The Transformation of the Republican Party: National Jurisprudence and Partisan Politics During the Civil War

by

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4	Roger B. Taney (D - MD)	Roger B. Taney	Roger B. Taney	**Salmon P. Chase (R - OH)**
5	[Peter Daniel (D - VA)]	James M. Wayne	James M. Wayne	James M. Wayne
6	James M. Wayne (D - GA)	John Catron	John Catron	John Catron
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8	John Catron (D - TN)	**David Davis (R - IL)**	**David Davis**	**David Davis**
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10			**Steven J. Field (R - CA)**	**Steven J. Field**

KEY:
[Bracket] - Vacant Seat and justice that previously held it
BOLD - Lincoln appointee

* Source: Silver, *Lincoln's Supreme Court*, 238 - 239; Gunther and Sullivan, Constitutional Law, B – 2, B – 3.

Introduction:
A National Jurisprudence and a National Judicial Strategy

On the mild afternoon of March 4, 1861, President-elect Abraham Lincoln stood on a platform on the East Portico in front of the United States Capitol and concluded his first inaugural address with a reminder and plea to his fellow countrymen from both northern and southern states that "We are not enemies but friends" and "must not be enemies."[1] As Lincoln finished those words, Roger B. Taney, the aging Chief Justice, "stood up" and approached him to administer the Presidential Oath of Office, which was a task he had performed since 1837. As he firmly read the Oath, a *New York Times* reporter observed, "The Chief Justice seemed very agitated, and his hands shook very perceptibly with emotion." Despite the tense situation, Taney was the "first person who shook hands with Mr. Lincoln"[2] Perhaps the jurist originally appointed by Andrew Jackson was apprehensive because he was pondering the new president's potentially hostile statements against the judiciary. Even though Lincoln claimed it is "assumed by some, that constitutional questions are to be decided by the Supreme Court," he emphasized that those decisions are binding only to the particular case in question and only "entitled to very high respect … in all parallel cases." In addition, Lincoln attacked the Court's ability to permanently decide "vital questions, affecting the whole people" because if the Supreme Court makes those types of decisions, "the people will have ceased, to be their own rulers" and will

[1] First Inaugural Address, March 4, 1861, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 4 2004), 271.

[2] New York *Times*, March 5, 1861. Microfilm Dickinson College Library.

have "resigned their government, into the hands of that eminent tribunal."[3] It was during this verbal lashing of the Court a different *New York Times* reporter recorded that "Judge Taney did not remove his eyes from Mr. Lincoln during the entire delivery," as he sat "in solemn dignity" dressed in a "silk gown and hat" on the red plush chairs borrowed from the Senate chamber. Another reporter observed that "Taney listened with the utmost attention to every word of the address."[4] Did the chief justice regret his decision in *Dred Scott v. Sandford* (1857) because it initiated numerous editorial attacks against the Supreme Court and aided with Lincoln's election? Or did the chief justice foresee an impending conflict between the executive and judiciary over the approaching Civil War? Despite his thoughts as he heard Lincoln criticize the Supreme Court, Taney knew the judiciary could perform a crucial role in the next and potentially final stage of the sectional conflict.[5]

One major justification for Taney's apprehension regarding Lincoln's election and the president's hostile stance toward the court in his Inaugural address revolved around the jurisprudential differences between the two men. Lincoln's opposition to Taney became evident in 1857 after the *Dred Scott* decision regarding the future of slavery in the territories and the rights of African Americans. This opinion demonstrated a recurring difference between the two men, which was a dispute over a basic interpretation of the Constitution and Declaration of Independence. Thus, at the time of Lincoln's inaugural, serious conflict existed between the chief justice and president; however, it possibly was not egregious enough to merit any major constitutional crisis. Yet the situation changed only before a few months later. While traveling

[3] First Inaugural Address, March 4, 1861, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 4 2004), 268.

[4] New York *Times*, March 5, 1861. Microfilm, Dickinson College Library.

[5] David M. Silver, *Lincoln's Supreme Court* (Urbana: University of Illinois Press, 1957), 6-7; Carl B. Swisher, *History of the Supreme Court of the United States*, vol. 4, *The Taney Period 1836 -64* (New York: Macmillan Publishing Co., Inc., 1974), 740-741.

on circuit in Maryland in June 1862, Chief Justice Taney issued a judgment against the government's suspension of *Habeas Corpus*. This opinion by Taney not only generated opposition to the court by newspapers and Congress, but also struck at the heart of Lincoln and Taney's jurisprudential differences. Furthermore, it helped to set the stage for circuit rearrangement and the addition of a tenth justice.

Following Taney's ruling, President Lincoln addressed the legal issues of the war before a July 4 Joint Session of Congress. In the speech, Lincoln justified the suspension of the writ and explained to Congress that the action was necessary to preserve the Union. Since in July 1862 the government had yet to achieve a major victory in the eastern theatre of the war, the president's actions might have been influenced by the army's abysmal performance. Following that speech, with additional losses by the Union Army, and further pending legal issues before the Supreme Court, Abraham Lincoln asked Congress in December 1862 to reorganize the federal judicial circuits. The rationale for circuit rearrangement was analogous to the reasons for the temporary addition of a tenth justice to the Supreme Court.

The tenth justice, among numerous concepts, symbolized a transformation of the Republican Party. In March 1863, Lincoln faced hostility over the war throughout the nation. His reelection prospects looked bleak. In response to this unpopularity, Lincoln began to change the image of the Republican Party to better reflect his nationalist views. The party subsequently shifted toward a Unionist label. The appointment of Stephen J. Field, a Democrat, as the court's new tenth justice during this period illustrates this transformation. By appointing a loyal Democrat, Lincoln expanded the base of the Republican Party, just as he tried to do in 1864 with the selection of Andrew Johnson, a Tennessee Democrat, as his new vice-presidential running-mate. Judicial rearrangement and the tenth justice also served to fulfill the

motives of other Republicans in expanding their party geographically. Both of these processes created a total of two new judicial circuits west of the Mississippi River --an area where Republicans wanted to establish themselves. Thus, changes in the judiciary helped the Republican Party become more national. The tenth justice also reflected a desire by Republicans to alter the partisanship of the court and further remove it from longstanding control by the southern-dominated Democratic Party. Since the court was the last major federal institution that Republicans did not possess and because numerous cases dealing with the legality of Lincoln's actions during the war would be heard before the court, Republicans felt that an additional justice might intimidate the Supreme Court into holding the president's actions as constitutional and force the judiciary to adhere to his nationalist jurisprudence.

The Civil War was a period in American history that tested numerous legal questions. The first challenge to the rule of law was secession. Could a state peacefully leave the Union, or was the Constitution, as historian Daniel Farber argues, a contract? Lincoln's response was that neither mattered because the Union existed before the ratification of the Constitution. This conclusion demonstrated Lincoln's nationalist jurisprudence, which governed his actions through the sectional conflict. Guided by his jurisprudential philosophy, Lincoln suspended the Writ of *Habeas Corpus* in 1861 in reaction to threats of sabotage along the railways into Washington. In response to the president's actions, Chief Justice Taney declared them unconstitutional because only Congress possessed the power to suspend *habeas corpus*. This ruling by Taney presented Lincoln with a crucial decision. Was he to permit "all the laws, but one to go unexecuted, and [let] the government itself go to pieces," and consequently let the South and Border States succumb to mob rule?[6] Or should Lincoln disobey Taney's ruling and adhere to his own

[6] Message to Congress in Special Session, Washington D.C., July 4, 1861, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln.

nationalistic interpretation of the Constitution? Ultimately, the president faced a pivotal moment with the Chief Justice. Lincoln's nationalist jurisprudence produced conflict with the court.

Lincoln's other response to secession was a blockade of the southern ports. He deemed this a necessary action for the Union in order to win the war. The president based his justification of the blockade on the same grounds that he used to validate the suspension of *Habeas Corpus*, which were both products of his nationalist jurisprudence. In response to the implementation of the blockade a series of legal cases (know as the *Prize Cases*) came before the Supreme Court. The situation was set for another possible conflict between the nationalistic jurisprudence of the president and the legal philosophy of Taney.

Secession, suspension of *Habeas Corpus*, and the *Prize Cases* were three of the most significant challenges to the rule of law during the Civil War. In each of those three issues numerous questions existed that directly dealt with the legality of Lincoln's actions and the application of his philosophy of law. Ultimately, these three issues demonstrate how Lincoln's nationalistic jurisprudence is relevant to a study about the organization of the Supreme Court and the federal judiciary. Since these legal cases and others involving the war would eventually come before the courts, it was prudent for the administration to have judges and justices who shared Lincoln's view of the Constitution.

The two other major challenges to the rule of law during the Civil War directly related to the organization and composition of the judiciary. In Lincoln's December address to Congress, he asked the members to reorganize the judicial circuits. The location of the circuits was significant because each Supreme Court justice was a resident of the circuit where he was appointed. Two forces combined during circuit rearrangement. Lincoln's desire to have justices appointed with similar views combined with the ambition of congressional Republicans to

expand their political base. Thus, through the process of circuit rearrangement the court became further integrated into the war effort because it permitted Lincoln to appoint justices who would be more sympathetic to the administration's war aims. The appointment of Steven J. Field, the tenth justice, to the Supreme Court in March 1863 was a significant moment for both Lincoln and Congress and also signified another attempt by Congress to incorporate the court into the war. Even though Lincoln's appointees were still within the minority, the court's expansion to ten further enhanced the Unionist influence and helped ensure that Lincoln's nationalistic view would be supported by at least four justices.

One of the crucial characteristics that defined Lincoln's actions throughout the Civil War was his nationalistic jurisprudence. In one of the most recent works on this subject, constitutional scholar Daniel Farber in *Lincoln's Constitution* (2003) analyzes this jurisprudence. Through the examination of secession, individual rights, and war time powers of the president, Farber concludes that Lincoln's reactions to those circumstances derived from his perspective on the Constitution and Union. The first tenet of this nationalist jurisprudence viewed the Union as perpetual. According to Farber and Lincoln, the Union originated with the signing of the Declaration of Independence; therefore it not only preceded the Constitution, but also was designed to further the ideals described in the Declaration. The second aspect of Lincoln's nationalist jurisprudence was evident in his July 4, 1861 speech to Congress in support of the suspension of the Writ of *Habeas Corpus*. In that address, Farber claims that Lincoln's actions were "taken in response to public demand and necessity," and were justified because of his "*reverence for the constitution and laws*." This combination of public necessity and respect for the rule of law further defined Lincoln's jurisprudential philosophy. Even though he chose to "violate a single law," Lincoln only did so in order to ensure that "one-third of the States" did

not violate all the laws, because that action was more egregious to the Union and his beliefs.[7] Ultimately, Farber concludes that Lincoln's nationalistic jurisprudence was the most significant factor in the president's decisions.

Other scholars besides Farber address Lincoln's jurisprudence and its effects on the Civil War; however, they do not provide as much insight on this point as Farber. One such historian, Harry V. Jaffa in *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War* (2000), describes Lincoln's view of the Union as perpetual. In an argument similar to Farber's, Jaffa argues that Lincoln placed the Declaration of Independence on the same level of importance as the Constitution. The Declaration was the "soul" and spirit of the country, Jaffa writes, because it espoused the ideals that the "body" of the nation, the Constitution, was created to further.[8] Accordingly, the scholar expanded upon that notion and justified Lincoln's suspension of the Writ of *Habeas Corpus* and other wartime measures because they were enacted to save the Union and the ideals it advanced. This nationalist jurisprudence especially becomes evident with the suspension of *Habeas Corpus*. According to Jaffa, Lincoln rationalizes the suspension on its necessity to save the Union. The president believed that if he did not intervene anarchy would result because the rule of law was destroyed.[9] This notion further connects to the president's jurisprudence. Lincoln's actions consistently were geared toward a national objective, which was the preservation of the Union.

Roger B. Taney, however, did not share Lincoln's view of the Union, and especially did not ascribe to the president's nationalist jurisprudential philosophy. According to Carl B. Swisher, the leading scholar on the former chief justice, Taney's opposition to Lincoln in *Ex*

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[7] Daniel Farber, *Lincoln's Constitution* (Chicago: The University of Chicago Press, 2003), 194.

[8] Harry V. Jaffa, *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War* (New York: Rowman & Littlefield Publishers, Inc, 2000), 302.

[9] Ibid., 365.

parte Merryman was "worthy of the deepest respect" because upholding the laws and values of a society, even during war, is crucial.[10] Swisher believes that Taney "regarded the dissolution of the Union as less disastrous than the reign of coercion that would be necessary to save and maintain it," while Lincoln, on the other hand, preferred to violate the Constitution rather than let the Union collapse.[11] This is a critical divergence between the jurisprudential thought of Lincoln and Taney. Despite the importance of the Union, Taney believed that law and due process rights could not be ignored. Consequently, Swisher infers, the chief justice did not oppose Lincoln's war measures because he sympathized with the South, but because he simply interpreted the Union as subordinate to the Constitution. Quoting Taney, Swisher writes, "A civil war or any other war does not enlarge the powers of the federal government.[12]" Taney believed that even during a dire situation, the rights guaranteed in the Constitution and Bill of Rights should not be disregarded. When the president suspended the Writ of *Habeas Corpus*, the chief justice's greatest fear became realized. Society was in danger, he wrote in *Merryman*, because "the people of the United States are not longer living under a government of laws."[13] The key difference between Lincoln and Taney was not an issue regarding the war, but rather a fundamental divergence in philosophical thought. Lincoln's national jurisprudence placed the Union as the supreme entity of the nation. Chief Justice Taney, on the other hand, viewed the preservation of written law as the government's and court's foremost priority.

Despite the divergent legal opinion between the president and chief justice and the important role the judiciary played in shaping the country's domestic policy; most leading Lincoln historians do not address the 1863 judicial restructuring or the 1864 addition of a tenth

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[10] Carl B. Swisher, *Roger B. Taney* (New York: The Macmillan Company, 1935), 560.
[11] Ibid., 555.
[12] Ibid., 567.
[13] Samuel Tyler, *Memoir of Roger Brooke Taney, LL.D: Chief Justice of the Supreme Court of the United States* (Baltimore: John Murphy & Co., 1872), 659.

justice in their analysis of the legal issues surrounding the Civil War. David Donald, a leading Lincoln biographer, does not reference the addition of the tenth justice or judicial reorganization in his 1995 biography of the president. Furthermore, the scholar only mentions the tenth justice Stephen J. Field in context of Treasury Secretary Salmon P. Chase's 1864 appointment to the Supreme Court after Taney's death. Since Donald's work was a biography of Lincoln's life, it is understandable that he does not address judicial reorganization or the tenth justice in detail. However, in his description of Chase's appointment, Donald states that once a new chief justice was selected, Lincoln appointees "would form a majority on the Court."[14] This statement was significant because it didn't account for the ten member court. At the time of Chase's appointment in 1864 the Supreme Court included ten justices and only five of them, including Chase, were Lincoln appointees. Five out of ten does not constitute a majority. Thus, a possibility exists that Donald forgot that the Supreme Court had expanded to ten. This clearly demonstrates the lack of historical focus on this issue.

Despite the potential importance of the tenth justice and judicial restructuring to Lincoln's legal philosophy, Daniel Farber and Harry Jaffa do not address either subject in their monographs on the president's jurisprudence. Even though both scholars claim that Lincoln's decisions were heavily influenced by his nationalist outlook, they neglect to explain how the restructuring of the court or addition of the tenth justice affected that perspective. Furthermore, Farber and Jaffa do not even address the role that Lincoln's nationalist jurisprudence played in shaping the president's attitude toward the judiciary. Since the scholars focus on Lincoln's philosophy and how it interacts with his wartime policy, an analysis of the Supreme Court is essential. Farber, for example, addresses secession, suspension of *Habeas Corpus*, and the *Prize Cases* in his book. In all three of those issues the judiciary played a significant role in Lincoln's

[14] David Donald, Lincoln (New York: Simon & Schuster, 1995), 551.

reactions to the events. Therefore, in order to fully comprehend the story of the tenth justice and judicial reorganization Farber should have addressed Lincoln's jurisprudence in terms of the various changes to the court.

In a recent biography that dealt more directly with the structure of the Supreme Court entitled *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era* (2003), historian Michael Ross examines the life and appointment of Samuel Miller to the court. Although the book addresses Miller's entire career, in one chapter the scholar focuses on both judicial reorganization and appointment of the tenth justice. In a short paragraph, the scholar postulated that the development originated from "fears concerning the upcoming decision" in *Prize*.[15] Except for a description of the public reaction to the additional justice, the scholar's commentary on the appointment concluded. Ross, however, gives more details to the reorganization of the judiciary and attributes it to the Republican's reaction to the *Dred Scott* decision. Focusing exclusively on Lincoln's June 26, 1857 campaign speech in Springfield Illinois that discussed the *Dred Scott* decision, Ross cites that speech as evidence of the president's hostility toward the judiciary and willingness to "reshape" it if the Republicans won the 1860 presidential election.[16] Thus Ross attributes the tenth justice and judicial reorganization to the fear held by northern politicians and newspaper editors that the Court was the apex of pro-southern and slavery sentiment.[17] In order to decrease the southern influence within the Judicial Branch, Lincoln asked Congress to restructure the federal circuits, and Ross wrote that Lincoln and his fellow Republicans, if elected, would work to ensure that the Supreme Court overruled *Dred Scott*. Ross drew these conclusions from Lincoln's 1857 campaign

[15] Michael A. Ross, *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era* (Baton Rouge: Louisiana State University Press), 84.

[16] Michael A. Ross, *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era* (Baton Rouge: Louisiana State University Press), 65.

[17] Ross, *Justice of Shattered Dreams*, 70.

speech. In his analysis, however, Ross excluded Lincoln's outline of the functions that the Supreme Court serves: "first, to absolutely determine the case decided, and secondly, to indicate to the public how other similar cases will be decided when they arise." Once these decisions are decided, Lincoln further articulated, they "should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution."[18] Ross manipulated Lincoln's speech to illustrate more opposition to the Court than Lincoln intended. Comprehending the full context of the speech is crucial because it offers a critical insight into understanding Lincoln's view on the rule of law. The 1857 speech also illustrates that another interpretation to judicial reorganization and the addition of the tenth justice exists. Even though Lincoln is critical of the Supreme Court, he also defends it as an institution. Therefore, once the partisanship of the court changes from Democrat to Republican, Lincoln's nationalistic jurisprudence might place the Supreme Court into a position of national prominence.

The only scholar who significantly addresses the addition of the tenth justice and its impact upon the Supreme Court is David Silver in *Lincoln's Supreme Court* (1957). Silver, who focuses on the role the Court played throughout Lincoln's presidency, largely credits Lincoln's political shrewdness for his success on judicial matters. Consequently, the book is titled *Lincoln's Supreme Court* for a reason, which was to reveal the significant role Lincoln played with regards to the suspension of the Writ of *Habeas Corpus*, the reorganization of the judicial circuits, and addition of the tenth justice. Silver focuses on various explanations for the Court's expansion to ten, but emphasizes that the decision was an action by the administration intended to make the court safe for their handling of the war. Lincoln's actions, Silver states, were based

[18] Speech at Springfield, Illinois, June 26, 1857, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 4 2004), 400 – 402.

upon "prudence," and a "packed Court" was necessary to "strengthen the position of those Justices who would view with favor the acts that the administration deemed necessary."[19] Even though Silver addresses both judicial reorganization and the addition of the tenth justice, he does not mention the philosophical issues that Farber and Jaffa discuss.

These philosophical issues are extremely important in comprehending the relevance of the tenth justice and judicial reorganization. Despite the vast academic scholarship on Lincoln, none of the scholars address how Lincoln's nationalist jurisprudence interacted with the Republican Party's national judicial strategy to further partisan control of the court and save the Union. Both judicial reorganization and addition of the tenth justice demonstrate the interaction of the Supreme Court with Lincoln's philosophy. Foremost, judicial reorganization and the tenth justice were measures intended to alter the political composition of the Supreme Court. As the Civil War progressed, the Supreme Court evolved. At the commencement of the conflict in 1861, the court was heavily dominated not only by southerners but also by Democrats. From the period between Andrew Jackson and Abraham Lincoln's presidency, only one member of the Supreme Court was affiliated with the Whig political party. Even though the Whigs were a national party that controlled the presidency seven years, they had minimal representation on the Supreme Court.[20] Once the Republican's replaced the Whigs as the national opposition to the Democratic Party, they were determined not to let the Democrats retain their monopoly over the Supreme Court. From 1862 to 1864, through judicial reorganization and an addition of a tenth justice, Lincoln and Congress worked to remove the Supreme Court from the control of the Democratic Party and place it into the hands of the Republicans.

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[19] David M. Silver, *Lincoln's Supreme Court* (Urbana: University of Illinois Press, 1957), 84.

[20] Gerald Gunther and Kathleen M. Sullivan, *Constitutional Law* (New York: Foundation Press, 2001), B – 2, B – 3.

Once the Civil War occurred, the Republicans found themselves in control of both the White House and Congress. Yet despite three vacancies on the Supreme Court, the Democratic Party remained in control of the judiciary. Once Field was sworn in, Lincoln appointees constituted four out of ten justices. This path toward Republican control of the Supreme Court is part of the story of the significance of the tenth justice and judicial reorganization. Through various letters and diaries the judicial strategy of the Republican Party becomes clear. In one instance a meeting, detailed in chapter three, occurs in March 1862 between Lincoln's Attorney General Edward Bates and Supreme Court Justice Noah Swayne. Throughout the course of their discussion, the two national figures conversed on congressional "gerrymandering" of the judicial circuits.[21] This discussion reveals that the story of both judicial reorganization and tenth justice was not entirely about Lincoln or exclusively about his management of the war. Along with Congress and the Supreme Court, the president was a participant. In chapter four a letter sent to Senate Judiciary Committee Chairman Lyman Trumbull demonstrates how members of the Republican Party viewed the Court. In the letter, Wait Talcott, a local party activist, asked Trumbull if he was "going to make three or four new States while we can control the Election of Senators? Can't you by doing so make a necessity for Another Judge?"[22] This quotation from Talcott, which Silver did not use in his study of the court, illustrates the importance of the court to Republican Party organizers. Not only did they foresee the judiciary as a means of expanding their partisan control of the government, but also they viewed the war as an opportunity to alter the political composition of the court and restructure it with additional Republicans. Thus, the addition of the tenth justice to the Supreme Court is a story about both presidential war powers and national partisanship in transition

[21] Howard K. Beale ed., *The Diary of Edward Bates: 1859 – 1866* (New York: Da Capo Press, 1971), 244.

[22] Wait Talcott to Lyman Trumbull, February 1, 1863. Lyman Trumbull Papers Library of Congress.

Chapter 1:
The Least Dangerous Branch?

Perhaps the most controversial Supreme Court case in American history, *Dred Scott v. Sandford* (1857), was partially responsible for the Civil War. In that case Army surgeon John Emerson's slave, Dred Scott, traveled from the slave state of Missouri, to the free territory of Wisconsin, and then back to Missouri. After returning to Missouri, Scott sued for his freedom and justified this action on the basis that he should have been freed once he entered the free territory of the North.[23] In a complicated decision the Supreme Court denied Scott's status as a freedman. Instead of uniting the country, as the chief justice desired, a polarization occurred. While southerners rejoiced in the decision, many freesoil northerners and westerners were unified by fear because they were concerned about additional Supreme Court decisions that would allow further expansion of slavery. Ultimately, it was these fears that helped unite the Republican Party and paved its way to victory in 1860.[24] To fully comprehend the effects of *Dred Scott* upon nineteenth century America, the Founding Fathers' role and notion of the Supreme Court must be addressed. Did the Fathers envision the court with the power of judicial review? Was *Dred Scott* consistent with previous judgments? How was the decision influenced by Taney's jurisprudence? These are three important questions that must be addressed, which all contributed significantly to the public's perception of the decision. Despite the Republican Party's disdain of the Taney Court because of the *Dred Scott* decision, it was still unwilling to alter the federal judiciary. A catalyst was necessary and, in 1861, Taney's circuit opinion in *Ex*

[23] Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978), 244, 249.

[24] David M. Silver, *Lincoln's Supreme Court* (Urbana: University of Illinois Press, 1957), 6; Paul Finkelman, "Hooted Down the Page of History: Reconsidering the Greatness of Chief Justice Taney," *Journal of Supreme Court History*, 1994., 96 – 97; Smith, *Roger B. Taney*, 172 – 173.

parte Merryman provided the mechanism. This combination of *Dred Scott* and *Merryman* motivated Republicans. *Dred Scott* planted the seeds of disdain for the Taney Court and, after the adverse ruling in *Merryman*. Republicans realized that the southern-dominated Supreme Court was a threat to Unionism and free – soilism.

Despite the Supreme Court's ambiguous role in the Constitution and *The Federalist*, its function in American government was already largely defined when Roger B. Taney delivered the opinion of the court for *Dred Scott* in 1857. In *Federalist 78*, Alexander Hamilton identified the function of the judiciary in the new republic. In that document, Hamilton espoused his belief that "the judiciary … will always be the least dangerous" branch of a multi-tiered government because it "has no influence over either the sword [of the executive] or the purse [of the Legislature]."[25] Furthermore, Hamilton wrote, the judiciary was "bound down by strict rules and precedents" in order to avoid any "arbitrary discretion" by the courts.[26] The perceived weakness of this branch of government prompted constitutional scholar Morton White to claim that "the main point of Number 78 … is that [the judiciary] will be the least dangerous to political rights … not that it will exercise the most effective restraint upon the invasion of those rights."[27] Since the Founders considered the judiciary the least dangerous branch of government, they bestowed upon the Supreme Court the ability to review laws in order to ensure that they did not violate the political rights established in the Constitution. It was within this context that *Dred Scott* came before the Supreme Court. This process, known as judicial review, was first invoked by in a United States Supreme Court case, *Marbury v. Madison* (1803), by Chief Justice John

[25] *Federalist 78*
[26] *Federalist 78*
[27] Morton White, *Philosophy, The Federalist, and the Constitution* (New York: Oxford University Press, 1987), 158.

