, 1805)). For a discussion of the reaction of Jefferson and other Republicans to the treason trial of Burr, see *infra* notes 142-48 and accompanying text.

⁸⁷ Federalists gloated over the ruling in *Marbury* that Jefferson violated the Constitution. See 1 Warren, *supra* note 53, at 247-48 (citing Constitution Violated by the President, N.Y. Evening Post, Mar. 23, 1803). For discussions of Federalist responses to the impeachment trial of Judge Chase and to Marshall’s conduct in the Burr trial, see *infra* notes 129-32, 146-48, and accompanying text.

judicial supremacy often was denied, at least in the three areas of controversy identified above the judiciary was supreme enough in its sphere to cause conflict. To identify but one example, although the Circuit Judges Act was unpopular, the fact remains that Federalist judges had taken those seats and were acting in highly partisan fashion. That was conflict enough for countermajoritarian commentary to emerge, even while supremacy was denied. More generally, parties to the debate intuitively understood they were playing out issues that were left unresolved in the wake of the American Revolution, the future importance of which was evident.⁸⁸ Chief among these was the future role of the judiciary,⁸⁹ and partisans to the debate often took extreme positions.⁹⁰ It may be that in practical terms the Federalist judiciary did very little to interfere with the Jeffersonian agenda,⁹¹ but Republicans of the time feared judicial supremacy and at least radical Republicans were anxious to nip it in the bud. As William Nelson suggests, "One [party, the Republicans,] sought to resolve all issues according to the will of the people and the other[, the Federalists,] sought to resolve them according to fixed principles of law."⁹² Out of that tension, countermajoritarian criticism emerged.

A. *The Sources of Countermajoritarian Tension*

1. *The Repeal Act*

The lengthy debate over repeal of the Circuit Judges Act provided an opportunity to rehearse contrasting views of the role of a judiciary in a constitutional republic.⁹³ Although the Republicans were furious that the Federalists had "retired into the judiciary as a stronghold . . . and from that battery all the works of republicanism

⁸⁸ See Ellis, *supra* note 77, at 4, 268 (explaining that after 1787, political figures were essentially required to give meaning to form American government would take).

⁸⁹ See *id.* at 4 ("In these encounters [over the form of constitutional government] no branch of the government presented as many problems that took as long to resolve, or were as complex, as the judiciary.").

⁹⁰ See *id.* at 9.

⁹¹ See Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 11 *Stud. Am. Pol. Dev.* (forthcoming 1998) (manuscript on file with the *New York University Law Review*). Graber argues that the relationship between the Marshall Court and moderate Republicans was actually quite close. See *id.* (manuscript at 7). With rare exception, the Marshall Court handed down decisions "congenial to the incumbent administration or legislative majority" from 1809-1828. *Id.* (manuscript at 9).

⁹² William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 *Mich. L. Rev.* 893, 928-29 (1978) (stating that party division was "closely related" to these two points of view).

⁹³ Background on the politics of the Repeal Act can be found in Haskins & Johnson, *supra* note 27, at 151-63.

are to be beaten down and erased,"⁹⁴ initially they were hesitant to move the repeal. After viewing Federalist judicial partisanship, however, and particularly in light of the show cause order issued in *Marbury v. Madison*, hesitation gave way to impulse and a bill to repeal the Circuit Judges Act was introduced.⁹⁵ The debate touched on many themes that would repeat themselves throughout American history and provided the first serious challenge to independent judicial review.⁹⁶ At the commencement of the debate the *National Intelligencer* boldly asserted: "Judges created for political purposes, and for the worst of purposes under a republican government, for the purpose of opposing the National will, from this day cease to exist . . ." ⁹⁷

The touchstone of the Federalist position was judicial independence. Time and again Federalists asserted that the "Judiciary ought to be independent, beyond the control or influence of either of the

⁹⁴ Letter from Thomas Jefferson to John Dickinson (Dec. 19, 1801), in 10 *The Writings of Thomas Jefferson* 301, 302 (Albert Ellery Bergh ed., 1903) [hereinafter *Writings*].

⁹⁵ See Ellis, *supra* note 77, at 44-45; 1 Warren, *supra* note 53, at 204. The initial stated basis for the challenge was economy: "[T]here was not enough work to occupy the judicial establishment erected by the Federalists." James M. O'Fallon, *Marbury*, 44 *Stan. L. Rev.* 219, 223 (1992). Jefferson set the stage for this argument as early as his annual message to Congress in December of 1801. See *id.* at 221-22. O'Fallon does an excellent job of placing the subsequent *Marbury* decision within the context of the repeal debate, perhaps too good in that he thus minimizes the significance of *Marbury* itself. See Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 *Sup. Ct. Rev.* 329, 379-81. Ellis suggests that although Jefferson's argument set the stage for repeal, he was—at least initially—a reluctant participant, a position that changed in the wake of the *Marbury* show cause order. See *id.* at 335; Ellis, *supra* note 77, at 44-45.

Battle royal is again being fought over the significance of John Marshall's decision in *Marbury*. Compare O'Fallon, *supra* (arguing that *Marbury* decision was framed by ongoing struggles over judicial independence, and was not bold and clever move many commentators suggest), with Sylvia Snowiss, *From Fundamental Law to the Supreme Law of the Land: A Reinterpretation of the Origin of Judicial Review*, 2 *Stud. Am. Pol. Dev.* 1, 3, 51 (1987) (arguing that "statesmanlike deviousness" Alexander Bickel attributed to Marshall was far greater than anything even Bickel seemed to understand, and crediting Marshall for defining Constitution as "ordinary law" to be construed by courts as such). For one recent entry that can at best be called provocative, see Robert Lowry Clinton, *Marbury v. Madison and Judicial Review* (1989). Whereas O'Fallon seeks to minimize the significance of *Marbury*, and Snowiss seeks to magnify Marshall's accomplishment in establishing modern-day judicial review, Clinton claims Marshall for conservatism's cause of "judicial restraint." All three revisionist positions are strenuously critiqued in Alfange, *supra*, at 387, none more harshly than Clinton's. See *id.* (calling Clinton's contention "preposterous" and his analysis "embarrassing in its shoddiness"); see also Howard Gillman, *The Struggle Over Marshall and the Politics of Constitutional History*, 47 *Pol. Res. Q.* 877, 877 (1994) (questioning extent to which Marshall's jurisprudence can be called upon to support present-day positions).

⁹⁶ See 1 Warren, *supra* note 53, at 215.

⁹⁷ *Id.* at 209 (quoting *Nat'l Intelligencer*, Mar. 5, 1802).

other departments of power.”⁹⁸ Independence from the Executive was essential, but judges should be “particularly so of the Legislature.”⁹⁹ The Federalists believed it a danger that the immediate passions of the people were expressed easily in the legislature.¹⁰⁰ Federalist distrust of direct popular will was evident. No one was more eloquent in opposing the Repeal Act than Senator Morris, who urged:

Do not rely on that popular will, which has brought us frail beings into political existence. That opinion is but a changeable thing. . . . Cast not away this only anchor of our safety. I have seen its progress. I know the difficulties through which it was obtained. . . . [I]f you lose this charter, never, no, never will you get another! We are now, perhaps, arrived at the parting point. Here, even here, we stand on the brink of fate. Pause—pause! For Heaven’s sake, pause!¹⁰¹

Republicans, on the other hand, were scornful of independent judges, displaying far more faith in the people.¹⁰² One notable direct

⁹⁸ 11 Annals of Cong. 574 (1851) (speech of Rep. Stanley). Representative Stanley further declared: “The Judiciary are our security. The Legislature may enact penalties, and denounce punishments against those who do not yield obedience to their unconstitutional acts; their penalties cannot be exacted, nor punishments inflicted, without the judgment of a court.” *Id.*; see also *id.* at 28 (speech of Sen. Breckinridge) (“The Judiciary department is so constructed as to be sufficiently secured against the improper influence of either the Executive or Legislative departments.”).

⁹⁹ *Id.* at 576 (speech of Rep. Stanley). Senator Tracy asked,

What security is there to an individual, if the Legislature of the Union or any particular State should pass a law, making any of his transactions criminal which took place anterior to the date of the law? None in the world but by an appeal to the Judiciary of the United States, where he will obtain a decision that the law itself is unconstitutional and void, or by a resort to revolutionary principles, and exciting a civil war.

Id. at 56 (speech of Sen. Tracy); see also *id.* at 574 (speech of Rep. Stanley) (“While the Judiciary firmly, independently, and uprightly, discharge their duty and declare the act of the Legislature contrary to the Constitution, to be void, the Legislature are checked, and the citizen shielded from oppression and persecution.”).

¹⁰⁰ See *id.* at 41 (speech of Sen. Morris) (“Why are we here? To save the people from their most dangerous enemy; to save them from themselves. What caused the ruin of the Republics of Greece and Rome? Demagogues, who, by flattery, gained the aid of the populace to establish despotism.”). Initially, at least, the Federalists offered their own version of the argument that the people’s will should prevail. According to the Federalists, the stable will of the people was embodied in the *Constitution*, which established an independent judiciary. See 1 Warren, *supra* note 53, at 225 (declaring Constitution supreme over laws—“the Courts do not control or prostrate the just authority of Congress. It is the will of the people expressed in the Constitution which controls them.” (quoting Sen. Ross)); see also *infra* note 153.

¹⁰¹ 11 Annals of Cong. 91-92 (1802) (speech of Sen. Morris). Immediately after Morris’s appeal the Senate voted in favor of the repeal.

¹⁰² Ellis suggests the rhetoric of the debate was largely that of extreme Republicans and that moderates went along somewhat unwillingly. See Ellis, *supra* note 77, at 50. Nonetheless, the vote was largely along party lines. See *id.* at 46, 50.

challenge to the idea of independent judges was that of Representative Giles, who criticized "the independence of judges; which, to the extent they carry the meaning of the term, is neither to be found in the letter or spirit of that instrument, or in any other political establishment, he believed, under the sun."¹⁰³ Representative Macon zealously joined Giles's condemnation of an independent judiciary when he said he was "astonished when my colleague said . . . that their independence was necessary, as he emphatically said, to protect the people against their worst enemies, themselves I had thought we, the people, formed this Government, and might be trusted with it."¹⁰⁴

The conflict between judicial independence and popular will played itself out squarely in countermajoritarian language. Giles said the Federalist view went "directly to the destruction of the fundamental principle of the Constitution, the responsibility of all public agents to the people" and criticized "establishment of a permanent corporation of individuals invested with ultimate censorial and controlling power over all the departments of the Government, over legislation, execution, and decision, and irresponsible to the people."¹⁰⁵ Recognizing that the courts might strike down the Repeal Act, Representative John Randolph said,

But, sir, if you pass the law, the judges are to put their veto upon it by declaring it unconstitutional. Here is a new power, of a dangerous and uncontrollable nature, contended for. The decision of a Constitutional question must rest somewhere. Shall it be confided to men immediately responsible to the people, or to those who are irresponsible?¹⁰⁶

¹⁰³ 11 Annals of Cong. 582 (1802) (speech of Rep. Giles). Representative Giles added that there is little, if any, notion of an independent judiciary in the Constitution and advocated a literal interpretation of its language. Specifically, he noted that "the term *independence of Judges or of the Judiciary department* was not to be found in the Constitution." *Id.* at 584. Representative Giles could not find the idea of independence anywhere in "the spirit, general character, or phraseology, of any article or section of the Constitution." *Id.* He rejected the notion "[t]hat the Constitution was a mere nose of wax, yielding to every impression it received." *Id.* at 582.

¹⁰⁴ *Id.* at 708-09 (speech of Rep. Macon).

¹⁰⁵ *Id.* at 602 (speech of Rep. Giles).

¹⁰⁶ *Id.* at 661 (speech of Rep. Randolph). Randolph further questioned the rationale for letting the Judiciary decide which laws were constitutional. "With all the deference to their [the judges]' talents, is not Congress as capable of forming a correct opinion as they are? Are not its members acting under a responsibility to public opinion, which can and will check their aberrations from duty?" *Id.*

Similar statements were made by others,¹⁰⁷ but the point was put succinctly by Senator Breckinridge:¹⁰⁸

It is said that the different departments of government are to be checks on each other, and that the courts are to check the Legislature. If this be true, I would ask where they got that power, and who checks the courts when they violate the Constitution? Would they not, by this doctrine, have the absolute direction of the government? To whom are they responsible?¹⁰⁹

2. *Partisan Judiciary and the Chase Impeachment*

Additional opportunity for assailing the judiciary as countermajoritarian came in response to the highly partisan activities of the Federalist judges. Complaints about such partisan activity were common.¹¹⁰ Republicans often expressed dissatisfaction with the appointment of judges to additional posts by President Adams. Chief Justices Jay and Ellsworth each accepted presidential appointments to ambassadorships while serving on the Court,¹¹¹ and John Marshall

¹⁰⁷ See, e.g., *id.* at 552-53 (statement of Rep. Thomson) (fearing tyranny of Judiciary more than democratically elected executive or legislative branches). Representative Nicholson stated that the judiciary

are to decide upon the lives, the liberties, and the property of your citizens; they have an absolute veto upon your laws by declaring them null and void at pleasure . . . and after being clothed with this arbitrary power, they are beyond the control of the nation, as they are not to be affected by any laws which the people by their representatives can pass.

Id. at 823-24 (speech of Rep. Nicholson). In response to the Federalist claim that the people intended that the judiciary be independent, Representative Mason declared: "Though of opinion that each department ought to discharge its proper duties free from the fear of the others, yet I have never believed that they ought to be independent of the nation itself." *Id.* at 59 (speech of Rep. Mason).

¹⁰⁸ Dean Alfange assures us that despite common (mis)spelling of the Senator's name as "Breckenridge," "Breckinridge" is correct. See Alfange, *supra* note 95, at 359 n.135.

¹⁰⁹ 11 *Annals of Cong.* 178-79 (1802) (speech of Sen. Breckinridge).

¹¹⁰ See *Aurora* (Phila.), Aug. 9, 1800:

It must be extremely gratifying to the lovers of justice to know, that the Supreme Court of the United States was to hold its session here on Monday last; but that owing to the absence of *Judge Ellsworth* who is on a *foreign mission*, of *Judge, [sic] Chase* who is *electioneering* in Maryland, and of *Judge Cushing* who is sick, no business has, as yet been done, for want of a quorum. The suspension of the business of the highest court of judicature in the United States, to allow a *Chief Justice* to add NINE THOUSAND DOLLARS a year to his salary, and to permit *Chase* to make electioneering harangues in favor of *Mr. Adams*, is a mere bagatelle.

Republican aims in the impeachment effort are described in Haskins & Johnson, *supra* note 27, at 205-34. The trials of Pickering and Chase are also described. See *id.* at 234-45.

¹¹¹ See 1 Warren, *supra* note 53, at 167 ("The appointments by Presidents Washington and Adams of Jay and Ellsworth as ambassadors had further served to convince the Anti-Federalists that the Judicial Bench was being made simply an annex to the Federalist party.").

had served simultaneously as Chief Justice and Secretary of State.¹¹² Jefferson reacted strongly to these appointments: "It [the executive] has been able to draw into this vortex the Judiciary branch of the Government, and by their expectancy of sharing the other offices in the Executive gift to make them auxiliary to the Executive in all its views, instead of forming a balance between that and the Legislature, as it was originally intended."¹¹³ Executive appointment of federal judges to other positions was just the tip of the iceberg, however. Partisan activity of Federalist judges was widespread. It was commonplace for judges to deliver political speeches during grand jury charges.¹¹⁴ Similarly, some Federalist judges regularly took to the stump in favor of political allies.¹¹⁵

Countermajoritarian criticism in the context of partisan activity by Federalist judges surfaced particularly pointedly during the attempt to impeach Justice Chase, who had incurred the wrath of Republicans for his highly partisan activity. "Of all the Judges, no one was more hated than Chase."¹¹⁶ The *Aurora* of August 8, 1800, commented that "Judge Chase[] has been recently attending public meetings of the people of Maryland, and haranguing them on the propriety of keeping in office *such men* as President *Adams* and *himself*. From such men good Lord deliver us!"¹¹⁷ In addition to electioneering,¹¹⁸ Chase had played a central and highly partisan role in Sedition Act prosecutions. The charges against him were damning, among them that at the trial of Thomas Callender, a newspaper editor, Chase refused to allow Callender's lawyers to argue the question of the constitutionality of the

¹¹² See Francis Wharton, *State Trials of The United States During The Administrations of Washington and Adams* 46 (1849) (stating that Marshall "presided during the whole of February term in the Supreme Court . . . discharging . . . the duties of the two offices[,] . . . on the same day issuing reports in the one capacity, and delivering judgments in the other").

¹¹³ Thomas Jefferson, Notes on Professor Ebeling's letter of July 30, 1795, in 8 *The Works of Thomas Jefferson* 205 (Paul L. Ford ed., 1904-1908), quoted in 1 Warren, *supra* note 53, at 167. Seeking to address the problem of executive appointment of judges, Charles Pinckney proposed a Constitutional amendment prohibiting federal judges from holding any other appointed office. See 1 Warren, *supra* note 53, at 167-68.

¹¹⁴ See 1 Warren, *supra* note 53, at 165-67; *id.* at 275 (noting Grand Jury charge of Chief Justice Dana of Massachusetts denouncing Vice President and minority in Congress as "apostles of atheism and anarchy, bloodshed and plunder"); Keith E. Whittington, *Reconstructing the Federal Judiciary: The Chase Impeachment and the Constitution*, 9 *Stud. Am. Pol. Dev.* 55, 86 (1995).

¹¹⁵ See 1 Warren, *supra* note 53, at 276.

¹¹⁶ *Id.* at 273.

¹¹⁷ *Public Plunder in a New Point of View*, *Aurora* (Phila.), Aug. 8, 1800.

¹¹⁸ Chase was considered one of the most effective Federalist campaigners, and his speeches often lasted hours. See *Aurora* (Phila.), Aug. 4, 1800 ("Judge Chase has been electioneering for Mr. Adams . . . [during which] he made a speech in favour of the 'Chief who now commands' of only *two hours*.").

Acts to the jury, conduct Marshall himself admitted was unusual.¹¹⁹ Chase, as was common with Federalist judges, used grand jury charges to vent Federalist views. Commenting on the Repeal Act, Chase stated that “the independence of the national Judiciary is shaken to its foundation.”¹²⁰ Giles protested that “we have seen judges, who ought to have been independent, converted into political partisans, and like Executive missionaries, pronouncing political harangues throughout the United States.”¹²¹ The *Virginia Argus* asked, “Is it proper, is it decent that this man should be forever making political speeches from the Bench?”¹²²

The Republican attempt to remove Chase was a bold attack on the judiciary. Jefferson himself was directly behind the impeachment attempt: writing to Representative Nicholson he asked, “Ought this seditious and official attack on the principles of our Constitution and on the proceedings of a State, to go unpunished?”¹²³ Though Chase’s actions might have justified removal even under today’s standards of impeachment, prominent Republicans saw the Chase impeachment as a test of the use of the impeachment power simply to remove judges with whose views they differed.¹²⁴ As Warren has observed, “Its grav-

¹¹⁹ See Testimony in the Trial of Samuel Chase, in 6 *The Papers of John Marshall* 350, 353 (Charles F. Hobson et al. eds., 1990). The charges against Chase are discussed in Whittington, *supra* note 114, at 59-67; see also Ellis, *supra* note 77, at 76-82; Haines, *supra* note 81, at 261. Callender was “perhaps the most scurrilous newspaperman America has ever known.” Ellis, *supra* note 77, at 78.

¹²⁰ 1 Warren, *supra* note 53, at 276. Warren also refers to a Chase grand jury charge where he said that “the present Administration was weak, relaxed and not adequate to a discharge of their functions, and that their acts flowed, not from a wish for the happiness of the people but for a continuance in unfairly acquired power.” *Id.*

¹²¹ 11 *Annals of Cong.* 583 (1802) (speech of Rep. Giles). In debates on the Repeal Act, Republicans argued that the power of the judiciary must be limited to mitigate judicial bias. See *Official Conduct of Judge Chase*, in 3 *Abridgment of the Debates of Congress, From 1789 to 1856*, at 100 (1857) [hereinafter *Abridgment*] (statement of Rep. Lowndes) (“[A]re not judges men? Are they not men subject to like passions and like feelings as other men?”).

¹²² 1 Warren, *supra* note 53, at 277 n.1 (quoting *Virginia Argus*, June 11, 1803); see also *id.* at 165 (referring to “a perversion of the institution of the grand jury from a legal to political engine”) (quoting Letter from Thomas Jefferson to P. Fitzhugh (June 4, 1797)).

¹²³ Letter from Thomas Jefferson to Joseph H. Nicholson (May 13, 1803), in 10 *Writings*, *supra* note 94, at 387, 390.

¹²⁴ See Whittington, *supra* note 114, at 101 (“The Chase impeachment is perhaps most remembered as a battle over the independence of the judiciary, with the justice’s acquittal preventing the judiciary from becoming pawns of the current political majority.”). Whittington stresses, however, that Republicans were not of one mind as to how far the impeachment power should extend. See *id.* at 74-75 (describing views more moderate than those offered by some House leaders); *id.* at 101-02 (question was what was nature of independence appropriate to judiciary). Whittington also makes the important point that the Republican move to strip Federalist judges of office was based in large part on a dispute over principle, not patronage. See *id.* at 64. This only serves to underscore that the Chase impeachment represented a threat to the judiciary as an institution.

est aspect lay in the theory which the Republican leaders in the House adopted, that impeachment was not a criminal proceeding, but only a method of removal."¹²⁵ In his memoirs, John Quincy Adams described Giles's extreme views on this subject:

He treated with the utmost contempt the idea of an *independent* judiciary . . . [I]f the Judges of the Supreme Court should dare, AS THEY HAD DONE, to declare an act of Congress unconstitutional, or to send a mandamus to the Secretary of State, AS THEY HAD DONE, it was the undoubted right of the House of Representatives to impeach them, and of the Senate to remove them, for giving such opinions, however honest or sincere they may have been in entertaining them.¹²⁶

Impeachment need not have anything to do with "criminality or corruption" but was merely a way of influencing the conduct of the judiciary:

[R]emoval by impeachment was nothing more than a declaration by Congress to this effect: You hold dangerous opinions, and if you are suffered to carry them into effect you will work the destruction of the nation. *We want your offices*, for the purpose of giving them to men who will fill them better.¹²⁷

So grave was the threat that it led none other than John Marshall to suggest a better recourse might simply be to give the Congress review authority over judicial decisions.¹²⁸

The Federalists viewed the impeachment effort as an attack on an independent judiciary and defended Chase in these terms: "I assuredly believe that the Independence of the Judiciary, which is the boast

¹²⁵ 1 Warren, *supra* note 53, at 293; see also *id.* (noting that Republicans wanted to use impeachment to keep Justices in "reasonable harmony with the will of the Nation, as expressed through Congress and the Executive"). In a House debate on Chase's conduct, Representative Clay portended "that unless great care be taken the doctrine of judicial independence will be carried so far as to become dangerous to the liberties of the country." Official Conduct of Judge Chase, *supra* note 121, at 90 (statement of Rep. Clay). Clay referred to the House as the "constitutional guardians of the morality of the Judiciary," recommending an inquiry "[w]henver even suspicion exists as to [a judge's] morality." *Id.* Jefferson tried to stay behind the scenes, permitting House leaders to push the impeachment; Ellis argues that ultimately the impeachment failed for lack of strong support from Jefferson. See Ellis, *supra* note 77, at 80, 104.

¹²⁶ Diary Entry of John Quincy Adams (Dec. 21, 1804), in 1 *Memoirs of John Quincy Adams* 321, 322 (Charles Francis Adams ed., 1874).

¹²⁷ *Id.* These criticisms were often leveled in countermajoritarian terms. During the Chase Trial, the prosecutor noted, "I am afraid the doctrine [of judicial independence] has been carried to such an extravagant length, that the Judiciary may justly be considered like a spoiled child. They are here placed almost beyond the reach of the people . . ." Trial of Judge Chase, in 3 *Abridgment*, *supra* note 121, at 268 (speech of Rep. Rodney).

¹²⁸ See Letter from John Marshall to Samuel Chase (Jan. 23, 1805), in 6 *The Papers of John Marshall*, *supra* note 119, at 347, 347.

of our Constitution, hangs on this Pivot."¹²⁹ The impeachment attempt was, in the Federalist view, designed to make the judges accountable to the people. The *Charleston Courier* editorialized on June 13, 1803:

[W]e see those last shaking hands, and apparently conspiring for the overthrow of that third branch of the constitution—and, in short, we see the whole fabric shattering and falling to pieces, before that spirit of pure democracy to which the demolition of Europe, and the usurpation of Bonaparte, are at this day wholly to be attributed.¹³⁰

Nor, as it stood, was the Federalist view unfounded. Just two weeks earlier, the *Aurora*, a Republican mouthpiece, had itself editorialized, "It will one day be a subject of enquiry, why judges and justices of the peace should be more independent of the control of a free people, than those who have the formation and execution of laws entrusted to them."¹³¹ Similarly, the *Independent Chronicle* asked, "Whence and for what cause has originated this novel cry about the sanctity and impunity of Judges? It seems as if they had a charter from heaven to do as they pleased, and it was sin against the elect to say, why do ye so?"¹³²

Ultimately, the attempt to remove Chase failed.¹³³ This did not stop the leader of the impeachment effort, John Randolph, from proposing a constitutional amendment that "[t]he Judges of the Supreme Court and all other Courts of the United States shall be removed from office by the President on joint address of both Houses of Con-

¹²⁹ Letter from Simeon E. Baldwin to Isaac Jones (Jan. 5, 1805), in *Life and Letters of Simeon Baldwin* 443, 444 (1919); see also *Trial of Judge Chase*, supra note 127, at 258 (statement of Rep. Martin):

[W]ould you really wish your judges, instead of acting from principle, to court only the applause of their auditors? Would you wish them to be . . . popular judges; judges who look forward, in all their decisions, not for the applause of the wise and good . . . but of the rabble, or any prevailing party?

¹³⁰ *Observations on Judge Chase's Charge*, *Courier* (Charleston), June 13, 1803, at 5; see also 1 Warren, supra note 53, at 281 ("The first object [of the Republicans] . . . was to level . . . the National Judiciary, or at least to render it completely subordinate to the other branches of the government.") (quoting *Connecticut Courant*, Feb. 27, 1805)).

¹³¹ *Aurora* (Phila.), Mar. 31, 1803.

¹³² 1 Warren, supra note 53, at 279 (quoting *Indep. Chron.*, Jan. 30, 1804); see also *Trial of Judge Chase*, supra note 127, at 268-69 (speech of Rep. Rodney):

Give any human being judicial power for life, and annex to the exercise of it the kingly maxim "that he can do no wrong,"—you may call him a judge or justice, no matter what is the appellation—and you transform him into a despot, regardless of all law but his own sovereign will and pleasure.

