ABSTRACT

The Jeffersonian Revolution and Multiple Modes of Institutional Change in Reconstructive Presidencies

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Using Thomas Jefferson's Presidency as an overarching example, the way Presidents reconstruct and implement lasting institutional change is examined. The idea that the only way presidential reconstruction occurs is in an explosion of entirely new institutions and policy may be suspect. Using Mahoney and Thelen's historical-institutionalist theory of institutional change and the pattern of Curt Nichols' 2014 article *Modern Reconstructive Presidential Leadership: Reordering Institutions in a Constrained Environment*, this thesis uses Nichols' application of a four part typology of institutional change to examine the Jefferson presidency. More specifically, it analyzes how Jefferson applied each of these change agents—displacement, conversion, layering, and drift—to his relations with a strongly federalist judiciary. It concludes that all four of these types are evident in Jefferson's presidency, and that reveals reconstructive presidents do not merely "shatter" and "create" the current order, but actually use multiple methods to accomplish the reconstructive task.

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THE JEFFERSONIAN REVOLUTION AND MULTIPLE MODES OF INSTITUTIONAL CHANGE IN RECONSTRUCTIVE PRESIDENCIES

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TABLE OF CONTENTS

Acknowledgements iii

Chapter One: Introduction 1

Chapter Two: Displacement and the Judiciary Act of 1801 . . . 15

Chapter Three: Drift and Jefferson's Impeachment Strategy. . . 22

Chapter Four: Conversion & Jefferson's Expressed Powers . . . 34

Chapter Five: Layering & The Debut of Court Packing . . . 43

Chapter Six: The Effects of "Multiple Modalities" on Federalist Jurisprudence 47

Chapter Seven: Conclusion 49

Appendix: Voting Record on Repeal of the Judiciary Act of 1801 . . 57

Works Cited 61

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Lamentations 3:22

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CHAPTER ONE

Introduction

What determines a president's political legacy? Some presidents encounter massive policy resistance and unpopularity but history books remember these same presidents for their successful leadership, why? Why do people remember Thomas Jefferson but not John Tyler? No doubt political accomplishment influences whether a president achieves such a label, but what separates “great” presidencies and poor ones historically? In this essay we will examine presidents who built timeless, transformational political legacies, how they accomplished this, and what that means in today's political climate.

My thesis examines how presidents implement lasting regime construction. Transformative presidents destroying their predecessors' institutions and replacing those institutions with more favorable ones in the “order shattering, order creating” (Skowronek 1999) processes Stephen Skowronek presented in his foundational text *The Politics Presidents Make* have disappeared, absent in over 25 years. These findings leave two options: the current conditions outdate the entire typology in Skowronek's original text, reflecting a new era characterized by independent policy entrepreneurs (what Skowronek himself believes) or the typology always reflected more nuanced aspects of political time than the original model implies. The root of both options is based on the question, “what factors denote reconstruction?” Reconstructors did not necessarily

accomplish more than other presidents, and even if they did, accomplishment is not a measurable quality.

Theory

Skowronek asserts all presidential regimes exist contextually within "political time," this concept works cyclically, based on the conditions affecting presidential leadership. Utilizing this outline, Skowronek presents a four part typology with two dimensions. The first dimension shows the state of the regime (dominant party or coalition versus minority party or coalition). In this dimension, Skowronek classifies a president in relation to the current regime as either affiliated or unaffiliated with the party or coalition in power. For example, a president "affiliated" with the new deal coalition was a Democrat. The other dimension expresses—in relation to the regime's ability to thwart challenges to its institutions—the overall state of resilience the regime possess (either weak or resilient)

State of Resilience	State of Regime: Unaffiliated	State of Regime: Affiliated
Weak	Reconstruction	Disjunction
Resilient	Preemption	Articulation

Figure 1: The Skowronek Typology

The first type, unaffiliated presidents inheriting the weak remnants of the previous regime, face a reconstructive opportunity. These reconstructive opportunities can

produce the transformational, reconstructive presidents aforementioned. Presidents that take over when the populace demand broad governmental changes and the previous regime begins to crumble receive the chance to reconstruct. Presidents who accomplish reconstruction exploit these conditions and "usher in new eras of American political development." (Bridge 2014, p. 146) Inheriting the reconstructive moment alone fails to guarantee reconstruction that is precisely what makes reconstruction so rare. A president must take hold of the opportunity and use presidential power to implement lasting change. Later I will explain how a president exploits such an opportunity.

The second type, articulation, generally follows reconstruction, and this designates the presidential politics which support the current regime. Affiliated presidents take over a resilient regime and continue the vision of the reconstructor. Reconstructive presidents' administrative aims lack the grand reconstructive aims their predecessor's platforms possessed, but do not confuse this with unimportance. Harry S. Truman, John F. Kennedy, and Lyndon B. Johnson each represent good examples of articulation because they implemented reforms meant as continuations of Franklin Roosevelt's New Deal. Articulatory presidents largely maintain the fight begun by their reconstructive counterpart.

The third type, preemption, takes place when an opposition president assumes power during a period characterized by resilient established commitments. Preemptive presidents possess the executive freedom to remain uninvolved in the previous regime's commitments, but lack the repudiative authority to accomplish path-breaking reform. Preemptors must accomplish their goals within the opposition coalition. Some preemptors achieve success by operating within the opposing party's established institutions. For example, Bill Clinton, a successful preemptor, worked within the

Ronald Reagan coalition to achieve welfare reform, containing shades of Republican policy throughout.

Fourthly, presidents in power while their own regime falls apart are disjunctors. These presidents attempt to implement their party's platform, once the tenets of a lasting regime, and fail. The party affiliate inherits an impossible leadership situation, where past commitments fail and the populace calls the regime's institutional pillars into question. People often label disjunctive presidents incompetent, but the disjunctive situation forces a president to either endorse failed commitments or attempt to fix these institutions without the popular credibility to accomplish this. An example of a disjunctor is Herbert Hoover, who inherited the dying laissez-faire, post-civil war, Republican structure.

Reconstruction, the principal focus of this inquiry, is an exceptionally difficult undertaking. Only a handful of presidents presented with the opportunity actually realize the reconstructive aims and implement the institutions of a new regime. For a president to reconstruct, the timing must correspond exactly with a historical juncture that affords the president authoritative necessity for new institutions. Skowronek calls this juncture the "distinct contexts for presidential leadership." (Skowronek 1999, p. 29) Even in the rare cases that reconstructive contexts appear, reconstruction still may not occur. Presidents commonly considered the subjective "best" chief executives—George Washington, Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin D. Roosevelt—had to capitalize on the reconstructive moment history afforded them. A president must use the popular mandate to break down the previous regime's commitment and institute their own. In the event the executive fails, he runs the risk of merely preempting or articulating the previous regime (depending on political affiliation).

Dr. Curt Nichols and Adam Myers (2010) evaluated more closely just what a president must accomplish to achieve a reconstructive presidency. Nichols and Myers assert a president must accomplish three main tasks in order to achieve this reconstructive goal:

1. Shifting the main axis of partisan cleavage,
2. Assembling a new majority coalition, and,
3. Institutionalizing a new political regime.

(Nichols and Myers 2010, p. 808; Laing 2012; McCaffrie 2013) In order to accomplish a successful reconstruction a president must complete all three of these tasks. This is precisely what makes reconstruction so difficult a challenge; each task must be satisfied to achieve reconstruction. The first task involves restructuring the basic issues parties associate around. Party realignment or a change in focus on major party policies generally results in this kind of shift. When this happens, the old cleavage fades and new issues become increasingly more important to parties. At the same time, once standard issues of the party platform are pushed to the background. The unaffiliated party is put at a great disadvantage by this shift because it puts the regime-affiliated party in the driver's seat on new policies.

Secondly, assembling a new party coalition involves attracting demographic groups, especially numerical minorities, to a new electoral coalition. Minorities become important because new coalitions are built on the basis of new demographics assembling a different coalition, whereas hardliners generally do not deviate from the poles. New partisan realignment occurs not only on the party side, as in the first task, but also on the popular side with platform changes. These changes intend to attract new factions to favorable legislation and policy changes in Washington. Building new coalitions help

insure popular mandates and galvanize support behind reconstructive platforms.

A lot, though, has already been written on shifting the axis of partisan cleavage (Sundquist 1983; Petrocik 1981) and building new coalitions (Karol 2007; Galvin 2010; Bridge 2014) My paper focuses on the third—less examined, more nuanced, and equally important—task. The third task, institutionalizing the regime, serves as the lynchpin of reconstruction, only taking place when the conditions are "enervated" or appropriately vulnerable for reconstruction. Enervation is a state occurring when a president is "elected amidst circumstances in which the regime has matured, lost some of its coalitional cohesion, and failed to keep institutional arrangements functioning effectively under new conditions." (Nichols & Myers 2010, pg. 807) Enervation represents a heightened state of political vulnerability for the reigning regime, giving that regime the opportunity to replace the current institutions. Timing alone cannot induce reconstruction however. The executive must accomplish each of the reconstructive tasks above or the reconstructive opportunity will go unrealized. When a president misses a reconstructive opportunity, "enervation continues and the conditions for reconstructive leadership do not disappear but rather remain available for others to exploit." (Nichols & Myers 2010, pg. 808) The possibility for failure exists. Nichols and Myers (2010) point out Grover Cleveland had a reconstructive opportunity and rather than seizing it took conservative measures, unsuccessfully attempting to implement the institutions of a new regime, allowing enervation to continue and placing Cleveland solidly in the preemptive class. Furthermore, because Cleveland failed to exploit this reconstructive opportunity, Nichols observes enervated conditions continued. William McKinley and Theodore Roosevelt then entered office and used the unfinished reconstructive opportunity to implement the "System of 1896" as an unorthodox, multi-administration, reconstructive episode.

(Nichols & Myers 2010, pg. 809)

When examining the Skowronek typology, it confines presidents in enervated conditions to either reconstruction or disjunction. These constraints set the bar for reconstruction extremely high, especially considering classical reconstructors such as the aforementioned Franklin Roosevelt, Jackson, and Lincoln. But, when following Nichols' (2014) lead and applying a new institutionalist theory provided by James Mahoney and Kathleen Thelen to this typology, it reveals a more nuanced view of reconstruction. Throughout, I apply the theory from Nichols' 2014 article, *Modern Reconstructive Presidential Leadership: Reordering Institutions in a Constrained Environment,* which first applied Mahoney and Thelen's (2009) typology to a reconstructive regime in this manner. I do not assert that reconstruction is an easy undertaking, nor that applying the Mahoney and Thelen (2009) typology somehow lessens the constraints on reconstructive presidents. Changing the tides of American politics is difficult. Even if a reconstructive president enters office with majorities in Congress, constitutional checks and even intra-party factions work as structural inhibitors to policymaking. Not to mention the difficulty a reconstructive president might have with the Supreme Court and judicial review when a reconstructor takes over while the members of the older order of politics occupy the courts. Good examples of this conflict occurred in 1800 with Thomas Jefferson and a Federalist leaning court and again in 1932 with Roosevelt and a Republican leaning court.