Marshall.[28] Despite Marshall's utilization of judicial review, the chief justice, according to Charles Hobson a leading Marshall scholar, never intended for a broad interpretation of the concept. Properly applied, judicial review only situated the Supreme Court on equal grounds as the other branches of government. Since Marshall believed, according to Hobson, that each branch of government possessed the ability to interpret the Constitution, the Supreme Court should only intervene and declare a legislative act unconstitutional when "repugnancy between statue and Constitution was plain, clear, and unequivocal."[29] Thus, under this interpretation of the concept, judicial review should never have been applied to *Dred Scott*.

At the heart of *Federalist 78* was the original concept of judicial review and the notion that the duty of the judiciary was to protect the rights established in the Constitution. The American courts, according to one scholar, were designed to judge not only "disputes between the citizen and the executive" but also "disputes between the citizen and the legislature," and the latter case "judged according to a Constitution which limits the legislature."[30] Hamilton detailed this concept in greater detail, writing,

> Limitations [on Congress by the Constitution] can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[31]

Thus, the judiciary was intended to prevent the usurpation of power by the legislature. Since the Constitution contained the will of the people, the Supreme Court's function, through judicial review, was to remind the legislature that, as one scholar stated, "the people's will is superior to

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[28] *Federalist 78*; White, *Philosophy, The Federalist, and the Constitution*, 158; Gottfried Dietze, *The Federalist: A Classic on Federalism and Free Government* (Baltimore: The Johns Hopkins Press, 1960), 171 – 173; David F. Epstein, *The Political Theory of The Federalist* (Chicago: The University of Chicago Press, 1984), 187, 191; Thomas M. Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (Princeton: Princeton University Press, 1992), 3 – 4.

[29] Hobson, *The Great Chief Justice*, 68.

[30] Epstein, *The Political Theory of The Federalist*, 187.

[31] *Federalist 78*.

their representatives."[32] The court performed this function by reviewing acts of Congress to ensure that the statutes did not violate the principles expressed in the Constitution. Opposition to the *Dred Scott* decision developed because, in the minds of many northerners and westerners, the Taney Court deviated from its primary responsibility. These countrymen perceived the Supreme Court not as defending their constitutionally protected rights, but rather as trampling and destroying them. For them, the judiciary transformed from the least dangerous to the most dangerous branch of government because the Supreme Court incorrectly exercised judicial review and imposed its own "will" on the country instead of casting "judgment."[33]

The decision in *Dred Scott* by Chief Justice Taney on March 6, 1857 was not the opinion the Court originally agreed to issue. After the justices heard the arguments for the second time, the majority of them agreed that *Dred Scott* should not be decided on the questions of congressional control of slavery in the territories or the issue of black citizenship. The majority contended that the opinion should simply uphold the circuit court's ruling that Dred Scott was a slave and subject to Missouri law. With that decision, the justices ended their conference and Samuel Nelson was assigned to write the majority opinion.[34] *Dred Scott* would have been a long forgotten case if the Supreme Court continued to endorse Nelson's opinion and did not address either the plea in abatement which dealt with the issues of black citizenship or the constitutionality of the Missouri Compromise. However, because of circumstances within the court, Justice Nelson's opinion became "the Dred Scott decision that almost was."[35] The grounds of his opinion upheld the circuit court's decision, which was based upon the notion that state laws were independent of each other. Nelson wrote that if Scott was free in Illinois it was

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[32] Epstein, *The Political Theory of The Federalist*, 188.

[33] Dietze, *The Federalist: A Classic on Federalism and Free Government*, 173 – 175; Epstein, *The Political Theory of The Federalist*, 186 – 189, 191; *Federalist 78*.

[34] Swisher, *Roger B. Taney*, 496 – 497; Fehrenbacher, *The Dred Scott Case,* 305 – 306.

[35] Fehrenbacher, *The Dred Scott Case*, 307.

because the state laws of Missouri did not apply, but once he returned to Missouri, the slave codes of that state applied. Consequently, because of Missouri law, Dred Scott was a slave and could not sue for his freedom. According to Don Fehrenbacher, an expert on *Dred Scott*, Nelson's opinion was the anticipated judgment until a second conference occurred. During the meeting, Justice James M. Wayne motioned for Chief Justice Taney to write a new "opinion of the court" that would address the constitutionality of slavery in the territories and the black citizenship issue.[36]

Historians disagree about the rationale surrounding the majority's change of opinion. They present two leading theories. The first scenario focuses on the dissents by John McLean and Benjamin Curtis that were critical of the court. Justices McLean and Curtis, for various political reasons, decided to address the territorial question, and determine whether Congress could outlaw slavery in the territories. Upon hearing this news, Fehrenbacher claims, the southern justices reversed their position and decided to directly address the plea of abatement and the constitutionality of the Missouri Compromise. The other hypothesis gives responsibility for the decision to the southern-dominated majority, with scholars specifically faulting the jurisprudence of Chief Justice Taney.[37] According to Supreme Court historian Carl Swisher, the southern justices believed a definitive ruling on the constitutional issues would ensure that "sectional peace would be restored" because "a center of abolitionist agitation would be removed."[38] Despite an 1870 recollection by Justice Campbell that specifically declared that the motion to address the constitutional issues was made by "Mr. Justice Wayne … without any notice … to any one of the members of the Court," Don E. Fehrenbacher presented a different

[36] Fehrenbacher, *The Dred Scott Case*, 309.

[37] Fehrenbacher, *The Dred Scott Case*, 308, 308 – 311; Swisher, *Roger B. Taney*, 498; Smith, *Roger B. Taney: Jacksonian Jurist*, 161.

[38] Swisher, *Roger B. Taney*, 498.

motive than most scholars.[39] He postulated that Taney was agitated by "Northern insult and Northern aggression," and the expediency with which he produced his opinion demonstrated that he was anxious to address the constitutional matters. Accordingly, Fehrenbacher observed that "the voice was Wayne's but the hand may have been the hand of Taney" and the chief justice was finally able to author the opinion he desired.[40]

Taney's "opinion of the Court" was, in the words of historian William M. Wiecek, "a witches' sabbath of judicial reasoning" because it incorporated numerous errors of judgment and logical fallacies.[41] The chief justice began the ruling with a review of the black citizenship question. In his analysis, he adopted a stagnant view of the Constitution. Taney believed that if the court declared that blacks had the status championed in the Declaration of Independence, this jurisprudence results in a "more liberal construction" of the Constitution than it was "intended to bear" when it was "framed and adopted."[42] The chief justice's interpretation was so egregious that it prompts Wiecek to claim that if Taney's constitutional jurisprudence were correct, "the Constitution would shrivel to a parchment museum piece, nothing more than a relic of something no longer alive and vital."[43] This point was a major jurisprudential difference between the chief justice and Lincoln, and greatly intensified because Taney claimed that the Declaration of Independence did not apply to blacks, as Lincoln and the Republican Party claimed. Both the future president and most Republicans believed that the Declaration of Independence's guarantee that "All men are created equal" entitled blacks to "Life Liberty and the Pursuit of happiness."[44] In the chief justice's opinion, however, he claimed that the Republicans' line of reasoning was

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[39] Samuel Tyler, *Memoir of Roger Brooke Taney, LL.D: Chief Justice of the Supreme Court of the United States* (Baltimore: John Murphy & Co., 1872), 384.

[40] Fehrenbacher, *The Dred Scott Case*, 311

[41] William M. Wiecek, "Chief Justice Taney and His Court," *This Constitution,* 23.

[42] Tyler, *Memoir of Roger Brooke Taney, LL.D*, 546.

[43] William M. Wiecek, *Liberty Under Law: The Supreme Court in American Life* (Baltimore: The Johns Hopkins University Press, 1988), 78.

[44] Paul Finkelman, "Hooted Down the Page of History," 96.

"historically and constitutionally wrong."[45] In *Dred Scott*, Taney wrote, "the language used in the Declaration of Independence, shows that neither … slaves, nor their descendants" whether "free or not," were entitled to the "general words used in that memorable" document.[46] Ultimately, Taney concluded that since blacks did not belong to the class of people for whom the Declaration of Independence was intended, the principles espoused in the document were inapplicable. To include them would be "utterly and flagrantly inconsistent with the principles" asserted by the Founders and was an entirely incorrect approach to constitutional jurisprudence.[47] This conclusion demonstrated Taney's view of the Constitution as a stagnant document. Unless an amendment changed the meaning of the document, the status of both slaves and free blacks was frozen in 1787. "Technological change" or evolving notions of race could not alter Taney's opinion, since all that mattered was the original meaning of the provisions in the Constitution regarding slavery.[48]

Taney did not conclude his judicial opinion after addressing the citizenship issue. He next tackled the constitutionality of the Missouri Compromise. Exercising the power of judicial review of a federal law for only the second time in American history, Chief Justice Taney invalidated that congressional statute and ruled that Congress could not restrict slavery from the territories. To reach his conclusion, Taney, in the words of one historian, used a "tortured interpretation of the … clause on territorial jurisdiction" and ruled that Congress had only enough power to preserve the territory until it was ready for statehood.[49] After the Chief Justice

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[45] Smith, *Roger B. Taney: Jacksonian Jurist*, 162; Paul Finkelman, "Hooted Down the Page of History," 96.

[46] Tyler, *Memoir of Roger Brooke Taney, LL.D*, 525.

[47] Tyler, *Memoir of Roger Brooke Taney, LL.D*, 529; Fehrenbacher, *The Dred Scott Case*, 347, 351.

[48] Wiecek, "Chief Justice Taney and His Court," 23; James B. O'Hara, "Out of the Shadow: Roger Brooke Taney as Chief Justice" *Journal of Supreme Court History 1* (1998): 29; Fehrenbacher, *The Dred Scott Case*, 364; Smith, *Roger B. Taney: Jacksonian Jurist*, 56.

[49] Finkelman, "Hooted Down the Page of History: Reconsidering the Greatness of Chief Justice Taney,"94; Smith, *Roger B. Taney: Jacksonian Jurist*, 166 – 167; Swisher, *Roger B. Taney*, 508.

established that slaves were property, he invoked the Fifth Amendment, as one historian states, to "undo a constitutional consensus that had existed for at least forty years."[50] Justifying his ruling, Taney wrote that "the rights of property are united with the rights of person," and the Fifth Amendment guaranteed that "no person shall be deprived of life, liberty, and property, without due process of law." Furthermore, if a Congressional statute deprived a citizen of his property "merely because he … brought [it] into a particular territory," that action "could hardly be dignified with the name of due process of law."[51] Taney described on that concept, and declared that "no word can be found in the Constitution," which gave slave property "less protection than property of any other description."[52] Essentially, Taney ruled that since slaves were property, Congress could not pass any laws that restricted the movement of that type of property into any territory. According to historian Charles Smith, Taney's ruling on the constitutionality of the Missouri Compromise was partially motivated by his hatred of the Republican Party. The chief justice believed that if slavery was restricted in the territories, the Republican Party, an organization he feared, would be destroyed.[53] For that reason, the heart of the "opinion of the Court" was a message to the party that their core issue was a judicial rather than political question.[54]

The chief justice desired to solve the nation's problems with a solution that he believed all parties could accept. Thus, his intentions in *Dred Scott* were not entirely stated in the opinion of the court. Taney's jurisprudence was motivated by two additional competing factors, namely

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[50] Tyler, *Memoir of Roger Brooke Taney, LL.D*, 575; Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development 1835 – 1875* (New York: Harper & Row Publishes, 1982), 184.

[51] Tyler, *Memoir of Roger Brooke Taney, LL.D*, 573; Charles Fried, *Saying What the Law Is: The Constitution in the Supreme Court* (Cambridge: Harvard University Press, 2004), 172 – 173.

[52] Tyler, *Memoir of Roger Brooke Taney, LL.D*, 575.

[53] Smith, *Roger B. Taney: Jacksonian Jurist*, 171 – 172.

[54] Finkelman, "Hooted Down the Page of History: Reconsidering the Greatness of Chief Justice Taney," 94; Fehrenbacher, *The Dred Scott Case*, 378; Fred Rodell, *Nine Men: A Political History of the Supreme Court from 1790 to 1955* (New York: Random House, 1955), 131.

his devotion to the Union and his love of the South. Since he was a slaveholder from the Upper South, he feared the growing abolitionist movement and viewed the Republican Party as a threat because it was rapidly accepting abolitionist doctrine.[55] Despite the Republican acknowledgement that the party did not desire to abolish slavery in the states, Taney believed that abolitionist presence in the party would further convert the question of slavery into a moral issue. Since "those who are engaged in a holy war stop at nothing," as Smith stated, slavery would eventually be abolished in the states.[56]

In addition to the expanding power of the abolitionists, the growing population of the North also alarmed the chief justice. This increase in population, Taney theorized, would enable the North to control the federal government, which would eventually force the South to submit to its will.[57] Taney believed that it was his duty to prevent this outcome. His opinion was based upon preserving a compromise that would ensure the continuation of the southern culture and way of life, and the *Dred Scott* opinion, as one scholar stated, was "an attempt to aid in preserving it."[58] Taney, however, was interested not only in preserving the South but also in rendering a decision that would perpetuate the Union. One scholar stated that Taney desired to occupy a "middle ground" between nullification and secession, and his opinion was intended as another compromise between North and South.[59] Taney's biographer, Carl Swisher, attempted to rationalize the chief justice's jurisprudence. He claimed that Taney and the southern justices were forced to rule on the constitutionality of the Missouri Compromise because Curtis and McLean, the two dissenters, were going to address the issue. Such an argument, Swisher claimed, was disastrous because it would "add to the effectiveness of abolitionist propaganda,"

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[55] Smith, *Roger B. Taney: Jacksonian Jurist*, 171.
[56] Ibid., 171.
[57] Swisher, *Roger B. Taney*, 503; Smith, *Roger B. Taney: Jacksonian Jurist*, 171.
[58] Swisher, *Roger B. Taney*, 505.
[59] O'Hara, "Out of the Shadow: Roger Brooke Taney as Chief Justice," 30 – 31.

increase sectional tensions, and "hasten" the South's secession or subjugation.[60] Consequently, Taney's appeal to the property rights guaranteed in the Constitution was his attempt to avoid a civil conflict and disaster. One scholar stated that

> He endeavored to settle by judicial decision what debate in Congress … could not settle but only disturb. He tried to avert the revolutionary disruption of a social and economic system. He was playing for high stakes, he played his trump card to maintain the old constitutional arrangements and prevent disunion – and he failed.[61]

Taney's gamble demonstrated his view of the court and its role in government, which was to resolve once and for all disputes involving divisive issues. Since the court was a neutral arbiter that based its decisions upon the rule of law, Taney reasoned that the opinions it pronounced would be respected. Despite his motivations in *Dred Scott* and his belief that his actions could save the Union and preserve the southern lifestyle, in the end the major issue was how the country would perceive the judgment.

The most significant aspect of *Dred Scott* was the public's reaction and perception of it, and how that contributed to the development of a negative view of the Supreme Court. Once delivered, the opinion of the court was immediately scrutinized by the public. Led by the *New York Tribune*, a Republican newspaper, a multitude of northern newspaper editorials criticized the decision. The *Tribune* wrote "that the character of the Supreme Court … as an impartial judicial body, had gone!" because it "has abdicated its … functions and descended into the political arena." Even more egregious, the paper claimed, was the court's immersion into the "filth of Pro-slavery politics … instead of planting itself upon the … principles of justice and righteousness."[62] Consequently, *Dred Scott* motivated Republicans to oppose the judiciary. As illustrated in northern papers, the Republicans began to view the Taney Court with much disdain

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[60] Swisher, *Roger B. Taney*, 504 - 505.
[61] Smith, *Roger B. Taney: Jacksonian Jurist*, 173.
[62] *New York Tribune*, Mar. 10, 1857. Microfilm Library of Congress

because they believed it was controlled by the South.[63] The *New York Times* observed that the *Dred Scott* decision was not motivated by "reason" but rather "interest," which "regulates the action of States, as well as individuals." Furthermore, "the decision of the Supreme Court…completes the nationalization of Slavery" because Taney's opinion "incorporated it into the Constitution." The *New York Times* concluded with a warning that "slavery is no longer local: it is national."[64] Opposition to *Dred Scott* was not limited to the press. In his March 3, 1858 speech to the United States Senate, New York Senator and Lincoln's future Secretary of State, William Seward, denounced the Taney Court and its decision. The Senator claimed that the court's opinion was erroneous, the people should never accept the ruling, and, furthermore, the court should "recede" and alter its opinion. Then Seward claimed, in what were possibly the first hints of the Republican desire to alter the federal judiciary, "Whether it recedes or not, we shall reorganize the court, and … reform its political sentiments and practices, and bring them into harmony with the Constitution and laws of Nature."[65] Congressional reaction to *Dred Scott* lasted over a year and culminated in a proposal originating from Senator George E. Pugh of Ohio on April 30, 1858 to weaken the court's authority. Abolitionist and Republican members of Congress introduced a bill which would repeal the twenty-fifth provision of the Judiciary Act of 1789. This provision was significant because it granted the court jurisdiction, commonly known as judicial review, to hear cases involving writs of error to state courts and, consequently, the power to declare state laws unconstitutional. Even though both proposals failed and Seward and his fellow allies were criticized by many northerners for their assaults on the court, the future

[63] Charles Warren, *The Supreme Court in United States History*, vol. 2, *1836 - 1914* (Boston: Little Brown and Company, 1932), 304 – 309.

[64] *New York Times*, March 9, 1857. Microfilm Dickinson College Library.

[65] *Congressional Globe*, 1857 – 1858, Part I. 943.

Secretary of State introduced a notion into Republican politics that would not entirely disappear.[66]

Opposition toward *Dred Scott* also occurred in the speeches of a rising politician campaigning for United States Senate in Illinois. Abraham Lincoln, running against Stephen Douglas, propelled two concepts into national politics. The first was an argument that Republicans had already utilized at the regional level. Lincoln, however, popularized it because he focused on the fear that *Dred Scott* signified a gradual nationalization of slavery.[67] In an analysis of the opinion of the court, he noted that the opinion explicitly stated slavery could not be excluded from the territories; however, as Lincoln also noted, it was silent on the permissibility of a state excluding slavery. Elaborating on that concept, the future president theorized that the legal void would be "filled with another Supreme Court decision, declaring that the Constitution of the United States does not permit a *state* to exclude slavery from its limits."[68] In *Crisis of the House Divided* (1959), Harry Jaffa described that concept. He hypothesized that since Lincoln believed *Dred Scott* recognized slaves as property and since property rights were protected by the Constitution, the possibility existed that a state could not destroy or restrict slave property.[69] This possibility alarmed Republicans, and Lincoln clearly articulated that concern when he told Illinois citizens, "We shall *lie down* pleasantly dreaming

[66] Warren, *The Supreme Court in United States History*, vol. 2, *1836 - 1914* ; 328 – 329, 333 – 335; Gustavus Myers, *History of the Supreme Court of the United States* (New York: Burt Franklin, 1968), 474.

[67] Fehrenbacher, *The Dred Scott Case*, 438.

[68] ``A House Divided": Speech at Springfield, Illinois, June 16, 1858, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (November 3 2004).466; Harry V. Jaffa, *Crisis of the House Divided: An interpretation of the Issues in the Lincoln – Douglas Debates* (New York: Doubleday & Company, Inc., 1959), 281 – 283; Swisher, *Roger B. Taney*, 649.

[69] Jaffa, *Crisis of the House Divided: An interpretation of the Issues in the Lincoln – Douglas Debates*, 288.

that the people of *Missouri* are on the verge of making their State *free*; and we shall *awake* to the *reality*, instead, that the *Supreme* Court has made *Illinois* a *slave* State."[70]

Lincoln invoked the second argument during the Lincoln – Douglas debates for Illinois Senate. These meetings between the two candidates were a series of debates that emphasized Lincoln's and Douglas's divergent views on the Declaration of Independence as one of the nation's governing documents and its effect on popular sovereignty. During the debates Lincoln emphasized a nationalistic view of the Union which placed the Declaration of Independence as a founding document of the nation. It was this issue that struck at the heart of the differences between Taney and the future president. Lincoln's interpretation of the Declaration, explained in chapter two, was opposite of Taney's. Unlike the chief justice, Lincoln believed that the principles in the document applied to all peoples, despite skin color.[71]

Dred Scott resulted in considerable damage upon the federal judiciary. At the time of Lincoln's inauguration, because of the decision, Taney was still hated and distrusted by many Republicans in the North. He did not resign his office. In an unpublished, incomplete manuscript written approximately January 26 1861, Roger B. Taney espoused his jurisprudence regarding the constitutionality of secession. After defending the institution of slavery as historic and legal, the chief justice blamed the North for appealing to a "higher law" and violating their original contractual obligations as declared in the Constitution. This led him to believe that the secession crisis was the Republicans' fault because their section of the country ascribed to "fanaticism against slavery" and, as evidenced by its politics, was determined to kill the

[70] ``A House Divided": Speech at Springfield, Illinois, June 16, 1858, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (November 3 2004).467.

[71] Swisher, *Roger B. Taney*, 649; Jaffa, *Crisis of the House Divided: An interpretation of the Issues in the Lincoln – Douglas Debates*, 374.

institution.[72] It was this concept of appeal to a higher law and its application to politics that alarmed Taney. He feared that if the South's position on slavery could be dictated by the North, then little could stop the North from dictating other issues to the South. According to one scholar, because Taney viewed the war as "a struggle by the North to destroy the federalism that had been established … by the Founding Fathers," he opposed the continuation of the Union because if the ideals that established the Union were abandoned, it was not worth preservation. Consequently, the war was the North's fault, and if the South was destroyed, then "national despotism" would result since southern opposition toward the North prevented despotism.[73] Taney claimed that the sectional Republican Party, which had prior to April 1861 already forced six southern states to secede, was "at best abolitionism in disguise only waiting for an opportunity" to impose its will upon the country. After blaming the North for secession, the chief justice finally explained his views on secession. He adopted a position similar to James Buchanan. Claiming that even though secession was illegal and the South was incorrect, the Union had no power to stop the action. Because federal law could be enforced only by citizens of the state; federal troops could only enter a state at the request of its officials. Therefore, Taney's conclusion to this dilemma, according to Fehrenbacher, was the last complete sentence of his manuscript, which reads, "There is no rightful power to bring back by force the states into the Union."[74] The sole power the federal government possessed was defensive, which was limited to the protection of federal forts and assistance of federal officers with their duties. However, to exercise that power, federal officers must exist in the state. If the officers resigned, then the government has no lawful authority to send any federal militia to the state. Farber

[72] Taney quoted in Fehrenbacher, *The Dred Scott Case*, 554 – 555.

[73] Robert M. Spector, "Lincoln and Taney: A Study in Constitutional Polarization" *The American Journal of Legal History* vol. 15,(3, 1971), 209 – 210.

[74] Taney quoted in Fehrenbacher, *The Dred Scott Case*, 554 – 555; Wiecek, *Liberty Under Law*, 83.

explained this concept by writing that according to Taney "the Constitution did not empower the federal government 'to make war against a State.'"[75]

After hostilities began at Fort Sumter and eleven of the southern states seceded from the Union, Lincoln deemed the suspension of the Writ of *Habeas Corpus* necessary. On April 27, 1861, because of the disloyalty in pockets of Maryland and other parts of the country Lincoln suspended the writ along the route to Washington. He feared that southern sympathetic judges would release saboteurs and permit them to wreak havoc in the state in order to deter the Union soldiers traveling by train to the capital. Even though the suspension of the writ was in effect in the area from Washington to Philadelphia, the most important area was the city of Baltimore because of the proximity of its railways to Washington. In a letter written to the Commanding General of the Union Army Winfield Scott, Lincoln authorized the general to suspend *Habeas Corpus* where he "find[s] resistance" and deems the action "necessary…for the pubic safety."[76] Furthermore, if Maryland seceded from the Union, Washington D.C. would be isolated from the Union, which would seriously place the capital in jeopardy of occupation. In addition to the suspension of *Habeas Corpus*, the president also ordered a blockade of Confederate ports and instituted military tribunals to try war criminals. Lincoln believed these radical steps were necessary to aid the Union's war effort and achieve victory; without these measures the Union Army was doomed to fail.[77]

While on circuit in May 1861, Taney declared that Lincoln's suspension of the Writ of *Habeas Corpus* was unconstitutional. The Writ of *Habeas Corpus*, a safeguard to personal

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[75] Daniel Farber, *Lincoln's Constitution* (Chicago: The University of Chicago Press, 2003), 75 – 76.

[76] To Winfield Scott, April 27, 1861, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln.