¹³³ See 1 Warren, supra note 53, at 291 (noting that Constitution required 23 votes of guilty in Senate to convict, but 19 was highest vote obtained against Chase). Ellis reports the failure as a collapse of Republican consensus, see Ellis, supra note 77, at 103, and a result of intraparty maneuvering to discredit Randolph, in part because of disagreements over the proper resolution of the Yazoo land grab, see *id.* at 87-90, 103.

gress."¹³⁴ While nothing came of this effort, it would be a mistake to conclude the Republican campaign had no effect. At the least, it changed the prevailing view of the propriety of political activity by judges.¹³⁵

3. *The Burr Conspiracy Trials*

The conduct of the Federalist judiciary, and of John Marshall in particular, with regard to the Burr conspiracy unleashed another round of fierce countermajoritarian criticism.¹³⁶ Corwin called the Burr trial the "one serious blemish in [Marshall's] judicial record."¹³⁷ The Burr trial resulted from activities that Jefferson believed indicated an intent to "precipitate a war with Spain and to set up a separate government in the Western States."¹³⁸ The Supreme Court released two alleged co-conspirators, Bollman and Swartwout, in an opinion Justice Story called the "best" definition of treason under the Constitution.¹³⁹ In subsequently directing a verdict for

¹³⁴ 1 Warren, *supra* note 53, at 295.

¹³⁵ See Whittington, *supra* note 114, at 83-93 (discussing effect of Chase impeachment as "depoliticizing" judiciary). The effort was not completely successful. See Graber, *supra* note 91 (manuscript at 67) (describing involvement of Federalist judges in Adams's 1828 election campaign).

¹³⁶ Mark Graber identifies the Burr case as "the only matter of public importance during the Jefferson administration in which Marshall Court rulings directly challenged Jeffersonian practice." Graber, *supra* note 91 (manuscript at 44). Graber's broader thesis is that the Marshall Court rarely allowed itself to come into conflict with dominant political majorities. See *id.* (manuscript at 9) ("Marshall almost always produced results, though not necessarily opinions, that were congenial to the incumbent administration or legislative majority."). This is somewhat in accord with William Nelson's thesis that Marshall only saw cases as "legal" rather than "political," and thus deserving of intervention, if the matter (a) involved individual rights, and (b) the claim was rooted in sufficiently widespread understandings that "a legal disposition of the case would command wide public support." Nelson, *supra* note 92, at 947, 953.

¹³⁷ Edward S. Corwin, *John Marshall and The Constitution* 111 (1919). As to Marshall's conduct, compare 1 Warren, *supra* note 53, at 315 (stating that majority of historians accept Federalist view of Marshall's conduct that he was protecting individual liberty instead of caving in to popular pressure), with Haines, *supra* note 81, at 279 (claiming that "[Marshall] was again applying his favorite political principles on the Bench as he did in the case of *Marbury v. Madison*").

¹³⁸ 1 Warren, *supra* note 53, at 301-02. Burr had assembled men and materials on an island in western Virginia, in preparation for an expedition against Mexico. The dispute was whether Burr's purpose was the treasonous one of seeking to sever the West from the Union or was simply one of personal gain in an attack on Mexico as part of a widely-anticipated war against Spain. See Haskins & Johnson, *supra* note 27, at 248-55 (detailing alleged treasonous conspiracy and concluding that treason was not Burr's purpose).

¹³⁹ See *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 126-27 (1807); see also Haines, *supra* note 81, at 286. At the Burr trial, the prosecution attempted to construe the language in *Bollman* as defining treason as "any assemblage whatever for a treasonable purpose, whether in . . . a condition to use violence, or not in that condition . . ." *Id.*

Burr,¹⁴⁰ however, Marshall was seen by many to disavow this definition.¹⁴¹ Jefferson wrote to William Thompson, "We had supposed we possessed fixed laws to guard us equally against treason and oppression. But it now appears we have no law but the will of the Judge."¹⁴² Similarly, Giles said, "I have learned that judicial opinions on this subject [treason] are like changeable silks, which vary their colors as they are held up in political sunshine."¹⁴³ The *Aurora* referred to the trial as the "*farce at Richmond*,"¹⁴⁴ and under the headline "BURR ACQUITTED, THOUGH GUILTY," complained that Marshall had stopped the presentation of evidence: "We therefore assume the ground that he is guilty, tho' acquitted."¹⁴⁵

¹⁴⁰ This is not to say that Marshall took the case away from the jury. The "directed" verdict of this period was instruction on the law, advice on the facts, or a mixture of the two. See William Wirt Blume, *Origin and Development of the Directed Verdict*, 48 Mich. L. Rev. 555, 567 n.46 (1950). Marshall told the jury:

No testimony relative to the conduct or declarations of the prisoner elsewhere, and subsequent to the transaction on Blennerhassett's Island, can be admitted; because such testimony, being in its nature merely corroborative and incompetent to prove the overt act in itself, is irrelevant until there be proof of the overt act by two witnesses. This opinion does not comprehend the proof by two witnesses that the meeting on Blennerhassett's Island was procured by the prisoner. On that point the court for the present withholds its opinions for reasons which have been already assigned; and as it is understood from the statements made on the part of the prosecution that no such testimony exists

United States v. Burr, 25 F. Cas. 55, 180 (C.C.D. Va. 1807) (No. 14,693). It would, of course, have been rather difficult for the jury to have found Burr guilty in light of this instruction. Nevertheless, the direction was not binding on the jury. See *Bingham v. Cabot*, 3 U.S. (3 Dall.) 19, 33 (1795) ("It will not be sufficient to remark, that the court might charge the jury to find for the defendant; because, though the jury will generally respect the sentiments of the court on points of law, they are not bound to deliver a verdict conformable to them."). It was not until 1850 that a judge could give a jury an imperative instruction to find for the defendant. See *Parks v. Ross*, 52 U.S. (11 How.) 362, 372-73 (1850) (allowing instruction to jury that there was no evidence upon which they could find for plaintiff); Blume, *supra*, at 571.

¹⁴¹ See Haines, *supra* note 81, at 286. Haines described Marshall's definition of treason in the *Burr* trial as "opposite of what both the friends and foes of Burr had understood it to mean" from the *Bollman* case. *Id.* The loose definition of treason from the *Bollman* case turned into a strict definition when applied to Burr. "To complete the definition [of treason] both circumstances must occur. They must 'perform a part,' which will furnish the overt act; and they must be 'leagued in conspiracy.'" *Burr*, 25 F. Cas. at 161.

¹⁴² 1 Warren, *supra* note 53, at 312 (quoting Letter from Thomas Jefferson to William Thompson (Sept. 26, 1807)).

¹⁴³ Letter from Joseph Story to Samuel P.P. Fay (Feb. 13, 1808), in 1 *Life and Letters of Joseph Story* 157, 159 (William W. Story ed., Books for Libraries Press 1971) (1851).

¹⁴⁴ *Aurora* (Phila.), Oct. 1, 1807.

¹⁴⁵ *Burr Acquitted, Though Guilty*, *Aurora* (Phila.), Sept. 23, 1807. The paper further fumed that "where no evidence was admitted, of course no proof could be given, and the jury had only to act the part that *eunuchs act* in the court of a Persian Starap." *Aurora* (Phila.), Sept. 25, 1807.

While Federalists hailed the decision as justifying the independent authority of the judges to protect individual liberty, the Republicans saw the need to bring judges into line with the will of the people. The Federalist *Charleston Courier* stated in defense of Marshall, "The judge who permits the reasons of State, or popular opinions to influence his judgment would be a fit member for a Star Chamber Court, or a revolutionary tribunal, but is wholly unqualified for a Judge in a Court which has been established by the Constitution and laws of a free and independent Nation."¹⁴⁶ The *Aurora* was not so impressed: "Will a free people possessing the undisputed right to alter and change what does not suit, remain slaves to absurd and disgusting abuses?"¹⁴⁷ Indeed, for the *Aurora* the question was posed precisely: "[W]hether the existing *judiciary system* and the English *common law*, are exactly calculated for a free nation and a virtuous people."¹⁴⁸

Congress and the President were quick to take up the sentiment of popular opinion. Numerous suggestions were made for the removal of judges and for stripping jurisdiction over criminal cases or denying the right to issue the writ of habeas corpus.¹⁴⁹ The *Aurora* reported that Dr. Lieb had introduced legislation in Pennsylvania calling upon Congress to seek a constitutional amendment for the removal of judges by Congress.¹⁵⁰ His speech in favor of the legislation was highly majoritarian; he considered "the people of our republic as the sovereign of the country; and that all public agents should be responsible to them."¹⁵¹ Legislation was introduced by the Republicans for an amendment providing for a limited term of office for federal judges and for their removal "by the President on the address of two-thirds of both Houses of Congress requesting the same."¹⁵²

¹⁴⁶ *Courier* (Charleston), Oct. 13, 1807; see also 1 Warren, *supra* note 53, at 311 ("The dignified independence which has characterized the Court sitting at Richmond has reflected high honor on the jurisprudence of our country . . ." (quoting *Columbian Centinel*, Sept. 19, 1807)).

¹⁴⁷ Burr Acquitted, Though Guilty, *supra* note 145; see also *id.* (calling Burr trial "an insult to plain sober men" and claiming that "simple truth and righteous judgment, has by little and little been thrown at last out of courts, and form, quibble, cut and shuffle, substituted in their place"); Burr's Acquittal, *Aurora* (Phila.), Sept. 18, 1807 (describing how "[d]uring the whole trial, the prerogative of a judge was thrown aside, as a useless incumbrance").

¹⁴⁸ *Aurora* (Phila.), Sept. 11, 1807.

¹⁴⁹ See 1 Warren, *supra* note 53, at 308 (reporting bill in Senate to abolish power of Supreme Court to issue writs of habeas corpus); *id.* at 314 (noting that Giles attempted to amend law of treason).

¹⁵⁰ See Speeches of Dr. Lieb, *Aurora* (Phila.), Feb. 19, 1808 (reporting Lieb's speeches in Pennsylvania House of Representatives advocating limited judicial tenure).

¹⁵¹ *Id.*

¹⁵² 3 Abridgment, *supra* note 121, at 550 (motion of Sen. Edward Tiffin).

B. Explaining the Criticism

Time and again as political crisis loomed, the Federalist judiciary and the judges were attacked in countermajoritarian terms. The sentiment frequently was expressed that judges should be accountable to the people,¹⁵³ more or less directly. When judges acted contrary to popular views, they were regularly condemned for interfering with the will of the people. The question is why? Were the factors present that would suggest that this sort of criticism should have surfaced regularly in Jefferson's time?

With regard to populism, the answer is certainly yes. The election of the Republicans in 1800 can be seen as a victory for democracy and as the culmination of a period of popular involvement in politics. William Nisbet Chambers called the Republican party the first "popular" party, contrasting it with the Federalist party, which "never developed strong ties of popular participation or responsiveness to popular opinion."¹⁵⁴ Leaders of both parties assuredly were elitist, but as Republican leaders like Madison and Jefferson viewed Federalist governance unhappily, they came to understand that it would be necessary to awaken the people to their cause. Of these and similar sentiments came a democratic movement in the 1790s. Jefferson and Madison were the impetus behind formation of a vibrant Republican press, including the first Republican paper, Phillip Freneau's *National Gazette*. The *Gazette* and other papers had a heavily democratic, populist tone, extolling the virtues of public participation in politics.¹⁵⁵ Another

¹⁵³ See O'Fallon, *supra* note 95, at 235, 253. Whittington and O'Fallon both make the point that, at least initially, the Federalist response was one of accountability as well. According to this argument, the Constitution represented the will of the people, and Federalist judges exercising judicial review only were enforcing that will against wayward political branches. See Nelson, *supra* note 67, at 1170-77 (offering same justification for state court exercise of judicial review); O'Fallon, *supra* note 95, at 235 (describing role of "the people" as limiting authority of Congress through Constitution); Snowiss, *supra* note 95, at 21-22 (explaining how popular sovereignty was offered as early defense of judicial review); Whittington, *supra* note 114, at 103-04. This argument bears close resemblance to Bruce Ackerman's "two track" theory of lawmaking in which judges preserve the people's will against faithless legislators during times of "normal lawmaking." See generally Ackerman, *supra* note 1. The argument obviously was most persuasive in the early years of the Republic, when the supermajoritarian act of constitution-making was still relatively new, and the constitutional structures were themselves still operating in many countermajoritarian ways. See Chemerinsky, *supra* note 1, at 74-75 (discussing ways in which Constitution is not majoritarian). Nonetheless, observes Whittington, by 1805 this "moderate" Federalist argument was "drowned out by the extreme claim that even a republic needed an element completely free from the people." Whittington, *supra* note 114, at 103-04.

¹⁵⁴ Chambers, *supra* note 78, at 107.

¹⁵⁵ See James Roger Sharp, *American Politics in the Early Republic 67* (1993) (noting that "the business of managing elections, and choosing our representatives, [cannot] be performed by any authority, but that of the people" (quoting *Nat'l Gazette*, Oct. 3, 1792)); *id.* (asserting that "every man 'ought to be a politician in a degree' making it 'his duty to

source of democratic participation were the Democratic-Republican societies. These societies were devoted to the Republican cause and indeed were somewhat more populist and radical in tone than Republican leaders. They served an important function in mobilizing the people, popularizing pamphleteering, assemblies, manifestos, and the like in the Republican movement.¹⁵⁶

The election of 1800, which brought the Republicans to power in Congress and ultimately Jefferson to the Presidency, indicated the extent of popular participation in politics. Estimates suggest a large popular turnout: in Virginia, for example, 25% of white males, some 50% of the potential electorate, participated in choosing electors, a level not seen again until 1828.¹⁵⁷ Similarly, gubernatorial elections in Massachusetts and Pennsylvania recorded unprecedented turnout, with twice the number of people voting in Pennsylvania as in any previous election.¹⁵⁸ At the federal level, popular support enabled Republicans to assume control of both the House of Representatives and the Senate¹⁵⁹ and, ultimately, of the Presidency.¹⁶⁰

It is somewhat more difficult, and perhaps unnecessary, to reach a definitive conclusion as to whether the acts of the Federalist judiciary actually interfered with majority will, the second factor for understanding when countermajoritarian criticism will arise. What is evident is that the threat of judicial interference with popular will alone

attend the annual or periodical election of his rulers and magistrates'" (quoting *Nat'l Gazette*, May 1, 1793)).

¹⁵⁶ See Philip S. Foner, Introduction, in *The Democratic-Republican Societies, 1790-1800*, at 3, 40 (Philip S. Foner ed., 1976). The societies provided a way of uniting urban dissent with the rural, agricultural vote. See Eugene Perry Link, *Democratic-Republican Societies, 1790-1800*, at 177 (1942). Although the importance of the societies was diminishing as the election of 1800 approached, they gave way to new forms that voiced themselves in town meetings, and in the Republican party. See Foner, *supra*, at 40.

The relatively populist perspective of the Republicans is shown by contrasting it with the Federalist challenge to democracy and the Democratic Republican societies. The Federalists organized their own newspapers to attack the societies, see Link, *supra*, at 189 (referring to Federalist-supported papers like *Gazette*, *Minerva*, and *Columbian Centinel*), as well as the anarchistic tendencies of democracy. Hamilton, for example, attacked for accompanying to Pittsburgh the troops sent to quash the Whiskey Rebellion, stated, "[I]t is long since I have learned to hold popular opinion of no value." Letter from Alexander Hamilton to George Washington (Nov. 11, 1794), in 6 *The Works of Alexander Hamilton* 457, 457 (Henry Cabot Lodge ed., 1904).

¹⁵⁷ See Richard P. McCormick, *The Presidential Game* 71 (1982). The electorate at the time consisted of white male property owners. See *id.*

¹⁵⁸ See *id.*

¹⁵⁹ See Chambers, *supra* note 78, at 160.

¹⁶⁰ In balloting of the electoral college, Jefferson and Burr each received 73 electoral votes. See *id.* at 158. Under the Constitution as it then stood, the old, Federalist-controlled House would choose the next president. See *id.* at 160. Each of the 16 states had one vote, determined by the majority of its representatives. See *id.* at 166. After 35 inconclusive roll call votes, Jefferson finally won, 10 states to 4. See *id.* at 167-68.

was sufficient to give rise to the criticism. Looking across the historical divide, it would not be easy to determine whether the Federalist judiciary in the early 1800s was, strictly speaking, acting contrary to the preferences of popular majorities. Certainly, some of the acts of Federalist judges aroused enough passion in the population to permit them to claim that those judges were acting in countermajoritarian fashion, as the discussion of the Chase impeachment and the Burr conspiracy makes clear. Yet, Mark Graber argues convincingly that throughout the early 1800s, the Marshall Court managed to keep itself relatively attuned to public opinion.¹⁶¹ The standard story of *Marbury* bears this out, depicting John Marshall as establishing the basis for judicial review while sidestepping disaster by not actually requiring the Jefferson administration to do anything. However, issuance of the show cause order in *Marbury* indicated the potential for judicial interference, which is why that order triggered the debate in Congress over the Repeal Act, a debate that was full of countermajoritarian concern. Given the uncertainty of how relationships between the judiciary and the political branches would develop over the course of the country's history, a substantial enough number of politically mobilized people evidently feared what the judiciary *could* do to give rise to countermajoritarian criticism.

This potentially disruptive aspect of judicial power feeds the most paradoxical aspect of the framework for countermajoritarian criticism, the question of judicial supremacy. Judicial supremacy would seem essential to countermajoritarian criticism. Yet, while today the edifice of judicial review is established, and much of what comes with it is accepted, that was hardly the case in the Jeffersonian era. We know how the debate comes out, but it is instructive to hear the terms of that discussion at a time when its result was still uncertain. Jefferson's famous switch with regard to the judiciary is one illuminating example.¹⁶² In the debate about a bill of rights, he wrote Madison: "In the arguments in favor of a declaration of rights, you omit one which has great weight with me; the legal check which it puts into the hands of the judiciary."¹⁶³ Yet, as matters were to develop, Jefferson would become a vehement foe of the judiciary.¹⁶⁴ His views expressed later in

¹⁶¹ See *supra* note 136 (discussing Graber's thesis).

¹⁶² For an excellent review of Jefferson's views on the judiciary and judicial review, including a discussion of how Jefferson's opinions changed over time, see David N. Mayer, *The Constitutional Thought of Thomas Jefferson* 257-94 (1994).

¹⁶³ Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 7 Writings, *supra* note 94, at 309, 309.

¹⁶⁴ See 1 Warren, *supra* note 53, at 322-24 (surveying Federalist commentary on Jefferson's "inveterate hostility" to judiciary).

life, when his time on the public stage was over, sum it up: "The judiciary of the United States is the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric."¹⁶⁵

In order to understand the terms of the argument over judicial supremacy, it is necessary to distinguish the question of supremacy from the question of judicial review, itself not uncontested at the time. Of course, many scholars have debated the question whether the Framers intended the judiciary to engage in *Marbury*-style judicial review, and any number of scholars today assert that the practice was fairly established even at the time of *Marbury* itself, at least in state practice.¹⁶⁶ Whether it was established or not in state practice, there were surely those who were heard to deny the authority of federal courts to disregard acts of Congress, the most outspoken of whom was probably Kentucky Senator John Breckinridge. His objection was stated in terms clearly based on the countermajoritarian difficulty:

I did not expect, sir, to find the doctrine of the power of the courts to annul the laws of Congress as unconstitutional, so seriously insisted on. . . . I would ask where they got that power, and who checks the courts when they violate the Constitution? Would they not, by this doctrine, have the absolute direction of the Government? To whom are they responsible?¹⁶⁷

¹⁶⁵ Letter From Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), in 15 Writings, supra note 94, at 295, 297. Some of Jefferson's strongest statements were made later in his life. Ellis paints Jefferson as much more moderate on the independence of the judiciary, at least at the time he held office. See Ellis, supra note 77, at 34-35.

Jefferson could turn a phrase, and he was prolific. But study of his writings reveals that once he found a phrase he liked, it was subject to repetition. See Thomas Jefferson, *Autobiography*, in 1 Writings, supra note 94, at 121-22 ("They are then, in fact, the corps of sappers and miners, steadily working to undermine the independent rights of the States, and to consolidate all power in the hands of that government . . ."); Letter from Thomas Jefferson to A. Coray (Oct. 31, 1823), in 15 Writings, supra note 94, at 480, 487 ("[T]hese decisions, nevertheless, become law by precedent, sapping, by little and little, the foundations of the constitution . . ."); Letter from Thomas Jefferson to Edward Livingston (Mar. 25, 1825), in 16 Writings, supra note 94, at 112, 114 ("But [the Judiciary] has proved that the power of declaring what the law is, *ad libitum*, by sapping and mining, slyly, and without alarm, the foundations of the Constitution, can do what open force would not dare to attempt.").

¹⁶⁶ See, e.g., Ellis, supra note 77, at 66 (arguing that few Republicans were prepared to deny Supreme Court's right to review acts of Congress); Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law 57-58* (1996) (suggesting broad consensus that in some situations courts could annul legislative act); Snowiss, supra note 95, at 3-5, 8-35 (discussing how idea of constitutions as fundamental law enforced by judiciary in clear cases of legislative departure preexisted *Marbury*).

¹⁶⁷ 11 *Annals of Cong.* 178-79 (1802) (speech of Sen. Breckinridge). The issue of judicial review was hotly debated in the context of the Repeal Act. See 1 Warren, supra note 53, at 216-17 (comparing Senator Breckinridge ("[T]his pretended power of the Courts to annul the laws of Congress cannot possibly exist.") with Representative Morris ("[T]he

The greater concern, however, was not judicial review, but rather judicial supremacy. The issue was not so much whether the judiciary could interpret the Constitution for itself in a case that called for it. Rather, the larger question was how far the judiciary's interpretation would bind litigants outside that case, including other branches of the national government, or the state governments. It was judicial supremacy that was feared and reviled. Senator George Mason, debating repeal of the Circuit Judges Act, commented, "This independence of the Judiciary, so much desired, will, I fear sir, if encouraged or tolerated, soon become something like supremacy."¹⁶⁸ Even after the Supreme Court had upheld the repeal, radical Republican leader Caesar Rodney wrote:

They should remember, however, that there is a boundary which they cannot pass with impunity. If they cross the Rubicon, they may repent when it will be too late to return. Judicial supremacy may be made to bow before the strong arm of Legislative authority. We shall discover who is master of the ship.¹⁶⁹

And Jefferson criticized William Jarvis for considering "the judges as the ultimate arbiters of all constitutional questions," deeming it "a very dangerous doctrine indeed The Constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots."¹⁷⁰

Many of those who accepted the legitimacy of judicial review nonetheless believed that judicial decisions could not bind the other branches of government.¹⁷¹ Thus, although Jefferson apparently

sovereignty of America will no longer reside in the people but in Congress, and the Constitution is whatever they choose to make it.")). See Haines, *supra* note 81, at 227-30 (discussing Federalist arguments); *id.* at 230-35 (discussing Republican arguments).

¹⁶⁸ 11 *Annals of Cong.* 63 (1802) (speech of Sen. Mason).

¹⁶⁹ 1 Warren, *supra* note 53, at 228-29 (quoting Letter from Caesar A. Rodney to Joseph H. Nicholson (Feb. 16, 1803)).

¹⁷⁰ Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), in 15 *Writings*, *supra* note 94, at 276, 277.

¹⁷¹ Jefferson's Attorney General, Levi Lincoln, conceding the binding nature of the Supreme Court's decision in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), on the *parties*, maintained such binding effect went no further:

Although they have fixed the principle for themselves, and thereby bound others, in reference to the case on which they have adjudicated, it can, I conceive, extend no further. In all other cases in which the Executive or other courts are obliged to act, they must decide for themselves; paying a great deference to the opinions of a court so high an authority as the supreme one of the United States, but still greater to their own convictions of the meaning of the laws and constitution of the United States, and their oaths to support them.

1 *Op. Att'y Gen.* 119, 122 (1802). Levi Lincoln here anticipates his namesake in other troubled times: A supreme court indeed, but evidently not so supreme as even to give its decisions *stare decisis* effect. See *id.*

agreed that courts could do what they would within their sphere of influence,¹⁷² even a judicial decree resolving matters between the par-

Similarly, Representative Davis conceded that he was "willing to admit the Judiciary to be coordinate with the Legislature in this respect, to wit, that judges, thinking a law unconstitutional, are not bound to execute it; but not to declare it null and void. That power rests alone with the Legislature." 11 Annals of Cong. 558 (1802) (speech of Rep. Davis). Similarly, Senator Breckinridge asserted that "this pretended power of the courts to annul the laws of Congress cannot possibly exist." *Id.* at 179 (speech of Sen. Breckinridge). He believed

that the Constitution intended a separation of the powers vested in the three great departments, giving to each exclusive authority on the subjects committed to it. That these departments are co-ordinate, to revolve each within the sphere of their own orbits, without being responsible for their own motion, and are not to direct or control the course of others.

Id.

¹⁷² Several scholars argue that at least at a basic level the practice of judicial review was established by the time of *Marbury*. See Hobson, *supra* note 166, at 57 (noting, at time of *Marbury*, "broad consensus" that "in some instances at least" courts could exercise power of judicial review); Snowiss, *supra* note 95 (detailing transformation of practice of judicial review). But it is important to distinguish judicial review and the argument—taken a significant step further—that judicial interpretations bind other branches of government. See *id.* at 67 (distinguishing "departmental" theory of constitutional interpretation, which permitted each branch to interpret Constitution for itself).