Given the engrained political inertia of American constitutional and party politics, Nichols' idea that multiple institutional modalities (2014) are probably necessary as change agents in American politics, especially for reconstructors attempting to "remake the government wholesale." (Skowronek 1999) "Multiple modalities" (Nichols 2014)—

the four types of institutional change provided by Mahoney and Thelen—provide an alternative for the dramatic removal and reinstallation of institutional policy, or "displacement," instead suggesting these same influential leaders can use other methods of transformation outside of the "order shattering, order creating" style and still accomplish the same goal, reconstruction. (Nichols 2014) Mahoney and Thelen assert that by "layering" institutions or allowing them to "drift" into a new use or character presidents can achieve insurrectionary change. These policy moves take place even when the president has strong veto points by those opposed to reconstruction. Conversely, when the president utilizes procedures or rules allowing for few veto points he can "convert" some of the institutions of previous regimes to new purposes for his own reconstruction.

Resistance to Political Change	Amount of Discretion in Interpretation and Enforcement: Low	High
Strong Veto Possibilities	Layering	Drift
Weak Veto Possibilities	Displacement	Conversion

Figure 2: The Mahoney & Thelen Typology

The first dimension of the typology deals with characteristics of the institution the change agent targets. Essentially this is how vulnerable an institution is to change by exploitation of ambiguities in rules or the ability to legally change an institution with varying degrees of oversight from other branches. For example, executive orders would

have high levels of discretion because—so long as they are made in pursuance to Congressional law or deal with powers expressly granted to the president by the Constitution—they allow the executive to manage the actions of the federal government without legislative oversight.

The second dimension deals with the characteristics of the political context the institution would encounter in the event of attempted modification or removal. The main question the second dimension asks is, "Does the political context afford defenders of the status quo strong or weak veto possibilities?" (Mahoney & Thelen 2009, p. 18) Veto possibilities can refer to either specific veto players or veto points (Tsebelis, Mahoney & Thelen) able to influence the formal or informal modification of the targeted commitment. The dimension concerns resistance encountered from those who do not want to see the institution modified, and the degree to which they can stop such changes. A constitutional amendment represents an example of a high veto point, since it takes a two-thirds majority in both the House and Senate and then ratification by three-quarters of state legislatures or conventions.

More than any other type of institutional change agent, displacement has easily recognizable traits. This form of regime building occurs when discretion to exploit rules is low and veto points are weak. Executives who use displacement tear out remnants of the previous regimes' policies and institutions and replace them with overhauls endorsed by the new regime. Skowronek refers to reconstruction as "remaking the government wholesale," because the classic definition of reconstruction encompasses displacement—this idea of removing and replacing—alone. The most important element of displacement is the complete replacement of one institution with another. Abraham Lincoln' elimination of slavery under the Emancipation Proclamation, and later the thirteenth

amendment provides the best example of displacement. Lincoln simply proclaims slavery illegal, replacing the old laws with a sweeping decree proclaiming the end of slavery.

Drift occurs as a much more gradual process. Jacob Hacker explains drift as circumstances leading to "changes in the operation or effect of policies that occur without significant changes in those policies' structure." (Hacker 2005, p. 246) Institutional drift takes place with high discretion for rule ambiguities and strong veto points. For example, allowing changing demographic makeup of Congressional districts without redistricting those areas in order to better suit the politicians in office constitutes an example of drift. The basis for symbiotic drift promotes change by ignoring the effects of certain political moves, often this process begins long before and an executive consciously allows it to continue under new regimes.

Policy actors set conversion into motion with the intention that a new institutional purpose will incrementally replace the old one. The most important characteristics of institutions remain unchanged in conversion but rather get retooled to serve new purposes under a different executive. Conversion allows new policy actors to adapt relatively successful or well-entrenched institutions to fit the purposes of the new regime. Political conversion takes place with a high level of discretion to neglect rules and weak veto points to prevent those changes. Roosevelt's ramping up of the Reconstruction Finance Corporation (RFC) represents a great example, as the program started under Herbert Hoover. Roosevelt expanded the RFC to provide more loans to big business damaged by the Great Depression, converting it to a New Deal institution. Political actors who repurpose institutions as new structures better suited to their coalition's platforms accomplish conversion.

Layering takes place through a process whereby a policy actor adds new policies and elements onto existing institutions. By adding these attachments, the new regime ultimately transforms the whole structure of the existing institution. This takes place with a low level of discretion to exploit rule ambiguities and strong veto possibilities. Layering takes place over time and often goes unrealized in the short-term. A lot of tax code amendments are examples of layering, the changing of specific tax breaks change almost annually, and while the basic progressive structure of the tax code has remained largely unmodified in over thirty years. By adding on these new rules, the policy actor effectively changes the behavior and purpose of the old structure to perform a new purpose. Executives often use layering when they lack the political capital or influence to change the institutions basic rules, so instead they target the institution by placing new rules on top of the old ones.

Displacement may not stand alone as the only method a president can use to achieve a regime transformation. There are three other types of institutional change often employed and accomplished by political actors. Would it be outside the realm of possibility that, as Nichols' (2014) asserts, the president of the United States would use these multiple modes of change? Presumably not. If true, the observed methods of institutional change which reconstructors (the presidential type which should be implementing the most broad, sweeping changes) utilize should encompass multiple paths to regime transformation outside of simply destroying and replacing. When you apply this typology to presidents in times of political enervation and view the process of reconstruction through an innovative lens, the idea that the only way presidential reconstruction occurs is in an explosion of entirely new institutions and policy is suspect.

Other, more incremental moves could play a large role in how a president remakes a regime.

Case Selection

In this paper, I apply the Mahoney-Thelen typology to the presidency of one of the most influential reconstructors, Thomas Jefferson. Jefferson, being the first president to gain power from an opposing party in America was one of the archetypes for how a reconstructor conducts regime rebuilding. History defines Jefferson as every bit of an order shatterer and order creator. During his presidency the size of the United States' overall landmass more than doubled with the Louisiana Purchase. He founded The United States Military Academy at West Point. He replaced the more loose economic policies of Washington and John Adams with the Embargo of 1807. So to an extent, Jefferson definitely fit the bill of a classical reconstructor, but displacement may not be the only method Jefferson used to complete what some scholars consider a quintessential reconstruction. If even the president in the first major handoff of political power in the United States used multiple methods of regime building, one can logically infer displacement is not the only way to build a regime and reconstructors after Jefferson have probably used other methods of institutionalizing their platforms.

Thomas Jefferson, a classical example of the perceived "order shattering" and "order creating" type of president constitutes the ideal case study. If even Jefferson uses "multiple modalities," (Nichols 2014) most reconstructors probably used these modes, and some presidents not previously considered reconstructors may completed reconstruction from these modes as well. We can generalize based on Jefferson's presidency because, as Skowronek and others note, the political state has undergone

"thickening" making it more difficult to accomplish institutional change. (Skowronek 2011, Nichols & Myers 2010, Bridge 2014) The political state was less thick in 1800, which should have made engineering political change easier. For example, the possibility the Alien and Sedition Acts would pass without extreme constitutional challenges and intense scrutiny today is highly unlikely. So, if the first president provided a real reconstructive opportunity still utilized drift, layering, and conversion in addition to the traditional "order shattering" and "order creating" mode of displacement even in this less thick political state, then the connection between reconstruction and the Mahoney-Thelen typology has real logical grounds.

Expectations

I expect Thomas Jefferson used all four kinds of institutional change described by Mahoney and Thelen. When Jefferson encountered strong veto possibilities in his dealing with the judiciary he probably used layering when low levels of discretion to enforce rules presented themselves and drift when high levels of discretion to exploit rules appeared. Conversely, when met with weak veto possibilities in the political climate, I would expect to see examples of the order shattering displacement Jefferson is known for, but when he had high levels of discretion in that same climate it is likely we will observe layering. While some types are more pronounced than others, I expect to find that while Jefferson's presidency contained many great leaps forward in institutional expansion that the method through which Jefferson created a new regime involved a large amount of incremental steps, many met by a significant of constraints.

To start, I will provide examples of how Jefferson used the classic ideal of order shattering and order creating, or displacement, by repealing the Judiciary Act of 1801.

Then I present an analysis of the impeachments of John Pickering and Samuel Chase as symbiotic drift. Jefferson's use of court appointees and pardoning of prisoners convicted under the Alien and Sedition Acts, as institutional conversion will follow. Next, I examination Jefferson's addition of a Justice to the Supreme Court as layering. Finally, I will contextualize these thesis examples to determine how this case affected reconstruction going forward.

CHAPTER TWO

Displacement and the Judiciary Act of 1801

Institutional displacement involves remaking the structure of the institutions left over from a previous regime by wholly replacing the institutions with new, different entities. When a policy actor uses displacement, it means there are few veto points from the defenders of the status quo and the ability of the executive to use his discretion in enforcement or interpretation is low. The executive faces heavy resistance and intense institutional control that makes it exceptionally difficult to simply ignore or stretch the rules concerning this institution, so instead he must replace the institution altogether, affording the executive the opportunity for insurrectionary change. An example of displacement is Lincoln's removal of the institution of slavery. Lincoln encountered weak veto points to make slavery illegal, but he had to actually remove the laws in place because his discretion for enforcement was low. Accordingly, Lincoln made a presidential proclamation, The Emancipation Proclamation, which unilaterally displaced slavery. Later, the 13th amendment was passed, solidifying this new institution as constitutionally sound. Displacement does not happen quietly, but rather rewrites doctrines and replaces institutions wholesale by ridding of the old structures and substituting new ones.