[77] Charles Warren, *The Supreme Court in United States History*, vol. 2, *1836 - 1914* (Boston: Little Brown and Company, 1932), 359-362; Silver, *Lincoln's Supreme Court*, 28; William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Alfred A. Knopf, 1998), 20 – 25; Swisher, *Roger B. Taney*, 548; Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York: Oxford University Press, 1991), 4 – 9.

liberty, had its origins in seventeenth century England. According to current Chief Justice William Rehnquist, the writ was issued to the prisoner's "custodian" ordering him to produce the prisoner and to explain the rationale for the incarceration.[78] On May 25 1861 John Merryman, President of the Maryland Agricultural Society and southern sympathizer, was taken into custody by the Federal Army on the suspicion that he was a saboteur. No charges were filed in Court. A few days later in *Ex parte Merryman,* Taney stated that John Merryman was detained unlawfully by the military and that charges should be filed immediately, or else the petitioner should be released. The issue of the suspension of the writ was, according to one scholar, an issue "of the most vital importance" because "it was a question of protecting the individual's right to live under a rule of law."[79] In events that took place over a few days, the executive ignored the Chief Justice of the Supreme Court's judicial opinions. Taney first issued the writ on May 26, 1861 and directed General George Cadwalader to bring Merryman to court the following morning. The general's aide, Colonel Lee, appeared the next day with a statement from the general that informed Taney that, under orders from the president of the United States, he was to ignore the chief justice's request. This action infuriated Taney, and he again ordered the writ delivered. Taney's actions began to garner national headlines, and a *New York Times* reporter questioned the chief justice's motives and postulated that he desired "to bring on a collision between the judicial and military departments of the government, and … throw the weight of the judiciary against the United States in favor of the rebels." The reporter further clarified that Taney "is at heart a rebel himself" because in this "most important" case he was prepared to rule against the Union.[80] Despite criticism from northern papers, Taney continued to demand Merryman's appearance. To no avail, the chief justice was rebuked for the third time and issued his ruling,

[78] Rehnquist, *All the Laws But One*, 36.
[79] Smith, *Roger B. Taney: Jacksonian Jurist*, 185.
[80] *New York Times*, May 29th, 1861. Dickinson College Microfilm

which declared that the arrest was illegal on two grounds. He declared that the president did not have the constitutional authority to suspend the Writ of *Habeas Corpus* because that power was bestowed upon Congress. Secondly, Taney ruled that a civilian was not subject to the articles of war, but rather must be tried through the civil system.[81]

In what legal scholar William Wiecek called a "manufactured confrontation" intended to "embarrass" Lincoln, the chief justice initiated his opinion and stipulated that in suspending the writ, the president exercised a power he did not possess.[82] This power, Taney wrote, was a "point of constitutional law" that he believed was common knowledge because it was "admitted on all hands that the privilege of the writ could not be suspended, except by act of Congress."[83] Since the Suspension Clause was placed in Article I of the Constitution, which dealt with the legislature, Taney reasoned that only Congress had the authority to suspend the writ. After an examination and a narrow reading of Article II, which dealt with the presidency, Taney concluded that presidential powers could not be construed so as to form an implied power to suspend *Habeas Corpus*. Furthermore, the chief justice wrote that Lincoln did not "faithfully execute the laws" because he took upon himself the "legislature power by suspending the writ … and the judicial power … by arresting and imprisoning a person without due process of law," which could only be provided by the courts.[84]

Even though the chief justice recognized that *Habeas Corpus* could be suspended by Congress in an emergency, he also declared that the writ could not be suspended in this case because civilian courts were still functional. Since there was no "obstruction to the process of

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[81] Silver, *Lincoln's Supreme Court*, 28 – 30; Swisher, *Roger B. Taney*, 550 – 552; Rehnquist, *All the Laws But One*, 33 – 36.

[82] Wiecek, *Liberty Under Law*, 83.

[83] Tyler, *Memoir of Roger Brooke Taney, LL.D*, 647.

[84] Tyler, *Memoir of Roger Brooke Taney, LL.D*, 651; Rehnquist, *All the Laws But One*, 36 – 37; Silver, *Lincoln's Constitution*, 30 – 31; Smith, *Roger B. Taney: Jacksonian Jurist*, 186 – 187.

any court or judiciary authority," it was the duty of any military office to give the information and "evidence to the district attorney" if any offense against the United States occurred. The president, however, did not order his military commanders to perform this function, which, Taney thundered, "has by force of arms … substituted a military government" in place of the civilian court system guaranteed by the Constitution.[85] Thus, another insight into the chief justice's jurisprudence was evident. Law and due process were extremely important and despite the dire political or military situation, those rights espoused in the Constitution and Bill of Rights still remained in effect. According to Taney, it was the responsibility of the executive to "take care that the laws be faithfully executed" by enforcing "the civil process." The chief justice further stated that Lincoln did not execute this duty, which caused his greatest fear to become realized, which was that "the people of the United States are no longer living under a government of laws."[86]

To further support his judicial interpretation, the chief justice examined Blackstone's *Commentaries* and Hallam's *Constitutional History*, two authorities on English common law. In citing those two works, Taney hoped to demonstrate that his judicial opinion was based upon the intent of the Founding Fathers. At the time of the ratification of the Constitution, the colonists were extremely apprehensive about a concentration of power, especially within the Executive Branch. Because of those fears of executive usurpation, any suspension of the Writ of *Habeas Corpus* would not be an executive act; analogous to the procedure in England. In the United States, this power belonged with the legislature.[87]

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[85] Tyler, *Memoir of Roger Brooke Taney, LL.D*, 657– 658; Smith, *Roger B. Taney: Jacksonian Jurist*, 188 – 189.

[86] Tyler, *Memoir of Roger Brooke Taney, LL.D*, 659; Rehnquist, *All the Laws But One*, 38 – 39.

[87] Tyler, *Memoir of Roger Brooke Taney, LL.D*, 652 – 656; Swisher, *History of the Supreme Court of the United States*, vol. 4, *The Taney Period 1836 -64*, 849 – 850.

Taney's citation of English common law, because it explained his jurisprudence, was not a peculiar action. Taney embraced England's long history of regard for the rule of law. In one explanation for the origins of Taney's jurisprudence, a historian cited a speech by William Pitt, one of England's greatest prime ministers, and theorized that ideas presented were similar to the chief justice's. Pitt, like Taney, felt that any arbitrary use of power by the government outside the confines of the Constitution would lead to destruction of the government.[88] Taney's biographer also made the same observation and claimed that the chief justice's high regard for the rule of law was evident in *Merryman*. Unlike his decision in *Dred Scott*, which was partially based upon the belief that it was necessary for the courts to intervene in the slavery issue because Congress could not resolve it, Taney did not apply the necessity doctrine to *Merryman*. To Taney, it did not matter if the suspension of the writ was not necessary to save the Union; the more important issue dealt with the means to achieving that goal. The whole question was the position of law over necessity. In *Merryman*, the chief justice stated that necessity of the situation is irrelevant because the U.S. government "is one of delegated and limited power" that "derives its" authority "from the Constitution," and none of the three branches can "exercise any power … beyond those specified."[89] The important question, as Taney's biographer stated, was "the dissolution of the Union … less disastrous than the reign of coercion which would be necessary so save and maintain it?"[90] Taney's answer was an unequivocal yes. In a letter written to former President Franklin Pierce shortly after *Merryman*, Taney hoped for a "peaceful separation" between the North and South because he thought that that situation was better than "the union of all the present states under a military government, and a reign of terror … which

[88] Smith, *Roger B. Taney: Jacksonian Jurist*, 195 – 197.
[89] Tyler, *Memoir of Roger Brooke Taney, LL.D*, 651 – 652.
[90] Swisher, *Roger B. Taney*, 555.

end as it may well prove ruinous to the victors as well as the vanquished."[91] The disagreement over this issue clearly identifies the differences between Taney and Lincoln. Summarizing Taney's argument, one scholar stated, "if the Union could be saved only by the sacrifice of constitutional liberty it was too great a price to pay" because even in times of war civil liberties should prevail.[92]

The *Merryman* decision alarmed many congressional Republicans because it meant that the Supreme Court or the chief justice was hostile to the Lincoln administration's handling of the war and would possibly declare crucial wartime measures unconstitutional. Even more importantly, however, Taney's opinion "had the impact of a military victory for the South" and was acclaimed by enemies of Lincoln's administration.[93] Southerners hoped that Lincoln's other wartime measures would be declared unconstitutional, which would not only injure the Union war effort but also accelerate the separation of the North and South. As a consequence of these concerns, Republican editors and Congressmen called for a reorganization of the federal judiciary. In a letter to Senator John P. Hale of New Hampshire, John Jay, the grandson of the chief justice, questioned the loyalty of the Taney Court. He speculated that the Supreme Court might not "sustain the Acts which Congress may pass for the conduct of the war" or overrule "Taney on the Habeas Corpus question." He proclaimed that the court's decisions would rally Northern Democrats to "stand by the judiciary," which could greatly complicate the war effort because "the North would be hopelessly divided." Jay's solution to this predicament was to alter the Supreme Court, creating a judiciary favorable toward Union wartime requirements.[94]

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[91] Quoted in Smith, *Roger B. Taney: Jacksonian Jurist*, 190.

[92] Smith, *Roger B. Taney: Jacksonian Jurist*, 190; Spector, "Lincoln and Taney: A Study in Constitutional Polarization," 203 – 204.

[93] Swisher, *History of the Supreme Court of the United States*, vol. 4, *The Taney Period 1836 -64*, 850.

[94] Quoted in Swisher, *History of the Supreme Court of the United States*, vol. 4, *The Taney Period 1836 - 64*, 824.

The northern Republican press denounced the chief justice and his opinion. The *New York Tribune* asserted that "no judge whose heart was loyal to the Constitution would have given such aid and comfort to public enemies." The editor continued and equated the Taney Court to the "most insidious" and "most dangerous" type of tyranny.[95] The *New York Times* also joined the ranks of critics and alleged that Taney was "steeped to the crown in treason," and that since he was "too feeble to wield the sword against the Constitution and weak to march in the ranks of rebellion and fight against the Union he uses the power of his office to serve the cause of the traitors." Despite "the feebleness of age," the paper continued, Taney hurried to Baltimore to "pervert," misuse, and "prostitute" the "writ of *habeas corpus*"[96] Northern Unionists claimed that Taney's decision in *Merryman* confirmed that the "reactionary Chief Justice and … three Southern Justices, would impede the Union cause."[97] One member of Lincoln's cabinet wrote that the purpose of the Supreme Court was "not to sustain the Government, but to embarrass it."[98] The *New York Tribune* declared that "The Chief Justice takes sides with traitors" and used the Writ of *Habeas Corpus* not to "secure the liberty of loyal men," as the Constitution intended, but to "shield rebels against a constitutional government." On the other hand, the *Baltimore American*, a pro-Southern newspaper, viewed Taney's decision as victory for the Constitution. The paper further proclaimed that a "Government which is fighting to maintain the integrity of the Constitution should interpose no arbitrary action to suspended or interfere with the rights plainly guaranteed under it."[99]

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[95] *New York Tribune*, May 30, 1861. Microfilm Library of Congress

[96] *The New York Times*, May 30, 1861. Microfilm Dickinson College Library.

[97] Kahn, "Abraham Lincoln's Appointments to the Supreme Court: A Master Politician at his Craft," 66.

[98] The member of the cabinet is unclear, cited in Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (New York: Alfred A Knopf, 1973), *225*

[99] Cited in Warren, *The Supreme Court in United States History*, vol. 2, *1836 – 1914*, 371 – 372.

Several newspapers drew parallels between *Dred Scott* and *Merryman*. One paper proclaimed that Taney was too old for the nation's top judicial post in 1857 and still suffered from the same effects of old age in 1861.[100] Additionally, when the *New York Times* explained the *Merryman* decision, it reminded readers that Taney was the author of *Dred Scott*. Based upon the court's rulings in *Dred Scott* and *Merryman,* numerous northern politicians and editors believed that the "Court was the instrument of the slave power" and, as the *New York Tribune* proclaimed, was "scandalously sectional, grossly partial, a mockery of the Constitution … and a disgrace to the country." After this declaration of his grievances, the editor proclaimed that the president should alter the Supreme Court and remove the southern influence.[101] According to David Silver, these radicals and abolitionists viewed the prospect of restructuring as Chief Justice Taney's "recompense for Dred Scott and John Merryman."[102]

Some scholars attributed Taney and Lincoln's constitutional differences to a divergent interpretation of the rule of law. Lincoln, similar to many Supreme Court justices and presidents during the eighteenth and nineteenth centuries, was a legal naturalist. He believed that the law of the Constitution was subordinate to a higher law, the natural law of God, and that no man-made law could violate the natural law.[103] Taney, however, was on a different plane of thought. He believed that laws should be grounded in the text of the Constitution and that, in search for an interpretation of a law; a judge should examine the Constitution and not adhere to a "higher law" supposedly decreed by God. This observation caused one scholar to comment that Taney "was the first constitutional *positivist* to serve on the Court," and this particular jurisprudence was evident in *Dred Scott* because his interpretation of the Constitution did not include any reference

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[100] Chicago *Tribune*, May 30, 1861 cited in Silver, *Lincoln's Supreme Court*, 31.
[101] *New York Tribune*, March 26, 1859; Microfilm Library of Congress
[102] Silver, *Lincoln's Supreme Court*, 43.
[103] Spector, "Lincoln and Taney: A Study in Constitutional Polarization," 213

to a "higher law."[104] Additionally, the same positivist outlook was demonstrated in *Merryman*. In his defense of civil liberties, Taney invoked the *Magna Carta* and the Constitution, rather than natural laws, as the protector of the rights of Englishmen and Americans. Thus, as Taney desired to demonstrate in *Merryman* and *Dred Scott*, the rule of law, despite the necessity of the situation, should always prevail and be grounded in the Constitution.[105]

[104] O'Hara, "Out of the Shadow: Roger Brooke Taney as Chief Justice," 29.

[105] Robert J. Steamer, *Chief Justice: Leadership and the Supreme Court* (Columbia: University of South Carolina Press, 1986), 110 – 111.

Chapter 2:
To Preserve, Protect, and Defend

Abraham Lincoln's jurisprudence throughout the Civil War was governed by a nationalistic interpretation of the Union. Through an examination of Lincoln's interpretation of the executive power and his interactions between the states and judiciary, key characteristics of his constitutional jurisprudence become evident. In his First Inaugural address, the president-elect, after detailing his interpretation of the Constitution, declared that

> no State, upon its own mere motion, can lawfully get out of the Union,---that *resolves* and *ordinances* to that effect are legally void; and that acts of violence, within any State or States, against the authority of the United States, are insurrectionary.[106]

The states were forever linked together and that bond could not be disturbed because outside of the Union, they had no legal status. Lincoln's argument, however, was two fold. Because he ascribed to the nationalistic view of the Constitution, he also believed that the states were united as one entity since the signing of the Declaration of Independence in 1776. Moreover, Lincoln subscribed to the belief that the principles espoused in the Declaration were the views and values of the country, which the 1787 Constitution was designed to further. Using the text of the Constitution to justify his claim, Lincoln quoted its Preamble. He stated that the point of the document was to "form a more perfect Union," which implied that a Union already existed prior to the Constitution. If states were allowed to secede from the Union and, consequently, destroyed it, then "the Union is *less* perfect than before the Constitution, having lost the vital

[106] First Inaugural Address, March 4, 1861, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 265.

element of perpetuity."[107] Thus, since secession was an unconstitutional act, Lincoln felt justified in opposing secessionists and preserving the Union. Lincoln's Secretary of the Navy, Gideon Welles, in his diary expressed similar sentiments. Welles wrote that the acknowledging that "states have seceded…would be to concede more than I am prepared for" because "secession is synonymous with disunion" and if that took place "we shall [then] belong to different countries."[108]

The nation's history did not entirely support Lincoln's viewpoint. The Constitution was silent on the topic of secession, and it was not directly addressed at the Constitutional Convention or in *The Federalist*. In 1860, the question remained, was secession constitutional? From the ratification of the Constitution until the Civil War, the supremacy of the United States federal government regarding its domestic sovereignty was unresolved. The Virginia and Kentucky Resolutions (1798), Hartford Convention (1815), and Nullification Crisis (1831-1832) continuously reintroduced the minority notion that states could override federal law and disobey the regulations the federal government imposed. During those events, there were both northerners and southerners who regarded the state as a constitutional check on the power of the federal government, and believed that the nation's domestic sovereignty rested at the state, not federal, level. President Andrew Jackson's stance against the South Carolinian nullifiers in 1832, however, demonstrated a different notion of sovereignty. Willing to use federal troops against the nullifiers, Jackson established that federal law superceded state law. Individual states could not declare federal law void without facing the threat of force.[109] Jackson's actions against

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[107] First Inaugural Address, March 4, 1861, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 265; Herman Belz, *Reconstructing the Union: Theory and Policy During the Civil War* (Ithaca: Cornell Univeristy Press, 1969), 8-11; Farber, *Lincoln's Constitution*, 79.

[108] Howard K. Beale, ed., *Diary of Gideon Welles: Secretary of the Navy Under Lincoln and Johnson* (New York: W.W. Norton & Company, 1960), 414.

[109] Farber, *Lincoln's Constitution*, 93.46, 59, 61.

South Carolina were a victory for the Union, but they did not completely resolve the question of domestic sovereignty. Even though that crisis, as well as the Virginian and Kentucky Resolutions and Hartford Convention, resulted in failure for the states' rightists, each event demonstrated that a persistent minority of citizens that was hostile to federal domestic sovereignty continued to remain vocal. The debate over sovereignty culminated after Abraham Lincoln's 1860 election, when seven out of fifteen of the southern states seceded from the Union. According to Daniel Farber, a constitutional scholar and legal historian, reaction to secession was governed by three conflicting views of sovereignty: nationalistic, transformational, and compact. The adherence to a particular theory ultimately determined positions on the constitutionally of secession, including those of President Lincoln.[110]

The nationalistic view of sovereignty argued that the Union, as Lincoln once proclaimed, "is older than any of the States; and, in fact, it created them as States."[111] In his first Inaugural Address, the newly elected president offered these sentiments, reminding his audience that "The Union is much older than the Constitution" because it was initially created by the "Articles of Association in 1774" and "matured… by the Declaration of Independence in 1776." Furthermore, he stated that its perpetuity was "pledged" by "Articles of Confederation in 1778," and was a "declared" objective for "establishing the Constitution."[112] Thus, the Union began with the unification and revolution of the colonies against the British Crown, which culminated in the signing of the Declaration of Independence. Those two actions forever linked the states together as a united country, and since 1776, according to Farber, sovereignty was administered

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[110] Farber, *Lincoln's Constitution*, 30.

[111] Speech to Special Session of Congress, Washington D.C., July 4, 1861, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 434.

[112] First Inaugural Address, Washington D.C., March 4, 1861, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 253.

by the federal government. The legal scholar, in his book on Lincoln and the Constitution, compared the formation and continuation of the Union to signing a contract. In that analogy, Farber described the ratification process as a contract because when multiple individuals enter an agreement, it "cannot be rescinded without the consent of all the parties."[113] Following this logic, advocates of the nationalistic view of government held secession as an unconstitutional action. Since the states were already considered a Union prior to the adoption of the Constitution, any deviation from that status was impossible.

In an 1825 letter authored by James Madison and Thomas Jefferson, written to the Board of Visitors of the University of Virginia, the men described the role that the Declaration of Independence played with regard to the formation of the Union. These men believed that one of "the best guides" regarding "the distinctive principles of the government…are to be found in...The Declaration of Independence," which was the primary motivation for "the fundamental act of Union of the States."[114] This evidence suggested that Lincoln's view of the Union, as preceding the Constitution, was not a radical approach to constitutional jurisprudence. In fact, it was originally advocated by the author of the Declaration of Independence and the father of the Constitution.

Another theory of sovereignty, according to Farber, was the transformational theory, which located governing authority at the state level right up until the state ratified the Constitution. After ratification occurred, sovereignty was transformed from the state to the federal government, and a new national sovereignty was created. Causing all federal decisions to become binding upon the state. It was at this moment that a new social compact was formed, and the people bestowed, at least in part, their power to the federal government and Constitution.

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[113] Farber, *Lincoln's Constitution*, 30, 79.

[114] Quoted in Harry V. Jaffa, *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War* (New York: Rowman & Littlefield Publishers, Inc, 2000), 192-193.

Consequently, constitutional scholar James Randall believed that secession could occur if, and only if, the majority of the nation's citizens agreed that the Union should be dissolved. This thesis paralleled Farber's contract analogy. Even though the people of individual states surrendered their sovereignty to the national government, states, at a later date, could not void that decision and reclaim independence. Once ratification occurred, some aspects of sovereignty were transformed to the federal government, and a contract was created between the peoples of each individual state. Thus the decision to dissolve the Union could not be made unless all the states that ratified the Constitution agreed.[115]

The leading commentator on the Constitution, *The Federalist*, was largely silent regarding an endorsement of either the nationalistic or transformational theory of government. The papers do, however, clearly abhor secession. According to legal scholars Harry Jaffa and Daniel Farber, *Federalist 22, 39, 40, 43* and *46* presented the strongest arguments against the secessionists and for the continuation of the Union. In his description of the Annapolis Convention in *Federalist 40*, Madison wrote that the Conventions most imperative task was to "render the federal Constitution *adequate to the exigencies of government and the preservation of the Union*."[116] Madison's statement was intended to discourage secession. In *Federalist 22*, Hamilton discussed the necessity of "ratification by the PEOPLE." If state legislatures conveyed power upon the Federal government, Hamilton warned that power would be conveyed by the same authority that can revoke it. He believed that a new government, perhaps an argument toward the transformational theory, should rest upon "THE CONSENT OF THE PEOPLE," which was a foundation "deeper than…the mere sanction of delegated authority."[117] Madison, in

[115] Farber, *Lincoln's Constitution*, 31-32.; James G. Randall, *Constitutional Problems Under Lincoln* (Urbana: University of Illinois Press, 1964), 20.

[116] *Federalist 40*.

[117] *Federalist 22*; Farber, *Lincoln's Constitution*, 30-31.

Federalist 39, further agreed with Hamilton's analysis. In "establishing the Constitution" through acts independent of the state legislatures, the ratification "will not be a NATIONAL, but a FEDERAL act," which would further unify the country.[118] The Founding Fathers, in their attempts to attain ratification of the Constitution, believed that approval from the state legislatures or representatives did not bestow the same degree of authority as endorsement from the represented. The difference between these two groups was so crucial because it could determine the success or failure of the new democracy. If the ratification process occurred through the individual citizens of each state, Madison theorized, the national government would attain the faith of the people, which would transform the state into the "subordinate government."[119]

The strongest argument in *The Federalist* against secession was evident in *Federalist 43*. In that document Madison, articulated the difference between, as one historian stated, "the delegated authority of the people and the sovereign authority of the people."[120] Legislative ratification, according to the Father of the Constitution, yielded simply a "compact between independent sovereigns," who "can pretend to no higher validity than a league or treaty between parties." Ratification by the individuals of each state, however, would "give due validity to the Constitution."[121] Consequently, the federal government would derive its authority in the same manner as the Declaration of Independence. Madison even invoked some of the claims of the Declaration. In his defense of the Constitution he invoked the "law of nature and of nature's God," which advocated that the "safety and happiness of society are the objects at which all

[118] *Federalist 39*.
[119] *Federalist 46*; Farber, *Lincoln's Constitution*, 31.
[120] Jaffa, *A New Birth of Freedom*, 190.
[121] *Federalist 43.*

political institutions aim."[122] Since the Constitution was designed to further that political objective, its perpetuity was crucial. The true point of the *The Federalist*, however, was to demonstrate that a weak government, such as the Articles of Confederation, yields chaos. That argument was justification for the nationalistic and transformational views of the Constitution. After all, why would the Founding Fathers desire to create a government that was just as weak as the one they abandoned?[123]

An astute reader would realize that James Madison also co-authored the Virginia and Kentucky Resolutions, which, according to some interpretations, bestowed power on individual states at the expense of the federal government. These resolutions were drafted in response to the John Adams administration's Alien and Sedition Acts. These acts curtailed free speech and restricted criticism of the federal government. These resolutions, however, cannot be cited as justification for secession. Because of a plethora of differences, the situation in the 1790s was not analogous to the 1860s. According to historians Adrienne Koch and Harry Ammon, the Resolutions did not demand action, but were rather a plea requesting assistance from various states. Quoting Madison, the scholar wrote that the Resolutions were not intended to have "any other effect than" to express an "opinion by exciting reflection."[124] In addition, the Virginia and Kentucky Resolutions specifically cited the federal government's violation of the First Amendment. The secessionists could not cite such documentation for their rationale. In addition, Jaffa's *A New Birth of Freedom*, drew a distinct separation between the Virginia and Kentucky Resolutions and secession. The Resolutions, according to the scholar, protested an action by the government that resulted in the limitation on freedom of speech. Because of the

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[122] *Federalist 43.*

[123] Jaffa, *A New Birth of Freedom*, 190 – 193; Farber, *Lincoln's Constitution*, 88.

[124] Adrienne Koch and Harry Ammon, "The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties," *William and Mary Quarterly*: 173.

resolutions, opposition to the Alien and Sedition Acts grew because according to Madison, even a majority cannot limit such fundamental rights. As Koch and Ammon pointed out, "these essential rights were neither theirs to give, nor theirs to take away."[125] The secessionists in 1860, however, had no such grievance and, consequently, could not secede just because they did not desire to adhere to the lawful desires of the majority. In fact Madison, in 1800, reiterated and clarified his fears of tyranny and nullification. Madison, in the words of one scholar, believed that "unguarded appeals to the rights of states were as great a danger to a stable union" as a much too powerful central government.[126] Clearly, citing the Virginia and Kentucky Resolutions in support of secession is a misuse of Madison's intent and thought.

In an 1864 letter to Albert G. Hodges, a friendly newspaper editor from Kentucky, Lincoln articulated a view about ratification of the Constitution that paralleled the author's of *The Federalist*, Publius. In defense of the suspension of *habeas corpus* and other actions, the president stated that it was his sole duty to preserve "that nation—of which that constitution was the organic law."[127] Lincoln's use of the term "organic law" was quite significant, because it indicated a belief that the consent of the federal government and Constitution came directly from the people and not the state legislatures or individual state.[128] Since the Constitution, like the Declaration of Independence, was derived from a higher authority than the states, Lincoln believed his actions also served this higher authority.