Robert Clinton argues that the exercise of judicial review in *Marbury* was entirely unprecedented, see Clinton, *supra* note 95, at 1, but that subsequent interpretation of the *Marbury* principle deviates from what that case held, see *id.* at ix-x. According to Clinton, *Marbury* supports the courts striking down laws only when those laws are of a "judiciary nature." *Id.* at 29. In a case not of a "judiciary nature," the courts may refuse to apply the law, and bind the parties, but Congress can provide for enforcement purely by the Executive. See *id.* Cases of a judiciary nature are those "which involve constitutional provisions directly addressed to the courts." *Id.*

Clinton's theory is somewhat opaque, but seems seriously flawed nonetheless. First, Clinton argues that commentary on *Marbury* was slight because the decision was consistent with prevailing theory and thus it caused little consternation. See *id.* at 102-03. Yet, the very issue Clinton suggests was not presented in *Marbury*—the power of the Supreme Court to invalidate acts of Congress—was the cause of great consternation in the debate over the Repeal Act, see *supra* notes 93-109 and accompanying text, and the show cause order in *Marbury* was a chief motivation for the Repeal legislation, see *supra* note 95 and accompanying text. Now, it could well be that the explanation for this inconsistency is that the order issued in *Marbury* was seen to address the question of whether the Executive's decision could be invalidated on constitutional grounds, perhaps not itself a question of a "judiciary nature." But suppose that the Supreme Court had invalidated the Repeal Act, on the grounds it violated the life tenure provisions of Article III. See Nelson, *supra* note 92, at 940 (discussing Federalists making this argument). It is difficult to see how a decision of this nature would not have caused quite an uproar, yet the Repeal Act clearly seemed to raise a question of a "judiciary nature." Likewise, *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803), clearly presented questions of a "judiciary nature": whether Congress could require a party to pursue his case in one court rather than another, and whether Congress could require Justices of the Supreme Court to ride circuit, effectively exercising original jurisdiction. See Nelson, *supra* note 92, at 941. Indeed, the latter is precisely the question of a "judiciary nature" Clinton concedes was presented in *Marbury*. Yet, again, it is difficult to imagine that a decision in *Stuart v. Laird* striking the Repeal Act would have been met with equanimity.

ties was susceptible to reversal by another branch of government acting within its sphere.¹⁷³ Jefferson repeatedly explained that although courts had upheld the constitutionality of the Sedition Act and sentenced individuals under it, he nonetheless pardoned the individuals because of his opinion that the Act violated the Constitution:

Both magistrates are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because the power was placed in their hands by the Constitution. But the executive, believing the law to be unconstitutional, were bound to remit the execution of it; because that [pardon] power has been confided to [him] by the Constitution.¹⁷⁴

Similarly, “[i]n the case of Marbury and Madison, the federal judges declared that commissions, signed and sealed by the President, were valid, although not delivered. I deemed delivery essential to complete a deed . . . and I withheld delivery of the commissions.”¹⁷⁵ Jefferson felt that according the power of constitutional interpretation to any one branch was a prescription for tyranny: “[T]he opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature and executive also, in their spheres, would make the judiciary a despotic branch.”¹⁷⁶

Perhaps “judiciary nature” is itself vague, for Clinton would seem to permit courts to strike laws on Fifth Amendment grounds. See Clinton, *supra* note 95, at 209, 301 nn.98-99. Some of the Fifth Amendment cases cited by Clinton involved Fifth Amendment violations by other branches. See, e.g., *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965) (striking requirement that Communist organizations register with Attorney General because admission of party membership *could be* used in subsequent prosecution). But if this is the case, why would not the decision in *United States v. Lopez*, 514 U.S. 549 (1995), striking down the Gun Free Schools Zone Act as outside Congress’s Article I powers, not be of a “judiciary nature,” involving as it does a criminal conviction? Yet, Clinton suggests that Article I limitations on congressional power are not of a “judiciary nature.” See Clinton, *supra* note 95, at 29.

Dean Alfange effectively guts Clinton’s thesis in Alfange, *supra* note 95, at 385-413. Alfange’s critique reinforces some of the points made here. See *id.* at 388 n.275 (critiquing Clinton’s understanding of “judiciary nature”); *id.* at 392, 409 (suggesting *Stuart v. Laird* could not have overruled Judiciary Act without meeting serious opposition).

¹⁷³ On Jefferson’s departmentalism, see Mayer, *supra* note 162, at 268-72.

¹⁷⁴ Letter from Thomas Jefferson to Mrs. John Adams (Sept. 11, 1804), in 11 Writings, *supra* note 94, at 49, 50-51.

¹⁷⁵ Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), in 15 Writings, *supra* note 94, at 212, 214.

¹⁷⁶ Letter from Jefferson to Mrs. Adams, *supra* note 174, at 51; see also Charles A. Beard, *Economic Origins of Jeffersonian Democracy* 454 (1936), which quotes a paragraph deleted from Jefferson’s first message to Congress:

Our country has thought proper to distribute the powers of its government among three equal and independent authorities constituting each a check upon one or both of the others in all attempts to impair its constitution. To make

Jefferson's view of judicial nonsupremacy also was bottomed expressly on the countermajoritarian difficulty. Thus, Jefferson explained why judicial interpretation of the Constitution is more problematic than that of the other branches: "When the legislative or executive functionaries act unconstitutionally, they are responsible to the people in their elective capacity. The exemption of the judges from that is quite dangerous enough. I know no safe depository of the ultimate powers of the society but the people themselves . . ." ¹⁷⁷

The supremacy of judicial interpretation was contested not only vis-à-vis Congress, but also vis-à-vis the states. Tracing back to the birth of the now-vilified doctrines of interposition and nullification, we find no less than Madison questioning the supremacy of judicial review. From today's perspective, of course, his stand was somewhat admirable, for the context was the Virginia Resolution challenging the constitutionality of the Alien and Sedition Acts. Nonetheless, his words sound radical to today's ears:

The states, then, being the parties to the constitutional compact, and in their sovereign capacity, it follows of necessity that there can be no tribunal, above their authority, to decide, in the last resort, whether the compact made by them be violated; and consequently, that, as the parties to it, they must themselves decide, in the last resort, such questions as may be of sufficient magnitude to require their interposition. ¹⁷⁸

Finally, the other branches certainly were not to be amenable to judicial process. This was the dramatic confrontation a different decision in *Marbury* might have prompted, but even as dicta it rankled Jefferson. ¹⁷⁹ During the Burr trial the issue became a real one as

each an effectual check it must have a right in cases which arise within the line of its proper function, where equally with the others, it acts in the last resort and without appeal, to decide on the validity of an act according to its own judgment and uncontrolled by the opinions of any other departments.

¹⁷⁷ Letter from Jefferson to Jarvis, *supra* note 170, at 278.

¹⁷⁸ Madison's Report on the Virginia Resolutions, in 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 546, 548 (Jonathan Elliot ed., 2d ed. 1888); see Haines, *supra* note 81, at 171 (noting that Madison believed states reserved right to place their own interpretation upon Constitution on grave political issues involved in distribution of powers).

¹⁷⁹ See 1 Warren, *supra* note 53, at 244. Jefferson felt that Marshall and the Court "had intentionally gone out of their way to rule on points unnecessary for the decision, and he regarded it as a deliberate assumption of a right to interfere with his Executive functions, 'an attempt in subversion of the independence of the Executive and Senate within their peculiar departments.'" *Id.* (quoting letter from Thomas Jefferson to George Hay (June 2, 1807)). "The attempt of the Supreme Court of the United States by a mandamus to control the Executive functions is a new experiment. It seems to be no less than a commencement of war between the constituted departments." 1 Warren, *supra* note 53, at 249 (quoting *Indep. Chron.*).

Marshall issued a subpoena against the President. Jefferson denied such judicial power existed: "They cannot issue a mandamus to the President or legislature, or to any of their officers."¹⁸⁰ The issue for Jefferson was one of interbranch independence:

But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, and to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south and east to west, and withdraw him entirely from his constitutional duties?¹⁸¹

The explanation for why countermajoritarian criticism surfaced despite such a denial of supremacy rests in part with the unique nature of the cases that came before an entrenched Federalist judiciary—both before and after the election of 1800—and the highly partisan nature of politics played out in the actual operation of government. The judiciary managed to do its harm by exercising power it could exercise alone, or almost alone in *a case*, without regard to whether supremacy extended beyond the immediate holding. By giving inflammatory charges to grand juries about seditious acts of opponents, by acting in biased fashion in sedition trials, by releasing the defendants in the Burr conspiracy, the judiciary—acting in a partisan fashion—drove its Republican detractors to distraction. These judicial actions stand in contrast to other periods in history, for example the aftermath of *Dred Scott*, or better yet the *Lochner* era, in which the issue was judicial decisions reaching beyond the parties to a specific case. During the struggles of the late 1790s and early 1800s, the thorn in the Republican side was very much the actions of judges having an impact on parties in individual cases. By these actions the judiciary could and *did* frustrate popular will.

But perhaps more important, the countermajoritarian difficulty likely surfaced at this time because, although supremacy was denied, the foremost fear of Republicans nonetheless remained the potential for judicial interference with their newly elected government. Again, it was the potential of judicial review as much as the reality of its exercise that drove the debate. The activities of Federalist judges, as well as the show cause order in *Marbury*, all raised the spectre of the Republican electoral victory being thwarted by an unaccountable but un-

¹⁸⁰ Letter from Jefferson to Judge Roane, *supra* note 175, at 214.

¹⁸¹ Letter from Thomas Jefferson to George Hay (June 20, 1807), in 11 Writings, *supra* note 94, at 239, 241. Madison made a similar point on the question of whether the judiciary could intervene in the case of the President removing an official from office. See Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 348 (1996) (discussing Madison's suggestion in debate over Presidential removal that judiciary has general power of judicial review, but not when it comes to the "limits of the powers of the several departments").

questionably partisan Federalist judiciary. Moreover, to the extent the question of judicial supremacy was unresolved at the framing, the many statements quoted above indicate the importance Republicans ascribed to the issue for the future. Battle royal was fought on this very point, and in arguing the point it was quite natural to speak in countermajoritarian terms in order to press home the consequences of resolution in favor of a fiercely independent judiciary.

The partisan nature of judicial action in individual cases also underscores the relevance of the final factor, the view of the determinacy of constitutional interpretation. The prevailing view of the lawyers who formed the Constitution was that the document did have a meaning that could be ascertained. "Hamilton formulated in its essential features the primary method and hypothesis of the mechanical school of interpretation. All that was necessary was to place the higher and lower law side by side and if there was a conflict the higher law prevailed, the lower law being *ex necessitate* invalid."¹⁸² The activities of Federalist judges, however, robbed Republicans of confidence that even if the law was discernible these men—tainted by partisanship—could or would apply it fairly.¹⁸³ The views on Marshall's definition of treason show this skepticism. And for this reason Jefferson put his faith in the hands of the people, not the judges:

The Constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please. It should be remembered, as an axiom of eternal truth in politics, that whatever power in any government is independent, is absolute also; in theory only, at first, while the spirit of the

¹⁸² Haines, *supra* note 81, at 201. Indeed, there was an intriguing continued exchange during the Repeal Act debate regarding the nature of law and how it was learned, Republicans argued judges should ride the circuit to gain familiarity with the law of the states, while Federalists repeatedly insisted circuit-riding took time away from studying the law, which could be learned in a "closet." 11 *Annals of Cong.* 82 (1802) (speech of Rep. Morris). Representative Stone insisted that it was "absolutely necessary . . . that the judges of the Supreme Court . . . by riding the circuit, render themselves practically acquainted with their duties." *Id.* at 71 (speech of Rep. Stone). Representative Bayard responded: "Your judges, instead of being in their closets and increasing by reflection and study their stock of wisdom and knowledge . . . would gradually lose the fruits of their former industry." 2 *Abridgment*, *supra* note 121, at 617 (speech of Rep. Bayard).

¹⁸³ H. Jefferson Powell argues that in the early years of the Jefferson administration, Federalist judges "generally treated constitutional argument as a species of political reasoning continuous with the specifically political and policy considerations of statesmanship." H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 *Va. L. Rev.* 689, 729 (1994). From battles over the Alien and Sedition Acts, however, there emerged a clearer understanding that the Constitution was to be read as a legal text, in effect a "lawyerizing" of the Constitution that took hold as Republican reign continued. See *id.* at 731. Powell explains that the lawyerizing involved a shift to textual interpretation. And while textualism often is associated with "fixing constitutional meaning," in practice it can be the means to "unsettle or change constitutional meaning." *Id.* at 733.

people is up, but in practice, as fast as that relaxes. *Independence can be trusted nowhere but with the people in mass.*¹⁸⁴

Charles Pinckney perhaps revealed the tension best in his discussion of legislation to prevent judges from accepting executive appointments:

[T]he Judges should, in a calm and unprejudiced manner, explain what the law literally is, and not what it ought to be; that they should not be allowed to carry upon the bench those passions and prejudices which too frequently prevail in the adoption and formation of legislative acts and treaties, and which never fail to give an irresistible bias to the opinions of a Judge who has been concerned in making them.¹⁸⁵

The "framework" of countermajoritarianism thus explains the prominence of such criticism during the Jeffersonian period. It was a highly populist period, and one during which many people feared the potential of the judiciary to undo popular results. True enough, it is an understatement to say that the judiciary was accorded little supremacy. But even so, the very nature of the issues that confronted the judges allowed them rather more power than Republicans could tolerate, simply by acting on parties in individual cases. Moreover, during this period the contours of the judiciary's role were being debated for the first time; even in the absence of supremacy, the stakes were high enough to call into being the strongest conclusions. And while it might generally be assumed the law could be studied, learned, and interpreted, there was absolutely no confidence that this was happening free of partisan bias. Thus, not only was the judiciary criticized, but it was criticized in highly countermajoritarian terms.

III

THE ERA OF GOOD FEELING AND THE AGE OF JACKSON

The movement of popular democracy begun by the Democrat-Republicans in the Jeffersonian era laid the foundation for one of the great groundswells of direct democracy in American history, the Age of Jackson. Given this groundswell and in light of the conventional story that Jackson was at war with the Supreme Court, one might expect countermajoritarian criticism to be rife during this period. Nonetheless, it was not. The lack of countermajoritarian criticism may be attributable in part to Jackson's slim agenda for the nation, which provided little occasion for direct conflict with the Supreme Court on the

¹⁸⁴ Letter from Jefferson to Judge Roane, *supra* note 175, at 213-14 (emphasis added).

¹⁸⁵ 2 Abridgment, *supra* note 121, at 419 (speech of Sen. Pinckney).

national level.¹⁸⁶ But, as will be evident momentarily, there are more important explanations.

The Supreme Court *was* vociferously attacked throughout this period by those attached to "states' rights," for the simple reason that the Marshall Court was quite active in striking down state laws.¹⁸⁷ For the most part, however, criticism of the Court was not countermajoritarian. There are two reasons why, despite this controversial exercise of Supreme Court jurisdiction over the states, criticism was not countermajoritarian. First, the states often simply denied that the Court had authority over them and frequently defied or disregarded its rulings. Second, even when denial of judicial authority was not an option, state foes of the Court saw themselves as in the minority.¹⁸⁸ Therefore, the rhetoric of the times rarely involved criticism of the Supreme Court as interfering with popular will.

The discussion of criticism of the courts during the Era of Good Feeling and Jacksonian Democracy is organized in a way that follows the issues of the day. The stage is set by discussing the highly democratic tenor of the times. Next there is a discussion of regard for, and criticism of, the Court during the period, making the point that despite the democratic fervor of the times, there was little countermajoritarian criticism. The reason for this is explored in the section that follows, in which it is made clear that the issue of the day was states' rights and that any criticism of the Court necessarily was framed by challenges to judicial authority directed at the states.

A. *Popular Democracy*

The Age of Jackson followed substantial broadening of suffrage and became a time of fervent calls for direct democracy.¹⁸⁹ Jackson's

¹⁸⁶ See Rosenberg, *supra* note 25, at 387 ("[A]lthough . . . Andrew Jackson was elected as a states-righter, his opposition to federal activity was selective.").

¹⁸⁷ See Hobson, *supra* note 166, at 115-16 (describing Marshall Court's resolution of "sovereignty" cases between 1819 and 1824); Dwight Wiley Jessup, *Reaction and Accommodation: The United States Supreme Court and Political Conflict 1809-1835*, at 172-82 (1987) (detailing many states' rights struggles during that period); 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, 159-66 (1997) (same).

¹⁸⁸ See Rosenberg, *supra* note 25, at 387 ("While opposition from one state's congressional delegation might be intense, others were not often willing to join. So, there was neither a large number of congressional opponents nor a successful coalition [of states-righters] facing the Court.").

¹⁸⁹ Although Andrew Jackson often is seen as the figurehead for the aggressive form of populism that he championed, history suggests Jackson was as much a recipient of the democratic movement as he was its creator. See *The Meaning of Jacksonian Democracy* vi (Edwin C. Rozwenc ed., 1963):

genius was in giving voice to that movement, in managing intuitively to stay one step ahead of popular opinion,¹⁹⁰ and in championing the notion that it was the people themselves who should run their government, because:

[I]n proportion as agents to execute the will of the people are multiplied there is danger of their wishes being frustrated. Some may be unfaithful; all are liable to err. So far, therefore, as the people can with convenience speak, it is safer for them to express their own will.¹⁹¹

Jackson's rule was a triumph for the power of the people to assert themselves over government.¹⁹² Jackson himself favored direct election of the President¹⁹³ and Vice-President¹⁹⁴ and frequent rotation of

[M]ost of the changes in suffrage and office holding qualifications which established more democratic electoral procedures for adult white males in the United States were introduced before the Jacksonian democrats controlled the centers of decision-making power. Other political groups were as active as Jacksonian democrats, and sometimes more so, in introducing some of the new popular devices of nomination and election.

Id.

¹⁹⁰ See Douglas T. Miller, *Then Was the Future: The North in the Age of Jackson 87-88* (1973) ("The President has had the sagacity to observe the sentiments of the great body of the people and the integrity and firmness to carry them into effect . . . Guided by the fundamental principle, that the will of the majority should, in all cases, control, he has never attempted to defeat that will." (quoting Mrs. Margaret Bayard Smith, an eyewitness of Jackson's inauguration)); Harold C. Syrett, *Andrew Jackson: His Contribution to the American Tradition 26* (1953) ("His genius as a spokesman for the majority lay not only in his ability to rally the people to his support, but also in the skill with which he perceived how the masses would react to any particular question before that question had been raised. He did not so much direct or form public opinion as stay one step ahead of it.").

¹⁹¹ Andrew Jackson, *First Annual Message to Congress* (Dec. 8, 1829), in *The Statesmanship of Andrew Jackson as told in his Writings and Speeches 35, 42* (Francis Newton Thorpe ed., 1909) [hereinafter *Statesmanship*].

¹⁹² See 1 Thomas H. Benton, *Thirty Years View 111* (1854) (calling Jackson's election "a triumph of democratic principle" and "assertion of the people's right to govern themselves"); see also Claude G. Bowers, *The Party Battles of the Jackson Period 34-35* (1922):

History has decided that in this campaign "the people first assumed control of the governmental machinery which had been held in trust for them since 1789"; and that "the party and Administration which then came into power was the first in our history which represented the people without restriction, and with all the faults of the people."

Id. (quoting Johnston & Woodburn, *American Political History*).

¹⁹³ See Jackson, *supra* note 191, at 42 ("To the people belongs the rights of electing their Chief Magistrate; it was never designed that their choice should in any case be defeated, either by the intervention of electoral colleges or by the agency confided, under certain contingencies, to the House of Representatives."); Letter from Andrew Jackson to Samuel Swartwout, Dec. 14, 1824, in Syrett, *supra* note 190, at 82, 83:

[T]he choice of a President is a matter for the people . . . I [do] repeat & assure you that I should feel myself an unhappy, perhaps degraded man, should anything of management or arrangement contrary to that consent place me in the Executive chair . . . I would rather remain a plain cultivator of the

political officials¹⁹⁵ to ensure they remained accountable to popular sentiment.¹⁹⁶ The premier issue of the *United States Magazine and Democratic Review* stated, in 1837, the credo of the times:

We believe . . . in the principle of *democratic republicanism*, in its strongest and purest sense. We have an abiding confidence in the virtue, intelligence, and full capacity for self-government, of the

soil as I am, than to occupy that which is truly the first office in the world, if the voice of the nation was against it.

However, Syrett notes that while Jacksonian democrats endorsed popular election of Presidential candidates, they “were the last of the three major parties of the period to adopt this new system.” Syrett, *supra* note 190, at 21. Moreover, while “[e]very state but one transferred from the legislature to the voters the right to designate Presidential electors . . . there is no evidence that Jackson supported this move to democratize the method for electing the nation’s chief executive.” *Id.*

¹⁹⁴ See Jackson, *supra* note 191, at 43-44 (“I would therefore recommend such an amendment of the Constitution as may remove all intermediate agency in the election of the President and Vice-President. The mode may be so regulated as to preserve to each State its present relative weight in the election . . .”).

¹⁹⁵ See *id.* at 44-45:

There are, perhaps, few men who can for any great length of time enjoy office and power without being more or less under the influence of feelings unfavorable to the faithful discharge of their public duties The duties of all public officers are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance; and I can not but believe that more is lost by the long continuance of men in office than is generally to be gained by their experience

In a country where offices are created solely for the benefit of the people no one man has any more intrinsic right to official station than another.

Jackson continued by explaining that rotation of political officials constituted a “leading principle in the republican creed.” *Id.* at 45; see also Robert V. Remini, *The Revolutionary Age of Andrew Jackson* 74 (1976):

Jackson believed that through rotation the federal government in Washington could be made to respond directly to the changing demands of the American people as expressed by their ballots. . . . Most important, rotation meant that a great many more people would get an opportunity to serve the government. The more people actively involved in the affairs of the nation, the more democratic the system, and the more the problems of the nation get to be widely known and understood.

Id.

Jackson and his followers invariably described rotation in public office as a “reform.” In this sense the spoils system was more than a way to reward Jackson’s friends and punish his enemies; it was also a device for removing from public office the representatives of minority political groups that Jackson insisted had been made corrupt by their long tenure.

Syrett, *supra* note 190, at 28.

¹⁹⁶ See Kirk H. Porter, *A History of Suffrage in the United States* 78 (1918) (“While Jacksonian Democrats may have had little to say directly about the suffrage, all that they stood for necessarily involved the very broadest suffrage. Universal participation in government function could not possibly tolerate a restriction on white manhood suffrage.”).

great mass of our people—our industrious, honest, manly, intelligent millions of freemen.¹⁹⁷

Four years later George Camp, writing what he believed to be the first treatise on democracy,¹⁹⁸ explained the vastness of government by “the people.” “[B]y ‘the people[]’ [w]e mean *the whole people*, and nothing short of the whole people, or a majority of the whole acting simultaneously. It is the government of the whole that alone constitutes self-government—democracy.”¹⁹⁹ The *Democratic Review* rejected “forms of representation” that “tend to weaken that universal and unrelaxing responsibility to the vigilance of public opinion.”²⁰⁰ And Justice Story simply expressed despair that “[t]he reign of King Mob seemed triumphant.”²⁰¹

¹⁹⁷ The Democratic Principle, U.S. Mag. and Democratic Rev. (Oct.-Dec. 1887), reprinted in *Notions of the Americans 1820-1860*, at 86, 87 (David Grimsted ed., 1970) [hereinafter *Democratic Principle*].

¹⁹⁸ See George Sidney Camp, *Democracy 10-13* (1841). Camp explains:

In a democratic country, where self-government has been successfully exercised by the people for nearly three quarters of a century, it might naturally have been expected that such democratic writers would not have been rare, and that a democratic nation would not have been so long without a democratic literature. . . . Eloquent vindications of popular rights, eloquent assaults upon hereditary prerogative, may occasionally be found scattered, at very rare points and very distant intervals, in the world of literature; but no work digesting such views in a philosophical system, and giving us a clear, consistent, and harmonious theory.

Id. at 10-11. Continuing, “it may be confidently asserted that *a connected and philosophical exposition of the peculiar theory of democratic government has never yet been written.*”

Id. at 13. Camp’s claims for himself may have been overly ambitious, falling as they did six years after the publication in France of the first part of Alexis de Tocqueville’s *Democracy in America*, and one year after publication of the second part.

¹⁹⁹ Camp, *supra* note 198, at 207. In light of this devotion to direct governance it comes as little surprise that the power of governmental institutions as independent actors was minimized. Arthur Schlesinger observed that “[t]he function of the legislature was now rather to elicit, register and influence public opinion than to assert its independent will.” Arthur M. Schlesinger, Jr., *The Age of Jackson* 51 (1953). Schlesinger continues,

The growing importance of the common man was accompanied by a declining importance of Congress. . . . The great party leader was no longer the eloquent parliamentary orator, whose fine periods could sweep his colleagues into supporting his measures, but the popular hero, capable of bidding directly for the confidence of the masses.

Id.

²⁰⁰ *Democratic Principle*, *supra* note 197, at 88.

²⁰¹ Schlesinger, *supra* note 199, at 6 (quoting Letter from Justice Story to Sarah Waldo Story (Mar. 7, 1829), in 1 *Life and Letters of Joseph Story* 562, 563 (William W. Story ed., 1851)).

B. The Supreme Court and the National Government: Little Activity, Little Countermajoritarian Criticism

Given the popular democratic tenor of the times, countermajoritarian criticism might be expected, but it was uncommon. There was *some* countermajoritarian criticism of the Supreme Court during this period, but it was relatively rare, dramatically less evident than during the Jeffersonian era. For example, in the spring of 1821—during the Era of Good Feeling—Marshall's nemesis, Spencer Roane, writing under the pseudonym Algernon Sidney, unleashed several bolts of thunder at the decision in *Cohens v. Virginia*²⁰² in a series of articles²⁰³ in the *Richmond Enquirer*. At one point in his discussion his criticism sounded in countermajoritarian terms: "With respect to oppressions, or violations of the constitution, committed by the *other* departments of the government, they can be easily corrected, by the elective franchise But the court in question claims to hold its authority, paramount the power of the people."²⁰⁴

Similarly, in 1832, the *Globe*, published in Washington, D.C., responded with countermajoritarian criticism to those who assailed Jackson's message accompanying his Bank veto. In the veto message, Jackson asserted authority to interpret the Constitution differently than the Court had in *McCulloch v. Maryland*.²⁰⁵ The *Globe* defended the assertion, asking, in part, "Was it ever intended to give to four men such dominion over our form of Government?—over the rights of the States—and the rights of a majority of the people of the United States?"²⁰⁶ In addition, the *Democratic Review* wondered why mention of the presidential veto was met with cries of "Executive usurpation" and "tyrant" when the president is "strictly accountable every four years to a sovereign people, while the absolute veto of seven, no one of whom is, or can be, brought to the judgment of the ballot-box, is fortified with more than Tribunitian sanctity and might."²⁰⁷ Such criticism is clearly countermajoritarian, but, again, it was not typical of the times.

²⁰² 19 U.S. (6 Wheat.) 264 (1821).

²⁰³ Roane's harangue runs through seven issues of the newspaper. It is repetitive and boring.

²⁰⁴ Spencer Roane, On the Lottery Decision, *Richmond Enquirer*, May 25, 1821, at 3 (writing under pseudonym Algernon Sidney).

²⁰⁵ 17 U.S. (4 Wheat.) 316 (1819).

²⁰⁶ Powers of the Supreme Court, *Wash. Globe*, July 27, 1832, at 3.

²⁰⁷ The Supreme Court of the United States: Its Judges and Jurisdiction, 1 *Democratic Review* 143, 166 (1838) [hereinafter *Democratic Review*]; see also *id.*:

No such formidable power is known to any representative government as the American republican irresponsible judicial veto The taxing power, the currency, and impost, the process power, municipal police, the militia power,

Judges of all types *were* frequently criticized during this period for their lack of accountability to the body politic.²⁰⁸ It was during and after this time that many of the states of the Union began the shift to an elective judiciary.²⁰⁹ The *Democratic Review* stated its "opinion that the judiciary system of the United States is based on false principles, . . . [namely t]he entire omission, in its organization, of the element of responsibility to public opinion."²¹⁰ In a piece written on the occasion of Marshall's death, William Leggett's *New York Evening Post* criticized the former Chief Justice in terms that implicated both the countermajoritarian difficulty and accountability.²¹¹ For this sharp

commerce and intercourse at home as well as abroad, the purse and the sword, church and state, all power in fine, is to be concentrated in the judicial focus.