This same type of removal and replacement is evident in one of Thomas Jefferson's first reconstructive moves. Jefferson targets the Judiciary Act of 1801, and is immediately confronted with low discretion for interpretation, but Republican majorities in both houses give him the ability to repeal the act, thus displacing it with the Judiciary

Act of 1802. The Judiciary Act of 1801 was passed in the midst of John Adams' controversial Midnight Appointments. The Act was an early construct of an inferior court system for the federal government, replacing the Judiciary Act of 1789. Under the previous law, Supreme Court Justices were obligated to "ride circuit," sitting as a judge on lower federal cases. This created an interesting situation for Justices wherein they were called to "decide cases at an appellate level which they themselves had determined on circuit." (Turner 5) This institutional nuisance was the subject of protests from many a Supreme Court Justice over the course of the thirty years it stood. Frankly, it was never in doubt that amendments to the judicial system were necessary; the question was simply how much a new judiciary bill would benefit the Federalists. The Judiciary Act of 1801 expanded the power of the federal judiciary, directly contrary to the small federal government philosophy of the Republicans. This positioned Jefferson directly opposed to this law and made it a priority for him to displace it immediately.

The law was directly contrary to the Jeffersonian position. As Senator William Bingham bluntly expressed in a letter, "the importance of filling these seats with federal characters, must be obvious." Firstly, the act would decrease the number of Supreme Court Justices from six to five, a clear effort to protect the lame-duck regime. This tenet of the law would not take effect until the *next* vacancy on the court, which strategically came after John Adams appointed John Marshall the Chief Justice. This would insure that when Jefferson, the president-elect, would have the next opportunity for nomination that seat would simply disappear. Also, the subtraction of one justice virtually guaranteed that Republicans could not have a majority on the court in the near future. The number of circuit courts was increased from three to six, Supreme Court Justices were also no longer required to ride circuit, creating circuit judges, whose nomination was the subject

of the infamous “midnight appointments.” It also subdivided some of the existing district courts to create a total of ten district courts. This infuriated Virginia Republicans, as the primarily Republican state was divided between two separate districts. The Virginians “immediately moved to retain only one court.” (Turner 1965, p. 16) One of the authors of the bill, Federalist Congressman Roger Griswold retorted that dividing the state was necessary to maintain ready access for diversity jurisdiction suits “because the state courts could not 'so well insure perfect justice as the courts of the United States.'” (Turner 1965, p. 16)

In addition, the Judiciary Act of 1801 redefined the amount which land must be worth in order to be under federal jurisdiction to $400. This would increase the number of land cases which the federal government had original jurisdiction over, a major policy blow to the mostly agrarian (and thus land-holding) populace of the Republican Party. In another expansion of the reach of federal courts, the law granted the circuit courts jurisdiction over “all cases in law or equity, arising under the constitution and laws of the United States, and treaties made, or which shall be made, under their authority." Federal Question Jurisdiction, as this doctrine is now known, despite its implication in the Constitution, was previously not granted to lower federal courts. This unprecedented power allowed the Supreme Court to essentially rule on any case in which the plaintiff alleges that a violation of their rights under the Constitution has occurred. In other words, this expanded the jurisdiction of federal courts even further, giving old guard federalist judges more power, even after Adams was out of office and the Federalist regime largely dissolved.

Clearly, the proper aims of the Judiciary Act of 1801 were twofold: create more judicial seats for presumably Federalist judges, and expand the jurisdiction of the federal

courts to rule in more cases. Federalists accomplished both of these goals with the passage of the act. Republicans clamored against the expanded power of the court, as it was contrary to the platform of the smaller federal government and states' rights they desired. Any expansion of judicial authority was viewed as a direct assault on states' ability to govern themselves. This sentiment was expressed in the debate over the Judiciary Act's repeal when Senator John Breckenridge simply put, “To make the Constitution a practical system this pretended power of the courts to annul the laws of Congress simply cannot exist.” (11 Annals 1802) Jeffersonians wanted a smaller court system with a smaller jurisdiction, so among Thomas Jefferson's first orders of business was repealing the Judiciary Act of 1801. Jefferson faced low discretion for interpretation of this Act, as the specifically enumerated reorganization of the judiciary did not allow for Jefferson to simply ignore or press the boundaries of the new rules it laid out. But because of the overwhelming gains made by the Republicans in the elections of 1800, Jefferson had weak veto points in Congress, making repeal and displacement with a new, more Republican law the best course of action.

That's why the first major policy move taken by the newly victorious Republicans in 1802 was repealing the act and replacing it with a much weaker judicial reorganization law. Displacement saw its full effect here. A new regime entered and immediately commenced order shattering. Jefferson faced a unique challenge of having a mandate to lead in an era when that concept was not fully developed on the presidential level. In effect, what Jefferson was doing paved the way for presidential reconstruction from that point onward. Jefferson was the first true reconstructive president. Instead of exercising the coercion of Congress into passage of laws the way later presidents would in the court of public opinion, Jefferson had to wage war behind the scenes (Skowronek 1999),

centering his Congress' platform on his partisan aims. But, as Bruce Ackerman notes, Jefferson had the advantage of "exploiting the underdeveloped condition of competing power centers" in Congress. (Ackerman 2005, p. 146) These underdeveloped power centers are a large reason why displacement did not occur in the vein of modern president who serve as public chief legislators.

Despite the assertion by some that Jefferson did not originally intend to attack the reorganized judiciary (Surrency 1958 p. 53-54, Carpenter 1915 p. 524-527), on the contrary, presidential historian Dumas Malone noted this was the first time a president "Bridged, or a least narrowed, the gap between the executive and legislative branches, this he was able to do because unlike the two presidents before him, he was the undisputed head of his party."
(Malone 1970, p. 112) In the act of insurrectionary change that is displacement, policy actors choose to replace these institutions because within them there is little room for exploiting rule ambiguities or ability to utilize discretionary powers. (Nichols, Mahoney & Thelen) That is precisely why Jefferson, upon the prompting of Breckenridge, saw the need to repeal this act. The "shamelessness" of this "court packing" drew so much ire from Republicans because not only did it change the rules of the court system to favor a Federalist approach, it insured that very same judiciary, which contained zero Republican justices would remain that way for a long time. (Malone 1970, p. 113) This fact ostensibly left Jefferson with no discretionary executive power to implement new institutions in the judiciary without replacing the Judiciary Act of 1801 entirely.

The Repeal of the Judiciary Act of 1801 in 1802 was a relatively smooth process for a party that boasted big majorities in both houses of Congress. With a lead of four Senators (out of 32 seats) and 23 representatives (out of 105 seats), the lack of real veto

points for the minority was evident by the speed with which the act was repealed, being one of the first pieces of legislation passed by the seventh Congress (See Appendix for a full break-down of the voting record). The repeal act had no judicial review, and a petition submitted to Congress by judges removed from office under the repeal requesting judicial determination on the repeal was declined consideration, another clearly weak veto point. A proposition to commend the matter to the courts failed in the House where it was held that Congress had the right to establish, and thus also destruct inferior courts. (Carpenter 1915)

Also, the next Supreme Court session was scheduled for February 1803, omitting the regular summer session which would have taken place in August 1802 to allow for hearings and review of the repeal. In the interim, a new law, the Judiciary Act of 1802 was passed (Ackerman 2005) this gave the new law time to take effect before the judiciary was even able to meet. The chances of the Federalists stopping the repeal of this law were slim, not after the sweeping mandate which the Republicans claimed in the 1800 election afforded the minority virtually no such ability.

Jefferson not only forced the justices to ride circuit and abolished the newly created circuit judgeships which in turn nullified the infamous Midnight Appointments of his predecessor in the repeal of the Judiciary Act of 1801, but with the passage of the Judiciary Act of 1802 he modified the schedule of the Supreme Court. As previously mentioned, not only did that prohibit the court from immediately hearing a judicial challenge to the new law—it entirely kept the highest court of the United States from meeting for the entire year of 1802 prohibiting what could have been the strongest veto point to repeal. Displacement in its purest form, Jefferson used a piece of legislation (as no other legal means existed or allowed any rules to be exploited) to block a left over

edifice of the previous regime and one of the biggest rival presences of the new regime from meeting at all. Due to life tenure, Jefferson had low discretion to remove the midnight appointees, but the presence of low veto points due to the aforementioned majorities in Congress afforded him the ability to displace the Judiciary Act of 1801 with the Judiciary Act of 1802, thus shutting down the court for a year and eliminating the circuit court justices.

Certainly Jefferson used this form of insurrectionary change, displacement, not only in this example but many other cases during his transformational two-term presidency. In fact, as aforementioned, Jefferson was the first president to develop such power of influence over the Congress. This does not however, engender that displacement is necessarily Jefferson's only insurrectionary tool used in his repudiation of Federalist ideology. In fact, the underdeveloped nature of such insurrectionary tools as a whole necessitated that Jefferson use other types of regime building to accomplish this complete transformation. "Multiple modalities" (Nichols 2014) of change were necessary because Jefferson could not simply remove and replace other institutions, especially when it comes to the judiciary, where specifically enumerated aspects of the constitution create low discretion for rule enforcement or naturally high veto points like the super-majorities needed for removing justices.

CHAPTER THREE

Drift and Jefferson's Impeachment Strategy

Even with the strong example of displacement utilized by Jefferson in the repeal of the Judiciary Act of 1801, simply because Jefferson was the first to use displacement in what could be called “a modern context” does not mean that it was the only institution building strategy that he used, Jefferson's use of drift is a prime example of how he used multiple modes of change (Nichols 2014), outside of Skowronek's conventional idea of reconstruction similar to what was observed with displacement. Jefferson used drift in the impeachments of John Pickering and later Samuel Chase.

Jefferson felt it his political duty to replace Federalist judges whose constitutional construction he found harmful to the new order of business in Washington, and while he could simply repeal the Judiciary Act to remove the circuit court judges, removing Supreme Court justices did allow him the same lack of veto points. In order to have a real effect on the Supreme Court, Jefferson had to have more Republican personnel on the bench. To accomplish this, Jefferson sent a plan to Congress to impeach Federalist justices and replace them with Republicans. While removing justices may seem more in the vein of heavy-handed political order shattering, simply removing justices was not the sole intent of Jefferson's impeachment plan. Jefferson knew this was a difficult undertaking, and in the event this strategy would fail, he would to use it as an opportunity for institutional drift, shifting the antagonizing judicial behavior of Chase, Marshall, and the rest of the Federalist controlled court away from attacking his policies in practice and in public. Impeachment, even without removal, would send a firm warnings to the

publicly outspoken Federalist judges to stop their public campaigns against Jefferson's repeal of the Judiciary Act of 1801 and to soften their combatively Federalist rulings to include a more interwoven constitutional fabric. Whittington says that this was indeed successful, noting that "Republicans succeeded in changing expectations of what constituted proper judicial behavior, thereby excluding expectations overt partisan activity." (Whittington 1999, p. 65)

Federalists expected a direct and swift attack on their institutional strongholds from the Jeffersonian Republicans, considering that Jefferson was elected with such a great share of the popular vote and the Congressional gains made by his party. Bruce Ackerman goes so far as to state, "From the start, Federalists had been predicting the worst." (199) This was the first occurrence of a partisan power shift in America and it was taking place with a political mandate. However, reconstructing institutions, especially when it comes to impeaching or removing justices—fiercely protected by the constitutional provision of life tenure—is not something that a president accomplishes without encountering veto points. The assault which Jefferson delivered had great magnitude, yes, but the effects were calculated in such a way that plenty of the actual reconstruction occurred as a part of the long term political culture shift which the impeachment strategy caused. This was triggered in different ways over Jefferson's term, and the impeachments of Pickering and Chase represent one way Jefferson's use of displacement was accompanied by coercing the general drift of judicial thought away from Federalist ideals towards a more favorable course for the Jeffersonians.