Adherents of the compact or state sovereignty theory, such as secessionists, believed that individual states and their people gained sovereignty in 1776 and continued to retain it through

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[125] Koch and Ammon, "The Virginia and Kentucky Resolutions," 172

[126] Farber, *Lincoln's Constitution*, 47-49; Jaffa, *A New Birth of Freedom*, 276, 269,270; [126] Koch and Ammon, "The Virginia and Kentucky Resolutions," 157, 172-173.

[127] To Albert G. Hodges, April 4, 1864, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 281.

[128] Belz, Abraham Lincoln, Constitutionalism, and Equal Rights in the Civil War Era, 93-94.

their ratification of the Constitution. Unlike the transformationalists and nationalists, these men did not ascribe to Madison's and Hamilton's arguments in *The Federalist*, and rejected the notion of dual sovereignty, which emphasized the role of both the state and federal government.[129] The secessionists' countered Madison's claims in *Federalist 43*, coincidently, by agreeing with his argument that sovereignty relied upon the people and not state legislatures. Describing the secessionists beliefs, Randall stated, that "the people…may bestow supreme power where they will, and what they bestow they may recall."[130] According to this theory, since the people of individual states ratified the Constitution, they could choose to divest it of its authority and leave the Union. In accepting the Constitution, citizens of the state did not restrict their own sovereignty, but rather loaned it to the federal government.[131] Ultimately, states still maintained political independence from the federal government because they surrendered only some of their powers. Daniel Farber explained that in the minds of secessionists that with the adoption of the Constitution, "the states' populaces had appointed the federal government to act as their agent to undertake certain functions."[132] This action, however, was not an endorsement of national power, but rather formed out of necessity, and the compact's continuation depended solely upon how beneficial its maintenance was for the state. Once it was no longer beneficial, a state's constituents could choose to dissolve the compact.[133] Senator John C. Calhoun further articulated this theory and commented that the "constitution was made by the States that it is a federal union of the States, in which, the [peoples of the] several States still retain their

[129] Jaffa, *A New Birth of Freedom*, 191.
[130] Randall, *Constitutional Problems Under Lincoln*, 14.
[131] Ibid., 13-14.
[132] Farber, *Lincoln's Constitution*, 31.
[133] Randall, *Constitutional Problems Under Lincoln,* 16.

sovereignty."[134] Thus, according to Calhoun, and other advocates of that theory, secession was constitutional.

In Lincoln's first major political speech regarding the rule of law and its role in society, addressed to the Young Men's Lyceum in Springfield, Illinois in 1838 and was entitled "The Perpetuation of Our Political Institutions," he emphasized the importance of adherence to the rule of law. Even though he believed that the distance between the United States and a major foreign power largely secured the country's peace, the country's success was not guaranteed because "if destruction be our lot," the future president wrote, "we must ourselves be its author and finisher." In order to avoid this destiny, Lincoln insisted that the "sober judgement of Courts" must prevail, which would offset the "increasing disregard for the law."[135] The rising politician believed that obedience to the law, and the court's interpretation of it, would prevent destruction of the Union. If all countrymen ascribed to a common mandate of law as defined by the un-biased and apolitical judiciary, the Union's longevity would be ensured. Even if people believed laws were unjust or incorrect, adherence to these laws was of utmost importance. As one scholar suggested, "Lincoln stressed the necessity of obeying even bad laws while working for their repeal or reform, because disobedience to bad laws engenders a habit of lawlessness that easily turns into mob rule."[136] This, in the words of Lincoln, "mobocratic spirit," would lead to the "total annihilation" of government.[137] Lincoln attempted to persuade the public that disobedience to laws would lead to anarchy, mob rule, or possibly despotism. As Lincoln's Lyceum speech proceeded, the future president's view of the law became clear and defined.

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[134] Quoted in Farber, *Lincoln's Constitution*, 31

[135] Address Before the Young Men's Lyceum of Springfield, Illinois., January 27, 1838, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 109.

[136] Jaffa, *A New Birth of Freedom*, 30.

[137] Address Before the Young Men's Lyceum of Springfield, Illinois., January 27, 1838, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 111.

Citing several examples of unpunished lawless activities, such as mob hangings in various southern states, Lincoln believed that such vigilante actions placed the country on a destructive path. He further theorized that additional violations would occur because the perpetrators are "used to no restraint."[138] Therefore, Lincoln's rhetoric invoked some of the same concerns the Founding Fathers had when they campaigned for the ratification of the Constitution. They, like Lincoln, feared anarchy and mob rule. The Civil War was the nightmarish realization of vigilante justice. In an 1862 speech to a joint session of Congress, Lincoln presented another possible justification against the constitutionally of secession. His speech reiterated the same fear of mob rule and vigilante justice that he emphasized 26 years earlier in Illinois. In the body of the speech, Lincoln described the modus operandi of the rebellion, which contained some similarities to the 1838 list of unpunished lawless behavior. Lincoln began with a claim that "the insurrection" to "overthrow the federal Constitution and Union…was clandestinely prepared during the winter of 1860 and 1861." Then the seceded states became mobocratic and "obstructed" roads, avenues, and the mail. Furthermore, the president continued,

> the lines of telegraph cut off by the insurgents, and military and naval forces, which had been called out by the government for the defence of Washington, were prevented from reaching the city by organized and combined treasonable resistance in the State of Maryland.

Thus Lincoln faced the decision to either "let the government fall at once into ruin" or using the implied powers of the presidency "make an effort to save it with all its blessings for the present age and for posterity." It was the parallel circumstances of these events that compelled Lincoln to react to South's secession.[139]

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[138] Jaffa, *A New Birth of Freedom*, 30.; Ibid., 111.

[139] To the Senate and House of Representatives, May 26,1862, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 240-241.

Some critics claim that Lincoln's Lyceum speech did not contain any theoretical interpretations of the Constitution. Lincoln historian and legal scholar, Mark Neely, analyzed that speech and believed that it was not a significant moment in Lincoln's career. He believed that Lincoln foremost was a politician and the speech was a political tactic designed to gain the rising politician favorability among the voters. The portions of the discourse regarding respect for the laws and Constitution, Neely further conjectured, were simply rhetoric. Lacking a clear vision and view of the Constitution or the rule of law, Lincoln merely, according to the scholar, altered his views in the direction of the political tide. Citing as evidence for his claim, the recent murder of Lincoln's abolitionist friend Elijah Lovejoy by the hands of a vigilante mob, Neely believed that Lincoln's reverence and "cheerleading" for the rule of law was the result of Lovejoy's death, and not any logical analysis of constitutional jurisprudence. Hence, the words and rhetoric in the Lyceum speech, and other constitutional and legal addresses throughout his career, was simply another tool in Lincoln's political arsenal.[140]

A close analysis, however, of Lincoln's speeches, memos, and letters refute the criticism of Neely and like-minded scholars. They claimed that the future president's actions were not motivated by his regard for the rule of law, but his ambition to achieve political success. This major criticism, which culminated in the belief that Lincoln mastered the political craft and language of American politics and simply applied it in his rhetoric, was an inaccurate representation of Lincoln. Plainly stated, these men believed that Abraham Lincoln was no political theorist.[141] The aspiring politician, on the contrary, presented a clear understanding and analysis of the Constitution, and clearly articulated an unambiguous notion of constitutional jurisprudence. In various speeches on such diverse subjects as the justification for the slave

[140] Neely, Jr., *The Fate of Liberty*, 214 – 215; Mark E. Neely Jr., *The Last Best Hope of Earth*, 15-17.

[141] Herman Belz, *Abraham Lincoln, Constitutionalism, and Equal Rights in the Civil War Era* (New York: Fordham University Press, 1998), 46-48; Neely, *The Fate of Liberty*, 215.

trade, appointment of presidential electors, and the constitutionality of the statehood of West Virginia, Lincoln articulated a clear understanding of the Constitution and its interpretation.[142] Not only did he present a comprehension of jurisprudence, but Lincoln also emphasized a new definition and meaning of the country, which was based on the fusion of the Liberalism defined in the Declaration of Independence and Unionism expressed in the Constitution.

The linkage of these two concepts was not unknown in American politics; however, Lincoln synthesized them to a greater degree, and it was at this moment that Lincoln's view of the rule of law regarding secession became evident. The Union and Constitution represented liberty, a commitment to equality, and a love of justice, and it was these theoretical notions that were first developed in the Declaration of Independence and later solidified in the Constitution that made the nation so significant. In an 1854 speech in Peoria Illinois, Lincoln emphasized his desire to "re-adopt the Declaration of Independence" and return to its "practices and policy." Once those principles are reinstated, he preached, "we shall not only have saved the Union, but we shall have so saved it as to make...it forever worthy of saving."[143] In an argument that would reappear with Lincoln's criticism of the *Dred Scott* decision, the president believed that his actions to save the Union were motivated by a rule of law that was based on the principles espoused in the Declaration of Independence, which emphasized the importance of individual rights and the ability to advance oneself. It was this fusion of the Declaration with the Union and Constitution that made the country's perpetuity so crucial, and demonstrated Lincoln's harsh

[142] Speech at Peoria, Illinois, October 16, 1854, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 279; Editorial on the Right of Foreigners to Vote, July 23, 1856, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 355-356; Opinion on the Admission of West Virginia into the Union, December 31, 1862, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 26-29.

[143] Speech at Peoria, Illinois, October 16, 1854, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 276; Greenstone, *The Lincoln Persuasion: Remaking American liberalism*, 236.

reaction toward secession. In describing Lincoln's reaction to the sectional conflict, one scholar stated that "the real danger," to Lincoln, "was that the Union might no longer deserve to be so described" as upholding the ideals of the Declaration of Independence, "not because of a geographically divisive quarrel but because of an assault on the Union's basic ethical principles."[144]

Throughout his tenure as president, Lincoln continuously demonstrated a consistent theoretical belief in the Union and Constitution as the bulwarks of the principles expressed in the Declaration, which, consequently, accounted for his opposition to secession. J. David Greenstone, a political theorist and legal scholar, believed that "*Lincoln's concept of liberty was an essential part of his description of the Union,*" and liberty was the concept that was evident in the Declaration of Independence. Since Union made liberty worthy and liberty made the Union significant and possible, Lincoln felt that he was obligated, as a believer in liberty, to fight for the preservation of the nation.[145] In a fragment of a speech believed to be authored by Lincoln in January 1861, the strongest case presented for the connection between the Declaration of Independence and the Union occurred. In that fragment, Lincoln used metaphorical language, which was inspired by Proverbs 25:11 according to scholar George P. Fletcher. Quoting the Bible, Fletcher wrote, "a word fitly spoken is like apples of gold in a setting of silver." Lincoln, referencing this Proverb, described the "Union and the Constitution" as "the *picture of silver*," which was "framed" around the apple. This picture was not designed to "*conceal* or *destroy*" it; "but to *adorn*, and *preserve* it. The *picture* was made *for* the apple—*not* the apple for the

[144] J. David Greenstone, *The Lincoln Persuasion: Remaking American Liberalism* (Princeton: Princeton University Press, 1993), 232,236.

[145] Greenstone, *The Lincoln Persuasion: Remaking American liberalism*, 239-240.

picture."[146] In this analogy, the silver framed around the apple represented the Constitution, and the apple was, consequently, the Declaration of Independence. Thus, Lincoln postulated that the Constitution was designed not to destroy the ideals expressed in the Declaration, but rather to further articulate and express them in greater detail. The Constitution was designed for the Declaration, and not vice-versa. Ultimately, according to Fletcher, this fragment of a speech demonstrated Lincoln's belief that the "constitution for the new republic" was based upon the notions of "nationhood, equality, and democracy," which already existed in American political culture.[147]

Even though non-compliance with the rule of law would lead to the destruction and "total annihilation" of the government, Lincoln believed that this fate could be avoided. "Let reverence for the laws," Lincoln beseeched in 1838, be preached across the country to the nation's schoolchildren, so that respect for law will "become the *political religion* of the nation." Those strong words signified Lincoln's respect for law, which not only continued throughout his political career, but also rationalized many of his war measures. As Lincoln concluded his speech, he included a major caveat. Respect for the rule of law did not mean "there are no bad laws," rather "although bad laws, if they exist, should be repealed as soon as possible, still while they continue in force, for the sake of example, they should be religiously observed."[148] In other words, if disagreement with a law or court decision arises, one should continue to obey the

[146] Fragment on the Constitution and the Union, c. January 1861, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 168-169; George P. Fletcher, Our Secret Constitution: How Lincoln redefined American Democracy, (New York: Oxford University Press, 2001), 68; Farber, *Lincoln's Constitution,* 179-180.

[147] George P. Fletcher, Our Secret Constitution: How Lincoln redefined American Democracy, (New York: Oxford University Press, 2001), 68.

[148] Address Before the Young Men's Lyceum of Springfield, Illinois., January 27, 1838, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 112; Farber, *Lincoln's Constitution*, 177.

decision even as its change is in the works. This political caveat will become very important to justify Lincoln's position on *Dred Scott* and *Ex parte Merryman*.

The significance of the Lyceum speech was two-fold. Foremost, it demonstrated Lincoln's devotion and adherence to the rule of law, and secondly it contained numerous concepts, passages, and notions that Lincoln repeated throughout his political career. In an 1839 speech regarding the constitutionality of the National Bank, Lincoln, in defense of Congress, gave a remarkable interpretation of the Constitution, which not only demonstrated his ability to rationalize political questions in context of the document, but also demonstrated a view of Constitutional jurisprudence that he would invoke approximately 25 years later. In his defense of the National Bank, Lincoln demonstrated an excellent understanding of the Constitution. He claimed that it "enumerates expressively several powers which Congress may exercise…which is a general authority 'to make all laws necessary and proper' for carrying into effect all the powers vested by the Constitution…of the United States."[149] Lincoln's reading of the Constitution gave Congress special abilities that were not explicitly stated.

Since secession was unconstitutional, the next step to explain Lincoln's consistency in regard to his rule of law was to comprehend his view of the executive. Lincoln, in explaining his actions to suspend the Writ of *Habeas Corpus*, reiterated the argument he made in 1839. Addressing a special session of Congress on July 4, 1861, Lincoln claimed that it was not only within his powers to suspend the writ, but was also necessary for the preservation of the Union. Lincoln, just as he did in 1839, found his justification in the implied powers of the Constitution. Referencing the phrase of the Presidential Oath which stated that it was his duty to "preserve, protect, and defend the Constitution," Lincoln contemplated that he would be violating his

[149] Speech on the Sub-Treasury, December 26, 1839, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 171-172.

official oath of office if he allowed "all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?" In addition to the Oath, Lincoln also directly referenced another provision of the Constitution that he believed justified his actions. Article II also required that the president "take care that the laws be faithfully executed" throughout the country. This stipulation was violated "in nearly one-third of the States" because the laws of the nation were resisted and unexecuted.[150] This justification connected specifically to Lincoln's Lyceum address. If society did not obey laws, the result was mob rule. In his First Inaugural Address, Lincoln made a similar statement and described the status of the Southern states and the whole notion of secession as the "essence of anarchy," because once the checks and balances of the federal government are destroyed, all that remains is "anarchy or despotism."[151] Both of these distort the rule of law and destroy society. According to Lincoln, the South's contempt toward the laws of the federal government was the danger because disobedience to law resulted in mob rule. One scholar suggested that sometimes "the rule of law is threatened by further adherence" to a perceived version of the rule of law, and "in those situations not only is decisive action by a single individual to be risked, it is required."[152]

In defending the Constitution, Alexander Hamilton wrote in *Federalist 23* that "no limitation of that authority which is to provide for the defense and protection of the community" should exist in times of crisis, specifically when the public safety is endangered.[153] Hamilton's statement was a reference to the inferred powers of the president during wartime. According to historian David Donald, Lincoln invoked a similar argument in a letter written to Erastus

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[150] U.S. Const. Art. II Sec. 1; Message to Congress in Special Session, July 4, 1861, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 430.

[151] First Inaugural Address, March 4, 1861, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 268; Belz, Abraham Lincoln, Constitutionalism, and Equal Rights in the Civil War Era, 91.

[152] Belz, Abraham Lincoln, Constitutionalism, and Equal Rights in the Civil War Era, 92-95.

[153] *Federalist 23*.

Corning and claimed that "in normal times" the suspension of the Writ of *Habeas Corpus* by the executive "would be violations of constitutionally guaranteed rights," but "in cases of Rebellion, Invasion, [or when] the public Safety may require it, the Constitution itself provided for the suspension of these liberties."[154] Accordingly, Lincoln's actions were within the realm of law because the suspension, he claimed, was "within the exceptions of the constitution," because the action was "indispensable to the public Safety."[155] Ultimately, invoking Hamilton's belief that the executive's primary duty was to ensure public safety, Lincoln claimed that the suspension of the writ was "constitutional *wherever* the public safety does require."[156] This action was the only measure left to ensure safety, and Lincoln believed that it did not matter where the suspension clause was in the Constitution because the more important point was that the suspension of the writ was included in the Constitution.[157]

Even though Lincoln presented a constitutional justification for the suspension of *Habeas Corpus*, he also believed the act was within his powers as president. In defending his action against critics, who believed that only Congress could authorize the suspension; the president claimed he acted within the Founding Fathers desires. Since suspension could only occur in an emergency,

> it cannot be believed [that the] framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion.[158]

Clearly Lincoln felt obligated to confirm that his actions were within the rule of law. His argument demonstrated that the placement of the suspension provision was irrelevant, because it

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[154] David Donald, *Lincoln* (New York: Simon & Schuster, 1995), 442.

[155] To Erastus Corning and Others, June 12, 1863, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 264.

[156] To Erastus Corning and Others, June 12, 1863, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 265.

[157] Jaffa, *A New Birth of Freedom*, 364.

[158] Message to Congress in Special Session, July 4, 1861, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 431.

was overshadowed by the issue of importance, and what was more important than, in the case of rebellion, securing the public safety?[159]

The last major step toward comprehending Lincoln's view of the rule of law, was to examine his interactions with the judiciary. In fact one major aspect of Lincoln's Lyceum speech, he stressed his regard for the courts and their judgment on the law. Many critics of Lincoln, however, articulated that the 1838 speech was inconsistent with Lincoln's later actions as president. Scholars such as Mark Neely and Michael Ross believed that Lincoln's reaction toward the *Dred Scott* decision and suspension of the Writ of *Habeas Corpus* were not consistent with his views of the rule of law as expressed at the Lyceum. These so-called inconsistencies prompted Neely to theorize that "thinking in constitutional ways did not come naturally" to Lincoln.[160] Despite the criticism of some scholars, the speech presented a clear vision of Lincoln's view on law, and a vision to which he adhered throughout his political career.[161]

Lincoln's opposition to the *Dred Scott* decision, despite some criticism from Michael Ross, was consistent with his approach to constitutional jurisprudence. After the "erroneous" opinion by the court, the politician still advocated respect toward the Judiciary, and a policy of "offer[ing] no *resistance*" because, as Lincoln knew from prior experience, the court had often overturned previous decisions.[162] This approach of "no *resistance*" was consistent with what he professed at the Lyceum. In regard to bad laws or judicial decisions, Lincoln articulated a belief that they "should be repealed as soon as possible, still while they continue in force…they should

[159] Farber, *Lincoln's Constitution*, 158-159; Jaffa, *A New Birth of Freedom*, 364.
[160] Neely, *The Fate of Liberty*, 215.
[161] Farber, *Lincoln's Constitution*, 180.
[162] Speech at Springfield, Illinois, June 26, 1857, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 401; John P. Frank, *Lincoln as a Lawyer* (Urbana: University of Illinois Press, 1961), 81.

be religiously observed."[163] Thus Lincoln's respect for law and the rule of law was still evident. In fact, according to Lincoln scholar David Donald, the future president "was reluctant to challenge the Court's ruling," because of his "enormous respect for the law and judicial process."[164] Lincoln's opposition only matured when he realized that Chief Justice Taney's opinion was an assault on the Declaration of Independence and the principles that it espoused. In response to Taney's egregious claim, Lincoln thundered that the once sacred language of the Declaration of Independence "is assailed, and sneered at, and construed, and hawked at, and torn, till, if its framers could rise from their graves, they could not at all recognize it."[165] To Lincoln, the court destroyed the true meaning of the document, which was the argument at the heart of Lincoln's disdain for the decision. He firmly believed that the Founder's intent was to "consider all men created equal—equal in ``certain inalienable rights, among which are life, liberty, and the pursuit of happiness.'"[166] This equality, inherent in the Declaration of Independence, applied to all human beings. Taney's denial in *Dred Scott* that blacks were not humans under the Constitution was the major point at issue. Lincoln believed the chief justice's conclusion was an impossibility because blacks were humans. As one scholar wrote, blacks "should be included in the proposition that all men are created equal."[167] Consequently, since the Constitution was designed to perpetuate the notions in the Declaration, blacks should be considered humans. Therefore, Lincoln opposed *Dred Scott* because it contradicted his basic view of the rule of law and Declaration of Independence.

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[163] Address Before the Young Men's Lyceum of Springfield, Illinois., January 27, 1838, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 112.

[164] Donald, *Lincoln*, 200.

[165] Speech at Springfield, Illinois, Illinois., June 26, 1857, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 404.

[166] Speech at Springfield, Illinois, Illinois., June 26, 1857, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 406.

[167] Jaffa, *A New Birth of Freedom*, 303; Donald, *Lincoln*, 201-202; Belz, *Abraham Lincoln, Constitutionalism, and Equal Rights in the Civil War Era*, 86-87.

Herman Belz, a legal philosopher and Civil War scholar, referred to Lincoln's approach toward legal issues "as a trinity" between the "Union, Constitution, and liberty."[168] The linkage of those three distinct issues demonstrated not only Lincoln's consistency with regard to the rule of law, but also what he believed justified his responses. Each issue, for the president, was interconnected. In a speech addressed to the New Jersey Senate, Lincoln clearly articulated his belief that not only was the central notion of the Declaration of Independence liberty, but also that it was "the original idea for which that struggle [the Revolutionary war] was made." The Union and Constitution, the president stated, "shall be perpetuated" by "perpetuating" those principles of liberty evident in the Declaration.[169] Since, according to some scholars, Lincoln viewed the document as "the source of the substantive principles of the Constitution," that meant the Constitution was drafted to further the intent of the Declaration.[170] It was this notion that made the Union, and, consequently, the "trinity" of ideas so significant.

In an 1864 letter, the theory of the Union, Constitution, and liberty linked together became even clearer. In that document, Lincoln rhetorically asked, if it was "possible to lose the nation, and yet preserve the constitution?" Answering his own question, the leader articulated that he was, "driven to the alternative of either surrendering the Union, and with it, the Constitution," or implementing "*otherwise* unconstitutional" [emphasis added] measures to preserve the Constitution, "through the preservation of the nation."[171] Lincoln chose the latter, which demonstrated how his approach toward secession, suspension of the Writ of *Habeas Corpus*, and attitude toward the *Dred Scott* decision, were each linked together by Belz's trinity.

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[168] Belz, *Abraham Lincoln and American Constitutionalism*, 96.

[169] Address to the New Jersey Senate at Trenton, February 21, 1861, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 236; Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978), 489.

[170] Belz, *Abraham Lincoln and American Constitutionalism*, 86-88.

[171] To Albert G. Hodges, April 4, 1864, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (October 28 2004), 281-282.

Ultimately, the unification of these three issues demonstrate how Lincoln viewed the Declaration of Independence as the nation's primary founding document.[172]

[172] Frank, *Lincoln as a Lawyer* ,150-151; Fletcher, *Our Secret Constitution*, 67-68; Farber, *Lincoln's Constitution*, 194.

Chapter 3:
Gerrymander the Circuits

For an understanding of Lincoln's interactions with the judiciary, the purpose of the Supreme Court's role in government and its institutional history must be understood. According to James Madison in *Federalist 47*, the inclusion of "all powers, legislative, executive, and judicial, in the same hands … may justly be pronounced the very definition of tyranny."[173] Out of that fear sprang the concept of the independent judiciary. In *Federalist 78,* Alexander Hamilton described the idea of the Supreme Court as an "intermediate body" whose purpose was to keep the legislature "within the limits assigned to their authority."[174] Thus, the principal motivation behind the Founders' desire to separate the judiciary from the executive and legislative branches of government was to remove judges from the political process. They asserted that only then could liberties be properly secured against the passions of a president or Congress. The Judicial Branch of government, however, was not given unchecked power; Congress constitutionally retained control of aspects of both its composition and jurisdiction. Consequently, the Supreme Court was unable to manage some of the most important facets of the judiciary, which included the composition and organization of the courts.[175]

Since the Constitution granted Congress the powers to establish inferior federal courts and to alter the composition of the Supreme Court, the First Congress embarked upon that task during its session in 1789. In April, a committee composed of a senator from each state was

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[173] *Federalist 47*

[174] *Federalist 78*

[175] David F Epstein., *The Political Theory of The Federalist* (Chicago: The University of Chicago Press, 1984), 126 – 127; William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* (Columbia: University of South Carolina Press, 1995), 18 – 19, 25; Bernard Schwartz, *A History of the Supreme Court* (New York: Oxford University Press, 1993), 11-13.

established. This committee, chaired by Connecticut Senator Oliver Ellsworth, organized the federal judiciary. The task, however, was not a simple venture because of the fears held by many congressmen about federal encroachment on individual states. According to one scholar, Virginia Senator George Mason expressed their anxiety predicting that the federal judiciary would "absorb and destroy the judiciaries of the several states."[176] Pennsylvania Senator William Maclay, in his journal July 17 1789, echoed these fears and claimed that he "opposed this bill" because it

> is a vile law … calculated … with a design to draw by degrees all law business into the Federal courts. The Constitution is meant to swallow all the State Constitutions … and thus to swallow, by degrees, all the State judiciaries.[177]

After much debate and compromise, the committee's final version of the Judiciary Act of 1789, largely influenced by Ellsworth, incorporated some features of the English Court system with slight modifications. One such concept was the notion of circuit riding. English law required judges to travel throughout the country and try cases in local towns because the king believed that as the judges tried their cases in localities, the people witnessed the his reign and power and became more loyal to the kingdom. In addition to circuit riding, the committee also stipulated that there should be a limited jurisdiction on inferior federal courts, development of a hierarchical three-tiered judicial structure, and, perhaps most importantly, a defined role for the Supreme Court as an appellate court regarding all federal questions, even those arising from state courts.[178]

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[176] Quoted in, Casto, *The Supreme Court in the Early Republic*, 29.