²⁰⁸ Criticism of the federal judiciary was exacerbated by the Federalists' escape to the electorally unaccountable judiciary in response to the Republican sweep of 1800. As Martin Van Buren, later Jackson's Vice President and successor, observed, the Federalist party was "conducted to the judicial department of the Government, as to an ark of future safety which the Constitution placed beyond the reach of public opinion." Schlesinger, *supra* note 199, at 15 (quoting Martin Van Buren, *Inquiry into Origin and Course of Political Parties in the United States* 278 (1867)); see Graber, *supra* note 91 (manuscript at 10), who argues that Van Buren was representative of the overstated "continuity" thesis that identified the Marshall Court with the Federalist party in strong opposition to the Republican party throughout the early nineteenth century.

Critics of the Marshall Court, chiefly the *New York Post* and the *Washington Globe*, characterized Marshall's views of the Constitution as "aristocratick." 1 Warren, *supra* note 53, at 810-11. In the 1820s, critics alleged that Marshall had improperly expanded the Court's powers under the Constitution. See, for example, John Taylor, who harshly criticized Marshall's expansion of the Court's powers in his books, *Construction Construed and Constitutions Vindicated* (1820), *New Views of the Constitution of the United States* (Da Capo Press 1971) (1823), and *Tyranny Unmasked* (F. Thornton Miller, ed., Liberty Fund 1992) (1822). Warren writes that one commentator of the time hoped that Jackson would appoint someone "whose principles, profession and practice afford a sure guarantee that on all questions involving the power of the government, he will strictly adhere to the letter of the Constitution and faithfully abide by the stern dictates of popular opinion." 2 Warren, *supra* note 53, at 6.

²⁰⁹ See Croley, *supra* note 1, at 716 ("Whereas the first twenty-nine states of the Union adopted nonelective variations of the basic federal constitutional method for selecting most of their judges, states entering the Union during and in the wake of Andrew Jackson's presidency . . . adopted constitutions providing for the election of most of their judges."); see also Stephen L. Carter, *The Confirmation Mess: Cleaning up the Federal Appointments Process* 107-08 (1994):

By the time of the Civil War, only a handful of states, mostly in the Northeast, still provided for a method other than popular election for judicial office. And only four states—Maine, Massachusetts, New Hampshire, and South Carolina—provided for life tenure. . . . Moreover, every new state that joined the Union from the 1840s on provided for judicial election.

²¹⁰ *Democratic Review*, *supra* note 207, at 144-45.

²¹¹ See 1 Warren, *supra* note 53, at 808 ("[H]e has been, all his life long, a stumbling block and impediment in the way of democrattick principles . . . and his situation, therefore, at the head of an important tribunal, constituted in utter defiance of the very first principles of democracy." (quoting N.Y. *Evening Post*)).

editorial, Leggett was brutalized in the other papers,²¹² though he stuck to his guns.²¹³

Although the question of accountability comes close to the countermajoritarian difficulty, and certainly builds from the same ground, it is not, precisely speaking, the same criticism. Just as an accountable body may engender countermajoritarian criticism for frustrating popular will, an unaccountable body may avoid countermajoritarian criticism because it does not take actions that frustrate the will of popular majorities. During the Jacksonian era, judges were criticized for being unaccountable, but the story of this period is how and why they largely avoided countermajoritarian criticism nonetheless.

In part there was little countermajoritarian criticism because, despite battles in which it found itself embroiled, the Supreme Court enjoyed an institutional sort of reverence throughout the period.²¹⁴ As Mark Graber has observed, the Supreme Court “enjoyed a golden age from 1809 until 1828.”²¹⁵ The Court was seen as a “supreme and impartial tribunal”²¹⁶ whose members were venerated for their hard work and painstaking devotion to the law,²¹⁷ even if their judicial decisions were not always heralded.

²¹² See 1 Warren, *supra* note 53, at 808-09 (stating that “brutality of the *Evening Post* is meeting bitter rebuke from every quarter of the Union” and calling article “an atrocious outpouring of partisan venom” and “the ravings of a mad man” (quoting N.Y. Courier, July 17, 1835)).

²¹³ See *id.* at 810 (“We lament the death of a good and exemplary man but we cannot grieve that the cause of aristocracy has lost one of its chief supports.” (quoting N.Y. Evening Post, July 28, 1835)).

²¹⁴ See, e.g., Condensed Reports of Cases in the Supreme Court of the United States, 7 Am. Q. Rev. 111, 112 (Mar.-June 1830) [hereinafter Condensed Reports] (“The judicial power, like the great principle of gravitation, keeps every other power of the government in its proper place and action; and maintains the whole in an uniform and beautiful order and motion. But it is done without any display of power; or any applause of its utility.”).

²¹⁵ Graber, *supra* note 91 (manuscript at 7).

²¹⁶ Condensed Reports, *supra* note 214, at 119.

²¹⁷ See, e.g., 1 Warren, *supra* note 53, at 699 (“The industry and vigor of the Judges is worthy of all commendation and fit to be examples even to younger men” (quoting Niles Reg., Mar. 24, 1827)); *id.* (“[T]hey [judges] have given their days to the hearing, and their early mornings and evenings to the consideration, of the many important and interesting causes which have come before them from the different parts of the Union.” (quoting Boston Courier, Mar. 22, 1827)); Condensed Reports, *supra* note 214, at 113 (“The strongest talents, the purest integrity, the highest efforts of learning, labour, and diligence, may be exerted in this department, and be unknown or disregarded beyond the limits of the halls of justice, and the offices of the members of the profession.”); *id.* at 125 (“This high, upright, and patriotic tribunal, has, on every occasion, looked with a steadfast, devotional regard to the great charter of the people, the only security of their rights and happiness; and have even held it to be their most sacred duty to govern themselves by the Constitution”). But see Edward Shepard, who quotes Van Buren as saying:

In addition, the Supreme Court encountered little countermajoritarian criticism because, despite the tension between Jackson and Marshall,²¹⁸ it was the nature of Jackson's administration that the Supreme Court had little of which to run afoul. Many commentators agree that, notwithstanding his populist rhetoric, Jackson stood for very little.²¹⁹ Perhaps this is why the Jacksonian era was the one long dry spell in our history for judicial review of congressional

I believe the judges of the Supreme Court (great and good men as I cheerfully concede them to be) are subject to the same infirmities, influenced by the same passions, and operated upon by the same causes, that good and great men are in other situations. I believe they have as much of the *esprit de corps* as other men. Those who think otherwise form an erroneous estimate of human nature

Edward M. Shepard, Martin Van Buren 136-38 (1899) (footnote omitted).

Despite the fact that the judiciary was the one branch of government stocked with remnants of the now-dead Federalist party, see *supra* note 208, William Rawle, in his treatise on the Constitution managed to say that "[p]arty spirit seldom contaminates judicial functions." William Rawle, *A View of the Constitution of the United States of America* 281 (2d ed. 1829). Even the Court's critics were forced to concede a certain measure of respect. In 1838, the *Democratic Review* published an article that attacked the Court viciously. The editors deplored the "blind veneration which has heretofore sealed the eyes of a very large population of the public, whenever their looks have been directed towards that sacrosanct tribunal, in prostrate submission to its presumed infallibility"—itself a statement—and proceeded to a scathing critique of the Court, its members, and its decisions. *Democratic Review*, *supra* note 207, at 143-45. Nonetheless, the authors of the piece recognized that "[i]n no part of the world is there such popular reverence for [the judiciary], as in the United States of America, which it would be infatuation to impair by usurpation or excess." *Id.* at 149.

²¹⁸ The antipathy between Jackson and Marshall is legendary. See, e.g., 4 Albert J. Beveridge, *The Life of John Marshall* 466 (1919) (noting difference between two men in terms of politics, personality, and character); Richard E. Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights, and the Nullification Crisis* 18 (1987) (noting Marshall was "hostile" towards Jackson from beginning). Other commentators appear to have found that the traditional commentary accusing Jackson of rejecting the independence of the judicial branch was political in nature and overstated. See, e.g., Ben W. Palmer, *Marshall and Taney: Statesmen of the Law* 168-72 (1939) (asserting that other issues such as Jackson's hatred of Bank of United States led to his Bank Veto and fact that Supreme Court was dragged into debate was merely incidental). Marshall gave up years of political abstinence to vote against Jackson, allegedly stating: "[S]hould Jackson be elected, I shall look upon the government as virtually dissolved." Richard P. Longaker, Andrew Jackson and the Judiciary, 71 *Pol. Sci. Q.* 341, 342 (1956). Although Marshall denied making such a statement, he publicly admitted that

"having said in private that though I had not voted since the establishment of the general ticket system, and had believed that I never should vote during its continuance, I might probably depart from my resolution in this instance, from the strong sense I felt of the injustice of the charge of corruption against the President and Secretary of State."

4 Beveridge, *supra*, at 463-64 (quoting *Enquirer*, Apr. 4, 1828).

²¹⁹ See, e.g., Boudin, *supra* note 28, at 318 (stating that excitement and upheaval in 1828 elections were "evidently about nothing, unless it was about the personality of Andrew Jackson"); Palmer, *supra* note 218, at 148-49 ("In the absence of fundamental issues the contest for the electoral vote was noticeably one of personalities.").

acts: falling between *Marbury* and *Dred Scott*, the Supreme Court invalidated no national legislation during this period. Thus, there was little occasion to accuse the Supreme Court of acting in countermajoritarian terms, at least vis-à-vis the national government. The chief ground of conflict, therefore, rested elsewhere.

C. States' Rights: The Ground for Conflict

Judicial activity in the state arena was a different matter altogether. The issue of the day was states' rights, and it is in the context of this issue that serious controversy over the role of the Supreme Court surfaced. The question of state subjugation to federal authority arose repeatedly throughout the Era of Good Feeling and Jackson's presidency. John Taylor devoted an entire volume, *Tyranny Unmasked*, to the central question of state versus federal power.²²⁰ Senate debate over a land act turned into a prolonged and heated debate about the role of states under the Constitution; this was the famous Webster-Hayne debate in which many Senators participated.²²¹ And South Carolina's Nullification Proclamation seized the attention of the entire country, arguably providing Jackson his greatest crisis while in office.²²²

In the center of this maelstrom about the autonomy of states in the Union stood the Court.²²³ Whereas Jackson had a small legislative agenda and as often as not supported the states—sometimes even ve-

The new President's supporters in Congress had conspicuously failed to develop measures to meet the discontents which had toppled the previous administration. Their opposition to Adams and Clay had been confused and opportunistic, hiding a basic lack of ideas behind a smoke-screen of parliamentary obstruction and campaign invective. The campaign had reflected its shallowness. Hardly an issue of policy figured in the canvass, and, when Jackson triumphed, no one could be certain that his administration would not duplicate that of Madison or Monroe or even of Adams.

Schlesinger, *supra* note 199, at 45. Also, Daniel Webster is rumored to have said that Jackson's supporters had "no common principle, they are held together by no common tie." Ellis, *supra* note 218, at 14; see also *id.* ("Jackson had not taken a firm stand on the issues in 1828. He had shrewdly avoided this in order to put together a winning coalition."). According to Ellis, Jackson basically stood for majority rule and states' rights. See *id.* at 14-16.

²²⁰ See John Taylor, *Tyranny Unmasked* (F. Thornton Miller ed., Liberty Fund 1992) (1822).

²²¹ See *infra* notes 240-41, 260-61 and accompanying text (discussing Webster-Hayne debate).

²²² See *infra* notes 310-17 and accompanying text (discussing South Carolina nullification proclamation). The other possibility is the war over the Bank of the United States.

²²³ See Democratic Review, *supra* note 207, at 146 ("The action of this branch of our political system has tended more fatally than any other towards that federal centralization of power deprecated by the State-Rights and Democratic school of politics . . ."); *id.* ("[B]y its lavish use of the judicial Veto it has gradually erected itself into a high political

toing congressional legislation unpopular with them—the Court was quite active striking down state statutes and invalidating state acts.²²⁴ Thus, the *Democratic Review* fumed, “During the first seventeen years there was but one judicial demolition of State sovereignty. During the second age they were so numerous that every session was signalized by them.”²²⁵ The Supreme Court’s decisions reviewing state laws provided the basis for the bulk of legal commentary of the times.²²⁶

Dissatisfied with anti-state decisions, numerous proposals²²⁷ were introduced in Congress throughout this period to discipline the Court, including proposals for removal of judges²²⁸ and appeals to the Senate

and legislative power—never contemplated by its founders—stretching its potent sceptre over sovereign States and nations, the monarch of all it surveys.”).

The Congress also was harshly criticized for interfering with states’ rights. For example, South Carolina’s Nullification Proclamation was passed in response to congressional action regarding the tariff, see *infra* notes 311-13 and accompanying text, and there was strong disagreement about Congress pursuing national improvements, see John C. Calhoun, Nationalistic Speech on Internal Improvements (Feb. 4, 1817), reprinted in *The Nullification Era: A Documentary Record 2* (William W. Freehling ed., Harper Torchbooks 1967):

When we come to consider how intimately the strength and political prosperity of the Republic are connected with this subject, we find the most urgent reasons why we should apply our resources to [internal improvements]. In many respects, no country of equal population and wealth, possesses equal materials of power with ours. . . . In one respect, and in my opinion, in one only, are we materially weak. We occupy a surface prodigiously great in proportion to our numbers. . . . It is our duty, then, as far as in the nature of things it can be effected, to counteract this weakness. Good roads and canals judiciously laid out, are the proper remedy

Id.; see also *id.* at 3 (explaining that member of Congress had “constitutional objections” to federal government conducting large scale national improvements on grounds “that the Congress can only apply the public money in execution of the enumerated powers”).

²²⁴ The Supreme Court’s activity throughout this period, and state reaction to it, are explored extensively (and excellently) in Jessup, *supra* note 187, at 172-82. A pithier rendition is found in Goldstein, *supra* note 187, at 159-66.

²²⁵ *Democratic Review*, *supra* note 207, at 164.

²²⁶ See, e.g., 24 N. Am. L. Rev. 345, 352 (1927) (concluding that collision between state and federal government has “disturbed the harmony of our government, and even threatened its stability” but “fortunately most of these questions are brought in the first place before the judicial tribunals, and . . . are made the subjects of elaborate investigation and solemn decision”) (reviewing 1 James Kent, *Commentaries on American Law* (1826)); *id.* at 361 (“Some of these questions are of vital importance, and if the constitution had not authorized these decisions of the Supreme Court, the government of the country must have been brought to a stand”); Condensed Reports, *supra* note 214, at 116-17 (concluding that dissemination of Supreme Court decisions to judges, lawyers, and public at large is crucial in order to educate nation as to importance of Court in protecting citizens’ rights).

²²⁷ These proposals also are explored in Jessup, *supra* note 187, at 425-29.

²²⁸ See 1 Warren, *supra* note 53, at 720-21 (stating that Louis McLane, former Senator from Delaware, advocated measure “to empower the President to remove Judges of the Court upon the address of the Legislatures of two thirds of the States of the Union” as a way to “give the people some better control over the tenure of the office” (quoting Letter from Louis McLane to Martin Van Buren (July 20, 1830))).

from unfavorable rulings.²²⁹ Of these, the most invidious and direct response was an attempt to repeal section 25 of the Judiciary Act, the provision that granted the Supreme Court jurisdiction over the decisions of state courts.²³⁰ The proposal passed out of the Judiciary Committee, with a report that argued that the Court's constitutional jurisdiction rested only over the lower federal courts.²³¹ While the proposal ultimately was defeated in the House,²³² the Judiciary Committee at the time was composed of seven members, four of whom supported the repeal, the remaining three filing a strong dissent.²³³

The Supreme Court was attacked from all quarters during this period,²³⁴ but despite the clamor against the Court, little of the criticism was in countermajoritarian terms. The following sections explain why. As discussed in Part III.C.1, in large part this was because the Court's critics challenged the supremacy of judicial decisions. The Supreme Court's decisions often were defied by the states, or simply were disregarded. Moreover, this situation was exacerbated by a certain amount of ambivalence at the national level as well regarding judicial supremacy. Jackson insisted on the independence of the other branches to interpret the Constitution in a manner contrary to the Supreme Court, and failed to support the Court in the face of state defiance, at least when it suited his purposes. The relationship between supremacy and countermajoritarian criticism is further explored in Part III.C.2, which describes the attempt by the Supreme

²²⁹ See 1 Warren, *supra* note 53, at 657 (explaining proposal of one Senator whereby "in cases where a State shall be a party, 'and in all controversies in which a State may desire to become a party in consequence of having the Constitution or laws of such State questioned, the Senate of the United States shall have appellate jurisdiction'" (quoting resolution introduced by Senator Johnson on Dec. 12, 1821)); Nagel, *supra* note 25, at 928; Rosenberg, *supra* note 25, at 377.

²³⁰ See 1 Warren, *supra* note 53, at 738 (describing attempt to repeal section 25).

²³¹ "Congress gives the power of a direct appeal from a State court to the Supreme Court of the United States; but, in the opinion of the committee, the Constitution of the United States gives the right of appeal only from such inferior courts as Congress shall from time to time ordain and establish."

H.R. Rep. No. 43, at 3 (1831) (quoting Rep. Davis).

²³² See 1 Warren, *supra* note 53, at 741 (describing defeat of proposal and explaining that "all but six" of votes for proposal came from southern and western states).

²³³ See 1 Warren, *supra* note 53, at 739 (claiming that minority report signed by James Buchanan of Pennsylvania, William W. Gilsworth of Connecticut, and Edward D. White of Louisiana "must be regarded as one of the great and signal documents in the history of American constitutional law"). Southern members made up a disproportionate number of the committee, which explains why the measure passed out of committee in the first place. See *id.*

²³⁴ See 1 Warren, *supra* note 53, at 660 ("The truth is, and cannot be disguised, even from vulgar observation, that the Judiciary in our country is essentially feeble and must always be open to attack from all quarters." (quoting Letter from then-Judge Story to Jeremiah Mason (Jan. 8, 1822))).

Court's opponents to fend off the impact of Supreme Court decisions by claiming that questions of state sovereignty were "political" not "legal," and therefore were not appropriate for judicial resolution. As that argument failed, countermajoritarian criticism might be expected to surface. Part III.C.3 explains that the reason widespread countermajoritarian criticism did not in fact present itself, even when state laws were subject to displacement by the Supreme Court, was largely because the Court's opponents saw themselves as a distinct minority. Thus, these opponents could not, and did not, assert that the Court was interfering with popular will.

1. *The Lack of Judicial Supremacy and Defiance of the Court*

Central to state claims of autonomy from the control of the national government was the "compact" theory. Under this view, which formed the basis for the nullification argument, the Union was a compact of states.²³⁵ The states being parties to the "compact,"²³⁶ their actions could not be judged by the judiciary of the government created by the compact.²³⁷ Such was Senator Hayne's position:

²³⁵ See 10 Abridgment, *supra* note 121, at 440 (speech of Sen. Hayne). Although the compact theory of constitutional law had appeared as early as 1798, it was first combined with nullification in the Webster-Hayne debates. As G. Edward White explains, "[n]ullification upped the political ante, since it converted compact theory from an abstract proposition to a concrete procedure by which states denied the powers of Congress or the Supreme Court to be 'the exclusive judge of the extent as well as the limitations of [their] powers.'" 3-4 G. Edward White, *History of the Supreme Court of the United States, The Marshall Court and Cultural Change, 1815-35*, at 281 (1988) (quoting Sen. Hayne).

²³⁶ "It is indeed true, that the term 'States' is sometimes used in a vague sense, and sometimes in different senses, according to the subject to which it is applied. Thus, it sometimes means the separate sections of territory occupied by the political societies within each; sometimes the particular governments established by those societies; sometimes those societies as organized into those particular governments; and, lastly, it means the people composing those political societies, in their highest sovereign capacity. . . . In the present instance, whatever different constructions of the term 'States,' in the resolution, may have been entertained, all will at least concur in that last mentioned; because, in that sense the constitution was submitted to the 'States;' in that sense the 'States' ratified it; and in that sense of the term 'States' they are consequently parties to the compact, from which the powers of the Federal Government result."

10 Abridgment, *supra* note 121, at 440 (speech of Sen. Hayne) (quoting report of James Madison).

²³⁷ [The judgment] completely negatives the idea, that the American states have a real existence, or are to be considered, in any sense, as sovereign and independent states. It does this, by claiming a right to reverse the decisions of the highest judicial tribunals of those states. That state is a non-entity, as a sovereign power, the decisions of whose courts are subjected to such a revision.

Roane, *supra* note 204, at 3. For a fuller discussion of compact theory, see White, *supra* note 235, at 485-594.

Having now established the position that the constitution was a compact between sovereign and independent States, having no common superior, "it follows, of necessity," (to borrow the language of Mr. Madison,) "that there can be no tribunal above their authority to decide, in the last resort, whether the compact made by them be violated, and consequently, that, as the parties to it, they must themselves decide, in the last resort, such questions as may be of sufficient magnitude to require their interposition."²³⁸

Much commentary on the Supreme Court simply denied its constitutional authority to sit in judgment of the states.²³⁹ Senator Rowan put the case sharply during the Webster-Hayne debate:

The epithet of supremacy, which is so unceasingly applied to the court, is calculated to swell the volume of their power, in the minds of the unthinking. Its supremacy is entirely relative, and imports only that appellate and corrective jurisdiction which it may exercise over the subordinate courts of the General Government. The appellate court of every State is just as supreme as it is; and in the same way, and for the same reasons. It is not supreme in reference to the other departments of the Government; nor has it any supremacy in reference to the States²⁴⁰

When state sovereignty was at issue, the Supreme Court's opponents maintained, the Court simply had no role. In the Webster-Hayne debate, Senator Hayne explained that "[i]t is clear that questions of sovereignty are not the proper subjects of judicial investigation."²⁴¹

In light of this theory, a typical posture of the states toward the Court was one of defiance.²⁴² The struggle between Georgia and the

²³⁸ 10 Abridgment, supra note 121, at 440 (speech of Sen. Hayne) (quoting report of James Madison).

²³⁹ See, e.g., H.R. Rep. No. 43, at 6 (1831) ("That the Constitution does not confer power on the Federal Judiciary, over the judicial departments of the States, by any express grant, is certain from the fact that the State judiciaries are not once named in that instrument."); Roane, supra note 204, at 3 ("[The case] is so decided, on grounds and principles which go the full length, of destroying the state governments altogether, and establishing on their ruins, one great, national, and consolidated government.").

²⁴⁰ 10 Abridgment, supra note 121, at 453 (speech of Sen. Rowan).

²⁴¹ Id. at 440 (speech of Sen. Hayne).

²⁴² State defiance is explored in Jessup, supra note 187, at 429-30 and Goldstein, supra note 187, at 159-66. The Jacksonian era, discussed above, was a particularly active time of defiance, not only with regard to statements of defiance, but actual state activity resisting or ignoring Supreme Court orders. It disturbed states' rights advocates to no end that, given the sovereign interest at stake, decisions of the Court could be made by the vote of just three judges. If three judges (a majority of the quorum of the Court) could decide a question of whether the compact was violated, surely the same question could be safely entrusted to a sovereign state. As one senator argued:

But I would ask again, if any reasonable man can suppose that there is more safety to the rights of the Union, or of the States, in the wisdom and patriotism of the seven men who compose that court, than in the wisdom and patriotism of the million and a half of people who compose the State of New York, or

Court with regard to the Cherokee Indian tribe is a case in point, leading to at least two acts of defiance of the Supreme Court.²⁴³ In the first,²⁴⁴ the State of Georgia had sentenced a Cherokee, Corn Tassel,²⁴⁵ to death. The United States Supreme Court issued a writ of error, but Georgia executed him anyway.²⁴⁶ In the second, *Worcester v. Georgia*,²⁴⁷ Georgia imprisoned two missionaries who were working on Cherokee lands, and defied an order of the Court holding the statute under which they were held unconstitutional.²⁴⁸

It is clear that Georgia's acts of defiance rested squarely on a denial of the Supreme Court's jurisdiction over the states. William Wirt, retained to represent the Cherokee, wrote then-Governor Gilmer suggesting the matter be resolved in litigation before the Supreme Court: "In the supreme court of the United States, we shall find a tribunal as impartial and as enlightened as can be expected on this earth" ²⁴⁹ But Governor Gilmer denied the Court's author-

even the fifty or sixty thousand who compose the little State of Delaware? Must the saying of the wise man be reversed in favor of that court? Is it no longer true that "there is safety in a multitude of counsel?"

10 Abridgment, supra note 121, at 455 (speech of Sen. Rowan).

²⁴³ The Cherokee cases arose out of actions by the Georgia legislature essentially claiming the right to nullify federal treaties with the Cherokee Indian tribes, allowing the Indian lands to be seized by violence. See Jessup, supra note 187, at 355-74; Goldstein, supra note 187, at 164-65. Pressure to seize Cherokee lands increased when gold was found there. See Ellis, supra note 218, at 28. For excellent discussion of the Cherokee cases, see generally Jill Norgren, *The Cherokee Cases: The Confrontation of Law and Politics* (1996).

Longaker argues that there was a third instance of defiance. The event supposedly occurred two years after the Tassel dispute "when one James Graves was tried and convicted of murder in Georgia. Again the state refused to obey an order issued by the Supreme Court to show cause why a writ of error should not issue." Longaker, supra note 218, at 344. However, Longaker provides no authority or historical references to the controversy.

²⁴⁴ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

²⁴⁵ Warren notes that while the name Corn Tassel is used in the cases before the courts, the Georgia legislature and some historians refer to Corn Tassel as George Tassels. See 1 Warren, supra note 53, at 733 n.1.

²⁴⁶ See Jessup, supra note 187, at 363-64.

²⁴⁷ 31 U.S. (6 Pet.) 515 (1832).

²⁴⁸ Warren notes that Governor Gilmer reacted to the decision by declaring that any attempt to execute the writ would be resisted with all the force at his command, saying: "If the judicial power, thus attempted to be exercised by the Courts of the United States, is submitted to or sustained, it must eventuate in the utter annihilation of the State Governments or in other consequences not less fatal to the peace and prosperity of our present highly favored country."

1 Warren, supra note 53, at 733 (quoting Message of Gov. Gilmer of Georgia to Georgia Legislature, reprinted in Niles Reg., Jan. 15, 1831).