Utilizing a high level of discretion on the interpretation of the impeachment power, the Jefferson administration wanted to change the use of impeachment to more of a reflection of popular rule rather than a criminal procedure. The idea was, since

Jefferson was elected with a popular mandate, that mandate should extend to all branches of government, including the judiciary. Why should Jefferson's policies be subject to the politicized constitutional interpretation of the old guard when their party was so handily defeated in the most popular elections? As such, Jefferson felt it his duty to replace these justices with Republican-leaning judges, quite simply because that was what the people had chosen. Even so, this was most assuredly a political attempt to deeper entrench the Jeffersonian coalition, not a genuine call for a more democratic judiciary.

Jefferson attacked the judiciary first with a small advance, testing the proverbial waters of impeachment to determine the extent of the veto points which this strategy would run into. The House was "called on" to draw up documents of impeachment, and it was expressed in a conversation with Senator William Plumer by Jefferson that District Court Judge John Pickering "had to go." (Plumer 1923, p. 100, Haskins & Johnson 1981, Ackerman 2005) Jefferson later stated his removal directive clearly, "If the facts of his denying an appeal and of his intoxication, as stated in the impeachment are proven that will be sufficient cause for removal without further inquiry." (Plumer 1923, p. 100) Granted, Pickering had regressed into alcoholism and senility, and many Republicans termed him "insane" on these bases. Jefferson, whom Ackerman calls the "principal motivator of the impeachment campaign" (Ackerman 2005) had picked a target that would face the lowest possible veto points fore removal, because his erratic behavior was public knowledge, decreasing the resistance to his impeachment. Jefferson did this in order to test if this strategy would have the desired effect. In addition, Jefferson meant it as a bit of a warning shot, and it is no small coincidence that Jefferson initiated this first impeachment in February of 1803, coming the year both *Stuart vs. Laird* and *Marbury*

vs. Madison were on the Supreme Court docket, but before an argument was heard on either.

The House, which easily had the numbers for impeachment on party-line vote—a weak veto point to impeach, although the two-thirds to remove represented a strong veto point—sent Pickering to stand trial before the Senate. Impeaching someone, or charging them with "high crimes and misdemeanors" to stand trial in front of the Senate requires only a simple majority, whereas actually removing them requires a two-thirds majority in the Senate. Here, sensing the importance of timing, the Senate carried out an expedited hearing despite the absence of both Pickering and his lawyer at the proceedings. In fact, Pickering's son even petitioned the Senate to give his father adequate time to travel to Washington and allow the Court to determine his insanity for themselves. Despite this, the Senate continued, finding affidavits of Pickering's unpredictable actions and drunkenness enough to remove him from office. Republicans impeached Pickering with little evidence that he had really committed any real "high crimes and misdemeanors," evidence of the amount of discretion which Jefferson was afforded to use impeachment as a political tool to remove the Federalist judges which stood in the way of his Republican agenda in the courts.

The next offensive in Jefferson's battle with the Judiciary was a much bolder move. Based on his success with the impeachment and removal of Pickering, Jefferson exploited his discretion over the impeachment power even further. He went a tier higher, this time calling for the impeachment of Associate Supreme Court Justice Samuel Chase on the basis of political criticisms Chase made of the Repeal of the Judiciary Act of 1801 to a Baltimore grand jury. No less than an hour after the Pickering removal was finalized, the House voted to impeach Chase. Although Jefferson did not publicly comment in

favor of the Chase impeachment, "he played an organizing role behind the scenes." (Ackerman 2005) The administration was particularly irked by remarks which Chase made at a grand jury in Baltimore, directly criticizing the repeal of the Judiciary Act of 1801 and the destruction of the recently appointed circuit courts. Chase went as far to assert, "the independence of the national Judiciary is already shaken to its foundation." (14 Annals 1803) Jefferson was infuriated and said privately in a letter to Joseph Nicholson, a republican House leader, that Chase had committed seditious acts and could not go unpunished, but again insured that he not become too intimately involved. Jefferson stated,

> "You must have heard of the extraordinary charge of Chase to the grand jury at Baltimore. Ought this seditious & official attack on the principals of our constitution, and on the proceedings of a state, to go unpunished? And to whom so pointedly as yourself will the public look for *the necessary measures*? I ask these questions for your consideration. As for myself, it is better that I not interfere." (Jefferson 1803, Haskins & Johnson 1981, Ackerman 2005)

A major difference from the Pickering impeachment and Chase's rushed procedure is the lack of a real attempt to prove that Chase actually violated any substantive law. This is clearly an exercise of the high level of discretion Jefferson was afforded over the impeachment of judges, with Congress unabashedly using impeachment as a "popular forum" for removal rather than a criminal proceeding. The articles of impeachment drafted by the House were themselves later modified, and Federalist Senator John Quincy Adams sensationalized that the Republicans freely admitted that this was "far from being a criminal prosecution" but in actuality it was "no prosecution at all." (Writings of John Quincy Adams 1913)

The trial before the Senate served to prove how the impeachment vehicle could be used going forward, with Jefferson poised to use it as an "expression of the popular rule"

(Ackerman 2005) to remove ministers who had fallen out of favor with the nation. Caesar Rodney, a Senate manager and Senator William Branch Giles expressed this idea of impeachment as the "popular will" at the trial. (Smith & Lloyd 1805, Hoffer & Hull 1984) In this case though, there was little doubt that the move toward this "popular forum" idea was really a move towards a "political forum" used to reengineer a judiciary more in favor of Jeffersonian political ends. There were two paths that could result from the impeachment strategy, each of which were predicated on the outcome of the Chase impeachment. One path involved the successful impeachment of Chase, which was numerically a long shot considering the Republicans held a two-thirds majority by the narrow margin of two votes. This represents a strong veto point, because even with the super majority in place, attaining votes from every Republican senator besides two meant asking Republicans to sign off on a specific constitutional interpretation. Republicans found themselves in the precarious position of not only endorsing the political move of removing Chase, but also endorsing the constitutional precedent of utilizing impeachment in such a way. In an era where legislators were exceptionally conscious of laws' long-term effects on the Constitution, this was a much taller order than it initially appeared.

The Senate trial began with a flair for the hasty, partisan, struggle that awaited with Vice President Aaron Burr frequently interrupting Chase during opening testimony. But as the trial actually began it seemed that Burr and the other Senate managers began backing off and allowing a more legal proceeding to take place. Ultimately the Republican Senate would come up short, due in large part to the Yazoo land tract scandal that robbed Senate leader John Randolph of his legislative authority to lead. This seems to repudiate the idea that Republicans were staked to the first plan where Chase was a stepping-stone to the impeachment of other justices. Ackerman goes as far as implying

that a successful removal of Chase would have set the table "for the grand climax: the impeachment and conviction of John Marshall." (Ackerman 2005) The idea that a few Senators' yes votes were all that separated the president's regime from controlling all three branches of government is a tantalizing possibility, but examining personal correspondence illustrates how Jefferson's deft use of institutional drift was not contingent upon the removal of Chase.

Jefferson most assuredly wanted the Chase removal to occur, that much is apparent from his writings, and it is viable to assume that Marshall could have followed. Jefferson was unable to remove Chase, but the impeachment still signaled that Federalists could not ignore that the other two branches of government were now firmly controlled by Republicans and their behavior had to shift. While Jefferson was intimately involved in the Pickering impeachment—formally sending a note to the House for consideration of impeachment (Whittington 1999)—he positioned himself in such a way that if the Chase trial was unsuccessful, the political ramifications were still wholly positive for his regime. The change Jefferson wanted to occur in the judiciary did so, with Jefferson using his discretion over the impeachment power as a tool for limiting the judicial branch: prohibiting judges from engaging in partisan disputes, and ultimately stepping back from the staunchly Federalist rulings typical of the pre-impeachment Marshall court. (Whittington 1999) The rash boldness that incriminated Chase was scarcely heard again, and the depoliticization of the judiciary is still felt. Impeaching Chase pointedly warned the federal judiciary that its power was subject to an equally powerful oversight, one controlled by the dominant national alliance in Congress, which the president proved a key player in.

Drift is an insurrectionary strategy marked by high discretion in interpretation and enforcement and strong veto possibilities. It is also characterized by neglect or changed enactment of rules. This is apparent in the Jeffersonian impeachment series, because the rules themselves of impeachment are entirely left intact, but Jefferson used his high level of discretion to threaten the use of impeachment as a political tool, and it is not the use of impeachment that represents drift but the judicial shift which resulted. For Jefferson, the idea of restructuring the judiciary with Republican judges was a lofty plan, but even in the event of a "failure" such as the unsuccessful Chase impeachment, Jefferson knew the judicial attack would serve to quiet the boisterous Federalists on the bench. The gambit worked perfectly in this respect because, like Roosevelt's court packing scheme, the desired effect was achieved to some end, even if it was not the ideal result for Jefferson.