[177] Kenneth Bowling ed., *The Diary of William Maclay and Other Notes on Senate Debates* (Baltimore: The Johns Hopkings University Press, 1988), 116.

[178] Casto, *The Supreme Court in the Early Republic*, 27 – 29, 36; Kermit L. Hall, ed., *The Oxford Companion to The Supreme Court of the United States* (New York: Oxford University Press, 1992), 472; Erwin C. Surrency, *History of the Federal Courts* (New York: Oceana Publications Inc., 1987), 1 – 2.

The major tenet of the Judiciary Act of 1789 was the structure of the federal judiciary, which largely stayed the same throughout the nineteenth century. The 1789 Act distinguished between three types of federal courts: district, circuit, and Supreme. The district courts, presided over by a single district judge, were the most numerous of all federal courts, located in each state. The circuit courts comprised the second tier in the judicial system. According to the Judiciary Act, the United States was divided into three geographic circuits: Eastern, Southern, and Middle. The Supreme Court, the sole court specifically guaranteed in Article III of the Constitution, was the chief federal court in the country. Its membership consisted of five Associate Justices and a Chief Justice, all of whom were required to ride circuit. Though praised by Kentucky Senator Isham Talbot as a beneficial requirement because it allowed justices to visit various states and to feel the people's "sentiments … connected … with the just pride, the sovereignty, the constitutional independence," the component of circuit riding was the subject of much controversy for the next century.[179] These circuits were composed of two Supreme Court Justices and each justice, along with the district judge, was permanently assigned to a circuit and required to hold court twice a year. Because of the difficulties associated with traveling, however, this particular provision was short-lived. In 1793, Congress decided that circuit courts should only consist of one justice from the Supreme Court in addition to the district judge, and that each justice should rotate his circuit duties in order to compensate the members of the Supreme Court who had to travel long distances.[180]

The role of the Supreme Court as an appellate court was accepted quickly by Congress. Unlike the debate that would eventually occur in 1861 and 1862 regarding the reorganization of

[179] Quoted in Surrency, *History of the Federal Courts*, 43.

[180] Leo Pfeffer, *This Honorable Court: A History of the United States Supreme Court* (Boston: Beacon Press, 1965), 43 – 44; Surrency, *History of the Federal Courts*, 15, 27, 35 – 37; Hall, ed., *The Oxford Companion to The Supreme Court of the United States*, 472 – 473; Casto, *The Supreme Court in the Early Republic*, 44 – 46.

the judicial circuits, arguments during the First Congress were largely concerned with the influence of the inferior federal courts. These fears were based upon beliefs that conflicts would arise between those courts and individual state courts, which would result in the powers of the state being usurped by the federal government. Consequently, these fears resulted in the limitation of the jurisdiction of the inferior federal courts. Some scholars, however, believe that the limited jurisdiction also served the interests of the Federalist Party. According to historian William Casto, Ellsworth's "ultimate objective" was not the creation of a federal judiciary; rather, he "sought to create a judicial system as a means to achieve several discrete and important national security objectives."[181] Consequently, the federal courts received vast power over prize cases, which dealt with the seizure of goods aboard a foreign or domestic ship in times of war, power to prosecute violators of federal law, and power to enforce federal revenue law. This jurisdiction was then divided even further between the district and circuit courts to the extent that one scholar commented that the "division" between these two courts "was then like a pie, with the district courts having a very small slice and the circuit courts having the larger share."[182] Dual rationale existed for the concentration of federal jurisdiction into the circuit courts. Supreme Court justices, according to New Jersey Senator William Paterson, would "carry Law to Homes" of the citizenry. Thus, citizens of states would become familiar with the federal government and its power, which would ensure longevity of the government. In addition, Congress also believed that the circuit riding of Supreme Court justices would ensure the supervision of federal trial courts without an appeals process.[183]

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[181] Casto, *The Supreme Court in the Early Republic*, 32.

[182] Surrency, *History of the Federal Courts*, 61.

[183] Schwartz, *A History of the Supreme Court*, 14; Hall, ed., *The Oxford Companion to The Supreme Court of the United States*, 473 – 474; Casto, *The Supreme Court in the Early Republic*, 45.

Even though the next major revision of the federal judiciary was brief, it introduced the most significant and necessary revisions to the courts. The Judiciary Act of 1801, often referred to as the "Midnight Judges Act," was approved by a Federalist-dominated Congress prior to the Jeffersonian Republican takeover. It received its nickname because judicial commissions were allegedly signed in the last fleeting moments of President John Adam's term. Even though the act appeared to be, and probably was, a partisan maneuver on behalf of the Federalists to retain power long after their defeat, it contained numerous provisions that enhanced the federal judiciary regardless of party. Most importantly, the 1801 Act recognized the judicial complaints regarding the difficulties of circuit riding and abolished that requirement, which was, as one scholar described, "the great albatross of the early Supreme Court."[184] This was a significant victory for the justices because circuit riding was a bane for many members of the court, and one scholar believed that Chief Justice John Jay's disdain for his circuit assignment caused him to consider resignation from the Supreme Court.[185] Even though Congress relieved the justices of their circuit duty, the legislative body still recognized the necessity of an intermediate level court. Therefore, they created six circuit court judgeships and authorized the formation of three additional circuits for a total of six. In addition to that improvement, Congress also established ten new judgeships for the district courts and four additional courts. Since circuit riding was eliminated and additional circuit judgeships were created, the Federalist-dominated Congress decided to reduce the total number of Supreme Court Justices to five. Jeffersonian Republicans argued that this provision was included to prevent President-elect Thomas Jefferson, the major political opponent of the Federalists, from appointing a member of the Supreme Court. The final major revision to the judiciary by the 1801 Act further expanded the jurisdiction of the inferior

[184] Schwartz, *A History of the Supreme Court*, 30.
[185] Casto, *The Supreme Court in the Early Republic*, 55.

federal courts, which many southerners perceived as a threat to their state sovereignty. Thus, the Jeffersonian Republicans were adamantly opposed to these revisions because they not only substantially increased the power and jurisdiction of the judiciary, but also enlarged the number of federal judges from twenty-three to thirty-five.[186]

Despite improvements, such as the abolition of circuit riding, the Jeffersonians rescinded the 1801 Act immediately upon gaining control of Congress. Even though they repealed the 1801 Act, the Jeffersonian Republican dominated Congress believed some changes to the federal judiciary were necessary. After some debate, the Seventh Congress passed the second Judiciary Act of 1801. The highlights of the new law were two-fold. Because the United States had grown significantly since 1789, Congress decided that six circuits were necessary for an adequate court system. The legislature, however, did not increase the number of Supreme Court justices; therefore, each justice was solely responsible for a circuit. Since this alteration was a modification of the 1793 Act that assigned two justices to each circuit, Congress recognized the new difficulties of travel and changed the term of the Supreme Court from meeting twice a year to once a year. This was done in order to provide more time for the justices to ride circuit so that they would not have to return constantly to Washington to hold court. The six circuit country only lasted five more years. In 1807, because of the expanding nation, Congress was forced to create a seventh circuit and thus added a seventh member to the Supreme Court. This maneuver

[186] Schwartz, *A History of the Supreme Court*, 30; Hall, ed., *The Oxford Companion to The Supreme Court of the United States*, 474; Casto, *The Supreme Court in the Early Republic*, 55; Pfeffer, *This Honorable Court*, 66 – 67; Surrency, *History of the Federal Courts*, 20 – 21; George Lee Haskins & Herbert A. Johnson, *History of the Supreme Court of the United States*, vol. 2, *Foundations of Power: John Marshall, 1801 – 15* (New York: Macmillan Publishing Co., Inc., 1981), 108.

began the tradition that for each circuit created, an additional appointment to the Supreme Court occurred.[187]

As the nineteenth century progressed and the country continued to expand, the justices confronted an increasing caseload both in the circuits and before the Supreme Court. Because of these circumstances, members of Congress, in 1820, proposed bills to create additional circuits in the Western United States, which would be presided over by justices who were not members of the Supreme Court. Western states considered this proposal discriminatory because they would be the only circuit courts without Supreme Court representation. Consequently, the western states opposed this bill and it failed.[188] In 1826 members from the western states introduced an alternative proposition before Congress that proposed to add three additional circuits and to increase the Supreme Court's membership to ten justices. This measure was opposed by numerous members because they believed that such a substantial increase would both drastically decrease the influence of the eastern section of the country and also render the Supreme Court inefficient due to its large size. Ultimately, the measure failed.[189] For the next decade, western states still considered the court biased toward eastern interests but were unable to alter its membership. Finally, in 1836, Tennessee Democratic Senator Felix Grundy introduced a bill that was able to garner enough votes to force change upon the federal judiciary. Grundy's efforts resulted in the Judiciary Act of 1837, which reorganized the circuits and created two new circuits entirely composed of states located in the West and South. Thus, as of 1837, four out of nine circuits and, consequently, four out of nine Supreme Court justices were southerners. It was Grundy's bill, the last major change in the judiciary prior to the Civil War, that created the

[187] Schwartz, *A History of the Supreme Court*, 30; Hall, ed., *The Oxford Companion to The Supreme Court of the United States*, 474; Pfeffer, *This Honorable Court*, 66 – 67; Surrency, *History of the Federal Courts*, 20 – 21, 36; Haskins & Johnson, *History of the Supreme Court of the United States*, vol. 2, 111.

[188] Surrency, *History of the Federal Courts*, 37.

[189] Ibid., 37.

geographic circuits and the nine-member Supreme Court that would be at the center of the Civil War – era judicial modifications.[190]

As additional circuits were designed and the Supreme Court grew, most presidents adhered to George Washington's precedents. The first president believed that appointment of justices should not be based upon political favors but rather on the "due administration of Justice."[191] Consequently, as long as Washington's ideology was adhered to, the Supreme Court would not become according to one scholar a "reliquary for political hacks."[192] Another precedent that was short – lived was the unanimity of opinions during the apex of Chief Justice John Marshall's Court. According to Marshall's biographer, the unanimity of the court was "fostered by the chief justice's effective leadership and by fundamental agreement on basic values embodied in the Constitution."[193] Throughout numerous controversial cases that dealt with the powers of the federal government, the Marshall Court spoke with internal unity. These unanimous decisions not only demonstrated Marshall's ability as a leader but also helped the Court gain prestige and respect as an interpreter of the Constitution. This period of harmony was not a permanent precedent, however, as it began to diminish during the end of Marshall's chief justiceship and never again did a period like that exist.[194]

One custom of the early Supreme Court that continued throughout the nineteenth century, dealt with circuit riding and the process of appointment. Despite numerous grievances from Supreme Court justices, Congress refused to abolish circuit riding. In 1807, however, they

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[190] Hall, ed., *The Oxford Companion to The Supreme Court of the United States*, 475; Surrency, *History of the Federal Courts*, 30, 38; Carl B. Swisher, *History of the Supreme Court of the United States*, vol. 4, *The Taney Period 1836 -64* (New York: Macmillan Publishing Co., Inc., 1974), 58 – 59.

[191] George Washington quoted in, Casto, *The Supreme Court in the Early Republic*, 55.

[192] Casto, *The Supreme Court in the Early Republic*, 55.

[193] Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence: University of Kansas Press, 1996), 10.

[194] Hobson, *The Great Chief Justice*, 10 – 12; Swisher, *History of the Supreme Court of the United States*, vol. 4, 3.

responded to the complaints and mandated that all appointees to the Supreme Court must reside in the circuit to which they were appointed. This requirement, however, was not a major modification because a precedent had already been established that the president appointed individuals to the Supreme Court who resided in the circuit. In the nineteenth century, accordingly, numerous traditions and laws affected a president's ability to appoint justices to the Supreme Court. Lincoln's proposals to modify the federal judiciary in 1861 dealt with these requirements. Since the majority of the vacancies on the court were in the South, Lincoln was forced to appoint additional southerners to the bench. The president believed that this would complicate the war effort because the South was in secession and it would be extremely difficult to find loyal Unionists. The court was still composed of the southern-dominated pro-*Dred Scott* majority.[195]

The *Dred Scott* decision was the principal source of Republican's suspicion of the Supreme Court. In particular, this fear prompted Lincoln to modify his views about the role of the judiciary. The 7 – 2 decision not only recognized slaves as property but also declared that Congress could not restrict slavery in the territories. The ruling of the Missouri Compromise as unconstitutional was extremely controversial and influenced Republicans to believe that the Supreme Court was pro-South and would sympathize with the Confederacy during the war. Since Supreme Court justices held lifelong tenure and had been confirmed by the heavily southern-dominated Senate, the court represented a last bastion of the aristocratic Old South during the shifting political climate of the late 1850s and early 1860s. Out of the nine justices who were on the court in 1857, six remained at the time of Lincoln's inauguration: Chief Justice Roger B. Taney, Robert C. Grier, James M. Wayne, John Catron, Samuel Nelson, and the abolitionist John McLean. Four of these six comprised the majority of the *Dred Scott* decision.

[195] Surrency, *History of the Federal Courts*, 27 – 28, 36; Silver, *Lincoln's Constitution*, 3.

The seventh member of the Taney Court was southern sympathizer Nathan Clifford, who was appointed by James Buchanan after Benjamin R. Curtis, a dissenter in *Dred Scott*, resigned. The other two southerners who composed the *Dred Scott* majority, Justices Peter V. Daniel and John A. Campbell, departed the court through death and resignation. Ultimately, the court was dominated by southerners because the circuits were not based upon population but by geographic size, and the equal representation of the Senate helped the South to maintain a political domination of the judiciary. Consequently, the South's representation on the Supreme Court was disproportional to its population. In 1861, the nation's population was approximately 27.87 million, and roughly 11.12 million lived in the South. Even though the southern states only accounted for 40% of the United State's population, five out of the nine or 55% of the judicial circuits were located in the South. Thus, at the time of Lincoln's inauguration, even though two vacancies existed, the Supreme Court was still dominated by southern sympathizers whose loyalty toward the Constitution and Union was unknown.[196]

Despite encouragement throughout 1861 from the northern press to alter the composition of the Supreme Court, Abraham Lincoln remained silent and carefully pondered his options. Even though he could appoint one third of the nine member body, these actions would not guarantee favorable judicial rulings. Of the six justices who had supported Taney in *Dred Scott*, four remained on the court, and all but one of the remaining justices were "embittered proslavery Democrat[s]."[197] Consequently, even with the appointment of "three zealous Republicans," according to one scholar, Lincoln would still face a "hostile" court, unfriendly to the administration and the war measures necessary to preserve the Union.[198]

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[196] Hall, ed., *The Oxford Companion to The Supreme Court of the United States*, 966, 967; Silver, *Lincoln's Constitution*, 8 – 24; Pfeffer, *This Honorable Court*, 152 – 153.

[197] Michael A. Ross, *Justice of Shattered Dreams*, 66.

[198] Ibid., 66.

After months of silence, the president offered Congress his suggestions on the future of the federal judiciary in a carefully crafted message on December 3, 1861. Citing the growing population difference between the North and South, the president declared that the "transfer to the north one [of the circuits currently located in the South], would not…be unjust."[199] Defending this assertion, Lincoln described the northern abolitionist Justice McLean's district, which, he declared, had "grown too large for any one judge." The president, however, did not conclude his criticism of the judiciary with that statement, rather he generalized that the entire country had "outgrown" its "present judicial system" and was desperately in need of modification.[200] This generalization, Lincoln warned, was not a suggestion to Congress that the body should add "enough justices" to accommodate "all parts of the country" because, he asserted, that action would create a court "altogether too numerous for a judicial body of any sort." If Congress wanted for the court to remain functional, Lincoln stressed that a change to the judicial structure was necessary. He then outlined three possible means of revamping the Federal Judiciary, which began with an important caveat - the Supreme Court should be "of convenient number in every event." The first plan stipulated that the country be divided into "circuits of convenient size," with both Supreme Court and "independent circuit judges" serving on them. The second, and probably best option, relieved the justices of their duties of riding circuit and created circuit court judges as their replacements. The final proposal, which was nightmarish for the overburdened judiciary, was to abolish the circuit courts altogether and leave judicial responsibilities to the District and Supreme Courts. With those suggestions, Lincoln concluded his views on judicial reorganization.[201] According to David Silver, this action

[199] Annual Message, December 4, 1861, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln Vol. 5 p. 41.

[200] Ibid., 41.

[201] Ibid., 42.

demonstrated "political acumen" because the executive's "attack upon the Court was oblique rather than frontal."[202] Furthermore, Lincoln knew that because of *Dred Scott* the radicals in Congress were willing to reprimand the court. This political ploy was successful. Despite the advantages or disadvantages of Lincoln's second and third suggestions, Congress, especially the radical Republicans, strongly supported the president's claim that the "Supreme Court be of convenient number" and "circuits of convenient size."[203] Radical Republicans were defined by two features. They believed the war was fought not only to end slavery, but also to give blacks full citizenship and that southerners should be punished for their role in the Civil War. Once these Republicans heard Lincoln's remarks, they interpreted them as an endorsement of revolutionary change, especially the prospect of enlarging the Supreme Court. During the annual address, the president explicitly wrote that even though the "country has outgrown our present judicial system," the addition of "judges to the Supreme Court, enough for the accommodation of all parts of the country, with circuit courts, would create a court altogether too numerous for a judicial body of any sort."[204] Lincoln's implicit message was that the Supreme Court should not grow absurdly in number, and the solution to the conundrum was not to create an ineffective judiciary.[205]

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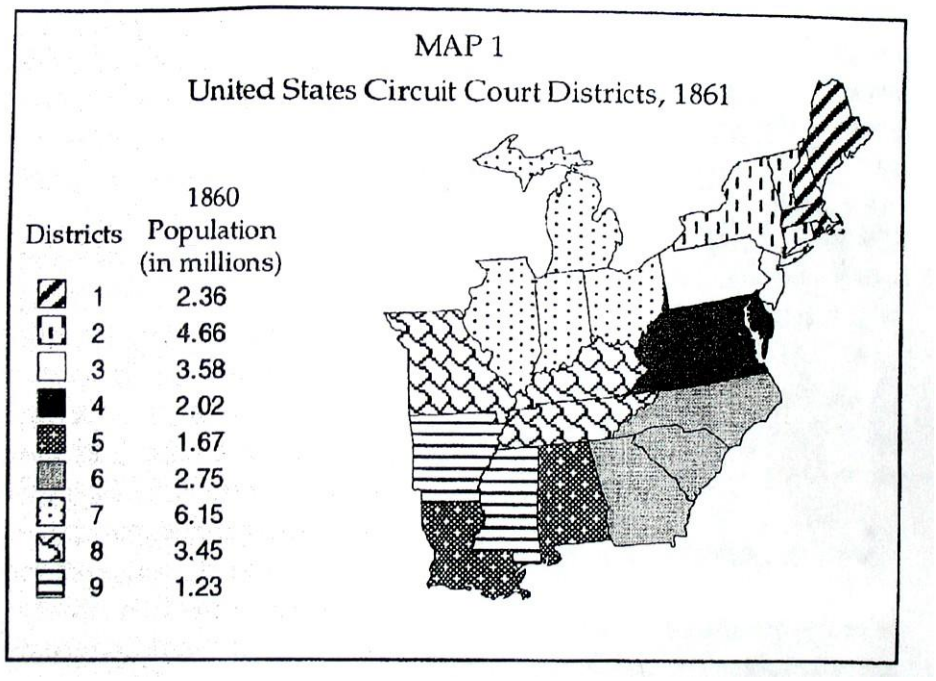
[202] Silver, *Lincoln's Supreme Court*, 41.

[203] Ibid., 42; Silver, *Lincoln's Supreme Court*, 40 – 41.

[204] Annual Message, December 4, 1861, Abraham Lincoln Papers at Library of Congress. The Collected Works of Abraham Lincoln, Collected Works of Abraham Lincoln (November 3 2003).

[205] Swisher, *History of the Supreme Court of the United States*, vol. 4, *The Taney Period 1836 -64*, 822.



Source: Ross, "Justice for Iowa: Samuel Freeman Miller's Appointment to the United States Supreme Court During the Civil War," 116.

The northern public's response to Lincoln's proposals was overwhelmingly positive. Both newspapers and congressmen expressed views that the Supreme Court should be modified because a more strategically composed court of Unionist justices would help the war effort and ensure the continuation of crucial wartime measures. In an editorial in the Chicago *Tribune*, the paper defended and led the northern resistance against the Supreme Court and declared that the Republican victory was not complete until the Supreme Court was forced to renounce the "evil" principles that it espoused in *Dred Scott*. Furthermore, the editor proposed the court should be restructured by "dropping off a few of its members" and appointing "better men in their places" because this action would ensure that the "last entrenchment behind which Despotism is sheltered" was destroyed.[206] Other papers detailed similar plans. The New York *Tribune* desired to increase the court's membership to thirteen. The paper's proposal increased the northern circuits from four to seven, maintained the five circuits in the border states and South, and

[206] Chicago *Tribune*, March 4, 1861. Quoted in Silver, *Lincoln's Supreme Court*, 42.

created a new circuit on the Pacific coast. According to the *Tribune*, Lincoln would appoint seven justices, which would guarantee a pro-administration court.[207] Another proposition, suggested to Lincoln prior to his December address, was from Samuel A. Foot. In a June 4 letter, Foot recommended that Supreme Court composition be increased to twelve justices, which would "give the administration six important appointments." Furthermore, he rationalized that such an action "may aid in bring treason to terms, as well as provide judicial machinery for punishing traitors."[208] The proposals suggested that both editors and politicians viewed an alteration of the Supreme Court as the next political step toward overturning *Dred Scott*. The plan was twofold. Only with control of the judiciary would the bane of *Dred Scott* be nullified, and a Republican dominated court could become another instrument that supported the Union during the Civil War.

Since Lincoln did not explicitly inform Congress of his preferred method of revision, the final remedy rested entirely in their hands. That body, however, was divided between the radical and conservative elements of the Republican Party, which both possessed vastly different views on slavery, emancipation, and how the court or federal judiciary should be improved. The radicals desired to drastically alter the Supreme Court's composition, while the moderates planned to focus on reorganizing the judicial circuits. Ultimately, this absence of a unified front resulted in various proposals that ranged from moderate to radical. These recommendations included suggestions such as measures intended to replace the entire Supreme Court, add a significant number of justices, or restructure the judicial circuits. Despite congressional inability to unite behind a single plan, the majority of members agreed with Lincoln that change was necessary. Immediately following Lincoln's December address, New Hampshire Republican

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[207] Silver, *Lincoln's Supreme Court*, 42-43; New York *Tribune*, June 10, 1861.
[208] Samuel A. Foot to Abraham Lincoln, June 4, 1861.

Senator John P. Hale introduced a measure that was intended to dissolve the current Supreme Court and replace it with "another Supreme Court," which would be entirely comprised of Lincoln appointees.[209] Even though Hale's opponents claimed the replacement of the entire Supreme Court was unconstitutional, radical Republicans grounded their rationale in a liberal interpretation of the Constitution. According to Article III, they reasoned, Congress possessed the power "from time to time, ordain and establish" the judicial power of the Supreme and inferior courts.[210] Thus, Hale concluded that it was the duty of Congress to replace the Supreme Court because such action was in accordance with the intentions of the Founding Fathers. Referring to the dire problems of the Civil War, he claimed "this is one of the very times the framers of the Constitution contemplated."[211] With resolution in hand, Hale and his supporters were ready to radically transform the court, politicize the judicial branch of government, and teach Taney a long overdue lesson about his role in *Dred Scott* and *Merryman*.

Hale led the radical Republican charge against the Supreme Court and began his criticism of the judiciary with the claim that the court had "utterly failed" and was "bankrupt in everything that was intended by the creation of such a tribunal." The court's malfunction, he explained, was not its own fault. Throughout the nineteenth century the tribunal was involved in political matters, and justices were not appointed because they "were learned in the law" and competent jurists, but rather were selected to serve on the high tribunal as "politicians." Therefore, Hale reasoned that since the politics of the era evolved, the court's composition should reflect those changes. Since the Supreme Court was involved in politics, took a stance on political questions,

[209] Cong. Globe, 37 Cong., 2nd sess., p. 8; Silver, *Lincoln's Supreme Court*, 43; Swisher, *History of the Supreme Court of the United States*, vol. 4, *The Taney Period 1836 -64*, 823.

[210] U.S. Constitution, Art. III, sec. 1; Silver, *Lincoln's Constitution*, 43 – 44.