²⁴⁹ Letter from William Wirt to George R. Gilmer (June 4, 1830), reprinted in *Cherokee Lands*, Niles Reg., Sept. 18, 1830, at 68, 69.

ity.²⁵⁰ Gilmer said that Wirt's suggestion of appearing in litigation before the Court "however courteous the manner, . . . cannot but be considered exceedingly disrespectful to the government of the state."²⁵¹ By complying with Wirt's suggestion, Gilmer would "exceed his authority" and "the letter and the spirit of the powers conferred by the constitution upon the supreme court forbid its adjudging such a case."²⁵² Similarly, in response to the mandate in the Corn Tassel case, the Georgia legislature passed a resolution instructing the Governor to disregard any and every mandate and process that has been or shall be served upon him or them That the state of Georgia will never so far compromi[se] her sovereignty, as an independent state, as to become a party to the case sought to be made before the supreme court of the United States, by the writ in question.²⁵³

The press echoed the challenge to the Supreme Court's jurisdiction and ridiculed the ineffectual power of the Court. Responding to the Cherokee controversy before the Supreme Court, the *Georgia Journal* fumed: "Has it come to this, that a sovereign and independent state is to be insulted, by being asked to become a party before the supreme court, with a few savages, residing on her own territory!!!—Unparalleled impudence."²⁵⁴ The *United States Telegraph* congratulated Georgia on its conduct, and observed that "the position in which the supreme court is placed by the proceedings of Georgia, demonstrate the absurdity of the doctrine which contends, that court is clothed with supreme and absolute control over the states."²⁵⁵ With regard to the *Worcester* case the *Richmond Enquirer* asked,

[T]o whom will the order be directed?—and let it be directed to whom it may—can it ever be enforced? . . . [T]o what arm can the Court delegate strength enough to execute its mandate? . . . How weak and powerless is the Supreme Court when it attempts to grasp a power which the Constitution does not give.²⁵⁶

While Georgia's contest with the Court was an extreme case, state defiance was emblematic of the times. In several notable instances when called to the bar of the Court, states simply failed to

²⁵⁰ He also questioned its impartiality: "You say the supreme court of the United States is a high, impartial, and enlightened tribunal. Why such commendation?" Letter from George R. Gilmer to William Wirt (June 19, 1830), reprinted in *Cherokee Lands*, supra note 249, at 68, 70.

²⁵¹ *Id.* at 71.

²⁵² *Id.*

²⁵³ *Georgia and the Cherokees*, Niles Reg., Jan. 8, 1831, at 338 (quoting resolution of Georgia legislature).

²⁵⁴ *Ga. J.*, Sept. 18, 1830, reprinted in *Cherokee Lands*, supra note 249, at 69; see also Niles Reg., Mar. 31, 1832, at 78 (referring to action of Court as "judicial despotism").

²⁵⁵ *Georgia and the Cherokees*, supra note 253.

²⁵⁶ *Political*, *Richmond Enquirer*, Dec. 10, 1831, at 1.

appear or denied jurisdiction.²⁵⁷ The Nullification Proclamation flatly forbade appeals to the Supreme Court regarding the Proclamation or duties imposed by Congress.²⁵⁸

Of course, these acts of defiance would have meant little in the face of resolution by the national government to enforce the supremacy of the Court, but here the picture was quite muddy. In principle, Congress supported the Supreme Court against claims of nonsupremacy. During the Great Debate, senators argued that the Court was neutral, was empowered by the Constitution to speak for the Nation, and that necessity demanded this be so.²⁵⁹ Webster ar-

²⁵⁷ Warren cites two examples of states ignoring the commands of the Supreme Court. See 1 Warren, *supra* note 53, at 773. In the first, *New Jersey v. New York*, 28 U.S. (3 Pet.) 461 (1830), counsel for New Jersey issued a subpoena to the state of New York. It expired without response. Counsel issued another subpoena, to which the Attorney General of New York responded by writing to the Supreme Court that the state considered such service of process void on grounds that the "Court could not exercise jurisdiction in controversies between States, without the authority of an Act of Congress." 1 Warren, *supra* note 53, at 770. The Court rejected the argument and sent yet another subpoena, which was again refused. The Court then ruled that if counsel for New York did not appear, the case would be heard in their absence. The Attorney General for New York then filed a demurrer denying jurisdiction to hear the case. The Court treated the demurrer as an appearance. After hearing part of the Attorney General's argument, the Court postponed the case until the next Term. The case was resolved in the interim and therefore the ultimate question of state amenability to process never was addressed. See *id.* at 771.

The second case, *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), concerned the right to charter a free bridge in competition with a previously chartered toll bridge. During argument before the Court in 1831, "a committee of the Massachusetts Democratic Convention reported that 'in the Warren Bridge case, the Supreme Court at Washington has no more constitutional right to meddle with the question than the Court of King's Bench.'" 1 Warren, *supra* note 53, at 773 (quoting *U.S. Telegraph*, Jan. 27, 1831). The case was not decided until 1837 when the Court upheld the decision of the Massachusetts Supreme Judicial Court. See *id.*

Yet another case, *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1821), centered on a Kentucky statute making it difficult to remove squatters from private land. Kentucky claimed that the federal courts did not have jurisdiction to rule on the constitutionality of the state statutes and as a result, declined to be represented by counsel when the Court decided the case, although Kentucky did send two commissioners to Washington in an attempt to persuade the justices to dismiss the case. The Court refused and held the statute unconstitutional. Kentucky's response to the decision is discussed *infra* text accompanying notes 300-02.

²⁵⁸ See *The Ordinance of Nullification* (Nov. 24, 1832), in *The Nullification Era*, *supra* note 223, at 151.

²⁵⁹ See, for example, the speech of Senator Robbins, made on May 20, 1830: [W]hat these courts finally decide the constitution to be, must be taken to be the constitution. The law, which they finally decide to be a law, made in pursuance of the constitution, must be taken to be a law made in pursuance of the constitution . . . and together must be taken as the supreme law of the land, and must be executed as the supreme law. It must be so, unless there is some other tribunal authorized to rejudge those judgments; and to decide over the head of the United States' Judiciary. . . . [T]he constitution neither provides nor recognises any such tribunal

gued that the Supremacy Clause and the Article III grant of judicial power taken together resolved the question.²⁶⁰ Indeed, Webster was at his most eloquent on this point. Resting the entire Union on the Court's role, he argued with regard to the provisions granting the Court review over state acts: "They are, in truth, the keystone of the arch. With these, it is a constitution; without them, it is a confederacy."²⁶¹

Ultimately, however, enforcement of the Court's orders was an executive function. Yet Jackson's views of judicial supremacy were remarkably unclear, and his actions were mixed. Politics appeared to move him much more than principle. The conventional story is that Jackson denied the supremacy of the Court,²⁶² and certain of his words and actions bear this out. Nonetheless, when push came to shove over the question of Union, Jackson stood behind the Court.

Jackson's much-discussed motives in the Cherokee cases are difficult to decipher, and may suggest little of his views of judicial supremacy.²⁶³ In neither Cherokee case did Jackson do anything to enforce the Court's mandates, for which he was sharply criticized.²⁶⁴

6 Register of Debates in Congress 436 (Gales & Seaton 1830) (speech of Sen. Robbins). Robbins continues,

[I]t is an entire mistake to suppose, as has been supposed, that the Supreme Court is the ultimate arbiter in these cases. For though the Supreme Court may decide a law to be constitutional which is not constitutional, a thing, by the way, not very likely to happen, they cannot continue the law. It rests with the nation to determine whether it shall be continued, or shall be repealed. And if the Supreme Court misinterpret the constitution, a thing as unlikely to happen, it lies in the power of the nation to apply the remedy, and correct the error; it lies in the power of amendment. So it is the nation, and not the Supreme Court, who is the ultimate arbiter in all those cases.

Id. at 438 (speech of Sen. Robbins). As Senator Clayton of Delaware argued, "They have transferred a portion of the judicial power to the Supreme Court, which acts as an impartial umpire, and not as an adversary party deciding his own cause . . ." Id. at 487 (speech of Sen. Clayton). And if neutrality was in doubt, then necessity solved the problem: "Every man of common sense knows that we must, necessarily, have some common tribunal to settle disputed questions among the States . . . otherwise disputation would never cease, nor any question become settled at rest; but confusion and anarchy, the element of demagogues, would reign forever." Id. at 152 (speech of Sen. Barton).

²⁶⁰ See 10 Abridgment, supra note 121, at 435 (speech of Sen. Webster).

²⁶¹ Id. (speech of Sen. Webster).

²⁶² See, e.g., Robert V. Remini, *The Legacy of Andrew Jackson: Essays on Democracy, Indian Removal, and Slavery* 25 (1988) (arguing that Jackson "denied that the Supreme Court was the final interpreter of the meaning of the Constitution").

²⁶³ See Longaker, supra note 218, at 346-47 (arguing that Jackson's "constitutional reasoning falls far short of a full explanation for his defiance of the Supreme Court" and stating that his "constitutional argument was largely feeble rationalization").

²⁶⁴ See, e.g., John W. Burgess, *The Middle Period 1817-1858*, 219-20 (1902) ("It was certainly the duty of the President of the United States to have executed this decision of the Court with all the power necessary for the purpose which the Constitution conferred upon him. He did not do it.").

Popular cant suggests Jackson's inaction in the Cherokee cases may have been evidence of a disregard for judicial supremacy, but this is not necessarily so. Allegedly (but probably apocryphally) Jackson said in response to *Worcester*, "John Marshall has made his decision, now let him enforce it,"²⁶⁵ suggesting he felt little responsibility to abide by the decisions of the Supreme Court. Yet, although it is true Jackson had little sympathy for the Cherokee situation,²⁶⁶ he probably

Both cases gave rise to intense popular debate about whether the Court's orders would be enforced. Arguing for the Cherokee, William Wirt made an impassioned plea that the Court issue its mandate and let the defendants and the Executive worry about enforcement:

[I]f we have a government at all, there is no difficulty . . . In pronouncing your decree you will have declared the law; and it is a part of the sworn duty of the President of the United States, to "take care that the laws be faithfully executed." It is not for him, nor for the party defendant, to sit in appeal on your decision.

Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 *Stan. L. Rev.* 500, 513 (1969). The press made much of Georgia's failure to comply with Court orders, one paper saying simply, "We are sick of such talks [of defiance]. If there is not power in the constitution to preserve itself—it is not worth the keeping." *The Cherokee Cases*, *Niles Reg.*, Mar. 31, 1832, at 78. And John Quincy Adams observed in response to the execution of Corn Tassel, "The Constitution, the laws and treaties of the United States are prostrate in the State of Georgia . . . because the Executive of the United States is in league with the State of Georgia. He will not take care that the laws be faithfully executed." Longaker, *supra* note 218, at 344 (quoting 8 *The Memoirs of John Quincy Adams* 262-63 (Charles F. Adams ed., 1876)); see also Burke, *supra*, at 524 ("The Court's decision had hardly been delivered when the anti-Jackson press began to berate President Jackson for not enforcing the decree of the Supreme Court. Article after article depicted the poor missionaries languishing in the Georgia penitentiary while the President allowed Georgia to defy federal laws, treaties, and the decision of the Supreme Court." (footnote omitted)).

²⁶⁵ 1 Warren, *supra* note 53, at 759. It is interesting to note that the infamous sentence was supposedly addressed to John Marshall and not the Supreme Court. This may indicate Jackson's feelings were directed towards Marshall as a personal matter and not towards the Court as a constitutional matter. See Longaker, *supra* note 218, at 342 ("It is a mistake to confuse Jackson's lack of esteem for John Marshall with presidential hostility toward the judiciary.").

²⁶⁶ Longaker cites Jackson's lack of sympathy for the Cherokee as just one of many reasons for not supporting the Supreme Court:

Long experience in fighting and negotiating with the Indians convinced Jackson years earlier that removal was the only sound policy. He informed Congress in his First Annual Message that the Indians had already been told "that their attempt to establish an independent government would not be countenanced by the Executive . . . [and had been advised] to emigrate beyond the Mississippi or submit to the laws of the states." Also, as an Indian fighter turned president he could not easily forget "the prowling lion of the forest who has done us so much injury." In short, he had respect for Indian rights so long as they were exercised on the western bank of the Mississippi.

Longaker, *supra* note 218, at 347 (quoting 2 James D. Richardson, *A Compilation of the Messages and Papers of the Presidents* 458 (1896); Letter from Jackson to Secretary Crawford, June 13, 1816, in 2 *Correspondence of Andrew Jackson* 246, 249 (John Spencer Bassett, ed. 1927)); see also Ellis, *supra* note 218, at 26 (claiming that Jackson strongly believed that Indians were hopelessly uncivilized and their way of life impeded forward

did not say exactly that,²⁶⁷ and there is some question first, whether there was anything in either case for the Executive to enforce,²⁶⁸ and second, whether Jackson felt he had the practical ability to enforce the mandate.²⁶⁹ It is clear, however, that Jackson's administration put a

momentum of civilization); Jessup, *supra* note 187, at 364 (discussing Jackson's expression of sympathy for Georgia).

²⁶⁷ See John Spencer Bassett, *The Life of Andrew Jackson* 691 (Archon Books 1967) (1910) (stating that while it is not certain those exact words were used, it is quite possible that they might have been spoken); Carter, *supra* note 209, at 108 ("The better histories tell us that Jackson did not really make the comment and, indeed, that he never refused to lend federal assistance to the enforcement of the decisions in the *Cherokee Cases . . .*"); Longaker, *supra* note 218, at 349 ("Whether or not the famous statement is apocryphal is a moot question, although it does not seem out of character and expressed the President's feelings.").

²⁶⁸ Regarding the dispute over the missionaries, historians suggest that the time for enforcement was not ripe, and that the matter was ultimately settled. See 1 Warren, *supra* note 53, at 776 n.2. First, the Court adjourned in March without issuing any mandate. As a result, nothing could be done in the regular course of procedure until the following January. As Warren explains, "the case never reached the stage when the exercise of the President's authority could have been properly called for, or employed." *Id.* at 764-65 n.1; see also Burke, *supra* note 264, at 525 ("Such an interpretation ignores the deficiencies in federal laws that probably would have made it impossible to execute the *Worcester* decree, even if Jackson had wished to enforce it. It ignores the fact that the Court ensured that its decree could not be enforced until its 1833 Term.").

Furthermore, Warren notes that by January, most commentators anticipated a quiet resolution to the conflict:

"The President has said, since the Proclamation was promulgated, that he would carry any decision the Supreme Court should make in the imprisonment of the missionaries into effect. The Georgians have been restive under the Proclamation, and there is much to induce a belief that they will in some way avoid a direct collision with the General Government."

1 Warren, *supra* note 53, at 776 (quoting N.Y. Daily Advertiser, Jan. 16, 1833). This prediction proved essentially accurate. See Ellis, *supra* note 218, at 31 ("As for Jackson, at this point the Supreme Court's decision did not require him to do anything, and nothing is precisely what Jackson did . . .").

²⁶⁹ See 1 Warren, *supra* note 53, at 759 n.1 ("Jackson 'could hardly have known his own mind' on the question of whether there was power in the Government to enforce a Court decree in this case . . .") (quoting John Spencer Bassett, *Life of Andrew Jackson* 690-91 (1910)). One letter of Jackson's supports this interpretation. Writing General Coffee about the *Worcester* decision, Jackson said,

The decision of the supreme court has fell still born, and they find that it cannot coerce Georgia to yield to its mandate . . . [I]f orders were issued tomorrow one regiment of militia could not be got to march to save [the Cherokee] from destruction and this the opposition know, and if a collision was to take place between them and the Georgians, the arm of the government is not sufficiently strong to preserve them from destruction.

Letter from Andrew Jackson to Brigadier-General John Coffee (Apr. 7, 1832), in 4 Correspondence of Andrew Jackson, *supra* note 266, at 429, 430.

Longaker speculates on how Jackson might have actually worded the infamous statement: "John Marshall has made his decision and he can try to enforce it. I cannot. Even if the Executive wished to enforce the mandate it is not powerful enough to oppose the tide of feeling in the South." Longaker, *supra* note 218, at 349. Indeed, Longaker contends

fair amount of distance between the Executive and judicial decisions and mandates.²⁷⁰

Perhaps the most well known indication of Jackson's view about judicial supremacy is his famous message in the controversy over the Bank of the United States, yet even here the evidence is confused. In the message vetoing the extension of the Bank of the United States' franchise, Jackson specifically reserved the authority of the Executive to interpret the Constitution in a manner contrary to the judiciary:

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. . . . The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.²⁷¹

that there is some question whether "Jackson should not be praised for prudence instead of being condemned for inaction." *Id.* at 350.

²⁷⁰ For example, in *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838), Jackson's Attorney General and Postmaster General took the position that executive acts could not be controlled by judicial orders. At issue in *Kendall* was an order to pay a claim for services rendered to the postal service that the Postmaster General had refused to pay even in light of Senate support for the claimant. See Longaker, *supra* note 218, at 353-55. "Both *Kendall* and *Butler* denied the right of the federal courts to issue a writ forcing an executive officer to perform any act, [under a] strict interpretation of the separation of powers." *Id.* at 354. *Kendall* further argued that "the effective and controlling Executive of this great republic will not be the Chief Magistrate elected by the people, but three judges of the Circuit Court for the District of Columbia." *Id.* at 355 (quoting Letter of the Postmaster General . . . In Reference to the Power of the Circuit Court for the District of Columbia to Control Executive Officers in the Performance of Their Official Duties 7 (1837)). Longaker notes, however, that it is unclear whether these views were also held by Jackson, since the statements were made near the end of Jackson's second term when he was "busy with other affairs of state." *Id.* at 356. Longaker concludes, however, that Jackson probably did share these views, and that the views "expressed a Jacksonian view of executive independence." *Id.* at 358.

Interestingly, in the course of that case, Jackson's Attorney General Benjamin Butler argued that although the judiciary could not command executive acts, the President and subordinates could be liable in a civil suit. See *id.* at 355-56.

²⁷¹ Andrew Jackson, Veto Message (July 10, 1832), in 2 A Compilation of the Messages and Papers of the Presidents 1139, 1145 (James D. Richardson ed., Bureau of Nat'l Literature 1912) (1897). Four months before the Veto Message was delivered, in response to the heated debate in the press as to whether Jackson should have forced Georgia to release the missionaries, the *Utica Observer* made essentially the same argument in favor of each branch reaching its own conclusion as to the constitution:

He is a *co-ordinate* and INDEPENDENT branch of the government, bound by his oath to support the constitution *as it is*, and not as it shall be *interpreted* by the federal judges. . . . The constitution has clearly defined their separate powers; and to deny the president the right of acting *independently* ON ALL CON-

As much as has been made of the statements in the Veto Message, however,²⁷² there is some question as to how broadly they can be read. After all, Jackson was not avoiding or reviewing a judicial decision.²⁷³ He simply was exercising his judgment as to whether to veto a congressional bill, and in that context even by modern standards he might well have been entitled to his own view of the constitutional question.²⁷⁴ But the matter is more subtle than that, as Jackson recognized, for in *McCulloch v. Maryland*²⁷⁵ the Court simply had held that creating a bank fell within Congress's necessary and proper powers. Jackson surely was entitled to his own view on the necessity and propriety of the Bank, and at times that is all Jackson seemed to be saying.²⁷⁶ Moreover, in the very same message Jackson relied upon the Court's decision when it suited him.²⁷⁷

STITUTIONAL QUESTIONS, is to convert our republican form of government into an odious monarchy—not with *one* but with *five sovereigns*. We claim for him in this matter the RIGHT to act as HE may think proper . . .

Burke, *supra* note 264, at 528-29 (quoting *Utica Observer*, reprinted in *Niles Reg.*, Apr. 14, 1832, at 112).

²⁷² See, e.g., Charles G. Haines, *The American Doctrine of Judicial Supremacy* 334 (Russell & Russell, 2d ed. 1959) (1932) (concluding that Jackson "insisted that the legislative and executive departments as well as the courts had the authority to determine the constitutionality as well as the expediency of a national bank").

²⁷³ See 1 Warren, *supra* note 53, at 763 ("And this is all the President has said . . . *General Jackson never expressed a doubt as to the duty and the obligation upon him in his Executive character to carry into execution any Act of Congress regularly passed, whatever his own opinion might be of the constitutional question.*" (quoting Letter from Roger B. Taney to Martin Van Buren (June 30, 1860))).

²⁷⁴ See *id.* at 763 ("[I]f a Member of Congress, or the President, when acting in his Legislative capacity, has, upon mature consideration, made up his mind that the proposed law is a violation of the Constitution he has sworn to support . . . it is not only his right but his duty to refuse to aid in the passage of the proposed law.").

²⁷⁵ 17 U.S. (4 Wheat.) 316 (1819).

²⁷⁶ See Jackson Veto Message, in 2 *A Compilation of the Messages and Papers of the President*, *supra* note 271, at 1146 ("[I]t is the exclusive province of Congress and the President to decide whether the particular features of this act are *necessary* and *proper* in order to enable the bank to perform conveniently and efficiently the public duties assigned to it as a fiscal agent, and therefore constitutional, or *unnecessary* and *improper*, and therefore unconstitutional."). Jackson cited numerous reasons why the Bank was either unnecessary or improper, including, *inter alia*: (1) the Bank was a monopoly; (2) many stockholders in the Bank were foreigners; (3) the stockholders left in the U.S. could not control the Bank; (4) the Bank was mismanaged; and (5) the Bank favored the rich over the poor. See *id.* at 1139-54.

²⁷⁷ The principle laid down by the Supreme Court concedes that Congress can not establish a bank for purposes of private speculation and gain, but only as a means of executing the delegated powers of the General Government. By the same principle a branch bank can not constitutionally be established for other than public purposes.

Id. at 1148-49.

What is clear is that when the question became one of Union, Jackson stood squarely behind the Union²⁷⁸ and the Court's role in it.²⁷⁹ Jackson vehemently opposed nullification²⁸⁰ and kept careful tabs on the actions in South Carolina,²⁸¹ prepared to use force when necessary to preserve the Union.²⁸² Jackson's strong opposition to nullification is well known, and it is important to observe that his Anti-Nullification Proclamation strongly defended the role of the Supreme Court in the constitutional system.²⁸³ He explained that the

²⁷⁸ See, e.g., Letter from Andrew Jackson to J.R. Poinsett (Jan. 24, 1833), in *Statesmanship*, supra note 191, at 22, 23 ("I repeat to the union men again, *fear not the Union will be preserved & treason & rebellion promptly put down, when & where it may shew its monster head. . . . They will know I will execute the laws, and that the whole people will support me in it, and preserve the Union . . .*"). Despite his previous states' rights stance, Jackson recognized that nullification would most certainly lead to secession and perhaps a civil war. See *id.* at 12. Indeed, in the midst of the debates, on April 13, 1830, at a dinner for the Democratic party, Jackson shrewdly gave this famous toast: "Our Federal Union, it must be preserved!" James Parton, *The Presidency of Andrew Jackson* 115 (Robert V. Remini ed., 1967). According to Colonel Benton, an attendee at the dinner, Jackson's toast in so few words first announced his position that he would not support the nullification doctrine, and that he saw the nullifiers as a threat to the Union. See *id.*

²⁷⁹ See, e.g., Letter from Andrew Jackson to J.R. Poinsett (Dec. 2, 1832), in *Statesmanship*, supra note 191, at 18, 18 ("The Union must be preserved, and its laws duly executed by proper means. . . . We must act as the instruments of the law and if force is opposed to us in that capacity then we shall repel it with the certainty, even should we fail as individuals, that the friends of liberty and union will still be strong enough to prostrate their enemies."). But see Burt, supra note 1, at 144-46 (expressing considerably more ambivalence about Jackson's support for Court in nullification controversy).

²⁸⁰ See, e.g., Letter from Andrew Jackson to Robert Oliver (Oct. 26, 1830), in *Statesmanship*, supra note 191, at 17, 17 ("I had supposed that everyone acquainted with me knew that I was opposed to the nulifying [sic] doctrine The South Carolinians, as a whole, are too patriotic to adopt such *mad projects* as the nulifiers [sic] of that state propose.").

²⁸¹ See, e.g., Letter from Andrew Jackson to J.R. Poinsett (Jan. 16, 1833), in *Statesmanship*, supra note 191, at 21, 22:

Write me often & give me the earliest intelligence of the first armed force that appears in the field to sustain the ordenance [sic]. The first act of treason committed, unites to it, all those who have *aided or abetted* in the excitement to the act—we will strike at the head and demolish the *monster nullification & secession*, at the threshold by the power of the law.

²⁸² See, e.g., Letter from Andrew Jackson to J.R. Poinsett (Dec. 9, 1832), in *Statesmanship*, supra note 191, at 19, 20-21:

The vain threats of resistance by those who have raised the standard of rebellion show their madness & folly. You may assure those patriots, who cling to their country, & this Union, which alone secures our liberty prosperity and happiness, that in forty days I can have within the limits of South Carolina fifty thousand men, and in forty days more another fifty thousand. . . . The weakness, madness & folly of the leaders & the delusion of their followers in the attempt to destroy themselves & our Union has not its parallel in the history of the world. The Union will be preserved. The safety of the republic, the supreme law, which will be promptly obeyed by me.

²⁸³ See Jessup, supra note 187, at 374-75 (citing "Jackson's stunning defense of the Court").

Confederation had failed in part because it “had no judiciary.”²⁸⁴ He criticized the fact that the nullification “ordinance declares there shall be no appeal[—making] the State law paramount to the Constitution and the laws of the United States” and stated bluntly “[t]he Constitution declares that the judicial powers of the United States extend to cases arising under the laws of the United States, and that such laws, the Constitution, and treaties shall be paramount to the State constitutions and laws.”²⁸⁵ In fact, drawing directly from Marshall’s representation argument in *McCulloch*, Jackson rejected the notion that states have a veto when the people of the country have no representation in the state.²⁸⁶ Indeed, in perhaps the strongest bow to the Court, at the very outset Jackson declared, “There are two appeals from an unconstitutional act passed by Congress—one to the judiciary, the other to the people and the States. There is no appeal from the State decision”²⁸⁷

²⁸⁴ Under the confederation, then, no State could legally annul a decision of the Congress or refuse to submit to its execution; but no provision was made to enforce these decisions. Congress made requisitions, but they were not complied with. The Government could not operate on individuals. They had no judiciary, no means of collecting revenue.

Andrew Jackson, Anti-Nullification Proclamation (Dec. 10, 1832), in *Statesmanship*, *supra* note 191, at 232, 237.

²⁸⁵ *Id.* at 243. This was Webster’s argument in the Great Debate.

²⁸⁶ Compare Jackson, *supra* note 284, at 241:

The Constitution has given [the discretionary right of raising revenue] . . . to the representatives of all the people, checked by the representatives of the States and by the Executive power. The South Carolina construction gives it to the legislature or the convention of a single State, where neither the people of the different States, nor the States in their separate capacity, nor the Chief Magistrate elected by the people have any representation. . . . Carry out the consequences of this right vested in the different States, and you must perceive that the crisis your conduct presents at this day would recur whenever any law of the United States displeased any of the States, and that we should soon cease to be a nation.

with *McCulloch*, 17 U.S. (4 Wheat.) at 429:

The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them.

²⁸⁷ Jackson, *supra* note 284, at 235; see also *id.* at 253-54 (“The laws of the United States must be executed. I have no discretionary power on the subject; my duty is emphatically pronounced in the Constitution.”).