The court's judgments most assuredly softened away from the ardent federalism that initially sparked this grand battle. Jefferson himself was powerless to control outcomes of Supreme Court cases but his intent to shape them was evident in a case of judicial retreat: *Stuart vs. Laird*. (Ackerman 2005) In the case, a circuit court judge, Hugh Stuart, whose seat was eliminated by the repeal of the Judiciary Act of 1801 tried a case, and then asked the Supreme Court to uphold his ruling. Stuart's lawyer argued that Stuart had the constitutional right to make the ruling because the Judiciary Act of 1802 was unconstitutional. Both Marshall and Chase had tended toward this line of thinking, in fact, Marshall admitted as much at the Virginia Constitutional Convention, stating that the repeal statute "could never be admitted as final and conclusive." (Dickson 1829, Ackerman 2005) but the impeachment of Samuel Chase served as a warning to the Federalist court that Jefferson would use any means necessary to prevent any further threatening rulings by the Marshall court. *Stuart* is evidence that the warning was

heeded. This is apparent in Samuel Chase's vote with the majority, in favor of upholding the repeal. Also Marshall, who did not let the fact that he was the main party responsible for the failure to deliver William Marbury's commission impede him from delivering his landmark decision in *Marbury vs. Madison*, curiously found the need to recuse himself from this case because he heard it at the circuit level. Many justices later ruled on cases at the Supreme Court level that they had previously decided at circuit, so this reasoning for Marshall's recusal was more than a little suspect. In a letter to the other justices, Marshall stated, "I am not of opinion that we can under our present appointments hold circuit courts, but I presume a contrary opinion is held by the Court and, if so, I shall conform to it."

The impact of this use of discretionary power is perhaps even more evident in the actions of John Marshall during the Chase impeachment. Marshall is ready to engage in political negotiations with Jefferson, expressing that there were not many things out of bounds for bargaining with the president. In a personal letter to Samuel Chase during his impeachment,

> "As, for convenience & humanity the old doctrine of attaint has yielded to the silent, moderate but not less operative influence of new trials, I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. *A reversal of those legal opinions deemd unsound with the legislature would certainly better comport with the mildness of our character than a removal of the Judge who has rendered them unknowing his fault.*" (Papers of John Marshall 1974)

In summary, the father of judicial review concedes he would be willing to give up judicial review in favor of a legislative oversight. According to Marshall, the idea of Congress overruling the Supreme Court's decisions as a trade-off for immunity to impeachments on the basis of politics (Ackerman 2005) was on the table. The failure of the Chase impeachment would ultimately cool such negotiations, and obviously judicial review was

solidified only a year later. All things considered however, the idea that judicial review was not untouchable proves the success of this use of drift. By launching this series of attacks on the judiciary, Thomas Jefferson reduced the future of the vaunted Marshall court to what Ackerman refers to as a "Paper tiger within the new constitutional order created by Thomas Jefferson."(Ackerman 2005) When observing what *Stuart,* means in light of the pre-1800 rulings of the Marshall court it is clear that there is a tangible switch that occurs despite what conventional histories project on the Marshall Court.

In one sense *Marbury* would prove that everything from Marshall's powerful and heavy handed Federalist rulings still existed, "including the right of a lowly justice of the peace to demand his commission from the president of the United States."(Ackerman 2005) (It is worth noting, as trivial as it may seem, that even in *Marbury* Marshall defers to Jefferson for the actual conveyance of said commission, citing his lack of authority to issue a *writ of mandamus*.) Conversely, Ackerman astutely observes that in *Stuart* Marshall's judicial power seems decidedly absent, and the Federalist principles from 1787 were gone. This applied even to the position which Marshall had so ardently opposed, the elimination of the circuit court justices. Marshall's recusal in *Stuart* seemed to imply "that nothing (from 1787) had survived—not even the justices' authority to defend the constitutional integrity of their own commissions as justices." (Ackerman 2005) Jefferson worked behind the scenes to mobilize the series of impeachment actions that caused a switch in the public rhetoric of Samuel Chase and changed the attitude of the Federalist court from the top down, swinging the balance of decisions back towards the center. This cleared the way for the eventual appointment of Jeffersonian justices which would continue to shift what was once a staunch Federalist stronghold.

To further convey that this was a case of institutional drift, the veto points were numerous and difficult. This is clear in the removal of Pickering but especially in the impeachment of Chase. While the House requires only a simple majority, the act of impeachment is a difficult undertaking. In total, since 1789 only 63 impeachment resolutions have been introduced on the House floor, and of those, only 19 were actually passed on to the Senate to stand trial. Despite the huge majority the Democratic-Republicans had (114 to only 28 Federalists) historically, even in the early years of the constitution, impeachment had never been wielded with the authority of a political tool used by the executive—until Jefferson did exactly that with Pickering and Chase in 1803-1805. Beyond this, removing an official is an even more difficult veto point, as it requires a 2/3rds majority. Although this number of votes was reached (11 Annals 1803, p. 179), the idea of carrying out such a feat in the first instances of using impeachment as a political weapon clearly represents surmounting a high veto point. In the case of Samuel Chase, the stakes were much higher, and the debate surrounding the use of impeachment as this sort of legislative referendum on the judiciary played a much greater effect on Chase's Senate trial. The Senate was ultimately only four votes short of impeaching Chase. This close call, as previously conveyed, was enough to prompt the attention of Chief Justice Marshall and change the course of the Supreme Court.

This is most notably drift because it does not institute any new rules, it simply attempts to coerce the Supreme Court to shift to new constitutional posture, one that is generally less politically charged and includes some level of Republican thought. This use of drift was not contingent upon Chase's successful removal, but employed impeachment in a way that would directly affect the behavior of the courts even without the removal of Chase. The inaction on the part of the Jeffersonians as far as removal

goes actually plays better as drift because without actually taking real action outside charging Chase they still achieved the desired goal. The reason the Republicans ceased the pursuit of further judicial impeachments was due in large part "to altered judicial behavior." (Whittington 1999) This shift in judicial construction was the result of the institutional drift of the impeachment procedure.

While one could facilely observe that the impeachment strategy on its surface appears to have failed, it instead prompted a "profound reorientation" of the judiciary (Ackerman 2005) not only on a rhetorical level, but on a substantive policy level. While it is impossible to contrast the rulings of the court with hypothetical scenarios about what rulings the court may have made in an alternate history where Chase is not impeached, there is a good amount of evidence to point to such a stitch in time occurring. Marshall himself was threatened enough by the message Jefferson sent that he allowed the institutional drift to occur, acquiescing to a law he hated (The Judiciary Act of 1802) in *Stuart*, and not pursuing such a staunchly Federalist constitutional construction from 1805 onward.

CHAPTER FOUR

Conversion & Jefferson's Expressed Powers

Another reconstructive strategy used by Thomas Jefferson in his overhaul of the judiciary was conversion. This involves taking institutions already in place and refitting them to suit the needs of the new regime. Conversion occurs when a political actor possesses a high level of discretion in interpretation and enforcement of rules and faces weak veto possibilities. When conversion takes place, few if any new rules are implemented but instead the old rules are exploited to better fit the administration's needs. Much in the same way the 14th amendment has been applied to incorporate other amendments and laws to give the federal government more expressed control over the state governments, conversion can be utilized to change the complete structure of an institution without the loud "order shattering" style of displacement. Conversion lacks the strong veto points encountered by institutional drift but has high levels of discretion to exploit. Thomas Jefferson applied this by nominating Republican justices. The one concern with this as the sole example of conversion is that Jefferson does not use the nomination process itself in a different way than it was originally intended. However, he does reconfigure the use of presidential pardoning with his approach to the Alien and Sedition Acts, another example of Jefferson's combative relationship with the judiciary that comes in the face of high discretion for interpretation and facing weak veto possibilities.

The Alien and Sedition Acts were passed in 1798 by the Adams administration in preparation for a war with France. Republicans were politically targeted by the Sedition Act, which restricted speech critical of the government. The act was phrased broadly stating that any person participating in "writing, printing, uttering, or publishing any false, scandalous and malicious writing or writings against the government...either house of Congress...or the President" could be fined and imprisoned. (1 Statutes at Large 1798) Republicans held that this act was unconstitutional, placing an undue burden on the freedom of speech.

This lead to the Virginia and Kentucky Resolutions, which sought to nullify the Alien and Sedition Acts and set a historical precedent for the nullification crisis of 1832. Jefferson's colleagues being the primary target of target of these laws naturally held them with contempt. In the Kentucky Resolution Jefferson secretly penned his vehement opposition to these laws stating,

> "That if the acts before specified should stand, these conclusions would flow from them; that the general government may place any act they think proper on the list of crimes and punish it themselves whether enumerated or not enumerated by the constitution as cognizable by them: that they may transfer its cognizance to the President, or any other person, who may himself be the accuser, counsel, judge and jury." (Kentucky Resolution 1798)

Written by Jefferson secretly during his term as vice-president, The Kentucky Resolution clearly expresses the Republicans' disdain for these laws, not only calling them unconstitutional, but tyrannical in nature. The power which the Sedition Act consolidated in the hands of the president particularly defied Republican thought; Jefferson and his fellow Republicans viewed such discretionary power over freedom of speech as an abomination.

Despite this, Jefferson's Republican Party colleagues actually used the Sedition

Act's relaxed definition of libel to prosecute newspaper and pamphlet writers that spoke critically of Republicans in Congress after the election of 1800, before Jefferson's presidency. (Mott 1943) But with the law set to expire at the time of inauguration in 1801, the problem remained that Republicans had already been incarcerated and fined in droves under the Sedition Act. In order to use this law to his full benefit, Jefferson exploited the high level of discretion he had by using selective enforcement and repurposing the executive power of pardon to circumvent the court's previous rulings in the cases of incarcerated Republicans. It is important to note that presidential pardon is the only essentially unchecked presidential power, once someone is pardoned, they cannot be retried. Even other presidential powers are subject to some checks, like executive orders for example, which must be funded by Congress. Presidential pardon had not previously been used for the purpose of circumventing judicial enforcement of disagreeable legislation; Washington and Adams used the pardon power to grant clemency to prisoners who were controversially incarcerated after acts of rebellion. Alexander Hamilton in Federalist 74 defends the president's power of unfettered pardon, saying it is necessary "in seasons of insurrection or rebellion, there are often critical moments, when a welltimed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall." (Hamilton 1788) Even Andrew Johnson used the impeachment power for this reason after the civil war, pardoning Confederate leaders. This is precisely what makes Jefferson's use of pardon a prime example of conversion: redeployment of pardoning as a political tool, which was clearly not the initial purpose.