[211] Cong. Globe, 37 Cong., 2nd sess., p. 26.

and was "part of the machinery of the old Democratic party," an alteration was necessary.[212] Hale's perception about the political composition of the court was not unfounded. Even though the political affiliation of the presidents between Jackson and Buchanan were five Democrats to four Whigs, the majority of the justices appointed to the court were from the Democratic Party. From 1829 to 1861, only one, Benjamin Curtis, out of the fourteen justices appointed to the court was a Whig.[213] After Hale made that observation, he demanded that the Senate accept its obligation and alter the Supreme Court, and then continued to detail the offenses the judiciary had committed. He claimed that Democratic politicians "imposed" upon the people of New Hampshire a justice, who was opposed by the "unanimous voice of the people." Supreme Court Justice Nathan Clifford, of the first circuit, Hale charged, was "sympathetic with the men who were for forcing … [slavery] doctrines upon the country," and was appointed by the party in power not because of his jurisprudence, but largely to "declare what was agreeable" to the Democratic Party. Since political power changed hands and "the party which was in power has gone out of power," Hale emphasized that it was now the duty of Congress to stop Clifford and the secessionist Democratic Party from declaring the law by destroying the remaining "citadel" of Democratic power, "the present Supreme Court of the United States."[214]

Promptly, following Hale's address, another Senator, moderate Republican Lafayette S. Foster of Connecticut, responded. Even though Foster agreed with Hale's characterization of the court, he attacked the proposal because he viewed it as an attempt to destroy the independent judiciary. The senator declared that members of Congress must "confine ourselves to our appropriate sphere of duty," and only upon cases of impeachment remove members of the

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[212] Ibid., 26.

[213] Gunther and Sullivan, *Constitutional Law*, B – 2, B – 3.

[214] Cong. Globe, 37 Cong., 2nd sess., p. 27; Silver, *Lincoln's Constitution*, 44; Swisher, *History of the Supreme Court of the United States*, vol. 4, *The Taney Period 1836 -64*, 823.

Supreme Court. The senator explained that even if the Supreme Court could be replaced "from time to time," according to the Senate's desires, the "new set of judges" appointed will still be appointed in the same manner, by a "fallible President" and confirmed by a "fallible Congress." Consequently, Foster explained, the country will be subject to the same evils that the nation had been "subject to for eight years past," with the additional grievance that each time a new party controls Congress, it can change the court system to favor its agenda.[215] Any such attacks on the court would destroy its credibility, and transform the judiciary into an irrelevant branch of government, not separate or equal to the Legislature or Executive, as the Founding Fathers intended. In order to avoid this blunder, Foster claimed, the Senate must remain "within its appropriate sphere of duty, and not attack the judiciary" and, hopefully, the Supreme Court shall return this "compliment" and not interfere with wartime measures.[216] Foster's conclusion demonstrated how the Republicans evaluated their partisanship against national responsibility. Despite being in the position to reconstitute the entire composition of the court, moderates balked. Perhaps they realized that Republicans would not always control the reigns of power, or that the court should not be a political pawn of Congress. Whatever their rational, Foster and other Republicans comprehended that the integrity of the Supreme Court and its role in the nation's future would be irreparably harmed if the radical's agenda was followed.

Other Senators quickly agreed with Foster, and emphasized a more realistic view of Lincoln's December 3 address. Unlike Hale, these members were inclined to revise the court, and not destroy the autonomous judiciary. Furthermore, they did not believe, according to David Silver, that it was yet necessary to "deal in an extremist manner with the Court," however, many

[215] Cong. Globe, 37 Cong., 2nd sess., p. 27
[216] Ibid., 27; Silver, *Lincoln's Constitution,* 45.

Republicans conceded "that day might arrive."[217] As evident by the numerous speakers criticizing Hale's proposal, especially Lincoln's friend Republican Senator Orville H. Browning of Illinois, moderate Republicans were not willing to take that additional step. In his speech, Browning criticized Hale's plan, and contended that the abolition of the current Supreme Court and replacement with another was "beyond the power of Congress." Even if Congress possessed that power, Lincoln's friend sarcastically stated that the resolution should not be focused on abolishing the present Supreme Court, but rather an inquiry into the "expediency of repealing the Constitution," which would be a more fitting action. Any major alteration of the court, especially as suggested by Hale, would further turn that judicial body into a political agent. As "the political composition of Congress changes," the senator argued, "the same 'town meeting proceeding' recurs, and the court is again abolished."[218] Ultimately, the acceptance of Hale's resolution, according to moderate Congressional Republicans, was equivalent to an acceptance of the Supreme Court as a sub-branch of the government unequal to the Legislative or Executive Branches.

Despite a verbal lashing from his colleagues, Hale was determined to prolong debate on his resolution. He contended that the Supreme Court could be altered and reformed as deemed necessary by the public and Congress. The intention of the Founding Fathers, he declared, was not to bestow "the first Congress" the power to create a court that for all time was immune from "improvement…alteration… [or] any reorganization." Rather, the intent was for the judiciary to remain accountable and "subservient to the public" will, because the people, and not the courts, were the protector of their own liberty. Consequently, if either a state or federal court challenged this notion, Hale believed that it was the duty of the legislature to reprimand the court. Citing the

[217] Silver, *Lincoln's Constitution*, 45.
[218] Silver, *Lincoln's Supreme Court*, 45 – 46; Cong. Globe, 37 Cong., 2nd sess., p. 28.

alteration of his state's Supreme Court through the "progress" of history as evidence, the New Hampshire senator claimed that "it was necessary to abolish it" because the court did not adhere to the "wants of the people." Therefore, "we got another and better one" more closely aligned with the desires of the states people. He perceived the New Hampshire Supreme Court as analogous to the United States Supreme Court, because both courts neglected their primary duty, which was service to the people. Thus, the only method to ensure a successful remedy was to replace the justices with citizens aligned with the views of the people.[219]

After debate concluded, moderate senators amended Hale's resolution into oblivion because they removed all clauses that dealt with the restructuring of the Supreme Court. The amended resolution simply recommend to the Judiciary Committee to examine Lincoln's proposals to alter the court. Even though Hale's resolution failed, the northern Republican press continued to advocate major reconstruction of the court. The New York *Tribune* noted that the Supreme Court remained largely sectional, and that Hale's proposal was "a favorable opportunity to restore a just equilibrium between the sections, and, at the same time, bring back public confidence to the Court." The paper emphasized that "our sole objective…is to impress upon Congress the…importance of embracing this opportunity to thoroughly reform our Federal judiciary" and ensure the successful conclusion of the Civil War.[220] Despite congressional inactivity and rejection of Hale's resolution, the public and press still remained largely in favor of massive judicial reorganization. In addition to support from the radical press, Hale received a letter from John Jay, grandson of the first chief justice, expressing his support for the resolution. In this letter, Jay claimed that reorganization of judicial circuits and the Supreme Court was necessary because the loyalty of the high tribunal was unknown. Furthermore, on important

[219] Cong. Globe, 37 Cong., 2nd sess., p. 28; Silver, *Lincoln's Supreme Court*, 46 – 47.
[220] New York *Tribune*, December 12, 1861. Cited in Silver, *Lincoln's Supreme Court*, 47.

issues, such as the suspension of the Writ of *Habeas Corpus*, Jay asked rhetorically if "we can rely upon the court to overrule the view of Chief Justice Taney…and sustain the Acts which Congress…pass for the conduct of the war and the Emancipation of slavery and Confiscation of the property of rebels?" The chief justice grandson's answer was no. The Supreme Court was unreliable. Jay wrote, "our troubles will be greatly complicated" if we allow the current Supreme Court to remain hostile to Congress and the president. The high court's actions will only inspire northern Democrats opposed to the government to "assume…the sanction of the Supreme Court" for their actions, which would ultimately "hopelessly divided" the North and complicate the Union's war effort.[221]

Hale's proposed inquiry into the replacement of the entire Supreme Court was not intended to modernize the judiciary, but rather, served as a political ploy meant to undermine the judicial system and gain power at the expense of the Democratic Party.[222] Even though the court was partisan, the acceptance of Hale's proposal would result in a further politicization of the judiciary because every time a new party gained control of Congress, they would respond by altering the Supreme Court's composition. Additionally, moderate Congressmen believed Hale's proposal was not necessary because of the advanced ages of many justices, with more vacancies on the court widely anticipated. Therefore, any radical alteration of the judiciary was deemed unnecessary. According to David Silver, the radicals and abolitionists, however, were impatient for vacancies on the court. Rather, these men viewed the Supreme Court's restructuring as Chief Justice Taney's "recompense for Dred Scott and John Merryman."[223] Changes were necessary, these men believed, because the country had greatly expanded since the last modification of the

[221] John Jay to John P. Hale, December 13, 1861, Hale Papers. Cited in Swisher, *History of the Supreme Court of the United States*, vol. 4, *The Taney Period 1836 -64*, 824.

[222] Joseph P. Fried, "The U.S. Supreme Court During the Civil War," *Civil War Times* 1 (1963): 32.

[223] Silver, *Lincoln's Supreme Court*, 43, 48.

judicial system in 1837. Since then, the population of the North had expanded exponentially, while the southern population remained mostly stagnant. Noticing this development the *Chicago Tribune* observed that "the twenty millions of the people of the free states are represented by four judges while the nine millions of whites in the South have five judges."[224] Members of Congress, additionally, acknowledged the disparity, which prompted James F. Wilson of Iowa to claim that the Supreme Court was a "monstrous citadel of slavery" and alteration was necessary.[225] Michael Ross, court historian, further described the population discrepancy in the judicial circuits between the North and South. According to the scholar, the organization reminded northerners of the injustice of the three-fifths compromise, which both were intended to bestow upon the South greater representation than deserved.[226]

After Hale's proposal failed, Senator John Sherman of Ohio, a moderate Republican, introduced a bill on January 9, 1862 that was intended to modify the federal judicial circuits. This overture was analogous to Lincoln's December 3, request because its goal was to consolidate the southern circuits, and create additional circuits in the North and Midwest, which, as Lincoln desired, allowed for greater northern representation on the court. Immediately after the bill's introduction, it was forwarded to committee, and within ten days, Illinois Senator Lyman Trumbull, Chair of the Senate Judiciary Committee, released Sherman's proposal onto the Senate floor.[227] In the ensuing debate, Trumbull urged acceptance of the resolution. The Illinois Senator claimed the first objective of the bill, which was to "equalize" the circuits based "chiefly upon population," ensuring fair representation of various sectional interests. In their

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[224] *Chicago Tribune*, June 5, 1862. Quoted in Ross, *Justice of Shattered Dreams*, 69.

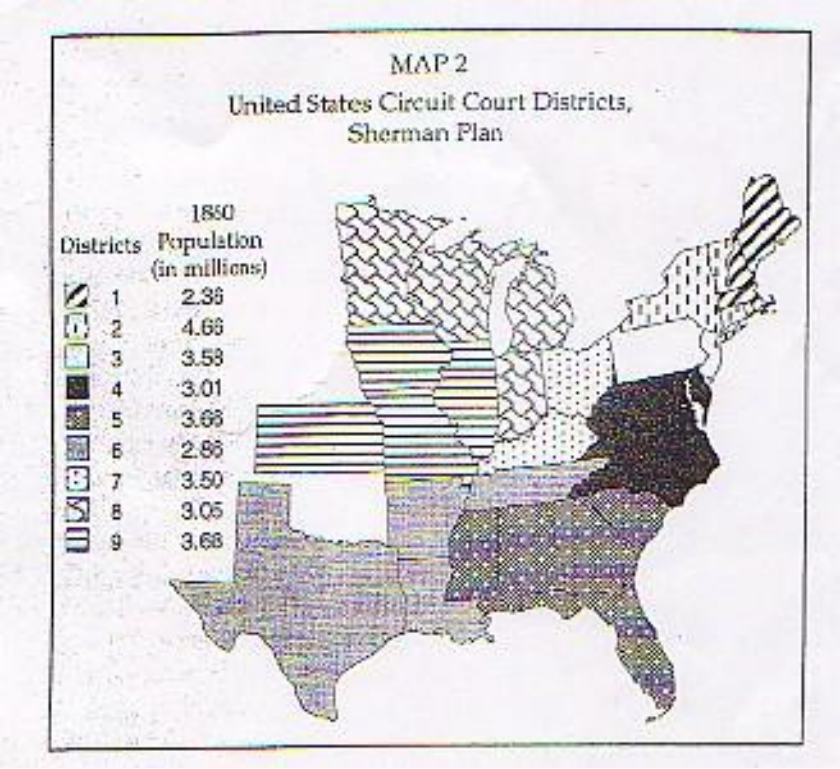
[225] Ross, "Justice for Iowa: Samuel Freeman Miller's Appointment to the United States Supreme Court During the Civil War," 116.

[226] Michael A. Ross, *Justice of Shattered Dreams*, 69.

[227] Silver, *Lincoln's Supreme Court*, 48 – 49; Ross, *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era*, 69.

attempt to "equalize" the circuits, Trumbull's committee did not alter the three northern circuits, but consolidated the five southern and border state circuits into three, and created two additional circuits in the Republican dominated Midwest. This reorganization, according to the Senator, would ensure that the judiciary was constituted so there was "a living judge on the bench in each of six circuits." The three vacant seats, Trumbull explained, "are made up of the states west of Pennsylvania," therefore, Lincoln's newly appointed justices would originate from the free states of the Midwest, which would guarantee that the vacancies on the court were filled by pro-Union men. Trumbull concluded that not all states, however, were assigned to a circuit. California and Oregon, the Pacific coast states, were excluded because "they have their own peculiar system there," with a circuit court judge, Matthew Hall McAllister, who was not a member of the Supreme Court. If Congress created a circuit, Trumbull claimed, it would be necessary to add a tenth justice to the Supreme Court, and the Judiciary Committee felt that "it would be a very small circuit compared with the others." Since there was not a significant population in the far west, the committee concluded that an additional circuit was not a necessary addition.[228]

[228] Cong. Globe, 37 Cong., 2nd sess., p. 155, 187, 188, 469; Silver, *Lincoln's Supreme Court*, 49 – 50; Ross, *Justice of Shattered Dreams*, 69.



Source: Ross, "Justice for Iowa: Samuel Freeman Miller's Appointment to the United States Supreme Court During the Civil War," 118.

Even though Sherman's proposal appeared moderate and apolitical, judicial improvement was not the only motivation of the senator. Sherman's plan was partially based on political intentions, and in this regard, the resolution was similar to Hale's proposal to abolish and replace the entire judiciary. After Trumbull completed his introduction of the legislation, Sherman complained to the Senate that the judiciary committee had altered his original proposal. Under his plan, Ohio, Indiana, and Michigan were combined, but the committee altered the proposal and combined Ohio with Kentucky. This action displeased Sherman and his constituents. The Ohio senator explained that if his state remained in the same circuit as Kentucky, President Lincoln "would not be able to give that satisfaction that he could" during the judicial appointment process, which could effect the caliber of justices appointed to the court. Sherman's refusal to accept the committee's modifications demonstrated two major concepts. Foremost, it

conveyed that politics was a major motivation behind the judicial reconstruction and that politicians would use that opportunity to construct the circuit rearrangement to their advantage.[229] In response to criticism from the Ohio senator, Trumbull emphasized the "importance" of the bill and reminded Congress of the necessity for expediency. Since "the Supreme Court has but six judges upon the bench," he noted, Congress needs to enact legislation. It is essential, he continued, for new justices to be appointed, which will not occur "until some bill passes on the subject." Furthermore, "it would be" in the best interest of the country to "act upon [altering the circuit] as early as we conveniently can."[230] According to Michael Ross, the Republicans desired for "quick passage of the judicial reorganization bill" because with "the constitutionality of Lincoln's wartime measures hanging in the balance," Trumbull desired for Republican appointees to "begin to reshape the Court's jurisprudence" as soon as possible.[231] In spite of that plea for expediency, however, Trumbull yielded to Ohio Republican Senator Benjamin F. Wade's request to further delay the bill by another week.[232]

By the conclusion of January 1862, it was clear that disagreement among members of Congress would slow revisions to the judiciary, which compelled Lincoln to appoint a justice. His hand was forced when Justices Taney and Catron became ill, since their temporary departure left the court unable to maintain quorum. To solve this predicament, the president appointed Noah Swayne of Ohio to the Seventh Circuit. The appointment of Swayne demonstrated several significant insights into Lincoln's appointment methodology, which incidentally, would remain unchanged throughout his tenure as president. Ultimately, it was characterized by two concepts. Foremost, according to Ross, Lincoln appointed Swayne because he "assumed" that he "would

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[229] Cong. Globe, 37 Cong., 2nd sess., p. 187; Silver, *Lincoln's Supreme Court*, 50.
[230] Cong. Globe, 37 Cong., 2nd sess., p. 188.
[231] Ross, *Justice of Shattered Dreams,* 70.
[232] Silver, *Lincoln's Supreme Court*, 50; Swisher, *History of the Supreme Court of the United States*, vol. 4, *The Taney Period 1836 -64*, 824 – 825.

uphold his war measures."[233] Secondly, the jurist's appointment was based upon Lincoln's constitutional jurisprudence. Since the president believed that the Constitution derived its authority from the people, numerous men were capable of serving upon the high tribunal and could meet those requirements. Swayne, who never had any judicial experience, demonstrated that concept. David Silver, Supreme Court historian, elaborated on the former point, and observed that the "cases involving the war, particularly the question of the legality of the blockade, would soon reach the Court," therefore, "it might be well to start to fill the vacancies."[234] Another crucial aspect of Swayne's appointment was that during the process, the political motivations of individual congressmen and President Lincoln became evident. One scholar expressed the belief that Swayne was chosen for two reasons, both of which encompassed politics. On the third ballot in 1860, at the Republican Party nominating convention, four Ohio Republicans switched their votes to Lincoln, and this action helped him win the party's nomination. This action caused the future president to feel indebted toward Ohio Republicans.[235] The second political motivation behind Swayne's appointment was not only his staunch pro-Union and anti-slavery views, but also his tenure as a prominent corporate attorney. Some scholars theorize that Lincoln chose Swayne because the administration needed to keep business interests satisfied in order to win the war.[236] Ultimately, two letters help reveal the politics behind the judicial appointments. In an 1861 telegraph from Ohio governor, William Dennison, to Lincoln, the governor articulated his belief that circuit rearrangement should group "Ohio Indiana & Michigan" together. Additionally, "consistent with your sense of duty" to the

[233] Ross, *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era*, 71.

[234] Silver, *Lincoln's Supreme Court*, 57,

[235] Ibid., 59.

[236] Ross, *Justice of Shattered Dreams*, 71 – 72.

state of Ohio, he wrote, that Swayne should be appointed as the "successor of Judge McLean."[237] Another letter between Swayne and Wade helped to illustrate the political motivation behind Senator Sherman's objections to an Ohio and Kentucky judicial circuits. In this letter, Swayne addressed concerns of his colleagues that Kentuckian John J. Crittenden would be placed on the Supreme Court to conciliate the South. Swayne emphasized that in their conversations Lincoln never "referred to" Crittenden as a potential justice, and reiterated the president's promise that "if the circuits were divided & Ohio disjoined from Illinois," Swayne would be appointed; there was no "other condition." The appointment of Crittenden, the future justice stated, would not occur because that action "would not be treating the loyal & republican state in which we live-well-to appoint the judge of our circuit from Kentucky"[238] Despite any reservations regarding Swayne's appointment, he was confirmed by the Senate on January 24 1862, and three days later took his place as a member of the United States Supreme Court.[239]

The northern press reacted favorably to Swayne's appointment. Surprised that Lincoln selected a justice before the circuit reorganization was complete, the Chicago *Tribune* commented that Swayne would uphold "the expectations of the people."[240] Other northern papers expressed the same sentiment. The Washington *National Intelligencer* praised Lincoln for the appointment of Swayne, and described the new justice as exemplifying "the qualities of mind which singularly fit him for the able and impartial dispensation of justice."[241] Another Washington paper, the *Evening Star*, further articulated praise for Swayne's appointment. Particularly impressed with the justice's southern roots, he was born in Virginia and moved to

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[237] William Dennison to Abraham Lincoln, December 14, 1861.

[238] Noah H. Swayne to Benjamin F. Wade, January 10, 1861, Wade MSS., Library of Congress. Cited in Silver, *Lincoln's Supreme Court*, 60.

[239] Silver, *Lincoln's Constitution*, 57 – 64; Swisher, *History of the Supreme Court of the United States*, vol. 4, *The Taney Period 1836 -64*, 825; Ross, *Justice of Shattered Dreams*, 71 – 72.

[240] Chicago *Tribune*, January 23, 1862. Quoted in Silver, *Lincoln's Supreme Court*, 61.

[241] Washington *National Intelligencer*, January 27, 1862. Microfilm Library of Congress; Also cited in Silver, Lincoln's Supreme Court, 61.

Ohio because of slavery opposition, the paper commented that he will serve on the Supreme Court with honor and "prove as efficient on…the bench, as in every other position he has previously" possessed.[242] Cleary, the northern press was not only optimistic regarding the new direction of the court, but also sanctioned Lincoln's selections.

After the appointment and senatorial confirmation of Swayne, the U.S. Senate enacted the judiciary committee's suggestion. They discharged a bill to the House of Representatives that recommend that Ohio and Kentucky form the Seventh Circuit. Both Sherman and Wade, the two Ohio senators, did not object to the maneuver. Their silence suggested that the historic motivations for joining Ohio, Indiana, and Michigan were irrelevant, rather the two senators solely desired an Ohio appointee for the Supreme Court. Meanwhile, the House of Representatives remained silent on the issue of judicial reorganization.[243] Despite the urgency for new judicial appointments and the completion of the circuit reorganization, the Iowa congressional delegation delayed all attempts to enact or further any legislation. Even though the Iowans were staunchly Republican and endorsed the changes, they stymied the legislation because of state concerns. Furthermore, with Lincoln's appointment of Swayne, Iowa's Congressional leaders intensified their plan to get a citizen of Iowa appointed to the Supreme Court. Republican Congressman James F. Wilson of Iowa led the crusade in the House of Representatives for Iowa to be placed in a separate district from Illinois. In his June 4, 1862 speech to the House on the judicial circuits, Wilson described the bravery of Iowa men in the military, all in anticipation of providing evidence that Iowa deserved the circuit arrangement of

[242] Washington *Evening Star*, January 23, 1861. Database, Dickinson College
[243] Swisher, *History of the Supreme Court of the United States*, vol. 4, *The Taney Period 1836 -64*, 825.

its choice. The congressman stated that "the volunteers of Iowa have done their duty" to the country because the state sent its quickly growing population away in defense of the Union.[244]

Seizing upon the inactivity in the House, Republican Senator James W. Grimes of Iowa reopened debate on the judicial circuits in the Senate. He again emphasized his desire to create a judicial circuit that contained Missouri, Iowa, Kansas, and Minnesota because "these States have adapted a different style of pleading from the other States."[245] Therefore, it was essential, he claimed, that those four states be grouped together. In addition to a similar set of laws, Grimes explained, these states contained a "rapidly increasing" population. Therefore, it would be prudent to lump them together in a circuit because the population growth quickly will augment the sparsely populated states and make that circuit equal in population to the others. Even though the Senate already approved the judiciary committee's resolution linking Ohio and Kentucky, Unionist Senator Joseph A. Wright from Indiana voiced his opposition to the resolution. He declared that Indiana and Ohio should be grouped together into circuits because "our bar and people want it to remain so." Additionally, he stressed that under the judiciary committee's proposal, it would be difficult for Judge John Catron of Tennessee to hold court because of the large geographic size of the circuit. Even though Wright did not explicitly state that he desired Swayne to serve as a circuit justice for political reasons, it was evident in his speech. He stated to Congress that

> Questions frequently arise there [in Indiana] growing out of this war; and how important it is to have a gentleman of the character of Judge Swayne who can be called for at any time to grant an injunction or anything of that sort.[246]

[244] Cong. Globe, 37 Cong., 2nd sess., p. 2562; Ross, "Justice for Iowa: Samuel Freeman Miller's Appointment to the United States Supreme Court During the Civil War," 118.

[245] Cong. Globe, 37 Cong., 2nd sess., p. 469.

[246] Cong. Globe, 37 Cong., 2nd sess., p. 3090.

Cloaked in Wright's praise of Swayne as an honorable justice was really a desire for the newly appointed jurist to hold circuit court in Indiana. Under Trumbull's judiciary committee plan, Justice Catron, a southern sympathizer, would serve as Indiana's representative on the court. Wright was fearful Catron might hinder Indiana's effort for the Union and, perhaps, release dangerous war criminals from jail through the Writ of *Habeas Corpus*. Consequently, his speech further demonstrated the political motivations behind not only appointments, but also circuit arrangement.[247]

On March 26 1862, in a private meeting between Lincoln's Attorney General Edward Bates and Supreme Court Justice Noah Swayne, the justice discussed both at Bates's office and later that night at his house the "the filling of the va[ca]nt seats on the Sup[rem]e bench." According to Bates's diary entry, Swayne believed the debates over circuit rearrangement were efforts by congressmen to "gerrymander the Circuits to suit" Lincoln's Secretary of the Interior C.B. Smith, and the process was "almost crowned with success." According to the justice, these congressmen desired to "gerrymander the Circuits" in order to "to give Smith a circuit without interfering with [Illinois Republican Senator Orville] Browning." Bates concluded the entry with a note that he has "warned the Prest to be on his guard."[248] These statements further confirmed not only the willingness of the justices to participate in political conversation, but also more importantly illustrated the perception that judicial rearrangement occurred for both regional and partisan political reasons. Bates's entry also demonstrated that Silver's account of judicial restructuring was incomplete. Lincoln was not the only participant throughout the process. Bates's diary suggested, however, the opposite, which was that Lincoln was unaware, but

[247] Swisher, *History of the Supreme Court of the United States*, vol. 4, *The Taney Period 1836 -64*, 826; Silver, *Lincoln's Constitution*, 51 – 52.

[248] Howard K. Beale ed., *The Diary of Edward Bates: 1859 – 1866* (New York: Da Capo Press, 1971), 244.

probably informed, of the regional politics of circuit rearrangement, and that both Congress and the Supreme Court played significant role in the process.