2. *The Interrelationship of Judicial Supremacy, Constitutional Determinacy, and Countermajoritarian Criticism*

Despite Jackson's waffling on enforcement of Supreme Court judgments in some instances in which enforcement might have mattered, there were cases in which Supreme Court decisions were "supreme." When the actions of the state were attacked, and process was to run directly against the state or state officials, states could defy. The ability to defy was quite diminished when the litigation was between purely private parties and the constitutionality of state legislation was put into question. Such was the case, for example, in *Green v. Biddle*,²⁸⁸ a suit challenging the validity of Kentucky's "stay" or squatter sovereignty laws. The peculiar story of *Green v. Biddle's* aftermath in Kentucky demonstrates the connection among judicial supremacy, countermajoritarian criticism, and the temper of the times regarding the determinate nature of constitutional interpretation.

In most cases involving states' rights, state advocates sought to fend off Supreme Court review altogether by resorting to a distinction between "legal" and "political" questions. This distinction is itself telling, for it suggests popular understanding that there were legal questions that had determinate answers, a conclusion about the Age of Jackson shared by today's commentators.²⁸⁹ Even the Court's de-

²⁸⁸ 21 U.S. (8 Wheat.) 1 (1823). The Court actually heard argument twice and issued two different opinions in this case. At the first hearing, counsel for the tenant failed to appear, see *id.* at 7, and Justice Story, writing for a unanimous Court, entered judgment *ex parte* on behalf of the plaintiff landowner, see *id.* at 11-17. One week later, Henry Clay moved for a rehearing on behalf of the unrepresented Kentucky tenants. See *id.* at 17-18. The Court granted Clay's motion and allowed him to file the first *amicus curiae* brief in the Court's history. See Jessup, *supra* note 187, at 47. Unfortunately for the tenants, Clay's precedent-setting effort came to nought: in its subsequent opinion (published *seriatim*), the Court again declared the Kentucky land laws invalid. See *Green*, 21 U.S. (8 Wheat.) at 92.

²⁸⁹ The historian Edward White observes, "It is clear that during Marshall's tenure the Court had an interest in fostering an impression of itself as removed from politics and faithful to the impersonal dictates of the law. It is also clear that the Court succeeded remarkably in establishing that impression in public consciousness." White, *supra* note 235, at 964. White comes to this conclusion after examining a comprehensive survey of writing about the Court during the Marshall years. While some criticism of judicial bias was held over from the Jeffersonian era, by far the greater amount of commentary characterized the Marshall Court as just, fair, and impartial, even where the author disagreed with the Court's result. See *id.* The Marshall Court's strategy was to convince the public that the Court's decisions were based on a duty to follow "the law" rather than politics, and according to White, that effort was largely successful. But see William Nelson:

By 1820 law was no longer seen as a body of fixed and immutable principles, but as "essentially variable, extending and contracting itself according to the condition of the nation, accommodating its flexible character to the manners, habits, and employments of the people"; law, men now thought, "must necessarily vary with the varying tempers of ages and nations." . . . In short, the courts realized by the 1820's that "[j]ustice is regulated by no certain or fixed

tractors professed respect for the Court and the rule of law, arguing only that review of state decisions was "political."²⁹⁰ The point was simply that political questions were not subject to judicial review.²⁹¹ Time and again when the Court's authority was challenged, speakers tried to draw this distinction. With regard to the attempt to repeal section 25, the criticism was that "[t]he Supreme Court virtually claims the right, under the Constitution, to pronounce *political* judgments, and asserts the power, under the judicial act, of carrying them into execution, by coercing sovereign states."²⁹² The argument was made several times in the legendary Webster-Hayne debates in the Senate in 1830.²⁹³ Although no one stepped forward to explain what made

standard, so that the ablest and purest minds might sometimes differ with respect to it." They further came to see that constitutions were not fixed and certain, that a "constitution . . . [often did] not define what . . . [was] meant" by its various provisions, and that the power of judicial review therefore gave judges a "latitudinarian authority" that was "great and . . . undefined."

Nelson, *supra* note 67, at 1179-80 (citations omitted).

²⁹⁰ I not only entertain the highest respect for the individuals who compose that tribunal, but I believe they have rendered important services to the country; and that, confined within their appropriate sphere, (the decision of questions "of law and equity,") they will constitute a fountain from which will forever flow the streams of pure and undefiled justice, diffusing blessings throughout the land. I object, only, to the assumption of political power, by the Supreme Court—a power which belongs not to them, and which they cannot safely exercise.

10 Abridgment, *supra* note 121, at 445 (speech of Sen. Hayne).

²⁹¹ This also seemed to be the view of state advocates regarding judicial review of acts of Congress. See *id.* at 440 (speech of Sen. Hayne); 38 Annals of Cong. 75 (1822) [hereinafter 1822 Debates] (speech of Sen. Johnson):

If a judge can repeal a law of Congress, by declaring it unconstitutional, is not this the exercise of political power? If he can declare the laws of a State unconstitutional and void, and, in one moment, subvert the deliberate policy of that State for twenty-four years, as in Kentucky, affecting its whole landed property, even to the mutilation of the tenure upon which it is held, and on which every paternal inheritance is founded; is not this the exercise of political power? . . . If this is not the exercise of political power, I would be gratified to learn the definition of the term

See also Democratic Review, *supra* note 207, at 147:

From the personal training of American judges, and the nature of American institutions, our courts have become so political, as to deem *meum* and *tuum* subordinate if not irksome matters; while the delight and glory of the Supreme Court has been . . . to pass upon the laws and rights, the interests and liberties, of sovereign States; to sit in judgment upon the acts of presidents and governors, charters of banks and universities, treaties, creation, existence, and inter-course of nations, rights of war, and other such ambitious topics, seldom elsewhere the province of the judicature; not only to interpret and enforce laws, but to annul them.

²⁹² H.R. Rep. No. 21-43, at 3 (1831). The measure failed on the floor by a vote of 138 to 51.

²⁹³ See, e.g., 10 Abridgment, *supra* note 121, at 440 (speech of Sen. Hayne) (stating that resolution of sovereignty questions between states and United States "are political, and not

some questions political and others legal, it was clear what was at stake. The House Report said:

The committee readily admit that there is great difficulty in distinguishing between *political* laws and judgments, and *civil* laws and judgments, in most of the Governments of the world, but confidently believe that it was foreseen and provided for by the framers of the Federal Constitution, by the division and limitations of power we find there, between the Federal and State Governments.²⁹⁴

When, despite the “political” label, such decisions were nonetheless binding, as they were in *Green v. Biddle*, the countermajoritarian criticism might be expected to make an appearance, and it did. Thus, after the *Green* decision, Senator Johnson of Kentucky proposed curbing the Court,²⁹⁵ in language that raised this precise theme. He argued that every branch that exercises political power is responsible to the people; the Court should confine itself to “decision upon the laws” or be made accountable.²⁹⁶ Senator Johnson proposed an appeal to the United States Senate of Supreme Court decisions. In the course of his extremely lengthy harangue against the Court, he made the case for accountability in strongly countermajoritarian terms: “Why should they [the people] hold the controlling power in every other department of the Government? *Vox populi, vox Dei*; but, if the voice of the people is the voice of God, what must the superior voice of a judge be?”²⁹⁷ During the same debate, Senator Otis proposed amending Johnson’s bill to grant the President power to remove federal judges on the “address” of a majority of both houses of Congress,²⁹⁸ also keying in on the accountability argument: “The theory of our Government was that every branch ought to be responsible to the people”²⁹⁹

Indeed, the aftermath of the Supreme Court’s decision in *Green* gave rise to one of the oddest chapters in American judicial history, demonstrating the close connection between judicial supremacy and countermajoritarian criticism. The Supreme Court’s decisions in *Green* stirred conflict between debtors and creditors, whipped politics

judicial questions”); *id.* at 453 (speech of Sen. Rowan) (“I deny that it was the intention of the States, in the formation of the constitution, to invest [the judicial] tribunal with the power of doing any political act whatever.”).

²⁹⁴ H.R. Rep. No. 21-43, at 3-4 (1831).

²⁹⁵ See 1 Warren, *supra* note 53, at 657.

²⁹⁶ See 1822 Debates, *supra* note 291, at 74-75 (statement of Sen. Johnson).

²⁹⁷ *Id.* at 78 (statement of Sen. Johnson).

²⁹⁸ See *id.* at 95 (statement of Sen. Otis).

²⁹⁹ *Id.* at 94 (statement of Sen. Otis) (noting, however, that judiciary must not be influenced too greatly by popular opinion, but influenced “sufficiently to feel and be sensible of it”).

in Kentucky into a frenzy, and led to numerous Kentuckian protests in Congress.³⁰⁰ When, after *Green v. Biddle*, the Kentucky Court of Appeals subsequently invalidated other Relief legislation, the people reacted angrily.³⁰¹ They elected a new pro-Relief legislature and governor. A legislative vote to remove the judges required a supermajority and failed, whereupon the new legislature addressed the problem by creating a new court of appeals. Chaos reigned in Kentucky for some time, as litigants were forced to guess whether to proceed before the "old" court or the "new" one. Eventually reason prevailed and the new court was put out of business.³⁰²

In attacking the old court, the people of Kentucky clearly leveled countermajoritarian criticism.³⁰³ To cite just one example, in a widely

³⁰⁰ See Jessup, *supra* note 187, at 217-28.

³⁰¹ In so acting, the Kentucky Court of Appeals followed the Supreme Court's decision in *Sturgis v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819). See *id.* at 227-28. The events described here are detailed at length in Jessup, *supra* note 187, at 213-31. Warren details Kentucky's reaction:

Kentucky was at once set aflame with resentment. "It is a fact which we have noticed, and our readers must have remarked the same of late," said a leading newspaper, "that at almost every session of the Court, the laws of the States are treated in a manner that does no credit, either to the motives or understanding of our State Legislatures. The Supreme Court of the United States is the proper tribunal to settle *some* disputed cases, and it must be submitted to; but the principles upon which it has recently acted are so broad, that it begins to look like the old iron bedstead that accommodated every person by stretching or lopping off a limb." "The slow encroachments and gradual usurpation of the Judiciary, facilitated by the irresponsible tenure of their office, are more dangerous to the liberties of the people and the right of the States, than Congress and the President with the army and navy at their command."

1 Warren, *supra* note 53, at 637-38 (quoting Kentucky Gazette, Mar. 29, 1821 and Dec. 26, 1822).

³⁰² See Carter, *supra* note 209, at 105-07 (describing events that took place in Kentucky after Court's decision in *Green v. Biddle*); Evan Haynes, *The Selection and Tenure of Judges* 92-93 (1944). See generally Jessup, *supra* note 187, at 228-29; B.J. Benthurum, *Old and New Court Controversy*, 6 Ky. L.J. 173 (1918). Both courts, however, refused to comply with *Green v. Biddle*. See *id.* at 231.

³⁰³ But the thwarting of Kentucky's fantastic scheme to replace its independent appellate court with one whose decisions would be more predictable was hardly the end of the clamor for a more accountable judiciary. On the contrary, throughout the early decades of the nineteenth century, the forces of Jacksonian democracy were busily demanding that government power be reduced or at least taken from the hands of the elites and returned to the people. The campaign for an elected judiciary—a judiciary "of the people"—was a cornerstone of the movement. Court decisions that seemed to the people of many states to consolidate federal power or to threaten popular legislative initiatives were the villains of the campaign.

Carter, *supra* note 209, at 107.

As soon as the higher court passed upon the questions bedlam broke loose in Kentucky. The adherents of the Relief party were thrown into a violent rage and with the tongue of slander they denounced the judges as tyrants, who had

publicized speech, Kentucky Representative George Shannon asserted that:

[The Judges] are responsible to the people; and the people will make them feel that responsibility through the power rested in their representatives

. . . .

. . . [The Judges] not only assume the power of abrogating the laws passed by this house, but of adopting arbitrary rules of their own, by which the persons and properties of the people are to be subject to their uncontrollable mandate.³⁰⁴

The speech “*turned the heads of many, and they seem[ed] to cry, as with one voice, ‘down with the judiciary.’*”³⁰⁵

3. *Minority Voices*

As the foregoing makes clear, sometimes judicial decisions were binding, and the countermajoritarian criticism was heard when they were. This suggests that yet another factor must explain the relative paucity of such criticism during the Age of Jackson. That other factor is that by and large the states’ righters did not, and could not, claim to be speaking for a majority.³⁰⁶ Thus, there was little assertion that the Supreme Court was interfering with popular will. Indeed, quite the contrary, the battle was cast primarily as one of *minority* rights, with the majority standing on the side of the Union.³⁰⁷ When those attacking the Court cannot plausibly argue they constitute a majority, their criticism will not be countermajoritarian.

Some context explains why the states’ rights battle took on the minoritarian cast that it did. First, with regard to Supreme Court deci-

wickedly substituted their own will for the will of the people, and denied the majority the right to rule.

Benthurum, *supra* note 302, at 175.

³⁰⁴ Advertiser (Louisville), July 13, 1822, at 1.

³⁰⁵ *Id.*

³⁰⁶ The forces that were most upset by Court decisions [during the Age of Jackson] were states-righters. However, they showed a curious inability to coalesce. The Court was never forced to face a united opposition. While opposition from one state’s congressional delegation might be intense, others were not often willing to join.

Rosenberg, *supra* note 25, at 387.

³⁰⁷ Ellis argues that in fact Jackson opposed South Carolina’s nullification activities because nullification itself was an attack on the idea of majority rule. See Ellis, *supra* note 218, at 46. Indeed, Ellis is careful to point out that the nullification controversy involved three factions: nationalists, nullifiers, and “traditional” states’ rights advocates. See *id.* at 9-11. The traditional states’ rights position itself was founded on deference to majority rule, and thus opposed South Carolina’s position on nullification. See *id.* at 10 (describing Madison’s hostile reaction to nullification on this ground).

sions, many of the issues implicated fewer than all the states. The Cherokee litigation, for example, was only about Georgia. Litigation about the Bank of the United States implicated the interests of several, but not all, states. The same was true of debt relief cases.³⁰⁸ Thus, the states were essentially “picked off” one or several at a time. The issues did not present themselves as a majority versus the Court.³⁰⁹ Second, and exacerbating the situation, the states frequently took one another on, further drawing into question how majoritarian any given issue was.³¹⁰ Third, the states were often as angry at Congress (or if not Congress, then the President) as they were at the Court. The countermajoritarian argument gets more difficult to make when neat battle lines cannot be drawn.

All of these factors were apparent in the nullification crisis. South Carolina’s drumbeat for nullification arose out of discontent with the tariff Congress had placed on goods coming into the country. While the ostensible purpose of the tariff was to protect growing American industry, the South saw it as northern protectionism at the expense of southern consumption. Instantly the issue, far from drawing the states together, separated them. Moreover, the villain in the picture was the Congress. North Carolina’s report on the tariff makes both these points clear:

³⁰⁸ As a curious commentary on the local nature of the doctrine of State-Rights, it may be noted that though Kentucky, in thus arraying herself against the “encroachments of the Federal Judiciary,” was but following the position taken and arguments advanced by Virginia after the *Cohens Case*, in 1819, Virginia now was heartily supporting the decision of the Court in *Green v. Biddle*. Thus again, it was made plain that State opposition to judicial action depended, not so much on the political theory held by the States, as on the particular interest aided or injured.

1 Warren, *supra* note 53, at 641-42.

³⁰⁹ With much reason did Henry Clay write to a friend in Virginia: “Has not Virginia exposed herself to the imputation of selfishness by the course of her conduct or of that of many of her politicians? When, in the case of *Cohens v. Virginia*, her authority was alone concerned, she made the most strenuous efforts against the exercise of that power by the Supreme Court. But when the thunders of that Court were directed against poor Kentucky, in vain did she invoke Virginian aid. The Supreme Court, it was imagined, would decide on the side of supposed interests of Virginia. It has so decided; and, in effect, cripples the sovereign power of the State of Kentucky more than any other measure ever affected the independence of any State in the Union; and not a Virginia voice is heard against this decision.”

1 Warren, *supra* note 53, at 642 (quoting Letter from Henry Clay to Frances Brooke (Aug. 28, 1823)).

³¹⁰ See Jessup, *supra* note 187, at 366 (discussing states splitting from Georgia on issue of Cherokee cases); *id.* at 383-84 (describing states splitting from South Carolina on nullification).

The People of North Carolina . . . have seldom expressed a legislative opinion upon the measures of the General Government

. . . [Nonetheless,] interests, either pecuniary or political, is the great point of union [W]henver a system of policy is pursued by the General Government which strikes at the very foundation of the Union, it is the right of every member of the Confederacy to call their attention to the fundamental principles upon which the Government was formed; and if, they persist in measures ruinous in themselves, the question may fairly be discussed whether the checks and balances of the Government have not been overthrown; whether they have been instrumental in producing so onerous an effect; and whether the benefits of the Union are not more than counterbalanced by the evils.³¹¹

In the United States, North Carolina argued, manufacturing was “not an object of *general* interest” over which Congress could legislate, “but of *local* interest.”³¹² According to the report, the bill was “artfully designed for the advancement of the incorporated companies of New England, and admirably adapted to its end.”³¹³

With issues of the time defined as state versus Union, the states frequently went their own ways. This served to isolate states’ discontent with national policy or Supreme Court decisions. It was not uncommon when one state was up in arms for other states simply to refuse to follow. For example, unhappy with the Supreme Court, Pennsylvania suggested establishment of “an impartial tribunal” to resolve state-federal disputes.³¹⁴ No state signed on, and nine states adopted negative resolutions.³¹⁵ Virginia (of all states!) responded in the negative, archly observing that “a tribunal is already provided by the constitution of the United States, to wit, the Supreme Court”³¹⁶ Nullification again provides perhaps the most poignant example. As indicated, the nullification controversy pitted southern states against their northern sisters. In response to South Carolina’s

³¹¹ Report of North Carolina on the Tariff (Jan. 1828), in *State Documents on Federal Relations: The States and the United States* 148, 148-49 (Herman V. Ames ed., 1906).

³¹² *Id.* at 149.

³¹³ *Id.* at 150.

³¹⁴ 6 Register of Debates in Congress, *supra* note 259, at 291.

³¹⁵ See *id.* Voting “no” were Virginia, North Carolina, Maryland, Georgia, Tennessee, Kentucky, New Jersey, Vermont, and New Hampshire. See *id.*

³¹⁶ *Id.*

The creation of a tribunal, such as is proposed by Pennsylvania, so far as we are able to form an idea of it . . . would, in the opinion of your committee, tend rather to invite, than to prevent, collision between the Federal and State courts. It might also become, in process of time, a serious and dangerous embarrassment to the operation of the General Government.

nullification ordinance, however, North Carolina (on record as opposing the tariff), Mississippi, and Alabama—among others—criticized South Carolina's action, often in the strongest language. Mississippi called the ordinance "reckless precipitancy"; North Carolina termed it "subversive of the Constitution of the United States."³¹⁷

In light of this dynamic, it comes as little wonder that the countermajoritarian difficulty found scant voice, and that as often as not the opposition to Court and Congress was framed in minoritarian terms. Hayne's famous speech in the Webster-Hayne debates makes the point sharply. Indeed, it sounds uncannily like a later-twentieth century argument *in favor* of judicial review to protect minority rights:

If the will of a majority of Congress is to be the supreme law of the land, it is clear the constitution is a dead letter, and has utterly failed of the very object for which it was designed—the protection of the rights of the minority. . . . A written constitution was resorted to in this country, as a great experiment, for the purpose of ascertaining how far the rights of a minority could be secured against the encroachments of majorities—often acting under party excitement, and not unfrequently under the influence of strong interests.³¹⁸

Likewise, it was Calhoun's recognition of the minority support for his views that undoubtedly led him and others to the "compact" theory that the Constitution was formed by sovereign states that retained a veto over actions of the central government to which they were in opposition. Thus, Calhoun explained:

The judges are, in fact, as truly the judicial representatives of this united majority, as the majority of Congress itself, or the President, is its legislative or executive representative; and to confide the power to the Judiciary to determine finally and conclusively what powers are delegated and what reserved, would be, in reality, to confide it to the majority, whose agents they are, and by whom they can be controlled in various ways; and, of course, to subject (against the fundamental principle of our system and all sound political reasoning) the reserved powers of the States, with all the local and peculiar interests they were intended to protect, to the will of the very majority against which the protection was intended³¹⁹

³¹⁷ Ellis, *supra* note 218, at 158-59 (quoting State Papers on Nullification 201). It is important to register what would be Ellis's own dissent on this issue. Although states split on nullification, Ellis argues the issue was much closer than the formal statements suggest, and that in fact Andrew Jackson's Proclamation on nullification incensed so many that the battle was close. See Ellis, *supra* note 218, at ix; *id.* at 112 (noting closeness of issue in Georgia and vote taken before Proclamation); *id.* at 137 (describing battle in Virginia).

³¹⁸ 6 Register of Debates in Congress, *supra* note 259, at 88-89 (statement of Sen. Hayne in reply to Daniel Webster).

³¹⁹ John C. Calhoun, Fort Hill Address, in *The Nullification Era*, *supra* note 223, at 140, 145; see Ellis, *supra* note 218, at 46-47.

When a national majority was lacking, the best ploy was to fall back on an argument that matters should be resolved by sovereign states.

The nullification crisis itself was resolved by negotiated settlement. Marshall passed away, and shortly thereafter the Taney Court decided several important cases in a manner favorable to state interests,³²⁰ though Warren argues that the overall tenor of the Taney Court remained nationalist.³²¹ And perhaps one reason the Court retained its prestige was that even to its opponents it seemed allied with the cause of the majority.

IV

THE *DRED SCOTT* DECISION

Call it the calm before the storm. "In the years 1848-49," Warren reported, "the Court may be said to have reached its height in the confidence of the people of the country."³²² Slavery, however, would be its undoing, the fault both of the Court and the politicians who sought answers there. Faced with an issue that seemed to many insoluble, politicians increasingly looked to the Supreme Court for guidance. In 1848, Senator Clayton proposed an appeal to the Supreme Court from the territorial courts, thus providing a way to bring the slavery issue before the Court.³²³ In offering the legislation he made the following statement, remarkable in light of the political-legal distinction drawn in the Age of Jackson: "[H]e who does not desire to distract the country by a question *merely political*, will be able, by voting for this bill, to refer the whole matter to the Judiciary."³²⁴ Clayton's proposal commenced a nine-year period of debate about

³²⁰ See Haines, *supra* note 272, at 336. Taney had served in Jackson's Cabinet during the national bank controversy and could be counted on to support the Jacksonian vision of democracy. The Taney Court's early decisions were characterized by "strict adherence to the language of the Constitution" and the "insistence upon the maintenance of the reserved rights of the states." *Id.* at 337-39. Whigs feared the Democratic Court would now act completely in synch with popular will:

"A new era is begun and new lights have arisen. . . . Any clear manifestation of the popular will, in opposition to the powers of the Constitution as hitherto expounded by the Court, will be regarded with all due deference and embodied in the new code. That same popular will will be looked to as the leading story of the new dynasty and as the only exponent of the Constitution."

2 Warren, *supra* note 53, at 29-30 (quoting Letter from Washington to Boston Daily Advertiser, Feb. 21, 1837).

³²¹ See 2 Warren, *supra* note 53, at 33.

³²² *Id.* at 206.

³²³ See *id.* at 211-12.

³²⁴ *Id.* at 209 (emphasis added) (quoting Cong. Globe, 30th Cong., 1st Sess. 988 (1848) (speech of Sen. Clayton)).

whether the slavery question should be referred to the Court.³²⁵ Although some continued to view the Court in nonpartisan fashion, many others began to see the Court in purely partisan terms, supporting or opposing reference of slavery to the judiciary depending upon their best guess as to what the outcome in that tribunal would be.³²⁶ Warren wrote that in the wake of this nine-year debate, "the faith of the general public in the Court's impartiality had been seriously weak-

³²⁵ Supporters of judicial resolution focused on the traditionally unbiased nature of the Court and the popular confidence in it. See *id.* at 210 ("In the integrity and capacity of that Court, I have equal confidence. . . . If the Court decide against me, I will submit." (quoting Cong. Globe, 30th Cong., 1st Sess. 993 (1848) (speech of Sen. Phelps of Vermont))); *id.* ("The members of the Supreme Court are not politicians. They are born in a different atmosphere, and address themselves to different hearers" (quoting Cong. Globe, 30th Cong., 1st Sess. 1000 (1848) (speech of Sen. Johnson of Maryland))); *id.* at 216 ("The Supreme Court has been established for the very purpose of giving [the Constitution] authoritative interpretation, and as a lover of the Union, I am willing to abide its solemn decision." (quoting Cong. Globe, 30th Cong., 2d Sess. 187 (1849) (speech of Sen. Johnson of Georgia))); *id.* at 268 ("For purity, integrity, virtue, honor, and all that ennobles and dignifies, [the Constitution] stands unimpeached and unimpeachable. . . ." (quoting Sen. Jones of Tennessee)).

Democrats hoped that resolution of the slavery question by the Supreme Court would settle the rift in their party. See William Lasser, *The Limits of Judicial Power* 40 (1988); see also 2 Warren, *supra* note 53, at 215 (noting that Crittenden felt that settlement through courts would be "the least offensive and injurious form" of defeat for South (quoting Letter from John J. Crittenden to John M. Clayton (Dec. 19, 1848))); *id.* at 214-15 (citing Franklin W. Bowdon's belief that "[a] decision from this elevated source would . . . go very far to restore harmony to the country[,] . . . command both respect and acquiescence[, and] . . . appeal with irresistible force to the great body of the people, North and South").

Critics of the push towards a judicial resolution, however, foresaw the devastating effect the policy would have on the Court.

"During the long . . . pendency of this question, [the Court] would be incessantly exposed to every adverse influence. Local sympathies, long-cherished prejudices, the predilections of party, the known wishes of the Administration and of the National Legislature, would all conspire to bias the decision; intervening vacancies would be filled with reference to the supposed, perhaps even pledged, opinion of the candidate upon this one question"

Id. at 212-13 (quoting Cong. Globe, 30th Cong., 1st Sess. 1072 (1848) (speech of Sen. Marsh, Whig from Vermont)); see also *id.* at 213 ("[T]he moral influence of the Court must be forever destroyed in one section or the other of the Union." (quoting Cong. Globe, 30th Cong., 1st Sess. 1073 (1848) (speech of Rep. Daniell, Democrat from North Carolina)). Senator Hannibal Hamlin, Democrat of Maine, further scorned "this shuffling off, this skulking from, shrinking behind a political question which it is our duty to meet, and throwing it upon the Supreme Court to decide." *Id.* at 211 (quoting Cong. Globe, 30th Cong., 1st Sess. 1155 (1848) (speech of Sen. Hamlin)).