The initial purpose of pardoning, at least in Hamilton's view, was an essential tool for presidential diplomacy on a domestic level. According to Hamilton, it was important

that the president could carry out this power without delay, especially in the event of rebellion or civil war. Washington used pardoning for this exact reason when he pardoned the only two leaders of the Whiskey Rebellion convicted, Phillip Vigol and John Mitchell, who were sentenced to death for treason. (Hogeland 2006) Adams acted similarly towards John Fries and other leaders of the Fries Rebellion, pardoning their sentences in return for a cease-fire. Both Federalist presidents used the pardon tool to ease tensions over rebellions that threatened the stability of the union. However, Jefferson uses his executive discretion to convert the use of the pardon to a political tool. In the case of the Alien and Sedition Acts, Jefferson finds himself with a high level of discretion to enforce the law selectively, even his own party—despite their public disdain of the law—used the law to prosecute its enemies just like Adams. Additionally, with the Sedition Act expiring, there are virtually no veto points to either the expiration of the law (considering the majorities Republicans held in both houses and the expressed March 3, 1801 expiration date in the verbiage of the legislation, Jeffersonians surely would not renew the law) or his use of pardoning. As a result, Jefferson ceases widespread enforcement, pardons political allies who were incarcerated under the law, and ultimately allows the laws to expire. This represents a textbook use of *converting* an institution to fulfill the purposes of the newly constructed regime

Appointing Justices to Advance the Regime

After some years of judicial frustration and attempted quelling of the onslaught of strongly Federalist jurisprudence with impeachment, a new "rebuilding" of the judiciary was of the utmost importance to Jefferson as it would have the most immediately lasting effect on the nation. Especially with the majoritarian politics that Jefferson had used to

throw his political weight around, the idea of nominating new justices gave Jefferson the ability to be extremely selective with federal court nominations. It is especially important to note that every judge Jefferson nominated was replacing a Federalist affiliated judge, so the simple strategy was to replace these judges with new Republican judges. Jefferson commenced quietly laying the tracks for his successor James Madison as well, whose appointments he not so quietly had a hand in. Jefferson wrote Madison "ceaseless letters of instruction" on this topic. (Ackerman 2005) Even writing him to say "another circumstance of congratulation is the death of Cushing," in reference to the death of William Cushing—the seat that would finally give Republicans a majority on the bench —in 1810. Calling the replacement of Cushing with a "firm and unequivocal Republican" the necessary step to "compleat the great reformation" in another letter to a person of his and Madison's acquaintance. (Writings of Thomas Jefferson 1810) Although Jefferson only had three Supreme Court appointments, the addition of a sixth seat (which accounted for Jefferson's third nomination) cleared the path for a court that would ultimately consist of John Marshall and five Republican justices nominated by either Jefferson, James Madison, or James Monroe from 1812-1826. The subsequent appointments made by Thomas Jefferson and his political kin allowed the curtailing of the radical rulings of the early Marshall court to reach a counterbalance in less than ten years.

Jefferson completely converts the court to a Republican controlled court in less than a decade. After all of the attacks on the judiciary, Jefferson uses a very contemporary strategy to rebuild the Supreme Court as a Jeffersonian institution: he picks new justices with exceptional care. Some historians explain Jefferson's' selection of Justices as "cautious scrutiny" (Dowd 1965) and this exacting process along with his

prejudices against northern law practitioners, those without much legal experience, and generally anyone who did not fit his subjective character and loyalty judgments led to precise requirements which Jefferson believed would insure powerful shift took place in the Supreme Court. (Dowd 1965, Ackerman 2005) Jefferson's goal was realized in the transformative objectives of his three nominations. Each of his first selections were powerful Republicans whose nominations were understood as "the first shots in a long war to shift the course of constitutional law." (Ackerman 2005) The nominations of William Johnson and Brockholst Livington who were trusted standard-bearers of Republicanism on a state level fit the bill nicely.

Johnson would go on to prove an important dissenter against Marshall's fervent federalism. A state legislator in South Carolina, Johnson served in the state house as a Republican representative for the city of Charleston and had Jefferson's desired legal experience, serving as a state judge from 1798-1804. Voting with the majority in *Stuart vs. Laird* to uphold the Judiciary act of 1802 and dealing the death-knell to common law prosecution in *United States vs. Hudson and Goodwin,* Johnson's nomination would prove an important step in Jefferson's conversion of the Supreme Court to a more politically balanced institution.

Livingston led the charge against John Jay's treaty with Britain, which Jeffersonians believed compromised the United States' economic neutrality. These transformational appointments were not simply confined to the Supreme Court either, when Jefferson was provided a vacancy for a Connecticut district judge he filled the seat with Pierpont Edwards who proceeded to attack Federalist newspaper editors under the state's sedition laws. These laws, ironically, were closely modeled after the since expired Alien and Sedition acts.

Jefferson had high discretion to select who he wanted and worked to convert the Supreme Court, and the judiciary as a whole with numerous lower court appointments, to a Jeffersonian institution. In addition, the veto points for judicial confirmation has always been very low. Even today, it is a rare occurrence that a justice is not confirmed unless previous misconduct or glaring partisanship is revealed in the nomination process. But, the earliest Supreme Court nominees were not in danger of these risks. Especially considering the filibuster did not develop in its modern form until 1975, it was far easier for the majority party to confirm almost all judicial appointees. This is precisely why Jefferson became more proactive in his appointment strategy. The conversion is evident, clearly Jefferson is swinging the balance of the court all on his own.

This is no more obvious than in the 1812 case *United States vs. Hudson and Goodwin*. Hudson and Goodwin were charged with seditious libel for running a story purporting that Congress secretly voted to appropriate $2 million to bribe Napoleon Bonaparte for a supposed treaty with Spain. Seditious Libel however, was no longer a law for which these men could be charged with violating, considering that the Alien and Sedition acts had expired five years before the men were charged with such a crime. The basis for the charge was federal common law, which Republicans vehemently opposed due to its contrast with states' rights and limited national government. Jefferson personally abhorred common law, stating that even such gross offenses by the Federalists as The Alien and Sedition Acts themselves, the national bank, or John Jay's treaty with Britain were trivial in comparison to laws that people could be prosecuted under without their passage by the legislature. (Ackerman 2005) This case served as the opportunity for Jefferson appointee William Johnson to not only oppose the prosecution of seditious libel in general, but also to denounce the constitutionality of federal common law. Johnson

attacked the Federalist tenet, stating in his majority opinion "legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall has jurisdiction of the offence." (Rowe 1992) This decision seems to be the true death-knell to early Federalist jurisprudence, confirming the Revolution of 1800 and vindicating the presence of a new regime. This was no longer strictly Marshall's court; it was a tamer Marshall, who voted with the Republicans on this unanimous decision. But the reason all this occurred was due to the appointments of Johnson, Livingston, and the oft-beleaguered and ill-contributing Justice Thomas Todd, the beneficiary of the additional seat which Congress later supplied to Jefferson.

Conversion was succinctly summarized by Mahoney and Thelen as "the changed enactment of existing rules due to their strategic redeployment." (Mahoney and Thelen 2009) This is clear in Jefferson's judicial appointments. The rule of the Marshall court was staunchly Federalist, but due to the ease of confirmation—a weak veto point—which Jefferson experienced due to the great majorities he enjoyed in both houses of Congress, Jefferson was able to disrupt the judicial activism that was unfavorable to the new Republican constitutional fabric he was assembling. The ability to nominate new judges was and is a presidential power that is almost entirely unchanged from its original constitutional manifestation, but Jefferson employed an exacting level of discretion to nominate Justices which would be able to combat Marshall's Federalist agenda.

Jefferson used these new nominations to convert the Supreme Court into a more accommodating institution for Republicans, even while it remained under the leadership of John Marshall. Jefferson utilized his high level of discretion to be extremely discriminating with his judicial nominations and use them to begin a Republican reconfiguration of the court that would continue with Jefferson's. It is also clear that

weak veto points existed because of the low institutional barriers that allow relative ease for confirming justices. The brilliance of this strategy continues in what it gives way to, the way that Jefferson becomes even more proactive in the face of stronger veto points and lower levels of discretion in interpretation. Jefferson takes the opportunity to implement this strategy further by pushing legislative leaders add another Justiceship to the Supreme Court bench.

CHAPTER FIVE

Layering & The Debut of Court Packing

Layering is a growth out of a political actor's desire to replace an institution when he encounters resistance in both the political climate (strong veto points) and discretion to exploit the rules governing this institution (low discretion). Unable to remove or alter the core rules of the institution itself, the political actor instead attaches new institutions or rules on top of the existing ones. Mahoney and Thelen observe that layering can have "substantial" effects on an institution if "amendments alter the logic of the institution." (Mahoney and Thelen 2009) Thomas Jefferson encountered this with his attempts to alter the judiciary's positions and personnel make-up. Impeachment, while effective with signaling a new constitutional shift and overall less combatively Federalist rulings (see *Stuart vs. Laird*) did not accomplish the separate goal of replacing Federalist justices on the court. After Jefferson nominated Johnson and Livingston—facing the strong veto points encountered by the impeachment strategy but still in need of more allies on the bench—he layered another justiceship onto the Supreme Court.

When confronted with the impeachment strategy's relative failure insofar that it did not actually replace justices on the Supreme Court—encountering the extremely high veto points associated with removing justices from the court—the Jefferson administration went with a different strategy. The Jeffersonian constitutional revolution had taken hold in the other two branches of government. However, even with the appointment of two Republican justices in the place of Federalists and the depoliticization of the previously outspoken Federalist court, the administration was still

left at a distinct disadvantage, especially when judicial review figured into the equation post-*Marbury*. The desperate need for more Republican personnel on the court even lead to Senator John Randolph introducing a constitutional amendment that would give the president unilateral removal power over members of the court, "anything in the Constitution of the United States to the contrary notwithstanding." (14 Annals 1803) This conveys the extremely limited number of methods by which a president might modify the personnel of the Supreme Court, a mark of not only how low the discretion in interpretation was but also how strong the veto points are for impeachment and constitutional amendment (the only legitimate alternatives to court-packing).

The only real way for Jefferson to equalize the physical balance of power was to add another justice, so the discretion level for affecting this balance of power was also low. Jefferson could not simply fire sitting Supreme Court Justices and replace them with reliable Jeffersonians, so we can safely conclude that his discretion was rather low (as opposed to pardoning Sedition Act violators for example where his discretion was extremely high). With strong constitutional veto points and limitations providing low discretion to change the make-up of the sitting Court, Jefferson looked to "layer" additional Justices onto the Court. Exploiting the majorities in both houses, Jefferson continues his proactive court nomination strategy by adding another judge to the bench with the Seventh Circuit Act of 1807. This is the first instance of "court packing," which set precedent for later presidents—most notably Roosevelt with his famous New Deal court packing scheme—to use Supreme Court expansion as a move to solidify judicial support when they already had majorities in Congress. Even Roosevelt, who is considered the prototype for modern reconstruction through "order shattering" and "order creating," had to resort to an additional modality of change, layering, to reconstruct.