Since, under both Sherman and Trumbull's plans, the three new appointments were situated in the Midwest, the congressmen from that area debated the circuit's geographical boundaries. The Iowa delegation provided the most commentary and hostility to both resolutions. This resistance was due partially to Senator Grimes's desire to achieve the appointment of his friend, Samuel Freeman Miller, to the Supreme Court. Since under both Sherman and Trumbull's plans, Iowa was placed in the same circuits as Illinois, the Iowa delegation became alarmed. According to Ross, Chicago's political and economic importance made the situation highly likely that Lincoln would appoint a justice from Illinois. Secondly, the president was a native of Illinois, and it was rumored that he felt as if "must appoint [Senator Orville] Browning" onto the Supreme Court.[249] This realization prompted one scholar to claim that

> with Swayne appointed and Browning rumored as a shoo-in for a reorganized Illinois circuit, Iowans dug in their heels and campaigned for a reorganization bill that would breathe a new trans-Mississippi circuit.[250]

The local political reasons behind the opposition to Browning were two fold as well. Foremost, as evident by Grime's resistance to the resolutions and his friendship with Miller, Iowans desired a jurist on the Supreme Court. The second justification was more economic. Iowa Congressional Republicans believed a justice from the West would be more sympathetic to their economic needs. This issue was important to Iowans because they were in an economic state of distress. In the 1850s the Northern Cross railroad, which was affiliated with Browning,

[249] Noah H. Swayne to Benjamin F. Wade, January 10, 1861, Wade Manuscript Collection, Library of Congress. Cited in Silver.

[250] Ross, "Justice for Iowa: Samuel Freeman Miller's Appointment to the United States Supreme Court During the Civil War," 122.

encouraged residents and local governments in Iowa to go into debt and purchase stock in the company. Unfortunately, the Panic of 1857 caused Iowa and other northern states economies to plummet. Thus, Iowans desired tougher regulation of the railroads and repayment of the bonds. Browning, on the other hand, opposed such regulation. As Ross explained, "Iowans hoped to avoid being saddled with a justice…who would be unsympathetic to their economic concerns."[251] Thus, an appointment of Browning threatened the Iowa economy. The urgency was so great that in March 1862, the Iowa legislature passed a resolution that compelled its senators and encouraged its representatives to continue to oppose Trumbull's reorganization bill. Furthermore, the Iowa state legislature's resolution also urged the state's national representatives to enact legislation that would create a circuit composed of the states west of the Mississippi.[252]

Despite the attempts of Iowa's senators, the Senate was unwilling to reconsider their proposals and continued to endorse the Judiciary Committee's recommendations. In the House, however, Iowa had better luck, and in addition to other state's representatives, they "turned their big guns" to that branch of Congress for the final fight.[253] Iowa Congressman James Wilson was an influential member of the House Judiciary Committee, which placed him in both a strategic position in the state and on the issue of the reorganization of the judicial circuits. Wilson, adverse to Trumbull's Senate bill, used his influence to retain it in committee from January to May 1862. During that time, the congressman employed his position on the committee to control the Senate bill and ensure that when it advanced from the House Judiciary Committee, it was amended to suit Iowa's needs. Wilson was significantly helped in his endeavor by the period's committee structure. The committee rules throughout the middle of the nineteenth century retained most of the legislative power at the committee level. In order for a proposal to

[251] Ross, *Justice of Shattered Dreams,* 71.
[252] Ibid., 69 – 72; Silver, *Lincoln's Supreme Court*, 52.
[253] Ibid., 52.

become introduced on the House floor, it had to first achieve passage in its originating committee. Thus, the committee chairman and vast amounts of power over legislation. On June 4 debate opened on the House floor regarding the reorganization bill, however, it was vastly altered. Because of Wilson's efforts, Iowa, Kansas, Missouri, and Minnesota were linked together to form one judicial circuit and Illinois was placed in a different circuit with Indiana and Wisconsin.[254] During his speech in support of the committee's recommendations, Wilson did not espouse a particular rationale regarding the reasons why the states west of the Mississippi should constitute their own judicial circuit. Rather, it was mainly a reiteration of the familiar claim that the "total population of the slaveholding south," composes "a majority of the judges of the Supreme Court." This discrepancy, he articulated, "forms a powerful argument in favor" of the immediate "passage of the pending bill."[255] At one point in the speech, however, the congressman did contend that the "rapid development of the West, its…increase in population" and "similar codes of practice and modes of procedure" justified Iowa and the western states to having "its just and equal share of the advantages of our present judicial system." Moreover, he claimed, the circuits were intended to "promote justice and equality," which could be accomplished if the states west of the Mississippi acquired a Supreme Court justice. The House agreed with Wilson, and in June passed his version of the bill.[256]

The regional politics of the discussion became evident when Republican Representative William Kellogg of Illinois realized that circuit rearranging was falling victim to sectional wishes. After hearing numerous congressmen express desire for the circuits to be rearranged to

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[254] Ross, *Justice of Shattered Dreams,* 72; Silver, *Lincoln's Constitution*, 52; Fairman, *Mr. Justice Miller and the Supreme Court*, 46; Cong. Globe, 37 Cong., 2nd sess., p. 2561 – 2565; Steven S. Smith and Christopher J. Deering, *Committees in Congress* (Washington D.C.: Congressional Quarterly, 1984), 14 – 15.

[255] Cong., 2nd sess., p. 2561.

[256] Cong., 2nd sess., p. 2562; Ross, *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era*, 72, 74; Silver, *Lincoln's Constitution*, 53; Fairman, *Mr. Justice Miller and the Supreme Court*, 46 – 47.

suit their states' needs, Kellogg exclaimed that he feared "that too many mantles for Supreme Court judges have already been cut, and made up," because "if it were not for that, there would be little trouble in arranging the States in compact circuits."[257] In the Senate, Michigan Republican Senator and Judiciary Committee member Jacob Howard reached the same verdict. Noticing the disparity in population between the Ohio (3.7 million), Iowa (2.1 million), and Michigan (3.2 million) judicial circuits, the senator questioned the motives behind Wilson's actions in the House Judiciary Committee and the necessity of a "division of judicial circuits upon the Mississippi River" and the rationale for that decision.[258] The senator elaborated upon his point, and stated his concern that "geographical divisions" were solely introduced on the notion that "there must be a separate circuit on the West side of the Mississippi River."[259] This division, one scholar claimed, made Howard uneasy because, "against the backdrop of a bloody civil war," this "sectional identity…highlighted regional differences and animosities," which could potentially destroy the Republican Party.[260] "I am getting a little distrustful of geographical divisions," the Michigan senator claimed, and he was apprehensive that this path of circuit rearrangement was based upon geographic boundaries, which were reminiscent of the South and the circuit system that was currently under debate.[261] "Iowa's plan," historian Michael Ross stated, "would replicate the problem, minus only the disruptive variable of slavery."[262] Senator Howard's fear was justified. Beginning with the commencement of the judicial reorganization process, both partisanship and regional politics were at the center of the procedures. Ranging from Hale's resolution to the opposition of Sherman and Trumbull's,

[257] Cong., 2nd sess., p. 2564.
[258] Ibid., 3276.
[259] Ibid., 3276.
[260] Ross, *Justice of Shattered Dreams,* 73.
[261] Cong., 2nd sess., p. 3276 – 3277.
[262] Ross, *Justice of Shattered Dreams,* 73; Silver, *Lincoln's Constitution*, 54 – 55.

individual political appointments and desires were the central components of both opposition and support for the proposals.

After months of debate and inaction, the *Chicago Tribune* not only began to question the fate of the "bill reorganizing the Supreme Court," but also pleaded with Congress to take action and not "leave the court in this wretched condition." The paper explained that some states were not organized into circuits, and the "twenty millions of people of the free States" still remained represented on the Supreme Court "by four judges…while the nine millions…in the South have five judges." Congress cannot, the paper concluded, "leave the court in this wretched condition."[263] As evident by this editorial in the *Tribune*, the press remained in favor of Supreme Court modification. This "growing pressure," according to Michael Ross, finally compelled the House and Senate into taking action.[264]

Since both the House and Senate approved different versions of the judicial bill, a conference committee, composed of members of both the Senate and House was established to facilitate a solution to the disagreement and produce a resolution that rearranged the circuits. Managing to become a member of the committee, Wilson used the position to his advantage. Because the majority of members hailed from the East, the representative knew they would be more willing to accept any version of the bill to expedite the appointment process. Additionally, the eastern districts remained the same in both the House and Senate bill; therefore, Wilson reasoned that opposition to a circuit west of the Mississippi River would be limited.[265] His assumption was correct. Through discussion in the conference committee, the Iowan Representative successfully secured unanimous consent for his trans-Mississippi circuit. Now

[263] Chicago *Tribune*, June 5, 1862. Quoted in *Silver, Lincoln's Supreme Court*, 53.
[264] Ross, *Justice of Shattered Dreams,* 74.
[265] Ibid., 74.

that Iowa received the circuit rearrangement it so coveted, the reorganization of the judicial circuits could finally come to a successful conclusion.[266]

After months of debate and parliamentary maneuvering, the Senate and House agreed upon a version of the bill, and on July 15, 1862, Lincoln signed it into law. The Iowan delegation achieved their goal, creating the first circuit west of the Mississippi River. Their next task, however, was to influence President Lincoln into appointing Samuel Freeman Miller to serve as the Ninth Circuit justice. One scholar described the future justice as a "loyal Republican with impeccable political and professional credentials" who was "brought to Lincoln's attention by one of the most vigorous nomination drives in the history of the Court."[267] This campaign for Miller was largely responsible for his appointment. In a letter by Republican Congressman Daniel F. Miller, no relation to Samuel Freeman, reminded Lincoln of Miller and Iowa's "devotion to our Union" during the war.[268] Additional letters reiterated this concept. Jurist George C. Wright of the Iowa Supreme Court commented to President Lincoln on Miller's loyalty "and devotion to his country" especially in the "hour of her greatest peril," and it was loyalty to the Union, which was essential for any Supreme Court justice.[269] After meeting with Iowa's governor, senators, and representatives, Lincoln decided to name Miller to the supreme tribunal. Even though he had never met Miller, he based his decision not only on the campaign to get Miller appointed, but also his loyalty toward the Union.[270] Since Lincoln was "preoccupied" by the war, he had to rely solely upon what he was told regarding Miller's loyalty, "patriotism [,] and unwavering commitment to Republican principles in their appeals to the

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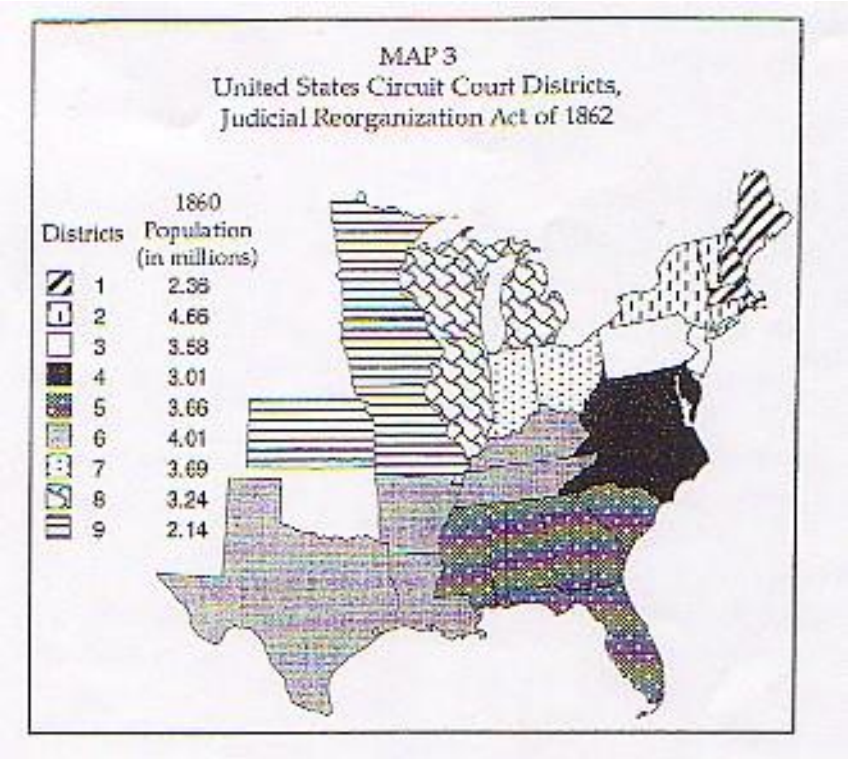
[266] Silver, *Lincoln's Supreme Court*, 50-55; Fairman, *Mr. Justice Miller and the Supreme Court*, 47.
[267] Abraham, *Justices, Presidents, and Senators*, 88.
[268] Daniel F. Miller to Abraham Lincoln, December 10, 1861.
[269] George C. Wright to Abraham Lincoln, December 16, 1861.
[270] Silver, *Lincoln's Supreme Court*, 65 – 69; Fairman, *Mr. Justice Miller and the Supreme Court*, 48 – 52; Ross, *Justice of Shattered Dreams*, 75 – 81.

president."[271] Ultimately, even though Miller and Lincoln differed on economic issues, Ross claimed that was irrelevant because he was "sound on race, slavery, and the war," which "was all that was required" by the president.[272]



Source: Ross, "Justice for Iowa: Samuel Freeman Miller's Appointment to the United States Supreme Court During the Civil War," 119.

After the selections of Swayne and Miller, Lincoln still had one last justice to appoint to the Supreme Court because the Eighth Circuit, which contained his home state of Illinois, remained vacant. The two leading candidates both hailed from Illinois, and had a long history with the president. Lincoln's long time friend and political campaign manger David Davis, and Illinois Senator Orville Browning employed all possible tactics to secure the position. From the commencement of Lincoln's term, Browning made the president aware of his interest. Through

[271] Ross, *Justice of Shattered Dreams,* 76 – 77.
[272] Ross, *Justice of Shattered Dreams,* 79.

correspondence from himself and political allies, the senator shared gossip and advice with Lincoln. In one letter, Browning's wife reminded the president that her husband was the best candidate for the judiciary, and that he should "gratify a sincere friend and devoted wife" with the honor of a judicial appointment.[273] David Davis also aspired to be appointed to the Supreme Court. John M. Scott, a supporter of the president and future Illinois district judge, supported Davis's appointment because his friendship and loyalty toward Lincoln was already known. Scott lectured Lincoln that "to appoint *one* not heretofore your most steadfast friend with the hope of *making him such* is neither wise in politics or morals." He claimed that Browning was not the friend which Davis had been. Finally, in October 1862, Lincoln notified Davis that he would be appointed to the Supreme Court. The rationale of his appointment centered largely on Browning's "lukewarm support for Lincoln's policies," and, as another scholar questioned, whether he "would…prove more devoted to Lincoln as a member of the Supreme Court" than he did as a legislator.[274] Thus, Davis was ultimately chosen because he was more reliable about upholding Lincoln's wartime measures and constitutional interpretation.[275]

After the president signed the Judicial Reorganization Act of 1862 into law, the *New York Tribune* claimed victory on behalf of Republicans. The paper no longer demanded the replacement of the court and hailed the reorganization of the circuits as "adapting to the growth and wants of the country."[276] Even though Lincoln appointees only constituted three out of the nine justices, perhaps the press endorsed the changes because the circuits were rearranged to better suit the Republican Party's national needs. The new bill not only guaranteed Lincoln three

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[273] Eliza H. Browning to Abraham Lincoln, June 8, 1861.

[274] Ross, *Justice of Shattered Dreams*, 72; Silver, *Lincoln's Constitution*, 73.

[275] Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton*, 89; Ross, *Justice of Shattered Dreams*, 72; Swisher, *History of the Supreme Court of the United States*, vol. 4, *The Taney Period 1836 -64*, 828 – 829; Silver, *Lincoln's Constitution*, 73, 77.

[276] New York *Tribune*, July 22, 1862. Microfilm, Library of Congress.

safe votes on war issues but also placed the new circuits in the Midwest, an area dominated by Republicans. Ultimately, the United States court system finally got the overhaul that was necessary. The substantial population differences between the North and South were solved, which for the time being satisfied moderate Republicans. Radicals, however, according to David Silver, believed that one day a "different policy" would be necessary, and in this prediction, "they were not in error." Consequently, the story of court packing did not end in 1862, but rather had only just begun.[277]

[277] Silver, *Lincoln's Supreme Court*, 55 – 56.

Chapter 4:
Toward a Unionist Court

Even though the radical Republicans initial attempt to drastically reorganize the judiciary failed, the events from summer 1862 to spring 1863 caused them to become hopeful that drastic alteration of the Supreme Court still could occur. After significant military failure by the Army of the Potomac, Abraham Lincoln confronted a dire situation. Despite continued opposition to the war, many Republicans believed the emancipation of slaves should occur. A few months after the Union victory at Antietam in 1862, Lincoln issued the preliminary Emancipation Proclamation, which decreed that slaves in all states in rebellion against the federal government free January 1, 1863. After Lincoln issued the Emancipation Proclamation, many Republicans were fearful that the Taney Court would declare the act unconstitutional. In an editorial which quoted a speech by abolitionist Wendell Phillips, the Washington *National Intelligencer* expressed the North's fear that the Supreme Court would destroy the administration's wartime policies. Phillips, in the editorial, described the obstacles the Emancipation Proclamation faced before the Supreme Court. Foremost, the proclamation must surpass the bias of Chief Justice Roger B. Taney, a man "whose body was in Baltimore" but whose "secessionist heart…and soul was in Richmond." Taney had decreed that "a negro has no rights that a white man is bound to respect." Even if Taney was overruled, the paper explained, the declaration must surpass "the bench of Judges" appointed by the "wickedness of Buchanan and Polk and Franklin Pierce." "The Supreme Court," Phillips concluded with a warning to the people of New York, "was the

point where our democratic government touches nearest to despotism."[278] Even though the federal judiciary was reorganized to favor the administration, some Republicans and press were still anxious about the Supreme Court. These fears gradually resulted in the addition of a tenth justice onto the Supreme Court.[279]

In addition to the Army of the Potomac's late 1862 and early 1863 military defeats, the numerous legal questions that arose during the Civil War began to reach the Supreme Court. *The Brig Amy Warwick, The Schooner Crenshaw, The Barque Hiawatha,* and *The Schooner Brilliante,* collectively known as *The Prize Cases*, regarded one of the most controversial and important war time decisions. These four cases, *The Prize Cases*, dealt with the constitutionality of the blockade of the southern coastline. The Supreme Court had the opportunity to humiliate the Lincoln administration in two ways. Foremost, the Taney Court could decide that the Civil War was not actually a war, and, in the words of one scholar, that the "prizes had been illegally taken and foreign trade with southern ports illegally broken up."[280] This verdict would result in the declaration of the blockade as unconstitutional; however, it would not necessarily grant sovereignty upon the Confederacy. If the court proclaimed Confederate sovereignty, Lincoln would be forced either to disobey the decision or to discontinue the blockade. Both options would harm his presidency, the war effort, and have a chilling psychological effect on the North. On the other hand, if the Court declared the blockade constitutional, it might result in the recognition of the Confederacy as a sovereign nation because a blockade was a recognized act of war between two sovereign nations. This result would also be disastrous because it would enable foreign governments to recognize and aid the Confederate States of America. Since a majority

[278] Washington *National Intelligencer*, December 29, 1863. Microfilm Library of Congress; Also quoted in Silver, *Lincoln's Supreme Court*, 137 – 138.

[279] Silver, *Lincoln's Constitution*, 83 – 84, 138

[280] Swisher, *Roger B. Taney*, 563.

of the prizes seized by the North belonged to foreign nations, the court's verdict potentially could significantly impact the war's conclusion. Foreign nations sympathetic to the southern cause would be able to trade with the South. According to historian David Silver, whatever option the court chose the "ability of the Union to suppress the South would be doubtful."[281] Furthermore, if an unfavorable decision was rendered in *The Prize Cases*, it was likely that Lincoln's Emancipation Proclamation also would be closely scrutinized by the court. Ultimately, Taney and his southern brethren now had opportunity to curtail Lincoln's power.[282]

Members of Lincoln's cabinet divided into two different camps regarding the implementation of a blockade. In an August 1861 letter that addressed the constitutionality of the action, written to Lincoln by his Secretary of the Navy Gideon Welles, the divergent opinions became evident. In that letter, the Navy Secretary argued that the North, by "closing the ports," could force the South to discontinue trade. Even though this action was not technically a blockade, it would result in the same accomplishment as an actual blockade. Since southerners were "usurping authority, and violating the laws and constitution," the Federal Government possessed the power to intervene. Welles then drew a distinction between a blockade and the "closing the ports" strategy which he advocated.[283] A blockade, he contended, was an act of war between two belligerent nations, and if the Union applied this approach, according to one scholar, it "was tantamount to proclaiming to the world that a war existed."[284] This was not a distinction the federal government wanted to create because it would result in the default recognition of the Confederacy as a legitimate nation. Even though the institution of the

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[281] Silver, *Lincoln's Constitution*, 106.

[282] Kens, *Justice Steven Field: Shaping Liberty from the Gold Rush to the Gilded Age*, 93; Swisher, *Roger B. Taney*, 563-564; Ross, *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era*, 82 – 85.

[283] Gideon Welles to Abraham Lincoln. August 5 1861, Papers of Abraham Lincoln.

[284] Stuart Anderson, "1861: Blockade vs. Closing The Confederate Ports," *Military Affairs* Vol. 41, No. 4 (Dec., 1977), 190.

blockade was necessary for the successful completion of the war, the inherent problem was that it was limited to conflicts between two sovereign nations. If the Confederacy was not a recognized nation, as the government claimed, then the legality of the blockade was questionable. However, if the administration instituted a blockade, Welles and other cabinet members feared that following the rules of war a blockade meant recognition of the Confederate government.[285] Furthermore, the recognition of the Confederacy as a legitimate nation would indicate that Lincoln's nationalistic view of the Union was incorrect and secession was constitutional.

Throughout the Civil War, Lincoln justified his response with two points. Foremost, he believed that states did not possess the right to secede from the Union, which meant that in Lincoln's eyes the war was a conflict within the nation and not a war between two different countries. The second argument Lincoln advocated also rationalized his decisions that were made prior to their authorization by Congress. The Supreme Court, in the majority opinion in *Prize*, summarized this view. Justice Grier, writing for the majority, declared that "if a war be made by invasion for a foreign nation, the president is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority." Despite the status of the belligerent, whether domestic foe or foreign invader, Grier continued, the conflict "it is none the less a war." Thus Lincoln "was bound to meet [the war] in the shape it presented itself, without waiting for Congress to baptize it with a name."[286] According to the president, a blockade was a necessary maneuver. For the Union to achieve victory, the administration relied on a strategy that isolated the rebellious

[285] Silver, *Lincoln's Supreme Court*, 104 – 105.
[286] Grier *Prize Cases*, quoted in Farber, *Lincoln's Constitution*, 140.

states. If the states could not trade or import arms, the federal government had the upper hand in the conflict.

Despite Welles's reservations regarding the meaning of the blockade, Lincoln disagreed with the recommendations. The president in accordance with his Secretary of State William Seward contended that the establishment of a blockade was a legitimate action by the federal government. Seward's biographer Glyndon G. Van Dusen described the rationale that justified the decision. The secretary argued that if the government chose to close the southern ports by executive fiat, the European nations, especially Britain and France, would not recognize the legality of that action because it was not recognized under international law. The two European powers believed the closing of the ports strategy simply amounted to a "paper blockade of the worst kind," which was bothersome because unlike an internationally recognized blockade, the rules and procedures of port closing were unknown.[287] Consequently, even though a blockade was generally understood as an act of war between two recognized nations, Seward argued that it did not imply any recognition of the Confederacy. The action was simply a different method that ensured commerce could not occur with the southern states. Welles dissented from that logic. He emphasized that the "closing the ports" tactic would preclude the court and foreign nations from intervening in the war because they cannot question "our right as a nation to close our own ports," which, consequently, were upheld by military vessels guarding the ports in order to ensure that commerce does not occur. Thus, Welles advocated that the closure of the southern ports was a policy "clear, distinct, honorable, and legally and morally impregnable."[288] According to the government, the blockade was justified because it was necessary to enforce the "closed-port" strategy. Since the southern ports, Welles argued, remained part of the United

[287] Lyons to Russell, 15 April 1861, cited in Anderson, "1861: Blockade vs. Closing The Confederate Ports," 190 – 191

[288] Gideon Welles to Abraham Lincoln. August 5 1861, Papers of Abraham Lincoln.

States, they could be closed whenever the government desired.[289] Despite fears that the blockade was a possible recognition of the Confederate government, and would certainly face a hostile Supreme Court; Seward nonetheless endorsed it as the better option. If the United States antagonized either Britain or France, he theorized, and if either power intervened in the war, a northern victory was unlikely. Thus, Lincoln was forced to consider these effects, and molded his strategy toward foreign pressure. Since the two nations preferred a blockade over the closure of the ports, Lincoln implemented that tactic.[290]

Secretary Welles's argument also indirectly addressed the definition of the conflict, which according to the North, was not actually a war, but rather an insurrection. This distinction was extremely important. If the Civil War was a war and not an insurrection, foreign nations could recognize and aid the Confederate government. Any foreign intervention significantly would complicate the Union's strategy and, perhaps, prolong the conflict. Also, Lincoln's view of the rule of law – and justification for many of his actions – was based upon his notion that secession was illegal. Southerners, however, insisted that since secession was a legitimate action, the Civil War was actually a clash between two sovereign nations. The South's contention demonstrated an even more important reason why Lincoln could not accept their claim, which helps to explain why the insurrectional approach was so essential to his argument. If the president accepted the premise that the Civil War was a conflict between two distinct nations, that action would constitute a recognition of the legitimacy of the Confederacy. Furthermore, once the Confederacy was recognized as a legitimate nation, secession, by default, could be viewed as a genuine constitutional action. If this revelation was upheld by the Supreme

[289] Silver, *Lincoln's Constitution*, 104 – 107.