³²⁶ See 5 Carl B. Swisher, *History of the Supreme Court of the United States: The Taney Period 1836-64*, at 593-94 (1974); 2 Warren, *supra* note 53, at 216 (describing how Free Soilers attacked any case that even remotely involved slavery issue in order to undermine popular confidence in Court and its ability to make impartial decisions, while both northern and southern Democrats used every occasion to voice belief in Court's freedom from bias).

ened by the undeserved attacks of the anti-slavery press and politicians."³²⁷

A. *The Criticism of Dred Scott*

Whatever the role of others, the Supreme Court certainly rose to the challenge of undermining its own reputation. In 1857, the process of political agitation culminated in the decision of *Dred Scott v. Sandford*,³²⁸ the most repugnant and reviled of Supreme Court decisions. In *Dred Scott*, the Court held that former African American slaves could not be citizens of the states, and thus could not invoke the jurisdiction of the federal courts, and that Congress was without power to prohibit slavery in the territories, slaves being "property" protected by the Constitution.³²⁹ Undoubtedly the "majority"³³⁰

³²⁷ 2 Warren, *supra* note 53, at 279.

³²⁸ 60 U.S. (19 How.) 393 (1856). For a concise but thorough explication of the issues and players in the *Dred Scott* litigation, see generally Paul Finkelman, *The Dred Scott Case, Slavery and the Politics of Law*, 20 *Hamline L. Rev.* 1 (1996).

³²⁹ Since the opinion was delivered, there has been a debate over the actual holding. See, e.g., Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 *Const. Comment.* 271, 275 (1997) (explaining difficulty with identifying holding in decision). At the time, everyone agreed that the Court had held that African Americans could not be citizens; however, many refused to recognize the part of the opinion about Congress's power to prohibit slavery as anything more than obiter dicta. See, e.g., Timothy Farrar, *A Report on the Decision of the Supreme Court of the United States and the Opinions of the Judges thereof, in the case of Dred Scott versus John F.A. Sanford*, 85 *N. Am. Rev.* 392, 398-99 (1857) (believing that Court could not rule on more after it declared that it did not have jurisdiction); Benjamin C. Howard, *The Decision of the Supreme Court in the Dred Scott Case*, 63 *Christian Examiner* 65, 75 (1857) (same).

³³⁰ The term majority is used loosely. Chief Justice Taney's opinion was denominated a majority opinion and, from the face of the decision, was by a 7-2 vote. The Court was sharply fragmented, however, and each Justice wrote separately. Commentators were quick to point out the lack of five votes behind Taney's positions. For example, in the *North American Review*, Timothy Farrar wrote:

[T]he argument of the Chief Justice is called the opinion of the court, for what reason does not appear on the face of the report

. . . .
 . . . There is no majority in favor of anything; but a majority against everything suggested; unless it should be claimed that Justice Grier is in favor of something, - in which case it would clearly be impossible to prove the contrary from any disclosure he has made of his views on this point in his published opinion.

Farrar, *supra* note 329, at 393, 395.

On the jurisdiction issue alone, Farrar says, "Four judges are of one opinion; two of the opposite; two will give no opinion, and one is divided." *Id.* at 395. Another contemporary law review decided that "[i]t is much easier to show that it was not in fact decided." Horace Gray & John Lowell, *The Case of Dred Scott*, 10 *Monthly L. Rep.* 61, 69 (1857). One contemporary commentator "grudgingly" counted five on the jurisdictional issue including Grier. See Howard, *supra* note 329, at 74. In the face of strident criticism of the decision and its designation as the majority decision, Taney took the unprecedented step of writing his own headnote for the decision. See Gray & Lowell, *supra*, at 65 (describing

members of the Court thought the time was auspicious for the Court to "settle" the slavery question: Buchanan's election in 1856 seemed to many, including Buchanan and his predecessor Franklin Pierce, as a mandate on the slavery issue.³³¹ Buchanan wrote to Justice Robert Grier shortly after the election, and before the *Dred Scott* decision, "The great object of my administration will be if possible to destroy the dangerous slavery agitation and thus to restore peace to our distracted country."³³² What the Court could not possibly have anticipated³³³ was the firestorm of criticism the decision unleashed.³³⁴ While historians can debate the precise causes of the Union's dissolution, *Dred Scott* assuredly did not resolve the slavery issue, and America subsequently was drawn into a bloody civil war.³³⁵

It would be difficult to overstate the vituperative reaction that met the Court's decision in *Dred Scott*. Some of the more sedate critics made an observation common at the time: that the Court had lost the confidence of the people.³³⁶ Writing in the *North American Re-*

headnote as "[s]o widely different from any form of such a note ever seen before, and contains so many positions not determined by the Court, nor even affirmed by a majority of the judges").

³³¹ See Swisher, *supra* note 326, at 610 (noting that Pierce believed election signified that people had rebuked North's attempt to sectionalize country).

³³² Draft of Letter from James Buchanan to R.C. Grier (Nov. 14, 1856), quoted in Swisher, *supra* note 326, at 610.

³³³ See Swisher, *supra* note 326, at 632 (describing how majority assumed their decision would be generally accepted, since Buchanan victory at polls seemed to support their position); *id.* at 634 (quoting response of Chief Justice Taney: "the opinion of the court has been greatly misunderstood and grossly misrepresented in publications in the newspapers," and noting how Taney lost "the judicial calm for which he was publicly noted"); 2 Warren, *supra* note 53, at 302 (stating that "the Judges did not realize, in the slightest degree, the effect which their decision was to have, or foresee the course which the public at the North would pursue towards it").

³³⁴ See *infra* notes 336-41 and accompanying text.

³³⁵ Contemporary commentators ascribe the split of the Democratic party, which led to the election of the Republican Abraham Lincoln and ultimately to the commencement of hostilities, to the debate over Kansas's Lecompton Constitution. See Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (1978); Lasser, *supra* note 325, at 41-43 (1989) (citing Lecompton Crisis as significant factor in Lincoln's election); Graber, *supra* note 329 (manuscript at 29-31) (noting that struggle over Lecompton "destroyed the fragile union between northern and southern Jacksonians, severely weakened Democratic party strength in the North, and paved the way for the Lincoln victory of 1860"). Some newspapers of the time, however, saw *Dred Scott* as the potential spark of conflict. See Practical Effect of the Dred Scott Judgment, *N.Y. Herald*, Mar. 11, 1857, at 4 ("No sooner does the fire threaten to go out for want of fuel than this Supreme Court appears, and loads the embers with dry combustible material."); The Slavery Question—The Decision of the Supreme Court, *N.Y. Daily Times*, Mar. 9, 1857, at 4 (stating that *Dred Scott* "has laid the only solid foundation which has ever yet existed for an Abolition party").

³³⁶ See, e.g., The Slavery Question, *supra* note 335 (predicting that decision would "paralyze and astound the public mind. . . . The decision will be accepted and obeyed as law. . . .

view, one of a number of journals of the times with law-related materials, Timothy Farrar observed that “[t]he greater the authority of the writers, the more dangerous are their errors”³³⁷ and concluded that loss of confidence in the Court “perhaps may well be accounted the greatest political calamity which this country, under our forms of government, could sustain.”³³⁸ On March 7, 1857, the *New York Evening Post* predicted an “end of the Supreme Court; for a judicial tribunal, which is not rooted in the confidence of the people, will soon either be disregarded as an authority or overturned.”³³⁹ But this was mild stuff. On that same day the *New York Daily Tribune* wrote, “If epithets and denunciation could sink a judicial body, the Supreme Court of the United States would never be heard of again.”³⁴⁰ Almost two years after the decision, having derided the Supreme Court at some length on the Senate floor, Senator Hale said, “So much for the Supreme Court. If it were not so late, I might say more. I hope I may be excused if I have not denounced them sufficiently for the enormity of their decision; I will make it up on some other occasion.”³⁴¹

Although countermajoritarian criticism might be expected given this outpouring of anger at the Court, in point of fact there was very little. There were occasional calls for an elected judiciary.³⁴² But, the relative absence of countermajoritarian criticism has been noted by several commentators.³⁴³ Of course, “there were . . . a few attacks on

But the doctrine it has promulgated will sink deep into the public heart, and germinate there as the seed of discontent and contest and disaster hereafter.”); The Supreme Court of the United States, N.Y. Evening Post, Mar. 7, 1857, at 2 (bemoaning that “the moral authority and consequent usefulness of that tribunal, under its present organization, is seriously impaired, if not destroyed”).

³³⁷ Farrar, *supra* note 329, at 393.

³³⁸ *Id.* at 415.

³³⁹ The Supreme Court of the United States, *supra* note 336.

³⁴⁰ The Latest News, N.Y. Daily Trib., Mar. 7, 1857, at 5.

³⁴¹ Cong. Globe, 35th Cong., 2d Sess. 1265 (1859) (speech of Sen. Hale). Indeed, in a side irony of this history, *Dred Scott* marked one of two occasions in the Court’s history in which it moved into grander chambers following actions that brought the Court into great disfavor. The other instance was during the Court’s war on the New Deal. See *supra* text accompanying notes 40-41.

³⁴² See, e.g., The Dred Scott Decision: Law or Politics? 48 (Stanley I. Kutler ed., 1967) [hereinafter Kutler] (“Confide into [the people’s] hands the election of the Judges of the United States, and thus infuse into these Judges a knowledge of their interests, a spirit and a purpose kindred with theirs, an independence of the Executive worthy of them.”) (quoting Chi. Trib., Mar. 12, 1857)); see also An Elective Federal Judiciary, Albany Evening J., Mar. 12, 1857, at 2 (reporting that Massachusetts House of Representatives had instructed its Congressional representatives to propose constitutional amendment to make Supreme Court justices and all inferior federal courts elective by people for term of years); The Supreme Court of the United States, *supra* note 336 (stating that “last objection to the election of the judges . . . is now removed”).

³⁴³ See, e.g., Fehrenbacher, *supra* note 335, at 439 (noting that Republicans argued not about right of Court to engage in judicial review but about range of that power); Lasser,

the Court as an antidemocratic institution.”³⁴⁴ Some newspapers leveled the countermajoritarian criticism quite explicitly. The *Albany Evening Journal* fumed: “Acknowledging no control either by Congress, the Executive, or even the People, [the Court] assumes to issue edicts to each, and to direct or forbid the action of all.”³⁴⁵ And occasional references by Lincoln were stated in seemingly countermajoritarian terms,³⁴⁶ although (as will be evident in a moment) these really were directed at the question of judicial supremacy. At any rate, such statements were few and far, far between.

B. Explaining the Lack of Countermajoritarian Criticism

1. Questions About the Countermajoritarian Nature of the Decision

One possible explanation for the paucity of countermajoritarian criticism of *Dred Scott* is that the decision perhaps did not actually trump the will of a “majority” of the people. This is a complicated proposition. Although the Court struck down an act of Congress, which initially would indicate the decision was contrary to popular will, in fact the act itself was thirty-seven years old and, with passage of the Kansas-Nebraska Act of 1854, the Missouri Compromise had lost its force in any case.³⁴⁷ Indeed, it seemed politics were moving in the South’s favor. Recall the certainty with which Buchanan took office, believing the antislavery forces had lost the fight.³⁴⁸ However,

supra note 325, at 38 (counting few attacks on Court as antidemocratic institution and noting that such rhetoric was politically dangerous); David Zarefsky, *Lincoln Douglas and Slavery in the Crucible of Public Debate* 10 (1990) (noting that Republicans were careful in criticizing *Dred Scott* not to “impugn the legitimacy of the Court”); G. Edward White, *Reconstructing the Constitutional Jurisprudence of Salmon P. Chase*, 21 *N. Ky. L. Rev.* 41, 53 (1993) (noting that criticism of *Dred Scott* centered on “deficiencies as substantive constitutional arguments,” but refraining from calling decision an example of “‘unjudicial’ excesses in textual interpretation or jurisdictional reach”).

³⁴⁴ Lasser, supra note 325, at 38.

³⁴⁵ *A Prediction Fulfilled*, *Albany Evening J.*, Mar. 12, 1857, at 2 (claiming, in addition, that Supreme Court had delegated to itself “powers of absolute government” which it was exercising with “the worst of despotism”); see also *The Issue Forced Upon Us*, *Albany Evening J.*, Mar. 9, 1857, at 2 (claiming that slaveholders have “converted the Supreme Court . . . into a propagandist of human Slavery”); *The Supreme Court*, *Albany Evening J.*, Mar. 19, 1857, at 2 (complaining that “[t]he Free States with double the population of the Slave States, do not have half the Judges”).

³⁴⁶ See *infra* text accompanying note 368.

³⁴⁷ See Fehrenbacher, supra note 335, at 184 (citing portions of Kansas-Nebraska Act that replaced Missouri Compromise with provision that people of territories were to be left “perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States”); *Harper’s Weekly*, Mar. 28, 1857, at 1, 1 (commenting that decision that Missouri Compromise was unconstitutional was of no consequence).

³⁴⁸ See, e.g., *The Supreme Court Decisions on the Slavery Question—Reconstruction of Parties and Party Platforms*, *N.Y. Herald*, Mar. 12, 1857, at 4 (“At present, the South is

others suggested strongly that the political power of the South was not a result of absolute numerical advantage. Senator Wade, in the course of discussing the Lecompton Constitution, protested, "The power of the Government seems to be in inverse ratio to the number of people that participate in the Government."³⁴⁹

Even if *Dred Scott* may not have been, strictly speaking, countermajoritarian,³⁵⁰ there is room to wonder whether this fact sufficiently explains the lack of such criticism. At the time of *Dred Scott* there obviously were no national polls, so any party caring to level the countermajoritarian criticism only needed a plausible basis to state a claim to majority status. There surely were commentators at the time who suggested that *Dred Scott* was contrary to popular opinion. Mississippi's Senator Brown appeared to acknowledge being in the minority when he thundered against the argument that the "dominant party of the North will take the other side of the proposition, and abolish slavery in the Territories."³⁵¹ The *New York Daily Times* put the matter succinctly, observing on March 7, 1857, that the *Dred Scott* decision would be startling "to the opinions and principles of three fourths of the people of the United States."³⁵² Without knowing for sure, there seems to be some basis for those who so desired to level the countermajoritarian argument, yet its relative absence was noticeable, contrasted for example with the Jeffersonian era.

2. Ambiguity Regarding Concern for Popular Democracy

Second, there is significant debate whether the period around *Dred Scott* was one of populist democracy. Scholars such as Eric Foner and Joel Silbey emphasize that this period was one of great political engagement and creativity, including the creation of the

strongly fortified. It has the administration, both houses of Congress and the Supreme Court as its constitutional defences.").

³⁴⁹ Cong. Globe, 35th Cong., 1st Sess. 1115 (1858) (speech of Sen. Wade).

³⁵⁰ Mark Graber argues forcefully that the *Dred Scott* decision was a clever compromise that was acceptable to many of the competing forces of the time. See Graber, *supra* note 91 (manuscript at 17-38). Graber seems to acknowledge, however, that his argument is stronger with regard to *Dred Scott's* denial of black citizenship than to its denial of power in Congress to prohibit slavery in the territories. See *id.* (manuscript at 17-19).

³⁵¹ Cong. Globe, 35th Cong., 2d Sess. 1242 (1859) (speech of Sen. Brown).

³⁵² Slavery in the Territories, N.Y. Daily Times, Mar. 7, 1857, at 4. Another paper declared:

[I]t is no wonder, we say, that such a decision excites comment, excites criticism, excites indignation, excites denunciation; and it will certainly require something in the way of argument and exposition far beyond anything yet brought forward by the Court or its apologists to reconcile the non-slaveholding public to such a monstrous stretch of judicial authority.

N.Y. Daily Trib., Apr. 2, 1857, at 4.

Know Nothing and Republican parties.³⁵³ On the other hand, David Zarefsky, in his excellent study of the Lincoln-Douglas debates, points out that although “[p]olitics played a prominent role in the culture of the mid-nineteenth century”³⁵⁴ and also served as a source of “communal entertainment,”³⁵⁵ the politics that occurred were party politics that tended to leave the people behind.³⁵⁶ The parties, according to Zarefsky, were seen as “unresponsive and beyond popular control.”³⁵⁷ The nativist Know Nothing party showed strength in the 1854 elections, its primary purpose being precisely to restore “power to the people,”³⁵⁸ but the party declined rapidly after 1856 as slavery increasingly gripped the attention of those involved in politics.³⁵⁹

It may be that at the time of *Dred Scott* politics was popular—as entertainment—but that the demand for democratic accountability was less than during the Jacksonian era. If this point is correct, it provides some explanation for the relatively muted countermajoritarian criticism of the time. If the point is incorrect, and accompanying political engagement of the time was a demand for government responsiveness to the people, then it is only more curious why countermajoritarian criticism did not arise.³⁶⁰

³⁵³ See Don E. Fehrenbacher, *Prelude to Greatness, Lincoln in the 1850's* 14 (1962) (“The pervasive and unremitting popular interest in politics was the most striking feature of Illinois life in the 1850's.”); Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* 7 (1995) (“Politics was, in one of its functions, a form of mass entertainment, a spectacle with rallies, parades, and colorful personalities. Leading politicians, moreover, very often served as a focus for popular interests, aspirations and values.”); Joel H. Silbey, *The American Political Nation, 1838-1893*, at 125 (1991) (“From the 1840's onward, a vibrant, noisy, and thoroughly partisan political world existed in the United States.”).

³⁵⁴ Zarefsky, *supra* note 343, at 18.

³⁵⁵ *Id.*

³⁵⁶ See *id.* at 18-19; see also Foner, *supra* note 353, at 7 (arguing that voters took their cues on political issues from politicians).

³⁵⁷ Zarefsky, *supra* note 343, at 18-19 (citing Michael F. Holt, *The Political Crisis of the 1850's* 4 (1978)).

³⁵⁸ *Id.* at 23.

³⁵⁹ See *id.* at 22-23.

³⁶⁰ If Foner and Zarefsky mark extremes on this point, Joel Silbey cuts somewhat of a middle course. In his thorough review of American politics between 1838 and 1893, Silbey paints a picture of vibrant party politics largely dominated by elite leaders, but nonetheless constrained by, and (within bounds) responsive to, popular will. See Silbey, *supra* note 353, at 118-24. After reading Silbey's work it is, quite frankly, difficult to conclude one way or the other about the period. Silbey concedes the role of elites, see *id.* at 119-21, and the role of politics as popular entertainment, see *id.* at 125, but he nonetheless insists that elite leadership was limited by the wishes of the broader electorate, see *id.* at 123. It is unclear whether some responsiveness to the masses by elite leadership is the same thing as the popular clamoring for direct governance that was common during the era of Jacksonian democracy.

3. *Constitutional Formalism at the Time*

Another possibility for the lack of countermajoritarian criticism was the relative attachment to legal formalism at the time of *Dred Scott*. In his study of conceptions of constitutional law in the antebellum period, G. Edward White concludes that "it did not contain a radically indeterminate theory of constitutional interpretation, such as the theory that the meaning of the Constitution was simply what a given set of judges said it was."³⁶¹ Similarly, Morton Horwitz described the "rise of legal formalism," which came to a head around 1850, as a way to freeze legal doctrine in a way favorable to "mercantile and entrepreneurial interests."³⁶² Certainly the legal materials from the time bear out the formalism of legal analysis. This is the first period to see law journals similar in sort to those published today. Although the review writers criticized *Dred Scott* in various ways, the attacks primarily were launched in formal legal terms. Warren described the "interminable discussion" of commentators who sought to dismiss the core of the *Dred Scott* holding as dicta.³⁶³ The reviews themselves wore out every possible point of law, one article being devoted entirely to demonstrating that Justice Daniel's reliance on Roman law regarding manumission was incorrect: "Were Roman law and usage as Judge Daniel represents them, or were they not? We undertake to show that they were not" ³⁶⁴ Similarly, Senator Thomas Benton published an entire volume, a "Historical and Legal Examination" of *Dred Scott*. Although the introduction attacks the decision in various ways (none countermajoritarian) the volume itself is dedicated to criticizing the merits, largely through the lens of history.³⁶⁵ Much of the other criticism of *Dred Scott*, as will be evident in a moment, related to the impropriety of judges *departing* from their legal task and engaging in political activity.³⁶⁶ In light of the formal-

³⁶¹ White, *supra* note 343, at 51 (noting further that principles of Constitution were intended to endure over time and judges were not free to replace constitutional principles with their own partisan concerns). "[N]o sharp separation existed, in constitutional discourse, between morality, constitutional politics and law." *Id.* at 50.

³⁶² Morton J. Horwitz, *The Transformation of American Law, 1780-1860*, at 254, 259 (1977) (writing that mercantile and entrepreneurial interests had gained enough control over legal profession so that doctrine favored their interests).

³⁶³ 2 Warren, *supra* note 53, at 300.

³⁶⁴ T.D. Woolsey, *Opinion of Judge Daniel, in the Case of Dred Scott*, 15 *New Englander* LIX 345, 348 (Aug. 1857).

³⁶⁵ See Thomas Hart Benton, *Historical and Legal Examination of That Part of the Decision of the Supreme Court of the United States in the Dred Scott Case Which Declares the Unconstitutionality of the Missouri Compromise Act, and the Self-Extension of the Constitution to Territories, Carrying Slavery Along With It* (Johnson Reprint Co., 1970) (1857).

³⁶⁶ See *infra* text accompanying notes 383-85.

ism of the times, scant countermajoritarian criticism was to be expected.

4. *Emerging Judicial Supremacy*

Whatever the impact of the other factors, the critical factor accounting for slim countermajoritarian criticism of *Dred Scott* was the question of judicial supremacy. This is where the politics happened, where the battle was fought, and where the lines were defined within which the Republican attack on the Court had to take shape. The discussions of judicial supremacy during this period were more robust than during any other period studied thus far. Even arguments about the decision unrelated to supremacy were really about supremacy, for the Republicans sought to criticize and avoid *Dred Scott* without challenging the Supreme Court directly. It is during this period that a subtle shift began toward a more modern conception of the role of the Court. It is ironic that the shift occurred at the same time as such a reviled decision was rendered, but it is true.

Before detailing the shift in views on supremacy, it is useful to see how they worked in tandem with the countermajoritarian criticism. As indicated earlier, countermajoritarian commentary was infrequent, but what is interesting is that, just as in the Age of Jackson, when it surfaced it did so in the context of speakers willing to accord supremacy to judicial decisions, or of speakers who indicated a countermajoritarian problem would be presented *if* judicial decisions were supreme. Thus, for example, the Republican *Albany Evening Journal* seemed to accept the Supreme Court's judgment in *Dred Scott* as authoritative, but this is the very paper that also fumed in countermajoritarian terms.³⁶⁷ On the other side of the coin, and perhaps the most famous example, in a much quoted portion of his first inaugural address, Abraham Lincoln appeared to deny supremacy precisely because of the countermajoritarian problem, stating that "if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers."³⁶⁸

For the most part, however, views about the merits of *Dred Scott* reflected what one was willing to say about judicial supremacy. Those satisfied with *Dred Scott* vaunted the absolute supremacy of the Supreme Court, but such expressions were often purely political ploys and as such not easy to credit. For example, the *Charleston Courier* was confident the *Dred Scott* decision would "settle these vexed ques-

³⁶⁷ See *supra* note 345 and accompanying text.

³⁶⁸ First Inaugural Address, in *The Writings of Abraham Lincoln* 646, 654 (1861).

tions forever," a surprising opinion coming as it did from the heart of the state that had urged the principle of nullification so recently.³⁶⁹ Senator Fessenden observed the switch, as did others, remarking:

It seems that when the decisions are one way by the Supreme Court of the United States, gentlemen of the South say "the judges are partisan judges; they cannot settle constitutional questions for us; those are political matters." When, however, they undertake extra-judicially to give opinions not called for by the point before them . . . we are told all this is law.³⁷⁰

Other expressions supporting judicial supremacy were equally disingenuous. Falling easily into this camp was President Buchanan, who at his inauguration discussed the question of slavery in the territories, and the pending *Dred Scott* decision:

This is happily a matter of but little practical importance. Besides, it is a judicial question which legitimately belongs to the Supreme Court of the United States before whom it is now pending, and will, it is understood, be speedily and finally settled. To their decision, in common with all good citizens, I shall cheerfully submit, whatever this may be . . .³⁷¹

Cheerful submitting was done by many of the day, gambling on the outcome. Lincoln, ironically, was among this group, and like other Presidents-to-be before him would have to repudiate his views.³⁷² But Buchanan was in a special position: he knew the outcome because Justice Grier had written him and told him.³⁷³ Submitting, cheerfully or otherwise, to "supreme" authority is easy if the authority's decision is already known.

Many of the "pro-*Dred Scott*" supremacy claims appear problematic. Senator Douglas strongly defended the supremacy of the deci-

³⁶⁹ See Daily Courier (Charleston), Mar. 9, 1857, reprinted in Kutler, *supra* note 342, at 54. Another paper praised the Court for being "elevated above the schemes of party politics, and shielded alike from the effects of sudden passion and of popular prejudice." Daily Union (Wash., D.C.), Mar. 12, 1857, reprinted in Kutler, *supra* note 342, at 52.

³⁷⁰ Kutler, *supra* note 342, at 57 (quoting Sen. Fessenden).

³⁷¹ 2 Warren, *supra* note 53, at 297-98 (quoting James Buchanan at his Inaugural Address).

³⁷² In a speech several months before the decision, Lincoln said, "'The Supreme Court of the United States is the tribunal to decide such a question, and we will submit to its decisions; and if you do also, there will be an end of the matter. Will you? If not, who are the disunionists,—you, or we?'" 2 Warren, *supra* note 53, at 330 n.1 (quoting speech of Abraham Lincoln at Galena, Ill. (Aug. 1, 1856), in 2 Works of Abraham Lincoln (Federal Ed., 1905)).

³⁷³ See 2 Warren, *supra* note 53, at 294-95. Grier's letter was in response to a letter from Buchanan, who himself wrote Grier at the behest of Justice Catron. See *id.* at 295 n.1 (quoting 10 Works of James Buchanan 106 (1908-1911)).

sion in the Lincoln-Douglas debates³⁷⁴ but as Lincoln pointed out, Douglas could not really reconcile his own position of popular sovereignty in the territories with the decision.³⁷⁵ Other expressions of support for the supremacy of the decision seemed to be wishful thinking. Many of the latter explicitly recognized that the decision was bound to be reversed in the end through processes peaceful or otherwise.³⁷⁶ Some of the more strident positions apparently were uttered to put the decision's opponents in the box of opposing the Court.³⁷⁷

Republican views of supremacy in light of *Dred Scott* were equally ambiguous. The common view, of course, is that Lincoln stood up to the Court, questioning its supremacy. There certainly are statements that support this. Lincoln accepted, as did others, the binding nature of the decision as to the parties before the Court, but denied that the Court could bind people in future cases.³⁷⁸ This was a question of importance well beyond the holding of *Dred Scott*: pend-

³⁷⁴ See Stephen Douglas, Douglas's Reply, The Sixth Joint Debate, Oct. 13, 1858, reprinted in *The Lincoln-Douglas Debates* 303-04 (Harold Holzer ed., 1993) [hereinafter Holzer] (stating that he knew "of but one mode of reversing judicial decisions, and that is by appealing from the inferior to the superior court; but [he had] never yet learned how you can appeal from the Supreme Court of the United States"); see also *id.* at 275-76 (quoting Stephen Douglas, Douglas's Rejoinder, The Fifth Joint Debate, Oct. 7, 1858) (declaring that he will stand by laws of land, as declared by Supreme Court); *id.* at 303 (wondering why Lincoln persists in discussing *Dred Scott*, "when under the Constitution a Senator has no right to interfere with the decisions of the judicial tribunals . . .—a question that he could not vote upon if he was in Congress" (quoting Stephen Douglas, Douglas's Reply, The Sixth Joint Debate, Oct. 13, 1858)); Stephen Douglas, *The Lincoln-Douglas Debates: 1858*, reprinted in Kutler, *supra* note 342, at 71 (asserting that once the Supreme Court's decision is made, "my private opinion, your opinion, all other opinions must yield to the majesty of that authoritative adjudication").