Given this opportunity to draw near a balance on the court with four Federalists and three Republicans, Jefferson had the chance to make a huge impact on the court. He ultimately selected Thomas Todd, a Kentucky lawyer. (Ackerman 2006) Todd proved largely insignificant, never authoring a constitutional opinion. Not to say the measure was ineffective, it was potentially a short-term zero-sum game, but the long-term effect of having an additional Republican seat was important. This played into the court's adaptive process to the new Jeffersonian constitutional order in a major way. Having an additional Republican justice helped to bolster the later articulatory appointments of Madison and Monroe which really reshaped the court's make-up. Although Marshall's presence on the court was ubiquitous, and the Federalist jurisprudence that he represented was often the outcome of the court under his term, even after these transformative measures Jefferson could not control judicial outcomes.

Ultimately, Jefferson cannot control what the court decides. As far as the personnel make-up of the Supreme Court goes, he only had two real options: one, wait for Washington and Adams' appointees to die or retire and replace them with Jeffersonians or two, create new seats on the bench to try to counter-balance Federalist judges who were not going to die or retire in the short term. Jefferson did both of these things. Despite this, some of the justices he appointed were politically strong-armed by Marshall. It was not the outcome of these change agents that really proves whether reconstructive presidents need to use multiple modalities of change (Nichols 2014), however. In fact, the ongoing struggle that Jefferson faced with the Marshall court emphasizes how important the process of layering and conversion really were to the administration. When faced with no other viable ways to reconstruct this institution, the

father of reconstructive presidents turned to multiple modes of change (Nichols 2014) to attack the Federalist stronghold the judiciary represented.

CHAPTER SIX

The Effects of "Multiple Modalities" on Federalist Jurisprudence

Thomas Jefferson's multi-faceted attack on the Federalist controlled judiciary yielded noticeable changes in the way that federalist jurisprudence was constructed. The decisions written during and after Jefferson's terms were reflections of a new Jeffersonian constitutional fabric which Federalist justices were now forced to consider. In *Stuart,* both Marshall and Chase had the chance to overturn the repeal of Judiciary Act of 1801 and held strong views that this repeal might have been unconstitutional yet they left it alone because the impeachment of Samuel Chase served as a warning to the Federalist court that Jefferson would use any means necessary to prevent these kinds of threatening Federalist rulings. *Stuart* is evidence that the warning was heeded. Samuel Chase cooled his partisan rhetoric after his impeachment, a landmark switch which Whittington proposes led to the modern concept of an independent judiciary.
(Whittington 1999)

This modified jurisprudential strategy again appeared in the 1812 case *United States vs. Hudson and Goodwin*. Hudson and Goodwin were charged with seditious libel for running a story purporting that Congress bribed Napoleon. Seditious libel however, was no longer a law for which these men could be charged with violating, and the basis for the charge was federal common law, which Republicans were strongly opposed to. This case demonstrated Jefferson's transformational appointments at work. William Johnson chose to not only oppose the prosecution of seditious libel in general, but also to denounce the constitutionality of federal common law. Johnson attacked the Federalist

tenet, stating in his majority opinion “legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall has jurisdiction of the offence.” (Rowe 1992) Clearly this represents another example of a changed court after Jefferson's judicial battles.

Even in cases with notably federalist outcomes, Marshall's posture towards Jefferson's government was more conciliatory. In *Cohens vs. Virginia* for example, the attitude towards state governments is decidedly different than in earlier Marshall opinions. In the case, two brothers sold Washington, D.C. lottery tickets in Virginia, violating a state law prohibiting the sale of lottery tickets. State authorities convicted the Cohen brothers, proclaiming that state courts were the final arbiters of disputes between the federal government and the state. In a unanimous decision the Marshall court ruled against Virginia, stating that the federal government had supremacy in such cases. Despite this ruling however, Marshall upheld the Cohens' convictions. This was clearly deference to the state's ruling, a foil to the earlier unilateral rulings of the Marshall court. *Marbury vs. Madison* even presents an interesting judicial move on Marshall's part. Rather than strictly stating that Marbury's commission must be issued, Marshall once again defers to Jefferson, stating that only Jefferson can actually convey the commission, citing his lack of authority to issue a *writ of mandamus*. These examples are proof that the Marshall Court's jurisprudence was effected directly by Jefferson's use of “multiple modalities of institutional change.” (Nichols 2014)

CHAPTER SEVEN

Conclusion

Contrary to the conventional wisdom that Thomas Jefferson undoubtedly utilized a muscular "order shattering" leadership strategy to reconstruct, clearly he utilized other methods as well. Mahoney and Thelen's typology sheds light on the requirements of drift, layering, conversion, and the traditional tear out and replace strategy of displacement, all four types Jefferson used in the course of his regime building. Demonstrating one specific area of his presidency Jefferson applied all four parts of the typology it follows simply because a president is a reconstructor, it does not necessitate the only type of leadership strategy they utilized was the tear down and rebuild method, as Skowronek suggests.

Yes, all reconstructive presidents use displacement to some extent—as Jefferson did with the textbook case of the repeal of the Judiciary Act of 1801. Jefferson orchestrated the repeal of the act and the passage of the Judiciary Act of 1802, removing a large part of the previous regime's legal structure. In this action, Jefferson also re-instituted the practice of Supreme Court justices riding circuit, abolished the offices of the Midnight Appointee judges which he so disdained, and limited the Supreme Court to one session per year. Jefferson displaced the Judiciary Act of 1801, but that alone does not define his interaction with the judiciary.

Jefferson also set into motion the drift of Supreme Court opinions with the series of judicial impeachments that curbed the strongly Federalist rulings of the early Marshall court. Impeaching Pickering tested the waters of politicized removal. Shortly thereafter,

the Chase impeachment put Marshall on the ropes, fearing the potential target of another impeachment bid enough to make judicial review a bargaining chip and recuse himself in the *Stuart* case. Impeachment made Marshall nervous and it changed the landscape of the partisan judiciary to a decidedly more moderate platform in the interim years before the Democratic-Republican appointments. Jefferson's high level of discretion with the use of impeachment as a political tool collided with strong veto points in the process of removal. Although Chase did not get removed, his impeachment proved a critical switch in the judicial record of the Marshall court.

Jefferson used conversion as another method to make institutional change within the courts with his judicial appointments, and exercise of executive power in regards to the Alien and Sedition Acts. Jefferson tried to fill the court with as many Republican as possible, and positioned his successor James Madison to do the same. Encountering little resistance during the confirmation process, Jefferson exploited this weak veto point to make two transformational appointments to the bench, which finally allowed for some dissent against the Federalist status quo, notably in *Stuart vs. Laird* and *United States vs. Hudson and Goodwin*. Jefferson also asserts his executive power in his manipulation of the Alien and Sedition Acts' enforcement. By pardoning Republicans tried under this group of laws, hated by Republicans, Jefferson essentially unilaterally judged who would be affected by the enforcement of these laws: prosecuting political enemies and pardoning Republicans sentenced before his term. Most importantly, Jefferson converted the use of pardoning into a political vehicle, something unprecedented. In both of these examples—the appointments and the selective enforcement—Jefferson uses his executive authority to attack Republican institutions and repurpose those institutions to meet his regime's ends.

By adding an additional seat to the Supreme Court, Jefferson layers onto an existing Federalist institution to shift the balance of power on the court. Jefferson faced low levels of discretion for interpretation when it comes to the rules of modifying court personnel. When impeachment failed in this respect, Jefferson went with his only other option. Veto points are historically high for adding justices to the court because of the public perception of politicization of what is supposed to be an independent judiciary. Jefferson's court personnel move here laid the groundwork for future Republican appointments which would help to implement the Jeffersonian vision.

Notable in all these changes is Jefferson's ability to institute new pillars of his regime within the judiciary. Not every such change was the historically overstated act of "order shattering" and "order creating." That kind of institutional change is most present in only one of Mahoney and Thelen's four part typology: displacement. Clearly while Jefferson used displacement in the repeal and replacement of the Judiciary Act of 1801, he also used the other three types of institutional change in his dealings with the judiciary. If the first reconstructor tasked with replacing the institutions of a previous party used multiple types of institutional change, surely that bodes well for others in the same position to have acted similarly.

This means there is a chance that other reconstructors have used multiple modes of institutionalization (Nichols 2014) to achieve their reconstructive aims as well. Perhaps similar patterns can be observed in the presidencies of Jackson, Lincoln, Roosevelt, and Reagan. Going a step further, this might uncover that presidents who were not believed to be reconstructors show signs of reconstruction. If they were able to replace the tenets of the previous regime using Nichols' (2014) theory of multiple methods, based on Mahoney and Thelen's (2009) typology but do not show the strict

"order shattering" changes that Skowronek suggests, would that still represent reconstruction?

This is not to say that Skowronek's assertion on reconstruction is flawed, but simply that it can be applied more widely. The political thickening that Skowronek suggests may not be a breakdown of political time but merely a modification of it. With the application of Mahoney and Thelen's typology to political time we observe a much more nuanced idea of political time. It becomes something that is changing, not wholly obsolete. This new observation of political time, not as something that has slowed or stopped altogether, but as a dynamic principle which is redefined based on how presidents choose to approach reconstruction opens the door for incrementally reconstructive presidencies. The presidency of Barack Obama may even prove to be that type of presidency.

Skowronek asks the question of whether "and to what extent, progressive policy making is effective as an *alternative* route to political transformation"? (Skowronek 183) I assert, and I believe this application of the data to Nichols' (2014) multiple modes theory suggests that the two need not be mutually exclusive. Can incremental institutional drift lead to the same kind of political transformation that Skowronek's historical idea of reconstructive leadership gets at? If even the prototypical reconstructor used this strategy when encountering resistance to displacement—all in a time when political time was notably less encumbered by thickening—who is to say it could not happen now?