[290] Anderson, "1861: Blockade vs. Closing The Confederate Ports," 190 – 191; Glyndon G. Van Deusen, *William Henry Seward*, (New York: Oxford University Press, 1967), 300 – 301; Silver, *Lincoln's Constitution*, 105 – 106.

Court, Lincoln's entire constitutional claim that states did not posse the right to secede would then be in doubt. As Welles pointed out in his 1861 letter, "to admit this, is to admit disunion, and revoke our whole policy."[291] Cleary *The Prize Cases* and the constitutionality of the blockade was a key component of the Union's wartime philosophy. As the case approached the Supreme Court, both Lincoln and Congress realized not only the practical necessity of the blockade, but also its meaning to the American people.[292]

A "confidential" January 1863 letter from Attorney General Edward Bates to Secretary of War Edwin Stanton, revealed the hesitancy within the Lincoln administration toward bringing legal questions before the Supreme Court. Stanton informed the fellow cabinet member that his "contemplation to bring before the Supreme Court of the United States for review, at its present term, certain proceedings of the Supreme Court of Wisconsin involving the question of the power of the President…to suspend the privilege of the Writ of *Habeas Corpus*" in that state was not a wise decision. Reiterating many of the fears held by Republicans, Bates claimed it would be "impolite for the government" at this present moment to request that the Supreme Court review the contention because of numerous circumstances surrounding the judiciary and its potential impact on the war. Foremost, he wrote, any decision against the power of the president to arrest and detain "disloyal persons would inflict upon the Administration a serious injury," which would further "weaken and divide the loyalty of the country" while destroying the people's "confidence" in their president. Bates suggested if the court could "vindicate" Lincoln's suspension of the writ, it would be helpful to the administration, however, because of the "present proclivities of the majority of that Court" the government should not

[291] Gideon Welles to Abraham Lincoln. August 5 1861, Papers of Abraham Lincoln.

[292] Jim Tinnick, "The Prize Cases: The Constitutional Nature of the Civil War and Presidential War Powers," *E.C. Barksdale Student Lectures 1997 – 1998* (15): 306 – 314, 316 – 317; Silver, *Lincoln's Constitution*, 104 – 107.

"anticipate…such result." Analogous to the arguments of numerous editors and politicians, the Attorney General evoked the argument that the court was dominated by southerners. He claimed that it was common knowledge that the "majority of the Court" was "nearly unanimous" in their "opinion against the power assumed by the President." Consequently, Bates believed that on questions dealing with presidential war powers, the justices would not deviate from their "political school" and continue to vote based upon their previous notions. The Attorney General concluded the letter with various rhetorical questions that stressed the typical Republican fears of adverse rulings by the court. Most importantly, Bates described the dire situation an adverse ruling would place the administration. Lincoln's position would either "conform to that rule" pronounced by the courts or "be compelled to pronounce" a great deal of his actions "illegal and unwarranted," which he used to justify the North's position during the war. Either option ultimately, would cause great injustice to the Union. [293] The significance of this letter was two fold. Foremost, it demonstrated the fear of the Taney Court that captivated many Republicans. From the pages of the *New York Tribune*, through the halls of Congress, to Lincoln's cabinet, the Supreme Court was perceived not as a partner in the Civil War, but as another adversary ready to strike against the Union. Bates's letter additionally served a second function because it emphasized the role politics and individual opinions of justices played in their jurisprudence.

As the constitutionality of the blockade maneuvered its way through the courts, members of Congress and their constituents revisited the issue of the Supreme Court's political composition. Even though circuit rearrangement was complete and Lincoln's three Supreme Court appointees were on the bench, radical Republicans remained fearful of the court's loyalty. In a letter addressed to Judiciary Chairman Lyman Trumbull February 1, 1863, a little over a month prior to *The Prize Cases* arguments before the Supreme Court, a constituent relayed the

[293] Edward Bates to Edwin Stanton. January 31 1863. Stanton Collection Library of Congress.

fears of many northerners and offered a suggestion. The leading scholar David Silver quoted only one small line of this important letter. Additionally, he did not discuss the letter's significance on either the appointment and selection of additional justices or its importance on the development of the role politics played during judicial nominations and circuit rearrangement. Ultimately, Wait Talcott's letter further illustrated that the court's composition was at the whim of the legislature because he suggested that Congress could simply alter its composition at their will. Talcott, a member of the Illinois legislature, emphasized the necessity of "keep[ing] the power of the Court right." He was concerned with the "composition" and allegiance of the Supreme Court because in addition to numerous war measures on the court's docket, the Emancipation Proclamation would probably be argued before the court. In order to further secure affirmative decisions, Talcott suggested that Trumbull take advantage of the Republican dominance in the Senate, and augment the high court with "another judge," especially "one that will be true" to the principles of Republicanism. Talcott, however, concluded his discussion of the Supreme Court with an analysis, and alerted the Illinois Senator of his "fear of this Court," which was greater "than anything else."[294] There was some truth to Talcott's apprehension. The court was still far from upholding Republican principles because it was still dominated by the *Dred Scott* majority. Five of the nine justices who deemed Scott a slave remained on the court, which meant their jurisprudence was known, especially with regard to their treatment of the Emancipation Proclamation.

On February 26 1863, during the fourteen day long oral arguments before the Supreme Court, Bates recounted in his diary a political visit by Justice Swayne. During that call, Swayne warned the Attorney General that it was within the government's interest to remove "Mr. Eames," one of the government's counsel, from the case. According to the justice, Eames "in the

[294] Wait Talcott to Lyman Trumbull, February 1, 1863. Trumbull Collection Library of Congress.

conduct of cases, made himself very obnoxious to the Court" and his arguments "did no good, but harm" to the Unionist cause. After making this comment, Bates further wrote in his diary

> this conversation was private and confidential, between Judge S.[wayne] and me. His *motive* was kind to me, and his object to warn me to *get rid of Mr. E.[ames]* in Govt. cases, because his presence was offensive to the Court.[295]

The interaction between the two officials demonstrated the close relationship between the court and administration. A sitting justice of the Supreme Court gave political advice to a member of Lincoln's cabinet regarding a case currently before the court's docket; this illustrated the politicization of the judiciary and how both Lincoln and the Republicans on the court viewed the judiciary as another partner in the war.

Both Talcott's and Bates's letter described their fear of additional adverse rulings by the court. Thus, some Republicans believed it was necessary to alter its composition. These men especially feared the court's role in regard to the upcoming *Prize Cases* and potentially with especially the Emancipation Proclamation because any adverse ruling on either of these important legal issues, especially the blockade, could aid in the creation of a "common union between…the Insurgents" and create widespread sympathy for Confederate cause.[296] Thus, radical Republicans remained hopeful that additional alterations in the federal judiciary could still occur because Congress, in the Judicial Reorganization Act of 1862, did not create a circuit in the Far West. Because of the peculiar nature of the judicial system in that territory, especially California, and since a special circuit court system was already present for the area in 1855, congressmen had decided that it was not essential to create a circuit court in the Far West during the initial reorganization. By 1863, however, the elderly judge that presided over that area, Matthew Hall McAllister, was near the end of his career. After Lincoln approved a six month

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[295] Beale, *The Diary of Edward Bates*, 281 – 282.
[296] Gideon Welles to Abraham Lincoln. August 5 1861, Papers of Abraham Lincoln.

sabbatical from the court, McAllister retired in January 1863. His action presented Congress with the option of creating an additional circuit for California and Oregon. Congressional leaders justified the addition because there was a substantial need by both the citizens of California and the country for the creation of an additional circuit. California property law was extremely complicated and, since the area was growing rapidly, a justice was needed who was knowledgeable of the developing land issues the court continuously faced.[297] Additionally, a circuit in the far west was a matter or pride for the citizens in that area because the rest of the country's circuit courts contained a justice from the Supreme Court. More important than those two issues, however, radical as well as moderate Republicans were fearful that the Supreme Court would rule against the administration in *The Prize Cases* and subsequently on emancipation.[298] During this time of crisis, the country required as much loyalty as possible, and radicals believed that the addition of loyal justices to the Supreme Court further served the national interest. Prudence, David Silver wrote, "dictated a packed court" because, with the addition of a justice, the administration would be further insulated from Taney and his Southern sympathizers.[299]

The bill that created the tenth justice originated in the House of Representatives January 6 1863. After debate in committee occurred, Iowa's Representative and judiciary committee member, James F. Wilson, referred the bill to the entire House. Besides the "other purposes" held in mind by its authors, the intention of the new judicial bill was largely to provide circuits courts in California and Oregon.[300] Despite the House consideration of the question first the

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[297] Swisher, *History of the Supreme Court of the United States*, vol. 4, *The Taney Period 1836 -64*, 829; Silver, *Lincoln's Supreme Court*, 84.

[298] Swisher, *History of the Supreme Court of the United States*, vol. 4, *The Taney Period 1836 -64*, 829; Kahn, "Abraham Lincoln's Appointments to the Supreme Court: A Master Politician at his Craft," 73; Silver, *Lincoln's Supreme Court*, 84 – 85.

[299] Silver, *Lincoln's Supreme Court*, 84.

[300] Cong. Globe, 37 Cong., 3rd sess., p. 210.

aspirations to alter the Supreme Court, according to Silver, "gained momentum in the Senate."[301] On February 20, 1863 in the same building and at the same time *The Prize Cases* were heard before the Supreme Court of the United States, California Democratic Senator Milton S. Latham introduced a bill before the Senate, which advocated the creation of a judicial circuit composed of Oregon and California. After no debate, the bill was referred to the judiciary committee. Just six days later, and the day after *The Prize Cases* concluded their lengthy deliberation before the court, Senator and Chair of the Judiciary Committee Lyman Trumbull introduced an amended version of Latham's resolution before the entire Senate. The most significant and important aspect of the bill created a tenth justice to serve on the Supreme Court, which was entitled to the "like powers…as the other associate justices." [302] Since no action on Wilson's bill had taken place since its referral to committee, the Senate's newly passed bill creating a tenth judicial circuit was introduced onto the floor on March 2. In order to expedite the process, the House, without debate, suspended their rules and quickly concurred with the Senate's legislation.[303] On the last day of the 37th Congress, Speaker of the House Galusha A. Grow forwarded the bill to President Lincoln, which he signed into law immediately. Thus, as the Supreme Court deliberated its verdict in *The Prize Cases*, Congress expressed to the court the message that its size, and consequently, the courts' influence were within the realm of Congressional legislation.[304]

When Congress decided to expand the Supreme Court with the addition of a tenth justice, no debate in the House or Senate occurred. The reorganization of the circuit systems in 1862, however, stimulated months of debate and controversy. The difference in Congressional

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[301] Silver, *Lincoln's Supreme Court*, 84.

[302] Cong. Globe, 37 Cong., 3rd sess., p. 1300 – 1301.

[303] Ibid., 1484; Swisher, *History of the Supreme Court of the United States*, vol. 4, *The Taney Period 1836 -64*, 829 – 830.

[304] Silver, *Lincoln's Constitution*, 84 – 85.

attitude, most scholars argued, was related to the function of the tenth justice, which was to provide security and greater "prospects of a favorable judicial stance" in the extremely important "Civil War litigation now on the Court's docket."[305] Another interpretation of Hale's proposal and the addition of the tenth justice was that they served as threats of intimidation against the court, which were created by the fears generated by Taney's decision in *Ex parte Merryman*. Congress and members of Lincoln's cabinet remained apprehensive that the non-Unionist justices would rule against the administration and derail the war effort. To rectify this danger, the House and Senate revised the number of justices as a form of blackmail against the court. Ultimately, the importance of legal questions involved in *The Prize Cases* triggered Congress to remind the court of the origins of their power. The addition of the tenth justice not only indirectly influenced the court's decision in *Prize*, but also ensured that they, according to historian Stuart Bernath, "could not…jeopardize the union war effort" in the future.[306] Therefore, Silver stated, it was no "coincidence" that the bill that created the tenth justice was proposed in Congress while the Supreme Court heard oral arguments on *The Prize Cases*. According to Silver, "this [action by Congress] was a direct threat and . . . challenge to the Supreme Court," but the court knew how to save itself: a judgment in favor of the Lincoln administration.[307] Another scholar, Henry Abraham, believed that the increase in the size of the court "suited Lincoln's purposes admirably" because the additional jurist would ensure that the administration had support on the court and that its positions would receive a favorable "judicial stance."[308]

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[305] Abraham, *Justices, Presidents, and Senators*, 90.

[306] Stuart L. Bernath, *Squall Across the Atlantic: American Civil War Prize Cases and Diplomacy*, (Berkely: University of California Press), 32.

[307] Silver, *Lincoln's Supreme Court*, 105.

[308] Abraham, *Justices, Presidents, and Senators*, 90; Bernath, *Squall Across the Atlantic*, 31 – 32.

Ultimately, the Congressional creation of the tenth justice was to reiterate to the court that its "size, its powers, and its role rested upon the will of Congress and the President."[309] The bill was an unequivocal warning to the Supreme Court: if the court followed Taney's judgment in *Ex parte Merryman,* the court's nine, now ten member judiciary were numbered. The ultimate goal of Congress was not to seriously change the court, but to intimidate it and remind the justices that they, Kahn believed, "had no legitimate role in derailing the war effort."[310] According to Silver, Congress, in their calculated agenda to ensure the success of the administration, had given the court "blunt warning by providing for one addition."[311] This warning, numerous Republicans and scholars believe, symbolized the meaning of the tenth justice and its concealed message that the end of the era of the "the old-line Democratic view of public policy" was at hand. If the Supreme Court did not rule favorably for the administration on *Prize,* more change should be expected.[312]

The appointment of Steven J. Field as the tenth justice also occurred hastily. On March 6, 1863, Lincoln appointed Field as its justice. In addition to the endorsement by California's governor and both of the state's U.S. Senators, David Dudley, an advisor of Lincoln and Field's brother, requested that the influential New York railroad enterpriser and merchant John A. C. Gray recommend, in a private meeting with Lincoln, Steven Field for the position. Gray agreed, and Lincoln adhered to the request. Even though the selection of Field occurred quickly, and on the same day the verdict in *The Prize Cases* was announced, Lincoln applied similar standards that he employed to select the other three jurists. Despite Field's political affiliation as a Democrat, he was appointed nevertheless. This action demonstrated that the president's primary

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[309] Silver, *Lincoln's Supreme Court*, 84.
[310] Kahn, "Abraham Lincoln's Appointments to the Supreme Court: A Master Politician at his Craft," 73
[311] Silver, *Lincoln's Supreme Court*, 118.
[312] Charles Fairman, *Mr. Justice Miller and the Supreme Court: 1862 – 1890* (Cambridge: Harvard University Press, 1939), 60.

concern with judicial appointments placed loyalty to the Union as the foremost priority. Incidentally, Field was pivotal to keeping California in the Union, and furthermore declared himself a loyalist and a Unionist as the war commenced. Thus, Republicans knew he could be trusted when the key issues of the war came before the Supreme Court.[313]

The reaction by the press to the addition of the tenth justice was divided along partisan lines. In *The New York World*, Democrats were warned to be vigilant because radical Republicans desired to "destroy the independent Supreme Court" and replace it with "new abolition judges" prepared to vote by political affiliation.[314] Despite the *New York World's* opposition, many newspapers praised the president and Congress for their actions toward the court. The *New York Times* described the addition of another justice as a major victory for the Union, because it "adds one to the number" required to further "remove the control of the Supreme Court from the Taney school."[315] Other papers endorsed the appointment of Field and acclaimed that his actions would ensure the continuation of the Union. In the Sacramento *Union* Field's appointment was praised because he "was unconditionally for the Union," and would "prove a valuable acquisition to the bench of the Supreme Court."[316] The Washington *Morning Chronicle* declared that the Field family was known "for their ability, integrity, and patriotism" and that "no better appointment…could have been made" by Lincoln.[317] Overall, Republicans reacted favorably toward the president and Congress's actions against the Supreme Court. The

[313] Silver, *Lincoln's Supreme Court*, 88 – 92; Abraham, *Justices, Presidents, and Senators*, 90; Kens, *Justice Steven Field: Shaping Liberty from the Gold Rush to the Gilded Age*, 95 – 96; Swisher, *History of the Supreme Court of the United States*, vol. 4, *The Taney Period 1836 -64*, 830.

[314] *New York World*, quoted in Ross, *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era*, 84.

[315] *New York Times*, March 4 1863. Microfilm Dickinson College Library.

[316] Sacramento *Union* quoted in Washington *Morning Chronicle*, April 3, 1863, see Silver, *Lincoln's Supreme Court*, 91.

[317] Washington *Morning Chronicle*, April 3, 1863, see Silver, *Lincoln's Supreme Court*, 91.

addition of Field as the tenth justice helped to ensure the loyalty of the court and their allegiance to Lincoln's wartime proclamations.

The addition of the tenth justice to the Supreme most likely was not a scheme by the radical Republicans to drastically alter the court, but a carefully executed plan by moderates and President Lincoln aimed to intimidate the high tribunal into issuing a favorable ruling in the *Prize Cases*. This maneuver was so successful that the court did not further attempt to obstruct the administration's handling of the war. The federal government would not be held hostage by a Supreme Court dominated by disloyal jurists self-empowered to impede the government. As historian Carl B. Swisher stated, the hidden message of the tenth justice was that the federal government will not be "inadvertently sabotaged by judges" that were more "devoted to the South" or their peculiar interpretation of the law than the more immediate "needs of the government."[318] That description of the Taney Court symbolized the necessity of the tenth justice. The federal government was backed into a corner and Lincoln played his trump card and packed the court in a scheme that, according to David Silver, which was necessary "to save it, to save the Constitution, and to save the Union."[319] At the time of the country's greatest need the government required all the loyalty and support it could possibly muster. After numerous disasters on the battlefield, Lincoln and Congress could not remain idle and permit another calamity to occur. Since both moderate and radical Republicans long feared the partisanship of the Supreme Court, the addition of the tenth justice was simply a venture to remove another potentially dangerous obstacle from the Union's path.[320]

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[318] Carl Brent Swisher, *Stephen J. Field: Craftsman of the Law* (Hamden: Archon Books, 1993), 113 – 114.

[319] Silver, *Lincoln's Supreme Court*, 93.

[320] Ibid., 88.

Conclusion:
Waving the Bloody Shirt: The Legacy of Circuit Reorganization and the Tenth Justice

The relatively short duration of the ten member court illustrates the partisan and Unionist purposes judicial rearrangement and the tenth justice served. Only three years after the addition of the tenth justice and one year after Lincoln's death, Congress, through the Congressional Act of July 1866, reduced the number of justices on the Supreme Court from ten to seven. According to Charles Warren, the radical Republicans were behind this maneuver. The scholar wrote that the Senate "was determined to curb the President in every move" because he might "have the opportunity to make further appointments to the Bench."[321] This reduction occurred largely because of opposition to Johnson. After Lincoln's death the radical Republicans continuously clashed with the executive over the policies of Reconstruction, and the plan to reduce the size of the court developed because of those conflicts. Since Johnson continuously opposed the radicals' view of Reconstruction, they feared that he would fill the vacant court seats with justices opposed to congressional, or more specifically radical views. After recently attaining control of the judiciary from the southern Democrats, Republicans did not want to face soon another hostile court. Even though Johnson was a Unionist he was still a former slaveholding southern Democrat, and the radicals did not even want a former Democrat to make lifetime appointments to the Supreme Court.[322] Thus, the reduction of the court to seven justices demonstrated the continuous efforts of congressional Republicans to alter the judiciary to their

[321] Warren, *The Supreme Court in United States History*, 422.

[322] Warren, *The Supreme Court in United States History*, 422 – 423.; For a different interpretation see Stanley I. Kutler, "Reconstruction and the Supreme Court: The Numbers Game Reconsidered," *The Journal of Southern History* Vol. 32 no. 1 (February 1966), 42.

preferences. The seven member court, however, only lasted for three years. In January 1869 Judicial Chairman Lyman Trumbull introduced a bill to reorganize the judicial circuits and reestablish the court's membership at nine. After quickly passing the House, the legislation stalled in the Senate because of controversy over the geographic location of the circuits. After a few months of debate and compromise, the bill finally became law in April 1869 during Ulysses S. Grant's presidency.[323]

In a November 25 1864 diary entry, Gideon Welles expressed the qualities that a chief justice of the Supreme Court should possess. Indirectly, however, the Secretary of the Navy described the meaning of the tenth justice. Welles wrote, "our Chief Justice must have a judicial mind…[and] should be a politician," but more importantly, the citizen on the court should be "impressed with the principles and doctrines which had brought…[his] Administration into power." Furthermore, a justice was not only expected to uphold the principles of the administration while it was in power, but in addition, Welles continued, "it was all important" that the judge continue to be the "correct and faithful expositor of the principles of…[his] administration and policy after his administration shall have closed."[324] These statements help to reveal one legacy of judicial reorganization and the tenth justice. Through both circuit reorganization and the tenth justice, the Republican Party intended to leave a lasting impact on the judiciary. Through their judicial appointments, the Republicans demonstrated their desire to retain control of the Supreme Court. From 1861 to 1864 the average age of the justices dropped from 71 to 62, and three of Lincoln's appointees were in their 40s and none are above 61.[325] These age statistics are quite significant. Since a majority of Lincoln's justices are so young, it appears that the one goal of the Republican Party was to utilize these justices as a basis to control

[323] Kutler, "Reconstruction and the Supreme Court," 52 – 53.
[324] Beale, *Diary of Gideon Welles*, Vol. 2, 181.
[325] Silver, Lincoln's Supreme Court, 238 – 239.

the Supreme Court in the future. Furthermore, each appointed justice symbolized a move by the court further away from the control of the Democratic Party.

Welles's November 1864 diary entry helps to reveal the transition from the Republican to Union Party. Since a Supreme Court justice should not only possess similar values, but also uphold the ideals of the administration that appointment him, every Lincoln appointee had an obligation to the Union. This common ideal that Swayne, Miller, Davis, and Field possessed was not the Republican Party's commitment to freedom of slavery in the territories, but rather the four justices united in support of the notion of the perpetual Union. Most importantly, Welles's statements applied directly to the selection of Field. Since the foremost duty of a justice was to uphold the values of the administration, the appointment of Field, a Democrat, suggested that the values of the administration were not solely the values of the Republican Party. Field's selection was based upon his loyalty toward the Union, and as a justice he was expected to uphold that value.

Welles's November 1864 diary entry also suggested that the Supreme Court should be an equal partner with the administration in successfully fighting the war. Since the judiciary was the only branch of government still controlled by Democrats in 1861; the Republicans believed that in order to become a more national organization their domination of the court was necessary. The whole notion of a Supreme Court loyal to the federal government was in accordance with the Republican Party's national oriented judicial strategy and Lincoln's nationalist jurisprudence. Ultimately, these ideals combined through the process of circuit rearrangement and appointment of a tenth justice. The Republican Party's judicial strategy reflected Lincoln's jurisprudence. The Republican's desired to rearrange the circuits and add a tenth justice to increase their influence on the Supreme Court. The president wanted more Republicans on the court because

they would uphold his wartime policies, which were crucial for the preservation of the Union. This belief in the preservation of the Union was the governing characteristic of Lincoln's nationalist jurisprudence. Even though circuit rearrangement and the addition of the tenth justice were partially intended by Congress to expand Republican Party's geographic influence and transform the political composition of the court, they also had the effect of permitting Lincoln to appoint justices that shared his jurisprudential philosophy. Consequently, with each new appointment the Supreme Court not only became more committed to the Union and Lincoln's view of the war, but also further removed the court from the control of the Democratic Party. Ultimately, the expansion of the court and rearrangement of judicial circuits ensured that Republican's finally achieved control of the final national institution not already under their influence.

One final meaning of the tenth justice and the transformation of the Republican Party was the birth of the tactic known as "waving the bloody shirt." Even though the Unionist ticket name did not last long, the message it conveyed remained at the heart of the Republican Party platform for at least another twenty years. The significance behind the appeal to Unionism was a tactic designed to win Lincoln reelection and appeal to the entire electorate. According to Lincoln biographer Phillip Shaw Paludan, the new label of Union meant "that Union was no longer the optional goal of emancipation; the Union party was unequivocally the party of emancipation and of black soldiers."[326] Most importantly, the transformation from the Republican Party to National Union Party reflected Lincoln's jurisprudence. Throughout the war, the president justified his actions on their necessity to save the Union because its preservation was the foremost priority of the country. Consequently, this notion also connects Lincoln's nationalistic

[326] Phillip Shaw Paludan, The Presidency of Abraham Lincoln (Lawrence: University Press of Kansas, 1994), 272.

jurisprudence with the tenth justice and Republican judicial strategy. Since Field was a Democrat, his appointment was an affirmation to the Unionist ticket. Through an appeal to the preservation of the Union, the Republican Party was able to portray Lincoln's reelection and future elections as a contest between pro-Union and anti-Union men. Since Lincoln was guaranteed support from the northern states, he had to appeal to the border states to secure his reelection. It was in these areas where, according to Paludan, gaining support for the president was "more problematic" because of their "ancient attachment to slavery and their hopes for the Union." Lincoln's strategy, however, was clear. By making the broadest possible appeal, Paludan states that Lincoln assured both southerners and northerners "that there was room for them too" in the Union.[327] Thus, one true legacy of the tenth justice was the success of this strategy. Whenever a national election was close between a Republican and Democrat, the Republican candidate "waved the bloody shirt," and reminded the nation that during the Civil War the Republican Party stood for Union.[328]

[327] Ibid., 273.
[328] Neely, *The Last Best Hope of Earth*, 178.

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