³⁷⁵ See Holzer, *supra* note 374, at 316 ("Judge Douglas had sung paeans to his popular sovereignty doctrine until the Supreme Court decision had squatted his popular sovereignty out of the way.") (quoting Abraham Lincoln, Lincoln's Reply, The Sixth Joint Debate, Oct. 13, 1858)).

³⁷⁶ See, e.g., *Nat'l Intelligencer*, May 29, 1857, at 4 (noting that Supreme Court has history of reversing its decisions when errors were committed); *The Dred Scott Decision—Our Anti-Slavery Journals and their Revolutionary Tendencies*, N.Y. Herald, Mar. 15, 1857, at 4 (describing "legitimate alternative" of North to change decision by changing members of Supreme Court); *The Supreme Court Decisions on the Slavery Question—Reconstruction of Parties and Party Platform*, *supra* note 348 (predicting that every future election would revolve around "the changes of the Supreme Court Judges necessary to reverse [the *Dred Scott* decision]"); N.Y. Daily Trib., Mar. 11, 1857, at 4 (predicting day when "different Judges, sitting in this same Court, shall reverse this wicked and false judgment").

³⁷⁷ See *The Decision of the Supreme Court in the Dred Scott Case, and its Tremendous Consequences*, N.Y. Herald, Mar. 8, 1857, at 4 (calling any disobedience to judgment "rebellion, treason and revolution," and directing Republican party to "choose between submission and revolution—loyalty or treason to the government").

³⁷⁸ See *supra* text accompanying note 368. Lincoln and the Republicans rejected the notion that *Dred Scott* should act as "a political rule . . . binding upon the man when he goes to the polls to vote, or upon the member of Congress, or upon the President, to favor

ing in the courts was the *Lemmon* case, in which the question seemed to arise whether states could ban slavery within their borders.³⁷⁹ The bait on Republican hooks for the likes of Douglas was whether a decision to that effect ought to have the same binding effect that they insisted should be accorded *Dred Scott*. Lincoln distinguished his view of supremacy from Douglas's by saying that to Douglas Supreme Court decisions were a "thus saith the Lord":

no measure that does not actually tally with the principle of that decision." Holzer, *supra* note 374, at 291.

Lincoln often cited the views of General Jackson and Thomas Jefferson to support his theory that Supreme Court decisions should not have great binding effect. See Holzer, *supra* note 374, at 264 ("Mr. Jefferson said that judges are as honest as other men, and not more so." (quoting Abraham Lincoln, Lincoln's Reply, The Sixth Joint Debate, Oct. 13, 1858)); *id.* at 316 (quoting Lincoln relying on Jackson's theory that while each man was bound to support Constitution, if he did not believe judicial decision was correct interpretation of Constitution, he was not bound to support that judicial decision). Lincoln also liked to point out that Douglas had a history of fighting state supreme court decisions. See Holzer, *supra* note 374, at 76 ("He is bespattered from the beginning of his life with war upon the courts, and at last he hangs with desparation [sic] to the *Dred Scott* decision.").

Several members of Congress expressed similar views. See Cong. Globe, 35th Cong., 2d Sess. 1249, 1250 (1859) (speech of Sen. Wade) (rejecting notion that Supreme Court of United States "has become the appointed expounder of Democratic principles" with sarcastic "Since when?" and denying that question of territories was even before Supreme Court to decide); Cong. Globe, 35th Cong., 1st Sess. 1115 (1858) (speech of Sen. Wade) (renouncing idea that "the Senate of the United States, like poor *Dred Scott*, are barred and thrown out of court" and denying "that these judges, holding their office for life, reposing with total immunity, have any right to decide the law of the land for every department of this Government"); Cong. Globe, 35th Cong., 1st Sess. 616 (1858) (speech of Sen. Fessenden) (stating that decision "is binding so far, and so far alone, as it can issue its mandate. Its opinion is of force only upon the question which settles the cause.").

Newspapers also chastised the Court for overstepping its authority. See, e.g., Power of the United States Courts, N.Y. Evening Post, Mar. 14, 1857, at 2 (asserting that authority of courts of United States is confined to certain "cases" and certain "controversies" and is "not to act as the interpreter of the constitution for the other branches of government").

³⁷⁹ *Lemmon v. People*, 20 N.Y. 562 (1860), would have presented the Court with a case in which some slaves were freed by writ of habeas corpus when the owner brought them through New York on his way to Texas. The Court would have had to decide whether slaveholders had any rights whatever within a free state, aside from provisions for the recovery of runaway slaves. Given the Court's ruling in *Dred Scott*, many feared that this second decision would extend federal protection to temporary slaveholding in the free states, leading toward nationalization of slavery. See Fehrenbacher, *supra* note 335, at 444-45.

Many papers voiced this fear. See, e.g., The Issue Forced Upon Us, Albany Evening J., Mar. 9, 1857, at 2:

The Lemmon case is on its way to this corrupt fountain of law. Arrived there, a new shackle for the North will be handed to the servile Supreme Court, to rivet upon us. . . . [I]t shall complete the disgraceful labors of the Federal Judiciary in behalf of Slavery. . . . The Slave breeders will celebrate it as the crowning success of a complete conquest.

See also Harper's Weekly, Mar. 28, 1857, at 1, 1 (foreseeing *Lemmon* case and commenting that "all these slave cases are sour enough").

[Douglas] sticks to a decision that forbids the people of a territory to exclude slavery, not because he says it is right in itself, but because it has been decided by a court—because it has come from that court, he, as a good citizen, and you, as good citizens are bound to take it in your political action—not that he judges of it on its merits, but because the decision of the court is to him a “thus saith the Lord.” He places it upon the ground, and you will bear in mind that this commits him to the next one just as much as this. He does not commit himself to it because of its merits, but because it is a “thus saith the Lord.”³⁸⁰

5. *Ducking Supremacy*

Fine and well, but if opponents of the decision were not to be bound, what to do about it? This was the question on the lips and pages of many pro-slavery partisans, and certainly one that the opponents of the decision felt they had to answer.³⁸¹ Unlike Jefferson's time, when he could pardon those prosecuted under the Sedition Act or refuse to deliver commissions, *Dred Scott* posed a real problem. Was the Republican position that slavery should simply be banned in the territories, despite the views of the Court, and enforced by Executive will, also in contravention of the Supreme Court's holding?

³⁸⁰ Holzer, *supra* note 374, at 75 (quoting Lincoln).

³⁸¹ The Democratic papers could not see any legal course of action for the Republicans to follow. See *The Dred Scott Decision—Our Anti-Slavery Journals and their Revolutionary Tendencies*, *supra* note 376 (stating that “between a loyal submission and a seditious resistance there is no choice”); *The Dred Scott Case in the Pulpit*, *N.Y. Herald*, Mar. 17, 1857, at 4 (asking, “Can this sort of abuse alter the decision?”).

The Republican papers generally answered that they meant to see future decisions go the other way. See *N.Y. Daily Trib.*, Mar. 12 1857, at 4 (“We mean to show that this *Dred Scott* decision is deficient in every element which should entitle it to respect—that it violates the truth of history and the logic even of the law; and in our humble way, we mean to assist in getting it overruled.”); *N.Y. Daily Trib.*, Mar. 16, 1857, at 4 (“We mean to show that a decision of the Supreme Court, though formidable, is not irreversible.”).

The Republican papers went on to assert their right to criticize the decision. See *N.Y. Daily Trib.*, Mar. 16, 1857, at 4 (claiming that if this is treason, “at least we shall have the satisfaction of hanging in respectable company. Upon these points Judge Curtis is quite as great a traitor as we are, and quite as likely to swing for it under this new definition of treason.”); *N.Y. Daily Trib.*, Mar. 12, 1857, at 4 (spewing that judges “are [not] so far elevated above the level of ordinary mortality” that it is treason to question correctness of decision, and that “we do not mean to submit slavishly to fraud and usurpation because the ermine is interposed to cloak their character”).

Finally the *New York Daily Tribune* told the *Journal of Commerce* to “howl itself hoarse in shouting over the *Dred Scott* decision as ‘authoritative and irreversible’” because “that decision will carry no weight with the public mind, and will do nothing toward settling the interpretation of the Constitution, except so far as the reasons on which it is founded shall stand the test of sharp criticism and rigorous examination.” *N.Y. Daily Trib.*, Mar. 21, 1857, at 4.

Reflecting the constitutional formalism of the times, *Dred Scott* opponents employed every device they could muster to avoid confronting *Dred Scott* head on and thus the question of judicial supremacy. The most common argument was the obiter dicta argument: because the Court had decided *Dred Scott* lacked standing to sue, the holding as to Congress's power was dicta and not binding.³⁸² The decision was deemed illegitimate for a variety of other reasons. It was a "political question" that the Court should not have addressed.³⁸³ The decision was part of a conspiracy between the Court

³⁸² Senators derided the opinion:

I allude to the late nefarious decision of your Supreme Court

. . . .

No court in this Union has been heretofore more chary of giving decisions that were not called for by the case, than the Supreme Court of the United States. They have always repudiated it. They would never go further than the necessities of the case required them to go.

Cong. Globe, 35th Cong., 1st Sess. 1114 (1858) (speech of Sen. Wade). Anything uttered after they decided the case was "a mere obiter dictum, entitled to no more respect than though it had been delivered here or in the streets." *Id.* (speech of Sen. Wade); see also *id.* at 1004 (speech of Sen. Hamlin):

This opinion of the court—mark the word I use; I do not call it the decision of the court, for I regard it only as the opinion of the judges individually—is given upon a question which they tell us gravely is not before them. . . . I hold that they had no more right to decide upon that question than we have to decide for them. It was a political question purely. . . . Of all despotisms upon earth, the despotism of a judiciary is the worst.

Republican newspapers also scorned the dicta. See *Extent of the Decision of the Dred Scott Case*, N.Y. Evening Post, Mar. 12, 1857, at 2 (stating that dicta "must be regarded as extra-judicial and as having no more authority than the conversations of the judges held in the street"); *The Political Judges and Their Belongings*, N.Y. Daily Trib., Mar. 17, 1857, at 5 ("The opinion, being outside of the case, or, as the lawyers term it, extra-judicial, has, happily, no legal bearing or control upon the Courts, either State or Federal."); N.Y. Daily Trib., Mar. 10, 1857, at 4 ("The opinions expressed are merely obiter dicta—indeed, they are hardly that. They are rather to be looked upon as a stump speech embodied into a judicial opinion, with the view of giving to it, by reason of the place of its delivery, a weight to which otherwise it would have no title.").

Contemporary law reviews also reasoned that the dicta was not binding. See, e.g., Howard, *supra* note 329, at 75 (claiming that Court's discussion of merits of case, once it decided it did not have jurisdiction, was without authority). Lincoln's Attorney General mused that "as a necessary legal consequence . . . whatever was done in the circuit court after the plea in abatement, and touching the merits of the case, was simply void, because done *coram non judice*." 10 Op. Att'y Gen. 409-13 (1866). See generally Lasser, *supra* note 325, at 34; Zarefsky, *supra* note 343, at 9, 116.

³⁸³ See *The Decision of the Supreme Court*, N.Y. Daily Trib., Mar. 10, 1857, at 6 (noting that "[t]he Court has rushed into politics voluntarily, and without other purpose than to subserve the cause of Slavery. They were not called, in the discharge of their duties, to say a word about the subject. . . . They consented with unseemly haste to dabble in the dirty waters of political corruption."); N.Y. Daily Trib., Mar. 10, 1857, at 5 (declaring that the Court "has abdicated its just functions and descended into the political arena. It has sullied its ermine; it has dragged and polluted its garments in the filth of Pro-Slavery politics. From this day forth it must stand in the inexorable judgment of impartial history as a self-disgraced tribunal."); Nat'l Intelligencer, Mar. 29, 1857 ("That the Supreme Court should

and the incoming administration.³⁸⁴ The members of the Court were “slaveholders” or allied with slave interests, and had simply delivered a partisan harangue.³⁸⁵

have been called at all to pronounce upon questions involved in political controversy must be a matter of regret to all who would desire to preserve that high tribunal not only from the influence of partisan bias in pronouncing decisions, but from even the suspicion of it on the part of any considerable portion of the community.”)

³⁸⁴ Many onlookers were suspicious of a conversation between President Buchanan and a Supreme Court Justice right before he gave his inauguration speech. See, e.g., Cong. Globe, 35th Cong., 1st Sess. 1004 (1858) (speech of Sen. Hamlin) (referring to conversation as “political complicity and collusion”); Cong. Globe, 35th Cong., 1st Sess. 941 (1858) (speech of Sen. Seward) (calling whole inauguration ceremony “a pageant”).

The Republican newspapers were quick to speculate on conspiracy theories. “We say frankly that we do not believe that this Dred Scott decision, the most important ever given in that tribunal, could have been wrenched from magistrates who were not under the undue influence of Slavery, and thinking so, we shall say so.” N.Y. Daily Trib., Mar. 12, 1857, at 4. “It is certainly a little curious that every measure of legislation which either directly or indirectly seeks to retard the spread of Slavery, is at once discovered by certain people to be unconstitutional. Those india-rubber instruments which we call Constitutions are wonderfully expansive and contractile . . .” N.Y. Daily Trib., Mar. 21, 1857, at 4; see also *The Dred Scott Case*, Albany Evening J., Mar. 11, 1857, at 2 (crediting slavery institution with “a conquest of all the subordinate courts of Law in the law-abiding North”); *The Issue Forced Upon Us*, Albany Evening J., Mar. 9, 1857, at 2 (claiming that “[t]he conspiracy is nearly completed. The Legislation of the Republic is in the hands of this handfull of Slaveholders.”); *The Supreme Court of the United States*, supra note 336 (declaring that “[a] conspiracy has been entered into of the most treasonable character; the justices of the Supreme Court and the leading members of the new administration are parties to it”). See generally Lasser, supra note 325, at 34-35 (noting charges that Court was tool of slave power and that Lincoln saw all events from 1854 to 1857 as “almost complete legal combination-piece of machinery”).

³⁸⁵ See N.Y. Daily Trib., Mar. 21, 1857, at 4 (wondering “[w]hich of the Pro-Slavery Judges, we should like to know, owes his appointment exclusively or in any considerable degree to his eminence as a jurist or to his character as a man?”); *Opinions of the U.S. Supreme Court in the Dred Scott Case*, Albany Evening J., Mar. 7, 1857, at 2 (commenting that “[i]t is no novelty to find the Supreme Court following the lead of the Slavery Extension party, to which most of its members belong. Five of the Judges are slaveholders, and two of the other four owe their appointments to their facile ingenuity in making State laws bend to Federal demands in behalf of ‘the Southern Institution.’”).

Some papers concluded that the Court’s decisions on slavery were a done deal before the case was ever heard. See, e.g., *The Supreme Court*, Albany Evening J., Mar. 19, 1857, at 2 (asserting that “[t]he advocate who pleads there against Slavery, wastes his voice in its vaulted roof, and upon ears stuffed sixty years with cotton. His case is judged before it is argued, and his client condemned before he is heard.”); *Nat’l Intelligencer*, Mar. 29, 1857 (predicting that “[t]he nature of the decision can almost certainly be foretold by a careful analysis of the political or geographical status of the members of the Court”).

As for partisanship, the most famous comment came from the *New York Daily Tribune*: “This decision, we need hardly say, is entitled to just so much moral weight as would be the judgment of a majority of those congregated in any Washington bar-room. It is a dictum proscribed by the stump to the bench—the Bowie-knife sticking in the stump ready for instant use if needed.” N.Y. Daily Trib., Mar. 17, 1857, at 4. The paper also explained that “[a]ny slavedriving editor or Virginia bar-room politician could have taken the Chief Justice’s place on the bench, and with the exception of a little bolder speaking up, nobody would have perceived the difference.” N.Y. Daily Trib., Mar. 10, 1857, at 4.

But ultimately those opposing the supremacy of the Court's pronouncement had a problem, for they were stuck between adherence to the decision and arguing for open defiance, a position that by the time of *Dred Scott* they were unprepared to take.³⁸⁶ Something had changed since Jefferson's time, or perhaps the nature of the issue brought the problem into sharp focus. The tension is palpable in this speech from Senator Seward, an avid opponent of slavery and *Dred Scott*:

[T]he Supreme Court of the United States attempts to command the people of the United States to accept the principles that one man can own other men; and that they must guaranty the inviolability of that false and pernicious property. The people of the United States never can, and they never will, accept principles so unconstitutional and so abhorrent. Never, never. Let the court recede. Whether it recedes or not, we shall reorganize the court, and thus reform its political sentiments and practices, and bring them into harmony with the Constitution and with the laws of nature. In doing so, we shall not only reassume our own just authority, but we shall restore that high tribunal itself to the position it ought to maintain, since so many invaluable rights of citizens, and even of States themselves, depend upon its impartiality and its wisdom.³⁸⁷

And in fact many of the proposals as to what to do about *Dred Scott* were by today's standards a perfectly legitimate understanding of how to change Supreme Court decisions. Many of the speakers simply said that they would see the decision reversed, without specifying how.³⁸⁸ Frequent reference was made to the appointments process as a way of changing the membership.³⁸⁹ Indeed, the latter prompted

Interestingly, despite the charges of slaveholding, Zarefsky says that none of the Court's members were slaveholders. See Zarefsky, *supra* note 343, at 8 (describing Court as strongly pro-Southern, though not pro-slavery); see also 2 Warren, *supra* note 53, at 269 (noting that only one pro-slavery Justice had been appointed after 1840).

³⁸⁶ See Lasser, *supra* note 325, at 56-57 (noting that although *Dred Scott* and contemporary membership of Court was attacked, Court as institution was not); Court and Constitution, Albany Evening J., Mar. 10, 1857, at 2 ("[The framers] created the Constitution, and the Constitution created Chief Justice Taney—the clay which now affects to despise the skill of the Potter."); see also Fehrenbacher, *supra* note 335, at 439 (pointing out that debate was not about power of judicial review, but rather about range of that power); Zarefsky, *supra* note 343, at 10 (describing how Republicans were careful in criticizing decision not to "impugn the legitimacy of the Supreme Court"); *id.* at 116 (showing how Republicans used obiter dicta argument to keep from making direct challenge to Court).

³⁸⁷ Cong. Globe, 35th Cong., 1st Sess. 943 (1858) (speech of Sen. Seward).

³⁸⁸ See, e.g., The Decision of the Supreme Court, *supra* note 383 ("What has been done will be undone. For the Court, instead of planting itself upon the immutable principles of justice and righteousness, has chosen to go upon a temporary and decaying foundation.")

³⁸⁹ See, e.g., The Supreme Court Decisions on the Slavery Question—Reconstruction of Parties and Party Platforms, *supra* note 348 (predicting that *Dred Scott* would cause "comprehensive reconstruction of our political parties and their platforms," revolving around

a response from Douglas that sounds remarkably like today's discussions of litmus tests for court candidates.³⁹⁰

The most popular suggestion, and the one that ultimately was adopted, however, is intriguing because it is in some sense legitimate by modern standards, and in another sense probably not so. Speaker after speaker discussed "reorganizing" the Court.³⁹¹ When a rationale was given it had to do with interesting notions of representation. The feeling was that the South, and slaveholders, had a disproportionate number of seats on the Court, and the solution was to adopt a geographical allocation method that was more representative of the country.³⁹² The representative nature of the arguments sounds curious to modern ears. And, it smacks of Court-packing, seemingly disfavored after the New Deal.³⁹³ But by the same token, there seemed to be legitimate reasons for reorganizing the Court into more uniform and orderly circuits; this coupled with a notion that a circuit justice should come from the circuit to which he is assigned, accomplished the same goal in an apparently acceptable manner.³⁹⁴

issue of "changes of the Supreme Court Judges necessary to reverse the majority of that ultimate tribunal").

³⁹⁰ "Suppose you get a Supreme Court composed of such judges, who have been appointed by a partisan President upon their giving pledges how they would decide a case before it arose, what confidence would you have in such a court?"

Would not your court be prostituted beneath the contempt of all mankind? What man would feel that his liberties were safe, his right of person or property was secure, if the supreme bench, that august tribunal, the highest on earth, was brought down to that low, dirty pool wherein the judges are to give pledges in advance how they will decide all the questions which may be brought before them? It is a proposition to make that court the corrupt, unscrupulous tool of a political party."

Kutler, *supra* note 342, at 76 (quoting Stephen Douglas in July 17, 1858 debate).

³⁹¹ See, e.g., *Freedom in Kansas*, in 4 *Speeches in the United States Senate* 574, 595 (1858) ("[W]e shall reorganize the court.").

³⁹² See Swisher, *supra* note 326, at 619 (noting proposal by Representative Stanton to bring Court more in line with population statistics that showed larger population in northern circuits); *N.Y. Daily Trib.*, Mar. 16, 1857, at 4 (suggesting, in reaction to *Dred Scott*, "[m]ak[ing] the Judicial Districts equal, let Judges be fairly selected therefrom").

³⁹³ David Silver notes that there were several proposals to pack the Court or to force older Democratic Justices to retire. See David M. Silver, *Lincoln's Supreme Court*, 38 *Ill. Stud. Soc. Sci.* 1, 131 (1956). Silver mentions a letter between Secretary of Treasury Chase and Lorenzo Sherwood discussing the support in Congress for a proposal to enlarge the Court by adding more circuit courts. See *id.* at 138 (citing Letter from Lorenzo Sherwood to Salmon P. Chase (Jan. 6, 1864)). Indeed, there were calls for a "retirement plan" that evokes images of Roosevelt's ideas for taming his Court. See *id.* at 140. Judge Foot publicly supported plans to pack the court. See *The Supreme Court's Decision*, *Albany Evening J.*, Mar. 20, 1857, at 2.

³⁹⁴ The composition of the Court was ultimately transformed through the appointments process, with the appointment of five new Justices by 1864. One appointment, nevertheless, was due to a mild reorganization bill in 1863, which added a tenth circuit to address

What emerges from the extensive debate over supremacy is a critical point. Other than extremists, everyone had their vulnerability. Douglas and those who agreed with popular sovereignty could argue for acceptance of *Dred Scott* and judicial supremacy, though they really disagreed with the Court's decision.³⁹⁵ But those bitterly opposed like Lincoln and Seward were trapped as well by growing sentiment that judicial decisions were binding. In short, even while many were angry with the *Dred Scott* decision, the role of the Court was becoming a firmament of American democracy. It was not so established, and the times were not so populist, to give rise to countermajoritarian criticism. But rather than disregarding it, people were beginning to understand the need to find other ways to work around unpopular decisions. And they were beginning to understand their need for a Supreme Court.

CONCLUSION

The history of the countermajoritarian difficulty is framed by four factors: the extent to which courts interfere with popular will, the extent to which the public favors a relatively direct form of democracy, the extent to which there is skepticism about fixed constitutional meaning, and acceptance of judicial supremacy. This part of the history of the countermajoritarian difficulty has told of the early years, of challenges to judicial independence during the Jefferson years, of the conflict between states' rights proponents and judicial authority during the Era of Good Feeling and the presidency of Andrew Jackson, and the pre-Civil War conflict over *Dred Scott*. Central to this part of the history has been the idea of judicial supremacy.

The history of the countermajoritarian difficulty and the issue of judicial supremacy are irrevocably linked. When judicial decisions are not supreme, they can be ignored or defied, and no complaint need arise regarding judicial interference with popular will. Throughout this first period, the supremacy of Supreme Court pronouncements was tenuous, and thus for the most part countermajoritarian criticism slight. The only exception was the Jeffersonian period, because in the context of the peculiar struggles of the time, judicial actions were supreme enough to cause conflict, even if they were not generally accorded supremacy, and because the stakes of the broader battle to come were apparent to all. In the era of Jacksonian democracy, on the other hand, the Supreme Court's authority was flouted, and it was

long-standing problems of the rapidly growing western circuits. See Lasser, *supra* note 325, at 39.

³⁹⁵ See *id.* at 49.

not until the question became one of the Union's survival that Jackson himself seemed to stand behind the Court. Then, in the aftermath of *Dred Scott*, it became apparent that notions of judicial supremacy had gained wide acceptance, causing many at the time to struggle with arguments why the Court should not be obeyed.

This is but the first part of an involved story. In Part Two it will become clear that supremacy takes firm hold, framing the countermajoritarian problem sharply. During the period discussed in Part Two, courts exercising judicial review frequently found themselves at odds with the political branches. Notable instances were the Populist-Progressive era, characterized by *Lochnerizing* courts that invalidated social welfare legislation, and the New Deal struggle over the extent of the national government's powers to deal with economic crisis. Even the potential for judicial action was enough to create tension and conflict in this period, such as the post-Civil War Congress's concern that the Supreme Court would deem Reconstruction unconstitutional. In light of judicial supremacy, whether countermajoritarian criticism was at the fore depended primarily upon prevailing notions of democracy and very little on whether there was any determinate, fixed meaning to the Constitution. Indeed, that latter factor exacerbated challenges to judicial authority during the Populist-Progressive era with claims of malleable constitutional meaning, giving rise to the Legal Realist movement. Yet, during the New Deal, sentiments on this score shifted abruptly, with a frustrated public explicitly urging the Court to keep the Constitution current with the times.

Throughout the second epoch, in light of established judicial supremacy, the political branches searched for a creative check on the judiciary, but to little avail. During Reconstruction and the New Deal, it was Court-packing. During Reconstruction and the early years of the Warren Court, it was jurisdiction-stripping. In between, there were calls for referenda, judicial recall, Senate override of the Court, and judicial elections. When push came to shove in each instance, however, the public chose judicial independence over judicial subjugation, though there was a certain amount of judicial acquiescence with majority wishes as well.

Finally, the third epoch was ushered in as it became clear that judicial supremacy was strong, and overt political moves to curtail the Court were unlikely to find popular support. Two things happened during this period. First, popular defiance reappeared as a way of dealing with judicial supremacy, both flagrant (as in the aftermath of *Brown v. Board of Education*), and discrete (as in the case of the school prayer decisions). Second, although the public accepted much

of the work product of the Supreme Court during the Warren Court era, academics became extremely anxious about the Court's role. In particular, liberals who once found themselves attacking the Court were busy defending it while also trying to reconcile judicial authority with their instinct for popular governance. Out of this conundrum, Alexander Bickel's "countermajoritarian difficulty" was born.