Barack Obama has faced criticism for the failure to realize his potential to reconstruct a political regime. But what if changes are occurring, just not in the "order shattering, order creating" method that presidential scholars are used to? Sweeping policy

changes have come about under the Obama administration in housing, healthcare, and social issues. The Helping Families Save Their Homes Act of 2009 has changed the way that bankruptcy and housing are approached in America, allowing bankruptcy judges to modify the terms of loans. (P.L. 111-22) This came, of course, in response to the housing crisis of 2008. Another, albeit controversial, new institutional change passed under the Obama administration is the Patient Protection and Affordable Care Act (ACA) of 2010. This piece of legislation changed the landscape of healthcare in America instituting new healthcare exchanges and market regulations which will affect the healthcare insurance industry for years to come. The likelihood of ACA being repealed is low as well. A super majority in the Senate would be necessary in order to achieve cloture on inevitable filibusters which repeal efforts would face. As far as social issues go, the shift in gay marriage laws during the Obama administration has been staggering. When Obama entered office, only two states had legal same-sex marriage. At the time of print, six years later, thirty states recognize the rights of gay couples to marry. While the Obama administration did not explicitly support gay marriage until 2012, the attitude toward this hot-button social issue paints a perfect picture of institutional drift. In 2011 the Obama administration officially announced it would end government defense of the Defense of Marriage Act. This made the later Supreme Court decision pronouncing Section 3 of the law unconstitutional in no way unexpected. Barack Obama might prove to be a case where additional examination under a reconstructive definition which allows for multiple modes of change in the vein of Nichols' (2014) assertion is necessary.

The most important result of a reconstruction definition which includes a variety of method of institutional change is its effect on political time. Instead of, as Skowronek implies, political time slowing or yielding completely to independent political

entrepreneurs, the political thickening that has occurred has forced presidents to use multiple types of construction. This does not necessarily make the act of reconstruction or exploiting the reconstructive moment more difficult, instead it makes displacement more difficult. Presidents are being forced to move away from a more traditional "order shattering" and "order creating" method of reconstruction and we are observing more widespread use of drift, layering, and conversion.

What Jefferson as a case study proves is based heavily on historical context. By stating that in this one specific policy area, the judiciary, Jefferson was able to apply all four of Mahoney and Thelen's observed methods of creating institutional change, then it is highly likely that Jefferson applied those methods in other areas of his presidency as well. In addition, if the first president to step in after a partisan regime change was constrained to use the other three methods of institutional change instead of merely displacement this conveys the importance and necessity of these tools to a reconstructive president.

Overall, Jefferson used multiple modalities (Nichols 2014) of institutional change to attack one of the strongest Supreme Courts in U.S. history. In 1809, when Jefferson left office, the judiciary—arguably the strongest Federalist institution remaining after the Jeffersonian revolution of 1800—looked entirely different than it did when Jefferson took office in 1801. The Judiciary Act of 1801 was gone, displaced by the Judiciary Act of 1802, meaning less circuit courts and Supreme Court justices once again riding circuit. This was a victory for the pro-decentralization that Republicans stood for. Another way the court was different was the ideological make-up. Federalist justices considered opinions from a more legal, less political point of view and spoke publicly with a much less politically antagonizing tone for fear that the reigning Republican regime might

threaten impeachment. This was a small price to pay when it seemed that only a few years before Marshall may have given the legislature political oversight over its rulings. In addition, three Republican justices now sat across from four Federalists. One of these Republican seats was added when the Jeffersonian Republicans "layered" a new Republican seat onto the court in 1807. The other two were "converted" to Republican seats by appointment, catalyzing a full partisan conversion—only sixteen years later, Marshall represented the last of the Federalists—of the court. The Supreme Court emerged from the Jefferson presidency dramatically changed.

Yes, this same Marshall Court produced Federalist precedents in *Marbury vs. Madison* and *McCullough vs. Maryland* that defined the strongly federal position of the court that stands even today. That notwithstanding, cases like *Stuart vs. Laird*, *United States vs. Hudson and Goodwin* prove that the Marshall court accommodated the new Jeffersonian constitutional order. Even in *Cohens vs. Virginia*—a case famously used to illustrate Marshall's posture of federal superiority—the attitude towards state governments is decidedly different than in earlier Marshall opinions. *Stuart*, *Hudson and Goodwin*, and *Cohens* all represent examples of how John Marshall's hardline Federalist rulings came to include some of the Jeffersonian constitutional fabric which encompassed the other two branches of government for over 25 years while Marshall was in power.

Marshall's Federalist rulings were never going to swing to the Jeffersonian extreme, and Marshall came to define the judiciary in a time where Jefferson had essentially remade the entirety of the government around him. All these changes did limit the rate and scope at which the judiciary produced Federalist jurisprudence. In addition, the policy produced by the court was probably curbed because of the Jefferson's "multiple modalities" (Nichols 2014) strategy. As the above cases prove, there was even

a measurable change in the way the Court handled cases. If Jefferson had not employed drift, layering, and conversion and had strictly attacked the judiciary with "order shattering" in mind, would these considerable changes have occurred? Although only speculation, I think it is safe to say probably not. Sometimes Jefferson's attacks on judicial power even reversed the course of the court entirely, evident by the altered public behavior of Samuel Chase after his impeachment. Even if Jefferson's "multiple modalities" (Nichols 2014) did not always accomplish reconstruction, he definitely used "multiple modalities" (Nichols 2014) and it made a history-altering difference.

APPENDIX

Voting Record on Repeal of the Judiciary Act of 1801

House of Representatives

Representative Name	Party Affiliation	Vote to Repeal
Willis Alston	Democratic-Republican	Yes
John Archer	Democratic-Republican	Yes
John Bacon	Democratic-Republican	Yes
Theodorus Bailey	Democratic-Republican	Yes
Phanuel Bishop	Democratic-Republican	Yes
Richard Brent	Democratic-Republican	Yes
Robert Brown	Democratic-Republican	Yes
William Butler	Democratic-Republican	Yes
Samuel J. Cabell	Democratic-Republican	Yes
Thomas Claiborne	Democratic-Republican	Yes
Matthew Clay	Democratic-Republican	Yes
John Clopton	Democratic-Republican	Yes
John Condit	Democratic-Republican	Yes
Richard Cutts	Democratic-Republican	Yes
Thomas T. Davis	Democratic-Republican	Yes
John Dawson	Democratic-Republican	Yes
William Dickson	Democratic-Republican	Yes
Lucas Elmendorf	Democratic-Republican	Yes
Ebenezer Elmer	Democratic-Republican	Yes
John Fowler	Democratic-Republican	Yes
William B. Giles	Democratic-Republican	Yes
Edwin Gray	Democratic-Republican	Yes
Andrew Gregg	Democratic-Republican	Yes
Joseph Heister	Democratic-Republican	Yes
William Helms	Democratic-Republican	Yes
William Hoge	Democratic-Republican	Yes
James Holland	Democratic-Republican	Yes
David Holmes	Democratic-Republican	Yes

George Jackson	Democratic-Republican	Yes
Charles Johnson	Democratic-Republican	Yes
William Jones	Democratic-Republican	Yes
Michael Leib	Democratic-Republican	Yes
John Milledge	Democratic-Republican	Yes
Samuel L. Mitchill	Democratic-Republican	Yes
Thomas Moore	Democratic-Republican	Yes
James Mott	Democratic-Republican	Yes
Anthony New	Democratic-Republican	Yes
Thomas Newton Jr.	Democratic-Republican	Yes
Joseph H. Nicholson	Democratic-Republican	Yes
John Randolph Jr.	Democratic-Republican	Yes
John Smilie	Democratic-Republican	Yes
John Smith (NY)	Democratic-Republican	Yes
John Smith (VA)	Democratic-Republican	Yes
Josiah Smith	Democratic-Republican	Yes
Samuel Smith	Democratic-Republican	Yes
Henry Southard	Democratic-Republican	Yes
Richard Stanford	Democratic-Republican	Yes
Joseph Stanton Jr.	Democratic-Republican	Yes
John Stewart	Democratic-Republican	Yes
John Taliaferro Jr.	Democratic-Republican	Yes
David Thomas	Democratic-Republican	Yes
Philip R. Thompson	Democratic-Republican	Yes
Abram Trigg	Democratic-Republican	Yes
John Trigg	Democratic-Republican	Yes
Philip Van Cortlandt	Democratic-Republican	Yes
John P. Van Ness	Democratic-Republican	Yes
Joseph B. Varnum	Democratic-Republican	Yes
Isaac Van Horne	Democratic-Republican	Yes
Thomas Boude	Federalist	No
John Campbell	Federalist	No
Manasseh Cutler	Federalist	No

Samuel W. Dana	Federalist	No
John Davenport	Federalist	No
John Dennis	Federalist	No
William Eustis	Democratic-Republican	No
Abiel Foster	Federalist	No
Calvin Goddard	Federalist	No
Roger Griswold	Federalist	No
William Barry Grove	Federalist	No
Seth Hastings	Federalist	No
Joseph Hemphill	Federalist	No
Archibald Henderson	Federalist	No
William H. Hill	Federalist	No
Benjamin Huger	Federalist	No
Thomas Lowndes	Federalist	No
Lewis R. Morris	Federalist	No
Joseph Pierce	Federalist	No
Thomas Plater	Federalist	No
Nathan Read	Federalist	No
John Rutledge	Federalist	No
John Stanley	Federalist	No
Benjamin Tallmadge	Federalist	No
Samuel Tenney	Federalist	No
Thomas Tillinghast	Democratic-Republican	No
George B. Upham	Federalist	No
Killian K. Van Rensselaer	Federalist	No
Peleg Wadsworth	Federalist	No
Benjamin Walker	Federalist	No
Lemuel Williams	Federalist	No
Henry Woods	Federalist	No

Senate

Joseph Anderson	Democratic-Republican	Yes
Baldwin	Democratic-Republican	Yes
Stephen Bradley	Democratic-Republican	Yes

John Breckenridge	Democratic-Republican	Yes
Robert Brown	Democratic-Republican	Yes
William Cocke	Democratic-Republican	Yes
Christopher Ellery	Democratic-Republican	Yes
Theodore Foster	Democratic-Republican	Yes
Jesse Franklin	Democratic-Republican	Yes
James Jackson	Democratic-Republican	Yes
George Logan	Democratic-Republican	Yes
Stevens T. Mason	Democratic-Republican	Yes
Wilson C. Nicholas	Democratic-Republican	Yes
David Stone	Democratic-Republican	Yes
Thomas Sumter	Democratic-Republican	Yes
Robert Wright	Democratic-Republican	Yes
Nathaniel Chipman	Federalist	No
John E. Colhoun	Democratic-Republican	No
Jonathan Dayton	Federalist	No
Dwight Foster	Federalist	No
James Hillhouse	Federalist	No
John Howard	Federalist	No
Jonathan Mason	Federalist	No
Gouverneur Morris	Federalist	No
Aaron Ogden	Federalist	No
Simeon Olcott	Federalist	No
James Ross	Federalist	No
James Sheafe	Federalist	No
Uriah Tracy	Federalist	No
William H. Wells	Federalist	No
Samuel White	Federalist	No

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